



Fairview Estate Limited v Wanho International Holdings Limited (Environment & Land Case 1222 of 2015) [2024] KEELC 5656 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5656 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1222 OF 2015**

EK WABWOTO, J

JULY 30, 2024

BETWEEN

FAIRVIEW ESTATE LIMITED PLAINTIFF

AND

WANHO INTERNATIONAL HOLDINGS LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff and the defendant entered into an agreement for sale dated 1st March 2010, wherein the defendant agreed to purchase the property known as LR No. 28093 measuring 100 acres to be excised from the property known as LR No. 4879/3 measuring approximately 320 acres.
2. The said agreement stipulated the purchase price as Ksh 660,000,000 wherein the defendant would pay a deposit of Ksh 66,000,000 being 10% of the purchase price to a joint interest earning account in the names of the parties advocates. The balance of the purchase price was to be deposited in the joint account on or before the completion date against the release of the completion documents.
3. After the execution of the agreement dated 1st March 2010, it also became apparent that there was need for the parties to have an addendum to the said agreement to address some issues that had not been documented in the earlier agreement. The parties subsequently entered into an addendum agreement dated 10th September 2010. The necessity of the addendum was due to the fact that the subdivision plan undertaken by the plaintiff leading to the issuance of deed plans in respect to L.R No 28093 and L.R No. 123426 did not provide access to the suit property L.R No. 28093.
4. The plaintiff being the vendor later felt that there was a breach of the said agreement and instituted this suit vide a plaint dated 30th November 2015 seeking for the following reliefs;
 - a. An order for rescission of the agreement dated 1st March 2010 and the addendum dated 10th September 2010.



- b. A declaration that the defendant repudiated the agreement dated 1st March 2010 and the addendum dated 10th September 2010 by its breach of the terms thereof.
 - c. A declaration that the defendant procured the transfer of the land known as Land reference number 28093 by material misrepresentation.
 - d. A declaration that the plaintiff is discharged from granting the defendant vacant possession of Land Reference number 28093.
 - e. An order directing the Chief Lands Registrar, at the defendants cost to forthwith cancel the registration of the transfer registered in favour of the defendant as I.R No 123426/2 in respect of land reference number 28093.
 - f. An order directing the Chief Lands Registrar to rectify the register in respect of the cancellation of Land reference number 28093 so that title to the said piece of land reverts to the plaintiff, namely, Fairview Estate Limited.
 - g. Consequent to prayers (a) to (f) above, an order directing the defendant, its agents, assigns, employees and or/servants to vacate and be evicted from Land Reference No. 28093 forthwith.
 - h. A temporary injunction restraining the defendant whether by itself, agents, servants, assignees, beneficiaries or otherwise howsoever from trespassing upon, accessing, developing, selling, mortgaging, alienation, wasting, leasing, renting, damaging or taking possession of any part of Land Reference No. 28093 pending the full hearing and determination of this suit on merits.
 - i. The defendant be condemned to Mense profits for the use of Land Reference 28093 from 2011 up to the time this suit is determined and the title number 123426 is cancelled and rectified.
 - j. An order that the defendant shall forfeit the deposit paid to the plaintiff and refund the balance of the purchase price to the defendant.
 - k. Damages for breach of contract
 - l. Damages for misrepresentation
 - m. Special damages for breach of contract enumerated at paragraph 23 of the Plaintiff.
 - n. All necessary and consequential accounts directions and enquiries.
 - o. Costs of this suit.
 - p. Such further orders as the honorable court may deem fit and necessary to give effect to its directions and orders.
5. The suit was contested by the defendant who filed a statement of Defence dated 26th March 2018 which sought for dismissal of the plaintiff's suit.

The Plaintiff's case.

- 6. It was the plaintiff's Case that on 30th December 2009, the defendant made an offer to purchase 100 acres of its land at the purchase price of Kshs 660,000,000 per acre from the plaintiff. The letter of offer dated 30th December 2009 was made subsequent to a meeting held on the same day where details of terms of sale were discussed.
- 7. It was argued that on the part of the representations made by the defendant, the plaintiff was induced to agree to sell and the defendant agreed to purchase the suit parcel at the consideration and subject to



the terms and conditions which were set out in an agreement dated 1st March 2010. According to the plaintiff, the sale was subject to the following obligations;

- I. The defendant furnishing the plaintiff with a master plan of development of the entire farm within 90 days of the date of completion for the plaintiff's perusal.
- II. The defendant developing a four (4) lane tarmac road running for 1.3 kilometers from the main Kiambu road to the farm prior to or during the course of the development of the property (if in any event that the road turned out to be single lane or not done, then the investment amount would be added to the purchase price). The defendant undertook to transfer 20% tax rebate which could accrue from the government to the defendant on construction of the said road to the plaintiff subject to the defendant receiving such rebate from the government. The plaintiff would be responsible for applying and obtaining all necessary approvals and consent from the governmental and other authorities in respect of the said road prior to the commencement of the said development. The defendant would be responsible for providing adequate design and related information to enable the processing of requisite approvals.
- III. The Defendant would construct a boundary wall of 2.5 meters high demarcating the entire farm. The cost of construction of the wall for the 100 acres would be borne by the defendant. The cost of the wall in respect of the remainder of the land would be treated as the Defendants advance payment into the joint venture. In the event that the parties did not agree or did not proceed with a joint venture with respect to the remainder of the land, the plaintiff would reimburse the costs to the defendant. The parties would agree on the cost of the boundary wall in respect of the remainder of the land prior to the commencing on construction of the wall.
- IV. The defendant would form a management company with the plaintiff in which the plaintiff would own 30% of the total issued share capital of the said company. The main objective of the management company would be to manage the main services including but not limited to provision of water, security and waste management, open spaces and club houses. The cost of incorporating the company would be borne by parties pro rata to their shareholdings and would include primary registration and initial operational costs.
- V. Subject to the issue of all relevant approvals, the Defendant would commence development of the property within 12 months from the completion date.
- VI. The defendant undertook and warranted to the plaintiff that upon completion of the development of the property, it would consider embarking on development of part of the remainder of the farm and in any event not less than 100 acres to comprise a second phase in joint venture with the defendant.
- VII. In addition to the purchase of 100 acres, the defendant and the plaintiff would conclude a separate agreement in respect to the development of a commercial zone and a hotel. The defendant would plan, construct and transfer these facilities to the plaintiff subject to the terms and conditions as would be mutually agreed
- VIII. Should the defendant consider developing the remainder of the farm, the purchase price of the area to be developed would be valued at a minimum of Kenya shillings ten million (kshs 10,000,000) per acre and a maximum of Kenya shillings twelve million (12,000,000) provided that this development was commenced within 24 months from the completion date.
- IX. Pursuant to clause (7.6) above and subject to the defendant making a profit, the plaintiff would be entitled to 30% of the total profit realized by the defendant from the development of the remainder of the land as would be agreed by both parties based on business plan.



8. It was also averred that on 10th September 2010, the parties executed a written addendum to the said agreement which had the following terms;
 - I. The plaintiff would upon execution of the said addendum cause to be resurveyed and provide two separate road access to Land Reference No. 28093 and the said road access would be provided through the adjoining piece of Land Reference Number 29159 each measuring 20 meters wide and separated by a 180 meters distance.
 - II. The plaintiff would cause to be prepared and completed another deed plan in substitution of or in replacement of deed plan No. 291762 in which plan the road earlier identified would be removed and the new access roads to the property clearly demarcated.
 - III. The defendant would finalize the registration of the transfer within 60 days from 10th September, 2010 whereas the plaintiff would conclude the resurvey, processing and production of the new deed plan within 120 days from 10th September, 2010.
 - IV. The parties would negotiate concluded and sign the joint venture agreement referred to in the main agreement document within 30 days from the date of the registration of the transfer of Land Reference No. 28093 in favor of the defendant.
 - V. The addendum would be read together with the agreement.
9. The plaintiff pleaded that acting on the faith and truth of the said representatives by the defendant in the agreement, per discussions and meetings the plaintiff executed a transfer in favor of the defendant which was registered on 8th October 2010
10. The plaintiff also pleaded that it performed most of its obligations of the agreement but the defendant refused to perform its part and breached the said agreement particulars which were particularized at paragraph 13 of the plaint. The Plaintiff also accused the defendant of procuring the transfer of the suit property through misrepresentation, particulars which were pleaded at paragraph 15 of its plaint.
11. During trial, 4 witnesses testified on behalf of the plaintiff. Eric Asembo, a licensed surveyor testified as PW1. He stated that his instructions were to undertake due diligence services on access road to Fairview estate. He produced his report in his evidence in chief. It was his testimony that the plaintiff caused the said parcel to be amalgamated and subdivided into 4 parcels of land LR No. 2527/3, 2527/2, 28093 and 28094 with the additional change of user. In 2010, he further stated that there was a further subdivided into two parcels to be able to create an access road. It was also his testimony that a further subdivision was done to LR. No. 25257 into three properties with a view of creating an access to L.R No. 28093 as was illustrated in his report. He also stated that the access road was to link the plaintiff's property to Kiambu road.
12. During cross examination, he stated that he was engaged in September and October 2021 and he did the work up to March 2022 and at that time the suit property had already been transferred to the defendant.
13. When reexamined he stated the following; that the survey plan would be undertaken subject to an approved subdivision plan, the public documents confirm that access is available and that the roads were to be used by the public. The proposed subdivision was approved on the 9th November 2010 as demonstrated at page 208 of the plaintiff's bundle.
14. Jane Nyambura Githinge, a director of the plaintiff's company testified as PW2. She adopted her witness statement dated 17th March 2022. She also produced the plaintiffs bundle of documents on



record which included the bundle of documents dated 30th November 2015 and the supplementary bundle dated 17th March 2022 during here evidence in chief.

15. During cross examination, she stated that the plaintiff is seeking compensation for lost time and lost opportunity among other reliefs. She also stated that the plaintiff is also seeking the reversal of the said agreement. She also conceded that the plaintiff received the entire purchase of kshs 660,000,000 for the sale agreement.
16. She also stated in cross examination that she placed a caveat in 2013 after they had severally pleaded with the defendant to develop the property, she also stated that the breach relate to clause 3 of the agreement. She denied misleading the defendant on the aspect of the access road and that the plaintiff did not enter into an addendum on alternate access road.
17. On further cross examination she stated that clause (c) of the addendum dated 1st March 2010 stated that the said deed plan and grant does not provide for proper or adequate access. The purchaser was expected to develop the access tarmac road while the vendor pursuant to clause 1 of the addendum was expected to rejoin the property and provide access.
18. She also stated in cross examination that the clause 6 of the agreement would not have something that would have occasioned the reversal of the agreement, she also stated that there was no time frame in respect to some obligations. The purchase price was paid within the stipulated period. The defendant are the lawfully registered owners of the property. She also added that the defendant misrepresented themselves
19. She further stated that the completion of the transaction was delayed and the delay was not on their end neither was the breach occasioned by them. The addendum was to provide extra access to the property that had been sold.
20. She further stated that it was a responsibility of the plaintiff to provide a deed plan which was provided as required. The same was dated 30th December 2010. The plaintiff also provided two separate access roads. The caveat was placed 3 years after the execution of the agreement. Construction of the boundary wall commenced after the agreement had been executed.
21. In re-examination, she stated that the plaintiff is willing to refund the purchase price, she also stated that the plaintiff had disclosed that a caveat had been filled at the time of filing the suit. She further stated that the conditions of the terms of the agreement were not fulfilled by the purchaser. The master plan was not provided after 90 days. The development was to commence within 12 months from the date of completion of the agreement. The plaintiff did not provide a deed plan for the access road. The plaintiff made several attempts to have the purchaser fulfill the terms of the agreement through various correspondences and various meetings but the defendant did not comply.
22. Paul Kamau, a Certified Investment Financial Analyst testified as PW3. He adopted and relied on his witness statement and report dated 24th November 2017, in his evidence in chief.
23. When cross examined, he stated that he was instructed in 2017 by the plaintiff and he was to determine the value that would have been lost by the project not being undertaken. He also stated that in his report he factored in the purchase price which had been paid in full by the defendant.
24. He also stated that his report was on the business opportunity lost. The land needed to be developed and there also needed to be a master plan. His report had sought to deal with the special damages sought by the Plaintiff. His report had been prepared after the suit had been filed and his report has summarized the completed business losses and that the indicated cost was not speculative.



25. When re-examined, he stated that the transaction was not completed as expected. The masterplan was not provided to him. The conditions had not been fulfilled. There was no evidence that the joint venture agreement had been signed by the parties.
26. The last witness to testify on behalf of the plaintiff was Philip Kiprotich, a valuer who testified as PW4. He relied on his witness statement dated 15th March 2022 in his evidence in chief and he also produced the plaintiff's 3rd further supplementary list of documents dated 15th December 2022 in his evidence in chief.
27. Upon cross examination, he stated that the true date of his valuation report ought to have been 31st May 2017. He had signed a contract with the plaintiff which had the terms of refence. The contract was dated 9th May 2017.
28. He stated in cross examination that he did not consult the defendant when preparing the report. The report had specific assumptions which according to him is permitted in the valuation report.
29. On re-examination he stated that part C of the sale agreement formed the basis of his assumptions. The user of the land was changed at the time of him doing the valuation.

The Defendant's Case

30. The Defendant filed a statement of Defence dated 26th March 2018. It was the defendant's Case that upon receipt of the original title, it became known to it that there was no access to the property and hence it was agreed that an addendum to the sale agreement would be executed so as to pave way for a further survey and preparation of another deed plan to amalgamate the land purchased with the access road.
31. It was pleaded that the necessity for the addendum was created after realization by the defendant that the plaintiff had sold land to it that had no access route. It was argued that clause (c) and (d) of the recitals to the addendum confirmed an acknowledgement by the plaintiff that it indeed misled the defendant to contract with it and misrepresented that there was access to the property. It was also argued that clause (c) as read with clause (b) of the addendum stipulated that the subdivision plan undertaken by the plaintiff leading to the issue of the deed plan in respect to L.R No. 123426 registered in the land registry as L.R No. 123426/1 does not provide proper or adequate access to the said L.R No. 28093. The addendum was to ensure that the defendant had a way of accessing the L.R No. 28093 to give effect to the sale agreement.
32. It was averred that the addendum stipulates that the plaintiff was to ensure resurvey processing and production of the deed plan within 120 days of the date of the addendum. The defendant argued that the plaintiff is in breach of this obligation as was set out in the addendum. It was also averred that clause 3 of the addendum stipulated that the plaintiff shall cause to be prepared and completed another deed plan in substitution of the deed plan No 29172 in which plan the road currently shown in deed plan No. 29172 would be reviewed and the new access roads to the property L.R No. 28093 clearly defined.
33. The defendant denied the particulars of the breach of the agreement as alleged by the plaintiff and responded to them at paragraph 26 to 32 of the Defence. The defendant also argued that the defendant is willing and still able to perform the obligations in the sale agreement as read with the addendum provided that access to the property is provided by the plaintiff in compliance with its obligations under the sale agreement and the addendum.



34. During Trial, Yu Chengquan testified on behalf of the defendant as DW1. The witness adopted and relied on his witness statement dated 19th December 2018 together with the bundle of documents dated 19th December 2018 that had been filed by the defendant.
35. On cross examination he stated the following; that he was not involved in the negotiations that led to the purchase of the property by the defendant but he got the information from the records of the company. Actual purpose of the development was to develop a high class mixed used development and the proposal for the same was provided to the plaintiff on pages 131 to pages 134 of the defendant's bundle which were emails confirming that the plaintiff had already seen the master plan.
36. He also stated in cross examination that the addendum was signed to address the issue of access road to the land since there was no proper access to the land. The addendum was to provide for two roads. The defendant never received any new deed plan from the plaintiff. He also stated that the plaintiff did not comply with the terms of the addendum.
37. On further cross examination, he also stated the following; The defendant had not provided evidence to show that the master plan was delivered. The boundary wall was not done. The management company was not formed. The defendant had already commenced the construction of the wall but was stopped after the caveat had been lodged. The approval of the construction of the wall had been obtained in 2013.
38. He also stated that the plaintiff issued a completion notice dated 15th September 2015 which they did not comply with.
39. When reexamined, he stated that the master plan was physically shared to the plaintiff vide an email dated 3rd November 2010, which was sent to James Kibera and the same was on page 131 of the plaintiff's supplementary bundle. The defendant has been unable to make the investment without an access road.

The Plaintiff's submissions

40. The plaintiff filed written submissions dated 20th May 2024. Counsel for the plaintiff submitted on the following 4 issues;
 - i. Did the defendant breach the agreement dated 1st March 2010, inclusive of the addendum dated 10th September 2010 made by the parties herein.
 - ii. Did the defendant make the representations set out in the agreement dated 1st March 2010 inclusive of the addendum dated 10th September 2010 fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false.
 - iii. Is the understatement of consideration in the transfer in respect of Land Reference Number 28093 by a sum of 260 million an illegality that renders the transfer falsely painted with few and thus null and void.
 - iv. Should this honourable court grant the orders sought in the plaint dated 30th November 2015.
41. On its first issue Counsel submitted that the defendant failed to honor its obligations under the agreement. It was argued that the defendant failed to produce the master plan that would lead to the implementation of the project. Counsel urged the court to find that the defendant had breached the agreement dated 1st March 2010 together with the addendum dated 10th September 2010. Reliance was placed in the following cases; Kukal properties Development Ltd -vs- Tadazzal H. Maloo and 3 others (1993) eKLR, Dhanjal Investments Limited -vs- Shabaha Investments Limited (Civil Appeal



80 of 2019 (2023) KECA 366 (KLR) (18 February 2022) (Judgment), Curtis -vs- Chemical cleaning and Dujeig Co. Ltd (1951) All Er 631 among other cases which the court has duly considered

42. On whether the defendant made the representations set out in the agreement dated 1st March 2010 and addendum dated 10th September 2010 fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false, Counsel submitted that the defendant was at all material times aware that the vendor was entering into the agreement for sale for the purpose of developing a high class development within a specific time frame which fact the defendant used to make various promises of its intention to develop in line with the plaintiffs aspirations and freely induced the plaintiff to enter into a binding contract with the defendant. It was submitted that the reserve notice was issued 5 years later in 2015. The defendant had still not performed contractual obligations including preparing the very first step required to get the project on its feet.
43. It was contended that the owing to the foregoing, the defendant's conduct leads to the inescapable conclusion that the defendant had no intention of performing its obligations but had been stringing the plaintiff along for several years for speculative purposes. The court was urged to find that the particulars of misrepresentations set out at paragraph 15 of the plaint have been adequately proved to the required standard and to declare that the defendant procured the transfer of L.R No. 28093 by material representation.
44. It was also submitted that the understatement of consideration in the transfer in respect of L.R No. 28093 by a sum of Kshs 260,000,000 was an illegality that reduced the transfer fatally tainted with fraud and thus null and void. The cases of Lazurus Estates Limited -vs- Beasley (1956) 1 All ER 341, and Heptulla -vs- Noor Mohamed (1948) KLR 580 were cited in support.
45. Counsel for the plaintiff concluded its Submissions by urging the court to grant the reliefs sought as prayed for in the plaint.

The Defendant's submissions

46. The defendant had two sets of written submissions filed, these were the submissions dated 15th May 2024 and supplementary submissions dated 14th July 2024. Counsel for the defendant submitted on the following issues;
 - i. Whether this honourable court should consider the unpleaded issue of stamp duty.
 - ii. Whether the defendant induced the plaintiff to enter into the agreement for sale by misrepresentation.
 - iii. Whether the defendant breached the terms of the agreement for sale dated 1st March 2010.
 - iv. Whether the title to the suit property is impeachable.
 - v. Whether the plaintiff is entitled to the prayers sought.
47. On whether the court should consider the unpleaded issue of stamp duty, Counsel submitted that the said issue was not raised in the plaintiff's plaint dated 30th November 2015 and hence the court cannot consider the same. Reliance was made to several cases in support of the same. These included Electoral and Boundaries Commission and another -vs- Steven Mutinda Mule and 3 others (2014) eKLR, Adetun Oladeji (Nig) -vs- Nigeria Beverages PLC SC 91/2002, Nyaya Cottolego Francis -vs- Pius Mwaniki Karani (2017) eKLR, and Anthony Francis Wareham AFV Warehem and 2 others -vs- Kenya Post Office, Sandry Bank (2004) eKLR.



48. On the issue of breach and misrepresentation it was submitted that the plaintiff had not demonstrated any misrepresentation by the defendant either in its pleading or its evidence adduced during trial, Counsel submitted that the plaintiff cannot purport to rely on the provisions of the agreement to aver misrepresentation to the exclusion of the addendum which was entered into to give effect to the initial agreement.
49. It was further submitted that the plaintiff had undertaken a subdivision plan of its property and caused to be prepared a deed plan in respect of L.R No. 28093 annexed in No. LR 123426 and registered as L.R No. 123426/1 but had failed to provide for proper and adequate access to the suit property. The Addendum went further to impose on both the plaintiff and the defendant in furtherance of the sale agreement which could not be fulfilled due to the problem of lack of requisite access to the suit property.
50. It was submitted that the first obligation was on the plaintiff upon execution of the addendum to cause to be resurveyed and provide two separate road access to the suit property since the road was to be provided through the adjoining property being Land Reference Number 29159. The plaintiff was also required to prepare another deed plan in substitution of Deed plan No. 291762 in which plan the road currently shown in deed plan number 291762 would be removed and the new access to roads to the property clearly defined. According to the defendant, the plaintiff has not discharged nor provided any evidence that would give effect to those obligations.
51. It was contended that the defendant duly paid the purchase price in full and registered the transfer within 60 days as was required to enable the plaintiff conclude the resurvey and the processing of a new deed plan within 120 days of the addendum. It was further contended that the intention of the parties was clear and there was no influence by fraud or coercion.
52. In respect to the Master plan, it was submitted that the defendant provided a master plan for the 100 acres part of the property and it could not provide for the entire 320 acres as the plaintiff had not furnished it with any title deed, maps or documentation relating to the remaining portion of the farm as could be necessary to design a master plan.
53. On the failure to construct a tarmac road, it was submitted that the same was not constructed due to the breaches attributed to the plaintiff. The plaintiff failed to provide a clear and lawful unimpeded access from Kiambu road to the suit property.
54. In respect to the boundary wall, counsel submitted that the terms of the agreement did not impose any timeliness in respect to the completion of the construction of the wall and that in any event the caveat placed by the plaintiff on the suit property halted its construction.
55. In respect to the failure for the formation of the management company, it was agreed that the management company was not formed because the development of the suit property was yet to commence. The need for the company was yet to materialize and consequently, the plaintiff cannot categorize this as a misrepresentation.
56. On the failure to commence the development on the suit property within 12 months of the completion date, it was submitted that the same was subject to issuance of all the relevant approvals and the plaintiff placed a caveat on the property halting any issuance of the approvals until the same is lifted.
57. Citing section 26 of the [Land Registration Act](#) 2012 and the cases of Alice Chemutai Too -vs- Nickson Kipkurui Korir and 2 others (2015) eKLR, Joseph Nk Arap Ngoko -vs- Moijo Ole Keiwuwa and 4 others (1997) Arthi Highway Developers Limited -vs- West End Butchery Limited and others, Court of Appeal No. 246 of 2013 It was argued that none of the allegations pleaded by the plaintiff rise to



the level of misrepresentation or fraud. The plaintiff has not surmounted the threshold established under Section 26 of the *Land Registration Act* and the prayers in the plaint seeking to impeach the defendant's title.

58. While opposing the grant of the prayers sought, Counsel submitted that the defendant is the owner of the suit property and hence no profit can be due to the plaintiff. No damages can equally be awarded to the plaintiff and equally the purchase price can't be refunded. The defendant concluded its submission by urging the court to dismiss the suit with costs.

Analysis and Determination

59. The court has carefully read and considered the pleadings by the parties, the oral and documentary evidence adduced together with the written submissions filed by the parties. The following issues arise for determination in this matter;
- I. Whether there was any breach of the agreement dated 1st March 2010 and the addendum dated 10th September 2010 and if so by which party.
 - II. Whether there was any fraud and or misrepresentation in respect to the sale and transfer of the suit property.
 - III. Whether the plaintiff is entitled to the reliefs sought.
60. Before this court addresses itself on the aforementioned issues, it is important for this court to pronounce itself on an issue raised by the plaintiff in its submission as to whether the understatement of consideration in the transfer in respect of the suit property by a sum of Kshs 260 million amounted to an illegality that renders the transfer fatally tainted with fraud and thus null and void.
61. The defendant while submitting on this issue argued that the same was not pleaded and hence should not be considered by the court.
62. It is title law that parties are bound by the pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, it was stated; -

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues



as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

63. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held in respect to the essence of pleadings in an election petition as follows:

-“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

In the instant case, the said issue was never pleaded by the plaintiff and as such the same cannot be considered by this court as the same will amount to trial by ambush.

64. Having addressed the said preliminary issue, this court shall now proceed to address itself on the main issues herein sequentially.

No i Whether there was any breach of the agreement dated 1st March 2010 and the addendum dated 10th September 2010 and if so by which party.

65. The plaintiff pleaded and particularized breach of agreement dated 1st March 2010 and addendum dated 10th September 2010 in its plaint dated 30th November 2015 and filed on 1st November 2015.
66. The 9th Edition, Page 213 of the Black’s Law Dictionary which defines a breach of Contract as:

“a violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

67. The agreement provided dated 1st March 2010 had the following terms;
- a. The purchaser furnishing the vendor with a master plan of the development of the entire farm within ninety days of the date of completion for vendors perusal.
 - b. The purchaser developing a 1.3 kilometers (4) lane tarmac road from the main Kiambu road to the farm prior to or during the course of the development of the property (if in any event that the road is done single lane or not done then the investment amount should be added to the purchase price). The purchaser undertakes to transfer 20%tax rebate which may accrue from the government to the purchaser on construction of the said road to the vendor subject to the purchaser receiving such rebate from the Government. The vendor shall be responsible for applying for and obtaining all the necessary governmental and other authorities consent of the said road prior to the commencement of the said development, the purchaser will be responsible for providing adequate design and related information to enable the vendor to lodge the application in adequate time to enable the processing of requisite approvals



- c. The purchaser constructing a boundary wall of 2.5 meters high demarcating the entire farm. The cost of construction of the 100 acres shall be borne by the purchaser. The cost of the wall in respect of the remainder of the land shall be treated as the purchaser's advance payment into the joint venture. In the event that the parties do not agree or do not proceed with a joint venture with respect of the remainder of the land the vendor shall reimburse the costs to the purchaser. The parties shall agree on the cost of the boundary wall in respect of the remainder of the land prior to commencement of construction of the said wall.
 - d. The purchaser forming a management company with the vendor in which the vendor shall own 30% of the total issued share capital of the said company. The main object of the management company will be the management of main services including and not limited to provision of water, security and waste management, open spaces and club houses. The costs of the formation of the company shall be borne by the parties pro rata to their shareholdings and will include primarily registration and initial operational costs
 - e. Subject to the issue of all relevant approvals, the purchaser commencing development of the property within 12 months from the date of the completion.
 - f. The purchaser undertakes and warrants to the vendor that upon completion of development of the property, it shall consider embarking on development of part of the remainder of the farm and in any event not less than 100 acres to comprise a second phase in joint venture with the purchaser.
 - g. In addition to the purchase of 100 acres the purchaser and the vendor will conclude a separate agreement in respect of the development of a commercial zone and a hotel. The purchaser shall plan, construct and transfer these facilities to the vendor subject to terms and conditions as shall be mutually agreed.
 - h. Should the purchaser consider developing the remainder of the farm as herein before stated, The purchase price of the area to be developed shall be valued at a minimum of Kenya shillings Ten Million (10,000,000) per acre and a maximum of Kenya shillings twelve million (12,000,000) provided that this development is commenced within 24 months from the date of completion hereof.
 - i. Pursuant to clause 3(f) above and subject to the purchaser making a profit, the vendor shall be entitled to 30% of the total profit realized by the purchaser from the development of the remainder of the land as to be agreed by both parties based on a business plan.
68. It was also stipulated at clause 5 of the said agreement that vacant possession of the property shall be given to the purchaser upon payment of full purchase price and fulfillment of all conditions and terms contained herein. The purchaser was to be allowed unlimited access for purposes of survey, construction of boundary wall and preparation of the master plan.
69. After the execution of the agreement dated 1st March 2010, the purchaser now defendant herein realized that there was no clear access to property that it has purchased and accordingly informed the plaintiff of this difficulty which had made it impossible for the defendant's agent to gain entry and undertake any development on the suit property. In view of the foregoing, parties deemed it necessary to have an addendum to the agreement dated 1st March 2010. Subsequently thereafter parties executed an addendum dated 10th September 2010. The addendum stipulated as follows;
- 1. The vendor shall upon execution hereof cause to be re-surveyed and provided two separate road access to the said property Land Reference Number 28093. The said road access shall



be provided through adjoining piece of Land Reference Number 29159 and they shall each measure twenty (20) meters wide and shall be separated by a one hundred and eighty (180) meters distance.

2. The Vendor shall cause to be prepared and completed another deed plan in substitution of or replacement of deed plan Number 291762 in which plan the road currently shows in deed plan number 291762 will be removed and the new access roads to the property clearly defined.
 3. The purchaser hereby mandates its advocates to release to the vendor the sum of Kenya Shillings One hundred Million (Kshs 100,000,00) upon the execution of this addendum. Upon the execution of this addendum the purchaser shall lodge the transfer for registration and it hereby mandates its advocates to release to the vendor the sum of Kenya shillings four hundred and ninety-four million (Kshs 494,000,000) to the vendor upon the registration of the transfer. The balance of the purchase price being the sum of Kenya Shillings Sixty six Million (66,000,000) together with the accrued interest shall continue to be held in the joint account with at NIC Bank Limited in the joint names of the Vendors and the Purchasers Advocates pending completion of the resurvey of the access roads and the processing of the new deed plan. On completion the balance shall be transferred to the vendor and the accrued interest transferred to the purchaser. Unless prevented by circumstances beyond its control, the purchaser shall finalize the registration of the transfer within sixty (60) of the date hereof whereas the vendor shall conclude the resurvey and the processing and production of the new deed plan within a period of one hundred and twenty days (120), of the date hereof. In the event that the purchaser does not complete the registration within the said period, it shall release the sum of Kenya shillings four hundred and ninety-four million (Kshs 494,000,000) to the vendor. In the event that the vendor does not complete the re-survey, processing and production of the deed plan within the aforesaid period, it shall pay interest to the purchaser on the sum of Kenya shillings One Hundred Million (Kshs 100,000,000) at the rate of ten percent (10%) per annum.
 4. The parties will negotiate conclude and sign the joint venture agreement referred to in the agreement within 30 days from the date of the registration of the transfer of Land Reference Number 28093 in favor of the purchaser.
 5. This Addendum is to be read together with the agreement.
 6. The vendor undertakes to carry out any other acts and execute any other documents which may be necessary to give proper access to the property and do such acts as may be required by the purchaser for the proper enjoyment and use of the property.
70. During trial evidence was adduced to the effect that the defendant paid the entire purchase price of Ksh 660,000,000 which payment was acknowledged by the plaintiff. It also emerged that the defendant effected the transfer of the suit property within sixty days as agreed.
71. It was argued during trial that the plaintiff did not discharge its obligations to prepare another deed plan in time for the road currently shown in deed plan No. 291762 for the new access road. Evidence presented before this court also showed that a master plan was prepared and provided to the plaintiff. Evidence was also adduced to the effect that the plaintiff lodged a caveat which affected the defendant in discharging the other obligations as stipulated in the agreement.
72. Having analyzed the evidence that was adduced herein the plaintiff beared more responsibility by failing to carry out its obligations which was necessary to give proper access to the property and do such acts as may be required by the purchaser for the proper enjoyment and use of, the property. The



plaintiff also placed a caveat to the suit property which affected the defendant's ability to fulfill its obligations that were stipulated in the agreement.

73. The court is satisfied that the defendant was able to fulfill the obligations which were primarily hinged on its role or responsibility and to those that were to be performed after compliance by the plaintiff, the defendant has equally been able to explain how it was able to perform and any failures on the same. The defendant was able to adduce evidence showing that what was not performed was solely dependent on the obligations of the plaintiff. The plaintiff cannot therefore hinge on the said breaches to its advantage in seeking the recession of the agreement.

Issue Number ii Whether there was any fraud and or misrepresentation in respect to the sale and transfer of the suit property to the defendant.

74. It is trite law that a party alleging fraud must specifically plead the particulars of fraud and specifically lead evidence to prove the allegations of fraud. There are steps that must be taken to prove fraud. In the case of *Vijay Morjaria Vs Nansign Madhusihn Darbar & Another* (2000) eKLR, the court of Appeal stated as follows"-

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts".

75. The same procedure goes for allegations of misrepresentation and illegally as outlined under Order 2 rule 4 of the Civil Procedure Rules. As regards the standard of proof, the court of Appeal in the case of *Kinyanjui Kamau Vs George Kamau* (2015)eKLR expressed itself as follows: -

"It is trite law that any allegations of fraud must be pleaded and strictly proved. (See *Ndolo Vs Ndolo* (2008) 2 KLR (G & F) 742 wherein the court stated that: -

"...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

"In cases where fraud is alleged, it is not enough to simply infer fraud from the facts".

76. It is the burden of the person who makes such allegations to present cogent and believable evidence of the same. Indeed, given the seriousness of charges of such character that border on criminality, the standard of proof is necessarily higher than the usual civil standard of a preponderance of probabilities. The standard does not, however, reach the criminal law standard of proof beyond reasonable doubt. It is proof to a level just below beyond reasonable doubt but must, in my estimation, reach the level of assured and confident proof. See *Magutu Electrical Services Ltd vs Miriam Nyawira Ngure & Anor* [2019] eKLR.



77. Whether there was fraud or not needs production of evidence. Fraud is defined under the Black's Law Dictionary 10th Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the 2nd Defendant.
78. How then can fraud be proved? The Court of Appeal in Mombasa Civ Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR held;
- "Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities". (emphasis added)
79. Similarly, the Court of Appeal decision in the case of John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR held that:
- "we find that the law is clear as put by Mr. Karanja that matters of "fraud" must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine."
80. The plaintiff submitted that it was entering into the agreement for sale for the purpose of developing a high-class development within a specific time frame which fact the defendant used to make various promises of its intention to develop in line with the plaintiff's aspirations and there fore induced the plaintiffs to enter into a binding contract with the defendant. It was also submitted that a recession notice was issued in October 2015 and the defendant had still not performed contractual obligations including preparing the very first step required to get the project on its feet.
81. On this aspect the defendant submitted the plaintiff had not pleaded nor particularized fraud on the pleadings. The plaintiff had only pleaded particulars of misrepresentations. The defendant also submitted that there was no misrepresentation incident or coercion in respect to the transfer of the suit property and the same cannot be impacted.
82. The law is, and has always been that he who alleges must prove, which finds statutory expression in sections 107(1), 108 and 109 of the [Evidence Act](#).
83. In the instant case, the Defendant has title to the land which was issued which conferred upon it an indefeasible right over the land. Its ownership over the land was by way of sale vide the Sale Agreement, which was dully executed and the consideration therein delivered up as per the agreement. The registration of the Defendant as the proprietor of land vested on it the rights thereon, within the meaning of Section 24 of the [Land Registration Act](#) which provides

"24. Subject to this Act—

the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;"

and

Section 25 of the same Act recognized that this right cannot be defeated unless as provided for under the [Land Registration Act](#). Section 26 of this Act



recognizes that this right can be taken away if it is established that the registered proprietor obtained the land fraudulently or irregularly.

84. The court has gone through the dozen particulars of fraud and misrepresentation submitted by the Plaintiff. It is the burden of the person who makes such allegations to present cogent and believable evidence of the same. Indeed, given the seriousness of charges of such character that border on criminality, the standard of proof is necessarily higher than the usual civil standard of a preponderance of probabilities. The standard does not, however, reach the criminal law standard of proof beyond reasonable doubt. It is proof to a level just below beyond reasonable doubt but must, in my estimation, reach the level of assured and confident proof.
85. The plaintiff did not plead any fraud but only aspects of misrepresentation. There was no evidence placed before this court that the Defendant was engaged in any and/or that there were any fraudulent transactions and or misrepresentation over the suit property.
86. It was the sole duty of the Plaintiff to lead evidence that the auction was fraudulent and the subsequent sale and transfer to the Defendant was illegal. In the case of Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 Others, [2013] eKLR, the Court held that:
- “... Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati* (1984) KLR 425, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”.
87. Taking the meaning of fraud as espoused above, and in the Plaintiff’s submissions, this court finds and holds that the Plaintiff did not on the required standard of proof demonstrate any existence of fraud and or misrepresentation on the part of the Defendant. In view of the foregoing, it is the finding of this court that the plaintiff has not produced sufficient evidence that prove the particulars of fraud, misrepresentation as against the defendant to the satisfaction of this court and as such there was no basis laid upon which this court can impeach the title and rescind the agreement.

Issue Number iii Whether the plaintiff is entitled to the reliefs sought

88. The Plaintiff sought several reliefs enumerated hereinabove. From the findings of this court, it is clear that the plaintiff has failed to prove its case against the defendant to the required standard. The plaintiff is therefore not entitled to the reliefs sought. No basis has been laid for the grant of the said reliefs and as such this court finds no basis in granting the same. This court proceeds to dismiss its suit.
89. On the issue of cost, as a general rule courts follow the law, unless the court for good reason orders otherwise in this case, the plaintiff has failed in its claim against the defendant, as such it is liable to pay the cost of the suit.

Conclusion

90. Flowing from the findings of this court, this court come to the conclusion that the plaintiff has failed to prove its claim to the required standard and as such this court issues the following final orders;
- a. The plaintiff’s suit is dismissed.
 - b. Cost of the suit are awarded to the defendant.



Judgement accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 30TH DAY OF JULY 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Plaintiff.

Mr. Okiring for the Defendant.

Court Assistant: Judith.

