Mwatela & another v County Government of Mombasa (Environment & Land Case 185 of 2021) [2024] KEELC 13999 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13999 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 185 OF 2021

LL NAIKUNI, J

DECEMBER 18, 2024

BETWEEN

CALIST ANDREW MWATELA ..... 1ST PLAINTIFF

JACINTA WANJALA MWATELA ..... 2ND PLAINTIFF

AND

THE COUNTY GOVERNMENT OF MOMBASA ..... DEFENDANT

JUDGMENT

I. Introduction

1. The Judgment of this Honorable Court pertains to the Plaint dated 30th August, 2021 and filed on 2nd September, 2021 by Calist Andrew Mwatela and Jacinta Wanjala Mwatela, the Plaintiffs herein against the County Government of Mombasa, the Defendant herein.

2. Upon service of the pleading and Summons to Enter Appearance, the Defendant entered appearance through a Memorandum of Appearance. Subsequently, they filed a Statement of Defence dated 22nd October, 2021 filed on 25th October, 2021 and the Plaintiffs subsequently responded to the Statement of Defence through a Reply to Defence dated 16th November, 2021 filed on 19th November, 2021.

3. It is instructive note that in the course of this proceedings, the parties had indicated that there were attempts to explore an out of Court negotiation of the matter with a view of settling it. The Honorable Court encouraged the efforts as they were in tandem with the Alternative Judicial System (AJS) policy advocated by Judiciary, the provisions of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Sections 20 (1) & (2) of the Environment & Land Act, No. 19 of 2011. Unfortunately, it appears this became a cropper and thus led to the hearing of the case whatsoever.

II. Description

4. The 1st Plaintiff was described as a male adult of sound mind residing and working for gain in the County of Taita Taveta within the Republic of Kenya. The 2nd Plaintiff was described as a female adult of sound mind residing and working for gain in the County of Taita Taveta within the Republic of Kenya. The Defendant was described in the Plaint as the County Government of Mombasa devolved under the provision of Article 176 of the Constitution of Kenya, 2010.

III. Court directions before the hearing

5. Nonetheless, on 30th October, 2023, the Honourable Court fixed the hearing dated on 16th May, 2024 with the parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing "viva voce" evidence with the Plaintiffs' witnessed (PW - 1, PW - 2 and PW - 3) testifying in Court on 16th May, 2024 at 10.30 am after which they marked their case closed and the Defendant opted not to call any witness and they subsequently closed their case.

IV. The Plaintiffs' case

6. From the filed pleadings, it was the Plaintiffs' case at all material times, the Plaintiffs were and still are the registered proprietors of all that property known as Plot No. 217/II/MN (CR No. 1081), which property was situated within the County of Mombasa at the Mishomoroni area of the Constituency of Kisauni. For purposes of this suit, this land was and is still known as "the Suit Property".

7. Sometimes in the year 2003, a few squatters without permission and/or consent from the 1st and 2nd Plaintiffs moved into the suit property and started constructing illegal temporary structures. The said structures never had approved plans by the Defendant. The Plaintiffs reported this invasion onto the suit property by the squatters to the agents of the Defendant. They demanded that the Defendant intervenes under its then by-laws and the provisions of Section 30 of the Physical Planning Act Cap. 286 which provides as follows:-

> '30. Development permission
>
> 1. No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.
>
> 2. Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both. CAP. 286 Physical Planning [Rev. 2012] [Issue 1]P17-19
>
> 3. Any dealing in connection with any development in respect of which an offence is committed under this section shall be null and void and such development shall be discontinued.
>
> 4. Notwithstanding the provisions of subsection (2)- (a) the local authority concerned shall require the developer to restore the land on which such development has taken place to its original condition within a period of not more than ninety days; (b) if on the expiry of the ninety days' notice given to the developer such restoration has not been effected, the concerned local authority shall restore the site to its original condition and recover the cost incurred thereto from the developer.

5. Subject to subsection (7) no licensing authority shall grant, under any written law, a license for commercial or industrial use or occupation of any building, or in respect of any premises or land, for which no development permission had been granted by the respective local authority.

6. For the purposes of subsection (5)-- (a) commercial use includes shops, offices, hotels, restaurants, bars, kiosks, markets and similar business enterprises and trade but does not include petroleum filling stations; (b) industrial use includes manufacturing, processing, distilling and brewing, warehousing and storage, workshops and garages, mining and quarrying and other similar industrial activities including petroleum filling stations.

7. No local authority shall grant a development permission for any of the purposes mentioned in subsection (5) without a certificate of compliance issued to the applicant by the Director or an officer authorized by him in that behalf.

8. Any person who contravenes subsection (5), or (7), shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding twelve months or to both.

8. According to the Plaintiffs, the Defendant abdicated its statutory obligation by failing to enforce the afore - stated provisions of Section 30 of the Physical Planning Act Cap 286 to ensure that squatters never entered into and remained on the suit property. Despite several promises by the agents of the Defendant to intervene nothing tangible came from them. As a result, it compelled the Plaintiff to file civil suit "HCCC No 275 of 2004 - Calist Mwatela & Anor – Versus - Esther Karisa and Others" and sought for the following orders against the squatters: -

   a. Vacant possession of the suit property.

   b. Damages for trespass.

   c. Costs.

   d. Any other or further relief this Honourable deems fit and just to grant. For purposes of this suit this case is referred to as "HCC No.275 OF 2004"

9. Once again, the Plaintiffs notified the agents of the Defendants about the filed case of HCCC No. 275 of 2004 and their quest to evict the squatters and acquire vacant possession of the suit property. While the adjudication of the said case HCC No. 275 OF 2004 was in progress the Defendant approached the Plaintiffs with an offer to purchase the suit property from the Plaintiffs and cause its distribution among the squatters in its occupation. After a long deliberation, the Plaintiffs agreed and the process commenced. Prior to entering into the contract, the value of the suit property was determined by a both a Private Valuer and a Government Valuer at a sum of Kenya Shillings Twenty Seven Million (Kshs. 27,000,000/-) and a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) respectively.

10. Intensive negotiations ensued. On 14th February, 2017 an agreement of sale, terms and conditions stipulated thereof was duly entered into between the Plaintiffs (as the Vendors) and the Defendant (as the Purchaser). For purposes of this suit this Agreement dated 14th February, 2017 was referred to as "The Contract". The Plaintiffs state that of the contract expressly provided that: -

    a. The Defendant offered to purchase and Plaintiffs agreed to sell the suit property for a consideration of Kenya Shillings Twenty-Five Million (Kshs. 25,000,000/-). For purposes of this suit, this amount is referred to as "The Consideration".

b. The Plaintiffs were to forego their rights on the suit property upon signing the contract which rights included the prosecution of HCCC No.275 OF 2004 and the removal of the squatters thereof.

c. The Defendant was to pay to the Plaintiffs the entire consideration as a result of the Plaintiffs foregoing their rights and interests over the suit property in terms of the contract. This payment was to be effected within 120 days after the signing of the contract.

11. The Plaintiffs stated that as a result of the contract they abandoned the prosecution of HCCC No 275 of 2004 as they waited for the payment of the consideration by the Defendant. In the meantime, the numbers of the squatters on the suit property swelled to hundreds and massive construction was initiated. Currently every inch of the suit property is occupied by a squatter. The Plaintiffs now stated that the Defendant had been promising to pay the consideration to no avail. On 12th April, 2019 the Plaintiffs issued a formal demand for the payment of the consideration but to date the Defendant has refused, ignored and or failed to settle the consideration. The Plaintiffs stated that the Defendant had grossly breached the contract.

12. The Plaintiffs relied on the following particulars of breach of contract:-

a. Failure to pay in deposit of the consideration being a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) as per Clause 2.5 of the contract or at all.

b. Failure to pay the balance of the consideration of Kenya Shilling Fifteen Million (Kshs. 15,000,000/-) as per Clause 3.2 of the contract.

c. Failure to pay the entire consideration as per Clause B of the contract or at all.

d. Exposing the Plaintiffs to great loss of the suit property to the squatters.

e. Exposing the Plaintiffs to loss of a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) and the interest thereof.

f. Giving empty promises since the year 2017 to no avail.

13. According to the Plaintiffs as a result of the breaches, they suffered substantial loss and damages. The Plaintiffs also relied on the following particulars of damages: -

a. Loss of Plot No. 217 / II/MN (CR No. 1081) to squatters. As at the date of this suit, there are permanent houses erected on the suit property and the entire property fully occupied by squatters with the blessings of the defendant.

b. Loss of a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) being the agreed purchase price plus interests since February, 2017 till payment in full.

14. The Defendant was estopped from denying liability created by the contract. Relying on the contract the Plaintiffs abandoned their pursuit for vacant possession of the suit property legitimately expecting that the defendant was to pay the entire consideration as per Clause B of the contract. Alternatively, and purely without prejudice to the contents of Paragraphs 11,12and 13 above, the Plaintiffs stated that the Defendant was excessively negligent in entering into the contract.

15. The Plaintiffs relied on the following particulars of negligence against the Defendant: -

a. While reasonably knowing that it did not have money to pay the deposit and or the entire consideration as per the contract, the defendant entered into the contract nevertheless.

b. While knowing the natural reaction of squatters upon learning that the suit property had been acquired by the Defendant for allocation to squatters, the Defendant entered into the contract blocking the Plaintiffs from pursuing the civil case - HCC No.275 OF 2004.

c. While knowing that they were not ready to pay, the defendant entered into a binding contract and expressly undertook to settle the consideration as per Clause B of the contract

16. According to the Plaintiffs they were ready willing and able to transfer the suit property in terms of the Agreement dated 14th February, 2017 upon the Defendant paying the sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-). Since February, 2017 to date the sum of Kenya Shillings Twenty Five Million (Kshs.25,000,000/-) should be subjected to commercial interests of 14% per annum until payment in full. For this reason, as between 1st March, 2017 to 1st March,2020 the accrued interest stood at a sum of Kenya Shillings Ten Million Five Hundred Thousand (Kshs. 10,500,000/-). According to the Plaintiffs there was no pending suit between the Plaintiffs and the Defendant save for the case of "MSA JR No. 53 OF 2019 Calist Andrew Mwatela & Anor -Versus - County Government of Mombasa& Anor" which was withdrawn on 18th August, 2021. The cause of action arose in Mombasa within the jurisdiction of this Court.

17. The Plaintiffs prayed for Judgment against the Defendant as follows: -

a. A declaration that the Defendant breached the provisions of Section 30 of the Physical Planning Act Cap 286.

b. A declaration that by entering into the agreement dated 14th February, 2017, the Defendant blocked the Plaintiffs from pursuing their interests over Plot No. 217 / II/MN (CR No. 1081) from the squatters with a promise to pay a sum of Kshs. 25,000,000/- in lieu of Plot No.217 / II/MN (CR No. 1081).

c. A declaration that the Defendant is estopped from denying liability to pay to the Plaintiff the sum of Kshs. 25,000,000/- in exchange of Plot No.217 / II/MN (CR No. 1081 taken by squatters.

d. A declaration that the Defendant is bound to pay the Plaintiff the sum of Kshs. 25,000,000/- together with interests at 14% per annum with effect from 1st March, 2017 to the date of payment.

e. Once the Defendant has paid the sum of set out in Paragraph (c) above, the Plaintiffs to execute documents of transfer in favour of the Defendant or the Defendant's nominee.

f. An order compelling the Defendant to pay to the Plaintiff sum of Kshs. 25,000,000/- together with interests at 14% per annum with effect from 1st March, 2017 to the date of payment.

g. The costs of the suit

18. The Plaintiffs subsequently responded to the Statement of Defence through a reply to defence dated 16th November, 2021 filed on 19th November, 2021, where they averred that: -

a. Save as was expressly admitted herein, the Plaintiffs join issues with the Defendant on matters raised in the various Paragraphs of its Defence.

b. The Plaintiffs denied the contents of Paragraph 3 of the defence and in response thereto reiterates the contents of Paragraph 3 of the Plaint.

c. In response to Paragraph 4 of the Defence, the Plaintiffs reiterated Paragraph 4 of the Plaint.

d. In response to Paragraphs 5 and 6 of the Defence, the Plaintiffs reiterated the contents of Paragraphs 5, 6, and 7 of the Plaint and averred that the defendant abdicated its duties, leading to the filing of Mombasa HCC No.275 of 2004.

e. In response to the contents of Paragraphs 8 and 9 of the defence, the Plaintiffs reiterated Paragraphs 8 and 9 of the Plaint and put the Defendant to strict proof.

f. In response to the contents of Paragraphs 10,11, 12, 13, 14, 15, 16, 17, 18 and 19 of the Defence, the Plaintiffs reiterated contents of Paragraphs 10 - 18 of the Plaint and averred that the Plaintiffs and the Defendant entered into contract on 12th April, 2019, which contract was breached by the defendant. In the circumstances, the loss and damages incurred by the Plaintiffs are as a result of the breach of contract.

g. In response to the contents of Paragraph 21 of the Defence:

i. The Plaintiffs denied that they misrepresented the condition of the suit property and averred that the defendants were aware of the presence of the squatters, as clearly stated in the Valuation Report dated 20th November, 2014.

ii. The Defendant never fulfilled its obligation and failed to deposit a sum of Kenya Shillings ten Million (Kshs. 10,000,000/-) as deposit.

h. In further answer to Paragraphs 21 and 9 of the Defence, the Plaintiffs averred that the Defendant was aware of the terms and conditions of contract it entered into and the Plaintiff relied on the contract in its entirety.

i. In answer to Paragraph 22 of the Defence, the Plaintiffs stated that this Honourable Court had jurisdiction to hear and determine the suit, time having been interrupted through issuance of demand letters and filing of the civil case - JR No.53 of 2019.

19. The Plaintiffs prayed that the Statement of Defence by the Defendant be dismissed and Judgment be entered for the Plaintiffs as prayed in the Plaint.

20. The Plaintiffs called their first witness PW - 1 on 16th May, 2024 at 10.30 am who testified as follows: -

A. Examination in Chief of PW - 1 by M/s Umara Advocate:-

21. PW – 1 testified under oath and in English language. He identified himself as Rashid Harun Chali, a citizen of Kenya holding a national identity card with all the particulars stated thereof. He was a Land Valuer. He was registered VR. 44 and a graduate of University of Nairobi where he obtained a Bachelor of Arts Degree in Land an Economics. He told the court that he practiced property valuation. He had 25 years experience. He practiced in the name of "Njihia Mwoka Rashid Company Limited". PW - 1 told the court that he met the Plaintiff Mr. Mwatela, through his advocate Steve Kithi Advocate on 20th November, 2014 to carry out valuation of land Reference No. MN/II/217/CR 1081. He proceeded to carry out the valuation of the property. The reason for the valuation was stated out under the Terms of Reference on the report. It was to advise of the valuer of the land for purpose of the sale of the land. He prepared the report dated 20th November, 2014.

22. PW - 1 stated that the owner of the property was Jacinta Wanjira Mwatela. It measured approximately acreage 2.5. acres. He used the methodology on comparative analysis to arrive at the figure which they recommended. On the land there were several structures – permanent and semi-permanent – Swahili houses constructed by squatters and there was a bridge. It would generate 30 plots of 70 feet. Proprietors had offered to sell the plot to the squatters though there was a Court Order. They

recommended a sum of Kenya Shillings Thirty Six Million (Kshs. 36,000,000/-) (hence a sum of Kenya Shillings Fourteen Million Four Hundred Thousand (Kshs. 14, 400, 000.00/=) per acre) and for sale value of a sum of Kenya Shillings Twenty Seven Million (Kshs. 27,000,000/-) which was at 75% of the market value. He produced the valuation report as Plaintiff – Exhibit, 1 and which submitted to the client.

B. Cross – Examination & Re - examination

Nil.

C. Examination in Chief of PW - 2 by M/s. Umara Advocate

23. PW - 2 testified under oath and in English language. He identified himself as Steven Kithi Ngombo. He told the court that he was an Advocate of the High Court of the High Court of Kenya. He was admitted in the year 2000 to the bar. He knew Mr. Calist Andrew Mwatela who was his client for many years. He had represented him and his wife as the Vendors on the sale of the suit property to the County of Mombasa as the Purchasers.

24. PW - 2 told the court that he prepared the sale agreement dated 14th February, 2017. The property had been invaded by squatters and the then Governor offered to buy the plot for the benefit of the squatters between the years 2013 and 2017 when the Sale Agreement was duly signed by all the parties herein. He had been involved in the sale process and all the stakeholders were involved. The County Government wanted to settle the squatters. The purchase price was a sum of Kenya Shillings Twenty Five Million (Kshs. 25, 000, 000.00/=) and a deposit of a sum of Kenya Shillings Ten Million (Kshs. 10, 000, 000.00/=) and hence to have left out an outstanding balance of Kenya Shillings Fifteen Million (Kshs. 15, 000, 000.00/=) later on. The agreement was executed by all the parties. The deposit was to be made into PW – 2's account as the Vendor's Advocate. Unfortunately, this never happened. From the information by his client, he had never received any payment from the Defendant. He produced the Sale Agreement – as evidence – Plaintiff Exhibit No. 2.

D. Cross – Examination & Re – Examination of PW - 2

NIL.

E. Examination in Chief of PW - 3 by M/s Umara Advocate.

25. PW - 3 testified under oath and in English language. He identified himself as Calist Andrew Mwatela, a citizen of Kenya and a holder of the national identity card bearing all the particulars as shown to Court. He was the 1st Plaintiff and had a written authority to pled on behalf of the 2nd Plaintiff who was his wife. He was a business man. He was a Member of the East Africa Legislative Assembly (EALA) from years 2001 to 2006. Thereafter he got elected as Member of Parliament for Mwatate from the year 2007 to 2013 and Assistant Minister for education. It was after that he proceeded to retirement. Previously, he a school teacher. He recorded a witness statement on 2nd September, 2021. He wished to rely on the said statement as his evidence in this case. The suit property was and still is Land Reference No. MN/II/217 MSA. It was in Mshomoroni Area and he owned it with his wife.

26. PW - 3 told the court that he had the official record and the Certificate of Title issued in 7th May, 1990 and the official Certificate of Search. He had never given the squatters permission to occupy his land. He went and he found many occupants on the land. He used the Local Assistant Chief who assisted him in getting the names. According to the witness they bought the land from Joseph Muthama Kioko. Hence he decided to challenged them in court. He informed the Court that he filed a civil case HCCC. No. 225/2004 against many people whom he wanted to be removed from his land by the Court. While

in Court, he was approached by the Defendant who offered to buy the land and settle these people there. They urged us to withdraw the case and which we agreed. They got a court order and they served the Municipal Council, the then Minister Mr. Karisa Maitha intervened and offered to convince the Municipality to purchase the land. But he died before this could happen. He was the area MP. The idea fizzled with MP Mwamboza. He was disinterested on the idea. Later on, Mr. Joho as the MP for Kisauni he offered to intervene when elected as a Governor. Upon his election as the Governor the witness approached him. Governor Joho instructed Mr. Thoya to act in the purchase of the land. The witness followed the process in vain.

27. With reference to a letter dated 17th May, 2016 by the County Attorney to the Executive Member Land Housing and Fiscal planning; PW - 3 told the court that with reference to the County Government Valuer dated 22nd November, 2016 it was valued at a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-). Before the valuation there were correspondences between the County Government and the National Land Commission for settlement of squatters – dated 22nd November, 2016 and 2nd December, 2016 and there was a response from the National Land Commission through a letter dated 10th February, 2017.

28. As a result, a Sale Agreement was prepared by his Advocate Kithi. Referred to Clause B – Purchase Price was a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-). Clause 2 (5) it was to be paid in instalment – for sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) on the execution and an outstanding balance of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) upon the transfer. His advocate never received the money as promised. He had never received any of the purchase price. Arising from this, he decided to engage legal services of the Law firm of Messrs. Munyithia, Mutungi, Umara & Muzna Company Advocate to file the case. He filed a Judicial Review case but later on they withdrew it and they filed this case. They issued a demand letter. There was no response.

29. PW - 3 further went on to state that he filed this case to have the Municipal Council compensate him. It was due to the intervention by the County Government he had failed to have access to his land. There had been multiplicity of squatters on the land – he was asking for the payment of a sum of Kenya Shillings Twenty Five (Kshs. 25, 000, 000.00/=) plus Interest at 14% from the date of filing this case. He produced the following documents:-

    a. Plaintiff Exhibit no. 3 – the Authority to plead.

    b. Plaintiff Exhibit no. 4 – the Copy of the Certificate of Title Deed.

    c. Plaintiff Exhibit no. 5 - the Official Search.

    d. Plaintiff Exhibit No. 6 – a copy of the Plaint in HCCC No. 275 of 2004 Mombasa.

    e. Plaintiff Exhibit No. 7 (a), (b), (c), and (d) copies of Letters dated 17th May, 2016 from County Attorney to the Executive Member Land, Housing and Physical Planning. Letter dated 22nd November, 2016 from Ministry of Land and Physical Planning to the Defendant Letter dated 2nd December, 2016 from Defendant to National Land Commission and Letter dated 10th February, 2017 from the National Land Commission to Defendant.

    f. Plaintiff Exhibit No. 8 - Copy of the Government Valuer's Valuation Report dated 22nd November, 2016.

    g. Plaintiff Exhibit No. 9 – A bundle of Photographs on Plot No. 217/II/MN.

    h. Plaintiff Exhibit No. 10 - a Copy of the Demand Letter dated 12th April, 2019.

i. Plaintiff Exhibit No. 11 a Copy of the Notice of Motion Application dated 19th November, 2019.

j. Plaintiff Exhibit No. 12 a copy of the consent and Notice of the withdrawal suit dated 18th August, 2021.

F. Cross Examination of PW - 3 by Mr. Makori Advocate.

30. He was referred to the sale agreement at the last page (page 44). The witness told the court that the stamp showed it was by the County Government but there was no name of the one who was authorized. There was no letter of authority for signing as he did not work at the County Government. With reference to the Plaint filed on 2nd September, 2021. It was against the County Government. Under Paragraph 4 of the Plaint, PW - 3 told the court that he only filed the suit against the County Government of Mombasa. He never joined the squatters as the Defendants or parties in this suit but he had mentioned them in the pleadings. He had had not brought any documents to show that there were squatters on the land or the individuals had legal right on the land and that they had constructed on the land without approvals.

31. PW - 3 told the court that he had mentioned several people such a Governor Joho, Francis Thoya, Maitha Karisa as having made promises. He had never sued them as Defendants in the case nor summoned them as witnesses to proof his case. In Paragraphs 6 and 7 of the Plaint, he confirmed to have referred to people as Agents, e.g. the County Attorney. It was not a ploy to get the County Government of Mombasa to pay him money. From the letter he had produced as Plaintiff Exhibit No. 7, (a), (b), (c) and (d) were never copied to him. He got those letters from the agents.

32. Once more on being referred to the sale agreement. Under Clause 2.1, PW - 3 told the court that from the breach by the County Government, he had come to Court to have the squatters out of the land. He had not taken any other steps to get the squatters out of the land. According to him, he was not trying to arm -twist the County Government to pay him money. He was the only one who had signed the agreement. He wrote the letters to various authorities.

G. Re - examination of PW - 3 by M/s. Umara Advocate.

33. PW - 3 confirmed that that the sale agreement was stamped by Advocate Jecinta Langat. With reference to the Plaintiffs Ex 7(a), (b), (c) and (d); none of them bore the stamp "confidential". All the letters were copied to his advocate Kithi Advocate. He never authorized any of the squatters to be on his land. He had never removed the squatters as the County Government offered to buy the land. From there the place was fully built up. The County Government gave him legitimate expectation on purchasing the land. That was all.

V. The Defendant's case

34. The Defendant filed a Statement of Defence dated 22nd October, 2021 filed on 25th October, 2021. They denied the contents of Paragraph 3 of the Plaint and specifically denied that the Plaintiffs were the registered proprietors of all that property known as Plot No. 217/II/MN (CR No. 1081). The Defendant was a stranger to the contents of Paragraph 4 of the Plaint and specifically denied that it was or was aware of the alleged occupation and/or construction by the unspecified squatters on the suit property.

35. In response to the contents of Paragraphs 5 and 6 of the Plaint, the Defendant denied the contents therein and specifically denied breaching any alleged obligation under the provision of Section 30 of the Physical Planning Act Cap 286 and further denied making any promises through itself or its agents

of intervening in respect of the alleged occupation and construction by alleged squatters on the suit property. In any event, the Plaintiffs had invoked provisions of a repealed statute.

36. In further response to the contents of Paragraph 6 of the Plaint, the Defendant denied being aware of the existence of, neither was it a party to the Civil Suit "HCCC No 275 of 2004 - Calist Mwatela & Anor – Versus - Esther Karisa and Others" and was a total stranger to the orders issued thereto.

37. The Defendant denies the contents of Paragraph 7 of the Plaint and specifically denies having been notified of the filing of "HCCC No 275 of 2004 - Calist Mwatela & Anor – Versus - Esther Karisa and Others" or the reason for its filing. The Defendant denies the contents of Paragraph 8 of the Plaint and more specifically denied ever approaching the Plaintiffs with an offer to purchase the suit property and further denied consenting to or giving instructions for the conduct of valuation of the suit property and denies the figures quoted as being the value of the suit property.

38. In response to the contents of Paragraph 9 of the Plaint, the Defendant denied ever participating in the alleged negotiations and equally denied entering into an agreement for sale with the Plaintiff. In line with the above paragraph, the Defendant denied having knowledge of the contents of Paragraphs 10 of the Plaint in its entirety. The Defendant averred that they were a total stranger to the contents of Paragraph 11 of the Plaint. The Defendant denied the contents of Paragraph 12 of the Plaint and specifically denied making any promises to pay any alleged amounts to the Plaintiffs and further denies receiving any demand from the Plaintiffs as alleged.

39. In response to the contents of Paragraph 13 of the Plaint, the Defendant denied being in breach of any contract. The Defendant specifically denied each and every single particular of breach of contract as alleged. The Defendant denied the contents of Paragraph 14 of the Plaint and specifically denied that the Plaintiffs have suffered any loss or damage and specifically denies each and every single particular of damage as alleged by the Plaintiffs. The Defendant denied the contents of Paragraph 15 of the Plaint and specifically denied that any legitimate expectation was created in favour of the Plaintiffs to the extent of either the alleged promise to purchase the suit property or the alleged obligations created under the said contract.

40. In response to the contents Paragraph 16 of the Plaint, the Defendant denied the contents thereto and specifically denied the each and every single particular of negligence. The Defendant denied the contents of Paragraph 17 of the Plaint and specifically denied knowledge of the Plaintiffs ability or lack thereof to transfer the in the basis of the contract and further denies any intention to acquire or make payment towards the acquisition of the suit property suit property. The Defendant denied the contents of Paragraph 18 of the Plaint.

41. The Defendant admitted the contents of Paragraph 19 of the Plaint and averred that there was no other suit pending between the Plaintiffs and itself over the same subject matter. Without prejudice to the foregoing and further without admitting to taking part in any pre-contractual negotiations, existence of and alleged execution of the Agreement for Sale dated 14th February 2017 (Contract), the Defendant averred that the Contract never crystallized for the following reasons:

    a. Under Clause 2.1 of the Contract, the Plaintiffs gave an undertaking and gave a warrant that no other person (s) at the date of the Contract had or became entitled to or had any claim or right to title or interest whatsoever in the suit property. The Plaintiffs misrepresented to the Defendant the condition of the suit property knowing well that squatters were in actual possession of the said property.

    b. Under Clause 2.5 of the Contract, the Plaintiffs would only execute the Contract upon receipt of the sum of Kenya Shillings Ten Million Only (Kshs. 10,000,000/-) as Deposit.

c. Under Clause 5.1 of the Contract, the said Contract was voidable at the option of the Defendant in the event of the Plaintiffs defaulting on any one of the warranties in the Contract (breach of the warrant under (a) above).

d. The remedy that the Plaintiff sought to invoke herein for specific performance is only available to the Defendant under Clause 5.1

42. The Defendant disputed the jurisdiction of this Honourable Court to hear and determine the suit herein and shall at the opportune time raise a notice of preliminary objection to that effect. The Defendant through their counsel Mr. Makori marked their case as closed without calling any witness on 16th May, 2024

VI. Submissions

43. On 16th May, 2024 after the Plaintiffs and Defendant marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that all parties complied. On 30th September, 2024 the Honourable court reserved a date to deliver its Judgement on Notice.

A. The Written Submissions by the Plaintiffs

44. The Plaintiffs through the Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna Company filed their written submissions dated 13th June, 2024. M/s. Umara Advocate submitted that sometime in the year 2003, the Plaintiff became aware of the presence of squatters on their land located in the Mishomoroni of the County of Mombasa County, known as MN/II/217measuring approximately 2.5 acres. In an effort to remove the said squatters, the Plaintiffs filed the Civil Case – "MSA HCCC No.275 of 2004; Calist Andrew Mwatela and Jacinta Mwatela—Versus - Esther Karisa and 2 others. This suit was however compromised when the County Government of Mombasa opted to buy the land from the registered proprietors for purposes of settling the squatters, who had grown in numbers.

45. It was the Plaintiffs' case that despite the promise(s) made by the County Government of Mombasa which culminated in the drawing and execution of a Sale Agreement, the Defendant reneged on the said Agreement, leading to the filing of this current suit.

46. In tandem with the Plaint and statement dated 30th August, 2021, the Plaintiffs filed documents on 2nd September, 2021 which was produced in court as follows: -

a. Exhibit 1-Valuation Report dated 20th November, 2014.

b. Exhibit 2-Sale Agreement dated 14th February, 2017.

c. Exhibit 3-Letter of Authority.

d. Exhibit 4-Title Deed.

e. Exhibit 5-Official search.

f. Exhibit 6-Plaint in MMSA HCC no. 275 of 2004

g. Exhibit 7 -(a - d) various correspondence.

h. Exhibit 8- Government Valuers report dated 22nd November, 2016.

i. Exhibit 9 - Photographs.

j. Exhibit 10 - Demand Letter dated 12th April, 2019.

k. Exhibit 11-Notice of Motion dated 19th November, 2019

l. Exhibit 12- Notice of Withdrawal of suit dated 18th August, 2021

47. According to the Learned Counsel, the Plaintiffs' case was outlined in the Plaint dated 30th August, 2021, in the witness statement of Calist Andrew Mwatela filed on 2nd September, 2021 and in the evidence given in court by Rashid Shake, Steve Kithi and Calist Andrew Mwatela on 16th May, 2024. On the brief facts the Learned Counsel submitted that the Plaintiffs were the registered proprietors of PLOT NO 217/II/MN (CR 1081) comprised of about 2.5 acres of land which property is situated within Mombasa County, Mishomoroni area of Kisauni. This land was known as the Suit property.

48. The facts of the case were that in year 2003 or thereabouts a few squatters moved into the suit property and started constructing illegal structures without the authority or consent of the Plaintiffs. These structures did not have approved plans by the defendant as provided in the Physical and Land Use Planning Act Cap 303. The Plaintiff reported the invasion to the Defendant and demanded the defendant to intervene under its then by-laws and the provisions of Cap 303.

49. Despite several promises by the Defendant to intervene, they failed to abdicate their obligations as provided under the Act to ensure the squatters vacated and also bar more squatters from entering and occupying the suit property. This forced the Plaintiffs to file the Civil Case of: "HCCC no. 275 of 2004 - Calist Mwatela & Anor (Supra) to seeking the court to issue orders of vacant possession of the suit property and damages for trespass. The Plaintiffs notified the Defendant of the filing of this suit.

50. While the above suit was in progress, the Defendant approached the Plaintiffs with an offer to purchase the suit property and distribute the same among the squatters who were in occupation. Towards this, the parties engaged in negotiations and the process commenced as evidenced in the various correspondence produced and marked as Plaintiff Exhibit No.7 (a) to (d) as follows:

a. Letter dated 17th May, 2016 - The county Attorney confirmed to the CEC Land Housing and Fiscal Planning, that there had been previous correspondence between the Plaintiffs' Advocate and himself. The County Attorney confirmed that there was an intention to purchaser the Plaintiff's property for settlement of squatters who were on the land, and the CEC was requested to cause a valuation to be conducted for onward transmission to the National Land Commission.

b. Letter dated 22nd November, 2016 - This letter confirmed that a valuation had been carried out by the Government Surveyor as requested by the office of the County Attorney via their letter dated 8th June, 2016.

c. Letter dated 2nd December, 2016 - The County Attorney wrote to the National Land Commission confirming that the office was in receipt of the Government Valuer's report and sought directions from the National Land Commission

d. Letter dated 10th February, 2017 - The National Land Commission authorized the County government of Mombasa to go ahead and purchase the said property upon agreement with the vendors, especially given that government valuation had been availed.

51. On the Valuation reports, the Learned Counsel submitted that Rashid Shake, a registered valuer, produced Plaintiff Exhibit - 1, a valuation report dated 20th November, 2024. He informed the court that he was instructed by Steve Kithi & Co. Advocates to carry out a valuation of the property known as MN/I/217 on behalf of the registered proprietors for purposes of determining the value for purchase.

He confirmed that he visited the suit property, where he found permanent, semi-permanent and makeshift structures done haphazardly without proper planning and consideration of accessibility/ services provision. In his report, the current market value at that time was a sum of Kenya Shillings Thirty Six Million (Kshs.36,000,000/-) while forced value was a sum of Kenya Shillings Twenty Seven Million (Kshs. 27,000,000/-).

52. The second valuation report dated 22nd November, 2016 was prepared by the Government Valuers. The property was valued in the sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-). It was this report that was forwarded to the National Lands commission, leading to the letter authorizing the purchase of the property dated 10th February, 2017 from the chairman of the Commission, Prof Mohammed A. Swazuri.

53. Pursuant to the valuation reports and to the consent to purchase the property given by the National Land Commission, the Plaintiff and the Defendant entered into a Sale Agreement dated 14th February, 2017, produced by Mr. Steve Kithi advocate and marked as Plaintiff Exhibit No. 2.

54. On the sale agreement dated 14th February, 2017, the Learned Counsel asserted that this was produced as Plaintiff Exhibit No. 2 by the drawer, Mr. Steve Kithi dated 20th November, 2024. He informed the court that the agreement was drawn, signed and witnessed by all parties. He further informed the court that non -funds were received by him on behalf of his client, despite the plaintiffs having fulfilled their obligations under the contract.

55. The agreement was signed by the Mombasa County Attorney and witnessed by Ms. Patricia Langat advocate. The total purchase price was a sum of Kenya Shillings Twenty Five Million (Kshs.25,000,000/-) payable in two instalments of a sum of Kenya Shillings Ten Million (Kshs.10,000.00) at the time of execution of the agreement, and the balance of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00) payable after 90 days, but was not to exceed 120 days. Despite verbal promises to pay the purchase price, the Defendant through its offices and/or agents failed to pay the purchase price as agreed in the Agreement, leading to the issuance of the demand notice dated 12th November, 2019 and produced as Plaintiffs Exhibit No. 10.

56. On the evidence of the Plaintiffs, the Learned Counsel submitted that the Plaintiff testified on 16th May, 2024. The witness Calist Andrew Mwatela, testified and adopted his witness statement filed on 2nd September, 2021 and produced as Plaintiffs Exhibits Nos. 3 - 12. The witness informed the court that as a result of the defendant's promise to purchase the property, the previous suit – "MSA HCCC No. 275 of 2004" was abandoned. His property measuring 2.5 acres had been invaded and now fully occupied by squatters who had put up permanent and temporary structures. It was his evidence that the Defendant had breached the Sale Agreement and as a result, he suffered loss and damage as particularized in the Plaint.

57. From the documents produced and evidence given in court, they submitted that the following are the issues of determination:

    a. Whether there was a contract, and if yes, whether the same was binding upon the parties.

    b. Whether the contract was enforceable.

    c. Whether there was breach of contract.

    d. Whether the Defendant is estopped from denying liability

    e. Whether the Defendant breached the provisions of the Physical and Land Use Planning Act CAP 303.

f. Whether the Plaintiffs are entitled to an order of specific performance and the reliefs sought.

g. Whether the doctrine of legitimate expectation applies

58. On whether there was a contract, and if yes, whether the same was binding upon the parties. The Learned Counsel submitted that the Black law dictionary defines "contract" as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The Defendants approached the Plaintiffs with an offer to purchase the suit property. The Plaintiffs accepted the offer and proceeded to enter into a sale agreement at an agreeable consideration. Each party had its contractual obligation as expressed in Clauses 2.0 and 3.0 of the sale agreements. Further the same was reduced into writing and signed by all the parties. The signing of the sale agreement confirmed the intention of the parties to contract. She referred Court to the provision of Section 3 (3) of the Contract Act, Cap. 23.

59. The Learned Counsel averred that the Sale Agreement met all the legal threshold of a valid Contract as per section 3(a) and (b) of the Contract Act therefore the contracting parties had an intention of creating a valid binding contract. The Environment and Land Court in the case of: "Broadspect Investment Limited – Versus - Francis Njoroge Mwangi [2017]eKLR" held that:-

> " The agreement herein is for sale of land and as stipulated in Section 3(3) of the Law of Contract, the said contract must be in writing and should be signed by all the parties herein. In the instant Sale Agreement, the same is in writing and is signed by the parties and therefore the Sale Agreement is a valid Sale Agreement which is capable of enforcement'. It further quoted the case of Nelson Kivuvani - Versus - Yuda Komora & Another. Nairobi HCCC No.956 of 1991where the High Court held that: -
>
> "The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligation express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amounts to a valid contract."

60. On whether the contract was enforceable. The Learned Counsel averred that it was a well settled that an agreement must show an intention of parties to create a legal relationship. The basic rules for formation of a valid contract include; an agreement, an intention to enter into a contractual relationship and a consideration. For a contract to be valid and enforceable, the subject matter must be certain, there must be evidence of contractual obligation in existence.

61. In this present case, the Plaintiffs had established that there existed a valid enforceable contract between the Plaintiff and Defendant. This Agreement for sale contains the names of the parties, the description of the property, the purchase price, and the contractual obligations of each party and was signed and witnessed by both parties. Further, it has met the requirements provided in section 3(3) of the Contract Act.

62. On whether there was breach of contract. The Learned Counsel submitted that the Plaintiffs had pleaded particulars of breach of contract under Paragraph 13 (a) to (f) of the Plaint. Having entered into an agreement, the Defendant failed to comply with the provisions of Paragraphs 3 and 4 of the Sale Agreement by failing to pay the sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) towards the purchase price within the specified period. The Plaintiffs had further stated in Paragraphs 10 to 14 of the witness statement the efforts made towards following up on the payment to no avail. As a result of the breach of contract, the Plaintiffs suffered loss and damage.

63. The Court of Appeal in the case of:- "Collins – Versus - Ogango (Civil Appeal 427 of 2018) [2024] KECA 19 (KLR)" in upholding the decision of the trail court stated that:-

> "……there is no doubt that there was an agreement for sale. Indeed, all the parties concede to this fact. We wish, however, to address the issue of breach of agreement. Black's Law Dictionary, 9th Edition, at Page 213, 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 "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.
>
> 18. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part ofthe contract. In the case of Rufale vs. Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592,Scrutton L.J.held as follows:
>
> > " The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.
>
> Equally, in the case of Attorney General of Belize et al – Versus -Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd – Versus - Northwest Metropolitan Regional Hospital Board (1973) I WLR 601 at 609, the court held as follows:
>
> > " The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and [free] from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."
>
> 19. Based on the above decisions and the summarized facts of the case, we are in no doubt that there was breach of the agreement. The question is who was in breach? On the basis of the record, we are satisfied, just like the trial court, that it was the appellant who breached the contractual terms and purported to amend the terms therein to suit herself. The appellant failed to do what the contract had demanded of her……"

64. On whether the Defendant was estopped from denying liability. The Learned Counsel submitted that it was not in dispute that the Defendant promised to purchase the suit property from the Plaintiffs with the intention to settle the squatters. The Plaintiffs discontinued the suit filed against the squatters in the civil case of "MSA HCC No. 275 of 2004". In any event, the Sale Agreement could not have

been signed by the parties when the suit was pending in court. The Court of Appeal in the case of:- "Serah Njeri Mwobi – Versus - John Kimani Njoroge (2013) eKLR", held that:

> "……..doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person…"

65. The letter dated 17th May, 2016 from the County Attorney to the Executive Member Land, Housing and Physical Planning of Mombasa County was specific that the purchase of the property was for settlement of the settlers currently on the property. The intention of the Defendant was clear. The Defendant is therefore estopped from denying liability. The doctrine of estoppel is further echoed in the Court of appeal decision in "748 Air Services Limited – Versus - Theuri Munyi [2017] eKLR". In this case, the court was estopped the Respondent from demanding the initial salary after accepting the reduced salary for eight months. In allowing the appeal, the court set aside orders issued by the ELRC and substituted with an order dismissing the suit filed by the Respondent before the trial court. Among issues that were dispositive to the appeal, was whether the doctrine of estoppel applied. In arriving at its decision, the court stated that: -

> "……..it would be unjust to allow Munyi to revert to the previous legal relationship with the company. By his conduct, he evinced an intention to affect the legal relationship between him and the company for a period of eight months…". It further proceeded to state that "…….. the doctrine of estoppel was raised and argued by the parties but was not considered by the trial court, which was a clear non-direction. We find on the first issue that the doctrine applied in this case and was favorable to the company."

66. On whether the Defendant breached the provisions of the Physical and Land Use Planning Act CAP 303. It was the contention of the Learned Counsel that this Act repealed the Physical Planning Act, 1996 and its dated of commencement was on 5th August, 2019. It makes provision for planning use, regulation and development of land and for connected purposes. Part IV of the Act provides for development control to ensure orderly physical land use development, optimum land use, and protection of the environment, ensure orderly and planned development, construction and design.

67. The provision of Section 56 of the Act grants power to the County Governments to prohibit or control the use and development of land and buildings, control or prohibit sub division of land consider and approve all developments applications, consider and determine development planning applications among others. Section 57 (1) of the Act provides that a person shall not carry out development within a county without a development permission granted by the respective county executive committee member, while the following subsections provide for penalties in the event that a developer fails to obtain development permits. Sections 58 & 59 of the Act requires every applicant to provide documents and plans prepared by a qualified person.

68. It was therefore the Learned Counsel submission that the Defendant abducted its statutory obligation by failing to enforce the provisions of the Act to ensure that squatters did not enter into the suit property and put up the structures without authority from the proprietors. The Defendant granted permission to the squatters to develop a land which did not belong to them in total disregard of the provisions of the Act.

69. On whether the Plaintiff was entitled to an order of specific performance and to the reliefs sought in the Plaint. The Learned Counsel argued that Jurisdiction on specific performance was held in the case

of "Reliable Electrical Engineers (K) Ltd – Versus - Mantrac Kenya Limited [2006] eKLR", where the court held as follows: -

> "The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant."

70. The Learned Counsel argued that the sale agreement in this suit was valid and enforceable. The Defendant had failed to live to its own promise. It was only right that this court do issue an order of specific performance to compel the Defendant to perform its contractual obligations as provided in the sale agreement by making a payment of the agreed purchase price to the Plaintiffs. Every breach of contract gives rise to a claim for damages. To determine whether or not there was breach of the contract, the Court must first determine whether there was a valid contract in place. The Plaintiffs had established that there exists a valid contract between them and the Defendant.

71. According to the Learned Counsel, it was clear that each party had its contractual obligations to perform. In his testimony, the Plaintiffs stated that the Defendant never lived up to its obligations under the contract despite several promises to do so. The Plaintiffs performed his obligations as agreed upon in the agreement and that the Defendant failed on its part. The Learned Counsel urged the Honourable Court to find and hold the Defendant in breach of the contract and find the Plaintiffs entitled to the reliefs sought as parties were bound by the contract that they both signed.

72. On whether the doctrine of legitimate expectation applied. The Learned Counsel submitted that the principle of the doctrine of legitimate expectation was put to rest by the Supreme Court of Kenya decision in the case of:- "Fanikiwa Limited & 3 others – Versus - Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR)". The Court stated that this principle imposes a duty to act fairly and to honour reasonable expectation raised by the conduct of a public authority. That if a government body leads a person to believe that he will be treated in a certain way, the government should not be allowed to renege.

73. The supreme Court laid down the principles that governed a successful invocation of the doctrine of legitimate expectation in the case of "Communication Commission of Kenya and 5 Others – Versus – Royal Media Services Limited and 5 Others [2004] eKLR" including that:-

> "there must be an express, clear and unambiguous promise given by a public authority, this expectation itself must be reasonable, the representation must be one which it was competent and lawful for the decision maker to make and there cannot be a legitimate expectation against clear provisions of the law or the Constitution..."

74. By virtue of the Defendant entering into a sale agreement to purchase the suit property with conditions to the Plaintiff to forego any rights over the suit property including eviction of the squatters from the suit land, the Plaintiffs relied on this statement thus abandoned the process of claiming their rights over the suit property. It is only right by this court that the Defendant be held liable and enforce its promise.

75. In conclusion, the Learned Counsel asserted that the Plaintiffs herein had proved their case to the required standard of balance of probabilities. The Court should therefore enter Judgment for the Plaintiffs against the Defendant herein as prayed in the Plaint together with costs of the suit. The Plaintiffs further prayed for any relief that this court shall deem fit to grant.

B. The Written Submission by the Defendant.

76. While defending the suit instituted by the 1st and 2nd Plaintiffs herein, the Defendant herein through the Law firm of Messrs. Soni & Associates Advocates filed their written submissions dated 24th November, 2024. Mr. Makori Advocate commenced his submission by providing a brief background of the matter. He stated that the Plaintiff filed this suit vide a Plaint dated the 30th August 2021 claiming that squatters descended upon their property Plot No 217/II/MN(CR 1081) comprised of 2.5 acres of land within Mombasa County in Mshomoroni area of Kisauni. They had built structures therein and they demanded that the Defendant intervene and evacuate the squatters. They claim to have entered into a sale agreement on 14th February 2024 with the Defendant to purchase the suit property and distribute the same upon the squatters who were in occupation. They further claimed that the Defendant failed to uphold the sale agreement and had not paid up the agreed purchase price despite demands to do so.

77. On its part, the Defendant denied all the above and stated that the sale agreement was signed by persons who were not authorized to do so. The agreement also never stated the designation of the person who signed the same. Additionally, the suit was time barred having been filed after the lapse of the statutory period as set out under Section 3 (2) of the Public Authorities Limitation Act, Cap 39 of the Laws of Kenya.

78. To support its case, the Learned Counsel relied on the following issues. These were:-

    a. Is the Defendant entitled to specific performance?

    b. Was the suit time barred in accordance with Section 3 (2) of the Public Authorities Limitation Act, Cap 39 of the Laws of Kenya?

    c. Are there any alternative remedies?

    d. Who should get costs?

79. On whether the Defendant was entitled to specific performance. The Learned Counsel stated that it was important to point out, that the Relief of Specific Performance was an equitable relief. Therefore, it did not ordinarily issue at the beckon of a Party. Simply put, an order for specific performance does not issue as a matter of right, but like all other equitable remedies, it was subject to exercise of judicial discretion and was dependent on the existence of other obtaining circumstance, as well as other alternative remedies. On the other hand, before a court of law could venture to deal with and issue an order of specific performance, it was important to ascertain and/or authenticate whether there existed a valid and enforceable agreement between the parties, which was capable of being implemented and/or enforced by a court of law.

    In respect of the subject matter, the Defendant submitted that the same was legally enforceable for the simple fact that the party who executed the same on behalf of the County Government was unknown. The signature put it on it did not denote who signed on the Defendant's behalf or their position in the Defendant. As no authorization had been issued by the Defendant, the executed document by unknown persons was of no legal consequences in their opinion. As such, legally there was no Sale agreement that was ever executed and/or engrossed, whatsoever. Consequently, no valid and/or

legal Sale agreement, never existed, between the Plaintiff and the 1st Defendant which was capable of enforcement to warrant Specific performance in the first instance.

80. In support of the foregoing observation, one needs only to look at the decision in the case of:- "Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited (2006) eKLR", where Justice Maraga (as he then was) stated that:-

> " Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles"
>
> "The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant."

81. The Learned Counsel opined that the law was settled that a party seeking specific performance must demonstrate that he had performed or was willing to perform all the terms of the agreement. That he had not acted in contravention of the essential terms of the said agreement. To buttress on this point he refereed Court to the case of:- "Gurdev Singh Birdi and Marinder Singh Ghatora - Versus - Abubakar Madhubuti CA No.165 of 1996" it was held that:-

> " .....It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed... a Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."

82. Specific performance is a discretionary remedy. It follows therefore that even if the Plaintiff has satisfied all the conditions for the grant of the relief, the court can still decline to grant the same for good reason. Further, he cited the case of: "Amina Abdulkadir Hawa – Versus - Rabinder Nath Anand & Another [2012] eKLR", the court cited "Chitty on Contracts, 28th Edition (Sweet & Maxwell,1999), Chapter 28 Paragraphs 027 and 028" where the authors have stated as follows:

> " Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles...specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third part... severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after

the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible."

83. On whether the suit was time barred in accordance with Section 3 (2) of the Public Authorities Limitation Act, Cap 39 of the Laws of Kenya. The Learned Counsel submitted that the suit was time barred by virtue of the provision of Section 3(2) of the Public Authorities Limitation of Actions Act? Section 3(2) of the Public Authorities Limitation Act provides that:

> " No proceedings founded on contract shall be brought against the Government or local authority after the end of three years from the date on which the cause of action accrued."
>
> According to Court of Appeal, whilst citing the case of:- "Iga – Versus -] Makerere University (1972) E.A. 62, in the suit of "John Kariuki Maina – Versus - Attorney General [2021] eKLR", the principles underlying time barred suits were enunciated as follows:
>
> "The limitation Act does not extinguish a suit or action itself, but operates to bar the claimor remedy sought for and when a suit is time - barred, the court cannot grant the remedy or relief.....
>
> The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaint, and on grounds of exemption are shown in the Plaint, the Plaint must be rejected." (Emphasis ours).

83. The prerequisites for vitiating a claim under Section 3(2) of the Public Authorities Limitation of Actions Act are basically two:-

a) demonstration that the claim was founded on contract; and

b) that the claim was lodged after the expiry of three (3) years as stipulated in the said section.

He averred that from a glance of the pleadings, it was clear that the Plaintiffs' suit is based upon the breach of the contract dated 14th February, 2017 by the Defendant. A fact that was not in dispute and thus both limbs of the stated prerequisites were therefore met. As a result, this Honourable Court ought to make a finding that the suit offended the provisions of Section 3(2) of the Public Authorities Limitation Act. The Plaintiffs' accused the Defendant of breaching the contract dated 14th February, 2017 by failing to pay both the deposit or the balance of the purchase price. The Plaintiffs' aver that the Defendant was required to pay the deposit at the time of executing the contract. That was not done. The Defendant did not dispute that fact.

84. The prayers (d) and (f) of the Plaint sought for computation of interest on the purchase price of a sum of Kenya Shillings Twenty-Five Million (Kshs. 25, 000, 000.00/=) from 1st March, 2017 to the date of payment". This was a clear indicator of the period when the cause of action arose that would entitle the Plaintiffs' to claim interest as at that date. One would therefore discern from the pleadings that the breach occurred when the Defendant failed to pay the deposit at the time of execution of the contract dated 14th February,2017. Accordingly, the cause of action arose upon that breach by the Defendant meaning that time started running as soon as the Defendant failed to pay the deposit of the purchase price on 14th February, 2017. The Plaintiffs' lodged the dispute for determination by this Honorable Court, on 2nd September, 2021. The period between the accrual of the cause of action and the filing of the instant suit was four (4) years and Six (6) months. This time goes beyond the time limitation of three (3) years given by the statute and the suit should thus be dismissed for violation of the above reproduced statutory provision.

85. On whether there were any alternative remedies. The Learned Counsel submitted that given that the title was still in the name of the Plaintiffs and no transfer was ever done, then they were still empowered by the provisions of Section 152E of the Land Act, No. 3 of 2012 to evict the squatters from the suit land. He wondered why they never sought for that prayer against the squatters herein. He asserted that where the land encroached upon was private land, the notice should be issued by the owner of the land to the affected persons. The notice should be in writing, by radio, newspaper and through display in strategic locations within the occupied land. It should also spell out the terms and conditions as to the removal of buildings, and the reaping of growing crops. It should also be served to the Deputy County Commissioner in charge of the area as well as the Officer Commanding the Police division of the area.

Section 152E provides as follows:-

(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

(2) The notice under subsection (1) shall

(a) be in writing and in a national and official language;

(b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

(c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

(d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

The process was well outlined above for the Plaintiffs to follow and get occupation of his land if the claim of squatters having settled thereon was true.

87. On who should get costs of the suit. The Defendant submitted that costs must follow the event even as it is a matter of discretion for the Court. He refrred Court to the case of the Supreme Court in the case of:- "Jasbir Singh Rai & 3 Others – Versus - Tarlochan Singh Rai & 4Others [2014] eKLR, stated as follows:-

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs."

As such the Defendants prayed for costs as against the Plaintiffs.

88. In conclusion, it was to be noted that the order of specific performance sought was an equitable remedy. It was not given as of right and any applicant has to satisfy the Court that he is deserving of the orders sought. The Plaintiff had failed to prove their suit thus they are undeserving of the orders sought. Thus, the Defendant prayed that the Plaintiff's suit dated 30th August 2021, was an abuse of court process, unmeritorious, mala fides, and should be dismissed with costs.

VII. Analysis and Determination

89. I have keenly assessed the filed pleadings by all the Plaintiff and Defendant herein, the written submissions and the plethora of cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

90. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are:

    a. Whether the suit instituted by the Plaintiffs has any legitimate merit whatsoever.

    b. Whether the Plaintiffs are entitled to the orders sought in the Plaint?

    c. Who will bears the costs of the suit?

Issue No. a). Whether the suit instituted by the Plaintiffs has any legitimate merit whatsoever.

91. Under this sub title the Court shall examine whether the Plaintiffs have a legitimate claim against the Defendant. It is the Plaintiffs' case, was undisputed fact, that at all material times, the Plaintiffs were and still are the registered proprietors of all that property known as Plot No. 217/II/MN (CR No. 1081), which property was situated within the County of Mombasa at Mishomoroni area of the Constituency of Kisauni.

92. Sometimes in the year 2003, a few squatters without permission and or consent from the Plaintiffs moved into the suit property and started constructing illegal temporary structures and which structures did not have approved plans by the Defendant. The Plaintiffs reported this invasion to the suit property by the squatters to the agents of the Defendant and demanded that the Defendant intervenes under its then by-laws and the provisions of Section 30 of the Physical Planning Act Cap 286.

93. According to the Plaintiffs, the Defendant abdicated its statutory obligation by failing to enforce the provisions of Section 30 of the Physical Planning Act Cap 286 to ensure that squatters did not enter into and remain on the suit property. Despite several promises by the agents of the Defendant to intervene nothing tangible came from the defendant which then forced the Plaintiff to file "HCCC No 275 of 2004 Calist Mwatela & Anor – Versus - Esther Karisa and Others" and sought the following orders against the squatters: -

    a. Vacant possession of the suit property.

    b. Damages for trespass.

    c. Costs.

    d. Any other or further relief this Honourable deems fit and just to grant. For purposes of this suit this case is referred to as "HCC No. 275 OF 2004"

94. The Plaintiffs once again notified the agents of the Defendants about the filing in court of HCCC No. 275 OF 2004 and their quest to evict the squatters and acquire vacant possession of the suit property. While in the process of adjudicating the Civil Case of: "HCCC no. 275 of 2004 (Supra) and while it was in progress, the Defendant approached the Plaintiffs with an offer to purchase the suit property from the Plaintiffs and distribute the same among the squatters in occupation. The Plaintiffs agreed and the process commenced. Prior to entering into the contract, the value of the suit property was determined by a both a Private Valuer and a Government Valuer at a sum of Kenya Shillings

Twenty Seven Million (Kshs. 27,000,000/-) and a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) respectively.

95. Pursuant to that negotiations ensued in earnest. Indeed, on 14th February, 2017 an agreement of sale was entered into between the Plaintiffs (as Vendors) and the Defendant (as the Purchaser).

96. Now turning to the main issues under this sub – heading, this Court intends to have a keen assessment on the principles of the Laws of Contract and the breach of it thereof. Contracts are governed by the provisions of the "The Laws of Contract, Cap. 23", the Land Act, No. 6 of 2012 among other Laws of Kenya. Contract is an agreement entered between one or more than one person with another or others creating an obligation for a consideration and its enforceable or recognizable in law. There are other definition of Contract as being a promise or a set of promise, for breach of which the law gives a remedy or the performance of which the law in some way recognized as a duty.

97. Therefore, based on the above stated facts, the Plaintiffs case against the Defendant is one of contractual relationship. Disposition of Land is based on contract. At this juncture, it's instructive to note that whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of Contract, Cap. 23 and Section 38 (1) and (2) of the Land Act, No. 6 of 2012. Both of these provisions of the Law which are materially and in nature identical are based on the validity of contract. The provision of Section 3(3) of the Law of Contract reads as follows: -

> " No suit shall be brought upon a contract for the disposition of an interest in land unless-
>
> (a) The contract upon which the suit is founded:
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust".

98. While the provision of Section 38 (1) and (2) which are more specific on the validity of contract in sale of land reads as follows:-

(1) Other than as provided by this Act or any other write law no suit shall be brought upon a contract for the disposition of an interest in land: -

(a) The contract upon which the suit is founded:

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Section 39:-

> " If, under a contract for the sale of land, the Purchaser has entered into possession of the land, the Vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the Purchaser by:-

a. Resuming possession of the land peaceably; or

b. Obtaining an order for possessions of the land from the court in accordance with the provisions of Section 41.

The provision of Section 40 of the Land Act, No. 6 of 2012 provides for the damages from the breach of Contract. It provides:-

40 (1) "Nothing in Section 39 of the Act prevents a vendor from claiming damages and Mesne Profits from the Purchaser for the breach of a Contract of sale or for breach of any other duty to the Vendor which the Purchaser may be under independently of Contract or effects the amount of damages that the Vendor may claim.."

(2) Any term express or implied in a contract or other instrument that conflicts with this section shall be inoperative.

99. It is not in dispute that, although the Defendant filed Statement of Defence, they never summoned any witnesses. The Court holds that the Plaintiffs' case was not fully controverted. Thus, the herculean task here by this Honourable Court is to determine on its own merit and based on facts and laid - down law, whether the Defendants breached the agreement for sale or not. To begin with, the Black's Law Dictionary, 9th Edition, Page 213, 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."

100. The provision of Section 39 of the Land Act No. 6 of 2012 further extrapolates on the validity of contract on sale of land and the breach of contract by stating as follows:

> " If, under a contract for the sale of land, the purchaser has entered into possession of the land, the vendor may exercise his contractual right to rescind the contract by reason of a breach of the contract by the purchaser by: -
>
> a. Resuming possession of the land peacefully; or
>
> b. Obtaining an order for possession of the land from the Court in accordance with the provision of Section 41.

101. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of "Rufale – Versus - Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592", Scrutton L.J. held as follows:-

> " The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

102. Equally in the case of "Attorney General of Belize et al – Versus - Belize Telecom Limited & Another (2009), 1WLR 1980 at page 1993", citing Lord Person in the case of: "Trollope Colls Limited – Versus - Northwest Metropolitan Regional Hospital Board (1973) I WLR 601 at 609", held as follows: -

> " The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

103. Based on the above decision, the starting point of the Honourable Court will be to critically assess the agreement entered into on 14th February, 2017 entered into between the Plaintiffs (as Vendors) and the Defendant (as the Purchaser). For purposes of this suit this Agreement dated 14th February, 2017 was referred to as "The Contract". The Plaintiffs states that of the contract expressly provided that:-

104. The Defendant offered to purchase and plaintiffs agreed to sell the suit property for a consideration of Kenya Shillings Twenty-Five Million (Kshs. 25,000,000/-). For purposes of this suit, this amount is referred to as "The Consideration".

105. The Plaintiffs were to forego their rights on the suit property upon signing the contract which rights included the prosecution of "HCCC No.275 OF 2004" and the removal of the squatters thereof.

106. The Defendant was to pay to the Plaintiffs the entire consideration as a result of the Plaintiffs foregoing their rights and interests over the suit property in terms of the contract. This payment was to be effected within 120 days after the signing of the contract.

107. The Plaintiffs stated that as a result of the contract they abandoned the prosecution of HCCC No 275 of 2004 as they waited for the payment of the consideration by the Defendant. In the meantime, the numbers of the squatters on the suit property swelled to hundreds and massive construction was initiated. Currently every inch of the suit property is occupied by a squatter. The Plaintiffs now stated that the Defendant had been promising to pay the consideration to no avail. On 12th April, 2019 the Plaintiffs issued a formal demand for the payment of the consideration but to date the Defendant has refused, ignored and or failed to settle the consideration. The Plaintiffs stated that the Defendant had grossly breached the contract.

108. The Plaintiffs relied on the following particulars of breach of contract:-

a. Failure to pay in deposit of the consideration being a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) as per Clause 2.5 of the contract or at all.

b. Failure to pay the balance of the consideration of Kenya Shilling Fifteen Million (Kshs. 15,000,000/-) as per clause 3.2 of the contract.

c. Failure to pay the entire consideration as per clause B of the contract or at all.

d. Exposing the plaintiffs to great loss of the suit property to the squatters.

e. Exposing the plaintiffs to loss of a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) and the interest thereof.

f. Giving empty promises since 2017 to no avail.

109. The Defendant on the other hand argued that the Defendant was a stranger to the contents of Paragraph 4 of the Plaint and specifically denied that it was or was aware of the alleged occupation and/

or construction by the unspecified squatters on the suit property. In response to Paragraphs 5 and 6 of the Plaint, the Defendant denied the contents therein and specifically denied breaching any alleged obligation under section 30 of the Physical Planning Act Cap 286 and further denied making any promises throughitself or its agents of intervening in respect of the alleged occupation and construction by alleged squatters on the suit property. In any event, the Plaintiffs had invoked provisions of a repealed statute.

110. In further response to the contents of Paragraph 6 of the Plaint, the Defendant denied being aware of the existence of, neither was it a party to "Hccc no. 275 of 2004 - Calist Mwatela & anor (Supra) and was a total stranger to the orders issued thereto.

111. From the facts of the case the Court is called upon to examine whether there is a valid contract between the Plaintiffs and the Defendant. Based on the foregoing and with reference to Section 3 of the Law of Contract Act Chapter 23 of the Laws of Kenya and Section 38 (1) of the Land Act 2012, I find that the Sale Agreement dated 14th February, 2017 fully meets the legal threshold of an agreement and therefore it is valid and enforceable by law.

112. On the provision of Section 30 of the Physical Planning Act Cap 286Laws of Kenya. It requires that for any development to be undertaken within a local authority, permission of that Local Authority should be sought. The Section reads;

> "S. 30
>
> (1) No person shall carry out development within the area of a Local Authority without a development permission granted by the Local Authority under S. 33.
>
> (2) Any person who contravenes subsection -
>
> (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding 5 years or to both.
>
> (3) Any dealing in connection with any development in respect of which an offence is committed under this section shall be null and void and such development shall be discontinued.
>
> (4) Notwithstanding the provision of Subsection (2)
>
> (a) the Local Authority concerned shall require the developer to restore the land on which such development has taken place to its original condition within a period of not more than ninety days;
>
> (b) If on expiry of the ninety days notice given to the developer such restoration has not been effected, the concerned Local authority shall restore the site to its original condition and recover the cost incurred thereto from the developer, 5.....8."

113. Section 33 provides that before any development is undertaken within a local authority, the Director has to approve the development plans. From all the empirical documentary and oral evidence adduced

herein, including the Valuation Report by PW – 1 the Plaintiffs have well established and shown how the Defendant contravened Section 30 of the Physical Planning Act Cap 286 Laws of Kenya. There is no doubt that there are all manners of semi and permanent structures constructed on the 2,5 acres of land belonging to the Plaintiffs without any approval from the Defendant. For these reasons, therefore, I find that the Plaintiffs have proved their case against the Defendant.

Issue B. Whether the Plaintiffs are entitled to the orders sought in the Plaint

114. Under this substratum we shall examine the prayers sought by the Plaintiffs prayed for:

a. A declaration that the Defendant breached the provisions of Section 30 of the Physical Planning Act Cap 286.

b. A declaration that by entering into the agreement dated 14th February, 2017, the Defendant blocked the Plaintiffs from pursuing their interests over Plot No. 217 / II/MN (CR No. 1081) from the squatters with a promise to pay a sum of Kshs. 25,000,000/- in lieu of Plot No.217 / II/MN (CR No. 1081).

c. A declaration that the Defendant is estopped from denying liability to pay to the plaintiff the sum of Kshs. 25,000,000/- in exchange of Plot No.217 / II/MN (CR No. 1081 taken by squatters.

d. A declaration that the Defendant is bound to pay the Plaintiff the sum of Kshs. 25,000,000/- together with interests at 14% per annum with effect from 1st March, 2017 to the date of payment.

e. Once the Defendant has paid the sum of set out in paragraph (c)above, the plaintiffs to execute documents of transfer in favour of the Defendant or the Defendant's nominee.

f. An order compelling the Defendant to pay to the Plaintiff sum of Kshs. 25,000,000/- together with interests at 14% per annum with effect from 1st March, 2017 to the date of payment.

g. The costs of the suit

115. This Honourable Court holds that the Advocate for the Plaintiffs has assisted this Honourable Court in defining the term "Breach of Contract" based on the definition from the Black Laws Dictionary to mean:-

> " A violation of a contractual obligation failing to perform one's own promise, by repudiating it or interfering with another's performance. A breach may be one by non performance or by reputation or by both. Every breach gives rise for a claim of damages and may give rise to other remedies...."

On this point, I cite the In the case of "Photo Production – Versus – Securicor Limited (1980) AC 827 at page 848 Lord Diplock remarked that:

> " a characteristically, commercial contracts are a source of primary legal obligations upon each party to it to procure that whatever has been promised will be done.....Every failure to perform a basic term of contract, is a breach of contract. The secondary obligation on the part of the contract on the part of the contract breaker to which it gives rise by....common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of breach".

The other issue raised by the Defendant was on time. According to Halsbury Laws of England (4th Edition) Vol. 9 Para. 481 Page 338 holds:-

> " The modern law, in the case of contracts of all types, may be summarized as follows:- Time will not be to be of the essence unless (1) the parties expressly stipulates that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that the time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence. Even if time is not of essence a party who fails to perform within the stipulated time will be liable in damages".

116. On the issue of creating legitimate expectation. I concur with the Learned Counsel for the Plaintiffs while citing the Supreme Court which laid down the principles that governed a successful invocation of the doctrine of legitimate expectation in the case of "Communication Commission of Kenya and 5 Others (Supra). The Defendant did this through the duly executed sale agreement terms and conditions stipulated thereof, numerous sessions, correspondences with the Plaintiffs and urging them to withdraw the Civil suit it had filed against the persons who were in occupation of the suit land as squatters on the suit land and even causing the National Land Commission to step in and create hopes to the Plaintiffs which actually led to the entering of the formal sale agreement for the land. Despite of all this, rising of legitimate expectations, the Defendant y turned round and renegated the same.

117. Undoubtedly, in the instant case, and from surrounding facts and inferences in the matter, this Honourable Court will not hesitate to conclude that the Defendant is in utter breach of the terms from the duly executed agreement for the sale of the suit land. I dare say that, it has been adequately proved that there was failure to make the payment of the outstanding balance, wrongful possession of the suit property and failure to comply despite being issued with a demand letter issued to them. proper 14 days notice in accordance with the provision of Clause 7.0 of the sale agreements.

118. On the issue of the consequences upon the breach of the contract. The Honorable Court has been persuaded by the two cases cited by the Advocate for the Plaintiff - the Cases of Kenya Tourism Development Corporation (Supra) and Consolota Anyango Ouma (Supra)

In the "William R. Anson's "The principles of the Law of Contract", 28th Edition at pages 589 and 590 the law is stated to be:-

> " Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damages , loss or injury the claimant has suffered through that breach. A Claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal"

119. According to the Halsbury's Laws of England, Third edition Vol. II defines nominal damages as follows:-

> " ..388. Where a Plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the Plaintiff has sustained actual damage, the damage arises not from the Defendant's wrongful act, but from the conduct of the Plaintiff himself; or the Plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which

he is entitled to receive are nominal.....Thus in actions for the breach of contract nominal damages are recoverable although no actual damage can be proved.."

120. On the same issues, the Court wishes to further rely on the decision in the case of "Kinake Co – operative Society – Versus – Green Hotel (1988) KLR 242, where the Court of Appeal held that where damages are at large and cannot be quantified, the Court may have to assess damages upon some conventional yardsticks. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages, a position also taken in the case of "Nyamongo & Nyamongo Advocates – Versus – Barclays Bank of Kenya Limited (2015) eKLR.

> Defence:- made some deposit of Kshs. 6, 000, 000.00; not having money; taking of possession – Clause 3; not using the land at all eg no cultivation of the land or sugar cane; lack of communication – failure to any demand notices; issue the 14 days notice as per Clause 7.0 of the agreement;

ISSUE C: Who bears the costs of the suit

121. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims.

122. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

123. In the case of: "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held;

> " It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

124. In the present case, the fact that the 1st and 2nd Plaintiffs have established their case they will be entitled to the costs of the suit to be borne by the Defendant herein.

VIII. Conclusion and Disposition

125. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiffs have established their case against the Defendants. Thus, for avoidance of doubt, the Honourable Court proceeds to make the following specific orders:

a. That Judgment be and is hereby entered in favour of the Plaintiffs - Calist Andrew Mwatela and Jacinta Wanjala Mwatela in respect to the Plaint dated 30th August, 2021 and filed 2nd September, 2021.

b. That a declaration made that the Defendant breached the provisions of Section 30 of the Physical Planning Act Cap 286.

c. That the Court makes a declaration that by entering into the agreement dated 14th February, 2017, the Defendant blocked the Plaintiffs from pursuing their interests over Plot No. 217 / II/MN (CR No. 1081) from the squatters with a promise to pay a sum of Kenya Shillings Twenty-Five Million (Kshs. 25,000,000/-) in lieu of Plot No.217 / II/MN (CR No. 1081) from the date of this Judgement.

d. That a declaration made that the Defendant be and is hereby estopped from denying liability to pay to the Plaintiff the sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) in exchange of Plot No.217 / II/MN (CR No. 1081 taken up by the squatters.

e. That a declaration made that the Defendant be and is hereby directed to pay the Plaintiff the sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) together with interests at 12% per annum with effect from 1st March, 2017 to the date of payment WITHIN THE NEXT NINETY (90) DAYS from the date of tjis Judgement.

f. That upon being paid by the Defendant the sum set out under Order (e) above, the Plaintiffs to execute documents of transfer in favour of the Defendant or the Defendant's nominee WITHIN THE NEXT FIFTEEN (15) DAYS thereof.

g. That an order made herein compelling the Defendant herein to pay to the Plaintiff sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) together with interests at 12% per annum with effect from 1st March, 2017 to the date of payment.

h. That costs of the suit be awarded to the Plaintiff to be borne by the Defendant.

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....18TH .....DAY OF .....DECEMBER.....2024.

.....

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT

AT MOMBASA

Judgement delivered in the presence of: -

a. M/s. Firdaus Mbula – the Court Assistant.

b. Mr. Mkomba Advocate holding brief for Mrs. Umara Advocate for the 1st & 2nd Plaintiffs.

c. No appearance for the Defendant.