Ndovu Estates Limited v Ntutu (Environment & Land Case 105 of 2017) [2023] KEELC 160 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEELC 160 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE 105 OF 2017

CG MBOGO, J

JANUARY 24, 2023

BETWEEN

NDOVU ESTATES LIMITED .... PLAINTIFF

AND

PETER LEMERIA OLE NTUTU .... DEFENDANT

(formally Nakuru ELC Cause No. 314 of 2016)

JUDGMENT

1. The plaintiff filed an amended plaint dated October 30, 2017 seeking judgment against the defendant jointly and or severally for: -

   a) A permanent injunction to issue restraining the defendant himself, his agents, servants and/ or any other person through whom he may act jointly and /or severally from trespassing, ploughing, planting, harvesting, interfering with harvesting, grazing cattle, alienating, selling, leasing to any third party or parties and/or any further interference in the use and quiet possession of land parcel Nos Cis-Mara/Ngorengore/46 till the 2016 crop is harvested and further for the duration of the lease agreement and /or dealing with land parcel No Cis-Mara/ Ngorengore/46 in any other way detrimental to the interests of the plaintiff.

   b) An order of specific performance against the defendant for the enforcement of the agreement for the year 2017 planting season which will have now to spill over to the year 2018.

   c) An order be issued that the defendant refund to the plaintiff the sum of Kshs 60,000/- paid to the document examiner as professional fees to examine documents and to compile his report.

   d) In the alternative, general damages for breach of lease agreement.

   e) Costs of the suit.

f) Interest on (c), (d) and (e) at court rates till payment in full.

g) Any other and further relied that this honourable court shall deem just and expedient to grant.

2. In the amended plaint, the plaintiff stated that it leased the defendant's parcel of land known as Cis-Mara/Ngorengore/46 measuring 258 *vide* a lease agreement for the year 2016 and 2017 and whose terms were that the plaintiff would pay rent in the respective planting season and if the defendant borrowed any money and failed to refund as agreed, then it would be converted to rent received in advance for any future planting. The plaintiff further stated that it paid for the lease upto and including the year 2016 and made a further advance payment for the year 2017 of kshs 138,000/- and the lease with the defendant remains in force till the end of 2017 planting season.

3. The plaintiff further stated that the 2016 crop was harvested but the defendant prevented it from utilising the land for the year 2017 planting season despite existence of a valid lease. Further, that the defendant has taken out a parallel lease with a third party to utilise the same land without due regard to existing leases and the defendant having denied the execution of a further lease, incurred expenses in engaging a forensic document expert which expense the plaintiff seeks a reimbursement.

4. The defendant retained his statement of defence dated May 26, 2017.In his statement of defence, the defendant denied the contents of the plaint and stated that there was a lease agreement effective to the year 2016 and the purported lease for the year 2017 is strange and two parallel leases cannot be utilised for similar subject matter. Further that having also engaged a document examiner, the signature contained in the 2017 lease agreement is not his and there is contradiction in the monies paid in advance for the year 2017 which is denied.

5. The defendant further stated that the plaintiff went ahead and peacefully harvested its 2016 without any interruptions and the allegation to disrupt the harvest is false. In conclusion, the defendant stated that being a stranger to the lease in the year 2017, he was well within his legal rights to lease the subject land to any third party.

6. This matter proceeded for hearing on July 9, 2019 where Viny Vyas (PW1) while adopting his witness statement filed in court on April 5, 2017 testified that there was a breach of agreement between the plaintiff and the defendant arising from a lease agreement which was drawn by the firm of Muigai Kemei Advocates dated January 2, 2014.He further testified that they had agreements for the year 2016 and 2017 and they paid rent upto December, 2016.However, in 2017 the defendant took monies in advance in 2015 and which agreement the defendant signed and petty cash vouchers issued. It was his testimony that in the year 2016, the plaintiff realised that it had overpaid the defendant by kshs 88,000/- bring the total to kshs 138,000/-. PW1 further testified that the defendant demanded for more money and he informed him that he would not give him any money from the year 2017 after which he was told not to step on the land anymore. It was his testimony that preparation for land is made in the previous years and they came to court in anticipation because they were not sure whether the defendant would allow them to cultivate the subject land in the year 2017.Further, that the plaintiff obtained injunction orders in the midst of the harvest season as there were crops on the land.

7. PW1 further testified that the plaintiff was shown by the OCS orders of *status quo* which were issued by this court and later, he realised that the subject property had been leased to a third party. It was his evidence that he is aware that the defendant also engaged a document examiner but maintains that the report by the plaintiff's document examiner is proof that the signature on the lease agreement is that of the defendant. He further testified that the plaintiff paid a sum of kshs 60,000/- and there is a balance of kshs 25,000/-. Also that he has never been engaged in any forgery and all agreements were signed by the defendant either in his presence or in the presence of his colleagues.

8. On cross-examination, PW1 testified that previously they had agreements from the year 2014 to the year 2017 which terms are the same save for the figure of kshs 5,000/-. He further testified that he could not cultivate in the year 2017 because of the defendant's conduct but the defendant did not interrupt their harvest for the year 2016.Further, that the plaintiff obtained an order of injunction pending hearing and determination of the suit and he is not aware when the defendant was allowed to use part of the land in the year 2018.With regard to the agreements, PW1 testified that the signatures appended on the agreements are that of the defendant and so far they have incurred a loss of about kshs 4,000,000 for the period they did not utilise the land. Also, that the plaintiff had made pre-payments for the year 2017 of kshs 138,000/- which were overpayments of kshs 88,000/.

9. On November 28, 2019, Emmanuel Karis Kenga (PW2), a former document examiner currently in private practise testified that he received instructions from the plaintiff's advocate to examine a letter, a further replying affidavit and a lease agreement for the year 2017 which all bear the signatures of the defendant. It was his testimony that upon comparing the said documents, he found that they are from the same author who is the defendant. Further that his charges for this service was kshs 60,000/-. With regard to the document examiner engaged by the defendant, PW2 testified that Martin Papa is not a document examiner but he was his trainee who did not complete the course.

10. On cross examination, PW2 testified that he received the documents and found them suitable for examination and did not see the need to examine all the six copies as he had three documents and that there is no rule that required having six copies. Further, that based on his analysis, he found that the percentage of individual characteristic is about 100% based on the style, pen lists, pen peruse, pen speed and free flow of ink. However, the report did not indicate the percentage but it is conclusive.

11. On re-examination, PW2 testified that he obtains samples from the witnesses when they are present but he could still use the known signature to give a report. Also, that the request for six specimens is for signature that were not specimen signatures but signatures on documents.

12. On January 26, 2021 Paul Saiyoti Karua (PW3) while adopting his witness statement dated April 5, 2017 testified that he knows the defendant as he had leased 258 acres to the plaintiff from the year 2012 to the year 2017.He testified that he was in charge of payments and that the defendant was receiving money for several years in advance and in the year 2015, he paid the defendant a sum of kshs 50,000/- which was payment for the year 2017 and which he paid him two months in advance.

13. He further testified that there was a lease agreement dated September 13, 2014 signed by him and the landlord and the same applied to the lease for the year 2017 and the amount of kshs 50,000/- features on the lease. This amount was received on December 22, 2015 with petty cash voucher No 5776 dated December 22, 2015.Also, that the plaintiff had paid a sum of kshs 138,000/- including an overpayment of kshs 88,000/-.

14. On cross examination, PW3 testified that he read the agreement and clause 7 stated that there will be no blackmail to make advance payments. Further that rents were paid in advance and they have been in business since the year 2012.Further that he gave his phone to PW1 who confirmed that money was paid to the defendant.

15. The defendant's case proceeded for hearing on September 21, 2022 where the defendant while adopting his witness statement filed in court on September 16, 2021 testified that the plaintiff leased his land from the year 2013 to the year 2015 for the sum of kshs 4,000/- per acre and from the year 2015 to 2016 for a sum of kshs 5,000/- per acre when the lease terminated. The defendant testified that he did not extend the plaintiff's lease in 2016 when it harvested its crops and that he did not receive any money for the year 2017 more so kshs 138,000/- as there was no agreement between them and that the

only money, he borrowed from the plaintiff is kshs 50,000/- in December, 2016. He further testified that he tried to pay the plaintiff the money but it declined and came to court seeking to be allowed to cultivate the land from the year 2017 to the year 2018.However, it did not plant any crops on the land and neither did he bar the plaintiff from working on the land. As such, he incurred loss as he did not earn any money and he requests for compensation for the year 2017/2018.

16. On cross examination, the defendant testified that he leased his land measuring 258 acres to the plaintiff through a lease agreement from the year 2013 to the year 2017 and that there was no lease for the year 2017 and neither was the lease to expire on December 31, 2017 .With regard to the lease dated January 2, 2014, the signature appearing on the agreement is his although they did not appear before any advocate. He agreed to have received money in the year 2014 but denied that the same was an advance payment for the year 2016 and that the plaintiff paid him for the year that it cultivated his land. He agreed to have signed four vouchers for the year 2014 and nine vouchers for the year 2015.The defendant further testified that he signed an agreement for kshs 5,000/- per acre with the plaintiff which was for the year 2016 and owes the plaintiff kshs 50,000/- in the year 2015. He reiterated that the money was not for the year 2017 lease. Further, that he did not demand for more money from the plaintiff in the year 2016 but he only indicated his intention to terminate the lease agreement.

17. The defendant further testified that he did not bar the plaintiff from harvesting his crops but by the time the plaintiff obtained the injunctive order, he had leased the land to Western Engineering East Africa Limited. It was his testimony that if he signed a lease agreement in the year 2014, it was for the same year. With regard to the signatures and the report of the plaintiff's document examiner's report, the defendant testified that he also engaged a document examiner who found that the signature was not his. He further admitted that he sought leave of the court to be allowed to use the land from March to August, 2018 and he leased the land to another party who is still on the land. Further, that he was not served with any order requiring him to use the land for some months. The defendant further testified that he did not receive any advance money of kshs 138,000/- and that the first agreement was signed in the camp of his previous tenant and as such did not receive any letter from the firm of Lel and Associates before the case was filed in court.

18. On re-examination, the defendant testified that he did not sign a lease agreement for the year 2014 to 2017 but there were separate agreements for each year from 2014 to the year 2016 and the signature on the disputed lease is not his. Further, that he leased the subject land to Western Engineering in the year 2017 but stopped after the court order.

19. Martin Papa (DW1) testified that he is a trained document examiner with twenty-four years' experience and he was hired by the defendant's advocates to examine a lease agreement dated 2017, standard signature of the defendant on a lease agreement dated 2016 and request signatures of the defendant. It was his evidence that after examination, the signatures on the lease agreement dated 2017 did not have similarities to indicate common origin when compared with the samples and known signatures of the lease agreement of 2016.

20. On cross examination, DW1 testified that the defendant's signature on the 2017 lease agreement is similar to the request samples and known handwriting and it was his finding that it was made by the same hand because of the habitual speed of writing, the pattern of shading, the rhythm, the pen position, the stroke formation and the freedom which characters are not exhibited by the questioned signature and that the defendant identified the signature that was his own. DW1 further testified that he prepared his report on September 9, 2016 and admitted that health, age poor eyesight and mental condition can affect a handwriting. With regard to the report by PW2, he testified that he did not have a benefit of looking at it but having had a look, his report was on similarities of the signature and not about the same author and in this case, it is not possible that the author is the same.

21. On re-examination, DW1 testified that it is possible for one to alter a sample of his signature and that PW2 being his trainer, each is entitled to their own opinion once they become professionals.

22. The plaintiff filed written submissions dated November 30, 2022.The plaintiff raised the following issues for determination: -

    a) Whether there existed any relationship between the plaintiff and the defendant.

    b) Whether there was a valid lease agreement between the plaintiff and the defendant from the year 2014 to 2017 and more particularly for the year 2017.

    c) Whether there existed any court order against the parties and which party was in breach of the said court order.

    d) Whether the party who is in breach of the direct orders of the court ought to be given audience by the court.

    e) Whether the defendant was in breach of the existing lease agreement for the year 2017.

    f) Whether the defendant borrowed aand/or received money from the plaintiff in advance.

    g) Whether the monies borrowed and/ or received from the plaintiff in advance are deemed as rent for the year 2017.

    h_ Who is entitled to succeed in this suit.

    i) Who should be condemned to meet the cost of this suit.

23. On the first issue, the plaintiff submitted that there is no dispute in issue as the plaintiff was the tenant and the defendant was the landlord. On the second issue, the plaintiff submitted that there was a valid lease as it is clear from the documents produced by the plaintiff i.e. "PEXH 1-4 (a)-(n)".On the third issue, the plaintiff submitted that from the evidence of the defendant he acknowledged the existence of the orders of injunction issued in court on February 20, 2017 and the suspension of the said orders vide a ruling dated March 21, 2018 permitting the defendant to utilise the subject land to earn a living and as such there was a direct admission of the contempt of a lawful court order.

24. On the fourth issue, the plaintiff submitted that the law of contempt is clear that the contemnor shall not get the audience of the court until and unless he purges the contempt and for this reason the defence as tendered by the defendant be disregarded as he has already admitted that he is in active contempt of the lawful orders of this court.

25. On the fifth issue, the plaintiff submitted that the lease agreement signed on January 2, 2014 is clearly indicated that it was for the period January 1, 2014 to December 31, 2017 and the same applies to the year 2017 which indicated it was for the duration for that respective year. The plaintiff submitted that the defendant was in breach of the lease agreement by leasing the subject land to Western Engineering East Africa Limited.

26. On the sixth issue, the plaintiff submitted that there was overpayment of kshs 88,000/- with an addition of kshs 50,000/- which was admitted by the defendant bringing the total advance payments to kshs 138,000/-. On the seventh issue, the plaintiff submitted that the agreement executed on January 2, 2014 clearly indicated that the defendant was in the habit of taking money in advance and later

blackmailing the plaintiff. Further that the vouchers produced indicate that the payments for the year 2017 were made in advance in the year 2015 and the defendant cannot therefore allege as he has done that he wanted to refund the money to the plaintiff. The plaintiff further submitted that at paragraph six of the two agreements, it is expressly stated that any money paid in advance shall constitute an extension of the lease period and this was done to ensure that the plaintiff did not loose its money since the word refund did not exist in the vocabulary of the defendant and that the roll over did not cover the year 2017 only but all lease transactions involving the defendant.

27. On the eighth issue, the plaintiff submitted that at the time of amendment of the plaint, it was hoped that the suit would be heard and concluded in the year 2018 hence the prayer for specific performance for planting to the year 2018 and since the defendant frustrated the plaintiff, it prays for damages for breach of the lease agreement. Further, that the calculation of damages is on average of kshs 15,000/- per acre which is a total of kshs 3,870,000/- for the entire 258 acres which is rounded off to kshs 4,000,000/-. In conclusion, the plaintiff submitted that the defendant should be condemned to pay costs.

28. With respect to the defendant's submission, the plaintiff submitted that the record shows that the parties signed all the agreements and they were therefore bound by the terms indicated therein as per section 44 of the *Land Registration Act*, section 3 (3) of the *Law of Contract Act* and section 6 of the *Land Control Act*. With regard to section 57 of the *Land Act*, the plaintiff submitted that the lease agreements which were reduced into writing did not permit for unilateral termination of the lease and the same had to by mutual consent which was not the case herein. the plaintiff further submitted that section 60 of the *Land Act* is self-explanatory and, in this case, the plaintiff was driven out of the subject land by hired goons who threatened to set the machinery ablaze which was worth more that what the plaintiff could make out of the harvest and there was no point in risking both machine and personnel at the mercy of the defendant. The plaintiff relied on the case of *Mutitika versus Baharini* Ltd Civil Application No NAI 24 of 1985 (CA), *Kairu versus Shaw and Others* [1986-1989] 1 EA 221 (CAK).

29. The defendant filed written submissions dated November 14, 2022 and raised four issues for determination as follows: -

    i. Whether there was a valid lease agreement between the plaintiff and the defendant for the year 2017.

    ii. Whether the defendant was in breach of the existing lease agreement for 2017.

    iii. Whether the defendant borrowed and/ or received money from the plaintiff in advance.

    iv. Whether the monies borrowed and/ or received from the plaintiff in advance are deemed as rent for the year 2017.

30. On the first issue, the defendant submitted that there existed separate lease agreements for each year from 2014 to 2016 and that he never executed a lease agreement for 2014 to the year 2017 and the plaintiff misled this court by introducing a foreign lease agreement for the duration of 2014 to 2017 yet it had earlier produced another agreement for the 2016 and 2017 which is not possible that these two lease agreements existed at the same time. The defendant further submitted that the defendant was never presented with the lease agreements for the year 2014 to 2017 as he has never executed such a lease agreement and a careful inspection of the said lease agreement reveals that it is undated and not clear when it was executed and who witnessed the same as is required under the law as per section 44 of the *Land Registration Act* and section 3 (3) of the *Law of Contract Act*. The defendant relied on the case

of *Hedwig-Hirt Mitterlerlehner Ulrich versus Hendrick Spin* [2020] eKLR and *Cornella Nabangala Nabwana versus Edward Vitalis Akuku & 2 Others* [2017] eKLR.

31. The plaintiff further submitted that section 6 of the *Land Control Act* consent requires that any transaction dealing with agricultural land must obtain consent of the Land Control Board and the lease agreement for the year 2017 is invalid for lack of consent of the Land Control Board.

32. On the second issue, the defendant submitted that there was no valid lease between the parties for the year 2017 and as per section 57 of the *Land Act* the plaintiff cannot claim breach on a non-existent and/or invalid lease agreement. On the third issue, the defendant submitted that he did not receive any money for the year 2017 and the only amount that he received was a soft loan of kshs 50,000/- that was to be paid back. Further, that the plaintiff is being dishonest and misleading this court by claiming pre-payment of kshs 138,000/- as rent for the year 2017 since the plaintiff would always pay for the lease in respective planting seasons. Also, that it is ironical that the plaintiff would pay in full the rent for the previous years whereas the defendant owed them money and as per the agreement, any money owed should be treated as pre-payment for rent.

33. On the fourth issue, the defendant submitted that although the alleged lease agreement provided that the amounts paid in advance by the lessee shall be deemed to be advance payment for a new planting season, the amount of kshs 50,000/- was a loan to be repaid and not an advance on the rent payable in 2017.It was the defendant's submission that he made several attempts to repay the loan but the plaintiff blatantly refused and the claim that it was rent for the year 2017 is outrageous as there was no lessor-lessee relationship between the parties. The defendant submitted that section 60 (2) of the *Land Act* precludes the plaintiff from contending continuance of the agreement to the year 2017.

34. I have analysed and considered the pleadings and the written submissions and authorities relied on by both parties and the issues for determination are as follows:-

    a) Whether there was a valid lease agreement for the year 2017.

    b) Whether the plaintiff is entitled to the prayers as sought in the amended plaint.

35. To address the first issue, the plaintiff contended that there was existence of a valid lease between the parties that was entered into on January 2, 2014 and executed by both the plaintiff and the defendant which was drawn by the firm of Muigai Kemei & Associates Advocates. The defendant on the other hand, submitted that he leased the subject land to the plaintiff from the year 2013 to the year 2015. However, there was no evidence to support this claim. The defendant having denied that the signature on the lease for the year 2017, both parties engaged the services of expert document examiners to give expert opinion on the same. The plaintiff engaged PW2 who produced "PEX -6C" which is dated October 15, 2016.His opinion was that there are similarities on the signatures indicating that they are by the same author. The defendant engaged the services of DW1 who produced his report dated September 7, 2016 marked as "DEX-1". His opinion was that there was no indication that the writer of the questioned signatures on "Q1" ever made the signatures on the exhibits marked as "A1" and "B1".

36. This court is confronted by two forensic documents examiners reports over the same documents but which are contradictory. In such a situation where the two reports are contradicting, the court will have to decide whether to rely on the said reports, or any one of them, or reject all of them. In the instant case, I will not rely on any of the reports but on the available evidence. I place reliance in the Court of Appeal decision in the case of *Amosam Builders Developers Ltd vs Betty Ngendo Gachie & 2 others*

(Nakuru Court of Appeal Civil Appeal NO 193 of 2001) (2009) eKLR, where the Court of Appeal assessed a situation in which the evidence of experts was in conflict as follows: -

> “ There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is not binding on the court. The court has to consider it along with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it... In the case before us there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it. In a case as this where evidence of experts is conflicting a decision one way or the other depends on the credibility of witnesses.”

37. As will be seen from the above Court of Appeal decision, the evidence of experts is not binding on the court. What the court does, is to consider it alongside other evidence that has been tendered, and then form its own opinion on the issue at hand.

38. Whether or not there was a valid lease agreement for the year 2017, it is evident from the documents produced by the plaintiff marked as PEX2,3, 4A-N that there was an agreement between the plaintiff and the defendant for the lease of land. This can be seen from the payment vouchers which was admitted by the defendant. A schedule of payment on the flip side of an undated land lease agreement for the complete year 2014, shows that the defendant began receiving payments in the year 2013 which convinces this court that the plaintiff and the defendant entered into a lease agreement in the year 2013 but the same was reduced into writing in the year 2014.It is the schedule of payment of an undated lease agreement for the year 2017 which shows payment of cash advance of kshs December 22, 2015.

39. It was the evidence of PW1 that the leases with the defendant were reduced into writing with the period being between the years 2013 and 2017.I have analysed the lease agreement dated 2nd January, 2014 and produced as PEX-1 which was for the period commencing January 1, 2014 to December 31, 2017.The lease which was drawn by the firm of Muigai Kemei and Associates appears to have been witnessed by Mary W Muigai, Advocate and parties covenanted to the terms therein. This court considers this agreement to have been the fundamental lease as it provided for terms and conditions of the agreement. Most importantly is clause 4 which provided that the cost of preparing and registering this lease shall be shared equally by both parties. Also, it is not disputed that the subject of the lease was for agricultural purposes. Which then brings the question, was there a valid lease in the first place?

40. The *Land Control Act*, cap 302 requires that transactions over agricultural land be subject to grant of consent by the relevant Land Control Board (LCB). Section 6 of the said *Act* provides as follows: - “(1) Each of the following transactions -

    (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

    (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

    (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all

> purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

41. It will be seen from a reading of section 6 (1) (a) that a lease of agricultural land is one of the transactions that require consent of the LCB and if no consent is given, then the transaction will be rendered void. Neither of the parties applied for consent from the Land Control Board which leaves the lease agreement unenforceable. I place reliance in the case of *Gatere Njamunyu vs Joseck Njue*; Nairobi Civil Appeal No 20 of 1992 where the Court of Appeal held: -

> "The agreement does not become binding because consent is given, and there is no appeal against it. The agreement is binding between the parties who make it though it is not enforceable until consent has been given. If consent is refused the dealing in agricultural land becomes void for all purposes under section 6 of the Act. Specific performance cannot be claimed in respect of a dealing which becomes void, only recovery of the consideration paid under the agreement is allowed under section 7". (emphasis mine).

42. There is no doubt that transactions involving agricultural land must comply with the provisions of section 6 of the *Land Control Act* failure of which the transaction is null and void. This makes the plaintiff's transaction for all practical purposes null and void. In fact, both parties were silent on consent. There was no effort from either party to apply for consent and seek consent from the Land Control Board. In my view both parties conducted this contractual relationship in a casual manner. The remedy for specific performance which is an equitable remedy in my view is not available to the plaintiff. This is a remedy that is discretionary in nature. The remedy of specific performance is based on the existence of a valid, enforceable contract and any litigant seeking the remedy must meet the requirements to qualify for specific performance; existence of a valid contract, conduct of the parties must commend itself to equity – come to equity with clean hands, remedy should not cause hardship and damages must be insufficient or cannot be established.

43. Having held that there was no consent of the Land Control Board, it follows that the plaintiff's claim must fail. I am unable to order specific performance on a contract that has been nullified by operation of law. The plaintiff sought for payment of kshs 138,000/- with kshs 88,000/- being an overpayment. The defendant admitted to owing the plaintiff kshs 50,000/- which according to him was money he made attempts to refund. The figure of kshs 88,000/-was not shown how it was arrived at and therefore this court is unable to make a conclusion on the same.

44. Arising from the above and having found that there was a valid lease between the plaintiff and the defendant, the same was null and void for lack of a consent from the land control board and in view of this the lease in unenforceable. As such the amended plaint dated October 30, 2017 is hereby dismissed. The defendant to pay the plaintiff kshs 50,000/- which is owing to the plaintiff. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL on this 24TH day of JANUARY, 2023.

HON. MBOGO C.G.

JUDGE

24/1/2023.

***In the presence of:-**

CA:Chuma