



REPUBLIC OF KENYA



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**Apungu v M/S Justnice Limited (Environment & Land Case 103 of 2019)
[2023] KEELC 16078 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16078 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 103 OF 2019**

**MD MWANGI, J
FEBRUARY 23, 2023**

BETWEEN

ARTHUR K. APUNGU PLAINTIFF

AND

M/S JUSTNICE LIMITED DEFENDANT

JUDGMENT

Background

1. This case was filed in the High Court way-back before the establishment of the Environment and Land Court. The court record shows that it was actually filed on November 18, 2003; over nineteen (19) years ago. It was only transferred to this court in the year 2019. That explains the case number.
2. The Plaintiff's case is as stated in the further amended plaint, amended on February 18, 2019 and filed in court on the same date.
3. The Plaintiff avers that he entered into an agreement with the Defendant for purchase of all that property situated at Soy, Eldoret known as Title Number Soy/Soy/Block 10 (Navillus 1), (hereinafter referred to as 'the suit premises'), on September 30, 1999. The agreed purchase price according to the Plaintiff, was Kshs 3,700,385/=. The said agreement was subject to the Law Society Conditions of Sale, 1989 Edition. The Completion date was December 20, 2001.
4. The Plaintiff avers that the purchase price was payable as per the specific term of the agreement set out in the special conditions of the sale agreement. It was provided inter alia that the Plaintiff was to pay Kshs 1,500,000/- on execution of the agreement and the balance was to be paid on or before the completion date as per the conditions of the agreement for sale.
5. The agreement also acknowledged that title was still in the name of a 3rd party at the date of execution of the agreement.



6. The Plaintiff pleads that he duly paid the deposit of Kshs 1,500,000/- through his advocates to the Defendant's advocates. The Plaintiff further averred that a management agreement, as stipulated in the agreement for sale, was to be drawn to give effect to the terms therein regarding the development, provision of security, management and use of the said land by the Plaintiff pending necessary documents for the completion of the transaction.
7. It is the Plaintiff's case that the Defendant instructed the Plaintiff's advocates to prepare a management agreement by which, the Plaintiff was to provide certain management services over the Defendant's adjoining properties measuring 202 acres. The management agreement was however, not finalized. The Plaintiff, in spite of the non-finalization of the management agreement proceeded to provide 'security, property development and management services' over the Defendant's adjoining properties. The asserts that the Defendant has since refused, ignored and or failed to pay him for the said services.
8. With regard to the costs for the development, provision of security, and management of the Defendant's property, it was the Plaintiff's case that he had agreed with the Defendant that the costs were to be shared between him and the Defendant in the ratio of 1:2, and that the portion payable by the Defendant would be deducted from the balance of the purchase price.
9. The Plaintiff alleges that he paid a further sum of Kshs 127,500/- being legal fees payable to their Advocate, M/s Adere & Company Advocates, to facilitate the expeditious completion of the intended sale. However, the Defendant failed to forward the transfer documents to the Plaintiff or his advocates for execution despite demand and efforts by the Plaintiff and his advocates to have the sale transaction completed.
10. The Plaintiff asserts that the Defendant is in breach of the sale agreement and has failed, refused and or neglected to execute the transfer of the title to the suit premises in favour of the Plaintiff and to complete the transaction within the stipulated time, despite express demand and notice from the Plaintiff to complete the transaction.
11. By a letter dated March 17, 2003, the Defendant purported to rescind the sale for unexplained reasons, and refund the sum of Kshs 1,500,000/- paid by the Plaintiff causing the Plaintiff loss and damage. The Plaintiff particularizes the loss as: -
 - a. Legal fees of Kshs 65,000/= paid to M/S Adere & Co. Advocates on behalf of the Defendant.
 - b. Amount payable to fence, develop and manage the properties and provide security for the properties.
 - c. Travel expenses for the Plaintiff from Nairobi to Eldoret to negotiate the sale, follow up on completion of the sale, and back severally.
 - d. The Plaintiff incurred and paid a total of Kshs. 15,841,930/- as costs for the performance of the various tasks, projects and activities to develop, provide security, and manage the properties. In accordance with the agreement between the Plaintiff and the Defendant, the Defendant is indebted to the Plaintiff to the tune of Kshs 10,561,286.67.
12. The Plaintiff avers that at all material times, he was ready, able and willing to fulfil his obligations under the said agreement and to complete the transaction.
13. The Plaintiff seeks for judgment against the Defendant for: -
 - a. An injunction to restrain the Defendant from disposing of or dealing in whether by sale or otherwise, the suit premises to other third parties.



- b. Specific performance of the said agreement for sale dated 30th September 1999.
- c. An order directed to the Defendant to executed all documents and papers and do all such things as are necessary for the effectual transfer of the property which is the subject of this suit to the Plaintiff.
- d. In the alternative to prayer (c), in the event that the Defendant fails to execute the transfer documents within 14 days, of the order the Deputy Registrar of the High Court be directed and or empowered to execute all documents and papers necessary for the effectual transfer of the suit premises to the Plaintiff.
- e. Special damages in the amount of Kshs 10,561,286.67.
- f. In the alternative to (e) above, reasonable compensation (quantum meirut) for the work done as per the agreements referred to in the agreement for sale, and in paragraphs 8, 8a, 8b and 8 c (of the plaint).
- g. An order that the balance of the Kshs 2,200,385/- purchase price of which the Plaintiff owes the Defendant, be deducted from the special damages pleaded in (e) above, or be deducted from the quantum meirut pleaded in (f) which the Defendant owes the Plaintiff.
- h. Legal fees of Kshs 65,000/- paid to M/s Adere & Co. Advocates on behalf of the Defendant.
- i. General damages for breach of contract in addition to specific performance.
- j. Costs of this suit.
- k. Interest on (e), (f), (g), (h) and (i) at court rates.
- l. Such further or other relief(s) as this Honourable Court may deem just to grant.

Response by the Defendant

14. The Defendant's response was by way of the amended Defence and counter-claim dated March 14, 2019, filed in court on March 26, 2019.
15. The Defendant denies the Plaintiff's claim in its entirety and puts the Plaintiff to strict proof. The Defendant avers that no formal agreement was signed between the parties. In effect, the Defendant avers that there was no sale agreement and or any sale at all and the purported sale and or sale agreement was void ab initio.
16. The Defendant avers that the sale agreement, if at all, was subsequently rendered illegal for the reasons elaborated in paragraph 4 of the amended defence and counter-claim in that: -
 - a. M/s Adere & Co. Advocates acting for the parties herein submitted the same for stamp duty processing before it had been executed.
 - b. It contained a purchase price of Kshs 3,700,385/= instead of Kshs 3,750,000/=
 - c. The deposit payable was altered from Kshs 1,700,000/= to Kshs 1,500,000/=
 - d. Mr. Adere Advocate purported to witness the agreement for the vendor when the vendor had not properly executed the same.
 - e. A special condition of 1:2 ratio included therein had not been discussed at all.



- f. It was unlawfully witnessed by Mr. Adere Advocate because he himself had drawn it. This is not allowed professionally.
- g. The sale agreement is in breach of both the Companies Act, Land Registration Act and the Advocates Act and is therefore null and void ab initio.
17. Without prejudice to the foregoing, the Defendant further averred that even if the temporary sale agreement came into force, the Plaintiff merely paid on deposit of only Kshs. 1,500,000/-. The balance of the purchase price was never paid within the stipulated period or at all making the purported sale void ab initio.
18. It is the Defendant's case that having formally rescinded the temporary agreement/contract herein, it subsequently sold and transferred the suit premises to M/s Jason Kipserem Too and Pius Mayende who took possession thereof.
19. The Defendant further states that the alleged transaction did not obtain the consent of the relevant Land Control Board making it void ab initio. The Defendant too asserts that having refunded the deposit paid, any claim for specific performance cannot arise.
20. It is the Defendant's case that the Plaintiff has through the misuse of provincial administration and the police in Eldoret forcefully trespassed into and occupied the suit premises. The Defendant prays for orders of eviction and vacant possession as well as an order of perpetual injunction restraining the Plaintiff from entering into, occupying or in any other way whatsoever interfering with the suit premises.
21. The Defendant too claims damages as a result of the Plaintiff's unlawful actions on the suit premises which have caused him to sustain colossal financial losses and suffering as tabulated, namely: -
- a. Illegal taking possession of Soy/Soy Block 10 (Navillus) 2 and 14 instead of overseeing security from Soy/Soy Block 10 (Navillus)1 thereby destroying all the black wattle trees which he sold at Kshs. 11.5 million.
- b. Planting maize and wheat on Soy/Soy Block 10 (Navillus) 1, 2 and 14 from the year 2001 to 2003 and failed to account for the proceeds to the Defendant. Harvesting and selling the produce at an average of Kshs. 600,000/= per property for 3 years amounting to Kshs. 5.4 million.
- c. Mesne profits for the occupation of property No. Soy/Soy/ Block 10 (Navillus) 1 from the year 2003 to date at Kshs. 600,000/= per year amounting to Kshs. 9,600,000/-
- d. The Defendant states that the Plaintiff through misuse of the provincial administration and the police in Eldoret forcefully trespassed into and occupied the land that had already been sold to third parties. The Plaintiff admits receiving notice to rescind the sale but continues to occupy the land. The Defendant lost income and continues to lose such income. The Defendant claims for loss of income of Kshs. 7.0 million which was the value of the sale of the said property.
- e. The Defendant therefore seeks for orders of eviction and vacant possession against the Plaintiff from occupying property No. Soy/Soy Block 10 (Navillus) 1 without any legal right whatsoever.



- f. The Defendant further seeks a perpetual order of injunction restraining the Plaintiff from entering into and occupying or in any manner whatsoever interfering with the suit premises of any part thereof.
 - g. The Defendant further claims from the Plaintiff for general damages including aggravated and exemplary damages, for wasted years since 2003 to date when the Plaintiff has been in illegal and wrongful occupation of property of the suit premises known as Soy/Soy Block 10 (Navillus) 1.
22. The Defendant prays for Judgment against the Plaintiff for: -
- i. An order of vacant possession and eviction from the suit premises – Title No. Soy/Soy/Block 10 (Navillus) 1. The said order to be enforced by OCS, SOY Police Station
 - ii. A perpetual order of injunction restraining the Plaintiff by himself, his agents, servants and/or employees from entering, occupying or in any manner interfering with the suit premises known as Title No. Soy/Soy/Block 10 (Navillus)1.
 - iii. Special damages of Kshs. 40,300,000/-
 - iv. General damages including exemplary and aggravated damages for forceful occupation of the suit premises, wastage and degradation thereof.
 - v. General damages for loss of use and profit of the suit premises.
 - vi. Costs of the suit and interest thereon on (c), (d) and (e) above at court rates.
 - vii. Any other relief that this Honourable Court may deem fit and just to grant.

Evidence adduced

23. The case proceeded to hearing with each party calling one witness.

Evidence adduced on behalf of the Plaintiff

24. The Plaintiff testified as a witness in his case. He adopted his witness statement dated April 30, 2021 as his evidence in chief. He produced the documents in his 3 bundles as exhibits in support of his case.
25. The court allowed the production of the witness statement of Mr. Adere Advocate who had since passed on.
26. The Plaintiff testified that he entered into an agreement with the Defendant for the sale of the suit premises on September 30, 1999. Rose Lumumba Nyaberi who had been introduced to him as the 2nd Director of the Defendant Company, Justnice Ltd, signed the agreement on behalf of the company. The agreement was allegedly signed before the advocate for both parties, Mr. Adere Advocate.
27. The suit premises which the Plaintiff was purchasing was 40.47 hectares, approximately 101 acres. The purchase price was Kshs. 3,700,385/-. The Plaintiff paid a deposit of Kshs. 1,500,000/- which was acknowledged in the agreement.
28. Upon execution of the agreement, the vendor (Defendant) had the responsibility to obtain the necessary consents and clearances. On his part, the Plaintiff was required to fence the land and provide security. The cost was to be shared in the ration of 1:2 between the Plaintiff and the Defendant respectively.



29. The Plaintiff averred that he fenced the entire land (the suit premises and 2 other portions owned by the Defendant) as agreed; a total of 303 acres. He compiled the cots in accordance with the tabulations produced before the court.
30. According to the Plaintiff, the entire land was a jungle where giraffes and fierce snakes habituated. He had to call the Kenya Wildlife Services (KWS) to relocate them in order for him to develop the land as agreed. He allegedly incurred a total of Kshs 29,751,626/-.
31. The expenses to be incurred by the Plaintiff were not agreed beforehand as stipulated in the agreement. The Plaintiff asserted that it would not have been possible to quantify the work then. There was however to be a 'management agreement' which was to provide what the Plaintiff was to do on behalf of the Defendant on the farms. The management agreement was never finalized. The Plaintiff however testified that he continued working on the land in spite of the absence of the management agreement from October 1, 1999 until April 30, 2004.
32. Since then, the Plaintiff has been on the suit premise where he lives with his family growing crops and rearing animals. He surrendered the other 2 portions to the Defendant.
33. The Plaintiff stated that he has always been ready to complete the agreement.
34. In cross-examination, the Plaintiff stated that only one director of the Defendant Company, one Rose Nyaberi, signed the agreement. He was not aware if Mr. Nyaberi, the other director of the company was supposed to have signed the agreement as well.
35. In regard to the purchase price, the Plaintiff agreed that he had merely paid a sum of Kshs 1,500,000/- only which was the deposit paid at the execution of the agreement. He had not paid any further amounts thereafter.
36. The completion date for the agreement was supposed to have been December 20, 2001. He admitted that sometimes on September 8, 2003, the Defendant's advocates had issued him with a notice of completion which he did not comply with.
37. The agreement was subject to the 1989 Law Society Conditions of Sale in so far as they were not inconsistent with the express terms and conditions of the agreement.
38. The Plaintiff admittedly took possession of the suit premises and two adjoining parcels owned by the Defendant allegedly at the request of the Defendant. He averred that the special condition 3 of the agreement allowed him to do so.
39. The Plaintiff further confirmed that his role as contemplated in the agreement was to provide fencing and security over the vendor's 2 properties adjacent to the suit premises. The expenses to be incurred was supposed to have been agreed in advance but the Plaintiff insisted that it was not possible to quantify the cost. So, there was no such agreement into between the parties as contemplated. He however, alleged that all the cost he incurred was with the consent and knowledge of Mr. Nyaberi. The Plaintiff averred that he used to converse regularly with Mr. Nyaberi over the phone.
40. The Plaintiff developed the 3 properties (inclusive of the suit premises) over and above fencing and providing security. The wattle trees that he cut down were used to make charcoal which was sold commercially. The proceeds from the sale of the charcoal were applied to foot some of the expenses incurred by the Plaintiff in the farms. The Plaintiff admitted that he also grew wheat on the Defendant's farms whose proceeds too were applied to foot expenditures incurred by the Plaintiff. The maize grown and harvested from the farms was used to provide food rations for the labourers that the Plaintiff had hired.



41. The Plaintiff affirmed that he was aware that the Defendant had entered into agreements with 3rd parties in an attempt to sell the suit premises. He became aware way back in August 2003.
42. The Plaintiff though denied receiving the refund of Kshs 1,500,000/- from either the Defendant company or its Advocates.
43. The Plaintiff allegedly became aware of the sale of the suit premises to 3rd parties on August 16, 2003 after the said third parties attempted to invade the land. He successfully resisted the invasion by calling the police. A police post was actually established within the suit premises. The title allegedly issued to the 3rd parties was subsequently cancelled by this court.
44. The Plaintiff admitted that the suit premises was agricultural land that was subject to the [Land Control Act](#). A consent to transfer the suit premises to the Plaintiff was not and has never been obtained.
45. The Plaintiff testified that he did not have all the supporting documents in respect of his claim for special damages since his manager who had the custody of most of the said documents passed on.

Evidence adduced on behalf of the Defendant

46. The Defendant called one witness, Mr. Justry Lumumba Nyaberi, a director of the Defendant Company. The witness adopted his two witness statements dated January 26, 2012 and October 26, 2021 respectively as part of his evidence in chief. The witness also produced the documents in the Defendants bundle of documents as exhibits in support of his case.
47. The witness (DW1) explained that the Plaintiff approached him sometimes in the year 1998 with a proposal to purchase one of his three parcels of land at Soy, Eldoret. DW1 affirmed that the Defendant company had acquired the parcels of land from Lornho. The witness stated that all that he needed from the Plaintiff was a refund of the money he had paid to Lornho for the parcel he was to sell to him.
48. DW1 testified that he agreed with the Plaintiff that they use the Law Firm of Ms. Adere & Co. Advocates to draft the agreement. The witness who is a Lawyer stated that at the time, he was engaged as a Defence Counsel at the UN Special Tribunal for Rwanda based at Arusha in Tanzania and also some appeal proceedings at the Hague, Netherlands. He therefore directed the Plaintiff to Ms. Adere & Co. Advocates who were to prepare the draft agreement. DW1 was to peruse the draft agreement once he was back to Kenya.
49. DW1 stated that when he came back, he did not find the draft agreement as expected. He wrote several letters to M/s Adere & Co. Advocates requesting for the draft agreement but all in vain. It was only in the year 2001, that DW1 allegedly received a copy of the agreement the subject matter of this suit. The agreement had by then even been stamped.
50. DW1 protested that the agreement was not sealed with the seal of the company. He was the custodian of that seal. As a director of the company, he further asserted that he had not signed the agreement and had not participated in any manner in its preparation.
51. The witness affirmed that he had informed the Plaintiff that he could get in touch with his wife but the actual agreement was to be placed on his desk for signing and sealing once he came back from his engagements. However, DW1 averred that he later learnt that Mr. Adere Advocate had called his wife to sign the agreement in his absence after convincing her that it would be sent to DW1's office for signing and sealing. His wife was also given the cheque for Kshs 1.5 million drawn in favour of his Law Firm, Nyaberi & Co. Advocates.



52. At the time of the sale, the title to the suit property was in the name of a third party. It was to be transferred to the Plaintiff directly upon payment of the full purchase price. The purchase price was supposed to be Kshs 3,750,000/- being the exact amount that the Defendant company had paid to Lornho.
53. DW1 further testified that the agreement drafted by Mr. Adere Advocate fell short of his expectation in that it did not provide for possession. It further indicated the wrong figure for the purchase price. The witness stated that he only came to learn later that the Plaintiff had taken possession of all his 3 parcels of land with the help of the late Mark Too. At no time had the Defendant company given possession to the Plaintiff. The witness alleged that he had been threatened by Mark Too and therefore had not set foot into the 3 properties at any one time.
54. DW1 denied having entered into an agreement with the Plaintiff to fence the land and provide security or to develop the properties. He termed the Plaintiff as a trespasser in his properties.
55. DW1 further stated that the suit property is agricultural land but the consent of the Land Control Board had not been obtained to validate the transaction between the parties. He therefore expressed the view that the Plaintiff's claim has no legal basis. He prayed for the dismissal of the Plaintiff's claim with costs. He too sought that the Defendant's counterclaim be allowed as prayed.
56. In cross-examination by the advocate for the Plaintiff, DW1 confirmed receipt of the cheque for Kshs 1.5 million in his Law firm's name. He however insisted that the alleged agreement was prepared without his input.
57. In regard to the statement of defence and counterclaim, DW1 stated that he had particularized the alleged illegalities but had not stated that the agreement was a forgery. He denied giving possession to the Plaintiff. It was his evidence that he did not know how the Plaintiff entered into his properties.
58. In the agreement prepared by Ms. Adere & Co. Advocates, the balance of the purchase price was payable upon the title documents being registered in the name of the Plaintiff.
59. The agreement was only signed by Rose Nyaberi – his wife, who was a sleeping director of the Defendant company. Though DW1 had accused Mr. Adere Advocate of professional misconduct, he had not reported him to the Law Society of Kenya nor to the Advocates complaints commissions.
60. DW1 confirmed that it was the Defendant's role to obtain the Land Control Board consent and clearance certificates in accordance with the terms of the agreement.
61. DW1 confirmed that he was still holding the sum of Kshs 1.5 million received from the Plaintiff. He had attempted to refund the Plaintiff the said amount but the cheque which he had sent by registered post was not collected.
62. DW1 further affirmed that he had sold the suit property to third parties but the transfer was canceled by the court.
63. DW1 denied that the Defendant company had instructed M/s Adere & Co. Advocates to prepare a management agreement. He asserted that there was no such agreement.
64. DW1 testified that the 3 properties when sold to the Defendant company by Lornho were already fenced. Regarding the claim for special damages, the witness admitted that he did not have and had not supplied the court with supporting documents.



Court's Directions

65. Upon close of the case, the court directed the parties to file written submissions. Both parties have complied. The Plaintiff's submissions run to 252 pages (inclusive of the authorities) while the defendant's run to 328 pages (inclusive of authorities). I will make my observations later in regard to the length of submissions.

The Plaintiff's submissions

66. The Plaintiff's submissions are dated May 30, 2022. The Plaintiff at paragraph 2 of his submission analyzes what he terms as undisputed facts. It is the Plaintiff's submission that the fact of him taking possession of the suit premises from October 1, 1999 is not disputed. The fact that he has remained in the suit premises since then too is not in dispute. The existence of the agreement dated September 30, 1999 according to the Plaintiff is also not a disputed fact. He referred to the Defendant's witness statement at paragraph 56 where the witness made reference to the said agreement.

67. The payment of the deposit of Kshs 1,500,000/- by the Plaintiff to the Defendant is not contested. It is the Plaintiff's contention that the provision in regard to the payment of the balance of the purchase price was that it was to be paid upon the title being registered in his name.

68. Finally, the Plaintiff submits that it is not disputed that the Land Control Board consent under the provisions of the *Land Control Act* was not obtained. The parties too did not enter into a written management agreement as contemplated in their agreement.

69. At paragraph 3 of his submissions, the Plaintiff identifies what he terms as the disputed facts which include: -

- a. The Defendant denies that there was a sale agreement between the parties.
- b. The Defendant alleges that if there was a sale agreement, it was rescinded.
- c. The Defendant denies that it authorized the Plaintiff to enter into the 2 adjacent properties (Soy/Soy/Block (Navilus) 2 & 14 to manage them on its behalf.
- d. The Defendant denies that there was an agreement to manage the properties.

70. The Plaintiff goes ahead to identify 5 issues for determination namely: -

- i. What is the weight to be given to Mr. Adere's evidence?
- ii. Was there a sale agreement between the parties?
- iii. Was the management agreement finalized and did the Plaintiff work on the properties?
- iv. What was the effect of failing to procure the Land Control Board Consent?
- v. Whether the parties are entitled to the prayers sought in their respective pleadings?

71. The Plaintiff submitted on each of the identified issues citing authorities to augment his position.

72. On his part, the Defendant submitted in support of his defence and counter-claim. The Defendant identified 11 issues for determination as follows; -

- i. Whether the late Stephen Adere's witness statement dated May 10, 2018 has any probative value and or is relevant in the case?
- ii. Whether the purported sale agreement dated November 12, 1998 is valid.



- iii. Whether the intended sale transaction between the parties is void for all purposes in view of the provisions of the *Land Control Act*.
 - iv. Was the purported sale agreement revoked and or rescinded by the Defendant?
 - v. Whether the stipulations in the purported sale agreement are burdened with deceit and misrepresentation not agreed between the parties?
 - vi. Whether the Plaintiff's case is based on constructive trust and proprietary estoppel?
 - vii. Whether the Plaintiff's possession and use of the suit premises and Soy/Soy Block 10 (Navillus) 2 & 14 was authorized?
 - viii. What rebuttals has the Defendant raised regarding the issues raised in the Plaintiff's submissions?
 - ix. Whether the Plaintiff is entitled to any relief.
 - x. Whether the Defendant is entitled to any relief.
 - xi. What is the appropriate order as regards costs of the suit and counter-claim?
73. The Defendant submitted on each of the identified issues citing authorities in support of its position.

Issues for determination

74. I have carefully considered the pleadings in this matter, the evidence adduced, and the submissions of the parties, each identifying its own set of issues for determination. In the court's opinion, the issues for determination in this case may be consolidated as here-below: -
- A. Whether there was a valid legal contract for sale of land between the Plaintiff and the Defendant in respect of the suit premises.
 - B. What is the effect of failure to obtain the land control Board consent on the transaction between the parties in respect of the suit premises?
 - C. Whether the Plaintiff is entitled to an order of specific performance.
 - D. What is the effect of the failure by the parties to make the management agreement authorizing the Plaintiff to work on the Defendant's parcels of land and incur expenditure on behalf of the Defendant?
 - E. Whether the Plaintiff is entitled to the special damages claimed.
 - F. Whether the Plaintiff is entitled to general damages for breach of contract.
 - G. Whether the Defendant is entitled to an order of vacant possession and eviction of the Plaintiff from the suit premises.
 - H. Whether the Defendant is entitled to an order of perpetual injunction against the Plaintiff in respect of the suit premises.
 - I. Whether the Defendant is entitled to the special damages claimed.
 - J. What orders should issue as regards the costs of the suit and counter-claim.



Analysis and Determination.

A. Whether there was a valid legal contract for sale of land between the plaintiff and the Defendant in respect of the suit premises.

75. The Plaintiff's case is premised on the agreement dated 30th September 1999. The Defendant however disowns the agreement. It is the Defendant's contention that even if there was an agreement between it and the Plaintiff, the purported agreement and or sale was void ab initio and was in any event subsequently rendered illegal for the reasons elaborated in the statement of defence and counterclaim namely: -
- i. Ms. Adere & Co. Advocates acting for the parties herein submitted the agreement for stamp duty processing before it had been executed.
 - ii. M/s Adere & Co. Advocates acting for the parties herein submitted the same for stamp duty processing before it had been executed.
 - iii. It contained a purchase price of Kshs 3,700,385/= instead of Kshs 3,750,000/=
 - iv. The deposit payable was altered from Kshs 1,700,000/= to Kshs 1,500,000/=
 - v. Mr. Adere Advocate purported to witness the agreement for the vendor when the vendor had not properly executed the same.
 - vi. A special condition of 1.2 ratio included therein had not been discussed at all.
 - vii. It was unlawfully witnessed by Mr. Adere Advocate because he himself had drawn it. This is not allowed professionally.
 - viii. The sale agreement is in breach of both the [Companies Act](#), [Land Registration Act](#) and the [Advocates Act](#) and is therefore null and void ab initio.
76. In his testimony, the Plaintiff stated that when they entered into the agreement, the subject matter of this suit, Rose Lumumba Nyaberi, signed the agreement on behalf of the company. The said Rose Lumumba Nyaberi had been introduced to the Plaintiff by Mr. Justry Lumumba Nyaberi, as the 2nd director of the Defendant company.
77. The suit premises that the Plaintiff was purchasing from the Defendant company measured 40.47 ha approximately 101 acres. The purchase price was Kshs 3,700,385/- out of which the Plaintiff paid Kshs 1,500,000/- as deposit.
78. The defence witness Mr. Justry Lumumba Nyaberi in his testimony narrated that the Plaintiff had approached him at his offices at Jubilee Exchange House in Nairobi with an intention of buying one of his three portions of land. At the time, the Defendant company had already paid for the 3 properties to the previous owner but the titles were still in the name of that previous owner. DW1 spelt out his terms for the sale to the Plaintiff on behalf of the Defendant Company. They agreed with the Plaintiff that all he needed to do was refund the Defendant Company the purchase price paid for one of the portions, that is the suit premises.
79. The parties then agreed to use Adere & Co. Advocates to make the agreement and facilitate the entire transaction. DW1 explained that at the time, he was a defence Counsel at the United Nations International Criminal Tribunal for Rwanda at Arusha and also at the International Criminal Court at the Hague. Due to his busy schedule, he told the Plaintiff to visit the law firm of Adere & Co. Advocates



- who was to prepare a draft agreement on their behalf. DW1 would attend to the agreement once he came back to Kenya from his engagements at Arusha and the Hague.
80. The Defence witness stated that on coming back to Kenya, he did not find the draft agreement in his office. He allegedly wrote several letters to Adere & Co. Advocates requesting for the draft but all in vain.
81. DW1 testified that it was only in the year 2001 that Adere & Co Advocates sent him the so called agreement which to his surprise had already been stamped at the Lands Office. What he was sent was actually a copy. To-date, as he stated in his testimony, he has never seen the original of the agreement.
82. DW1 averred that he was the custodian of the seal of the Defendant company. The agreement was not sealed with the seal of the company. The witness, DW1 too had not signed the agreement. It was only signed by his wife, Rose Lumumba Nyaberi, who was a dormant and minority director of the Defendant Company.
83. DW1 averred that he had not authorized his wife to execute the agreement on behalf of the Defendant company. His instructions had been that the draft agreement was to be placed on his desk in his office where he was to sign and seal it appropriately. He told the court that he came to learn that Mr. Adere advocate had instead and without his knowledge and express instructions called his wife to sign the agreement. He had indicated to her that it would be sent to his office for signing and sealing once he came back from his duties out of the country.
84. DW1 confirmed that, after signing the agreement, his wife was given a cheque drawn in favour of Nyaberi & Co Advocates, for the sum of Kshs 1.5 million. This amount was supposedly the deposit of the purchase price payable under the agreement.
85. In cross-examination by the Advocate for the Plaintiff, the Defence witness insisted that the agreement was prepared without his input. The director who had signed the agreement on behalf of the Defendant company, Rose Nyaberi was the wife to the witness and a sleeping director of the Defendant company.
86. DW1 on being shown a letter written on behalf of the Defendant company confirmed that it referred to the agreement of 30th September 1999. He confirmed that he indeed received the sum of Kshs 1.5 million from the Plaintiff and was still holding the money.
87. From the testimony of the Defence witness, this court finds that it is not in dispute that Rose Nyaberi, the director who signed the agreement on behalf of the Defendant company was indeed a director of the company. The objection by the defence witness seems to be based on the fact that: -
- a. The agreement was not sealed with the seal of the company; and
 - b. That the agreement was not executed by DW1, Justry Lumumba Nyaberi, the main director of the Defendant company.
88. On the first objection whether the failure to affix the company seal on the agreement invalidated it, section 38 of the [companies Act](#) (now repealed) addressed the issue with finality. The section expressly provided that: -
- “ a document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company and need not be under its common seal.”



89. Simply stated, the absence of the company seal on a document alone is not enough to invalidate an agreement/contract entered into by a company.
90. In regard to the 2nd objection, I start by reiterating that it is not disputed that Rose Nyaberi was a director of the Defendant company. Further, though the defence witness referred to her as a sleeping director, he did not state nor prove for that matter, that she was not authorized to execute or sign documents on behalf of the Defendant company; neither did he demonstrate that he had warned the Plaintiff that the said director was not authorized to sign the agreement on behalf of the Defendant Company.
91. In the case of Bougainville Estate Ltd - Vs- Kenya Deposit Insurance Corporation & 3 others (2017) eKLR, my brother Olola J while addressing the position of a contract entered into between a company and a third party made reference to the rule in the Turquand's case in the following words; -

“The position under the law of contract as I understand it is that any third party may enforce a contract against a company if the obligations arising thereunder were assumed by the company or an officer thereof with ostensible authority. This is the doctrine arising under the Rule in Turquand's case (derived from the case of Royal British Bank –Vs- Turquand (1885) E & B 327).”

Dealing with the doctrine of constructive notice as provided under the rule in Royal British Bank –Vs- Turquand (Supra), the learned Authors in Palmer's Company Law, 22nd Ed. Vol 1 provide as follows (page 286);

‘.....That parties who have dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with. The rule in Turquand's case was again subject to exceptions. Even this solution would have been principle that a director or other officer could bind the company if he had ostensible or apparent authority, even though the Board of Directors had not endowed him with actual authority. By this circuitous route, English and Scottish Company Law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily.’

92. In his evidence in chief, the Defendant's witness stated that on the day that the Plaintiff had visited him in his office, he (DW1) informed him (the Plaintiff) that he could get in touch with his wife. The actual agreement was however to be put on his desk for signing and sealing. It was at that juncture that the Defendant's witness would have expressly informed the Plaintiff that his wife, though a director of the Company did not have the authority to bind the company, if that were the case, as the witness insinuates in his testimony.
93. The subsequent action by the Defendant company demonstrates that the company recognized and acknowledged the agreement with the Plaintiff. Two particular actions suffice: -
- i. The action of the Defendant's witness, DW1 accepting the cheque of Kshs 1.5 million from the Plaintiff and retaining the same.
 - ii. The action by the Defendant company of purporting to rescind the contract. An invalid contract is incapable of being rescinded because it is void ab initio.
94. I find and hold that the rule in the Turquand's case applies in this matter. The court finds that the agreement entered into by the parties herein and dated September 30, 1999 was valid.



95. I must state at this juncture categorically that my decision on the validity of the agreement has not been influenced by the pronouncement of my brother Judge Mutungi J who in his ruling dated at the interlocutory stage of this case had stated that;

“the documentary evidence in the pleadings and the annexures thereto show that there is a legally binding sale agreement between the Plaintiff and the 1st Defendant for the purchase of the suit property.”

96. The Plaintiff in his submissions made reference to the pronouncement by Mutungi J submitting that though the ruling was made at the interlocutory stage, the finding (by the learned judge) ‘remains and cannot be assailed’ at this stage as it was based on the facts of the matter which have not changed.

97. The submission by the Plaintiff prompted a stern reaction from the Defendant who submitted that the decision by Mutungi J cannot be binding on the court since it was made per incuriam and in obiter dictum.

98. What was before the learned judge when he made the ruling referred to above was an application by the Plaintiff for an interlocutory injunction. At that juncture, as well established in law, the court was not called upon to make any conclusive or definitive findings of fact or law.

99. Ringera J (as he then was) in *Airland Tours & Travel Ltd vs National Industrial Credit Bank Nairobi HCCC No. 1234 of 2002* stated that in an interlocutory application the court is not required to make any conclusive or definitive findings of fact or law.

100. While adopting the same position, the Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR* added that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

101. That was the same position adopted in the dicta in *Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR)* where it was stated:

‘...I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs



and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein...”

102. Mutungi J, certainly did not have an opportunity to hold a mini trial to examine the merits of the case as he considered the Plaintiff’s application for an interlocutory injunction to enable him make conclusive findings on the validity or otherwise of the agreement between the parties. The pronouncement was surely made in obiter. It is not conclusive; neither would it be binding upon the court, in any event.

B. What is the effect of failure to obtain a Land Control Board consent on the transaction between the parties herein in respect of the suit premises.

103. It is not in dispute in this case that the Land Control Board consent provided for under the [Land Control Act](#) was not obtained in this instance. Both parties agree that the suit premises was agricultural land and was therefore subject to the provisions of the [Land Control Act](#), Chapter 302 of the Laws of Kenya (hereinafter called ‘the Act’).

104. Under section 6 of the Act, transactions affecting agricultural land, “shall be 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 the Act.”

105. The said transactions are: -

- a. The sale, transfer, lease, mortgage, exchange, partition, or other disposal of or dealing with any agricultural land;
- b. The division of any such agricultural land into two or more parcels to be held under separate titles; and
- c. The issue, sale, transfer, mortgage or any other disposal 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.

106. I have carefully read the respective submissions of the parties in regard to this issue. The submissions confirm the observation of the Court of Appeal in the case of David Sironga Ole Tukai –Vs- Francis Arap Muge & 2 others (2014) eKLR, where the court observed that the ‘[Land Control Act](#)’ remains one of the most litigated statutes in Kenya. This informs the numerous decisions from both the Court of Appeal, and the High Court over a span of 47 years since the enactment of [Land Control Act](#) in 1967. The decisions, as the court observed, have been consistent on the effect of failure to comply with the provisions of that law.

107. In the said case, the Court of Appeal was considering a decision of the High Court that had departed from the previous ‘consistent decisions’ of the courts. The Judges of Appeal considered the said decision of the High Court alongside the Court’s own decision in Macharia Mwangi Maina & 87 others –Vs- Davidson Mwangi Kagiri CA NO. 26 & 27 OF 2011 (NYERI). The question as the court framed it was whether that departure from the previous decisions was really based on sound legal foundation.

108. I wish to reproduce verbatim the pronouncement of the Court of Appeal as here below: -

“The reason behind the above stringent provisions of the Act is to be found, in our view, in the rationale of the ‘Land Control Legislation. Before enactment in its present form, the [Land Control Act](#) had existed in one form or another in the colonial period. Writing on a previous version of the same law namely, the Land Control (Native Lands) ordinance



(No. 28 of 1959), the eminent Kenyan Legal Scholar, the late Prof. H.W.O Okoth Ogendo captured the purpose of the legislation thus;

“The purpose of the Land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate. The Royal Commission had warned, for example, that in many peasant communities individualization had led to ‘the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little income-earning opportunity for those who have parted with the land’ ”. (See TENANTS OF THE CROWN, Acts Press (1991) page 74).

109. The Court of Appeal concluded that the departure from previous decisions by the Learned Judge was not informed by any serious reasons. In essence, the court reiterated that failure to obtain the consent of the Land Control Board required under section 6 (1) of the Act rendered the transaction void. This court is bound by the decisions of the Court of Appeal.
110. I must add that I fully agree with the reasoning in the above decision. When the people of Kenya adopted, enacted and gave themselves [constitution of Kenya 2010](#) , they under Article 68 of the [constitution](#) commanded parliament to revise, consolidate and rationalize existing Land Laws. The fifth schedule of the [constitution](#) spelt out timeline for the parliament to do so as four years.
111. The Parliament of Kenya indeed revised, rationalized and consolidated various Land Statutes. In the process, Parliament repealed various Acts including the Indian Transfer of Property Act, 1882. The Government Lands Act, the Registration of Titles Act, The Registered [Land Act](#), the Way leaves Act and The Land Acquisition Act.
112. In its own wisdom, Parliament, the institution vested with the legislative authority of the Republic by the people of Kenya left the [Land Control Act](#), Cap 302 of the Laws of Kenya intact. It is therefore remains one of the Laws of Kenya.
113. Former Chief Justice of the USA John Marshal stated that;

“Judicial power, as contra distinguished from the power of the laws, has no existence; courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge, always for purpose of giving effect to the will of the legislative; or in other words to the will of the law.”
114. I believe I have said enough on this issue. I will proceed to consider the other identified issues for determination.

C. Whether the Plaintiff is entitled to an order of specific performance.

115. One of the prayers that the Plaintiff seeks in his plaint is an order of specific performance of the agreement for sale dated September 30, 1999. Consequent to the said order, the Plaintiff too prayed that an order directed to the Defendant to execute all documents and papers and do all such things as are necessary for the effectual transfer of the property which is subject of this suit to the Plaintiff. In the alternative the prayer (c) in the event that the Defendant fails to execute the transfer documents within



- 14 days of the order, the Deputy Registrar of the High Court be directed and or empowered to execute all documents and papers necessary for the effectual transfer of the suit premises to the Plaintiff.
116. The jurisprudence for specific performance I must state is well established in Kenya. The oft cited case in this respect is the case of *Reliable Electrical Engineers Ltd –Vs- Mantrac Kenya Ltd (2006) eKLR* where Maraga J as he then was stated that: -
- “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 when a contract is valid and enforceable, specific performance will however not be ordered where there is adequate alternative remedy. In this respect damages are considered to be an adequate alternative where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages is 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.”
117. In the case of *Amina Abdul Kadir Hawa –Vs- Rabinder Nath Anand & Another (2012) eKLR*, the court held that one of the parameters to be met or demonstrated to exist was that,
- “the party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfil the same.”
118. In the case of *Thrift Homes Ltd –Vs- Kays Investment Ltd (2005) eKLR* the court stated as follows: -
- “specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well settled 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 same defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”
119. The question then that I must pose at this point in time is whether in this case there was a valid enforceable contract between the parties. My finding on issue number 2 was that the contract between the parties herein was rendered void by failure to obtain the consent of the Land Control Board under Section 6(1) of the *Land Control Act* within the stipulated time. This means that the agreement became unenforceable or invalid. This alone would dis-entitle the Plaintiff the order of specific performance.
120. The other condition for the grant of an order of specific performance, form the above cited precedents, is that the party who seeks the relief of specific performance must demonstrate that he has fulfilled all his obligations under the contract or demonstrate that he is willing to do so. In this case, the Plaintiff did not pay the full purchase price. He merely paid the deposit of Kshs 1,500,000/-. Specific performance is an equitable remedy. Equity would not therefore come to his aid. His hands are not clean.
121. Conscious of this shortfall, the Plaintiff in his submissions introduced the aspect of a constructive trust, which they had not however pleaded in their plaint. This court has consistently held that parties in litigation are bound by their pleadings. There is a legion of authorities to support the position.
122. The Court in the case of the *Independent Electoral and Boundaries Commission –Vs- Stephen Mutinda Mule & 3 others (2014) eKLR* was categorical on the issue, to the effect that parties in litigation are bound by their pleadings. The court in the case cited with approval the decision of the



Malawi Supreme Court of Appeal in *Malawi Railways Ltd –Vs- Nyasulu* (1998) MWSC 3, where the court quoted an article by sir Jacob entitled “The present importance of pleadings” published in 1960 where the author had stated that

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any other business” in the sense that points other than those specific may be raised without notice.”

123. The Supreme Court of Nigeria on the other hand in *Adetoun Oladeji (NIG)- Vs- Nigeria Breweries PLC SC 91/2002* re-emphasized the principle that parties are bound by their pleadings and further stated that,

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enable parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”

124. In the case of *Raila Odinga & Another –Vs- IEBC & 2 others* (2017) eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that: -

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

125. It was too late in the day for the Plaintiff to introduce the issue of trust at the submissions stage.

126. Even if the court were to consider the issue of trust it would not be applicable in this case. In the above cited case of *David Sironga Ole Tukai –Vs- Francis Arap Muge & 2 others* (supra), the Court of Appeal was emphatic that,

“.....granted the express, unequivocal and comprehensive provisions of the *Land Control Act*, there is no room for the courts to import doctrines of equity into the Act. This is the simple message of section 3 of the *Judicature Act*. Consequently, invocation of equitable doctrines



of constructive trust and estoppel to override the provisions of the Land Control Act has, in our view, no legal foundation. We have also noted that this Court had previously held in a line of consistent decisions and in very clear terms, that there was no room for application of the doctrines of equity in the Land Control Act. Those previous judgments were not referred to in the judgment in *Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri (supra)*.”

127. Secondly the provisions of section 6(2) of the Land Control Act are explicit that:

“For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

128. The Court of Appeal made reference to its decision in *Daniel Ng’ang’a Kiratu V Samuel Mburu (supra)* where it stated that;

“section 6(2) of the Land Control Act was introduced on December 24, 1980 by Act No 13 of 1980 to undo the judgment of the High Court in *Gatimu Kinguru v Muya Gathangi (supra)* where Madan, J., as he then was, held that creation of a trust over agricultural land in a land control area did not constitute “other disposal of or dealing” for the purposes of section (1) of the Land Control Act and therefore did not require the consent of the Land Control Board.”

129. In the case of *Daniel Ng’ang’a Kiratu V Samuel Mburu* the Court, relying of section 6(2) of the Land Control Act reiterated that declaration of trust over agricultural land required consent of the Land Control Board. Therefore,

“By relying on *Gatimu Kinguru V Muya Gathangi (supra)* whose effect had been undone by the amendment, which brought in section 6(2), the decision of this Court in *Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri (supra)*, was clearly per incurium. On the same vein even the judgment of the High Court in *Mwangi & Another v Mwangi [1986] KLR 328* which was cited in *Macharia Mwangi Maina & 87 Others* was also per incurium because it was based on *Gatimu Kinguru* without realizing that the latter decision had been overridden by Act No 13 of 1980.”

130. Consequently, the court’s finding is that the Plaintiff is not entitled to the order of specific performance and the consequential orders on the execution of the documents and papers to transfer the title to the suit premises to him.

D. What was the impact of the failure by the parties to make a management agreement authorizing the Plaintiff to work and incur expenditure on the Defendant’s parcels of land.

131. Under the special conditions clause 3 of the agreement dated 30.9.1999, it was agreed between the parties that: -

“3. The purchaser undertakes to fence and provide security over his and the vendor’s property and the sum to be incurred shall be agreed upon in advance and divided between the purchasers and the vendor in the ration 1:2 and the portion payable by the vendor shall be deducted from the balance of the purchase price aforesaid.”



132. The import of this clause was that there was to be a subsequent agreement between the parties that was to authorize expenditure for purposes of fencing and provision of security over the suit premises and the vendor's property. It was in the contemplated agreement that the amount of money to be expended by the Plaintiff was to be agreed upon.
133. Both the Plaintiff and the Defendant's witness were unanimous that the contemplated agreement was never made.
134. The Plaintiff in his pleadings and evidence before the court testified that in spite of the lack of the contemplated agreement provided for in their contract with the Defendant, he still went ahead and fenced around the suit premises and the Defendant's two parcels of land adjacent to the suit premises. In total, the Plaintiff stated that he fenced a total of 303 acres of land which included the suit premises.
135. The Plaintiff further testified that since the beacons of the 3 parcels of land were not traceable, he was forced to engage surveyors to point out the boundaries of the parcels of land. The Plaintiff further testified that he hired security as the properties were being damaged by strangers who were grazing on the land. He went ahead and allegedly even employed a manager whom he instructed to hire personnel to guard the properties.
136. In addition to fencing and provision of security, the Plaintiff went ahead to cultivate on the land, the suit premises, and the Defendant's portions. In total, the Plaintiff alleges to have incurred Kshs 29,751,626/-. The Plaintiff averred that he worked on the Defendant's parcels of land for a period of approximately 4 years from October 1, 1999 until April 30, 2004.
137. In his plaint, the Plaintiff had quantified the expenditure at kshs 10,561,286.67. The Plaintiff claims the said amount from the Defendant. In the alternative, the Plaintiff prays for reasonable compensation (quantum meirut) for work done.
138. From the evidence presented before the court and the averments in the plaint, it is clear that there was no management agreement made or executed by the parties. This is the agreement that would have defined the scope of the assignments that the Plaintiff was to undertake on behalf of the Defendant. It is the agreement that would have set the limits of the money to be expended/expenditure to be incurred by the Plaintiff on behalf of the Defendant.
139. I wonder why the Plaintiff was in such a hurry that he could not wait for the finalization of the agreement before engaging on a spending spree even before the main agreement for sale of the suit premises was completed.
140. Whereas the sale agreement only stipulated that the purchaser (the Plaintiff) would fence and provide security only, the Plaintiff testified that he went ahead to engage in other activities that were not even contemplated in the agreement. This was clearly and without doubt not authorized by the Defendant. The Plaintiff cannot turn back and purport to seek compensation from the Defendant while he went on a frolic of his own.

E. Whether the Plaintiff is entitled to the special damages or the alternative of reasonable compensation (Quantum Meirut) for the work done.

141. In his plaint, the Plaintiff prays for special damages of Kshs 10,561,286.67. In the alternative, he seeks reasonable compensation (quantum meirut) for the work done and tabulated in paragraph 8, 8a, 8b and 8c of the plaint.
142. At paragraph 8 of the plaint, the Plaintiff pleads that he duly paid a sum of kshs 1,500,000/- by way of a deposit to the Defendant through its advocate. Further the Plaintiff avers that the Defendant had



- instructed M/s Adere & Co. Advocates to prepare a management agreement by which the Plaintiff was to provide certain management services over the Defendant's adjoining properties measuring 202 acres. The management agreement was however never finalized.
143. The Plaintiff at paragraph 8b avers that he duly performed the 'property development services' over the Defendant's adjoining properties for which services the Defendant has refused, ignored and or failed to pay the Plaintiff.
144. At paragraph 15, of the further amended plaint, the Plaintiff particularized the loss as follows:
- a. Legal fees of Kshs 65,000/- paid to M/s Adere & company Advocates on behalf of the Defendant.
 - b. Amount payable to fence develop and manage the properties and provide the security of the properties.
 - c. Travel expenses for the Plaintiff from Nairobi to Eldoret to negotiate the sale, follow up completion of the sale, and back severally.
 - d. The Plaintiff incurred and paid a total of kshs 15,841,930/- as costs for the performance of various tasks, projects and activities to develop provide security and manage the properties in accordance with the agreement between the Plaintiff and the Defendant. By virtue of the agreement between the Plaintiff and the Defendant, the Defendant is indebted to the Plaintiff in the sum of Kshs 10,561,286.67
145. From my finding that there was no agreement made between the parties, there is no basis therefore for the Plaintiff's claim for special damages nor the alternative for reasonable compensation.
146. Secondly, the law on specific damages is well spelt out. Special damages must not be only be specifically pleaded but must be strictly proved. In the case of Hahn –Vs- Singh (1985) KLR 716, the Court of Appeal held that: -
- “special damages must not only be specifically claimed (pleaded) but must also be strictly provedfor they are not the direct natural or probable consequence of the act complained of and many not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
147. In Total (Kenya) Limited formally Caltex Oil (Kenya) Ltd – Vs- Janevans Ltd (2015) eKLR the court insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide proforma invoices sent to the party by a third party.
148. In this case, the Plaintiff has not pleaded the special damages with specificity rather he has merely lumped them up, terming them as the claim and named it “costs for the performance of various tasks projects and activities to develop, provide security and manage the properties.” This is not specific. It is generalization.
149. Additionally, the Plaintiff did not strictly prove the claim for special damages. As came out during cross-examination the Plaintiff admitted that he did not have all the documents/receipts/ invoices in support of his claim for special damages. He alleged that his manager who was holding most of the documents passed on in 2018 and the documents got lost. No evidence was provided about the passing on of the manager. Further as I noted at the beginning of this judgment, this is a case that was filed in court way back in the year 2003. The said manager had not written a statement explaining the receipts or documents allegedly prepared by himself.



150. Again, the records that the Plaintiff was relying on in proof of his claim were not authenticated. An example is the exercise book on Page 85 of the Plaintiff's bundle of documents that was allegedly used to record expenses incurred including wages for casuals who were clearing the site.
151. The Plaintiff too included expenses for hotel accommodation despite the fact that the company he was working for then paid the expenses for him.
152. Conveniently, the Plaintiff was not forthright about the income received from sale of charcoal made from the wattle trees that were in the farms. In cross-examination, he admitted having made upto Kshs 1,000,000/- from the sale.
153. The harvests of maize too were not accounted for. In re-examination, the Plaintiff merely stated that the expenses were much higher than the incomes received.
154. The claim has not been sufficiently proved. It would have taken an auditor to compute the income and expenditure statement and to verify the documents relied upon by the Plaintiff. In the absence of that, i would dismiss the claim for special damages for lack of proof.
155. The same reasoning applies to the alleged payment of legal fees by the Plaintiff on behalf of the Defendant. The agreement was silent on the mode of payment of legal fees. Secondly, the Plaintiff did not produce any invoice nor a fee note from M/S Adere and Company Advocates for legal fees. There was no demand to the Defendant Company to pay legal fees. I find no basis whatsoever for this claim by the Plaintiff.
156. Having disallowed the Plaintiff's claim for special damages and the alternative for compensation, the Plaintiff's prayer then for an order that the balance of the purchase price be deducted from the special damages fails.

F. Whether the Plaintiff is entitled to general damages for breach of contract in addition to specific performance.

157. I will not spend much time on this issue. The law is settled that general damages are not awardable for breach of contract or breach of contractual obligations. (Dhavamshi –Vs- Karsan (1974) EA 41 Securicor Curriour (K) Ltd –Vs- Benson David Onyango & Another (2008) eKLR & Kenya Women Microfinance –Vs- Martha Wangari Kamau (2021) eKLR). The claim for general damages therefore has no rooting in law. It is disallowed.

G. Whether the Defendant is entitled to an order of vacant possession and eviction of the Plaintiff from the suit premises.

158. The basis of the Plaintiff's occupation of the suit premises was the agreement between the parties dated September 30, 1999. The court has already found that the said agreement was rendered void by failure to obtain the Land Control Board consent under the provisions of the Land Control Act. Accordingly, this court has no other option but to grant the Defendant an order of eviction of the Plaintiff from the suit premises. The court will, having considered the circumstances of this case and the fact that the Plaintiff had built a home on the suit property, allow the Plaintiff 180 days, within which period he shall vacate the suit premises by removing all his properties and developments on the suit premises, failing which he be evicted from the suit premises known as Title Number Soy/Soy/Block 10 (Navillus 1). The order to be enforced by the Officer Commanding Station, Soy Police Station.



H. Whether the Defendant is entitled to an order of perpetual injunction against the Plaintiff.

159. In the case of Kenya Power & Lightning Company Ltd –Vs- Sheriff Molana Habib (2018) eKLR the court made the following pronouncement as regards a perpetual permanent injunction;

“A permanent injunction also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the Plaintiff to be protected.”

160. I find in favour of the Defendant in this matter. The Plaintiff has no right to remain in occupation of the suit premises. I therefore grant the Defendant an order of perpetual injunction as prayed for in the counter-claim restraining the Plaintiff by himself, his agents, servants and or employees from entering, occupying or in any other manner interfering with the suit premises known as Title No. Soy/Soy/BLOCK 10 (Navillus)¹, subject off course to the grace period of 180 days granted to the Plaintiff.

I. Whether the Defendant is entitled to special damages of Kshs 40,300,000/- against the Plaintiff.

161. In cross-examination by the advocate for the Plaintiff, the Defendant’s witness conceded that he had not provided proof for the special damages claimed. As the court has already determined in respect of the Plaintiff’s claim for special damages, the benchmark for the award of such is a claim is that it must not only be specifically pleaded but must also be strictly proven. On that basis, the defendants claim fails.

J. Whether the Defendant is entitled to general damages including exemplary and aggravated damages for forceful occupation of the suit premises, wastage and degradation thereof.

162. The Defendant’s justification for the grant of the orders for general including aggravated damages as stated in his submissions is that the Plaintiff illegally occupied and degraded the suit premises from September 8, 2003, when he rescinded the impugned agreement and even after revocation on March 17, 2003.

163. In regard to the Defendant’s other parcels of land, the Defendant avers that the Plaintiff illegally occupied and degraded them from October 1, 1999 to October 31, 2003, through illegal farming activities. He further submits that the Plaintiff’s conduct of inserting un –agreed terms in the purported sale agreement and misleading Rose Nyaberi to sign on the defendant’s behalf aggravated the illegal farming activities and degradation of properties through destruction of trees.

164. The Defendant therefore submits that he is entitled to exemplary aggravated and general damages.

165. The Plaintiff’s position however was that the Defendant had not provided any proof of forceful occupation of the suit premises or the Defendant’s adjacent properties. Regarding wastage and degradation, the Plaintiff avers that it was common ground that the suit premises and the adjacent properties were a jungle with wild animals and even wilder snakes. By converting them into arable land and remarkably appreciating the value of the property, the Plaintiff did not waste nor degrade them at all.

166. Under section 22 of the *Land Control Act*, where an agreement is avoided by section 6 of the Act, a party who remains in possession in furtherance of the avoided transaction or agreement that person shall be guilty of an offence. The person is for all intents and purposes a trespasser.



167. The Plaintiff in this case has remained in possession of the suit premises in furtherance of the agreement that this court has declared void. He therefore has been trespassing on the suit premises.
168. Trespass to land is actionable ‘per se’. In the case of Park Towers Ltd –Vs- John Mithamo Njiika & 7 others (2014) eKLR which was cited with approval in the case of Avid Developers Ltd –Vs- Blue Horizon Properties Ltd & 20 others (2021) eKLR the court held that where trespass is proved, a party needs not prove that he/she suffered any specific damage or loss in order to be awarded damages. Damages however shall be awarded depending on the unique facts and circumstances of each case.
169. Each case must be determined in consideration of its own unique circumstances. The Plaintiff in this case has remained in possession with the sanction of the court. As early as 24th November 2003, the Plaintiff was enjoying interim orders granted by the ruling of Justice O.K. Mutungi delivered on 20th May 2005 pending the final determination of this suit. It would therefore be unfair to condemn the Plaintiff to pay damages for trespass.
170. The Defendant’s prayer for damages was specific on the suit premises meaning Soy/Soy Block 10 (Navillus)1. On the alleged wastage and degradation, I agree with the Plaintiff’s submission that the Defendant has not offered any evidence in support of the same.

J. Whether the Defendant is entitled to General damages for loss of use and profit of the suit premises.

171. Where a person has been wrongful deprived of his property he is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of his occupation of his property by another Attorney General Vs Halal Meat Products Ltd (2016) eKLR.
172. In the case of Rajan S. Shah & Partners Vs Bipinbishah (2016) eKLR while discussing ‘mesne profits made reference to the Halsburys Laws of England and stated that: -

“A more useful description of mesne profits can be found in Halsubrys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner’s lands and who has deprived the owner of income that otherwise may have been obtained to obtain from the use of the land. The Landlord may recover in action for mesne profits the damages which he has suffered through being out of possession of the land.”

173. Mesne profits are in the nature of special damages. They are not general damages. The Defendant was therefore wrong to claim general damages for loss of use and profit of the suit premises. It is an oxymoron.
174. In the case of Karanja Mbugua & another –Vs- Marybin Holding Co. Ltd (2014) eKLR, Nyamweya J (as she then was) expressed herself as follows: -

“the court is alive to the legal requirement that mesne profits being special damages must not only be pleaded but also proved, as shown by the provisions of order 21, rule 13 of the Civil Procedure Act.”

175. Consequently, it is upon the party who seeks mesne profits to place evidence before the court to justify the grant of an order of mesne profits. The court of Appeal in Peter Mwangi Mbuthia & Another – Vs- Samow Edin Osman (2014) eKLR held that: -

“We agree with Counsel for the appellants that it was incumbent upon the Respondent to place material before the court demonstrating how the amount that was claimed for mesne



profits was arrived at. Absenting that, the Learned Judge erred in awarding an amount that was neither substantiated nor established.”

176. The prayer by the Defendant is wrongly framed as a claim for general damages. Further the amount sought has neither been pleaded nor proved. The claim must fail.

K. What Orders should issue in regard to the Costs of the suit and the Counter-claim?

177. In the case of DGM v EWG [2021] eKLR, Kariuki Charles J, addressed the issue of costs in detail making reference to a number of decided cases. He cited with approval the case of Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review Application No. 6 of 2004, where Mativo J, (as he then was) held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR.
178. The Judge observed that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.
179. In the case of Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others (2013) eKLR which cited with approval the words of Murray C J in Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 where the court stated that:

“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 ...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.”

180. Courts have the ultimate discretion in the award of costs. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

181. The Halsburys Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.



182. Any departure from the general principle can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation, since in such a case the litigant is pursuing public interest as opposed to personal gain.
183. A court must therefore put into considerations the circumstances of each case when determining the issue of costs. These circumstances were addressed by the learned judge in *Morgan Air Cargo Limited v Everest Enterprises Limited* (Supra) to include:
- a. the conduct of the parties
 - b. the subject of litigation
 - c. the circumstances which led to the institution of the proceedings
 - d. the events which eventually led to their termination
 - e. the stage at which the proceedings were terminated
 - f. the manner in which they were terminated
 - g. the relationship between the parties and
 - h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.
184. The list is not exhaustive off course. In other words, the court must be guided not only by the issues listed above, but also by other relevant matters including the likely consequences of the order for costs.
185. In this instance, I have agonized over the issue of costs. I have keenly considered the circumstances of this case, the conduct of the parties and the fact that though the Defendant has succeeded in some aspects of its counter-claim, it has also failed in other aspects including the special and general damages. In the end, I find it fair and reasonable that each party bears its own costs.

Lengthy submissions

186. As I noted earlier in this judgment, the parties in this matter filed voluminous submissions totaling 590 pages (inclusive of submissions). Under the new constitutional dispensation, filing of written submissions as opposed to oral submissions has become the norm as the court rightly observed in the case of *Joseph Mwangi Njoroge –Vs- Republic* (2017) eKLR.
187. The idea of filing written submissions is intended to save on judicial time and expedite disposal of cases.
188. In the Environmental and Land Court the ELC practice directions of 201 provide for filing of written submissions. Rule 33 implores the court to encourage parties to proceed by way of written submissions except in exceptional cases, in respect of all interlocutory applications. In any event however, parties are to present written submissions that summarize their argument, but which do not exceed 10 pages. A judge may however allow the filing of lengthy submissions owing to the nature of the case. In all cases submissions must be paginated.
189. In the case of *Lawi Duda & 21 others –Vs- Bamburi Cement Company Ltd* (2015) eKLR, the court of Appeal dismissed the applicant’s argument that limiting the length of written submissions was



unconstitutional. The Applicant had argued that by limiting a party in the length of submissions, the party's right to do a fair hearing was infringed. The court stated that.

“But even if we were to be charitable to applicants, we do not see how an order that an appeal be heard through written submissions or the setting of time for oral address by counsel, can possibly constitute a violation of the right to fair hearing. This is because Article 159 (2) (c) of *the Constitution* expressly recognizes the principle that justice shall not be delayed as one of the cardinal principles of judicial authority in Kenya. The order on written submissions and the setting of time for address by counsel are in our view legitimate devices for actualization of that important constitutional principle.”

190. In as much as there is no prescribed template as to the format of submissions the Court of Appeal practice directions (Civil Appeals and applications) are a good benchmark.
191. The directions in regard to written submissions provide some useful specifications. Written submissions must:
 - i. Contain a chronology of relevant events including any previous court history.
 - ii. Refer to the grounds of appeal being argued and indicate if any grounds are being abandoned or argued together.
 - iii. Identify any error or errors said to have been made by the Court appealed from and the basis in principle or authority for that contention.
 - iv. Where it is contended that a finding of fact should have been made or that a finding of fact which was made should not have been made, the basis for that contention should be set out by reference to the evidence.
 - v. Be set out in numbered paragraphs.
 - vi. Be cross-referenced to the relevant pages and passages in the Record of Appeal.
 - vii. Not include extensive quotations from documents or authorities.
192. There is no rule of the thumb on written submissions but brevity and precision should be some of the key considerations. After all, the target audience is the Judge or Magistrate whose judicial time is usually very constrained. Unduly long written submissions will defeat the very purpose they were intended to serve – the efficient use of court resources.
193. In summary therefore the court makes the following orders:
 - A. The Plaintiff's case is dismissed in its entirety.
 - B. The Defendant's Counter-claim is allowed in the following terms:
 - i. An order of eviction of the Plaintiff from the suit premises Soy/Soy/Block 10 (Navillus 1) be and is hereby issued. The Plaintiff is however, allowed a hundred and eighty (180) days, from the date of this judgement, within which period he shall vacate the suit premises by removing all his properties and developments on the suit premises, failing which he be evicted from the suit premises known as Title Number Soy/Soy/Block 10 (Navillus 1). The order of eviction shall be enforced by the Officer Commanding Station, Soy Police Station.



- ii. An order of perpetual injunction be and is hereby issued restraining the Plaintiff by himself, his agents, servants and/or employees from entering, occupying or in any manner interfering with the suit premises known as Title No. Soy/Soy/Block 10 (Navillus)1. This order shall be subject to the grace period of 180 days from the date of this judgement, granted the Plaintiff to vacate the suit premises.

C. Each party shall bear its own costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 23rd day of February 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mwihuri for the Plaintiff.

Mr. Rotich for the Defendant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

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