Sitienei & 4 others v County Executive, Environment Water Energy and Natural Resources & another (Civil Appeal E022 of 2020) [2024] KEHC 4848 (KLR) (26 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E022 OF 2020

JRA WANANDA, J

APRIL 26, 2024

BETWEEN

EMMANUEL SITIENEI ..... 1ST APPELLANT

SARAH NDINDA ..... 2ND APPELLANT

JAMES KOROS ..... 3RD APPELLANT

PHILIP KEMBOI ..... 4TH APPELLANT

HORSE WHEEL SELF HELP GROUP ..... 5TH APPELLANT

AND

THE COUNTY EXECUTIVE, ENVIRONMENT WATER ENERGY AND NATURAL RESOURCES ..... 1ST RESPONDENT

THE COUNTY GOVERNMENT OF UASIN GISHU ..... 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment delivered on 30/10/2020 in Eldoret Chief Magistrates Court Civil Case No. 388 of 2016. In the suit, the Appellants were the Plaintiffs whereas the Respondents were the Defendants.

2. The suit was first instituted as Eldoret Environment and Land Court No. 1 of 2015 vide the Plaint filed on 5/01/2015 before being subsequently transferred to the lower Court. In the Plaint, filed through Messrs Angu Kitigin & Co. Advocates, the Appellants pleaded that they are the Chairperson, Treasurer and Vice-Chairperson, respectively, of the 5th Appellant, an association established and registered with the Ministry of Culture, Sports and Social Services, that by written contracts obtained after open tendering, the predecessor to the Respondents (Eldoret Municipal Council) offered under a Public-Private Partnership in the development of the environmentally, friendly public toilets to be developed by the private investor at its own cost and to operate it till full recovery of the investment and hand

over the project to the Respondents after a term of not less than 15 years, that the Appellant did tender for the development of environmentally friendly public toilets on the public private partnership and was commissioned to develop the same at the western stage herein called "Tagore Public Toilets" along the Eldoret-Webuye Road, that the project was jointly valued and bills of quantities obtained wherein the project was agreed to cost the Appellant/private investor Kshs 712,370/- excluding labour charges, that the Appellants obtained a loan from the Co-operative Bank of Kenya for Kshs 2.5 Million and invested the loaned sum in the project as concessioned and had the toilets done within 12 months of concessioning.

3. It was pleaded further that the Appellants sought to operationalize the project but realized that the same could not be commercially viable without the supply of utilities of water, electricity and sewerage which required further expenditure to be installed and supplied, that the predecessor to the 2nd Respondent wrote to the Eldoret Water and Sanitation Company for a quotation on how much it would cost to instal the sewerage, that the same was given as project cost (Kshs 712,370/-), installation of sewerage(Kshs 611,500/-), installation of electricity power (Kshs 120,000/-) and installation of water (Kshs 15,000/-). According the Appellants, they incurred that cost as the Eldoret Municipal Council did not have finances.

4. The Appellants pleaded further that on completion of the project, the predecessor to the Respondents issued the Appellants with a Certificate of Completion, Notice of Completion and a Certificate issued on 18/07/2007 for occupation and usage, that as the toilets were located at Lorry Park, outside the Central Business District, the public toilets took a long time to take off till the western bound matatus were moved to the previous trucks perk along Uganda Road to attract reasonable business, that by a notice dated 15/12/2014 and served on 31/12/2004 titled "termination of contract – all public toilet operators", the 2nd Respondent terminated the Plaintiff's Public-Private Partnership unilaterally and without having regard to the internationally acceptable procedures of terminating a partnership.

5. The Appellant therefore accused the Respondents of breach of contract and gave particulars as the Respondent failing to provide the Appellant with any notice of intention to terminate, failing to take accounts on the project, disregarding the partnership unilaterally, and disregarding the rules of natural justice. The Appellants claimed that were the contract to be determined prematurely, the group was likely to suffer loss and damage for the capital investment, cost of electrical installation, sewerage installation, cleaning and fumigation and improved site value for the investment. The Appellants stated that they will in lieu of the private-partnership agreement be seeking a refund of the expenditure on the project, loss of expectation of earning and any other loss incurred on the implementation thereof, and that the 1st Appellant did an appeal to the County Executive for reconsideration of the decision or opportunity to be heard but to no avail.

6. In their prayers, the Appellants sought entry for Judgment as follows:

    a. An order of declaration that the Respondents' notice dated ... is unconscionable.

    b. An order of declaration that the notice as issued is too short and in breach of Article 47 of *the Constitution* of Kenya.

    c. An order of declaration that the Public-Private Partnership is still subsisting and can only be dissolved by consent of both parties.

    d. An order of declaration that the notice infringes on the Plaintiff's right to own property contrary to Article 40 of *the Constitution* of Kenya.

e. In the alternative, an order for damages for breach of contract as pleaded in paragraph 8 above and a refund of the expended amount.

f. Any other order the Court may deem fit to grant.

g. Costs of this suit.

7. In its Statement of Defence filed on 1/11/2017 through Messrs Gumbo & Associates Advocates, the Respondents pleaded that there is no binding or enforceable contract between the parties and there has never been any Public-Private Partnership Agreement between them, that the notice issued to the Appellant was not with respect to termination of a Private-Public Partnership but rather, notification of termination of the contract with the defunct Municipal Council of Eldoret by effluxion of time, that the alleged contract between the Municipal Council and the Appellants provided at Clause 2 that the contract was for a period of 3 years and was to terminate by effluxion of time by 1/07/2013, that the contract was terminated by contractual provisions hence no reasonable cause of action can be founded against the Respondents, that the Respondents have therefore not breached any contract with the Appellants and that if the Appellants have suffered any loss, then the same cannot be attributed to the Respondents.

8. It was further pleaded that the Appellant is actuated by a mischievous intention by the Appellants to justify themselves to unjustly enrich themselves at the expense of tax payers, that the suit is actuated by an attempt by the Appellants to introduce extraneous terms into the contract, that parties to a contract are strictly bound by their agreed terms and the Plaintiffs should not abuse the process of this Honourable Court to alter the duration of the contractual relationship, that the subject facilities are currently under the operation of the interested party having been successful in a tendering process hence its interests should equally be protected, that the suit is an afterthought by the Appellants as can be gleaned from the fact that they never challenged the tendering process, that the Court is not vested with the requisite jurisdiction to hear and determine the matter due to the public procurement issues involved which fall under the purview of the Public Procurement Administrative Review Board.

9. After a series of interlocutory Applications and determination, including questions on whether the suit should be referred to Arbitration and whether the matters raised belonged to the Public Procurement Administrative Review Board, the suit eventually proceeded to trial. The Appellants called two witnesses while the Respondents called one.

10. PW1 was the 1st Appellant, Emmanuel Sitienei. He recounted the Appellants' case, adopted his Witness Statement and also produced the Appellants' supporting documents. In cross-examination, he stated that he is the one who signed the contract on behalf of the Group, that the contract was for 3 years, that they were to pay rent of Kshs 20,000/- per month, that in December 2014 he was informed that the contract had lapsed, and that he did not apply for extension. In re-examination, he stated that the contract referred to the same as Private-Public Partnership and that they invested money to put up the public washroom.

11. PW2 was one Peter James Kariuki who was called as a Valuer and produced a Valuation Report for the public washroom facility.

12. For the Respondents, one Kennedy Mutai Serem, a Legal Counsel at the County Government of Uasin Gishu testified as DW1. He adopted his Witness Statement and also produced the Respondents' supporting documents. He then stated that the contract was for 3 years, from 1/07/2010 to 1/07/2013, that there was no application for extension and that the termination notice was issued on 15/12/2014 because the Appellants did not hand over. In cross-examination, he stated that the facility was not leased on a public-private way although it talks of being leased under public-private partnership,

that the developments made by the Appellants were for their own benefit, that he does not have the accounts for the project, that the contract had its own timelines, and that although the Appellants were invited to tender, they never did so. In re-examination, he stated that there was no partnership between the parties but only a lease upon payment.

13. After trial, the Court delivered its Judgment on 30/10/2020 dismissing the suit with costs to the Respondents. Aggrieved by the decision, the Appellants filed this Appeal vide the Memorandum of Appeal filed on 13/11/2020. 9 grounds of Appeal were preferred as follows:

    i. That the learned trial Magistrate erred in law in failing to make a finding that there is a public private partnership.

    ii. That the learned trial Magistrate erred in failing to make a finding that the partnership has never been dissolved.

    iii. That the learned trial Magistrate erred in failing to make a finding that the Plaintiffs/Appellants had not recouped his investment from the partnership.

    iv. That the learned trial Magistrate erred in law and in fact in making a finding that the contract of lease had expired – when in fact the totality of the undertaking was more than a lease

    v. That the learned trial Magistrate failed to appreciate the nature, structure and import of a public private partnership hence arriving at an erroneous judgment.

    vi. That the learned trial Magistrate erred in failing to realize that a partnership is dissolved by taking of accounts and not by one party forcefully kicking out another

    vii. That the Judgment seeks to authorize deprivation of property without compensation contrary to Article 40 of the new Constitution of Kenya 2010.

    viii. That the judgment/ruling is a threat to private public partnerships that are grounded upon major Investment projects world over.

    ix. That the trial Court erred in failing to distinguish between a private public partnership as contracted under law and the periodic leases that derive from it.

Hearing of the Appeal

14. It was then agreed, and I directed, that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed its Submissions on 1/03/2024 while the Respondents filed on 13/03/2024.

Appellants' Submissions

15. In his lengthy 20-page Submissions, Counsel for the Appellants recounted the Appellants' case before the trial Court and the background thereof and submitted that the public private partnership tenders now regulated by the Public Private Partnership Act 2015 are to be negotiated and registered by a committee at the Public Private Partnership Secretariat, and that on tendering, the process fell within the *Partnerships Act*, Cap. 29. He then cited Section 39 which regulates dissolution of partnerships and submitted that the Respondents' notice dated 15/12/2014 did not wind up the Public Private Partnership (hereinafter referred to as "PPP").

16. Counsel urged that one party to a partnership cannot wind it up without the consent of the other and that this is why the law created the window for Court mandated winding up, that the purpose of the winding up process is to enable the parties establish an inventory of assets, obtain list of creditors

and debtors and prepare a trial balance, all based on the contribution donated by each partner and it is upon taking of accounts that the parties agree on the settlement of accounts and transfer of assets, that the tendering process was controlled by the Respondents and the Appellant was not accorded legal assistance to protect and have built in it their interest, that the Appellant had obtained credit and developed the facility which remains partnership property till the accounts are taken, that the trial Court erred in holding that the partnership ended with the re-tendering as it flies in the eyes of the law of partnerships, that the 30 years old leasehold had not expired under Section 21 of the PPP Act, that the project was developed over a period of 24 months and was commissioned on 21/06/2007, that it went into operation after cobbling up Kshs 1,524,370/. Counsel then at length gave a description of the works and investments that it has put into the project, including those, such as electricity, water and sewerage services, which, he claimed, ought to have been done by the Respondents but since the Respondents either did not have the funds or were unwilling to do so, the Appellants incurred by themselves.

17. He submitted that under the PPP Act 2013, PPP has 3 components, namely, build-operate-transfer, that the predecessor to the Respondents issued a notice of completion of a building by the letter dated 21/06/2007 and issued an operationalized licence on 17/07/2007, that a project only starts paying back on investment when an investor recovers the investment capital used, that the 1st phase of operationalization was a lease term of 3 years expiring in 2010, that a further lease of 3 years was awarded in the year 2010 when a new dispensation came into force creating the Respondent as a successor in title to the Eldoret Municipal Council, that the Respondent never understood the meaning and purpose of PPP and hence purported to terminate the contract by way of tender, that the transfer phase was managed under the *Partnerships Act*, Cap. 29, that the Appellants effectively started running the project in August 2007, that it was realized that the human traffic frequenting the toilets was low as the project was at an isolated site far away from the Central Business District, that the western bound matatus had yet to be moved to the site and was relocated there only in 2008. He submitted further that under Section 29 of the *Partnerships Act*, no majority of the partners can expel any partner unless a power to do so has been conferred by express agreement, that the failure by the Respondents to close the partnership as required under the provisions of the Act exposes the Appellant to future litigation upon a contract not lawfully wound up.

18. He contended further that even in cases where there is no express requirement that a person be heard before a decision is made, the authority or public body entrusted with the mandate of making the decision must act fairly, and that in this case, procedural fairness was not applied. He then cited various authorities and also Article 47 of *the Constitution* on the issue of fair administrative action. He further argued that during operationalization a developer is given term leases that are not terminal to the project in nature, that these are meant to allow the public body to account for the project and obtain rental fees on the land utilized, that conversely, the developer keeps the operating expenses and further is to recoup the cost invested in the project plus some descent interest on top, that the Respondents having conceded that the business is a partnership, the applicable provision for dissolution is Section 39 of the *Partnerships Act*, that the contract is now fortified by Schedule 2 Clause 7-11 of the PPP Act 2013, Section 62 and 63 where the specified term is 30 years, that the intention of the parties must be read throughout the contract to give effect to the terms, that the purpose was meant to enable the private party recoup his investment and earn interest and a profit from the project, that the Respondent being a public body, had the upper hand in negotiating and drafting, that the subsequent lease to the third party – Sqclean Professional Limited – demonstrates a similar failing in drafting but captures the PPP Act concept, that the Respondents have been earning Kshs 672,000/- per year for the last 6 years without dissolving the partnership, and that this amount is therefore partnership funds amounting to Kshs 4,032,000/- which should be factored in the dissolution agreement.

19. Counsel also submitted that by the termination of the contract, the Appellant was left helpless with a loan to service, that the Respondents' argument that the Appellant was not obligated to finance the construction of the project is a contradiction, that the Court should order that the partnership be wound up and accounts taken to establish what is due to each party, that the Court do order a reimbursement of income earned unilaterally by the Respondents, namely, rental fees earned at Kshs 56,000/- x 6 x 12 = Kshs 4,032,000/- less rental fees due on contract at Kshs 720,000/- leaving a balance of Kshs 3,312,000/-. He added that termination of the contract did not entitle the Respondents to the capital gains as they had not invested in the business, that termination only constituted an end to the leasing contract and not a winding-up of the partnership created under the "build-operate-transfer" concept, that the Appellant being a diligent partner has prepared and filed the Annual Report and Statements of Accounts that should form the basis of the dissolution. He then cited a case, namely, Mochan v Omega Oil and Gas Ltd & Others (1988) LRC which he described as a case from the Supreme Court of Canada in which that Court ruled that a party to a partnership cannot appropriate the assets to a partnership to himself or others without the authority of the partnership.

Respondent's Submissions

20. On his part, in a brief and precise Submissions, Counsel for the Respondents submitted that the relationship that existed between parties was a lease and not a PPP as alluded by the Appellants, that the contract dated 1/07/2010 clearly stipulated this and the Appendix A provided for terms of reference and scope of services provided under clause 2, that at no point in time did the contract stipulate the engagement to be one in the nature of the of PPP and this was confirmed by the 1st Appellant during cross-examination, and who also confirmed that the contract was for 3 years and that they did not apply for renewal when that duration lapsed, that the parties are bound by the contents of the contract that they mutually negotiated and agreed. He cited the case of National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A. 503, [2001] eKLR and also the case of Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017] eKLR and submitted that in this case, no allegation of fraud and/or undue influence has been made, that there was no provision for a PPP and this Court should reject the invitation by the Appellants to make a finding on it when it never existed in the first place, that the finding of the Court was proper as the contract was a fixed contract i.e. from 1/07/2010 and continuing through 1/07/2013, and that the same lapsed upon effluxion of time. He cited the case of Josephat Rubia Oyangi v Kenya Education Management Institute (KEMI) [2018].

21. Counsel submitted further that the contract did not contain a provision for recouping of profits within the contract period and that this is an attempt to contradict the purpose of the written contract through extrinsic evidence which offend the parole rule. He cited the case of Urbanus Kyalo Wambua v Brigitta Ndila Musau [2019] eKLR cited in an excerpt from Chitty on Contract 29th Edition, Vol. 12. On burden of proof, Counsel cited Section 107 of the *Evidence Act* and also the case of Anne Wambui Nderitu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 as cited in Mourine Mukonyo v Embu Water and Sanitation Company [2020] eKLR and submitted that no evidence was presented to demonstrate that the contract was a PPP.

Determination

22. As reiterated in a plethora of cases, this being a first appellate Court, its role is to evaluate, re-assess and re-analyze the evidence before the trial Court and draw its own conclusions. In the case of Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212, for instance, the following was stated:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that

it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

23. In the circumstances, upon examination of the Record, including the Submissions presented, I find the issues that arise for determination in this Appeal to be the following:

    i. Whether the contract herein fell within the Public Private Partnership Act and the Partnership Act, including on duration, termination or dissolution, or whether it was an ordinary 3 year fixed-term contract or lease which was to end by effluxion of time.

    ii. Whether therefore the contract was unlawfully terminated and whether as a consequence, it should be declared that the contract is still subsisting

    iii. Whether, in the alternative, the Appellants should be granted compensation for breach of the contract or for refund for investments made to the facility.

24. Regarding the first issue, the Appellant's case before the trial Court was that the Respondents unilaterally and without giving the Appellant a hearing, terminated the Public-Private Partnership contract entered into by the parties on 1/07/2010 and thus committed a breach of contract. The Appellant argues that the contract between the parties was governed by the Public Private Partnership Act 2013. I understand the Appellant to be advancing this argument because if accepted, then termination of the contract would require to have been effected under the provisions of that Act and would be required to comply with the conditions and stipulations in that Act. Of course, this will be to the benefit of the Appellant since it is likely to invalidate the termination already effected herein by the Respondents.

25. In their response, the Respondents contended that the notice issued to the Appellant was not a termination of a Public Private Partnership contract but rather, notification of the end of an ordinary 3 years fixed term contract which had ended by effluxion of time.

26. The contract in contention herein is a basic, simple straightforward agreement containing only 10 paragraphs written in clear and simple English language. The rest of the document consists of Appendix A which deals with the terms of reference and scope of services and tenant's obligations and Appendix B which deals with cost estimate of expected renovations, list of personnel and schedule of rates. One would not therefore ordinarily imagine that interpretation of such a simple contract would turn out to be the basis for such heated and protracted battle fought in Court for this long. Be that as it may, this litigation confirms that no matter how precise drafters of legal documents may try to be, interpretation will always remain a constant point of dispute.

27. Coming back to the *Public Private Partnerships Act* 2021, under its interpretation provisions, namely, Section 2, it defines a "public private partnership" as follows:

    " means a contractual arrangement between a contracting authority and a private party under which a private party—

    a. undertakes to perform a public function or provide a service on behalf of the contracting authority

    b. receives a benefit for performing a public function by way of—

        i. compensation from a public fund;

ii. charges or fees collected by the private party from users or consumers of a service provided to them; or

iii. a combination of such compensation and such charges or fees

c. is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement; and

d. transfers the facility to the contracting authority;"

28. Public private partnerships (PPPs) are now being more frequently adopted in the country in an attempt to mitigate the so called "infrastructure gap". In regard thereto, and in line with Article 227 of *the Constitution*, the *Public Private Partnerships Act* 2013 was enacted. However, due to inadequacies in the Act, operating within it turned out to be lengthy, costly, tedious and inefficient and the processes and procedures stipulated became impractical. In the circumstances, the Act was repealed and replaced with the *Public Private Partnerships Act* 2021.

29. In this case, the contract was entered into on 1/07/2010, 3 years before the now repealed *Public Private Partnerships Act* 2013 was even enacted. From this perspective alone, the Act not having being in existence at the material time, it cannot at all be said that the parties entered into the contract with any contemplation of the Act. Needless to state therefore, the contract could not have made any mention of the *Public Private Partnerships Act*.

30. Although I appreciate and agree that even before enactment of the 2013 Act, the public private partnerships concept was already widely in use in Kenya and many contracts had been executed under such arrangement, and although clearly the arrangement between the parties herein was one based on such public-private partnership understanding, the contract herein cannot be said to have been specifically entered into pursuant to the Act in the manner alluded by the Appellants. The Act came much later and there is no suggestion that the same was to operate retrospectively or retroactively. It will therefore be absurd to interpret and construe the contract under the provisions of the Act.

31. In any event, looking at both the 2013 and 2021 Acts, there are elaborate conditions, steps and requirements that must be met and adhered to before a contracting authority (the Respondents in this case) can enter a valid contract under the Acts. The Act not having been in existence at the material time, these prerequisites could not have been contemplated or met during execution of the contract thereby lending credence to the conclusion that the contract was at no time governed by the Act.

32. Further, both Acts contain express alternative dispute resolution mechanisms which must be followed before any aggrieved party seeks recourse in Court. Both Acts establish an organ known as the Petition Committee which "shall hear and determine petitions regarding any decision by the Committee, Directorate or a contracting authority under this Act" and an application to the Petition Committee must be made within 7 days from the date of the impugned decision. It is only after the Committee has rendered its decision that a party aggrieved by that decision may then approach the High Court by way of Appeal. Therefore, even assuming that the contract was governed under the PPP Acts, the Appellant would have been adjudged to have come to Court prematurely and would not have been entertained.

33. In view of the foregoing, I agree with the Respondents' Counsel's argument that the relationship that existed between the parties was an ordinary contract, in fact a lease, and was not one that was to regulated under the PPP Acts. It is true that the idea behind the arrangement was definitely one under the PPP concept since the Appellant was to create and operate the facility for a specific duration, make its profit during that period and then hand it over to the Respondents. However, in their wisdom, the

parties expressly fixed this period at 3 years duration. The Appellants' statement made in the Plaint that the Appellants were to hand over the facility after not less than 15 years is therefore a strange one since it is not borne out of the terms of the contract. Accepting such an argument will be to introduce extraneous terms into the contract to alter the expressly fixed duration of the contractual relationship. I therefore agree with the trial Magistrate that the engagement was an ordinary contract commencing on 1/07/2010 and was for a fixed 3-year term. The contract not having been extended, it came to a natural end on or about 1/07/2013 by effluxion of time. Indeed, in his testimony, PW1 readily conceded to all these facts.

34. The Appellant also correctly argued that a project such as the one herein only starts paying back on investment when the investor recovers the investment capital used. The Appellants however then follow with the strange argument that because of the above, the 1st phase of operationalization of the contract herein was a lease term of 3 years expiring in 2010 and that a further lease of 3 years was awarded in the year 2010 because a new dispensation came into force creating the Respondents as a successor in title to the Eldoret Municipal Council. I find this to be a perfect example of a desperate but poor attempt at crafting and introducing totally extrinsic terms into an express written contract. The argument is not borne out of the contract and has no basis at all. I wholly reject it.

35. At some point in his Submissions, Counsel for the Appellant, perhaps inadvertently, let it out that the Respondents, being a public body, had the upper hand in negotiating and drafting the contract. It is therefore evident that the Appellants appreciate that the arguments advanced by them were never captured in the contract and that the same amount to an attempt at introducing extrinsic terms into the contract. If the Appellants voluntarily and knowingly entered into a skewed contract, under what provisions of the law will the Court "re-write" the contract for them? Considering that the contract was executed in July 2010, why did the Appellants only find it necessary to challenge it after being notified of the end of the contract in December 2014, more than 4 years later? Unfortunately for the Appellants, in law, parties are bound by the terms of the contract as they are presumed to have mutually negotiated and agreed upon.

36. I am also persuaded by the Respondents' submissions that the facility is currently under the operation of a third party, such party having been the successful bidder in the tendering process that was advertised and conducted after the Appellants' contract herein ended. The Appellants never participated in the tender and never challenged it in any known tribunal. The Appellants have not alleged that they were not aware of the advertisement of the tender or the awarding of the same to the successful bidder. If by any chance therefore the Appellants had any lawful claims, then they squandered the opportunity to raise the same when they failed to act when the tender was floated and even up to the time when it was awarded. By their conduct and inaction, the Appellants are clearly estopped from raising any belated challenges. In the circumstances, the Appellants' contention that the contract is still subsisting cannot be a serious one. Consequently, I am also persuaded by the Respondent's defence that the suit before the trial Court was an afterthought by the Appellants.

37. Having made the finding that the agreement dated 1/07/2010 was an ordinary 3-years fixed term contract, the Appellant's contention that the dissolution of the same was subject to or governed by the *Partnerships Act*, Cap. 29 also does not now arise.

38. In any event, the *Partnerships Act* that was in force at the time when the contract herein was entered into was the now repealed *Partnerships Act* 2012. In its interpretation provision at Section 2, it defines "partnership" and "partnership agreement" in the following terms:

> " partnership" means the relationship which exists between persons who carry on business in common with a view to making a profit;

"partnership agreement" means an agreement between, persons carrying on business in common with a view to making a profit;

39. From the nature of the contract that the parties entered into, I am not at all persuaded that it can be said that the parties were "carrying on business in common with a view to making a profit" within the meaning contemplated under the Partnership Act. This was not a "business in common" since the Respondents only leased the portion of the parcel of land to the Appellant and it is the Appellant who was to solely carry on the business on its own. The Appellant's obligation was to develop the land by rehabilitating the public toilets at its own cost and then offer services to the public at a fee. In return, the Appellants were to pay rental fees to the Respondents. For all intents and purposes, what the parties entered into was a modified lease agreement and they cannot be said to have entered into the kind of Partnership covered under the *Partnerships Act*.

40. Further, the key characteristics required of a Partnership as set out in the Act are absent in the contract herein. For instance, under Section 7 of the repealed Act, a Partnership is one that can sue and be sued in its own capacity, enter into contracts and own/hold property. Can the parties herein be said to have formed one entity capable of suing or being sued or entering into contracts or owning properties? Of course not.

41. Again, ordinarily, a Partnership as contemplated under the *Partnerships Act* would be codified in the parties' written agreement referred to as the "Partnership Deed". Partnership businesses are then registered under the *Registration of Business Names Act*, Cap. 499 and the Partnership Deed is necessary for this purpose. The absence of registration under the *Registration of Business Names Act*, and also the absence of a Partnership Deed lends further credence to the conclusion that what the parties had was never one that was contemplated to fall within the meaning of the *Partnerships Act*.

42. I therefore also reject the Appellants' contention that the contract herein ought to have been wound up or dissolved under the provisions of the *Partnerships Act*.

43. I now turn to consider the remaining issue, namely, whether as a consequence of the end or termination of the contract, the Appellants should be granted compensation or refund for the investments that they made on the facility the subject of the contract.

44. It is evident from the contract that the rehabilitation and improvement of the facility was to be carried out by the Appellants solely at their own cost. I have keenly perused the contract and I find no term or provision thereof providing for any kind of payment to be made to the Appellants upon termination or conclusion of the contract. The whole idea behind the contract was for the Appellants to operate the facility for a period of 3 years, pay rental charges to the Respondents during that period and keep as their profits any further income collected. There was no term providing that the Appellant must recoup its investments or must make a profit or that the Respondents would compensate the Appellant in the event that the Appellants did not recoup its investments. As found by the trial Magistrate, business is a speculative venture and depending on many variables, one may at times make handsome profits but on other occasions, may also suffer humbling losses. That is the nature of business and the business venture herein was no exception.

45. I agree with the Respondents that the rehabilitation, investments and improvements made by the Appellant to the facility were for the purposes of the Appellants making the facility more attractive for their targeted clientele. This is because the Appellants were to rehabilitate the facility at their own cost. Before putting in such investments, it is expected that the Appellants carried out proper research and/or commissioned a feasibility study whose verdict convinced them that despite the cost of such investments, they would still make a reasonable profit. If the Appellants had any doubts or uncertainty,

then before putting in the investments, they ought to have first secured express commitment from the Respondents confirming that the Respondents would refund the Appellants or compensate them for the value of the investments in the event that the Appellants failed to recoup the said costs during the duration of the contract.

> " ..... It is also clear that the defendant cannot seek to present extrinsic evidence when her relationship with the plaintiff is already spelt out in the written agreement. In the book by Treitel entitled 'The law of contract' the learned author discussed parol evidence rule as follows:
>
> "The parol evidence rule states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, i.e on evidence not contained in the document. Although the rule is generally stated as applying to parol evidence, it applies just as much to other forms of extrinsic evidence. Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents."

The defendant is forbidden by that rule from introducing, as she does in her defence and counter claim, verbal representation to alter written agreement. This was also the holding in the case Muthuuri Vs National Industrial Credit Bank Ltd [2003] KLR 145 where the court held as follows:

1. The history preceding the execution of a contract and any discussions or assurances in that regard are superseded by the subsequent written contract which becomes the exclusive memorial of the parties' agreement.

2. No extrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of the document."

46. As observed above, admission of extrinsic evidence offends the parole evidence rule. In view of the foregoing, I once again find that accepting the Appellant's plea for compensation will be to contradict the very purpose of the parties having entered into a written contract in the first place.

Final Orders

47. In the end, this Appeal fails and is dismissed in its entirety with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF APRIL 2024

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WANANDA J.R. ANURO

JUDGE