



**Kiplagat & 3 others v Mega East Africa Limited (Civil Appeal  
434 of 2018) [2025] KECA 2258 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2258 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 434 OF 2018  
M NGUGI, DK MUSINGA & F TUIYOTT, JJA  
DECEMBER 19, 2025**

**BETWEEN**

**ISAIAH KIPLAGAT ..... 1<sup>ST</sup> APPELLANT  
JOAN CATHERINE KIPLAGAT ..... 2<sup>ND</sup> APPELLANT  
MOSES KIPLAGAT ..... 3<sup>RD</sup> APPELLANT  
ROYAL HEALTH FITNESS ..... 4<sup>TH</sup> APPELLANT**

**AND**

**MEGA EAST AFRICA LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Ngetich, J.) dated 29th September 2017 in HC Commercial and Admiralty Division Civil Case No. 99 of 2007)*

**JUDGMENT**

1. In its judgment dated 29<sup>th</sup> September 2017, the High Court (Ng'etich, J.) found in favour of the respondent and made an award for refund of Kshs 3,761,868.30 to the respondent by the appellants, comprising refund of goodwill of Kshs. 2,750,000, refund of rent of Kshs. 900,000 and refund of Kshs. 111,868.30 being electricity arrears paid by the respondent.
2. The basis of the award was that the appellants had made misrepresentations to the respondent which had induced it to enter into a contract for sale of a health and fitness club business and assets; and a lease of the premises on which the business was situated. The court further found that the appellants had frustrated the contracts between them and the respondent, and that the respondent was not in breach of the contract between the parties.
3. Aggrieved by the decision, the appellants filed the present appeal in which they raise 7 grounds of appeal in their memorandum of appeal dated 30<sup>th</sup> November 2018. They impugn the judgment on the grounds that the learned judge erred in law and fact: in joining the directors of the company as



defendants; misdirected herself by unilaterally framing her own issues for determination and thereby lifted the corporate veil of the 4<sup>th</sup> appellant, leading to a finding that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were personally liable; in finding that there was a misrepresentation on the part of the appellants that led to the frustration of the contract; in finding that the respondent did not breach the contract and was entitled to refund of the moneys paid to the 4<sup>th</sup> appellant; in finding that the invitation to treat referred to the sports complex only and not the grounds, which were not part of the space being leased out; and failed to exercise her discretion properly and judiciously in considering the appellants' case and to have due regard to the appellants' pleadings and submissions, and the facts, evidence and authorities in support thereof; and failed to do justice as regards the suit before her and accordingly erred in law by granting the orders that she did.

4. The appellants asked this Court to allow their appeal and set aside the judgment of the trial court; and to grant them the costs of the suit in this Court and the trial court.
5. In considering this appeal, we bear in mind our mandate as a first appellate court as enunciated in the case of *Selle and Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123, which is to evaluate the evidence before the trial court and draw our own conclusions of fact and law. In doing so, we bear in mind that we have neither seen nor heard the witnesses, which the trial court did. Further, we will depart from the findings of fact by the trial court only if they were not based on evidence on record; where the said court is shown to have acted on the wrong principles of law as was held in the case of *Jabane vs Olenja* (1986) KLR 661; or where its discretion was exercised injudiciously, as was held in the case of *Mbogo & another vs Shah* (1968) EA 93.
6. The background to the dispute between the parties as it emerges from the pleadings is fairly straightforward. By an advertisement placed by Manpower Services Limited on behalf of the 4<sup>th</sup> appellant, whose directors were the 1<sup>st</sup> appellant (deceased) and the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, the appellants offered for sale a business known as Royale Health Club and a restaurant, operated by the 4<sup>th</sup> appellant on L. R. No. 1160/381 Karen. The advertisement indicated that the business comprised a 'Restaurant, bar, swimming pool, gym, sauna, large park suitable for wedding receptions, children's playground, conference facility, standby generator, borehole, large parking space and extra space for development of residential rooms.'
7. The respondent responded to the advertisement by a letter dated 20<sup>th</sup> August 2006 from its advocates, Ojiambo & Co., and made an offer, which was accepted by the appellants by a letter from their Advocates, Kiage & Co, dated 23<sup>rd</sup> August 2006. Following further negotiations, a contract dated 10<sup>th</sup> November 2006 was entered into between the parties. The terms of the contract were that the appellants would sell and transfer the business and goodwill to the respondent; the respondent would take, on hire, all the assets of the business which were listed in a schedule annexed to the agreement; and that the consideration for the sale of the business, goodwill and hire of all the assets was agreed at Kshs. 2,750,000.
8. Additionally, a lease was entered into between the 1<sup>st</sup> appellant, the registered owner of L. R. No. 1160/381 Karen, for a 15- year lease of the premises on which the health club stood and the surrounding grounds, with the exception of a portion, demarcated by a cypress fence, on which the appellants' residential house stood.
9. Pursuant to these agreements, the respondent paid the amount agreed for sale of the business, hire of assets and good will of Kshs. 2,750,000 and rent of Kshs. 1,200,000, comprising three months' rent deposit together with advance rent, and was given possession of the premises on 10<sup>th</sup> November 2006 to commence operations.



10. Things went wrong, however, on the day of hand-over of the business and leased premises. According to the respondent as alleged in its plaint dated 20<sup>th</sup> February 2007, trouble started on the same day that it was given possession. On the evening of that day, the 2<sup>nd</sup> respondent and her daughter, Betty Kiplagat, went into the leased premises and took out some of the items that had been listed in the schedule of assets for which the respondent had paid; that the appellants also refused to relinquish the servants quarters which were part of the premises leased to the respondent; that the appellants declared that the grounds surrounding the business did not form part of the premises leased to the respondent; and that there was no agreement for the respondent to construct additional rooms on the grounds as had been agreed in the lease.
11. The respondent averred that a meeting was held on 23<sup>rd</sup> November 2006 in an attempt to resolve the dispute, with a follow-up meeting scheduled for 1<sup>st</sup> December 2006, to which, according to the respondent, the appellants did not appear. Accordingly, on 2<sup>nd</sup> December 2006, the respondent vacated the premises, asserting that the agreements were effectively terminated due to the appellants' misrepresentations and failure to deliver what had been promised. It thereafter filed the suit the subject of this appeal in which it sought declarations that there was total lack of consideration for, and refund of monies paid by the respondent to the appellants on account of goodwill, sale of the business, hire of the assets and rent.
12. It further prayed that it be discharged from the lease following the mutual agreement reached on 21<sup>st</sup> November 2006; refund of all interest and charges paid by the respondent to Co-operative Bank of Kenya Limited on account of a loan of Kshs. 5,000,000 for the purchase of the business and lease of the premises; and for the sum of Kshs. 4,076,868.30 with interest thereon from 10<sup>th</sup> November 2006 until payment in full, and for the costs of the suit.
13. In their statement of defence dated 25<sup>th</sup> April 2007, the appellants admitted various elements of the respondent's contentions with respect to the transaction between them: that they had agreed to sell the health club business to the respondent; that they had agreed on the goodwill, the lease term and the rent for the grounds, and for the hire of assets used in the business.
14. They denied, however, that they had made any misrepresentation to the respondent and maintained that all material particulars were known to the respondent before the contract. They contended that the newspaper advertisement and related communication through Manpower Services (K) Ltd were invitations to treat, not binding offers or warranties; that the respondent inspected the premises before takeover; and that the written agreements captured the true bargain. They further denied that the gardens surrounding the business premises had been included in the agreements between them and the respondent; denied that the 2<sup>nd</sup> respondent and her daughter had frustrated the takeover of the business; and asserted that the respondent had abandoned the business and failed to pay rent, which amounted to breach of contract and disentitled it to a refund.
15. They further alleged that they had a set-off against the respondent for Kshs. 943,767 for stock taken out; and alleged being owed a further amount of Kshs. 7,368,000, though it was not indicated in the defence what the amount was in respect of.
16. At the hearing of the matter, the respondent called 5 witnesses.

Samuel Muhindi (PW1), was the Managing Director of Manpower Services (K) Ltd. His testimony was that his company had been appointed by the 4<sup>th</sup> appellant to advertise a hotel in Karen for sale of business; that he had been shown the premises by the 1<sup>st</sup> appellant and he advertised it in the newspaper as instructed, and the advertisement had all the particulars as given to him by the 1<sup>st</sup> appellant. It was his testimony that the respondent was among those interested, and that it made an offer of Kshs. 2,750,000



for the assets and good will; and for a 20-year lease at a monthly rent of Kshs. 200,000. Mr. Muhindi testified that he accepted the offer after discussing it with the 1<sup>st</sup> appellant.

17. He stated in cross-examination that the space available for lease was disclosed in the sketch map; that he personally visited the premises and was shown the limits of the premises to be leased; that the domestic servants' quarters and the surrounding gardens were not to be left out; and the space behind the servants' quarters was to be let out subject to discussion of terms. It was his testimony that the respondent visited the premises and was shown around by the appellants' Manager, one Mbugua; and that he and the respondent visited the premises together a second time. He later learnt that a dispute had arisen with respect to the leased premises.
18. Aldrin Ojiambo, the advocate acting for the respondent, testified as PW2. His testimony was that he had been contacted by the respondent to negotiate the transaction between it and the appellants. He contacted the appellants' lawyer and together, they visited the premises, and one Mbugua showed them the business for sale and premises for lease. He learnt that the owner of the hotel stayed in the premises, and that apart from the owner's house, which was demarcated by a cypress fence, and a vegetable garden and chicken house, the rest of the property was to be leased out.
19. It was his evidence that under clause 4.34 of the lease, the respondent was permitted to develop additional buildings on the premises; and that the appellants would repay Kshs. 2.5 million on expiry of the lease. Mr. Ojiambo testified that a business sale agreement was executed by the parties, under which the respondent was to pay Kshs 2,750,000 for good will, existing customers, licences for operating the hotel, stock in trade and assets of the business. He stated that he prepared a notice of transfer of business, but the transfer was not done due to disagreement between the parties.
20. He further testified that the respondent took over the business on 10<sup>th</sup> November 2006 and the following day, he received information that a disagreement had arisen between the 2<sup>nd</sup> appellant, her daughter, Betty Kiplagat and the respondent. He scheduled a meeting for 23<sup>rd</sup> November 2006 which was attended by the respondent and the appellants and their lawyers. That it emerged at the meeting that disagreement had arisen as the parties had not agreed on lease of gardens; that some assets had been carried out of the hotel on claims by the appellants that they were not part of the contract; and that the 2<sup>nd</sup> appellant had used the bar at the restaurant without paying or used a credit card under which money would go to the 1<sup>st</sup> appellant's bank account. Further, that it turned out that assets in the hair salon were owned by a 3<sup>rd</sup> party who was taking them away; and that many new issues which had not been disclosed emerged.
21. Mr. Ojiambo testified that an attempt was made to reach an amicable settlement but the parties could not agree as the appellants were asking for 900,000 for stock in trade while the respondent was offering Kshs. 100,000. According to Mr. Ojiambo, it was clear, at the close of the meeting, that the appellants did not intend to continue with the agreement. The respondent therefore wrote to the 4<sup>th</sup> appellant on 30<sup>th</sup> November 2006 seeking a refund of Kshs. 1.2 million paid on account of rent and Kshs 2.75 million paid on account of good will. The respondent moved out of the premises thereafter.
22. In cross-examination, Mr. Ojiambo denied that the gardens were not part of the leased premises; he confirmed that he had visited the premises before the lease with the appellants' lawyer, Ms. Ivy Nyarango; that the house, curved out by cypress trees, was not to be leased out but the gardens formed part of the grounds that were to be let out. He stated that discord arose a day after the respondent took possession on 10<sup>th</sup> November 2006 due to interference by the appellants, and that the respondent left the premises on 2<sup>nd</sup> December 2006.



23. Washington Ndagu Ndegwa, (PW3), a director of the respondent, testified that he was present at the takeover of the premises on 10<sup>th</sup> November 2006. He was at the premises with the 1<sup>st</sup> appellant until about 7pm. They agreed about the takeover and stoppage of the usage of credit cards and use of cash until the respondent brought in its PDQ. At about 8.00 p.m., the 2<sup>nd</sup> appellant and her daughter, Betty Kiplagat, caused a scene after the 2<sup>nd</sup> appellant's credit card was declined. That the 2<sup>nd</sup> appellant complained that the respondent had conned the 1<sup>st</sup> appellant and threatened to burn the premises.
24. Mr. Ndagu further testified that the respondent was stopped from constructing extra rooms as had been agreed, and it was his testimony that the appellants frustrated the contract between them.
25. Peter Kimani Wainaina (PW4), also a director of the respondent, confirmed his co-director's evidence that the appellants had frustrated the contract between them. It was his evidence that he visited the premises after the advertisement by Manpower Services Limited and was shown the premises and items mentioned in the advertisement by the manager, Mr. Mbugua; that there were large spaces suitable for gardens and extra space for construction of extra rooms; and that the two places were separated by Mauritius thorn fence. He testified that they paid good will of Kshs. 2,750,000 and monthly rent of 200,000 and an outstanding electricity bill of Kshs 111,868.30; and that they were in the premises from 10<sup>th</sup> November 2006 to 1<sup>st</sup> December 2006.
26. According to PW4, he borrowed Kshs. 5,000,000 from Cooperative Bank to run the business, though he did not have any evidence to show that he borrowed the money or that he paid interest thereon. He further stated that the appellants demanded Kshs 943,967 from him for the stock, and when he failed to pay, they carried away many items from the business, including towels, microwave and photocopying machine. It was PW3's evidence, further, that while the respondent had a lease for 15 years, it was in the premises for 21 days for lack of quiet possession.
27. The respondent's final witness, PW5, was David Njuguna Mungai, a certified public accountant. His evidence was that he took stock and valued items which were being leased by the 4<sup>th</sup> appellant to the respondent; that the 1<sup>st</sup> appellant requested Mr. Mbugua, the premises manager, to take him around. He took stock and prepared a report and was later called to confirm whether the stock he took was what was handed over, which he stated was not the case.
28. The appellants' case was presented through three witnesses.  
  
DW1, Paul Mwaura Kimani, was working as an accountant for the 4<sup>th</sup> appellant. He was instructed by the 1<sup>st</sup> appellant to take the respondent's directors around the premises. He testified that he took them around and informed them that certain stock was to be excluded as it belonged to the 2<sup>nd</sup> appellant. He confirmed that the respondent took over the business on 10<sup>th</sup> November 2006 and that the employees were given termination letters. He said he never witnessed any misunderstanding as he tendered his resignation on 30<sup>th</sup> November 2006. It was his testimony that he was asked to show the respondent the business area, which included the kitchen, bar, gym and swimming pool, and he was not aware whether the respondent was shown any other area.
29. Eric Ndege (DW2) was employed as an accountant by the 4<sup>th</sup> appellant. He stated that his employment was terminated on 10<sup>th</sup> November 2006, and he did not know how long the respondent carried on business, though he stated that it left without giving notice. It was his testimony, further, that he continued working for the respondent even after being given a termination letter by the 4<sup>th</sup> appellant; that from 10<sup>th</sup> November 2006 to end of November 2006, he was paid by the cashier and continued working up to May 2007. He did not have an appointment letter and did not know who his employer was, but that the directors of the 4<sup>th</sup> appellant took over the business in May 2007.



30. The 2<sup>nd</sup> appellant, Joan Catherine Kiplagat (DW3) was a director of the 4<sup>th</sup> appellant, the widow of the 1<sup>st</sup> appellant and the mother of the 3<sup>rd</sup> appellant. She testified that the contract at issue was between the respondent and the 4<sup>th</sup> appellant and confirmed that Kshs. 2,750,000 was paid as good will to the 4<sup>th</sup> appellant, but that the value of stock in trade was to be paid later; that the lease was signed and the assets of the 4<sup>th</sup> appellant handed over to the respondent; that an inventory was taken before hand over; and that the premises being leased were the parking, gym, swimming pool, rooms and grounds for parties. It was her testimony that the 4<sup>th</sup> appellant operated on one and a half acres while the residential house was on one (1) acre, and that they were fenced separately. Further, that consent was to be obtained from the lessor before putting up cottages, and that the respondent never wrote to them to ask for anything.
31. Upon considering the respective cases of the parties, the trial court rendered the judgment the subject of this appeal.
32. At the hearing of the appeal, learned counsel, Mr. Ted Kaburu, appeared for the appellants and highlighted their submissions dated 10<sup>th</sup> May 2023. The 1<sup>st</sup> issue addressed by the appellants is whether, by ‘enjoining’ (sic) the 1<sup>st</sup>-3<sup>rd</sup> appellants, the corporate veil of the 4<sup>th</sup> appellant was lifted. The appellants submit that the action of joining the 1<sup>st</sup>-3<sup>rd</sup> appellants amounted to lifting the 4<sup>th</sup> appellant’s corporate veil and, in essence, holding the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants liable for its liabilities. Their submission is that the mere fact that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants are directors of the 4<sup>th</sup> appellant does not, ipso facto, make them liable for the debts and liabilities of the 4<sup>th</sup> appellant, unless circumstances are such that the veil of incorporation can be lifted.
33. In their view, this was not a proper case to warrant the lifting of the corporate veil, which can only be done in exceptional circumstances where the corporate personality is being used as a mask for fraud or improper conduct. They submit that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants did not in any way act fraudulently or improperly, relying for this submission on the case of Charles Ray Makuto vs Almakony Limited & Another [2016] eKLR Civil and Pinnacle Tours and Travel Limited & 3 others v Pauline Ngigi t/ a Safari Market Tours [2019] eKLR.
34. The appellants submit that the respondent failed to particularize its claim with respect to fraud by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants, and also failed to adduce any evidence in that respect. It is their submission, therefore, that the respondent did not discharge the burden of proof as is required, thereby failing to meet the test under section 3(4) of the *Evidence Act*. That the respondent having failed to discharge the burden of proof, the trial court erred by finding them liable and failing to find that the 4<sup>th</sup> appellant was a separate legal entity.
35. The appellants addressed, secondly, the issue whether there was a misrepresentation on their part that led to the frustration of the contract between them and the respondent. They submit that the advertisement that they placed in the media was an invitation to treat and not an offer. It was thus, they submit, not binding upon them as it was not a binding contract. They submit that the invitation to treat was in respect of the sports complex and the grounds and gardens. They rely on the case of Ladopharma Company Ltd v National Hospital Insurance Fund {2005} eKLR to submit that the respondent made an offer which was accepted and reduced into writing in a lease agreement executed by the parties.
36. The appellants submit that the lease was clear on what the 4<sup>th</sup> appellant was leasing to the respondent, and the gardens were not included. They submit, therefore, that there was no misrepresentation on the part of the 4<sup>th</sup> appellant, and the trial court erred in so holding.



37. The appellants addressed themselves, thirdly, to the question whether the trial court erred in finding that the respondent did not breach the contract, and was therefore entitled to a refund of the monies paid to the appellants. They submit that the lease at issue was for a term of fifteen (15) years, and both parties had willfully executed it and were therefore bound by it. It is their submission that soon after execution of the lease and hand over of the premises, the respondent, contrary to the specific provisions of clause 6.6 of the lease, illegally and without consent embarked on construction of residential cottages on the premises, thereby contravening the lease agreement. Further, that barely a month after execution of the lease, hand over and physical control of the premises, the respondent illegally and unprocedurally, and without proper notice, terminated the lease, and thus breached the express provisions of the agreement. They cite in support the case of *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR in which the court cited the case of *Pius Kinwiyo Langat v Co-operative Bank of Kenya Ltd.* [2017] eKLR for the proposition that it is not the business of courts to rewrite contracts between parties, and that parties are bound by the terms of their contract unless fraud, coercion or undue influence are pleaded and proved. They submit, therefore, that having breached the terms of the lease, the respondent was not entitled to a refund of the monies paid. The appellants urge this Court to allow their appeal and award the costs to them.
38. The respondent filed submissions dated 18<sup>th</sup> May 2023 which were highlighted by learned counsel, Ms. Nyakundi, holding brief for Mr. Koceyo. The respondent reiterates the essential facts of the case as set out above, which we need not rehash. With regard to the question whether there was misrepresentation on the part of the appellants that led to the frustration of the contract, the respondent submit that the 2<sup>nd</sup> appellant confirmed that Manpower Services (K) Limited was contracted to advertise lease of premises and sale of business and hire of assets, leading to execution of two contracts, one between the 1<sup>st</sup> appellant and the respondent for lease of the premises; and the second between the 4<sup>th</sup> appellant and its three directors and the respondent for the sale of the business and hire of assets of the business. The respondent submits that the advertisement listed, among others, a large park suitable for wedding reception and children's playground, but that after taking over the premises, the respondent learnt that the gardens were not meant to be part of the contract. The respondent submits that it was made to believe that the grounds were included in the premises it was leasing, and the only part excluded was the residential house. Its submission was that had the appellants intended to exclude the said grounds, they should have expressly stated so. Its submission was therefore that by turning around to seek to renegotiate on the lease of the grounds, the appellants' conduct amounted to misrepresentation, thereby frustrating the contract.
39. The respondent submits, further, that the parties had reduced the agreement of sale of business and hire of assets into writing and it had paid the appellants Kshs. 2,750,000 as consideration for the sale of business, goodwill and the hire of all the assets of the health club as set out in the business sale and asset hire agreement. It submits that while the appellants were under a duty to deliver to the respondent all the assets of the business, they instead carted from the premises vital assets meant for the operation of the business, such as drycleaner and washing machine used to launder towels at the Health Club, water dispensers from the gym and aerobics room, and all the towels from the Health Club, and only a few old towels were returned after persistent demand; misrepresented that they were the owners of all the salon equipment listed in the agreement but upon taking possession, the respondent learnt that the equipment belonged to the tenant; and that the appellants also made misrepresentations with respect to the car wash equipment. The respondent relies on the case of *Edward Mugambi v Jason Mathiu* [2007] eKLR to support its contention that the appellants had frustrated the contract.



40. The respondent submits that it was not in breach of the contract and was entitled to refund of the monies paid; that it was not in dispute that it had met its obligations under the contract since it paid all the required amounts under the lease agreement and the contract.
41. The respondent submits that the trial court properly found the 1<sup>st</sup>- 3<sup>rd</sup> respondents, directors of the 4<sup>th</sup> respondent, personally liable for breach of the contract. It submitted that the court is entitled to lift the corporate veil where the directors of a company misconduct themselves, as was held in Director of O'Javs investment v Loise Mukunya [2015] ECLR where the court upheld the piercing of the corporate veil on account of dishonesty, improper conduct and fraud. It submits that based on the director's misrepresentations to the respondent, it was right and just to hold them personally liable since the lease was made in the name of the 1<sup>st</sup> appellant and the appellants generally, in their personal capacity contributed in the frustration of the contract. The respondent submits, further, that the business sale and asset hire agreement was entered into between the respondent and the appellants in their personal capacity. Further, that the respondent made payment to the 1<sup>st</sup> appellant personally, and not in the name of the 4<sup>th</sup> appellant.
42. We have considered the record of appeal, the respective submissions of the parties, and the authorities cited. We believe that the determination of this appeal turns on determination of four issues which the parties have addressed us on in their submissions:
- i. Whether the appellants made material misrepresentations that induced the respondent to enter into the contract and ultimately led to the frustration of the contract;
  - ii. Whether the trial court erred in finding that the respondent was not in breach of the contract between the parties;
  - iii. Whether the learned Judge erred in holding the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants personally liable, with the 4<sup>th</sup> appellant, for breach of the contract;
  - iv. Whether the trial court properly found that the respondent was entitled to a refund of the monies paid under the agreements between the parties.
43. The determination of the above issues turns, primarily, on a consideration of the facts presented before the trial court, and in particular, the terms of the sale and hire of the assets of the business, and the lease between the 1<sup>st</sup> appellant and the respondent. In our view, there are no serious disagreements on matters of law between the parties, and we shall therefore consider the issues together.
44. The transaction giving rise to the disputed agreement and lease started with an advertisement placed in the press by Manpower Services Limited, on behalf of the appellants, in May 2006. The advertisement does not bear a date, but it is undisputed. Its contents were as follows:
- “Restaurant and Sports Complex- for long-term lease (High class area- Nairobi) Facilities Restaurant-bar- swimming pool- gym- sauna (separate for men and women) Large park suitable for wedding receptions- Children's playground- conference facility standby generator (guaranteed power) borehole (guaranteed water) large parking space -extra space for development of residential rooms...



45. The appellants describe this advertisement as an invitation to treat, correctly so. In its decision in *Wataari & 11 others v registered Trustees of Telposta Pension Scheme (Civil Appeal 390 of 2019) [2023] KECA 1171 (KLR) (6 October 2023) (Judgment)* this Court considered the phrase and stated:

“As is stated in Halsbury's Laws of England, 4th Edition, Vol. 9 paragraphs 228 and 230:

“228. ..., the formation of a contract is frequently preceded by preliminary negotiation. Some of the exchange in these negotiations contain no declaration at all, as where one party simply asks for information. Others may amount to invitations to the recipient to make an offer, these being invitations to treat. Thus, a distinction must be drawn between the declarations which amount to offers, and those which only amount to invitations to treat. Sometimes, a particular type of declaration is, at least prima facie, put into one or the other category by statute or by common law; but in all other cases it is a question of intention. An express statement that a declaration is not an offer is effective to prevent it being an offer, but the mere use of the terminology "invitation to treat" or "offer" in the declaration may not be conclusive one way or the other. Otherwise, the vital question is the intention of the declarant, though his actual intention must give way to a contradictory apparent intention at the time of the declaration.”

46. In response to the advertisement, the respondent made an offer through its Advocate, Aldrin Ojiambo, dated 23<sup>rd</sup> August 2006, to purchase the business, goodwill and hire the assets at Kshs. 2,750,000, and to lease the premises from the 1<sup>st</sup> appellant for a 20-year term at Kshs. 200,000 per month. The offer was accepted by the appellants through the letter from their advocates dated 28<sup>th</sup> August 2006, the only variation of the terms offered by the respondent being the term of the lease, to 15 years instead of 20, and a biannual rent increase of 15%.
47. These terms were reduced into writing in the sale and hire agreement and the lease, both dated 10<sup>th</sup> November 2006. A perusal of the sale and hire agreement shows that the 1<sup>st</sup> -3<sup>rd</sup> appellants, as directors of the 4<sup>th</sup> appellant, were all parties to the agreement. Condition 10.1 of the agreement provided that the 4<sup>th</sup> appellant and each of its directors gave the respondent the warranties set out in the second schedule to the agreement, on the basis of which the respondent had entered into the agreement. One of the conditions was that all the stock in the premises belonged to the 4<sup>th</sup> appellant.
48. Clause 1 of the lease between the 1<sup>st</sup> appellant and the respondent provided that “the premises means all that the complex erected by the Lessor on the property comprising a bar, restaurant, hair salon, gymnasium, health club, swimming pool, borehole and grounds excepting the lessor’s residential house and known as Royale Health Club Complex”.
49. A perusal of the agreement and the lease shows that it was duly executed by the appellants and the respondent. Pursuant to the terms of the agreements, the respondent paid the amounts due by cheques drawn by Co-operative Bank in the name of the 1<sup>st</sup> appellant, Isaiah Fundi Kiplagat, for Kshs. 2,750,000 for the goodwill and two cheques each of Kshs 600,000 in respect of the sums due under the lease.
50. Having examined the evidence and specifically the terms of the documents as we have set out above, we are satisfied that the trial court correctly found that the appellants had made misrepresentations, on the basis of which the respondent entered into the contracts with them; and that the appellants’ conduct thereafter frustrated the contract. The advertisement by Manpower Services indicated that the grounds to be leased included extra space for development of additional cottages. The lease agreement indicated



that all the premises, save for the appellants' residential house, were being leased. The respondent paid all the sums due from it under the two agreements.

51. What did it find on going to take over possession? The evidence adduced by the respondent shows that the 2<sup>nd</sup> appellant and her daughter caused a scene at the premises on the date that possession was given. While schedule 1 to the agreement indicated all the stock that was on hire, it appears that the 2<sup>nd</sup> appellant took some of the said goods, contending that they were hers or belonged to her son; a third party, one Anne Murangi, claimed to be entitled to the salon equipment. More problematic was the claim by the appellants that not all the grounds save the appellants' residential house had been leased out.
52. The evidence shows that there was an attempt to sort out the issue and renegotiate the terms, an attempt that ultimately bore no fruit, leading to the respondent vacating the premises three weeks after it was given possession.
53. In its decision, the trial court, after analyzing the provisions of the contracts between the parties, observed as follows:

“From the above it is evident that at the time of taking up the premises, Plaintiff believed the grounds were included as part of the space he was leasing and what was excluded was the residential house. I therefore find that the 1st Defendant misrepresented to the Plaintiff that the leased premises included the grounds.”
54. Our own analysis of the facts, which we have set out above, leads us to the conclusion that the trial court was correct in its findings. The advertisement by Manpower Services, the offer by the respondent, the acceptance by the appellants and the agreement and lease, both dated 10<sup>th</sup> November 2006, were clear on what the appellants contracted with the respondent for. From the evidence, particularly that of PW1 and PW2, the appellants contracted to lease the premises, save for the residential house. They may have changed their minds, but that does not detract from the fact that they had a legal obligation to meet what they had contracted to do. We find no basis to fault the trial court on its findings in this regard.
55. Similarly, we find no basis to fault the trial court for its finding that the appellants frustrated the contract. It was a term of the agreement that the assets used in the salon were part of what the respondent was hiring from the appellants. As we have noted above, the appellant, by the letter dated 12<sup>th</sup> November 2006 was intimating, clearly, that its representations with respect to the salon were false. The salon business and assets belonged to a third party, as did the carwash business. We are satisfied, therefore, that the court correctly found that the appellants frustrated the contract between them and the respondent.
56. We have already found that the respondent paid all the sums due from it under the contracts. That being the case, and the appellants having frustrated the contract, we find that the trial court properly found and made an order for refund of the monies paid to the appellants by the respondent.
57. The appellants complained that the trial court erred when it found them personally liable only by virtue of the fact that they were directors of the 4<sup>th</sup> appellant. We note that while the trial court had identified this as one of the issues for determination, it did not address itself to it. On our part, having considered the evidence before us, we are satisfied that the appellants were indeed personally liable, even without the need to lift the corporate veil of the 4<sup>th</sup> appellant. We observe that the sale and hire agreement was expressly entered into by the 4<sup>th</sup> appellant and its directors, and the respondent and its



directors. Further, at clause 10.1 thereof, the directors of the appellant expressly gave warranties and representations to the respondent, on the basis of which it entered into the two agreements.

58. Accordingly, we are satisfied that the trial court was correct in finding for the respondent in its claim against the appellants, and we find no basis to disturb its findings.

59. In the result, it is our finding that the present appeal is devoid of merit, and it is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2025.**

**D. K. MUSINGA (PRESIDENT)**

.....

**JUDGE OF APPEAL MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

