



**Thiani v Kedong Ranch Limited (Environment & Land Case 87 of 2024)
[2025] KEELC 21 (KLR) (Environment and Land) (16 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 21 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 87 OF 2024
MC OUNDO, J
JANUARY 16, 2025
(FORMERLY NAKURU ELC 31 OF 2023)**

BETWEEN

SARAH NAOMI WAIRIMU THIANI PLAINTIFF

AND

KEDONG RANCH LIMITED DEFENDANT

JUDGMENT

1. Vide a Plaint dated 13th April, 2023, the Plaintiff herein sought for the following orders:
 - i. A declaration that the Defendant had no authority to moderate the request for expression of interest to purchase Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres dated 14th February, 2023.
 - ii. An order quashing the decision of the Defendant contained in the letters to the shareholders of the Defendant and to the Plaintiff dated 30th March, 2023 to moderating the request for expression of interest to purchase Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres.
 - iii. An order quashing the Defendant's offer to sell 42.08 acres within Land Reference Number 10854/309 Naivasha to Newell Holdings Ltd.
 - iv. An order directing the Defendant to offer Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres to the Plaintiff.
 - v. In the alternative, Kshs. 45,288,000/= plus interest from 15th March, 2023 until payment in full.



- vi. Costs of the suit plus interest.
 - vii. Any other and/or further relief as the court may deem fair and just.
2. In its statement of defence dated 24th November, 2023 the Defendant denied the allegation contained in the Plaintiff putting the Plaintiff to strict proof. That it had invited its shareholders to express interest in purchasing Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres at a reserve price of Kshs. 430,000,000/= through its letter of General Offer dated 14th February, 2023 which was in the nature of an invitation to treat. That the said letter had only required the Defendant's shareholders interested in the said purchase to send a written expression of interest accompanied by a refundable deposit of 10% of the offer price in order to be considered and further that the Defendant's Board of Directors would moderate and allocate the sale of the said land to the shareholders who expressed interest.
 3. That subsequently the Defendant had received two offers, to wit; from Newell Holdings Limited and the Plaintiff herein through their letters dated 13th March, 2023 and 15th March, 2023 respectively. That they had each paid the mandatory refundable deposit of 10% hence both parties had been entitled to participate in the allocation to be moderated by the Board Management Committee, according to the number of shares they each held, for which whereas Newell Holdings Limited shares were equivalent to 40.66%, the Plaintiff's shares on the other hand were equivalent to 2.24% of the Defendant Company.
 4. That the said Board had moderated the bids on the principle of pro rata basis wherein it had allotted 42.08 acres of land to Newell Holdings Ltd and 2.32 acres to the Plaintiff respectively wherein parties had been issued with their respective Letters of Offer subject to the signing of a formal Contract for Sale.
 5. That the invitation to treat to the interested shareholders had not been an auction where the Defendant was obliged to accept the highest offer and disregard all the others. That the suit land being the Defendant's asset, any disposal, specifically to the shareholders would be in accordance with the provisions of the Articles of Association and the resolution of the Company.
 6. That the Plaintiff's prayer was not attainable as it was contrary to the General Offer that had been made to all the shareholders and in any case, her 10% deposit as her expression of interest was readily available for refund. The Defendants sought for the dismissal of the Plaintiff's suit, with cost.
 7. At the hearing of the case the Plaintiff's Counsel's the opening remarks were that the Plaintiff was a shareholder of the Defendant. That she had expressed her interest to the Defendant's General offer to its shareholders for the purchase of 44.4 acres of land known as LR 10854/309 Naivasha, vide her letter of 15th March 2023, wherein she had given her bid of Kshs. 452,880,000/= and made a deposit of 10% totaling to Kshs. 45,288,000/= into the Defendant's account.
 8. That the offer was not immediately acknowledged by the Defendant but after enquiry, the Defendant vide a letter dated 30th March, 2023 had informed the Plaintiff that she had been allocated a portion of 2.3 acres of the land on sale while another bidder Newell Holdings Limited had been allocated 42.08 acres. That since the Plaintiff's bid had been higher than that of Newell Holdings Limited, she had instituted the instant suit seeking to be allocated the entire parcel of land as per her bid.
 9. Advocate Eliud Nganga Njoroge, then testified as PW1 to the effect that he was the Plaintiff's Attorney/Agent and that he held a specific Power of Attorney dated 13th April, 2023 which had been executed by the Donor had been witnessed by a Notary Public, because the Plaintiff was not a resident in Kenya, and himself as an Advocate.



10. He produced the Power of Attorney, as Pf exh 1 and then proceeded to adopt the Witness Statements recorded by the Plaintiff and dated 13th April, 2023 and 14th February, 2024 respectively as his evidence in chief. That he would also rely on the list of documents filed.
11. He proceeded to testify that whereas the Plaintiff was his client in other matters, she was also his cousin. That the Plaintiff was a shareholder of the Defendant through her late husband who had been one of its original shareholders. That when the Plaintiff received the invitation to express interest for purchase of a parcel of land on offer being LR 10854/309 (herein after referred to as “the land”), she had contacted him and expressed her interest to purchase the whole land. That upon her instructions, he had made an offer of Ksh. 452,880,000/= to purchase 44.4 acres being the whole parcel of land, vide a bid dated 15th March 2023, and also deposited Kshs. 45,288,000/= being 10% of the amount through RTGS, both within the specified time.
12. He produced the Defendant’s General Letter of Offer for the sale of LR No. 10854/309 dated 14th February 2023 as Pf exh 2 and confirmed that the reserve price had been Kshs.430,000,000/=. That as an Attorney, he had signed the bid letter on Plaintiff’s behalf which letter had been received by the Defendant on 15th March, 2023. He produced the said letter as Pf exh 3.
13. He also produced the RTGS form as Pf exh 4 and then proceeded to testify that it had been drawn from Family Bank, Moi Avenue Branch for which the Defendant had been the beneficiary of the money.
14. He testified that after the expression of interest, he had waited for more than 14 days with no response wherein vide a letter dated 3rd April, 2023 addressed to the Defendant, the Plaintiff had expressed herself to the effect that 14 days had passed pursuant to the General letter of offer to shareholders. That he had signed the letter and requested for a response and that the letter had been received and acknowledged on the same date. He produced the letter dated 3rd April, 2023 as Pf exh 5.
15. That subsequently a response had come through an e-mail of 4th April, 2023 with an attachment of a letter to all the shareholders dated 30th March, 2023 wherein the Defendant had informed the shareholders that out of the five enquiries they had received, there had been only 2 qualifying offers of expression of interest which had been supported by 10% of the buying price. He read out aloud clause 2, of the letter and confirmed that they had also been informed that there had been a form of moderation. He then confirmed that the letter had been signed by the Defendant’s Chairman one Stanley Kinyanjui, before producing it but as Pf exh 6.
16. He testified that the second attachment had been a letter of offer addressed directly to the Plaintiff, for sale of 2.32 acres of the land which she had succeeded to purchase.
17. On being referred to Article 14 (a) of the Articles of Association which had been referred to in the letter dated 30th March, 2023, he confirmed that the same had provided for pre-emption right and allocation of shares for which the Plaintiff had been awarded 2.32 acres of the land which she had not applied for. That the Application of the said Article had been a surprise to the Plaintiff and inapplicable in the circumstances as it had been ingenious to purport to apply and farfetched. He produced the said letter dated 30th March, 2023 and signed by the Defendant’s Chairman, one Stanley Kinyanjui as Pf exh 7.
18. He testified that a letter of offer dated 30th March 2023 from the Defendant to the Plaintiff was neither accepted nor signed for reason that the Plaintiff had bid to purchase 44 acres in accordance with invitation of expression of interest and at no time had she contemplated on being offered 2.32 acres of the land under a principle she had neither agreed or been revealed in the bid invitation. That whereas the Defendant’s offer had been signed, the Plaintiff did not accept the same. He produced the said letter of offer as Pf exh 8.



19. He testified that vide the Defendant's CR 12 in his possession, the Defendant's Secretary had been indicated as Sichangi Partners and Associates Network LLP, George Namasaka Sichangi and Rahab Mwihaki Karoki were its Directors while the Plaintiff was a shareholder (as at the date of the search.) He confirmed that Newell Holdings Limited was also a shareholder with 2,175,000 shares and that Stanley Ngethe Kinyanjui was also a Director. He produced the CR 12 as Pf exh 9.
20. His further evidence was that the CR 12 for Newell Holdings Limited had indicated that George Namasake Sichangi Stanley Ngethe Kinyanjui and Rahab Mwihaki Karoki were its Directors. That, therefore, the three persons were Directors of both the Defendant and Newell Holdings Limited. He confirmed that the company that had won the bid was Newell Holding Limited despite its bid having been lower. That indeed the Defendant had confirmed that both the Plaintiff and Newell Holdings Limited had won the bid after moderation.
21. He confirmed that Newell Holdings Limited was the majority shareholder of the Defendant with over 40% of the total shares. That the Plaintiff's interpretation of the situation had been that there must have been a conspiracy between the Defendant and Newell Holdings Limited having discovered that the two companies shared common Directors. That in any case, the two Directors who made the decisions as to who had won the bid were from Defendant and Newell Holdings Limited and therefore the Plaintiff's conclusion had been that they both had been conflicted and hence had no ability to render an objective decision. He produced the CR 12 for Newell holdings as Pf exh 10.
22. When he was referred to the Defendant's documents dated 31st January, 2024 and a letter from Sichangi & Partners dated 13th March 2023, he confirmed that the same had been addressed to the Defendant's Directors and that Sichangi Partners were acting for Newell Holdings Limited. He confirmed that Newell Holdings Limited's offer had been Kshs.440,000,000/= which was Kshs. 12,000,000/= lower than the Plaintiff's offer.
23. Upon being referred to an extract of the Defendant's Board of Directors of minutes of Defendant's documents at Page 25, he confirmed that chairperson at that time had been Stanley Ngethe Kinyanjui. That Rahab Mwihaki had been present while George Namasake Sichangi had been in the meeting both as a Director and the Defendant's company secretary.
24. His response when he was rferred to paragraph 1 of the said minute, was that the opening paragraph of the resolution had referred to the issue of moderation by stating that the Board of Directors shall adopt the higher price and moderate. That the decision to moderate the offer had been made in the said meeting by those who had attended. He pointed out that the said minutes had however not been signed.
25. When he was referred to Pf exh 2, he confirmed that there had been a sentence in the final paragraph of the letter of offer that had "that upon conclusion of the offer period, the Board would moderate and allocate the sale of the land to shareholder(s) who would have made a valid offer". That there had been no indication of the mode of moderation nor was the word moderation explained. That in any event, the provisions of Article 14 of the Defendant's Articles of Association had no word like 'moderate'.
26. That whereas he understood moderation to mean that in the event of two or more bids being equal, the shares would be issued pro-rata, he was surprised that the Article was being brought in to explain moderation which had not been in the letter of offer. He urged the court to grant the prayers sought in the Plaintiff.
27. On cross-examination, he confirmed that the Power of Attorney was dated 13th April, 2023 and that the same had been registered. In reference to Pf exh 1, his answer had been that being an Advocate of many years standing, he understood that whereas the Power of Attorney was register-able, yet it was not in all



- situations. That Pf exh 1 herein was specific to instant case only hence it was not compulsory that the same be registered and that it was not mandatory to have a document registered to use it to file a case.
28. He confirmed that the Plaintiff in the present case was Sarah Naomi. That whereas the Power of Attorney had given him the authority to come to court, it had not been registered. That nonetheless, even in the absence of a power of attorney, he was a legitimate witness.
 29. When he was referred to Pf exh 2, he confirmed that he was aware that the Defendant had sold other properties, subdivided its assets and shared them among its shareholders. That he was aware of the formula that had been applied by the Defendant in the sub-division of its land wherein parcels of land had been allocated in accordance with the shareholding of each member of the Defendant and which parcels of land had not been the suit property herein. He confirmed that the said parcels of land had been subdivided based on the pro-rata share holding and whereas he would not be able to give the approximate acreage, the Plaintiff had received 2 or 3 allocations for which he had collected the respective title deeds.
 30. That there was a precedent on how the shares were divided among shareholders. That to his understanding the terms of the offer had been laid out in the letter of offer of 14th February 2023 which was an invitation to treat and not an offer to sale. That there had been three times set out in the said later to wit;
 31. There had to be an expression of interest, the offer was restricted to shareholders and lastly that the bid had to be above Ksh.430,000,000/= with a 10% deposit. He also confirmed that there had been no expression that the highest bidder would get the land.
 32. He explained that a responsive bid was to make an offer and pay a deposit of 10% of their bid. That in the instant case, there had been two responsive bids which had been described as qualified other than responsive bids. That according to the Defendant's CR 12, there were 26 shareholders therein hence there would have been 26 responsive bids if all the shareholders had participated. That since was a possibility of there being winners and losers, the exercise could be described as an auction, but it had been an invitation to treat. That nonetheless, the impression that had been created by the offer was a general offer for sale hence the sale should have been allocated to the highest bidder.
 33. That a wholistic reading of the offer together with paragraph 3 meant that if one did not meet the reserve price, there was a likelihood that they would not proceed. That whereas every shareholder had been given an opportunity to participate since all shareholders had been equal, the 2 bidders had not been equal. That further, whilst the offer by the two bidders had been valid, the Plaintiff had made a higher bid wherein the company had adopted the highest offer and there had been no loss occasioned to the Defendant. That the instant dispute had arisen due to the inequality on the responsive bid.
 34. When he was rferred to page 2 of Pf exh 2, he read it out and confirmed that although the word used therein had been 'moderate' yet the Defendant had not explained the meaning of the same. That whereas there had been a precedent on how the Defendant had shared previous parcels of land, the instant case was one that involved the sharing of land, but it had been the sale of land to shareholders. He confirmed that Defendant had held a meeting on 9th February, 2023 before the bid.
 35. His evidence was that the extract of the minutes at page 39 of the Defendant's documents had concerned a discussion on the two qualifying interests and the mode of moderating the sale. That he had been made aware of the formula adopted after he had received the communication from the company which mode of moderation he had disputed. That subsequently after the meeting, the Plaintiff had received an offer which she did not accept since that was not what they had expected on



- the invitation and acceptance of the bid. That they were in court because the Plaintiff was entitled to receive the whole land measuring 44 acres.
36. He confirmed that as per the invitation of the letter of offer, the statement had contemplated more than one equal bid thus moderation in the present circumstance would only be to arbitrate or mediate when there was more than one equal bid. That the same was confirmed by Article 14 (e) of the Defendant's Articles of Association where the word moderate did not appear anywhere since the terms that had been used in the said Article was "pro-rata basis."
 37. In reference to item No. 2 of Pf exh 7, his response had been that it would be incorrect to state that the Board had been alive to the closeness of Article 14 as per the opinion of the Defendant. That there had been no equity since this had been a straight forward commercial transaction. That further, there had been conflict of interest because of the common Directorships in the Defendant and Newell Holdings Limited who had been the other qualified bidder.
 38. He confirmed that the invitation to treat had been restricted to shareholders. He explained that according to the rules of proper corporate governance which were captured in the Companies, where there arose a situation like the present one, the Director who would have an interest in a matter being discussed at a Board meeting was obliged to declare his interest and, in most cases, opt out. That indeed the offer had not been to the Directors but to shareholders thus it had excluded the Directors since it had been addressed to the shareholders but nonetheless, a Director in regard to Newell Holdings Limited, which was a corporate body, had been represented by Directors.
 39. He confirmed that they had not sued Newell Holdings Limited although it had been within their right to sue it. That he was also aware of the jurisprudence of Judicial Review that gave the court powers to quash decisions and also that then court was concerned with procedure for which they had captured at paragraphs 6, 7 and 8 of the Plaintiff.
 40. On being referred to prayer (d) of the Plaintiff he stated that the court was not usurping the powers of the Board by the said prayer and that the reason as to why the company had sought to sell the land was contained in the letter of offer. That there had been justification of sale to all the shareholders and not specifically to the Plaintiff. That the terms of sale had been ordinary and he was not aware that the company had suffered loss. That whereas the Plaintiff was entitled to refund of deposit, they had sought refund and interest because the Defendant had wronged them.
 41. In re-examination, he confirmed that he was aware that the Defendant had distributed land to its shareholders by way of distribution of assets to shareholders which was different with the matter before the court. That whereas the distribution by shareholder was by equity, the subject of the present suit was a sale.
 42. In reference to Pf exh 2, he reiterated that that an invitation to treat was an offer in some respects. That the letter had been a "General offer for sale". On being referred to page 1 at Paragraph 3 he confirmed that the company had made an offer to express interest for the purchase wherein the term "offer" had been use repeatedly hence the same had been an offer and not an invitation to treat. That further, the word shareholder had an (s) in bracket hence it had presumed that there would be an ultimate winner.
 43. In reference to Pf exh 7, his response had been whereas Pf exh 2 had been made on 14th February 2023 wherein it had provided for moderation, no explanation had been given on the mode of the said moderation. That subsequently Pf exh 7 which defined the term moderation was dated 30th March, 2023 and had been released a month after issuance of the letter of offer. The Plaintiff did not know what "moderation" would be.



44. That there had been conflict of interest and the rules of Natural Justice had been broken. That the Company Act recognized the disclosure of conflict of interest and he did not think that he had a cause of action against Newell Holdings. He concluded by stating that court had the power to issue orders to the Defendant as sought in paragraph (d) of their prayers.
- The Plaintiff thus closed its case.
45. The opening statement by the Counsel for the Defendant in their defence was that the dispute before court was between a Company and a Shareholder emanating from the sale of an asset by the Company. That the Defence had conceded that it was not a derivative suit despite the fact that the Plaintiff was a shareholder since the said Plaintiff was not asserting any right or seeking protection of breach of any right as a shareholder. That the matter before court was simply in regard to a sale of property known as Land Reference No. 10854/309 where the Defendant had sought to sell that asset strictly to its shareholders only.
46. That the Defendant had passed a resolution on 9th February, 2023 resolving to sell the asset only to its shareholders. That there were about 28 paid up shareholders hence the property potentially could have been bought by 28 shareholders if they had met the conditions outlined in the letter dated 14th February, 2023 inviting them to show interest to acquire that parcel of land. That they would demonstrate through oral evidence by their witness supported by documents produced in court that the letter dated 14th February, 2023 was an invitation to treat and that the Plaintiff had jumped the gun by instituting these proceedings.
47. That they would also demonstrate that the Defendant through one Board Director and a Committee of the Board tasked with overseeing the sale of land had acted within its powers as provided by its Articles and Memorandum of Association. That in conclusion they would, through evidence demonstrate that the Plaintiff was asking the court to usurp that role and powers of its Directors who had not violated any Articles of the Company or the Company's Act to warrant the court to exercise its jurisdiction and annul the Jurisdiction of the Board.
48. George Namasaka Sichangi then took to the stand as DW1, and testified that he was an Executive Director and Company Secretary of the Defendant, That he was also a Co-member together with the Board Chairman of the Defendant's Board Management Committee which was a committee of the Board of Directors responsible for the day to day management of the Company instead of an Managing Director or Chief Executive Officer.
49. He confirmed that he resided both in Loresho Nairobi and also on Kedong Ranch off Moi South Lake Road and that he was also an Advocate of the High Court of Kenya of 33 years standing and in active practice.
50. That the Board's Chairman was Mr. Stanley Ngethe Kinyanjui wherein the co-business of the Defendant was primarily a ranch wherein they reared animals like cattle, sheep and goats for sale. That the Defendant originally had an area of about 80,000 acres in Naivasha Sub-County which land had now been reduced to about 10,000 acres after the rest had been disposed of to shareholders by way of dividends in kind while other parcels of land had been sold to Government agencies for public purposes.
51. That the Defendant's shareholders totaled 28 in number and were made up of individuals and share co-operatives, as per the table of all shareholders together with their shares as computed in percentage terms in his statement dated 31st January, 2024. That the Plaintiff appeared at No. 10 on the list and held 120,000 shares which was 2.24% of the total shares.



52. That he was aware of the dispute between the Plaintiff and Defendant wherein the Defendant's land was made up of different titles including LR No. 10854/309 which measured 44.4 acres and which property it (Defendant) had sold to its shareholders.
53. He referred to an extract of the minutes of the meeting of the Board of Directors of the Defendant that had been held on 9th February, 2023 stating that at minute 9, the Board had resolved to sell the land, which was usually referred to as Flamingo (Kings Holme), because it had been leased to Kings Holme, a Company that grew flowers and which Company was a tenant.
54. That preceding the instant sale, the Company had had previous resolutions in a General meeting wherein it had been decided that the land be distributed as divided in kind to all its shareholders in accordance to their percentage of their respective shareholding. That in the processes, the Company had thus borrowed a sum of Kshs. 350,000,000/= from Kingdom Bank Limited in order to finance this exercise, with a condition that the loan would be payable in 12 months.
55. That to secure the said amount a charge of Kshs. 300,000,000/= had been created and registered against the title to the land. That since the income from ranching business had been insufficient to pay the loan, the Board had resolved to dispose of the land so as to pay off the loan within the period that had been given by the bank and also to mitigate its financial obligation to avoid accrual of interest.
56. That the approach that had been taken was to offer the land strictly to its shareholders wherein the said shareholders were to pay for the same through a process established. That it had been a unique disposal method wherein the shareholders were to pay for the land instead of being given dividends. This was to be voluntary as it had been anticipated that not every shareholder would be willing to buy. He confirmed that the letter of offer dated 29th November 2023 had been a renewal of a letter that had been given earlier. He adopted his witness statement as his evidence in chief and marked the extract of the minutes as DMFI 1.
57. He testified that the Board had given conditions for sale of the land to the effect that
- the reserve price would be Kshs. 430,000,000/=
 - wherein the Board Management Committee would moderate the allocation of the land to the shareholders who would have qualified using the pro-rata principle to the shareholding.
 - That the minimum terms of sale of the legal contract was to be entered into by the qualified shareholders
 - part of the extract had also been envisaged in the conditions for sale.
58. He proceeded to testify that the Powers to order was the principle of equity between shareholders of different percentages given that they were of the same class and enjoying the same rights proportionate to their shareholding. That an analogy had been made in reference to Article 14 (e) of the Article of Association which ordinarily applied in the case of competition between shareholders over a limited source or opportunity.
59. That once the Board had passed the resolution, the Defendant communicated vide a letter dated 14th February, 2023 to all shareholders inviting them to send their expression of interest in the purchase of the land at a price of Kshs. 430,000,000/= for the whole land obviously divisible in acreage. He produced the said letter (Pf exh 2) as Df exh 2 stating that the letter had communicated to the shareholders that upon conclusion of the offer period, the Board would moderate and allocate to the Shareholders who would have made a valid offer.



60. He confirmed that conditions of a valid offer was the deposit, by a shareholder, of 10% of the amount of the portion of land that they would have expressed interest in. That further, the offer was to be made by a deadline of 15th March, 2023. That subsequently, they had received at least 4 interests from the shareholders being the Plaintiff herein, Newell Holdings Limited, Family Circle Investments Limited and the Estate of Njenga Muigai.
- i. He produced the letter of offer by Family Circle dated 10th March, 2023 as Df exh 3.
 - ii. A letter of offer by Newell Holdings Limited through Sichangi Partners letter dated 13th March, 2023 Df exh 4.
 - iii. An undated letter of offer by the Administrator of the Estate of Paul Muigai as Df exh 5.
61. That only two shareholders, being the Plaintiff and Newell Holdings Limited had made payments of their respective 10%.
62. He produced a letter, that had been signed for the Plaintiff, being an expression of interest to purchase the entire land dated 15th March, 2023 and the Swift transfer remitted on the Plaintiff's behalf as Df exh 6(a) and (b) respectively, and confirmed that the account in which the money had been remitted to belonged to the Defendant. That the Plaintiff's offer of the entire portion of land had been Ksh. 452,880,000/= wherein she had paid 10% being Kshs. 45,288,000/= and which amount had been received by the Defendant. He produced the statement by the finance department as Df exh 7.
63. He testified that Newell Holdings Limited had also made an offer of Kshs. 440,000,000/= and paid a deposit of Kshs. 44,000,000/= being 10% as per a statement herein produced as Df exh 8.
64. His evidence was that although the estate of Paul Muigai had expressed an interest for 10 acres of the land, yet they did not make any payments despite having the bank payment details as per a letter dated 13th March 2023, herein produced as Df exh 9.
65. That lastly, Family Circles' bid had not been valid but they had responded to questions raised in the bid, vide a letter of 13th March, 2023 herein produced as Df exh 10.
66. His evidence was that once they had the two valid bids, the Board Management Committee had made a moderation and adopted a higher price, even though it had not a condition, out of prudence as the price was supposed to be 430,000,000/=. That the said Board had then allocated 94% of the land to Newell Holdings Limited being an equivalent of 42.08 acres, at the price of Ksh. 429,233,188.88 wherein the Plaintiff had been allocated 5.3% of the land an equivalent of 2.32 acres at the price of Ksh. 23,646,881.12 wherein the Board had re-affirmed that any ensuring contract would be entered into as per the resolution of the Board that had authorized the same before, through the hand of the Chairman, the Defendant sent out the letters of offer to the two qualified shareholders.
67. That subsequently the Board Management Committee had held a meeting on 29th March, 2023, minutes herein marked as DMFI wherein after, the Defendant had sent out letters of allotment, signed by its Chairman and dated 30th March, 2023 to the Plaintiff wherein it had explained in detail how it had come to the distribution of the land and also disclosed who else had qualified. He produced the letter as Df exh 12. That the said letter had been accompanied by a letter of offer, of the same date, in respect to which the Plaintiff had been expected to sign and return to the Defendant. That the said Letter of Offer which had been Subject to Contract and had summarized the parties, the amount of land, the mode of payment and the options that the Plaintiff had on the deposit since she had paid more; the account in which the money would be paid into, completion possession and validity of offer. He produced the Letter of Offer to the Plaintiff as Df exh 13. His evidence was that similar documents



- had also been issued to Newell Holding Limited which documents he produced as Df exh 14 and 15 respectively.
68. He testified that they did not enter into any sale contracts as the court had issued an injunction against them after the Plaintiff filed suit, wherein the Defendant had maintained the status quo to date.
 69. His evidence was that the Defendant had not refused to refund the Plaintiff her 10% but that she had not made any demand for refund hence their assumption was that since the matter was pending in court, they would abide by the outcome. His assertion was that the Defendant was willing and ready to refund the deposit if demanded since all deposits were refundable. That in any case, the Defendant had given the Plaintiff options on the deposit that she had made but there had been no response to the said options, instead a suit had been filed in court.
 70. He produced as Df exh 16 a letter by Kingdom Bank Dated 29th November, 2023 to the Defendant, of a renewal of a loan of Kshs. 300,000,000/= which had previously been given to the Defendant.
 71. At this juncture Counsel for the Plaintiff informed the parties and the court that they were not opposed to the production of documents marked as DMFI 1 and DMFI 11 being signed by the Defendant's officials and thereafter being admitted in evidence as exhibits on condition that they were executed, served and filed in court within 7 days.
 72. In cross examination the defence witness confirmed that he was an Advocate of the High Court of Kenya for 33 years standing, was a Company Secretary of the Defendant and a certified Company Secretary CPS 930 for over 20 years.
 73. When he was referred to the Shareholder Schedule, he confirmed that he, the Chairperson, one Stanley Ngethe, Rahab Mwihaki Karoki and Paul Wanderi Ndungu were the Defendant's Directors and that Sichangi and Partners Associates LLP were the Defendant's Company Secretary. That No. 17 was Newell Holdings Limited, a shareholder of the Defendant, with 2,175,000 shares.
 74. On being referred to Pf exh 10, he confirmed that Stanley was also a shareholder and Director of Newell Holdings Limited with 250 shares. That he was also a Director of Newell Holdings limited, Rahab Mwihaki was a Director of Newell Holding Limited with 150 shares while Paul Wanderi Ndungu was a Director of Newell Holdings Limited with no shares and that all of them held dual roles in the two companies being the Defendant and Newell Holdings Limited.
 75. When he was referred to Df exh 4, he confirmed that the same was a letter from their law firm wherein they had been acting for Newell Holdings Limited and that he was also their Advocate. He confirmed that the members of the Board Management Committee were himself and Stanley and that the said Committee was the one that had done the moderation through delegation of the Board.
 76. He confirmed that Newell Holding Limited's offer for the purchase of the land had been Kshs. 440,000,000/= while the Plaintiff's offer had been Kshs.452,880,000/=. He admitted that the Plaintiff's offer had been higher than Newell's offer and that the two shareholders had qualified for the bid and that there had been no winning of bidding.
 77. He also confirmed that whereas the Plaintiff had bided to purchase the entire land, she had been allocated 2.34 acres out of 44 acres while Newell Holding Company had been allocated 42.08 acres.
 78. That Df exh 2 was a General offer for sale of land which was restricted to shareholders and had been opened for 30 days wherein some moderation was to be done. He admitted that there had been no explanation of what "moderation" had meant and that he did not know whether the Plaintiff knew its what moderation was to be used as the letter did not say more than what had been stated and neither did it state what moderation would entail.



79. He admitted that the Defendant had no procurement policy. That incidences of conflict of interest were in the Article of Association. That in the present case, it had been a shareholder's right and not a contract between the Defendant and Shareholders. That there had been no conflict of interest when the Management Committee sat to allocate the land to Newell Holdings Limited.
80. He confirmed that the purchase price had been fixed at Kshs. 430,000,000/= and that the decision to adopt a higher price had been out of prudence as a fiduciary treat to the Defendant to get more money for the shareholders to benefit. That the Plaintiff would have been disadvantaged by not being a Director. He confirmed that the instant suit was a contractual case.
81. That whereas he was aware of the the provisions of Article 227 of *the Constitution*, the Defendant was a Private Land Company governed by its Articles including cases where there appeared to be conflict of interest. That in any case, there had been nothing that was in violation of *the constitution*.
82. He explained that the pre-emptive rights in a private Limited Company was in a situation where when a shareholder opted to sell shares, she must first make an offer to all existing shareholders through the Board.
83. That the Public Procurement and Disposal Act covered only public disposals and therefore did not apply to the Defendant and that he was not aware of authorities that had held that that private entities were also bound by the Public Procurement Act.
84. He confirmed that their Article of Association had provisions on conflict of interest wherein would a Director be involved in conflict of interest act, he would disqualify himself or disclose the same. He reiterated that in the present situation there had been no conflict of interest to register as the transaction had not been between the Company or Director or a single shareholder.
85. He explained that they did not use pre-emptive rights to moderate and that the pre-emptive rights clause set out the principle of equity. That it had been people of different shares competing for the same property herein they had referred to the Article of Association on how shareholders would be treated.
86. He reiterated that the portions of land that had been given to both the Plaintiff had Newell Holdings Limited had been equitable to their respective shareholding. That whereas there had been an alternative prayer in the plaint, they had not received any demand letter for a refund and therefore he was not sure whether the pleadings would amount to a demand letter for a refund.
87. In re-examination, he confirmed that they did not apply any pre-emptive rights to the sale of the property but had applied logic. That the person sitting as a Management Committee of the Defendant did not sit as Newell Holding Limited That the affairs of a Private Company were governed by the *Companies Act* and not the Public Procurement Act hence the said act did not apply to the affairs of the Defendant.

The Defence thus closed their case.

88. Parties filed their respective submissions wherein after the Plaintiff had summarized the factual background of the matter as well as the evidence adduced in court, she framed her issues for determination as follows:
 - i. Whether a Conflict of Interest arose;
 - ii. Whether the Procurement and Asset Disposal Laws are applicable;
 - iii. Whether the moderation and allocation criteria were ambiguous;



- iv. Whether a legitimate expectation arose;
 - v. Whether Pre-emptive rights are applicable in land transactions;
 - vi. Whether the Power of Attorney is valid; and
 - vii. Whether the Letter of General Offer was an invitation to treat.
89. On the first issue for determination, the Plaintiff hinged her reliance on the definition of Conflict of Interest in the decided case of *Mwasighwa & 55 others v Mbulia Community Land & 3 others* (Petition E007 of 2024) [2024] KEELC 5862 (KLR) (Environment and Land) (30 August 2024) (Ruling) to submit that according to the Defendant's CR-12 Form, Newell Holdings Limited was the largest shareholder with 2,175,000 ordinary shares. That Df exh 1 and 11 had depicted an attendance of the Board of Directors Meeting and the Board of Management Committee meeting which had been held on 9th February, 2023 and 29th March, 2023 respectively and where Newell Holdings Limited having made a lower bid had been awarded 42.08 acres out of the available 44.4 acres of the suit property.
90. That Pf exh 10 being the CR-12 for Nowell Holdings Limited had clearly indicated that Stanley Ng'ethe Kinyanjui, George Namasaka Sichangi, Rahab Mwihaki Karori and Paul Wanderi Ndung'u were members of the Defendant's Board of Directors, members of the Defendant's Board of Management Committee and Directors and/or shareholders of Newell Holdings Limited. It was thus her submission that there had been glaring conflict of interest since the said persons had not only been the decision makers in both the Defendant's Board of Directors and/or Board of Management Committee but also the gainful recipients of the said decision as the Directors and/or shareholders of Newell Holdings Limited.
91. That subsequently, the said Directors and/or shareholders had been heavily conflicted since they had made the decision to dispose off the land, placed a lower bid, evaluated the bids, decided the moderation criteria and then awarded themselves, (Newell Holdings Limited) 42.08 acres of the land to the detriment of the Plaintiff. Reliance was placed on the provisions of Section 146 (1) and (3) (b) of the *Companies Act* to submit that there had been no authorization of a conflicted Director from the other Director which was in breach of the statutory duty of a Director to avoid conflict of interest. Reliance was further placed on the provisions of Sections 151, 152 and 153 of the *Companies Act* to submit that there had been no Notice from the conflicted Directors of the Defendant declaring the nature and extent of their interest, to other Directors of the Company and therefore the Plaintiff had proved the issue of Conflict of Interest on a balance of probability and should be granted the prayers sought in her Plaint.
92. On the second issue for determination as to whether the Procurement and Asset Disposal Laws were applicable in the present case, the Plaintiff's submission was in the affirmative. That the Defense witness having admitted in cross-examination that the Defendant lacked a procurement and asset disposal policy, in the absence of the said policy and in order for the Defendant to conduct a fair, transparent, and just disposal of the land, it ought to have resorted to *the Constitution* of Kenya and Public Procurement and Asser Disposal Act. She placed reliance on the provisions of Articles 2 and 10 of *the Constitution* to submit that *the Constitution* being the supreme law of land, the Defendant was required to apply the national values and principles in all its decisions especially those relating to the disposal of all that parcel of land known as Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres, through a restricted tendering to the Defendant's shareholders.
93. She further placed her reliance on the provisions of Article 227 of *the Constitution*, Section 3 of the *Public Procurement and Asset Disposal Act* as well as on the decided case in *Hydropower International (PVI) Limited v Kenya Tea Development Agency (Holdings) Ltd & 5 others* [2017] eKLR to submit



- that indeed that the provisions of the *Public Procurement and Asset Disposal Act* were applicable in private procurement, hence the Defence witness' position to the contrary had failed.
94. It was her submission that Land Reference Number 10854/309 Naivasha measuring approximately 44.4 ought to be have been disposed of to the highest bidder as had been established during the hearing wherein the Defence witness had confirmed that the the Plaintiff herein had made the highest offer of Kshs. 452,880,000/= for the entire land.
 95. On the third issue for determination as to whether the moderation and allocation criteria had been ambiguous, she referred to the second last paragraph of Pfexh 2 being the letter that had been addressed to all the shareholders dated 14th February, 2023 to submit that the term "moderate" and "allocate" had not been explained whatsoever, a fact which had been admitted by the Defence. That it had been incumbent upon the drafter of the General Offer, to alleviate any form of ambiguity before the shareholders could submit their expression.
 96. That the Defendant had subsequently purported to explain the term "moderation" and "allocation" way after the shareholders had submitted their expressions of interest for consideration, which on the face value had been unfair, unjust and unconstitutional.
 97. That further, the Defendant had failed to mention in the Letter of General Offer dated 14th February, 2023 that the highest bid was to be adopted and enforced on other qualifying bidders who had wished to buy the entire land which was a misnomer in procurement laws thus unconstitutional. That in fact, it was the Defendant's Directors who were to benefit from the said ambiguity by awarding Newell Holdings Limited whose Directors and/or Shareholders were the Defendant's Directors. Reliance was placed in the decided case of African Merchant Assurance Co. Ltd v Robert Omondi Onyango & Elizabeth Anyang Odongo [2010] KEHC 1002 (KLR).
 98. The Plaintiff relied on a decision in the case of Kenneth Kasemo Karisa v Kenya Bureau of Standards [2011] KEHC 1344 (KLR), to submit that the contra proferentem doctrine looked on favorably to a drafter whose documents were ambiguous and urged the court to apply the contra proferentem rule in the instant matter and interpret the ambiguity in her favour and thereafter find that the Defendant lacked authority to moderate the request for expression of interest to purchase Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres. That further, the decision by the Defendant contained in the letter to the shareholders of the Defendant and to the Plaintiff dated 30th March, 2023 moderating the request for expression of interest to purchase the land should be quashed.
 99. As to whether a legitimate expectation had arisen, the Plaintiff relied on the decisions in the cases of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment) and Kuto v Kenya Magistrates and Judges Association; Independent Electoral and Boundaries Commission & another (Interested Parties) (Petition E422 of 2023) [2023] KEHC 26157 (KLR) (Constitutional and Human Rights) (1 December 2023) (Judgment) to submit that the Defendant having represented to the shareholders through its letter dated 14th February, 2023 that the whole land was for sale at a purchase price of Kshs. 430,000,000/=, the Plaintiff had relied on the said representation and made an offer to purchase the entire land for Kshs. 452,880,000/= and therefore in applying the reasonable man's test, it behooved the court to find that there arose a legitimate expectation that the entire land would be sold to her being the highest bidding shareholder.
 100. On the fifth issue for determination as to whether pre-emptive rights were applicable in land transactions, she submitted that whereas the Defendant had relied on Article 14(e) of the Articles of Association that spoke of the application of pre-emptive rights on the disposal of the land, yet such pre-



- emptive rights in land matters only applied either in terms of expiry of a leasehold or in terms of failure or cessation of the purpose for justifying the compulsory acquisition.. She then placed reliance on the provisions of Sections 13 and 110 of the Land Act as well as a combination of decisions in the case of Republic v Chief Land Registrar; Ex-parte Ranan Investments Ltd (Judicial Review 13 of 2018) [2019] KEELC 3765 (KLR) (4 April 2019) (Judgment) and Town Council of Awendo v Nelson O Onyango 1st - 13th Respondents, Attorney General 14th Respondent; Abdul Malik Mohamed & 178 others (Petition 37 of 2014) [2019] KESC 38 (KLR) (Civ) (30 April 2019) (Judgment).
101. That whereas the Defendant's letter dated 30th March, 2023 had described the method of the allocation to be analogous to pre-emptive rights in a share sale transaction pursuant to the provisions of Article 14 (e) of the Defendant's Articles of Association, a reading of the excerpt of the said Article 14 (e) showed that the pre-emptive rights referred to therein were in reference to the sale of the Defendant's shares. She placed reliance on the provisions of Section 38 of the Companies Act which afforded the existing shareholders, including minority shareholders, pre-emptive rights.
 102. That it was not only unfair but also unjust to the Plaintiff for the Defendant, to have failed to explain to her what "allocation" had meant but also what methodology of the allocation would be used and whether the said methodology was anchored in law. That further, the Defendant had created and used a methodology that was favorable to Newell Holdings Limited whose Directors and/or shareholders were the Defendant's Directors. That the aforementioned methodology of allocation that was analogous to pre-emptive rights in the Companies Act was unconstitutional and illegal.
 103. She thus submitted that the decision by the Defendant to allocate the land on pro-rata basis according to the qualifying applicant's share in the Defendant ought to be found unconstitutional and she be offered the land in its entirety as the highest bidder for Kshs. 452,880,000/=.
 104. As to whether the Power of Attorney was valid, reliance was placed in the decided case of Etiang v Uyoga & 3 others (Environment & Land Case 259 of 2007) [2022] KEELC 3851 (KLR) (28th July 2022) (Judgment) and the provisions of Section 4 (1) and (5) of the Registration of Documents Act to submit that the specific Power of Attorney needed not to be registered since it had only given the Plaintiff's witness, Eliud N. Njoroge, the power to institute the instant suit in the name of the Plaintiff and to execute all documents relevant to the institution of the same. That the Power of Attorney was therefore valid and properly produced as evidence. That in any event, the court was obligated to dispense justice without undue regard to technicalities.
 105. On the seventh issue for determination as to whether the Letter of General Offer had been an invitation to treat, she placed reliance in a combination of decisions in the case of Wataari & 11 others v Registered Trustees of Telposta Pension Scheme (Civil Appeal 39 of 2019) [2023] KECA 1171 (KLR) (6th October 2023) (Judgment) and Kioko & 2 others v Safaricom Limited (Cause 233 of 2017) [2023] KEELRC 2399 (KLR) (4th October 2023) (Judgment) to submit in the negative. That the Defendant's statement to the Plaintiff and other interested shareholders on the sale of the land at a reserved price of Kshs. 430,000,000/= had been clear and unequivocal manifestations of its intention to contract with any interested shareholder and therefor the court should find that the Letter of General Offer dated 14th February, 2023 was not an invitation to treat.
 106. In conclusion, she submitted that by dint of the Plaintiff dated 13th April 2023, and both the oral and documentary evidence adduced in court, she had proved her case on a balance of probabilities as required by law hence her prayers in the Plaintiff be granted as prayed.
 107. In opposition thereto the Defendant's submissions dated 1st November, 2021 had also summarized the factual background of the case wherein it framed its issues for determination as follows; -



- i. Whether Mr. Eliud N. Njoroge had legal capacity to act on behalf of the Plaintiff.
 - ii. Whether the invitation to express interest in the purchase of the suit property created any contractual obligations.
 - iii. Whether there was an express term that the general offer for sale of the suit property was open to the highest bidder.
 - iv. Whether the Plaintiff is entitled to the prayers sought.
108. On the first issue for determination, the Defendant submitted that the Specific Power of Attorney that had been donated to Mr. Eliud N. Njoroge to institute a suit against it had not been registered and therefore Mr. Eliud N. Njoroge lacked capacity to institute the instant suit and act on behalf of the Plaintiff. That the present suit was therefore incompetent and should be dismissed forthwith. Reliance was placed on the decisions in the case of *Gatatha Farmers Company Limited v Chemtingei & 3 others; Kaitet Tea Estates (1977) Limited & another (Interested Parties) (Environment & Land Case 9 of 2023) [2023] KEELC 20564 (KLR) (11 October 2023) (Ruling)* and *Francis Mwangi Mugo v David Kamau Gachango [2017] eKLR*.
 109. On the second issue for determination, the Defendant's submission was that the invitation to express interest in the purchase of the suit property had not created any contractual obligation but was a mere invitation to treat, an indication of a person's willingness to negotiate a contract, and therefore could not amount to a binding contract between the parties.
 110. That the Board of Directors meeting that had been held on 9th February, 2023, had resolved that the land be offered exclusively to the shareholders wherein it had further agreed that upon receipt of the expression of interest with a deposit, it would adopt the higher price and moderate the allocation to qualifying shareholders using the equitable pro rata principle. This resolution had then been effected vide a Letter of General Offer dated 14th February, 2023.
 111. That whereas the Defendant had received a request for clarification from Family Circle, there had been an offer by Newell Holdings, the Estate of Paul Muigai and the Plaintiff wherein at the close of the General Offer on 15th February, 2023 only the Plaintiff and Newell Holdings Limited had complied with the conditions of the expression of interest. That for a contract to be valid, there needed to be an offer, acceptance, a meeting of the minds of the parties, consideration and the legal capacity of the parties to enter into a contract.
 112. Reliance was placed on *Tritel's Law of Contract* as well as on the decided case of *Ladopharma Company Limited v National Hospital Insurance Fund [2005] eKLR* to submit that it had not been the Defendant's intention that a mere assent to the terms in the letter dated 14th February, 2023 would create a binding contract between the shareholders and the Defendant since the sale of the suit property had been subject to complying with the conditions set in the said letter and moderation by the Defendant's Board. That a simple expression of interest and paying the 10% refundable deposit had only been an invitation to treat and not an offer.
 113. That subsequently, it had not been the intention of the Board of the Defendant for the Letter dated 14th February, 2023 to become binding to all the shareholders who had expressed interest, thus the Defendant would not be bound merely by the shareholder assenting to the terms of the said letter.
 114. On the third issue for determination as to whether there had been an express term that the general letter of offer for sale of the land had been open to the highest bidder, the Defendant submitted that



it was cognizant of the fact that it would receive more than one valid expression of interest, thus there was the need to moderate and allocate the sale of the land among all the shareholders with valid bids.

115. That in any event, the Letter of General Offer had not used the word “winning bid’ but had instead used the word “valid bid” thus it had to consider all valid bids. That indeed, the term “winning bid” had been coined by the Plaintiff to twist the facts to fit into her narrative of tendering/procurement process when it had been clear that the matter before the court was nor related to procurement. That further, the letter of General Offer to the shareholders did not state that the highest bidder would be entitled to the entire land hence the Plaintiff could not fault the Defendant for failing to offer her the entire land. That in any case, the said letter had been an invitation to treat which was regulated by principles of Contract law and not a tender in line with the Public Procurement and Disposal Act.
116. That having established that there had been no enforceable contract between the Defendant and the Plaintiff, and that the Defendant’s decision to moderate the offer and sale of the land had been well within the Letter of General Offer dated 14th February, 2023, the Defendant submitted that all the prayers sought by the Plaintiff were untenable as they had amounted to the Plaintiff inviting the court to take over the responsibility to manage the internal affairs of the Defendant without any reasonable cause.
117. The Defendant further submitted that it had been pursuant to the resolution made on 9th February, 2023, that the Defendant’s Board proceeded to moderate and thereafter resolve that the letter of offer and invitation be sent out to the shareholders and upon acceptance, other terms to be negotiated. The resolution gave rise to the issuance of the letter dated 30th March, 2023 which had enclosed the Letter of Offer.
118. That Newell Holdings Limited which had qualified for the bid and had been offered 42.08 acres of the land was not a party to the instant suit and therefore the Plaintiff’s prayer for an order to quash the Defendant’s decision in the letter dated 30th March, 2023 and the offer to sell 42.08 acres of the land to Newell Holdings Limited, could not hold.
119. That since Newell Holdings had qualified, the Plaintiff’s allegations of conflict of interest in a bid to stop it from being offered the land was unjustified. That in fact, according to the said resolution of 9th February, 2023 and the letter of general offer of 14th February, 2023 had included all shareholders and had not the excluded shareholders whose Directors were officials of the Defendant.
120. That the Plaintiff’s prayer for an order directing the Defendant to offer her the entire suit property being of specific performance in the nature could not issue but there having been no enforceable agreement between the Plaintiff and the Defendant. Reliance was placed in the decided case of Reliable Electrical Engineers Ltd v Mantrac Kenya Limited [2006] eKLR. That whereas the Defendant had subsequently offered the qualified shareholders portions of the land in accordance to their shares, the Plaintiff did not accept the Letter of Offer but filed the instant suit instead. That subsequently, in the absence of a valid enforceable contract, the court had no jurisdiction to direct the Defendant to sell the entire land to the Plaintiff.
121. As to whether the Plaintiff was entitled to the refundable sum of Kshs. 45,288,000/= plus interest from 15th March, 2023, the Defendant reiterated that it had at all times been ready to refund the 10% deposit in the event the Plaintiff declined the offer and had been waiting for Plaintiff to formally decline the offer so that they could refund her deposited amount. That there had been no resolution by the Board that the deposit would be refunded together with the interest on the same. That the Plaintiff’s prayer for interest had no bases since it had neither been contractual, proposed or resolved by the Defendant.



122. In conclusion, the Defendant submitted that the Plaintiff's case was devoid of merit. Since she had refused the offer for the sale of 2.32 acres of the land, the recourse available to her had been to seek for a refund of the 10% deposit from the Defendant. Instead she had filed the instant suit. It thus urged the court to dismiss the present suit with costs.

Determination.

123. I have considered both the oral and documentary evidence herein adduced in court, the Plaintiff's claim against the Defendant and the Defendant's defence therein. I have also considered the submissions and authorities therein cited.

124. The Plaintiff's case which was filed and presented on her behalf by M/s Eliud Nganga Njoroge Advocate by virtue of a specific Power of Attorney dated 13th April, 2023 is that pursuant to its General letter of Offer dated 14th February, 2023 inviting its shareholders to express interest in purchasing Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres at a reserve price of Kshs. 430,000,000/=, she as a shareholder had expressed her interest to purchase the whole land by making the highest offer of Ksh. 452,880,000/= vide a bid/letter dated 15th March 2023, wherein she had also deposited 10% of the offer price in the sum of Kshs. 45,288,000/= within the specified time.

125. That subsequently there had been no response from the Defendant for which after some prompting, had the Defendant vide an e-mail of 4th April, 2023, with an attachment of a letter to all the shareholders dated 30th March, 2023, informed its shareholders that out of the five enquiries they had received, there had been only 2 qualifying offers of expression, herself and Newell Holdings Ltd. She had also been informed that the bids had been moderated wherein Newell Holdings Ltd had been allotted 42.08 acres of land while she had been allotted 2.32 acres. Attached therein was a Letter of Offer for sale of the 2.32 acres of land.

126. The Plaintiff's argument therein was that the offer having been one for sale and not for treat, she had been awarded 2.32 acres of the land which she had not applied for as she had bid to purchase 44 acres in accordance with invitation of expression of interest.

127. That although the word 'moderate' had been used in the letter of offer, there had been no explanation of its meaning and the Application of Article 14 (a) of the Articles of Association was inapplicable in the circumstances as it had been ingenious to purport to apply and farfetched.

128. That although the offer had been to the Defendant's shareholders yet a Director to Newell Holdings Limited, which was a corporate body, had been represented by Directors who had an interest in the matter being discussed at a Board meeting but he did not declare his interest or opt out and therefore there had been conflict of interest because of the common Directorships in the Defendant and Newell Holdings Limited who had been the other qualified bidder.

129. The impression that had been created by the offer was a general offer for sale hence the sale should have been allocated to the highest bidder yet Newell Holdings Limited whose offer had been Kshs. 440,000,000/= which was Kshs. 12,000,000/= lower than her offer, had been awarded a larger parcel of land that measured 42.08 acres wherein she had only been allocated 2.32 acres. That there had been no equity since this had been a straight forward commercial transaction.

130. The Defendant's response on the other hand had been that yes indeed the Directors of the Defendant had at a Board meeting held on 9th February 2023 resolved to sell the suit land wherein the conditions for sale of the land had been as follows;

-the reserve price would be Kshs. 430,000,000/=



-the Board Management Committee would moderate the allocation of the land to the shareholders who would have qualified using the pro-rata principle to the shareholding.

-That the minimum terms of sale of the legal contract was to be entered into by the qualified shareholders.

-conditions of a valid offer was the deposit, by a shareholder, of 10% of the amount of the portion of land that they would have expressed interest in.

-That the offer was to be made by a deadline of 15th March, 2023.

131. That after a communication had been made vide a letter dated 14th February, 2023 to all shareholders inviting them to send their expression in the purchase of the land at a price of Kshs. 430,000,000/= for the whole land, they had received five offers wherein only two had qualified, thus the offer from the Plaintiff and another from Newell Holdings Limited.
132. That the Board Management Committee had then made a moderation and adopted a higher price out of prudence as the price was supposed to be 430,000,000/=. The Defendant admitted that although the Plaintiff's offer had been higher than Newell's offer and that the two shareholders had qualified for the bid yet, there had been no winning of bidding and the Board had then allocated 94% of the land to Newell Holdings Limited being an equivalent of 42.08 acres, at the price of Ksh. 429,233,188.88/= wherein the Plaintiff had been allocated 5.3% of the land an equivalent of 2.32 acres at the price of Ksh. 23,646,881.12/= and thereafter re-affirmed that any ensuring contract would be entered into as per the resolution of the Board. Letters of allotment and offer which had been Subject to Contract, summarizing the parties, the amount of land, the mode of payment and the options that the Plaintiff had on the deposit since she had paid more; the account in which the money would be paid into, completion possession and validity of offer had been sent out to the two qualified shareholders who been expected to sign and return to the Defendant. The Plaintiff did not sign the letter of offer and despite the Defendant having given her options on the deposit that she had made, there had been no response to the said options, instead a suit had been filed in court.
133. The Defendant admitted that there had been no explanation of what "moderation" had meant and or entailed in their letter of offer but maintained that the portions of land that had been given to both the Plaintiff and Newell Holdings Limited had been equitable to their respective shareholding.
134. That there had been no application of any pre-emptive rights since the same apply to shares and disposals of a company, but that it had applied logic.
135. The Defendant's argument had been that the present case had been a shareholder's right and not a contract between the Defendant and Shareholders. That the purchase price had been fixed at Kshs. 430,000,000/= but the decision to adopt a higher price had been out of prudence as a fiduciary treat to the Defendant to get more money for the shareholders to benefit.
136. That whereas it was aware of the provisions of Article 227 of *the Constitution*, it being a Private Land Company was governed by its Articles including cases where there appeared to be conflict of interest although in this case there had been no conflict of interest when the Management Committee sat to allocate the land to Newell Holdings Limited as the person sitting as a Management Committee of the Defendant did not sit as Newell Holdings Limited.
137. That although it had no procurement policy, yet the Public Procurement and Disposal Act covered only public disposals hence the said Act did not apply to the affairs of the Defendant which was a Private Company and whose affairs were governed by the *Companies Act*.



138. That the portions of land that had been given to both the Plaintiff had Newell Holdings Limited had been equitable to their respective shareholding and that the letter of offer of 14th February 2023 which was an invitation to treat was not an offer to sale.
139. Lastly the Defendant challenged the validity of the specific Power of Attorney dated 13th April, 2023 issued by the Plaintiff to M/s Eliud Nganga Njoroge Advocate stating that since the same was not registered, Mr. Eliud N. Njoroge lacked capacity to institute the instant suit and act on behalf of the Plaintiff and therefore the present suit was incompetent and should be dismissed forthwith.
140. The issues that are in contention that will inform the court’s determination herein are as follows;
- i. Whether the Power of Attorney dated 13th April, 2023 is valid. If the answer is Yes, then I shall consider the next issues being;
 - ii. Whether the Letter of General Offer was an invitation to treat.
 - iii. Whether the invitation to express interest in the purchase of the suit property created any contractual obligations.
 - iv. Whether there was an express term that the general offer for sale of the suit property was open to the highest bidder.
 - v. Whether the Plaintiff is entitled to the prayers sought.
141. A specific Power of Attorney also known as a special Power of Attorney or a Limited Power of Attorney is a legal document that grants someone else the authority to act on their behalf of for a specific purpose or for a limited time noted in the Power of Attorney.
142. The Black’s law Dictionary, Tenth Edition defines a power of Attorney as :-
- “an instrument granting someone authority to act as agent or attorney-in-fact for the grantor’ [donee] “
143. In the instant case, the Plaintiff herein one M/s Sarah Naomi Wairimu Thiani executed a Power of Attorney dated 13th April 2023 herein produced as Pf exh 1, granting M/s Eliud Nganga Njoroge Advocate the authority to institute suit against the Defendant relating to the cause of action arising from the general offer for sale of the suit land. The specific Power of Attorney having been executed by the Plaintiff who resides out of the country, had a Notary Public stamp from Wake County, NC affixed to verify its authenticity.
144. Section 4 of the [Registration of Documents Act](#) provides as follows;
- “All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:
- Provided that the registration of the documents following shall not be compulsory—
- (i) any composition deed;
 - (ii) any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;



- (iii) any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;
- (iv) any endorsement upon or transfer of any debenture issued by any such company;
- (v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;
- (vi) any lease or licence of land for any term not exceeding one year; or
- (vii) [spent];

Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this Act.

- (2) A person may register a document referred to in subsection (1) by filing it in physical or electronic form.

145. Section 9 of the same Act provides as follows:

“Every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after its arrival in Kenya.”

146. Section 18 of the *Registration of Documents Act* also provides as follows:

“A document the registration of which is compulsory under this Act shall not, unless duly registered, be received as evidence in any transaction affecting the property to which the document relates, conditions as the court may impose”.

147. Section 44 (4) of the *Land Registration Act* further provides as follows;

“An instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe.”

148. Lastly, Section 116 of the repealed Registered *Land Act*, required registration of powers of Attorney “which contain any power to dispose of any interest in land”.

149. As seen from the above provisions of the law, the Power of Attorney although not specifically mentioned as requiring registration, yet there cannot be contestation that any power of attorney allowing the donee to deal with land will not need to be registered since land is immovable property.



150. In the instant case there was no evidence tendered that proved that the Specific Power of Attorney, a document which M/s Eliud Nganga Njoroge Advocate seeks to rely upon to act on behalf of the Plaintiff having been executed outside Kenya, had been registered within two months after execution and after it arrived in Kenya wherein it would have become effective immediately after registration.
151. In the case of Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR, Hon Justice Munyao Sila had stated as follows;
- “The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity, for one cannot act for another without having the legal capacity to do so. I hold the view, that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have capacity to act.”
152. In re Estate of Abdulkadir Musse Farah (Deceased) (Succession Cause 691 of 2019) [2023] KEHC 19010 (KLR) (Family) (12 June 2023) (Ruling) the probate Court had held as follows:
- “The document which Ali Muse Farah seeks to rely upon to act on behalf of the Applicants has not been registered in Kenya as required by section 9 of the [Registration of Documents Act](#). Therefore the Power of Attorney purportedly issued to Ali Muse Farah is null and void. Accordingly the said Ali Muse Farah lacks legal capacity to act in this matter.”
153. And in Micheal Waweru Ngene v Dorothy Ikamba Muturi [2012]eKLR , the court had held as follows;
- “The provisions of Section 18 are mandatory. The plaintiff did not seek the Court’s consent as provided under the said section. A power of Attorney is one such document that must be registered as provided under section 4 of the said Act Cap 285 and the [Stamp Duty Act](#) Cap 480 section 19. Counsel for the defendant has clearly dealt with the issue of the plaint being defective in page 2 of his submissions. I agree with him that the purported power of attorney is a nullity ab initio and invalid for failure to comply with sections 4, 9 and 18 of the [Registration of Documents Act](#) Cap 285 and the [Stamp Duty Act](#) Cap. 480 and as a consequence thereof the plaint filed herein is incompetent”
154. Respectively, the authority herein cited by the Plaintiff being Etiang v Uyoga & 3 others (supra) in support of his submission that special power of attorney was valid is distinguishable with the present case in that the issue therein had related to a claim that the special power of attorney had been signed under duress and undue influence and therefore the purported donee of the power of attorney had no authority to deal with the 2nd defendant’s property.
155. Having found that the Specific Power of Attorney which ought to have been registered was not registered in effect thereof the suit herein was filed and prosecuted by M/s Eliud Nganga Njoroge Advocate who had no locus standi.
156. In Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:
- “.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”



157. Indeed the Court of Appeal authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490 and in Trouistik Union International & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990 to the effect that Locus standi, being a primary point of law almost similar to that of jurisdiction, the lack of capacity to sue or be sued would render any the suit incompetent.
158. Since the issue of locus standi is a point of law which goes to the root of any suit whereby its absence renders a suit fatally defective, lack of it cannot therefore be termed as a mere technicality and therefore the provisions of Article 159 (2) (d) of *the Constitution* cannot in such circumstance salvage the suit.
159. I shall therefore not consider the other issues for determination herein as I find that M/s Eliud Nganga Njoroge Advocate cannot claim any rights under representative authorization of the Specific Power of Attorney unless and until it is registered for as it stands, the same was null and void and accordingly M/s Eliud Nganga Njoroge Advocate lacks legal capacity to act in this matter. If one has no capacity, whatever such person files, at the time he/she had no capacity is a nullity. The documents herein filed before registration of the specific Power of Attorney are therefore invalid and that includes the Plaintiff.
160. In the end this suit is struck out with costs to the Defendant.

It is ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 16TH DAY OF JANUARY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

