Patflex Solutions Limited & 7 others v Board of Trustees Kenya Railway Staff Retirement Benefits Scheme & 3 others (Environment & Land Case E151 of 2020) [2025] KEELC 27 (KLR) (16 January 2025) (Judgment)

Neutral citation: [2025] KEELC 27 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E151 OF 2020

JO MBOYA, J

JANUARY 16, 2025

BETWEEN

PATFLEX SOLUTIONS LIMITED ..... 1ST PLAINTIFF

DOUBLE X ENTERPRISES LIMITED ..... 2ND PLAINTIFF

DAEWON LIMITED ..... 3RD PLAINTIFF

MOGO AUTO LIMITED ..... 4TH PLAINTIFF

KEGECO INTERNATIONAL LIMITED ..... 5TH PLAINTIFF

MILES MOTORS LIMITED ..... 6TH PLAINTIFF

H H HUSSAIN MOTORS LIMITED ..... 7TH PLAINTIFF

AUTO CAPITOL LIMITED ..... 8TH PLAINTIFF

AND

BOARD OF TRUSTEES KENYA RAILWAY STAFF RETIREMENT BENEFITS SCHEME ..... 1ST DEFENDANT

KENYA RAILWAY CORPORATION ..... 2ND DEFENDANT

NAIROBI METROPOLITAN SERVICE ..... 3RD DEFENDANT

NATIONAL LAND COMMISSION ..... 4TH DEFENDANT

JUDGMENT

Introduction And Background:

1. The Plaintiffs herein approached the court vide Plaint dated the September 22, 2020; and wherein the Plaintiffs have sought for the following reliefs;

    i. A permanent injunction restraining the Defendants from trespassing on, removing or evicting the Plaintiffs from the demised premises of interfering with the Plaintiffs right to peaceful and quiet enjoyment of the demised premises unless and until the Plaintiffs are compensated for the loss of their lease interests.

    ii. Special damages as particularized in paragraph 24 of the Plaint.

    iii. Compensation for breach of the Plaintiffs' right to property and fair administrative action as provided under Articles 40 and 47 of *the Constitution*.

    iv. Aggravated and exemplary damages for trespass.

    v. Interests on (2) and (3) above at commercial rates from the date of filing of the suit until payment in full.

    vi. Costs of this suit and interest thereon from the date of judgment until payment in full.

    vii. Any such orders of reliefs that the Honourable Court may deem just and fit to grant

2. Upon being served with the Plaint and summons to enter appearance,[STEA]; the 1st Defendant herein duly entered appearance and thereafter filed a statement of defence dated the 19th January 2021. Instructively, the 1st Defendant denied the allegation at the Plaint. Furthermore, the 1st Defendant contended that this Honourable court is devoid of the requisite jurisdiction to entertain and adjudicate upon the dispute beforehand.

3. The 2nd Defendant also entered appearance and filed a statement of defence. Suffice it to state that the 2nd Defendant also disputed and denied the Plaintiffs claim.

4. The other party that entered appearance in respect of the instant matter is the 4th Defendant. Same entered appearance and filed a defence denying the Plaintiffs claim. In particular, the 4th Defendant contended that the process pertaining to the compulsory acquisition was carried out and undertaken in accordance with *the constitution* and the relevant laws and hence the Claims by the Plaintiffs were devoid of substance.

5. Suffice it to state that the 3rd Defendant neither entered appearance nor filed a statement of defence. Nevertheless, it is common ground that the 3rd Defendant ceased to exist as a legal entity following conclusion of the 2022 general election.

Procedural Directions:

6. The instant matter came up for hearing on the 10th June 2024 whereupon the Plaintiffs intimated to the court that same [Plaintiffs] were desirous to have the matter disposed of on the basis of pleadings, witness statement and documents filed. The position herein was acceptable to the 2nd and 4th Defendants. However, because the 1st and 3rd Defendants were not represented, the court directed that the matter be adjourned and the 1st and 3rd Defendants be served.

7. Subsequently, the matter came up on the 1st October 2024 whereupon the parties entered into a consent. For coherence, the terms of the consent stipulated inter-alia that the matter shall be disposed of on the basis of documents and witness statement filed by and on behalf of the parties.

8. Additionally, it was agreed that the parties shall forfeit the right to cross examine the witnesses. Furthermore, it was agreed that the parties shall thereafter file and exchange written submissions.

9. Suffice it to state that the agreement/consent by the parties was adopted and endorsed by the court. Consequently and taking into account the terms of the consent, the court circumscribed the timelines for the filing and exchange of written submissions.

Parties' Submissions:

Plaintiffs' Submissions:

10. The Plaintiffs filed written submissions dated the 15th October 2024 and wherein the Plaintiffs adopted the contents of the Plaint dated the 22nd September 2020; the witness statement and the bundle of documents filed on behalf of the Plaintiffs.

11. Furthermore, learned counsel for the Plaintiff proceeded to and canvassed Five [5]] pertinent issues for consideration and determination by the court. Firstly, learned counsel for the Plaintiffs submitted that the process of compulsory acquisition pertaining to and concerning the suit property was carried out and undertaken in contravention of the provisions of the *Land Act* 2012 and *the Constitution*. In particular, it was contended that the impugned process violated the provisions of Sections 107 to 112 of the *Land Act*,2012[2016].

12. It was the further submissions by counsel for the Plaintiffs that the Plaintiffs herein, who had a stake and interests in the suit property were neither issued with the requisite notices nor afforded an opportunity to be heard in accordance with the law. To this end, learned counsel for the Plaintiffs has submitted that the process of compulsory acquisition was therefore illegal, unlawful and unconstitutional.

13. In support of the submissions that the impugned process was illegal and unconstitutional, learned counsel for the Plaintiffs has cited and referenced inter-alia the case of Mutuma Angaine v M'arete M'muronga [2011] KCA 411; Suchan Investment Ltd v The Ministry of National Heritage & Culture & 3 Others [2016] KECA 729; Patrick Musimba v National Land Commission & 4 Others [2016]eKLR; Fidel Holdings Ltd v Kenya Railways corporation Ltd & Another [2023] KEELC 16720 and Attorney General V Zinj Ltd [2021] KESC [2023], respectively.

14. Secondly, learned counsel for the Plaintiffs has submitted that the Defendants herein proceeded to and evicted the Plaintiffs from the suit property illegally and unlawfully on [sic] the 15th September 2024. Nevertheless, it was contended that by the time the Plaintiffs were evicted from the suit property, same [Plaintiffs] had not been afforded the opportunity to be heard in accordance of the provisions of Section 112 of the *Land Act*, 2012.

15. In support of the submissions that it was obligatory and peremptory for the Plaintiffs to be afforded an opportunity to be heard, learned counsel for the Plaintiffs has cited and referenced the decision in the case of Thomas Kimagut Samo v National Land Commission; Kenya National Highways Authority & Attorney General [2018]KEELC 3673.

16. Thirdly, learned counsel for the Plaintiffs has submitted that the Defendants herein have neither tendered nor produced any evidence before the court to demonstrate that there was urgency in the

taking of possession of the suit property that would have warranted the immediate eviction of the Plaintiffs. To the extent that no evidence has been tendered by the Defendants, it has been contended that the impugned actions by the Defendants were therefore illegal and unconstitutional.

17. Fourthly, learned counsel for the Plaintiffs has submitted that arising from the actions by and on behalf of the Defendants, the Plaintiffs herein suffered loss and are therefore entitled to compensation. To this end, learned counsel for the Plaintiffs has invited the court to proceed and award damages to the Plaintiffs for inter-alia breach/violation of the Plaintiffs' constitutional rights to property as well as for aggravated and exemplary damages.

18. It was the further submissions by learned counsel that taking into account the nature of violation[s] complained of, the court should find it appropriate and expedient to decree compensation in the sum of Kes.10, 000, 000/= only to each of the Plaintiffs.

19. To buttress the submissions pertaining to and concerning the Plaintiffs entitlement to recompense, learned counsel for the Plaintiffs has cited and referenced various decisions inter-alia Arnachery Ltd v Attorney General [2014]eKLR; Wilfred Juma Wasike & 11 Others v Ministry of Interior & Coodination & Another [2022]eKLR; Gerrison v Commissioner of Lands & 4 Otherss; County Government of Meru & 2 Others [2022] KEELC 13725 and Issabela Waithira Njoroge v Permanent Secretary Ministry of State for Provincial Administration & Internal Security & 4 Others [2014]eKLR, respectively.

20. Be that as it may, it is instructive to point out that learned counsel for the Plaintiffs conceded that the prayer for permanent injunction has since been overtaken by events. Suffice to underscore that learned counsel for the Plaintiffs acknowledged that the Plaintiffs were evicted and removed from the suit property on the 15th September 2020.

21. Additionally, learned counsel for the Plaintiffs has also submitted that the prayer pertaining to and concerning special damages has equally been overtaken by events. In particular, it has been contended that the Plaintiffs herein were [sic] paid some compensation which same [Plaintiffs] accepted without protest.,

22. Arising from the foregoing submissions, learned counsel for the Plaintiffs has contended that the only prayer that remains alive for consideration by the court relates to damages for violation/ breach of the Plaintiffs' right to property and fair administrative action. For coherence, it is in this respect that learned counsel has implored the court to award compensation in the sum of Kes.10, 000, 000/= only to each of the Plaintiffs.

1St Defendant's Submissions:

23. The though the 1st Defendant duly entered appearance and filed a statement of defence through the firm of M/s Musyoka Wambua & Katiko Advocates; the 1st Defendant neither participated in the proceedings nor filed any submissions.

2Nd Defendant's Submissions:

24. Similarly, it suffices to state that though the 2nd Defendant duly entered appearance and filed a statement of defence same [2nd Defendant] did not file any written submissions.

3Rd Defendant's Submissions

25. It is common ground that the 3rd Defendant was constituted and took over part of the functions of the City County Government of Nairobi. Nevertheless, by the time the instant matter proceeded, same [3rd

Defendant] had ceased to exist. For coherence, the 3rd Defendant ceased to exist immediately following the holding of the 2022 general elections.

4Th Defendant's Submissions:

26. The 4th Defendant filed submissions dated 4th November 2024 and wherein the 4th Defendant highlighted and canvassed three [3] issues for due consideration and determination by the court.

27. First and foremost, learned counsel for the 4th Defendant has submitted that the 4th Defendant undertook the process of compulsorily acquiring the suit property in accordance of the provisions of the *Land Act*, 2012 and *the Constitution*,2010.

28. In particular, learned counsel for the 4th Defendant has submitted that the 4th Defendant duly issued and published gazette notice number 2161 Volume CXII No. 48 of 12th March 2020. To this end, it was posited that the said gazette notice constituted a notice of intention to acquire inter-alia the suit property.

29. It was the further submissions by learned counsel for the 4th Defendant that thereafter the 4th Defendant published another gazette notice number 163 of 4th September 2020 and wherein the 4th Defendant invited the various persons with interests in the suit property to attend an Inquiry Hearing and present their claims for compensation.

30. Additionally, it was contended that the various persons including the Plaintiffs herein indeed participated in the inquiry proceedings and thereafter the 4th Defendant issued awards on account of compensation. For good measure, it has been contended that the awards which were issued were duly accepted by the Plaintiffs herein

31. In a nutshell, learned counsel for the 4th Defendant has submitted that the 4th Defendant complied with the provisions of the law underpinning compulsory acquisition. In this regard, counsel has posited that the process of compulsory acquisition that is complained of was lawful and constitutional.

32. Secondly, learned counsel for the 4th Defendant has submitted that the Plaintiffs right to property and fair administrative action, were never breached and/or violated. At any rate, learned counsel has contended that the taking over of the suit property prior to payment of compensation was underpinned by the provisions of Section 120 [2] of the *Land Act*, 2012.

33. Other than the foregoing, learned counsel for the 4th Defendant has submitted that the Plaintiffs herein subsequently participated in the inquiry proceedings and thereafter accepted the awards made by the 4th Defendant.

34. Finally, learned counsel for the 4th Defendant has submitted that the Plaintiffs herein are not entitled to the various reliefs enumerated at the foot of the Plaint. In particular, it has been submitted that the process leading to compulsory acquisition of the suit property was carried out in accordance with the law and the requisite compensation was duly paid.

35. Arising from the foregoing, learned counsel for the 4th Defendant has invited the court to dismiss the Plaintiffs' claim and award costs to the 4th Defendant.

Issues For Determination:

36. Having reviewed the pleadings filed by the parties; having considered the witness statements and the documents on record and having taken into account the written submissions filed on behalf of the parties, the following issues do crystalize[emerge] and are thus worthy of determination;

i. Whether the suit by the 1st ; 3rd to 8th Plaintiffs are legally competent taking into account the provisions of Order 4 Rule 1[4] of the Civil Procedure Rule 2010 or otherwise.

ii. Whether the Plaintiffs' suit disclose any reasonable cause of action as against the 2nd Defendant or otherwise.

iii. Whether the Plaintiffs' have proved their claims, if any, as against the Defendants or any of the Defendants.

iv. What orders [if any] ought to be granted.

Analysis And Determination

Issue Number 1 Whether the suit by the 1st ; 3rd to 8th Plaintiffs are legally competent taking into account the provisions of Order 4 Rule 1 [4] of the Civil Procedure Rule 2010 or otherwise.

37. It is common ground that the instant suit has been filed by and on behalf of 8 separate and distinct companies. In this regard, there is no gainsaying that each and every company constitutes a separate legal entity suing on its own behalf.

38. To the extent that each and every company is a legal entity on its own, it was incumbent upon each and every company to designate and authorize an officer of the company to execute a verifying affidavit to accompany the Plaint. For good measure, the provisions of Order 4 Rule 1[4] of the CPR demand that where the suit is filed by and on behalf of a limited liability company, the verifying affidavit shall be accompanied by a resolution under seal.

39. Given the importance of the provisions of Order 4 rule 1[2] of the Civil Procedure Rules in determining the competence of the suit by the 1st ; 3rd to 8th Plaintiffs, it is imperative to reproduce the said provisions.

40. For ease of appreciation, same are reproduced as hereunder;

(1) The Plaint shall contain the following particulars—

(a). the name of the court in which the suit is brought;

(b). the name, description and place of residence of the plaintiff, and an address for service;

(c). the name, description and place of residence of the defendant, so far as they can be ascertained;

(d). the place where the cause of action arose;

(e). where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and

(f). an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

(2) The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

(3) Where there are several Plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

41. From the cited provisions, it is crystal clear that the person to swear a verifying affidavit on behalf of the designated company/corporation must be an officer of the company duly authorized under the seal of the company. To this end, there is no gainsaying that the deponent of the verifying affidavit must no doubt be the authorised officer of the corporation and not any other person.

42. As pertains to who constitutes an officer of the corporation/company, it is instructive to take cognizance of Rule 2[c] of the Civil Procedure Rules Order 9.

43. Same stipulates as hereunder;

2. Recognized agents [Order 9, rule 2]

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

44. Having taken cognizance of the foregoing provisions of the law, it is now apposite to revert back to the verifying affidavit sworn by one Ngui Mutisya and filed alongside the Plaint under reference.

45. Suffice it to state that the deponent avers as hereunder;

> "I am a director of the 2nd Plaintiff company and have been authorized by the 1st to the 8th Plaintiffs to swear this verifying affidavit and I am well vast with the facts with the issues hence competent to swear this affidavit".

46. The foregoing excerpts constitutes the only basis upon which Ngui Mutisya swear[s] the impugned verifying affidavit. Nevertheless, it is instructive to point out that the said deponent does not state that same [deponent] is a director or authorized officer of the 1st ; 3rd to the 8th Plaintiffs or at all.

47. Notably, it is only a director or an authorized officer of a designated company that can swear a verifying affidavit in accordance with the law. For coherence, that function/ mandate does not fall to any other by-stander, no matter how close the same maybe to the corporation.

48. Other than the foregoing, it is also not lost on the court that Ngui Mutisya [deponent of the verifying affidavit] has also not exhibited the resolution under seal generated/issued by the 1st; 3rd to 8th Plaintiffs, to demonstrate that same; deponent has been authorized to swear the impugned verifying affidavit.

49. To my mind, Ngui Mutisya, who is neither a director nor authorized officer of the 1st; 3rd to 8th Plaintiffs has no capacity to swear the impugned verifying affidavit. At any rate, the capacity [if any] would only be underpinned by the resolution under seal.

50. The significance of the resolution of a company under seal was highlighted and elaborated upon by the Supreme Court of Kenya in the case of Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment), where the court stated and held thus;

> 120. An additional reason as to why the two superior courts below ought to have accorded little weight to the letter from JP Hulme is that it is not clear whether the said JP Hulme had the sanction, competence or authority of Lonrho Agribusiness, a registered limited liability company to bind the company. In our view, there was insufficient evidence to support the claim that Lonrho Agribusiness intended to surrender the suit properties for the allocation to Sirikwa. This is a serious question that the two superior courts below did not address their minds to. It is elementary principle of company law that a company as a distinct legal entity from its promoters, directors or employees can only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.

51. In the absence of the requisite and lawful verifying affidavits filed on behalf of the 1st; 3rd to 8th Plaintiffs and taking into account the provisions of Order 4 Rule 1[2] of the Civil Procedure Rules 2010, it is my finding and holding that the suit on behalf of the named Plaintiffs, it is incompetent and legally untenable. To this end, the suits on behalf of the named Plaintiffs lend themselves to striking out.

52. Before departing from this issue, it is instructive to take cognizance of the decision in the case of Research International East Africa Ltd V Julius Arisi & 213 Others [2007] eKLR, where the Court of Appeal held and stated as hereunder;

> Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.
>
> The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule.

53. I accept that I have discretion to issue and or grant such other orders as may be expedient. Nevertheless, it is common ground that learned counsel for the Plaintiffs did not deem it just and/or expedient to avail himself of the various provisions of the law to remedy the situation.

54. Consequently, and to this end, the only alternative that is available to the court is to prescribe the sanction stipulated under the law. Suffice it to underscore that the remedy for an incompetent suit is to strike same out and I hereby do as much.

Issue Number 2 Whether the Plaintiffs' suit disclose any reasonable cause of action as against the 2nd Defendant or otherwise.

55. The 1st and 2nd Plaintiffs herein contend that same entered into a lease agreement with the 1st Defendant whereupon the 1st Defendant demised unto the 1st and 2nd Plaintiffs portions of L.R No. 209/11953 [I.R No. 72448]. [See paragraph 8 of the Plaint].

56. Furthermore, the 1st and 2nd Plaintiffs have ventured forward and stated that upon acquiring the lease from the 1st Defendant same [1st and 2nd Plaintiffs] executed sub-leases with the 3rd to the 8th Plaintiffs. The details of the sub-leases that were executed between the 1st and 2nd Plaintiffs on one hand and the 3rd and 8th Plaintiffs on the other hand, have been outlined at the foot of paragraph 9 of the Plaint.

57. It is also worthy to note that the 1st and 2nd Plaintiffs have indicated that the suit property was registered in the name of the 1st Defendant. At any rate, all the dealings and transactions that underpin the subject suit are said to have been entered into with the 1st Defendant.

58. The only aspect of the Plaint that brings on board the 2nd Defendant into play is paragraph 23 of the Plaint. To this end, it is appropriate to reproduce the entirety of the said paragraph.

59. Same are reproduced as hereunder;

> 23. the 1st Defendant employed the use of the 2nd and 3rd Defendants to harass the Plaintiffs, destroy their property and forcefully remove the Plaintiffs from the suit property and the 2nd and 3rd Defendants are therefore liable for the damages occasioned to and losses suffered by the Plaintiffs".

60. It is the foregoing paragraph that underpins the claim/cause of action against the 2nd Defendant. Nevertheless, it is worthy to recall that the Plaintiffs herein did not tender and/or produce before the court any evidence to underpin the contention that the 1st Defendant employed the use of the 2nd Defendant or at all.

61. Other than the foregoing, it is also not lost on this court that the Plaintiffs suit has been prosecuted on the basis of the documents filed. For good measure, learned counsel for the Plaintiff exercised his right to forego a plenary hearing. Notwithstanding the foregoing, it is worthy to reiterate that the Plaintiffs' claim is predicated upon breach of contract [sic] executed with the 1st Defendant. In this regard, there is no gainsaying that the doctrine of privity of contract neither extends to nor binds the 2nd Defendant.

62. Arising from the foregoing, it is my finding and holding that the Plaintiffs herein have neither established nor demonstrated any reasonable cause of action as against the 2nd Defendant. In the absence of a reasonable cause of action as against the 2nd Defendant it suffices to state and underscore that the joinder of the 2nd Defendant in the suit was misadvised and misconceived.

63. In a nutshell, it is my finding and holding that the Plaintiffs herein are non-suited as against the 2nd Defendant. In this regard, the 2nd Defendant is not an appropriate Party to the proceeding[s] and hence the same is hereby struck out the suit.

Issue Number 3 Whether the Plaintiffs' have proved their claims, if any, as against the Defendants or any of the Defendants.

64. Notwithstanding the findings in respect of issues number[s] 1 and 2 herein before, it is still imperative to interrogate the Plaintiffs' claim as against the Defendants and to ascertain whether same [claims] have been proved.

65. To start with, it is important to outline that the Plaintiffs claim is founded on alleged breach of the lease contracts that were entered into and executed with the 1st Defendant. To put this position into context, it is imperative to reproduce the contents of paragraph 24 and 25 of the Plaint.

66. Same are reproduced as hereunder;

> 24. It was also a term of the lease contracts that upon destruction of the Demised Premises the 1st Defendant was to refund any advance rental payment in excess of the rental responsibilities accrued to the date of the destruction. The 1st Defendant has failed, neglected and/or refused to address the Plaintiffs' concerns as to the refund of the advance rent despite requests from the Plaintiffs.
>
> 25. By reason of the said breach of the lease contracts the Plaintiffs suffered damages which they claim against the Defendants and which damages are particularized hereinbelow:
>
> (a) 1st Plaintiff [Patflex Solutions Limited]
>
> i. Refund of deposit paid Kshs.615,000
>
> ii. Refund of rent paid for September Kshs.200,000
>
> iii. Improvements made on the Demised Premises Kshs. 12,900,000
>
> iv. Mesne profits (rent receivable from sub-lessees):
>
> a) From Mogo Finance Ltd Kshs. 300,000 per month for from September 2020to 28th February 2023 (remaining term of three (3) years);
>
> b) From Daewon Ltd Kshs. 110,000 per month from September 2020 to 30th November 2028 (remaining term of nine (9) years);
>
> c) From Kegeco Ltd Kshs. 90,000 per month from September 2020 to 30th April 2028 (remaining term of eight (8) years);and
>
> d) From Evezy Track Limited Kshs. 80,000 per month from September 2020 to 30th March 2025 (remaining term of five (5) years)
>
> (b) 2nd Plaintiff (Double X Enterprises Limited)
>
> I]. Refund of security deposit paid Kshs.759,427.20
>
> ii]. Refund of rent paid for September Kshs.500,000
>
> iii]. Improvements made on the Demised Premises Kshs.22,000,000
>
> iv]. Mesne profits (rent receivables from sub-lessees):
>
> a) from Miles Motors Ltd Kshs. 200,000 per month for from September 2020to 14th October 2028 (remaining termn of eight (8) years ten (10) months)
>
> b) From Autokapitol Ltd Kshs. 120,000 per month from September 2020 to 16th December 2027 (remaining term of eight (8) years)
>
> c) From H. H. Hussain Ltd Kshs. 250,000 per month from September 2020to 30th November 2028 (remaining term of nine (9)years)

V.] Loss of user/future profits from business @ Kshs. 300,000 per month from September 2020 to 30th November 2028 (remaining term of nine (9) years)

Vi]. Damages for relocation Kshs.100,000

Vii]. Valuation expenses Kshs.100,000

Viii]. Damages for goodwill Kshs.5,000,000

(c) 3rd Plaintiff (Daewon Limited)

i.] Loss of user/future profits from business @ Kshs. 245,000 per month from September 2020 to 30th November 2028 (remaining term of 9 years)

ii.] Improvements of Demised Premises Kshs. 1,752,500

iii]. Damages for relocation Kshs. 100,000

iv]. Damages for goodwill Kshs.2,000,000

(d] 4th Plaintiff (Mogo Auto Limited)

I]. Loss of user/future profits from business @ Kshs.200,000 per month from September 2020 to 28th February 2023 (remaining term of three(3)years)

Ii]. Damages for relocation Kshs.100,000

Iii]. Damages for goodwill Kshs.2,000,000

v.] Loss of user/future profits from business @ Kshs. 250,000 per month from September 2020 to 30th November 2028 (remaining term of nine (9) years)

vi.] Damages for relocation Kshs.100,000

vii]. Valuation expenses Kshs.100,000

viii] Damages for goodwill Kshs. 5,000,000

(e] 5th Plaintiff (Kegeco International Limited)

I]. Improvements on the Demised Premises Kshs.1,512,600

ii.] Loss of user/future profits from business @ Kshs. 460,000 per month from September 2020 to 30th April 2028 (remaining term of 8 years)

iii]. Damages for relocation Kshs.100,000

iv] Damages for goodwill Kshs.2,000,000

(f] 6th Plaintiff (Miles Motors Limited)

I]. Improvements on the Demised Premises Kshs.1,384,270

Ii]. Loss of user/future profits from business@Kshs.307,000 per month from September 2020 to 14th October 2028 (remaining term of eight (8) years ten (10)months)

Iii]. Damages for relocation Kshs.100,000

Iv]. Damages for goodwill Kshs. 2,000,000

(g) 7th Plaintiff (H.H. Hussain Limited)

I] Improvements on the Demised Premises Kshs.1,559,788

Ii]. Loss of user/future profits from business @ Kshs. 600,000 per month from September 2020 to 30th November 2028 (remaining term of 9 years)

Iii]. Damages for relocation Kshs.100,000

Iv]. Damages for goodwill Kshs.2,000,000

(h) 8th Plaintiff (Autokapitol Limited)

I]. Loss of user/future profits from business @ Kshs. 320,000 per month from September 2020 to 16th December 2027 (remaining term of 8 years)

Ii]. Damages for relocation Kshs.100,000

Iii]. Damages for goodwill Kshs.2,000,000

67. From the contents of paragraph *24* [details highlighted herein before], it is instructive to note that the Plaintiffs are all raising a claim on account of the breach of the lease contract. To this end, the 1st question that does arise is whether the 3rd to the 8th Plaintiffs, who had no contract with the 1st Defendant can raise a claim for breach of contract. Quite clearly, the answer is in the negative.

68. Without belabouring the point, it is my finding and holding that in the absence of any contract between the 3rd to the 8th Plaintiffs with the 1st Defendant, the claim being propagated on their behalf is stillborn. [See the decision in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Automobile Association of Kenya (Civil Appeal 272 of 2006)* [2015] KECA 784 (KLR) (Civ) (24 April 2015) (Judgment)].

69. Secondly, if at all the 3rd to the 8th Plaintiffs suffered and accrued any losses [sic] for breach of any contract, their claim if any, can only lie against the head leasees, namely, the 1st and 2nd Plaintiffs and not otherwise.

70. Thirdly, there is no gainsaying that the various claim[s], which have been particularized at the foot of paragraph 25 of the Plaint constitute liquidated/special damages. To this end, the law is settled that special damages must not only be pleaded and particularized; but same must be specifically proved.

71. The critical question that begs an answer is whether the Plaintiffs herein have specifically proved their claims. Nevertheless, I am afraid that the throwing of figures on the face of the court does not suffice.

72. In any event, it is also apposite to point out that the claim based on improvements made on the demised premises would have required the production of a valuation report. For good measure, a valuation report only accrues probative value when same is tendered and produced before the court by the author thereof. This was not the case herein.

73. Similarly, the other limb[s] of the claim touches on loss of profit and business. There is also a claim for goodwill. Pertinently, these claims require specific proof, in the manner known to Law.

74. For coherence, the manner in which special damages are to be proved has been spoken to and highlighted in a plethora of decisions. In this regard, it suffices to sample just but a few.

75. In the case of DAVID BAGINE v MARTIN BUNDI [1997] eKLR, the Court of Appeal stated thus;

> It has been held time and again by this court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Shabani V. City Council of Nairobi (1982-88) 1KAR 681 at page 684:
>
> ".....Special damages in addition to being pleaded, must be strightly proved as was stated by Lord Goddard C. J. in Bonham Carter Vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damage it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it'

76. The manner of proving special/liquidated damages was also adverted to in the case of Ouma vs. Nairobi city Council [1976] KLR 297 at page 304 and Kenya Bus Services vs. Mayende (1991) 2 KAR 232 at page 235; where the Court stated thus;

> The evidence before the learned judge on the question of loss of user was just "thrown at him". The respondent had stated that his profit margin was Kshs. 5000/- to Kshs.9000/- per day from the sale of potatoes. Although the learned judge said that there was not a single receipt to show or prove those figures, the learned judge nevertheless proceeded to treat the damages under the heading of "loss of user" as general damages and said:

77. Most recently, the Court of Appeal dealt with the question of proof of special damages in the case of Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020) [2024] KECA 1102 (KLR) (19 August 2024) (Judgment), where the court stated as hereunder;

> 72. As a matter of fact, the appellant never applied to amend the petition to introduce the particulars of special damages. Instead, on 15th February 2019 before the hearing, one of its witnesses, Judith Maroko (PW2), swore an affidavit purporting to particularise the special damages suffered by the appellant as a result of the enforcement order.
>
> 73. It is a basic principle that, before a court can award special damages, those damages must be specially pleaded and strictly proved. In Ouma v. Nairobi City Council [1976] KLR 207, Chesoni, J. (As he then was) held as follows:
>
> "Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence."
>
> The authors of McGregor on Damages (10th Edition), Para. 1498 explain why special damages must be specially pleaded, as follows:
>
> "Where the precise amount of particular item of damages has become clear before the trial, either because it has already occurred and so become crystallised, or because it can be measured with complete accuracy, the exact loss must be pleaded as special damages".
>
> Similarly, in Banque Indosuez v. D J. Lowe & Co. Ltd. [2006] 2 KLR 208, this Court held as follows:
>
> "It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not

only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act."

78. The other limb of the Plaintiffs claims touches on and concerns aggravated and exemplary damages for trespass. Nevertheless, there is no gainsaying that the suit property which was allegedly trespassed upon did not belong to and was never registered in the names of the Plaintiffs herein. In this regard, neither of the Plaintiffs can stake and maintain a claim for damages for trespass.

79. In my humble view, a claim for damages for trespass only accrues to and in favour of the registered proprietor/leaseholder. To this end, the provisions of Sections 24 and 25 of the *Land Registration Act* are instructive and pertinent.

80. Other than the foregoing, it is also imperative to cite and reference the decision of the Court of Appeal in this case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR, where the Court of Appeal considered the award of damages for trespass. [See also the holding in the case of Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga (Civil Appeal 111 of 2018) [2024] KECA 1048 (KLR) (16 August 2024) (Judgment)].

81. Finally, the Plaintiffs herein have brought into the picture a claim based on compensation for illegal and unlawful compulsory acquisition. For good measure, learned counsel for the Plaintiffs has made extensive submissions on the question of compulsory acquisition and how same [compulsory acquisition] was undertaken without due regard to the provisions of the *Land Act* 2012 and *the Constitution*.

82. Nevertheless, I beg to state that the Plaintiff's case as pleaded and captured at the foot of the Plaint dated the 22nd September 2020 touches on and concerns breach of lease contracts and damages arising therefrom. Quite clearly, the submissions anchored on compulsory acquisition constitute departure from the pleadings before the court.

83. I beg to state that a party, the Plaintiffs herein not excepted, cannot generate submissions on an issue that is outside the pleadings on record. Such an endeavour is prohibited by the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010, which underpins the Doctrine of Departure.

84. Other than the foregoing, it is also instructive to cite and reference the decision of the Court of Appeal in the case of Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR while quoting with approval an excerpt from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" restated that:-

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and

neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."[Emphasis supplied]

85. Furthermore, if the Plaintiffs herein were keen and desirous to propagate a claim based on the impropriety attendant to [sic] the compulsory acquisition, then again, such a claim ought to have been raised in the 1st instance with the Land Acquisition Tribunal. [See Section 133 [a] of the *Land Act* 2012[2016].

86. On the other hand, it is also worthy to recall that the claim based on compensation on account of compulsory acquisition is also misconceived. Instructively, learned counsel for the Plaintiffs has conceded that the Plaintiffs herein were actually paid monies/compensation on account compulsory acquisition. [See paragraph 46 of the written submissions].

87. Notwithstanding the foregoing, the Plaintiffs are still brave enough to contend that same [Plaintiffs] are desirous to accrue compensation [sic] on account of compulsory acquisition. Quite clearly, the Plaintiffs herein are not only being dishonest but are seeking to accrue unjust enrichment.

88. Without belabouring the point, it suffices to draw the attention of the Plaintiffs and their learned counsel to the provisions of Article 201 of *the Constitution* 2010 which underpins the manner in which public funds are to be expended and utilized. Similarly, it is also instructive to highlight the provisions of Article 10[2] of *the Constitution* and more particularly, the aspect that underpins equity and social justice.

89. Finally, it is worthy to recall that the Plaintiffs counsel chose to prosecute the matter herein without calling oral evidence. Indeed, the witness statements and the documents were merely thrown to the court. Notably, the witness statements and the documents therein were never proved before the court.

90. To this end, there is no gainsaying that the Plaintiffs did not prove their claim in accordance with the provisions of Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya. Suffice it to state that the burden of proof laid on the shoulders of the Plaintiffs and not otherwise. [See the holding in the case of Dr. Samson Gwer and 5 Others versus Kenya Medical Research Institute [2020]eklr; para 49,50 and 51, respectively].

91. Furthermore, the manner of tendering and producing exhibits before a court of law was highlighted by the Court of Appeal in the case of Kenneth Nyaga Mwige v Austine Kiguta Civil Appeal No. 140 of 2008 [2015]eKLR, where the court stated as hereunder;

> " 18. Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.
>
> Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the

document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

92. Pertinently, it is the obligations of the Claimant to prove his/her case. The case must be proven on a balance of probabilities. This requirement must be complied with and met, even when the matter proceeds on the basis of formal proof.

93. In Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, the Court of Appeal elaborated the position and stated as hereunder;

> It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

94. Flowing from the foregoing analysis, my answer to issue number three [3] is to the effect that the Plaintiffs herein have failed to discharge the burden of proof cast upon same.

95. In this regard, the Plaintiffs' claim must fail.

Final Disposition:

96. Arising from the analysis [details enumerated in the body of the judgment] it must have become apparent that the Plaintiffs claim is not only premature and misconceived, but same is also legally untenable.

97. Barring repetition, it is also worthy to reiterate that the Plaintiffs' claim is laced with dishonesty and an endeavour to accrue unjust enrichment. Such an endeavour must be frowned upon by every conscientious court and citizen.

98. In the circumstances, the final orders that commend themselves to the court are as hereunder;

i. The Plaintiffs suit against the 2nd Defendant be and is hereby struck.

ii. The Plaintiffs' suit as against the rest of the Defendants be and is hereby dismissed.

iii. Costs of the suit be and are hereby awarded to the 2nd and 4th Defendants only and same [costs] shall be borne by the Plaintiffs jointly and/or severally.

99. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY 2025.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Court Assistant: Benson.

Mr. Kevin Wakwaya for the Plaintiffs.

Ms. Sandra Kavaji for the 2nd Defendant.

Ms. Joyce Wanini for the 4th Defendant.

N/A for the 1st Defendant.

N/A for the 3rd Defendant.