



REPUBLIC OF KENYA



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**Kandagor v Odongo & another (Environment and Land Appeal
11 of 2020) [2023] KEELC 16535 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 11 OF 2020
FM NJOROGE, J
MARCH 23, 2023**

BETWEEN

ISABELLE JEROP KANDAGOR APPELLANT

AND

JOSEPH OCHIENG ODONGO 1ST RESPONDENT

THE REGISTERED TRUSTEES POSTAL CORPORATION OF KENYA

PENSION SCHEME 2ND RESPONDENT

(Being an appeal against the judgment of Hon. J.B. Kalo dated 6/5/2020 in Nakuru CMCC No. 910 of 2014(Isabella Kendagor versus Joseph Odongo and Corporation of Kenya Pension Scheme)

JUDGMENT

1. This is a judgment in respect of an appeal brought by way of a memorandum of appeal dated 21/02/2022 against the judgement and decree of Hon. J. B. Kalo C.M. in Nakuru CMCC No. 910 of 2014. The appellant sought that the judgement of the trial court be set aside and it be substituted with an order of specific performance of the contract between the Appellant and the 1st respondent together with an order of permanent injunction. The appellant also sought costs of the suit in the lower court and of this appeal.
2. The background of the present appeal is that on 16/03/2010 the appellant filed Nakuru CMCC No. 910 of 2014 against the respondents seeking an order of specific performance of the sale agreement dated 1/12/2008 and 12/01/2009 to be issued against the respondents, an order of permanent injunction against the respondents restraining them from selling, transferring and/or disposing of land parcel Number Nakuru Municipality Block 21/861/12 and to provide vacant possession and costs of the suit.
3. The 2nd respondent filed its Statement of Defence dated 31/05/2010 on 2/06/2010.



4. The suit was heard on 08/11/2018 where the appellant testified. Judgement was delivered on 06/05/2020. In its judgment, the trial court held that the appellant had failed to prove her case against the respondents and dismissed it with costs.
5. Being dissatisfied with the judgement of Hon. J.B. Kalo delivered on 6/05/2020 in Nakuru CMCC No. 910 of 2014, the appellant has appealed to this honourable court against the said judgment and set forth the following grounds of appeal;
 1. The learned trial magistrate erred in law, in fact and the interpretation of the contract executed between the appellant and the 1st respondent; in particular the trial magistrate erred in the following respect: -
 - a. He failed to appreciate that completion of the contract was by way of the 1st respondent providing all the completion documents and the appellant paying the entire purchase price.
 - b. He failed to appreciate that the 1st respondent purported to rescind the contract for breach when he never had all the completion documents.
 - c. He found that the 1st respondent had rescinded the contract when there was no evidence of rescission on the part of the 1st respondent to that effect.
 - d. He found that the purported rescission of the contract by the 1st respondent was effective without restitution in integrum.
 2. That the learned trial magistrate erred in law in failing to apply the condition in the contract relating to notice in particular clause 9.2 of the agreement between the appellant and the 1st respondent.
 3. That the learned trial magistrate erred in law in failing to apply the condition in the contract relating to notice.
 4. That the learned trial magistrate erred in law and in analysis of the evidence in the following respect. He found as a fact that “there is a letter stating that the 1st defendant refused to accept cheques” in the same ruling he found that the “the plaintiff neither produced copies of the cheques nor communication from the advocates for the 1st defendant asking him to collect the cheques if any”
 5. That the learned trial magistrate erred in law in finding that the Appellant had failed to produce the cheques for payment of the consideration when that issue was neither denied nor a fact in issue.
 6. That the learned trial magistrate erred in law, evidence and analysis of the facts in finding that the Appellant had not proved her case on a balance of probability when there was no evidence from the defence against which the scale of civil liability could be weighed.
 7. That the learned trial magistrate erred in law and in fact in considering an issue of breach of contract between the Appellant and the 2nd respondent while the question before him was whether there was assignment of contractual and property rights between the appellant and the respondent.
 8. That the trial magistrate erred in law, fact and analysis of evidence in finding that there was neither privity of contract legal relationship between the appellant and the 2nd respondent



while it was in evidence that the 2nd respondent had received consideration from the appellant for the assignment of property rights in respect of the parcel of land known as Nakuru Municipality Block 21/861/12.

9. That in overall, the learned trial magistrate erred in arriving at a finding which against the weight of evidence, unsupported by the law and the facts before him.
6. The appellant prays that the judgment of the trial court be set aside and it be substituted with the judgement of this court directing specific performance of the contract dated 12/01/2009 between the appellant and the 1st respondent, an order of permanent injunction be issued to the respondent to deliver vacant possession of the parcel of land known as Nakuru Municipality Block 21/861/12 and that costs of the suit and the appeal be borne by the respondents.
7. On 5/10/2022 the appeal was admitted for hearing and the court gave directions that the same be canvassed by way of written submissions. The appellant filed her submissions dated 21/11/2022 on 23/11/2022 while the 2nd respondent filed its submissions dated 06/12/2022 on 09/12/2022.

Submissions of the Appellant

8. The appellant in her submissions identified the following issues for determination: -
 - a. Whether the appellant has established its claim on a balance of probability;
 - b. Whether the 1st respondent was in breach of the terms of the agreement dated 12/01/2009;
 - c. Whether the 1st respondent had procedurally and legally terminated the 2nd agreement;
 - d. Whether any contractual obligations flowed from the 2nd respondent to the appellant;
 - e. Whether the trial magistrate erred in the analysis of evidence produced during trial.
9. On the first issue the appellant submitted that it is settled in law that in instances where a defendant/ respondent fails to call witnesses or produce contrary evidence, the other party stands to have established his case on a balance of probability. The appellant further submitted that in the subordinate court her evidence was uncontroverted as no evidence was adduced by the respondent. The appellant relied on the cases of *Shaneebal Limited vs County Government of Machakos* [2018] eKLR, *Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*, *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No 1243 of 2001* among other cases in support of her arguments. The appellant also submitted that on this ground, the court should set aside the judgement of the subordinate court and allow the prayers as sought in the plaint as her evidence was uncontroverted.
10. On the second issue, the appellant submitted that it is irrefutable that parties are bound by the terms of their agreement and the conditions stipulated therein. The appellant relied on the cases of *Dhanjal Investments Limited vs Shabaha Investments Limited (Civil Appeal 80 of 2019)* [2022] KECA 366 (KLR) in support of her arguments. The appellant further submitted that the failure by the 1st respondent to serve a notice to comply as provided for in clause 5.1 and 9.1 of the agreement dated 12/01/2009 and in furtherance, his acceptance of the cheque issued to him by the appellant on the 01/04/2009 implied that the discharge of the parties' duties was still on course. The appellant also relied on the case of *John Mburu v Consolidated Bank of Kenya* [2015] eKLR and submitted that the learned trial magistrate erroneously failed to consider the affirmation of the agreement by the 1st respondent's conduct and the reason for the delay in payment owing to the purported change in the terms of the contract by the vendor. The appellant further submitted that it is her prayer that the court



finds that the contract was affirmed and was still on course by the time of the purported illegal rescission and grant the order of specific performance of the contract.

11. On the third issue, the appellant submitted that the learned trial magistrate failed to consider that as per the agreement, a notice to complete was supposed to be served on her after the intended completion date before rescission could be considered. The appellant relied on the cases of Samuel Murigi Waigwa vs Francis Babu Mwangi [2021] eKLR and Ann Mumbi Hinga vs William Mwangi Gathuma & another [2017] eKLR in support of her arguments.
12. On the fourth issue, the appellant submitted that the issue of whether there was a contract between herself and the 2nd respondent was not in question before the trial court and therefore the trial magistrate erred in law and in fact in considering an issue of breach between herself and the 2nd respondent. She relied on the cases of Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & another [2015] eKLR, Amazing Sports Talent Agency v Tusker Football Club, Atotos Sports management (Interested Party) [2022] eKLR among other cases in support of her arguments.

Submissions of the 2nd Respondent

13. The 2nd respondent in its submissions submitted on various grounds on the amended memorandum on appeal. On ground No. 6 which is on whether the learned trial magistrate erred in law and in fact in finding that the appellant had not proved her case on a balance of probability, the 2nd respondent submitted that the onus lay with the appellant to prove her case.
14. It was the 2nd respondent's submissions that the appellant failed to produce any evidence of a contract between herself and the 2nd respondent in respect of the sale of the property. The 2nd respondent relied on the cases of Savings & Loan (K) Ltd vs Kanyenje Karangaita Gakombe & another [2015] eKLR, Agricultural Finance Corporation vs Lengetia Limited & another [1985] eKLR and submitted that the doctrine of privity of contract provides that no liability can attach to a person who is not a party to a contract.
15. The 2nd respondent submitted on ground No. 7 which is on whether the learned trial magistrate erred in law and in fact in considering an issue of breach of contract between the appellant and the 2nd respondent and ignored the question as to whether there was an assignment of contractual and property rights between the appellants and the respondents. It submitted that the learned trial magistrate did not consider any issue with regard to breach of contract as it had held that there was no contract between the appellant and the 2nd respondent. That the said sale agreement was between the 1st and 2nd respondents and it does not mention the appellant.
16. On ground No. 8, the 2nd respondent reiterated that the appellant did not produce any agreement between herself and the 2nd respondent concerning the suit property. That the payments referred to and in favor of the 2nd respondent did not show that they were drawn by the appellant or that they emanated from the appellant.
17. On ground No. 9, the 2nd respondent submitted that the appellant's cause of action ought to be directly to the 1st respondent as she did not enter into any agreement with the 2nd respondent. The 2nd respondent therefore submitted that the appellant's appeal does not display any reasonable cause of action against it and sought that the same be dismissed with costs.

Analysis and Determination

18. After considering the grounds on the Memorandum of Appeal, it is my view that the following principal issues arise for determination:



- a. Whether the trial court misinterpreted the law and facts in the evaluation of the contract between the appellant and the 1st respondent;
- b. Whether the trial court erred in finding that the appellant had failed to produce the cheques for payment of the balance of the consideration;
- c. Whether the trial court erred in finding that the appellant had not proved her case on a balance of probability when there was no evidence from the defence;
- d. Whether the trial court erred in considering the issue of breach of contract between the appellant and the 2nd respondent and in finding that there was no privity of contract between the appellant and the 2nd respondent.

Whether the trial court misinterpreted the law and facts in the evaluation of the contract between the appellant and the 1st respondent.

19. The appellant averred that by the agreement of sale dated 01/12/2008, the 2nd respondent agreed to sell to the 1st respondent land parcel No. Nakuru Municipality Block 21/861/12.
20. The appellant further averred that by a subsequent agreement dated 12/01/2009, the 1st respondent agreed to nominate the appellant to take over his rights contained in the agreement for sale dated 01/12/2008 and acquire interest in the suit property.
21. During the hearing, the appellant produced as P. Exh.1 a copy of the sale agreement dated 01/12/2008 and also produced the agreement dated 12/01/2009 as P. Exh.2.
22. The terms of the agreement between the appellant and the 1st respondent dated 12/01/2009 were that the suit property belonged to the 2nd respondent and that the 1st respondent was selling his interest to the suit property to the appellant.
23. The other terms of the agreement were as follows:
 - 5.1 If for any cause whatsoever other than non-completion caused by the default of the Vendor, the transaction shall not be completed on the completion date or is unable to be completed, then the Vendor shall, after giving Twenty one (21) days' notice to complete, be entitled to rescind the assignment and the purchaser shall have no interest or claim in the property whatsoever and the Vendor shall be entitled to re-sell his interest in the property...
 - 9.1 At any time after the completion date, either the purchaser or the vendor being ready, able and willing to complete this transaction and perform their other obligations under this agreement, may by notice to the other party invoke the provisions of this clause.
 - 9.2 Whether or not time is of the essence of this agreement, if any party (the defaulting party) shall fail to comply with its obligations under this agreement, the other party (the non-defaulting party) may give the defaulting party 14 days' notice in writing to comply with his/her obligations and such notice shall specify the default and require the defaulting party to make good within 14 days' time being of the essence.
 - 9.3 On the failure of the defaulting party to comply with the notice issued in accordance with clause 9.1, the non-defaulting party may rescind this agreement by notice in writing to the defaulting party, provided that the non-defaulting party may not rescind this agreement if the defaulting party complies with the notice given under clause 9.1 before notice of rescission shall have been given.



24. It was the appellant's evidence before the trial court that she paid the required amounts of money till there was a balance of only Kshs.140,000/=. The appellant testified that she was not able to pay the balance because the 1st respondent rescinded the contract vide the letter dated 16/04/2009 which was produced as P. Exh.5.
25. The learned trial magistrate in his judgement stated as follows:
- “On the first issue, the 2nd agreement was entered into as an assignment of the 1st defendant's interest in the suit property to the plaintiff by the 1st defendant. At the time, the 1st defendant was in the process of acquiring the suit property from the 2nd defendant but seemed to have encountered financial difficulties before the process of acquisition was completed. Apparently and in the fullness of time, the 1st defendant obtained title to the suit property and at the time of the plaintiff's testimony, the suit property was registered in the 1st defendant's name and a title deed to that effect issued in his name. The 1st defendant contents that the plaintiff was in breach of the 2nd agreement by failing to pay the agreed purchase price within the agreed timelines, something that led him to rescind the 2 agreement. Indeed it is the 1st defendant's case that the 2nd agreement has since been rescinded and is incapable of enforcement...”
26. After the 1st respondent rescinded the contract vide the letter dated 16/04/2009, the appellant's advocates wrote to the 1st respondent's advocates the letter dated 20/04/2009 where under No. (ii) it was indicated as followed:
- “The dispute between the vendor and or client purchaser arose when your client sought to orally vary the terms of the agreement by insisting that he be given a tenancy of (5) years at the current rent as a pre-condition to completion of the transaction, a term which was not in the agreement. The vendor brought the issue when the purchaser had already committed herself by executing the agreement and making part payments to the vendor and also the Postal Corporation of Kenya Staff Pension Scheme, the first vendor. The purchaser was therefore rightfully entitled to withhold any further payments until the issue was clarified and her interests protected...” (Emphasis mine)
27. It is my view that the appellant admitted in her letter dated 20/04/2009 that she had withheld the payments of the purchase price before the 1st respondent wrote the letter dated 16/04/2009 rescinding the contract dated 01/12/2008. However, it is clear from the evidence adduced by the appellant in the trial court below that the 1st respondent had before the purported rescission commenced on a course of action disagreeable to the terms of the contract between him and the appellant when he attempted to include strange terms regarding a proposed five-year tenancy into the agreement as a condition for its completion.
28. As per the contract dated 12/01/2009, the completion date was 01/03/2009. Therefore, as at the time the 1st respondent was writing the letter to rescind the contract on 16/04/2009, the completion date had already passed. Consequently, it is my view that the applicable clause of the contract was clause 9.2 which states that if any party failed to comply with its obligations under the agreement, the non-defaulting party would give the defaulting party 14 days' notice and shall specify the default and require the defaulting party to make good their default within 14 days.
29. From the pleadings and the evidence on record, there is no evidence that the 1st respondent issued to the appellant the 14 days' notice for her to comply with her obligations. The said issue was not addressed



by the trial court as it had found that the 1st respondent had rescinded the contract and therefore the orders sought by the appellant could not be granted.

30. It is my view that the 1st respondent was in breach of the sale agreement dated 12/01/2009. That being the case, that the trial court misdirected itself by finding that the 1st respondent had effectively rescinded the contract and yet he had not issued the required 14 days' notice as required in the agreement.

Whether the trial court erred in finding that the appellant had failed to produce the cheques for payment of the balance of the consideration.

31. The appellant in her evidence produced as P. Exh 4 copies of cheques issued to Joseph Ochieng Odongo and Postal Corporation of Kenya Staff Pension Scheme. In her evidence before the trial court the appellant admitted that there was a balance of Kshs. 140,000/= which she did not pay as the 1st respondent had rescinded the contract. It was also her evidence that she later issued cheques to the 1st respondent which she left with her lawyers but the 1st respondent refused to collect them.

32. It is with regard to the cheques for payment of the balance of the purchase price that the learned trial magistrate stated as follows in his judgment:

“On her part, the plaintiff testified that she prepared cheques for the balance of the purchase price and deposited them with her lawyer who advised the 1st defendant to collect them but he refused. However the plaintiff neither produced copies of the cheques nor communication from the advocates to the 1st defendant asking him to collect the cheques, if any. The plaintiff has therefore failed to demonstrate that she fulfilled the terms of the 2nd agreement so as to be entitled to the orders sought against the 1st defendant. The court finds that the plaintiff was in breach of the 2nd agreement. In the circumstances, the 1st defendant was well within his rights and he acted within the provisions of the 2nd agreement by rescinding the same for breach by the plaintiff...” (emphasis mine)

33. Upon perusal of the court record, I am inclined to agree with the findings of the trial magistrate that the appellant did not produce the cheques drawn for the balance of the purchase price of Kshs. 140,000/= and neither did she produce the letter addressed to the 1st respondent asking him to collect the said cheque.

Whether the trial court erred in finding that the appellant had not proved her case on a balance of probability when there was no evidence from the defence.

34. The trial court in its judgement held that the appellant had failed to prove her case against the respondents and dismissed it with costs. The appellant alleges that the trial court erred in arriving at the said finding as the respondents did not adduce any evidence.

35. The court in the case of Netah Njoki Kamau & another v Eliud Mburu Mwaniki [2021] eKLR held as follows:

“11. The appellants, however had the onus of proving their case against the respondent whether or not the respondent adduced evidence. This is because appellant's case not being a liquidated claim ought to have been proved. Further this is because this was a defended claim and there was no interlocutory judgment entered against the respondent since the respondent had filed his memorandum of appearance and defence within the requisite period.



12. The appellants as correctly stated by the trial court in its judgment failed to meet the standard of proof with regard to evidential burden. The appellants were required in order to succeed in their claim, to discharge an evidential burden in relation to the fact in the issue...Lord Nichol of the House of Lords in the case RE H AND OTHERS (MINORS) (SEXUAL ABUSE: STANDARD OF PROOF) (1969) stated the Civil standard of proof to be:-

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability, the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

36. From the court record, neither of the respondents adduced evidence in support of their respective defences. It is my view that even though the respondents did not adduce any evidence, the burden of proof was on the appellant to prove her case on a balance of probabilities. Consequently, it is not sufficient for the appellant to state that just because the respondents did not adduce any evidence, the trial magistrate erred in finding that she had failed to prove her case. In the recent case of Nakuru Land Case No. 216 Of 2016 John Gitahi Ndegwa (Suing as The Legal Representative of the Estate of Jedidah Wanjiku Ndegwa (DCD)) vs Jonada Services Limited the court observed as follows:

“ 12. There was no evidence called for the defendant’s case but I agree with the defendant’s submission and an undefended case does not guarantee the claimant automatic judgment against his adversary, a position that was also reiterated by the Court of Appeal in the case of Nairobi Civil Appeal No. 240 of 2011 Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.”

37. However, it is noteworthy that the letter admitting that the plaintiff withheld Kshs 140,000/= was written on 20th April 2009 in response to the rescission letter written by the 1st respondent on 16th April 2009. The subject agreement had been executed by the parties on 1st December 2008. The suit in the lower court was instituted on 16th March 2010. The said events relating to the contract all happened within a relatively brief period. Though the cheques drawn for the balance of the purchase price of Kshs. 140,000/= and the letter addressed to the 1st respondent asking him to collect the said cheque were not produced in evidence in the absence of any evidence from the respondents this court is inclined to believe that the said cheques and the letter were issued. Upon that ground, this court is inclined to hold, and does so hold that the appellant was ready and willing to complete the contract.

Whether the trial court erred in considering the issue of breach of contract between the appellant and the 2nd respondent and in finding that was privity of contract between the appellant and the 2nd respondent.

38. One of the grounds the appellant has raised in his memorandum of appeal is that the learned trial magistrate erred in fact and in law in considering the issue of breach of contract between the appellant and the 2nd respondent while the question before him was whether there was assignment of contractual and property rights between the appellant and the respondents.



39. The appellant also alleges that the learned trial magistrate erred in law and in fact in finding that there was no privity of contract between the appellant and the 2nd respondent while it was in evidence that the 2nd respondent had received consideration from the appellant for the assignment of property rights in respect of the parcel of land known as Nakuru Municipality Block 21/861/12.
40. The learned trial magistrate in his judgement held that the appellant did not produce any contract between herself and the 2nd respondent and further that there was no evidence that the 2nd respondent had expressed willingness to be bound by the sale agreement between the appellant and the 1st respondent.
41. The learned trial magistrate in his judgement further held that there can be no legally binding obligations flowing from the 2nd respondent to the appellant over the suit property in the absence of a written agreement.
42. As pointed out before, the appellant produced two agreements for sale in support of her case. The one dated 01/12/2008 was between the 1st respondent and the 2nd respondent while the sale agreement dated 12/01/2009 was between the appellant and the 1st respondent.
43. I agree with the learned trial magistrate's finding that the appellant did not produce any agreement between herself and the 2nd respondent. The appellant was not a party to the contract dated 01/12/2008 which was between the 1st and 2nd respondent and neither was the 2nd respondent a party to the agreement dated 12/01/2009 that was between the appellant and the 1st respondent.
44. The Court of Appeal in the case of *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR quoted with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110 where it was held as follows:
- “As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”
45. The rule is that a court of law must determine the matters that arise in any litigation as between parties before it based on the evidence before it, and it must do so conclusively. The 2nd respondent had been joined in the suit and the issue of its liability to any claim by the appellant had to be pronounced.
46. Consequently, it is my finding that the learned trial magistrate did not err in law and in fact in considering whether there was breach of contract between the appellant and the 2nd respondent and in determining that there was no privity of contract between the appellant and the 2nd respondent which I hold to be the correct position. In any event, the appellant did not seek any orders against the 2nd respondent and the suit property had already been transferred to the 1st respondent.
47. The appellant seeks that the judgement of the trial court be set aside and it be substituted with a judgement of this court issuing an order of specific performance of the contract dated 12/01/2009 between the appellant and the 1st respondent.



48. The court in the case of Godfrey Ngatia Njoroge v James Ndungu Mungai [2019] eKLR held as follows:

“Granting of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR, wherein Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

49. As was held in the above case, for a court to grant orders of specific performance there has to be in existence a valid and enforceable contract. The court will not grant orders of specific performance if the contract suffers from a defect such as failure to comply with the formal requirements of the contract. This court finds that the respondents did not demonstrate that there was any defect in the contract between the appellant and the 1st respondent.

50. It was my finding earlier in this judgement that the 1st respondent was in breach of the land sale agreement dated 12/01/2009. He never issued any notice to complete to the appellant and therefore in issuing a rescission notice prior to the completion notice provided for in the agreement, he violated the terms of the contract between the parties. Had the notice been issued and the appellant persisted with the default, then the appellant would have had herself to blame for the 1st respondent’s rescission of the agreement and she would not have been entitled to any orders of specific performance. I am of the view that the appellant is therefore entitled to the orders of specific performance sought in her plaint dated 15th March 2010.

51. Consequently, I find that the appellant’s appeal has merit and allow it and I issue the following final orders:

- a. The judgment of the trial court in Nakuru CMCC No. 910 of 2014 delivered on 6th May 2020 is hereby set aside and substituted with the following orders of this court:
 - i. The suit against the 2nd respondent is hereby dismissed;
 - ii. An order of permanent injunction is hereby issued restraining the 1st respondent herein from selling, transferring and/or disposing of the parcel of land known as Nakuru Municipality Block 21/861/12 except to the appellant in accordance with this judgment;



- iii. An order of specific performance of the sale agreement dated 12th January 2009 is hereby granted to compel the 1st respondent herein upon the tendering of payment of Kshs 140,000/= by banker's cheque to him by the appellant within 30 days of this judgment to forthwith take all measures necessary to complete and complete the agreement dated 12th January 2009 by transferring to the appellant's name all that land known as Nakuru Municipality Block 21/861/12;
 - iv. In default by the 1st respondent of acceptance of payment as ordered in order no. (iii) above, then the appellant shall notify him by way of registered post of the deposit of a bankers cheque for the said sum with the appellant's advocates for his collection within 30 days of the notification of;
 - v. In default of compliance by the 1st respondent with the transfer in order no (iii) herein above the Executive Officer of the Magistrate's court shall upon proof of payment to the 1st respondent as ordered herein above or upon proof of postage of the notification mentioned in order No. (ii) above, execute all documents requisite for transfer of the parcel known as Nakuru Municipality Block 21/861/12 into the appellant's name;
 - vi. An order that the 1st respondent shall deliver to the appellant herein vacant possession of land parcel No. Nakuru Municipality Block 21/861/12 forthwith.
- b. The 1st respondent only shall bear the costs of the trial in the trial court.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 23RD DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

