



REPUBLIC OF KENYA



KENYA LAW
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**Kamuti & another v Waitathu (Environment & Land Case
713 of 2017) [2023] KEELC 17151 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17151 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 713 OF 2017**

JG KEMEI, J

APRIL 27, 2023

BETWEEN

JANE NJERI KAMUTI 1ST PLAINTIFF

FRANCIS KAMUTI KARIUKI 2ND PLAINTIFF

AND

GABRIEL CHEGE MBURU WAITATHU DEFENDANT

JUDGMENT

1. Vide an amended plaint dated 17/5/2021, the Plaintiffs averred that all material times the Defendant was the registered owner of the land parcel known as Juja/Kiaura Block 7/448 measuring approx. 0.0458ha (the suit land) which he agreed to sell to them at a consideration of Kshs. 800,000/- vide a sale agreement dated 11/12/2014.
2. The Plaintiffs contend that they paid a deposit of Kshs. 600,000/- which was acknowledged by the Defendant. That the balance of Kshs. 200,000/- was payable on or before 15/1/2015 after obtaining Land Control Board consent.
3. Further that they averred that the Defendant was obliged to hand over the completion documents to enable the Plaintiffs register the suit land in their names but failed to avail the Land Control Board consent thus breaching the sale agreement.
4. The Plaintiffs accused the Defendant for neglecting and refusing to transfer the suit land prompting them to file suit and seek Judgment for Orders for;
 - a. An order of specific performance of the said sale agreement dated 11/12/2014 that the Defendant transfers the suit parcel no. LR Juja/Kiaura Block 7/448 to the Plaintiffs.



- b. A Permanent injunction to issue restraining the Defendant whether by himself, servants, agents and/or otherwise from disposing off in or any way interfering with the Plaintiffs' rights over the suit parcel no. LR Juja/Kiaura Block7/448.
 - c. That in the alternative to prayer (a) above, the Defendant be compelled to pay the Plaintiffs the current market value worth of the land parcel no. LR Juja/Kiaura Block7/448 to be determined by an independent Court appointed valuer.
 - d. Damages for breach of contract.
 - e. Mesne profits for the deprivation of the land.
 - f. Any other remedy that this Honorable Court may deem fit just in the circumstances.
 - g. Costs of this suit with interest at Court rates.
5. In his defence filed on the 2/12/2017 the Defendant denied the Plaintiffs claim and contended that he was prevented from obtaining Land Control Board consent and delivering completion documents on account of difficulty in securing spousal consent from his spouse who has declined to avail the same.
 6. He averred that he had not refused to hand over the completion documents but it is the lack of Land Consent Board consent occasioned by denial of spousal consent that has hampered the transaction. That the Plaintiffs have failed to invoke Clause 2 of the Conditions contained a Clause in the sale agreement that provide that in the event the Defendant defaulted in completing the sale, he would pay the full consideration plus 30% of the said sum as interest. He denied this Court's jurisdiction to hear the suit and also service of any demand letter upon him.
 7. On a without prejudice to his defence, he admitted in his counterclaim entering into a sale agreement for the sale of the suit land to the Plaintiffs. He maintained that the suit land was matrimonial property which he held in trust for his wife and family. That the sale was subject to the terms contained in the said sale agreement which was drawn by the Plaintiffs' advocate. He averred that he has been willing to refund the paid purchase price in line with Clause 2 of the Supporting Affidavit but for the refusal of the Plaintiffs to accept the same. That the failure to complete the transaction was occasioned by lack of spousal consent which was not forthcoming from his wife. That upon conducting a search, he learnt that the Plaintiffs had placed a caution over the suit land to his detriment and urged the Court to order for its removal. He urged the Court to dismiss the Plaintiffs' suit with costs and grant his counterclaim as prayed.

The Evidence

8. Urging his case, the 2nd Plaintiff Francis Kamuti Kariuki testified as PW1 and adopted his witness statement filed on 22/8/2017.
9. PW1 also produced documents in the List of Documents filed on 22/8/2022 marked as PEX. 1 - 11 which included copies of suit land title deed, sale agreement dated 11/12/2014, Barclays bank receipt for Kshs. 600,000/-, application for Land Consent Board consent, title search form, letter dated 10/3/2015, demand letter dated 24/4/2017, letter dated 27/9/2017 and the valuation report amongst others.
10. He testified how he learnt about the sale of the suit land through his brother, John Kinyanjui and that initially the suit land was unregistered.
11. The title would later be processed in the Defendant's name resulting into execution of the sale agreement. That a deposit of Kshs. 600,000/- was paid and acknowledged by the Defendant with the



- balance of Kshs. 200,000/- payable on or before 15/1/2015. That the Defendant's wife was present at the time of executing the agreement and never raised any objection.
12. In cross, PW1 admitted purchasing the suit land for Kshs.800,000/-. Referred to the spousal consent on page 6 of his bundle, PW1 confirmed that the Defendants wife gave the spousal consent which consent was duly executed and attested by way of an Advocate's stamp embossed thereon. That the said spousal consent though undated was accompanied by the copy of the Defendants wife. That though spousal consent form contains the year 2013, this could not invalidate the same. That he applied for the Land Control Board consent on 13/10/2016. This he attributed to the delay in processing the title on one part and the lack of cooperation on the part of the Defendant. That his counsel sent a demand letter dated 17/8/2017 to the Defendant demanding completion.
 13. In re-exam, PW1 maintained that the offer for refund of monies by the Defendant was not made in good faith because it was offered after he filed his suit. That they were given possession of the suit land upon signing the agreement.
 14. The 1st Plaintiff – Jane Njeri Kamuti took the stand as PW2. Similarly, she relied on her witness statement filed on 22/8/2017 as her evidence in chief. She produced the pay slip on page 17 of her bundle and marked PEX. 12 as evidence of the loan deductions for financing the purchase of the suit land. She stated that she wanted the seller to transfer the land to her or in the alternative refund of the purchase price but at the current market value.
 15. In cross, PW2 stated that the Defendant is hiding behind the lack of spousal consent to avoid his obligations in the agreement and to frustrate the transaction.
 16. The witness was in agreement with PW1 that the Land Control Board Application was done in 2016 outside the 6 months' time limit.
 17. On the other hand, the Defendant Gabriel Chege Mburu testified as DW1. He adopted his witness statement dated 2/11/2017 and produced documents in the List of Documents filed on 3/11/2017 as DEX. 1 – 4 namely copies of Supporting Affidavit dated 11/1/2014, letters dated 17/8/2017 & 27/9/2017, official search dated 3/8/2017 and title deed issued on 3/10/2014 in the Defendant's name.
 18. His testimony was a replica of the averments in the statement of defence already enumerated above.
 19. In cross-examination, DW1 said he is married though he did not produce any marriage certificate in support of this averment. That he had not refunded the money but had offered to do so. That the Plaintiffs were to apply for the Land Control Board though the same was not included in the sale agreement. That DW1 gave the Plaintiffs the original title to retain until the full amount was paid. Further that DW1 did not have any evidence to proof that his wife declined to give the spousal consent.
 20. In re-exam, DW1 said he saw the spousal consent at the Advocate's office which was neither dated nor certified. That he offered to refund the money in 2017 but the offer was declined and instead the Plaintiffs' advocate threatened him with criminal charges. That DW1 was in possession of the suit land but did not know of any activity thereon having not visited it.

Written Submissions

21. The firm of Tony Martin LLP Advocates filed two sets of submissions filed on 3/11/2022 and 28/2/2023 on behalf of the Plaintiff.
22. The Plaintiffs rehashed the background of the case and summary of evidence as adduced in Court. They drew six issues for determination that are summed up as follows; firstly that the parties entered



into a valid sale agreement in compliance of Section 3 (3)(b) of the Law of Contract Act and therefore it suffers no defect.

23. Secondly, that the Defendant has refused to procure completion documents and has failed to show any communication to the Plaintiffs for an offer of refund and the denial of spousal consent as alleged.
24. Thirdly that while spousal rights are recognized as overriding interests under Section 28 Land Registration Act, the suit land does not constitute a matrimonial home as defined in the Land Act hence spousal rights do not apply.
25. Fourthly that if the Court is convinced to hold otherwise, then the spousal consent denial is overridden by the doctrine of acquiescence.
26. Fifthly, on the issue of Land Consent Board consent, the Plaintiffs submitted that it was agreed that the Defendant was specifically tasked to obtain the same. That under Section 7 of Land Control Act any valuable consideration paid in the course of a controlled transaction under the Act can be recovered as a debt. Nevertheless, they urged the Court to grant SP based on the CoA case of Willy Kimuta Kitilit Vs Michael Kibet [2018] eKLR on application of equitable doctrine of constructive trust in their favor since the Defendant willfully frustrated the agreement.
27. Sixthly, they beseeched the Court to allow their suit as prayed with costs.
28. The Defendant through the firm of Kiaritha & Associates Advocates filed submissions dated 17/11/2022. Admitting the sale agreement between the parties and its validity, the Defendant submitted that he did not breach the sale agreement but having failed to obtain spousal consent, he offered to refund the monies to the Plaintiffs. That his offer was rejected and be that as it may, nothing stopped the Plaintiffs from invoking the default Clause 2 in the sale agreement.
29. Moreover, the Defendant maintained that the Plaintiffs are not entitled to the order of specific performance because the offer for refund was declined and the Plaintiffs' claim for refund of Kshs. 3.5M at current market value is unfair and tantamount to unjust enrichment. On the prayer for mesne profits, the Defendants refuted the same stating that the Plaintiffs have been reaping benefits from the occupation and possession of the suit land from 11/12/2014 and in any event the claim is unproven.
30. That the suit land being matrimonial property, the Defendant holds it in trust for his wife and family and the denied the purported spousal consent indicating the year 2013 way before execution of the sale agreement. Further that the transaction is void for want of Land Control Board consent and failure by the Plaintiffs to seek extension of time to apply for it. He urged the Court to dismiss the Plaintiffs' suit and order removal of the caution thereon forthwith.

Analysis & Determination

31. Having considered the pleadings the evidence adduced at the trial the written submissions and all the materials placed before the Court the issues that commend themselves for determination are;
 - a. Whether the agreement of sale was frustrated/breached
 - b. Whether there exists a constructive trust in favour of the Plaintiff in relation to the transaction
 - c. Whether the Plaintiffs are entitled to orders of specific performance
 - d. Costs of the suit
32. In order to determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Plaintiffs have alleged that they entered into a sale



agreement with the Defendant for the purchase of the suit property. Further that the same was reduced into writing and signed by all the parties as required by Section 3 (3) of the Contract Act and in its replica under Section 38 of the *Land Act*.

33. Section 38 of the *Land Act* provides that;

“Validity of contracts in sale of land.

- (1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
- (2) Subsection (1) shall not apply to-
 - (a) a contract made in the course of a public action;
 - (b) the creation or operation of a resulting, implied or a constructive trust; or
 - (c) any agreement or contract made or entered into before the commencement of this Act, provided that-
 - (i) the verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and
 - (ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.”

34. Section 3(3) of the Law of Contract provides that:

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless

—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:”

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”



35. The Court has carefully perused the sale agreement produced as evidence by the Plaintiffs and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act as well as Section 38 of the *Land Act*.
36. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No.956 of 1991, where the Court held that:-
- “The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.”
37. It is commonly agreed that the agreement of sale was entered into by the parties. There is no dispute on this fact. The agreement is dated the 11/12/2014 and executed by the three parties in the suit as the purchasers and the seller respectively. The identity and size (0.0458 ha) of the land is not in dispute. The purchase price was Kshs 800,000/- and a deposit of Kshs 600,000/- was paid in advance and duly acknowledged under para 2 of the agreement.
38. The Sale agreement having met all the requirements between the Plaintiff and the Defendant and therefore the sale agreement between the two is valid and it thus met the requirements of Section 3(3) of Contract Act and Section 38 of the *Land Act*.
39. It then follows that the Court must further interrogate whether there was breach /frustration of the said Contract.

Whether the agreement of sale was frustrated/breached

40. It is the case of the Plaintiffs that the Defendant has failed to complete of the transaction by handing over completion documents including the Land Control Board consent to enable the successful transfer of the suit land to the Plaintiffs. Further that it failed to invoke Clause 2 and 3 of the agreement of sale thus prejudicing the Plaintiffs. The Plaintiffs aver that they have complied with their part of the obligations and that it is the Defendant in breach. He has therefore refused to transfer the suit land to the Plaintiffs.
41. The Defendant contends that he has not refused to comply with the agreement save for the frustration of the same by the lack of spousal consent and therefore the Land Control Board consent has not been obtained. That for that reason the Court has no jurisdiction to entertain the matter as the transaction is null and void. Further that the suit land is matrimonial land and that he held it in trust for his wife and family.
42. The doctrine of frustration is covered by the Court of Appeal in the case of *Lucy Njeri Njoroge v Kalyahe Njoroge* [2015] eKLR where the Court observed as follows:

“For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In *Maritime National Fish v Ocean Trawlers* [1935] AC 524., self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of their other trawlers leaving no licence to operate the contracted trawler.”



43. In *Davis Contractors Ltd v Fareham U.D.C.* (supra), it was stated thus,

“The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self-induced.”

44. Secondly, it is also important for the Party pleading frustration, to show that the circumstances which are alleged to found frustrations are neither self-induced nor self-inflicted.

45. In the case of *Charles Muirigi Miriti v Thananga Growers Sacco Limited And Other* [2014] eKLR, the Honourable Court held as follows:

“As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.”

46. In view of the foregoing, I find and hold, that the Doctrine of frustration, does not apply to the circumstances of this case and neither does it come to the aid of the Defendant.

47. In support of the foregoing observation and to authenticate the circumstances where equity will intervene, it is appropriate to take cognizance of the decision in the case of *Mwangi Macharia And 87 Others Versus Davidson Mwangi* [2014] eKLR which states as follows:

“Article 159(2) (b) of *the Constitution* requires that justice should not be delayed. This matter has been in the Courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2) (a) of *the Constitution* requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of *the Constitution* stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a Court of law and a Court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at



delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

48. Evidence was led by the Plaintiffs that the agreement of sale was signed in the presence of the Defendant’s wife who raised no objection. I observe from the record that there is indeed a spousal consent executed by one Mary Wanjiru Joseph of ID No 5703999 and an ID accompanying the same. The Defendant argued in evidence that he did not obtain the spousal consent and that the same is a forgery. However, no evidence was tendered in support of the alleged forgery. Even the said Mary was not called in evidence or swore an affidavit to rebut the documents. The Defendant led evidence that his wife was aware of the sale of the land. It is the finding of the Court that the spousal consent on record was given by the spouse of the Defendant. There was also no evidence that the Land Control Board consent was declined on her refusal.

49. The Defendant led evidence that the land is matrimonial property. The definition of a matrimonial property is given under Section 2 of the [Matrimonial Property Act](#) as follows;

“In this Act, unless the context otherwise requires—

“contribution” means monetary and non-monetary contribution and includes—

- (a) domestic work and management of the matrimonial home;
- (b) child care;
- (c) companionship;
- (d) management of family business or property; and
- (e) farm work;

“family business” means any business which—

- (a) is run for the benefit of the family by both spouses or either spouse; and
- (b) generates income or other resources wholly or part of which are for the benefit of the family;

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

“matrimonial property” has the meaning assigned to it in Section 6;

“spouse” means a husband or a wife.”

50. The law provides limitations in the disposal of matrimonial property and makes it mandatory for spousal consent to be availed. I have already held that spousal consent was given.

51. Even if I was wrong on whether or not the land is matrimonial property, the Defendant has not laid any evidence before the Court to support that the property was indeed matrimonial land. And if it was, it remained his sole obligation under the contract to procure the same. Evidence led by the PW1 that the agreement was executed in her presence was never rebutted. In addition the reason she objected to the Land Control Board consent was that she was unhappy about the quantum of the purchase price and no issue was raised about the spousal consent.



52. It is not in dispute that the Land Control Board consent was not obtained within the period of 6 months. The Plaintiffs have led evidence that they applied twice, the first time the Defendant's wife protested on the question of the purchase price and the 2nd time she did not attend. It is evident that the Land Control Board consent was not obtained purely for the lack of cooperation from the Defendant. The parties had covenanted to obtain the consent. The Defendant failed on his part to take any action at all including obtaining the Land Board Consent. It is clear from the pleadings that the Defendant has a made-up mind not to complete the agreement in return for refunds of the purchase price.
53. It is trite that a party must plead particulars of frustration and prove the same to the standard of probabilities. A party is not allowed to rely on frustration if the facts or circumstances have been authored or occasioned by him. In the case of *Billey Oluch Orinda v Ayub Muthee M'Igwetta & 2 Others* [2017] eKLR the Court stated as follows;

“Evidence was led by the Plaintiff and through PWII and III that the suit property following a Court order was reduced in size to 0.48Ha. A party in law can be excused from performing a term of the contract because of the (sic) impossibility. Like in this case, the parties contracted for a specific measurement of land to be transferred to the Plaintiff. However due to factors which cannot be blamed either on the Plaintiff or the Defendant, that acreage was reduced. It was reduced following an order of the Court. That reduction was done after the parties had contracted to sell and buy the suit property. The reduction of the measurement of the suit property makes the performance of the contract as per the agreement of the parties impossible. There is no way the Defendants can be able (sic) to transfer the acreage they agreed with the Plaintiff. Indeed the act of reducing the suit property measurements frustrated the party's contract. Frustration is discussed in the book of Treitel: *The Law of Contract*, eleventh Edition Pg 909:-

Frustration terminates a contract automatically at the time of the frustration event, though the parties for some time after the event went on behaving as if the contract existed.

The Plaintiff's prayer therefore for orders of specific performance of the contract cannot be entertained because of that frustration of the contract.”

54. From the foregoing, what becomes evident and/or apparent is the fact that before a Party can invoke and rely on the Doctrine of frustration, such a Party must plead particulars of the circumstances leading to frustration. No particulars were given in this case albeit the same having been pleaded.
55. From the foregoing I hold most respectfully that the doctrine of frustration is not available to the Defendant. In this case the Defendant was feigning frustration so as to wriggle the land from the Plaintiffs and sell it at a higher price. Perhaps that explains why he was eager to refund the purchase price of every opportune time.
56. The next sub issue is whether the agreement was breached. *Blacks Law Dictionary*, 9th Edition, page 213 defines a breach of Contract as;

“A violation of a contractual obligation by failing to perform one's own promised, by repudiating, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a claim for nominal damages.”



57. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts for the parties. The role of the Court to interpret contracts within the confines of the law and the intention of the parties except where there are vitiating factors that impugn the contract. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* [2002] 2 E.A. 503, [2011] eKLR the Court of Appeal at page 507 stated as follows: -
- “A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
58. In the case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR the Court of Appeal further stated that: -
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.
59. In this case it is not in dispute that the completion date was the 4/1/2015 or any such earlier or later date as the parties may agree. From the circumstances of the case so far, the completion did not take place on the 4/1/2015. It therefore follows that after that date the parties were to set another date and in default the one ready to complete was to issue notice which would trigger a completion.
60. According to the evidence of the Plaintiffs they aver that it took them time to procure the official search at the lands office and finally when they got it booked the land board in 2016. That their effort to get the Defendant to complete was fruitless leading to the filing of the suit on the 22/8/2017.
61. Presumably upon being served with the summons and the suit the Defendants advocate on record authored a letter dated the 17/8/2017 addressed to the Plaintiffs lawyers that their client is unable to transfer the land because the land control board consent had not been sought and obtained. The letter suggested that the best option is the refund of the purchase monies. The response from the Plaintiffs was fast and swift in a letter dated the 27/9/17 informing him that the client was not willing to accept a refund and reiterated the need to complete the transaction. In addition, the Defendant was advised that a suit had already been filed.
62. It was a term of the agreement that the balance of the purchase price in the sum of Kshs 200,000/- was payable on or before the 15/1/2015 after successfully obtaining land control board consent. The parties bound themselves under para 4 to attend to the land control board to obtain the said consent. The completion date was 4/1/2015 or such other earlier or later date as the parties may agree.
63. It is manifestly clear that the parties did not complete the transaction by the 4/1/2015 as agreed. It is not in dispute that the Defendant did not procure the Land Control Board consent nor hand over the completion documents by the said date. The balance of the purchase price was to be paid upon successfully obtaining the Land Control Board consent. None of the parties sought the termination or rescission of the agreement meaning that both acquiesced in the default and since they were at liberty to agree on the completion any other time, the acquiesced default persisted. The Plaintiffs issued completion notice in their letter dated the 24/4/2017 giving the Defendant 7 days to complete the contract. The Defendant responded that he was willing to refund the purchase price forcing the Plaintiffs to file suit in Court.
64. Upon receipt of notice to complete the Defendant failed to do so and I hold that he breached the agreement without any justifiable cause.



Whether there is constructive trust in favour of the Plaintiffs.**

65. At the centre of this case, is the application of the [Land Control Act](#) which provides for controlled transactions in agricultural land. The transaction affecting agricultural land which are controlled are specified in Section 6(1) of the [Land Control Act](#) and include, sale, transfer, lease, mortgage, partition, sub-division and sale of shares in a private Company or Co-operative Society which owns land. Section 6 (1) further provides that such a transaction. Further, the section provides that such a transaction is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.
66. Section 6 (2) of the [Land Control Act](#) provides:
- “For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1).”
67. Further, Section 6 (3) (b) states that Section 6 of the [Land Control Act](#) does not apply to:
- “A transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.”
68. Section 8 (1) requires that an application for consent should be made in the prescribed form within six months of the making of the agreement but the proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit. Section 8 (2) requires the Land Control Board either to give or refuse its consent and Section 9 (1) specifies the matters that the Land Control Board should consider and the principles it should apply in making its decision whether to grant or refuse consent. Section 11 (1) of the Act provides for appeals from the decision of the Land Control Board to the Provincial Land Control Appeals Board for each Province chaired by a Provincial Commissioner. Further appeal is provided under Section 13 (1) to Land Control Appeal Board chaired by the Minister.
69. The 2010 Constitution, in Article 60 (1) provides for the principles of land policy which include equitable access to land, security of land rights and in Article 67 (1) established the National Land Commission as the overall body in charge of land. Article 68 authorizes Parliament to, among other things, revise, consolidate and rationalize existing land laws. Pursuant to that power, Parliament has reformed the land laws. It has enacted, the [Land Registration Act](#) 2018 (Chapter 300 (LRA)) which repeals five other legislations; the [Land Act](#) 2012 (Chapter 280) which has repealed two other legislations and the [Community Land Act](#) – No. 27 of 2016.
70. As observed in the case *William Kimutai Kitilit Vs Michael Kibet* [2018] eKLR. The provisions of the [Land Control Act](#) are outdated and are not in tandem with [the Constitution](#) and the current land law regime. The Court held:
- “We have extensively quoted the provisions of the [Land Control Act](#), [the Constitution](#) and the current land laws in order to demonstrate that the [Land Control Act](#) is not a modern legislation although it has not been repealed. Some of the institutions created by the [Land Control Act](#) are no longer in existence, for instance, the office of District Commissioner, Provincial Commissioner and the Central Land Control Appeals Board. The President who had power under that Act to exempt transactions from the provisions of the Act has no longer power under [the Constitution](#) to deal with matters relating to land.”



71. However, the law is still in place Courtesy of Clause 7 (1) of the Transitional and Consequential Provisions in the Sixth Schedule to [the Constitution](#) of Kenya 2010, which provides:
- “All law in force immediately before the effective date continues to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with this Constitution.”
72. The decision in *Yaxley v Gotts* [2000] Ch. 162 (Yaxley’s case) on which the Court in *Macharia Mwangi Maina Decision* relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity’s intervention to provide relief against unconscionable conduct.
73. Furthermore, the Court in *William Kimutai Kitilit v Michael Kibet* [2018] eKLR in providing further guidance on the applicability of the doctrine of constructive trust to a contract rendered void by lack of the consent of the Land Control Board is largely dependent on the unique circumstances of the case. The Court held that:
- “(23) The [Land Control Act](#) does not, unlike Section 3 (3) of the [Law of Contract Act](#) and Section 38 (2) of the [Land Act](#) save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the [Land Control Act](#) have unreasonably delayed in performing the contract. However, whether the Court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.”
74. In addition, the *Kimutai Kitilit* decision affirms that Article 10(2) (b) of [the Constitution](#) of Kenya provides another more compelling reason for applying the doctrines of constructive trust and proprietary estoppel to the [Land Control Act](#). Equity is one of the national values which binds the Courts in interpreting any law. Besides, Article 159(2) (e), the Courts in exercising judicial authority are required to protect and promote the purpose and principles of [the Constitution](#). Further, as stated before, by virtue of Clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to [the Constitution](#), the [Land Control Act](#) should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with [the Constitution](#).
75. Article 10(2) (b) Constitution of Kenya elevated equity as a principle of justice to a constitutional principle and requires the Courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the [Land Control Act](#) where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.



76. Notably, I wish to reiterate the position established in the case of *Kiplagat Kotut v Rose Jebor Kipngok* [2019] eKLR, with regard to the *Land Control Act*, Cap 302. It was held that:

“We hasten to state that the *Land Control Act*, Cap 302 of the Laws of Kenya was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.”

77. In comparison, two Canadian cases *Pettkus v Becker*, [1980] 2 S.C.R. 834 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217) highlight the elements necessary for constructive trust. They include: first, the enrichment of the Defendant. Second, the corresponding deprivation of the Plaintiff. Third, the absence of a juristic reason for the enrichment.

78. Thus, constructive trust holds persons in different situations to high standards of trust and probity and prevent them from retaining property which in good conscience they should not be permitted to retain. I find that it is prudent in this matter for the Defendant to be held to a high standard of trust and probity and in good conscience should not be allowed to keep the suit property.

79. From the foregoing paragraphs, I am in agreement with the *Macharia Mwangi Maina* decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the *Land Control Act*, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the Court in its discretion

80. To the extent that the Defendant is seeking to rely on the absence of Land Control Board consent to vitiate the agreement, an act that it was contractually obligated to, the Court is of the view that this ground must fail. I am guided by the provisions of Article 10 of *the Constitution* of Kenya which states as follows;

- “(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) Applies or interprets this Constitution;
 - (b) Enacts, applies or interprets any law; or
 - (c) Makes or implements public policy decisions.
- (2) The national values and principles of governance include— *Const2010 Constitution of Kenya, 2010* 14 (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.”

81. This is a case that a constructive trust has been created in favour of the Plaintiffs. The parties by their own conduct evinced the meeting of minds as far as the agreement is concerned. The interest in the land had passed to the Plaintiffs and the right of the Defendant was the receipt of the balance of the purchase price. In this case the Defendant has been unreasonable in performing his part of the obligations in the agreement.



Specific performance

82. The Granting of the equitable remedy 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 v 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.”

83. As Lord Diplock observed in *Sudbrook v Eggleton*, in some cases the proper remedy in such a case is an action for specific performance, since damages are often inadequate and unjust remedy for a refusal to convey the suit property. Similar circumstances are exhibited in this case, as such, an order for specific performance is appropriate and is hereby granted.

84. In addition, a person seeking an order for specific performance must show and satisfy the Court that it can comply, that is to say ready willing and able to do so and mere statements are not enough. This is premised on the equitable maxim that he who comes to equity must do equity. In the case of *Palmer v Lark* [1954] 1 Cha 182 and *Openda Vs Ahn* (1984) KLR 2018 the Court held that a purchaser must pay or render at the time and place of completing the sale the purchase price to the seller and this is a condition precedent for specific performance of the agreement.

85. In the premises, an Order for specific performance, is appropriate and suffices to issue, in favor of the Plaintiff herein. For clarity, an Order for specific performance is an equitable remedy and therefore equity deems as done, that which ought to have been done, were it not for the breach and infractions by the Defendant.

86. I am satisfied that the Plaintiffs have complied with the agreement of sale and that they are entitled to specific performance. The Plaintiffs have tendered evidence on intention to pay the balance of the purchase price but the Defendant’s reluctance to accept and/or receive the payment of the said purchase price. In view of the foregoing, what becomes apparent is that the Plaintiffs have been ready and willing to complete the transaction.

87. On the issue of damages for breach of contract, it is trite that damages be they specific have to be pleaded and proved, in this case the Plaintiffs did not do so and am constrained to entertain the prayer.

88. With respect to mesne profits its not in dispute that the Plaintiffs have been in occupation of the suit land and in any event no particulars were presented before the Court for consideration. This prayer is rejected because they were in occupation of the land and therefore not deprived of the use of the same. I am inclined to agree with the Defendant on this subject.

89. In the end I enter judgement in favour of the Plaintiffs as follows;



- a. An order of specific performance of the said sale agreement dated 11/12/2014 that the Defendant do forthwith transfer the suit parcel no. LR Juja/Kiaura Block 7/448 to the Plaintiffs subject to the payment of the balance of the purchase price in the sum of Kshs 200,000/-
- b. In default the Deputy Registrar of this Court is mandated to execute all the documents necessary to effectuate the orders.
- c. A permanent injunction do issue restraining the Defendant whether by himself, servants, agents and/or otherwise from disposing off in or any way interfering with the Plaintiffs' rights over the suit parcel no. LR Juja/Kiaura Block7/448.
- d. Damages for breach of contract is disallowed.
- e. Mesne profits for the deprivation of the land is disallowed.
- f. Costs shall be payable by the Defendant in favour of the Plaintiffs.
1. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Kingangi for 1st and 2nd Plaintiffs

Kiaritha for Defendant

Court Assistants – Kevin/Lilian

