



Maina (Suing on his behalf and on behalf of 33 others) v Nzuki & 2 others (Environment & Land Case 18 of 2008) [2023] KEELC 17131 (KLR) (26 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17131 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 18 OF 2008**

**A NYUKURI, J
APRIL 26, 2023**

BETWEEN

SIMON MURIITHI MAINA (SUING ON HIS BEHALF AND ON BEHALF OF 33 OTHERS) PLAINTIFF

AND

ANTHONY NZUKI 1ST DEFENDANT

EMMANUEL KAKULA (BOTH BEING SUED IN THEIR CAPACITIES AS PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE RAPHAEL KAKULA NZUKI) 2ND DEFENDANT

DIVISONAL INTERGRATED DEVELOPMENT PROGRAMMES COMPANY LIMITED (DIPS) 3RD DEFENDANT

JUDGMENT

Introduction:

1. The Plaintiff initiated this suit by a Plaint dated 28th February 2008 and filed on 29th February 2008, where he sought the following orders;
 1. An order of specific performance of the Sale Agreement entered into between the Plaintiffs and the 3rd Defendant
 2. An order directed to the 1st and 2nd Defendants to execute the transfer forms in favour of the 3rd Defendant to enable the latter issue titles to the Plaintiffs.
 3. Costs of the suit and interest.
2. The Plaintiff averred that on 10th April 2002, one Raphael Kakula, now deceased, (hereinafter referred to as the deceased), who was the registered proprietor of Land Parcel L.R. No. 12715/197 plot No. 25



(Suit property), entered into a land sale agreement in respect of the suit property with the 3rd Defendant at a consideration of Kshs. 1,600,000/=. Further that the deceased died before the transaction was completed as a balance of the consideration in the sum of Kshs. 642,500/= was still unpaid and the suit property had not been transferred to the 3rd Defendant. They also averred that pursuant to an advertisement in the local dailies, for sale of the suit property which had been subdivided into smaller plots, they individually purchased various plots from the 3rd Defendant. According to the Plaintiffs, the amount paid was used to clear the balance that the 3rd Defendant owed the deceased being the sum of Kshs. 642,500/=: which was paid to the deceased's agent one Gacau Kariuki.

3. It was the Plaintiffs' case that they completed their part of the bargain with the 3rd Defendant and that the 1st and 2nd Defendants who are the personal representatives of the deceased's estate, were obligated to transfer the suit property to the 3rd Defendant for the latter to transfer it to them. That however the 1st and 2nd Defendants have refused to transfer the suit property to the 3rd defendant thereby frustrating the Plaintiffs pursuit of their respective titles and that the 1st and 2nd Defendants have demanded to be paid consideration afresh. They maintained that they have taken possession of their respective plots where they have constructed.
4. The suit is opposed. The 1st and 2nd Defendants filed a statement of Defence on 2nd April 2008 and later amended the same to include a counterclaim dated 9th July 2009. They denied all the averments in the Plaint and stated that even though there was a land sale agreement between the 3rd Defendant and the deceased, the same was breached by the 3rd Defendant who failed to pay the agreed purchase price according to the terms of the agreement. They further stated that any subsequent agreement on the suit property between the Plaintiffs and the 3rd Defendant was hence a nullity and that the Plaintiffs, not being privy to the agreement between the deceased and the 3rd Defendant, have no cause of action against the deceased's estate as the 1st and 2nd Defendants are strangers to the agreements between the Plaintiffs and the 3rd Defendant. They also claimed that the agreement between the Deceased and the 3rd Defendant was the subject matter in Nairobi HCC No.1157 of 2005 (raphael Kakula Nzuki Vs Divisional Integrated Development Programme Limited) which is yet to be heard and determined.
5. In their counterclaim, the 1st and 2nd Defendants sought the following orders;
 - a. That the Plaintiffs be evicted from the parcel of land known as L.R 12715/197, and any structures that they may have unlawfully put up on the said land be demolished.
 - b. The Plaintiffs do pay costs of both the suit and the counterclaim, plus interest thereon, to the first and the second defendants.
6. On 17th March 2008, the 3rd Defendant filed a notice of claim against the 1st and 2nd Defendants dated 14th March 2008, wherein they sought full indemnity against the latter, in respect of the Plaintiffs' claim. The notice was based on assertions that although the 3rd Defendant entered into a land sale agreement with the deceased, the 1st and 2nd Defendants who are the personal representatives of the deceased's estate, had refused to execute transfer documents in favour of the 3rd Defendant to enable them transfer the land to the Plaintiffs and to enable the 3rd defendant pay the balance of Kshs. 642,000/= as per the agreement dated 10th April 2002. The 3rd Defendant therefore sought the following orders;
 - a. Full indemnity for any judgment entered in respect of the Plaintiffs' claim.
 - b. An order directing the 1st and 2nd Defendants to execute transfer documents in favour of the 3rd Defendant to enable the 3rd Defendant issue titles to the Plaintiffs.
 - c. Costs of this suit and interest thereof to be met by the 1st and 2nd Defendants



- d. Any other relief this Honourable Court may deem fit to grant.
7. The 3rd Defendant also filed a statement of Defence dated 14th March 2021. They agreed with the averments contained in the Plaint as regards the sale agreement between themselves and the deceased. Further, they stated that their inability to complete their part of the agreement with the Plaintiffs was occasioned by the refusal of the 1st and 2nd Defendants to execute transfer documents in their favour to enable them transfer the suit property to the Plaintiffs.
 8. In response to the Plaintiffs' claims, they averred that they have all along been ready and willing to complete the agreement entered into with the deceased, upon execution and receipt of the transfer documents from the 1st and 2nd Defendants. They held the view that the 1st and 2nd Defendants have frustrated the completion of the respective agreements and that they should be held liable.
 9. On 21st September 2020, the 1st and 2nd Defendants filed a reply to the 3rd Defendant's claim. They stated that the agreement of 10th April 2002 was breached by the 3rd Defendant who failed to pay the entire consideration within the agreed period, prompting the deceased to file Nairobi HCC NO. 1154 of 2005 against the 3rd Defendant. They maintained that the 3rd Defendant only paid the deposit of Kshs. 160,000/= and that the documents demonstrating payments filed by the 3rd Defendant were forgeries. They also stated that the sale of the suit property by the 3rd Defendant to the Plaintiffs was unlawful and that the Plaintiffs unlawfully constructed houses on the suit property in contravention of the injunction issued by this court. They emphasized that there was no privity of contract between the Plaintiffs and the 1st Defendant and that the 1st Defendant was a stranger to the agreements between the Plaintiffs and the 3rd Defendant. They prayed that the 3rd Defendant's claim be dismissed.
 10. The matter proceeded by way of viva voce evidence.

Plaintiff's Evidence

11. PW1 was the 1st Plaintiff, Simon Muriithi Maina. He adopted his witness statement filed on 6th September 2018 as his evidence in chief. His evidence was that following advertisement by the 3rd Defendant for sale of plots subdivided from L.R No.12715/197, he visited the 3rd Defendant's offices in the company of one Ann Gichuku Njeru. He then stated that while at the offices, they were shown the original title deed and a sale agreement between the 3rd Defendant and the deceased in respect of the sale of L.R No.12715/197. It was his testimony that the Director of the 3rd Defendant, one Mr. Musyoki, confirmed to them that they had bought and subdivided the parcel of land and were selling to clients the subdivisions as shown in the Plaintiff's bundle of documents at page 45. He stated that they then settled for plot No.12 measuring 0.045 ha and paid for the same at KSh.145,000/= as agreed after which they obtained a receipt and a certificate of land ownership.
12. He further informed court that having completed the purchase price, they now expect the 3rd Defendant to furnish them with the title documents having undertaken to obtain the consent from the Land Control Board for the transfer. He explained that his efforts to pursue the title from the 3rd Defendant were met with a response that the administrators of the deceased's estate had frustrated them, but in his opinion, the issue of frustration did not have anything to do with his title deed and that the 3rd Defendant is liable in contract as he is in breach of his contract with the Plaintiffs. He confirmed to have taken possession of the land and developed the same. His bundle of documents included a copy of the title for the suit property, a copy of search certificate, an agreement between the deceased and 3rd Defendant to hold the title, several payment vouchers, receipts, agreements between the plaintiffs and the 3rd defendant, plaintiffs' certificates of ownership, allotment letters, a payment analysis and approved subdivision.



13. Upon cross examination, he stated that he was representing 33 other buyers as listed, together with their agreements and receipts. He also stated that he was not aware that the 3rd Defendants had been told to vacate the land for breach of contract and that the deceased had filed suit number Nairobi HCCC 1157 of 2005 for breach of contract. He also stated that about twelve other Plaintiffs live on the land including himself. He further testified to have seen the agreement between the deceased and the 3rd Defendant which formed the basis of their purchasing the suit property. He stated that he was shown the mother title in the name of the deceased and that paragraph 4 of the agreement of the 3rd Defendant and the deceased allowed the 3rd defendant to enter the land, survey and subdivide it. Upon re-examination, he confirmed to have moved into the land in 2007 and that he has ever been summoned for contempt of court orders.
14. PW2 was Gordon Omondi Ngutu who adopted his witness statement filed on 5th September 2018 as his evidence in chief. He stated that by agreement he purchased plot no.15 from L.R. No. 12715/197 from the 3rd Defendant and paid the entire consideration. He averred that he was persuaded to purchase the parcel of land since he was shown the mother title and a sale agreement between the 3rd Defendant and the deceased who was the registered proprietor. He confirmed that the said agreement allowed the 3rd Defendant to subdivide the plots for sale to clear the outstanding balance. He averred that he had paid a purchase price of Kshs. 120,000/= and that the same was fully cleared. Mr. Ngutu further stated that he was later issued with a certificate of land ownership dated 17th May 2004 and an allotment letter to the parcel of land dated 14th June 2003. The witness concluded by stating that despite several demands to the 3rd Defendant to issue them with title documents, the same has not been done and that the 1st and 2nd Defendants have issued threats of eviction to the Plaintiffs.
15. Upon cross examination, the witness conceded that he never transacted with the deceased or his personal representatives. He further stated that he was shown the title documents in the name of the deceased and that by the time the injunction was being issued, he was already on the property with his family. He also stated that he was shown the sale agreement by the 3rd Defendant and was not aware that the same had been rescinded. On re-examination, he stated that he has never been brought to court for disobedience of court orders.
16. PW3 was Dominic Mutie Mwanthi. He also adopted his witness statement filed on 5th September 2018. He stated that he had entered into a sale agreement with the 3rd Defendant for the purchase of Plot No.10 on L.R. No.12715/197 for Ksh.135,000/=. That in the said agreement, the sale was to be completed in three months with the 3rd Defendant procuring a title deed for the buyer. The witness stated that he was indeed issued with a certificate of land ownership dated 13th December 2006. He also stated that he was convinced to buy the land having been shown by the director of the 3rd Defendant, one Boniface Musyoki, the mother title and the sale agreement between them and the registered proprietor, the deceased herein. It was his case that the agreement between the two was clear in that the 3rd Defendant had been allowed to subdivide the plots for sale to clear the outstanding balance. He averred that the 3rd Defendant has never issued him with the title document despite paying the full purchase price as agreed. He stated that he was now facing eviction threats from the 1st and 2nd Defendants.
17. Upon cross examination, he stated that he bought the land on 29th July 2005 and took occupation in 2007 after building a bungalow where he has since lived. He stated that he did not move out after the injunctive orders were issued. He stated that he was not aware of any cancellation of the agreement between the 3rd Defendant and the deceased and that the agreement between the 3rd Defendant and the



deceased authorized the former to subdivide and sell the land. That marked the close of the Plaintiffs' case.

18. As the 1st and 2nd Defendants together with their counsel were not in court when the matter came up for defence hearing, the court allowed the 3rd Defendant to give his evidence. However, in the course of his testimony, counsel for the 1st and 2nd Defendants turned up and therefore the evidence of the 3rd defendant preceded the evidence of the 1st and 2nd Defendants as the court allowed the 3rd Defendant's witness to proceed with his testimony.

3rd Defendant's Evidence

19. DW1 was Boniface Musyoki, the Managing Director of the 3rd Defendant. He adopted his witness statement dated 10th December 2019 as his evidence in chief. It was his testimony that the 3rd Defendant entered into a land sale agreement with the deceased on 10th April 2002 for the sale of the suit property at a consideration of Kshs. 1,600,000/=. He averred that the 3rd Defendant paid a deposit of Kshs. 160,000/= on the date of signing the agreement and later by installments making a total of Kshs. 1,117,500/=. He stated that the deceased handed over to him the original title for safekeeping. He further stated that the agreement expressly provided that the 3rd Defendant was free to have the suit property surveyed and subdivided for purposes of selling the same to clear the balance of the purchase price. He further stated that it was a term of the agreement that any delays in repaying the balance on the purchase price would attract an interest of 3% per annum until payment in full. The witness stated that it was pursuant to the agreement that the 3rd Defendant took possession of the suit property, subdivided it and sold it to the Plaintiffs, but that unfortunately Mr. Raphael Kakula passed on before he could complete the transaction and that the administrators of the deceased's estate have refused to complete the transaction.
20. According to DW1, the agreement between the 3rd Defendant and the deceased has never been rescinded by either party nor the administrators of the estate of the deceased. He stated that the 3rd Defendant was still willing to pay the balance on the purchase price with interest at 3% per annum. He prayed that the notice of claim against the 1st and 2nd Defendants be allowed as prayed and that they be directed to collect the balance or the 3rd Defendant be ordered to deposit the same in court. He produced a copy of the title of the suit property, a search certificate, a sale agreement dated 10th April 2002, agreement to hold title, payment analysis and payment vouchers.
21. Upon cross examination, he stated that he wanted the Plaintiff's case to be dismissed. He also confirmed that the 3rd Defendant sold the suit property to the 33 Plaintiffs, stating that they now reside on the suit property. He confirmed that he signed the agreement he entered into with the deceased, dated 10th April 2002. He further explained that he did not pay the entire purchase price since the vendor had not been available to receive the same. He also explained that he was to subdivide the suit property to pay the balance on the purchase price, which he did. He produced a payment analysis as Exhibit 5 which outlined the breakdown of the payments he had done. He stated that at some point the deceased had appointed an advocate to receive the payments on his behalf but he did not have any letter to show any such instructions. He also confirmed that the deceased had filed a suit against him seeking his eviction. He stated that the 33 Plaintiffs have been on the land for over 20 years. He stated that he sold the entire parcel. He conceded that any amount not paid was to attract interest. He further confirmed that Exhibit 6 was a payment for Kshs. 100,000/= towards the land, issued to Nzuki who needed the money urgently as he had borrowed from the bank.
22. The witness further confirmed that clause 5 of the agreement between him and the deceased allowed him to subdivide and sell the suit property and that is why he sold the land to the Plaintiffs. He



confirmed issuing the Plaintiffs the certificates of ownership, receipts produced by the Plaintiffs and all documents produced by the plaintiffs and confirmed the same as having been issued by the 3rd defendant. He stated that he was ready to honour the agreement between him and the Plaintiffs, that he had failed to issue them with title document since the seller had disowned the sale agreement and did not co-operate in respect to the transfer. He confirmed that on his part he was ready to complete the agreement with 3% interest on delayed payments as stipulated in the sale agreement.

23. DW2 was Mr. John Muinde, a senior superintendent of police and forensic document examiner. He testified about his training and stated that he had an experience in forensic examination of 19 years. He confirmed receipt of various exhibits with a request to ascertain the following;
- a. Whether the questioned signatures in documents A1-A17 were made by the same author when compared with known signatures on B1 and B2 shown in blue ink. His opinion was that the signatures were made by the same person.
 - b. The 2nd request was to ascertain whether the questioned signatures in blue ink in A1-A17 were made by the same author when compared to the known signatures in pencil on B1 and B2. His finding on that issue was that the signatures were made by the same person.
 - c. The third issue was whether the signature on Exhibit A1-A17 marked in ink matched with the known signatures of Tom Muya on B1 and B2 marked in pencil. He explained that the similarities indicated that the signatures were made by the same person as per the standard procedures manual of the lab.
24. He produced the examination report as D Exhibit 7. Upon cross examination, he confirmed to know one Emmanuel Karisa Kenga DW3, who he said was his boss up to the year 2011. He further confirmed that a forensic examiner deals with both civil and criminal matters. He also stated that the reports and the exhibits were two different matters. That marked the close of the 3rd Defendant's case.

1st and 2nd Defendants' Evidence

25. DW3 was Emmanuel Karisa Kenga who stated that he was a forensic document examiner with over 30 years of experience. He confirmed to have received documents from one Antony Mwendwa Nzuki with a request to examine the documents. He confirmed to have examined documents 1A, A4, A6, A8, A10, A11, A12, A13, A14, A15, A16, A17, A18, A19, A22 and A24. That he had compared the same with known signatures on B1-B5 and his finding was that the signatures were made by the same person. He further confirmed to have examined signatures on exhibits A2, A3, A5, A7, A9, A20, A21 and A23 as compared with the known signatures on exhibits B1-B5 and his findings was that they were made by different persons. He also confirmed similarities on exhibits marked in red arrows as A2 with known signatures in blue arrow marked B2 and found that the signatures were made by the same person. He further confirmed to have examined signatures marked in red arrows on exhibits B20, B21 and B23 with known signatures marked in red ink on exhibit B7-B8 and found that they were made by different people. He confirmed to have prepared a report dated 16th October 2020 and produced the same as DW3-Exb1.
26. Upon cross-examination, he stated that he is a private document examiner and was instructed by Antony Mwendwa Nzuki the 1st Defendant herein as a private examiner and was paid by the 2nd Defendant. He stated that the known signatures of the late Raphael Nzuki were B1 to B5 and that exhibits A1-A25 as stated in paragraph 1 of the report were also made by Raphael Nzuki. He also stated that the signatures on B7 and B8 did not have a name and that they did not belong to the late Raphael. He further stated that his report was professionally done and that he was paid as a private examiner. He also confirmed that he had been shown the report by one John Muinde who was his student and



that he did not know the details of the report. He also confirmed that the best documents to examine are originals and not photocopies.

27. DW4 was the 1st Defendant Anthony Muinde Nzuki, the son and administrator of the estate of the late Raphael Nzuki. He adopted his witness statement dated 21st July 2020 as his evidence in chief. He confirmed that the deceased was the registered proprietor of the suit property and that he had entered into a sale agreement with the 3rd Defendant for the sale of the suit property at a consideration of Kshs. 1,600,000/=. He stated that some of the payment vouchers indicated by the witness as having not been signed by the deceased, were signed by persons who were not party to the agreement and whose names appear on the voucher including Alexander Nzuki, Emmanuel Wambua and Emmanuel Nzuki.
28. He further stated that the deceased had allowed the 3rd Defendant to informally subdivide the parcel of land and to sell portions thereof as part of their means to raise the balance on the purchase price on condition that no third party would be brought to the suit property by the 3rd defendant before the completion of payment of the purchase price and transfer effected to the 3rd Defendant. He also stated that the agreement between the parties was that the 3rd Defendant would keep the title document in trust for the deceased for the four months within which he was expected to complete the payment on the purchase price and the property is transferred to their name or return the same if payment was not done as agreed. He further stated that the 3rd Defendant did not make any further payments apart from the initial deposit of Kshs. 160,000/=:, which means that the 3rd defendant was in breach of the agreement.
29. He also testified that his late father had sued the 3rd Defendant for breach of the agreement vide Nairobi HCC No. 1157 of 2005 for eviction, release of the title document and damages for breach of contract but that the deceased died on 2nd January 2007 and thereafter the matter was dismissed for want of prosecution. It was his testimony that the 3rd Defendant failed to vacate the suit property and return the title back to the administrators of the estate of the deceased but instead unlawfully subdivided the suit property and sold it to third parties who were strangers to the estate of the deceased. DW4 further testified that there was no privity of contract between the Plaintiffs and the estate of the deceased, and that the plaintiffs did not produce sale agreements between them and the 3rd Defendant. He prayed that the suit be dismissed with costs to the 1st Defendant and his counterclaim be allowed. He produced the bundle of documents attached to the list of documents dated 21st July 2020 which included; Grant of letters of administration for the estate of Raphael Kakula Nzuki, Lease document on title 12715/197; Copies of Plaintiff and verifying Affidavit in Nairobi HCCC 1157 of 2005; Memorandum of appearance in Nairobi ELC No.1636 of 2007; High Court's ruling dated 22nd November 2012; High Court's extracted order dated 22nd November 2012; a bundle of photographs of Plaintiffs' structures and Court of Appeal's Ruling dated 18th May 2018 in Nairobi CA 226 of 2017.
30. Upon cross-examination, he stated that 10% of the purchase price was paid by the 3rd Defendant to the deceased, but that he could not know if any other money was paid. He also confirmed that the 3rd Defendant had approached him and agreed to pay the difference on the purchase price plus the interest. He also confirmed that the agreement between the 3rd Defendant and the deceased, provided that if there was breach by the 3rd Defendant, he was to pay interest at 3% per annum until the amount is paid in full and that the 3rd Defendant had conversed with him and agreed to pay the money. He also stated that he had not sought the revocation of the said agreement or the payment of the defaulted sum. He also stated that if the 3rd Defendant had paid the full sum, he would not be against the Plaintiffs' possession of the suit property.
31. On further cross examination he stated that he did not witness the agreement between his father and the 3rd Defendant. He further stated that he did not know if the 3rd Defendant had made payments of



- Kshs. 700,000/= and he confirmed having seen the payment vouchers signed by his father but stated that he had not calculated the total amount paid to his father. He conceded that subdivision of the suit property was allowed by the deceased and he was aware that balance due was to be paid with 3 % interest. He stated that although the sale of the suit property to the Plaintiffs was authorized by the deceased pursuant to clause 5 of the agreement to raise funds towards payment of the consideration, he was not willing to receive the balance plus the penalty from the 3rd Defendant. He also stated that before he obtained an injunction, six Plaintiffs had constructed on the suit property but that thereafter there were ten Plaintiffs on the land. On being shown a petty cash voucher signed by one Tom Muya, he confirmed that Tom was a broker who was assigned the role of finding a buyer by the deceased and a witness to the sale agreement and also a witness for the 1st Defendant in the instant suit. He further stated that he was not aware of the notice of indemnity by the 3rd Defendant and that his brothers and himself don't live on the suit property because the 3rd Defendant allocated the same to other people. He wanted them evicted and he did not want the balance and interest.
32. Upon re-examination, DW4 stated that the 3rd Defendant's entry on the land was not a blanket entry but that it was conditional. According to him, the purchaser was yet to clear the balance hence the transfer could not be done. He further stated that the 3rd Defendant had never invited him in regard to completion of the agreement and that the vouchers before the court were forgeries. As for the indemnity filed by the third Defendant, he stated that he has never transacted with the Plaintiffs.
33. DW5 was Tom Muya, who testified that he was a friend of the deceased. He adopted his witness statement dated 21st July 2020 as his evidence in chief. He confirmed that sometimes in the year 2002, the deceased had requested him to get a buyer for his land. He confirmed to have taken him to the 3rd Defendant's offices in Nairobi and witnessed the sale agreement between the parties. He also stated that the agreement required the buyer to pay 10% deposit and the balance in four months, with an informal permission to subdivide the parcel to raise money to settle the balance but that the buyer was not permitted to bring any third parties to the land before completion. He testified that the deceased later told him that the buyer did not pay any other amount. He stated that the deceased had sued them, but he unfortunately passed on before the completion of the suit. It was his testimony that he did not sign any other document other than the sale agreement, and that any other purported signature could only be a forgery.
34. Upon cross examination, he confirmed that he was a broker and that he was not aware of any other payments other than the deposit amount of Kshs. 160,000/=. He confirmed that he was paid a commission on the sale. On being shown the voucher for Kshs. 20,000/= showing he was paid Kshs. 20,000/= by the 3rd Defendant him, he stated that the same did not indicate whether it was the commission amount. Upon re-examination, he confirmed that exhibit A2 shows a payment of commission from Raphael Nzuki, which was a voucher dated 15th April 2002. That marked the close of the 1st and 2nd Defendant's case.
35. The court directed the parties to file and serve their written submissions in support of their respective cases. On record are the Plaintiffs' submissions dated 9th March 2023 and the 1st and 2nd Defendants' submissions dated 25th March 2023.

Plaintiffs' Submissions

36. Counsel for the Plaintiffs submitted that they were entitled to the prayer for specific performance, and contended that the doctrine of privity of contract would apply to the agreement between the Plaintiffs and the 3rd Defendant, and that frustration caused by the 1st and 2nd Defendants necessitated their joinder to the suit. It was their submission that the contract between the 3rd Defendant and the deceased



- allowed the former to subdivide and sell the suit property to third parties so as to raise the consideration to be paid to the deceased. Counsel also argued that the agreement provided that in the event of default, an interest on the balance at 3% per annum would be payable till payment in full.
37. Counsel submitted further that the contract entered into by the Plaintiffs satisfied the elements envisaged in Section 3 (3) of the *Law of Contract Act* in that a contract for disposition of interest in land should be in writing, signed by the parties thereto and the signatures attested to by an independent witness who is present at the signing. They also submitted that consideration had passed by the acknowledged amounts paid to the Vendor. They then outlined the Vendor's obligations as per their subsequent agreement between the Plaintiffs and the 3rd Defendant, stating that the failure by the 3rd Defendants to fulfill their obligations in transferring the title documents to the Plaintiffs' names was the genesis of the suit. It was further submitted that although the 3rd Defendant was willing to deliver titles to the Plaintiffs, their efforts were frustrated by the estate of the deceased who had refused to transfer the property to the 3rd Defendant.
 38. Reliance was placed on the case of Husamuddin Gulamhussein Ebrahim Pothiwalla Administrator Trustee of the Estate of Gulamhussein Ebrahimji Pothiwalla vs Kidogo Basi Housing Corporative Society and 31 Others Civil Appeal No.330 of 2003 for the proposition that where there is a genuine agreement, an order of specific performance should issue.
 39. Counsel further relied on the cases of Macharia Mwangi & 87 Others vs Davidson Mwangi Kagiri [2014] eKLR and Willy Mutai Kitilit v Michael Kibet [2018] eKLR and submitted that where a purchaser is in actual possession and occupation of the suit property and being a bona fide purchaser for value, they ought to be granted an order for specific performance. Counsel argued that in the circumstances of this case, there was a constructive trust based on "common intention" which ought to be upheld by the court.
 40. It was further submitted on behalf of the Plaintiffs that an order of specific performance would be in vain if the 1st and 2nd Defendants are not compelled to execute transfer documents in favour of the Plaintiffs. Counsel relied on the case of Fred J.M Imbatu vs Rashid K.Toos [2018] eKLR for the proposition that where a party compelled to execute transfer documents fails to comply, the Deputy Registrar of the court should be authorized to execute such documents instead.
 41. Counsel further argued that the Plaintiffs were entitled to costs as they were forced to file this suit due to the frustrations on the part of the Defendants.
 42. As regards the counterclaim by the 1st and 2nd Defendants, they submitted that there is still no privity of contract between the Plaintiffs and the 1st and 2nd Defendants and that they only joined them to the suit to facilitate the prayers for specific performance as prayed. Counsel held the view that the 1st and 2nd Defendants have no locus to allege that the contracts between the Plaintiffs and the 3rd Defendant has no legal effect. They prayed that the counterclaim be dismissed with costs.

Submissions by the 1st and 2nd Defendants

43. Counsel for the 1st and 2nd Defendants set out five issues for determination by the court as follows;
 - a. Whether the 3rd Defendant adhered to the terms of the agreement dated 10th April 2002.
 - b. Whether the Plaintiffs lawfully and/or rightfully acquired vacant possession of the suit property.
 - c. Whether an order should issue compelling the 1st and 2nd Defendants to execute the transfer in favour of the 3rd Defendant.



- d. Whether the Plaintiffs should be evicted from the suit property and structures erected thereon demolished.
 - e. Who bears the cost of the suit and counterclaim.
44. On the issue of whether the 3rd Defendant complied with the terms of the sale agreement he entered into with the deceased, counsel submitted that Clause 3 of the agreement was couched in mandatory terms that the balance of the consideration was to be paid in four months from the date of the agreement and that time was of essence. Counsel however stated that the agreement became ambiguous when it introduced a 3% interest penalty on default of completion. Counsel argued that it is now 21 years yet the balance has not been paid. According to counsel, the filing of Nairobi High Court Civil Suit No. 1157 of 2005 by the deceased seeking eviction against the 3rd Defendant calls for an inference that the deceased did not intend to continue with the contract. Counsel referred to section 107 of the *Evidence Act* to argue that the law provides that whoever alleges must prove and that therefore the 3rd Defendant ought to have proved compliance with the agreement.
45. It was further argued for the 1st and 2nd Defendants that the Plaintiffs have no privity apropos in respect of the contract between the 3rd Defendant and the deceased and hence they are precluded by the doctrine of privity of contract from any obligations on the said agreement. They contended that the intention of parties to a contract is sacrosanct and cited the case of *Aineah Liluyani Njirah v. Agha Khan Health Services [2013] eKLR* for the proposition that a contract cannot be enforced by a third party unless it expressly states so. In their view, it was upon the 3rd Defendant to prove that they had complied with obligations under the contract. They also submitted that nothing in the agreement dated 10th April 2002 gives authority to any of the plaintiffs to enforce the contract. Counsel argued that the court cannot rewrite a contract between parties and buttressed that argument by placing reliance on the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another [2001] eKLR*. Counsel submitted that parties are bound by their contract and that no development on the suit property was authorized as the subdivision was conditionally allowed within the contract period so that the 3rd Defendant was to enter and informally subdivide the suit property, for purposes of raising money to clear the balance of the purchase price within the contractual period. Counsel pointed out that the earliest agreement between the 3rd Defendant and the Plaintiffs was done on 26th May 2003 yet they were obligated to pay the purchase price within four months from 10th April 2002.
46. Counsel also relied on the cases of *Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited [2017] eKLR* and *Elijah Mbatha v Madivest Company Limited [2018] eKLR* and argued that where a contract states that time is of the essence, it means performance of the contract by one party within the stipulated time requires the other party to comply in time as doing otherwise will amount to breach of such contract.
47. Counsel further contended that the 3rd Defendant did not prove that he had made any further payments after the 10% deposit and that the vouchers produced in court were forgeries. Counsel relied on the evidence of their forensic examiner, Emmanuel Karissa while dismissing the expert opinion of one John Muinde as being incomplete. They prayed that the court finds that the 3rd Defendant as not having fulfilled his contractual obligations with the deceased.
48. On whether the Plaintiffs lawfully acquired vacant possession of the suit property, they argued that any authority that the Plaintiffs purport to have over the suit property is pegged on compliance by the 3rd Defendant of the contract between the 3rd Defendant and the deceased. They submitted that the 3rd Defendant arrogated to themselves authority to allow construction by the Plaintiffs with the full knowledge of its own breach of the agreement and that the sale was subject to the LSK Conditions of



sale, specifically Condition 5 which denied the purchaser possession until payment of the full purchase price. In challenging the Plaintiffs' claim of authority to develop the suit property, they cited the case of Fidelity Commercial Bank Limited vs. Kenya Grange Vehicle Industries Limited [2017] eKLR where the court was of the view that once parties have reduced their agreement into a single and final writing, extrinsic evidence or terms should not be considered when interpreting the written contract as the parties had consciously decided to leave them out of the contract.

49. Further, it was their contention that the Plaintiffs had not conducted due diligence to ascertain whether the 3rd Defendant had good title to pass since in their testimony, they were unable to confirm whether the 3rd Defendant had fulfilled his part of the bargain with the deceased. To buttress their position, they referred the court to the case of Falcon Global Logistics Co. Ltd v Management Committee of Eldama Ravine Boarding Primary school [2018] eKLR.
50. On whether the 1st and 2nd Defendants should execute the documents in favour of the 3rd Defendant, they argued that failure to comply with the terms of the contract regarding payment of the purchase price was a fundamental breach that goes to the root of the contract allowing the 1st and 2nd Defendants herein to rescind the same. They cited the case of Edward Mugambi vs Johnson Muthiu [2007] eKLR where the court outlined the consequences of fundamental breach of a contract. On whether the Plaintiffs should be evicted from the suit property, they reiterated that the original contract having been breached, the Plaintiffs have no basis upon which to remain on the suit land. Further, that the deceased had during his lifetime sought to have them evicted vide Nairobi HCC No.1157 of 2005 and that the sale agreement did not allow the Plaintiffs to construct permanent structures on the suit property.

Analysis and Determination

51. Having considered the pleadings, evidence as well as rival submissions by the parties, I note that the following facts are not in dispute;
 - a. That the suit property is registered in the name of the late Raphael Kakula (deceased).
 - b. That the 1st and 2nd Defendants are the legal administrators of the estate of the deceased.
 - c. That on 10th April 2002, the 3rd Defendant entered into a land sale agreement with the deceased for the sale of the suit property at a consideration of Kshs. 1,600,000/= and a sum of Kshs. 160,000/= being 10% of the consideration was paid by the 3rd Defendant on the date of the agreement.
 - d. That the balance of the consideration was to be paid within four months from the date of the agreement and in default interest of 3% per annum on the balance was to be paid till payment in full.
 - e. That the 3rd Defendant did not pay the entire consideration within four months of the agreement, and to date, some of balance of the consideration remains unpaid and hence they are in breach of the agreement dated 10th April 2002.
 - f. That the 3rd Defendant was permitted to subdivide and sell the land to third parties upon payment of 10% deposit, so as to raise the balance of the purchase price.
 - g. That Nairobi HCC 1157 of 2005 filed by the deceased against the 3rd Defendant was dismissed for want of prosecution.



- h. That the Plaintiffs entered into sale agreements with the 3rd Defendant for sale of the plots being subdivisions of the suit property and consequently, some plaintiffs moved into the suit property and reside thereon.
52. The above being the case, it is my considered view that the issues in dispute herein requiring the court's consideration are as follows;
- a. What were the consequences of failure on the part of the 3rd Defendant to pay consideration to the deceased within the agreed period under the agreement of 10th April 2023.
 - b. Whether the Plaintiffs are entitled to benefit from and enforce the agreement dated 10th April 2002 between the 3rd Defendant and the deceased.
 - c. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff
 - d. Whether the 1st and 2nd Defendants are entitled to the orders sought in the counter claim.
 - e. Whether the 3rd Defendant was entitled to indemnity against the 1st and 2nd Defendants; and if yes what would be the nature and extent of the indemnity.
 - f. Who should bear the costs of this suit and the counterclaim?

53. A contract binds the parties thereto and each party ought to comply with the terms thereof. In the case of Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR, the court stated as follows:

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.

54. In the instant case, the agreement dated 10th April 2002 between the 3rd Defendant and the deceased provided in clauses 1 to 5 as follows;

The vendor is registered owner of the land reference number L.R 12715/197 Plot No. 25 or thereabout and whereas of selling and transferring the aforesaid land together with all the buildings improvements if any to the purchaser subject herein below: -

1. In consideration of the sum of Kenya Shillings One Million Six Hundred Thousand (1,600,000/=) to be paid as hereinafter provided the vendor will sell and the purchaser will buy the said pieces of land.
2. The vendor hereby agrees to receive Kenya Shillings One Hundred and Sixty Thousand (160,000/=) being 10% deposit of the purchase price on 10/4/2002.
3. The balance of the purchase price shall be paid within 4 months instalments on the 10th day of every month.
4. That the purchaser would be at liberty to enter into the land with his surveyor and do subdivisions at their own cost and in the event of not completing payment of the purchase price will pay interest at a rate of 3 % per annum until the amount is paid in full.



5. I have authorized Divisional Integrated Development Programmes Company Limited to sale the said subdivisions as part of the means to clear the outstanding purchase price.

55. While the 3rd defendant has argued that failure to pay the balance of the decretal sum within the stipulated period of 4 months attracted interest of 3% per annum; which he has all along been willing to pay, having intimated as much in 2008 vide his statement of claim, the 1st and 2nd Defendants have argued that time was of essence and that the clause providing payment of 3% interest on the balance was an ambiguous clause.

56. Having considered the agreement, I do not find any ambiguity in the agreement as suggested by the 1st and 2nd Defendants. The agreement is clear that the consideration was to be paid in four months and in breach thereof, the penalty would be interest of 3% per annum on the balance till payment in full. The 1st and 2nd Defendants cannot now be heard to argue that the clause on interest is ambiguous just because they are no longer willing to accept the balance. It is my considered view that if that was a bad bargain for them, the law will not allow them to wiggle out of it. I am fortified in my opinion with the court's reasoning in the case of National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR, where the court was emphatic that:

It is clear beyond para adventure, that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

57. It is therefore the finding of this court that the penalty for failure on the part of the 3rd Defendant to pay the balance of the consideration within four months, was payment of interest of 3% per annum on the balance till payment in full and that is what the deceased or the 1st and 2nd Defendants being administrators of his estate, were entitled to claim. I take that position because the deceased allowed the sale of the land by the 3rd Defendant, before payment of the entire consideration meaning that he had agreed to hand over his interest in the land to third parties, before compliance on the part of the 3rd Defendant, hence he could not get the land back once the same was sold to third parties and his entitlement would only be to claim the balance and interest thereon as per clause 4 of the agreement aforesaid.

58. In any event, while the 1st and 2nd defendants argued that apart from the deposit of Kshs. 160,000/=, no other payments were done to the deceased, yet their own witness DW-3, who was the document examiner Emmanuel Karisa Kenga found that sixteen payment vouchers being A1, A4, A6, A8, A10, A11, A12, A13, A14, A15, A16, A17, A18, A19, A22 and A24 were signed by the deceased. This means that the deceased acknowledged payments made by the 3rd defendants as particularized in the above payment vouchers. Therefore, from the evidence of DW3, the deceased signed 16 payment vouchers acknowledging payments for the cumulative sum of Kshs. 404,000/=, which payments were made on various dates between 28th February 2002 and 26th October 2004. The witness also confirmed that DW5, Tom Muya, the deceased's broker, signed the payment voucher acknowledging receipt of Kshs. 20,000/= from the 3rd Defendant as per the payment voucher marked A2. Therefore, the total amount of money paid to the deceased by the 3rd Defendant was Kshs. 424,000/=.

59. As the aforesaid 17 payment vouchers for the sum of Kshs. 424,000/=, were in respect of payments made to the deceased between 28th February 2002 and 26th October 2004, it means that the deceased agreed to receive part of the balance of the consideration outside the agreed four months period. This means that he waived his rights under the contract dated 10th April 2002 to receive the balance in four



months and was therefore doing so pursuant to clause 4 of the agreement. In the case of *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd* [2007] eKLR, while discussing conduct of a party that amounts to waiver, the court stated as follows:

A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.

36. Further, in *John Mburu v Consolidated Bank of Kenya* [2018] eKLR, the Court of Appeal cited the case of *D & C Builders vs Sidney Rees* (1966) 2 QB 617 where Lord Denning, M.R. stated:

It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.

60. Therefore, the conduct of the deceased confirmed that he intended to receive the balance out of the four months period together with interest at 3% per annum as provided in the agreement of 10th April 2002.

61. Although two contradicting document examiners' reports were produced in this matter, having considered both reports, I reject the findings in the report prepared by DW2, John Muindi, and proceed to accept the evidence in the report of DW3, Emmanuel Karisa Kenga. This is because although the report by DW2 indicated that vouchers marked A1-A24 were examined and all the signatures found to belong to the deceased, the report did not have the examined specimen signatures as well as the known signatures of the deceased which were allegedly compared and, therefore there is no basis for that report. And more importantly, the signatures that the witness said that they belonged to the deceased, were in respect of vouchers signed by persons other than the deceased, whose names are on the vouchers, including Alexander Nzuki (A3). Obviously, a voucher bearing the names of persons other than the deceased and indicating to have been signed by those other persons, could not be expected to have been signed by the deceased. In any event, even from the naked eye, the signature of Alexander Nzuki on specimen marked A3 has no similarity whatsoever to the signatures of the deceased, and therefore concluding that all the vouchers in issue were signed by the deceased is misleading and also inconsistent with the other evidence on record. On the other hand, in the Report of Emmanuel Karisa Kenga, DW3, he found that the vouchers in the name of the deceased, save for a few of them, were signed by the deceased. Among the vouchers whose signatures did not match that of the deceased were the vouchers bearing names of persons who were not party to the agreement of 10th April 2002. These were vouchers signed by, and bore the names of Alexander Nzuki, Emmanuel Wambua and Emmanuel Nzuki.

62. Having found that the report of DW3 on the vouchers signed by the deceased as being the true reflection of amounts paid by the 3rd Defendant to the deceased, it is clear that the deceased was paid Kshs. 404,000/= which he personally acknowledged receipt by his signature and Kshs. 20,000/= was paid on behalf of the deceased to Tom Muya, DW 5 the deceased's broker. I therefore find and hold that besides the deposit of Kshs. 160,000/=, the deceased was paid a further Kshs. 424,000/= by the 3rd Defendant. According to the agreement, the 3rd Defendant was to pay the balance of the consideration



on or before 10th August 2002. However, from the confirmed payment vouchers, he had only paid Kshs. 60,000/= as per the payment vouchers marked A1, A2 and A10 before that date. Therefore, the balance of Kshs. 1,380,000/= attracted interest of 3% per annum with effect from August 2002. In the first year of default, the 3rd defendant paid a total of Kshs. 110,000/= vide vouchers marked A6, A8, A11, A12 and A13. This left a balance of Kshs. 1,270,000/=. In the second year the 3rd Defendant paid a total of Kshs. 69,000/= vide vouchers marked A14, A15, A16, A17 and A18. Therefore, the balance was Kshs. 1,201,000/=. In the third year the 3rd defendant paid Kshs. 150,000/= vide vouchers marked A19, A22 and A24. Hence the balance was Kshs. 1,051,000/= which amount continue to earn interest with effect from August 2005 to date. Therefore, the estate of the deceased is entitled to interest of Kshs. 41,400/= in the first year, Kshs 38,100/= for the second year, Kshs. 36,030/= for the third year and Kshs 586,458/= for the period between August 2005 and April 2023 at the date of delivery of this judgment. In the result, the amount being the balance and interest, which is owed to the deceased's estate by the 3rd Defendant as of the date of this judgment is Kshs. 1,752,988/=.

63. On whether the agreement between the 3rd Defendant and the deceased conferred any rights on the Plaintiffs who purchased the suit property from the 3rd Defendant, the 1st and 2nd Defendants have argued that there is no privity of contract between the Plaintiffs and the deceased and that the Plaintiffs have no locus to benefit from the agreement between the 3rd Defendant and the deceased.
64. Under common law, the general rule is that a contract is binding only on the parties thereof, and no liability can be placed on a third party in a contract they are not parties to. However, there are exceptions to that rule which allow third parties to benefit and or enforce a contract in which they are not parties. One of such exceptions is in regard to an acknowledgment or on account of equitable estoppel. In my view, where a contract allows third parties to act pursuant to its terms to their detriment, tenets of equity would require that parties to the contract are estopped from denying such third parties the benefits of such contract. In the case of Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) eKLR, the Court of Appeal discussed the doctrine of privity of contract as against third parties and rendered itself as follows: -

In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co LTD* [1915] AC 847, Lord Haldane, LC rendered the principles thus:

My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation V Lendetia Ltd* (supra), *Kenya National Capitalcorporation Ltd V Albert Mario Cordeiro & Another* (supra) And *William Muthee Muthami V Bank Of Baroda*, (supra).

Thus in *Agricultural Finance Corporation V Lendetia Ltd* (supra), quoting with approval from *Halsbury's Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

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.

Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in *Shanklin Pier V Detel Products Ltd* (1951) 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contract to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In *Darlington Bourough Council V Witshire Northern Ltd* [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms.

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 have respectively been enacted.

65. In the instant suit, clause 5 of the agreement between the 3rd defendant and the deceased, specifically allowed the 3rd defendant to enter the suit property, subdivide it and sell it to third parties, when the deceased had only been paid a deposit of Kshs. 160,000/=.
66. Essentially therefore the contract between the 3rd Defendant and the deceased allowed the 3rd Defendant to survey, subdivide and sell the suit property to third parties to raise the balance of the decretal sum. It is pursuant to that clause that the Plaintiffs purchased the suit property from the 3rd Defendant. The 1st and 2nd Defendants contended that the permission to survey, subdivide and sell was an “informal permission”. That in my view is a dishonest position taken by the said Defendants. This is because there is nothing in law or in the ordinary course of human interaction where a valid contract based on offer, acceptance and consideration in relation to purchase of any property including immovable property, can be termed as or amount to informal purchase. The deceased knew and or ought to have known that any third party who purchased the suit property and paid for the consideration thereof, would in effect, expect nothing less than a transfer of what they purchased. In any event, the description invented by the 1st and 2nd Defendants in their pleadings, evidence and



submissions of “informal permission to sell” to imply that the contract was subject to recalcitrance by the deceased, does not feature anywhere in the agreement of 10th April 2002. In my considered view, the reference to “informal permission” is just a ploy and strategy by the 1st and 2nd Defendants to deny the plaintiffs the benefit of a contract in which the deceased allowed the sale of his land to third parties and did receive some of the monies paid by the Plaintiffs via the 3rd Defendant. Therefore the 1st and 2nd Defendants are estopped from denying the Plaintiffs the benefits of the agreement dated 10th April 2002.

67. Equity is no longer merely a common law principle but is now a principle backed with Constitutional authority. Under Article 10 of *the Constitution*, this court is bound by the National values and principles of governance when interpreting the law. That Article provides that Equity is one of the National values and principles of governance which this court is enjoined to uphold. Having considered the circumstances of this case, and more specifically that by his own agreement, the deceased allowed third parties and in this case the Plaintiffs, to buy plots subdivided in the suit property, it is my considered view and finding that it would be unconscionable and against all facets of equity to deny the Plaintiffs the benefit of the agreement dated 10th April 2002, when in fact the deceased himself used the same agreement to benefit from the Plaintiffs by receiving money from the 3rd Defendant paid by the Plaintiffs. In the premises I find and hold that the Plaintiffs are entitled to benefit from and enforce the agreement dated 10th April 2002 between the 3rd Defendant and the deceased.

68. In the case of *Macharia Mwangi Maina & 87 others –vs- David son Mwangi Kagiri* [2014] eKLR, the Court of Appeal held as follows:-

This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical and procedural justice.

69. The Plaintiffs sought for orders that the 1st and 2nd Defendants be compelled to transfer the suit property to the 3rd Defendant so that the latter can transfer the same to them. They also sought for specific performance against the 3rd Defendant. The 3rd Defendant on their part admit the Plaintiffs’ claim and state that they have been ready and willing to complete the transactions with the Plaintiffs save that it is the 1st and 2nd Defendants who have frustrated their efforts by refusing to receive the balance of the consideration with the 3% interest penalty. They indeed filed a claim for indemnity and sought that the 1st and 2nd Defendants do transfer the suit property to them and that they be allowed to pay the balance or deposit the same in court.

70. An order for specific performance may be made where there is a valid contract and where the party seeking to enforce the same is not in breach of the contract. In the case of *Reliable Electrical Engineers Ltd. v Mantrac Kenya Limited* (2006) eKLR, the court stated that: -

Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well 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 unenforceable. 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 an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

71. Similarly, in the case of Benard Ng'ang'a Ndirangu v Samuel Wainaina Tiras [2019] eKLR as regards specific performance as an equitable remedy, the Court of Appeal stated as follows: -

31. On the issue whether the trial court erred in issuing an order for specific performance, we reiterate that specific performance is an equitable remedy. In Thrift Homes Limited vs Kenya Investments Limited [2015] eKLR it was stated that specific performance like any other equitable remedy is discretionary. The jurisdiction to grant specific performance is based on the existence of a valid enforceable contract; specific performance will not be ordered if the contract suffers from some defect, mistake or illegality. Specific performance will also not be granted if there is an alternative effective remedy.

72. The above being the position, I note that the Plaintiffs' prayer for specific performance as against the 3rd Defendant is not contested. However, that can only be effected if the 3rd Defendant has received title from the 1st and 2nd Defendants. Having found that the Plaintiffs are entitled to benefit from, and enforce the agreement between the deceased and the 3rd Defendant, it is my finding therefore that the Plaintiffs are entitled to orders that the 1st and 2nd Defendants do transfer the suit property to the 3rd Defendant for onward transmission to the Plaintiffs.

73. In the premises I am satisfied that the Plaintiffs have proved their case on the required standard and the same is allowed.

74. As regards the counterclaim by the 1st and 2nd Defendants, I take the position that the deceased having sold the suit property to the 3rd Defendant and having allowed them to sell it to the Plaintiffs cannot in equity be allowed to evict the Plaintiffs, as they came on the land on the deceased's own invitation and for his own benefit as he did receive some money from the Plaintiffs through the 3rd Defendant. Therefore, their claim for eviction must fail.

75. On the 3rd Defendant's claim, the third defendant cannot get an indemnity from the deceased's estate without payment of the balance of the consideration and interest of 3% as agreed as that would be unjust. I note that the 1st Defendant's testimony on record was that they were unwilling to receive the balance of the consideration and the 3% interest penalty. I cannot therefore entirely blame the 3rd Defendant for non compliance as the 1st and 2nd Defendants admitted that the 3rd defendant approached them with an intention of paying the balance but that they have all along been unwilling to accept the same. Indeed the 3rd Defendant in his claim for indemnity as against the 1st and 3rd Defendant, filed in 2008, sought for an order to be allowed to pay the balance of consideration to the 1st and 2nd Defendants or that the same be deposited in court. Therefore, it is my finding that while the deceased agreed to, and indeed received part of the consideration outside the four months period, the act of refusing payment of the balance was meant to frustrate completion of the agreement of 10th April 2002.

76. In the premises, and taking into consideration the rights of the three parties herein and in the interests of justice, I make the following orders;

- a. The 1st and 2nd Defendants' counterclaim be and is hereby dismissed with no order as to costs.
- b. The 1st and 2nd Defendants be and are hereby ordered to transfer L.R. No. 12715/197 to Divisional Integrated Development Programmes Company Limited, the 3rd Defendant herein to enable the 3rd Defendant to transfer the same to the Plaintiffs. In default, the Deputy



Registrar of this court to sign all the necessary documents to transfer the suit property to the 3rd Defendant.

- c. Upon transfer of L.R No. 12715/197 to Divisional Integrated Development Programmes Company Limited, the 3rd Defendant herein, the latter to transfer the said parcel to the Plaintiffs respectively in accordance with their respective land purchase agreements; in default the Deputy Registrar of this court to sign all the necessary documents to transfer the suit property to the plaintiffs.
- d. The 3rd Defendant to deposit in court the sum of Kshs. 1,752,988/= being balance and interest in respect of the agreement of 10th April 2002 within 60 days of this judgment; for collection by the 1st and 2nd Defendants if they so wish. In default on the part of the 3rd Defendant, the 1st and 2nd Defendants shall be at liberty to execute for the same.
- e. As the 3rd Defendant is largely to blame for this dispute, I order that the Plaintiffs' costs of the suit shall be borne by the 3rd Defendant.

77. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Nzei for 1st and 2nd Defendants

Ms Munyao for 3rd Defendant

No appearance for Plaintiff

Ms Josephine – Court Assistant

