



**Lakhani v Waweru (Environment & Land Case 686 of 2011)
[2023] KEELC 19299 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 686 OF 2011
LC KOMINGOI, J
JULY 26, 2023**

BETWEEN

PRAFUL KUMAR LAKHANI PLAINTIFF

AND

STEPHEN NDIRANGU WAWERU DEFENDANT

JUDGMENT

1. By a Plaint dated December 2, 2011, the Plaintiff prays for judgment against the Defendant for;
 - a. Possession of the suit land.
 - b. An injunction to restrain the Defendant by himself and or his servants and agents or otherwise howsoever from remaining on or continuing in possession of the suit property of the suit property.
 - c. A declaration that the sale agreement stands discharged and that the parties are released from performance of the same.
 - d. A declaration that the plaintiff is the true and beneficial owner of the suit property.
 - e. Damages for trespass.
 - f. Damages in the sum of Ksh.13,568,651/=.
 - g. An order that the Defendant forthwith vacate the suit property and deliver up the suit property to the plaintiff in vacant possession.
 - h. An order that the Defendant demolish all the incomplete structures erected on the suit property.



- i. In the alternative, a declaration that the Defendant has been unjustified enriched in the sum of Ksh.12,568,651/= which sum the Defendant should pay to the plaintiff.
 - j. Interests.
 - k. costs
2. It's the Plaintiff's case that he is the registered owner of L.R No.13114/3 measuring five (5) acres whose approval for subdivision into three portions was granted in 2003 by the Commissioner of Lands. Out of the three portions, he sold 1.3 acres of the Plot to a Mr. Robinson. With regard to LR No.13114/59, measuring 0.485 hectares (1.2 acres), delineated as plot b upon subdivision, which is the subject of this suit, the Defendant approached the Plaintiff through his estate agents, Geogladys Holdings Limited seeking to purchase it. Through an agreement dated 9th December 2005, the purchase price was agreed at Ksh. 5,900,000/=.
3. The Plaintiff contends that before execution of the agreement, the Defendant was informed that its title had not yet been issued by the Department of Lands. However, the same would be issued to him subject to performance of the terms and conditions of the agreement. According to the agreement, 10% of the purchase price was to be paid upon execution while the balance was to be paid by completion date, being 180 days from the date of execution. The Defendant was to pay the land rates. He would also be granted possession of the suit land once he paid the full purchase price. With regard to transfer of the suit property, it would be effected if the plaintiff advocate issued a professional undertaking that balance of the purchase price would be paid with 14 days of registration of the suit land title to the Defendant.
4. It is the Plaintiff's case that he never thought that the sub-division of the suit property would take longer than anticipated, a fact which was within the Defendant's knowledge. The process was completed by March 2007. The Plaintiff avers that the Defendant was not prejudiced since he requested to be granted possession of the suit property to construct a residential house. As a result, the Plaintiff parted with its' possession. The defendant assured him that he would pay balance and perform his obligations.
5. The Plaintiff's case is that the Defendant is guilty of breaching the sale agreement, his promises and fraudulently misrepresenting that he would perform his contractual obligations. He asserts that he informed the Defendant through a letter dated April 23, 2007 to stop all construction of the suit property and vacate it as the sale agreement would be terminated. The Defendant never adhered to the plaintiff's demand. The Defendant is also faulted for failing to pay balance of the purchase price by completion date, stamp duty and all outgoings.
6. It is the plaintiff's case that he has been deprived off the enjoyment of the suit property by the Defendant who continues to wrongfully possess it despite various demands to vacate. The particulars of loss and damage suffered included unpaid balance of Ksh. 5,310,000/=, rates and annual rent charges payable to the local government between 2006-2011 amounting to Ksh.67,320/= and Ksh.1,122 and loss on interest therein amounting to Ksh. 39,221 and Ksh.844/= respectively. In addition, he has also lost Ksh.7,818,833 interest of the unpaid purchases calculated at 16 % p.a. Ksh. 134,000/= and Ksh.197,311/= being the cost of the erecting suit land chain linked perimeter fence and interest amounting to Ksh. 134,000/= and Ksh.197,311/= respectively is also alleged to have been lost.

The Defendant's Case

7. The Defendant through a statement of defence and counterclaim dated January 9, 2012 and filed on January 13, 2012 acknowledged that he entered into a sale agreement with the plaintiff over the suit



property at an agreed price of Ksh. 5,900,000/= . He accuses the plaintiff of breaching it by failing to update him on the process of subdivision. In addition, the plaintiff never sought extension of the completion date which was June 5, 2006. It is his case that he never gave any assurance nor promises to the plaintiff. He adds that the acted plaintiff abused his good will and trust.

8. He reproaches the plaintiff of coercing, harassing and intimidating him, illegally and irregularly chasing his contractor and workers from site, abusing them and making it inaccessible by stationing a security guard. He also failed to avail to the completion documents and update him on the status of subdivision and transfer of the suit land. It is the defendant's case that, he never received the plaintiff's letter dated April 23, 2007 which was written on a without prejudice basis and addressed to his advocates M/S Kahuthu and Kahuthu Advocates.
9. In the counterclaim, he maintains the argument that the plaintiff abused his good will and trust for his financial gain at his detriment when he breached the agreement. He did this when he failed to undertake subdivision within the stipulated time, surrender the title and provide citation number or copies of the suit property. He adds that the plaintiff concealed material facts and misled the Defendant. Considering he was always ready and willing to perform his obligations under the Agreement, the plaintiff failed to do his part despite being notified.
10. The Defendant maintains he is entitled to the suit property even though he has not executed any instrument of transfer. He therefor prays that the plaintiff suit be dismissed with costs and judgement entered against the Plaintiff for the following orders
 - a. An order of specific performance compelling the plaintiff to complete the sale and accept the balance of the purchase price.
 - b. General damages and aggravated damages
 - c. In the alternative, the Plaintiff do pay the Defendant Ksh.35,000,000/= as at December 19, 2011 plus interest at 20% fix deposit rate p.a until payment in full as damages
 - d. A permanent injunction order restraining the plaintiff by himself and or his servants and agents or otherwise howsoever from interfering with the Defendants quiet enjoyment, possession, construction of the suit property as a purchaser or from evicting the Defendant.
 - e. An order that the Plaintiff do execute the transfer documents and deliver the title documents and or in his place (the plaintiff), the deputy registrar of the high court of Kenya Milimani do execute the same in favor of the Defendant.
 - f. An order that the plaintiff do accept payment of Ksh.5,310,000/= by the Defendant and the plaintiff do transfer L.R No. 13114/59 to the Defendant at the Plaintiffs cost.
 - g. Interest
 - h. Cost.

Reply To Defense And Counterclaim

11. Through a reply to defence and counterclaim dated January 26, 2012 filed on the same date, the Plaintiff prays that it be dismissed with costs. He maintains that the Defendant was fully aware of the subdivision process as he was updated and that he personally collected the letter dated April 23, 2007 from the Plaintiff advocate. He maintains that the Agreement was breached by the Defendant who was not ready and willing to perform his contractual obligations. His claim for specific performance is therefor time barred.



Evidence Of The Plaintiff.

12. PW1, Praful Kumar Lakhani, the plaintiff testified on April 29, 2019. He adopted his witness statement dated November 21, 2018 and filed on November 22, 2018 as part of his evidence in chief. He also relied on the bundle of documents filed on November 22, 2018. He told the court that he was the registered owner of LR. No.13114/3 measuring approximately five acres. He intended to subdivide it into three portions. He intended to sell LR No.13114/59 to the defendant, after he (defendant) expressed interest through Geogladys Holdings Limited. He stated that he instructed Mr. J.K Mwangi Advocate to act for him in the transaction, while Mr. Kahuthu Advocate acted for the defendant.
13. They eventually entered into a sale agreement dated December 9, 2005 whereby the defendant paid Kshs.530,000/= being 10% of the purchase price.
He further stated that it was agreed the Defendant would get the completion documents upon completion of the process of sub-division and he would pay the balance of the purchase price.
14. It was his testimony that the defendant did not pay the balance of the purchase price. That as per clause 13 of the Sale agreement, possession would be upon the payment of the balance.
He however stated that in good faith, he allowed the defendant to take possession of the suit property before he paid the balance of the purchase price. This was because the defendant requested. He took possession on January 25, 2006. He told the court there was a delay on getting documents from the Land Registry but the process was completed and title issued.
15. He further stated that despite request by his lawyers, the defendant did not pay the balance of the purchase price. He stated that he sought an undertaking from the defendant's Advocates as to the availability of funds but none was forthcoming.
That there were many attempts to resolve the issue but with no success.
16. He later instructed his Advocates M/s O.P Nagpal to seek vacant possession with no success.
He told the court that he wants his property back as he sees no progress in the future.
17. When he was cross-examined by Mr. Wachira for the Defendant he told the court that the defendant was aware that the process of sub-division was ongoing.
18. When he was re-examined by his counsel he stated that the title came out in his name after he waited for one year to get the balance of the purchase price on undertaking as to the availability of the funds.
19. PW2- James K. Mwangi, commenced his testimony by adopting his witness statement and list of documents. He admitted that he acted for the Plaintiff in the sale agreement which was also subject to the LSK Conditions of Sale. He stated that although at the time of executing of the Agreement, the suit land title as not in existence, it copy was forwarded to the Defendant counsel. According to him, the property would only be transferred to the Defendant once he paid the outstanding balances. He added that he never received any default notice from the Defendant.
20. On cross examination, he testified that even although the title was not obtained within 180 completion, which was never extended, the Defendant was granted possession of the suit land to develop for the reason that he had obtained approved building plans. When the suit land title was received in 2007, the Defendant counsel was informed in a letter dated March 28, 2007. The letter also indicated intention to have it transfer the title to the Defendant. Although the Defendant was to pay fees for subdivision, stamp duty and other outgoing according to the Agreement, he only paid 10% of the purchase price. PW2 informed court that several meetings were held seeking to have the matter resolved. During



one of the meeting, it was deliberated that the Defendant does pay the current market price of the suit property. While still on cross examination, he stated that the Plaintiff intention to rescind the agreement was expressed through a letter dated October 17, 2008 written on without prejudice basis.

21. During re-examination, he testified that the Agreement never provided that the defendant could be issued with the title before payment of the purchase price. Although the defendant requested that the completion date Agreement ought to be 210 days, the proposal was not incorporated in the agreement. He added that the Defendant knew subdivision was ongoing at the time of purchase. It was his testimony that the balance of the purchase price was never paid.

Evidence of the Defendant

22. DW1- Stephen Ndirangu Waweru, the defendant relied entirely on his witness statement and list of documents as his evidence in chief to support of his case. He testified that at the time of executing the agreement, the Plaintiff agreed to grant him possession of the suit property to develop it as it's his. When commenced development of his house, which costed him Ksh.10 million, construction was stopped by the Plaintiff who harassed his workers and even closed the gate. Although he admitted that they had several meetings with the Plaintiff seeking to resolve the matter, it was his testimony that he refused to pay balance for the reason that the Plaintiff asked for more money. He told court that he only paid 10% of the purchase because he was not issued with suit property title deed nor the completion documents. He also however willing to pay the balance if ordered by court. According to his testimony, the suit property was valued at Ksh.35 million according to his valuer report.
23. On cross examination, it was his testimony that he never issued with completion nor recession notice for the agreement whose completion date was 180 days neither did he knew why his advocate never gave profession undertaking to pay the purchase price. He self-confessed that he never paid the balance, stamp duty, registration fee and other outgoing as the agreement never provided, he pays. The Plaintiff also never availed him with the completion documents. He stated that he obtained possession of the suit property through mutual agreement. He added that it appeared transfer would only be effected upon him once he paid the balance. It was his testimony that he never paid rates neither were the terms of the agreement varied. He sustained the argument that he obtained approval before construction his house which costed him Ksh. 10 million even though he never had any Bill of quantities to support these averments. He also never understood why the Plaintiff was harassing his workers on the construction site. The court was informed that the letter dated July 24, 2007 from the Plaintiff counsel was never received by the Defendant. DW1 stated that the letter dated November 12, 2008 expressly stated that refund of the purchase price would not be accepted unless transfer of the suit property was made to him. While still on cross examination, he admitted that several meetings were held to resolve the matter, however a deadlock was reached when he was told to pay a higher amount for the purchase price. He also wanted transfer to effected in his name.
24. On re-examination, he upheld his position that given he never breached the agreement whose termination notice he was never aware of, he still seeks orders for specific performance. His justification was that subdivision took longer than expected and that the Plaintiff demanded more money when he realised suit land value was high. In addition, certain documents were to be released to his advocated making any further payment was done.
25. DW2, James Kahuthu, acknowledged that he acted for the Defendant in respect of the agreement for the sale of the suit property. At the time of execution, subdivision was already ongoing and the Defendant never sought any extension as he had no doubt subdivision would be completed within 180 days. It was his testimony that PW2 disclosed to him that the defendant proposed that transfer be



effected to the Plaintiff so as to avoid paying stamp duty. At the time of filing this suit, the suit property was registered in Plaintiff name.

26. DW2 explained that despite conducting several meetings between the parties and advocates seeking to resolve the matter, the Defendant was never issued with a copy of the title deed nor its citation for the reason that the Plaintiff was not willing. According to his testimony, deliberation of the said meetings were conducted on a without prejudice basis. The Defendant only paid 10% of the purchase price because transfer was not effected upon him within the stipulated timelines. In addition, he would only issue professional undertaking once he saw the actual title. He testified that the Plaintiff took control of the transaction as observed in a letter dated 29/6/2009 addressed DW2 and copied to J.K Mwangi Advocates. Communication to the Defendant counsel was supposed to be made by the Plaintiff counsel. The Plaintiff also wanted more money but the Defendant refused. DW2 attested the Defendant did not have any obligation to cancel the agreement whose completion date was 180 because he was still in possession of the suit property. It was the Plaintiff who breach the Agreement as he defaulted in the completion date. It was his evidence that the Defendant never sought for specific performance relief because the Plaintiff kept on informing him, he would serve the suit land title. He further added that construction by the Defendant was never stopped. This is because once building development plans are submitted to the county government, a person can continue as they are await approvals to be issued.

When cross examined, his evidence was that a person can continue with construction as they await approval if building plans have been submitted. He further stated also he never saw any letter signifying that construction done by the Defendant was illegal. He also maintained the position that he never issued professional undertaking because he was not asked for never. In addition, payment of the balance of the purchase price would only be made once the title was availed. According to him, the balance and registration fee was not paid because the Plaintiff breach the agreement and that completion date was never extended. Although he acknowledged receiving a letter rescinding the Agreement, he stated that it was not issued to the Defendant because there was no need. Even though he never had any issue with defendant being granted possession of the suit land, it was his evidence that the Plaintiff wanted more money.

27. DW3, Boniface K Terer, a valuer practising under the name Legend Valuers Limited testified that he visited the suit property on December 16, 2011 upon being given instruction by the Plaintiffs to valuer the property. According to his valuation report which he produced in support of his evidence, he found a four-bed room house under construction which was 62% complete on approximately 1 ¼ acres. The land was valued at Ksh.25,000,000/= while improvements were valued at Ksh.10,000,000/= . It was his evidence that the land be valued at Ksh. 65,000,000/= at the time of testimony. The court was informed that quantity surveyor prepares the Bills of Quantity indicating estimated cost of undertaking a construction.
28. When he cross -examined he attested that a valuer normally comes in once construction is complete. He specified he was the one who valued the suit property, building and construction therein and prepared a report. During this time, the value of the property had gone up. In addition, he never spoke to the Plaintiffs who was registered owner of the suit property as seen from a copy of title given to him by the Defendant. It was his testimony that he was never given the QS report, architecture and approved plans showing prices because he never asked for them. He acknowledged that although cost estimation and Bill of quantities are prepared by QS, he would not dispute the QS report because there was a publication on the construction site.
29. At the close of the oral testimonies parties tendered final Written Submissions.



The Plaintiff's Submissions

30. The Plaintiff counsel in submission dated August 31, 2022 and March 1, 2023 filed on January 25, 2023 and March 7, 2023 respectively raised following issues for determination;
 - a. Who breached the contract of sale?
 - b. Whether the plaintiff is entitled to rescind the sale agreement?
 - c. Whether the plaintiff was entitled to the prayers sought in the plaint?
 - d. Whether the Defendant is entitled to the prayers sought in the counterclaim?
 - e. Who should bear the costs of the suit?
31. On the first issue, it is argued that the basis of this suit is the sale agreement dated December 9, 2005. The court is there for obligated to consider, interpret and enforce the express terms of the agreement and determine who breached the Agreement. This is because courts cannot rewrite contracts. Court decision of *Fidelity Commercial Bank Limited v Kenya Vehicle Industries Limited* (2017)eKLR, *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd* (2002) 2 EA 503, *Lalji Rabadia & Others v Commercial Bank of Africa* (2015)eKLR and *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board* (1973) 1 WLR 601 are cited to support these submissions. It is further argued that considering the Defendant has not proved the agreement was vitiated by coercion, fraud or undue influence, parties are obligated to hold their bargain.
32. Counsel insists that the Plaintiff did not breach the agreement since transfer of the suit property and delivery of its documents to the Defendant would only be undertaken once he paid balance of the purchase price as indicated in Clause 15. Given clause 11 of the Agreement stipulated that the Defendant counsel would provide professional undertaking to pay the balance within 14 days upon registration of the suit land in Defendants name, the Defendant cannot feign ignorance. This is because the Agreement as well the LSK Condition of sale provided that the issuance of title to the Defendant would only be undertaken once the balance was paid. The Defendant in his testimony admitted he had not paid the full purchase price, stamp duty and other outgoings neither did his advocate offer any professional undertaking for payment of the said monies. It is further maintained that the Agreement never provided that the balance would be paid after registration of the title in Defendants name.
33. Reliance is placed on the decision of *Parminder Singh Sagoo & Another v Neville Anthony Dourado & another* (1983) eKLR to state that the Defendants' allegations that the Plaintiff breached the Agreement do not stand as he seeks to rewrite the Agreement again. Considering the completion of 180 days, the Defendant had an option of terminating the Agreement or requires completion if he felt the Agreement was breached but he did not. It is also asserted that the Defendant was not prejudiced because the Plaintiff was granted possession of the suit property on 25th January, 2006 when he realized subdivision was taking long. He also commenced construction of his dwelling house without issuing any termination or default notice. According to the Plaintiff counsel, the Defendants excuse that he would not pay the purchase price balance, stamp duty and other outgoing was just an afterthought.
34. The Plaintiff counsel insists that it is the Defendant who breached the Agreement since he refused to pay the balance of stamp duty and other outgoings neither did his advocate offer any professional undertaking to pay the said monies.
35. On whether the Plaintiff was entitled to rescind the agreement, it is reasoned that the Defendant abused the Plaintiff good will when he refused to pay balance of the purchase price yet he was given possession of the suit property. His failure to pay the balance was confirmed by DW1 and DW2 in their testimony



who testified that only 10% of the purchase price was paid. In addition, the Defendant advocates in his letter dated November 14, 2008 expressed that the Defendant only intended to obtain possession of the property and not pay the outstanding balance. The Plaintiff counsel therefor upholds the view that the Plaintiff was properly justified in rescinding the Agreement through his counsel letter dated October 17, 2007 affirmed on November 12, 2008. Given the Defendant conduct, he is not legally entitled completion of the Agreement as it was rescinded nor possession of the suit property.

36. On the issue whether the Plaintiff is entitled to the prayers sought in the Plaint, the Plaintiff counsel makes the following arguments. On prayer (a) and (d), it is argued that the Agreement was frustrated and breached by the Defendant therefor halting transfer of the suit property. The court is beseeched to declare the Plaintiff as the beneficial owner of the suit property which he has successfully repossessed from the Defendant. This is because the courts have no jurisdiction to order parties to enter into another Agreement. It also argued that the Plaintiff is entitled damages of Ksh.13,568,651/= because he has demonstrated that the Defendant unjustified enriched himself by retaining suit land possession without paying rents, rate nor monies utilized in fencing the property. Counsel states that prayer (g) has already been overtaken by events since the Plaintiff has already obtained possession of the suit property from the Defendant. On prayer (h), it is submitted that the Defendant undertook illegal construction on the suit property without approved plans as provided for in Section 30 and 33 of the Physical Planning Act. Given the said structures were nuisance and liability, the Plaintiff is entitled to this prayer. Reliance is placed on Kenya Airways Limited v Satwant Singh Flora (2013) eKLR to reason that the Defendant cannot be allowed to benefit from his illegal acts. On relief for interest, counsel insisted that's the plaintiff is entitled to costs for suit land at the current market price and interest therein because the Defendant not only refused to pay the balance but he also remained on the suit land illegally.
37. On the issue whether the Defendant is entitled to the prayers sought in the counterclaim, Section 107 of the Evidence Act and Santowels Limited v Stanbic Bank (K) Limited Civil Appeal 160 of 2018(2022) KECA 545 (KLR) are cited to put forward the arguments that the Defendant has not proved his counterclaim and therefor it should be dismissed with costs for being unmerited. It further stated that the Defendant has no cause of action neither is he entitled to any relief sought since he breached the Agreement. The Plaintiff rescinded the Agreement through a letter dated October 17, 2008. The Defendant also refused to Plaintiff request to open a joint account to deposit balance of the purchase price pending transfer of the suit property title to him.
38. The court is therefore argued to exercise its discretion and award cost to the Plaintiff as provided on Section 27(1) of the Civil Procedure Act as he has proven his case on a balance of probabilities.

The Defendant's Submissions.

39. The Defendant counsel in submission dated February 7, 2023 and March 10, 2023 filed on February 17, 2023 and March 17, 2023 respectively contends that the Plaintiff breached the sale agreement whose completion date was 180 days from the date of execution. The breach according to counsel was disclosed through various correspondences. It is asserted that the Defendant was always ready and willing to complete the Agreement but the Plaintiff never gave nor passed the suit land title to him. Counsel supported these arguments by quoting various court authorities of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd 2002) 2 E.A 503, Lalji Rabadis and Others v Commercial Bank of Africa (2015)eKLR and Trollope Colls Ltd v North West Metropolitan Region Hospital Board, 1973 1WLR 601 and 609.
40. According to counsel, the Defendant was voluntary granted possession of the suit property by the Plaintiff when he failed to undertake subdivision within 180 days and therefore the balance of the



purchase price would not be paid. The Defendant correspondences written on without prejudice basis were not an admission but purely for negotiation purposes.

41. With regard to the Quantity Surveyor's report, it is submitted that the Plaintiff never availed any valuer to disapprove the report. The Plaintiff is also accused of failing to disclose that the status of the subdivision process nor seek extension of the 180 completion date. He therefor would not rescind Agreement yet he was the one who breached it.

Analysis And Determination.

42. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the written authorities. The issues for determination are;

- a. Whether the plaintiff is entitled to rescind the sale agreement?
- b. Whether the plaintiff was entitled to the prayers sought in the plaint?
- c. Whether the Defendant is entitled to the prayers sought in the counter claim?
- d. Who should bear the costs of the suit?

43. It is not in dispute that the Plaintiff is the owner of the suit property, a resultant subdivision of L.R 13114/3 Langata Kikeni road. The approval for subdivision was granted on September 8, 2003 by the Commissioner for land subject to fulfillment of certain conditions. The Plaintiff sold the suit property to the Defendant for value consideration of Ksh.5, 900,000/= in a sale agreement dated December 9, 2005. Before the agreement was executed, parties negotiated its terms. At the time of execution, the Plaintiff was well aware that subdivision of the suit property had not been completed neither was its title ready. Upon execution, the Defendant paid 10% of the purchase price being Ksh.590, 000/=, a fact that is not disputed.

44. Clause 3 and 5 of the Agreement provided that the balance was to be paid before the completion date being, 180 days from the date of execution. In the alternative clause 11 provided as follows

“against receipt of a professional undertaking by the purchasers advocates to pay the balance of the price within 14 days of registration of the transfer in the name of the purchaser the vendor advocates will transfer the subject of the sale to the purchase”

In addition, clause 12, 13 and 14 provided that the stamp duty, land rates and outgoings would be paid by the purchaser who would be granted possession after full repayment of the purchase price. He would also be issued with the suit land title documents duly registered in his name within 14 days after paying the full purchase price.

45. The Plaintiff was represented by J.G. Kahuthu of Kahuthu & Kahuthu Advocates while the Defendant was represented by J.K Mwangi of J.K Mwangi and Company Advocates during the drafting, reviewing and negotiating the terms of the Agreement on behalf of the clients before it was executed. These advocates actively participated in the transaction leading to grant of possession of the suit property as seen from the correspondences placed before this court.

46. It is not in dispute that the Agreement was not fully implemented within the 180 days-completion date. The Defendant and the Plaintiff accuse each other of breaching the Agreement. The Plaintiffs asserts that he was not able to perform his obligation of transferring the suit land title to the Defendant because the subdivision delayed, a factor that was explained to the Defendant. This notwithstanding, he granted the Defendant possession of the property and allowed him to commence construction and



use it as it is his. On his part, the Defendant maintains that it is the Plaintiff who failed to effect transfer with the completion date.

47. According to the Plaintiff letter dated January 25, 2006, the Defendant was granted possession of the suit property to utilize as his own pending issuance of title in his name when the Plaintiff realized he would not perform his obligation under the contract. Further, the Plaintiff pursued the Defendant and his counsel through various letters that the full purchase price needed to be paid in full to facilitate of transfer of title to the Defendant.
48. The Defendant and his counsel admitted in their testimony the balance of the purchase price would only be paid when they were shown the title or its citation and transfer was effected. Their conduct made the Plaintiff notify them of his intention to repudiate the agreement through a letter dated October 17, 2008 citing breach of the agreement. The effect of this was that the 10% deposit would be refunded to Defendant. The Defendant would also give the Plaintiff vacant possession of the suit land. Responding to the Plaintiff, the Defendant counsel in a letter dated November 14, 2008 stated the agreement was breached by the Plaintiff who never gave any documentations to establish whether the subdivision was undertaken and not the Defendant. The vacant possession would not be given as the Defendant had utilized Ksh 15,000,000/= in the suit land. The Defendant counsel expressly stated that the no refund would be accepted because the Defendant was in possession of the suit land.
49. The Plaintiff in his testimony contested the Defendant's valuation report dated December 19, 2021 which valued the suit property at Ksh.35,000,000/=. This encompassed Ksh.25,000,000/- being the value of the land and Ksh. 10,000,000/= being improvement therein, as the construction of the house was incomplete. According to the Plaintiff quantity surveyor report dated 2/6/2009, the estimated cost of undertaking construction of the Defendant house was property was Ksh.2,316,857/=
50. It is not in dispute that the defendant did not pay the balance of the purchase price before demanding to be given the title documents.
51. The Defendant counsel testimony seemed to imply that correspondences made to the Plaintiff on behalf of the Defendant seeking to ensure full execution of the agreement ought not be taken into consideration by this court as they were made on "without prejudice basis". Although the court dealt with this issue, during the pendency of the suit, it is important to expound further on it
52. From to the pleadings, submission and documents filed in support of the Defendants case, the court notes that it is the Defendant counsel who misadvised his client and never wanted to fulfill his contractual obligation specifically clause 11. Parties have contractual freedom to choose what should be contained in an agreement. If they never wanted clause 11, they would have omitted it at the time of signing and attestation. The court takes judicial notice that the Defendant counsel participated in drafting and negotiating terms of the agreement. However, when it comes to performance of his contractual obligations under the contract, he decline to perform and distances himself on allegation that his communication was made without prejudice basis.

In the Case of *National Bank of Kenya Ltd Vs. PipePlastic SamKolit (K) Ltd* (2002) 2 EA 503 the court stated thus;

“A court of law cannot rewrite a contract, between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.....”



53. Similarly in *Lalji Rabadia & Others Vs. Commercial Bank of Africa* (2015) eKLR the Court of Appeal stated thus;

“A minute and careful examination of documents and facts laid before the court is part of the daily task in the performance of its judicial duty”. See the Gupta case (Supra). We also find no error in principle for the statement that the court has no power to rewrite a contract for the parties as it is based on many authorities including Wallis Vs. Smith (Supra) where Jessel, Master of the Rolls, stated, thus:-

“I have always thought, and still think, that it is of the utmost importance as regards contracts between adult-persons not under disability, and at arm’s length – that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character”.

I agree with the Plaintiff’s submissions that the plaintiff would only transfer the suit property and deliver the title documents to the defendant upon receipt of the balance of the purchase price.

54. It is not in dispute that the delay in the completion was due to the process of sub-division, which was beyond the control of the plaintiff. I agree with the plaintiff’s submissions that if the defendant felt the delay amounted to breach of the sale agreement, he had the option of requiring the plaintiff to complete or terminate the sale agreement as per Clause 4(7) (b) of the LSK conditions of sale.

In the Case of *Dhanjal Investments Ltd. Vs. Shabaha Investments Ltd* (2022) KECA 366 KLR the Court of Appeal stated as follows:

36. The legal significance of a terminate contract that time is of the essence is that it elevates the time period in which one party must complete its contractual obligations to the other party to a condition in the agreement and failure to perform obligations within the stipulated deadline will amount to a fundamental breach of the agreement. The consequences that will flow from such a breach are identified in Chitty on Contracts – Volume I at paragraph 21-016, namely, that the innocent party will be entitled to terminate performance of the contract, and thereby put an end to all the primary obligations of both parties that remain unperformed, and to claim damages from the contract breaker on the basis that the breach of the contract has deprived the innocent party of the benefit of the contract.

37. This was the position that obtained in *Kukal Properties Development Ltd Vs. Tafazzal H. Maloo & 3 Others* (1993) eKLR, where this Court set out the course of action required to be followed upon breach of the condition that time is of the essence as follows: “The respondents by accepting the refunds of the deposits paid by the, thereby accepted the breach with the result that they could only sue for damages for the alleged breach. Alternatively, they could refuse to accept the breach, treat the contracts as alive, and sue for specific performance. In that event, the respondents would have been obliged to perform their part of the contracts. In this case, the respondents did not keep the contract alive. In his speech in the house of Lords in the case of *Johnson Vs. Agnew* (1979) 1 All ER 883, Lord Wimberforce set out the law on this point admirably at p 889 C:

55. From the foregoing, it is clear that the Defendant was in breach of the Sale Agreement by failing to pay the balance of the purchase price. His contention that he was not shown the transfer in his name went



beyond the terms of the sale agreement. The failure by his Advocate to give a professional undertaking on the availability of funds has not been explained.

The plaintiff in good faith allowed the defendant take possession and commence construction.

56. From the Pleadings, documentation and Defendant and his counsel testimony, it appears that it was the Defendant counsel who was misadvising his client not to discharge his contractual obligation under the sale agreement. The court is therefore not persuaded that the correspondences made by the parties were made on without prejudices basis and will proceed to rely on them in making its determination.
57. The court holds the view that the Plaintiff was entitled to repudiate the sale agreement for the following reasons. The court notes from the pleadings, documents filed and party's testimony that when the Plaintiff noticed he was unable to perform his contractual obligations of securing the suit property title and transferring it to the Defendant within the required 180, he gave the Defendant vacant possession of the suit property to use as he wished as though he was its legal owner. Upon obtaining vacant possession, the Defendant commenced construction of his dwelling house. Upon obtaining the suit land title, the Defendant was requested by the Plaintiff to pay the balance of the purchase price or professional undertaking be issued to enable transfer of the title. Instead of making the payment, he demanded that the title be transfer to him first. The plaintiff plea that balances be paid in a joint account was also rejected. Frustrated by the Defendant, the Plaintiff was issued with a notice to terminate the agreement.
58. The court notes that the Defendant clearly never wanted to fulfill his contractual obligation nor take any steps to ensure the Agreement is fully implemented despite efforts made by the Plaintiff. The same applies to the Defendant's counsel who rejected the Plaintiff decision that the 10% deposit be refunded in exchange of grant of vacant possession to the Plaintiff.
59. While dealing with a similar suit Justice Sila Munyao in *Kibuba Holdings Limited v Charo Karisa Ngulu* [2021] eKLR held as follows;
24. I do not see why the plaintiff is alleging that the defendant breached the contract. It is the plaintiff who failed to make available the balance of the purchase price within time and she cannot complain. She was accommodated by the defendant in order to salvage the sale transaction, albeit out of time, but the plaintiff refused to tender a professional undertaking. I in fact wonder why the plaintiff came to court. If she was willing to proceed with the sale then all she needed to do was make the money available to the defendant and/or issue the professional undertaking. The defendant to me did not appear to have any problem with completion so long as he was guaranteed payment of the balance.....
26. I am afraid that the plaintiff has failed to demonstrate to me that the defendant failed to complete his part of the bargain. I have already stated that in my opinion, it is the plaintiff who failed to perform her part of the bargain. The plaintiff is therefore not entitled to the remedy of specific performance. The plaintiff is similarly not entitled to any award for general damages against the defendant because it was her who breached the contract. The sale agreement was self-executing in so far as failure by the purchaser to pay the balance of the purchase price in time was concerned. The agreement was to be nullified with the remedy being a refund of the deposit paid. The defendant has stated that all along he has been willing to refund the purchase price. The only remedy that the plaintiff is entitled to is therefore a refund of the deposit. I will order a refund within the next 90 days. If no refund is forthcoming, the plaintiff will be at liberty to execute for the same."

I find that the plaintiff is entitled to rescind the sale agreement.



60. It is not in dispute that the plaintiff has regained possession of the suit property upon the breach by the Defendant. It was his testimony that he has since remained in possession.

This court is of the view that there is no basis to hold that the Defendants intention was to enrich himself at the expense of the plaintiff.

The payment of stamp duty, rent and rates, are payable by the plaintiff as the title was never passed to the defendant for the reasons aforementioned.

61. I am unable to find the defendant as a trespasser as he was given permission by the plaintiff to enter and commence construction. I therefore decline to award any damages for trespass. The defendant is entitled to a refund of the deposit.

62. As to the construction of the dwelling house, DW1 and DW2 confirmed that it was done without approval from the relevant authorities.

The plaintiff who is possession, is entitled to the prayer for demolition of the building.

63. In essence the Defendant's claim for Specific Performance fails. In *Reliable Electrical Engineers Ltd Vs. Mantrac Kenya Ltd* (2006) eKLR, Maraga J (as he then was) stated;

“Specific Performance like any other equitable remedy is discretionary and the court willingly grant it on well stated 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 some defect, such as failure to comply 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 ad equated alternative remedy.....”

I find that the Defendant's counter claim is unmerited and is dismissed save for a refund of the deposit of the purchase price.

64. The upshot of the matter is that the plaintiff has proved his case as against the Defendant on a balance of probabilities.

65. I enter judgement in his favour as follows:

- a. That a permanent injunction is hereby issued restraining the defendant by himself and/or his servants and agents from interfering with the plaintiff's possession of the suit property.
- b. That a declaration is hereby issued that the sale agreement stands discharged and parties are released from performance of the same.
- c. That a declaration is hereby issued that the plaintiff is the true and beneficial owner of the suit property.
- d. That an order is hereby issued directing the defendant to demolish all the incomplete structures erected on the suit property within one hundred and twenty (120) days from the date of this Judgement. In default the plaintiff be at liberty to demolish the same at the expense of the defendant.
- e. Cost of the suit and interest

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF JULY 2023.



L. KOMINGOI

JUDGE.

In The Presence Of:

Ms. Cheptoo for Mr. Muthui for the Plaintiff.

Mr. Wachira for the Defendant.

Court Assistant – Mutisya.

