



**Alvine Brooks Limited v Kirunyu (Environment & Land Case E007 of 2022)
[2023] KEELC 20159 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E007 OF 2022
BM EBOSO, J
SEPTEMBER 21, 2023**

BETWEEN

ALVINE BROOKS LIMITED PLAINTIFF

AND

GEOFFREY KIMANI KIRUNYU DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around a sale of land contract entered into by the parties to the suit on 5/11/2021. Through the contract, the defendant sold to the plaintiff Land Reference Number 4953/2149, measuring approximately 0.4868 hectares [the suit property]. The land is located in Thika Municipality. Although the plaintiff performed all its obligations under the contract, including payment of purchase price in full within the completion period of 90 days, the defendant changed his mind and sought to cancel or rescind the contract, a move that triggered the suit. One of the key issues to be determined in the suit is whether the defendant was entitled to unilaterally cancel or rescind the contract in the absence of any breach or misrepresentation by the plaintiff. The other key issue to be determined is whether the remedy of specific performance is available to the plaintiff in the circumstances of the suit. I will briefly summarize the parties' respective cases, evidence, and submissions before I dispose the issues that fall for determination.

Plaintiff's Case

2. The plaintiff initiated the suit through a plaint dated 19/1/2022. In summary, the plaintiff's case was that, by an agreement for sale dated 5/11/2021 (the agreement for sale), the defendant agreed to sell to it and it agreed to purchase Land Reference Number 4953/2149, comprised in Grant Number IR 57398, located in Thika, Kiambu County, at a purchase price of Kshs 45,000,000. Among the salient terms of the sale agreement were that:



- (i) the plaintiff was to pay a deposit of Kshs 15,000,000 within seven (7) days of execution of the agreement for sale;
 - (ii) the defendant was to pay the balance of the purchase price [Kshs 30,000,000] on completion;
 - (iii) the completion period was to be 90 days from the date of execution of the agreement; and
 - (iv) the property was being sold with vacant possession; and
 - (v) the plaintiff was to take possession of the property within 30 days of payment of the agreed deposit of Kshs 15,000,000.
3. The plaintiff contended that upon execution of the agreement on 5/11/2021, it proceeded to pay the agreed deposit of Kshs 15,000,000 on 8/11/2021, and the defendant, through his advocate, acknowledged receipt of the money. By a letter dated 30/11/2021, the defendant requested the plaintiff to grant him an extension of the period within which to take vacant possession by 30 days, a request which the plaintiff acceded to and advised the defendant to yield vacant possession by 31/12/2021.
4. The plaintiff added that although the last day for paying balance of the purchase price was 6/2/2022, it paid the said sum of Kshs 30,000,000 on 31/12/2021 and forwarded to the defendant a copy of the RTGS Slip evidencing payment. Further, it requested the defendant to yield vacant possession and supply completion documents. The plaintiff added that having paid purchase price in full, it subsequently took possession of the suit property on 17/1/2022 at about 12.00 noon, with the knowledge and consent of the defendant, and immediately commenced renovations and developments on the suit property.
5. The plaintiff further contended that on 18/1/2022, it notified the defendant's advocates that it had taken possession of the suit property on 17/1/2022 and it had commenced developments and renovations on it. On the same day, 18/1/2022, the defendant wrote to the plaintiff purporting to cancel the sale contract on the ground that some strangers who were neither owners of the suit property nor privy to the sale contract had objected to it. It was the case of the plaintiff that the action of the defendant constituted a breach of the contract.
6. The plaintiff listed the following as the particulars of breach of the contract by the defendant:
 - (i) failing to procure a signed but undated instrument of transfer in favour of the plaintiff;
 - (ii) failing to apply for consent to transfer the suit property in favour of the plaintiff;
 - (iii) failing to provide the plaintiff with the original consent to transfer the land, from the Department of Lands;
 - (iv) failing to provide the plaintiff with a valid original land rent clearance certificate;
 - (v) purporting to cancel the sale of land transaction long after receiving the full purchase price and delivering vacant possession to the plaintiff;
 - (vi) raising flimsy grounds not anchored on the law or reason in purporting to terminate or cancel the agreement for sale;
 - (vii) yielding possession to the plaintiff on 17/1/2022 instead of 9/12/2021 as envisaged in clause 7 of the agreement for sale;
 - (viii) failing to pay the outstanding land rent which stood at Kshs 147,510 as at the year 2021;
 - (ix) failing to pay outstanding land rates which stood at Kshs 1,349,749 as at the year 2021; and



- (x) interfering with the plaintiff's quiet and peaceful enjoyment and possession of the suit property.
7. Consequently, the plaintiff sought the following verbatim reliefs against the defendant:
- a. A declaration that the plaintiff is entitled to registration as the owner of all that property known as Land Reference Number 4953/2149, Grant 57398, situated at Thika in Kiambu County as envisaged in the agreement for sale dated 5th November, 2021 to the exclusion of the defendant, his agents, servants, relatives or howsoever claiming under him.
 - b. An order of specific performance compelling the defendant to procure, execute and supply all documents that are necessary to transfer the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County to the Plaintiff as envisaged in the agreement for sale dated 5th November, 2021.
 - c. An order that in default of the defendant executing any document that is necessary to complete the sale within 7 days of the Judgment, the Deputy Registrar of the Environment and Land Court be and is hereby directed to execute such documents, including the transfer instrument, as are necessary to complete the transfer of the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County, in favour of the plaintiff.
 - d. An order compelling the defendant to pay outstanding land rates of Kshs.1,349,749.00 as at the year 2021 to Kiambu County Government within 7 days of the judgment herein, in default, the plaintiff to pay and recover the said sum by way of execution against the defendant.
 - e. An order compelling the defendant to pay outstanding land rent of Kshs 147,510.00 as at the year 2021 to the Government of the Republic of Kenya within 7 days of the judgment herein, in default the plaintiff to pay and recover this sum by way of execution against the defendant.
 - f. An order compelling the defendant to pay all outstanding utilities and procure land rent and rates clearance certificate at his own expense within 7 days of the judgement herein, in default the plaintiff to pay for all these utilities and procurement of land rent and rates clearance certificates and recover the amounts so paid by way of execution against the defendant.
 - g. A permanent injunction be issued restraining the defendant either by himself, his agents, relatives or employees or otherwise howsoever from interfering with the plaintiff's quiet and peaceful possession and occupation of the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County.
 - h. A declaration that the plaintiff company is entitled to exclusive ownership, possession and occupation of the property known as Land Reference Number 4953/2149, Grant 57398 situated in Thika in Kiambu County as against the defendant, his agents, representatives or relatives, which possession and occupation should be granted to the plaintiff unconditionally, in default of which an eviction order against the defendant, his agents, representatives or relative do issue and which eviction order should be enforced by the Officer Commanding Station, Thika Police Station.
 - i. In the alternative to prayers (a), (b), (c), (d), (e), (f), (g) and (h) above, an order be issued compelling the defendant to refund the plaintiff the same of Kenya Shillings Forty Five Million (Kshs 45,000,000.00), being the full purchase price paid and an additional Kenya Shillings Nine Million (Kshs 9,000,000.00) being the agreed liquidated damages for breach of contract under clause 10.3 of the agreement for sale dated 5th November, 2021.



- j. Compound interest on each of the amount in (i) above effective the scheduled completion date of 6th February 2022 at the rate of 20% per annum as envisaged in clause 3.2 of the agreement for sale dated 5th November, 2021 until payment in full.
- k. Costs of the suit.

Defendant's Case

- 8. The defendant entered appearance on 27/1/2022. He filed a statement of defence dated 12/3/2022 in which he acknowledged that they had indeed entered into the agreement for sale dated 5/11/2021. His case was that he was unable to deliver vacant possession of the suit property as per the agreement of sale because he was facing resistance from the tenants in the suit property who were objecting to the short notice and family members who were objecting to the sale of the suit property. The defendant contended that he opted to cancel the agreement for sale as a result of the foregoing. He added that he was willing to refund to the plaintiff the total purchase price.
- 9. The defendant urged the court to allow his defence and the prayers (i) and (j) of the plaint. He further urged the court to dismiss prayers (a) to (h) and (k) of the plaint with costs.

Plaintiff's Evidence

- 10. Anthony Mwangi Ndungu testified as PW1. He adopted his witness statement filed on 7/4/2022 as part of his sworn evidence-in-chief. He produced the following 27 exhibits:
 - (i) Copy of the plaintiff's resolutions and written authority to plead, act and depone, dated 7/4/2022;
 - (ii) Copy of the plaintiff's CR12;
 - (iii) Plaintiff's special ordinary resolutions and written authority to plead, act and depone dated 18/1/2022;
 - (iv) Copy of certificate of title for Land Reference Number 4953/2149, Grant Number I.R 57398;
 - (v) Copy of a search dated 8/12/2021 of Land Reference Number 4953/2149, Grant Number I.R 57398;
 - (vi) Copy of the agreement for sale dated 14/2/1991;
 - (vii) Copies of court papers which the defendant filed in Nairobi High Court Civil Suit No. 449 of 2008 (O.S)- Geoffrey Kimani Kirunyu v Stephen Wainaina Ndegwa (sued as the legal representative of Jackson Kariuki Ndegwa);
 - (viii) The decree of the High Court dated 13/10/2008;
 - (ix) Directors' Resolution dated 4/11/2021;
 - (x) Copy of the valuation report and architectural drawings;
 - (xi) Copy of the agreement for sale dated 5/11/2021;
 - (xii) Copy of the letter dated 9/11/2021 together with the RTGS application form for the sum of Kshs 15 million;
 - (xiii) Copy of the defendant's advocates' letter dated 11/11/2021;
 - (xiv) Email extract and a copy of the plaintiff's advocates letter of 11/11/2021;



- (xv) Plaintiff's advocates email of 15/11/2021, a letter dated 15/11/2021 and draft transfer instrument;
 - (xvi) Copy of the defendant's advocates letter dated 30/11/2021;
 - (xvii) Copy of the plaintiff's advocates letter dated 6/12/2021;
 - (xviii) Copy of SWIFT/RTGS application dated 31/12/2021 evidencing payment of Kshs 30,000,000 to the defendant by plaintiff;
 - (xix) Email extract and a copy of the plaintiff's letter dated 5/1/2022;
 - (xx) Text message print of 11/1/2022 at 0539 hours;
 - (xxi) Copy of the plaintiff's advocates letter dated 12/1/2022;
 - (xxii) Copy of the OB No. 34 of 18/1/2022;
 - (xxiii) Copy of the plaintiff's advocates letter dated 18/1/2022;
 - (xxiv) Copies of the defendant's advocates letters dated 18/1/2022;
 - (xxv) Text message print out of 17/1/2022 at 0716 hours;
 - (xxvi) Plaintiff's certificate of incorporation and CR12; and
 - (xxvii) Certificate of electronic records dated 7/4/2022.
11. It was PW1's testimony that he was the Chief Operations Officer of the plaintiff company and that the plaintiff company was owned by Mount Kenya University. He added that he was also the Director - Institution Planning and Administration at Mount Kenya University. PW1 testified that the plaintiff was owned by Mount Kenya University as its special purpose vehicle for expansion and asset acquisition.
12. PW1 further stated that in October 2021, the defendant offered to sell the suit property to the plaintiff at a consideration of Kshs 45,000,000. The plaintiff conducted due diligence and established that the defendant was registered as the sole and absolute owner of the suit property, having purchased it from one Jackson Ndegwa Kariuki. PW1 added that although Mount Kenya University was financially constrained, it took the following factors into account prior to deciding to accept the defendant's offer:
- (i) The headquarters of Mount Kenya University, which owns the plaintiff company, was located along General Kago Road in Thika where a number of learning facilities such as lecture halls and offices were established;
 - (ii) The suit property was located about 500 metres off General Kago Road and was opposite Mount Kenya University's Mwai Kibaki Convention Centre. The suit property was adjacent to Mount Kenya University and other learning institutions such as Imperial College of Medical and Health Sciences (formerly Thika School of Medical and Health Sciences) within Thika Municipality in Kiambu County;
 - (iii) The suit property measured approximately 1.2 acres and the immediate access road was tarmacked. There were public facilities and social amenities within the suit property's neighbourhood; and
 - (iv) Mount Kenya University had enrolled 320 medical students who were utilizing the Thika Training and Referral Hospital for their studies.



13. PW1 stated that the plaintiff passed a resolution on 4/11/2021 to purchase the suit property with the intention of effecting a change of user of the suit property and developing thereon the Mount Kenya University Medical and Health Sciences School, comprising of a new administration/office block, lecture halls, and a mortuary . He added that Mount Kenya University contracted Reliance Valuers Limited and Architect Kariuki Kimaru who ascertained the utility of the suit property for the intended purpose and came up with a valuation report and architectural drawings and concluded that the property was unique for the intended purpose and had no substitute.
14. PW1 contended that the agreement for sale was executed on 5/11/2021 and the plaintiff was required to pay a deposit of Kshs 15,000,000 to the defendant not later than 12/11/2021, being 7 days after execution. The balance of the purchase price, being Kshs 30,000,000, was to be paid within 90 days after execution of the agreement for sale. He added that the plaintiff paid Kshs 15,000,000 to the defendant through Mount Kenya University on 8/11/2021. He added that vide a letter dated 11/11/2021, the defendant's advocates acknowledged receipt of the deposit and in turn surrendered to the plaintiff the original Grant [Title] relating to the suit property, copies of the defendant's identity card, KRA pin certificate, passport photos, among other documents. He further added that according to clause 7 of the agreement for sale, the plaintiff was entitled to vacant possession on 9/12/2021 being 30 days from the date of payment of deposit of the purchase price.
15. PW1 stated that by a letter dated 30/11/2021, the defendant informed the plaintiff that he was not able to deliver vacant possession of the suit property by 9/12/2021 and requested for an extension of 30 more days to enable him fully vacate the suit property, a request which the plaintiff acceded to on condition that the defendant would yield vacant possession of the suit property by 31/12/2021. He added that although the plaintiff was expected to pay the balance of the purchase price by 6/2/2022, it paid the money on 31/12/2021 through Mount Kenya University. PW1 stated that the plaintiff, with the knowledge of the defendant, took vacant possession of the suit property on 17/1/2022 and commenced renovations and developments thereon. PW1 further stated that in a turn of events, on the morning of 18/1/2022, goons who introduced themselves as agents of the defendant attempted to invade the suit property but were repulsed by the plaintiff's security guards. As a result, the plaintiff, through its employee, one Benard Mwaye, reported the incident to Thika Police Station. The report was booked as OB No. 34.
16. PW1 further stated that on the same day, at about 2.00 pm, the plaintiff received a letter from the defendant, dated 18/1/2022, acknowledging receipt of the entire purchase price and at the same time purporting to cancel the transaction allegedly on the ground that his sons, who were neither owners of the suit property nor parties to the agreement for sale, had objected to the transaction. He added that as a consequence, the plaintiff instituted this suit to challenge and quash the defendant's unlawful cancellation of the agreement for sale. PW1 added that the allegation by the defendant that the plaintiff paid the balance of the purchase price on 31/12/2021 with the knowledge that the defendant had already cancelled the agreement for sale was untrue because as late as 17/1/2022 at 0716 hours, the defendant, through his advocates, informed the plaintiff via a text message that the defendant would provide all completion documents as envisaged in the agreement for sale. During cross-examination, PW1 testified that although the plaintiff had made an alternative prayer for the refund of the sum of Kshs 45,000,000 and liquidated damages, the plaintiff was not agreeable to a refund.
17. Anthony Nganga Nzuve testified as PW2. He stated that he was a professional valuer practising under the name Reliance Valuers Limited. He identified and authenticated the valuation report dated 3/11/2021. The report had already been produced by PW1 without any objection from the defendant. He stated that he prepared the valuation report dated 3/11/2021. During cross-examination, he stated that the valuation report related to the suit property. He added that he was instructed by Anthony



Mwangi who was acting on behalf of the plaintiff. He added that he inspected the suit property on 2/11/2021 but he did not interact with the defendant and neither did the defendant issue him with a letter authorizing him to enter the suit property.

18. During re-examination, PW2 testified that it was not necessary for him to meet with the registered proprietor of the suit property since his instructions were to inspect and prepare a valuation report.

Defendant's Evidence

19. Geoffrey Kimani Kirunyu testified as DW1. He adopted his witness statement dated 12/3/2022 as part of his sworn evidence-in-chief. He produced the following 13 exhibits: (i) Certificate of title for land reference number 4953/2149; (ii) A copy of the agreement of sale dated 5/11/2021; (iii) A letter from the defendant's sons; (iv) Letter from P K Njiiri Advocates dated 17/1/2022; (v) Letter dated 17/1/2022 by defendant to Equity bank; (vi) Bank statement from 1/12/2021 to 18/1/2022; (vii) Letter dated 18/1/2022 by Mutitu, Thiongo & Co Advocates; (viii) Photographs taken on the 26/1/2022; (ix) Photographs taken on the 8/2/2022; (x) Advert by plaintiff on 20/1/2022; (xi) Bank statement from 1/12/2021 to 20/1/2022; (xii) A copy of court order; (xiii) Letter dated 26/1/2022; (xiv) OB extract.
20. It was DW1's testimony that he did not give possession of the suit property to the plaintiff because upon receipt of the deposit of Kshs 15,000,000, his children who were using the suit property as a garage objected to the sale; requested to continue using the suit property as a garage; and offered to raise the deposit of Kshs 15,000,000 for refund to the plaintiff. He added that he acceded to their request and he decided to inform his advocate that he had changed his mind about the sale. He further stated that he was ready to refund the purchase price together with the contractual penalties.
21. During cross-examination, DW1 stated that he was the only registered proprietor of the suit property and that he bought the suit property in the 1990s from one Jackson Kariuki Ndegwa. He added that he lived in Githunguri and his children lived in Nairobi. He further stated that prior to the signing of the agreement of sale dated 5/11/2021, he had a lawyer who explained to him the contents of the agreement and that he voluntarily agreed to sell the suit property to the plaintiff at the agreed purchase price of Kshs 45,000,000. He further confirmed that the entire purchase price was paid into his bank account and that the sum of Kshs 30,000,000 was credited into his bank account on 3/1/2022 even though he was aware it was paid on 31/12/2021. DW1 further confirmed that the plaintiff fulfilled all its obligations under the sale agreement and at the time of forwarding the letter of objection dated 18/1/2022, he had already received the entire purchase price from the plaintiff and all that remained was the conveyance of the suit property. DW1 added that the first communication to the plaintiff of his intention not to convey the suit property to the plaintiff was vide the letter dated 18/1/2022.
22. DW1 further stated that clause 13.1.4 of the agreement for sale provided that there was no adverse claim nor family dispute over the suit property. He added that he used the deposit of Kshs 15,000,000 to repay a bank loan which he had defaulted to service and that at that point in time he was facing the threat of auction of the charged property which was the land on which he ran a school.
23. During re-examination, he stated that when his children objected to the sale of the suit property, he verbally shared his predicament with one Mr Gicharu on phone. He added that he returned the sum of Kshs 30,000,000 to the account from which the money had been wired but the plaintiff declined to accept the money back. He stated that he did not, however, attempt to refund the deposit of Kshs 15,000,000 and that he did not have any intention of defrauding the plaintiff.
24. Simon Kimani testified as DW2. He adopted his witness statement dated 14/5/2022 as part of his sworn evidence-in-chief. He stated that he was the defendant's son and that the suit property was



registered in the defendant's name but it was a family property on which they had been carrying on a coffee berry drying business; a garage business; and rental business. DW2 further stated that the defendant entered into a sale agreement with the plaintiff but only involved him and his brothers after he had received the deposit of Kshs 15,000,000. DW2 stated that a family meeting was called on 1/1/2022 during which the defendant's sons objected to the defendant's decision to sell the suit property. He added that the defendant acceded to their objection and decided to cancel the agreement for sale and communicated the decision to the plaintiff's director, one Prof. Simon N. Gicharu vide a letter dated 17/1/2022. DW2 added that his brothers also communicated the decision to cancel the agreement for sale to the firm of Mutitu Thiongo & Company Advocates who were handling the sale on behalf of the defendant. DW2 contended that the said firm of advocates communicated the defendant's decision to cancel the agreement for sale to the plaintiff through a letter dated 18/1/2022. The plaintiff through its advocate responded to the letter on the same date and informed the defendant that the plaintiff had already taken possession of the suit property and that they would deny the defendant, his sons, their tenants and their agents, entry to the suit property. DW1 contended that as at 18/1/2022, they had not surrendered possession of the suit property to the plaintiff.

25. During cross-examination, he stated that he had not produced any evidence to show that he was the defendant's son. He added that he was not a co-proprietor of the suit property and that the suit property was neither an ancestral home nor was it acquired by the defendant through inheritance. On re-examination, DW2 testified that it was not true that the plaintiff took possession of the suit property on 17/1/2022 because they were still operating the garage as at the said date. He added that they were removed from the suit property on 5/2/2022.

Plaintiff's Submissions

26. The plaintiff filed written submissions dated 14/4/2023 through the M/s Rapando & Odunga Advocates. They deciphered the following as the main issues that fell for determination in the suit:
- (i) Whether there was a valid agreement for sale of land between the plaintiff and the defendant and whether there was breach of the agreement;
 - (ii) Whether there was a valid reason for rescinding/cancelling the agreement for sale dated 5/11/2021;
 - (iii) Whether the plaintiff breached the agreement for sale in taking possession;
 - (iv) Whether an order for specific performance should issue; and
 - (v) Who should bear costs of the suit.
27. On whether there was a valid agreement for sale of land between the plaintiff and the defendant and whether there was a breach of the said agreement, counsel submitted that although the validity of the agreement was not in dispute, the plaintiff was enjoined to establish that there was a valid contract for sale of land. Counsel relied on the decisions in the cases of Solomon Ndegwa Kuria v Peter Nditu Gitau [2019]eKLR and Nelson Kivunani v Yuda Komora & Another, Nairobi HCCC No. 956 of 1991 to buttress this point. Counsel also relied on Section 3 (3) of the *Law of Contract Act*, Cap 23 Laws of Kenya. Counsel submitted that the agreement for sale which the plaintiff sought to enforce was in writing and was executed by both the plaintiff and the defendant.
28. On whether the defendant breached the agreement for sale, counsel submitted that the pleadings and evidence on record showed that the defendant had invariably breached the contract with impunity and without regard to commercial morality. Counsel contended that the defendant confirmed receipt of the entire purchase price; applied the deposit to clear a non-performing loan to forestall foreclosure



- of his charged land; and at the same time continued to hold onto completion documents. Counsel argued that the defendant's conduct amounted to impunity which should not be countenanced by the court. Counsel relied on the decision in the case of Eldo City Limited v Corn Products Kenya Limited & Another [2013]eKLR.
29. On whether there was a valid reason for rescinding/cancelling the agreement for sale dated 5/11/2021, counsel submitted that the defendant testified that his children objected to the transfer of the suit property to the plaintiff, necessitating the purported cancellation of the agreement for sale. Counsel argued that the said reason was not envisaged in the agreement for sale. Counsel further argued that no law required the defendant to consult his children or seek their consent prior to entering into the agreement for sale of the suit property with the plaintiff. Counsel urged the court to find that the purported objection by the defendant's children did not suffice to vitiate the sale and transfer of the suit property to the plaintiff.
30. On whether an order of specific performance should issue, counsel relied on the decisions in the cases of Makicher General Contractors Limited v Communication Graphics Limited [2021]eKLR; Reliable Electrical Engineers (K) Ltd v Mantrac Limited [2006]eKLR; and Sisto Wambugu v Kamau Njuguna[1983]eKLR. Counsel submitted that an order of specific performance should be issued because: (i) the plaintiff had demonstrated the existence of a valid enforceable contract that the parties entered into freely; (ii) it was undisputed that the plaintiff fulfilled its obligations in the agreement; and (iii) an alternative remedy in the form of damages would result in an injustice and would not be adequate. Counsel urged the court to consider the following factors in determining that damages would not be adequate: (i) there was on record, evidence in form of resolutions, which showed that the plaintiff agreed to purchase the suit property owing to its proximity of about 500 metres from Mount Kenya's University main university campus and headquarters; (ii) there was on record a valuation report which showed that the suit property was unique to the plaintiff given its proximity to Mount Kenya University; and (iii) the defendant and DW2 in their evidence stated that the suit property was not only prime and unique but also testified that a similar property would not be readily available in Thika Town.
31. Counsel for the plaintiff further submitted that the court should also consider the fact that the plaintiff had been in occupation of the suit property since 17/1/2022. Counsel further argued that in the unlikely event that the order of specific performance does not issue, then the court should direct that the defendant refunds the plaintiff the full purchase price and agreed liquidated damages of Kshs 9,000,000 with interest on each amount that should be compounded at the rate of 20% per annum effective 18/1/2022 until payment in full.
32. On whether the plaintiff breached the contract by taking possession of the suit property on 17/1/2022, counsel argued that clause 7 of the agreement for sale provided that the plaintiff shall take possession of the suit property within 30 days of the payment of the deposit of the purchase price. Counsel argued that the plaintiff was entitled to take possession as from 9/12/2021 and that it was immaterial that it actually took possession of the suit property on 17/1/2022.
33. On the issue of costs, counsel submitted that filing of the suit was necessitated by the defendant's breach of the agreement for sale. Counsel urged the court to award costs of the suit to the plaintiff.

Defendant's Submissions

34. The defendant filed submissions dated 22/5/2023 through M/s P K Njiiri & Company Advocates. They deciphered the following as the two main issues that fell for determination in the suit:
- (i) Whether the cancellation/rescinding of the sale agreement by the defendant was valid; and



- (b) Whether the plaintiff's continued forceful possession of the subject suit property was legal.
35. On whether the cancellation/rescinding of the sale agreement by the defendant was valid, counsel submitted that rescission arises where one party in a contract is in default. Counsel argued that clauses 10.2 and 10.3 of the sale agreement made provisions on the consequences of default attributable to the vendor. Counsel further argued that it was not the duty of the court to make a contract for the parties but to construe the contract and arbitrate on the contract. Counsel relied on the decision in the case of *Kanyango v Kenya Commercial Bank Limited & Another* [2004] 1KLR 126 to buttress this point.
36. Counsel submitted that the remedy of specific performance that the plaintiff sought was not the agreed remedy stipulated in the agreement for sale. Counsel further submitted that the defendant was not opposed to giving effect to clause 10.3 of the agreement for sale and that the defendant had refunded Kshs 30,000,000 to the plaintiff but the amount was sent back to the defendant's bank account because the plaintiff refused to receive the same. Counsel contended that the defendant was no longer interested in selling the suit property to the plaintiff and he was willing to refund the entire purchase price and pay interest plus liquidated damages as provided for in the agreement for sale. Counsel added that the defendant's reasons for the cancellation of the agreement for sale were valid. Counsel urged the court to allow the plaintiff's prayers (i) and (j) and dismiss prayers (a) to (h) and (k) of the plaint with costs to the defendant.
37. On whether the plaintiff's possession of the suit property was legal, counsel submitted that the plaintiff's act of entering the suit property on 17/1/2022 and taking possession was wrongful. Counsel added that the plaintiff was illegally occupying the suit property without the defendant's consent and had no right to develop the suit property. Counsel contended that there was no clause in the agreement allowing forceful entry into the suit property. Counsel further contended that the continued forceful possession of the suit property by the plaintiff was tantamount to trespass since the sale agreement did not confer upon the plaintiff proprietary rights over the suit property. In conclusion, counsel submitted that the plaintiff had not come before the court with clean hands following the damage and the loss occasioned to the defendant as a result of the forceful entry and possession of the suit property.

Analysis and Determination

38. The court has considered the parties' pleadings, evidence and submissions. The court has also considered the legal frameworks and the jurisprudence relevant to the issues that arise for determination in the suit. Parties did not agree on a common concise statement of issues that the court is required to determine.
39. Taking into account the parties' pleadings, evidence and submissions, the following are, in the view of the court, the five key issues that fall for determination in this suit:
- (i) Whether the option of unilateral cancellation or rescission of the sale of land contract was available to the defendant in the absence of any misrepresentation or breach by the plaintiff;
 - (ii) Whether the taking of possession of the suit property by the plaintiff breached the sale agreement;
 - (iii) Whether the remedy of specific performance is available to the plaintiff in the circumstances of this case;
 - (iv) Whether the remedy of damages is adequate in the circumstances of this case; and
 - (v) What order should be made in relation to costs of this suit. I will analyse and dispose the five issues sequentially in the above order.



40. The first issue is whether the option of unilateral cancellation or rescission of the sale of land contract was available to the defendant in the absence of any misrepresentation or breach by the plaintiff. Both parties have not challenged the validity and enforceability of the sale of land contract contained in the agreement dated 5/11/2021. No allegation of misrepresentation was made against the plaintiff. The key contractual covenant of the plaintiff as a purchaser was the obligation to pay the agreed purchase price within the agreed time- frame.
41. The agreed purchase price was Kshs 45,000,000. Under Clause 2.1, the plaintiff was contractually obligated to pay a deposit of Kshs 15,000,000 within seven (7) days of execution of the sale agreement. The agreement was executed on 5/11/2021. Uncontested evidence was tendered proving that the plaintiff fully discharged this obligation by paying the deposit of Kshs 15,000,000 on 8/11/2021. This was within the time-frame of seven (7) days.
42. The defendant conceded during cross-examination that the land where he ran a school business was up for auction on account of a non-performing loan which he had taken from a finance institution. He conceded that he needed the purchase price urgently for the purpose of repaying the loan to redeem his other property. He confirmed that he used the deposit of Kshs 15,000,000 to redeem his other property. Further, uncontroverted evidence was tendered showing that upon receipt of the deposit, the defendant surrendered to the plaintiff the original title relating to the suit property. Clause 7 of the agreement authorized the plaintiff to take possession of the suit property within 30 days of payment of the deposit of Kshs 15,000,000.
43. Under clause 4 of the agreement, the date of completion of the contract was 90 days from the day the agreement was executed. The plaintiff's principal obligation under Clause 2.2 as read together with clause 9 was to pay the balance of the purchase price [Kshs 30,000,000] within the agreed time-frame of 90 days from the date of signing the agreement. Uncontested evidence was tendered proving that the plaintiff paid to the defendant the balance of the purchase price on 31/12/2021. This was within the time-frame of 90 days. It is therefore clear from the evidence that was tendered during trial that the plaintiff fully discharged its obligations under the contract.
44. Did the defendant have the liberty to unilaterally cancel or rescind the contract in the absence of any misrepresentation or breach by the plaintiff? I have looked at the sale agreement dated 5/11/2021 in its entirety. Clause 6 of the sale agreement incorporated into the contract the 2015 Edition of the Law Society of Kenya Conditions of Sale. None of the clauses in the sale agreement gave the parties to the agreement the liberty to cancel or rescind the contract without breach or misrepresentation by the other party.
45. Clause 13.4.1 of the 2015 Edition of the Law Society of Kenya Conditions of Sale which the parties incorporated into the contract contain the following framework on cancellation or rescission of a land sale contract by a vendor:

“Purchaser’s failure to comply with notice to complete

“13.4.1 If the purchaser fails to complete in accordance with a completion notice to complete, the vendor may rescind the agreement, and if he does so:

- a. The vendor may without prejudice to his rights in law and at equity:
 - i. Declare forfeited and keep a deposit of up to ten per centum (10%) of the purchase price and accrued interest thereon.



- ii. Sell the property and any contents included in the Agreement to a third party;
 - iii. Claim damages from the purchaser.
 - b. The purchaser must immediately return all title deeds and documents in his possession that belong to the vendor and at his own expense procure the cancellation of any entry relating to the agreement in any register.”
46. It is clear from the above framework that the defendant’s right to cancel or rescind the contract would accrue only as a consequence of the plaintiff’s failure to complete the agreement. Secondly, the right would crystallize only after a notice to complete has been served on the plaintiff. Thirdly, there was no allegation or evidence of misrepresentation on part of the plaintiff.
47. Both the defendant and his advocate placed emphasis on the remedy of damages. They contended that the only remedy available to the plaintiff was damages. They did not point out any clause in the contract that gave the defendant the liberty to unilaterally cancel or rescind the contract. They seemed not to appreciate that the two parties to the agreement had entered into a fully binding commercial contract and that neither of them had the liberty to unilaterally cancel or rescind it in the absence of any misrepresentation or breach by the other party or in the absence of any other proper vitiating factor. They did not seem to appreciate that the contract dated 5/11/2021 created binding rights and obligations that neither party had the liberty to wish away.
48. The reason which the defendant advanced for attempting to cancel the contract is that, after he sold the suit property and after he received purchase price in full, he held a meeting with his sons in early January 2022, during which he informed them that the plaintiff had paid the purchase price in full and that he was required to execute the transfer instrument. He contended that his sons opposed his intention to complete the sale and offered to refund the purchase price and pay to the plaintiff all liquidated damages.
49. Both the defendant and DW2 confirmed that the suit property belonged to the defendant and was not ancestral land. They confirmed that the defendant purchased the suit property from one Jackson Kariuki Ndegwa. The defendant confirmed that he acquired registration of the suit property after a lengthy litigation against the previous owner [Jackson Kariuki Ndegwa].
50. Our courts have, in a line of decisions made it clear that the right to rescind a contract accrues as a consequence of breach and that the right crystallizes after the party in breach fails to remedy the breach upon being notified to remedy the breach. It does not accrue as a matter of course. [See (i) Sisto Wambugu v Kamau Njuguna [1983] eKLR; (ii) Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others[2018] and (iii) Gurdev Singh Birdi & another v Abubakar Madhbuti [1997] eKLR.
51. It is clear from the foregoing that the defendant having entered into a binding contract for sale of the suit property, he did not have the liberty to unilaterally cancel or rescind the binding contract. The right of cancellation or rescission could only accrue as a consequence of default or beach or misrepresentation by the plaintiff. No such breach or default or misrepresentation was proved against the plaintiff. Consequently, it is the finding of this court that the defendant had no right to unilaterally cancel or rescind the contract in the absence of any breach or misrepresentation by the plaintiff.
52. The second issue is whether the taking of possession of the suit property by the plaintiff breached the sale agreement. The plaintiff contended that it took possession of the suit property on 17/1/2022. On



his part, the defendant contended that as at 18/1/2022, the plaintiff had not taken possession because he [the vendor] had not given the plaintiff possession of the suit land.

53. Clause 7 of the sale agreement contained the following mutually agreed framework on possession:

“The property is sold with vacant possession and the purchaser shall take up possession thereof within thirty (30) days of payment of the deposit of the purchase price”

54. It does emerge from the evidence that was tendered that through a letter dated 30/11/2021, the defendant requested the plaintiff to delay taking possession by 30 days. Through a letter dated 6/12/2021, the plaintiff acceded to the request for an extension of 30 days.

55. It is clear from the above evidence that under the contract, the suit land was sold with vacant possession and that the plaintiff was entitled to take possession upon expiry of 30 days from the date when the deposit was paid [8/11/2021]. The 30 days period was to lapse on 8/12/2021. However, before the expiry of the 30 days period, the defendant asked for an extension of 30 days. The extension having been granted, the plaintiff was entitled to take possession upon expiry of 60 days reckoned from 8/11/2021. That period lapsed on or about 7/1/2022.

56. Given the above evidence, the taking of possession of the suit property by the plaintiff on 17/1/2022 or any other day after 17/1/2022 cannot be faulted because there was a binding contract between the parties that the plaintiff would take possession upon expiry of 60 days. I see no proper basis for faulting the plaintiff for taking possession of the sold land. It is also not lost to the court that although the plaintiff was entitled to take possession after paying the deposit of Kshs 15,000,000, he paid the entire purchase price before taking possession.

57. The third and fourth issues are intertwined. They will be disposed simultaneously. The third issue is whether the remedy of specific performance is available to the plaintiff in the circumstances of this case. The fourth issue is whether the remedy of damages is adequate. Jurisdiction to grant the equitable remedy of specific performance is exercised on well-settled principles. In their book THE LAW OF REAL PROPERTY, Seventh Edition, The Rt Hon Sir Robert Megarry and Sir William Wade set out the following principles that govern the exercise of jurisdiction to grant the equitable remedy of specific performance in land disputes:

“This remedy is purely equitable, and in principle is confined to cases where the common law remedy of damages is inadequate. But land is always treated as being of unique value, so that the remedy of specific performance is available to the purchaser as a matter of course; and even though the vendor is merely concerned to obtain the purchase-money, so that he could be adequately compensated in damages for the purchaser’s refusal to complete, the remedy of specific performance is equally available to him”

58. The two authors add thus:

“Like other equitable remedies, specific performance is discretionary. However, the court’s discretion is governed by settled principles. Examples of where the remedy may be refused include the following:

- i. in proper cases where there is mistake or great hardship, even though these do not invalidate the contract at law.
- ii. where there has been delay causing injustice to the other party



- iii. whether the vendor would be required “to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession.
- iv. where the property is being used for illegal purposes, which would make the purchaser liable to prosecution, even though on this ground he has no right to terminate the contract; or
- v. where the vendor’s title is doubtful but he has failed to disclose the known cause of that doubt and the purchaser has agreed to accept any defects that there may be.

In these cases the contract will remain binding at law, so that the party in default will be liable in damages, but equity will not assist with a decree of specific performance. On the other hand, specific performance may be decreed before the legal time for performance has arrived if there has been an anticipatory breach, e.g. by repudiation”

59. In *Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Mahhubuti* Court of Appeal No 165 of 1996, the Court of Appeal outlined the following principle which guides our courts when exercising jurisdiction to grant the remedy of specific performance.

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

60. In the present dispute, the plaintiff fully discharged its contractual obligation to pay purchase price. The defendant needed the purchase price to salvage his business property which was up for auction. The defendant gave the plaintiff the original title to the suit property.
61. Further, under clause 7 of the agreement, the defendant agreed to the taking of possession of the suit land. Pursuant to the said clause, the plaintiff took possession of the suit property and has been in possession of the suit land since January 2022. The plaintiff demonstrated through evidence that it is the investment vehicle of Mount Kenya University and that it acquired the suit land for the purpose of establishing the University’s medical school campus and related learning facilities. The plaintiff further demonstrated that there is no readily available land for the same purpose within the same locality. Lastly, the validity and enforceability of the contract has not been questioned. All the defendant has stated is that the contract provided for damages as a remedy.
62. The defendant contended that the only remedy available to the plaintiff was the refund of purchase price and payment of liquidated damages. Does the agreement dated 5/11/2021 preclude the plaintiff against pursuing the remedy of specific performance? Clause 10.3 which the defendant relies on provides as follows:

“If the vendor fails to comply with the notice in clause 10.2 above, the purchaser may at its discretion and without prejudice to any remedies available in law either rescind this Agreement and the vendor shall within thirty (30) days thereafter return all monies paid by the purchaser with respect to the purchase price pursuant to this agreement with an additional sum equivalent to 20% of the purchase price being the agreed liquidated damages for breach of contract. The purchaser shall be entitled to a summary judgment in the



recovery of both the purchaser price paid and agreed liquidated damages in the event of breach by the vendor.”

63. The words “the purchaser may at its discretion and without prejudice to any other remedies available in law” have been underlined by the court to illustrate that the remedy provided under Clause 10.3 was only one of the options that the plaintiff had. The other options were the other remedies available in law. Specific performance was one such remedy available in law.
64. Given the above circumstances, the court is satisfied that it is just and equitable to grant to the plaintiff the equitable remedy of specific performance. The remedy of damages would not be appropriate in a case such as this one, where the purchase price was paid in full; the plaintiff was given the title to the suit property; the plaintiff was allowed under Clause 7 to take possession of the suit property and duly took possession; the plaintiff has been in possession since January 2022; and the plaintiff has demonstrated that it cannot easily find an alternative land within the same locality. In the circumstances, it would be unjust and inequitable to uproot the plaintiff out of the suit property and make it to surrender the title that it was given way back in November 2021 in the absence of any breach on its part.
65. Consequently, my finding on the third issue is that the remedy of specific performance is the appropriate remedy and it is available to the plaintiff. The finding of the court on the fourth issue is that the remedy of damages is neither appropriate nor adequate in the circumstances of this case.
66. On costs, the principle in Section 27 of the [Civil Procedure Act](#) is that costs follow the event. There are no unique circumstances to warrant a departure from the above general principle.

Disposal Orders

67. In the end, Judgment is entered in favour of the plaintiff and against the defendant in the following terms:
 - a. A declaration is hereby made that the plaintiff is entitled to registration as the owner of all that property known as Land Reference Number 4953/2149, Grant 57398, situated at Thika in Kiambu County as envisaged in the agreement for sale dated 5th November, 2021 to the exclusion of the defendant, his agents, servants, relatives or howsoever claiming under him.
 - b. An order of specific performance is hereby issued compelling the defendant to procure, execute and supply all documents that are necessary to transfer the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County to the Plaintiff as envisaged in the agreement for sale dated 5th November, 2021.
 - c. An order is hereby made that in default of the defendant executing any document that is necessary to complete the sale within 7 days of the judgement, the Deputy Registrar of the Environment and Land Court at Thika be and is hereby directed to execute such documents, including the transfer instrument, as are necessary to complete the transfer of the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County, in favour of the plaintiff.
 - d. An order is hereby made compelling the defendant to pay outstanding land rates of Kshs.1,349,749.00 as at the year 2021 to Kiambu County Government within 7 days of the judgment herein, in default, the plaintiff to pay and recover the said sum by way of execution against the defendant.
 - e. An order is hereby made compelling the defendant to pay outstanding land rent of Kshs 147,510.00 as at the year 2021 to the Government of the Republic of Kenya within 7 days of



the judgment herein, in default the plaintiff to pay and recover this sum by way of execution against the defendant.

- f. An order is hereby made compelling the defendant to pay all outstanding utilities and procure land rent and rates clearance certificate at his own expense within 7 days of the judgement herein, in default the plaintiff to pay for all these utilities and procurement of land rent and rates clearance certificates and recover the amounts so paid by way of execution against the defendant.
- g. A permanent injunction is hereby issued restraining the defendant either by himself, his agents, relatives or employees or otherwise howsoever from interfering with the plaintiff's quiet and peaceful possession and occupation of the property known as Land Reference Number 4953/2149, Grant 57398, situated in Thika in Kiambu County.
- h. A declaration is hereby made that the plaintiff company is entitled to exclusive ownership, possession and occupation of the property known as Land Reference Number 4953/2149, Grant 57398 situated in Thika in Kiambu County as against the defendant, his agents, representatives or relatives, which possession and occupation should be granted to the plaintiff unconditionally, in default of which an eviction order against the defendant, his agents, representatives or relative do issue and which eviction order should be enforced by the Officer Commanding Station, Thika Police Station.
- i. The defendant shall bear costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF SEPTEMBER 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Rapando for the Plaintiff

Ms Kamau holding brief for Mr Kariuki for the Defendant

