



REPUBLIC OF KENYA



**Kimonye v Kirera & 2 others (Environment & Land Case 9 of 2018)
[2023] KEELC 19928 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 9 OF 2018
CK NZILI, J
SEPTEMBER 20, 2023**

BETWEEN

JAMES KIMONYE PLAINTIFF

AND

WILSON KINOTI KIRERA 1ST DEFENDANT

PHILLIP GUANTAI M'TURUCHIU 2ND DEFENDANT

JOSEPH GATOBU RARAMA 3RD DEFENDANT

JUDGMENT

1. The plaintiff came before this court through an amended plaint dated 20.2.2018. He claimed that on 20.1.2012, the 1st defendant sold him L.R. Nos. Abothuguchi/Katheri 3734 and 3735 which were adjacent to his land parcel L.R. No. Abothuguchi/Katheri/3732. He averred that the purchase price was Kshs.2 million and that he paid Kshs.1,560,000, leaving a balance of Kshs.440,000/= payable within two weeks upon the 1st defendant successfully transferring the two parcels to him. The plaintiff averred that he immediately took over vacant possession of the two parcels of land and embarked on permanent developments while awaiting the 1st defendant to effect the transfer after obtaining the requisite land control board consent.
2. In breach of the sale agreement, the plaintiff averred that on 22.3.2012, the 1st defendant obtained the original title deed discharge of charge and other relevant documents from Equity Bank of Kenya Limited and that on 23.3.2012, he hurriedly and fraudulently sold and transferred the same parcels of land to the 2nd & 3rd defendants respectively. The plaintiff averred that he complained to the police, who arrested and charged the 1st defendant for obtaining monies by pretenses from him, in the Chief Magistrates court Milimani Cr. Case No. 420 of 2013.
3. Further, the plaintiff averred that between July and August 2013, the 2nd and 3rd defendants trespassed into the two parcels of land and started interfering with his occupation by cutting down his



trees, fence and cultivating thereon, which acts of trespass were valued at Kshs.21,562,500/= and Kshs.8,610,625/= for the two parcels of land based on the anticipated earnings. The plaintiff prayed for an order requiring that the 2nd and 3rd defendants transfer the suit parcels of land to him; in the alternative, a refund of the deposit paid of Kshs.1,560,000/= with interest and an additional value of Kshs.28,613,125/=. The plaintiff also prayed for general damages and a permanent injunction barring and restraining the defendants from entering, trespassing, remaining, cultivating, cutting trees, dealing, or interfering with his enjoyment of the suit premises. The amended plaint was accompanied by a verifying affidavit sworn on 20.2.2018, witnesses' statements, a list of documents dated 23.8.2013, and a case summary in a paginated bundle of documents dated 22.8.2018.

4. The 1st defendant opposed the claim by a statement of defense dated 22.11.2013. He admitted that he was initially the owner of the two parcels of land, which he sold and transferred to the 2nd and 3rd defendants in early 2012. Further, the 1st defendant admitted entering into a sale agreement with the plaintiff, who frustrated the same by fundamentally breaching its terms and conditions to the extent of making it unenforceable. The 1st defendant averred that he had no option but to enter into fresh sale agreements with the 2nd and 3rd defendants, who eventually became bona fide owners of the suit land.
5. The 1st defendant denied handing over any alleged vacant possession of the suit lands to the plaintiff on 20.1.2012 or any other date, since upon sale and transfer of the same to the 2nd & 3rd defendants, they immediately took vacant possession from him, hence was not aware of any such alleged vacant possession by the plaintiff. The 1st defendant admitted that at one time, his two parcels of land had a charge with Equity Bank of Kenya Limited, which loans he solely paid off and lawfully received the title deeds at the time he sold and transferred the same to the 2nd & 3rd defendants, free of any encumbrances. He insisted that he was then at liberty to deal with his parcels of land the way he so desired.
6. As regards the alleged arrest, the 1st defendant admitted being arraigned before the Milimani Chief Magistrates court on fabricated charges allegedly instigated by the plaintiff to coerce, intimidate, and or make him give out his two parcels of land. The 1st defendant averred that after surrendering vacant possession of the suit parcels of land in early 2012 to the 2nd & 3rd defendants, he relinquished his interest. He denied any alleged trespass to the land in 2013; therefore, he could not be answerable for any loss, damages, or the reliefs sought by the plaintiff. The 1st defendant's defense was not accompanied by any witnesses' statements or a list of documents.
7. By a written statement of defense amended on 19.7.2018, the 2nd & 3rd defendants denied the plaintiff's claim. On the contrary, they averred that the plaintiff had attempted to forcibly take possession of the suit lands on 5.9.2013 by entering into and effecting wanton destruction of their developments thereon. The 2nd and 3rd defendants averred that the suit lands were lawfully sold and transferred to them on 23.3.2012. They denied the particulars of fraud attributed to them or any alleged proprietary interest over the suit land by the plaintiff.
8. Further, the 2nd and 3rd defendants averred that they had been in an uninterrupted and exclusive occupation of their respective parcels of land between 29.3.2012 and 5.9.2013, when the plaintiff made unlawful incursions. Additionally, the 2nd and 3rd defendants denied the value attached to the suit properties at paragraph 14 (a) of the amended plaint. Moreover, the 2nd and 3rd defendants averred that the claim was unsustainable against them due to the provisions of the *Land Control Act* since they were innocent purchasers for value without notice of the plaintiff's alleged interest in the two parcels of land. The 2nd and 3rd defendants denied receiving any demand notice from the plaintiff. Nevertheless, they maintained that the suit disclosed no known cause of action against them. The amended defence was accompanied by lists of witnesses and documents dated 22.3.2021.



9. By a reply to the defence dated 26.11.2013 and 19.11.2013, respectively, the plaintiff termed the alleged sale and transfer of the suit lands to the 2nd and 3rd defendants as fraudulent and unprocedural. He denied the alleged frustration or breach of the sale agreements since he deposited the entire purchase price of Kshs. Two Million with their mutual lawyers, which the 1st defendant was at liberty to collect as soon as he had successfully transferred the suit lands to him. Regarding vacant possession, the plaintiff reiterated that he was granted the same, which was never contested as per the sale agreement, and proceeded to clear the 1st defendant's outstanding loan with the bank to discharge the subsisting charge before the parcels could be transferred to his name. However, the 1st defendant fraudulently and dishonestly rushed to transfer the suit land to the 2nd and 3rd defendants.
10. The plaintiff denied that the criminal charges against the 1st defendant were fabricated, for the latter had already admitted the transfers of the suit lands to the 2nd and 3rd defendants despite having previously sold the same to and receiving monies from him, which was prima facie criminal conduct. Regarding the 2nd and 3rd defendants' defense, the plaintiff averred that he took vacant possession of the suit land on 20.1.2012; therefore, it was impossible to attempt or forcibly take vacant possession on 5.9.2013 as alleged or at all.
11. On the *Land Control Act*, the plaintiff averred that due to the fraud pleaded in his amended plead, the Act was inapplicable or could not be invoked by the defendants to benefit from their wrongdoing. Further, the plaintiff denied that the 2nd and 3rd defendants were innocent purchasers for value without notice, for they were all aware of the agreement between him and the 1st defendant; hence, the reason the land was hurriedly and fraudulently transferred to defeat his interest. Additionally, the plaintiff pleaded that the reason that from 29.3.2012, when the 2nd and 3rd defendants alleged to have bought the suit land, they never tried to set foot on the suit land since they were aware that he was the one in possession.
12. Following the application dated 23.8.2013, this court issued both inhibition and temporary orders of injunction and transferred the suit to the Meru Chief Magistrates Court. The interim orders were, however, discharged by a ruling delivered on 14.3.2014. Subsequently, by an order dated 21.2.2018, this suit was placed before this court after the proposed amendment of the plead, which raised the claim above the lower court's jurisdiction. By an order dated 5.2.2018, the court formally transferred the suit to this court.
13. At the trial, the plaintiff testified as PW 1. He adopted the witness statement dated 23.8.2018, as his evidence in chief. His evidence was that in early January 2012, Peter Kithinji Marete informed him that the 1st defendant was selling some land measuring approximately 5 acres, which he offered to buy at Kshs.2,000,000. PW 1 testified that after accepting his offer, he met with the 1st defendant before M/ S Mucimi Mbaka and Co. Advocates in Nairobi on 20.1.2012 and on realizing that the suit parcels of land were charged with Equity Bank Limited with a loan balance of Kshs. Five Hundred and Sixty Thousand. Parties entered into a sale agreement and agreed the bank to be paid directly Kshs.560,000, while Kshs. One million would be deposited to the 1st defendant's account, and the balance of Kshs.440,000 would be paid within 14 days upon transfer of the two parcels to his name. Further, PW 1 said that they agreed that Mucimi Mbaka & Co. Advocates collect the security documents held by the bank upon the discharge of charge which the law firm had prepared.
14. PW 1 told the court that after a few days, he tried to get in touch with the 1st defendant, in vain, to sign off some documents at the bank, who said that he was busy in South Sudan. Eventually, PW 1 told the court that on 18.11.2012, his neighbor, James Mworira, came to him with the news that the 1st defendant was reselling his two parcels of land. Through his lawyers, the plaintiff established that the



- 1st defendant went ahead and collected the title documents as soon as the properties were discharged and transferred the suit lands to the 2nd and 3rd defendants, who were his close relatives and friends, as per the official search certificates he obtained.
15. PW 1 testified that he reported the matter to the Criminal Investigation Department (DCI) headquarters Land fraud office in Nairobi, who commenced investigations, arrested and arraigned the 1st defendant before the court for obtaining monies through pretenses, leading to a conviction and sentence on 19.7.2018. PW 1 indicated that after the investigations commenced, the 2nd and 3rd defendants started interfering with the original status of the land by digging trenches and cutting trees.
 16. The plaintiff told the court that he bought the two parcels of land adjacent to his land, for he had initiated a feasibility study for a fish pond project to reap profits as per the valuation report, which he had put on hold to await the outcome of the case. His evidence was that after he took vacant possession on 20.1.2012, he tended the blue gum tree stumps, pruned and replanted new trees. The plaintiff termed the alleged transfer of the suit lands to the 2nd and 3rd defendants as fraudulent since it occurred before obtaining the land control board's consent, the execution of transfer forms, and with no record of payment of any consideration.
 17. The plaintiff produced the sale agreement dated 20.1.2012 as P. Exh No. (1), letter to Equity Bank (Kenya) Limited dated 20.1.2012 as P. Exh No. (2), note authorizing deposit of the cheque as P. Exh No. (3), deposit slip for cheque No. 100638 for Kshs.560,000/= dated 23.1.2012 as P. Exh No. (4), deposit slip for Kshs. 1,000,000 to the 1st defendant's account No. 069000010245 Family Bank as P. Exh No. (5), letters dated 26.11.2012 and 1.2.2012 to Equity Bank Limited as P. Exh No. (6) & (7), official searches for the two properties as P. Exh No. (8) & (9), letter of consent as P. Exh No. (10), valuation reports as P. Exh No. (11) and (12) respectively, a judgment in Chiefs Magistrates Court Milimani Criminal Case No. 420 of 2013 Republic vs Wilson Kinoti Kirera as P. Exh No. (13) , lastly, the agreement dated 27.3.2020 as P. Exh No. (14).
 18. Cross-examined by the 1st defendant, the plaintiff told the court that it was the 1st defendant who authorized him to pay monies directly to the bank so that the properties could be discharged, and for the title documents to be forwarded to his lawyers for the transfers to be effected and the balance of Kshs.440,000/= to be released to the 1st defendant, in line with the sale agreement. PW 1 told the court that his lawyers still held the balance to date since the 1st defendant failed to comply with the sale agreement and transfer the suit lands to him, but instead disappeared, only to resell and transfer the two parcels of land to third parties. PW 1 maintained that he took vacant possession as per the sale agreement, for he had paid for the two parcels by 20.1.2012.
 19. As regards the criminal case, PW 1 admitted that he was the complainant and that the 2nd and 3rd defendants, among others, were witnesses to the matter as summoned by the DCI during the investigations, following which the 1st defendant was found guilty and sentenced. Cross-examined by the 2nd and 3rd defendants, PW 1 told the court that P. Exh No. (1) in Clause No 34 was not complied with by the 1st defendant, whereas Clause No. 5 (2), required that vacant possession would take place upon clearance of the entire purchase price.
 20. Regarding clause 8 (3), (11) of P. Exh No. (1) PW 1 admitted that it was an arbitral clause which was frustrated by the disappearance of the 1st defendant leading to his arrest, after which he was also not keen on any out-of-court negotiations. Further, PW 1 admitted that he never attended any land control board meeting since the 1st defendant was unavailable. PW 1 insisted that he took vacant possession by 30.1.2012. Therefore, it could not be true that he uprooted any crops on the suit land belonging to the 2nd & 3rd defendants only that in 2020, a complaint was lodged with Githongo Police Station after



the 2nd & 3rd defendants allegedly cut down his trees against the court order leading to an agreement to maintain the status quo until the suit was heard and determined as per P. Exh No. (4). His evidence was that the 2nd and 3rd defendants' transfers were done six days before the sale agreement was signed with the 1st defendant. PW 1 told the court that it was the 1st defendant who was to initiate the land control board meeting, which he never did, The plaintiff said that he took vacant possession till to date for he did not require any more authorization from the 1st defendant to do so after the sale agreement was effected. Further, PW 1 told the court that despite his occupation of the suit parcels of land, none of the defendants had sought or obtained any eviction orders against him.

21. PW 2 was James Mworira, who adopted his witness statements dated 28.8.2013 as his evidence in chief. As a land broker, he told the court that the 1st defendant had authorized him to sell the two parcels of land for a commission. He said that he contacted the plaintiff, who visited the land only to establish that the land he had already bought was up for sale again.
22. Mr. Muciimi Mbaka Advocate testified as PW 3 and adopted his witness statement dated 15.1.2013 as his evidence in chief. His evidence was that he acted for both the plaintiff and the 1st defendant in the sale agreement dated 20.1.2012, only for the transaction to take a fraudulent turn after the plaintiff had paid Kshs.1,560,000/= to the 1st defendant, hence frustrating the sale agreement. PW 3 said that he was always ready to hand over the balance to the 1st defendant had he complied with the terms and conditions of the sale agreement.
23. Cross-examined by the 1st defendant, PW 3 admitted that the parties of the sale agreement came to his offices while accompanied by the area chief, Mr. Marete, who identified the 1st defendant to him and eventually witnessed the two parties append their signatures to the sale agreement and the acknowledgment notes produced as P. Exh No's (1-11).
24. PW 3 told the court that the 1st defendant went against the sale agreement, collecting the title documents and reselling the land, despite the loan having been cleared by him for the process of transfer to sail through in favor of the plaintiff, which was irregular.
25. PW 3 said that the sale agreement was enough authority from the 1st defendant for him to collect the title deeds from the bank after he had paid the loan, hence the reason that he called the police to arrest the 1st defendant in his offices for obtaining money by pretenses, yet he was allegedly coming to collect the balance from him based on the sale agreement yet he knew he had already resold the land to the 2nd & 3rd defendants. PW 3 termed the 1st defendant as a fraudster who had no intention to transfer the land or the capacity to do so when he allegedly came to collect the balance from him, hence the police report.
26. Further, PW 3 told that the court it was the 1st defendant who frustrated the sale agreement after the plaintiff had paid the deposit, which helped him discharge the title deeds. Therefore, PW3 believed that the 1st defendant could not have been entitled to the balance before transferring the land parcels to the plaintiff. Regarding the arbitral clause, PW 3 told the court that an element of fraud and frustration of the contract arose; and out of the misadventure and lack of intention to transfer the land, the plaintiff could not be blamed.
27. The 1st defendant testified as D.W. 1. His evidence was that he entered into a sale agreement with the plaintiff dated 20.1.2012 and was paid Kshs. 1,000,000 and that Kshs.560,000/= was paid directly to Equity Bank (Kenya) Limited, leaving a balance of Kshs.440,000, which he was never paid. He denied that the plaintiff took vacant possession of the parcels of land as per the sale agreement. D.W. 1 told the court that he appeared before the bank, collected both the title deeds and the discharge of charge,



- and lawfully sold the land parcels to the 2nd and 3rd defendants, who took vacant possession since the lands were vacant.
28. D.W. 1 denied disappearing as soon as he took the money from the plaintiff. On the contrary, he said he had visited the offices of PW 3 severally to finalize the transactions, only to be told that the plaintiff was out of the country. Further, D.W. 1 said that his efforts to trace the plaintiff through PW 2 were unsuccessful, leaving him with no option but to resell the suit lands to the 2nd and 3rd defendants with no objection from the plaintiff.
 29. D.W. 1 told the court that it was only in February 2013 that PW 3 called him to say that PW 1 was available to finalize the transaction, only for him to be arrested, charged, convicted, and sentenced to four years imprisonment. The 1st defendant faulted PW 3 for declining to accompany him to collect both the title documents and the discharge of charge or even complete the transaction after he had reportedly visited the law firm after acquiring the documents, only to be told that the plaintiff would only be available after his overseas trip.
 30. In cross-examination, D.W. 1 told the court he allegedly wrote a rescission or a demand letter to the plaintiff, though he had no such copy for the court, including an appeal that he had filed against his conviction and sentence. Further, D.W. 1 admitted that he never refunded the Kshs.1.560,000 to the plaintiff after he resold the suit parcels of land. He believed that since the plaintiff breached or frustrated the sale agreement, he was not entitled to any such refund.
 31. D.W. 1 told the court that the land control board consent was issued before the discharge of charge was registered. Additionally, the 1st defendant accepted that the stamp duty paid was based on a lower figure than what was appearing on the sale agreement with the 2nd and 3rd defendants. The 1st defendant clarified that Clause No. 1 (1) (a) of P. Exh No. (1) was a completion date of 30 days from the receipt of title or security documents from Equity Bank Limited. He blamed PW 3 for not attending the said offices to collect the title documents.
 32. On questions posed by the court, DW1 testified that no default notice was issued to the plaintiff as per clause No. 6 (b) of the sale agreement, even though he had collected the security documents three days after the loan was cleared. Further, D.W. 1 said that he had no letter before the court showing that he had attempted to surrender the title documents to PW 3 as per Clause No. 4. (1) of the sale agreement before the completion date and or invoked clause No. 8 (e) or (g) of P. Exh No. (1) before selling the land to the 2nd & 3rd defendants. Philip Guantai, the 2nd defendant, testified as D.W. 2. He adopted his witness statement dated 22.3.2021. His evidence was that by a sale agreement dated 29.3.2012, he was sold L.R. No. Abothuguchi/Katheri/3734 by the 1st defendant for a valuable consideration after he became the registered owner on 23.3.2012 and immediately took vacant possession. He denied knowing the plaintiff's interest in the land when he bought it. D.W. 2 stated that the plaintiff only attempted to forcibly take over the land on 5.9.2013 and wrongly imposed restrictions on his land, yet if any claim ever existed, the same could only be sustained against the 1st defendant. D.W. 2 produced a copy of the sale agreement as D. Exh No. 2DD "1" an acknowledgment receipt of Kshs.500,000/= from the 2nd defendant as D. Exh No. 2 D.D. "2", copies of post-dated cheques for Kshs.250,000/= each dated 30.6.2012 as D. Exh No. 2DD 3 (a) & (b) and photographs as D. Exh No. 2DD 4 (a) (b) – (h). He told the court that he was the one currently utilizing the land alongside the 3rd defendant.
 33. Regarding the sale agreement and transfer form anomalies, D.W. 2 told the court that they paid Kshs. 1,500,000 on 29.3.2012 and authorized the 1st defendant to transfer the land, who was their neighbor, and a clansman as they sought monies to clear the consideration as per paragraph 3 of D. Exh No. one 2DD "1".D.W. 2 denied that the plaintiff was on the land by 29.3.2012, when they took vacant possession.



34. On the criminal case against the 1st defendant, D.W. 2 confirmed that no criminal complaint was preferred against him by the plaintiff even though he (D.W. 2) was one of the prosecution witnesses against the 1st defendant during the trial as per page 4 of the judgment. D.W. 2 clarified that D. Exh No. 2DD 4 (a) – (b) manifested the developments the 2nd and 3rd defendants had initiated on the suit land. D.W. 2 told the court he only became aware of the plaintiff's claim when a dispute arose after he had acquired the title deed following the clearance of the consideration on January 2013 as per his last post-dated cheque.
35. D.W. 2 told the court that before he bought the land, he conducted an official search, which indicated that the land was encumbered, but nevertheless proceeded with the sale agreement since the 1st defendant had loan clearance documents. He insisted that he cleared the purchase price as per the acknowledgment note of the same by the 1st defendant. His evidence was that by the time he bought the land after making a maiden visit, there were recent activities on the land in terms of cutting trees. He said that the plaintiff took vacant possession from them with effect from 2013 after he came with a court order issued on 28.8.2013 and planted nappier grass, which order lapsed and he took over occupation of the land. Regarding the criminal case, D.W. 2 admitted that the 1st defendant, in his mitigation statement, had acknowledged that the plaintiff was the one utilizing the land at the time.
36. D.W. 2 acknowledged that he had no land control board consent application forms, proceedings thereof, or consent, which, in his view, were processed by the 1st defendant. He could also not tell if any stamp duty valuation forms were obtained or payment receipts issued regarding his transfer documents. He termed the land transfer to him before a formal sale agreement was executed as normal. He denied any alleged fraud with the 1st defendant. Similarly, D.W. 2 said that the D. Exh No. 2 D.D. "1" was silent about the encumbrances to the title.
37. Joseph Katobu Rarama, the 3rd defendant, testified as D.W. 3 and adopted his witness statement dated 22.3.2021 as his evidence in chief. His evidence was that he bought L.R. No.Abothuguchi/Katheri/3735 from the 1st defendant, became a registered owner on 23.3.2012, after which a sale agreement was executed on 29.3.2012 as per D. Exh marked 2 D.D. "1". He adopted the testimony by D.W. 2 and maintained that he followed the law in acquiring his land since he had no prior knowledge of the plaintiff's interest in the land.
38. D.W. 3, in cross-examination, told the court that it was the 1st defendant who processed the transfer forms on their behalf and brought the title deeds under their names. He said he did not have the accompanying documents alongside the title deed, which he expected that the land registrar would have. D.W. 3 could not tell if his bank had cleared the cheques issued to the 1st defendant without his bank statement.
39. D.W. 3 testified that he established that a third party had cleared the bank loan, as per P. Exh No. (2) but never made more inquiries as to why a third party could clear the sum on behalf of the 1st defendant before the bank issued a discharge of charge. He said that as an honest seller, the 1st defendant should have disclosed to them that he had entered into a sale agreement over the same land with the plaintiff a month earlier. He denied engaging in any fraudulent or illegal activities in cohorts with the 1st and 2nd defendants in the manner that he acquired the suit land. Asked questions by the court, DW 3 defendant denied that he had undertaken any activities on the land save that he was only on the suit land after the court orders in favor of the plaintiff were vacated.
40. At the close of the defense case, parties were directed to file and exchange written submissions. By written submissions dated 5.6.2023, the plaintiff identified five issues based on facts as pleaded for this court determination. On whether there was a binding agreement between the plaintiff and the



- 1st defendant and if it was breached, the plaintiff relied on *Omar Gorhan vs. Municipal Council of Malindi County Government of Kilifi vs Overlook Management (K) Ltd (2020) eKLR*, on ingredients of a valid contract.
41. To this end, the plaintiff submitted that there was a binding sale agreement, which was frustrated by the 1st defendant, who fundamentally breached clause 4.1 of P. Exh No. (1) making the same unenforceable even after the plaintiff had honored all his obligations. Further, the plaintiff submitted that the 1st defendant hurriedly obtained the title documents and transferred the suit parcels to the 2nd and 3rd defendants, without engaging their mutual advocate, PW 3, or invoking Clause No. 8.(3) (1). It was submitted that the 1st defendant failed to reach out to the plaintiff, who was willing to complete the transaction.
42. On whether the 2nd and 3rd defendants were innocent purchasers for value without notice, the plaintiff submitted that the 2nd and 3rd defendants have not met the threshold set in *Katende vs. Harridar Co. Ltd (2008) 2 ED 173*, for they acted in bad faith, the circumstances of the transfer preceding the sale agreement have not been sufficiently explained, a sale agreement must have been in writing as per Section 3 of the *Law of Contract Act*, there was no consideration paid, it occurred before the discharge of charge was registered; the evidence of D.W. 2 and D.W. 3 contradicted each other on who processed the title documents, consideration was proved; the valuation of the two parcels of land was contradictory, and that the 2nd and 3rd defendants were aware of the letter written 20.1.2012 by PW 3. The plaintiff submitted that land in Kenya only appreciated as held in *Minolta Ltd vs. National Bank Kenya LTD HCC NO. 32 of 2018*, and therefore, it defeats the logic of how land is valued at Kshs. 2,000,000 by Paragon Property Valuers Limited could be sold at Kshs.450,000/=.
43. Therefore, the plaintiff submitted that in the absence of a valuable consideration paid by the 2nd and 3rd defendants and proved by way of bank deposits or statements or acknowledgment receipts by the 1st defendant, there was no value paid for by the alleged buyers as required to be proved under Section 3 (4) of the *Evidence Act* and as found as a fact in the Criminal Case No. 420 of 2013.
44. On whether the 2nd and 3rd defendants were aware of the fraud by the 1st defendant, the plaintiff submitted that the 1st defendant was a known close relative of the 2nd defendant, whereas the 3rd defendant was a colleague of the 2nd defendant at Katheri High School. Therefore, the two could not feign ignorance of the letter written by PW 3 dated 20.1.2012, which clarified who had cleared the bank loan, which information D.W. 1 told the court they were privy to, yet D.W. 1 even after selling the land to the 2nd & 3rd defendant still approached PW 2 in September 2012 requesting for potential buyers to his land meaning that the 2nd and 3rd defendants were mere proxies of the 1st defendant who knew or were part of his fraudulent activities.
45. On the issue of the transfers, the plaintiff submitted that the 2nd and 3rd defendants failed to adduce copies of stamp duty payment receipts and that the misstating of the figure of the value in the transfer forms meant that they did not pay any consideration to acquire the land parcels. Reliance was placed on *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. A.G. and others (2017) eKLR*, on the proposition that the failure to enter a sale agreement, to pay stamp duty and keep a copy of the transfer document raised more questions than answers and portrayed negligence in a business transaction for one to be said to be an innocent purchaser for value. To this end, the plaintiff submitted that the 2nd and 3rd defendants do not fit the description of innocent purchasers but were accomplices to the fraud with the 1st defendant, whose title deeds should be revoked under Section 80 of the *Land Registration Act*.



46. Regarding who was in occupation of the suit parcels of land, the plaintiff submitted that the 2nd and 3rd defendants were not being truthful, yet all the parties to the suit come from the same locality. As a pointer to the correct status, the plaintiff submitted that during mitigation on the criminal trial on 12.7.2018, the 1st defendant had stated categorically that he (the plaintiff) was already in possession of the land, which fact was also confirmed in the valuation exercise conducted on 31.7.2017 and that injunctive orders were also obtained at the inception of this suit after which a scene visit by the court confirmed who was in occupation leading to orders to maintain the status quo, and a police report at Githongo Police Station on March 2020. Thus, the plaintiff submitted that the adamancy by the 2nd and 3rd defendants that they were in occupation of the land depicted their deceitful nature.
47. On whether the transaction between the plaintiff and 1st defendant was void on account of a land control board consent, the plaintiff submitted that since the parties entered into the sale agreement voluntarily, he performed his part of the bargain willingly and was willing to complete the transaction to finality and given that it was the 1st defendant who failed to honor his part and instead resold the two parcels of land to the 2nd and 3rd defendant, a constructive trust as held in *Lloyds Bank PLC vs Rosset* (1991) 1 AC 107 132 as cited with approval in *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri* (2014) eKLR should arise to prevent the 1st defendant acting in an unconscionable manner by defeating the parties common intention.
48. On the reliefs sought, the plaintiff submitted that he was entitled to the same since he had established a binding agreement between him and the 1st defendant, where he honored all his obligations. Reliance was placed on *Electrical Engineers Ltd vs. Mantral (K) Ltd* (2006) eKLR *Fred M'Imbatu vs. Rashid K Too* (2018) eKLR.
49. Further, the plaintiff submitted that when he entered into the sale agreement, he already knew the purpose for which he intended to utilize the land, for the land was prime for fish farming and coupled with the matured plants. He urged the court to grant him Kshs.30,000,000/= . In the alternative, a refund addition of Kshs.30,173,125/= and a permanent injunction. Reliance was placed on *Robert Munene Muriungi vs. Kinyua Mbaya* (2022) eKLR.
50. The 1st defendant by his written submissions dated 21.6.2023 submitted that the plaintiff was not entitled to the reliefs sought because he did everything possible to trace him to finalize the transaction and because he was financially burdened he had to sell and transfer the land to the 2nd and 3rd defendant. Again he submitted that the plaintiff had undertaken no developments on the and to deserve any compensation.
51. The 2nd & 3rd defendants submitted that the orders of temporary injunction were dismissed and those of inhibition detained in *James Kimonye vs Wilson Kinoti Kirera and 2 others* (2015) eKLR paving the way of the appeal which orders were vacated in *James M. Kimonye vs Wilson Kinoti Kirera & another* (2017) eKLR.
52. The 2nd and 3rd defendants isolated five issues for determination. On the issue of fraud, the 2nd & 3rd defendants relied on *Virjay Morjaria vs Nansigh Madhusingh Darbar & another* (2003) eKLR, *Macharia Mwangi Maina* (supra), *Moses Parantai & another* (supra) which has to be specifically pleaded and proved.
53. The 2nd and 3rd defendants submitted that the plaintiff failed to prove payment of the entire purchase price with PW 3 and that nothing in law stops a relative or friend from transacting the land.
54. On the issue of the land control board consent the 2nd & 3rd defendants distinguished the cited case by the plaintiff of *Macharia Mwangi Maina* (supra), since no vacant possession or payment of the entire



- purchase price had taken place in the instant case. Reliance was also placed on David Sirona Ole Tukai vs Francis Arap Muge & others (2014) eKLR, Zachary Warwind Rubango vs Clement Muturi Kigami (2017) eKLR.
55. On innocent purchaser for value the 2nd & 3rd defendant relied on Katende vs Haridar & Co. Ltd (2008) 2 E.A 173.
 56. On the letter dated 20.1.2012 the 2nd and 3rd defendants submitted that the said letter was not signed by pW 3 it did not disclose the interest of the plaintiff and was also written ten months after the sale agreement contrary to the completion date of 30 days.
 57. On the reliefs sought by the 2nd & 3rd defendants since they are innocent purchasers for value without notice it was submitted that given they were not parties to the initial sale agreement they should not be deprived of their land parcels after they had paid for them and therefore the remedy should only be against the 1st defendant who had a binding contract with the plaintiff.
 58. On the sale agreement executed between the defendants the 2nd & 3rd defendants urged the court to find that under section 3 (3) of the Law of Contract Act it was not mandatory to put such a transaction in writing and so was such a law preventing a land control board from issuing a consent to transfer land before a discharge of charge was registered.
 59. The 2nd and 3rd defendants submitted that such issues as presented by the plaintiff would not amount to fraud.
 60. The issues commending themselves for the court's determination are:
 - i. Who between the plaintiff and the 1st defendant breached or frustrated the sale agreement dated 20.1.2012?
 - ii. If so, in (i) above, what were the consequences of the breach or frustration of the sale agreement as regards the rights and remedies to the two parties?
 - iii. If the 1st defendant was justified in offering, selling, and transferring the suit parcels of land to the 2nd and 3rd defendants without terminating or refunding the deposit received from the plaintiff.
 - iv. If the plaintiff had taken over vacant possession as per the sale agreement.
 - v. If the 2nd and 3rd defendants were innocent purchasers for value with a protected title to the suit land.
 - vi. If the plaintiff is entitled to the reliefs sought.
 - vii. What is the order as to costs?
 61. The primary pleadings in this suit are the amended plaint 20.2.2018, 1st defendants' statement of defense dated 22.11.2013, the 2nd and 3rd defendants amended defense dated 19.7.2018, and the plaintiff's reply to the defense dated 26.11.2013 and 19.11.2013, respectively. The law is that parties are bound by their pleadings, and issues flow from them unless evidence has been led by the parties on an unpleaded issue, which is left for the court to determine. In the case of Raila Odinga & another vs. IEBC (2017) eKLR, the court observed that in an adversarial system, parties are not allowed to travel outside their pleadings for each of them is entitled beforehand to know and prepare for its case and that of the opponent based on the pleaded issues. In this suit, the plaintiff pleaded that he entered into a sale agreement dated 20.1.2012 with the 1st defendant. This fact was admitted by the 1st defendant in paragraph 4 of the statement of defense dated 22.11.2013. The 1st defendant, however, pleaded



without giving any particulars that the plaintiff occasioned a fundamental breach or frustration of the sale agreement, thus making it unenforceable.

62. Further, in paragraph 5 of the statement of defense, the 1st defendant averred that due to the breach or frustration, he entered into fresh agreements with the 2nd and 3rd defendants who bought the said land parcels and became bonafide purchasers or owners.
63. The 1st defendant denied that he had handed over to or that the plaintiff had taken vacant possession of the subject parcels of land on 20.1.2012 or any other date as alleged or at all, for after the transfer took place, the 2nd and 3rd defendants were the ones who assumed possession after he surrendered the same to them.
64. In *M.P Furmston, Cheshire Fifoot and Furmston's Law of Contract* 11th ed, Butterworth and Co. 1986 page 516, it was observed that the question of whom to perform first was a question of construction of the contract assisted by presumption as to a standard rule for contracts of a particular kind, which has to be established from the language of the conditions set in the agreement. Some conditions may be concurrent. If a party complains, he must show that he is ready, willing, and able to perform some other conditions or obligations that may be independent of the other party's performance. A fundamental breach, on pages 526 – 27 (supra) was that which went to the very root of the contract, making further performance impossible and it has to affect the core or substance of the agreement.
65. In construing contracts, it is trite law that parties are bound by their contracts based on the doctrine of freedom to contract. Parole evidence, as a general rule may not be used to change what has been contracted unless it was against public policy, illegal and or unconscionable in law.
66. In the case of *Housing Company of East Africa Limited vs. Board of Trustees NSSF and others* (2018) eKLR, Kshs.46,025,000/= had been paid out of Kshs.67,259,000/= and partial occupation granted of an acre of the suit premises. An extension of the completion period had been sought for 90 days and a deed of variation executed to that effect. A demand letter for the balance had been issued. Some payments had been made, and other extensions sought and allowed, on condition that failure to complete would enable third-party offers to be considered.
67. The appellant had alleged that despite the non-performance, it was ready, able, and willing to complete the purchase of the suit premises, but the 1st respondent was not keen to do so, which in breach it purported to enter into a sale agreement for the sale of the same property with the 2nd respondent and rescind the deal. A completion notice had not been given to cancel the agreement. The 1st respondent had pleaded particulars of breach of the sale agreement. The appellant had sued for special damages out of the profit it would have made if it had put up 66 units on the suit premises and sold them.
68. The claim was for a permanent injunction, specific performance and in the alternative, a full refund with interests. On the other hand, the 1st respondent had put a defense and counterclaim maintaining that the appellant had failed to fulfill its obligations under the sale agreement and, therefore, after the expiry of the extension period, it was at liberty to offer the premises to third parties, hence there was a proper rescission of the contract. The 2nd respondent had believed that the appellant could not block the agreement with the 1st respondent because the latter had a right to choose whomever to sell the property to; it feigned ignorance of the former sale agreement.
69. The trial court had dismissed the appellant's claim. At issue before the court of appeal was whether or not the rescission or repudiation of the agreement of sale by the 1st respondent was valid and the consequences ensuing from that place. The court observed that to do so, it had to fall back to the question of whether time was of the essence or not and if it was whether or not a completion notice was issued and served under Law Society of Kenya Conditions of Sale. The court reiterated that contracts



were voluntary undertakings and contracting parties were free to specify the terms and conditions of their agreement; a court had no right or ability to substitute its judgment for that of the parties and that where a contract was clear and unambiguous, its role was to interpret the contract as written and not to rewrite it.

70. Further, the court held that the failure to pay the purchase price balance on the final, mutually agreed completion date was a fundamental breach that the other party could construe as amounting to repudiation of the contract. The court held further that time was of the essence; the history of the appellant's past repudiatory conduct demonstrated a lack of willingness to comply. The court cited with approval *Njamuyu vs. Nyaga* (1983) KLR 282, that a party in default had to be notified of the default and given humble time to rectify it in default, of which a contract would be rescinded.
71. On special damages, the court cited with approval that *Zachariah Waweru Thumbi vs Samuel Njoroge Thuku* (2000) eKLR, that special damages were reimbursed as part of a total that had been spent as a consequence of the tortious acts complained of, which must be proved by way of receipts as future loss which has to have strict pleadings and strict proof.
72. Applying the preceding case law to the instant case, parties set the completion date on the first page of P. Exh No. (1) to mean on or before thirty days from receipt of the security documents from Equity Bank Ltd. In Clauses No. 3.3 & 3.5, the 1st defendant authorized Kshs.560,000, part of the consideration to be paid to Equity Bank Ltd directly by PW 3 on behalf of him as part of his loan and for PW 3 to receive the discharge of charge, original title deed (the security documents) and to retain the same pending the completion date. On Clause No. 4.1, on or before the completion date, the vendor was to release the instruments of transfer, duly executed land control board letters of consent to transfer, a copy of his I.D. card, PIN certificate, and six passport-size colored photographs, and all documents of title in his possession.
73. Clause No. 5.3 thereof required the 1st defendant to hand over the properties to the plaintiff immediately upon receipt of the balance, which, as per Clause No. 5.4, the balance of Kshs.440,000/= was to be given within 14 days of the transfer of the properties to the plaintiff.
74. Clause No. 6, (3) (d) mandated the vendor to disclose in writing to the purchaser any event or circumstance that may arise or become known to him after the date of the agreement and before the completion date which was inconsistent with any of the warranties or which had it occurred on or before the date of this agreement would have constituted a breach of the warranties or which was material to be known by the purchaser for value of the properties. Under Clause 7.3, the 1st defendant was to meet the cost of obtaining a discharge of charge, the stamp duty, and registration charges.
75. Under Clause No. 8.1, the parties had incorporated the Law Society Kenya Conditions of Sale (1989) edition, while under Clause 8.2, time was of the essence to the sale agreement. Further, Clause 8.3 required that any dispute on interpretation, rights, obligations, or completion of any part of the agreement be amicably solved or, if not within 15 days, a written notification be issued to each party and the dispute be referred to arbitration under the *Arbitration Act* 1995 in Nairobi.
76. In this suit, the plaintiff pleaded and testified that he had substantially complied with the terms and conditions of the sale agreement. He produced the letter dated 20.1.2012 forwarding the cheque to Equity Bank Ltd for Kshs.560,000/=, P. Exh 2, the deposit note, P. Exh No.3, the deposit slip of the cheque from the bank received on 23.1.2012, a cheque for Kshs. 1,000,000 as P. Exh No. (4), letter dated 1.2.2012 to the bank as P. Exh No. (5) forwarding the discharge of charge for approval and execution by the bank and requesting for the original security documents to be forwarded to PW 3 as agreed by D.W. 1 in the sale agreement and a letter dated 26.11.2012 seeking for the security documents as P. Exh No. (6).



77. The 1st defendant, in his defense, raised a defense of frustration and a fundamental breach of the sale agreement by the plaintiff, which led him to offer the land parcels to the 2nd and 3rd defendants by a sale agreement dated 29.3.2012. Clause No. 3 of the said agreement indicates that the transfer of the two parcels of land had occurred before the said agreement was executed. It contradicted Clause No. 4 thereof, which stated that the two parcels of land shall be transferred to the buyers together with everything on the suit parcel of land from the sale agreement. The 1st defendant and the plaintiff had agreed that time was of the essence before PW 3. The plaintiff undertook his obligations as per the sale agreement to the extent of causing a discharge of charge to be prepared and forwarded for execution through PW 3. The 1st defendant has not denied that Kshs.1,560,000/= was paid by 23.1.2012, to him for the clearance of the loan so that the security documents could be released to PW 3. When, how, and on what basis the 1st defendant collected the security documents instead of PW 3 has not been explained. If the 1st defendant collected the security documents from the bank to complete the sale agreement, one would have expected that he would notify the plaintiff or PW 3, so that he had collected them. Prudence would also have required that the 1st defendant disclosed collecting the title documents, to register the discharge of charge, and then surrender it to the plaintiff or PW 3 so the formal transfer documents could be prepared to allow him to collect the balance.
78. The completion date was 30 days from the security documents retrieval from Equity Bank Ltd. The 1st defendant took the position of PW 3 in the transaction and unilaterally acquired the documents on a date he has not disclosed or pleaded. So, if the fundamental breach or frustration claimed was on the part of the plaintiff or PW 3, the 1st defendant ought to have particularised the material facts as required under Order 2 Rules 3, 4, and 10 of the Civil Procedure Rules. The 1st defendant would also have disclosed copies of any notification of the material facts, completion notice, and rescinded notice of the sale agreement to the plaintiff and his defense as required under Order 7 Rule 5 of the Civil Procedure Rules. It is trite law that he who alleges must prove the fact under Sections 107, 109 and 111 of the *Evidence Act*. The 1st defendant alleged the fundamental breach and or frustrations of the contract. Unfortunately, it is the 1st defendant who went against the precise conditions of the sale agreement and took away the security documents.
79. Clause 4 (7) of the Law Society of Kenya Conditions of Sale (1989) required the 1st defendant to serve a completion notice to the plaintiff as the agreed procedure to be followed in terminating or rescinding the sale agreement on account of non-completion by a party in default. D.W. 1 conceded that he never served the plaintiff any completion, termination, or rescission notice. The absence of such notice in law meant that the contract remained in force and was enforceable. The 1st defendant had to specify the fundamental breach or frustration in the notice and before this court through pleadings and evidence. The notice had to be unequivocal on the event to follow should there be non-completion.
80. In *Dhanjal Investment Ltd vs Shabaha Investment Ltd Civil Appeal No. 80 of 2019 (2022) KECA (3667) KLR 186 February (2022) (Judgment)*, the court observed that clause No. 4(2) (a) Law Society of Kenya Conditions of Sale 1989 stipulated how a completion would occur on the date of completion upon the vendor procuring the necessary consents. The court held that the legal significance of the terms in a contract that time was of essence was that it elevated the time in which one party had to complete its contractual obligations to the other party to a condition in the agreement and that the failure to perform duties within the stipulated deadline as amounting to a fundamental breach of the agreement, with the consequences flowing from there as identified in *Chitty on Contracts, Volume 1* paragraph 21-016 and as entitling the innocent party to terminate performance of the contract and to claim damages from the contract breaker, who has denied him benefits from the agreement, as held in *Kukal Properties Development Ltd vs. Tafazzal H Maloo & others (1993) eKLR*, including a prayer for specific performance.



81. In this suit, Clause No. 8(3) of P. Exh No. (1) required the 1st defendant to issue a notice of any breach. He did not issue any non-completion or on the alleged fundamental breach or frustration of the sale agreement. Instead, the 1st defendant terminated or rescinded the sale agreement without notifying the plaintiff. How the breach and or frustration occurred has been pleaded or proved through evidence. The 1st defendant did not avail any evidence that over and above discharging the title deed from the encumbrances, he ever sought the plaintiff to attend a land control board meeting for a land control board consent as required under the sale agreement. There is no evidence tendered that the 1st defendant notified the plaintiff or PW 3 that he had booked a land control board meeting and needed the plaintiff's attendance before the board. The 1st defendant failed to produce evidence that the plaintiff frustrated his efforts to complete the sale agreement by either failing to sign, attend, and assist in procuring the completion documents or declining to receive the security documents and other accompanying documents as per Clause No. 4.1 of the sale agreement. See *Elijah Kipkorir Barmatel & another vs. John Kiplagat Chemweno & others* (2010 eKLR).
82. Given the preceding, I find that no fundamental breach or frustration going to the root of the sale agreement justified or necessitated the 1st defendant to unilaterally and without notice, cancel, rescind, and terminate the sale agreement dated 20.1.2012. The apparent consequence of the 1st defendant's actions entitled the plaintiff to effect his remedies according to the law. See *Sisto Wambugu vs Kamau Njuguna* (1983) eKLR.
83. It is the 1st defendant who failed to avail the completion documents, yet he had received Kshs.1.560,000/= from the plaintiff. He knew the conditions attached to the sale before he could collect the balance of Kshs.440,000/=. Had he brought the completion documents to the plaintiff or PW 3 and failed to be given the balance, he would have been justified to allege a fundamental breach or frustration of the sale agreement. The 1st defendant never executed any land control board form or transfer forms in favor of the plaintiff. The completion documents were neither available nor had he completed them in favor of the plaintiff as of 3.3.2012 when he engaged the 2nd and 3rd defendants with a fresh sale agreement.
84. Specific performance, as held in *Manzoor vs. Baram* (2003) E. A 580 is an equitable remedy where equity is regarded as done that which ought to be done. Damages would be inadequate, giving an unfair advantage to a party who sought to avoid his contractual obligations through false claims.
85. In this suit, there is no evidence of an inordinate delay between 20.1.2012 and March 2012, when the 1st defendant resold the two parcels of land. If there was any delay, the same was not attributable wholly on the plaintiff. See *Gurdev Singh Birdi & another vs Abubakar Madhubuti* Civil Appeal No. 165 of 1996.
86. Therefore, I find the plaintiff had a justiciable right to file the claim since the 1st defendant was not justified in offering, selling, and or transferring the suit parcels of land to the 2nd and 3rd defendants who, if at all, the 1st defendant had pressing financial needs appear to have only attempted to pay him the purchase price in June 2012 and the balance after a year. The court cannot, therefore, aid a party who chose to ignore the law and the sale agreement. See *JTM Construction & Equipment Limited vs Circle B Farms* 2007 Hcr 05110.
87. Regarding vacant possession, clause 5.2 of the sale agreement required that the plaintiff take up the suit parcels of land 14 days after the 1st defendant had received the purchase price balance. All parties herein could not agree on when the plaintiff took or retook vacant possession of the suit properties and the nature of activities that and for how long. The 1st defendant denied that the plaintiff ever took



vacant possession on 20.1.2012, whereas the 2nd and 3rd defendants averred that the plaintiff showed up on 5.9.2013 long after they took vacant possession in March 2013.

88. In paragraph 7 of his defence, the 1st defendant averred that he handed over vacant possession to the 2nd and 3rd defendants in early 2012. In paragraph 8 of the defence, the 1st defendant denied that the plaintiff ever took vacant possession as alleged in the plaint. He alleged that he paid the loan on his own, yet the evidence on record is that Kshs.560,000/= was out of the sale agreement dated 20.1.2012 from the plaintiff. Therefore, at the time, the 1st defendant alleged that he handed vacant possession to the 2nd and 3rd defendants he knew of the accrued interest of the plaintiff. He did not issue any notice of rescission or termination of the sale agreement. The 1st defendant did not offer to refund, forward the deposit, or seek from the plaintiff to come and collect his deposit on account of the alleged fundamental breach or frustration. See *Njamuyu vs Nyaga* (supra).
89. On the other hand, the plaintiff did not explain on what basis he took vacant possession contrary to an explicit clause on when vacant possession was to be handed over. Other than the letter dated 26.11.2012, there is no evidence that the plaintiff was vigilant enough before March 2012 or soon after following up on why the completion documents were taking so long. In the case of *Mercy Nkirote vs. Lawrence Ngaku Bundi and others* (2022) eKLR, the court cited with approval *Prudential Assurance Company of Kenya vs Sukhwinder Singh Jutley & another* (2007) eKLR, that where the intention of parties had been reduced into writing, parole evidence may not be permissible to either show the intent of parties or add to the terms of the document and that courts must adopt an objective theory of contract when giving effect to the parties' intentions within the four corners of the instrument. The court also cited with approval *Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd* (2017) eKLR, that the freedom to contract was the central core of the law of contract.
90. The sale agreement in this suit was in line with the *Law of Contract Act*. Suppose the plaintiff took vacant possession on 20.1.2012; this would have contradicted the sale agreement. Any developments then would have been illegal and amounted to trespass on the land. Assuming that the plaintiff took the said step outside the sale agreement and with the concurrence of the 1st defendant again, one would have expected there was a notice of entry given. The parties would have also made an addendum to the sale agreement. Similarly, if the plaintiff had been put into possession by the 1st defendant, who then purported to regain entry and hand over vacant possession to the 2nd and 3rd defendants, then the plaintiff, in that case, would have been entitled to move to court for reprieve.
91. As of March 2012, the suit properties had changed ownership. The sale agreement between the 1st, 2nd and 3rd defendants is also unclear on when the alleged vacant possession occurred and or was continued. The 2nd defendant and 3rd defendants did not produce any evidence of actual control and occupation of the suit parcels of land if they were lawfully on the land as at March, 2012. If so, they would not have consented to P. Exh No. (14). My finding is that the plaintiff was a trespasser under section 3 (3) of the *Trespass Act* if he had taken vacant possession by 20.1.2012.
92. On the question of the 2nd and 3rd defendants being innocent purchasers for value without notice whose title deeds would be protected by this court, in *Moses Parantai & another suing as representative of Estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* (2020) eKLR, the court cited with approval *Katende vs Haridar & another Co. Ltd* (2008) 2 E. A 173, on the proposition that for one to rely on bonafide doctrine, he has to prove he holds a certificate of title, bought the property in good faith, had no knowledge of the fraud, purchased it for valuable consideration without notice of the fraud, the vendor had an apparent valid title, and that he was not a party to any fraud. Further, the court observed that since there was due diligence by conducting a search and obtaining a green card, followed by a valid sale agreement, good faith, payment of purchase price, vacant possession, and with



no evidence led by the opposite party of notice of illegality or fraud, it would have been impossible for an average thinking person to suspect fraud let alone have knowledge of it.

93. In this suit, there is no dispute that the 1st defendant offered the two parcels of land for sale to the 2nd and 3rd defendants immediately after he had sold the land to the plaintiff without rescinding or terminating the earlier sale agreement. The second agreement for sale was made on 29.3.2012. It indicated that Kshs.1,500,000 was paid at the signing of the sale agreement, and the balance was to be paid in two equal installments due on 30.6.2012 and by 31.1.2013. Clause 3 indicated that a land transfer had already taken place. Clause 4, however, was couched in a future tense. Answering questions before the court, D.W. 1 told the court that he obtained the security documents from the bank three days after the plaintiff had cleared the loan but failed to surrender them to PW 3 as per Clause No. 4.1 of P. Exh No. (1).
94. D.W. 1 failed to issue a non-completion notice to the plaintiff. D.W. 2, on the other hand, told the court he was not only a neighbor of D.W. 1 but also a clansman and a colleague of D.W. 3. He stated that he paid Kshs.1,500,000 to the 1st defendant but had no proof for it, though they had consented for the transfer to take place before the sale agreement, as they sought for monies to pay the 1st defendant. D.W. 2 admitted that the land control board consent was obtained before a discharge of charge was registered against the title deed.
95. Asked why he believed D.W. 1, D.W. 2 told the court that since the 1st defendant had an original discharge of charge form and receipt for clearance of the loan balance, he had no reason to doubt the 1st defendant. Regarding Kshs.1,500,000, D.W. 2 insisted that he paid it to the 1st defendant, who had never complained about it. No evidence was, however, produced by D.W. 2 and D.W. 3 on the source of the money or through documentary evidence of the transfer of such a colossal amount to the 1st defendant. Further, in cross-examination by the plaintiff, DW 2 told the court that he had conducted an official search of the two titles of land and established that it had a charge but proceeded with the sale after evidence was produced before him that the loan had been cleared and a discharge of charge obtained from the bank.
96. D.W. 2 conceded that such crucial facts were not included in the sale agreement with the 1st defendant since, in his view they were not necessary at the time. He produced no bank statement to prove that his bank cleared the post-dated cheques issued to the 1st defendant on their due dates. D.W. 2 failed to avail any land control board application or proceedings thereof, even when it was clear that the process took place in a haste. His view was that there was nothing unusual about it. Further, D.W. 2 confirmed that it was the 1st defendant who processed all the transfer documents.
97. Nonetheless, D.W. 2 failed to avail the valuation report or evidence of the payments of stamp duty equivalent to Kshs.2,500,000. D.W. 3 told the court that he paid stamp duty for the transfer but could not tell how much since it was D.W. 1 who went to process his title deed. He said that he never requested the supporting documents of the transfer from the 1st defendant to him, for in his view, they were not necessary. Similarly, D.W. 3 admitted that he had no bank statements showing any consideration that he had paid to the 1st defendant for the suit land. His evidence was that they started paying for the land in late February 2012, and after conducting an official search, he found an encumbrance, which the 1st defendant informed him that a third party had cleared the loan. D.W. 3 told the court that D.W. 1 showed them the documents to prove payments but never disclosed to them at an earlier sale agreement on 20.1.2012 with the plaintiff.
98. D.W. 3 denied being party to irregularity, illegality, or fraud in acquiring the suit land. He conceded that the transfers were effected before a formal sale agreement was written or total consideration paid. He



however denied undervaluing the suit property for purposes of the stamp duty. D.W. 3 also confirmed that he obtained his title deed on 23.3.2012.

99. In *Daudi Kiptugen vs Commissioner of Lands and 4 others* (2015) eKLR, the court observed that where there was contention that a certificate of lease held by an individual was improperly acquired, then the title holder had to demonstrate through evidence that he held a properly acquired title to land since the acquisition of title could not be construed as an end result for the process of its acquisition was equally material.
100. In this suit, the plaintiff has pleaded and testified that there was impropriety, illegality, and irregularity in that the 2nd and 3rd defendants acquired the land in collusion with the 1st defendant. The plaintiff had pleaded and testified that the 2nd and 3rd defendants paid no consideration for the two titles and were transferred the land to defeat his rights to it when the defendants knew of his earlier sale agreement. On the other hand, the 2nd and 3rd defendants plead good faith in acquiring the two parcels of land for valuable consideration.
101. In *Agri Seed Co. Ltd vs. Christine Chepchirchir Baig and another* (2019) eKLR, the court, on the question of good faith in a transaction under Section 117 of the *Evidence Act*, said that the burden of proving good faith of the transaction was on the party who was in a position of active confidence.
102. In this suit, the 2nd and 3rd defendants in the amended defense dated 19.7.2018 pleaded that there was no fraud as alleged in paragraphs 10, 11, and 12 of the amended plaint. They denied that the sale and transfer were hurriedly done. On the value of the suit properties, the 2nd and 3rd defendants, in paragraph 14 A of their defense, denied the value attached to them in paragraph 13 of the amended plaint. Further, they rejected the notice of the plaintiff's alleged interest in the two properties and urged the court to find no cause of action disclosed against them. The 2nd and 3rd defendants termed the sale agreement void for lack of a land control board consent, which the plaintiff reiterated in reply to the defense dated 19.11.2013 that the 2nd and 3rd defendants could not invoke to aid them in wrongdoing.
103. In *Agri Seed* (supra), the court observed that the speed with which the appellant had attempted to have the transaction finalized, even paying the purchase price balance before the conveyance documents were registered, was also telling. The court found the circumstances of the case as one tantamount to a party trying to pull a fast one to be termed as an innocent purchaser for value without notice. The court declared the land transaction invalid and ineffective.
104. In this suit, the 1st defendant knew that he had received substantial monies on the same parcels of land from the plaintiff when he purported to sell and transfer the land to the 2nd and 3rd defendants. He even transferred the two properties before signing a sale agreement with the two new purchasers. No evidence was availed to show that the 2nd and 3rd defendants paid Kshs.1,500,000 on 23.3.2012 to the 1st defendant. If indeed the 1st defendant received such an amount, he could not be said to have acted in good faith to enter into such a transaction with the 2nd and 3rd defendants without first revoking, terminating, or rescinding the earlier sale agreement with the plaintiff.
105. In *Omweri vs. Kiptugen Civil Appeal No. 5 of 2018* (2022) KECA 413 (KLR) 4th March (2022) (Judgment), the question of the six months under the *Land Control Act* from the date of execution of the sale agreement had been raised. The court cited with approval *Sun Sand Dunes Ltd vs. Raiya Construction Ltd* (2018) eKLR, on the proposition that in the construction of terms of a contract, the primary purpose was to ascertain its meaning or the common intention of the parties thereto, in an objective manner from the standpoint of a reasonable person. The court observed that once a down payment was made and vacant possession was taken, the intention that the properties would be transferred on the completion date raised a constructive trust in favor of the appellant and that, as held



in *Willy Kitilit vs. Kibet* (2018) eKLR, constructive trust and proprietary estoppel were applicable and enforceable to land subject to [Land Control Act](#). The court also cited with approval *Macharia Mwangi Maina* (supra) that constructive trust acts on the consonance of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention and letting the other party incur expense or prejudice his position on the faith of the agreement being valid only to turn around and assert that the agreement was unenforceable.

106. In this suit, the 1st defendant knew the position that he had put the plaintiff and the monies he had collected from him, including the clearance of the loan arrears. The 1st defendant has termed the sale agreement as frustrated or fundamentally breached. The particulars were not pleaded or proved to the required standard. At the hearing, the 1st defendant told the court that the plaintiff was not entitled to any refund for he had breached or frustrated the sale agreement. In other words, he urged the court to find that the plaintiff has neither a right nor remedy in law. In my view, justice is all about fairness and fair play. To countenance such behavior, in my opinion, would be enforcing unjust enrichment to the 1st defendant, who has benefited twice from the same land and does not wish to refund the earlier deposit of Kshs.1,560,000.
107. On the other hand, the 2nd and 3rd defendants support the position of the 1st defendant. They participated in the criminal case in support of the 1st defendant. The 1st defendant was found guilty of the illegal conduct to which he obtained money through pretenses from the plaintiff. The conviction and sentence were not set aside on any appeal. Even after that conviction and sentence, the 2nd and 3rd defendants have not distanced themselves from the unconscionable conduct of the 1st defendant. At least before this court, the 2nd and 3rd defendants pleaded and took the view that the plaintiff had no ascertainable interest over the two parcels of land. Based on the transaction's circumstances, the 2nd and 3rd defendants did not obtain the suit lands in good faith or as innocent purchasers for value without notice. The paper trail of the transaction between the 2nd and 3rd defendants with the 1st defendant was and remains tainted with irregularities and illegalities and was done in an unprocedural manner. The 2nd and 3rd defendants went to the extent of undervaluing the two properties for purposes of stamp duty. None produced valid transfer forms, land control board application forms, stamp duty, valuation or transfer forms, or fee payments. No authentic evidence was also brought to the effect that the 2nd and 3rd defendants paid consideration in obtaining the two parcels of land. See *Omar Abdalla Kondo vs Josephine Mwikali Kikenye and Others* (2016) eKLR, *Annastacia Kingori & Anor vs Stephen Muikamba* (2019) eKLR.
108. Further, the 2nd and 3rd defendants knew the third party who had cleared the loan balances was the plaintiff through PW 3. The concept of caveat emptor applied to them, yet they never ascertained why a third party without interest in the land parcels would clear such colossal amounts.
109. Consequently, since the 2nd and 3rd defendants were not innocent purchasers, the titles to land held by them cannot enjoy the sanction of the law under Sections 24, 25, and 28 of the [Land Registration Act](#). This court invalidates the same under Section 80 of the [Land Registration Act](#).
110. As to the other reliefs sought by the plaintiff, the court has found that vacant possession was not handed over on 20.1.2012, and any other takeover after that was not proved.
111. In *William Kazungu Karisa vs. Cosmas Angore Chanzera* 2006 eKLR, the court observed that the basic rule of the law of contract was that parties must perform their respective obligations. In *Sisto Wambugu vs Kamau Njuguna* (supra), the court said that the rescission of a contract only applies where time was of the essence and a party fails to pay on the appointed time after he has been given a reasonable notice to make good the term.



112. In *George Njenga Kagai vs. Samuel Kabi Njoroge and another* (2019) eKLR, the court cited with approval *Birdi vs Abubakar Madhbuti* CA no 165 of 1996 that to obtain specific performance, a party must show that he performed all his obligations to the agreement at the date of the writ in action. Further the court cited with approval *Nabro Properties Ltd vs. Sky Structures Ltd & 2 others* (2002) eKLR, that a party must also show and satisfy the court's willingness to comply and meet its obligations. The 1st defendant has not offered an alternative remedy to the plaintiff in terms of a refund of the deposit. The same case applies to the 2nd and 3rd defendants, who did not even raise a counterclaim for the suitlands. Equity favors the first on time; in this case, the plaintiff's legal right is enforceable against the 1st defendant and whomever else has taken the property with actual or constructive notice of his claim. See *Arthi Developers vs. West End Butchery* (2015) eKLR.
113. The special damages pleaded in paragraph 13 A of the amended plaint were not specifically proved with tangible evidence. They were more speculative to be genuine. No expert reports or receipts were produced to sustain the claims. Similarly, no evidence was led regarding general damages. In *Christopher Kiprotich vs. Daniel Gathua and others* (1976) eKLR, the court observed that damages above specific performance could be granted if a purchaser was unfairly kept away from the land, hence incurring a quantifiable loss. See *Housing Company of East Africa vs. Board of Trustees NSSF and others* 2018 eKLR.
114. Consequently, I find the plaintiff entitled only to specific performance and permanent injunction. The prayers for general and special damages are dismissed. Costs to the plaintiff in any event.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 20TH DAY OF SEPTEMBER 2023

In presence of

C.A Kananu/Mukami

Atheru for plaintiff

HON. CK NZILI

ELC JUDGE

