



**Wulff v King Steel Kenya Limited (Environmental and Land Originating Summons E10 of 2023) [2023] KEELC 21942 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21942 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E10 OF 2023  
JO MBOYA, J  
NOVEMBER 30, 2023**

**BETWEEN**

**NILS DAVID WULFF ..... PLAINTIFF**

**AND**

**KING STEEL KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. The Judgment herein relates to the Originating Summons dated the 20<sup>th</sup> February 2023; and wherein the Plaintiff has sought for the determination of various issues, inter-alia;
  - i. Whether the Defendant should be ordered to execute leases, partial discharges or any other requisite completion documents in respect of property Apartment Unit number 1305 situate in Nairobi Municipality in Nairobi County on property L.R. No. 1/609 in the next seven (7) days or such other period as the Honourable Court may consider reasonable;
  - ii. Whether in default, the Deputy Registrar of this Honorable Court should be authorised and directed to execute the Lease(s), Partial Discharge(s) or any other requisite completion documents on the Defendants behalf;
  - iii. Whether the costs of and in respect to the proceedings should be paid by the Defendant in any event;
  - iv. Whether such further or other relief as this Honourable Court may deem just should be granted?
2. Furthermore, the instant Originating summons is anchored on the Grounds and averments which have been alluded to in the Supporting affidavit sworn by one, namely, Nils David Wulff, the Plaintiff herein. For coherence, the Supporting affidavit was sworn on the 17<sup>th</sup> February 2023.



3. Suffice it to point out that upon being served with the Originating summons and the attendant documents thereto, the Respondent herein duly entered appearance and thereafter filed a Replying affidavit by Stanley Yandi; and which was sworn 23<sup>rd</sup> October 2023.
4. Notably, the Defendant herein has averred, inter-alia, that the Plaintiff herein reached out to the Defendant vide several email correspondence and in respect of which the Plaintiff intimated that same had been duly appointed as the Legal administrator of the Estate of one Kai Uwe Wulf, [now deceased], who had entered into a lawful sale agreement with the Defendant over and in respect of an apartment unit number 1305, situate on L.R No. 1/609 (original number 1/103/6).
5. On the other hand, the Defendant has also contended that the Plaintiff herein intimated to the Defendant that same was not keen to progress the transfer and registration of the suit premises/ Apartment unto him, but was desirous to be refunded the purchase price hitherto paid.
6. Be that as it may, the Originating summons herein came up for directions on the 25<sup>th</sup> September 2023; whereupon the advocates for the respective Parties covenanted to canvass and dispose of the summons on the basis of affidavit evidence. Further and in addition, the advocates for the Parties also agreed to file and exchange written submissions.
7. Arising from the foregoing, the Honourable court proceeded to and indeed issued directions pertaining to the hearing and disposal of the Originating summons; as well as circumscribing the timelines for the filing and exchange of the written submissions.
8. For completeness, both Parties thereafter proceeded to and filed written submissions. Instructively, the Plaintiff filed written submissions dated the 2<sup>nd</sup> November 2023, whereas the Defendant filed written submissions dated the 10<sup>th</sup> November 2023.
9. Both submissions are on record.

### **Parties' Submissions:**

#### **a. Plaintiff's submissions:**

10. The Plaintiff herein filed written submissions dated the 2<sup>nd</sup> November 2023; and wherein same adopted the contents of the Originating summons as well as the averments contained in the Supporting affidavit sworn on the 17<sup>th</sup> February 2023.
11. Furthermore, the Plaintiff thereafter proceeded to and highlighted three [3] salient issues for consideration by the Honourable court.
12. Firstly, Learned counsel for the Plaintiff has contended that one Kai Uwe Wulf, [now deceased], and who is represented by the Plaintiff herein duly entered into and executed a lawful and valid sale agreement with the Defendant herein, whereby the Defendant covenanted to sell and transfer to the deceased apartment number 305, situate on L.R No. 1/609 (the suit property herein).
13. It was the further submissions of Learned counsel for the Plaintiff that upon entry into and execution of the sale agreement, the Plaintiff's predecessor, now Deceased, duly paid the entire purchase price amounting to Kes.14, 500, 000/= only, which payment was duly received and acknowledged by the Defendant.
14. Based on the foregoing, Learned counsel for the Plaintiff has thus contended that there is an existence a lawful and valid sale agreement between the Plaintiff herein [as the legal administrator of the deceased]; and the Defendant, which is capable of being enforced.



15. Additionally, Learned counsel for the Plaintiff has submitted that the said sale agreement has never been rescinded, varied and/or withdrawn, whatsoever.
16. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on, inter-alia, the case of Broadspect Investment Ltd vs Francis Njoroge Mwangi (2017)eKLR and Nelson Kivuvani vs Yuda Komora & Another Nairobi HCC No. 956 of 1991 (UR).
17. Secondly, Learned counsel for the Plaintiff has submitted that though the Plaintiff exchanged a trail of emails correspondence with the Defendant herein, the exchanges between the Plaintiff and the Defendant could not culminate into a valid basis to rescind and/or vary the sale agreement that had hitherto been entered upon and executed between the deceased and the Defendant herein.
18. Furthermore, Learned counsel for the Plaintiff has submitted that at the time when the Plaintiff entered into the email correspondence with the Defendant, same was not seized of the requisite authority to act on behalf of the Estate of the Deceased, insofar as the Letter of independent administration, which had been issued elsewhere in the United State of America, had not been re-sealed in Kenya in accordance with the provisions of Section 77 of the Law of Succession Act, Chapter 160 Laws of Kenya.
19. Further and in any event, Learned counsel for the Plaintiff has submitted that without having procured and obtained the requisite Grants of Letters of administration; and the attendant confirmation thereof, the Plaintiff herein was not seized of the requisite capacity to deal with the suit property, which is an immovable property forming part of the Estate of the Deceased.
20. To support the foregoing submissions, that the Plaintiff herein could neither deal nor transact with the property of the deceased prior to and or before re-sealment of the Foreign Grant, Learned counsel has cited and relied on the case of Re-Estate of M' Ajogi M' Ikiugi (deceased) (2017)eKLR.
21. On the other hand, Learned counsel for the Plaintiff has equally submitted that the Plaintiff herein has established and demonstrated a lawful basis to warrant the grant of an order of Specific Performance.
22. Invariably, Learned counsel for the Plaintiff has submitted that there is in existence a lawful and valid sale agreement between the Plaintiff, (as the legal administrator of the estate of the deceased) and the Defendant herein, which complies with the provisions of Section 3(3) of The Law of Contract Act, Chapter 23 Laws of Kenya.
23. In support of the submissions pertaining to and concerning the grant of an order of specific performance, Learned counsel for the Plaintiff has cited and relied on, inter-alia, the case of Gurdev Sign Birdi & Narinda Sign Gatore as the Trustees of Ramgaria Institute of Mombasa versus Abubakar Madhbuti (1997)eKLR, Amina Abdulkadir Hawa vs Rabinda Nathanand & Another (2012)eKLR and Reliable electrical Engineers Ltd vs Mantrac Kenya Ltd (2006)eKLR, respectively.
24. Consequently and in view of the foregoing, Learned counsel for the Plaintiff has thereafter proceeded to and contended that the Plaintiff has demonstrated a basis to warrant the grant of the reliefs sought at the foot of the Originating summons.
25. Other than the foregoing, Learned counsel for the Plaintiff has also submitted that the grant of the orders of specific performance would be just, expedient and mete in the circumstances of this case, insofar as it would not be possible for the Plaintiff to procure and obtain a House/ Apartment of a similar nature, elsewhere within the city of Nairobi with the same amount of money, taking into account the lapse of time.



26. In a nutshell, Learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Plaintiff herein has duly proved his case to the requisite standard and hence same ought to be granted.

**b. Defendant's submissions:**

27. On her part, the Defendant herein filed written submissions dated the 10<sup>th</sup> November 2023; and in respect of which same has adopted and reiterated the averments contained in the Replying affidavit sworn on the 23<sup>rd</sup> October 2023, together with the annexures thereto.
28. Furthermore, Learned counsel for the Plaintiff has thereafter raised, highlighted and canvassed one [1] issue for determination by the court.
29. Instructively, the issues that has been highlighted by the Defendant touches on and concerns whether the Plaintiff herein is entitled to the Equitable reliefs of specific performance, either as sought at the foot of the Originating summons or at all.
30. In particular, Learned counsel for the Defendant has submitted that following the death of one Kai Uwe Wulf, [ the Deceased], who was the purchaser of the suit apartment, the Plaintiff herein reached out to the Defendant and sought to know the status of the suit apartment, inter-alia, whether same had been fully paid for and whether same had been transferred and registered in the name of the deceased.
31. Additionally, Learned counsel for the Defendant has submitted that upon being appraised of the status of the suit apartment, the Plaintiff herein, who intimated that same had been issued with a Letter of Independent Administration thereafter advised the Defendant that same was not keen to proceed with the transfer and registration of the suit apartment in his name.
32. Conversely, Learned counsel for the Defendant further submitted that the Plaintiff intimated to the Defendant that same was desirous to have the suit apartment re-sold by the Defendant and thereafter same be refunded the entire purchase price, namely, Kes14, 500, 000/= only which had been duly paid.
33. Other than the foregoing, Learned counsel for the Defendant has submitted that upon receipt of the communication/instructions from the Plaintiff herein, the Defendant sought from the Plaintiff the details of the Bank account wherein the refund would be remitted to.
34. It was the further submissions of Learned counsel for the Defendant that arising from the email correspondence between the Plaintiff and the Defendant, the Plaintiff herein ultimately disseminated the details of the Bank account wherein the refund was to be processed and paid out in full.
35. Based on the foregoing, Learned counsel for the Defendant has therefore submitted that it is erroneous and misleading for the Plaintiff to now turn back and contend that same has variously sought to have the Defendant execute the transfer instrument and avail the completion documents to the Plaintiff, for purposes of transfer and registration of the suit property in favor of the Plaintiff.
36. Other than the foregoing, Learned counsel for the Defendant has also submitted that the Plaintiff herein is estopped vide the Doctrine of Estoppel from now turning back and contending that same is entitled to specific performance, yet same had expressly stipulated and intimated to the Defendant that same was not keen to progress the transfer and registration of the suit property in his name.
37. In support of the submissions touching on and concerning the relevance and application on the Doctrine of Estoppel, Learned counsel for the Defendant has cited and relied on inter-alia, the case of 748 Air Services Ltd vs Theuri Munyi (2017)eKLR, Sera Njeri Muobi vs John Kimani Njoroge (2013)eKLR and Titus Mwiruri Ndoge vs Kenya Cannors Ltd (1988)eKLR, respectively.



38. As pertains to whether the Plaintiff herein is entitled to the discretionary remedy of Specific Performance, Learned counsel for the Defendant has contended that the conduct of the Plaintiff vitiates and militates against the exercise of discretion in favor of the Plaintiff herein.
39. Further and in any event, Learned counsel for the Defendant has submitted that insofar as specific performance is an equitable relief, one who comes to court to seek for same, must approach the Honourable court with clean hands and not otherwise.
40. To this end, Learned counsel for the Defendant has cited and relied on, inter-alia, the case of Chirchir Arap Kuto vs Nancy Choreotrich & Another (2022)eKLR and Reliable Electrical Engineers Ltd vs Mantrac Kenya Ltd (2006)eKLR, respectively.
41. Consequently and in view of the foregoing, Learned counsel for the Defendant has thus impressed upon the Honourable court to find and hold that the Plaintiff is not entitled to the Equitable reliefs of specific performance, either as sought for or at all.
42. To the contrary, Learned counsel for the Defendant has submitted that the Defendant has always been ready to refund the proceeds of the suit unit/ Apartment to the Plaintiff in accordance with the intimation by the Plaintiff; and further that the filing of the instant suit was intended to frustrate the Defendant, who has always been ready to make the refund.

#### **Issues For Determination:**

43. Having appraised the Pleadings and the Responses filed by the Parties; and upon consideration of the written submissions filed, the following issues do emerge and are thus worthy of determination;
  - i. Whether the Plaintiff herein is estopped by the Doctrine of Estoppel from now turning back and seeking for the suit apartment to be transferred to him or otherwise.
  - ii. Whether the Plaintiff is entitled to the Equitable remedy of Specific Performance, either as sought or at all.
  - iii. What reliefs, if any; ought to be granted.

#### **Analysis And Determination**

##### **Issue Number 1 Whether the Plaintiff herein is estopped by the Doctrine of Estoppel from now turning back and seeking for the suit apartment to be transferred to him or otherwise.**

44. Before venturing to address and resolve the issue hereinbefore, it is imperative to observe that the Plaintiff's predecessor, namely, Kai Uwe Wulf, now deceased, duly entered into and executed a lawful sale agreement pertaining to and concerning apartment unit number 1305, situate on L.R No. 1/609 (hereinafter referred to as the suit apartment).
45. Furthermore, it is common ground that upon entry into and execution of the sale agreement, the Plaintiff's predecessor proceeded to and paid the entire purchase price amounting to Kes.14, 500, 000/= only to and in favor of the Defendant.
46. On the other hand, there is no gainsaying that the payment of the entire purchase price was duly acknowledged and confirmed by the Defendant herein. For coherence, the fact that the purchase price was paid in full has been admitted vide paragraph 5 of the Replying affidavit sworn by Stanley Yandi, on behalf of the Defendant.



47. Notwithstanding the foregoing, it is imperative to state that following the death of Kai Uwe Wulf, [now deceased], the Plaintiff herein reached out to the Defendant vide a plethora of email correspondence and thereafter sought to be appraised of the status of the suit apartment, inter-alia, whether same had been fully paid for and whether the suit apartment could be resold.
48. Pursuant to and arising from the various email correspondence between the Plaintiff and the Defendant, the Plaintiff herein intimated to the Defendant that same had been duly appointed as the Legal Administrator of the Estate of Kai Uwe Wulf; and in any event, the Plaintiff confirmed that same was in possession of a Letter of Independent administration, issued in the State of Cameron, in the United State of America.
49. Furthermore, the Plaintiff also intimated to the Defendant that on the basis of the Letters of administration, same (Plaintiff) was therefore duly authorized to engage with the Defendant as pertains to the suit apartment.
50. Given the significance of the Email correspondence in determining whether or not the Doctrine of Estoppel is applicable in the matter, it is imperative to sample a few.
51. Consequently and in this respect, various Email correspondence are reproduced as hereunder;

“On Thursday, May 20, 2021, 03:35 Allen Mwaniki – wrote;

Greetings Mr. Nills, we trust that this emails finds you well.

Receive our deepest condolence for your loss.

Before we proceed to propose the next steps, please confirm whether you are willing to proceed with the purchase of the property or whether you seek to terminate the agreement.

We look forward to hearing from you.

Kindest regard,

Allen Mwaniki – Legal Office Saif properties Ltd)

On Thursday, May 20, 2021 at 05:39 pm Nills Wulf – wrote

Greetings Allen.

Thank you for your condolence. Firstly I need to know more about this property in general, from my understanding it was already paid off and is free and clear. Is this a property we are able to sell?. I am not purchasing the property, I am the heir and executor of my Father’s Estate.

On Tuesday, May 25, 2021 at 2:41pm Nills Wulf – wrote

Greetings Mr. Mwaniki.

Thank you for the reply. I guess the question is what is the path of less resistance, if waiting is easier I do not mind doing so. If demand is quit high for the unfinished unit we can go that route also.

On Tuesday, May 25, 2021 at 6:20am Allen Mwaniki – wrote

Greetings Mr. Wulf.



Apologies for the belated response on this matter.

It is confirm that the property was in fact already paid of in full.

You have the option of either reselling it to any other interested purchaser or you may proceed to await completion and hand over and deal with it further as you wish.

However, please note that the premises are yet to be completed and the unit is not yet registered under your late fathers name, for the terms of the sale might be different.

Do reach out in case of any further queries.

Allen Mwaniki.

On Tuesday, May 25, 2021 at 3:07pm Nills Wulf – wrote

I have all the documentation required, lets open up a new thread and proceed with selling it.

On Friday, June 11, 2021 at 1:48am Nills Wulf – wrote

Following up on this Mr. Mwaniki, I have figured out the accounts and would like to know how we can proceed with selling the unit.

On Monday, June 14, 2021 at 3:36am Allen Mwaniki – wrote

Greetings Mr. Wulf, trust your well. Please share your account details with our finance team copied herein to enable us proceed.

Looking forward to hearing from you.

Kind regards

Allen Mwaniki

On Friday, 28, October, 2022 at 9:51 Allen Mwaniki – wrote

Good morning Job

Your email dated Thursday October 27, 2022 refers.

Please refer to the thread of emails hereunder as between ourselves and Mr. Nills Wulf, who confirmed his intention not to proceed with the purchase of the property, but rather seek a refund of the sums paid.

We trust this sheds more light on the matter and the actions taken.

Regards

52. From the contents of the emails correspondence, which were exchanged between the Plaintiff and the Defendant's representative herein, three [3] pertinent issues do arise and merits mention.
53. Firstly, it is evident and apparent that after being appraised of the status pertaining to and concerning the suit apartment and upon being informed that the suit apartment had been fully paid for, the Plaintiff herein was given a right to elect/ choose his desired way forward.



54. Secondly, the Plaintiff herein after evaluating his options wrote back and informed the Defendant that same was desirous to have the unit/ Apartment resold and thereafter same be refunded the purchase price that have been hitherto been paid.
55. Thirdly, the Plaintiff herein intimated to and informed the Defendant that he was the Executor of the Will of one Kai Uwe Wulf, [now deceased], and similarly that he (Plaintiff) had been issued with a Letter of independent administration.
56. Other than the foregoing, it is also not lost on the court that the Plaintiff herein also promised to avail and supply to the Defendant the details of the beneficiary account to which the proceeds of resale/ refund were to be remitted to.
57. My understanding of the clear and equivocal representations contained in the body of the various emails correspondence, is to the effect that the Plaintiff herein represented/ intimated to the Defendant that same was not desirous to have the suit apartment transferred and registered in his name.
58. Conversely, it is crystal clear that the Plaintiff herein, who similarly, intimated that same was the Executor of the Will of the deceased, sought to have the suit apartment re-sold and thereafter same be refunded the purchase price.
59. Arising from the representations made to the Defendant, it is stated and there is no denial by way of a Further affidavit, or otherwise, that the suit apartment was indeed re-sold.
60. Consequently and in the circumstances, can the Plaintiff herein now turn back and contend that same is entitled to the transfer and registration of the suit apartment in his name, irrespective of the representation hitherto made?
61. Notably and in my humble view, the answer to the question alluded to in the preceding paragraph is in the negative. Suffice it to point out that by his conduct, actions and representations, the Plaintiff made the Defendant to proceed and re-sell the suit apartment, with a view to refunding the purchase price of Kes.14, 500, 000/= only to the Plaintiff.
62. Quiet clearly, the representations that were made by the Plaintiff forms and/or provide a basis to invoke and adopt the Doctrine of Estoppel, which essentially bars the Plaintiff from now retracting, reneging and/ or resiling from the position hitherto taken and acted upon by the adverse Party, in this case, the Defendant.
63. To underscore the significance of the Doctrine of Estoppel; it suffices to invoke and reiterate the provisions of Section 120 of the Evidence Act, Chapter 80 Laws of Kenya.
64. For ease of reference, the provisions of Section 120 [supra] are reproduced as hereunder;
  120. General estoppel When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.
65. Other than the foregoing, the import, tenor and scope of the Doctrine of Estoppel was also elaborated upon in the case of 748 Air Services Limited v Theuri Munyi [2017] eKLR, where the Court of Appeal observed as here under;

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the Serah Njeri Mwobi case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-



"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited vs Development Finance Company of Kenya Limited*, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 16. At page 992 waiver has been defined as follows:-

„Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?.”

66. Quiet clearly, the Plaintiff herein induced and caused the Defendant to act in a particular manner, taking into account that the representations and intimations by and from the Plaintiff were factual, correct and bona fide.
67. Additionally, the Defendant herein took assorted and/or various steps, which culminated into, inter-alia, the re-sale of the suit apartment.
68. Owing to the foregoing, the Plaintiff herein cannot now be allowed to turn back and contend that the representations/ intimations which were made by himself, were made by a person who at the point in time was not seized of the requisite legal capacity so to do.
69. Further and in any event, it is instructive to recall that the Plaintiff herein pointed out and intimated to the Defendant that he was the Executor of the Will of his late Father, namely, Kai Uwe Wulf, [now deceased]. Consequently and in this regard, there is no gainsaying as the Executor of the Will, the Plaintiff was mandated and authorized to deal with the Estate of the deceased, even prior to and before the Grant of Probate.
70. Either way, I come to the conclusion that the Plaintiff by his representations caused the Defendant to act and behave in a particular manner, as pertains the suit property and hence the Plaintiff cannot now be allowed to turn around and recant and resile from the explicit representations that were made to and acted upon by the Defendant.
71. In a nutshell, my answer to issue number one [1] is to the effect that the Plaintiff herein is estopped from reneging from the position and or representations that were made to and acted upon by the Defendant, to her detriment.

**Issue number 2 Whether the Plaintiff is entitled to the Equitable remedy of Specific Performance, either as sought or at all.**

72. Other than the question of the Doctrine of Estoppel, there is also the issue which has been adverted to and relied upon by the Plaintiff as pertains to the grant of the orders of specific performance.



73. From the totality of the evidence placed before the Honourable court, the Plaintiff contends that his predecessor entered into and executed a lawful agreement with the Defendant herein and which agreement remains valid and enforceable.
74. Additionally, the Plaintiff has also contended that upon the execution of the sale agreement, the deceased proceeded to and paid the entire purchase price to and in favor of the Defendant.
75. Despite the payment of the full purchase price to and in favor of the Defendant, the Plaintiff herein has contended that the Defendant has failed, neglected and/or otherwise refused to effect the transfer and registration of the suit apartment in favor of the Plaintiff herein.
76. Arising from the foregoing, the Plaintiff has therefore approached the Honorable court and same now seeks an order of specific performance to compel the Defendant to execute the relevant Transfer instrument; and to hand over the completion documents, with a view to transferring the suit Apartment to the Plaintiff.
77. On the other hand, the Defendant has contended that pursuant to the express and explicit representations made by the Plaintiff, same (Defendant) proceeded to and re-sold the Apartment.
78. Furthermore, the Defendant herein contends that upon the re-sale of the suit apartment, same intimated to and advised the Plaintiff and his Legal representative [ Advocate], of the sale of the suit apartment.
79. To this end, there are a plethora of email correspondence, whose import attest to the fact that the suit apartment was indeed resold.
80. For brevity, it is appropriate to reproduce the contents of some.
81. Same are reproduced as hereunder;

On Monday, 30, January 2023 at 9:19 – Allen Mwaniki wrote

Greetings counsel.

Your email and its contents are confirmed as well received.

Making reference to a meeting held at our offices with counsel Job on Friday, 27<sup>th</sup> January 2023; kindly note the current state of affairs as follows;

- i. That the Aptment Unit was sold following several meetings held with Mr. Nills Wulf.
- ii. That the agreed arrangement was for the refund to be directed towards the beneficiaries account upon confirmation of grant.
- iii. That were are still awaiting the said grants, duly re-sealed in Kenya for the refund to be disbursed.

With regards.

On Monday, January 30, 2023 at 12:33pm Job Ochieng – wrote

Afternoon Allen.

We have received your email. As a lawyer you have a duty to account for actions.

My question is if you had authority to sell before sealing of grant why are you asking for the seal grant now.



Secondly, you indicated you sold the Apartment in 2021, what have you been doing with the monies since then.

There is lack of accountability.

On Tuesday, January 31, 2023 at 2:03pm Allen Mwaniki – wrote

Good afternoon Job.

Following numerous discussions and confirmations with Mr. Nills Wulf, the Unit was initially offered for re-sale on the 15<sup>th</sup> September 2021. Seven subsequent attempt to re-sale it have since occurred and to which neither intended purchaser ever saw the deal finalized.

As per our policies, the funds ought to be refunded to the original account. From our thread of discussions with Mr. Wulf, having confirmed that he lacks access to the originating account, the vendor retained the said sums pending such confirmations.

The funds are still within our accounts pending dispatch to the bona fide beneficiary,

Regards.

82. It is evident and apparent from the contents of the email correspondence, [which were exchange between the Parties]; and in particular, which have been adduced before the court by the Plaintiff himself, that the suit apartment was resold.
83. Consequently and in the premises, the question that does arise and which needs to be answered is to the effect that if the suit apartment was indeed re-sold on the instructions of the Plaintiff, can the Plaintiff now seek specific performance?
84. Similarly, the incidental question that does arise is what unit/ Apartment, if at all, would the Defendant be transferring to and in favor of the Plaintiff, if; (and it has not been denied), the suit apartment was resold.
85. Surely, the plea for specific performance by and on behalf of the Plaintiff herein, whilst knowing that the suit apartment had been re-sold, has not been made in good faith and is in any event, same reeks of mala-fides. Simply put, same is legally untenable.
86. Furthermore, it is not lost on this Honourable court that an order of Specific performance is an Equitable relief and therefore the person beseeching the court to grant same [ Specific Performance], must demonstrate good faith and candour, in his/her endeavor to partake of such an order.
87. Put differently, even in a situation where there does exists a valid and enforceable agreement and the claimant has demonstrated compliance with the terms thereon, the Honourable Court can still decline to grant and/or decree an order of specific performance; if the conduct of the claimant, is less than Equitable, like in the instant case.
88. Other than the foregoing, it is also worth noting that an order specific performance cannot also issue where the issuance of same is likely to occasion adverse effects or grave injustice to the Defendant and/ or such other Third Parties; or better still, where its enforcement would be impracticable.
89. To underscore the equitable nature of the relief of specific performance and the circumstances when same can issue, it is suffices to adopt and reiterate the succinct exposition of the law in the case of



Reliable Electrical Engineers Ltd versus Mantrac Kenya Ltd (2006)eKLR, where Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

90. Taking into account the various perspective/nuances that have been highlighted in terms of the preceding paragraphs and more particularly, the acknowledgment that the suit apartment was re-sold in terms of the email dated the 30<sup>th</sup> January 2023, issued by the Plaintiff’s own advocate, I come to the conclusion that the prayer for specific performance is neither available nor allowable at all.
91. To surmise, my answer to issue number two [2] is that the prayer for specific performance is not meritorious and is thus declined.

**Issue Number 3: What Reliefs, if any; ought to be granted.**

92. It is imperative to point out and underscore that the Plaintiff herein only sought for orders of specific performance as pertains to the suit apartment and essentially, an order directing the Defendant to execute the relevant Transfer Instrument and thereafter avail the completion documents.
93. In the alternative, the Plaintiff herein sought to have the requisite transfer instrument to be executed by the Deputy Registrar of the Honourable court, with a view to facilitating the transfer and registration of the suit apartment to and in favor of the Plaintiff.
94. Nevertheless, whilst discussing issue number two [2], this Honourable court has come to the conclusion that the suit apartment was re-sold , on the instructions and representations of the Plaintiff himself, who intimated to the Defendant that same (Plaintiff) was desirous to obtain refund of the purchase price.
95. Arising from the foregoing, the court thereafter came to the conclusion that the prayer for specific performance, which was sought for by and on behalf of the Plaintiff is neither maintainable nor legally tenable.
96. Be that as it may, in the body of the Replying affidavit, sworn by Stanley Yandi, on behalf of the Defendant, same has contended that the Defendant has always been ready to make the refund to the Plaintiff, albeit in instalments in accordance with (sic) Clause 6 of the terms and conditions of the Letter of offer.
97. Other than the foregoing averment, it is also worthy to recall that the Defendant herein wrote to the Plaintiff’s advocates vide Email dated the 31<sup>st</sup> January 2023, at 2:03 pm, wherein the Defendant intimated as hereunder;



On Tuesday, January 31, 2023 at 2:03pm Allen Mwaniki – wrote;

Good afternoon Job.

Following numerous discussions and confirmations with Mr. Nills Wulf, the Unit was initially offered for re-sale on the 15<sup>th</sup> September 2021. Seven subsequent attempt to re-sale it have since occurred and to which neither intended purchaser ever saw the deal finalized.

As per our policies, the funds ought to be refunded to the original account. From our thread of discussions with Mr. Wulf, having confirmed that he lacks access to the originating account, the vendor retained the said sums pending such confirmations.

The funds are still within our accounts pending dispatch to the bona fide beneficiary,

Regards.

98. From the contents of the Email correspondence, which have been reproduced in the preceding paragraphs, what comes out clearly is that the suit apartment was re-sold and that the Defendant has been holding onto the funds pending dispatch to (sic) the bona fide beneficiary.
99. My understanding of the foregoing position is that the entire purchase price, which was due and refundable to the Estate of Kai Uwe Wulf, now deceased, have always been available ever since the re-sale of the suit apartment, save that the Defendant was waiting for authentication of the Bona fide beneficiary.
100. Invariably, the Plaintiff herein procured and obtained a Letter of Independent administration from the County of Cameron, in the United State of America [USA]; and which Letter of independent administration was thereafter re-sealed in Kenya on the 21<sup>st</sup> November 2022; in accordance with the provision of Section 77 of the Laws of Succession Act, Chapter 160 Laws of Kenya.
101. Consequently and in the premises, there is no gainsaying that upon the re-sealing of the grant on the 21<sup>st</sup> November 2022, the Plaintiff, who was duly constituted as the Executor of the Will of the Estate of the deceased, became entitled to the refund of the purchase price.
102. Furthermore, it is imperative to underscore that the question of the confirmation of the grant, which has been alluded to by the Defendant herein at the foot of the Email correspondence dated the 30<sup>th</sup> January 2023 at 09:19 is misconceived and red-herring.
103. For coherence, the Plaintiff herein did not require a confirmed Grant of Probate or at all for purposes of collection of the assets and resources belonging to the Estate of the Deceased.
104. Arising from the foregoing, it is my humble position that the Defendant herein ought to have processed and released the entire purchase price to and in favor of the Plaintiff immediately, the Plaintiff availed evidence of his appointment as the Executor of the Will of the Estate of the deceased; or at the very latest, from the re-sealing the Letter of administration with the Will annexed thereto.
105. Even though, the Plaintiff herein did not seek for the refund of the purchase price at the foot of the Originating summons, the question/issue of refund has been brought to the attention of the court and duly canvassed by the respective Parties in terms of the pleadings placed before the court.
106. Consequently and in the premises, this court is at liberty, despite the import and tenor of the Doctrine of departure, [ Order 2 Rule 6 of the Civil Procedure Rules], to venture forward and speak to the refund of the purchase price, namely, the sum of Kes.14, 500, 000/= only.



107. To this end, I am duly guided by the holding of the Court of Appeal in the case of Transworld (k) Limited V Robin Makori Ratemo [2008] eKLR , where the court stated and held as follows:

“In any event, looking at the entire pleadings including the amended defence which directly brought the issue of carriage by air into the dispute, one cannot escape the conclusion that the superior court was left by the parties in their pleadings, evidence and submissions, with that issue to decide upon even if it was not specifically pleaded in the original plaint. In the case of Shire vs. Thahiti Finance Co. Ltd, this Court relied on the well known case of Odd Jobs vs. Mubia (1974) EA 476 and stated as follows:

“With respect to the learned Judge, that issue does not flow from the pleadings. However, that notwithstanding, a court may base a decision on an unpleaded issue where, as here, it appears from the course followed at the trial, that the issue has been left to the court for decision – see Odd Jobs vs. Mubia (1974) EA 476.”

108. Lastly, it is also worthy to address the question of Interests and the applicable interests rate, where applicable. In this respect, it is important to recall that the Defendant herein confirmed vide their Email address dated 30<sup>th</sup> January 2023; that same had the funds in their accounts waiting for dispatch to the bona fide beneficiary.

109. Nevertheless, despite holding onto the said funds and whilst knowing that the suit apartment had been resolved, the Defendant herein neither made tender nor proposed to release the monies to the Plaintiff herein. Further and in any event, the said monies have never been released to date.

110. In view of the foregoing, it is my humble view that the Plaintiff herein would be and is indeed, entitled to Interest at the rate of 14% per annum w.e.f September 2021; when the suit apartment was admittedly re-sold.

111. To buttress the holding that the Plaintiff is entitled to recompense on account of interests, it suffices to adopt and apply the ratio decidendi in the case of Highway Furniture Mart Limited versus Permanent Secretary Office of The President & another [2006] eKLR, where the court of appeal stated and held thus;

The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In *Later v Mbiyu* [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:

“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest”.

(See also the Uganda case of *Lwanga v Centenary Rural Development Bank* [1999] 1 EA 175).

112. Simply put, the payment of interests, is ordinarily intended to indemnify the claimant for the loss and/or diminished value of money over time and in this case, for the duration of time between when the suit Apartment was re-sold to the date of actual refund/repayment thereof to the Claimant/legal administrator of the Estate of the Deceased.



**Final Disposition:**

113. From the discourse, [duly captured and enumerated in the body of the Judgment herein], it is crystal clear that the Plaintiff herein has neither established nor demonstrated the requisite grounds for the grant of the Equitable orders of specific performance.
114. Nevertheless, whilst discussing the various issues which were itemized hereinbefore, the Honourable court has also found and held that the entire purchase price in respect of the suit apartment, has not been refunded to the Estate of the purchaser, [now deceased].
115. Consequently and in the premises, I am now minded to and Do hereby make the following orders;
- i. The claim for Specific performance be and is hereby Dismissed.
  - ii. The Defendant be and is hereby ordered and/or directed to refund the sum of Kes.14, 500, 000/= only; to the plaintiff herein and same to be refunded forthwith; and in any event, within 30 days from the date hereof.
  - iii. The monies in terms of clause (ii) hereof shall accrue and attract Interests w.e.f September 2021 until payment in full.
  - iv. In the event that the Defendant does not refund the purchase price and the consequential interest within the stated timelines, the Plaintiff shall be at liberty to execute.
116. Finally, there is the question of costs. As pertains to costs, it is instructive to point out that the Plaintiff herein was privy to and knowledgeable of the fact that the suit apartment have been re-sold, on his instructions and advise.
117. Nevertheless, the Plaintiff was still courageous to mount the instant originating summons seeking for specific performance.
118. In my humble view, even though costs of a suit ought to be decreed and awarded to the successful Party, there are instances where the conduct of the successful Party, may militate against the award of costs.
119. For coherence, the conduct of the Plaintiff in respect of this matter does not warrant/ merit an award of costs in his favor. See the dictum of the Supreme Court in the case of Jasbir Singh Rai & 3 Others vs Tarlochand Singh Rai & 4 Others (2014)Eklr.
120. Consequently and in the premises, Each Party shall bear own Cost of the Proceedings.
121. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**OGUTTU MBOYA,**

**JUDGE**

In the Presence of;

Benson - Court Assistant

Mr. Chris Ochieng' h/b for Mr. Job Ochieng for the Plaintiff.

Ms Zahra Salim h/b for Mr. Kimathi for the Defendant.

