



**Nga'nga & 4 others v M'Arimi (Environment and Land Appeal
20 of 2020) [2023] KEELC 21759 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 20 OF 2020**

CK NZILI, J

NOVEMBER 22, 2023

BETWEEN

**PHILIP MAKUMI NGA'NGA 1ST APPELLANT
CAROLINE GATHONI MAKUMI 2ND APPELLANT
JOHN NGA'NG'A MAKUMI 3RD APPELLANT
JAMES GITHINJI MAKUMI 4TH APPELLANT
GEORGE WARUINGE MAKUMI 5TH APPELLANT**

AND

GERALD MUTAI M'ARIMI RESPONDENT

*(Being an appeal from the judgment of Hon. J. Irura, Principal
Magistrate in Nkubu PMCC No. 25 of 2017, delivered on 22.1.2020)*

JUDGMENT

1. The court is asked to find fault in the judgment and decree issued by the lower court because the trial court:
 - i. Failed to comply with Sections 6 and 7 of the [Land Control Act](#) regarding controlled transactions, which became invalid after six months.
 - ii. Failed to consider the appellants' facts that the suit land belonged to the family and was subject to customary and constructive trust.
 - iii. It was erroneous in granting damage for breach of contract, yet there was frustration out of trust.
 - iv. She failed to find the contract unenforceable.



- v. It went against the weight of evidence tendered.
2. As an appellate court, the duty is to rehearse and review the lower court record while mindful that the lower court saw and heard the witnesses firsthand. See *Selle vs Associated Motor Boat Company Limited & others* (1968) E.A 123.
 3. At the trial court, Philip Makumi Nganga, the 1st appellant herein, had, through a plaint dated 12.2.2014, been sued by Gerald Mutai M'Arimi, the respondent, as the defendant said to have been a beneficial owner of L.R. No. Igoji/Kianjogu/277 registered in his father's name (deceased), Rufus Mwithimba M'Araria for breach of a sale agreement dated 22.11.2012 for half an acre of the suit land, which was to be handed over after the completion of Meru High Court Succession Case No. 316 of 2002.
 4. The respondent averred that the land was subdivided into L.R. No. Igoji/Kianjogu/1905 and transferred to him on 21.12.2012.
 5. The respondent averred that the seller breached the sale agreement by refusing to transfer the land and remaining with the money paid. He sought specific performance of the sale agreement and, in the alternative, a refund of the purchase price and the agreed liquidated damages. The plaint was accompanied by written statements and documents dated 12.2.2014 and 25.7.2018. Alongside the plaint, the respondent sought and was granted a temporary injunction and inhibition orders on 19.8.2015.
 6. On 14.10.2015, Caroline Gathoni Makumi, John Nga'ng'a Makumi, James Githinji Makumi, and Goerge Waruinge Makumi applied to be joined as interested parties to the suit since they were intended beneficiaries of the estate of the late. The application was allowed on 8.6.2017.
 7. By a defense dated 17.8.2017, the 1st appellant and the 1st – 4th interested parties opposed the claim. They averred that the suit land was acquired after selling the initial ancestral land in Kiambu. They termed the sale agreement as null and void, given that the legal beneficiaries were never involved in the sale. They pleaded the particulars of customary trust and its breach by the 1st defendant for lack of consent from the 1st – 4th interested party.
 8. Further, the 1st defendant and the interested parties, now 2nd – 4th appellants, averred that the respondent violently and forcefully hired goons who destroyed the 1st appellant's properties valued at Kshs.200,000/=. They termed the claim untenable due to Sections 6 and 7 of the [Land Control Act](#) and owing to a breach by the respondent. The defendant was accompanied by witness statements dated 9.10.2017.
 9. At the trial, Gerald Mutai M'Arimi, Godfrey Kiambi M'arimi, and Thomas Mbaabu Mwirichia testified as PW 1, PW 2, and PW 3, respectively. PW 1 adopted his witness statement dated 25.7.2018 as his evidence in chief. He testified that he entered into a sale agreement dated 22.11.2012 with the 1st appellant for ½ acre of L.R. No. Igoji/Kianjogu/277, for Kshs.310,000/=, paid a deposit of Kshs.250,000/=: leaving a balance of Kshs.60,000/= payable after the transfer of his name.
 10. PW 1 told the court the 1st appellant was a beneficial owner of the portion, which was eventually subdivided as L.R. No. 1905. PW 1 said he had visited the land before the sale agreement and identified the portion and the interested parties were all aware of the transaction since the proceeds were to be utilized in a party made in favor of a daughter of the 1st appellant and that the mother to the interested parties had consented to the transaction by signing the agreement and spousal consent.



11. PW 1 told the court he took possession, but the appellants started blocking his access and use of the land to sell it at a higher price due to its proximity near the planned Igoji campus. PW 1 told the court that some of the proceeds were utilized in erecting a home for the 3rd and 5th interested parties. Further, PW 1 said he visited the land with a land surveyor who erected beacons, fenced it, and started development with no objection from the appellants. He termed the appellant's allegations baseless since only a portion of the ancestral land was sold to him. PW 1 said the appellants had later breached the sale agreement and placed a caution on the title.
12. Additionally, PW 1 said the 1st appellant out of the sale bought and cleared a purchase price for a parcel of land from Kathuguchi Zipporah, Rufus. He produced the sale agreement dated 22.11.2012, a copy of green and certificate of conferment of the grant, grant of letters of administration chief's letter, gazette notice, an affidavit by Kathuguchi Zipporah Rufus, and a demand letter as P. Exh No's 1-10. In cross-examination, PW 1 told the court the 2nd – 4th appellants were not parties to the sale agreement and that the developments on the suit land belonged to him. Further, he said the 1st appellant's wife had signed a spousal consent before his advocates.
13. PW 2 echoed the evidence of PW 1 as contained in his witness statement dated 10.2.2014. He told the court that though he witnessed the sale agreement, he never attended a land control board meeting for any land control board consent since the 1st appellant had no title deed during the sale.
14. PW 2 said family members were all living on the suit land when the sale agreement was entered into and were, therefore, aware of the sale. He denied that some crop damage to the 2nd – 5th appellants shamba occurred. He said he witnessed the payment of the deposit of Kshs.250,000/= to the 1st appellant in the presence of his wife and children. Further, he said that since the transfer was not effected, the balance of Kshs.60,000/= was not paid by PW 1.
15. PW 3 adopted his witness statement dated 14.2.2014 as his evidence in chief. He associated himself with the evidence of PW 1 and PW 2, but he could not ascertain if the respondent attended a land control board meeting. He said the land's original owner was Rufus. He denied that the land was ancestral in nature. PW 3 said the land was sold to clear an outstanding balance to the person who had sold the land to the 1st appellant, Philip Makumi Ng'ang'a, who testified as D.W. 1 as per his witness statement dated 9.10.2017. He told the court he sold ½ an acre of the family land without consulting them for Kshs.310,000/=. He said he was paid Kshs.250,000/=:, and Kshs.60,000 was due on 30.11.2013.
16. D.W. 1 said the respondent failed to clear the balance. He said the land was ancestral since he bought it after disposing of some family land in Kiambu, with the consent of the family members. He said the sale was subject to customary trust and void due to breach of trust and non-compliance with the [*Land Control Act*](#).
17. In cross-examination, D.W. 1 said the 2nd – 4th appellants were his children. He acknowledged a pending succession cause before his wife and Thomas Mbaabu executed the sale agreement. He said the title deed was issued on 21.12.2012, but did not affect the transfer by 28.2.2013 or soon after, since if the respondent acquired ½ an acre, he would only be left with ¾ of an acre. He said he attended the land control board meeting with the respondent only to find a caution on the title. He denied handing over vacant possession to the respondent. He said he was willing to transfer the land but found a caution placed on the title by his family members. Further he0 said if the court directed otherwise, he would be willing to transfer the land; otherwise, his family members complained. He said his family members and the respondent affected two cautions on his title. He said the respondent breached the sale agreement, though as of 28.2.2013, a caution was already on the title register.



18. Caroline Gathoni Mukami testified as D.W. 2 per her witness statement dated 9.10.2017. She said the land was ancestral in nature, which the 1st appellant, who lived in Timau, wrongfully and illegally sold without the family's consent. D.W. 2 told the court a notification had been issued to potential buyers through the area chief to the respondent by he went-ahead to buy the land.
19. In cross-examination, D.W. 2 said that though their mother witnessed the sale agreement, she had not consulted the 2nd – 5th appellants, and therefore, her signature was procured through duress. She said it was Thomas Mbaabu who had looked for a buyer and had also attended a baby shower. She denied that the sale proceeds were used to cater for the party, for as a teacher, she was the one who paid for the hosting of the baby shower. She admitted that the respondent had erected a structure on the suit's land, which he forcefully subdivided in his favor. She said the land was subject to a customary trust, so their father should have notified them of the sale. D.W. 2 said the respondent destroyed their family structures, crops, and banana plants, leading to a report at the police station.
20. The appellants, through written submissions dated 16.10.2023, submitted that an appellate court must re-evaluate the lower court record and reach a conclusion in respect thereof as held in *Oluoch Eric Gogo vs Universal Corporation Ltd (2015) eKLR*, from a fresh perspective and with an open mind.
21. On grounds numbers 1 and 3 of the memorandum of appeal, the appellant submitted the sale agreement, which was subject to the consent of the land control board since it was over agricultural land. Since the appellants submitted the expiry of six months was 22.4.2013, and in the absence of an application for an extension of time, the transaction became void under Section 22 of the Act. Reliance was placed on *Macharia Mwangi Kagiri & 87 others vs Davidson Mwangi Kagiri (2014) eKLR* and *Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR*, where despite the being no land control board consent, the Court of Appeal allowed the contract to be performed, unlike in *David Sironga Ole Tukai vs Francis Arap Muge & others (2014) eKLR*, where a different bench of the Court of Appeal upheld the land control board consent was mandatory.
22. Regarding recovery of consideration, the appellant submitted under Section 7 of the [Land Control Act](#) that the only option for the respondent was to recover what he paid under the contract.
23. On whether the land was family or ancestral, the appellants submitted as held in *Njenga Chogerua vs Maria Wanjiru Kimani and two others (2005) eKLR* citing with approval *Mathuita vs Mathuita (1982 – 1988) 1 KLR 42*, trust was proven through the evidence as a question of fact. The elements to found a trust were stated in *Isaac Kiebia M'Inanga vs Isaaya Theuri M'Lintari Supreme Court of Kenya Pet No. 10 of 2015*. Therefore, the appellants submitted it was evidence from the nature of holding of the land and the parties' intention that the 1st appellant bought the land and registered did not hold in trust for his children, who were the co-appellants.
24. On constructive trust, the appellants, relying on *Halsbury's Laws of England 4th Edition Vol. 48 paragraph 690*, submitted it would arise in their favor due to the circumstances of the case since there was a common intention by them for the property to be shared beneficially, for they had been using the land since birth which overriding interest should have been inquired on. Reliance was placed on *Onyango Omoke vs John Omoke Kisumu C. A No. 10 of (1981)* and *Philip H Petil 4th Edition Equity and the Law of Torts Hussey vs Palmer (1972) 3 ALLER 744*.
25. The 1st appellant submitted the justice of the matter, justice being conscience of the whole humanity would require the court not to evict the appellant from the suit, him being the voice of the family. The 1st appellant submitted that the ends of justice would be served if the appellants were not evicted from their father's land, and it would be against public interest and good order to issue an order of eviction



- or specific performance against the appellants, which would perpetuate poverty, homelessness, and social disorder.
26. On grounds numbers 4, 5, 6, and 7, the appellants submitted that since the subject matter was family land, which subject to constructive or customary trust, the contract having been frustrated or becoming unenforceable and further breached for non-payment of the balance the trial court erred in law and in fact by granting orders, specific performance when there was a caution by the 2nd – 5th appellants making the sale impossible to complete. Reliance was placed on *Davis Contractors Ltd vs Fareham CDC (1956) AC 696*.
 27. On the law of specific performance, the appellants submitted that a claimant must demonstrate he has performed or was willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the agreement. Reliance was placed on *Gurdev Singh Birdi and another vs Abubakar Madhubuti C. A No. 165 of 1996*, on the proposition that specific performance was a just and equitable discretionary remedy which the court can grant unless there was a good reason not to do so and, in this case, there was constructive or customary trust.
 28. The appellants submitted, guided by *Amina Abdul Kadir Hawa vs Rabinder Nath Anand & another (2012) eKLR*, that specific performance can be refused if there was undue influence or if it would cause severe hardship to the defendant where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant.
 29. The appellants submitted that they were willing to pay back the monies paid to the respondent for the land purchase as the only remedy available. On costs, the appellants submitted the general rule that costs follow the events under Section 27 of the *Civil Procedure Act* for good reasons the court can order otherwise. In this appeal, the appellants submitted that the trial court did not exercise its discretion judiciously. In this instance, the appellants urged the court to allow the appeal to dismiss the suit or, in the alternative order, refund only the consideration paid and received by the 1st appellant, with costs to them. Reliance was placed on *Republic vs Rosemary Wairimu Munene vs Ihururu Dairy Farmers Cooperative Society Ltd J.R. Application No. 6 of 2014*, *Thomas Nyaga Njuki vs Alexander Ileri Karimi (2020) eKLR* and *Lucy Njeri Njoroge vs Kaiyahe Njoroge (2015) eKLR*.
 30. By written submissions dated 19.10.2023, the respondent submitted that he was a bonafide purchaser for value without notice, and the appellants had no valid claim against him, hence the lower court's judgment. The respondent urged the court to consider his rights, legal position, and interest since he followed the law to the letter when purchasing the land in question, and undertook all the necessary and legal requirements that ought to be taken to acquire a good title. Reliance was placed on *Blacks Laws Dictionary 9th edition* and *Katende vs Haridar & Co. Ltd (2008) 1. EA 173*.
 31. The respondent submitted that he tendered evidence that he bought the land in good faith without notice of any fraud and was therefore protected under Sections 24 (a), 25 (1), and 26 of the *Land Registration Act* and Article 40 (6) of *the Constitution* since the 1st appellant's wife signed the sale agreement and the children were all aware of the transaction.
 32. On the *Land Control Act*, the respondent submitted it was tongue in cheek for the appellants to purport that six months to acquire this consent had expired from the date of the date agreement, for it was the 1st appellant who refused to cooperate on subdivision and transfer, despite him willing to fulfill his part of the contract, hence was estopped from invoking Sections 6 and 7 of the *Land Control Act* to benefit from their deliberate action of breach of contract.
 33. Regarding ancestral land, the respondent submitted such a claim as false, baseless, and unsubstantiated by evidence since the land was registered under the *Land Registration Act 2012*. Reliance was placed



- on James N. Kiarie vs George Kinuthia and another (2012) eKLR. The respondent submitted that the 1st appellant acted in cohorts with the 2nd – 5th appellants in deliberately delaying securing the land control board consent or the subdivision and transfer, yet the 1st appellant admitted the sale agreement was freely and voluntarily entered into.
34. The issues claiming for the court’s determination are:
- i. If the respondent pleaded and proved the sale agreement on the suit land with the 1st appellant,
 - ii. If the respondent performed per the terms and conditions of the sale agreement.
 - iii. If there was a breach of the sale agreement.
 - iv. Whether the suit land was subject to the ancestral or family interests or rights of the 2nd – 5th appellants.
 - v. If the sale agreement became frustrated, void, or unenforceable.
 - vi. If the 2nd – 5th appellants’ rights or interests were pleaded and proved before the trial court,
 - vii. If the 1st appellant was justified in law in declining to honor the terms and conditions of the sale agreement.
 - viii. What were the remedies available to the respondent?
 - ix. Whether the appeal has merits.
 - x. What is the order as to costs?
35. In trite law, parties are bound by their pleadings, and issues flow from them. See Raila Odinga & others vs IEBC (2017) eKLR. At the lower court, the respondent had pleaded that he entered into a sale agreement with the 1st appellant for ½ an acre to be excised from L.R No. Igoji/Kianjogu/227 at Kshs.310,000/= paid a deposit of Kshs.250,000/=, took vacant possession, and developed the land while awaiting the transmission and transfer process to complete so as to clear the purchase price balance. He averred that the 1st appellant took his money and failed to transfer the land and hence was entitled to specific performance of L.R. No. 1905, in the alternative a refund of the purchase price and the agreed liquidated damages. The respondent averred and testified that the 1st appellant sought more time to transfer the land after acquiring a title deed but refused to do so and threatened to sell the land to a third party or evict him.
36. On his part, the 1st appellant, while admitting entering into a sale agreement and receiving Kshs.250,000/=, averred that the same, was frustrated or was unenforceable for non-payment of the balance the land was subject to trust being ancestral or family land.
37. There is no dispute that the 2nd - 5th appellants joined the suit as interested parties. In Francis Muruatetu vs Republic (2016) eKLR, the court observed that an interested party has an identifiable stake in a matter with no necessary rights to enforce or claim. The court said the overriding interest or stake in any matter was that of the primary or principal parties, for third parties or interested parties may only be remotely or indirectly affected, but the primary impact was on the parties that first moved the court.
38. The court said the issues for determination remain the issues presented or, as framed by the court, the pleadings and submissions of the principal parties. The court noted that an interested party may not frame its own fresh issues or introduce new issues for the court’s determination and that an admitted interested party’s stake cannot take the form of an altogether new issue to be introduced before the court.



39. Unfortunately, when the interested parties joined this suit, they filed a defense with the 1st appellant. The stake of the interested parties was not defined in the defense statement. The primary pleading remained that of the 1st appellant. There were no specific averments in the statement of defense advancing the stake of the 2nd – 5th appellants. Grounds numbers 1, 2, 3, 5, and 7 of the memorandum of appeal relate to unpleaded facts or issues.
40. Order 2 Civil Procedure Rules provides for matters that must be specifically pleaded and proved. In *Omweri vs Kiptugen* (C.A No. 5 of 2018) (2022) KECA (KLR) (4th March 2022) (Judgment), the court cited with approval *Kenya Hotel Ltd vs Oriental Commercial Bank Ltd* (2018) eKLR and *Openda vs Ahn Martin* (1984) KLR that grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial, with neither of the parties changing their case or facts into a different case at the appellate stage.
41. In his statement of defense, the 1st appellant failed to plead breach of contract, frustration, undue influence, unenforceability, contract voidability, the land being subject to customary or constructive trust, and non-compliance with Sections 6 and 7 of the *Land Control Act*. In *Omweri* (supra), the court cited with approval *Sun Sand Dunes Ltd vs Raiya Construction Ltd* (2018) eKLR, that the object of construction for terms of a contract is to ascertain its meaning or, in another words, the common intention of the parties to it, in an objective manner. Further, the court cited with approval *Halsbury Laws of England 4th Edition Vol. 9 Pg 481*, that time will not be considered of the essence unless expressly stipulated depending on the nature of the subject of the matter and the surrounding circumstances. The court cited with approval *Aida Nunes vs John Mbiyo Njonjo & Another* (1962) 1 E. A 88, that in land sale agreements, a party cannot avoid time as of essence on the ground of unreasonable delay by the other party until a notice has been served upon the defaulting party, making time of the essence.
42. In *Gregory Mburu vs Thika District Hospital* (2018) eKLR, the court said time starts to run when the defendant breaches the terms of the contract. In *National Bank Kenya vs Pipeplastic Samkolit (K) Ltd & another* (2002) eKLR. The court said courts do not rewrite contracts between the parties and are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved.
43. In *Steadman vs Steadman* (1976) AC 540, the court held that if one party to an agreement stands by and leads the other party to incur expenses or prejudice, his position on the faith of the agreement being valued, he will not then be allowed to turn around and assert that the agreement was unenforceable.
44. Further, in *Macharia Mwangi Maina & others* (supra), the court observed that the respondent having put the appellants in possession of the suit land created an overriding interest in favor of them concerning the property. Additionally, in *Thomas Joseph Openda* (supra) the court held the typical remedy in a contract for the sale of land was an action for specific performance because damages are frequently inadequate and an unjust remedy for refusal to convey the property concerned.
45. As to the frustration of contracts, in *Gimalu Estates Ltd & other vs 1 Finance Corporation & another* (206) eKLR, the court said examples of frustration include but were not limited to the destruction of subject matter death or in capacity of a party, change in the law and or a supervening event, sudden lack of finances due to crop failure as held in *Charles Miriti vs Thananga Tea Growers Sacco Ltd* (2014) eKLR.
46. On the rights of children to land in *Toroitich Suter vs. William Toroitich and 3 others* (2017) eKLR, the court said the only family interest in the property was the spousal interest, which is an overriding interest and vests in either the husband or wife of the registered owner of the property. The court said children and grandchildren of a living title holder have no overriding interest in the property of their



- father or grandfather. The court restrained the defendants from interfering with the subdivision and transfer and directed the caution they had placed on the title to be vacated. See also *Reuben Shikambe Shisambo vs Antonina Shilwatso Materu* (2017) eKLR.
47. In *Robert Mbui vs Kennedy Mwanzia Musembi* (2018) eKLR, the court said a father could deal with his land subject to his wife's consent in any way, since no law mandated a father to share his land with his children during his lifetime.
48. Applying the preceding case law in the instant suit, the sale agreement signed by the 1st appellant and the respondent was in clear terms. Each party's duties were defined, and time was of the essence. The consequences of the breach were stated. It was also stated when the respondent was to take up vacant possession. The 1st appellant's spouse duly signed the sale agreement. The 1st appellant never disclosed if there were any overriding interests save for those required by law through his spouse. The land came under the name of the 1st appellant while he had honored his part of the agreement by putting the respondent into possession and causing him to expend on the land as if it was his. There is evidence that the 2nd - 5th appellants, all adults, saw the respondent take up vacant possession and assert his possession and possessory rights without objection. The 1st appellant willingly entered into the sale agreement and has not pleaded any breach on account of coercion, illegality, frustration, or undue influence or fraud. He was, therefore, estopped in law from reneging on the sale agreement by pleading unenforceability or impossibility to comply. There is privity of contract and the freedom to enter into contracts. The 1st appellant knew the size of his land, yet he opted to offer it for sale and transfer to the respondent.
49. However forceful, submissions do not amount to evidence or pleadings, as in *Daniel Toroitich Moi vs Stephen Murithi* (2014) eKLR. Both parties to this appeal have made eloquent submissions on factual and evidentiary matters which were not pleaded at the lower court. Unfortunately, such evidence or facts were not placed before the trial court through pleadings and tested under the rules of evidence during the trial. For instance, there were no pleadings on possession of the suit land by the 2nd - 5th appellants tantamount to being an overriding interest. The 1st appellant pleaded nothing on frustration of the contract or the implications of specific performance, causing undue or severe hardship, or being arbitrary, and likelihood to cause undesired consequences to him, such as landlessness and poverty. The 1st appellant failed to plead or, in the alternative, make an offer for a refund of the purchase price in his defense.
50. Order 2 Rule 4 & 10 Civil Procedure Rules provide misrepresentation, willful default, undue influence performance, release, payment, fraud, illegality, and every ground of defense by a defendant in recovery of land to be specifically pleaded and that possession by way of a tenacity shall not be sufficient. The 1st appellant failed to plead the above and include their particulars. Similarly, as indicated above, the 2nd - 5th appellants remained neither a plaintiff nor a defendant. See *Supermarine Handling Services Ltd vs. Commissioner General KRA* (2002) 2 KLR 758 and *City Council of Nairobi vs Salo Properties Ltd & another* (2009) eKLR.
51. A court has no jurisdiction to decide on an issue that is not pleaded. See *Nairobi City Council vs Thubet Enterprises Ltd* (1995 - 1998) 2 E.A 237. The sale agreement between the 1st appellant and the respondent was in line with the *Law of Contract Act* and Section 38 of the *Land Act*. The parties duly executed it. The 1st appellant cannot attack the sale agreement at the appellate stage because of illegality, coercion, undue influence, and fraud. The 1st appellant did not plead that the sole agreement became void for lack of land control board consent.
52. In *Billey Oluoch Orinda vs Ayub Muthee M'Igweta & others* (2017) eKLR, the court observed that a party wishing to rely on a frustrating event must plead the particulars resulting in frustration. In *Lucy*



- Njeri Njoroge vs Kalyane Njoroge (2015) eKLR, the court cited with approval *Maritime National Fish vs Ocean Trawlers* (1935) AC 524 induced and *Davis Contractors Ltd vs Fareham UDC* (1956) A.C 696 that the doctrine of frustration should be used under circumstances arising out of no fault of either party.
53. In *Charles Mwirigi Miriti* (supra), the court held that frustration renders performance impossible or only possible in a different way from what was contemplated by the parties. In *Mwangi Macharia & 87 others* (supra), the court observed that being a court of equity, equity shall suffer no wrong without a remedy, and no man shall benefit from his wrongdoing.
54. In this appeal, the duty and obligation to transfer the land was on the 1st appellant. He was the one to secure a title deed after subdivision. There was no evidence that the 1st appellant obtained the land control board consent for the subdivision and transfer in favor of the respondent, and the latter failing to clear the balance of Kshs.60,000/= . There was no evidence that the 1st appellant notified the respondent that there had been a fundamental breach of the sale agreement and failed to remedy the same failure, which would have caused the sale agreement to be rescinded.
55. In *Gurder Singh Birdi & another* (1997) eKLR, the court said rescission only comes after the defaulting party has given reasonable written notice. Further, in *Mwangi vs Kiiru* (1987) eKLR, the court cited Chitty on Contracts 25th Edition, paragraph 1591, on page 876 that, any breach of a contract gives rise to a cause of action and that no breach gives a discharge from liability. The court said rescission or discharge for non payment of the agreed consideration concerns only future performance. However, the primary obligations under the contract stand substituted with a secondary obligation to pay damages, namely the purchase price and other amounts agreed to be paid for improvement and compensation.
56. In this appeal, the respondent took possession of the land and caused developments on it with the 1st appellants' knowledge. Section 120 of the *Evidence Act* provides the doctrine of estoppel. The 1st appellant is the one who put the respondent into possession of the suit land. He is estopped from denying those facts. In *Gurdev Singh Birdi* (supra), the court observed that the plaintiff had to show he had performed all the terms of the contract which he had undertaken to perform.
57. Since the sale agreement was not been impeached by the 1st appellant on account of mistake, illegality, or fraud, and given the land is still available, the respondent deposited Kshs.60,000/= before the trial court, constructive trust or resultant trust was created by the 1st appellant in putting the respondent into possession. I think there is no other alternative remedy except specific performance.
58. The general rule is that damages for breach of contract are not recoverable as held in *Kenya Tea Development Authority vs Sundowner Lodge Ltd* (2018) eKLR, *Capital Fish (K) LTD vs KPLC* (2016) eKLR, *DK Njagi Marete vs Judicial Service Commission* (2020) eKLR and *Toshike Construction Co. Ltd vs Harambee Cooperation* (2021) eKLR. Evidence shows that the respondent took vacant possession and utilized the suit land. Kshs.620,000/= was like special damages. It was not specifically pleaded and proved. I find the claim lacking merits.
59. The upshot is the appeal succeeds in terms of prayer number (iv) of the trial court's judgment. There are no exceptional circumstances for this court to depart from the general rule that costs follow the event. The 1st appellant filed no statement of admission of the claim. There was no partial admission of the claim or on offer of the deposit made before the trial court. The respondent is entitled to costs for this appeal and in the lower courts. Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERUON
THIS 22ND DAY OF NOVEMBER 2023**



In presence of

C.A Kananu/Mukami

Anampiu for appellant

Miss Githinji for Inoti for respondents

HON. CK NZILI

ELC JUDGE

