



Muhia & another v Dellian Langata Limited & another (Environment & Land Case 30 of 2016) [2023] KEELC 22229 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 30 OF 2016
AA OMOLLO, J
DECEMBER 14, 2023**

BETWEEN

SIMON THUO MUHIA 1ST PLAINTIFF

MARY NJOKI MUHIA 2ND PLAINTIFF

AND

DELLIAN LANGATA LIMITED 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION 2ND DEFENDANT

JUDGMENT

1. This suit (formerly Nairobi High Court Civil Suit No. 1561 of 1991) was brought by way of Plaintiff filed in court on 2nd April, 1991 seeking the following reliefs against the Defendants jointly and/or severally;
 - a. A declaration that they are entitled to registration of the instrument of Transfer executed by the First Defendant with respect to Parcel No. L.R. 3591/22.
 - b. In the alternative, that the First Defendant do produce the original deed title to the Registrar of Titles for purposes of effecting the said registration.
 - c. Specific performance of the said Agreement by way of duly executed transfer in their favour with respect to L.R. 3591/23.
 - d. All necessary and consequential accounts directions and enquiries.
 - e. Any further or other relief that this Honourable Court may deem fit to grant.
 - f. Costs



2. The Plaintiffs' case is that they had entered into a valid agreement dated 5th February 1988 with the 1st Defendant for sale two parcels of land located in Lang'ata Area of Nairobi namely L.R. No. 3591/22 and L.R. No. 3591/23 (the suit properties) for a consideration of KShs. 2,125,000/- payable to the 1st Defendant. The suit properties were subdivisions of L.R. No. 3591 and the 1st Defendant was to take all steps to ensure the subdivision was completed and title deeds or deed plans issued for the new plots. The 1st Defendant was to further comply with all conditions imposed by the relevant government and quasi-government authorities as well as the conditions subject to which the Agreement for Sale was made.
3. The Plaintiffs contended that on receiving the title deeds for the new plots and upon payment of the consideration, the 1st Defendant was to transfer the interest in the land to them subject only to the easement and wayleaves agreements that ran with the original Grant. The sale was to be completed on 29th February, 1988 and was subject to the LSK Conditions of Sale, 1974 Edition.
4. It is the Plaintiff's case that by letter dated 13th February, 1990 the 1st defendant appointed the 2nd Defendant as its agent with respect to all matters pertaining to its loan account and the properties charged to it. By virtue of Section 33(3) of the Agricultural Finance Act CAP 323, the 2nd Defendant was a statutory agent of the 1st Defendant for reason of loan recovery from the 1st Defendant. It was an express and implied term of the Agreement that the 1st Defendant would obtain sufficient funds from sale of the suit properties herein and other plots L.R. Nos. 3591/21, 3591/24 and 3591/25 to redeem the charge of the 2nd Defendant. The 1st Defendant failed to redeem the said charge. On 28th October 1987 and 21st February 1991, the Plaintiffs paid KShs. 850,000/-, being full purchase price for L.R. No. 3591/22 and KShs. 714,431/- for L.R. No. 3591/23 leaving a balance of KShs. 560,569/-, which the Plaintiffs averred that they were ready, able and willing to pay.
5. They further averred that the 1st Defendant executed the transfer on account of L.R. No. 3591/22 and obtained Land Control Board (LCB) Consent thereto but informed the Plaintiffs that the original title was lost, thereby advising them to present the Transfer under Section 65(1)(h) of the Registration of Titles Act. The 1st Defendant however unlawfully and wrongfully objected to the said registration and has obstructed the Plaintiffs' right to register the transfer under the said Section 65 (1)(h). In the alternative, the 1st Defendant refused and or neglected to produce the original title to enable the registration, despite the Plaintiff having fulfilled and performed all their obligations under the said agreement and being ready, able and willing to complete payment of the balance on L.R. 3591/23. Further, that despite calls from the Plaintiffs to transfer the suit properties by sufficient legal instrument, the 1st Defendant has not done so.
6. The 2nd Defendant entered Appearance on 29th April, 1991 and filed its Defence on 10th May, 1991. The 2nd Defendant averred that it was a stranger to the contents of the Plaintiff, stating however that the 1st Defendant had redeemed the Charge in favour of the 2nd Defendant over the suit property. Consequently, the 2nd Defendant was not at the material times the agent of the 1st Defendant in so far as the alleged transaction herein. It averred that the Plaintiff did not reveal any cause of action against the 2nd Defendant and it would seek to have its name struck out. Consequently, the suit was by Notice of Discontinuance made under Order XXIV Rule 1 of the Old Civil Procedure Rules wholly discontinued against the 2nd Defendant.
7. The 1st Defendant entered appearance on 2nd May, 1991 and filed its Defence dated 16th May, 1991. The 1st Defendant denied that the Agreement dated 5th February, 1988 was still subsisting or at all. The Agreement had been entirely voided by lack of LCB Consent within the prescribed time limits and it was not binding on the 2nd Defendant which was not a party thereto. It averred that the said Agreement



- was replaced by another of 30th January, 1989. This new agreement with a completion date of 31st March 1989, was not completed on that date or within reasonable time and is of no effect as it was further voided for failure to obtain LCB Consent over L.R. No. 3591/23 within the prescribed time.
8. The 1st Defendant averred that even if the Agreement was severable as between the two parcels, part of the purchase price for L.R. No. 3591/22 was to be paid by way of legal fees to the firm of Kembi & Muhia where the 1st Plaintiff was a partner. Since the costs were disputed and had not been taxed, the Plaintiff had not paid the balance of the purchase price thereon. The 1st Defendant denied appointing the 2nd Defendant as its agent and it would rely on Section 33(3) of the Agricultural Finance Act for its full terms and effect. The 1st Defendant denied the existence of the conditions precedent to the Agreement either expressly or by implication. Further that although the 1st Defendant intended to pay off its indebtedness to the 2nd Defendant through sale of L.R. No. 3591/21, 3591/24 and 3591/25, these sales were not conditions precedent to any transactions with the Plaintiffs, and the Defendant had in fact made substantial payments on the loan and held an unregistered discharge of charge from the 2nd Defendant.
 9. The 1st Defendant averred that the Plaintiff's only paid KShs. 280,000/- in respect of L.R. No. 3591/22 and denied that the Plaintiffs paid the sum of KShs. 1,564,431/- as alleged in the Plaint or any other sum. The 1st Defendant further denied that the Plaintiffs were ready and willing to pay KShs. 560,569 as alleged. It was averred that if there was any agreement for sale of L.R. No. 3591/22 then the Plaintiff having neglected to pay the purchase price in full, and the Defendant lawfully objected to the registration of the Transfer thereto. However, the 1st Defendant denied either refusing to produce the Head title, executing a transfer in favour of the Plaintiffs or that it has obstructed the Plaintiffs in exercising their legal rights as alleged. It averred that should there be held to be a binding agreement with purchase price paid thereon, the 1st Defendant would make good title to L.R. no. 3591/22 only. The 1st Defendant averred that the entire transaction was void for want of LCB Consent to the sale of L.R. No. 3591/23, and urged the court to dismiss the suit with costs.
 10. The Plaintiffs filed a Request for Further and Better Particulars under Order VI Rule 8 of the previous Civil Procedure Rules dated 16th May, 1991 on the 1st Defendant's Defence, seeking to the following information:
 - a. When the 1st Defendant redeemed the Charge.
 - i. State the date of the Discharge of Charge
 - ii. If it was registered, the date of registration of the Discharge of Charge
 - iii. If there is correspondences to confirm date of redemption or payment of the redemption Account, state the dates and references of such correspondence. Furnish copies of the same
 - iv. State the redemption Account and when it was paid
 11. The particulars were furnished on 12th June, 1991 and the 1st Defendant indicated that the Discharge of Charge dated 21st March, 1990 was registered on 27th February, 1990 and a copy of the said document was annexed. The redemption account was given as Number 38055991, which was fully redeemed on 26th November, 1990.
 12. By order of the court made on 27th August, 1991 this suit was consolidated with High Court Civil Case No. 184 of 1991.



Hearing and Evidence

13. Hearing of the suit commenced on 17th July 2018. The 1st Plaintiff testified as PW1 and gave a sworn testimony stating that he was an Advocate of the High Court of Kenya. He relied on his statement dated 23rd October 2017 and filed on 31st October, 2017. He produced a bundle of documents dated 27th October, 2017 as PEXB 1 and a supplementary bundle of documents dated 12th July, 2018 as PEXB 2. PW1 testified that his claim was for specific performance of an agreement made between the Plaintiffs and the 1st Defendant dated 5th February, 1988 for sale of the suit properties. He clarified that L.R. No. 3591/22 was registered in his favour successfully and the dispute remained over L.R. No. 3591/23.
14. PW1 testified that the issue as framed by the court and agreed by the parties is whether the suit properties were subject to the [Land Control Act](#). He testified that whereas the 1st Defendant opined that they were, his proposition was that under the Land Development & Use (Planning) Regulations, 1961 made under the previous Land Planning Act, the status of the land changed upon subdivision into plots of 20 Acres or less and in this case the two plots were 5 and 7½ Acres. This was known as a Class 'A' Development under the said regulations, and the status of the suit property thus changed from Agricultural to Residential.
15. PW1 testified that under the [Land Control Act](#), the Minister for Agriculture could declare areas that were subject to the said Act. Pursuant to this, Legal Notice No. 31 of 10th September 1975 excluded the area where the suit properties are situated from the provisions of the [Land Control Act](#). He further testified that the City Council of Nairobi, which was the Planning Authority, zoned the said area as residential as shown in the minutes of the Town Planning Committee dated 16th January 1979. PW 1 averred that as the Advocate who acted for the 1st Defendant in the sub-division and sale of the plots from the mother title to redeem the loan granted by the Agricultural Finance Corporation, he was familiar with the regulations he had referred. Further that the initial subdivision had been amended to create the two plots herein, and the 1st Defendant did not apply for LCB Consent to do this as it was not necessary due to the change of status of the plots to residential.
16. It was PW1's testimony that in High Court Civil Case No. 3316 of 1993 where he was one of the Plaintiffs, evidence was led by the Defendant's witness, one David Nyika, who was a Surveyor and a Planner, that LCB Consent was not necessary for the reasons given above. The mentioned case proceeded to the Court of Appeal in Civil Appeal No. 144 of 2014, which confirmed the High Court's decision that the law had been complied with in the subdivisions.
17. PW1 also testified that despite orders of status quo issued by Ang'awa J. on 26th March 2009, unknown people claiming to be the 1st Defendant's agents had entered into the land and constructed a boundary wall, installed electricity and put up structures thereon. He testified that at the time the order was made there was only a barbed wire fence. The status at the time the order was made is as shown in the photographs annexed to the Affidavit of one Mwangi Thuithi dated 3rd July, 2008. The said order has not been set aside and thus the activities complained of are in contempt of the order.
18. On cross-examination, PW1 testified that the Agreement dated 5th February, 1988 was drafted by his office while he acted for the 1st Defendant and duly stamped formed the basis of his claim. He admitted that although the sale was subject to LCB Consent, the same was not obtained. He conceded that it was a condition that payment was to be made before the transfer was executed, however the issue of payment was not relevant as it was not one of the issues to be determined. He further stated that he paid the consideration to be entitled to specific performance. That he had paid KShs. 714, 431/- on the remaining property leaving an outstanding balance of KShs. 560,569/- which was being held by his Advocate. PW 1 informed court that he was paying for the two plots without differentiating the



- payments. He denied that he had only paid KShs. 460,000/- and further explained that part of the payment was to come from his legal fees which the 1st Defendant had been unable to pay.
19. PW1 referred the Court to the 1st Defendant's letter dated 3rd April 1988 which said the fees was to be recovered from the sale of 44 acres which was never sold. That under Paragraph 5 of Agreement, he was to make some payment to AFC, but AFC varied the terms of that clause through correspondence he did not have in court. He continued in evidence that it was not true they had an agreement with the 1st Defendant to only deal with L.R. No. 3591/22, and since the draft memorandum of agreement in the 1st Defendant's bundle was never signed, it was meaningless. That the same was a proposal that came from the Plaintiffs but was never accepted. He testified that the letter dated 27th January 1989 mentioned the fees payable to them, and although the fees were not agreed, they were formally taxed.
 20. The 1st plaintiff testified that in the draft Memorandum, among other terms, the 1st Defendant was to apply for LCB Consent for L.R. No. 3591/22. He stated he had made payments in respect of L.R. No. 3591/23. Further, that there are no payments that PW1 did directly to AFC. That the 1st Defendant did not give him instructions on the payment of the balance. When referred to the letter from the 1st Defendant to him dated 13th February, 1990 PW1 testified that the letter requested him to release the title to L.R. No. 3591/23 but it did not ask him to keep off the plot. The letter at page 72 of the Defendant's bundle from the Plaintiff's to the Defendant enclosed an application for LCB Consent, because as at that date it was relevant. He reiterated that there was an outstanding balance of KShs. 560,569 in respect of L.R. No. 3591/23 and he had produced evidence of the payments made.
 21. PW1 also confirmed that he was enjoying L.R. No. 3591/22 as legal owner without interference by the 1st Defendant. That he had taken a loan from Housing Finance Corporation (HFC) with the said property as security and he had a case against HFC, which was settled and closed. PW1 admitted that in the case against HFC, he had argued that LCB Consent was necessary, however at the time of the transaction with the 1st Defendant it was not.
 22. PW1 was re-examined and testified that he knew of HCCC No. 813 of 2002 which did not proceed to full trial but the court in its ruling noted that the issue of the LCB Consent required evidence at trial. That the court did not determine whether the land was agricultural or not. That the area was excluded from the *land Control Act* vide Gazette Notice No. 31 of 1975. He reiterated that the Town Planning committee zoned the area as residential. He informed court that he had filed a supplementary bundle of documents dated 24th February, 2020 produced as PEXB3 which had the Certificate of taxation and statement of accounts, and that he had paid a total of KShs. 1,326,262/- leaving a balance of KShs. 798,738/- in respect of L.R. 3591/23. PW1 stated that he was ready to pay the amount owing and deposit the money in court as the 1st Defendant kept changing Advocates which presented a challenge to him.
 23. On further cross-examination, PW1 stated that the minutes of the Town Planning Committee showed that the committee did not discuss Land Control Board Consent. That his testimony was supported by receipts. That further he was not informed about the monies paid into court, and he did not know why the payment was to be made to court, thus he had no way of claiming the amount paid in court. He testified that the balance of KShs. 798,738 was to cover the bill of costs.
 24. The Defence called Phyllis Christabell Wambura Maranga who testified as DW1 under oath. She adopted her witness statement dated 30th October, 2017 as her evidence-in-chief. She produced her Bundle of Documents dated 30th October, 2017 as DEXB 1 and the Bundle of Documents dated 2nd July, 2018 as DEXB2. She testified that the Plaintiff was known to her as an Advocate. That the 1st Defendant purchased land in 1984 financed by AFC and due to inability to repay the loan, the



property was subdivided and part of it was to be sold to repay the loan. DW 1 stated that the Ecumenical Institute (Nairobi) Limited was to buy part of the property and in the transaction the 1st Defendant was represented by the firm of Kembi & Muhia Advocates 25. That the initial subdivision scheme was amended to create plots F1 and F2 measuring 5 acres and 7 1/2 acres respectively to be sold to meet the cost of the 1st Defendant's operations. The 1st Defendant then entered into an agreement for sale of the two plots with the Plaintiffs under which PW1 made some payments. Subsequently, PW1 then wrote the Memorandum proposing new terms to the 1st Defendant, who in turn made a counter-proposal that was accepted by PW1, where the Plaintiffs was to be credited for L.R. No. 3591/22 only. That the Plaintiffs were to deal directly with AFC with respect to L.R. No. 3591/23.

25. She testified that by a letter dated 21st February, 1990 the 1st plaintiff wrote to the 1st Defendant enclosing an application for LCB Consent. The said letter mentioned that he would make some payments to AFC, however by their letter dated 16th October, 1989 it is clear they had not made any payments to AFC. That all this was unnecessary as AFC had already agreed to manage the 1st Defendant's account. DW1 further testified that the transactions involving the suit properties required LCB Consent as it was agricultural land, as was the mother title and there was no change of use. She testified that they equally obtained consent for the subdivisions as well as for transfer of L.R. No. 3591/22 to the Plaintiffs, but there was no application for LCB Consent made with regards to L.R. No. 3591/23 because the Plaintiffs never paid for it.
26. It was DW1's testimony that although the Plaintiffs transferred L.R. No. 3591/22 fraudulently without the 1st Defendant's involvement or the original title, she agreed to give them possession. She continued that at the time of filing the suit, the Plaintiffs were already registered as owners of L.R. No. 3591/22 and the orders sought in respect of it were in bad faith. With regards to the Certificates of Taxation, DW1 testified that the bills taxed were for services rendered by Kembi & Muhia Advocates and not the Plaintiffs, and the payments were made into court, to which the Plaintiff had receipts for the deposits. She insisted that the Plaintiffs were not entitled to L.R. No. 3591/23.
27. On cross-examination, DW1 confirmed that they had no issue with the transfer of L.R. no. 3591/22 even though she did not sign the transfer form thereto, and that they applied for consent. She informed the court that the Plaintiffs had some blank transfers that were not for any particular plot as well as the 1st Defendant's seal. She admitted that the 1st Defendant's property was threatened with auction, but denied the Plaintiff's intervention in stopping the auction. She testified that the Plaintiffs were not in the picture at the time of the original sub-division and that the 1st Plaintiff came after the original sub-division scheme had already been submitted. Although she denied entering any agreement with the Plaintiffs, she admitted that the Agreement dated 5th February, 1988 was made between the 1st Defendant and the Plaintiffs. She however stated that the Plaintiffs were keeping some sale agreements so that they could show to AFC that they were doing something, and the sale agreement herein was one such documents that DW1 signed.
28. DW 1 was shown her statement where she had stated that the Agreement was not separable. She also testified that they applied for LCB Consent when the original subdivisions were done, but she could not remember if Consent was sought for the amended subdivision. She admitted that she was not stopped from getting legal representation in the sale. DW1 informed this court that if the Plaintiffs made any payments to AFC, she was not aware. She agreed that she received some payments from the Plaintiff under the agreement for sale. It's DW1's contention that the agreement was varied at the instance of the Plaintiffs through a counter proposal that the Plaintiff accepted, which she considered to be an agreement.



29. DW1 further testified that the Plaintiff's legal fees were to form part of the purchase price and the letter from Daly and Figgis dated 27th February, 1991 evidenced this understanding. She went on to say that though the costs were taxed in 2007, she was advised by the Law Society of Kenya and her then advocate to pay the money into court despite the fact that there was no order directing that they do so. She further confirmed that they never informed the Plaintiff that they had deposited the costs so taxed in court. Despite denying earlier that the Plaintiff had paid money to AFC, on cross examination, she admitted that AFC received a deposit of KShs. 600,000/-
30. DW1 also testified that they are the ones who came up with the acreage of the suit properties and the transfers to the Plaintiffs was to happen after the loan to AFC was repaid in full. She concluded by saying that even though she never received any letter from the Plaintiffs that they were unable to pay, the Plaintiff was not ready and willing to complete the transactions because if they were, the property would not have been sold by auction. That the whole land was auctioned in December for KShs. 40 Million and that is why the Plaintiff ran to court. She admitted to the contradiction in her written statement where she had stated in one paragraph that the auction was done and in another, that the auction did not materialise. DW1 also admitted that at Paragraph 91 of her written statement, she acknowledged receipt of the Transfer and LCB Application but she did not sign the documents. Towards the end of cross-examination, she testified that they had obtained consent for the amended subdivision scheme which together with the original scheme had been done in 1987.
31. On re-examination, DW1 testified that the 1st Defendant sub-divided its property into plots for sale to clear a loan with AFC, however this was overtaken by events as the entire property was sold by auction to the highest bidder for KShs. 40 Million. She stated that AFC was to refund the money over and above the loan but the refund was not coming. She further stated that her evidence is that the auction did not take place. On the issue of payment, she testified that she is not aware that any other payment was made after 16th October, 1989 and the Plaintiff had not given any testimony that he had paid either to her or AFC. Further that the 1st Plaintiff spoke to her in January, 1990 and wanted to pay the balance but she told him she did not want the money. DW1 concluded that she had refused to transfer L.R. No. 3591/23 because the Plaintiffs had not paid for it. In addition, that LCB Consent was required and they never applied for it in time with respect to L.R. No. 3591/23.

Submissions

Plaintiff's Submissions

32. The Plaintiff's submissions are dated 8th April, 2023. Setting out the background of the case, the Plaintiff's Counsel submitted that the entire property being L.R. 3591/3, which had been charged as security for a loan advanced by AFC, was on the verge of being sold by public auction. The 1st Defendant engaged the 1st Plaintiff who engaged AFC even giving a professional undertaking that the loan would be repaid and the auction was stalled. The Plaintiff convinced AFC to allow the 1st Defendant subdivide the property into smaller plots for sale to repay the loan.
33. Counsel submitted that not being able to afford legal fees and expenses relating to the subdivision and sale of the plots (consents, surveyor's fees e.t.c.), the 1st Defendant agreed to sell 12.5 acres to the 1st Defendant herein which are the suit properties herein vide the Agreement for Sale dated 5th February, 1988. They were hived off and sold to the Plaintiffs in two plots, measuring 5 acres and 7.5 acres, hence the amendment to the original subdivision scheme. The Plaintiffs made payments towards the purchase of both plots as agreed and at the time the dispute arose, they had paid KShs. 1,564,431/-.



34. Counsel clarified that Prayer 1 and 2 of the Plaint have been overtaken by events as Plot L.R. No. 3591/22 has since been transferred and registered in the name of the Plaintiffs, leaving only prayers 3, 4 and 5 relating to L.R. No. 3591/23. On this, the Plaintiffs' Advocate submitted that there was a valid sale agreement whose terms were clear that the two plots were being sold together. Under the said agreement, the Plaintiff was to pay KShs. 500,000/- to the 1st Defendant and the balance was to be paid directly to AFC. It was submitted that the Plaintiffs were making payments for both plots since the sale was inseparable, and the payments made to the 1st Defendant indicated that they were for Plots F1 and F2, the suit properties herein.
35. Plaintiff's counsel submitted that at the time of contracting, the 1st Defendant only disclosed the loan from AFC but failed to disclose that there were other loans with other institutions. The 1st Defendant was engaged in court battles with these institutions as the property had been used as security for the loans obtained from them. It was submitted that for this reason, the Plaintiff halted payments until the issues were resolved. These other creditors, the Plaintiff submitted, obtained orders to auction the property as evidenced by, among other pieces of evidence, an auction advertisement Notice at page 66 of DEXB2 and the 1st Defendant's letter dated 5th September, 1988. It is further evidenced by the prohibitory order issued in Nairobi HCCC No. 1836 of 1983, yet in 1987 the 1st Defendant did not disclose this suit to the Plaintiffs. The Plaintiff submitted that this was a material concealment, which was itself a clear breach of the agreement, and the 1st Defendant could thus not claim that the Plaintiffs were in breach.
36. Plaintiffs' counsel submitted that it is the Plaintiff who settled the decretal sum and costs of the suit in the above-mentioned suit, which is proof that the Plaintiffs were ready and willing to complete the sale. In fact, the Plaintiff resumed paying the outstanding balance once the mess was sorted out, and as late as 23rd October, 1989 the Plaintiffs were still making payment. As to the draft memorandum, counsel submitted that any document that seeks to amend an earlier agreement must be executed in the same manner as the inimmmtial agreement. The draft memorandum was not signed or sealed by the parties and thus did not affect the Agreement of 5th February, 1988. The correspondence directing the Plaintiff to transact with AFC if he wished to purchase L.R. No. 3591/23 was in clear breach of the Agreement as the Plaintiffs had already been paying for this plot.
37. Counsel submitted that the Plaintiffs were ready and willing to pay the balance as shown in the Letter dated 16th October 1989, but the 1st Defendant went behind their backs and sold the land to AFC, the proceeds thereto offsetting the loan. That the 1st Defendant should not be allowed to benefit from her misdeeds to evade fulfilling the obligations under the Agreement, that the transaction stalled due to the 1st Defendant's unwillingness to comply coupled with her misrepresentation and concealment of material facts. In his submissions, counsel denied that LCB Consent was necessary in the transaction. He submitted that the property being a leasehold for a term of 999 years, and the Nairobi City Commission had demarcated it as residential thus it was exempted from the Land Control Board. Counsel submitted that for the foregoing arguments, the Plaintiffs were entitled to the order for specific performance. On costs, counsel submitted that costs follow the event, and since the suit arose out of the 1st Defendant's breach, justice demands that the 1st Defendant should be condemned to pay costs.

1st Defendant's Submissions

38. In response, the 1st Defendant filed its submissions dated 9th August, 2023 submitting that the Plaintiffs' main obligation in the sale was payment of the purchase price, however there is no evidence that the Plaintiff paid any money to AFC as agreed. Further, that then land was subject to consent from



- the Land Control Board as pleaded at paragraph 4(ii) (i) of the Plaintiff. The issue of consent was only raised during the Plaintiff's testimony, a clear departure from their pleadings. Counsel relied on *David Sironga Ole Tukai vs Francis Arap Muge & 2 Others* (2014) eKLR where it was held that the court is itself bound to adjudicate the dispute on the specific matters raised in the pleadings of the parties.
39. Counsel submitted that on 23rd May 2006, Justice P. Kihara Kariuki (as he then was) directed that the preliminary issue of change of use of the land as be determined by viva voce evidence, however this did not happen and thus the issue has been overtaken by events. In an interesting turn, Counsel then submitted that the issue before the court was whether LCB Consent was obtained, and how lack of the said consent affected the transaction herein. Further, that Land Control Board consent in respect of L.R. No. 3591/23 was not obtained, yet it was a requirement of the Agreement. Relying on among other cases cited, one of them being the *David Sironga Case* (Supra), Counsel argued that Section 6(3) of the [Land Control Act](#) declared any transaction in land to be null and void if not sanctioned by the relevant Land Control Board and nothing could resurrect such an agreement and he urged the court to find thus.
 40. In addition, counsel submitted that the necessity of the said Consent is further shown in the 1st Plaintiff's letter dated 21st February, 1990 addressed to the Defendant, in which he was asking for the LCB Consent. He stated that the suit properties fell within the properties declared by the Nairobi Area Boundary Plan No. 499/A/13/A/REV to be agricultural land for purposes of the [Land Control Act](#), 1967. In addition, the Plaintiffs in their suit, HCCC No. 813 of 2002 against Housing Finance Corporation pleaded at paragraph 12 of their Plaintiff that the Charge in that suit was "void and unenforceable as it relates to property within a land control area within the meaning of the [Land Control Act](#)". The constant changing of positions by the Plaintiffs to suit their case is an abuse of the court process.
 41. It was submitted also that the initial Agreement dated 5th February, 1988 was amended by the parties through the draft memorandum of agreement and various correspondences relating thereto. That in particular, the response thereto dated 27th January 1989, required the Plaintiffs to sign and return a copy if they accepted the conditions, which they did, thus varying the terms of the Agreement. Counsel thus urged that the Agreement of 5th February, 1988 is not the only agreement that should be relied on. The Defendant submitted that apart from KShs. 460,000/-, there is no evidence of any other payment including the alleged decretal amount and costs of the suit.
 42. On payment of the purchase price, Counsel for the Defendant submitted that there is no evidence of any payment made after 16th October 1989, or how the alleged payment into court and other expenses related to or benefitted the 1st Defendant. As to the taxed Costs, counsel submitted that they were deposited into the judiciary account and were to be paid to the firm of Kembi & Muhia Advocates, therefore the Plaintiffs could not claim a set-off of this amount
 43. against the Defendant. Additionally, the amount due and owing is KShs. 1,354,137/- yet the Purchase Price was KShs. 1,275,000/-, meaning the Plaintiffs had paid no monies towards L.R. No. 3591/23. Counsel submitted that the current value of the property is KShs. 100 Million and it would be a travesty of justice to order for specific performance of an agreement made 35 years ago. He pointed out that L.R. No. 3591/22 had already been transferred to the Plaintiffs as at the time of filing of the suit, yet the Plaintiff still sought order in respect of that land. Consequently, counsel urged for dismissal of not only prayer (a) and (b) of the plaintiff, but the dismissal of the entire suit with costs to the 1st Defendant.



Analysis and Determination

44. Having now carefully considered the available evidence and the exhibits thereto, together with the submissions rendered, the Court has set apart the following issues for determination:
- a. Whether the failure to obtain Land Control Board Consent was fatal to the transaction
 - b. Whether the agreement for sale agreement dated 5th February, 1988 is enforceable and capable of entitling the Plaintiffs to orders of specific performance.

Whether The Failure To Obtain Land Control Board Consent Was Fatal To The Transaction

45. Under Section 6 of the [Land Control Act](#), CAP 302 Laws of Kenya, any transaction in land including the sale, transfer, lease, mortgage, exchange, partition, subdivision or other disposal of or dealing with any agricultural land situated in a land control area was void for all purposes unless the consent of the land control board for the land control area or was obtained.
46. The description of “agricultural land” is given under Section 2 of the said Act, which at Section 2(b) provides that agricultural land includes:-

“land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non- agricultural purpose;”

47. In addition, Section 8 (1) of the Act provided that:-

“(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”

48. Further Section 3 of the [Land Control Act](#) provides that:

“The Minister may, by notice in the Gazette, apply this Act to any area, if he considers it expedient to do so.”

49. It is the 1st Defendant’s contention that the Agreement was voided by the failure to obtain the requisite LCB Consent on time or at all with respect to L.R. No. 3591/23, and thus the Plaintiffs are not entitled to the order for specific performance. The Plaintiffs on the other hand claim that the LCB Consent was not a requirement in the transaction as the land was not subject to the [Land Control Act](#). The Plaintiffs rely on Legal Notice No. 31 of 10th September 1975, which purportedly excluded the area where the suit properties are situated from the provisions of the [Land Control Act](#). The boundary plan No. 499/A/71 referred to in the gazette notice was not produced by the plaintiff and without it, this court cannot conclusively find that the suit properties were not subject to [Land Control Act](#).



50. In his testimony, PW1 relied on the minutes of the Town Planning Committee dated 16th January 1979. The said minutes were produced in court and whereas the committee seems to have discussed minimum plot sizes without expressly stating the area was excluded from the jurisdiction of the Land Control Act. However, the reference to plots within Karen – Langata as residential areas points to the fact that it ceased being an agricultural zone which then excluded the requirement for LCB consent.
51. Although the Plaintiffs seemed to hold a different view on the issue of LCB in their suit against the Housing Finance Company of Kenya in HCCC No. 813 of 2002. The court also notes that the Plaintiffs did not deny that their main grievance against Housing Fiancé Corporation in HCCC 813 of 2002 was that LCB Consent was not obtained for the charge. Indeed, the court in its ruling delivered on 23rd July, 2013 in *Symon Thuo Muhia & another v Housing Finance Company of Kenya Ltd* [2015] eKLR, summarised of the Plaintiffs case therein, in the following words
- “(4) The best argument presented in support of the application is that; the charge instrument dated 5th December 1994 and registered on 7th December 1994 as IR 52533/4 over LR No 3591/22 (hereinafter “the suit property”) was null and void for all purposes owing to the failure to obtain consent from the Divisional Land Control Board to charge the land. It was argued that, therefore, the charge and/or agreement were of no legal effect. Thus, the charge registered against the title of the suit property was invalid. It was deposed that there was no application made to the Land Control Board for the charge to be created over the suit property and therefore there was no consent granted for the creation of the charge as provided for and required by law. The Applicants reinforced their said position through their submissions dated 4th March 2015 and supplementary submissions dated 19th March 2015. They cited Section 6 of the Land Control Board Act, Cap 302 of the Laws of Kenya as well as the decisions in *Onyango & Another vs Luwayi* [1986] KLR 513 and *Karuri v Gituru* [1981] KLR 247. According to the Plaintiffs, it was a mandatory requirement for the consent of the Land Control Board to be obtained prior to the registration of any charge or mortgage against the title of the suit property. The charge herein was created in contravention of the law.”
52. Despite the conflicting positions taken by the Plaintiffs on the issue of LCB Consent, there are court decisions which have held that lack of LCB Consent cannot be the sole reason to deny parties their rights under the Sale Agreement, an obligation of the 1st Defendant. Further, the 1st Defendant on its part cannot honestly claim to have come to court with clean hands. To start off, the 1st Defendant’s position on whether its entire property was eventually auctioned off is shifty at best. The property was either auctioned or it was not, there can be no two ways about it, and the 1st Defendant as the registered owner should know this. DW1 stated in her testimony on one hand stated that the entire property was sold by auction to the highest bidder at KShs. 40 Million. She then reneged on this testimony and said that the auction did not take off. It is also noteworthy that L.R 3591/22 is registered in the plaintiff’s name confirming that the whole property was not auctioned.
53. In *Kiplagat Kotut v Rose Jebor Kipngok* [2019] eKLR, the Court of Appeal at Eldoret held that:-
- “We hasten to state that the Land Control Act... was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding



unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.”

54. The Plaintiffs readily admit that there is a balance due and owing to the 1st Defendant in the sum of. KShs. 560,569/-. The Plaintiffs have indicated that they are able, ready and willing to settle the balance. DW1 testified that she never received any communication that the Plaintiffs were unable to pay. From the sum total of the testimonies, it appears that the 1st Plaintiff reached out to discuss payment of the balance in January, 1990 but at that time the 1st Defendant was no longer interested in completing the transactions as she had other buyers lined up for the property.
55. In addition, the 1st Defendant claims that a higher figure is owed and it denies the purported set off by way of legal fees as taxed in the alleged Certificates of Taxation produced by the Plaintiff. Although it was provided for in the Agreement for sale, there indeed seems to have been an understanding and DW1 confirmed in her testimony that the legal fees earned by the firm of Kembi & Muhia Advocates would be used to off-set part of the balance of the purchase price. The 1st Defendant admitted to this fact at paragraph 2(f) of its Defence. The 1st Plaintiff was a Partner at the said firm of Advocates, a fact well known to the 1st Defendant, and this court can safely presume that by virtue of his position he could make such decisions on how fees could be appropriated. In any event, there was no strict provision in the agreement as to where the purchase price should come from, the only requirement being that it was to be paid.
56. The 1st Defendant however opted to pay the taxed costs into the judiciary account even though there was no order directing it to do so. DW1 cited advice from the Law Society of Kenya and advice of her Advocates, but there is no proof of such communication. This court does not believe that the Law Society of Kenya would advise a litigant not to pay fees duly earned and taxed to any one of its members and instead direct said litigant to deposit the monies into court where there is no direct order of the court to that effect. This can only have been a well thought out ploy to avoid the 1st Defendant’s obligations under the contract, to enable the 1st Defendant claim non-payment of the purchase price. The Court in the case of *Gabriel Makokha Wamukota v Sylvester Nyongesa Donati* [1987] eKLR, saying:-

‘...an obviously unhappy Apaloo JA captured the injustice visited on purchasers in interpreting situations such as presently before us as voiding the contract of sale of land on the basis that Land Control Board consent has not been obtained. In that case, the original owner of the land, one Ismael Machio, had sold it to the respondent, then he reneged on the sale on the basis that Land Control Board consent had not been obtained. He then sold it to the appellant and, together, they applied and obtained consent, and the land was transferred to the appellant. The High Court ruled in favour of the initial purchaser, and the appellant, the subsequent purchaser in whose name the land had been registered appealed. In his decision, Apaloo JA observed as follows:

“ In a contest of title between Machio and the respondent, if the latter sought to rely on the *Land Control Act* to defeat the sale he himself made, it would seem to me perfectly legitimate to reply that it would be contrary to good conscience for him to be permitted to do that. He ought not to be allowed to use an Act of parliament as a vehicle for fraud. If that argument could properly be made against



Machio, it can, in like manner be made against the appellant, who as the judge found colluded with Machio to purchase the land.”

57. The court has seen an Application for Land Control Board Consent duly signed by the Plaintiffs as Purchasers over L.R. No. 3591/23 dated 21st February, 1990. The said Application for LCB Consent which DW1 acknowledged receipt and admits that she did not sign as vendor. This would mean then that the Plaintiffs were unable to lodge it as it was, hence the failure to obtain consent in good time. In *Aliaza v Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment) the court held that:

“Then there will be situation in which the seller, as in this case, enters into a sale agreement with a purchaser, receives the full purchase price and gives vacant possession of the land to the purchaser, yet declines to apply for Land Control Board consent. As the prescribed form for applying for Land Control Board consent, Form 1 in the Schedule to the Land Control Regulations, 1967, indicates, both the proposed seller and purchaser must sign the application for consent. If the seller decides not to apply for consent, then such consent has not been ‘refused’ within the meaning of section 9(2) of the Act, for the appropriate authority under the Act, the area Land Control Board, has not had an opportunity to consider and grant or refuse consent on the grounds set out in the Act.”

58. This court has also noted that in response to the request for further particulars, the 1st Defendant furnished particulars indicating the Discharge of Charge from AFC was dated 21st March, 1990. At paragraph 2 of the said particulars the 1st Defendant indicated the Discharge of Charge was registered on 27th February, 1990. I do not see how it is possible that an instrument can be registered nearly a month before it was allegedly made. Further, in the 1st Defendant’s letter dated 27th February, 1991 addressed to the Permanent Secretary, Lands and Settlement, the 1st Defendant indicates at paragraph 2 that the title was still charged to AFC. This letter was written a year after the Discharge of Charge was registered if the particulars furnished are to be believed. All these not only point to the dishonesty in the 1st Defendant’s dealings, but also show its efforts in frustrating the transaction with the Plaintiffs.

Whether The Agreement For Sale Agreement Dated 5th February, 1988 Is Enforceable And Capable Of Entitling The Plaintiffs To Orders Of Specific Performance.

59. The agreement for sale is between Plaintiffs is dated 5th February, 1988. The Plaintiffs seek orders of specific performance of the said agreement. The remedy of specific performance was explained in *Chirchir Arap Kuto v Nancy Cherotich Koech & another* [2022] eKLR in the following terms:-

“54. It is important to point out, that the Relief of Specific Performance is an Equitable relief and therefore same does not ordinarily issue at the Beckon of a Party. Simply put, an order for Specific performance does not issue as a matter of right, but like all other Equitable remedies, same is subject to exercise of Judicial discretion and is dependent on the existence of other obtaining circumstance, as well as other alternative Remedies. 55. On the other hand, before a court of law can venture to deal with and issue an Order of specific performance, it is important to ascertain and/or authenticate whether there existed a valid and enforceable agreement between the Parties, which is capable of being implemented and/or enforced by a court of law.”



60. In *Gharib Suleman Gharib vs Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 the Court held that:-

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

61. Although DW1 denied the existence of the Agreement, a copy thereof has been produced in court bearing the 1st Defendant’s seal and the agreement was duly stamped. There are also various correspondences between the parties herein as well a letter produced herein from the Defendant. For instance, at Page 52 of PEXB1 at the 2nd last paragraph, the 1st Defendant wrote that they “were sending copies of the Agreement between yourselves and ourselves on L.R. No. 3591/22 and 3591/23”. The 1st Defendant has in its statement of Defence admitted its existence but denies that it still subsists. The said agreement for sale is signed by both Parties thereto, being the Plaintiffs and the 1st Defendant and sealed as required under Section 3 (3) of the Law of contract Act which provided that:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it

62. The Draft memorandum of Agreement however, did not comply with this provision of section 3(3). It is only signed by Plaintiffs herein but does not bear the signatures of the 1st Defendant’s Director(s) or the company seal thereto. How the 1st Defendant can now purport to rely on a document it did not execute, is baffling to say the least. The alleged letter dated 27th January, 1989 that the 1st Defendant alleges was a counter proposal that the Plaintiffs accepted by signing and returning a copy to the 1st Defendant is in fact not signed by the Plaintiffs. It only bears the signatures of one Cordelia Maranga, a Director of the 1st Defendant and the signatory thereto is Muringo Kagure for the 1st Defendant. These two documents cannot therefore be said to have been a variation of the Agreement of 5th February, 1988. See the case of *Nelson Kivuvani...Vs...Yuda Komora & Another*, Nairobi HCCC No.956 of 1991, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”

63. The agreement for sale dated 5th February, 1988 between the parties is valid in all material respects as relates to an agreement for sale of land under the Law of Contract Act at the time. The agreement was performed in part by the Plaintiff. The Plaintiff paid a deposit and other sums leaving a balance in the sum of KShs. 560,569/-. The 1st Defendant had contended that the agreement was not enforceable because it had been voided by failure to obtain LCB Consent in respect of the transaction, and further that the Plaintiff had not paid the agreed purchase price.

64. Whereas it is true that the purchase price was not paid in full with respect to L.R. No. 3591/23, the Plaintiff efforts towards settling the balance of the purchase price and was frustrated by the 1st Defendant from doing so. The 1st Defendant has in all these years held on to the deposit and further



payments made in respect of L.R. No. 3591/22 and 3591/23 that were paid. While the Plaintiffs kept on pursuing the completion of the agreement, including filing this suit for specific performance once it became clear that the 1st Defendant intended to avoid the contract. Even after the 1st Defendant obtained and registered a Discharge of Charge over its property and it was in a position to complete the agreement, it still refuses to honour its obligations to the Plaintiffs.

65. The 1st Defendant further argued that since the agreement dated 5th February, 1988 the market value of the property has gone up and it would be a miscarriage of justice to allow a transfer on the amount as agreed 35 years ago. The 1st Defendant entered the agreement on the said value that it felt was sufficient at the time. The Plaintiffs had a legitimate expectation that the property would at the completion of the transaction be registered as owners thereto. That did not happen, and it is unfortunate that it has taken 35 years for this matter to be resolved.
66. However, the passage of time is not sufficient ground to deny the Plaintiffs their rightful claim, and/or vary the terms of an agreement that the parties entered into voluntarily and without notice of coercion or undue influence. The delay in resolving this matter is not the mistake of the plaintiffs solely but rather the court process merged with the failure of both parties to amicably resolve this matter.
67. The remedy of specific performance will be issued where the claimant shows that they have fulfilled all their obligations under the contract or they are ready and willing to do so. It is clear that save for the frustrations by the 1st Defendant, the Plaintiffs have stated that they are ready and willing to pay the balance of the Purchase price with respect to L.R. No. 3591/23, and their conduct proves as much. The discussion made earlier on the payment of the balance of the purchase price through the legal fees earned by the 1st Plaintiff's firm also go a long way in supporting the Plaintiffs' case. In addition, while being re-examined, DW1 testified that the 1st Plaintiff spoke to her in January, 1990 and wanted to pay the balance but she told him she did not want the money.
68. Extracts from Halsbury's laws of England 3rd edition Vol. 36 paragraph 444 have the following observation:-

“A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed or been ready and willing to perform all the terms which ought to have been performed or been ready and willing to perform all the terms which ought to have been performed by him; and also that he is ready and willing to perform all future obligations and or the contract.”

69. It was similarly held in *Amina Abdul Kadir Hawa v Rabinder Nath Anand & another* [2012] eKLR that:

“The afore set out principles have been construed and applied by case law assessed herein namely “*union Eagle limited versus Golden Achievement Limited*” (Supra) and “*Nabro Property Limited Versus Sky Structures Limited and 2 others* (upra). There is agreement that in order for the relief of specific performance to be availed to the claimant the following guiding principles or parameters should be met or demonstrated to exist:-

- a. The remedy is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it (the court) it is equitable in the interests of both parties to grant the reliefs.
- b. It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met



and favour the granting of the relief of specific performance the court can withhold it and award damage instead.

- c. It is a discretionary relief which discretion should not be exercised arbitrarily but on the basis of applicable principles. The guiding principles applicable to the courts exercise of its discretion which is trite and which this court has judicial notice of is that the discretion has to be exercised judiciously with a reason.
- d. Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may none the less be with held in circumstances where it is likely to course hardship to the defendant even if circumstance giving rise to the hardship to be suffered by the defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract.
- e. The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfil the same.”

70. I am further guided by the Court of Appeal in Willy Kimutai Kitilit v Michael Kibet [2018] eKLR, where it was held that:-

“As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.”

71. Since costs follow the event, and the Plaintiffs have discharged their burden to the required standard of a balance of probabilities, there is no reason to deny them costs of the suit.

72. For the above reasons the Court enters Judgment for the Plaintiff against the Defendant in the following terms as prayed in the plaint.

- a. An order of specific performance of the Agreement dated 5th February, 1988 which directs the 1st Defendant to provide the original title document and a duly executed transfer in favour of the Plaintiffs with respect to L.R. 3591/23 within 30 days of this judgement.
- b. In default of the 1st Defendant (Dellian – Langata Ltd) not executing the requisite documents to facilitate the registration of the plaintiff as owner of 3591/23 within the timelines stated, the Land Registrar shall dispense with the production of the original title document for purposes of registration while the Deputy Registrar, Nairobi Milimani ELC shall execute the requisite transfer documents to facilitate the registration in favour of the plaintiff.
- c. The Plaintiff shall in exchange of executed transfer documents (whether signed by the Defendant itself and or by the deputy Registrar) release to the 1st Defendant the sum of Kshs 560, 569= to the 1st Defendants by way of cash or bankers cheque.
- d. The Plaintiff is also granted vacant possession of the suit properties.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER, 2023

A. OMOLLO



JUDGE

