



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. E131 OF 2020

BILITA WAMBUI KIARIE.....PLAINTIFF

-VERSUS-

EMBAKASI RANCHING COMPANY LTD.....DEFENDANT

JUDGMENT:

INTRODUCTION:

1. Vide Plaintiff dated the 15th September 2020 the Plaintiff herein has sought for the following Reliefs:

a. An order of Specific Performance to compel the Defendant to transfer and issue the Plaintiff with Title and Ownership Documents for Plots Numbers 150/8696 and 150/8697 situated in property L.R 10904/2.

b. An order for Damages for loss of bargain and use;

c. Costs of and incidental to the suit and interests at court rate from the date of filling suit.

2. Though the Plaintiff filed and/or lodged the subject suit together with an application for temporary injunction and thereafter caused the pleading to be served upon the Defendant, the Plaintiff nevertheless did not extract the summons to enter appearance either in line with Order 5 Rule 1 of the Civil Procedure Rules, 2010, or at all.

3. Based on the non-extraction and service of the summons to enter appearance, the Defendant herein did not enter appearance or at all, but instead the Defendant instructed a firm of advocate who proceeded to and filed a Notice of Appointment of advocate on the 23rd December 2020.

4. On the other hand, the Defendant herein neither filed any Statement of Defense nor witness statements, in term od the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010 or at all. Suffice it to state, that the Defendant filed no pleadings at all in respect of the subject matter.

DIRECTIONS BY THE COURT:

5. After the hearing and disposal of the Application dated the 15th September 2020, which essentially sought for orders of temporary injunction, to restrain the Defendant from alienating and/or disposing of the property, pending the hearing and determination of the subject matter, the honourable court set down the subject matter for directions on the 28th April 2021.

6. On the 28th April 2021, the matter was mentioned before the Deputy Registrar and the advocates of the Parties, including one Mr. Muriuki for the Defendant, appeared and addressed the Deputy Registrar as hereunder;

“ We are yet to comply. I pray for thirty days to comply. We had a challenge with compiling documents”

7. Premised on the address by counsel for the Defendant, the Deputy Registrar of this court proceeded to and directed that the subject matter shall be mentioned on the 11th July 2021 and the Defendant was directed to comply with the Pre- Trial Directions within 30 days from the date thereof.

8. On the 1st July 2021, the matter was again mentioned before the Deputy registrar and yet again the advocate for the both Parties appeared and this time the defendant was represented by Ms Kemunto advocate, who similarly addressed the court and pleaded with the Deputy registrar to extend timeline within which to file the requisite documents. For clarity, the Deputy registrar conceded the request and extended timeline for a further 30 days.

9. After extending the timeline for the filing and exchange of the trial bundle and incidental documents for a further 30 days for and/or on behalf of the Defendant, the Deputy Registrar set down the matter for mention on the 18th October 2021.

10. Come the 18th October 2021, the advocates for the Parties appeared before the court and this time the Defendant was represented by Ms Kwoba who again mounted an application for extension of time within which to file and serve the Trial bundle, as well as the incidental Documents.

11. Being aware of the orders that had been hitherto granted by the Deputy registrar to and in favor of the Defendant herein, the court proceeded to and issued further directions in the following terms;

a. The Defendant be and is hereby granted 30 days to file and serve the trial bundle.

b. The trial bundle shall contain all the Documents for trial and the witness statement shall be cross- referenced to the relevant documents.

c. In default to file and serve the trial bundle, the Defendant shall be deemed to have no documents to rely on and the matter shall proceed on that basis.

d. The Parties to avail to court hard copies of documents filed.

e. Hearing on 25th January 2022.

12. The foregoing directions would become relevant as I proceed to craft the Judgment herein, more particularly because one of the issue that the Defendant has now raised and which is germane for determination is that the Plaintiff failed to extract and serve summons to enter appearance and as a result of such failure, the suit has since abated.

EVIDENCE BY THE PARTIES:

PLAINTIFF'S EVIDENCE:

13. During the hearing of the subject matter, the Plaintiff herein testified that same entered into an agreement with the Defendant company on the 28th November 1992, whereby the Defendant herein covenanted to sell and indeed sold to and in her favor two plots, namely, **Plots Numbers 150/8696 and 150/8697**, which were to be excised from **L.R 10904/2**, belonging to and registered in the name of the Defendant.

14. It was the Plaintiff's further testimony that upon the entry into and execution of the agreement, same paid to and in favor of the Defendant the sum of Kes.500/= per share on account of survey fee and kes.3, 500/= per share on account of civil engineering fee, which payments were meant to facilitate the processing and ultimate issuance of the ultimate title documents.

15. It was the Plaintiff's further testimony, that other than the aforesaid payments, same paid a further sum of kes.12, 000/= Only, to the Defendant and the said monies were paid on the 13th May 1993, for purposes of members registration and survey fee for bonus plot.

16. Following the payments made by and/or on behalf of the Plaintiff, the Plaintiff further testified that the Defendant herein proceeded to and issued in favor of herself a letter of allotment dated 28th November 1982, whereby the Defendant signalled that the Plaintiff was indeed allocated **Plots Numbers 1019 and 1020**, respectively.

17. On the other hand, the Plaintiff further testified that same made further payments in favor of the Defendant and the payment have since been received by the Defendant and the last payments being received on the 30th October 2019 by the Defendant and in respect of which, the Defendant confirmed that same would be conducting a site visit in respect of the Plaintiff's plots.

18. Other than the foregoing, the Plaintiff further testified that the Defendant herein has since prepared a list of members to be issued with leases for Embakasi ranching Ltd and particularly for Block 105 and that the Plaintiff is shown as being entitled to be registered as the proprietor and/or owner of the suit properties herein, namely **Plots Numbers 150/8696 and 150/8697**.

19. Other than the foregoing, the Plaintiff relied on and adopted the documents contained at the foot of the list dated the 15th September 2020. For clarity, the said Documents were thereafter produced and marked as exhibit P1 to P9 respectively.

20. When time came for cross examination, counsel Ms Kwoba, who appeared for the Defendant stated that same did not have any questions in cross examination. Consequently, the Plaintiff thereafter proceeded to and closed her case.

EVIDENCE BY THE DEFENDANT:

21. The Defendant herein did not file any statement of Defense and/or any other pleadings in the subject matter. For clarity, the only document that was filed by the Defendant was a Notice of appointment of Advocate dated the 23rd December 2020.

22. Premised on the fact that the Defendant neither entered appearance nor filed any pleading, same was not entitled to call and/or lead any evidence and true to it, no such evidence was called and/or led on behalf of the Defendant.

SUBMISSIONS:

23. At the close of the Plaintiff's case, the Parties herein sought for latitude to file and exchange written submissions and directions were given towards the filing and exchange of the written submissions.

24. Suffice it to point out, that the Plaintiff filed her written submissions on the 4th of March 2022, whereas the Defendant filed her submissions on the 23rd February 2022. For clarity, the submissions by the Defendant preceded the ones by the Plaintiff.

25. Given the nature of the issues raised by the Defendant, it is perhaps appropriate to start with the submissions that were filed by the Defendant. First and foremost, the Defendant contended that the Plaintiff herein neither extracted nor served the summons to enter appearance.

26. Based on the failure to extract and serve the summon to enter appearance, the Defendant has thus contended that the Plaintiff's suit has since abated and thus same ceases to exist in the eyes of the law.

27. In support of the foregoing submissions, the Defendant has relied on various decisions including the case *of Terry Wanjiku Kariuki v Equity Bank Ltd & Another (20120 eKLR, Mobile Kitale Service Station v Mobil Oil Kenya Ltd & Another (2004) eKLR, Equitorial Commercial Bank Ltd v Mohan Sons (K) Ltd (2012) eKLR and Brenda Karanja v Mwiki Dominic (2021) eKLR.*

28. Secondly, the Defendant has also contended that the Plaintiff is not entitled to the equitable relief of specific performance, either as pleaded or at all given that the Plaintiff has not proved and/ or established that L.R No 10904/2 belongs to and is registered in the name of the Defendant herein, to warrant an order being made against the Defendant.

29. Based on the foregoing, the Defendant has submitted that the burden of proof rested on the Plaintiff and that however, the Plaintiff has since failed to discharge the burden of proof. In this regard, the Defendant has therefore sought that the Plaintiff's suit be dismissed.

30. On her part, the Plaintiff has conceded that indeed upon the filling of the subject suit, same concentrated on the Interlocutory Application, which was subsequently heard and disposed of vide the ruling of the court made on the 1st March 2021. In this regard, the extraction and service of the summons to enter appearance escaped her attention and same was thus inadvertent.

31. Secondly, the Plaintiff has submitted that even though the Defendant was never served with summons to enter appearance, the Defendant was served with the rest of the court pleadings, including the Plaint, the interlocutory application, the mention notices as well as the order of the court arising from the interlocutory application, and that based on the service on the various court processes, the Defendant became aware of and conversant with the existence of the subject suit.

32. Thirdly, the Plaintiff has further submitted that premised on the service of various court processes and based on the knowledge of the existence of the subject suit, the Defendant proceeded to and indeed filed a Notice of Appointment of advocate, which is testament to the fact that the Defendant was alive to the existence of the suit.

33. Fourthly, the Plaintiff has also submitted that other than the filing of a Notice of appointment and being aware of the existence of the suit, the Defendant herein participated in the proceedings herein, without any reservation or any protest. In this regard, it is the Plaintiff's further submissions that the Defendant cannot now be heard to challenge the jurisdiction of the court and particularly the validity of the suit.

34. If I understand the Plaintiff's submissions well, though the Plaintiff does not seem to be explicit, what the Plaintiff seems to be stating is that the Defendant having participated in the proceedings without reservation or any protest, the Defendant is deemed to have waived any irregularity in the service or otherwise, of the summons to enter appearance. Simply put, the Plaintiff is invoking the Doctrine of waiver.

35. Finally, the Plaintiff has submitted that having been issued with a Provisional Letter of allotment, same shows that the Plaintiff was the allottee of plot numbers 1019 and 1020 respectively, located within L.R No. 10904/2 belonging to the Defendant, in terms of exhibit P1.

36. On the other hand, the Plaintiff also submitted that having complied with the terms of the allotment, including payments of the requisite fees and charges, same (read Plaintiff), is therefore entitled to an order for Specific Performance.

37. Based on the foregoing, the Plaintiff contends that same has established and/or proved his case on a balance of probabilities and that same is entitled to Judgment as against the Defendant.

ISSUES FOR DETERMINATION:

38. Having reviewed the Plaint dated the 15th September 2020 together with the witness statement on behalf of the Plaintiff, as well as the Bundle of documents and having also taken into account the evidence by the Plaintiff and having similarly considered the submissions filed on behalf of the Parties herein, the following issues do arise and are germane for determination;

- a. Whether the failure to extract and serve the summons to enter appearance by and/or on behalf of the Plaintiff herein has occasioned the abatement of the subject suit.
- b. Whether the unreserved participation and conduct of the Defendant during and in the course of the proceedings herein would amount to waiver and therefore, Whether the Doctrine of Waiver applies.
- c. Whether the Plaintiff is entitled to the remedy of Specific Performance.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the failure to extract and serve the summons to enter appearance by and/or on behalf of the Plaintiff herein has occasioned the abatement of the subject suit.

39. The Plaintiff's counsel admitted and/or conceded that same did not take out and/or extract the summons to enter appearance and that upon the filing the subject suit, same concentrated on the issues pertaining to and/or concerning the interlocutory application, which was ultimately disposed of vide a ruling rendered on the 1st March 2021.

40. Nevertheless, the Plaintiff's counsel submitted that despite not having extracted and served the summons to enter appearance in the subject matter, the Defendant herein was served with various court processes, including, the interlocutory application, the mention notices as well as the order arising from the interlocutory application and that based on the court processes that were served on same, the Defendant therefore became aware and/or knowledgeable of the existence of the subject suit.

41. On behalf of the Plaintiff, it has therefore been submitted that the failure to extract and serve the summons to enter appearance in line with the provision Order 5 Rule 1 of the Civil Procedure Rules, 2010, does not therefore invalidate the suit.

42. On the other hand, the Defendant has made a strong case to the extent that the provisions of Order 5 Rule 1 of the Civil Procedure Rules, 2010, are couched in mandatory terms and therefore a failure to extract, collect and or serve summons to enter appearance within the prescribed timelines, is fatal and invalidates a suit.

43. In support of the foregoing position, the Defendant herein has placed reliance in the case of **Mobile Kitale Service Station v Mobil Oil Kenya Ltd & Another (2004) eKLR**, where the court stated as hereunder

'If there is no summons which was issued in the first instance then there is nothing capable of being extended. I agree with Mr Ohaga that the failure of the plaintiff to issue and give summons is in clear contravention of the order of injunction granted to the plaintiff. And it would be impossible for the defendant to respond to the suit. We ought to respect the rules of engagement for they are promulgated to achieve justice to the rival parties:

Summons is a judicial document calling a party to submit to the jurisdiction of the Court and if the party is not given that opportunity how else would he submit to the jurisdiction of the Court. In my understanding, order 4 and 5 of the Civil Procedure Rules are designed to enable the parties to follow certain procedures. The word used is "shall" which makes it mandatory to comply with the direction. And if there is no explanation as to why the summons were not taken out then the Court has no discretion but a judicial duty to ensure the Rules of Procedure are followed and failure to observe would be fatal.'

44. Other than the foregoing decision, the Defendant has also relied in the decision in the case of **Lee Mwathi Kimani v National Social Security Fund & another [2014] eKLR**, where the court held as hereunder;

'Under order 5(1) sub rules 3, 5 and 6 reproduced above it is evident that the plaintiff has an obligation to ensure the summons are prepared and signed by the court to facilitate service on the defendant. In the present case it is apparent the plaintiff did not follow up and/or collect the summons as envisaged under sub rule 6 of Rule 1 of Order 5. There is no indication that the plaintiff has applied for a re issue and/or extension of the original summons.

It is my view that where no summons have been issued in accordance with order 5 of the Civil Procedure rules there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are elaborate and comprehensive and we couched in mandatory terms and where for some reason a plaintiff has experienced difficulties in service of the summons Order 5 Rule 2 provides a reprieve in that a plaintiff can apply for the validity of the summons to be extended. Service of summons in my view is a vital step in initiating the litigation and thus until a summons is properly served the Defendant has no valid invitation to defend the suit.'

45. Nevertheless, despite the foregoing decisions, I am also aware of the decision of the Court of Appeal in the case of **Equatorial Commercial Bank Ltd v Mohan Sons (K) Ltd (2012) eKLR**, where the Court of Appeal, citing other Court of Appeal decisions including **Nanji Bhai Prabhudas & Co Ltd v Standard Bank Ltd (1968) E.A (K)** stated as hereunder;

"Considering the facts and circumstances before us can summons be treated as void though because it has not complied strictly with the statutory provisions? Can a litigant after having fully participated in the legal process on service of such summons, resile on all the actions taken by him openly and voluntarily? We may add that there is no allegation that such actions have caused any prejudice to the respondent either in law or in equity. We shall emphatically decline to find so. We shall find that the

respondent, having openly and unconditionally followed the process in the manner in which it did, specially prompting the appellant to believe in the actions taken by both parties.”

... We find therefore, that the respondent by its overt acts waived its right to challenge the validity or otherwise of the summons issued in the matter. The following passages from the Halsbury's Laws of England, Vol. 16(2) at Paragraph 907 on page 390 stipulate the meaning of 'waiver' and we reproduce it:-

“The primary meaning has been said to be 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.”

“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

Lastly we find that the defect in the summons was an irregularity and that the same was waived by the respondent.”

46. Other than the foregoing decision, I have also come across the decision in the case of **Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 Others 2016 eKLR**, where the court similarly held as hereunder;

‘I am fortified by the decision in Equatorial Commercial Bank Ltd V Mohan Sons (K) Ltd [2012] e KLR where the Court of Appeal, citing other Court of Appeal decisions including Nanjibhai Prabhudas & Company Ltd V Standard Bank Ltd [1968] EA (K) 670 stated:

“.....we definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law.”

41. In this case, that aim of summons to enter appearance was achieved since there was an unconditional appearance and participation in the proceedings which constituted voluntary and complete waiver of any defect that could have affected the summons.’

47. In respect of the subject matter herein, I must observe that the Defendant herein even though same was not served with summons to enter appearance, same willingly submitted to the jurisdiction of the court and voluntarily participated in the proceedings of the court and in respect of which same sought for various extension of time within which to file pleadings and the requisite trial bundles, resting with the appearance before the court on the 18th October 2021.

48. In my humble view and given the number of appearances, coupled with the level of participation in the proceedings, which were unreserved, it would be unjust and inequitable for the Defendant herein to now implead the provisions of Order 5 Rule 1 of the Civil Procedure Rules, 2010, and seek to have the suit herein terminated on the basis of abatement.

49. Further, I must state that equity and social justice, behooves me and my conscience to look at the wider Interest of justice and to ensure that a Party does not approbate and reprobate at the same time. For to do so, would amount to the abuse of the due process of the court. Suffice it to say, that Article 10 (2) of the Constitution, 2010, has elevated Equity to a Constitutional threshold.

50. Based on the foregoing and coupled with the purpose, object and scope of summons to enter appearance and given that the Defendant herein was indeed made aware of the existence of the subject suit and thereafter same variously participated therein, I find and hold that the suit herein has remained alive by virtue of the actions and participation of the Defendant.

ISSUE NUMBER 2

Whether the unreserved participation and conduct of the Defendant during and in the course of the proceedings herein would amount to waiver and therefore Whether, the Doctrine of waiver applies.

51. It is worthy to recall that at the onset of this judgment, I reproduced in extenso the various directions that were previously given by the court and while doing so, I pointed out that the basis of reproducing the directions would become apparent herein after.

52. Perhaps, it is now opportune to state that the reasons why the directions were extensively reproduced and quoted was because the court was keen to show the extent to which the Defendant unreservedly participated in the proceedings and variously sought for indulgence.

53. Suffice it to note, that the manner in which the Defendant conducted herself and participated in the proceedings is one that conforms with a conduct which was not only voluntary, but bespoke of acquiescence and submission to the jurisdiction of the court.

54. In my humble view, the Defendant herein had all the right to file and/or take out a motion to strike out the subject suit and/or otherwise raise a preliminary objection, to vindicate her right, premised and/or anchored on non-service of summons to enter appearance.

55. However, the Defendant did not chose to do so and instead unreservedly participated in the proceedings, up to and including the conclusion thereof. In this regard, the question that arises is whether the conduct of the Defendant herein fits within the four corners of the Doctrine of waiver.

56. In my humble view, the Defendant had a right to protect and/or vindicate her interest by taking the necessary action, but same chose not to do so. To the contrary, same adopted a conduct, which reflected and/or represented forfeiture, abandonment and/or otherwise waiver of the rights.

57. In the premises, it is my finding and holding that the Doctrine of waiver is relevant and applicable in the circumstance of the subject matter, taking into account the level of participation of the Defendant in the subject matter and the unreservedly participation during the proceedings, which ostensibly underscore the application of the Doctrine of waiver.

58. In support of the foregoing legal position, I adopt and rely in the holding in the case of **748 Air services Ltd v Theuri Munyi (2017) eKLR**, where the Court of Appeal cited various decisions including the case of **Banning vs Wright (1972) 2 All ER 987**, at page 998; where the House of Lords stated thus:-

"The primary meaning of the word waiver in legal parlance 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. A person who is entitled to a stipulation 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. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct".

Closer home in the case of Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR the Court stated thus:

"A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right."

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, 4th 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?."

59. Based on the foregoing, I come to the conclusion that the Defendant herein is bound by the Doctrine of waiver, abandonment, estoppel and acquiescence and consequently, same cannot now be heard to raise the issue of non-extraction of summons to enter appearance as a basis to non-suit the Plaintiff.

ISSUE NUMBER 3:

Whether the Plaintiff is entitled to the remedy of Specific Performance.

60. It is worthy to point out that the Plaintiff's evidence was neither challenged nor controverted in any manner whatsoever and howsoever. For clarity, no statement of defense was ever filed to contradict the Plaintiffs claim.

61. On the other hand, after the Plaintiff had testified before the court, the Defendant had the opportunity to cross examine the Plaintiff and thereby contradict and/or impeach the Plaintiff's case. However, despite opportunity being afforded to the Defendant to do so, the Defendant herein chose not to ask any questions.

62. Nevertheless, the Plaintiff herein tendered evidence and established before the court that indeed the Defendant granted unto her a provisional letter of allotment, which showed that same was allocated two Plots, namely plot number 1019 and 1020, which were to be exercised from L.R No. 10904/2, belonging to and registered in the name of the Defendants. See exhibit P1.

63. Subsequently, the Plaintiff herein made various payment to and in favor of the Defendant and the various payments were received, acknowledged and receipted. For clarity, the receipts which were issued by the Defendant herein were produced and tendered in evidence.

64. Other than the foregoing, the Plaintiff also adduced in evidence a schedule containing the names of the persons who are supposed to be issued with title and/or leases in respect of specific parcels of land and the said schedule authenticated that the Plaintiff is entitled to be issued with titles over and in respect of the suit properties herein, namely, Plot numbers 8696 and 8697, situate within L.R No. 10904/2.

65. Suffice it to note, that the Defendant herein did not challenge the totality of the documents which were produced and placed before the court by the Plaintiff herein. Consequently, the Defendant cannot be heard to challenge the probative value of the said documents by way of submissions.

66. In a nutshell, it is my finding and holding that the Plaintiff has placed before the court sufficient material to warrant the grant of the equitable remedy of Specific performance, given that same has already performed all that was required of her.

67. In support of the foregoing proposition, it is appropriate to adopt and rely on the holding in the case of **GURDEV SINGH BIRDI & NARINDER SINGH GHATORA as Trustees of RAMGHARIA INSTITUTE OF MOMBASA v ABUBAKAR MADHBUTI [1997] eKLR**, where the honourable Court of Appeal observed as hereunder;

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury’s Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

“must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim.”

FINAL DISPOSITION:

68. Having addressed and/or dealt with the issues enumerated hereinbefore, it is now convenient and appropriate to render the dispositive order.

69. Consequently and in the premises, I proceed to enter judgment in favor of the Plaintiff in terms of prayer 1 of the Plaint dated 15th September 2020.

70. For clarity, an order of Specific performance be and is hereby issued and the Defendant is hereby compelled to execute all the transfer instruments and facilitate the transfer and registration of the Suit Properties to and in favor of the Plaintiff.

71. Secondly, the execution of the transfer instrument, details in terms of the preceding paragraph, shall be carried out and/or undertaken within thirty (30) days from the date hereof and in default, the transfer instrument and the incidental instruments necessary to effect the transfer and registration of the suit properties in the Name of the Plaintiff, shall be executed by the Deputy Registrar of the court.

72. Lastly, the Plaintiff be and is hereby awarded the costs of the suit.

73. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF APRIL 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Murioki Gitonga for the Defendant

Mr. Nyachio H/B for Mr. Muchemi for the Plaintiff