



Customer Self Service and General Contractors Company Limited v Nkatha (Environment and Land Case Civil Suit 17 of 2019) [2022] KEELC 3549 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE CIVIL SUIT 17 OF 2019**

CK NZILI, J

MAY 11, 2022

BETWEEN

CUSTOMER SELF SERVICE AND GENERAL CONTRACTORS COMPANY LIMITED PLAINTIFF

AND

EVANGELINE NKATHA ALIAS BAJEREN NKATHA DEFENDANT

JUDGMENT

A. Pleadings

1. By an amended plaint dated 17.10.2018 the plaintiff sued the defendant for breach of a sale agreement dated 31.3.2016 over L.R No. Nkuene/Uruku/762 measuring seven acres at Kshs.13,400,000/= which title was charged at the time with with Yetu Sacco Ltd. The plaintiff averred it paid Kshs.5,500,000 directly to Yetu Sacco Limited so as to discharge the title from liability and eventually cleared the entire purchase price as agreed.
2. The plaintiff averred it took over 21474 tea bushes as part of the vacant possession on 9.9.2016 and undertook various developments thereon.
3. Further the plaintiff averred that in the cour of processing the title, it discovered that the acreage to the land in the sale agreement as offered for sale was only 6.8 acres as opposed to 7.4 acres which he had paid for.
4. Similarly the plaintiff averred the defendant intentionally delayed to obtain the land control board consent and instead allegedly started offering for sale and retransfer of the suit land to third parties.
5. As a consequence the plaintiff averred that though in possession of the suit land, the actions by the defendant were fraudulent, was aimed at defeating its claim and in breach of trust of the overriding



interest following its occupation developments thereon possession of the suit premises which had been done with the full consent, knowledge and approval of the defendant.

6. The plaintiff sought for prayers for the declaration of trust, specific performance, and cancellation of the defendant as the registered owner and replacement of her name with the plaintiff in the alternative a refund with interests.
7. By a defence dated 28.11.2018, the defendant denied the alleged sale and payment of the purchase price or any alleged developments held that the doctrine of caveat emptor applied in the botched transaction; insisted it was the plaintiff who had frustrated the agreement by raising baseless claims on the land size; denied any alleged fraud; expressed her willingness and readiness to refund the monies paid by the plaintiff; averred their relationship was purely contractual in nature hence denied any alleged existence of trust; insisted the sale agreement was unenforceable for lack of a land control board consent; stated the alleged loss or damage could not apply since the plaintiff was continually benefitting from the tea payment and annual bonus for over 3 years and lastly averred it was the plaintiff who had frustrated the sale agreement by unfairly seeking for a refund or part of the consideration on baseless allegations that the land was less in acreage than what it had bought.
8. In a reply to defence dated 21.1.2019 the plaintiff reiterated the contents of the plaint, particulars of fraud, breach of trust, immense loss and damage out of the breach of contract.

B. Pre-trial Conference

9. The plaint was accompanied by a list of witnesses, witness statements a list of documents and copies thereof dated 5.4.2018. Further the plaintiff filed two paginated bundle of documents dated 28.1.2020 and 21.5.2021 respectively containing further witness statements, further list of documents, certificate of incorporation, green card for the suit land, Yetu Sacco letter, discharge of charge, transfer form for the factory number, surveyors report, chiefs letter, contract agreement, farm audit report and bank letters.
10. On the other hand the defendant filed a paginated bundle of documents dated 30.3.2021 containing witnesses statements, list of documents among them the sale agreement dated 31.3.2016, copy of the title deed photos, valuation report, demand letters and response thereof.

C. Testimony

11. PW 1 adopted his witness statement filed on 9.5.2018 and another further statement dated 21.5.2021. He stated he was the managing director of the plaintiff company incorporated on 7.3.2008, as per the certificate of incorporation thereof which had bought seven acres of L.R No. Nkuene/Uruku/762 from the defendant at Yetu Sacco Limited at Kshs.13,400,000/=.
12. He stated they paid a sum of Kshs.5.5m directly to account no. 01120444201 cooperative Bank Limited in the name of Yetu Sacco Limited and another Kshs.550,000/= following which the title was released to the plaintiff and the title discharged from liability by the Sacco.
13. After obtaining the title deed, PW 1 said that it took vacant possession and embarked on processing the transfers, changed the farm name, brought on board land surveyors who established that the suit land was actually 6.8 acres as opposed to 7.4 acres that the plaintiff had paid for. The defendant however requested for time to rectify the anomaly before the transfer could be effected. The plaintiff averred the defendant unreasonably delayed processing the title deed but nevertheless they continued developing the suit land. After wards the plaintiff sent a demand letter dated 8.11.2018 to the defendant on account of default of paragraph B2 of the sale agreement. In support of its suit PW 1 produced the



following exhibits; a copy of the certificate of registration (P. Exh 1(copy of sale agreement dated 31.3.2021) P. Exh 2(copy of the title) P. Exh 3, (photos) P. Exh 4, (valuation report) P. Exh 5, (demand letter P). Exh. 6, (reply to demand letter) P. Exh 7, (search certificate) P. Exh 8, (green card for the suit and dated 31.3.2016 and 5.7.2016) P. Exh 10, (discharge of charge dated 11.8.2016) P. Exh 11, (transfer form) P. Exh 12, (surveyors report) P. Exh 13, (chiefs letter dated 16.12.2016) P. Exh 14, (contract agreement dated 5.8.2016 8.8.2016 & 5.9.2016) P. Exh. 15, (bank letters dated 26.2.2021, 8.3.2021 and 10.3.2021 P. Exh 16 and (the farm audited report for 31.3.2016 to 28.2.2021) as P. Exh 17. The plaintiff asked the court to grant prayers sought in the amended plaint for breach of trust in the alternative a refund together with damages.

14. In cross examination the PW 1 admitted he had not filed a board resolution as authority to institute the suit since those were internal issues of the plaintiff.
15. As regards the developments on the suit land PW 1 stated he had not brought any accompanying documents to show that he had bought the project as confirmed by the contents at pages 12, 14, 22, 29, 34, 36, 37, 56, 22-108 of both the 1st and the 2nd bundle of documents respectively.
16. On the issue of the size of the suit land, PW 1 said the search certificate reflected more acreage than what was on the ground and the sale agreement. Further PW 1 said the suit land contained old buildings, tea bushes and was sold to the plaintiff together with all the developments thereon.
17. PW 1 testified he had undertaken various developments after he took over vacant possession as per the bill of quantities and contract agreements contained in pages 12,14,22, 34, 36, 37, 56 108 of the paginated bundle as exhibits. He denied that the defendant had alleged a refund as allegedly offered in the statement of defence, which would adequately compensate it for the loss and damage incurred, given he had the company sold its land in Kajiado to purchase the suit land for the purposes of investments.
18. PW 1 testified that he executed the sale agreement dated 31.3.2016 in his capacity as a director of the plaintiff. Likewise PW 1 stated that at the execution of the sale agreement, the defendant never insisted on a board resolution by the plaintiff.
19. PW further testified that the plaintiff was always willing to be transferred the land but the defendant had insisted her land could have been spilling or overlapping over her neighbour's land since there was a difference of 0.4 acres. PW 1 blamed the defendant for breaching with clause C of the sale agreement.
20. PW 2 adopted his witness statements filed on 9.5.2018 and dated 21.5.2021 respectively in which he confirmed he was a witness to the sale agreement; attended the visit by the land surveyor when it was established that the suit land was more on paper than on the ground. PW 2 testified that the plaintiff had undertaken immense developments on the suit land as per the documents produced as exhibits by PW 1.
21. PW 3 adopted his witness statement dated 21.5.2021 as a neighbor of the plaintiff, he said there were various developments and projects on the suit land some of which he personally undertook such as clearing the bushes, putting up the structures, assisting the contractor and overseeing water installation works.
22. Further PW 3 admitted that he would occasionally run some errands on behalf of the plaintiff. Additionally PW 3 said he was present when the surveyors came to establish the actual suit land size.
23. The defendant adopted his witness statement dated 30.3.2021 and stated her land was initially 7.5 acres and she had sold 7.4 acres of the plaintiff. She produced her exhibits in the list of documents dated 19.4.2021 namely; the sale agreements, copy of (Dexh (1) and the Dexh (2) title, photos, valuation



report, d Exhibit (4) demand letter and dated 14.9.2017 from the plaintiff D. Exh (5) and her reply to the demand letter dated 18.1.2018 D. Exh (6) all marked as D. Exhs 1-6 respectively. The defendant testified that she established her land had been encroached upon by her neighbours on all sides hence the reason it was less than 6.8 acres. She said she followed up to get the entire acreage through the chief, wrote a letter to the land office but the plaintiff allegedly became impatient and started harassing her by demanding for a refund.

24. The defendant told the court she asked the plaintiff to get a land surveyor to establish the actual suit land status. According to her, if she had transferred the land to the plaintiff as it was it would have been impossible to recover the extra acre allegedly encroached upon by neighbours.
25. The defendant testified that she had sold the land together with the structures on it including houses, water system and tea bushes. Given the harassment of her family by the plaintiff, the defendant said she was only ready and willing to refund the purchase price without any interest so that the suit land could revert back to her. In her view the plaintiff was not entitled to any interest since it had been collecting all the tea bonus and interest for the last 3 years.
26. In cross examination, DW 1 confirmed appending her signature, supplying personal details and documents at the time the sale agreement was executed between her and PW 1 as the director of the plaintiff. She also confirmed she received the entire purchase price within a period of eight months. Regarding the refund DW 1 stated she had not formally written to the plaintiff on the same including filing a counterclaim to recover the suit land.
27. In her view, after going to the suit land with the land surveyor she collected D. Exhibit 9. DW 1 admitted that there were special clauses in the sale agreement, one of which was at time of essence in the sale agreement. She however admitted that for five years she had not transferred the land but could not be blamed for the same though it was one of her obligations to seek and obtain the land control board consent and all the requisite documents so as to effect the transfer in favour of the plaintiff.
28. D.W 1 alleged that there was a time she was unable to get the plaintiff on phone given they were to undertake the process of the transfer together. As concerning D. Exh 3, the defendant said the developments thereon belonged to her though she could not verify the date the photos produced by the plaintiff were taken for lack of a certificate under the *Evidence Act*. However, D.W 1 admitted that clause (3) of the sale agreement was clear that all the said developments were included in the purchase price though in her view the house was to remain on her side of the land.
29. Concerning the completion date of the sale agreement, the defendant insisted that if she had transferred the suit land before verifying the boundaries it would have meant that the plaintiff taking all her land. The defendants admitted that differences or disagreements arose after the discovery of the anomalies regarding the size of her land on the ground and her boundaries which were not resolved by the lands office. She insisted the developments appearing on the photos produced by the plaintiff belonged to her and not the plaintiff as alleged.

D. Written Submissions

30. The plaintiff by written submissions dated 3.1.2022 based its claim on the doctrine of constructive trust as per paragraph 11A of the amended plaint which it had proved though oral and documentary evidence going by the decision in *Juletabi African Adventure Ltd & another vs Christopher Michael Lockley* (2017) eKLR, since the intention of the parties and the circumstances obtaining in this suit were clear so as to guard against unjust enrichment on the part of the defendant.



31. Reliance was also placed on *Peter Ndungu Njenga vs Sophia Watiri Ndungu* (2000) eKLR on the proposition that in case of absolute necessity the court may presume a trust so as to give effect to the intention of the parties. In this instance the plaintiff submitted that the common intention between the parties in relation to the suit land was evident all through. However the subsequent conduct of the defendant in failing to transfer the suit land was unconscionable.
32. Further the plaintiff relied on *Charles Makheti vs Florence Mukanda Barasa* (2020) eKLR on the proposition that if a party to an agreement stand by and lets the other party incur expenses or prejudice his position on the faith of the agreement being valid he should not be allowed to turn around and assert that the agreement was unenforceable.
33. The plaintiff submitted that going by P. Exhs 2, 10, 11, 13, 14 and 15, it was quite clear there was honest believe and intention to complete the sale agreement. That notwithstanding, the defendant became difficult and vowed never to transfer the land in utter breach of clause no. (c) of the sale agreement.
34. The plaintiff relied on *Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri* (2014) eKLR where in similar facts as on the instant case, the Court of Appeal held that the possession of the land by the purchaser was an overriding interest in favour of the purchasers which could not be departed by lack of a consent under the Land Control Act.
35. In sum the plaintiff submitted there was no dispute that the plaintiff bought 7 acres in 2016, took vacant possession, paid the entire purchase price incurred expenses but the defendant refused to transfer the land for flimsy reasons. Therefore it would be unjust and inequitable in law to allow her retain both the money and the title deed.
36. The defendant vide written submissions dated 2.2.2022 stated that the suit should be dismissed for having a verifying affidavit lacking authority under seal of the plaintiff company; for being filed without a board resolution and for being filed without regard that a company is a distinct legal person from its directors. On the basis that the boundaries to the suit land must be rectified before a transfer could be effected; that the plaintiff entered into an agreement in bad faith to take away all her land when she was supposed to be left with a balance; that the agreement could not be enforced for lack of a consent since it was agricultural land and lastly, that the plaintiff had benefited enough from the harvesting of the tea bushes hence was not entitled to any refund with interest.
37. Reliance was placed on order 4 rule 4 *Civil Procedure Rules* and *Ibacho Trading Company ltd vs Samuel Aecha Ondora & 3 others* (2017) eKLR. Further, the defendant submitted that no CR 12 form was filed to confirm if the PW 1 was a director of the plaintiff at the time of filing the suit and while testifying in court. Reliance was placed on *Kenya Commercial Bank Ltd Vs Stage Coach Management Ltd*, (2014) eKLR *Leo Investment Ltd Vs Trident Insurance Co. Ltd* (2014) eKLR.
38. Regarding the land control board consent the defendant submitted that it could not be overlooked. The defendant took the view that the plaintiff was deemed to have due diligence before the sale and therefore by disputing the size of the land thereafter amounted to frustrating the agreement itself.
39. Further the defendant submitted there were no independent witnesses called to substantiate the alleged developments on the suit land including production of permits and licences hence the court should find no new developments were undertaken by the plaintiff apart from what was on the land at the time of the sale.
40. In sum the defendant submitted that the suit was fatally defective, that the court could not breathe life into it and that the holding in *Raila Odinga vs IEBC and others* (2013) eKLR as regards article 159



(2) of *the Constitution* did not mean or oust the obligation of parties to ignore the compliance with procedural imperatives as they seek justice before a court of law.

E. Issues for Determination

41. The issues commending themselves for the courts determination are:
 - i. If the suit is fatally defective for lack of a seal of the plaintiff, CR 12 and a board resolution.
 - ii. If the sale agreement signed by parties was frustrated and or breached.
 - iii. Who among the parties caused the breach.
 - iv. If the plaintiff is entitled to the remedies sought.

F. Determination

42. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. In this suit the plaintiff relies on the amended plaint dated 17.10.2018, the reply to defence dated 21.1.2019 while the defendant's defence is the one dated 28.11.2018. The defendant took the view that the suit was fatally defective for non-compliance with Order 4 Rule 1 (4) Civil Procedure Rules for lack of a board resolution and for non-filing of the CR 12 to confirm if the PW1 was a director of the plaintiff as alleged or at all.
43. In her submission the defendant stated the above key missing items could amount to a procedural irregularity curable by article 159 (2) of *the Constitution*.
44. The plaintiff describes itself as a registered company which bought L.R No. Nkuene/Uruku/762 from the defendant on 31.3.2016 and took vacant possession after paying the consideration of Kshs.13,950,000/= to the defendant.
45. The amended plaintiff's verifying affidavit was signed by Festus Muriungi Kinoti P.W 1 who described himself as the director of the plaintiff; well versed with the facts of the suit.
46. In the defence dated 28.11.2018 the defendant admitted the descriptive parts of the amended plaint. There was no specific objection raised over any defects of the suit and or prejudice for lack of a company seal, board resolution or a request for a CR 12 under order 11 *Civil Procedure Rules* to confirm if the deponent to the verifying affidavit was genuine or not. Accompanying the plaint was also the certificate of registration indicating that the plaintiff was a duly registered company with effect from 17.3.2008 by the Registrar of Companies.
47. In *Peeraj General Trading and Contracting Co. Ltd Kenya & another vs Mumias Sugar Co. Ltd* (2016) the court held citing with approval Assia Pharmaceutical case (supra) that an action commenced without authority is capable of being ratified and that in the interest of justice such a defect did not go to the jurisdiction of the court which was held in *Microsoft Corporation vs Mitsumi computer Garage Ltd & another* (2001) eKLR the court should go for the higher calling to do justice by saving the proceedings in issue.
48. The defendant relied on *KCB Ltd vs Stage Coach case* (supra). In that case there was already a preliminary objection filed unlike in the instant case where the defendant did not plead such an objection. In this matter the defendant introduced the three issues at the time the PW 1 was testifying. All along the pre-trial conference including the applications for temporary injunction dated 5.4.2018 in which the defendant swore an affidavit in reply on 16.7.2018, the defendant never disputed the



capacity of PW 1 and by extension the plaintiff to sue her and or enter into a sale agreement with her. DW 1 has admitted it was PW 1 representing the plaintiff throughout the transaction.

49. In *Leo Investments Co.* (supra) the court reached the decision based on the pleadings. I find the cases distinguishable from the instant suit.
50. In *Makupa Transit Shade Ltd and another vs Kenya Ports Authority & another* (2015) eKLR the Court of Appeal held that affidavits deponed by persons with knowledge of the issues at hand were sufficient unless the opposite party had sufficient evidence to demonstrate otherwise that they were not authorized.
51. PW 1 representing the plaintiff was also the person who signed the sale agreement which the defendant has not disputed. D.W 1 has admitted PW 1 was the one who cleared her loan with Yetu Sacco Ltd and she authorized him to collect the title deed on behalf of the plaintiff. Order 4 Rule 1 Civil Procedure Rules is in discretionary terms. In absence of the preliminary objection or pleading to that effect I find no prejudice occasioned to the defence at all and finish the defect, if any curable under article 159 of *the constitution* see also *Eye Co (K) Ltd vs Erastus Rotich T/A Vision Investments Ltd* (2021) eKLR *Leo Investment Co. Ltd Vers Trident Insurance Co. Ltd* (2014) eKLR, *SpIre Bank Ltd Land Registrar and 2 others, Brownstone Agencies Ltd & another vs County Government of Bomet & another* (2022) eKLR.
52. Coming to the sale agreement herein the law governing a contract of sale of land is section 3 (3) the *Law of Contract Act*, section 38 – 42 the *Land Act* and section 43-49 of the *Land Registration Act* 2012.
53. In this suit the sale agreement herein has defined the contradicting parties, the subject matter the consideration, mode of payment, the timelines, roles of each party, the mode of termination and the implications thereof. The sale agreement was also signed and attested in accordance with the law. Over and above the sale agreement the defendant acknowledged receipt of the purchase amount, the clearance of the loan with Yetu Sacco, the release of the title deed, and discharge of charge and the grounds verification exercise as per the P. Exhs 9, 10, 11 and letter dated 5.7.2016 (12) (13) & (14).
54. Similarly the plaintiff took vacant possession and was handed over the title deed. Parties to an agreement are bound to the terms and conditions thereof. The sale agreement was clear as to its terms and conditions as well as the timelines.
55. The defendant takes the view the sale agreement was frustrated by the plaintiff's unnecessary demand and or could not be enforced for lack of land control board consent within 6 months as stipulated by the law.
56. The *Sun Sand Dunes Ltd vs Raiya construction ltd* (2018) eKLR the Court of Appeal held the object of the construction of terms of a contract was to ascertain its meaning or in other words the common intention of the parties thereto and that such a construction must be objective as to what a reasonable person in the position of the parties would have understood the words to mean.
57. In this sale agreement, the plaintiff was to pay the total sum by 31.3.2016, the suit land was sold with all the developments thereon, the defendant was to obtain the original title, upon clearance of the loan and effect the
58. At clause 13 and on special conditions sub clause A of the sale agreement stated that, time shall be deemed to be of essence. At sub clause C the defendant was to obtain all the necessary consents and transfers documents for the completion of the sale agreement whereas the plaintiff was to bear the costs for the stamp duty and the transfer.



59. As regards force majeure if there was a delay by the vendor out of any circumstances beyond its reasonable control she could be excused so long as and to the extent that the effects of the circumstances of force majeure continued after issuance of a 14 days' notice.
60. Regarding the variation of the sale agreement the same had to be in writing and signed by both parties. On the completion date, upon payment of Kshs.5.5 million, the defendant was to release the original title and all other completion documents for the subdivision and excision of 7 acres from the main land for the transfer of the same unto the plaintiff's name.
61. Vacant possession was to be handed over upon completion and on full payment of the purchase price. Further, failure to complete the agreement required a termination notice of not less than 21 days and in breach of failure to rectify the same, termination was to take effect after an extension of the notice. As regards termination on account of failure by the vendor, the purchaser was entitled to a refund plus 10% of the consideration as liquidated damages and vice versa if the default was on the other party.
62. In this suit the plaintiff blamed the defendant for misrepresenting her land to be 7 acres which it paid for but in essence she knew it was 6.8 acres. On the other hand, the defendant blamed the plaintiff for being impatient as she tried to adjust her land which had allegedly been encroached upon by the neighbours.
63. Similarly as defendant pleaded that the plaintiff had done conducted due diligence before the sale took place hence knew what the land size was and should not have unreasonably raised such issues afterwards which amounted to frustrating the sale agreement. The sale agreement talked of 7 acres and not 6.8 acres. P. Exh 3 did not include the acreage of the suit land. The copy of records produced as P. Exh (10) indicates the acreage to be 3.00 ha. The record indicated the discharge of charge was registered on 11.8.2016 to pave way for the transfer to be effected.
64. Therefore, once there was a discharge of charge and in line with the sale agreement the duty was on the defendant to obtain the requisite consents to transfer and also sign the necessary transfer documents.
65. The title deed was handed over on July 5, 2016 as per the letter from Yetu Sacco Ltd duly signed by PW 1 and DW 1. What remained thereafter was the other completion documents. The defendant did not give any evidence to show what she did towards securing the land control board consents and the transfer forms in favour of the plaintiff once the plaintiff performed its part of the bargain.
66. Exh. 14 indicated that the surveyor conducted the ground survey or site inspection in the presence of the defendant on 1.4.2016 whereof he established the suit land was 6.80 acres. On the same day, the defendant requested for more time to liaise with the lands office over the difference after which she would apply for the land control board for subdivisions and transfer consents.
67. The defendant did not do so until a demand letter (P. Exh 6) was written to her. In P. Exh 7, the defendant was formally notified of the breach in line with the P. Exh 2 of the sale agreement. The demand notice was in accordance with part V of the Land Act 2012.
68. In P. Exh 7, the defendant acknowledged the sale agreement but now raises the issue that there had been no land control board for the subdivision or transfer applied for or obtained within 6 months hence termed the sale agreement as void and unenforceable. She insisted therefore the demand for vacant possession could not therefore be met.
69. Looking at the foregoing it is quite evident the defendant was the one who was under the duty to seek for and obtain the requisite land control board consents for both the subdivision and transfer so as to complete the sale agreement.



70. In P. Exh 7 the defendant did not give any reasons for not obtaining the consents and transfers or perhaps state any difficulties she was experiencing which may have amounted to force majeure. DW1 did not raise anything which the plaintiff had failed to do on its part which may have led to the non-performance of her obligations. Further, the defendant did not even allude to the issue of alleged encroachment by neighbours or improper interference on her acreage by the land office so as to make her incapable of transferring the land to the plaintiff.
71. The defendant testified that the reason she could not transfer the land as it was to the plaintiff, was that it would have meant the plaintiff taking all her land and leaving her without a portion. Such a condition was never part of the sale agreement. Parole evidence cannot be used to change clear terms to a contract. See *National Bank of Kenya Ltd Vs Pipe Plastic Sam Kolit (K) Ltd and another* 2001 eKLR. The defendant was selling seven acres of land. It was established her land was only 6.8 acres. The defendant was in my view duty bound to effect the transfer to the plaintiff after the latter had met its part of the bargain. The defendant could not possibly in law and in equity hold the plaintiff at ransom until she established where her alleged 0.4 acres had gone. In her testimony, the defendant produced nothing to support her assertion that her land was 7.4 acres prior to the sale agreement and had been allegedly encroached upon by third parties hence the reason there was a difference.
72. There was no single letter of complaint a scientific assessment from the district land registrar and or a land surveyor showing that the defendant had raised a boundary dispute or acreage size with the said officers and which complaint was pending investigations so as to delay the defendant from transferring the land. In absence of any of the foregoing, my finding is that the defendant breached the sale agreement for no apparent reasons or justifications. The plaintiff was therefore justified in demanding for the completion of the sale agreement and hence such a demand could not be said to be unreasonable or amounting to any frustration of the contract as alleged or at all.
73. In *Omweri vs Kiptugen* (Civil Appeal 5 of 2018) (2022) KECA 413 (KLB) (March 4, 2022) Judgment, the court citing with approval Halsbury's laws of England 4th Edition vol. 9 at 481 held that time is of essence in contracts will not be considered unless parties stipulate so or the contract requires time to be of essence or there has been unreasonable delay.
74. In this time was of essence. This was for a good reason since the transaction was governed the Land Control Act. The defendant unreasonably delayed the same and now wants to reap the benefits of her delay by pleading and testifying that the sale agreement became void and unenforceable for lack of a land control board within 6 months in line with Section 6 of the *Land control Act* Cap 302 Laws of Kenya.
75. The plaintiff on the other hand pleaded and testified that it paid the entire purchase price, took vacant possession and hence a constructive trust was established in its favour which this court should uphold by granting the prayers sought as remedies available to it under the circumstances.
76. In *Omweri*; case (supra), the court cited with approval *Simpson vs Conolly* 4 (1953) 2 All E.R 474 where Finnmore J held, the purchaser or vendor could not just say "The time has gone and the contract is at end" without giving a notice.
77. In this suit a formal notice to rectify the default was sent to the defendant through P. Exh 6. Instead of rectifying the breach or default the defendant gave a defence of voidability and unenforceability. She did not seek for more time to rectify the default and or pray for the variation of the sale agreement if at all she held a firm view that her land was more than 6.8 acres.
78. That left the plaintiff who was in possession and had paid all the purchase price holding a title deed where the defendant was not willing to transfer with no option than to move to court for reprieve.



79. The conduct and attitude of the defendant was unconscionable and unreasonable. She had already created a constructive trust in the mind of the plaintiff all along that there would be a transfer in its favour. She took the purchase price and willingly in writing, handed over the original title deed to the plaintiff. All what remained was for her to book the land control board for the necessary consents and sign the transfer forms so that the plaintiff could pay the stamp duty and the transfer fees.
80. The common intention was clear from the signing of the sale agreement the handover of the original title deed and the vacant possession thereof. In *Macharia Mwangi Maina & 87 others* case (supra) the court held that the conscience of the legal owner prevents him from acting in an unconscionable manner by defeating the common intention. In this suit the defendant allowed the plaintiff to clear the amount in the sale agreement, collect the title deed and to take up vacant possession on the understanding that all would be well in the long run in so far as transferring the land to it.
81. There can be no turning back in such circumstances especially where the defendant has given no justification why she has not transferred the land which she sold to the plaintiff. See *Macharia Mwangi Maina* (supra), *Willy Kimutai Kitiliti Vs Michael Kibet* (2018) eKLR, *William Kipsoi Sigei Vs Kipkoech Arusei & another* 2019 eKLR.
82. In the premises, I find the plaintiff to have proved its case on a balance of probabilities hence entitled to the reliefs sought for in the amended plaint dated on October 17, 2018 for a declaration of constructive trust in its favour for the suit land. The respondent is hereby directed to obtain consent of the Land Control board and effect the transfer for 6.8 acres of the suit land within 90 days from the date hereof failure of which the Deputy Registrar Environment and Land Court shall execute the transfer forms in the alternative refund of the amount of Kshs.13,950,000 purchase price plus interest at court rates from the date of this judgment. The claim for the compensation of developments on the suit land is rejected. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 11TH DAY OF MAY, 2022

In presence of:

Muthomi for plaintiff

Miss. Kimotho for defendant

HON. C.K. NZILI

ELC JUDGE

