



**Pyrethrum Processing Company Limited v Kich Agricultural Company Limited &
another (Land Case 107 of 2013) [2022] KEELC 3679 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 107 OF 2013
FM NJOROGE, J
MAY 11, 2022**

BETWEEN

PYRETHRUM PROCESSING COMPANY LIMITED PLAINTIFF

AND

KICH AGRICULTURAL COMPANY LIMITED 1ST DEFENDANT

ROGER SHAKO NGOO 2ND DEFENDANT

JUDGMENT

1. A couple of decades ago, the then happy partners in this land sale dispute grinned with glee at the execution of a land sale contract that would fulfil their respective dreams. The parties entered into quite an ordinary agreement with gusto and seductive promise of a photo-finish completion at or before the appointed date. A paltry seven days into the completion period, the plaintiff, in one false start, outstripped it's compatriots by cheerily approaching them with what it considered completion documents, only to be humbled back to the start once more by their supplication for extra time. It so occurred that within a few days of contract execution, some unknown force injected the defendants with a surfeit of the spirit of lethargy that ruthlessly drained the plaintiff's oomph to the very dregs of melancholia; the lackadaisical waltz so soon adopted by the defendants metamorphosed the plaintiff's embryonic dalliance with the ethos of forbearance into some monochromatic repertoire of entreaties for completion interspersed with scantily clad menaces of retributive contract rescission which eventually gave way to actual termination. This court is now called upon in these proceedings to determine whether that termination of contract was proper. This court will with considerable fidelity to the voluminous record and as far as is practicable summarize the respective parties' pleadings and submissions in order to arrive at the answer to that vexing question.



The Plaintiff

2. The Plaintiff company commenced this suit against the two defendants by way of a plaint filed on 14/5/2004 seeking the following orders:
 - a. A declaration that the transfer of LR 11322/3 Oljororok by the defendant is illegal, null and void;
 - b. An order that the 1st defendant be ordered to transfer LR 11322/3 Oljororok back to the plaintiff;
 - c. That there be a permanent injunction restraining the 1st defendant from transferring, encumbering, entering or in any other way dealing with LR No. 11322/3 Oljororok;
 - d. Costs of suit and interest.
3. It is the plaintiff's case that it entered into a sale agreement with the 1st defendant for sale of LR 11322/3 Measuring 331.1 hectares for a consideration of Ksh. 30,500,000/=. The plaintiff avers that the 1st defendant was by that agreement required to pay the full purchase price within the 90 days from the date of execution. It states further that the original title documents, land board consents and the deed plan were handed over to the 2nd defendant on an undertaking that the land would not be transferred to the 1st defendant until the completion of the payment of the full purchase price by the 1st defendant. In breach of the agreement, the 1st defendant failed to pay the full purchase price as required; that is by 20/5/2002, prompting the plaintiff to rescind the sale agreement on the basis of that breach. Upon rescission, the plaintiff requested the 2nd defendant to return the title documents, deed plan and the land board consent and instead of complying with the request the 2nd defendant proceeded to transfer the suit land to the 1st defendant which action the plaintiff describes as illegal, irregular and fraudulent, null and void and that it ought to be cancelled and the land reinstated to the plaintiff. Particulars of the fraud are given in paragraph 9.

The 1st Defendant's Defence.

4. The 2nd defendant entered appearance through Ochieng Onyango Kibet & Ohaga Advocates on 31/5/2004 who filed a notice of preliminary objection to the Plaint on the same date. Subsequently the 2nd defendant filed a defence on 15/5/2005 as well as chamber summons application seeking striking out of the suit which was dealt with.
5. The 1st defendant filed a statement of defence on 18/6/2004 and filed an amended version on 31/3/2009 to include a counterclaim and sought the following orders:
 - i. An order dismissing the plaintiff's suit with costs.
 - ii. An order of injunction do issue restraining the plaintiff whether by itself, its servants or agents or otherwise howsoever from entering or using the said piece of land LR Number 11322/3 Oljororok.
 - iii. Possession
 - iv. An order that the Plaintiff do render a true account of all money or profits made by virtue of the use of the land since the 7th day of May 2003
 - v. An order for payment by the plaintiff to the 1st defendant of all sums found due from the plaintiff to the 1st defendant on the taking of the account under (iv) above.



- vi. Damages
- vii. An order awarding the 1st defendant interests on sums found due in (iv) and (v) above at 15% per annum to be calculated on monthly rates and interests added to the principal sum and interest calculated thereon.
- viii. Costs of the suit and the Counterclaim together with interests thereon at Court rates.
- ix. Any further or alternate relief which this Honourable Court may deem fit to grant

The Defence of The 2nd Defendant.

6. The 2nd defendant filed a defence on 15/6/2004 through Gichigi Burugu & Co. advocates, denying the claim. He stated that the plaintiff never revoked the sale agreement; that no notice of completion was issued as required by the LSK Conditions of sale; that the balance of the purchase price was tendered in April 2003; that the communication revoking the contract was conveyed after the balance of the purchase price had been tendered.

Hearing

7. The hearing on this suit began on 18/3/2021 when PW1 testified. By consent of the parties entered into before the hearing began, the documents dated 5/8/2014 were produced as PExh.1 to PExh.47 and 1st defendant's documents in the list dated 27/4/2011 were produced as DExh.1 – DExh.21 respectively.

Evidence of the Plaintiff

8. PW1 Wesley Kiprono Korir testified and adopted his witness statement dated 7/10/2020. He stated that he is an administrative assistant who has worked with the Plaintiff for 35 years. He stated that the Plaintiff was formerly known as Pyrethrum Board of Kenya (PBK); that in 2002 PBK desired to sell the property measuring approximately 865 acres; that the decision was prompted by unprofitability of the project and threat of land grabbing; that PBK advertised the land for sale and the 1st defendant won the bid and a price of Ksh.33,000/= per acre was agreed upon; the 1st defendant was to deposit 10% of the consideration being Ksh.3,050,000/=; the Plaintiff however cancelled the contract because the 1st defendant did not pay within the agreed time frames. The 1st defendant however transferred the parcel into its name contrary to the contract without completing payment.
9. Upon cross-examination by Mr. Masika for the 1st Defendant, PW1 stated that the balance was to be paid within 90 days according to the agreement and the completion period ended on 21/5/2002. As at 17/4/2002 however, the completion date had not lapsed and there was no need to ask for extension. The witness did not know if the completion period was extended but he was aware that some payments were made after 21/5/2002 one of them being for Kshs.6, 800,000/= by way of a bankers cheque dated 21/10/2002 which the Plaintiff received unconditionally; that as at 24/10/2002 the Plaintiff had paid Kshs. 19,850,000/= and an acknowledgment had been made; the balance then stood at Kshs.10,650,000/=. He stated that at completion the Plaintiff needed to have availed completion documents including rent clearance certificate which was obtained on 13/6/2002. The plaintiff however did not have some of the completion documents as required by the agreement; the transfer forms were to be signed and released to the Plaintiff's Advocate upon payment of a deposit and that clause 5 allowed the Plaintiff's advocate to forward the duly executed transfer forms to the 1st defendant's advocate upon full payment of the purchase price. PW1 stated that he was not aware whether clause number 5 was ever varied. He admitted that a letter dated 27/6/2002 (page 115 of the bundle) from the Plaintiff's advocate forwarded to the 1st defendant's advocate



completion documents and asked for the purchase price balance and that the defendant's advocate gave a professional undertaking to pay the balance within 7 days in response to that letter *vide* the letter dated 1/7/2002. He admitted that it is not correct as pleaded in paragraph 6 of the Plaintiff that the transfer could not take place until full payment; that the documents show that the property was transferred on 7/5/2003; that the balance of Kshs.10,650,000/= was paid to the Plaintiff but the Plaintiff declined it; he stated that clause 7 of the sale agreement provided that the 1st defendant was to process the transfer at his own costs and that the agreement had no clause for termination; that clause 8 subjected to the LSK conditions of sale 1989 Edition which provided for the issuance of the completion notice at condition 7B. However, the witness maintained that several completion notices were issued by the plaintiff to the 1st defendant including a letter dated 16/8/2002; three months after the completion period the plaintiff accepted Ksh. 6,800,000/=. He agreed that as at 26/10/2002 the undertaking issued by the 1st defendant's advocate of 1/7/2002 was still in force; as at 11/2/2003 the plaintiff was still asking for the payment of the balance of the consideration; on 22/2/2003 the plaintiff instructed its advocates to revoke the agreement; that as at 28/2/2003 the transfer had not been registered and hence the terms of the undertaking could not take effect; that as at 18/6/2003 the 1st defendant's advocate had forwarded the balance of the purchase price and had registered the transfer.

10. When re-examined by Ms. Nasimiyu, PW1 stated that it is the 1st defendant who sought the extension of time to pay the balance of consideration and that the plaintiff agreed to the extension. However as at 21/5/2002 the 1st defendant had not paid as promised in their letter dated 17/4/2002; he stated that the undertaking of 21/7/2002 was followed by a letter dated 16/8/2002 from the plaintiff's advocate seeking payment and that by that date the undertaking was still in place. He stated that in the letter dated 16/8/2002, the plaintiff's advocate gave notice that if the balance was not paid within 7 days then the title document would be recalled and the laws on breach of agreement would be invoked. He maintained that the completion documents were recalled *vide* a letter dated 11/2/2003 which elicited no response from the 1st defendant.
11. PW2 Nancy Wanjiku Njoroge testified on the same date as PW1 and adopted her witness statement dated 5/8/2014 as her evidence in chief. She stated that she prepared the land sale agreement dated 21/02/2002 in respect of land parcel No. Oljororok LR 11332/2; that the said agreement was executed by both the plaintiff and the 1st defendant's nominee Radial Ltd; that one of the terms of the agreement was that the purchase price was Kshs. 30,500,000/= payable within 90 days from the date of the agreement; that at the time of the signing the agreement the 1st defendant paid Kshs. 3,050,000.00/= being 10% of the purchase price; that the balance of the purchase price of Kshs. 27,450,000/= was to be paid within 90 days of the agreement; that via a letter dated March 25, 2002 she wrote to the 2nd defendant informing him that they had already obtained the requisite consent from the Nyahururu Land Control Board and sought the balance of the purchase price; that the 2nd defendant in response to that letter wrote a letter dated April 17, 2002 seeking to extend the completion date of the agreement to May 21, 2002 which they allowed; that by a letter dated May 10, 2002, the 1st defendant paid a sum of Kshs.10,000,000; that via the letter dated 6/06/2002 she sent the executed transfer forms together with the land control board consent to the defendants; that via the letter dated 1/07/2002, the 2nd defendant acknowledged receipt of the original grant and deed plan amongst other documents; that *vide* the letter dated August 16, 2002, she wrote to the 2nd defendant reminding him of the need to pay the balance of the purchase price; that she also sent another letter dated 6/09/2002; that on October 25, 2002, the 1st defendant paid a further sum of Kshs. 6,800,000/= leaving a balance of Kshs. 10, 650,000/=; that *vide* the letter dated November 26, 2002 she sought for payment of the outstanding amount within seven days failure to which they would revoke the sale agreement and sue the 1st defendant for breach of contract; that *vide* the letter dated 1/03/2003 she revoked the sale agreement on the plaintiff's



instructions for breach of payment of the full purchase price and called for the original documents in possession of the 2nd defendant; that she later received the letter dated June 16, 2003 from the 2nd defendant informing her that they had finalized the registration of transfer and forwarded a cheque of Ksh. 10, 650,000/= while knowing that the agreement had been revoked; that the plaintiff instructed her to return the said cheque and that *vide* the letter dated November 20, 2003 she demanded that the land be transferred back to the plaintiff where the amounts paid by the 1st defendant would be returned less the 10% deposit.

12. On cross-examination by Mr. Masika, PW2 stated that she drafted the sale agreement; that the completion period was 90 days from 21/2/2002; that the completion period lapsed on 21/5/2002; that the request for extension of time dated 17/4/2002 was not necessary; that some of the terms of the sale agreement were varied by the parties' conduct and that there was a lot of contact between the 1st defendant and the Managing Director of the Plaintiff. He stated that the Managing Director orally informed her that the 1st defendant should be given time to pay the balance and that is why the completion date kept changing; that however the agreement was only revoked when the 1st defendant failed to pay even after the extension of time. She admitted that the sale agreement did not have a termination clause. She maintained that the termination notice was *vide* a letter dated 1/3/2003 (page 129 of the plaintiff's bundle) and that that letter also doubled up as a completion notice in accordance to LSK conditions of sale; however, when pressed by counsel for the defendant, she admitted that that letter was a notice of revocation and not a completion notice and that there was no notice of completion as per the LSK conditions of sale. She stated that however the 1st defendant's advocate had given an undertaking not to transfer the land until the balance was paid and that she had accepted the undertaking under the instruction from the Plaintiff's Managing Director. She stated that she forwarded the required transfer documents to the 2nd defendant even before the purchase price was paid under the instructions of the Plaintiff's Managing Director contrary to clause 5 of the agreement which required the transfer to be forwarded after payment in full. She stated that the plaintiff had made some payment even before the transfer was executed and that the Managing Director did not follow proper procedure and he panicked later when he realized that the balance was not forthcoming. She testified that the 2nd defendant refused to give back the documents to her; after being shown her letter of 19/6/2003 she stated that she then became aware that the transfer had been effected. At the time of transfer however there was a balance of Ksh. 10,650,000/=. The sum of Ksh. 6,800,000/= was also paid before the revocation. She testified further that the cheque for Ksh. 10,650,000/= was forwarded through her but the plaintiff instructed her to reject it. The witness further testified that she did not release the 2nd defendant from his professional undertaking because he transferred the land before his client paid the full purchase price.
13. Upon re-examination by Ms. Nasimiyu she stated that 3 completion notices were issued *vide* 3 separate letters. At that point the plaintiff closed its case.

The Defendant's Evidence

14. DW1, Gideon Kiptarus Toroitich testified on 8/12/2021 and adopted his 11-page witness statement dated 28/5/2021 as his evidence-in-chief. His evidence is that the Plaintiff advertised the suit property for sale sometime in January 2001 and the 1st defendant bid for the land by a letter dated 19/1/2001 through the 2nd defendant; that a sale agreement was later entered into and executed by both parties on 21/2/2002 which was subject to the LSK's Conditions of sale; 10% of the purchase price was paid prior to the execution of the agreement and acknowledged on 2/3/2002; the completion date was to be 21/5/2002; that they paid Kshs.10,000,000/= on 10/5/2002 which was acknowledged by the Plaintiff; that completion documents were not ready within 90 days and parties mutually agreed on



extension of time for completion; that neither party was ready to complete the sale by 21/5/2002 and neither party terminated the contract on that basis; that the 1st defendant held direct discussions with the plaintiff and consequently some terms in clause 2 and clause 5 of the sale agreement were adjusted; that since compliance by the completion date of 21/5/2002 had not been achieved as per clause 2, the plaintiff agreed with the defendant to forward the completion documents to the 2nd defendant immediately and that upon receipt the 1st defendant was to either pay the balance immediately or issue an undertaking through its advocates to pay it within 7 days of the registration of the transfer in favour of the defendant; that the completion documents were forwarded *vide* a letter dated 27/6/2002 and the undertaking given *vide* the 1st defendant's advocate's letter dated 1/7/2002; that due to factors beyond the control of the 1st defendant, it was not able to transfer the title to itself immediately and the plaintiff demanded full payment of the balance in a letter dated 16/8/2002 and threatened to recall the completion documents; that in a letter dated 18/9/2002 the plaintiff recalled the completion documents, demanding they be surrendered by 21/9/2002; that despite the foregoing notices the 1st defendant paid a further Ksh 6,800,000/= on 24/10/2002 which the plaintiff acknowledged, leaving an unpaid balance of Ksh 10,650,000/=; that a day after that acknowledgment the plaintiff demanded that the entire balance be paid; that a dispute arose regarding how much balance was outstanding hence the defendant wrote a letter clarifying the sum due; that the plaintiff responded by requesting that the completion documents be returned, and later sent a letter dated 1/3/2003 revoking the contract for non-payment of the balance; that the purported revocation was contrary to condition 7(b) of the LSK conditions of sale as no completion notice had been served and it was also baseless since the agreement had been varied and time had been extended and an undertaking given; that on 11/4/2003 the 1st defendant made to the plaintiff a cheque for the entire balance outstanding and then proceeded to register the transfer on 7/5/2003 and subsequently obtained title to the suit land, after which it forwarded the cheque to the plaintiff's advocates by a letter dated 16/6/2003; that the plaintiff's advocates rejected the cheque and returned it *vide* a letter dated 19/6/2003 and that to date the plaintiff has never ceded vacant possession of the suit land to the 1st defendant leading to it suffering loss over an 18-year period.

15. Upon cross-examination by Ms Nasimiyu DW 1 stated that he was not aware of the procedure required for disposal of property belonging to a public corporation.
16. At that juncture the 1st defendant closed its case and since the 2nd defendant did not appear by self or by advocate his defence case was also deemed as closed and parties were ordered to file submissions. The 2nd defendant filed no submissions.

Submissions of the parties.

17. The plaintiff filed submissions on 25/1/2022. According to the plaintiff the issues arising were twofold; one whether the transfer of the suit property to the 1st defendant was illegal irregular and fraudulent, and two, whether the plaintiff had discharged its burden of proof. The plaintiff submitted that strict compliance with clause 2 (ii) of the agreement (on the 90-day completion period) was frustrated by the 1st defendant's requests for an extension. The plaintiff admitted to having indulged the 1st defendant but added that when it perceived delaying tactics on the 1st defendant's part by way of change of advocates it asked its advocates to demand for the return of the completion documents and was shocked to learn that contrary to the special condition (c) of the sale agreement, the transfer had been registered in the 1st defendant's favour. The plaintiff then deemed the 1st defendant to be in breach and through its advocate it rejected and returned to the 1st defendant the bankers cheque made in its favour as payment of the final balance. A caution was also registered over the title to the suit land. The plaintiff submits that the 1st defendant fraudulently dealt with the title documents, bypassed the proper procedure



regarding payment, and colluded with its advocates to dispossess the plaintiff of the suit land without paying the balance of the purchase price. Citing Sections 107 and 108 of the *Evidence Act*, order 2 Rule 4 of the *Civil Procedure Rules* and the decisions in *Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another* [2000] eKLR and *Kinyanjui Kamau Vs George Kamau* [2015] eKLR, the plaintiff submitted that it had discharged its burden of proof and that the orders sought in the plaint ought to be granted.

18. The 1st defendant filed its submissions on 16/2/2022 which ran into a remarkable 23 pages in all. In the 1st defendant's view the issues for determination are as follows: whether the termination of the agreement was lawful; whether the 1st defendant was in breach of its undertaking; whether registration of the suit land in the name of the 1st defendant was properly undertaken and whether the plaintiff was justified in declining to accept the final instalment of the balance of the purchase price.
19. The 1st defendant stated that completion documents, including the land rent clearance certificate, were not ready within the completion period of 90 days and parties mutually agreed to extend time; that the allegation by the plaintiff that the 1st defendant provoked the rescission of the contract when it failed to pay the purchase price by the end of the 90 days is incorrect; that the terms of the agreement were varied as stated by DW1 herein before and that the completion documents were released to its advocates long after the expiry of the completion period and an undertaking to release the balance of consideration within 7 days of registration of transfer was issued; that the undertaking at paragraph 6 of the plaint is misstated and contrary to the undertaking the 1st defendant's advocates gave; that any demands to pay the balance in full and threats to revoke the agreement for breach and recalling of the completion documents before registration of the transfer in its favour went contrary to the spirit of the 1st defendant's advocate's undertaking; that nevertheless the 1st defendant complied and paid a part of the balance hardly a month after the two demands were made and that the transfer to the 1st defendant was registered in line with the undertaking given earlier. The 1st defendant submitted that its title to the suit land is therefore protected by Section 26 of the *Registration of Titles Act* No 3 of 2012 since no fraud or misrepresentation on its part has been proved by the plaintiff which is the test provided for in that section. Citing *Demutilla Nanyama Pururmu Vs Salim Mohamed Salim* 2021 eKLR and *Joseph Gitari Vs Muthui Chomba & 7 Others* 2018 eKLR, the 1st defendant urged the court to find that the plaintiff never pleaded any particulars of fraud against it in the plaint, yet it is trite law that fraud must be pleaded specifically and proved. The 1st defendant, citing *Halsbury's Laws of England* 3rd Edition Volume 8 On Page 165, the cases of *Samuel Ngigi Kiarie Vs Njowamu Construction Company Ltd & Another* 2019 eKLR, *David Moses Gekara Vs Hezron Nyachae* 2012 eKLR, *Beatrice Muthio Nzioka Vs Charles Akelo Ongwen* 2014 eKLR and *Karanja Mbugua & Another vs Marybin Holding Co Ltd* 2014 eKLR, submitted that issuance of a completion notice by the aggrieved party in a contract serves to make time of essence; that it is clear that from the conduct of the parties they had both waived strict compliance with the timelines for payment under the sale agreement and time ceased to be of essence and the purported notices of termination dated 28/2/2003 and 1/3/2003 were unreasonable and conflicted with the LSK Conditions and were not issued on any contractual or legal basis; that the plaintiff was a beneficiary of the waiver as it had not been able to complete the sale as at the completion date; that in any event the last payment, which showed the 1st defendant's willingness to complete the sale, was done before any completion notice was issued and within 7 days of the registration of the transfer as professionally undertaken by the 1st defendant's advocate, and no completion notice has ever issued to date and that PW2 had indeed admitted in evidence that no completion notice was issued; that the 1st defendant could not easily obtain vacant possession of the suit land due to the presence of squatters thereon; that the title held by the 1st defendant is lawful and that the return of the cheque for the final instalment of consideration was a breach on the plaintiff's part. The conclusion of the 1st defendant's submissions is that the termination of the agreement by the plaintiff was unlawful, that the



plaintiff has failed to discharge its burden of proof regarding fraud and its suit ought to be dismissed with costs.

Determination

20. It is common ground that the parties entered into a sale agreement for the sale of the suit land; that the completion never materialized on the agreed completion date in the agreement; that the completion documents were forwarded to the 1st defendant contrary to the sale agreement; that contrary to the contractual terms, the 1st defendant effected the transfer of the title in its favour before the full purchase price was paid and that thereafter, the plaintiff rejected the last instalment of the balance of the purchase price citing breach on the 1st defendant's part.
21. The issues that arise for determination in the instant dispute are as follows:
 - a. Whether the terms of the agreement were varied by consent of the parties and if so to what extent?
 - b. Whether the plaintiff issued the 1st defendant with any completion notice;
 - c. Whether the plaintiff issued the 1st defendant with any proper termination notice;
 - d. Whether the registration of the title to the suit land in the 1st defendant's favour was fraudulent and liable to cancellation;
 - e. Who should bear the costs of this litigation.

The above issues are discussed as herein under.

Whether the terms of the agreement were varied by consent of the parties and if so to what extent?

22. It is the 1st defendant's stance that the terms of the agreement were varied by consent to allow two crucial things: extension of the completion period and leave to have the land registered in the 1st defendant's name before full payment of the consideration. However, the plaintiff's position in the plaint is that the completion date stood firm, and that the plaintiff terminated the agreement when 1st defendant breached the agreement by failure to remit the full consideration by that completion date. Was there any variation and if so, to what extent?
23. First, it must be noted that the purchaser in the agreement dated 21/2/2002 is "Radial Ltd" and not "Kich Agricultural Company Limited." However, a letter dated 3/6/2002 from the 1st defendant's advocates is among the plaintiff's exhibits, and it sought that albeit the execution of agreement was by Radial Ltd the transfer ought to be prepared in the name of "Kich Agricultural Company Limited." That is the company in whose name the title is currently registered and it is now quite understandable then why the plaintiff had to sue it. Having mutually assumed each other's roles in this dispute and conglomerated them into a common interest, "Kich Agricultural Company Limited" and "Radial Ltd" must therefore be taken to be one and the same party in these proceedings and will be referred to as the 1st defendant.
24. In this court's view, completion of a land sale transaction ordinarily implies the full performance of the vendor's contractual obligations including and especially the ceding of all necessary registration documents as would free him from all duties under the contract to the purchaser, and the latter's full compliance with the requisite provisions as to payment of consideration as would similarly free him from all obligations to the vendor under the contract.



25. In so far as the purported variations are concerned, the relevant, affected parts of the sale agreement regarding completion read as follows:
2. The purchase price shall be payable by the purchaser as follows:
 - (i) Three million and fifty thousand shillings (Ksh 3,050,000) shall be paid to the vendor at the time of signing execution of this agreement by cheque;
 - (ii) Twenty-seven million four hundred and fifty thousand shillings (27,450,000) being the balance of the purchase price shall be paid on or before 90 days from the date of this agreement.”
 3.
 4.
 5. Upon full payment of the purchase price, the vendor’s advocates shall forward the transfer forms duly executed together with a valid transfer within 14 days to the purchaser’s lawyers to enable them complete the registration of the transfer of title.
26. The sale agreement clearly provided for full payment of the purchase price within 90 days of execution thereof and forwarding of the duly executed transfer forms to the purchaser’s advocate only after the full payment of the consideration.
27. It is common ground that the executed transfer and title to the land were given to the 1st defendant before payment of the full purchase price hence the claim of variation by the defendant. Did this amount to a variation in the agreement? What evidence is there to support variation?
28. The Court of Appeal in Nairobi Civil Appeal 155 of 1992 *Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others* [1993] eKLR stated as follows;

“Evidence of negotiations is never admissible to vary the terms of the written contract. However, where there is a latent ambiguity, extrinsic evidence may be given of surrounding facts to explain the ambiguity. But certainly no evidence or correspondence on prior negotiations may be admissible. It is assumed that the intentions of the parties to a written contract are embodied in a written contract itself. I have used the phrase “prior negotiations” because subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect the written contract. For instance, subsequent correspondence may vary the terms of the written contract if it is clear from the correspondence that the parties intended to vary the contract.”

Further the court in the case of *Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999 held that:

“...Courts are not fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”



Also the court in the case of Civil Suit 606 of 2003, *Gimalu Estates Ltd & 4 Others V International Finance Corporation & another* [2006] eKLR made reference to various English decisions and observed as follows;

“Parties to a contract effect a variation of the contract by modifying or altering its terms by mutual agreement...a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract. (see. (*Cowey Liberation Operations Ltd*, [1966] 2 Lloyds’ Rep. 45)...So the form of variation is important to determine whether there has been a mere variation of terms or a rescission. The effect of a subsequent agreement – whether it constitutes a variation or a rescission depends upon the extent to which it alters the terms of the original contract. In the case of *Morris -vs- Baron & CO*. [1918] A.C. 1, 19. Lord Haldane said that, for a rescission, there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting.”

The Court of Appeal also in the case of *Kenya Breweries Limited v Kiambu General Transport Agency Limited* [2000] eKLR stated as follows:

“This Court in the case of *Mburui Matiri & Sons v Nithi Timber Co-operative Society Limited* Civil Appeal No 125 of 1987 (unreported), held in the unanimous judgment of Platt, Gachuhi and Apaloo JJ A, that a written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract...”

This was also the holding in the case of *County Government of Migori v Hope Self Help Group* [2020] eKLR where it was held as follows:

“A meeting of minds is an essential component for the formation of an enforceable contract. Variation must be proved to have been arrived at by mutual engagement, as opposed to unilateral imposition of terms by one party upon the other. See *Gimalu Estates Ltd & 4 Others -vs- International Finance Corporation & another* (*supra*) and Halsbury’s Laws of England, Vol 4, 4th Ed (*supra*).”

29. Correspondence dated 25/3/2002 shows that the plaintiff had already obtained a consent to transfer by that date. That letter also sought the expedition of the payment of the consideration to enable completion of the transaction. Upon receipt of that letter the 1st defendant’s counsel responded with a letter dated 17/4/2002 seeking “extension of the completion date to 21/5/2002.” The agreement having been executed on 21/2/2002, and having granted the 1st defendant 90 days therefrom to pay the balance, such payment was due on 21/5/2002, exactly 90 days later. That letter assured the plaintiff of “finalization” of the matter by 21/5/2002. In effect that letter did not effectively seek an extension but confirmed that the completion date would be observed.
30. It is also noteworthy that the plaintiff had in a letter dated 25/3/2002 indicated that it had obtained the land control board consent and sought payment to conclude the sale. By 25/3/2002 the plaintiff was therefore ready for completion and was demanding from the 1st defendant payment of the balance of the purchase price long before the expiry of the 90-day completion period. In retrospect, this readiness by the plaintiff now explains why the 1st defendant’s advocate wrote on 17/4/2002 seeking extension of time before the 90-day completion period had expired, and seeking that the completion date in the agreement be adhered to.



31. It appears that much occurred between 25/3/2002 and 6/6/2002 which has not been expressly disclosed by the parties, for a letter written by the plaintiff's advocates on the latter date purports to show that the 1st defendant was to execute some land control Board forms, apparently in readiness for the act of seeking further Land Control Board consent on 10/6/2002 when a special Board meeting was scheduled to be constituted. Going by the letter dated 27/6/2002 from the plaintiff's counsel to the defendant, it appears that perhaps the parties agreed to seek subdivision of the suit land since that letter forwards *inter alia* a consent to subdivide. It can not be understood at a glance who was to benefit from the said subdivision or at whose request it was done, yet this new development added to the delay in the completion of the transaction.
32. Also noteworthy is the fact that both consents for subdivision and sale, the grant and the deed plan were released to the 2nd defendant *vide* a letter dated 27/6/2002 alongside another demand, contained in the same letter, for the payment of the balance of the purchase price owing, and the 1st defendant's counsel acknowledged receipt of that letter *vide* his letter of 1/7/2002. In the latter letter an undertaking was given that the balance of purchase price would be paid within 7 days of the registration of transfer in favour of the 1st defendant. However, it is clear that no such undertaking had been sought in writing in the letter dated 27/6/2002 which, in contrast, demanded full payment of the balance owing. However, PW2's evidence was that the 1st defendant's advocate had given an undertaking not to transfer the land until the balance was paid and that she had accepted the undertaking under the instruction from the Plaintiff's managing director. In the absence of any express, admitted or written variation, only a probability that does not cause dissonance with the expressly stipulated terms of the original agreement should sway this court. I am inclined to believe the evidence of PW2 as there is no sufficient evidence to support the 1st defendant's claim that there was any variation of the contract allowing it to transfer the suit land to itself before paying in full the balance of the purchase price. Therefore, the letter by the 2nd defendant undertaking to have the balance paid after the registration of the transfer was a unilateral variation by the defendants which could not bind the plaintiff. See the decisions in Gimalu Estates Ltd (*supra*) and County Government of Migori (*supra*.)
33. The 1st defendant's assertion that there was variation to extend the completion period lacks specificity as to which was to be the new completion period. The ordinary impact of this lack of specificity would be that the court has to look out for some obvious event that was crucial to the completion of the transaction to determine the time window so allowed by the parties. There appears to have been a variation of the sale agreement to the extent that the plaintiff would abandon the consent to transfer the whole land it had obtained by 25/3/2002 in favour of seeking consents for subdivision and sale which it would forward to the 1st defendant alongside other completion documents and nothing more beyond that. Therefore, the additional completion period was in this court's view bound to the obtainance by the plaintiff and submission to the 1st defendant of the freshly requisitioned consent among other documents that had been readied beforehand. That is the only logical explanation as to why the plaintiff's counsel demanded full payment in the letter dated 27/6/2002. It is highly improbable, if any specific completion date or period beyond 27/6/2002 was informally agreed upon by the parties in the variation, that the plaintiff's advocate's memory lapsed so soon extent that she demanded immediate payment of the balance in the letter forwarding those very documents. In this court's view, it is also highly improbable that the 1st defendant was by his direct negotiations with the plaintiff granted a blank cheque to conduct itself and pay as and when it ever felt like doing so.
34. The conclusion of this court on the issue is therefore that there was a variation, but that variation was only to the extent that the plaintiff was to obtain fresh consents and forward them, among other completion documents, to the 1st defendant whereupon the balance of purchase price would be settled.



Whether the plaintiff issued the 1st defendant with any completion notice.

35. Issuance of a completion notice is necessary in agreements where the agreed completion date is past. Indeed, the 1st defendant correctly submitted that issuance of a completion notice by the aggrieved party in a contract serves to make time of essence. It is common ground that the LSK Conditions of sale applied to the sale agreement subject matter herein. The defendant states that no completion notice was issued as required by Condition 7 of the LSK conditions of sale. That condition states that if the sale shall not be completed on the completion date then either party being ready and willing to complete may after that date serve on the other party a notice to complete. In accordance with that condition it shall become a term of the contract that the transaction shall be completed within 21 days of service, and in respect of such period, time shall be of essence to the contract.
36. So after the expiry of the completion date, and there being no other fresh, definite completion date set by the parties, did the plaintiff issue a completion notice as required by Condition 7 of the LSK conditions?
37. This court has already found that there was no variation save that which allowed for the plaintiff to obtain fresh consents of the land control board and submit them to the 1st defendant, upon which the latter would be expected to pay the balance of the purchase price. It has already been stated that had there been no subsequent need for fresh consents the plaintiff was ready for finalization of the transaction by 25/3/2002. It appears that the plaintiff was ready and willing to complete the transaction immediately upon obtaining the fresh consent and it gave express notice of that to the defendant *vide* the letter dated 27/6/2002 which also clarified that its part of the contract was done and demanded the balance.
38. In her evidence under cross-examination by Mr Masika, PW2 vacillated on the issue of whether a notice was issued or not, first stating that the completion notice anticipated by the LSK Conditions was contained in a letter dated 4/3/2003, then retreating to state that it was not a completion notice but a revocation notice. However, between the dates 27/6/2002 and 7/5/2003 the latter on which the transfer was registered in the 1st defendant's favour, documentary evidence paints an unsavoury picture of a vendor and its advocate who had complied with the agreement being held at ransom by and having to literally beg a purchaser who had declined to pay the balance of the purchase price until the transfer was registered, contrary to the agreement, in its favour. I find that from 27/6/2002, the 1st defendant knew it was expected to pay and numerous letters were written demanding payment lest serious consequences befall it.
39. In the letter dated 16/8/2002 the advocate for the plaintiff wrote in part as follows:

“Our instructions are to remind you that by a letter dated 18th July 2002 you had promised that the balance owing would be paid by 26th July 2002. The above promised (*sic*) by yourselves has not been met.

Our instructions are to demand from you which we hereby do the immediate payment of the balance as per the agreement of sale failure to which we shall invoke the clauses of breach as per the Law Society's rules.

Take notice and be advised that if we do not receive the balance within 7 days from the date of this letter, we shall have no alternative but to recall the deed plan and the title document from yourselves and we shall proceed to invoke the relevant laws as to the breach of the agreement of sale.”



40. The letter dated 18/9/2002 stated in part as follows:
- “Can we kindly have the two documents otherwise we are contemplating a court action without any other reference to you.Can we have the said documents on or before 21/9/2002.”
41. The letter dated 26/11/2002 reads in part as follows:
- “I now have firm instructions to demand that your client pays ours the outstanding balance within seven days from the date of this letter otherwise we shall call off the agreement due to breach by your client.”
42. When by a letter of 27/1/2003 the 1st defendant asked to be accommodated till end of February 2003 to pay the balance, the response by the plaintiff’s counsel was in a letter dated 11/2/2003 which read as follows in part:
- “Kindly give us copies of the title documents and the deed plan which we shall release to you once your client completes payment.”
43. In a letter dated 27/2/2003 the plaintiff wrote to its advocate and stated in part as follows:
- “We hereby irrevocably instruct you to revoke the sale and inform the purchaser immediately.”
44. In a letter dated 28/2/2003 the plaintiff’s advocate wrote to the defendant’s advocate in part as follows:
- “If by the end of this day we do not have the (balance), we shall revoke the agreement herein.”
45. Finally, in a letter dated 1/3/2002 the plaintiff’s advocate wrote to the defendant’s advocate as follows:
- “Our client is concerned that attempt to change advocates at the eleventh hour by the purchaser is a further attempt to delay the finalization of this agreement.
- I have instructions from our client to revoke the sale herein for the breach in payment of the full purchase price within the time stipulated in the agreement.
- Can we have the original documents held by yourselves.”
46. It was to the last letter mentioned above that the 1st defendant’s advocate responded as follows in part in a letter dated 16/6/2003:
- “We have now finalized registration of transfer.
- We enclose herewith bankers cheque in the sum of Kenya Shillings Ten Million Six Hundred and Fifty Thousand (Ksh 10,650,000) in respect of the above matter.
- We feel that it was premature to revoke the transaction as we had not received a notice to complete as required by the Law Society Conditions of sale.”
47. Subsequently the matter ended on a very sour note two days later as a letter dated 18/6/2003 from the principal plaintiff to its advocates demanded that the cheque from the 1st defendant’s advocate be rejected and returned. It turned out that the minutes of the tender committee meeting held earlier on 19/5/2003 resolved had *vide* minute no TC 19/2003 that the revocation of the transaction by the



board “through the Board’s lawyer’s letter of 28/2/2003 and 1/3/2003 to stand.” This court takes the content of that letter to be complete proof that the principal, the plaintiff, had made up its mind to rescind the contract.

48. Condition 7 of the LSK Conditions stated that a party shall be deemed to be ready, able and willing to complete the transaction if he could do so but for some default or omission on the part of the other party. Upon service of the completion notice it shall become a term of the contract that the transaction shall be completed within 21 days of service and, in respect of such period, time shall be of essence of the contract.
49. So was there any completion notice issued? To my understanding a notice under Condition 7 of the LSK Conditions needed not state the time period within which the 1st defendant ought to have complied. There is indeed no special format provided for that notice in Condition 7.
50. In the circumstances of this case where no notice labelled as such was issued but in which numerous correspondences were sent by the parties to each other the true function of a completion notice must be considered in order to arrive at the decision whether one was or was not issued. This is informed by insight that in the present case content should reign over form in determining the present issue.
51. The true function of a completion notice is to inform the party in breach that it is in breach and reminds them, either expressly or by implication, to correct their act or omission of breach. Under the LSK conditions, the consequence of service of a notice is that upon expiry of the 21 days, if a purchaser does not comply with a completion notice he shall return forthwith all documents delivered to him by the vendor and at own expense procure the cancellation of any entry relating to the contract in any register.
52. The letter dated 16/8/2002 merely threatened to invoke the clauses of breach as per the Law Society’s rules and recall the completion documents. The letter of 18/9/2002 notified the 1st defendant that the plaintiff was contemplating a court action without any other reference it and demanded return of the completion documents on or before 21/9/2002. The letter of 26/11/2002 conveyed yet more threats to revoke the agreement. The letter of 11/2/2003 has contents that imply that the plaintiff had not yet made a final decision to revoke the agreement as it called for payment of the balance. However, it is the plaintiff’s letter of 27/2/2003 that instructed its advocate to revoke the agreement. It can not be understood why the plaintiff’s advocate never wrote a letter cancelling the agreement in unequivocal terms. Instead she wrote the letter dated 28/2/2003 which gave notice that the agreement would be revoked if the balance of consideration was not received by the end of that day. Finally, the letter dated 1/3/2003 from the plaintiff’s advocate appears to have finally delivered with certainty the message that the agreement had been revoked as desired by the plaintiff in its letter of 27/2/2003. Three months later on 16/6/2003 the 1st defendant’s advocates wrote to the plaintiff’s advocate notifying her that the transfer had been registered in favour of their client and forwarding the balance.
53. While read as isolated documents, none of the plaintiff’s advocate’s letters dated 16/8/2002, 18/9/2002, 21/9/2002, 26/11/2002, 11/2/2003 can be considered to be a proper completion notice owing to their ambivalent language and the indulgence that they convey; however, they still carry in them demands that convey a sense of urgency in the twin issues of payment and/or return of the completion documents; that last feature makes this court persuaded that the collective impact of those letters was to convey to the 1st defendant the message that it was in breach of the agreement which it required to rectify; If the 1st defendant had settled the balance on any date within 21 days of the last of those letters, then this court would have been of the opinion that it had taken advantage of the indulgence by the plaintiff and it was safe from any rescission thereafter. Besides, more than 21 days elapsed from the date of the last of those letters and no final no payment issued. As long as 21



days elapsed from the date of the last of the letters, it matters not that sometime in the middle of that exchange of correspondence some money, amounting to less than the whole balance outstanding, was paid by the 1st defendant. The desired notice had taken effect. In this court's view, the said letters effectively carried out the function of a 21-day completion notice as envisaged by condition 7 of the LSK conditions. Completion notice was therefore properly issued.

Whether the plaintiff issued the 1st defendant with any proper termination notice;

54. The foregoing analysis regarding whether completion notice was issued also reveals that a letter dated 1/3/2002 terminating the agreement was issued. This was in the opinion of this court the notice of termination of the contract. The 1st defendant's advocate's submission at para 49 recognizes this fact and so it is not in dispute that a termination notice was issued. In cross-examination by Mr Masika, PW2 also admitted that that was the termination notice, which assertion Mr Masika himself seemed to agree with. The question that remains is whether it was properly issued. Therefore, the 1st defendant's only grievance in the circumstances appears to be that that no completion notice had been issued before the termination notice issued. However, this court has found that completion notice had been issued before the date of the termination notice. Consequently, the only conclusion this court can arrive at is that the termination notice given in the letter dated 1/3/2002 was properly issued and that it effectively terminated the contract between the parties.

Whether the registration of the title to the suit land in the 1st defendant's favour was fraudulent and liable to cancellation.

55. The agreement dated 21/2/2002 provided that registration of title in the 1st defendant's name was predicated on the prior payment of the purchase price in full yet the registration happened before that event. An analysis of the evidence in this suit has revealed that there was no written variation of that condition executed by both parties and the only party that believes that there was such a change in terms is the 1st defendant. The only evidence relied on by the 1st defendant to that effect is its advocate's letter dated 1/7/2002 purporting to issue an undertaking to forward the balance of purchase price within 7 days of the registration of the transfer in favour of his client. The 1st defendant has not demonstrated that the plaintiff's advocates had requested for such an undertaking in any way before it was issued, and the contents of the 2nd defendant's letter purporting the agreement was varied to include the undertaking can not be relied on to conclude that the parties had agreed that the clause be varied in that manner. In the absence of evidence of mutual variation of such a crucial term of the contract, the only undertaking that can be presumed to have bound the defendants was that which required them to abide contractual condition that required payment of the balance before registration of transfer. Consequently, the transfer of the suit land into the 1st defendant's name prior to payment of the balance was irregular.
56. The plaintiff's pleading of particulars of fraud at paragraph 10 is to the effect *inter alia* that the transfer was fraudulent in that it was procured after the agreement was revoked. It also states that the 2nd defendant went against the undertaking not to register the transfer until final payment was made. In view of the previous analysis set out in this judgment, I find the claims by the plaintiff to be justified, for no transfer can be rightfully effected after revocation of the agreement. If there had been full payment of the balance before transfer made within 21 days of the completion notice, the situation may have been different.



57. The Court of Appeal in its Judgment the case of *Sagoo & another v Mwicigi & 3 others* (Civil Appeal 410 of 2018) [2022] KECA 83 (KLR) (Environment and Land) (4 February 2022) held as follows:

“It is clear from the sequence of events that whereas the 1st respondent was willing and ready to sell the suit property, the appellants were not on the same page with her. The 1st respondent entered into the sale agreement dated 28th June, 2005. The completion date was 15th September, 2005. The original title document for the suit property as well as a valid clearance certificate were duly handed over to the 2nd respondent on 8th November, 2005... Having complied with her obligations, the least the 1st respondent expected was the appellants to fulfil their part of the bargain. When her expectation was not met, she caused her lawyer, Messrs Kandie Kimutai & Co. Advocates to issue a Notice of Completion dated 24th November, 2005... On receipt of the Notice of Completion, the 2nd respondent *vide* a letter dated 26th November, 2005 undertook to complete by 29th November, 2005... In his letter of 26th November, 2005, the 2nd respondent undertook to complete by 29th November, 2005. Again, that was not to be. On 19th December, 2005, the 1st respondent called for the return of her original title. Her request for the return of her original title fell on deaf ears and in spite of lack of confirmation of placement of funds by the 29th November, 2005 as undertaken by the 2nd respondent in his letter of 26th November, 2005, the second respondent proceeded to present the transfer for registration on 19th December, 2005... In our view, it was callous and unprofessional for the 2nd respondent to have presented the transfer documents for registration and yet he was not in possession of the balance of the purchase price. Indeed, this lack of professionalism is evident right from the time (5th November, 2005) the 2nd respondent called for the original title and the transfer documents as well as a valid rates clearance certificate on the pretext that he was in possession of the balance of the purchase price...

The crux of the matter is that the appellants had the property transferred unto themselves through deceit and without them being in a position to pay the balance of the purchase price. We think that the 1st respondent performed her part of the deal and the delay in finalization of the transaction was solely caused by the appellants. We do not see how and why the appellant is blaming the 1st respondent when they were given adequate time and opportunity to pay the balance of the purchase price...” (Emphasis mine)

58. In the present suit, the 2nd defendant had been informed of the revocation yet he proceeded to have the transfer registered contrary to the agreement; in doing that he was acting as the 1st defendant’s authorized agent and the 1st defendant stood to benefit directly for such action. It is trite law that the acts of the agent including wrongs committed in the course of the agent’s employment bind the principal. In the light of that established legal position, the argument by the 1st defendant in its submissions that there are no particulars of fraud attributed to it sound hollow as long as it benefitted from the 2nd defendant’s acts and omissions which were expressly pleaded in paragraph 10 of the plaint. The conclusion that this court arrives at is that the transfer of title into the 1st defendant’s name was uninformed by the terms of the sale agreement, fraudulent, illegal, null and void and liable to be set aside.

Who should bear the costs of this litigation?

59. I find that the present suit was necessitated by the actions and omissions of the 1st and 2nd defendants and so they are jointly liable to pay to the plaintiff the costs of this litigation.



What orders should issue?

60. The upshot of the foregoing is that the plaintiff has established its claim on a balance of probabilities while the defendant has failed to prove its counterclaim to the required standard. This court has found that the termination of the contract *vide* the letter dated 1/3/2003 was properly done. It is therefore clear from the foregoing analysis that all the prayers in the counterclaim cannot be granted.
61. Consequently, I dismiss the 1st defendant's counterclaim wholly and I enter judgment for the plaintiff against both defendants jointly and severally and I issue the following final orders:
- a. The 1st defendant's counterclaim is hereby dismissed;
 - b. A declaration is hereby issued declaring that the transfer of LR 11322/3 Oljororok to the 1st defendant's name is illegal, null and void;
 - c. The 1st defendant and the 2nd defendant shall at their own cost transfer LR 11322/3 Oljororok back to the plaintiff within 30 days of this order;
 - d. A permanent injunction is hereby issued restraining the 1st defendant and the 2nd defendant from transferring, encumbering, entering or in any other way dealing with LR No. 11322/3 Oljororok save as ordered in order no (c) herein above;
 - e. The 1st defendant and the 2nd defendant shall jointly and severally pay to the plaintiff the costs of the suit and counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 11TH DAY OF MAY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

