



REPUBLIC OF KENYA



KENYA LAW
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**Joshua v Okworo & 3 others (Environment & Land Case E003 of 2022)
[2022] KEELC 14573 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E003 OF 2022**

JM KAMAU, J

OCTOBER 19, 2022

BETWEEN

RICHARD JOSHUA PLAINTIFF

AND

SUSAN NYANGWESO OKWORO 1ST DEFENDANT

NYANCHOKA JASPER ISAAC 2ND DEFENDANT

CYRUS OKEMWA OKWORO 3RD DEFENDANT

GERALD MATOKE ONGONDO 4TH DEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaint dated March 4, 2022 in which the Plaintiff avers that the 1st Defendant, who is the mother of the 2nd, 3rd and 4th Defendants is the registered proprietor of the Parcel of land known as LR No West Mugirango/bosamaro East/266. Vide sale agreements dated 20/05/2012 and 13/5/2021 the Plaintiff entered into a contract in which the Defendants agreed to sell to the Plaintiff a parcel of land measuring 76.5 feet by 234 feet to be carved out of LR No West Mugirango/bosamaro East/266 at an agreed consideration of Kshs 310,000/= which purchase price was duly paid in full. But the Defendants breached the sale agreement and failed to transfer the suit property to him and the Plaintiff now seeks the following orders:
 - a) An order directing the Defendants to execute transfer and sign Mutation forms of the land measuring 76.5 ft by 234ft out of Land Parcel number LR No West Mugirango/bosamaro East/266.
 - b) An order directing the County Surveyor, Nyamira to give effect to the drawing on the mutation form;



- c) Alternatively, the Deputy Registrar Nyamira to sign the transfer forms and the Land Registrar be ordered to register the 76.5 ft by 234ft portion out of LR No West Mugirango/bosamaro East/266 in favour of the Plaintiff.
 - d) Damages for breach of contract in lieu of or in addition to Specific Performance;
 - e) Costs of this suit; and
 - f) Any such other or further relief as this Honourable Court may deem appropriate.
2. The above averments were supported by the Plaintiff's statement dated March 4, 2022 and which statement was adopted as the Plaintiff's evidence when the case came up for hearing on September 29, 2022. This is after the Defendants failed to enter appearance. They also filed no Defence. According to the evidence adduced in Court, the Plaintiff, a primary school teacher who lives in Enchoro Sub-location of Bosamaro Masaba in Nyamira County, testified that on various dates to wit May 20, 2012 and May 13, 2021 the 2nd, 3rd and 4th Defendants sold to him 76.5 feet by 234 feet from the parcel of land LR No West Mugirango/ Bosamaro East/266 measuring 1.1. Hectares. Being the registered proprietor of the suit land as is evident from the certificate of official search dated February 28, 2022, but in trust for her sons who include the 2nd, 3rd and 4th Defendants, the 1st Defendant did consent in writing to the agreement dated May 13, 2021. It was registered in her name on January 27, 1977 and Title Deed issued to her on the same date and remains so to date save that on November 5, 2020 a caution was registered in favour of her son, Joseph Gichana Okworo claiming a beneficiary interest. A private surveyor was brought by the Plaintiff who hived off the 76.5 by 234 feet and mutation forms were prepared with the full co-operation of the 1st Defendant but she failed to sign the same and therefore the mutation forms could not be presented for registration. The same was the case for the Application for consent of the Land Control Board. The said application for consent was produced in Court as Plaintiff's Exhibit No 3 while the mutation form is exhibit number 2 and the 2 Agreements dated May 20, 2012 and May 13, 2012 were produced as Exhibits Nos 1 A and 1B respectively. The Plaintiff also produced a copy of the official search as Plaintiff's Exhibit 4. Having paid the full purchase price of Kshs 310,000/= and filled all the requisite sub-division, consent and transfer documents in time and having commenced the transfer process in May 2021 Joseph Gichana Okworo, the eldest son to the 1st Defendant and brother to the 2nd, 3rd and 4th Defendants registered a caution against the entire suit land on January 5, 2020 claiming a beneficiary interest.
 3. The Defendant then stopped co-operating with the Plaintiff for purposes of facilitating the transfer. On June 29, 2021 the Land Registrar, Nyamira County summoned all the parties herein together with Joseph Gichana Okworo, the cautioner to attend a meeting in his office on July 14, 2021 at 10:00 AM for purposes of determining the fate of the caution registered in favour of Joseph Gichana. Another invitation for July 28, 2021 was made on July 15, 2021 after failure by the Vendors and cautioner to attend the first meeting. This time the parties turned up but the cautioner was very arrogant and refused to co-operate, prompting the Land Registrar to hear the Plaintiff and the Defendants herein where the Defendants acknowledged having received the purchase price in full. The cautioner, without substantiating, accused everyone of being compromised.
 4. The Land Registrar, Mr Charles Mwendwa Mutua advised the Plaintiff to move the Court seeking the removal of the caution and/or any other redress.
 5. The Plaintiff testified that he has been in possession of the 234 by 76.5 feet parcel of land since 2012 and no one has disturbed his occupation only that he does not have the Title documents to the same which he has longed for.



6. The Defendants having failed to enter appearance and/or file Defence and the Court having heard the Plaintiff's evidence, the Court has now to consider the following issues:
 1. Is the Plaintiff entitled to the relief of Specific Performance?
 2. Is the Plaintiff entitled to General Damages for breach of contract in lieu of Specific Performance?
 3. Did Joseph Gichana Okworo have a right to register a caution over the suit land?
7. From the outset, an immoral culture has taken root in this country where people enter into a sale agreement particularly in land transactions, receive money from purchasers, use the money but when the purchasers demand for transfer, the former become difficult and introduce other family members who they say have raised objections to the transaction. The Vendor then uses this as an excuse for not completing the transaction. He refuses to attend the Land Control Board for consent to transfer, does not refund the purchase price and makes the entire process stall. As a consequence, the Land Control Act has been converted into a vehicle for soft loans and perpetuation of fraud. This was not the intention of parliament when passing the Land Control Act, CAP 301 of the Laws of Kenya. It is so immoral to receive purchase price from a person who may have used all his lifetime savings and with whom the Vendor enters into a willing seller willing buyer contract freely and voluntarily to buy a piece of land but later on the Vendor introduces another member of the family who says that he was not consulted and would not have sanctioned the sale. The objector is used as an excuse not to complete the transaction. The latter even undertakes to refund the consideration when 'I get the money'. By then the Vendor's urgent needs have been sorted out, courtesy of the consideration received. There are also instances where family members differ over the sharing of the purchase price and a member decides to object to the transfer in order to push for a bigger piece of cake. Others, after spending the purchase money, want to go back to the Purchaser for renegotiation, claiming that they got a raw deal. The land may even have attracted a healthier buyer after the Vendor has signed the sale contract and received the consideration and he would now want to renegotiate the contract or pull out. Effectually, people have used this tool to "borrow" money as capital for their businesses, fees to educate their children, money to buy other parcels of land elsewhere or enrich themselves in any other way and then later on refuse to complete the transaction using the excuse of their families not having consented to the transaction or that the suit land is family or ancestral land and they have nowhere else to call home. Others even come with arguments that their so and so had left a curse in the family that no one should sell the land. It is not uncommon to hear the Vendor brag, "You cannot get far. Even if you go to Court it will take years before the matter is finalized and even if the Court gives judgment in your favour, we shall apply to court to be allowed to pay by monthly instalments and the Court will order the refund of the purchase price at a partly small interest and also allow the refund in peanut instalments. The money will then not benefit you". Should Courts allow this? Should Courts be used to preserve this practice? Courts should not abet this callous behavior. The Court cannot shut its eyes to this sharp practice and allow it to thrive. In our society where the doctrine of laissez faire is the order of the day it is inequitable to allow this wicked conduct to flourish. Contracts must be allowed to be performed as agreed upon.
8. The Plaintiff in this case finds himself in the scenario I have just described above. He exercised due diligence because even though the actual Vendors were the 2nd 3rd and 4th Defendants, he decided to involve the 1st Defendant who is the registered proprietor of the suit property viz LR No West Mugirango/bosamaro East/266 in trust for the 2nd 3rd and 4th Defendants. In the sale Agreements dated May 13, 2021 and May 20, 2012 respectively her name and Identify card number 33835938 appear. Her signature also appears in the agreement dated May 20, 2012. The question we ask is: where was Joseph Gichana Okworo when all this was taking place and why did he not object to the sale contract at



the time his siblings were receiving the purchase price? Who knows? May be part of this money could have been given to him.

9. Was the Purchaser supposed to ask the Vendor as Prophet Samuel in the Bible asked Jesse in 1Samuel 16:11 after parading seven of his sons, “Are all your children here? to which the 1st Defendant should have responded; “There remaineth yet the youngest, Joseph Gichana Okworo and behold, he is in the bush, grazing the sheep. He is not qualified to be king. He is too young to be involved in this exercise. He would not even understand it. I will put his share in a savings Account to be opened in my name in trust for him until he attains the majority age”. And the Plaintiff should have pleaded: “Send and fetch him: for we shall not conclude this contract till he cometh hither”. If the presence of Joseph Gichana Okworo did not matter at the time of concluding the contract, he should have remained in the “bush” until after the transfer. How does the Purchaser know how many other sons of Jesse are still out there grazing or chitchatting with their peers at Kebirigo shopping Centre in the neighbourhood of Nyamira town and who don’t matter in the negotiation of the contract at hand? Is he expected to go to the nearest market place and shout: “Are there people here related to Jesse and who have an interest in the land L. R. No this and that before I start the process of buying it? Does anyone have any objection?” After getting no objection at the marketplace, does the Purchaser then go to the family tree to find out the closest relatives to the Vendor up to the 6th Degree in consanguinity to be satisfied that there is no objection? I believe due diligence does not extend this far. All that the Purchaser is supposed to find out is the ownership of the land and no more and whether there are any encumbrances over the property. If the Vendor is not truthful enough, then he should be ready to live by the dictates of his signature and not get someone to question the contract at the transfer stage. Why place a caution only after the purchase price had been received and possibly spent in its entirety? Joseph Gichana Okworo was offered an opportunity by the Land Registrar, Nyamira to explain why he was against the transfer of the land to the Plaintiff but in the words of the Land Registrar in his letter of October 1, 2021,

“..... the cautioner was requested to produce documents in proof of his claims which he failed and decided to be arrogant in the aforesaid letter and accusing everyone of being compromised.”

The Land Registrar also said that all the other parties acknowledged that the complainant (Plaintiff), Mr Richard Joshua had purchased the parcel in dispute,

“-- this parcel was sold to the Complainant in the year 2012. According to the records produced during the caution hearing the sellers being Nyanchoka, Jaspheer Isaac, Cyrus Okemwa Okworo and Gerald Matoke Oyando acknowledged receiving the said sale proceeds but claimed the cautioner was out inciting others to deny the said Complainant his share.”

10. Before coming to the main prayer of Specific Performance, I take great exception to the Land Registrar’s advice to the parties after they appeared before him.
11. Under the *Land Registration Act* No 3 of 2012 section 73(1,) a caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2) by order of the Registrar. Subsection (2) gives powers to the Land Registrar to remove the caution after notifying the cautioner that he would do so after the expiration of a certain period of time. After listening to the parties herein the Land Registrar was duty bound to render a Decision under section 73(4) as to whether to lift or retain the caution. As long as the Cautioner is given an opportunity to show cause why the caution he had lodged cannot be lifted, then the Land Registrar is free to decide on the matter. Joseph Gichana Okworo was given such an opportunity but he instead accused everybody, I believe the Lands officials,



of having been compromised. He did not explain what interest he had in the land he had cautioned and in fact failure to explain this should have brought the matter to an end.

12. By referring the parties to Court, the Land Registrar, Mr Mutua was abdicating his role and causing the parties to incur more costs and time by filing this suit. Just like Courts, Land Registrars have jurisdiction to deal with disputes involving the lifting of cautions.
13. Section 75 of the [Land Registration Act](#), No 3 of 2012 provides for wrongful cautioning.

“any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.”

14. What interests does the cautioner intend to protect by lodging a caution over a parcel of land a portion of which his mother has already received money in respect of? Whatever the interests, are they overriding those of the registered proprietor or those of the purchaser? It should not escape the attention of this Court that even long after the meeting at the Land Registrar’s offices, the Vendors still received more money from the Plaintiff towards the final instalment of the purchase price.

The rights of Children over their father’s estate are inchoate. In [Marigi v Muriuki & 2 Others Civil Case No 189 of 1996 \[2008\] I KLR 1073](#), the Court held as follows;

“It was stated that the law recognizes the rights of Children over their father’s estate. These rights are inchoate and accrue upon the death of the father. The inchoate rights of the Respondent to the land owned by the 1st Appellant had not accrued at the time of filing suit before the High Court and at the time when this appeal was lodged. If the Respondent has any claim of land against his father, his inchoate rights accrued when his father (the 1st Appellant) died. Further, the Learned Judge ignored the fact that the 1st Appellant was the registered proprietor of the suit property and it was an error of law to restrain the 1st appellant from trespassing and dealing with his own land”.

15. By describing the children’s rights as inchoate (meaning immature) and which only accrue upon the parent’s (registered proprietor’s) death I doubt that the cautioner has any extant rights which would be protected by cautioning the suit land and if there are such interests to be so protected the same ought to have been brought to the attention of the Land Registrar for consideration.
16. The rights of a registered owner of land are protected under section 25 of the [Land Registration Act](#) and the only exception is Trusts and overriding interests under section 28 of the Act. The cautioner did not claim any Trust and if he had, he was obligated to provide evidence. The law provides under section 26 of the [Land Registration Act](#), subject to proof of ownership, the instances when a proprietor’s right to land can be challenged, none of which includes rights by Children.
17. In the celebrated case of *Esiroyo v Esiroyo* and the more recent case of [Marigi v Muriuki & 2 Others](#) (supra) no child has a right over the parent’s properties as long as the latter is still living. Article 40 of the [constitution](#) guarantees enjoyment of one’s property rights. This being the case, what rights does a child have over his parent’s property save as a licensee? In this case, the cautioner is not a purchaser, nor is he a chargee and the word “otherwise” under Section 71(1) (a) of the [Land Registration Act](#) giving a class of potential cautioners should be interpreted to mean a right that is registrable. The rule of ejusdem generis should also apply here. Is a future right (through transmission) an accrued interest? Certainly not during the lifetime of the registered proprietor. Joseph Gichana Okworo herein applied for the registration of a beneficiary interest. The only Beneficiary interest in law that I have come across



in respect to Joseph Gichana Okworo accrues only after the death of the registered proprietor. For the Land Registrar to have accepted the cautioner's Application for a caution on account of beneficiary interest when the registered owner is still alive is in my view stretching the right too far.

18. On Specific Performance, the Plaintiff attained full ownership rights over the 234 by 76.5 feet out of the parcel of land known as LR No West Mugirango Bosamaro Eact/266 the moment he completed to pay the purchase price of Kshs 310,000/= on May 13, 2021. Any continued registration of this parcel in the name of the 1st Defendant was as a Trustee. In the case of *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR* Civil Appeal No 51 of 2015 the Court of Appeal held that the Vendor holds the property in constructive trust for the Purchaser. Once the contract of sale is consummated, the parties are tied to it and opting out should have attendant severe consequences.
19. Section 38 (1) provides, in essence, that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed.
20. Likewise, the *Law of Contract Act*, Chapter 23 of the Laws of Kenya provides in Section 3 that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

 - (a) the contract on which the suit is founded –
 - (i) is in writing.
 - (ii) is signed by all parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
21. In the instant case, there was consideration and the Defendants have not even suggested that the same was inadequate. The 2 sale agreements dated May 20, 2012 and May 13, 2021 respectively are in writing and endorsed, by among others, the registered proprietor of the suit property out of which a portion had been negotiated and for which purchase price was paid. The said signatures were duly witnessed.
22. In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR* the Court of Appeal held that the Appellant's action of receiving the full purchase price and putting the Respondent in possession created a constructive trust in favour of the Respondent. The Court accordingly granted an order of Specific Performance in favour of the Respondent. In this case, the Appellant (Vendor) had sub-divided his land into 240 one-acre plots, and by an agreement of sale sold some of those plots to the Respondents and others (Purchasers). Upon paying the full purchase price and survey fees, he put each Purchaser in possession. Each of the Purchasers in the suit claimed to have developed their own portions by erecting permanent structures, built schools, churches and installed water and electricity. The Vendor did not make an application for consent of the Land Control Board for purposes of obtaining consent to transfer. Later, the Vendor filed a suit for injunction and eviction. The Purchasers filed a Defence and counter-claim seeking an order to compel the Vendor to transfer the land to them. The trial Judge entered judgment for the Vendor and dismissed the counter-claim on the basis that the suit land being agricultural land the consent of the Land Control Board was required and in the absence of the consent, the agreements of sale were not enforceable. On appeal, the Purchasers' counsel contended that the Purchasers were entitled to the land by constructive trust and that the *Land Control Act* should be interpreted in the light of the 2010 Constitution to ensure that the Purchasers



received substantive justice. The Court sitting in Nyeri held, inter alia, that the possession of the land by Purchasers was an overriding interest in favour of the Purchasers and further at paragraph 20 that:

“In the instant case, there was common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case.”

The Court stated further at paragraph 25 thus:

“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to *Land Control Act* is enforceable.”

23. In *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR* the Court of Appeal at Eldoret Civil Appeal No 51 OF 2015 held as follows:

“The *Land Control Act* does not, unlike Section 3 (3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the *Land Control Act* have unreasonably delayed in performing the contract. However, whether the Court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case..... since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the Courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.....”

The Court of Appeal concluded as follows:

“.....the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2-acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on December 4, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case. As we have held in essence that, the lack of the consent of Land Control Board does not preclude the Court from



giving effect to equitable principles, in particular the doctrine of constructive trust.....If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable.”

24. The instant case resonates with the above findings by the Court of Appeal whose Decisions bind this Court and I do not find even a crack through which I can escape. It is on all fours with the present case. The Purchaser is entitled to the land by constructive trust and the Land Control Act should be interpreted in the light of the 2010 Constitution to ensure that the Purchaser receives substantive justice.
25. The case of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR explains the position of law that the only common law remedy that may be claimed as of right is Damages. All other remedies are equitable and are granted at the discretion of the Court.
26. In Chase International Investment Corporation and Another v Laxman Kesbra and Others [1978] KLR 143; [1976-80] 1 KLR 891 the Court held that:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the Judge is to pass through them undeterred”.
27. In making prayers for Specific Performance I believe the Plaintiff smelt the harshness of common and written laws and decided to borrow from the wisdom of Lord Eldon who said that Equity came to assist and mitigate the harshness of the Common Law but not to replace it. He retaliated this view in the case of Lord Dudley v Lady Dudley⁴:

“Equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak...and defends the law of crafty evasions, delusions and subtleties, invented and contrived to evade and delude the common law...Equity therefore does not destroy the law nor create it but assist it”.
28. The discretionary nature of the award is tantamount to the Court considering all relevant matters that lean towards the justice or injustice of granting the remedy. This will be the position in the case of contracts for the sale of property that have a unique quality. Where there is a contract for the sale of land the claimant might want the land for its unique value and would regard Damages as a poor substitute. The equitable remedy of Specific Performance is an order addressed to a contracting party requiring him to perform what he promised to do. The Court takes a holistic view of the circumstances before deciding whether or not to grant the remedy. Factors that are relevant to the Court before deciding whether to grant an equitable remedy include, but not limited to:
 - (a) whether the remedy at common law is inadequate;
 - (b) whether the conduct of the claimant has been inequitable, that is whether the Claimant comes to Court ‘with clean hands’;
 - (c) whether the availability of the remedy sought may cause undue hardship to the Defendant;
 - (d) whether the imposition of the remedy may cause the Defendant to suffer undue hardship.



29. And in considering the issue of hardship to the Defendant, the Court could consider events which had occurred after the contract had been entered into, although this would be rare. This requires a balancing exercise on the part of the Court. On the one hand the Judge will weigh up the inconvenience or detriment that will be suffered by the Purchaser if he were left without an equitable remedy and determine whether this outweighs the hardship that may be suffered by the Vendor. The oppressive nature of the Order on the Vendor is required to be judged on the date of the application for the grant. In an action for Specific Performance the Purchaser is required to show that there is a contract which is enforceable at law. Hence, all the essential elements of a contract, such as agreement and consideration must be present.
30. Specific Performance compels a party to execute a contract according to the precise terms agreed upon or to execute it substantially so that under the circumstances, justice will be done between the parties. The rationale behind the remedy is to give effect to the intentions of the parties. It operates in relation to the entire contract and not merely a part of the agreement. The Purchaser has to come to Court with clean hands and to apply for relief without unreasonable delay. It grants the Plaintiff what he actually bargained for in the contract rather than Damages for not receiving it. Thus, Specific Performance is an equitable rather than legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by awarding Damages for breach of contract. As a general rule, Specific Performance is applied in breach of contract actions where monetary Damages are inadequate. In the instant case, more than 10 years after the Plaintiff paid the purchase price, was put into possession of the suit property, developed it and has had legitimate expectation, how would a refund of the purchase price put him back to where he was or could have been had he put his money to an alternatively better use? He cannot get a similar parcel of land in the neighbourhood at the same price.
31. In a nut shell, equitable remedies were developed to make up for the shortcomings of the common law Courts, which could not provide a remedy if the harmed party wanted the contract performed or a wrong threatened to be committed prevented. If a wrong is committed, there must be some kind of redress as the maxim 'ubi jus ibi reedium' goes. Equity was created to soften the blows of the Common Law but not to replace the common law in its whole entity.
32. Upon the application of the equitable doctrines, the Court in its discretion may award Damages and where Damages are an inadequate remedy, grant the equitable remedy of Specific Performance.
33. Article 10(2) (6) of the constitution of Kenya, 2010 recognizes equity as one of the values and principles of governance. Under Article 259 (1) (a) and (d) the constitution of Kenya, 2010 shall be interpreted in a manner that promotes its purposes, values and principles and (d) articulates to good governance. Equity as stated above is one such national value and principle of governance. Such construction to the constitution must equally be extended to all the laws of the land including the common law and the equitable remedy of Specific Performance.
34. Having said so, I find that an award of Damages for breach of contract would be an inadequate remedy for the wrong done to the Plaintiff by the Defendants for he would most probably not get an alternative parcel of land in the neighbourhood of LR No West Mugirango/ Bosamaro East/266 and even if he got one, the same will have appreciated so much since he paid for the current one about 10 years ago. It would be absurd to award him General Damages. In the premises, I award Judgment to the Plaintiff against the Defendants jointly and severally in the following terms:
1. An order of Specific Performance do and is hereby issued ordering the 1st Defendant to execute all necessary documents to effect the transfer to the Plaintiff of 76.5 ft by 234ft portion out of LR No West Mugirango/ Bosamaro East/266.



2. If (1) above is not effected within the next 30 days hereof, the Deputy Registrar of this Court is hereby directed to sign the transfer forms on behalf of the 1st Defendant and the Land Registrar, Nyamira is hereby ordered to register the 76.5 ft by 234ft portion out of LR No West Mugirango/bosamaro East/266 in favour of the Plaintiff.
3. An order is hereby issued directing the County Surveyor, Nyamira to facilitate the drawing and registration of the mutation forms to effect this transfer;
4. Costs of this suit to be borne by the Defendants jointly and severally.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 19TH DAY OF OCTOBER 2022.

MUGO KAMAU

JUDGE

In the presence of: -

C/A: Sibota

Plaintiff: Ms. Gogi

Defendant: N/A

