



**Odembo v Gacheru & 2 others (Environment & Land Case 165 of 2019)  
[2022] KEELC 15385 (KLR) (13 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15385 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 165 OF 2019  
MD MWANGI, J  
DECEMBER 13, 2022**

**BETWEEN**

**STELLA ACHIENG ODEMBO ..... APPLICANT**

**AND**

**LUCY WANJIRU MWENJE GACHERU ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF TITLES ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Plaintiff's case is that on 13/5/2014 she entered into an agreement with the 1<sup>st</sup> Defendant to purchase the 1<sup>st</sup> Defendant's beneficial interest in land IR 8392/44 at the cost of Kshs 23.0 million. The Plaintiff in accordance with the terms therein paid a deposit of Kshs 2,760,000/- to the 1<sup>st</sup> Defendant upon execution of the agreement.
2. The Plaintiff alleges that the 1<sup>st</sup> Defendant who was the vendor was unable to secure the title to the specific portion of the land, the subject matter of their agreement, within the stipulated time. Consequently, the two parties agreed on a Supplementary agreement which they executed on July 17, 2015. The Plaintiff paid a further sum of Kshs 1,050,000/- to the 1<sup>st</sup> Defendant towards the purchase of the subject property (hereinafter referred to as 'the suit property').
3. It is the Plaintiff's case that in both the earlier and supplementary agreements, the understanding was that the 1<sup>st</sup> Defendant was to procure all the completion documents and hand them over to the Plaintiff's advocate in exchange with a professional undertaking that once the transfer to the Plaintiff was complete, then she would pay the entire balance of the purchase price to the 1<sup>st</sup> Defendant.
4. The Plaintiff averred that by the date of filing her case, she had paid the 1<sup>st</sup> Defendant a total of Kshs 8,310,000/- as part payment of the purchase price way beyond what the agreements provided. She



asserted that she had always been ready to honour her part of the bargain but the 1<sup>st</sup> Defendant had refused and or failed to honour her obligations as per the agreements between them.

5. The Plaintiff affirmed that he registered a caveat against the title to the suit property on the September 16, 2016. However, the Plaintiff alleged that the caveat was irregularly and unlawfully removed without appropriate notice to her despite the fact that the 1<sup>st</sup> Defendant's case, Misc Application No 107/2018 seeking to remove the caveat had been dismissed by the Milimani Chief's Magistrate's Court for lack of merit.
6. The Plaintiff averred that both the Supplementary agreement of July 17, 2015 and the earlier agreement of May 13, 2014 had granted her partial possession of the suit property upon payment of the deposit of the purchase price. She had therefore taken possession and gone ahead to improve the suit property. She alleged that she had cleared the land, planted trees and flowers and even fenced the suit property as well as put a gate and other structures besides hiring security to guard the property.
7. The Plaintiff sought to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from lifting the caveat registered on LR No 8392/44 - IR No 164195/1, a permanent injunction restraining the 1<sup>st</sup> Defendant from subdividing, interfering, alienating, selling off and or transferring all that land IR No 8392/44 and from evicting and/or in any way interfering with the Plaintiff's quiet possession of the suit property.
8. The Plaintiff further prayed for specific performance of both agreements for sale entered into by her and the 1<sup>st</sup> Defendant. In the alternative and in the event of failure by the Defendants to execute such transfer documents, as indicated, a vesting order be granted to the Deputy Registrar to execute such transfer documents in regard to LR No 8392/44 transferring the said property to the Plaintiff.

**Response by the 1<sup>st</sup> Defendant: -**

9. The 1<sup>st</sup> Defendant filed a statement of defence dated October 2, 2019 in essence denying the Plaintiff's claim in its entirety. While admitting that she had entered into an agreement with the Plaintiff, the 1<sup>st</sup> Defendant's position was that at the time of entering into the contract with the Plaintiff, the title to the suit property was not yet registered in her name. As soon as the title was processed and issued in her name, she duly notified the Plaintiff. That was when they executed the Supplementary agreement dated July 17, 2015 which clearly spelt out the terms and conditions that each party was obligated to fulfil.
10. The 1<sup>st</sup> Defendant's case was that the Plaintiff failed to complete the contract forcing her to issue a notice to the Plaintiff to complete the purchase. The Plaintiff did not however, comply with the completion notice. The 1<sup>st</sup> Defendant, upon non-compliance of the Plaintiff subsequently issued a notice of rescission of the contract in accordance with the terms of the Supplementary agreement. The 1<sup>st</sup> Defendant averred that the contract was therefore lawfully rescinded.
11. The 1<sup>st</sup> Defendant asserted that it was an express term of the contract that the purchaser's financier's advocates were to provide her with a professional undertaking before she could release the completion documents to the purchaser's advocate. Such an undertaking was never given according to the 1<sup>st</sup> Defendant.
12. In regard to the caveat, the 1<sup>st</sup> Defendant averred that the Plaintiff lodged the same after she had received both the notice to complete and the rescission notice; the caveat was therefore unmerited. The 1<sup>st</sup> Defendant admitted that she made an application for removal of the caveat whereupon the registrar issued the Plaintiff a 45 days' notice. Subsequently, the Registrar removed the caveat after the expiry of 45 days.



13. The 1<sup>st</sup> Defendant was categorical that there were no developments whatsoever made on the suit property by the Plaintiff as alleged. Further the 1<sup>st</sup> Defendant affirmed that she was the one in possession of the suit property.

**Response by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants: -**

14. The Attorney General filed a statement of defence on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denying the Plaintiff's case and putting her to strict proof of the allegations in her plaint.

**Evidence Adduced Before the Court.**

15. The case proceeded to full hearing. Both the Plaintiff and the 1<sup>st</sup> Defendant called witnesses in support of their respective positions. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants participated in the hearing but did not call any witnesses.

**Evidence Adduced on Behalf of the Plaintiff.**

16. The Plaintiff adopted her witness statement dated May 17, 2019 as her evidence in chief. The Plaintiff's testimony was that at the time of making the 1<sup>st</sup> agreement, the land the subject matter of the agreement had not yet been subdivided meaning that the 1<sup>st</sup> Defendant didn't have a title document to the portion she was to sell to her. It was to be excised from the main block. The subdivision was ongoing at the time. It was expected to have been completed within the completion period of 180 days.
17. The 1<sup>st</sup> Defendant obtained the title document of the suit property one year after the execution of the 1<sup>st</sup> agreement. The Supplementary agreement was made after the issuance of the title document in the name of the 1<sup>st</sup> Defendant. The supplementary agreement provided that completion would be within 90 days after successful transfer of the title in her favour.
18. By the time of signing the Supplementary agreement, the Plaintiff had paid a total of kshs 3,810,000/-, much more than the deposit contemplated. The balance of the purchase price was to be paid at the completion.
19. The Plaintiff's testimony was that completion did not happen. Certain documents that were to be provided by the 1<sup>st</sup> Defendant were not provided.
20. The Plaintiff asserted that in accordance with the terms of both agreements, she was entitled to partial possession of the suit property. She allegedly took partial possession of the suit property soon after the execution of the 1<sup>st</sup> agreement.
21. According to the Plaintiff, the agreement was rescinded after the 1<sup>st</sup> Defendant got a title to the property.
22. The Plaintiff affirmed that she had kept aside money to pay the balance of the purchase price at the time of signing the 1<sup>st</sup> agreement. She produced her bank statement to demonstrate that.
23. In cross-examination, the Plaintiff confirmed that by the time they made the Supplementary agreement, the title of the subject matter had changed to LR No 8392/44 and was in the name of the 1<sup>st</sup> Defendant.
24. The completion date in the 1<sup>st</sup> agreement had been 180 days with a provision for an additional 60 days.



25. The Plaintiff was aware that the half (½) acre she was to buy from the 1<sup>st</sup> Defendant was to be excised from a main block which was family property. She was to buy the 1<sup>st</sup> Defendant's share in the main block only. The sale would not have been completed until and unless the subdivision was completed.
26. The Plaintiff admitted that she was kept updated on the progress of the subdivision, through her husband since she was at that time working in Nigeria. She was therefore aware of the challenges encountered in securing the subdivision and registration of the titles arising out of the subdivision of the main block. Her husband had recommended a surveyor to help speed up the process of subdivision and registration at the Lands' Ministry.
27. Sometimes in June 2015, the 1<sup>st</sup> Defendant wrote her an email confirming acquisition of the title to the suit property in her name. They signed the supplementary agreement at the request of the 1<sup>st</sup> Defendant. The price of the subject property remained the same. According to the terms of the Supplementary agreement, the 1<sup>st</sup> Defendant's advocate was to forward completion documents in thirty (30) days in exchange with a professional undertaking from her financier's advocates. The delivery of the completion documents was conditional to the receipt of the professional undertaking. The professional undertaking as contemplated in the agreement has never been given to date.
28. The default clause in supplementary agreement provided that the vendor was at liberty to issue a completion notice in case of default by the purchaser. Failure to comply with the notice would lead to a rescission of the agreement.
29. The Plaintiff confirmed that the Supplementary agreement embodied the entire agreement of the parties and the Supplementary agreement therefore took precedence over the 1<sup>st</sup> agreement.
30. In total, the Plaintiff had paid a sum of Kshs 8,310,000/- to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was insisting on an undertaking. She further had stated that she wanted full payment of the balance of the purchase price and not partial payments but the Plaintiff did not have the money then. The Plaintiff had since used the money she had set aside to purchase some other property.
31. The Plaintiff remembered being given 7 days by the court in this matter to deposit the money in court but she was not able to.
32. The Plaintiff acknowledge refund of Kshs 6,010,000/- by the 1<sup>st</sup> Defendant.
33. Under cross-examination by Counsel representing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the Plaintiff protested that she received the letter from the Land Registrar in respect of the removal of the caveat long after the expiry of the 45 days given therein. She therefore insisted that the caveat was not procedurally removed.
34. PW2 was the husband to the Plaintiff. He adopted his witness statement dated October 21, 2021 as his evidence in chief. He asserted that the Plaintiff had taken partial possession of the suit property, cleared the bushes, put up a fence and built a guard house in the suit property after the signing of the 1<sup>st</sup> agreement.
35. In cross-examination, DW2 confirmed that he represented his wife who was out of the country then in following up the subdivision and excision of the half (½) acre land. He had recommended a Mr Martin to help in expediting the process at the Lands' Offices. The process admittedly took longer than contemplated by the parties. He was however kept informed of the progress.
36. The parties got into the supplementary agreement due to the delays in the process of subdivision and excision of the half (½) acre land. The agreement was mutual.



37. PW2 confirmed that they were seeking financing from National Bank of Kenya Ltd. He was however, not aware that the 1<sup>st</sup> Defendant had gotten title to the subject property one month before the signing of the Supplementary agreement.
38. PW2 confirmed that they spent the money they had reserved for the purchase of the suit property in acquiring a different property.
39. PW2 stated that he was not aware of the notice by the land registrar to remove the caveat on the title.

#### **Evidence Adduced on Behalf of the 1<sup>st</sup> Defendant.**

40. The 1<sup>st</sup> Defendant called 3 witnesses including herself.
41. PW1 was her daughter Esther Mitchel Wamwitha who confirmed paying the refund of Kshs 6,010,000/= to the Plaintiff from her own bank account on behalf of her mother, the 1<sup>st</sup> Defendant.
42. On her part, the 1<sup>st</sup> Defendant adopted her witness statement dated October 2, 2019 and the further statement of November 4, 2021 as her evidence in chief.
43. The 1<sup>st</sup> Defendant testified that the process of subdivision took long delaying the completion of the 1<sup>st</sup> agreement. That was the reason why the Plaintiff had recommended a Mr Martin to help in speeding up the process. The 1<sup>st</sup> Defendant asserted that she kept the Plaintiff well informed about the progress of the process of subdivision of the main block of land through emails and through her husband whom they were in contact with.
44. The 1<sup>st</sup> Defendant acknowledged signing the supplementary agreement without coercion after she acquired title to the subject property in her name. The Plaintiff had informed her that she needed the Supplementary agreement for purposes of seeking financing.
45. The 1<sup>st</sup> Defendant affirmed that she did not receive the professional undertaking contemplated in the agreement. She was not aware where the Plaintiff ever obtained the undertakings from her financiers.
46. The 1<sup>st</sup> Defendant had expressly informed the Plaintiff via email that she would move on if she did not pay the balance of the purchase price without further delay. She had tried to engage with the Plaintiff as much as was possible but without success. She therefore issued a completion notice and upon failure by the Plaintiff to comply, she proceeded to issue the rescission notice in accordance with the provisions of the supplementary agreement.
47. The 1<sup>st</sup> Defendant retained a sum equivalent to 10% of the purchase price.

#### **Court's Directions.**

48. Upon close of the hearing, the court directed the parties to file written submissions. All the parties complied.
49. I must point out that the Plaintiff did not file her submissions within timelines given by the court on May 18, 2022. The Plaintiff's advocate on July 13, 2022 explained that he had been unwell. The court extended the time for the parties to file submissions.
50. Apparently, the Plaintiff once more didn't comply with the timelines given. The 1<sup>st</sup> Defendant proceeded to file her submissions ahead of the Plaintiff. When the 1<sup>st</sup> Defendant was served with the Plaintiff's submissions, she found it necessary, as she explained in her supplementary/further submissions dated September 16, 2022 to make a response to the Plaintiff's submissions. I agree with the 1<sup>st</sup> Defendant that it was appropriate for her to file the supplementary/further submissions



after service of the Plaintiff's submissions. The sequence was to be that the Plaintiff was to file her submissions first but she, I believe mischievously, chose to wait until the 1<sup>st</sup> Defendant had filed and served her submissions before filing hers. Her submissions were in essence a response to the 1<sup>st</sup> Defendant's submissions and not vice versa.

51. The court will therefore admit and consider all the submissions filed.

### **Issues for Determination.**

52. After a careful consideration of the pleadings filed by the parties, the evidence adduced and the submissions filed, the court is able to isolate the undisputed facts from the disputed facts.

53. It is not in dispute that the Plaintiff and the 1<sup>st</sup> Defendant entered into an agreement for sale of land dated 13/5/2014 at the price of Kshs 23.0 million. The two parties thereafter entered into a supplementary agreement dated 17/7/2015. The price remained the same.

54. It was also not disputed that the Plaintiff paid a total sum of Kshs 8,310,000/- to the 1<sup>st</sup> Defendant being part payment of the purchase price. The 1<sup>st</sup> Defendant, after issuing the Plaintiff with a notice of completion followed with a notice of rescission of the contract subsequently refunded the Plaintiff Kshs 6,010,000/- out of the Kshs 8,310,000/- paid to her; meaning that she retained a sum of Kshs 2,300,000/- (Kshs 2.3 million) equivalent of 10% of the purchase price. The legality of the purported rescission of the contract by the Plaintiff and the decision to retain 10% of the purchase price is what is in contention.

55. From the foregoing, the issues for determination in this matter are clear-cut. In the court's opinion, the issues for determination are: -

- a. Whether the Supplementary agreement executed by the Plaintiff & the 1<sup>st</sup> Defendant superseded the earlier agreement.
- b. Whether the 1<sup>st</sup> Defendant lawfully and procedurally rescinded the contract/agreement with the Plaintiff.
- c. Whether the 1<sup>st</sup> Defendant was entitled to retain a sum equivalent to 10% of the purchase price.
- d. Whether the Plaintiff is entitled to an order of specific performance of the contract and subsequently an order of permanent injunction.
- e. Whether the caveat lodged by the Plaintiff against the title to the suit property was lawfully removed.
- f. What orders should the court make in respect to the costs of the suit.

### **Analysis and Determination.**

#### **A. Whether the supplementary agreement executed by the plaintiff & the 1<sup>st</sup> defendant superseded the earlier agreement.**

56. The Supplementary agreement between the Plaintiff and the 1<sup>st</sup> Defendant is dated July 17, 2015. It is clear from the evidence and from the agreement itself that this supplementary agreement was executed after the 1<sup>st</sup> Defendant secured the title to the suit property in her name. The intention of the supplementary agreement was to confirm that the land described in the agreement for sale executed by



the parties on May 13, 2014 was the same as the land whose title was obtained by the vendor on May 20, 2015. The citation 2(B) on page 2 of the agreement expressly states that:

“The vendor (1<sup>st</sup> Defendant) and the purchaser (the Plaintiff) have agreed to execute this Supplementary agreement to confirm that the land described in the agreement for sale executed by the parties on May 13, 2014 is the same as the land whose title was obtained by the vendor on May 20, 2015 and whose LR No is 8392/44 and whose details are more particularly described in “A” above.”

57. The Supplementary agreement re-defined the completion date to mean ‘90’ days from the date of successful transfer in favour of the purchaser. The purchase price remained Kshs 23.0 million. At the time of execution of that supplementary agreement, the Plaintiff had paid Kshs 3,810,000/- which the vendor acknowledged by signing the agreement. The balance was to be paid at completion.

58. The supplementary agreement acknowledged the earlier agreement signed by the parties on May 13, 2014. The parties in a bid to clarify the import of this supplementary agreement and rightly so, to avoid any confusion, at paragraph 14.3 expressed their intentions explicitly as follows: -

“14.3. This agreement embodies the entire understanding of the parties and there are no other arrangements between the parties relating to the subject matter of this agreement, save for the terms of the agreement signed between the parties on May 13, 2014, some of which have been amended by this agreement, therefore in case of a dispute, this agreement shall take precedent (precedence) over the agreement signed on May 13, 2014.”

59. I think the clause 14.3 sufficiently addresses the issue. On that note, I will proceed to the 2<sup>nd</sup> issue.

**B. Whether the 1<sup>st</sup> defendant lawfully and procedurally rescinded the contract/agreement with the plaintiff.**

60. At paragraph 9 of her amended plaint, the Plaintiff alleged that since the execution of the agreements, she had made several demands to the 1<sup>st</sup> Defendant to keep her end of the bargain and make good her obligations as per the agreements for sale. The Plaintiff averred that the 1<sup>st</sup> Defendant had refused and or failed to procure and obtain the original documents so as to enable the parties conclude the transaction. In essence, the Plaintiff was accusing the 1<sup>st</sup> Defendant of breaching the terms of the agreement.

61. The Plaintiff during cross-examination by the advocate for the 1<sup>st</sup> Defendant acknowledged that under the terms of the Supplementary agreement, the vendor’s advocate was to forward completion documents in 30 days in exchange with a professional undertaking from the purchaser’s financiers advocates. The delivery of the completion documents was conditional of the receipt of the professional undertaking; which was not given and has not been given to date.

62. On completion and default, the Plaintiff too confirmed that the supplementary agreement allowed the vendor (1<sup>st</sup> Defendant) to give a 21 days’ completion notice. Failure by the purchaser to comply with the completion notice would entitle the vendor to rescind the contract/agreement.

63. The Plaintiff admitted receiving the 21 days’ completion notice as well as the rescission notice from the 1<sup>st</sup> Defendant. She however termed it as not right.

64. The 1<sup>st</sup> Defendant on cross-examination by the advocate for the Plaintiff acknowledged that the Plaintiff too had a right to terminate the agreement but did not do so. She affirmed that she is the one



- who terminated the agreement exercising her right under the agreement as a vendor. The rescission notice was sent on August 23, 2016.
65. The 1<sup>st</sup> Defendant admitted that she had received a total sum of Kshs 8,310,000/-. She refunded the Plaintiff Kshs 6,010,000/- retaining Kshs 2.3 million equivalent of 10% of the purchase price.
66. The Supplementary agreement of July 17, 2015 at paragraph 3.1 titled, ‘completion documents’ provided that:
- “The vendor’s advocate shall forward to the purchaser’s advocates the following completion documents within 30 days after execution of this agreement in exchange of a professional undertaking from the purchaser’s financier’s Advocates. The delivery of the completion documents shall be conditional to the receipt by the vendor of the professional undertaking.”
67. The termination clause in the Supplementary agreement was clause 4 thereof. Clause 4.2 provided that where the purchaser failed to comply with their obligations under the agreement including the obligation to pay the purchase price pursuant to clause 2 of the agreement, the vendor had the liberty to give the purchaser a 21 days’ notice in writing to comply with her obligations. The notice was required to specify the default and require the purchaser to comply within 21 days. Failure by the purchaser to comply with the notice would entitle the vendor to rescind the agreement by notice in writing. The vendor could not rescind the agreement before the notice under clause 4.2 was given.
68. The 1<sup>st</sup> Defendant’s completion notice was dated July 26, 2016 issued pursuant to the termination clause in the ‘supplementary agreement for sale of land LR No 8392/44 dated July 17, 2015’. The completion notice was followed by the rescission notice dated August 23, 2016.
69. After issuance of the rescission notice, the Plaintiff through her advocates vide a letter dated September 22, 2016 wrote what I will refer to as a protest. The advocates stated that their instructions were,
- “to demand which we hereby do, that you withdraw the rescission notice immediately in any case not less than two days from the date hereof. Our client will then provide you with an undertaking for purposes of completion and (our) client is willing to make a further payment of Kshs 2,000,000/- in the course of next which shall further reduce the outstanding balance.”
70. The penultimate paragraph stated as follows: -
- “Take notice that our client shall not pay any interest as indicated by yourself. The delay in completion has been contributed to by both parties. You cannot therefore ask for interest at this point.”
71. At the point at which the 1<sup>st</sup> Defendant issued the completion notice and subsequently the rescission notice, it is clear from the above letter and other correspondence exchanged that the Plaintiff had not yet issued the professional undertaking as contemplated in the supplementary agreement neither did she have the money to pay the balance of the purchase price in full. The agreement between the parties was explicit that: -
- “the delivery of the completion documents shall be conditional to receipt by the vendor of the professional undertaking.”



72. I note the Plaintiff's attempt to introduce a 'red herring' in her submissions alleging that the contemplated professional undertaking could only be issued by one advocate to the 1<sup>st</sup> defendant's advocate. Since the supplementary agreement had not indicated who the 1<sup>st</sup> Defendant's advocate was, the Plaintiff insinuates that to be the reason why she was allegedly unable to issue 'her financier's advocates' professional undertaking' to the 1<sup>st</sup> Defendant. I call it a red herring for two reasons.
73. First and foremost, it was not pleaded in the Plaint. It has only been introduced in the submissions. It is an attempt by the Plaintiff to depart from her pleadings and as I observed earlier, after the 1<sup>st</sup> Defendant had already submitted. Secondly, the Plaintiff did not in her evidence demonstrate that she had identified and secured a financier and that all that remained was for the 1<sup>st</sup> Defendant to name her advocate for purposes of the issuance of the professional undertaking.
74. In the case of the *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 others* [2014] eKLR, the court cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, where the court quoted an article by sir Jacob entitled "*The present importance of pleadings*" published in 1960 where the author had stated that
- "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other business" in the sense that points other than those specific may be raised without notice."
75. The Supreme Court of Nigeria on the other hand in *Adetoun Oladeji (NIG)- Vs- Nigeria Breweries PLC* SC 91/2002 re-emphasized the principle that parties are bound by their pleadings and further stated that,
- "In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enable parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation."
76. In the case of *Raila Odinga & Another v IEBC & 2 others* [2017] eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that
- "It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely



to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

77. My finding is that the 1<sup>st</sup> Defendant was entitled to issue a completion notice as she did, to the Plaintiff on her failure to comply with her obligations under the supplementary agreement in terms with clause 4.2 thereof. On failure by the Plaintiff to comply with the completion notice, the 1<sup>st</sup> Defendant was entitled to rescind the agreement again as she did, by notice in writing to the purchaser. The rescission of the agreement therein by the 1<sup>st</sup> Defendant was both procedural and lawful.

**C. Whether the 1<sup>st</sup> defendant was entitled to retain a sum of Kshs 2.3 million equivalent to 10% of the purchase price upon rescinding the agreement.**

78. The answer to this issue is to be found in clause 4.4 of the supplementary agreement. The clause provided that if the agreement was rescinded by the vendor, as was in this case, ‘A sum of Kshs 3,810,000/= being the deposit of the purchase price plus any other amount that shall have been paid by the purchasers to the vendor shall be refunded to the purchasers less 10% of the agreed price – Kshs 2,300,000/-.
79. I need not say more on this issue. The agreement speaks for itself. The parties are bound by the terms of their contract. The vendor was entitled to retain 10% of the agreed price – being Kshs 2,300,000/-.

**D. Whether the Plaintiff is entitled to an order of specific performance of the contract and subsequently an order of permanent injunction.**

80. In the case of *Amina Abdul Kadir Hawa -Vs- Rabinder Nath Anand & Another* (2012) eKLR, the court held that the remedy of specific performance is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it, that it is equitable in the interest of both parties to grant the relief. More importantly, the party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfil the same.
81. I am in full agreement with the above cited decision. It is trite that a party seeking the equitable remedy of specific performance of a contract must show that he or she has performed or is ready, willing and able to perform, all the terms of the contract which he or she was obligated to, whether expressly or by implication.
82. The Plaintiff in this case has not demonstrated that she has performed her part of the bargain neither has she demonstrated that she was willing and ready at all times to do so. From the evidence before the court, in form of the testimony by the Plaintiff and the correspondence produced as exhibits in this matter, the Plaintiff did not procure the professional undertaking as contemplated in the supplementary agreement neither did she have the money to pay the balance of the purchase price in full.
83. My finding is that the Plaintiff is therefore not entitled to the order of specific performance.
84. The Plaintiff too prayed for an order of permanent injunction. In the case of *Sammy Kemoo Arekai v Eliakim W Olweny & another* [2021] eKLR, Mutungi J stated that;

“A permanent injunction would only issue after the rights of the contesting parties have been adjudicated and the Court has reached a final decision.”



85. Mutungi J had cited the case of *Kenya Power & Lighting Co Ltd v Sheriff Molana Habib* [2018] eKLR where Korir J stated that: -

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

86. The Plaintiff having failed to establish a legal claim of right over the suit property would surely not be entitled to an order of permanent injunction.

**E. Whether the caveat lodged by the Plaintiff against the title to the suit property was lawfully removed.**

87. In respect of the caveat, this court had earlier on considered the prayer by the Plaintiff for an injunction to restrain the Defendants from removing the caveat lodged. Justice Eboso on May 22, 2019 issued a conditional injunction order; the condition being that the Plaintiff deposits a sum of Kshs 14,690,000/- in court within seven (7) days. In default the injunction order stood vacated.

88. From a perusal of the court record and even from the Plaintiff's own admission during the hearing, the condition to deposit Kshs 14,690,000/- in 7 days was not complied with. The injunction order therefore lapsed the caveat could therefore be lawfully removed.

89. I agree with the Attorney General's submissions that the Land Registrar under section 78(1) of the *Land Registration Act* has the power to remove a caveat lodged on a title.

90. The Plaintiff sought to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from lifting the caveat registered on the title to the suit property. From her own testimony, the Plaintiff affirmed that the caveat had already been removed by the Land Registrar albeit, unprocedurally according to her. This is a prayer that was therefore overtaken by events. This court does not issue orders in vain.

**F. What orders should the court make in respect of the costs of the suit.**

91. In the case of *Party of independent candidate & Another v Mutula Kilonzo & 2 others* HCEP No 6 of 2013, the court cited with approval the case of *Nedbank Swaziland Ltd -Vs- Sandile Dlamini* SZHC30[2013] where Maphalala J had referred to the holding of Murray CJ in the case of *Leuben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 CSR at 227 who had stated as follows: -

“It is clear from authorities that the fundamental principle underlying the award of costs is twofold. In the first place, the award of costs is a matter in which the trial Judge is given discretion. But this judicial discretion must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.....in the second place, the general rule is that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds.”

92. Having carefully considered the circumstances of this case, I have enough ground to depart from the general rule on the issue of costs. At the time of filing the suit, the 1<sup>st</sup> Defendant was yet to refund the Plaintiff the monies due to her despite having rescinded the agreement between them more than two



(2) years prior to the filing of suit. The court will therefore not condemn the Plaintiff to the costs of the suit despite dismissing her case.

93. The conclusion is that the Plaintiff's case against the Defendants is dismissed but with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER 2022**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

**Ms. Nyamolo holding brief for Owago for the Plaintiff.**

**Ms. Mwalizi for the 2<sup>nd</sup> Defendant.**

**Ms. Kariuki holding brief for Mwaure Waihiga for the 1<sup>st</sup> Defendant.**

**Court Assistant – Hilda**

**M.D. MWANGI**

**JUDGE**

