Mama Millers Limited v Sunrise Synthetics Limited (Environment & Land Case 226 of 2018) [2022] KEELC 15485 (KLR) (6 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15485 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 226 OF 2018

JG KEMEI, J

DECEMBER 6, 2022

BETWEEN

MAMA MILLERS LIMITED ..... PLAINTIFF

AND

SUNRISE SYNTHETICS LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff is a Limited Liability Company carrying out the business of flour milling in Thika Town while the Defendant is the registered owner of the suit land known as LR No 4953/1192/1 (whole land) measuring 12.41 Ha or 31 acres or thereabouts within Thika Town.

2. It was its averment that vide an agreement dated the 20/9/2009 the Plaintiff entered into an agreement of sale with the Defendant for the sale and purchase of 4 acres to be excised out of the whole land (suit land) for the consideration of Kshs 16 Million. The Agreement contained the terms and conditions and obligations of sale between the parties. The Plaintiff paid the purchase price to the tune of Kshs 15.6 Million to the Defendant. The Plaintiff was put in possession of the suit land where it has developed a large milling factory.

3. It is further averred that the cause of action occurred on the 23/7/18 when the Defendant purported to rescind the agreement of sale dated the 20/9/2009 by offering to refund the purchase price and abandon the completion of the said agreement, despite several reminders to complete over the years, an action that the Plaintiff avers amounts to breach of contract, is malicious, bad faith and misrepresentation. See the particulars in para 15 of the Plaint.

4. The Plaintiff sought orders as follows;

    a. A permanent injunction to restrain the Defendant from charging alienating selling transferring or otherwise dealing with the suit premises or any other part thereof until the subdivision

process has been carried out and the Plaintiff is given the 4 acres of land it bought in terms of the sale agreement dated 20/9/2009.

b. A permanent injunction to restrain the Defendant from evicting and or attempting to evict the Plaintiff or in any way interfering with the Plaintiff's quiet user and enjoyment of the 4 acres of the land it purchased.

c. An order of specific performance of the sale agreement dated the 20/9/2009 and amended as per the Defendant's advocates letters dated the 26/5/2010 and 7/6/2020 so as to hive off 4 acres of land from the suit premises and transfer to the Plaintiff.

d. An order that the Defendant carries out the subdivision process of the suit premises so as to give effect to the sale agreement dated the 26/9/2009 within 30 days of the delivery of the judgement of the Court in default of the Defendant carrying out the subdivision process the Plaintiff be at liberty to do so and the costs of such subdivision be recovered by the Plaintiff in a civil and summary debt from the Defendant be the Plaintiff.

e. An order that the Plaintiff be permitted to deposit the balance of Kshs 400,000/- in Court for the Defendant to collect as the Defendant has refused to accept it.

f. The Deputy Registrar of this Hon Court to sign all the documents necessary to give effect to specific performance of the agreement dated the 20/9/2009 if the Defendant declines to execute them.

g. Costs of the suit be awarded to the Plaintiff

h. Damages for breach of contract malice bad faith and misrepresentation.

5. The Defendant denied the claim of the Plaintiff vide its defence and counterclaim filed on the 11/1/2019. Whilst maintaining that the parties entered into a sale agreement on the 20/9/2009; the Plaintiff paid 10% deposit and additional payments to the Defendant, took possession before conclusion of the agreement, the Defendant contends that time was of essence to the agreement hence the same has been rendered time barred by virtue of Section 4(1) (a) of the *Limitations of Actions Act* noting that the transaction was predicated on a pure contract. The Defendant contends that the Plaintiff is not entitled to any redress as the Plaintiff lost all claims to the suit land after the lapse of the 6-year period and in any case the Defendant has expressed willingness to make refunds of the full sum to the Plaintiff.

6. In its counterclaim, the Defendant sought the following orders against the Plaintiff;

a. The suit be struck out and dismissed with costs.

b. The Plaintiff be ordered to pay the Defendant Kshs 80 Million being the sum due to it for possession of the suit land at the rate of Kshs 500,000/- per acre per month.

c. Interest on b above

d. Any other relief as the Court may deem fit to grant.

7. The Defendant raised a Preliminary Objection on the 23/9/2018 on the grounds that;

a. That the Plaintiff's suit herein in incompetent having been barred by the express mandatory provisos of Section 4 (1) (a) of the *Limitation of Actions Act* Chapter 22 of the Laws of Kenya by dint of the fact that the actions sought to be enforced herein are founded on a sale agreement, a pure contract which can't be brought after the end of six years from the date on which the

action accrued. Notably, the Plaintiff now seeks to enforce a contract entered into on the 20th day of September 2009. We are now over nine (9) years down the line.

b. That the Plaintiff engaged in the said alleged sale in blatant contravention of the provisos of Section 34 of the *Government Land Act* Chapter 280 of the Laws of Kenya for engaging the Defendant who had not obtained the Commissioner of Lands' Consent to transfer the said parcel of land a consent that was mandatory before the transaction could be actualized.

c. That similarly, the said alleged sale is void ab initio having contravened the special conditions as prescribed by the Commissioner of Lands to regulate any transfer/sale and particularly the need for a prior written consent as per special condition number nine (9) as carried in the said grant. The said conditions are indeed mandatory buttressed by the provisos of Section 26 of the *Land Act* No 6 of 2012.

d. THAT despite the fact that the Plaintiff was well aware that the instant suit was fully impacted by the express provisos of Section 4 (1) (a) of the *Limitation of Actions Act* Chapter 22 of the Laws of Kenya they ignored the need to properly commence Court by seeking leave to have their timelines which had clearly lapsed enlargement/expanded.

e. That the suit herein is wholly incompetent, contra statute, misconceived, unprocedural, lacks merit and is an abuse of the Court process as it is both bad in law and is incurably defective.

8. On the December 20, 2020 the Court made orders interalia and directed that the Preliminary Objection should be incorporated in the main suit. In addition, the Court granted leave to the Plaintiff to deposit the balance of the purchase price in the sum of Kshs 400,000/- in Court for the Defendant to collect then or at the conclusion of the case.

The Evidence

9. PW1- Bernard Wainaina Mwangi took the stand and introduced himself as the Managing Director of the Plaintiff Company. He relied on the witness statement dated the 9/8/2018 and the supplementary statement dated the 15/1/2019 as his evidence in chief and produced the documents marked PEX NO 1-16 appearing on pages 18-98 of the Plaintiff's bundle.

10. The witness stated that the subject plot purchased by the Plaintiff is marked B on the subdivision scheme plan shown on page 28 of the trial bundle.

11. He stated that the Plaintiff paid the full purchase price for the suit land as follows;

a. 20/8/2009 - Kshs 1.6 Million

b. 20/6/2010 - Kshs 2.0 Million

c. 27/5/2010 - Kshs 12.0 Million

d. December 20, 2019 - Kshs 400,000/- paid to Court as per the Court orders of even date.

12. The witness stated that the transaction was for 90 days and completion was contemplated for 20/9/2009 or such other date to be appointed by the Defendant. Completion was subject to the production of the completion documents listed in para 7 of the agreement of sale. That the Defendant did not appoint another completion date after the initial one had lapsed.

13. He stated that the completion date is still open. That he paid the last installment into Court because the Defendant had refused to take the money. That the Defendant through its lawyer had asked that

the Kshs 400,000/- be held pending the completion of the subdivision of the land. He informed the Court that the Defendant is yet to submit any documents of completion todate.

14. The witness informed the Court that the Plaintiff issued a notice of completion dated the 31/7/2014 at page 165 of the bundle which was 5 years after the completion date. That on the 27/6/2016 the Plaintiff issued another completion notice of 21 days against the Defendant to complete in default the Plaintiff would caveat the suit land and move the Court for specific performance in addition to other remedies.

15. That though Clause 13 k of the agreement of sale provided the manner in which the agreement was to be amended, the Defendant amended the agreement vide the letter dated the 7/6/2010 in terms of Clauses 3(iii) and 5 (b) of the said agreement. That vide the above letter the Defendant duly put the Plaintiff into possession of the suit land.

16. The witness insisted that the agreement was not frustrated by any event beyond the control of the parties. That the Defendant claimed that he had a problem obtaining the completion documents because of the subsisting loan with his bankers as well as the delay at the lands office in obtaining the Commissioner of Lands Consent to subdivide and transfer.

17. The witness stated that the Defendant paid off the loan on the property as shown on page 35 of the bundle and entry No 19 – discharging the said loan on the 17/5/2013.

18. The witness confirmed that he lodged a caveat on the suit land on the 13/2/2017. See entry No 21 on the title. That the entry is per the agreement of sale dated the 20/9/2009 together with the subdivision scheme – plot B annexed and shown on page 28 of the bundle.

19. PW2 – Joseph M Muchungu introduced himself as the registered valuer and director of Proximate Valuers Limited. He produced the valuation report dated the 7/8/2018 on pages 49-75 of the bundle and marked PEX No 17. He led Evidence that he valued the 4 acres at Kshs 133 Million. That at the time of carrying out the valuation the buildings and some of the equipment had been installed. That he relied on the agreement of sale as a basis of the valuation though he saw the copy of the mother title later.

20. PW3- Florence Wanjiru introduced herself as an Advocate of the High Court of Kenya practicing as such in Nairobi and relied on her witness statement dated the 9/8/2018 in her evidence in chief. She stated that she acted for the Plaintiff, the purchaser in the transaction.

21. She stated that time was of essence to the agreement as set out on para 10 of the said agreement. She stated that the agreement of sale was not amended pursuant to para k of the said agreement. However, the parties amended the agreement through correspondences exchanged between them with respect to the Clause 3(ii) on payment of the balance of the purchase price and possession.

22. That though the agreement was subject to a 90-day completion it had an additional rider which stated that or such other date to be appointed by the vendor/Defendant.

23. That the Plaintiff intimated to the Defendant that it was ready to pay and called for the completion documents in writing but the Defendant failed to complete. That the completion date has not lapsed as the Defendant is yet to appoint another date and the Defendant is yet to produce the completion documents.

24. DW1 – Kilnah Shah took the stand and introduced herself as the director of the Defendant Company and relied on her witness statement dated 11/1/2019 and 12/1/2021 as her evidence in chief. She relied entirely and adopted all the documents produced by the Plaintiff (see Plaintiffs trial bundle) and also contained in her bundle on pages 59-152.

25. She stated that there was no amendment to the agreement for sale. That the Plaintiff issued a completion notice in 2014. She stated that the completion date was 90 days or such other date as the vendor may appoint. That Clause 13 (e) of the agreement provided for extension of the completion date by the purchaser. She stated that the agreement collapsed because both parties failed to comply on completion date; the purchaser failed to pay the purchase price and the Vendor failed to obtain the completion documents. That the process of completion was frustrated at the lands office. In addition, the witness stated that the claim of the Plaintiff is time barred.

26. In cross examination the witness informed the Court that the purchaser paid Kshs 15.6 Million as at 26/5/2010 as part of the rent for the occupation of the premises. That the Plaintiff became a tenant post the 90 day completion. She added that the Plaintiff is a tenant of the Defendant and hence the claim for rent in the sum of Kshs 80 Million.

27. The firm of J K Mwangi & Co advocates filed written submissions on behalf of the Plaintiff while that of John Ogada & Co advocates filed written submissions on behalf of the Defendant. I have read and considered the submissions.

28. The parties have separately filed issues for determination which I have read and considered.

29. The key issues for determination are;

    a. Whether the Plaintiff's suit is time barred

    b. Whether the agreement of sale dated the 20/9/2009 was breached and if yes by whom and what are the consequences

    c. Whether the Plaintiff is entitled to Specific performance

    d. Whether the counterclaim is merited.

    e. Who meets the costs of the suit?

Time bar

30. On the 26/9/2018 the Defendant filed a Preliminary Objection on the grounds that; the suit is incompetent having been barred by the express provisions of Section 4(1) (a) of the *Limitation of Actions Act*; the sale was contracted in blatant contravention of the provisos of Section 34 of the *Government Land Act* for want of obtaining consent from the Commissioner of Lands to transfer; the sale was void ab initio having contravened special conditions No 9 of the grant with respect to the commissioner of lands consent to transfer; that Plaintiff has not obtained leave to enlarge time before filing the suit.

31. The Plaintiff submitted that under the *Limitation of Actions Act* the time limit for breach of contract for a simple contract is 6 years but for the recovery of land is 12 years. It argued that the cause of action occurred on the 23/7/18 and not at the signing of the agreement in 2009 and that being the case the suit was filed well within time in both situations.

32. The Defendant on the other hand submitted that in as far as the claim of the Plaintiff interalia is for specific performance the claim is for simple contract brought out of the 6 year period and hence time barred. That the cause of action accrued the first day that the parties failed to perform its obligations under the agreement. The Defendant argued that both parties breached the agreement on the December 19, 2009, the date for completion and therefore time started running from that date for purposes of limitation. That the suit having been filed in 2018, 9 years later is time barred beyond

redemption. That the contract therefore remained unenforceable following its lapse on the December 19, 2009.

33. The definition of a Preliminary Objection was aptly given in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

> " .... a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."
>
> > (15) Thus a Preliminary Objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

34. For a Preliminary Objection to succeed the following tests ought to be met: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

35. A valid Preliminary Objection should, if successful, dispose of the suit in finality. See the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu High Court Civil Case No 22 of 1999, where the Court held that:-

> "When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone."

36. The basis of the Plaintiff's case arises from the agreement of sale dated the 19/9/2009 in which the parties agreed to sell and buy the suit property. The question that the Court is being called to determine is this; when did the cause of action accrue to the Plaintiff? Is it at the time of execution of the agreement (19/9/2009) or the contemplated completion (19/12/209) or the date of the alleged termination by the Defendant (23/8/2018)? The corollary issue arising from this is whether the applicable law is Section 4(1) (a) or Section 7 of the *Limitation of Actions Act* (LAA).

37. The Plaintiff has argued that the suit falls under Section 7 for the recovery of land and therefore not time barred while the Defendant has taken cover under Section 4 of the said statute and insists that the suit is long dead having been time barred after the contemplated completion date i.e the December 19, 2009 because, it is argued, on that day both parties failed to complete the agreement.

38. Section 4(1) of the *Limitation of Actions Act* states as follows

> " The following actions may not be brought after the end of 6 years from the date on which the cause of action accrued; (i) actions founded on contract."

Section 7 on the other hand provides that an action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him.

39. My understanding of the above provision is that a claim for time bar in either case is predicated on when the cause of action arise. In this case the cause arose from the date of breach of contract and not the date of execution. That being the case the Court is being called upon to look into facts to determine when the cause of action arose, that is when the breach of agreement occurred.

40. From the above arguments of the parties this Court is being called upon to assess evidence so as to arrive at the decision whether or not the suit is time barred. I agree with the Plaintiff that this removes the objection from being a pure point of law.

41. It is trite law that the limitation period provided under Section 7 of the *Limitation of Actions Act* is 12 years and the Plaintiffs suit was filed in 2018 and therefore it is not time barred. Even if it was to be argued that the same was based on contract, the cause of action would only accrue in 2018 when the Defendant notified the Plaintiff in writing that it was not willing to complete the contract by providing the completion documents. Looked that way I find the suit is neither barred by Section 4 or 7 of the *Limitation of Actions Act*.

42. I therefore find that there is no merit in the Preliminary Objection and it is hereby dismissed with costs to the Plaintiff.

Whether the agreement of sale dated the 20/9/2009 was breached, and if yes, by whom.

43. It is not in dispute that the parties entered into agreement dated the 19/9/2009. The validity of the agreement is not challenged. The issue is whether it was breached and by whom. It was a term of the agreement that the suit land being 4 acres would be excised from the mother title; the mother title was charged to I & M Bank Limited; purchase price was Kshs 16 Million; the deposit was payable upon the execution of the agreement and the balance of the purchase price in the sum of Kshs 14.4. Million was payable on or before the completion date and in exchange of the of the completion documents and vacant possession; property was sold with vacant possession on the completion date; vacant possession was to be given upon payment of the full purchase price; sale was subject to the law society conditions of sale; completion was 90 days from the date of execution or such other later date as the vendor may appoint after obtaining the necessary approvals consents and deed plans for the subdivision; on the completion date the vendors advocates was to deliver to the Purchasers advocate the completion documents listed i-xi in the agreement; the advocates for parties were disclosed under para 8 of the said agreement; time was of the essence; under para 13 b the vendor was to obtain the necessary consents necessary to complete the transaction;

44. It was admitted by both PW1 and DW1 that the Plaintiff paid the deposit to the Defendant on the land that the transaction was not performed at the completion date. The Defendant's case is that since both parties failed to complete within 90 days then the agreement was breached by both parties and there being two wrong doers the Plaintiff being one of them cannot benefit from the wrong.

45. It is trite that in the absence of any vitiating factors parties are bound by the bargains they make in the contract. In the case of *National Bank of Kenya v Pipelastic Samkolit (K) Ltd & another* [2001] eKLR the Court held that a Court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

46. I note that that though time was of essence in this contract, the transaction was not completed on the completion date. The matter went quiet until the 20/5/2010 when the Plaintiff intimated to the

Defendant that it wanted to pay the balance of the purchase price in exchange of possession. 6 days later on the 26/5/2010 the Defendant wrote in agreement as follows;

> " .... Our instructions are that your client Mama Millers Limited may take possession of the property defined in Clause 1 (a) of the agreement of sale dated the 20/9;/2009 subject to the payment of the purchase price in a accordance with Clause 3(ii) of the agreement of sale dated the 20/9/2009."

47. On the 25/5/2010 the Plaintiffs paid Kshs 14 Million which monies were admitted by the acknowledge by the Defendant vide its letter dated the 7/6/2010 as follows;

> " ..... Our client has instructed us to confirm that it is in receipt of the Kshs 14 Million being a further installment of the purchase price of 4 acres sold to Mama Millers Limited. The balance of the purchase price being the amount of Kshs 400,000/- in respect to 4 acres being bought by Mama Millers is to be paid once the subdivision is completed. Accordingly, Clause 3(ii) of the agreement for sale dated the 20/9/2009 stands amended.
>
> Further our client further confirms that Mama Millers may take possession of the 4 acres is purchasing as requested. Accordingly, Clause 5 (b) of the agreement for sale dated the 20/9/2009 regarding the 4 acres sold to Mama Millers Limited all other terms and conditions of the said agreement for sale remains as they are and are operational."

48. From the above paras it is clear beyond per adventure that the parties varied the agreement and changed their positions to the effect that the Defendant got a benefit in the form of the 14 Million being the purchase installments and the Plaintiff got possession of the suit land. The argument of the Defendant that the agreement was not amended is inconsistent as the amendment is clearly set out in para 47. In addition, there is no merit in the argument of the Defendant that the contract was breached on completion that is to say the December 20, 2009. This is because the Defendant confirmed in writing on the 2/6/2010 that save for the amendments with respect to the payment of the balance of the purchase price and the possession all other terms remain as they are and are operational. This means the Defendant acknowledged that the agreement was still in force and parties and open for enforcement by the parties.

49. Another reason why the agreement was still in force is that the completion Clause had a proviso that 90 days or such other date as the Vendor may appoint. In the letter dated the 25/5/2010 the Defendant elected a new completion date and subjected it to the completion of the subdivision of the land and perhaps the submissions of the completion documents. In this second instant the parties therefore expressly flanked the completion door wide open.

50. It is to be noted from the evidence of DW1 read together with entry No 18 that the Defendant paid off the loan at I & M Bank Limited as seen in the discharge of charge dated the 17/5/2013 further showing the accrued benefit to the Defendant.

51. The Defendant's argument that it did not issue the instructions contained in the letter dated the 26/5/2010 and 7/6/2010 does not hold water seeing that no evidence was placed before the Court and neither the lawyers were called to testify in Court to demonstrate otherwise in rebuttal of the letters. .

52. Further the purpose of the sums being acknowledged by the Defendant in the letter dated the 27/5/2010 clearly refers to the installment for the sale and not rent as alluded by the Defendant. There was no evidence placed before the Court in form of a lease agreement between the parties. It is clear in the letter that the Plaintiff was put in possession by the Vendor pursuant to a purchaser's right. The argument that the Plaintiff was a tenant is therefore without any basis.

53. Under the agreement it was the obligation of the Defendant to obtain all the consents necessary to complete the transaction. DW1 led evidence that the delay in so obtaining the documents was occasioned by problems at the Commissioner of Lands. There was no evidence that the consents and subdivision had been applied for nor the nature of problems it experienced at the lands office. In any event the Defendant cannot benefit from his own failure to meet an obligation in the agreement.

54. Fast forward on the 9/8/2014 the Defendants advocate wrote to the Plaintiff stating that it had no instructions from the Defendant and that they should contact the Defendant but the significance of this letter is that the Defendant had been handling the subdivision of the land directly. However in a new twist and apparent change of mind, the Defendant vide its letter dated the 23/7/18 wrote to the Plaintiff as follows;

> " ... We wish to inform you that before you proceed to file a suit kindly refer to the terms and conditions of the agreement. We are willing to refund the monies paid to us."

55. I agree with the Plaintiff that this is when the cause of action accrued to it given the Defendant had breached the agreement by its clear intention not to conclude the agreement. At this time the Plaintiff has paid substantially most of the purchase monies leaving a balance of Kshs 400,000/- which was payable on completion of the subdivision. That Plaintiff has also been put in possession of the suit land. Unchallenged evidence was produced by PW2 that showed that the Defendant has carried out massive developments on the land to the tune of Kshs 200,000,000/-. (See the Valuation Report).

56. Courts have made pronouncements on delinquent sellers who enter into agreements and breach them at will. In the case of *Eldo City Ltd v Corn Products Kenya Ltd & Another* (2013) eKLR where the Court when confronted with a similar case held:

> " In my view, to uphold the position where a party can pull out of a transaction when the parties are already at consensus ad idem, will not be prudent in the world of economics. To my mind, that freedom should be limited up to the point the parties are still negotiating. Once all terms have been agreed and settled, that freedom should dissipate. Otherwise, mischievous parties with no intention of selling their merchandise may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage. I think this is not to be encouraged."

57. Further in the case of *James Muchangi Gachemi v Solio Ranch Limited & Chief Land Registrar* [2017] eKLR where Nambuye J (as she was then) respectively pronounced herself as follows:

> " ...The trial Court would have gone a long way to fortify this principle by establishing that although a property owner has a right to sell or not to sell it, he has no right to dangle it with impunity before the eyes of a serious intending buyer and where he does so, he has to be made to meet the consequences for his impunity by either being put on hold in the exercise of his right of sale to a 3rd party, pending the trial or to ultimately be told to specifically perform the contract in favour of the serious intending purchaser before whose eyes the sale was dangled with impunity as alleged by the Plaintiff."

58. I find that the Defendant breached the agreement at will and without any just cause.

Whether the Plaintiff is entitled to Specific performance

59. Specific performance is an equitable remedy grounded in the equitable maxim that equity regards as done that which ought to be done and as an equitable remedy it is decreed at the discretion of

the Court and the basic rule is that specific performance will not be decreed where the common law remedy such as damages would be adequate to put the Plaintiff in the position, he would have been but for the breach. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.

60. In addition, a person seeking an order for specific performance must show and satisfy the Court that it can comply, that is to say ready willing and able to do so and mere statements are not enough. This is premised on the equitable maxim that he who comes to equity must do equity. In the case of *Palmer Vs Lark* (1954) 1 Cha 182 and *Openda Vs Ahn* (1984) KLR 2018 the Court held that a purchaser must pay or render at the time and place of completing the sale the purchase price to the seller and this is a condition precedent for specific performance of the agreement.

61. In this case the Plaintiff having performed its part of the bargain that is to say paid the purchase price in full, and been put in possession, and the Defendant having received the full purchase price, what remained were the formalities of transfer of the land to the Plaintiff. The Defendant held the land in trust for the Plaintiff. I find that this is a case where the principle of constructive trust and proprietary estoppel applies. Needless to state that there exists a valid enforceable contract between the parties.

62. A constructive trust is a doctrine of equity imposed by Courts to benefit a person who has been wrongfully deprived and requires a person who would be unjustly enriched to transfer the property to the intended party. In this case allowing the Defendant to benefit from the purchase price and hold from reneging on the agreement on the land amounts to unjust enrichment, a situation that is frowned by equity.

63. In the *Willy Kimutai Kitilit Vs Michael Kibet* [2018]eKLR the Appellate Court stated that the *Constitution* under Article 10 (2) (b) has elevated equity as a principle of justice to a constitutional edict. Under Article 10(2) equity is now a national value enshrined in the *Constitution*.

64. I find that there is a valid contract between the parties and damages are inappropriate for the instant case.

The Counterclaim

65. Having held that there was no evidence adduced with respect to any tenancy between the parties, I find that the claim of the Defendant with regards to the claim of Kshs 80 Million remains unsupported and therefore fails with costs.

Final orders and disposition

66. In the end I enter judgement for the Plaintiff against the Defendant in the following terms;

    a. A permanent injunction be is hereby issued to restrain the Defendant from charging alienating selling transferring or otherwise dealing with the suit premises or any other part thereof until the subdivision process has been carried out and the Plaintiff is given the 4 acres of land it bought in terms of the sale agreement dated 20/9/2009.

b. A permanent injunction be and is hereby issued to restrain the Defendant from evicting and or attempting to evict the Plaintiff or in any way interfering with the Plaintiff's quiet user and enjoyment of the 4 acres of the land it purchased.

c. An order of specific performance of the sale agreement dated the 20/9/2009 be and is hereby issued so as to hive off 4 acres of land from the suit premises and transfer to the Plaintiff.

d. It is hereby ordered that the Defendant carries out the subdivision process of the suit premises so as to give effect to the sale agreement dated the 26/9/2009 within 60 days of the delivery of the judgement of the Court in default of the Defendant the Plaintiff be at liberty to do so and the costs of such subdivision be recovered by the Plaintiff in a civil and summary debt from the Defendant by the Plaintiff.

e. The Deputy Registrar of this Hon Court to sign all the documents necessary to give effect to specific performance of the agreement dated the 20/9/2009 if the Defendant declines to execute them.

f. Costs of the suit shall be awarded to the Plaintiff.

67. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mwangi for Plaintiff

Ms. Njeru for Defendant

Court Assistant – Phyllis / Kevin