



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND

AT MURANGA

ELC NO. 25 OF 2017

AFRICAN COTTON INDUSTRIES LIMITED..... PLAINTIFF

VS

RURAL DEVELOPMENT SERVICES LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on the 23/10/13 against the Defendant. The Plaintiff avers that it entered into an agreement of sale with the Defendant on the 2/7/13 for the purchase and sale of KAKUZI/KIRIMIRI BLOCK 7/281 (the suit land) for the sum of Kshs 205,360,000/-. A 10% deposit was paid and acknowledged by the Defendant. That the Defendant has refused, neglected and/or failed to complete the sale of the suit land. The Plaintiff has pleaded *inter-alia* the particulars of constructive trust and breach of the right to property and agreement of sale.

2. The Plaintiff sought the following orders;

- a. A declaration that the Agreement for Sale dated 2/7/2013 between the Plaintiff and the Defendant, notwithstanding the Defendant's refusal to the same, remains valid and enforceable against the Defendant;
- b. An order of Specific Performance do issue compelling the Defendant to complete the Agreement for sale dated 2/7/2013 and in this regard to take all such actions and to execute all such documents as shall be necessary to effect due and effectual transfer of the Suit Property, namely, KAKUZI/KIRIMIRI BLOCK /281 situated in Makuyu and containing by measurement 51.28 hectares or thereabouts to the Plaintiff;
- c. An Order directing that should the Defendant fail to take all the necessary actions and execute all the requisite documents in terms of Order b) above so as to transfer the Suit Property to the Plaintiff within fourteen days of the order, the Deputy Registrar of this Honourable Court shall stand empowered to take the said actions and to execute the said documents at the Defendant's expense;
- d. A declaration that the Land Control Act, Chapter 302 Laws of Kenya (now repealed) did not apply to the transaction which is the subject of the Agreement for sale dated 2nd July, 2013;
- e. As an alternative to the Declaration sought in prayer d) above, an order do issue compelling the Defendant to honour and discharge its obligations under the Agreement for Sale and to, *inter-alia*, apply for the consent to Transfer from the relevant Land Control Board, within fourteen (14) days of this Order, in default whereof the Deputy Registrar of this Honourable Court shall be empowered to apply for the said Consent on behalf of and at the cost of the Defendant to apply for the Land Control Board consent to the transaction as per the Sale Agreement dated 2/7/2013 within the statutory time limit or in the alternative, the Registrar of this Court, to apply for such consent on behalf of the Defendant;
- f. If required, and as a further alternative to the order d) above, an order for extension of the statutory time limit for applying for Land Control Board Consent pursuant to Section 8(1) of the Land Control Act be granted for such period as this Honourable Court determines to be adequate;
- g. A declaration that the Plaintiff holds the Suit Property, that is, KAKUZI/KIRIMIRI BLOCK 7/281 situated in Makuyu containing by measurement 51.28 hectares or thereabouts in trust for the Defendant;
- h. An order for compensation against the Defendant as provided for in Article 23(3)(e) of the Constitution made up of general

damages for pain and suffering, punitive and exemplary damages to compensate the Plaintiff for denying, violating, infringing or threatening the Plaintiffs' right to property over the Suit Property KAKUZI/KIRIMIRI BLOCK 7/281 situated in Makuyu containing by measurement 51.28 hectares or thereabouts;

i. A declaration that Section 9 (2)(a) of the Land Control Act is unconstitutional to the extent that it deprives the Plaintiff of its contractual interest in land, in violation of the Principles of Article 40(2)(a) of the Constitution which stipulate that parliament shall not enact a law that deprives a person of any interest in any property;

j. As an alternative to the relief for Specific Performance of the Agreement for Sale dated 2nd July, 2013, the Plaintiff claims from the Defendant special damages in the sum of Kshs.846,314,247.00 as particularized in paragraph 22 of the Plaint together with interest thereon at Court rates from September 2016 when the various amounts were computed until payments in full;

k. As a further alternative to the relief of Specific Performance of the Agreement for sale dated 2/7/2013, the Plaintiff claim from the Defendant special damages in the sum of USD 43,629.93 as particularized in paragraph 25 of the Plaint together with interest thereon at Court rates from February 2017 when the amount was settled in full;

l. An order that the Plaintiff's Business Plan dated 7/10/2013 remains confidential to the parties and cannot be disclosed to third parties and/or used without the prior written consent of the Plaintiff or the Court's permission.

m. Costs of this suit for two Counsels and

n. Any other relief that this Honourable Court deems just and appropriate under the circumstance

3. The Defendant denied the Plaintiff's claim in its entirety. In its amended statement of defence filed on the 7/9/17 it contended that it was reluctant to sell the suit land for the reasons; duress, mental illness of Dr Kimani and want of Land Control Board consent inter alia.

4. At the hearing of the suit the Plaintiff called a total of 6 witnesses. The Defendant called 3 witnesses in rebuttal. Mr. Regeru Njoroje of Regeru & Co Advocates led the Plaintiffs' team of Counsels alongside Messrs. Situma and Wambugu of Anjarwalla Khanna Advocates while Mr. Wanga of Waweru Gatonye & Co Advocates represented the Defendant.

5. The 1st to take the stand was **Salim Hussein Anjarwalla** as **PW1**. He relied on his witness statement dated the 23/10/13 and the supplementary statement dated the 22/5/18. In support of his evidence, he produced 4 volumes of bundles marked as Vol 1-4 running from pages 1- 2733.

6. The witness introduced himself as the Chairman of the Plaintiff Company whose factory is located at Athi River off Mombasa Road, Nairobi. The Company is a local manufacturer of *inter-alia* cotton products for household and hospital use including cotton wool, toilet paper, sanitary towels, and diapers. That at the time the Company faced challenges such as reliable power supply, expansion space and poor road network and to meet the challenges it decided to purchase land and set up a new cotton processing factory. That the suit land was sourced in January/February of 2013 and negotiations on the sale and purchase begun. That he met and negotiated the purchase price with Dr. Kimani in his offices situate at Hurlingham, Nairobi. He offered the Price of Kshs 1.7 million per acre vide a letter dated the 4/2/13. The offer was accepted by the Defendant on the 5/2/13. The heads of terms were discussed and a draft agreement of sale was exchanged. This transaction however collapsed because of disagreements on certain clauses. That the negotiations having aborted the witness informed the Court that the Plaintiff embarked on sourcing another parcel of land, albeit unsuccessful.

7. However, on the 14/6/13 Dr. Kimani informed the Plaintiff that he had consulted with his family and had arrived at the decision to offer the property for sale to the Plaintiff on the same terms as previously agreed. The offer was duly accepted on the 17/6/13. Immediately the Defendant arranged for an inspection and survey of the suit property which showed discrepancies in the acreage. This led to the reduction of the acreage and corresponding adjustment of the total purchase price. The survey also revealed the developments on the suit property.

8. PW1 stated that he later offered to purchase the moveables (livestock, tractor etc) on the suit property at a price to be agreed.

9. The agreement of sale dated the 2/7/13 which was duly executed by both parties in the presence of their respective Advocates. That the Plaintiff paid the sum of Kshs 20.5 Million being the deposit to the Defendants Advocates which was duly acknowledged vide the letter dated the 5/7/13.

10. The he informed the Court that having signed the agreement for sale and in anticipation of the commencement of the factory project, the Plaintiff embarked on commissioning professionals to compile project plans based on the suit land, put up its factory on Mombasa Road for sale in readiness for relocation to the suit land and travelled abroad between the 20/7/13 and 12/8/13 meeting potential equipment suppliers in readiness for the project. That in all these the Plaintiff incurred significant expenses.

11. That trouble with the completion of the agreement started on the 12/7/13 when the Defendant's Advocates informed him not to visit the suit land. On 14/7/13 he was informed through Mr. Regeru, his General Manager that Dr. Kimani was unwell. Time for completion was drawing near and through his Advocates sought to know the progress made on completion of the transaction. However, no information was forthcoming from the Defendant's Advocate ostensibly on the ground that Dr. Kimani was in and out of hospital and had no further instructions. That he finally managed to contact Dr. Kimani on the 14/8/13 who confirmed that he was unwell but stated that some family members were causing trouble (objecting to the sale) in respect to the transaction however his Advocate and wife were dealing with them.

12. On the 15/8/13 Mrs. Kimani finally broke the news that the family was considering backing out of the sale. That on the 29/8/13 the Defendant's Advocates cancelled the agreement and returned the deposit in the sum of Kshs 20.5 Million to the Plaintiff's Advocates.

Shocked by the turn of events the witness testified that he instructed his Advocates to return the deposit to the Defendant and issue a notice of completion which was done on the 4/9/13 which notice was not complied with by the Defendants. That the deposit was again returned to the Plaintiffs lawyers and in a letter addressed to the Plaintiff dated the 12/9/13, the Defendant explained that it was cancelling the contract because Dr. Kimani was not in the right frame of mental condition to enter the agreement in respect to the suit land. Secondly that the family members were objecting to the sale because the suit land was matrimonial home and a major family asset. Thirdly that no consent of Land Control Board had been applied nor obtained thus rendering the transaction void. The letter was categorical that the Defendant will not provide the completion documents called for in the notice to complete or at all and dared the Plaintiff to sue it.

13. In answer to the question whether Mrs. Kimani signed the agreement for sale under duress the witness expressed doubt and stated that he was aware that the agreement was signed by Dr. Kimani and Mrs. Kimani before their lawyer Ms. Lydia Gitaka and received no communication from the said lawyer that she signed the agreement for sale under duress. In any event, the witness stated that the Defendant through its said lawyer acknowledged the receipt of the deposit on the 5/7/13 while the execution was made on the 2/7/13.

14. On whether Dr. Kimani was mentally incapacitated at the time of signing the agreement of sale, the witness testified and placed before the Court two bundles of documents in form of financial and business reports of blue-chip companies that Dr. Kimani was investing buying and selling shares at the Nairobi Stock exchange. These Companies included Safaricom, Kakuzi Limited, Total Kenya Limited, Nation Newspapers Limited etc. The witness informed the Court that given the active investments by Dr. Kimani in the bourse it was not apparent that he was mentally incapacitated. He went ahead to express his opinion that Dr. Kimani was using the accident and ill health to avoid the transaction. He explained that in his interaction with Dr. Kimani he came out as a shrewd and decisive businessman.

15. While under cross examination by Mr. Wanga, the witness stated that there was no mention in the agreement of the nature of the project intended to be set up on the suit land and neither the value of the project was disclosed. That the transaction was purely a sale of land. He admitted that he caused due diligence on the suit land which revealed that the land was agricultural and had homesteads (domestic workers houses) alongside other developments. The witness stated that the reason for the collapse of the earlier agreement was because the Defendant was unhappy with some of the special conditions therein.

16. Further the witness informed the Court that he learned that there were issues with the agreement vide the email of 14/8/13 when Dr Kimani informed him that family members were causing trouble but his wife and lawyer were dealing with the matter. That after the return of the cheque for deposit the Plaintiff did not exercise the right to rescind/terminate the agreement as per Special conditions clause H.

17. With regard to the expenses enumerated in para 18 of the witness statement, he informed the Court that the Defendant was liable for the expenses incurred in the project. That the survey and due diligence of the land was to be done at the cost of the Plaintiff. He confirmed that the agreement was signed by the Plaintiff before the completion of the due diligence, a risk he consciously took. Further that Dr Kimani was not aware that he was putting up the factory on Mombasa Road on sale. He further explained that it was not premature to put up the Mombasa Road factory for sale because of the planned schedules in respect to land acquisition and the factory set up were due immediately on completion.

18. PW1 explained in cross examination that the sum of Kshs 803 Million was in respect to lost profits which would have been made by the Plaintiff had the factory been set up successfully on the suit land.

19. To salvage the agreement, he informed the Court that a meeting was held between the representatives of the Plaintiff and that of the Defendant on 18/9/13 in the absence of Dr Kimani. Mrs. Kimani and her brother-in-law offered 30 – 40 acres of land for sale, an offer he declined arguing that the agreement was for the purchase of the whole land.

20. Explaining why the Plaintiff did not obtain the consent, the witness informed the Court that it was the obligation of the Defendant to apply and obtain the Land Control Board consent. That on the rescission of the agreement by the Defendant the Plaintiff lodged a caution to protect its purchasers' interest in the suit land.

21. Reacting to a question why the Defendant was not involved in the assessment of the expenses, the witness responded that there was no need to involve it in assessing its own losses. Instead, he instructed Price Water Coopers (**PWC**) to quantify the same and a report was filed in Court.

22. PW2 – Nabil Onali Anjarwalla, described himself as the Project Manager having joined the employ of the Plaintiff on the 1/6/13. He informed the Court that he did not witness the agreement of sale nor was he aware that Dr Kimani suffered a mental condition. That the Plaintiff had obtained letters of credit/financing from banks to fund the project but was frustrated by the rescission of the agreement by the Defendant, although he tabled no evidence in support. He disclosed that the Plaintiff identified and purchased another land around Kabati/Kenol but later sold it because it was unsuitable for the project.

23. PW3- Mureithi Regeru, introduced himself as a director of the Plaintiff. He stated that he was involved in coordinating and directing the process of land acquisition and the proposed project. He liaised with land agents and lawyers and reported to PW1. That after the collapse of the 1st agreement on the 18/3/13, he again re-engaged land agents to source for land, albeit, unsuccessfully. That he coordinated the due diligence and arranged for the survey of the suit land leading to the signing of the agreement of sale on the 2/7/13. That though the Plaintiff agreed to purchase the moveables, it was subject to a price to be agreed by the parties. That he was present at the meeting held on the 18/9/13 to resolve the sale stalemate. He reiterated the evidence of PW2 that the Plaintiff acquired another parcel of land near Kenol but sold it as the land was not fit for purpose. With regard to Dr Kimani, he informed the Court that he met him in early 2013 and there was nothing to suggest that he had a mental condition.

24. PW4- Peter Mburu Mbugua, a general trader/businessman stated that in 2012 he learnt through a friend that the Defendant was selling the suit land. On meeting Dr Kimani as he purchased goats and ballast from him at the suit property, he struck an agreement to source a potential buyer at a 3% commission. The first potential buyer he approached was Geodetic International Limited. This Company failed to raise the purchase price and the sale fell through. He later met with James Wauthi, a land agent who introduced his client the Plaintiff to the

suit land who liked it and later he was introduced to PW1, the Managing Director/Chairman of the Plaintiff.

25. PW5- James Waweru Wauthi described himself as a generalist estate agent trading as Tidetwo Enterprises and testified that in mid-2012 on instructions of PW1 he unsuccessfully sourced for land along Nakuru -Nairobi Highway for the Plaintiff for purpose of setting up a factory project. That the land had to be of unique characteristics as required by the Plaintiff that is to say close to Nairobi, good accessibility, adequate water and electricity, contain murrum/red soils, flat with sufficient room for expansion. He advised him that there was land in Makuyu that matched the plaintiff's specifications that he had sourced through PW4. That on viewing the land PW1 confirmed its suitability and on the 5/2/13 he sent an offer to Dr Kimani on behalf of the Plaintiff which letter was delivered by PW4. He stated that he did not meet with Dr Kimani. The offer was accepted and the parties later entered into an agreement of sale.

26. PW6 – Antony Muniu Thoiti introduced himself as a Partner leading the Forensic services practice in East Africa at PWC. He gave an impressive educational and work credentials relating to his practice. He testified and informed the Court that he was engaged by the Plaintiff in March 2016 to quantify and advise it in respect to costs, expenses and damages arising from the rescission of the transaction and compute the opportunity costs on breach of contract by the Defendant. He presented and explained the report on pages 339 -619 of the Plaintiffs bundle yielding the sum of Kshs 846, 314,247/- being the amount due in respect to lost profits, expenses, damages and interest due to the Plaintiff and payable by the Defendant. That the sum relating to lost profits of Kshs 803 Million is the computation of the present value of the cashflows expected to have been generated by the proposed project from October 2014 to 2026 (profits that would have accrued to the Plaintiff had the project kicked off uninterrupted) based on the business plan, estimates and critical assumptions supporting the business. One of the assumptions was that the project would commence in October 2014. The dollar currency applied was because the borrowing by the Plaintiff was to be in US Dollars.

27. That in arriving at the sums above he relied on the plaint, agreement of sale, feasibility study, Project (board manufacturing) study and documents presented by the Plaintiff. He stated that he proposed that damages be recovered from Feb 2013 to cover the agreement that aborted because related expenses had been incurred by the Plaintiff. The interest applied was 6.7% pa. annum (CBK rate) and not the contracted 14 % in the agreement of sale.

28. With that the Plaintiff closed its case.

29. DW1 – Mrs. Lilian Wanjuki Kimani led the Defendant's defence. She introduced herself as a co- director and shareholder of the Defendant Company. The other Director/shareholder being Dr Kimani, her husband whom she married on 28/6/75. That together with Dr Kimani they have 4 grown children some of whom are married with children. She stated that she lives in Nairobi, Kileleshwa now but have lived in Karen, Othaya Road Kilimani before. She retired as a Director – Administration & Training from KARI in 2007 and has tried a hand in business and farming after that and currently she is a house wife.

30. Although she stated that she does not know the % holding, she confirmed that Dr Kimani has interests in form of shares in many quoted companies at the Stock Exchange such as Kakuzi, Safaricom etc.

31. She relied on her witness statement dated the 13/3/17. She also relied on list of documents on pages 17-24 and marked DEX Nos 1-24.

32. She narrated to the Court how Dr Kimani was involved in an accident on 28/2/13 at Hurlingham Nairobi and sustained a head injury which injury was initially thought not to be serious. She produced the police abstract and a medical report in support of the accident. That he was treated and discharged at Nairobi Women Hospital. On the 8/3/13 he consulted Dr. Mwangemi and Dr. Aruka where upon a CT scan being done, was diagnosed with acute hematoma and brain injury. That he resumed his consultancy duties in Juba South Sudan. However, on the 27/5/13 he fell ill in Juba and was flown into the country and admitted at Nairobi hospital for brain surgery under the care of Dr Silverstein. He was discharged on the 5/6/13. On the 8/7/13 he was again admitted at Nairobi hospital this time suffering from a blood clot on the leg. She testified that at the time of the hearing his condition has improved and recovered considerably.

33. She stated that the Defendant Company owns the suit land. It was her understanding that the assets of the Company are independent from the Directors/Shareholders. That the Plaintiff lodged a caution on the title on the 26/8/13 claiming a purchaser's interest. That the Company has no employees. On the farm, are semi-permanent structures, water tanks, irrigation system and staff quarters, she testified.

34. She confirmed the board resolution authorizing the sale of the land to the Plaintiff dated the 4/2/13. However, the initial agreement aborted because of disagreements on special conditions which were unfavourable to the Defendant.

35. That later Dr Kimani re-offered the suit land for sale to the Plaintiffs at the same terms as previously. The she and Dr Kimani executed the agreement for sale on 2/7/13 before the Company's lawyer, Ms. Lydiah Gitaka in her office. This was contrary to the averments in her written statement which stated that the agreement was given to her by Dr Kimani. She confirmed the deposit was paid by the Plaintiff to the said lawyer.

36. As to why the agreement was cancelled by the Defendant, she advanced reasons inter alia; she did not want the family land to be sold because it is their only rural home; Dr Kimani was not in the right frame of mind to sell the land due to mental incapacity; Dr Kimani was born and raised at Katito, a place 3 kilometers away from the suit land hence the sentimental attachment to the suit land; family and matrimonial interests on the land; her family was opposed to the sale and for that reason her children and brother in law wrote to the District Officer Kakuzi division blocking the Land Control Board consent. That she conveyed the objection to PW1 on telephone.

37. DW1 confirmed that she and her brother-in-law John Kimani attended a meeting with PW1 and his managers on the 18/9/13 where she offered to sell 30-40 acres of land to the Plaintiff, an offer that was declined by the Defendant.

38. That after the cancellation of the agreement by the Defendant the deposit was returned to the Plaintiff who issued a notice to complete and re-tendered the cheque. There was a to and fro in respect to the deposit and finally it ended up with the Plaintiffs.

39. Further she informed the Court that she signed the agreement under duress subjected to by Dr Kimani. That at that time Dr Kimani had grown moody, irritable and short tempered. That said, she informed the Court that she did not protest the signing of the agreement on grounds of duress; neither did she inform the lawyer who was her cousin; she permitted the deposit to be accepted and acknowledged; did not inform the auditors/stock brokers about Dr Kimani's mental incapacity. She neither took out guardianship proceedings with respect to Dr Kimani and his estate. She was categorical that she was not willing to complete the agreement at all. That she and Dr Kimani later prepared and executed the letter dated the 16/8/13 cancelling the transaction.

40. She reiterated her statement that they are in occupation of the suit land to date carrying on livestock keeping and crop farming.

41. With respect to the damages claimed by the Plaintiff, the witness stated that there was no agreement on any costs to be incurred and therefore none is payable by the Defendant.

42. As to why Dr Kimani was not testifying in the case, she responded that Dr Kimani is not a party to the suit and further that the family agreed that he should not testify.

43. DW2- Dr Philip Masege Mwangemi testified and stated that he is a consultant Physician engaged in general practice and a specialist in internal medicine having practiced medicine for the last 40 years. He explained that internal medicine deals with the internal organs of the body whilst psychiatrist deals with mental health. He was categorical that his specialty was in internal medicine and not mental health/psychiatry. He disclosed that the only time Dr Kimani visited his clinic was on the 8/3/13 after the accident where he diagnosed him with a head injury. He then referred him to a Radiologist for a CT scan which revealed no fracture to the skull. He informed the Court that Dr Kimani had suffered a chronic subdural haematoma where the lining of the brain had a blood clot. He stated that he recommended surgery to remove the clot. Later he learned that Dr Kimani travelled to South Sudan where he worked.

44. He stated that his report is based on the medical and treatment notes of Dr Silverstein, a cardiologist and Dr Qureshi, the surgeon who performed the brain surgery both based in Nairobi Hospital. He accessed the medical notes at the Nairobi Hospital although he did not produce the medical report by Dr. Qureshi. According to the report, the Glasco Coma Scale (GCS) used to measure neurological state of a patient was 15/15 which is the highest score indicative of normal neurological soundness. That the second admission from the report related to a blood clot in the leg and had nothing to do with the brain. He admitted that he did not examine Dr Kimani before preparing the medical report on 14/8/13 although he had met him socially. That the conclusions in the report are based on other doctors (Dr Silverstein & Dr Qureshi) medical reports that he reviewed.

45. In conclusion he stated that his report had nothing to do with the mental condition of Dr Kimani but was in all respects to his physical illness specifically the injury to the brain and a blood clot.

46. PW3- Ndegwa Gichuhi Kimani testified that he is the son of Dr. & Mrs. Kimani and was in Court to testify on behalf of the Defendant. He is a holder of a master's degree in electrical engineering from Manchester University UK and works with Safaricom as a data analyst. That he is a successful businessman and an investor on his own right having investments in real estate, blue chip companies like Safaricom, Kenya Airways Kenya Commercial Bank Limited. That he was a director of the Defendant Company but when pressed for evidence he recanted this evidence.

47. With regard to the sale transaction, he informed the Court that he learned from his mother that the land was being sold to the Plaintiff. That he was not involved in the negotiations, the execution and the payment of the deposit. He expressed doubt on whether his father was in the right frame of mind when he entered the agreement for sale. That he was not present at the signing of the said agreement but confirmed it was attested to by Ms. Lydia Gitaka Advocate.

48. That the family objected to the sale and he, sister and uncle wrote to the District Officer Kakuzi asking him not to approve the Land Control Board consent because his father had signed an agreement while suffering from a mental illness. He admitted that none of the family members were parties to the agreement of sale; that it was only the Company. Another reason for opposing the sale is because he expected his father to bequeath him a portion of the suit land to settle on. That he considered the suit land his rural home.

49. Parties filed and exchanged written submissions which I have read and considered.

The written submissions of the Plaintiff

50. The Plaintiff in its submissions asserts that the sale agreement is enforceable under section 3(3) (b) of the Law of Contract Act cap 23 laws of Kenya. That the directorship of the Defendant was undisputed both in the pleadings and in oral evidence adduced before Court. The CR12 on record shows that Dr and Mrs Kimani are the only 2 directors of the Defendant Company. That there were no grounds to lift the Defendant Company's veil, and asserts that sale agreement was valid both under statute and in form.

51. That Mrs. Kimani failed to prove duress on her part in signing the agreement, no threat to herself was demonstrated, the issue of duress was not communicated to the Buyer in time after signing of the agreement and was not raised in the rescission letter.

52. In regard to Dr. Kimani's mental illness the Plaintiff expressed its objection to the same and submitted on instances in their interactions during the entire transaction that demonstrated that Dr Kimani was in the proper state of mind among them being the negotiation over the movable properties on the suit land in early July 2013 interalia. The Plaintiff faulted the Defendant for failing to avail Dr. Kimani to the Court thus denying the Court the opportunity to verify his mental incapacity.

53. The Plaintiff completely discredits the evidence adduced by DW3 the medical doctor who it believes was intended to testify over Dr. Kimani's mental unfitness and equates it to that of a laymen for reasons that he was not a psychiatrist; never met or examined Dr. Kimani at any point before making the report; that Dr. Kimani had a perfect score of 15/15 on the Glasgow comma scale test relevant on brain injury on

27/05/2013 and the annexures to his report were inadmissible. That Dr. Kimani had in the same period transacted huge business in the stock market through agents instructed by himself within the meaning of the Capital Markets Act cap 485A Laws of Kenya No. 3 of 2000. That the mental incapacity alleged is unspecified as such it will be tasking the Court to determine his capacity to bind the Defendant. The Plaintiff believes that this line of defence has been adopted by the Defence with the sole aim to avoid their poor commercial judgement in the transaction. They assert that Dr. Kimani had capacity to transact and his actions bind the Defendant in all respects.

54. In respect to the claim of matrimonial property the Plaintiff submits that the suit land is registered in the name of the Defendant, a limited liability Company would not be bound by customary rights. That the directors of the Company and their family would then have no demonstrable sentimental connection to a property they do not own. Secondly that the couple, directors of the Defendant have never lived on the suit property but only hoped to retire there at some time in future and DW1 did list several places/estates that she has lived with her husband since the commencement of their marriage which do not include the suit property and none of the two were born on the suit property.

55. That having demonstrated that the suit property is not matrimonial property it was thus not subject to spousal consent and if the Court find in the contrary Mrs. Kimani is barred by the doctrine of acquiescence from denying that she gave consent having executed both the resolution to sell and the sale agreement itself. That the children of the Kimani's have accrued no overriding interest over their living parent's title. Besides the Defendant had warranted to the Plaintiff that the suit property was not subject to any overriding interests.

56. That a constructive trust had been created in favour of the Plaintiff's, after the offer to sell was made, advanced negotiations took place culminating to the execution of the sale agreement in a commercial transaction and have cited authorities which consider it would be oppressive and high ended for the Defendant to be allowed to pull out of the sale. That damages would not be compensatory in the circumstances and only orders for specific performance would suffice.

57. In regard to the Land Control Act being repealed it referred to the advisory by Lenaola J as he then was in the case of **Basil Criticos vs. Attorney General & 8 others [2013] eKLR** to the AG noting its lack of inclusion in the schedule of repealed laws after enactment of the land laws in 2012 to address the issue following the Parliament's decision on the same. That the Court of Appeal in the case of **Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR**; observed that several sections of the Land Control Act were obsolete and invited the Court to find that Section 9 thereof relevant to this case. That Equitable doctrines of constructive trust and proprietary estoppel supersede the Land Control Board.

58. That by virtue of the wilful refusal/delay by the Defendant to obtain consent of the Land Board this forms a good basis for the Court to find a constructive trust has been created in favour of the Plaintiff and relied on the case of **William Kipsoi Sigei vs. Kipkoech Arusei & Another [2019] eKLR**;

59. That the Plaintiff is entitled to the relief of specific performance as it was ready, willing and able to complete its obligations under the agreement whilst the Defendant wilfully declined to discharge its obligations under the agreement.

60. In regard to payment of costs for two Counsel it is was submitted that it is anchored under **Section 59** of the Advocates (Remuneration Amendment) Order ,2017 which provides for award of costs to more than one Counsel upon certification by a judge to a case deserving of such orders at trial or on delivery of judgement. It relied on the case of **Atsango Chesoni vs. David Morton Silvestein [2009] eKLR** in that regard.

The written submissions of the Defendant

61. The Defendant submits that the Defendant Company is a family Company with its directorship being a couple, Mr. and Mrs. Kimani. That the suit property was independently acquired by Dr. Kimani and registered it in the name of the family Company where Mrs. Lilian Wanjiku Kimani was already a shareholder. That the suit property hosts their rural home including their employees.

62. That the Defendant never disclosed the nature of the business it intended to engage on the suit property. That Dr Kimani was reluctant to sell the property but for push, persistence and over zealousness on the part of PW1 and him. That the sale collapsed at the 1st attempt.

63. That at the time of entering into the second sale agreement Dr. Kimani had just been discharged from hospital where he underwent surgery of the brain then immediately developed a deep vein thrombosis (DVT) complication which affected his mental capacity which was well within the knowledge of PW1. The agreement was then rescinded vide a letter dated 16/8/2013 owing to Dr. Kimani's poor health and the resistance from his family members.

64. That the sale was subject to interalia consent of the Land Control Board being obtained, and each warranty being true and correct in all respects until the completion date. That each party had the option to terminate the agreement based on the other party's inability to complete or any of the warranties turning out to be untrue, misleading or breached. That the Plaintiff being faced with difficulty under the agreement did utilise the available remedy of rescission and promptly refunded the deposit which has been retained by the Plaintiff since 2013. That apart from the deposit paid no other documentary evidence was shown to demonstrate the Plaintiff's ability to pay the balance. That the alternative relief of damages as enlisted in the Forensic review report is untenable.

65. That looking at the conduct and correspondence exchanged between the Plaintiff 's PW1 and Dr. Kimani it was evident that that there was no meeting of minds owing to the lack of mental capacity on the part of Dr Kimani Company and the resistance from Mrs. Kimani to the sale.

66. That on various correspondence with PW1 the Plaintiff had been notified of Dr. Kimani's resistance to the sale. That the fact of the family interest on the land created an overriding interest on the land essentially meaning the warranties had turned out to be false thus entitling the Plaintiff to rescind the agreement. That the suit property hosted the matrimonial rural home for the couple and their children.

Relying on the case of **Isack M’Inanga Kieba Vs Isaaya Theuri M’Intari & Anor (2018) Eklr** the Defendant invites the Court to find that the suit property was registered in the Defendant’s name in trust for the Kimani’s family.

67. That the Land Control Act was fully operational at time of making the agreement and it is so to date as it is not listed in the schedules to the new land laws as amongst the repealed statutes. That being so the sale agreement in the instant suit was subject to the Land Control Act and thus it became void for want of consent of the Land the only remedy available to the Plaintiff would a refund of the purchase price paid, if any. That the Court must refrain from forcing the Defendant to apply for the consent as it has already expressed its unwillingness to do and its resistance to complete the sale.

68. That the claim of a constructive trust cannot stand while the Defendant remains the registered owner of the suit property and remains in occupation and use of the same. That the doctrine would operate in favour of the Plaintiff had it paid the purchase price in full, taken possession of the land and developed the land.

69. Consequently, the equitable relief for specific performance cannot issue as no constructive trust was created in favour of the Plaintiff and in absence of consent being obtained the agreement became void for all purposes. That it would occasion injustice to the Defendant to compel it to complete an agreement seven years after the event. That the agreement was vitiated by the Dr. Kimani’s mental incapacity.

70. In regard to the claim for special damages it opposed expenses incurred and losses expected to be incurred before and after the making of the agreement. The purpose of buying the land was outside the agreement for sale. That the claim for losses incurred from 2014 to 2026 were speculative thus not fit for granting under the head of special damages. That the Plaintiff has erred in calculating the interest on the deposit refunded on a scale not within the agreement thus not for granting too. The Defendant urges the Court to decline the said prayers for special damages for being contradictory, inconclusive and speculative.

71. In respect to the prayer for costs for two Counsels, it argued that the firm of Anjarwalla & Khana Advocates was involved in the filing of the case while Njoroge Regeru only showed up at the hearing stage when all pre-trial procedures had been dispensed with. It submitted that the second Counsel is not entitled to costs.

Agreed issues

72. The parties listed agreed list of 13 issues for determination I have taken the liberty to reduce to 4 key issues which in my considered view will dispose of the dispute;

- a. Whether the agreement for sale is valid?
- b. Whether the agreement of sale was breached?
- c. What remedies should be granted in the circumstances?
- d. Who meets the costs of the suit?
- e. What orders are appropriate in this case?

The undisputed facts

73. The suit land KAKUZI/KIRIMIRI/BLOCK7/281 measuring 51.28 hectares or thereabouts is registered in the name of Rural Development Services Limited, the Defendant herein as at 6/12/12. A caution was lodged on the title on the 26/8/13 by the Plaintiff claiming purchasers’ interest. See the copy of the official search dated the 17/9/13.

74. The directors and shareholders of the Defendant Company are Dr. John Kibunga Kimani (998 shares) and Mrs. Lilian Wanjiku Kimani (2 shares). See the copy of the Company search dated the 15/7/13 at page 69 of Vol 1.

75. The parties entered into an agreement of sale dated the 2/7/13. The salient clauses are as follows;

- A. The completion date shall be sixty (60) days from the date of this Agreement and if such day is not a Business day then on the immediately succeeding business day.
- B. The Vendor shall at its expense procure the completion documents.
- H. If the Vendor is not ready, able or willing to complete on the completion date then, without prejudice to any other rights or remedies available to the Purchaser, the Purchaser shall in its sole discretion have the right to rescind this agreement.
- I. If on the Completion date the Purchaser is not ready, able or willing to pay the Purchaser price as required under the provisions of this Agreement and the Vendor is ready, able and willing to complete the sale and transfer of the property as provided in this Agreement the Vendor shall be entitled to-in its sole discretion rescind this Agreement, and upon such rescission the Purchaser shall forfeit fifty (50%) percent of the deposit to the Vendor and any balance of monies paid by the Purchaser on account of the purchase price shall be refunded to the Purchaser forthwith and this Agreement shall thereafter terminate and cease to have force or effect and no party hereunder shall have any claim or demand (whether arising in contract or in tort) against the other under or pursuant to this Agreement.

J. Notwithstanding any other provisions of this Agreement, the sale and purchase of the property is subject to:

- a. The Purchaser undertaking a survey of the property at its own cost and the survey being satisfactory to the Purchaser and the Vendor hereby grants the Purchaser and the Purchaser's authorized agents access to the property to enable the Purchaser to undertake the survey provided that the Purchaser shall indicate in writing within Twenty (20) days whether or not the survey is satisfactory to it; and
- b. The Purchaser's Advocates undertaking a due diligence in respect of the Property and its title and the Vendor and such due diligence being satisfactory to the Purchaser and for purposes thereof the Vendor shall provide the Purchaser's Advocates with all documents, information and clarifications as may reasonably be required by the Purchaser's Advocates provided that the Purchaser shall indicate in writing within Twenty (20) days whether or not the due diligence is satisfactory to it.
- c. Vacant possession being provided to the Purchaser on or before the Completion date; and
- d. Each warranty being true and correct in all respects of the completion date up to (and including) the date of registration.

K. It is agreed by the Parties that in the event that the conditions precedent in special condition 1 have not been satisfied and/or waived by the Purchaser by the Completion date or by the date of registration, the Purchaser shall be entitled, upon serving a notice in writing to the vendor and without prejudice to any other rights or remedies available to the Purchaser, to terminate this Agreement as of the date specified in the notice and the Vendor shall forthwith refund and shall forthwith procure the refund of all monies paid by or on behalf of the Purchaser to the Vendor's Advocates pursuant to or under this Agreement.

P. The parties agree that if any of the warranties is untrue or misleading or has been breached, the Purchaser shall be entitled, upon serving a notice in writing to the Vendor and without prejudice to any other rights or remedies available to the Purchaser, to terminate this Agreement as of the date specified in the notice and all monies paid by or for account of the Purchaser to the Vendor or the Vendor's Advocates pursuant to or under this agreement shall be repaid forthwith to the Purchaser without interest.

The valid agreement

76. Validity of a contract is provided for in law. Section 3(3) of the Law of Contract Act read together with section 38 of the Land Act, 2012 provide that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested by a witness who is present when the contract was signed. This was the decision of the Court in the case of **Machakos District Cooperative Union Vs Philip Nzuki Kiilu CA No 112 of 1997**.

77. It is on record and undisputed that the parties executed the agreement of sale dated the 2/7/13. This agreement contains the full description of the Parties; The property being sold is KAKUZI/KIRIMIRI/BLOCK 7/281 measuring 51.28 hectares and excluding moveables; The purchase price is Kshs 205,360,000/-; The parties covenants including the special conditions of sale, the warranties, the obligations of the parties, the default clauses and *inter-alia* general provisions which the parties agreed to bind themselves. Earlier the offer was made by the Plaintiff and accepted by the Defendant leading to the execution of the said agreement for sale.

78. According to the certified copy of the green card the suit land is registered in the name of the Defendant Company. Under section 26 of the Land Registration Act a certificate of title is taken by the Courts as prima-facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject only to the limitations permitted by law.

79. According to the evidence of PW1 the agreement was signed by Salim and a Ms. Nafysa on behalf of the Plaintiff. Mrs. Kimani confirmed to the Court that she and her husband Dr. Kimani executed the agreement as Directors of the Defendant Company.

80. It is therefore the holding of the Court that the existence of a valid agreement of sale has not been assailed.

Vitiating factors; -

81. The case for the Plaintiff is that it entered into an agreement for sale with the Defendant in respect to the purchase and sale of the suit land. That the agreement of the parties was duly reduced into writing and duly executed but the Defendant has willfully breached the agreement and refused to complete the transaction. The Defendant on the other hand has justified its actions based on alleged vitiating factors that in their opinion go to the root of the agreement making it impossible for it to complete.

82. Vitiating factors in a contract are those factors the existence of (any of) which will cripple or invalidate the contract. Examples are; mistake, duress, misrepresentation, undue influence, illegality, unconscionable contracts, fraud, insanity, a party being a minor and void agreements.

83. Vitiating factors may infect a contract either at its formation or at the performance of the contract. In this case the Defendant alleges the contract is vitiated both at formation and performance. That the incapacity of Dr Kimani, overriding interest (matrimonial/family interests), duress tainted the contract at the formation while the absence of the Land Control Board consent is at its performance.

84. I shall now discuss the factors in turn.

Mental incapacity

85. Mrs. Kimani testified and informed the Court that Dr. Kimani lacked the requisite mental capacity to bind the Defendant to the agreement. Plainly that he laboured under mental incapacity to understand the consequences of his actions when he executed the agreement of sale. The Plaintiff has denied this claim. It averred that the Defendant has not discharged its burden that indeed Dr Kimani was mentally incapacitated. It argued that Dr Kimani had the presence of mind to bind the Defendant to the agreement.

86. It is trite that there is always a rebuttable presumption that a person is of sound mind when he executes a contract. The law presumes that every person is of sound mind. Otherwise, how else would one be held responsible for their actions. Barring any issues of illegality, public policy and other vitiating elements, freedom of contract is a hallowed principle on which commerce is anchored. In the case of **Fidelity Commercial Bank Limited vs. Kenya Grange Vehicle Industries Limited [2017]** eKLR the Court stated as follows: -

"It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration. The traditional view was expressed quite persuasively in the decision of Lord Craighead in the House of Lords' case of **Chartbrook Limited v Persimmon Homes Limited (2009) UKHL 38** as follows;

"...the very purpose of a formal contract is to put an end to the disputes which would invariably arise if the matter were left upon what the parties said or wrote to each other during the period of their negotiations. It is the formal contract that records the bargain, however different it may be from what they may have stipulated for previously".

87. The freedom to contract is never absolute since the presumption of sanity may be challenged in which event the contract may be impaired by the mental incapacity of a person so alleged. Where any dispute or doubt of sanity is alleged the person propounding the same must establish and prove affirmatively the incapacity of the person alleged to be suffering from mental insanity. This may be proved by medical evidence, oral evidence of the witnesses who knew the person well or by circumstantial evidence.

88. It is trite that the question of capacity is one of degree, the person's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. See **Halsbury's Laws of England Vol 1 Page 904**.

89. In the case of **Patrick Muchira Vs Patrick Kahiaru HCCC No 113 of 1999** the Court held;

"It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be of unsound mind one must always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one's own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering. The validity of ordinary contracts entered into by persons of unsound mind depends mainly on the circumstances which accompany the act. If there is nothing unreasonable in the conduct of the person of unsound mind and the party with whom he contracts has no knowledge or suspicion of his mental disorder, the contract will be binding on the person of unsound mind and his representatives.

A contract with a person of unsound mind is valid and enforceable against him if at the time when the agreement was made he was not of unsound mind; and soundness of mind may be presumed if it appears that the negotiation of the agreement was conducted by him with apparent prudence, sanity, and judgment, although in fact he was insane both before and after the transaction. The general rule is that when a person of apparently sound intellect enters into an ordinary contract, and the parties cannot be restored to their former condition, the mere fact that one of them was at the time *non compos mentis* is no ground for setting aside the contract. But contracts of a person who is *non compos mentis* may be avoided when there is proof that his condition was known to the other party. There is no right to avoid a contract made with a person of unsound mind unless it is proved that the other party either knew that he was of unsound mind or knew such facts about him that the other party must be taken to have been aware that he was of unsound mind. Moreover, supervening mental disorder does not release a person from his obligations under a contract unless the nature of the mental disorder renders the performance of the contract impossible."

90. A person may become of unsound mind because he has lost the ability to reason by disease, grief or other condition. Where a person is shown to have suffered under a mental incapacity and the other party was unaware of this incapacity then any contract other than a contract for necessities made by such a person is not binding on him.

91. For a defence of mental incapacity to succeed the one alleging it must show that the Defendant is incapacitated due to mental illness in one form or another and that the Plaintiff knew of the condition of the Defendant. See the case of **Wiltshire Vs Cain (1958-69) 2 Barbardos 149** referred to in the case of **Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 others [2011] eKLR**.

92. It is not in dispute that Dr. Kimani was unwell having been involved in a hit and run accident at Hurlingham, Nairobi on the 28/2/13. According to the evidence of Mrs. Kimani the injuries appeared not to be serious and he proceeded to Juba, South Sudan where he worked as a Consultant Economist. It is upon falling ill in Juba on 27/3/13 that he was airlifted to Nairobi and admitted at the Nairobi Hospital where he underwent a head operation on 29/5/13. He was discharged on 4/6/13.

93. She further informed the Court that the second readmission on the 8/7/13 was related to deep vein thrombosis (blood clot on the leg) and severe headache. He was put under treatment and discharged on the 15/7/13. He was further managed with medication and subsequent medical reviews by his doctors including Dr. Oluoch Olunya who assessed him on the 30/7/13 and diagnosed him with a persistence of second subdural haematoma on the left side of the head. It was her testimony that based on the injury she concluded that Dr. Kimani, at the time of the execution of the agreement of sale on the 2/7/13 did not have the mental capacity to bind the Defendant to the agreement. In addition, that the Plaintiff was made aware of Dr. Kimani's health condition during the disputed sale through correspondences exchanged between the Plaintiff and the Defendant.

94. I will now reexamine the evidence as to whether the alleged incapacity of Dr. Kimani has been proved and secondly whether the Plaintiff was aware.

95. According to the testimony of Salim, he negotiated the purchase and sale of the suit land with Dr Kimani whom he met in his (Dr Kimani's) office at Hurlingham in the presence of PW2 and PW3 in the month of Jan/February 2013. He stated;

“Dr. Kimani appeared to me to be in his normal faculties. He came across as an astute businessman.”

The witness further stated that Dr. Kimani drove a hard bargain in the negotiation in the sum of Kshs 1.7 million per acre which the witness did not manage to reduce.

96. It is on record that the negotiations became still born at the pre-agreement stage because the Defendant was unhappy with Special Conditions J a) and b) contained in the draft agreement) prompting the Defendants' lawyers to communicate the cancellation of the transaction to the Plaintiffs on the 18/3/13.

97. After the collapse of the initial agreement on the 18/3/13 and on the prompting of Salim, Dr Kimani wrote an email on 2/4/13 as follows;

“... for the moment, I cannot reconsider my decision regarding selling the land because, among other reasons, I will be travelling to South Sudan in five days time. Perhaps in July I will examine my options again”.

97. True to form and word on the 14/6/13 he wrote informing Salim that he had returned from South Sudan and after consultation with his family he had decided to dispose the suit property and that in case Salim was still interested he would give the first priority on terms earlier discussed (terms of the cancelled draft agreement). Dr. Kimani was also concerned about the position of the moveables on the suit land which worry was assuaged with an offer by the Plaintiff to purchase them at an agreed price. See letter dated the 1/7/13.

98. Other witnesses who testified of their interactions with Dr. Kimani were PW2 and PW3 who described him as a normal person with a clear mind. PW4 testified that he met Dr. Kimani at his farm around June 2012 and a couple of times thereafter when he went to purchase goats, bananas and ballast. He informed him that he was selling his land and asked him to source potential buyers at a commission which he did through PW5. In his opinion Dr. Kimani struck him as a normal, clear minded person. The evidence of these witnesses was not challenged by the Defendant.

99. The Defendant led evidence through its expert witness DW2- Dr. Mwangemi who introduced himself as a practicing medical doctor specializing in internal medicine. His impressive CV spans over 40 years practice as a consultant Physician at Nairobi, Matter, and M.P Shah Hospitals as well as his private clinic in Nairobi.

100. Dr. Mwangemi struck me as a candid and honest person in giving his testimony. His testimony was based on the review of the treatment notes and records prepared by Dr. Silverstein, a cardiologist and Dr. Qureshi a brain surgeon both of whom treated Dr. Kimani which he prepared on the 14/3/18, 5 years after the incident. He informed the Court that he examined Dr. Kimani only once on the 8/3/13, about 10 days after the accident on the 28/2/13 and recommended a CT scan which diagnosed his injuries as chronic subdural hematoma with bilateral frontal subdural hygromas (swelling of the brain walls- thus applying pressure on the brain). Simply, that Dr. Kimani sustained a blood clot in the brain which was removed through a brain surgery performed by Dr. Qureshi. It was his testimony that Dr. Kimani did not suffer any neurological problem as his Glasco Comma Scale (GCS) test returned a score 15/15 which is the perfect score used worldwide to measure the neurological soundness and state of a brain injury victim. Further that thereafter he only met Dr. Kimani in a social setting. That Dr. Kimani was admitted again but for a blood clot in his leg (DVT).

101. In summary his testimony is that he is not a psychiatrist but a general physician and that there was nothing in his report to suggest that Dr. Kimani had a mental incapacity of whatever nature. He concluded that Dr. Kimani suffered a physical illness specifically on the brain but not a mental illness which denotes an illness affecting the mental functionality of the brain.

102. The long and short of the evidence of DW2 is that there is no proof that Dr. Kimani was mentally incapacitated after the accident or at all. It therefore follows that the mere fact that he suffered a brain injury did not ipso facto proof mental incapacity.

103. In her evidence Mrs. Kimani stated that;

“I formed an opinion that Dr. Kimani was unable to understand the sale agreement.”

She alluded to Dr. Kimani taking to sleeping in his house and being slow in doing things. There was no medical report to support that these activities were caused by a mental condition. All these remained her opinions, which she is legitimately entitled save not backed by any scientific proof of any mental illness on the part of Dr. Kimani.

104. In respect to whether the Plaintiff through its Director Mr. Salim was aware of any mental incapacity of Dr. Kimani, PW1 did admit that he learned from PW3 that Dr. Kimani was admitted in hospital. PW3 in turn explained in evidence that he was informed by Ms. Lydia Gitaka, the Defendants lawyer. There is no concrete evidence adduced by the Defendant to show that the Plaintiff's representative, Salim had knowledge that Dr. Kimani suffered from a mental illness. I have no reason to infer the same.

105. Uncontroverted evidence was further tendered by PW1 which demonstrated before, during and after the execution of the agreement of sale, that Dr. Kimani, being the astute businessman, was busy trading at the Nairobi stock exchange as seen in the copious reports comprising of quoted companies across the economic spectrum. See Vol 2 pages 1679-2733. Mrs. Kimani confirmed to the Court that Dr. Kimani has

invested widely in these companies and that so often attends board meetings and Annual General Meetings. She stated further that during the material time of the agreement of sale he transacted through agents lending credence to Plaintiff's evidence that he remained the principal in those circumstances.

106. It is on record that the Defendant Company through its board resolution approved the sale of the suit land to the Plaintiff in February 2013. This resolution was not challenged.

107. The actions of Dr. Kimani show consistency which is reflective of a man in charge of the affairs of the Defendant Company and made decisions in the interest of the Company. For example, on the 2/4/13 he informed Salim that he will examine his options in July and he did that on 14/6/13 without any prodding. Further on the 16/8/13 he sent text to Salim intimating that the transaction was on course but for family members who were causing trouble and gave him the assurance that the same would be dealt with by his lawyer and wife. Earlier Mrs. Kimani had on 15/8/13 telephoned Salim and informed him that the family was considering backing out of the sale. Dr Kimani's text seemed to have been reassuring Salim that the issue was being handled. Again, this communication was consistent with a man devoid of any mental incapacity.

108. These circumstances do not lend credence to a man who can be said to be of unsound mind or laboured under any mental malady, least of all insanity. It is clear to me that Dr. Kimani was in charge of the transaction at every stage and there is nothing to suggest that he did not understand what he was doing. PW4 testified that he struck a friendship and rapport with Dr. Kimani and in his interaction he came across as a man who was looking for a good bargain for the sale of the land.

109. I have come to the conclusion that the Defendant has neither proved that Dr. Kimani suffered under any mental incapacity nor that the Plaintiff was aware of any such mental incapacity. The evidence adduced and analysed above leads the Court to conclude that Dr Kimani had the requisite fitness of mind to bind the Defendant in the transaction. The claim of mental incapacity is therefore rejected.

Duress

110. The legal concept on duress has been defined by **Halsburys Laws of England 4th Edition Volume 9** as:

“The compulsion under which a person acts through fear of personal suffering. Whereas undue influence has been defined as the conscientious use by one person of power possessed by him over another to induce the other to enter into a contract.”

111. In the case of **PAO ON VS LAU YIU [1978] 3 All ER 65**, the Privy Council said at page 78:

“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation commercial pressure is not enough. There must be present some fact on which one could in law be regarded as a coercion of his will, so as to vitiate his consent.

.....

In determining whether there was a coercion of will such that there be no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it”.

112. In the case of **Astley v Reynolds [1731] 2 Stra 915, 93 ER 939**, the Court held that the compulsion had to be such that the party was deprived of “*his freedom of exercising his will.*” It would appear that American law, also, now recognizes that a contract may be avoided on the ground of economic duress. See **Williston on Contracts** (3rd Edn, 1970 Chapter 47). The commercial pressure alleged to constitute such duress must, however, be such that the victim:-(i) must have entered the contract against his will; (ii) must have had no alternative course open to him and (iii) must have been confronted with coercive acts by the party exerting the pressure. This holding was upheld by the Court of Appeal in the case of **Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others [2008] eKLR**.

113. In advancing the defense of duress, Mrs. Kimani sought to persuade the Court that she signed the agreement of sale under duress. In her testimony she informed the Court that she and Dr. Kimani signed the agreement on the 2/7/13 or thereabouts in the offices of Lydia Gitaka Advocate, who happened to be her first cousin. That their signatures were witnessed by the said Advocate. That she signed under duress. Challenged to explain the particulars of duress she stated that Dr. Kimani subjected her to duress; he was unwell, easily irritated, moody and short tempered and she signed the agreement to accord him peace of mind as his wife. She informed the Court that she raised no objection before the lawyer or the Company auditors that Dr. Kimani was of unsound mind nor that she was signing the agreement under duress. That she was aware that the deposit was paid to their lawyer after the signing of the agreement and yet did nothing to stop either the agreement or the deposit from being received on behalf of the Company.

114. Having considered the evidence of Mrs. Kimani, it is clear that her claim of duress was not particularized in the pleadings other than that she signed under duress for the sake of Dr. Kimani who pushed her to do so. Mrs. Kimani had the opportunity to protest at the signing of the agreement, payment of the deposit but she did not. Ms. Lydia Gitaka was not called to testify to confirm if indeed Mrs. Kimani was under duress when she signed the agreement. Furthermore, she did not claim that she signed the Resolution dated the 4/2/13 by the Company authorizing the disposal of the suit property to the Plaintiff under duress.

115. The Court is not persuaded that Mrs. Kimani signed the agreement under duress. This ground seemingly is an afterthought. It is rejected accordingly

Matrimonial Property

116. Mrs. Kimani demonstrated to the Court through evidence that she and her husband have lived in various estates in Nairobi resting with their current home at Kilimani Estate. That in addition the suit property is their matrimonial home. DW1 explained to the Court that although the title to the suit property was registered in the name of the Defendant Company the land simply belonged to the couple. She stated that the land was acquired in 1986 by Dr. Kimani through a loan procured from the National Bank of Kenya Limited as well as personal savings and had it registered in the name of the Defendant Company. That Dr. Kimani was born about 2-3 kilometers from the land and therefore had sentimental affiliations to the suit land. That on it stands her matrimonial home; it is the only land that they own; she and her husband expect to be buried on the land someday.

117. The Matrimonial Properties Act (MPA) defines matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property. Further clarity on the definition of matrimonial property is to be found in Section 6 of the said Act; matrimonial property means matrimonial home or homes; household goods and effects in the matrimonial home or homes and any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. Section 12 a) of the Act provides that an estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

118. According to the copy of the green card on the suit property was registered in the name of Defendant Company on the 6/12/12. It is settled law that the property of a Company is distinct and separate from the property of the shareholders or Directors. In this case the suit land is neither owned nor leased by the couple individually or jointly nor occupied by the family as their family home. Evidence was led that the family lives in Nairobi. It is common for Kenyan families to have a matrimonial home in urban and rural areas, however in the circumstance of this case this is a property owned by a limited liability Company and the true interest of the couple is as shareholders and Directors. If indeed the couple reside on the suit land, no evidence in form of a lease was presented before the Court to show that indeed they occupy the suit land as their matrimonial home.

119. The agreement of sale provided for warranties *inter-alia* that the suit property was, among other things, not a matrimonial property. It reads as follows;

“the property is not subject to any overriding interest or equities in favour of a third party or other rights which grants that hired party any non- registrable interest or right in the property.

120. If I am wrong in my findings that the suit property is not a Matrimonial home, then Mrs Kimani having warranted that the property is not subject to Matrimonial property is estopped from using the same as defence.

121. The property therefore does not qualify as a matrimonial home and the claim by the Defendant through Mrs. Kimani is unfounded.

122. Evidence was led that consent of the family members was not obtained and therefore the agreement is vitiated by family interests. It is on record that the children of the couple wrote to the Land Control Board blocking the application and granting of the consent on grounds that the land is family land in addition to Dr. Kimani being of unsound mind at the signing of the agreement. Seemingly no action was taken by the Land Registrar pursuant to the letter by the District Officer requesting the office to register a caution. None was registered. John Kimani, the step brother of Dr. Kimani was said to be selling ballast on the land and he too was unhappy that the suit land was being disposed.

123. Under Para 1 (g) of the warranties contained in the agreement of sale, the Defendant warranted that there are no circumstances which would entitle third parties to exercise any rights or power over the suit property. In my view third parties would include family members of the Directors.

124. It is the view of the Court that all these persons are strangers to the suit property.

125. This ground is for rejection. I do so reject it.

Land Control Board

126. It was a term of the Agreement that the Defendant would apply and obtain the Land Control Board consent. It is admittedly clear that the Defendant while cancelling or repudiating the agreement that it has no intention of obtaining the consent nor giving the completion documents contrary to clause D of the special conditions in the Agreement.

127. It is the law that any disposition of interest in respect to Agricultural land is subject to the Land Control Board consent having been applied and obtained. Although the Land Control Act provides that either party may apply for consent, it was a term of the agreement that the responsibility fell on the Defendant at least within the completion period of the agreement of sale which was 60 days within which time the Plaintiff was not obligated to do so. That said after the completion date however either party (the Plaintiff included) would still be within the legal limits to obtain the same within the period of 6 months or thereafter with the leave of the Court to extend the time for seeking the consent.

128. At the time the agreement was repudiated the time to apply and obtain the consent was still in force and therefore the Defendant cannot use this to abrogate the contract.

129. This Court being a Court of law as well as equity, the Defendant cannot be allowed to abrogate on a contractual duty and thereafter wish

to rely on the same as a defence. At best I agree with the decision of Gicheru JA (as he then was) that no man shall take advantage of his own wrong to gain a favourable interpretation of the law. See the case of **Nabro properties Limited Vs Sky Structures Limited & others CA No 175 of 2000**. More so when evidence was led that the children and brother-in-law of the couple blocked the issuance of the said Land Control Board consent in writing. Refer to the letter addressed to the District Officer, Gatanga.

130. To the extent that the Defendant is seeking to rely on the absence of Land Control Board consent to vitiate the agreement, an act that it was contractually obligated to, the Court is of the view that this ground must fail.

Meeting of the minds

131. The meeting of minds in contract law refers to the moment when both parties have recognized the contract and agreed to enter into and be bound by its obligations. This is also called Mutual assent or *consensus ad idem*. A contract can be voided if it is founded on undue influence, fraud, misrepresentation, thus mutual assent is essential.

132. The Supreme Court of the United Kingdom stated as follows in the case of **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14, [45]** :

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

133. In the case of Alfred M O Michira vs. M/S Gesima Power Mills Limited Civil Appeal No. 197 of 2001 the Court of Appeal held that where there is no meeting of the minds of the contracting parties the contract is incapable of performance. The Court further held that where the agreement is uncertain on the fundamental term on the payment of the purchase price in that it does not provide for the time within which the balance of the purchase price is payable or secure the payment, it makes the entire agreement void for uncertainty and neither party can be held to be in breach of the agreement or be entitled to any damages from the abortive agreement. A similar position was taken by the same Court in **Nairobi Homes Ltd. vs. Major Bashir Kalyan Civil Appeal No. 50 of 1985**.

134. Going by the decisions of the Court cited above, it is clear that the agreement for sale in this instant case was certain in consideration, the description of the property, the intention of the parties to create a contract and the terms of the said contract as captured in the agreement of the parties. The parties agreed to be bound by the agreement which they warranted as “the whole” in their covenants.

135. The claim that there was insufficiency of the meeting of minds does not apply. This claim is rejected.

Breach of the agreement of sale

136. The next issue that I shall determine is whether agreement of sale was breached and by whom.

137. On the 14/8/13 the Plaintiffs Advocate wrote to the Defendant’s Advocate enquiring *inter-alia* about position of the completion documents, the Land Control Board hearing and permission to access the land for purposes of undertaking a valuation, topographical and hydrogeological surveys. In addition, the latter reiterated the importance of timely completion of the transaction as per the agreement of sale dated the 2/7/13. These triggered events leading to the cancellation of the agreement by the Defendant. On the 15/8/13 Mrs. Kimani informed Salim that her family was considering cancelling the sale. On the 16/8/13 Dr Kimani informs Salim that some family members were bent on causing trouble in respect to the transaction but assured him that his lawyer and wife was dealing with it. On the same date the said Directors of the Defendant instructed their lawyer to cancel the transaction and refund the deposit. On the 17/8/13 Salim requested for a meeting with Mrs. Kimani to discuss the stalemate. It would appear the meeting did not take place.

138. On 29/8/13, about 4 days to completion, the Defendants Advocate cancelled the agreement for sale and returned the deposit to the Plaintiffs Advocate. This cheque was rendered to the Defendants but returned to the Plaintiffs vide the letter dated the 12/9/13.

139. It is noteworthy that there was no resolution of the Company to cancel the transaction. This is key noting that the purchaser in this case was a limited liability Company that resolved through a board resolution to sell the land and not the Directors in their individual capacities. In the absence of a company resolution to cancel the agreement, the import of the said letter is put in doubt as to the intentions of the Defendant.

140. According to Black’s Law Dictionary, 9th Edition at page 1418, to repudiate is to reject or renounce a duty or obligation especially to indicate an intention not to perform a contract. A repudiation is a statement by a party to the other indicating that it will commit a breach that would of itself give the innocent party a claim in damages. In order to constitute a repudiation a party’s language must be sufficiently positive to be reasonably interpreted to mean that the statement amounts to an intention not to perform under the agreement.

141. It is trite that repudiation in the sense of a refusal by one of the parties to a contract to perform his obligations does not abrogate the contract. One party cannot rescind a contract by its action. Even when the repudiation is acquiesced or accepted by the other party, that does not end the contract. In essence the contract still stands but one of the parties has declined to fulfil his part of it.

142. The offended party may take one or more of these options; do nothing and wait for the completion date; accept the repudiation and

rescind the contract – in other words treat it as terminated and move on with his life; treat the repudiation as a breach in which case the contract subsists for all purposes for an action of specific performance and or alternative damages. A remedy for specific performance orders the Defendant to perform the contract according to its terms.

143. In this case the Defendant by its words and conduct evinced an intention to no longer be bound by the contract. It is undisputed that the Defendant acknowledges the existence of the agreement of sale dated the 2/7/13 but claims that it is no longer binding because its unwillingness to apply and obtain the land control board consent coupled with all the alleged vitiating factors discussed in the preceding sub heading in this judgement. By these factors the Defendant seeks to invalidate the agreement. Such actions included but not limited to the express letter through its lawyers cancelling the agreement coupled with the return of the deposit monies. Earlier the couple's family members had procured the stoppage of the issuance of the Land Control Board consent alleging the said vitiating factors as justification. All these actions and conduct amounted to unequivocal repudiation of the agreement of sale.

144. The Parties provided for instances of default in the agreement. Special condition H provided that if the Vendor/Defendant was not ready able or willing to complete on the completion date then without prejudice to any rights or remedies available to the purchaser/Plaintiff, the purchaser shall in its sole discretion have the right to rescind the agreement. The Plaintiff elected not to rescind the agreement but to demand its completion and on the 4/9/13 the Plaintiffs Advocate issued a 21-day notice to complete in default of which the Plaintiff would enforce the agreement of sale which notice was met with an explicit noncompliance.

145. On the 12/9/13 the Defendants Advocate responded and was categorical that it will not complete the transaction nor provide the Plaintiff with the completion documents.

146. According to the evidence on record the Plaintiff did not accept the repudiation. It treated the agreement of sale as subsisting and proceeded to file suit for specific performance among other remedies.

147. 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.”

148. In the case of **National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, where the Court held that: -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

149. The Court has found that there were no vitiating factors to justify the termination of the contract. It is the conclusion of the Court that the Defendant breached the agreement without any just cause. I shall make the appropriate orders in the end.

150. The next issue for determination is what remedies should be granted in the circumstances?

Specific performance and constructive trust

151. It is the Plaintiff's case that the sale of the suit land was halted by the willful refusal of the Defendant to obtain the Land Control Board consent in breach of the agreement and contractual terms. Maintaining that the equitable doctrines of constructive trust and proprietary estoppel apply, it relied on the case of **Willy Kitilit Vs Michael Kibet (2018) eKLR and William Kipsoi Sigei Vs Kipkoech Arusei & Anor (2019) Eklr**;

152. The Defendant on the other hand has resisted the arguments of the Plaintiff insisting that neither of the equitable doctrines can be called in aid of the Plaintiffs case.

153. A constructive trust can either be express or implied. 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. The concept of remedial constructive trust gives the Courts the discretion to grant justice tailored on the facts of the case where there is unfairness.

154. In this case the agreement of sale was terminated a few days before completion. There are no circumstances in which the Plaintiff was shown to have failed to comply with the contract. At the hearing of the case the Court observed the demeanour of the Defendant's witness DW1 and found her to have little regard to the terms of the agreement and went to great lengths to avoid the contract.

155. The Defendants action of walking away from its side of the bargain without any legal reasons was intended to steal a match on the Plaintiff. It is unfair and unconscionable. The conduct of the Defendant calls upon a Court of equity to impose a constructive trust on the intention of the Defendant to fulfil its original intent in other words against the contrary intent not to perform or an unconscionable denial to perform its part of the agreement.

156. In doing so I am guided by the decision in the case of **Willy Kitilit Vs Michael Kibet (2018) eKLR** (above) where 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 Art 10(2) equity is now a national value enshrined in the constitution.

157. 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 himself 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.

158. Is the Plaintiff entitled to the remedy of Specific performance? This is an equitable remedy 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 for the grant 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, mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. Specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the opposite party.

159. In this case the Court has found that agreement of sale did not suffer from any illegality, undue influence, duress, mistake or any other defect.

160. With respect to the proposition that 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. In this case the Plaintiff under para 16 of the Plaint has pleaded that it remains ready willing and able to complete the purchase of the suit land. In response to this plea the Defendant under para 15 of the amended statement of defence reiterated its intention not to complete the transaction. In its submissions the Defendant has stated that the Plaintiff has not shown any evidence to pay the balance of the purchase price.

161. The sale agreement was entered into on the 2/7/13 for a period of 60 days that is to say the 2/9/13. Upon the Defendant terminating the agreement on the 29/8/13, the Plaintiff issued a 21 day notice to complete. In the said notice it was categorical that it;

“is and has been ready able and willing to complete this transaction having confirmed that they have the balance in readily available funds.”

162. Evidence was led by PW1 and admitted by DW1 that in an effort to save the transaction, parties met on 18/9/13 and the minutes of the meeting held on 18/9/13 is testament of conduct of a party still interested in concluding the agreement. The Defendant re-offered the Plaintiff 30-40 acres of the suit land. The Plaintiff responded that it was not prepared to take a portion of land because they wanted the whole farm.

163. The act of returning the deposit cheque to the Defendant is an unequivocal act on the part of the Plaintiff of its intention to complete the agreement. Needless to state, the Defendant has not presented any evidence to show inability to pay on the part of the Plaintiff. This would have been in form of a bankruptcy order or audited accounts showing that the Plaintiff is unable to meet its obligations as they arise or such other relevant evidence. The onus to proof inability to pay shifted to the Defendant which burden it failed to discharge. Under the special condition H of the agreement, the Plaintiff had the right subject to any other rights or remedies available to it to walk away from the contract but it did not and instead filed the current suit. The fact of filing suit is an indication of the Plaintiff's intention to conclude the agreement.

164. According to the special condition D of the agreement the balance of the purchase price was payable by the Plaintiff upon receipt of the professional undertaking from the Defendants Advocates that they would release the original completion documents immediately upon receipt of the balance of the purchase price. This did not take place because the agreement was terminated before completion with clear refusal to complete from by the Defendant.

165. The Court has already found that the transaction was subject to Land Control Board consent, which was a function of the Defendant under the contract to fulfill. The Defendant did not seek or obtain the consent. Such action would render the transaction run afoul to the provisions of the Land Control Board Act and accordingly became void in accordance with section 6(1) rendering the transaction void for all purposes including the equitable remedy of specific performance. This is an ideal situation to call in aid equity under Article 10 of the Constitution and grant relief to the Plaintiff. Failure to do so, would render the Defendant to be a beneficiary of its illegal actions against the Plaintiff. This position is supported by the decision taken by the Appellate Court in the **Willy Kitilit** case as far as the issue of Land Control Board consent is concerned. The Defendant is estopped from relying on its unwillingness to obtain the consent contrary to the terms of the agreement. It cannot be left to enjoy the benefit of the breach.

166. The Defendant has submitted that it will suffer hardship if the agreement is enforced after 7 years. The particulars of hardship were not expounded. In my view I do not foresee any hardship that is likely to be suffered by the Defendant save for the appreciation of the value of the land. The Defendant having been the author of the breach cannot be heard to complain.

167. I have considered whether damages are adequate and appropriate in this case and my conclusion is in the negative. In my considered view, the ends of justice will be served when the parties are redirected to their original agreements to pursue completion. The underlying principle is that allowing the Defendant to benefit from its wrong will go against the principles of fairness and good conscience I therefore find that this is a case that specific performance is appropriate.

The repeal of the Land Control Act.

168. The Plaintiff sought orders in form of a declaration that the Land Control Act is repealed and therefore does not apply to the transaction. The Defendant posits that the Act is still in force. It is true that at the repeal of the Land Laws, the Land Control Act was not included in the gazetted repealed Acts. The Court of Appeal in the **Willy Kitilit** Case appreciated that the Act is still in existence. In the **Basil Criticos** case the Court directed the Hon Attorney General to gazette the repeal of the Act. There is no evidence that this has been done. To the extent that the Act has not been repealed, it means that the statute is still part of our laws. The Court of Appeal in the **Willy Kitilit** Case stated that some provisions have been rendered irrelevant and opined that the said Act must be interpreted in conformity with the 2010 Constitution.

169. I hold that the Act is still in force. No evidence was led to support this claim and as always, he who alleges must prove. For avoidance of doubt the Land Control Act remains in force. For the above reason, I decline to hold section 9(2)(a) of the said Act unconstitutional.

Business Plan dated 7th October, 2013

170. The business plan was presented by the Plaintiff as part of its list of documents in support of its case. The Plaintiff sought orders that the said document remain confidential and should not be disclosed to third parties. No foundation was laid for this prayer. The document is part of the Court records which are public documents and granting this prayer will not serve any purpose.

Costs for two Counsels

171. Section 27 of the Civil Procedure Act provides as follows;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.”

172. The Plaintiff has succeeded in its suit on the major substantial issues. The Court has been invited to determine costs for two Counsels. The pleadings in this case were filed by the firm of Anjarwalla Khanna Advocates. The said firm was led at the hearing by Messrs. Njoroge Regeru Advocate, hence the prayer for costs for two Counsels.

173. In the case of **Atsango Chesoni v David Morton Silverstein (200) eKLR** the Court allowed costs for two Counsels because the case involved novel and complex issues in the fields of law and medicine.

174. Unlike in the case of Chesoni, this matter involved ordinary principles of contract law and remedies with no circumstances of novelty and or complexity. It is therefore the finding of the Court that there are no cogent reasons presented before the Court by the Plaintiff to justify instructing two Counsels.

175. Costs therefore shall follow the event and in the circumstances of this case it is the Defendant that wrongfully breached the agreement. I therefore find that costs are payable on a higher scale by the Defendant to the Plaintiff in respect to one Counsel.

176. Final orders and disposal

a. A declaration that the Agreement for Sale dated 2/7/2013 between the Plaintiff and the Defendant, is valid and enforceable against the Defendant;

b. An order of Specific Performance do issue compelling the Defendant to complete the Agreement for sale dated 2/7/2013 and in this regard to take all such actions and to execute all such documents as shall be necessary to effect due and effectual transfer of the Suit Property, namely, KAKUZI/KIRIMIRI BLOCK 7/281 situated in Makuyu and containing by measurement 51.28 hectares or thereabouts to the Plaintiff within a period of 30 days from the date of this judgement.

c. Upon the Defendant successfully completing the Agreement for sale dated 2/7/2013 by executing and delivering to the Plaintiff all such documents as shall be necessary to effect due and effectual transfer of the Suit Property to the Plaintiff, the Plaintiff within fifteen (15) days thereon shall pay to the Defendant the sum of Kshs 205,360,000.00 being the full purchase price of the suit property as expressed in the Agreement for sale.

d. An order for extension of the statutory time limit for applying for Land Control Board Consent pursuant to Section 8(1) of the Land Control Act is hereby granted for a period of 120 days from the date of this Judgement;

e. An order do issue compelling the Defendant to honour and discharge its obligations under the Agreement for Sale and to, *inter-alia*, apply for the consent to Transfer from the relevant Land Control Board, within fourteen (14) days of this Order, in default whereof the Deputy Registrar of this Honourable Court shall be empowered to apply for the said Consent on behalf of and at the cost of the Defendant to apply for the Land Control Board consent to the transaction as per the Sale Agreement dated 2/7/2013 within the statutory time limit or in the alternative, the Registrar of this Court, to apply for

such consent on behalf of the Defendant;

f. If the Defendant refuses and/or fails within thirty (30) days from the date of this judgment to execute and deliver to the Plaintiff all such documents as shall be necessary to effect due and effectual transfer of the Suit Property, namely, KAKUZI/KIRIMIRI BLOCK 7/281 situated in Makuyu and containing by measurement 51.28 hectares or thereabouts to the Plaintiff the Deputy Registrar of this Honourable Court does execute and deliver the said documents to the Plaintiff at the Defendant's expense;

g. Prayers **d,g,h,i, j, k, l** and **m** are hereby declined.

h. The Defendant does pay the costs of the suit for one Counsel on the higher scale to the Plaintiff.

177. It so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 10TH DAY OF FEBRUARY, 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Messrs Regeru Njoroge, Ahmed Yasin Jelle,

Ngatia Wambugu and Ian Kanja for the Plaintiff

Mr Wanga for the Defendant

Court Assistant: Njeri