Serem & 3 others (Suing as Personal Representatives of the Estate of the Late Michael Kibet arap Serem) v Ndiwa (Environment & Land Case 42 of 2020) [2025] KEELC 4416 (KLR) (10 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4416 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 42 OF 2020

CK NZILI, J

JUNE 10, 2025

BETWEEN

CHRISTINE KIGEN SEREM ..... 1ST PLAINTIFF

ROSALEEN CHERUTO SEREM ..... 2ND PLAINTIFF

FREDRICK KIPSANG SEREM ..... 3RD PLAINTIFF

ALEXANDER KIPTANUI SEREM ..... 4TH PLAINTIFF

SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE MICHAEL KIBET ARAP SEREM

AND

MICHAEL KIMTAI NDIWA ..... DEFENDANT

JUDGMENT

1. The plaintiffs approached this court through an amended plaint dated 11/5/2023, as legal representatives of the estate of the late Francis Kibet Arap Serem, who was the registered owner of L.R Nos. 2177/92 (IR No. 182896), 2177/93 (IR No. 182897), 2177/94(IR No. 182893), 2177/95 (IR No. 182899), and 2177/108(IR No. 182900), each measuring approximately 10 acres and cumulatively 50 acres, (hereinafter the suit premises).

2. The plaintiffs averred that by a sale agreement dated 27/2/2013, the deceased offered to sell the suit properties to the defendant at Kshs.20,000,000/= to which the defendant paid a deposit of Kshs.7,000,000/=, with the balance payable at Kshs.1,000,000/= on 1/3/2013, Kshs.6,000,000/= by 25/5/2013 and Kshs.6,000,000/= by 31/12/2013. The plaintiffs averred that the defendant only paid Kshs.3,650,000/= by 27/9/2013 but neglected, refused, or ignored to clear the balance of Kshs.9,350,000/= as agreed or at all, even though he had taken vacant possession. As a result of the

breach, the plaintiffs averred that they demanded that the defendant vacate the land, which he has refused to do.

3. The plaintiffs averred that they gave a rescission notice dated 2/1/2018, which expired on 16/1/2018, they had been ready and willing to complete the transaction till its rescission on 2/1/2018 upon expiry of the notice dated 19/12/2017. The plaintiffs sought:

   (a) Declaration that the sale agreement dated 27/2/2013 stands rescinded as a result of the defendant's breach.

   (b) Declaration that the sale agreement dated 27/2/2013 became void ab initio for lack of a land control board consent.

   (c) Declaration that the plaintiffs are entitled to retain 10% of the purchase price as liquidated damages for the pleaded breach.

   (d) Mandatory injunction evicting the defendant from the suit parcels of land.

   (e) Permanent injunction restraining the defendant from ploughing, cultivating, trespassing, laying claim, or otherwise dealing with the suit property.

   (f) OCS Cherangany Police Station to provide security during the eviction.

   (g) General damages for breach of contract/or mesne profits for the loss of use of the suit property.

4. The defendant opposed the suit through a statement of defense, and counterclaim dated 6/6/2023. The defendant admitted entering into the sale agreement dated 27/2/2013 with the deceased to purchase the suit parcels of land L.R Nos. 2177/92, 93, 95, and 108, to which he paid a deposit of Kshs.7,000,000/=. The defendant averred that as per Clause No. 1.1(a) and 7 of the sale agreement, the completion date was supposed to be 31/12/2013, when all the parties were expected to be ready and willing to complete their part, the deceased intentionally and maliciously breached the clause, for he represented the entire suit land as 50 acres, only for the defendant to realize later that it was not.

5. The defendant averred that as he was about to pay the 2nd deposit, the vendor informed him that he did not have the original title documents and therefore he would use the deposit paid to him to acquire them, whereupon he would notify him on when to continue paying the purchase price, so that they can meet the completion date as agreed.

6. Given the new development, the defendant averred that the plaintiffs handed over vacant possession of the land with an understanding that the title documents be processed by 31/12/2013, being the completion date, any pending deposits to continue being made, the plaintiffs to hand over completion documents on 31/12/2013 in exchange of the balance of purchase price and lastly, the land be surveyed to ascertain its actual acreage before paying the balance of the purchase price because only then will the parties be able to know the amount payable.

7. Again, the defendant averred that upon taking vacant possession, he fenced, cultivated, and planted approximately 20,000 avocado trees, began putting up an avocado factory, and recruited personnel to man the project. The defendant averred that around March 2013, he established and notified the vendor that the suit property was 44 acres as opposed to 50 acres, who undertook to look into the issue as soon as the title deeds were ready, but in any event not later than 31/12/2013.

8. The defendant averred that by 24/12/2013, payments to the tune of Kshs.13,000,000 had been paid to the vendor through N.K. Tigogo & Co. Advocates, leaving a balance of Kshs.4,600,000/=, which he has always been ready and willing to pay on the condition that the plaintiff avails the completion

documents in line with Clause 6 of the sale agreement. The defendant averred that he made the position clear as per his letter dated 24/12/2013, which the plaintiff never responded to.

9. Further, the defendant averred that on 31/12/2013, the vendor was unable to avail the completion documents as agreed or at all and or give an explanation for the default, despite the notice dated 24/12/2013.

10. The defendant maintained that it was the vendor who breached the sale agreement, leaving him with the option of revoking or rescinding the same. The defendant averred that he chose not to rescind the agreement, since he had already taken possession and started developing the suit properties, otherwise, when the vendor kept quiet, he assumed that he was still working on the completion documents and would inform him as soon as the completion documents were ready. In the intervening period, the defendant averred that he went to undertake some farming activities in Uganda, until 2019, while awaiting communication from the vendor all in vain.

11. The defendant averred that the vendor having made him believe that he was still working on the completion documents, and he would communicate when ready, and having remained silent till 2020, while aware of his occupation, such conduct precludes the vendor from alleging that he was the one who breached the sale agreement and or estops him from relying on the default clause.

12. According to the defendant, he never received any letter from the vendor communicating his readiness to complete the sale agreement. On the contrary, the defendant blamed the vendor for breaching the sale agreement by not processing title documents, delivering completion documents, misleading him on the acreage, putting him into vacant possession, declining to respond to his letter, and remaining quiet or misleading him till 2020, that all was in order.

13. The defendant averred that the vendor had no title deeds or procured or applied for the land control board consent within 6 months and therefore he was the one who created the impossibility of completing the transaction hence is estopped from relying on the failure as a defense.

14. By way of a counterclaim, the defendant reiterated the contents of the statement of defense and prayed for:

    (a) Declaration that the sale agreement is still valid and enforceable.

    (b) Declaration that the defendant is entitled to retain 10% as liquidated damages of the purchase price to the deducted from the balance of the purchase price.

    (c) An order directing the County Surveyor to visit the suit parcels of land to ascertain the acreage on the ground to determine how much money is owed to the plaintiff to clear the same.

    (d) Specific performance order for the plaintiffs to accept the balance and transfer the land.

    (e) Permanent injunction .

    (f) In the alternative, the plaintiffs be compelled to transfer land equivalent to Kshs.13,000,000/ = paid as of 24/12/2020 or.

    (g) In the alternative, refund of the amounts paid by 27/2/2013 with interest at the rate of 13%, together with the cost of all developments made on the land.

15. By a reply to the defense and defense to the counterclaim dated 11/5/2023, the plaintiffs denied the alleged breach of the sale agreement by the vendor as alleged or at all, otherwise, it was the defendant who failed to honor the payment of the installments on their due dates. As to acreage, the plaintiffs

averred that before the sale agreement, the defendant had the opportunity to inspect the property and bought it on that basis, hence there were no facts induced or misrepresented.

16. The plaintiffs denied the existence of any separate oral or otherwise agreement outside the one dated 21/2/2013 as alleged or at all. The plaintiffs averred that the defendant was given vacant possession, hoping that he would honor the terms of the sale agreement, but unfortunately has only paid Kshs.10,650,000/= leaving a balance of Kshs.9,350,000/=, which was a fundamental breach of the sale agreement, stifling the completion date. The plaintiffs averred that the vendor was always ready and willing to complete the transaction, going by letters dated 4/9/2017 and 19/12/2017, sent via registered post, hence the counterclaim has no basis.

17. At the trial, Alexander Tanui Serem testified as PW1 on behalf of the vendor, his late father, based on a witness statement dated 11/5/2023. He equally adopted as his evidence the deceased witness statement dated 30/6/2020 filed in court before he passed on and was substituted as the initial plaintiff on 21/7/2022.

18. PW1 told the court that he was a personal representative of the deceased estate alongside Christine Kigen Serem, Rosaleen Cheruto Serem, and Fredrick Kipsang Serem, the 1st, 2nd, and 3rd plaintiffs herein. He told the court that the deceased, as the vendor and owner of the land, entered into a sale agreement with the defendant on 27/2/2013, to sell 50 acres of the land at Kshs.400,000/= per acre, and was paid the deposit of Kshs.7,000,000/=, with the balance payable in installments of Kshs.1,000,000/=, Kshs.6,000,000/=, and Kshs.6,000,000/= on 1/3/2013, 25/5/2013, and 31/12/2013, respectively, the latter being the completion date.

19. PW1 stated that, between 26/2/2013 and 27/9/2013, the defendant managed only to pay installments totaling Kshs.3,650,000/=, and has refused to clear the balance of Kshs.9,350,000/=, despite numerous demands, reminders, and indulgences by the vendor, despite the vendor performing all his obligations under the sale agreement, including granting the defendant vacant possession of the suit properties in 2013.

20. According to PW1, on 4/9/2017, a completion notice was served upon the defendant who refused to respond to the it, which was followed with a notice to remedy the breach dated 19/12/2017, in default of which rescission of the agreement in terms of Clause 7(a) would take place.

21. PW1 told the court that upon the expiry of the notice on 2/1/2018, the vendor rescinded the agreement, and the defendant was notified to yield vacant possession, in vain, leading to the suit. PW1 told the court that the defendant has been reaping benefits from the suit property, yet ownership has not been passed to him. PW1 termed the sale agreement as void for lack of obtaining land control board consent within 6 months.

22. Again, PW1 that the estate of the deceased is now subject to financial loss and damage since it was inequitable for the defendant to keep both the money and the land. PW1 said that only Kshs.10,650,000/= was paid to the deceased and not Kshs.13,000,000/= as alleged. PW1 added that his late father had processed the transfer documents from land limited to himself, in readiness to complete the transaction hence it was the defendant who showed no goodwill towards completing the agreement by paying the balance.

23. PW1 relied on exhibits contained in a list of documents dated 11/5/2023, namely; a copy of the sale agreement dated 27/2/2013, an official search certificate for L.R Nos. 2177/92, 93, 94, 95 and 108, letters dated 4/9/2017, 19/12/2017, 25/1/2019 and 14/2/2019, as P. Exhibit Nos. 1 - 10, respectively.

24. In cross-examination, PW1 acknowledged that the sale agreement was silent on the exact acreage of the suit premises. Equally, PW1 said that his late father did not comply with the competition date of

31/12/2013, since he had not been paid the balance of the purchase price. PW1 admitted that the title deeds were all registered under his late father's name on 26/4/2016, as per P. Exhibit Nos. 2 - 6. PW1 admitted that the letter dated 24/12/2013 (DMFI No.5), made an indication that the defendant had the balance ready. He stated that the said letter was responded to through P. Exhibit No. (7), a letter dated 4/9/2017, which was over 3 years after the completion date had passed.

25. PW1 told the court that the notice to rescind the sale agreement namely P. Exhibit No. 8 was sent to the defendant by way of registered post to the purchaser's postal address, though he had no evidence of acknowledgment of receipt by the defendant of P. Exhibit Nos. 7, 8, and 9.

26. In re-examination, PW1 maintained that Clause No. 4 of the sale agreement was clear on the acreage. PW1 insisted that the letters were duly served to the defendant at his address as indicated in Clause No. 3 of the sale agreement. Between 2013 and 2017, PW1 said that the delay in processing the title deeds was attributed to the Agriculture Development Corporation and the Land Limited.

27. Following directions issued on 20/1/2025, under Order 18 of the Civil Procedure Rules, the parties by consent agreed to proceed with the matter from where my predecessor left it.

28. Michale Kimutai Ndiwa testified as DW1. He relied on a witness statement dated 6/6/2023 as his evidence in chief. He told the court that by an agreement dated 27/2/2013, he bought 50 acres of the suit premises from the late Francis Kibet Arap Serem the initial plaintiff for Kshs.20,000,000/=, and paid a deposit of Kshs.7,000,000/=, with a completion date set for 31/12/2013.

29. DW1 said that under Clause Nos. 6 and 7 of the agreement, the plaintiff was unable to honor the same on the completion date, to which on 28/2/2013, the vendor orally varied the terms and conditions of the sale agreement given that he had not procured the original title document. As a consequence, DW1 said that he took vacant possession on condition that the vendor would process the documents, whereas the defendant would continue paying the installments, and that handing over at the completion date would be in exchange with the balance remaining as of 31/12/2013.

30. Subsequently, DW1 stated that upon taking vacant possession, he caused several developments on the land as pleaded in the defense. Further, DW1 said that in March 2013, he established through a survey that the land he was occupying was less than what was stated in the sale agreement to which he notified the vendor of the same, who undertook to look into the issue since they were friends, when the title deeds would be ready, but not later than 31/12/2013.

31. DW1 said that as of 24/12/2013, he had paid Kshs.13,000,000/=, through N.K. Tigogo & Co. Advocates leaving a balance of Kshs.4,600,000/=, which he has been ready and willing to clear. He denied the alleged breach of the agreement. DW1 told the court that on 24/12/2013 he changed his advocates to Onyancha & Co. Advocates, who wrote the letter dated 24/12/2013 to the plaintiffs regarding the balance in exchange for the completion lands as per Clause No. 6 of the sale agreement, but the vendor failed to honor his part or respond to the letter, thereby breaching the clause.

32. Again, DW1 said that he chose not to rescind the sale agreement under the honest belief that since he was in occupation, and had developed the land, the vendor, after obtaining the title documents, would notify him. DW1 told the court that he went to work in Uganda from 2017 until 2019, while awaiting the vendor to notify him that the completion documents were ready.

33. Further, DW1 told the court that due to his honest belief, the vendor was estopped from blaming him for any breach so as to rescind the agreement.

34. He denied receiving P. Exhibit Nos. 7, 8, and 9; otherwise, the vendor was the one who had no title deeds under his name until 24/4/2016, for the *Land Control Act* to be invoked. DW1 said that his letter

dated 20/12/2013 was not responded to, nor were completion documents ready by 31/12/2013 for him to pay the balance. DW1 produced exhibits namely; a copy of ID, sale agreement, photographs, a letter dated 24/12/2013, survey report, valuation report, and a receipt dated 13/2/2022, as D. Exhibit Nos. 1-7, respectively.

35. DW1 told the court that after the site visit, he established the land was 44 acres, contrary to what was indicated in the sale agreement. Similarly, he said that he was never told if the title deeds were not available at the signing of the sale agreement otherwise the vendor was issued with them on 26/4/2016. DW1 denied receiving P. Exhibit Nos. 7, 8, and 9, otherwise, the address used was for Nyahururu and not Kitale.

36. DW1 confirmed that the sale agreement had an address, namely; P.O. Box 631, Kitale, Code No. 20300. DW1 admitted that he paid a portion of the installment of Kshs.6,000,000/=on its due dated of 25/5/2013, leaving a balance of Kshs.6,500,000/=. DW1 said that Kshs.2,350,00/= was lying in the offices of his former law firm, though he has no acknowledged receipts before the court.

37. DW1 admitted that the transaction was incomplete, otherwise, he would have been ready to perform his part of the agreement, by clearing the balance once the transfers were effected into his name. He added that the breach was by the vendor who had no title deed by 31/12/2013. DW1 said that he was informed of the lack of original title deeds on 28/2/2013, to which they varied the terms of the contract of the sale agreement in line with paragraphs 11(a)–(b) of his statement of defense and counterclaim.

38. Equally, DW1 said that the survey report was crucial for the verification of the exact acreage and its implication on the specific purchase price. Unfortunately, DW1 said that all these new issues were not reduced to writing by way of a variation to the initial sale agreement. DW1 admitted that Clause No. 4.1A of the sale agreement showed that he had visited and viewed the land before the sale agreement was signed.

39. DW1 admitted that the surveyor's report was silent on the land reference number, had omitted the acreage of the riparian land, and that the sketch map had no dimensions. Equally, DW1 admitted that the survey report before the court had no key or notes on the methodology used. He however admitted that the survey was done in the absence of the vendor, though the plaintiffs had been duly notified.

40. DW1 told the court that the valuation report showed the value of the land and development stood at Kshs.49,100,000. DW1 admitted that he has been reaping profits from the land since 2013, which he had not shared with the plaintiffs. He clarified that Clause No. (6) on vacant possession was not complied with since he took vacant possession on 29/2/2013, after the vendor was unable to obtain title deeds at the completion date, otherwise, the vendor has never termed him as a trespasser to the land.

41. The plaintiffs relied on written submissions dated 28/2/2025, isolating six issues for the court's determination. On the capacity to sue, the plaintiffs submitted that the suit was initially filed by the late Francis Kibet Arap Serem on 16/7/2020. Following his death on 2/8/2021, the plaintiffs were allowed to substitute him by an application dated 15/7/2022, on the strength of a limited grant ad litem issued on 2/6/2022 in High Court Nairobi Succession Cause No. E825 of 2022. The plaintiffs submitted that pleadings were appropriately amended, hence the defendant cannot deny the said facts. Reliance was placed on Habo Agencies Ltd -vs- Wilfred Odhiambo Musingo [2015] KECA 597 [KLR], that the limited grant, which forms part of the court file, is not disputed.

42. Regarding the breach of the sale agreement, the plaintiffs submitted that the defendant failed to pay the balances on their due dates, before the completion date, or prove compliance before the court despite issuance of the letters dated 4/9/2017, 19/12/2017, and 25/1/2019. Equally, the plaintiffs submitted

that the breach, as explained in the letter dated 28/2/2013, before the second installment was paid, is not plausible and if taken, would have substantially altered the terms and conditions of the sale agreement, such that nothing would have been better than putting these variations in writing and signing them, otherwise the sale agreement dated 21/2/2013 was complete.

43. The plaintiffs submitted that had the vendor breached the sale agreement, there was nothing stopping the defendant from invoking Clause No. 7(c) of the sale agreement on rescission. The plaintiffs submitted that the sale agreement was not only already invalid and unenforceable, but was also lawfully rescinded as a result of breach by the defendant in terms of Clause No. 7(a) following the letter dated 19/12/2017 and also offends the *Land Control Act*. Reliance was placed on Christine Nyanchama Oanda -vs- Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 [KLR] and David Sirreonga Ole Tukai -vs- Francis Arap Muge & Others [2014] KECA 155 9KLR].

44. On the alleged acreage, the plaintiffs submitted that Clause No. 4.1(a) of the sale agreement was clear that the defendant diligently inspected the suit premises before purchase and, hence he had full knowledge of its actual state and condition. Further, the plaintiffs faulted the survey report for its glaring fundamental omissions on the exact parcels.

45. The defendant relied on written submissions dated 6/3/2025. As a preliminary issue, the defendant submitted that although the plaintiffs purported to represent the estate of the deceased Francis Kibet Arap Serem, they did not file or produce the grant of letters of administration or a limited grant of letters of administration in respect of that estate, hence lack locus standi to bring the suit, making the suit incompetent. Reliance was placed on Order 3 Rule 7 of the Civil Procedure Rules, Alfred Naju -vs- City Council of Nairobi [1983] KLR 625.

46. Further, the defendant submitted that although the suit initially had been filed by the deceased, the substitution of the deceased did not absolve the plaintiffs from Order 3 Rule 7 of the Civil Procedure Rules, to litigate over the suit. Even assuming the plaintiffs rely on a limited grant of letters of administration attached to the notice of motion dated 15/7/2022, the same was not produced as an exhibit before the court; hence, the filing of the suit without producing the same invalidated it and hence the suit remains incurably defective.

47. Reliance is placed on Bottom -vs- Salim Khanoi [1958] EA 560 as cited in Julian Ndoyo Ongunga -vs- Francis Kiberenge Abano Migori Civil Appeal No. 119 of 2015. The defendant submitted that the defect was fatal and incurable under Article 159(2 (d) of *the Constitution*, hence the case of Habo Agencies (supra) is irrelevant.

48. On who breached the sale agreement, the defendant blames the vendor, who should not benefit from his failure to present completion documents before the completion date of 31/12/2013, in line with Clause (6) of the sale agreement dated 27/2/2013. The defendant submitted that the vendor had made a representation that the suit premises was 50 acres, only for the defendant to realize it was not, hence the need for a surveyor to ascertain the same before the completion date,

49. Again, the defendant submitted that the vendor failed to rectify or address the issue of the acreage, even after being informed of the anomaly at the time of payment of the second installment, in March 2013. He, the vendor, told the defendant that he would use the deposit to obtain or process the title documents and then notify him when he was ready and therefore opted to hand him over vacant possession.

50. The defendant submitted that the D. Exhibit No. 6 was clear that the suit premises were 44 acres and not 50 acres as represented by the vendor, which report has not been rebutted by any other report. The defendant submitted that despite D. Exhibit No. 4 showing his readiness to clear the balance in

exchange for the completion documents, there was no response or compliance, hence it was the vendor who flouted Clause No. 6.

51. Similarly, the defendant submitted that P. Exhibit Nos. 2-6 show that the vendor only became the registered owner of the parcel of land on 26/4/2016, after which he purportedly responded to D. Exhibit No. 4 by a letter dated 4/9/2017, (P. Exhibit No.7), 3 years, 8 months, and 10 days after the completion date, and which letter was allegedly sent to the wrong address, hence the vendor cannot be allowed to benefit from what he created.

52. As to whether the sale agreement is still valid and enforceable, the defendant submitted that because none of the parties to it exercised the right to rescind under Clause No. 7 after the expiry of the completion date, it remains valid and enforceable, otherwise, the clause did not envisage an automatic rescission.

53. The defendant urged the court to find the purported notice of rescission allegedly sent by the vendor invalid, for it was sent to the wrong address and there is no evidence that the defendant received it.

54. Needless to say, the defendant urged the court to rely on the doctrine that he who comes to equity must come with clean hands, hence the vendor who was already in breach of the completion date should not enforce a remedy against an innocent party who had paid Kshs.13,000,000/= as of 31/12/2013. Reliance is placed on Guchu -vs- Wanjiru [1994] eKLR.

55. Further, the defendant submitted that the vendor could not rescind the sale agreement when he had put him into vacant possession, and received Kshs.13,000,000/=, had authorized him to start developing the suit property, and knew that he was ready and willing to clear the balance in exchange with completion documents, hence the doctrine of estoppel operates against the vendor to allege breach on his part. Reliance was placed on Serah Njeri Mwobi -vs- John Kimani Njoroge [2013] eKLR.

56. As to eviction, the defendant submitted that the plaintiffs were estopped from evicting him since vacant possession was handed over willingly and in good faith, he was allowed to extensively develop the suit premises on the belief that the title documents would be readily availed in exchange of the balance as per his letter dated 24/12/2013, before the completion date.

57. Further, the defendant submitted that the vendor remained silent up to 2020, while aware that the defendant was occupying and developing the suit premises, hence the plaintiffs' conduct precludes them from stating that there was a breach on his part.

58. On the validity of the sale agreement, the defendant submitted that it was the vendor who caused a delay in complying with Section 6(1) of the *Land Control Act* (Cap 302), since he had no title deeds until 24/4/2016, despite his willingness to complete the sale agreement, which delay was not explained at all.

59. Therefore, the defendant submitted that the vendor should not be permitted to benefit from his failure and wrongdoing to evade his contractual obligation. Reliance was placed on David Sironga Ole Tukai -vs- Francis Arap Mugi [2014] eKLR and William Kimutai Kitilit -vs- Michael Kibet [2018] eKLR, on the proposition that the vendor should not benefit from his wrongs and that the doctrine of constructive trust and proprietary estoppel apply to contracts, which are void, and unenforceable for lack of land control board consent, especially where parties have unreasonably delayed performing their contractual obligation.

60. The defendant submitted that the circumstances of this case fall within the exception where specific performance can be granted, since he took possession of the land, developed it, and acted in reliance on the agreement as established in Wanjiru -vs- Macharia [1995] eKLR.

61. Regarding the eviction order, the defendant submitted that reliefs for the injunction and eviction orders sought by the plaintiffs are not tenable, for he has been in possession of the land since 2013, with the full knowledge and acquiescence of the vendor, relying on a contractual promise to have the land transferred to him. He therefore submitted that the plaintiffs must either complete the transaction or refund his money instead of seeking to unjustly enrich themselves through eviction.

62. Lastly, the defendant submitted that he is entitled to the reliefs of specific performance since he has substantially performed part of his bargain, and he has made substantial development, otherwise equity demands that the contract be enforced as held in Mwangi -vs- Kiiru [1995] eKLR.

63. In the alternative, the defendant submitted that he should either be transferred land equivalent to his Kshs.13,000,000/= or refunded the deposit together with interest at 14% p.a. and on top of that, compensation for the developments made on the property.

64. The defendant urged the court to allow the reliefs sought in the counterclaim by dismissing the primary suit, declaring the sale agreement valid and enforceable, compelling the plaintiffs to accept the balance and transfer the land or in the alternative transfer land equivalent to Kshs.13,000,000/=or refund the sum with interest and a permanent injunction.

65. The issues calling for my determination are:

    (1) If the plaintiffs have locus standi to advance the suit filed by the late Francis Arap Serem as the legal representatives.

    (2) If the sale agreement dated 27/2/2013 complied with the law.

    (3) If there was a breach of the sale agreement by any of the parties.

    (4) If there was a valid variation and revision of the sale agreement.

    (5) What were the rights and obligations of the parties after the alleged breach?

    (6) If there was representation, promise, and or reliance of any sort by the defendant.

    (7) If the sale agreement remains valid and or enforceable.

    (8) Whether the plaintiffs are entitled to the reliefs sought.

    (9) Whether there is a valid counterclaim to enable the defendant to obtain the reliefs sought.

66. It is not disputed that this suit was commenced by the late Francis Kibet Arap Serem before he passed on 2/8/2022, following which the plaintiffs sought and obtained a limited grant ad litem dated 2/6/2022 in HC Nairobi Succession Cause No. E825 of 2022.

67. By an application dated 15/7/2022, the plaintiffs as personal legal representatives of the estate of the deceased, sought to substitute the initial plaintiff and to amend the plaint to reflect the substitution, for the cause of action survived the deceased.

68. In the said application, the plaintiffs attached a death certificate and a limited grant of letters ad litem issued by the High Court, Nairobi, as annexures marked ACRF '1' and '2'. When the application came for hearing on 21/7/2022, Mr. Teti learned counsel for the defendant told the court that he was not opposed to the application. The application was thereafter allowed by consent and leave issued to amend the pleadings to reflect the substitution to both the plaint and the defense and counterclaim. The order was that the amendments be made within 14 days of grant of leave. The deadline to do so should have been 3/8/2022. It appears that the matter was mentioned on 11/10/2022 to confirm

compliance. Parties were also ordered to comply with Order 11 of the Civil Procedure Rules. As of 6/12/2022, none had complied. Another 14 more days were granted.

69. Come 8/2/2023, a hearing date was set for 17/4/2024. On 17/4/2023, an objection was raised that a reply to the defense and defense to counterclaim had been filed out of time. The court ordered that a formal application be filed. The plaintiffs filed an application dated 25/4/2023 seeking to re-open the pleadings since the plaintiff had omitted to amend the plaint to reflect the personal representatives of the initial plaintiff in line with Order 3 Rule 2 of the Civil Procedure Rules and also to file a reply to defense and defense to the counterclaim.

70. When the application came up on 9/5/2023, the parties recorded a consent to allow the same. The plaintiffs were granted 7 days to amend the plaint and include the personal representatives' names instead of the initial plaintiff and file and serve a reply to the defense and defense to the counterclaim, in default the original position to obtain. Throw away costs of Kshs.3,000/= were given to the defendant. Following this, the amended plaint dated 11/56/2023 was filed listing the names of the personal representatives on the face of the amended plaint. Unfortunately, the plaintiffs failed to replace the names of the initial plaintiff with the new plaintiffs in the body of the plaint, as well as introduce the capacity that the new plaintiffs were advancing the suit.

71. The amended plaint was accompanied by a verifying affidavit and an authority to plead under Order 24 Rule 3 of the Civil Procedure Rules, where the co-personal representatives of the estate of the deceased authorized the 4th plaintiff to appear, act, and represent the estate in these proceedings. Equally, other than the witness statement dated 11/5/2023, the plaintiffs did not list the grant of letters ad litem as one of the documents to rely upon at the hearing. That notwithstanding, the matter proceeded to hearing with PW1, who was cross-examined on the capacity to sue by the defense and referred to the grant ad litem in the court record.

72. After some documents were expunged from the court record the court granted the plaintiffs leave on 14/12/2023 to file a formal application to file a further list of documents and introduce the grant. None was filed by 22/1/2024 and the plaintiffs abandoned the same, opting to close their case. When the matter came for a defense hearing on 20/1/2025, the defendant sought to amend the defense and counterclaim dated 6/6/2023 as relates to the deponent of the verifying affidavit.

73. Learned counsel told the court that he was not going to introduce any other new issues to the pleadings except the name Michale Kimtai Ndiwa instead of Christopher Amunze. The amendment was allowed by consent of the parties to be filed within 7 days. The verifying affidavit was therefore filed dated 20/1/2025, alluding to the plaintiffs as the legal representatives of the estate of the deceased.

74. Coming to the amended defense and counterclaim dated 6/6/2023, paragraphs 5, 16, 18, 20, 22, 23, 24, and 25 of the amended defense refer to the deceased as the plaintiffs' late father and the vendor in the sale agreement dated 27/2/2013. The defendant did not dispute the capacity that the plaintiffs were now advancing the suit by way of an amended plaint.

75. It is trite law that a counterclaim is a stand-alone suit that stands or falls independent of the primary plaint. It must have a titular heading as per Order 7 Rule 3 of the Civil Procedure Rules.

76. In William Koross -vs- Hezekiah Kiptoo & Others *CA No. 223 of 2013*, the court said that there cannot be two judgments, the presence of a counterclaim does not give rise to a separate or standalone second judgment, and that a counterclaim never stands on its own and cannot be independent of a defense. The court notes that the defendant did not define who are the defendants in his counterclaim and which parties he seeks to enforce the reliefs sought in his counterclaim against. If the court were to make a finding that the capacity of the plaintiffs is in doubt and was not proved solely by not producing

the limited grant, then it would also mean that the defendant is shooting himself in the foot. He is turning the gun against himself.

77. Parties are bound by their pleadings and issues for the court's determination arise out of the pleadings. From the pleadings before the court, the defendant was privy to and was aware of how the plaintiffs were introduced to the suit. The defendant is speaking from both sides of his mouth. The capacity to sue and be sued in both the amended plaint and the amended defense, counterclaim, and the reply to the defense and defense to the counterclaim is not contested.

78. Admission of facts may be by way of pleadings or otherwise. In Choitram -vs- Nazari [1984] KLR 327, the court said it had a duty to examine the pleadings and establish whether there were specific denials or a definite refusal to admit allegations of fact.

79. Estoppel is a bar raised by the law that precludes a man from alleging or denying a certain fact or state of facts. An admission may be formal by way of pleadings or informal. Once there is admission, it renders it unnecessary to adduce evidence to prove such a fact. The law allows for the admission of facts under Order 13 Rule 2 of the Civil Procedure Rules. Once a party makes an admission in pleadings, it binds such a party and no further evidence needs to be adduced by the opposite party concerning the admitted facts. See Energy Industrial Credit Ltd -vs- Oxyplan International Ltd & Others [2021] eKLR.

80. There is evidence that the plaintiffs were allowed to join the suit by consent of the defendant, who had been supplied with the limited grant ad litem. The defendant is not saying that the limited grant ad litem supplied to the court is not authentic, genuine, or valid. The defendant has described the plaintiffs as children of the deceased in his pleadings. The prejudice to be suffered by not producing the limited grant to confirm obvious facts is not clear, yet the defendant should also be happy to have the plaintiffs' capacity equally benefit him if his counterclaim were to succeed. A court of law deals with real disputes and not academic pursuits. A court of law cannot act in vain. The court finds the capacity of the plaintiffs not contested, hence the suit is properly before the court.

81. Turning to the sale agreement dated 27/2/2013, it is not the business of courts to rewrite agreements but to enforce them unless the contract is illegal, unenforceable, procured through deceit, undue influence, or is unconscionable. See Pipe Plastics -vs- Samkolit (K) Ltd [2002[E.A 503. Parties have the freedom to contract. In construing an agreement, a court looks into the four corners of the document without resorting to extrinsic or parole evidence. In Barclays Bank of Kenya Ltd -vs- Banking Insurance & Finance Union (Civil Appeal E013 of 2022 [2025] KECA 253 [KLR] (21st February 2025) (Judgment), the court cited TSC -vs- Simon P. Kamau & Others [2010] eKLR, that common sense is demanded in interpretation to give effect to an agreement between parties to avoid disregarding an agreement signed by parties, otherwise it may result to an injustice to one party.

82. In Mwalambe & Another -vs- Freedom Ltd (Civil Appeal E022 of 2023 [2025] KECA 252 [KLR] (21st February 2025)(Judgment), the court cited James Kanyiita Nderitu & another -vs- Marios Philotas Ghikas & another [2016] KECA 470 (KLR), that a contract may be set aside on account of mistake, fraud or misrepresentation.

83. Land agreements are governed by Section 3(3) of the *Law of Contract Act* and Section 38 of the *Land Act*. For an agreement to be valid, it has to have the signatures of the parties, attestation of the signatures, capacity to contract, consideration, and a date and subject matter. A contract must meet the essential requirements of an offer, acceptance, and consideration, coupled with an intention to create legal relations. See Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Co. Ltd [2014] eKLR.

84. The parties to the sale agreement the subject matter of this suit had the freedom to contract and the right to vary the terms and conditions of the agreement. A variation agreement must also possess the characteristics of a valid contract. In Kenya Breweries Limited -vs- Kiambu General Transport Agency Ltd [2000] eKLR, the court observed that to give effect to a variation, parties must have ideas in the same sense, and as for the formation of the contract and the agreement for the variation must be supported by consideration. The court further said that if the agreement for variation is a mere nudum pactum, it would give no cause of action for breach, particularly if its effect was to give a voluntary indulgence to the other party to the agreement.

85. In Ongera & 14 others -vs- Mwakwae (Civil Appeal E246 of 2022) [2025] KECA 535 (KLR) (21 March 2025) (Judgment), the court observed that in a sale agreement, it is essential to prove the existence and terms, especially in cases where the title deed is under challenge and without a written agreement, it is difficult to demonstrate that the sale ever occurred or consideration was paid at all. The court said that as long as the transaction is not perceived by the court to have been carried out in good faith, there will always be considerable doubt as to the protection of such a title. The court said that in the absence of sale agreements and other relevant documentation regarding the transactions, the appellant had no valid defense and could not hoist any liability on any other party, especially when their duplicitous conduct in the transaction was vivid, apparent, and even annoying.

86. The court cited Esther Ndengi Njiru & Another -vs- Leonard Gatei Mbugua [2020] eKLR, that without a sale agreement validity of a title was in doubt. Further, the court cited Davy -vs- Garrett [1878] 7 Ch.D 489, on the proposition that the general allegation, however strong, maybe words in which they are stated, but may not be sufficient to amount to fraud for the court to take notice. The court cited Black's Law Dictionary as a bona fide purchaser as one who buys something for value without notice of any defects or equities.

87. As to defects to the description of the subject land in a sale agreement, the state of mind and intentions of the parties, and due diligence, frustration in a land transaction, in Kenya Commercial Finance Co. Ltd -vs- Kipngeno Arap Ngeny & Another [2002[KEA 306 [KLR], the court observed that the doctrine of frustration operates to excuse from further performance of a contract where it appears from the nature of the contract, and the surrounding circumstances that the parties have contracted that based on some fundamental thing or state of mind will continue to exist, and that an event renders performance impossible or only possible in a very different way from that contemplated, but without default of either party, the court cited Bank of Australasia -vs- Palmer [1897] SAC 540, that parole evidence cannot be received to contradict, vary or add to or subtract from the terms of a written contract, or terms in which the parties have deliberately agreed to record any part of their contract.

88. In Ramji Meghji Gudka Ltd vs Getembe Thrift Co. Ltd & Others (Civil Appeal 45 of 2019) [2025] KECA 22 [KLR] (17th January 2023)(Judgment), the court observed that a contract must pass the legal muster by conforming to the provisions of the *Law of Contract Act*.

89. Applying the cited case law to the instant suit, the plaintiffs blame the defendant for the breach of the sale agreement.

90. On the other hand, the defendant says that in March 2013, the vendor brought to his attention that he did not have the title documents under his name, hence he would use the deposit to acquire them. Further, the defendant pleaded and testified that he established that the subject land was not 50 acres as indicated in the sale agreement, but was 44 acres hence, agreed verbally with the vendor to ascertain the correct acreage before the completion date, since the same would determine the correct purchase price.

91. In a rejoinder, the plaintiffs averred, testified, and submitted that the sale agreement dated 27/2/2013 was complete, was not altered or varied, the defendant had inspected the property before signing the sale agreement, and that there was no promise or intention to alter the sale agreement, acreage, consideration and or extend the completion date.

92. Breach of a contract refers to a violation of contractual obligations, either by failing to perform one's promise or by interfering with another's performance. The defendant pleads that there was a fundamental defect in the sale agreement as regards acreage or consideration that, the vendor misled him. Section 29 of the *Land Registration Act* provides that a party to an agreement must carry out due diligence before purchasing land.

93. The defendant is introducing extrinsic evidence that there was variation, review, and change for the terms and conditions of the sale agreement as of March 2013, hence the reason that he did not meet the completion date, since title deeds came into the name of the vendor on 26/4/2016, 3 years 8 months and 10 days after 31/12/2013. Nevertheless, he says he was still willing to honor his obligations despite the inordinate delay.

94. The burden of proof was on the parties to prove the invalidity or otherwise the sale agreement or breach on the part of the opposite party as provided under Section 107(1) of the *Evidence Act*. A court of law has to interpret and construe a contract the way the parties reduced it into writing as to the terms and conditions unless it is challenged on account of illegality or fraud. In Mureri -vs- Maroo & another (Environment and Land Appeal E033 of 2022 [2024] KEELC 4595 (KLR) (5 June 2024) (Judgment) the court cited RTS Flexible System Ltd -vs- Molkerei Alois Muller GmbH & Co. KG (UK Production 2010) UKSC 14, that in construing a contract, the court will look not into the subjective state of mind of the parties, but upon consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create a legal relationship.

95. From the sale agreement dated 27/2/2013, the property, the subject matter, consideration, terms and conditions, timelines, obligations, completion date, and default clause, the rights and liabilities of the parties were set out. Clause 4.1 was a disclaimer showing that the defendant had viewed the suit property and was purchasing it with full knowledge of its actual state, condition, and how it stood. The sale agreement was complete in all its intents and purposes. Buyer be aware is a doctrine at the core of any contract.

96. In Dina Management Limited -vs- County Government of Mombasa & 5 others [2023] KESC 30 (KLR) and Torino Enterprises Limited -vs- Attorney General [2023] KESC 79 (KLR), the court pronounced itself on what due diligence entails. Other than D. Exhibit No. (4), there is no evidence that the defendant communicated in writing any detection of the fundamental defects to the sale agreement in terms of the acreage on the ground, lack of registration in the name of the vendor, and its effect on the consideration and the completion date. The issues raised in my view went to the core of the sale agreement and hence, if the vendor agreed to a variation of the terms and conditions of the sale agreement, the same required a supplementary agreement or a correction or alterations of the same.

97. Further, the issue raised bordered on misrepresentation of facts on the part of the vendor.

98. In the letter dated 24/12/2013, the defendant never raised the issue of the acreage, alteration of the acreage, reduction of the consideration to reflect the new realities on the ground based on a confirmed report by an independent land surveyor vis-à-vis what is held by the government records, seeking for consensus on same, with the vendor before the completion date, hardly seven days away.

99. Instead, the defendant expressed his willingness to complete the sale agreement dated 27/2/2013 as it was. It is not the business of the court to aid parties to walk away from what they freely and willingly

contracted and reduced into writing. The defendant did not blame the vendor for making a false statement in the sale agreement to induce him to his detriment, as he relied on it.

100. Therefore, guided by case law afore cited, this court finds that parole evidence may not be introduced to vary, replace, and introduce an unambiguous sale agreement that the parties signed.

101. The fundamental breach or frustration as pleaded by the defendant as per Order 2 Rules 3, 4, and 10 of the Civil Procedure Rules in the amended defense and counterclaim is inconsistent with the conduct of the defendant between March 2013 and 2020. It is not supported by any documentary evidence that the defendant took remedial action to ascertain the correct official, and valid acreage of the land, he was buying and sought a formal amendment of the sale agreement, to tally with the correct acreage and also to ensure that there was agreement on the acreage, and the exact consideration before the completion date. The survey report produced to show the acreage is dated 30/7/2020. The instructions to establish the acreage were given by the defendant on 28/7/2017. The maker was not called to produce the document.

102. The parties invoked the Law Society of Kenya, the terms and conditions of sale agreement. Even after the completion date expired, there is no evidence that the defendant soon thereafter or before the completion date, complained about the delay in effecting the transfers or providing him with the completion documents in terms of Clause (6), D. Exhibit No. 4. Which does not confirm the taking of vacant possession with the concurrence of the vendor pending completion.

103. In Housing Co. of E.A. Ltd -vs- Board of NSSF & Others [2018] eKLR, the court's main issue was whether or not the rescission or repudiation of the agreement of sale by the 1st respondent was valid and the consequences ensuing therefrom.

104. The court observed that in determining the issue, the fallback is whether time was not of the essence, and if it was, whether or not the completion notice was issued and served following the Law Society of Kenya conditions of sale. There had been a deed of variations of the agreement and extension of time granted through correspondences, unlike in the instant suit, where none exists either from the vendor or the purchaser. Vacant possession had been granted by consent of the parties after the completion date expired. A valid notice showing the default or requiring a remedy had been issued, in terms of Clause No. 4 (4) (b) of the LSK conditions.

105. The Court of Appeal observed that contracts are voluntary undertakings between parties and courts have no right or ability to substitute their judgment for that of the parties, when a contract is unambiguous, other than interpreting it as it is written without rewriting it. The court observed that the appellant could not in good faith insist that it was not in breach or did not understand the nature of the letter of default and rescission, for the breach went to the root of the contract. The court said that the failure to comply for more than 783 days of extension was a conduct construable as amounting to repudiation beyond the completion date.

106. The court said that time had been made of essence by the parties. The court interpreted the letter as making it clear that the breach was fundamental, going to the root of the contract and the failure to comply would be inferred as amounting to repudiation. The court cited Njamunya -vs- Nyaga [1983] KLR 283, that before an agreement can be rescinded, the party in default should be notified of the default and given a reasonable time within which to rectify the breach, failure of which it will result in a rescission of the contract.

107. The defendant has urged the court that there was no valid default notice in line with the sale agreement or the law, and even if there was, the vendor is estopped in law from invoking it or trying to unjustly enrich himself, for he had defaulted in giving completion documents on time or at all. Further, the

defendant pleads, testifies, and submits that vacant possession was lawfully handed over after the alleged variation of the sale agreement and was given a go-ahead to develop the land, while awaiting the vendor to avail the completion documents.

108. Similarly, the defendant urge the court to find the promises and conduct of the vendor as estopping him from reneging on the promise of unjustly benefiting from his default, including making it impossible to comply with Section 6 of the *Land Control Act* within 6 months since title deeds were not available until 2016.

109. It is noted that the defendant, on one hand, pleads a fundamental defect of the sale agreement and at the same time wants it declared valid. The defendant has also relied on Willy Kimutai Kitilit (supra) that the doctrine of constructive trust and proprietary estoppel applies to contracts, especially when the vendor has defaulted and put a party into possession to defeat an unfounded eviction.

110. In Kimonye -vs- Kirera & Others E&L Case 7 of 2018 [2023] KEELC 19928 [KLR] (20th September 2023) (Judgment), the court was faced with the question of who between the parties to the agreement had breached or frustrated the agreement and the remedies thereof and consequences and the legality of vacant possession. The court cited M.P Furmston, Cheshire Fifoot and Furmston's Law of Contract 11th ed, Butterworth and Co. 1986 page, 516, that a fundamental breach went to the very root of the contract, making any further performance impossible and having an effect on the core or substance of the agreement.

111. The court observed that the court is construing a contract and may not resort to parole evidence unless what was contracted was against public policy, illegal, and unconscionable in law. The court cited Housing Co. of E.A. (K) Ltd (supra), that failure to pay the balance of the purchase price on the finally, mutually agreed completion date was a fundamental breach that the other party could construe as amounting to a repudiation of the contract.

112. There is evidence that the defendant defaulted on paying the installments on their due date. Similarly, there is evidence that as of the completion date, the defendant had only paid Kshs.10,350,000/=, directly to the vendor and not the total Kshs.13,000,000/=. By the time the completion notice was issued on 4/9/2017, the defendant had not cleared the purchase price and demanded the completion documents from the vendor.

113. The defendant in his own words says that he took vacant possession of the land in March 2013 and has been reaping profits from the land. There is no evidence that the defendant was lawfully handed over vacant possession in line with the sale agreement or with the consent, approval, knowledge, and acceptance of the vendor.

114. Willingness to comply with the terms and conditions of the sale agreement by paying the entire consideration on time or soon after the vendor obtained title documents in 2016 or soon thereafter in 2017, 2018, 2019, and before the filing of the suit is lacking on the part of the defendant. The defendant wants the court to believe that there was a variation of the terms and conditions of the sale agreement.

115. If the acreage was the basis for not honoring the terms and conditions of the sale agreement, one would have expected that the defendant would have acted in the best interests of the rights and obligations under the sale agreement. Clause No. 4(17) of LSK Conditions [1989] was incorporated by the parties in the sale agreement. The defendant says that he did not exercise it despite the breach by the vendor since he believed that he was working on the original title documents and would notify him when ready. The absence of the default notice on the part of the defendant soon after 31/12/2013 would mean then that the defendant meant and so is the law, that the contract remained in force and was enforceable.

116. In Dhanjal Investment Ltd -vs- Shabaha Investment Ltd [2023] KECA 3557[KLR] 186 (18th February 2022) (Judgment), the court observed that the legal significance of Clause No. 4 (2)(a) of the Law Society of Kenya conditions of sale incorporation in a sale agreement, is that time is elevated in a contract such that a party failing to perform the obligation on time would be in fundamental breach of the agreement, with legal consequences flowing therefrom; including to the innocent party to terminate it and to claim damages for breach.

117. There is no evidence that the defendant called or wrote to the vendor between 24/12/2012 and 2017 to confirm or demand a status report on the readiness of the vendor on his obligations. Between 2016 and 2020, there is no evidence that the defendant sought out the vendor to establish the status of the title documents and to tender the balance. The defendant is unable to account for Kshs.2,065,000/= which he allegedly paid through his former advocates. He did not provide receipts to confirm when he made the payments.

118. Equally, the defendant did not call his former advocates to establish why the monies meant for the vendor were not forwarded on time or at all. Equally, the defendant insists that the monies were part of the purchase price and hence he duly complied with the terms and conditions of the sale agreement when the vendor vehemently denied receiving the monies on the due dates set in the sale agreement.

119. The basis of not paying Kshs.6,000,000 on 25/5/2013 and the completion date on 31/12/2013 is not substantiated. If the defendant was always willing to honor the sale agreement, there is no evidence that he demanded the transfer forms, land control board application form or booked a land control board meeting and requested the vendor to attend, towards the completion of the sale agreement, who unfortunately failed to sign, attend or assist in processing the completion documents. See Elijah Kipkorir Barmatel & Another -vs- John Kiplagat Chemweno & Others [2010] eKLR.

120. There is no dispute that the parties failed to meet their obligations on the completion date. By a letter dated 4/9/2017, the vendor wrote to the defendant acknowledging receipt of a letter dated 24/12/2013 admitting inordinate delay in procuring the original title deed. The blame was heaped on the subdivision and transfer bureaucracy at the Ministry of Lands. The letter acknowledges the sale of the parcels to the defendant.

121. The letter was a professional undertaking regarding the sale agreement dated 27/2/2013, stating that the vendor was willing to complete the transaction. The letter was written to Ms. Onyancha & Co. Advocates. The defendant has not denied receiving the same. From the said letter, it appears that despite the expiry of the completion date and the default of payment by the defendant on 31/12/2013, the vendor still considered the sale valid and enforceable.

122. A professional undertaking is a promise, pledge, or engagement. It binds a party to perform a certain duty. See Diamond Star General Trading LLC -vs- Ambrose Rachier [2017] eKLR. It is issued under Clause No. 19, Gazette Notice 5212 of 20/5/2017.

123. The obligation is to honor a professional undertaking until the undertaking is performed, released, or excused. In Prof. Tom Ojienda & Kataria Juma in their book; Professional Ethics: A Kenyan Perspective, 2011; Law African, page 62, a professional undertaking is defined as an unequivocal declaration by a professional advocate to be relied upon. See also Kenya Reinsurance Corporation Ltd -vs- Muriu [1995-98] 1 EA 107.

124. In Equip Agencies Ltd -vs- Credit Bank Ltd [2008] 2 EA 115, it was said that it is given to make transactions easier, faster, and more convenient. It is a bond by an advocate on the authority of a client as held in Harit Sheth t/a Harit Sheth Advocate -vs- K. H. Osmond t/a K. H. Osmond Advocate [2011] KECA 286 (KLR).

125. . The vendor's advocate gave an unequivocal undertaking that despite the expiry of the completion date and inordinate delay, the sale agreement was still valid and they were willing to complete the same. In D. Exhibit No. 4, the defendant acknowledged receipt of the letter of undertaking. Instead of releasing the amount due, as per the sale agreement, he introduced a condition that was not in the sale agreement, that the funds would only be released upon receipt of all the completion documents. The defendant did not raise the issue of the acreage, inordinate delay, alteration of the sale agreement, to reflect the alleged acreage, or for the adjustment of the purchase price.

126. As a consequence, the vendor, by a letter dated 19/12/2017, exercised his right to rescind the sale agreement for non-payment of the balance of the purchase price under Clause 7(b) of the sale agreement. The letter indicates that a reply had not been received, several phone calls had been made and promises by the defendant to attend the office had not been honoured. Similarly, the letter was followed by a second letter dated 25/1/2019 in which the vendor acknowledged receipt of only Kshs.10, 650,000/=, with the last payment on 27/9/2013. The address used by the vendor is the one indicated as belonging to the defendant as per the sale agreement dated 27/2/2013.

127. The defendant pleads, testifies, and submits that he never got P. Exhibit Nos. 7, 8 and 9. The defendant does not deny that he signed the sale agreement dated 27/2/2013, which gave the postal address of the parties. He has not produced evidence to the contrary that the postal address was not supplied by him and does not belong to him. The defendant never called the owner to show that the letter was not received by him or on his behalf. The same was the defendant's last known address. To this effect, evidence of service through the registered post has been availed by the plaintiffs. The certificate of posting issued by the Postal Corporation of Kenya has not been controverted. I find that the notices were properly issued, guided by Kyangavo -vs- KCB & Another [2004] eKLR.

128. Having established that the plaintiffs had confirmed the validity and enforceability of the sale agreement as of 2017, was the vendor entitled to revoke or rescind it? Clause No. 7(a) required a 7-days' notice to make good the default. There is no evidence that the defendant availed the requisite documents to prepare completion documents for the plaintiff's advocates after receiving the letter of undertaking, P. Exhibit No. 10 dated 14/2/2017 and sought vacant possession. It referred to the letter dated 25/1/2019. Paramount to note, between 4/9/2017, 19/12/2017, and 25/1/2019 and the filing of this suit, there is no evidence to show any willingness on the part of the defendant to honor the terms and conditions of the sale agreement.

129. The conduct of the defendant, despite the notices made, is inevitable for the vendor to exercise his right under the sale agreement. See Kimutai -vs- Wakibiru [1985] KECA 120 [KLR]. The defendant cannot, in those circumstances, turn around and rely on extrinsic evidence as the basis why he did not honor his obligations despite a professional undertaking and notices issued to remedy the breach, in default of which the sale agreement would be rescinded.

130. Needful to say, the defendant had all the time to cross-check the acreage after title deeds were issued through valid official documents held by the Survey of Kenya and the Land Registrar between 2016 and 2017.

131. The alleged discovery in 2020 came too late, it is not based on official land documents and was not brought to the attention of the relevant government agencies for verification between what is in the title deed and on the ground. The property sold to the defendant was definite and defined. In KPLC Ltd -vs- Membley Housing Co. (Civil Appeal 336 of 2017 [2022] KECA 742 [KLR] (29th July 2022) (Judgment), the court held that previous negotiations, discussions, communications, and agreement would have to be ignored by the court where the words of the agreement conveyed the intention of the parties and that a clause that the agreement constitutes the entire agreement of the parties with regard

of its subject matter, supersedes and cancels all previous negotiations and agreements does not prevent the terms from being implied into a contract if there was a plain and obvious gap in the agreement that was inconsistent with the objective intentions of the parties.

132. The court cited Fidelity Commercial Bank Ltd -vs- Kenya Grange Vehicle Industries Ltd [2017] eKLR, on the primacy of the intention of the parties as set out in the documents, while interpreting it, namely; the principle of the four corners of the documents by adopting the objective theory of contract interpretation.

133. There is no evidence that the parties intended their contract to be in both oral and written forms. The court cannot infer that there was an intention to resurvey the land and re-adjust the consideration on an alleged riparian land. If the defendant thought that the issue was fundamental, nothing was stopping him between March 2013 and 2017 from remedying the same and incorporating the 'new issues' into the sale agreement. Even after this was known to him, the defendant paid some money in September 2013 and stopped making any further payments until a notice to rescind was issued.

134. Similarly, no evidence was adduced that the defendant before 2017, put it in writing that he was only going to pay for 44 acres and not 50 acres, in view of the contradiction or uncertainty in the sale agreement on the acreage, as well as on the ground. Such a contradiction or uncertainty had to be brought to the attention of the vendor formally between 2013 and 2017, based on cogent and tangible evidence.

135. As to the Land Control Board consent, again, the defendant was notified of the availability of the title deed through his advocates on record. He acknowledged the letter by D. Exhibit No. 4. The defendant knew that 6 months was running against the revived sale agreement.

136. After D. Exhibit No. 4, there is no evidence that the defendant took action to comply with Section 6 of the *Land Control Act*. He cannot, therefore be heard to invoke the doctrine of constructive trust and proprietary estoppel. The same was not pleaded including its particulars set out in line with Order 3 of the Civil Procedure Rules. Though vacant possession was to take place on the completion date, the letter dated 24/12/2013 does not indicate that the defendant had been granted vacant possession earlier than in March 2013 and not on the completion date. Extrinsic evidence cannot be used to vary what the parties had agreed. If the defendant had obtained vacant possession in March 2013, nothing stopped him from confirming such facts by the letter dated 24/12/2013, as well as including the fact that the deadline was impossible to meet in view of the disputed acreage and consideration.

137. In Wambugu -vs- Njuguna [1983] KLR 171, the court observed that the general rule is that until the contrary is proved, possession in law follows the right to possess. The parties intended that possession was to take place on 31/12/2013 and not earlier. The defendant had not met his obligations by paying the entire purchase price as a justification to move onto the land while awaiting the completion documents. The defendant was well aware that there was no supplementary agreement authorizing possession before the completion date.

138. It is inconceivable the defendant would therefore opt to take vacant possession if at all the acreage, and the consideration were in doubt or disputed. Equally, it is curious why the defendant would take vacant possession, keep the balance to himself, and make no follow-ups to obtain completion documents for close to 7 years unperturbed, while reaping profits from the land, only to turn around and accuse the vendor of fundamental breach.

139. The defendant was not a bona fide purchaser for value to be taken to have obtained legal possession of the land based on a sale agreement. The developments on the land were not sanctioned by the vendor otherwise, the defendant would have produced such evidence of approval or consent. Actual

and physical possession followed with consents, approval, and concurrence by the vendor has not been pleaded and proved for the doctrine of constructive trust and proprietary estoppel to be invoked, as held in Willy K. Kitilik (supra).

140. In Macharia Mwangi Maina & Others -vs- David Mwangi Kagiri [2014] eKLR, the court observed that constructive trust is based on common intention, which is an agreement, arrangement, or understanding reached between parties, and relied upon or acted upon.

141. In Obuba -vs- Nyabwatana Civil Appeal 30 of 2019 [2022] KECA 1425 KLR (16th December 2022) (Judgment), the court observed that constructive trust is an equitable concept that acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner to defeat the common intention. The intention of the vendor was expressly indicated in the professional undertaking, which was sent to the defendant but was not acted upon.

142. The defendant chose to introduce conditions to honor the sale agreement, not initially provided for in the sale agreement. The defendant made it impossible to complete the sale agreement between 2016 and 2019. The doctrine of constructive trust and proprietary estoppel if it had properly been pleaded and proved, would still work against the defendant who entered into the land irregularly, paid no full consideration for it, and failed to complete the sale agreement on time, or at all by clearing the balance of the purchase price.

143. Equally, the payment of the balance of the purchase price as per the sale agreement was not dependent on the exact acreage of the land being obtained or the exchange of the completion documents, as the defendant wants the court to believe.

144. The probative value of the survey report is weakened because its findings lack a scientific basis. The maker was not called to testify. It is not conclusive as to the acreage. It cannot be used to vary the sale agreement. Further, the valuation report by the defendant equally suffered probative value. There is no evidence of how the defendant gained entry into the suit premises. Equally, approvals for the developments by the vendor and government agencies are lacking.

145. The court has found that the defendant breached the sale agreement as of 2013. After the revival of the sale agreement by a letter dated 4/9/2017, there was a further breach, which elicited the issuance of a rescission notice. The defendant urges the court to find the sale agreement valid and enforceable. First and foremost, a party relying on the doctrine of specific performance has to show that he has performed all the terms of the contract which he had undertaken to perform, whether expressly or by implication.

146. In Thrift Homes Ltd -vs- Kenya Investment Ltd [2015] eKLR, the court observed that specific performance was a discretionary remedy based on the existence of a valid enforceable agreement, and will not be issued if the agreement suffers from some defects, mistakes, or illegality, and even if it was valid, there was an alternative remedy, and where also the plaintiff is ready and able to complete the transactions and damages may not be an adequate remedy.

147. In Ngaira -vs- Cheng'oli (Civil Appeal 397 of 2017) [2022] KECA 80 (KLR) (4 February 2022) (Judgment), the court was faced with a situation where neither party had rescinded the agreement following default, nor did they execute another agreement extending the completion time. Rates and the purchase price had been cleared by the respective parties. A protest for the default had not been issued by either party. The court said that the conduct of the respondent meeting his part of the obligation of payment of rates out of time and bringing this to the attention of the appellant who acquiesced to it by the conduct of want to protest and the conduct of the respondent acquiescing to the appellant conduct of meeting the balance of the purchase price outside the stipulated time by accepting the money from the appellant without a protest, showed that the agreement should not have

been either overlooked or ignored and that they desired to carry on with the sale agreement to its logical conclusion despite the lapse of time.

148. The court held that since the sale agreement had no defect, mistake, or illegality pointed out by the parties, it was unconscionable for the respondent to raise the issue of enforceability of the contract on an alleged non-compliance with the completion date to circumvent her obligation under the sale agreement especially when she had neither refunded the purchase price to the purchaser nor tendered it before the court.

149. The court held that it was inequitable for the seller to retain both the suit property and the money. On vacant possession, the court held that since the appellant had performed his obligation to be entitled to vacant possession of the suit property having executed the instruments of transfer, and having paid the full purchase price as per the sale agreement, he had a beneficial proprietary claim or interest over the suit property.

150. Applying the cited principles in the instant case, the court has found that the defendant opted to walk out of the sale agreement by not honoring his obligation under it, even after the professional undertaking was issued. The defendant before this court has confirmed that only Kshs.10,650,000/= has been paid to date. The defendant still has issues with the acreage and the sum due under the sale agreement.

151. A party cannot approbate and reprobate at the same time. Demonstration of willingness to honor the part of the bargain by the defendant must be real, genuine, and straightforward. The remedy of specific performance is based on good faith. It is the defendant who refused to complete the sale agreement in 2017, leading to its repudiation.

152. In Thrift Homes Ltd -vs- Kenya Investment Ltd [2015] eKLR, the court held that if a purchaser fails to pay the balance, on the agreed date, the vendor is discharged from further performance of the purchaser's failure to pay the balance.

153. The court has already found that the rescission of the agreement by the vendor was justified. A professional undertaking had even been given to the defendant in 2016. A completion notice was also issued to the defendant. The defendant ignored all those gestures. No tangible evidence or reason has been placed before the court as to why the defendant did not place the balance based on the professional undertaking, yet he says that he was already in possession of the land since 2013.

154. The defendant knew that he had been reaping profits on the land since 2013 without an impediment from the plaintiffs. He knew that he had not cleared the balance and that the title deeds were already in the names of the plaintiffs. The defendant can readily claim the equivalent of what he paid. He has failed for the last 10 years to agree on the acreage, and amount payable and clear the same. He now wants a specific performance for the equivalent of what he has paid, which is contested.

155. A court of law cannot rewrite a contract for the parties. The terms and conditions of the sale agreement, in which the defendant wants an order for specific performance, are not clear, valid and signed.

156. The refund sought if any, by the defendant has not been verified, ascertained, and proved before this court, save for the Kshs.10,650,000/= that the vendor admitted receipt of. That notwithstanding, the amended counterclaim lacks a titular heading. The value of the developments, if any on the land have not been tabulated or pleaded. The deposit made and the value of the developments are in the value of special damages that must be strictly pleaded, prayed for, and proved by way of tangible evidence. The suit premises is not registered in the names of any defined dependents in the counterclaim for the defendant to be entitled to the issuance of the reliefs sought in the counterclaim.

157. The upshot is that the plaintiffs have proved their claim to the required standards to be entitled to:

(a) Declaration that the sale agreement dated 27/2/2013 stands rescinded as a result of the defendant's breach.

(b) Declaration that the sale agreement dated 27/2/2013 became void ab initio for lack of a land control board consent.

(c) Declaration that the plaintiffs are entitled to retain 10% of the purchase price as liquidated damages for the pleaded breach.

(d) Mandatory injunction evicting the defendant from the suit parcels of land.

(e) Permanent injunction restraining the defendant from ploughing, cultivating, trespassing, laying claim, or otherwise dealing with the suit property.

(f) OCS Cherangany Police Station to provide security during the eviction.

158. The amended statement of defense and the counterclaim are found to lack merits, incompetent, both in form and content and therefore unsuitable. Costs for both the main plaint and the defense and counterclaim to the plaintiffs.

JUDGMENT DATED, SIGNED, AND **DELIVERED** VIA **MICROSOFT TEAMS/OPEN COURT** AT **KITALE** ON THIS **10TH** DAY OF **JUNE 2025.**

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Court Assistant - Dennis

Teti for the defendant present

Maiyo for the plaintiff preset