



Kenya Re-Insurance Corporation Limited & another v Ng'ok & 2 others (Environment & Land Case 5 of 2023 & Civil Case 515 of 2007 (Consolidated)) [2024] KEELC 4004 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 5 OF 2023 & CIVIL CASE 515 OF 2007 (CONSOLIDATED)**

JO MBOYA, J

MAY 6, 2024

BETWEEN

KENYA RE-INSURANCE CORPORATION LIMITED PLAINTIFF

AND

DR. JOSEPH KIPRUTO ARAP NG'OK DEFENDANT

AS CONSOLIDATED WITH

CIVIL CASE 515 OF 2007

BETWEEN

HARIET CHEBET NG'OK [SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH KIPRUTO ARAP NG'OK - DECEASED ... PLAINTIFF

AND

ROCKHOUND PROPERTIES LIMITED 1ST DEFENDANT

KENYA REINSURANCE CORP. LIMITED 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. The instant suit relates to the dispute pertaining to and concerning L.R No. 1160/613 [I.R No. 77064] which was formerly referred to as Kenya Reinsurance Housing Project, Nairobi, Karen House No. 8, Ndege Road [hereinafter referred to as the suit property].



2. For coherence, the instant suit was commenced vide Plaint dated the 3rd December 2003; and in respect of which the Plaintiff [Kenya Reinsurance Corporation Ltd] sought for various reliefs, inter-alia, [verbatim]:
 - i. An order of Eviction from the property known as Land Reference No. 1160/613; House No. 8 Ndege Road, Karen Nairobi.
 - ii. Declaration that the sale Agreement between the Plaintiff and the Defendant dated 10th November 1996 as amended by the Agreement dated 6th August 1999 has been rescinded.
 - iii. Mesne profits at the rate of Kes.70, 000/= per month with effect from 1st July 2000 until the Defendant vacates the suit premises, namely Land Reference No. 1160/613; House No. 8 Ndege Road, Karen Nairobi.
 - iv. A declaration that the Plaintiff is entitled to offset the cumulative Mesne profits from the deposit of the purchase price held by them.
 - v. Cost and Interests of the suit.
3. Notably, upon being served with the Plaint and summons to enter appearance, the Defendant [Dr. Joseph N K Arap Ngok, now deceased] duly entered appearance and filed a statement of defense dated the 3rd February 2004, but which statement of defense was subsequently amended culminating into the filing of the amended statement of defense and counterclaim dated the 30th August 2005.
4. Suffice it to point out that the Defendant herein sought for the following reliefs at the foot of the counterclaim;
 - i. Damages for breach of contract.
 - ii. Damages for fraudulent misrepresentation.
 - iii. Specific performance of the terms and conditions of the contract of sale of the suit premises.
 - iv. A declaration that the Plaintiff has received from the Defendant the full purchase price of the suit premises.
 - v. Specific performance, compelling the Plaintiff to transfer the suit property to the Defendant.
 - vi. Any other relief as shall be fair in the circumstances of this suit.
 - vii. Costs and interests.
5. Instructively, upon being served with the amended statement of defense and counterclaim [details in terms of the preceding paragraph], the Plaintiff/Defendant to the Counterclaim filed a Reply to the statement of defense and defense to counterclaim dated the 17th October 2005; wherein the Plaintiff/Defendant to the counterclaim disputed the claims by and on behalf of the counter-claimer.
6. Other than the foregoing, it is also worthy to point out that the Defendant herein [Dr. Joseph N. K. Arap Ngok, now deceased] and who has since been substituted by his daughter and Legal administratix also filed a separate suit [namely, Nairobi HCC No. 515 of 2007] and wherein same sought for the following reliefs;
 - i. An order of Permanent injunction to issue restraining the Defendant jointly and or severally, whether acting by themselves, their agents, employees, directors or otherwise, howsoever, from



selling, offering for sale, transferring, alienating or otherwise dealing to the suit property against the interest of the Plaintiff.

- ii. An order of Specific Performance to issue against the 2nd Defendant herein to complete the sale transaction in favor of the Plaintiff.
 - iii. A declaration that the sale agreement between the Defendant[s] and the subsequent purported sale and transfer of the suit property to the 1st Defendant by the 2nd Defendant is null and void and has no effect in law and the same be canceled.
 - iv. Interests on the amounts paid to the 2nd Defendant from the date of payment to date of Judgment herein at commercial rates.
 - v. Costs of this suit.
 - vi. Interests on [e] above at court rates.
 - vii. Any other relief as shall be fair in the circumstances of this suit.
7. Pertinently, upon being served with the Plaint and summons to enter appearance in respect of Nairobi HCC No. 515 of 2007, the 2nd Defendant [read Kenya Reinsurance Corp. Ltd] duly entered appearance and thereafter filed a statement of defense dated the 7th November 2007 and wherein the 2nd Defendant contended inter-alia that the suit by the Plaintiff was sub-judice and thus violated the provisions of Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya.
8. Nevertheless, it is imperative to underscore that the 1st Defendant [Rockhound Properties Ltd] however failed to enter appearance nor filed a statement of defense. In this regard, the Plaintiff thereafter filed a request for interlocutory Judgment as against the said 1st Defendant.
9. Be that as it may, it is not lost on this court that though the Plaintiff in respect of Nairobi HCC No. 515 of 2007, filed a request for interlocutory Judgment, it is apposite to point out that no such Judgment would have legally issued in favor of the Plaintiff insofar as there was no liquidated claim at the foot of the impugned Plaint.
10. Be that as it may, the subject matter, which had been filed in the year 2003 and which spent a whopping 20 years [two decades], before the High Court, was transferred to the ELC Court on the 26th October 2023, whereupon this court assumed the responsibility [obligation] to hear the matter.
11. Notably, the instant matter was thereafter listed for pretrial directions on the 26th October 2023 and 20th November 2023, respectively, where after the advocates for the respective parties confirmed to the court that same [Advocates], had duly filed and exchange the requisite bundle of documents and witness statement[s].
12. Arising from the foregoing, the court confirmed that the suit was indeed ready for hearing and thereafter proceeded to and set down the matter for hearing on the 6th February 2024. For good measure, the hearing proceeded on even date when the Plaintiff's case was substantially heard.

Evidence by the Parties:

a. Plaintiff's Case:

13. The Plaintiff's case is premised and anchored on the evidence of one witness, namely, John Arika. Same testified as PW1.



14. It was the testimony of the witness [PW1] that same is the property manager of the Plaintiff herein. Furthermore, the witness averred that by virtue of being the property manager of the Plaintiff herein, same [witness] is therefore conversant with the facts of the instant matter.
15. On the other hand, the witness averred that same [witness] has since recorded a witness statement dated the 2nd February 2024 and which witness statement, same [witness] sought to adopt and rely on as his evidence in chief. Instructively, the witness statement dated the 2nd February 2024 was thereafter admitted and constituted as the evidence in chief of the witness.
16. Additionally, the witness alluded to a List and bundle of document[s] dated the 25th November 2009, containing 43 documents and which documents the witness sought to adopt and produce before the court.
17. There being no objection to the production of the documents, same [documents] were thereafter produced and tendered before the court as Plaintiff's Exhibits P1 to P43, respectively.
18. Other than the foregoing, the witness also adverted to a supplementary List and bundle of documents dated the 12th July 2010 and sought to produce same [documents] as further exhibits before the court.
19. Similarly and in the absence of any objection, the documents at the foot of the Supplementary list and bundle of documents dated the 12th July 2010 were tendered and produced before the court as Exhibits P44 to P46, respectively.
20. Furthermore, it was the testimony of the witness that the Plaintiff herein had filed various pleadings, inter-alia, the Plaint dated 3rd December 2003, Reply to amended statement of defense and defense to counterclaim dated the 17th October 2005; and defense in respect of HCC No. 515 of 2007 dated 7th November 2007, respectively.
21. Pertinently, the witness thereafter intimated to the court that the Plaintiff was keen to adopt and reiterate the contents of the various pleadings and documents filed. Furthermore, the witness invited the court to grant the reliefs sought at the foot of the Plaint dated the 3rd December 2003.
22. On cross examination, by Learned counsel for the Defendant, the witness pointed out that the Plaintiff herein received a total of Kes.4, 440, 722/= only at the foot of the sale agreement, which was entered into between the Plaintiff and the Defendant on the 10th of December 1996.
23. Whilst under further cross examination, the witness averred that the entire purchase price at the foot of the sale agreement was Kes.12, 635, 200/= only. In any event, the witness averred that the balance of the purchase price [less the deposit] was to be financed by the Plaintiff via a mortgage in terms of clause 9 of the sale agreement.
24. It was the further testimony of the witness that it was the Plaintiff herein who was to perfect and generate the mortgage in favor of the Defendant. Furthermore, the witness averred that the Plaintiff herein indeed proceeded to and generated a letter of offer/application towards the mortgage.
25. On further cross examination, the witness averred that the amount that was to be financed courtesy of the mortgage was Kes.8, 533, 000/= only. However, upon being referred to page one [1] of the Plaintiff's bundle of document, the witness clarified that the figure alluded to was Kes.8, 400, 000/= only.
26. Be that as it may, the witness stated that the Defendant herein duly received the letter of offer as pertains to the mortgage and thereafter accepted same [letter of offer of mortgage] on the 20th May 1996.



27. In any event, it was the evidence of the witness [PW1], that clause 4 of the letter of offer of the mortgage indicated that the security towards the mortgage was to be the Title of the suit property.
28. On further cross examination, the witness averred that even though the suit property was to be the security in respect of the mortgage, same [witness] indicated that he did not no know whether the mortgage was ever registered.
29. Additionally, it was the evidence of the witness that it was the suit property which was to be charged in accordance with the letter of offer of the mortgage. Nevertheless, the witness repeated that same [witness] is not aware whether the mortgage was ever created.
30. Whilst under further cross examination, the witness averred that at the time of the issuance of the letter of offer, the Plaintiff herein had the requisite certificate of title in respect of the suit property. In any event, the witness clarified that the title in respect of the suit property relates to Land Reference No. 1160/613.
31. However, when pressed further, the witness stated that the certificate of title which same [witness] has tendered before the court was issued on the 1st July 1998, whereas the Letter of offer was issued in the year 1995.
32. In this regard, the witness thereafter conceded that the certificate of title was not available as at the time when the Plaintiff generated and issued the letter of offer on the 11th March 1995.
33. Other than the foregoing, it was the testimony of the witness that though the letter of offer was issued on the 11th March 1995, the sale agreement was never prepared up to and including the 10th December 1996. In this regard, the witness admitted that it took approximately two [2] years before the sale agreement was prepared.
34. Whilst under further cross examination, the witness averred that the balance of the purchase price was to be advanced by the Plaintiff to the Defendant albeit on the basis of a mortgage. In any event, the witness has averred that same [witness] is aware that the mortgage was duly advanced.
35. On the other hand, the witness averred that upon the execution of the sale agreement, the purchaser, namely, the Defendant was granted possession of the suit property. Furthermore, the witness averred that the Plaintiff herein also undertook to transfer the suit property to the Defendant.
36. Nevertheless, it was the evidence of the witness that even though the suit property was to be transferred to the Defendant, same [suit property] was however not transferred to the Defendant.
37. On further cross examination, the witness averred that indeed the Plaintiff had agreed to finance the purchase price of the suit property. Furthermore, the witness testified that the Plaintiff proceeded to and created a mortgage in favor of the Defendant.
38. However, when pressed further the witness conceded that same [witness] has not tendered and/or produced a copy of the mortgage before the court.
39. On further cross examination, the witness averred that during the intervening period, the suit property was leased to and in favor of M/s Investment Promotion Centre, [who was the Defendant's employer]. For good measure, the witness admitted that the tenancy/lease agreement is one of the document[s] which have been tendered and produced before the court.
40. It was the testimony of the witness that by the time the Plaintiff created and entered into the tenancy agreement with M/s Investment Promotion Centre, the Plaintiff had not procured a certificate of title in respect of the suit property.



41. On the other hand, it was the witness testimony that the Plaintiff and the Defendant herein entered into a further sale agreement with the Defendant dated the 6th August 1999. Furthermore, the witness clarified that the said agreement was in respect of the same suit property.
42. Additionally, it was the testimony of the witness that by the time the Plaintiff and the Defendant entered into the sale agreement dated the 6th August 1999, the mortgage had neither been created nor operationalized. For clarity, the witness averred that the mortgage had not been created as at 1999.
43. On further cross examination, the witness averred that the Tenancy which had been created over the suit property was for the benefit of the purchaser, namely, the Defendant. In any event, the witness averred that the tenancy was for monthly rents of Kes.70, 000/= only.
44. Whilst under further cross examination by Learned Counsel for the Defendant, the witness averred that the terms of the mortgage was to be varied and same [terms of mortgage] were to restart again w.e.f 30th June 2000, upon the determination of the Tenancy Agreement.
45. It was the further testimony of the witness that the payments [rents] were to be credited and applied towards the purchase price. Furthermore, the witness added that the rents which were realized out of the tenancy agreement were to be deployed towards liquidating the purchase price of the suit property.
46. On the other hand, it was the testimony of the witness that the Plaintiff herein received a letter from the Defendant dated the 27th November 2001 and in respect of which the Defendant itemized and tabulated the total monies that had been paid towards and on account of the suit property. In any event, the Witness added that the Defendant contended that the total monies paid amounted to Kes.9, 473, 308.30/= only.
47. On further cross examination, it was the testimony of the witness that if the total rents were paid to the Plaintiff, then the Plaintiff would be holding a total [aggregate] of Kes.3, 360, 000/= only on account of rental income.
48. Other than the foregoing, it was the testimony of the witness that the Plaintiff herein also generated a schedule and in respect of which same stipulated the figures which had been received, inclusive of interests. In this regard, the witness alluded to the document at page 49 of the Plaintiff's bundle of document[s].
49. It was the Plaintiff's testimony, that the Plaintiff herein indeed received rents from Investment Promotion Centre in accordance with the tenancy agreement. However, the witness testified that even though the Plaintiff received the rents, same [witness] was not aware of the total amount [figure] that was received by the Plaintiff.
50. On the other hand, it was the testimony of the witness that the Plaintiff herein generated a letter dated the 30th July 2002. However, the witness added that the letter under reference did not allude to and/or mention issue relating to rent arrears.
51. On further cross examination, it was the testimony of the witness that the suit property was subsequently sold and transferred to M/s Rockhound Properties Ltd [who is the First Defendant in respect of Hcc No, 515 of 2007], on the 8th December 2005. In any event, the witness averred that the transfer and registration of the suit property in favor of Rockhound Properties Ltd was undertaken during the pendency of the suit filed by the Plaintiff herein.
52. Furthermore, the witness stated that the said M/s Rockhound Properties Ltd is currently indicated as the proprietor of the suit property. Nevertheless, the witness added that the suit property is also the



- subject of an order of preservation which order was procured and issued at the instance of the Ethics and Anti-Corruption Commission [EACC].
53. It was the further testimony of the witness that the transfer of the suit property to and in favor of M/s Rockhound Properties Ltd was the subject of criminal proceedings culminating into the charge, prosecution and conviction of one Mr. John Kinywa, who was the Finance Director of the Plaintiff Corporation.
 54. On the other hand, the witness averred that it is the Plaintiff herein who transferred the suit property to M/s Rockhound Properties Limited, albeit during the pendency of the instant suit.
 55. Whilst under further cross examination, the witness averred that same is aware that the suit property is currently restricted by an order of the court which was issued by and at the instance of EACC. For good measure, the Plaintiff averred that the registration of the order is evident and reflected at the foot of the document at pages 102 of the Plaintiff's bundle of documents.
 56. On re-examination, the witness averred that the letter dated the 16th February 1999, and which is contained at page 19 of the Plaintiff's bundle of document was written on a without prejudice basis.
 57. In any event, the witness averred that the addressee of the letter under reference was Dr. Joseph N K Arap Ngok.
 58. On further re-examination, the witness clarified that other than the initial sale Agreement, the Plaintiff and the Defendant entered into and executed a subsequent agreement dated the 6th August 1999. In any event, the witness averred [clarified] that the said sale agreement was in respect of the suit property.
 59. On the other hand, it was the testimony of the witness that the rental income which was derivable from the lease agreement between the Plaintiff and M/s Investment Promotion Centre was to be deployed towards the purchase price of the suit property.
 60. Whilst under further re-examination, the witness averred that the letter dated the 17th September 2004; forwarded proposal from the Defendant to the Plaintiff. However, the witness clarified that the said proposal[s] were not accepted to the Plaintiff.
 61. Besides, it was the testimony of the witness that the deposit[s] which were made toward and in respect of the suit property were not to attract and/or to accrue interest. In any event, the witness stated that the Plaintiff and the Defendant undertook discussion on the question on interest on the deposit, but there was no consensus that was reached by the Parties.
 62. Furthermore, it was the evidence of the witness that M/s Investment Promotion Center indeed paid the entire rents attendant to the tenancy. In this regard, the Witness [PW1] averred that the total amount of rents which were received by the Plaintiff amounted to Kes.3, 360, 000/= only.
 63. It was the further testimony of the witness that even though the Plaintiff had attempted to reconcile the monies due and owing, there was no agreement on the quantum outstanding.
 64. Additionally, it was the evidence of the witness that the title of the suit property was supposed to be transferred and registered in the name of the Defendant upon clearance of the mortgage. Nevertheless, the witness admitted that the balance of the purchase price was to be advanced by the purchaser.
 65. Furthermore, it was the testimony of the witness that the advancement of the balance of the purchase price was to be secured vide a first charge [Mortgage] to be registered as against the suit property.
 66. With the foregoing testimony, the Plaintiff's case was duly closed.



b. Defendant's/ Counter-claimer's Case:

67. Similarly, the Defendant's case is anchored on the testimony of one witness, namely, Harriet Chebet Ngok. Same testified as DW1.
68. It was the evidence of the witness that same is the daughter of one Dr. Joseph N K Arap Ngok, now deceased, who was the Defendant in respect of the instant matter. Furthermore, the witness averred that same [witness] has since been appointed and constituted as the Legal administratrix of the Estate of Dr. Joseph N K Arap Ngok, now deceased.
69. It was the further testimony of the witness that by virtue of being the Legal administratrix of the Estate of Dr. Joseph N K Arap Ngok, now deceased, same [witness] is conversant with the facts of this matter and hence knowledgeable of the issues beforehand.
70. Additionally, the witness averred that same [witness] has since recorded a witness statement dated the 21st February 2024 and which witness statement same [witness] sought to adopt and rely on as her Evidence in chief.
71. Instructively, the witness statement dated the 21st February 2024 was therefore adopted and constituted as the evidence in chief of the witness.
72. On the other hand, the witness also alluded to the List and bundle of documents dated the 17th November 2023; and thereafter sought to adopt and produce same as evidence before the court. Instructively, the documents at the foot of the said List were admitted as Exhibit[s] D1 to D26, respectively.
73. Furthermore, the witness also alluded to another List ad bundle of documents, dated the 17th November 2023, albeit filed vide Nairobi HCC No. 515 of 2007. In this respect, the witness similarly sought to adopt and tender the documents as Exhibits before the Honourable Court.
74. There being no objection to the production of the said the Document[s], same [documents] were admitted and produced as Exhibits D27 to D42, respectively.
75. On the other hand, the witness intimated to the court that same has same has since filed various pleadings and in this regard, the witness adverted to the amended statement of defense and counterclaim dated the 30th August 2005; and the Plaint dated the 2nd October 2007, respectively.
76. Furthermore, the witness thereafter invited the Honourable court to grant the reliefs sought at the foot of the various pleadings [details in terms of the preceding paragraph].
77. On cross examination, by learned counsel for the Plaintiff the witness averred that the Defendant herein duly entered into a sale agreement with the Plaintiff over and in respect of the suit property. Furthermore, the witness averred that subsequent to the entry into the sale agreement, the Plaintiff and the Defendant exchanged various correspondence, including the Letter at page 17 of the Plaintiff's bundle of documents.
78. Whilst under further cross examination, the witness averred that there were also rents which were paid to and in favor of the Plaintiff corporation. Nevertheless, the witness added that the payment of rents was premised on the preparation of the lease.
79. It was the further testimony of the witness that the Defendant also received a letter from M/s Muriu & Co Advocates. In this regard, the witness alluded to the letter dated the 31st December 2001.



80. It was the further testimony of the witness that though the Parties have endeavored to discuss the issue of interests and the amounts that was outstanding at the foot of the sale, no consensus was reached on either issue. For good measure, the witness averred that there was no agreement on whether interests was included and chargeable towards the Deposit that was paid by the Defendant.
81. Whilst under further cross examination, the witness averred that the deceased [Dr. Joseph N K Arap Ngok] did not endeavor to cancel the said agreement. In any event, the witness averred that the deceased also did not intimate that same wanted to vacate the suit premises.
82. Be that as it may, it was the testimony of the witness that same [witness] is privy to the terms of the sale agreement.
83. On re-examination by learned counsel for the Defendant, the witness averred that according to clause 9 of the sale agreement, the suit property was to be transferred to the deceased upon payment of the deposit and thereafter same was to be charged [mortgaged] in favor of the Plaintiff. Nevertheless, the witness added that the suit property was never transferred to and in favor of the deceased.
84. On further re-examination, the witness averred that the sale agreement and the lease were duly signed by both Parties. In any event, it was the evidence of the witness that the occupation of the suit property by the deceased was premised on the fact that same [Defendant], was the purchaser.
85. On further re-examination, the witness averred that the terms of the sale agreement were however varied to a limited extent by a lease [Tenancy] agreement that was entered into and executed by the Parties.
86. It was the further testimony of the witness that the rents which were payable from the tenancy of the suit premises were to be deployed for the benefit of the purchaser. For clarity, the witness averred that the purchaser was Dr. Joseph N K Arap Ngok, now deceased. Furthermore, it was the testimony of the witness that the rents were to be applied towards the purchase price.
87. Whilst under further re-examination, the witness averred that though the Plaintiff was obligated to prepare the mortgage of the suit property, the mortgage was never created. In any event, the witness added that the Plaintiff also failed to advance the balance of the purchase price to and in favor of the Defendant.
88. Finally, it was the testimony of the witness that the contents of paragraph 21 of her witness statement, which was adopted as her [witness] evidence in chief are correct as pertains to the dispute beforehand.
89. With the foregoing testimony, the Defendant/Counter-claimer's case was duly closed.

Parties' Submissions:

90. At the close of the hearing, the advocates of the respective Parties covenanted to file and exchange written submissions. Consequently, the court proceeded to and circumscribed the timeline [s] for the filing and exchange of the written submissions.
91. Pursuant to and in line with the direction[s] of the court, the Plaintiff proceeded to and filed written submissions dated the 18th March 2024 whereas the Defendant/Counter-claimer filed written submissions dated the 19th March 2024. For coherence, both sets of written submissions are on record.
92. Furthermore, it is instructive to underscore that even though the court has neither reproduced nor rehashed the written submissions on behalf of the respective Parties, the failure to do so is not informed by contempt.



93. Conversely, the contents of the written submissions [which are indeed comprehensive] shall be taken into account in considering the thematic issues which are pertinent as pertains to the dispute beforehand.
94. Additionally, it suffices to state that the court is indeed grateful to both Learned counsel for the extensive research and the various case law [authorities] which have been cited and highlighted at the foot of the submissions beforehand.

Issues for Determination:

95. Having appraised the pleadings on behalf of the Parties; the evidence [both oral and documentary] tendered and upon consideration of the written submissions filed on behalf of the Parties, the following issues do emerge [crystalize] and are thus worthy of determination;
- i. Whether there exist a valid, lawful and enforceable sale agreement [contract] between the Plaintiff and the Defendant of otherwise.
 - ii. Whether the sale agreement [contract] if any, between the Plaintiff and the Defendant has ever been rescinded or otherwise.
 - iii. Whether the Defendant/Counter-claimer is entitled to the Equitable remedy of Specific Performance, either as sought or otherwise.
 - iv. Whether the Plaintiff is entitled to the reliefs sought at the foot of the Plaint or otherwise.
 - v. Whether the Defendant is entitled to any relief and if so, the nature thereof.

Analysis and Determination:

Issue[s] Number 1 and 2: Whether there exist a valid, lawful and enforceable sale agreement [contract] between the Plaintiff and the Defendant of otherwise.

Whether the sale agreement [contract] if any, between the Plaintiff and the Defendant has ever been rescinded or otherwise.

96. The Plaintiff herein proceeded to and generated a letter of offer dated the 10th March 1995 and in respect of which same [Plaintiff] offered to and in favor of the Defendant [Dr. Joseph N K Arap Ngok, now deceased] the property hitherto known as Kenya Re-Housing Project, House No. 8, Ndege Road, Karen, within the City of Nairobi.
97. Pursuant to the letter of offer [detains in terms of the preceding paragraph], the Plaintiff intimated to the Defendant, now deceased that the suit property was to be sold at the price of Kes.12, 635, 200/= only. In any event, the Plaintiff ventured forward and stated that if the Defendant was keen to accept the offer under reference, the same [Defendant] was to accept the letter of offer within 30 days from the date thereof.
98. Furthermore, the letter of offer also posited that same [letter of offer] was subject to the Defendant paying a deposit of the sum of Kes.4, 235, 200/= only and which deposit, was also payable within 30 days.
99. Suffice it to point out that the Defendant, [Dr. Joseph N K Arap Ngok] thereafter proceeded to and accepted the letter of offer within the stipulated timeline.



100. Other than the foregoing, the letter of offer also contained a clause wherein the offeree [Defendant] was to be eligible for mortgage to be offered by the Plaintiff herein, subject to application. [See clause 3 of the letter of offer].
101. Notably, the Defendant, [Dr. Joseph N K Arap Ngok] duly proceeded to and applied for the mortgage facility in accordance with the stipulation contained at clause 3 of the letter of offer. In any event, it is worth noting that the application for the mortgage facility by the Defendant [Dr. Joseph N K Arap Ngok] was duly received by the Plaintiff, who thereafter proceeded to and accepted same in terms of the letter dated the 29th April 1996.
102. Instructively, upon the acceptance of the application for mortgage, it became incumbent upon the Plaintiff herein to prepare the requisite mortgage document for necessary execution by the Defendant.
103. However, evidence abound that the mortgage instrument was neither prepared nor executed by the Parties.
104. Other than the foregoing, it is important to recall that the Plaintiff and the Defendant entered into a formal agreement dated the 10th December 1996 and wherein the Plaintiff herein admitted and acknowledged that the Defendant had duly paid the entire deposit that was alluded to at the foot of the letter of offer, leaving a balance of Kes.8, 400, 000/= only, as the balance due and outstanding at the foot of the sale agreement.
105. Furthermore, clause 2 of the sale agreement under reference also intimated that the said balance [Kes.8, 400, 000/= only] was to be advanced to the purchaser by the corporation [Plaintiff] by way of a first charge on the security on the said premises, subject to the corporations terms and conditions of lending.
106. Other than the foregoing, it is also important to recall that even though the Plaintiff had indicated that the balance of the purchase price would be advanced to the purchaser [Defendant] on the basis of a first charge on the suit property, it is common ground that the Plaintiff herein was not in possession of the certificate of title in respect of the suit property.
107. Arising from the fact that the Plaintiff herein was not in possession of the certificate of title as at the time when the sale agreement dated the 10th December 1996 was entered into, the Plaintiff and the Defendant entered into a mutual arrangement whereupon it was agreed that the suit premises were to be demised to M/s Investment Promotion Centre [who was the Defendant's Employer] for a duration of 4 years w.e.f June 1996 to June 2000 only.
108. Furthermore, it was also agreed that the rental income derivable from the lease in favor of Investment Promotion Centre [who were the Defendant's employer], would be deployed and utilized towards the purchase price of the suit property. [See clause 5 of the agreement dated the 6th August 1999].
109. In any event, the fact that the rental income derivable from the lease/tenancy between the Plaintiff herein and Investment Promotion Center, were to be utilized towards payment of the purchase price was also confirmed by PW1 [John Arika].
110. For ease of reference, it suffices to reproduce the salient [pertinent] features of the evidence of PW1 as pertains to the utilization of the rental income.



111. Same [PW1] stated as hereunder whilst under cross examination by learned counsel for the 1st Defendant.

“I do confirm that the tenancy was for the benefit of the purchaser, the monthly rents were Kes.70, 000/= . The payments [rents] were to be credited and applied towards purchase price”.

112. Furthermore, PW1 ventured forward and stated as hereunder;

“I do confirm that all the monies paid at the foot of the tenancy agreement were to be deployed towards the purchase price”.

113. From the testimony of PW1, it is evident and apparent that the rental income that were derivable from the lease/tenancy entered into between the Plaintiff and M/s Investment Promotion Centre [who was the Defendant’s employer] were to be utilized towards diminishing of the purchase price of the suit property.

114. Notably, the sale agreement/contract between the Plaintiff and the Defendant [Dr. Joseph N K Arap Ngok, now deceased] remained intact save for the slight variation underpinned by the agreement dated the 6th August 1999.

115. To my mind, the contract, which had hitherto been entered upon and executed between the Plaintiff and the Defendant remained alive and in existence up to and including June 2000, when the tenancy agreement in favor of Investment Promotion Centre lapsed.

116. First forward, it is also not lost on this court that on or about the 24th July 1998, the Plaintiff herein had indeed written to the Defendant [Dr. Joseph N K Arap Ngok] that the transfer documents in respect of the suit property were now ready for execution and further action. However, it later turned out that the transfer document in respect of the suit property were not ready in the manner alluded to.

117. Be that as it may, it is important to recall that the substantive agreement [contract] between the parties remained the agreement dated 10th December 1996 and which agreement stipulated the circumstances and manner in which the sale agreement [contract] could be terminated.

118. For coherence, the termination [determination] of the sale contract between the Plaintiff and the Defendant, now deceased could only be undertaken in the event of breach and/or violation of the terms that were contained between clauses 1 and 9 thereof. Instructively, the operative clause is clause 10 of the sale agreement dated the 10th December 1996.

119. Given the significance of the said clause 10 of the sale agreement [contract] dated the 10th December 1996, it is imperative to reproduce same verbatim.

120. Same is reproduced as hereunder;

Clause 10

Notwithstanding full payment of the deposit together with legal charges, if the purchaser shall fail to perform and observe any aforementioned covenant and condition on his part to be performed and observed or failing to make any or all of the payment specified in clauses 7 and 9 hereof then instead of or in addition to the exercise of any other available remedy the corporation may by not less than two months’ notice in writing determine this agreement and resume possession of the premises hereby agreed to be demised and the purchaser shall give up possession on the expiration of such notice.



121. In my humble view, the termination [determination] of the sale agreement [contract] between the Plaintiff and the Defendant, [if at all] could only arise where there was default in paying the monies highlighted vide clauses 7 and 9 of the contract dated the 10th December 1996.
122. Be that as it may, there is no gainsaying that the Plaintiff herein concedes and confirms that the Defendant duly paid the entire deposit in terms of the Letter of offer as well as a further sum of Kes.205, 522/= only which was first instalment towards the mortgage.
123. For brevity, it is instructive to reproduce paragraph 6 of the Plaint dated the 3rd December 2003.
124. Same states as hereunder;

The Defendant paid a deposit of Kes.4, 235, 700/= and a further sum of Kes.205, 522/= making a total of Kes.4, 441, 222/= as required. The balance of the purchase price of Kes.7, 558, 778/= as to date not been paid.
125. It is worth noting that the Defendant herein had complied with the contents of clauses of 7 and 9 of the sale agreement [contract] as at the time when the sale agreement was being entered into. Consequently and in this regard, it is evident and apparent that the Plaintiff herein could not purport to rescind and/or determine [the sale agreement] or at all.
126. Nevertheless, it is important to recall that on the 13th May 2003, the Plaintiff herein generated a letter and which was addressed to the Defendant [now deceased] and wherein same contended that the Defendant had failed to pay and/or liquidate the balance of the purchase price amounting to Kes.7, 558, 778/= only, being the balance of the purchase price.
127. Furthermore, the Plaintiff herein also intimated that if the sale balance [Kes.7, 558, 778/= only] was not paid within two [2] months from the date of the letter under reference, then the sale agreement dated the 10th December 1996 would stand rescinded under clause 10 thereof.
128. Nevertheless, it is important to recall that clause 10 of the sale agreement dated and executed on the 10th December 1996, [the contract] could only be invoked and applied upon the occurrence of the designated circumstances [whose details are alluded to thereunder].
129. Be that as it may, it is not lost on the court that the payment of the balance of the purchase price was to be financed by the Plaintiff herein albeit on the basis of a mortgage to be registered against the suit property. Consequently, it is curious that the Plaintiff who was to finance the balance of the purchase price, is the one now seeking to invoke [sic] the default to pay the balance of the purchase price in a bid to determine the contract.
130. Other than the foregoing, even though the Plaintiff contends that as at 13th May 2003, the balance of the purchase price amounted to Kes.7, 558, 778/= only, it is worth noting that same Plaintiff has not factored in the total rental income amounting to Kes.3, 360, 000/= only [which was received by her] and which was to be deployed towards the purchase price.
131. Having reviewed the totality of the evidence [oral and documentary] tendered before the court, I come to the conclusion that the sale agreement [contract] dated the 10th December 1996, remained in situ, [save] for the slight variation introduced vide the agreement dated the 6th August 1999.
132. Furthermore, I hold the view that the Parties herein, namely, the Plaintiff and the Defendant were bound by the terms of the sale agreement [contract] and hence both the parties were obligated to comply with and/or adhere to the terms thereof.



133. In any event, none of the parties herein, was at liberty to unilaterally alter and/or vary the terms of the contract, unless there was a unanimous addendum [which was not the case]. Consequently and in this regard, issues like Interest[s] on deposit etc, which the Defendant herein [sic] sought to sneak into the contract, were outside the terms of the Contractual Document.

134. Before departing from the issue herein, it is instructive to take cognizance of the ratio decidendi in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, where the court stated and held as hereunder;

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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

135. Similarly, the binding nature of a contract on the parties was also highlighted by the Court of Appeal in the case of *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR, where the court stated and held thus;

It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally, and the learned judge's ultimate findings cannot by any stretch of imagination be faulted.

136. Furthermore, the Court of Appeal revisited the same legal issue [read, principle] in the case of *Centurion Engineers & Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021)* [2023] KECA 1289 (KLR) (27 October 2023) (Judgment), where the court stated and held as hereunder;

23. In the House of Lord's decision in *Brogden v Metropolitan Rly Co* [1876-77] LR 2 APP CAS 66, Lord Blackburn held as follows:“I have always believed the law to be this, that when an offer is made to another party and in that offer, there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound.”

24. Having considered the record as put to us, the rival submissions, the pleadings and evidence as presented by both parties, it is clear to us that there was indeed a contract between the parties as evidenced by the instructions from the respondent to the appellant to carry out extra works as appears on pages 934-937 of the record, as well as the supplementary contract dated December 17, 2009 appearing on pages 1189- 1190 of the record. This court is persuaded that the variation was arrived at by mutual agreement and meeting of the minds. In *Jiwaji v Jiwaji* [1986] EA 547 this court held:“where there is no ambiguity in an agreement it must (emphasis mine) be construed according to the clear words used by the parties.”

137. Arising from the foregoing analysis, my answer to issue and number two herein before, are twofold. Firstly, the sale agreement [contract] dated the 10th December 1996, remain in situ and binding on the Plaintiff and the Defendant save for the limited variation vide the agreement dated 6th August 1999.



138. Secondly, even though the Plaintiff had endeavored to [sic] rescind the said agreement, the impugned endeavor at the foot of the letter dated the 13th May 2003, was misconceived, erroneous and invalid.
139. At any rate, it is evident that the Plaintiff was endeavoring to determine [terminate] the contract, merely to frustrate same, perhaps in collusion and connivance with her Finance Director, who ultimately caused the suit Property to be transferred into the name of M/s Rockhound Properties Limited, wherein the said Finance Director, had an interest.
140. In a nutshell, it is my finding and holding that the contract between the Plaintiff and the Defendant [Dr. Joseph N K Arap Ngok] was never rescinded in accordance with clause 10 of the contract or at all.

Issue Number Three [3] - Whether the Defendant/Counter-claimant is entitled to the Equitable remedy of specific performance, either as sought or otherwise.

141. Having found and held that the sale agreement dated the 10th December 1996 remains valid and binding on the parties save for the limited variation effected vide agreement dated the 6th August 1999; the next question that merits consideration is whether the Defendant/Counter-claimant is entitled to the equitable relief of specific performance.
142. To start with, there is no gainsaying that the letter of offer dated the 10th March 1995; called upon the Plaintiff to accept same [letter of offer] within 30 days from the date of the post mark.
143. Additionally, the said letter of offer also intimated to the Defendant [Dr. Joseph N K Arap Ngok] to pay the sum of Kes.4, 235, 200/= only within the same time line. Instructively, the Defendant proceeded to and complied with both aspects of the letter of offer.
144. In any event, the fact that the Defendant duly complied with the terms of the letter of offer was also confirmed vide the sale agreement which was executed on the 10th December 1996.
145. Other than the foregoing, it is also worth recalling that the Plaintiff herein had covenanted to finance the Plaintiff as pertains to the balance of the purchase price. For good measure, the balance of the purchase price was to be advanced to the Defendant, albeit on the basis of the title of the suit property being used as a security.
146. Nevertheless, even though the Defendant, [Dr. Joseph N K Arap Ngok, now deceased] duly complied with his part of the bargain, including applying for the mortgage facility and which application was accepted by the Plaintiff, the Plaintiff herein failed to facilitate the advancement.
147. Simply put, the Plaintiff herein neither crafted nor created the mortgage, which was to be perfected against the title of the suit property.
148. For the avoidance of doubt, the fact that the Plaintiff herein failed to create and perfect the mortgage facility in favor of the Defendant was conceded to and admitted by PW1.
149. For ease of reference, it is instructive to reproduce the salient aspects of the evidence of PW1 whilst under cross examination by learned counsel for the Defendant. Same stated as hereunder;

“ The balance of the purchase price was to be advanced by the Defendant by way of mortgage. I am aware that the mortgage was advanced. The purchaser was placed in possession as a purchaser. The Plaintiff herein also undertook to transfer the suit property to the Defendant. However, the property was not transferred to the Defendant”.



150. Furthermore, the witness PW1 continued and stated as hereunder;

“I do confirm that no mortgage was created as at 6th August 1999. There was no mortgage that had been created as at the year 1999”.

151. From the foregoing, it is evident that even though the Defendant [Dr. Joseph N K Arap Ngok] had duly performed his part of the bargain, the Plaintiff [who had hitherto agreed to advanced the balance of the purchase price], was however, flip-flopping.

152. Other than the foregoing, it is also worth remembering that instead of facilitating the transfer of the suit property to and in favor of the Defendant and thereafter perfecting a charge thereon, the Plaintiff herein, through her Finance Director [Mr. John Kinyua] hatched a plot to defeat the transfer of the suit property to and in favor of the Defendant.

153. Notably, the Finance Director [Mr. John Kinyua] with the connivance of the Plaintiff herein entered into [sic] another agreement pertaining to the sale of the suit property to and in favor of M/s Rockhound Properties Ltd on the 31st August 2005. Quiet clearly, the purported sale agreement between the Plaintiff and M/s Rockhound Properties Ltd [a company which the Plaintiff’s financial director had an interests] was entered into during the subsistence of the contract between the Plaintiff and the Defendant.

154. It is not lost on this court that by the time the Plaintiff herein was entering into the sale agreement with M/s Rockhound Properties Ltd, same [Plaintiff] had already filed the instant suit and wherein same was seeking to have the sale agreement dated the 10th December 1996 declared to have been rescinded.

155. Notably, the sale agreement which was being entered into by the Plaintiff and Rockhound Properties Ltd, was being entered into before an order for recession [which had been sought for], had been issued.

156. Worse still, the purported sale agreement between the Plaintiff and M/s Rockhound Properties Ltd and the subsequent transfer of the suit property to the said M/s Rockhound Properties Ltd, was being undertaken during the subsistence of the suit herein.

157. To my mind, having filed the suit [Nairobi HCC No. 776 of 2003], it behooved the Plaintiff, [just like any other conscientious Litigant], to desist from undertaking any dealings over and in respect of the suit property during the pendency of the suit.

158. Suffice it to point out that every litigant, the Plaintiff not expected is bound by the doctrine of Lis pendens [which prohibits alienation of the suit property during the pendency of the suit].

159. As pertains to the import and tenor of the doctrine of Lis pendens, it is imperative to take cognizance of the holding of the Court of Appeal in the case of Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR, where the court stated and held thus;

The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the *Land Registration Act* (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or



exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of *lis pendens* would remain applicable to the circumstances of this case.

Furthermore, *lis pendens* is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, section 3 (1) of the *Judicature Act* Cap 8 stipulates that,

“The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

- a. *the Constitution*;
- b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
- c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

Similarly, in the light of this provision, the doctrine of *lis pendens* would remain applicable to this case.

As to whether the requirements of the principles of *lis pendens* were met, there is no doubt that the instant case concerns a contested property dispute, where the rights to the suit property are in serious contention.

160. Additionally, the doctrine of *Lis pendens* [supra] was highlighted and amplified by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR, where the court stated and held thus;
51. Our previous land legislation regime expressly embraced the doctrine under Section 52 of the repealed (Indian) Transfer of Property Act (ITPA) 1882 by stipulating that:

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council,



of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.” Emphasis added.

52. Do courts still recognize the doctrine? The ITPA was repealed by the [Land Registration Act](#) (LRA) Number 3 of 2013; whose Section 107 (1) of the LRA provides for the saving and transitional provisions of the Act, and provides that:-

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

53. Presently, the LRA does not prohibit the application of the doctrine of lis pendens; nor does any law for that matter. For this reason and in view of Section 107 aforesaid, this Court has previously held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see. *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR)

161. To my mind, the Plaintiff herein was engaging and indulging in nefarious acts and/or omissions, whose purpose was to defeat the valid contract that same [Plaintiff] had entered into and executed with the Defendant.
162. On the contrary, the Defendant herein exercised due diligence and demonstrated concerted endeavors to ensure that the terms of the sale agreement were complied with and adhered to.
163. Notably, up to and including the time when the Plaintiff was hatching a plot in connivance with her Financing Director [John Kinywa] to transfer the suit property to Rockhound Properties Ltd, same [Plaintiff] was holding a total of Kes.7, 772, 200/= Only, inclusive of the rental income [which was agreed to be utilized towards the purchase price.
164. Put differently, by the time the Plaintiff was conniving to have the suit property transferred to and registered in favor of M/s Rockhound Properties Ltd, the Defendant [Dr. Joseph N K Arap Ngok] had paid a substantial portion of the purchase price and which monies were being held by the Plaintiff.
165. Suffice it to point out that the said monies [Kes.7, 772, 200/=] Only, are still being held and retained by the Plaintiff to date.
166. Notwithstanding the foregoing, it is also not lost on this court that in an endeavor towards fulfilling the terms of the contract [sale agreement dated the 10th December 1996], the Plaintiff herein placed the Defendant in occupation and the Defendant and his family have remained in occupation to date.
167. For good measure, it was the testimony of PW1 that the Defendant was placed and or put in possession of the suit property as a purchaser and not otherwise. Instructively, the terms of the Letter of Offer and the sale agreement attest to the same fact[position].
168. In my humble view, the Defendant has tendered and placed before the court plausible and credible evidence to demonstrate her endeavor towards meeting and or satisfying her part of the bargain.



169. Simply put, the Defendant herein has demonstrated her readiness and willingness to conclude the contract between herself and the Plaintiff. In any event, the contract under reference would have been completed [concluded], had the Plaintiff exercised due diligence and honesty, in her undertakings.
170. In a nutshell, I come to the conclusion that the Defendant has duly established and met the requisite ingredients underpinning the grant of an order for specific performance.
171. To this end, I adopt and reiterate the succinct exposition of the law in the case of *Reliable Electrical Engineering Company Limited v Mantrac Kenya Limited* [2006]eKLR, where the court stated and held thus;

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

172. Similarly, it is also appropriate to take cognizance of the decision of the court of appeal in the case of *Gurdev Singh Birdi & Narinder Singh Ghatoraas Trustees of Ramgharia Institute of Mombasa vAbubakarMadhbuti*[1997] eKLR, where the court stated and held thus;

It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

“must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.

173. Pertinently, the conditions to be met, established and/or satisfied before an order for specific performance can issue were also amplified by the Court of Appeal in the case of *Thomas Openda v Peter Martin Ahn* [1984] eKLR, where the court held and observed as hereunder;

The fact is Ahn did not accept the repudiation but kept the agreement open and Openda persisted in the wrongful repudiation. Walton J dealt with the purchaser's obligations in such circumstances in this way:

“It appears to me that in consequence [the purchaser] was never at any time under any obligation to show that it was ‘able’ to perform its part of the contract. ‘Ability’, in this connection, means arranging the finance, which, under modern conditions, could be done either by arranging a mortgage or a sub-sale, and



doubtless there are other methods as well. But they all involve some form of preparation on the part of the person raising the finance; and it appears to me *pessimi exempli* if the vendor was in a position to say: "Because you were not on a particular day ready with your finance, you cannot claim damages against me. True it is that it would have been perfectly useless for you to make the preparations because I told you I was not going to complete, but I can now huff you for having failed to carry out this perfectly useless exercise." This is the morality of a game, not of a serious legal contest. *Rightside Properties v Gray* [1974] 2 All ER 1169, 1183 F."

174. In a nutshell, it is my finding and holding that the Defendant, [Dr. Joseph N. K Arap Ngok, now deceased], made various efforts to conclude the contract, including the letters dated the 31st December 2001 and 20th June 2003, but the deceitful and conniving Plaintiff would hear none of it.

Issue Number Four [4] - Whether the Plaintiff is entitled to the reliefs sought at the foot of the plaint or otherwise.

175. Despite having discussed the issues [details in terms of the preceding paragraphs], it is still worthy to interrogate and consider the various reliefs which have been sought for by and on behalf of the Plaintiff herein.

176. To start with, the Plaintiff has sought for an order of eviction of the Defendant [now deceased] and his family from the suit property.

177. However, evidence abound that during the pendency of the contract between the Plaintiff and the Defendant, the Plaintiff herein proceeded to and effected the transfer of the suit property in favor of M/s Rockhound Properties Ltd.

178. For good measure, PW1 was succinct as pertains to the current ownership status of the suit property.

179. Same stated as hereunder whilst cross examination by learned counsel for the 1st Defendant;

"I wish to repeat that the certificate of title was transferred to Rockhound Properties Ltd on the 8th December 2005. The transfer was done during the pendency of the case. Our case was filed on the 3rd December 2003. The transfer was after the filing of the suit. The Defendant [Rockhound Properties Ltd] are the current owners of the suit property".

180. Notably, the Plaintiff's witness is confirming that the suit property does not belong to the Plaintiff at the moment. In this regard, the question that begs the answer is whether the Plaintiff [who does not own the property] can partake of an order of eviction.

181. To my mind, an order of eviction can only be issued to and in favor of a person, the Plaintiff not excepted, who can demonstrate that same has lawful and legal rights to the property and not otherwise. [See the provisions of Sections 24 and 25 of the *Land Registration Act*, 2012].

182. Secondly, the Plaintiff has sought for an order for payment of mesne profits. Suffice it to point out that mesne profits can only accrue to and in favor of the land owner who has wrongfully been disposed of the designated property. [See *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR].

183. Other than the foregoing, the Plaintiff has also sought for a declaration to set-off the accumulated mesne profits as against the deposit held by same [Plaintiff]. Nevertheless, I have since found and held



that mesne profits can only be pursued by the registered owner of the land and not otherwise. [See Section 2 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya].

184. Notwithstanding the foregoing, it is not lost on this court that Dr. Joseph N K Arap Ngok, now deceased was placed in occupation of the suit property and remained thereon as a purchaser and not otherwise.
185. Consequently and in the premises, it is evident that no order for mesne profits can issue and be obtainable against the Defendant [Dr. Joseph N K Arap Ngok] or his estate at all. In this regard, the submissions by and on behalf of the Plaintiff are not well grounded.
186. To the contrary, the Submission[s] by the Learned Counsel for the Plaintiff as pertains to the grant of the Order for Mesne Profit[s] are premised on a misconception of the Law and the various caselaw, which were cited by the Learned Counsel.

Issue Number Five [5] - Whether the Defendant is entitled to any relief and if so, the nature thereof.

187. The Defendant on her part filed a Counter-Claim and in respect of which same [Defendant] sought for various reliefs touching on and concerning the suit property. For good measure, the Defendant sought for inter alia declaration that the same [Defendant] is entitled to an order for specific performance in respect of the sale agreement dated the 10th of December 1996.
188. Nevertheless, while dealing with issue number one [1] hereinbefore, I found and held that the sale agreement [Contract] was still valid and binding on the parties. In any event, I have also found and held that the Defendant has satisfied the requisite ingredients that underpin the equitable remedy for specific performance. [see the ratio in the case of *Reliable Engineering Company Limited v Mantrack [K] Limited [2006] eKLR*].
189. On the other hand, the Defendant had also sought for an order to cancel and/or revoke the transfer and registration of the suit property to and in favour of M/S Rockhound Properties Limited, which transfer was in any event the subject of criminal proceedings instituted against one, John Kinyua [who was the Plaintiff's finance director].
190. Furthermore, it is not lost on the Court that the impugned transfer and registration of the suit property to and in favour of M/S Rockhound Properties Limited, culminated into the arrest, prosecution and ultimate conviction of the Plaintiff's finance director.
191. To my mind, the sale and transfer of the suit property to M/S Rockhound Properties Limited, was vitiated by several illegalities, inter alia, being undertaken in contravention of the doctrine of *Lis pendens*, as well as in abuse of Office by the Plaintiff's Finance Director.. [See the holding of the Court of Appeal in the case of *Naftally Ruthi Kinyua v Thuita Gachure [2015] eKLR*].
192. Arising from the foregoing, I am duly persuaded that the offensive and fraudulent transfer of the suit property to and in favour of M/S Rockhound Properties Limited, merits revocation and/or cancellation.
193. Additionally, the Defendant has sought for an order of declaration that same [Defendant] has fully paid the purchase price at the foot of the suit property. However, in making the foregoing contention, the Defendant included the deposit that was paid, interest on deposit and the rental income that was derivable from the lease/tenancy of the suit property to M/S Investment Promotion Centre.
194. Nevertheless, it is common ground that the letter of offer, sale agreement and the subsequent agreement, the latter dated 6th of August 1999, did not provide for levying and/or charging of interest



on deposit. Consequently, the endeavor to charge interest on deposit and thereafter utilize same as part of the purchase price [sic] in calculating the total paid, is erroneous.

195. At any rate, insofar as neither the letter of offer nor the sale agreement [contract] provided for the charging of interest, the attempt to utilize interest as part of the purchase price thus amounts to unilateral variation and/or alteration of the contract. Instructively, such an endeavor is frowned upon by the law. [see *Housing Company of East Africa Limited v Board of Trustees, National Social Security Fund* [2018] eKLR].
196. Notwithstanding the foregoing, the Defendant herein also sought for an award of general damages for breach of contract and for fraudulent misrepresentation. However, even though the Defendant had sought for the said reliefs in the body of the Counter-Claim, the Defendant abandoned the said reliefs at the tail end. For coherence, learned counsel for the Defendant did not endeavor to make any submissions in this regard.
197. Notably, Learned counsel for the Defendant appears to have abandoned the prayer for General damages for breach of contract and fraudulent misrepresentation. In this regard, the court does not intend to engage with the said reliefs any further. For good measure, I shall treat the said reliefs as abandoned.
198. Nevertheless, had learned counsel for the Defendant propagated the claim for General damages for breach of contract and tendered credible evidence in this regard, the Court would have been obliged to make an award.
199. In any event, it is worth noting that an award for general damages for breach of contract can and often do issue in exceptional and peculiar circumstances. [See *Capital Fish Kenya Limited v Kenya Power and Lighting Company Limited* [2016] eKLR and *Delila Kerubo Otiso v Ramesh Chander Dhingra* [2018] eKLR, respectively].

Final Disposition:

200. Having analyzed the thematic issues, [which were enumerated in the body of the Judgment], it is apposite to bring the Judgment to closure.
201. Nevertheless and before making the final orders, it is worthy to point out that this is yet another of those many cases that have taken inordinately too long in the corridors of Justice. For coherence, the matter beforehand has taken two [2] decades in the corridor[s] of Justice.
202. Hopefully and as time goes, [taking into account the principles underpinning the STA] Blueprint] the Judiciary will find an appropriate mechanism to avert the length of delay evident at the foot of the instant matter.
203. Nevertheless, I now proceed to and Do hereby make the final orders in the following manner;
 - i. The Plaintiff's suit be and is hereby Dismissed.
 - ii. The Defendant's counterclaim be and is hereby allowed as hereunder;
 - a. The sale agreement dated the 10th December 1996 [contract] be and is hereby declared to be lawful, valid and binding on the Plaintiff and the Defendant.
 - b. The Defendant is entitled to an order of specific performance as pertains to the suit property namely, L.R No. 1160/613 House No. 8 Ndege Road, Karen Nairobi.



- c. To facilitate the actualization of the order for specific performance, the fraudulent transfer and registration of the suit property in the name of M/s Rockhound Properties Ltd, be and is hereby cancelled, revoked and nullified.
- d. The Plaintiff be and is hereby ordered and directed to execute the requisite transfer instruments [documents] to facilitate the transfer and registration of the suit property to and in favor of the Defendant [Harriet Chebet Ngok] to hold on trust of the Estate of Dr. Joseph N K Arap Ngok, now deceased.
- e. Nevertheless and before the transfer of the suit property [details in terms of clause [d] herein above, the Defendant shall pay to and in favor of the Plaintiff the balance of the purchase price amounting of kes.4. 263, 000/= only [being the difference between the Purchase price and the aggregate Deposit paid plus the Rental Income received by the Plaintiff ; and which admittedly, was to deployed towards the purchase price].
- f. That the said monies [details in terms of the preceding paragraph] shall be paid to the Plaintiff within 180 days from the date hereof.
- g. In default by the Defendant to pay the balance of the purchase price within the stipulated timeline, the Sale Agreement [contract] between the Plaintiff and the Defendant shall stand nullified.
- h. In the event of such an occurrence [details in terms of clause [g] herein, the Plaintiff herein shall refund to the Defendant the entire monies s far paid [retained] namely kes.7, 772, 200/= only without any interest.
- i. Costs of the Plaintiff's suit are hereby awarded to the Defendant.
- j. Cost of the counterclaim be and are hereby awarded to the Defendant/Counter-claimer.
- k. Cost of the suit [Nairobi HCC No. 515 of 2007] be and are hereby awarded to the Plaintiff in the said suit.
- l. The costs in terms of clause [i], [j] and [k] shall be taxed and certified by the taxing officer in the usual manner.
- m. Any other order not expressly granted is hereby declined.

204. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2024.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – Court Assistant.

Ms. Mauleen Awuor for the Plaintiff

Mr. Alex Thangei for the Defendant/Counter-claimer

N/A for the 1st Defendant in HCC No. 515 of 2007.

