



REPUBLIC OF KENYA



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**Ng'onde v Mburugu & another (Environment and Land Appeal
E040 of 2024) [2024] KEELC 6908 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E040 OF 2024
CK NZILI, J
OCTOBER 16, 2024**

BETWEEN

MOSES KIMATHI NG'ONDU APPELLANT

AND

NICHOLAS MURIUNGI MBURUGU 1ST RESPONDENT

AGNES KAGWIRIA RIUNGU 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. L.N Juma
– PM delivered on 25.4.2024 in ELC NO. 77 OF 2020)*

JUDGMENT

1. The appellant, who was the plaintiff at the lower court, had sued the 1st respondent by a plaint dated 31.8.2020 for breach of a sale agreement dated 11.9.2019 to sell, subdivide, and transfer to him ½ an acre out of his L.R No. Kiirua/Naari/1413. He sought specific performance to transfer the resultant subdivisions L.R No's. Kiirua/Naari/3459 and 3460 to him, cancellation of the titles to the subdivisions, and the same be registered under his name.
2. The 1st respondent opposed the suit with a statement of defense dated 5.10.2020. Though admitting that there was a sale agreement between him and the appellant, he termed the agreement as illegal for lack of spousal consent or that of the land control board consent hence rendering it a nullity by operation of the law. As to a former suit seeking for the lifting of a restriction against the title the 1st respondent termed it as filed incompetently for lack of a substantive suit. The 1st respondent denied that there was fraud, illegality and irregularity in subdividing the suit land or an intention to dispose of it to third parties, as alleged or at all.
3. Additionally, the 1st respondent denied that the appellant suffered any loss, harm, or damages as alleged in the suit. Moreover, the 1st respondent denied any alleged breach of the sale agreement in view of the



- same having been rendered void by operation of the law. He termed the suit as incompetent and an abuse of the court process.
4. Through an application dated 5.10.2020, the 1st respondent sought to join the 2nd respondent, who is his spouse, as an interested party to the suit. By a ruling dated 5.5.2022, the 2nd respondent was joined as an interested party.
 5. Pursuant to Orders 1 Rule 10 (2) & (4) of the Civil Procedure Rules, the 2nd respondent filed a statement dated 24.8.2022. The 2nd respondent stated that L.R No. Kiirua/Naari/1413 was initially in the name of the 1st respondent where their matrimonial home was situated and was occupied by their three children. The 1st respondent stated that out of substance abuse, she developed some differences with the 1st respondent, of which she was thrown out of the matrimonial home and the suit land.
 6. The 2nd respondent averred that later on, she discovered that the suit land had been subdivided into L.R No's. Kiirua/Naari/3459 and 3460 and also the existence of a sale agreement between the 1st respondent and the appellant, to dispose of part of the suit land, without her consent. She termed the sale agreement as vitiated by lack of spousal consent. Similarly, the 2nd respondent averred that the sale agreement was also void by operation of the law, hence non-enforceable, save for the refund of the purchase price to the appellant.
 7. At the trial, Moses Kimathi Ng'onde testified as PW 1. Relying on the witness statement dated 1.9.2020 as his evidence in chief, he told the court that by a sale agreement dated 11.4.2009, the 1st respondent sold to him ½ an acre out of his L.R No. Kiirua/Naari/1413, and after paying for the same, he took vacant possession and settled his family on the land while awaiting the formal subdivisions, transfer and registration of the title in his favor.
 8. To fastrack the process, the appellant told the court that as per the sale agreement, he paid his part of the incidental cost only to realize that the 1st respondent intended to resell the land, which he restricted the title. PW 1 said that eventually, they agreed he applied to lift the caution and clear the outstanding balance on condition that the 1st respondent would transfer the land to him, which he did. Despite the lifting of the caution and the payments, PW 1 said that the 1st respondent declined to effect the transfer.
 9. PW 1 added that without his knowledge, the 1st respondent, on 23.1.2020, subdivided the land into two portions with the intent of selling the resultant portions to third parties and has now given him notice to vacate the land; otherwise, he would have had him evicted.
 10. PW 1 relied on a copy of the sale agreement, an official search certificate, a bundle of receipts, an acknowledgment receipt, an order and a letter dated 4.6.2011 as P. Exh No's. 1-6, respectively. He said that he has been living on the suit land since 2019. In cross-examination, PW 1 said that the 2nd respondent was not involved in the transaction for ½ an acre for Kshs.160,000/=, which he cleared in cash as per the receipts produced.
 11. In re-examination, PW 1 said that he cleared the purchase price, otherwise the 1st respondent would not have offered him a refund. If he had not paid him for the land, PW 1 said that it was the 1st respondent who had been postponing the visit to the land control board. Further, PW 1 said that by that time, 2nd respondent was an estranged wife. He similarly denied that his land was the 1st & 2nd respondents' matrimonial home.
 12. Nicholas Muriungi testified as DW 1. Relying on a witness statement dated 31.7.2023, he told the court that it was confirmed that before the sale, the appellant initially used to lease out his land and later purchased ½ an acre of his land L.R No. Kiirua/Naari/1413 for Kshs.160,000/=, before it was



- closed for subdivisions. He said that his family was not involved in the transaction, which they, later on, objected to, and he notified the appellant of the same.
13. DW 1 said that he offered to refund the purchase price for the agreement but had been frustrated. He denied that the appellant had settled his family on the suit land or that he intended to dispose of the land to third parties. Further, D.W. 1 said that the appellant did not pay him all the money, for he would only choose to pay in bits when he found him drunk and forced him to acknowledge receipt of the money.
 14. DW 1 stated that he was willing to settle the matter amicably before the court and to be allowed to clear the acknowledged monies in installments. DW 1 denied receiving a demand letter. He refuted the contents of annexures M.K. 2 (a), (b) & (c) and M.K. (4) to the affidavit in support of the application dated 31.8.2020.
 15. In cross-examination DW 1 admitted that the appellant was still utilizing the land which initially he had inherited from his grandmother. Further, DW 1 confirmed that by the time he entered into the sale agreement, he had separated from the 2nd respondent; hence, he could not have notified her about the sale. Similarly, D.W. 1 admitted attending the land control board meeting in the company of the appellant where consent to subdivide the land was issued. He said that before selling the land, he had erected a semi-permanent house and planted trees.
 16. Agnes Kagwiria Mburugu testified as the interested party. She told the court that she was the wife of D.W. 1 and a teacher at Magazin Zone Kilifi County. She relied on an affidavit sworn on 5.10.2020 as her evidence in chief. According to her, their marriage was blessed with three children, namely Faith Kaaari, Riungu Glory, Kiende Muriungi, and Weddy Gatwiri Muriungi. She said that they had separated after the 1st respondent became an alcoholic and very violent to both herself and the children and also due to her workstation in Kilifi, where he spends most of her time.
 17. The interested party told the court that during the separation, the 1st respondent decided to dispose of part of the matrimonial property without her consent, approval, or that of the children. She believed, therefore, that the appellant took advantage of the vulnerability of the 1st respondent under the influence of alcohol and manipulated him into signing the sale agreements. She produced some exhibits three unnamed exhibits as per the interested party's list of documents dated 23.8.2023. The court has not come across them nor are they included in the record of appeal.
 18. In cross-examination, the 2nd respondent admitted that the appellant had paid some money for the land, though she was not aware of the exact amount. She equally clarified that the suit land was inherited land where they had also established their matrimonial home, but after the sale, the 1st respondent was occupying half of the land. The interested party said that part of what the appellant sought was inside the homestead.
 19. At the close of the interested party evidence, the trial court dismissed the suit on 25.4.2024. The appellant approached this court through a memorandum of appeal dated 9.5.2024, complaining that the trial court:
 - i. Failed to consider all his evidence and arrived at the wrong decision.
 - ii. Failed to appreciate that the land was not matrimonial property as the evidence demonstrated customary trust which did not require spousal consent.
 - iii. Failed to consider the evidence tendered that the sale agreement was both valid and enforceable in law since matrimonial property as an overriding interest was inapplicable.



- iv. Failed to consider the evidence that the parcel sold was customary land belonging exclusively to the 1st respondent.
 - v. Decided against the law, and the evidence tendered to hold that the 1st respondents would have both the money and the land, which would amount to an inequitable decision.
20. With leave of court, the appeal was canvassed through written submissions. The appellant relied on written submissions dated 30.9.2024. On whether the suit property, the subject matter of sale, was matrimonial property; the appellant submitted he had demonstrated that it was not through evidence in the supplementary affidavit sworn on 4.6.2024 in the record of appeal as further evidence of the appellant.
21. Additionally, the appellant submitted that in the green card marked as M.K. "1", L.R No. Kiirua/Naari/1413 arose out of L.R No. Kiirua/Naari/604, registered in the name of Elijah Kiiru Stephen, then on 18.5.1987, came to the name of Juliah Kariuntu Mugambi, the 1st respondent's mother, on 12.10.1998.
22. Therefore, since DW 1, in cross-examination admitted the land was family and not jointly bought with the interested party, the suit land could not be termed as matrimonial property. The appellant submitted that by virtue of having a home or property, it does not ipso facto make the land matrimonial property. Reliance was placed on the definition of matrimonial property in Sections 28 of the Land Registration Act, Sections 2 of the Matrimonial Property Act, and JOO vs MOO Petition No. 11 of 2000, that it must be jointly owned during the subsistence of marriage; otherwise any property acquired by either spouse prior to the marriage like in this case shall remain separate.
23. The appellant submitted that the issue of the suit property forming part of the matrimonial property was a rebuttable presumption whose evidential and legal burden to discharge was on the respondents to do through evidence. In this instance it was submitted that the respondent failed to demonstrate when and how the property was acquired by them during the subsistence of their marriage, other than merely alleging there was a matrimonial home.
24. The appellant submitted that as per Section 93 (1) & (2) of the Land Registration Act, the property must pass the test of whether the same is matrimonial or otherwise. In this case, the appellant submitted that the 1st respondent testified that he acquired the property of his grandmother after working for her for over 20 years, and therefore, the 2nd respondent could not have acquired it as a spouse.
25. As to the land control board, guided by *George Chayuga Aliaza vs Zephaniah Khisa Saul (2022) eKLR*, the appellant submitted that the trial court was wrong to find the contract void for lack of land control board consent without applying the doctrine of constructive trust and proprietary estoppel to avoid aiding illegality to invalidation of the sale, Moreso, when it was not disputed that the appellant had occupied the land of over 15 years having paid total purchase price, otherwise, the 1st respondents would have filed a counterclaim for any balance of the purchase price. Reliance was placed on *Aliaza case (supra)* on the distribution where there was payment of the total purchase price, handing over vacant possession, and declining to apply for land control board consent.
26. The respondents relied on written submissions dated 3.10.2024. It was submitted that the trial court, on page 24 of the record of appeal considered all the evidence and pleadings and came up with the issues for determination hence cannot be faulted.
27. As to matrimonial property, the respondents submitted that there was no dispute that the respondents were a married couple as per the marriage certificate and their matrimonial home was in the suit land



- as per pages 96, 97 & 151 of the record of appeal, which they put up jointly and brought up their three children.
28. The respondents submitted that it was immaterial that they had physically separated during the purported sale, which was neither a divorce nor judicial separation, which in any event cannot serve the interests of the 2nd respondent in the suit land as provided under Sections 4 and 6 of the Matrimonial Property Act 2013.
 29. Further, the respondents submitted that regardless of the source of the property, it did not prevent it from acquiring the status of matrimonial property by dint of contribution on the part of the 2nd respondent as provided under Section 9 of the Matrimonial Property Act.
 30. The respondents submitted evidence that the 2nd respondent helped put up a matrimonial property, having been tendered, the interest of the 2nd respondent could not legally be alienated without her approval. Reliance was placed on *JKW vs JWN and others* (2022) eKLR and *MWK vs PKM Interested Party Equity Bank Holdings* (2019) eKLR.
 31. The respondents submitted that there was no signature of acceptance of Kshs.86,000/=, for the portion to sign was left blank. As to clauses 2 (b) & (c) of the sale agreement, the respondents submitted that it had some anomalies which they termed dubious and suspicious, more so when the entities issuing the payment receipts had no connection or relationship with the 1st respondent.
 32. Similarly, the respondents submitted that given that there was no total payment of consideration and for lack of spousal consent, the 1st respondent stated that he was not obligated to sign the transfer. As to the judgment, the respondents submitted that the appellant treated the issue of payment of the consideration casually and brought receipts unrelated to the parties, and hence, the trial court could not order a refund of a disputed figure.
 33. In addition, the respondents submitted that purchase, disposal and alienation of land was a serious undertaking that parties getting themselves into such deals must carry out due diligence before the transaction and establish the interest of those people whose rights could be affected by the alienation of such property before delving into a sale agreement.
 34. Further, the respondents submitted that the fact becomes more relevant if a spouse does not accompany the vendor, as in the instant suit where the appellant not only ignored the rights of the spouse but failed to clear the entire purchase price, both of which constitute fraud and or illegality.
 35. The mandate of this court requires it to rehearse and re-assess the records of the court below with an independent perspective and establish the facts, evidence, and the law, bearing in mind that the trial court saw and heard the witnesses testify. See *Abok James Odera t/a J. Odera and Associates vs John P. Machira t/a Machira & Co.* (2013) eKLR. The first appellate court must weigh the conflicting evidence and draw its conclusion, see if there was evidence to support the conclusion of the lower court. See *Peters vs Sunday Post* (1958) C.A 424.
 36. Having looked at the record of the court below, the issues calling for my determination are:
 - i. If the court had jurisdiction to hear and determine the issues raised by the 2nd respondent that the suit land was part of the matrimonial property.
 - ii. If the sale agreement dated 11.4.2019 was valid and enforceable in law.
 - iii. If the appellant pleaded and proved breach of the sale agreement.
 - iv. If the appellant was entitled to specific performance.



- v. If the 1st respondent proved that the sale agreement had become void by operation of the law.
 - vi. If the appeal has merits.
 - vii. What is the order as to costs,
37. It is trite law that parties are bound by their pleadings and issues for a court's determination arise thereof. A party is supposed to plead all the facts in his pleadings, which ideally are the bedrock upon which all proceedings arise. Evidence to be produced by parties is aimed at and must align with the averments in the pleadings.
 38. Evidence at variance with the pleadings must be disregarded as held in *IEBC and others vs Stephen Mutinda Mule* (2014) eKLR. A party may not be allowed to raise a fresh or different claim during the trial. A party may not adduce evidence through written submissions. See *Robert Ngande Kathethi vs Francis Kivuva Kitonde* (2020) eKLR and *Daniel Toroitich Moi vs Mwangi Stephen Murithi & another* (2014) eKLR.
 39. Similarly, a party on appeal, unless with leave, may only raise grounds or issues that were canvassed at the hearing of the primary suit by the trial court. An appellate court thereof, under Section 78 of the of the *Civil Procedure Act* as read together with Order 42 Rule 27 Civil Procedure Rules, cannot, without leave having been sought and granted or for recorded reasons, admit new and fresh evidence or grounds on appeal. See *Tarmohamed & another vs Lakhani & Co.* (1958) E. A 567, *National Cereals and Produce Board vs Erad Suppliers and General Contractors Ltd E.A No. 9 of 2012*, *Wanje & others vs Sakwa & others* (1984) KLR 275.
 40. The appellant's case was captured in the plaint dated 31.8.2020. The 1st respondent opposed it through a defense dated 5.10.2020 and did not raise the issue of non-payment of the total purchase price. He admitted that there was a previous suit for the lifting of a restriction and the payment of the outstanding balance of Kshs.15,000/=, so as to effect the transfer as per a court order dated 10.1.2010. In paragraph No. 7 of the plaint, the appellant pleaded that he had paid all the incidental charges for the land control board consent, application and surveyors fees in the preparation of the issuance of a title deed.
 41. The 2nd respondent had not objected at the land control board application stage or as a respondent in the former suit based on spousal rights or when the 1st respondent subdivided the land on 23.1.2020. The appellant had averred that the 1st respondent unilaterally subdivided the land into two, without involving him with a view of selling it to third parties. There was no evidence that the 2nd respondent had raised an objection at the land control board application process for the subdivisions or had registered a caution against the initial parcel or thereafter that since separating with the 1st respondent.
 42. The date of separation was not indicated. The appellant had pleaded that he was put into occupation, use and possession of the land by the 1st respondent and made substantial developments thereon. In response, the 1st respondent in paragraph 3 of the defense, did not specifically deny those facts. The particulars of the sale agreement being illegal, invalid and in operational in law were not pleaded at all.
 43. The 1st respondent, in his statement of defense, did not plead that the suit land was matrimonial property or that was where the matrimonial home was situated and, therefore, such property could not be alienated without spousal consent. Further, the 1st respondent did not plead that his wife the 2nd respondent was estranged and the nature of the estrangement.
 44. In the sale agreement dated 11.4.2009, there was no mention that her suitland, the subject matter of the sale, was occupied by the appellant in terms of a matrimonial home. What the appellant was purchasing



- is 0.405 ha out of 0.81 ha of L.R No. Kiirua/Naari/1413. In the consent order dated 30.12.2010, which was adopted as an order of the court on 10.1.2011 the portion was indicated.
45. In the said consent order, 1st respondent admitted that he had been paid the balance of KShs.15,000/= for ½ of an acre of land out of L.R No. Kiirua/Naari/1413. There is no evidence that the consent order was set aside, vacated, varied, or successfully appealed against. A consent judgment is like an agreement that is binding on the parties. Therefore, the respondents are estopped in law from denying apparent facts. Arising from such facts, the issue of completion of payment of the purchase price was *res judicata*.
 46. It was the appellant who had sought the lifting of the caution on 2.3.2011, registered over the title by Julia Karamuta. It was the 1st respondent's advocates who joined the 2nd respondent as an interested party to the suit. After the joinder, the 2nd respondent filed a statement dated 24.8.2022. Section 2 of the *Civil Procedure Act* defines what a pleading is. A witness statement is not a pleading. See *Martin Kabanga Gathatwa vs Associated Battery Manufactures Ltd (2020) eKLR*, *Surgipharm Ltd vs Kenya Invalid Pharmacy Suppliers Ltd & others (2013) eKLR*.
 47. What the 2nd respondent filed was not a statement of defense. The titular heading is a witness statement and not a third party or an interested party's statement of defense. It does not answer the statement of the plaintiff by the appellant. It did not refer to or answer to the 1st respondent's statement of defense or the appellant's suit. A witness statement and or list of documents did not accompany it. It cannot be termed or equated to a third-party defense, otherwise, third-party directions would have been taken by the trial court.
 48. In *Vishva Stone Suppliers Co. Ltd vs RSR Stone (2006) KECA 978 (KLR) (26th July 2024) (Judgment)*, the court said that pleadings are formal written statements filed by the parties to a lawsuit, outlining their respective claims, defenses and responses to each other's claims. The court said that pleadings include claims and counterclaims, but not the evidence that the litigant needs to prove his case. To the contrary, the court said that a written witness statement was essentially a means by which a litigant proves his claim and, therefore, is evidence whose primary purpose is to prove the litigant's claim as provided under Section 3 of the *Evidence Act*.
 49. The court said that a witness statement cannot supplement a pleading, nor can the function of two be confused. The court cited *IEBC and another vs. Stephen Mutinda Mule (supra)* that evidence cannot be converted into a pleading for parties are left to formulate their cases in their own way subject to basic rules of pleadings and the court is bound by the pleadings and issues formulated by the parties; and that a court cannot formulate the case on behalf of the parties or pronounce any claims or defense not made by the parties. Further, the court said that in an adversarial system, there is no room for any other business, for the parties who set the agenda for trial.
 50. In this appeal, the respondents are equating the written statement by the 2nd respondent dated 24.8.2022 to a pleading. The 1st respondent cannot purport to rely on that statement as if it were a pleading, raising issues of spousal consent and matrimonial property. Parties are bound by their pleadings. The 2nd respondent was joined as an interested party. An interested party is a person with a stake or legal interest or duty in the proceedings but not a party to the proceedings.
 51. The statement by the 2nd respondent is purported to have been filed under Order 1 Rule 10 (2) & (4) 4 of the Civil Procedure Rules. That section is restricted to the defendant or a plaintiff only.
 52. In *Francis Karioko Muruateru & others vs Republic & others (2016) eKLR*, the court pronounced itself on the extent to which an interested party may participate in the proceedings. The court said that an interested party must come to terms with the fact that the overriding interest or stake in any matter, remains that of the primary parties and that the issues for determination by the court always



- remain the issues presented by the principal parties or framed by the court from the pleadings and the submissions of the principal parties. The court said that an interested party may not frame its fresh issues or introduce new issues for the determination by the court and that the stake by the interested party cannot take the form of an altogether new issue to be introduced before the court.
53. The *Civil Procedure Act* & and the Rules thereof, unlike the Mutunga Rules, have not defined who an interested party is or the style of the pleadings by an interested party. Therefore, the case of Muruatetu (supra), which is binding to this court, remains the pronouncement of the law.
 54. A critical look at the statement and the list of documents filed by the 2nd respondent leaves no doubt in my mind that they introduced a new cause of action and or issues not pleaded by either the 1st respondent or the appellant, namely; the aspect of matrimonial property, divorce, separation and the spousal rights on the property, before, during and after the subsistence of marriage. The respondents have extensively submitted on those issues before this court. Jurisdiction is everything.
 55. The jurisdiction to determine and pronounce on matrimonial property requires that the parties file a matrimonial property cause before the family court. There is an admission that the 1st respondent that they had separated, and the 2nd respondent left to live in Kilifi County.
 56. As to when the two were separated, divorced, or the suit property was acquired or improved before, during, and after the subsistence of their marriage, had not been pleaded by the primary parties to the suit. There was no decision from the family court defining such rights in favor of the 2nd respondent. Material evidence to sustain the 2nd respondent's claim, if it had been adequately pleaded, was lacking. Equally this court has no jurisdiction to hear and determine such issues.
 57. The next issue is whether there was a valid sale agreement between the 1st respondent and the appellant. It is trite law that courts do not rewrite contracts since parties have the freedom to contract. In *NBK Ltd vs Pipeplastik Samkolit (K) Ltd* (2002) 2 E.A 503, the court held that the terms of the contract, bind parties unless coercion, fraud, or undue influence are pleaded and proved. In *Housing Finance Co. of (K) Ltd vs Gilbert Kibe Njuguna NRB HCC No. 1607 of 1999*, the court said that contracts belong to the parties, who are at liberty to negotiate and even vary the terms as and when they choose, and they must do so together and with the meeting of the minds.
 58. Further, the court said that if it appears to the court that one party varied the terms of the contract with another, without the knowledge, consent, or otherwise of the other and that the other demonstrates that the contract did not permit such variation, the court will say no to the enforcement of such contract.
 59. A contract for the sale of land must conform to Section 3 (3) of the *Law of Contract Act* and Section 38 of the *Land Act*. The sale agreement before the trial court had complied with the law as mentioned above. There is no provision in law that a spouse must append their signature in a sale agreement. Order 2 Rules 4 and 10 of the Civil Procedure Rules provide for matters that must be specifically pleaded and proved. Such issues include issues of fraud, illegality, statute of limitation, misrepresentation, breach of trust, willful deceit, and undue influence.
 60. The 1st respondent did not plead or attack the sale agreement by any of the above defenses. Parties, as indicated above, are bound by their pleadings. A party may not at the hearing be allowed to travel outside what they had pleaded.
 61. In *Antony Francis Wareham t/a AF Wareham and others vs Kenya Post Office Savings Bank* (2004), the court said that cases are tried and determined based on the pleadings made and the issues of fact and or law framed by the parties or arising out of the pleadings. In discharging the burden of proof,



evidence is only adduced as to the existence or non-existence of the facts in issue or facts relevant to facts in issue. Only evidence of facts pleaded is to be admitted, and if the evidence does not support those facts, the party with the burden of proof should fail. Courts do not make findings or unpleaded matters or grant any relief that the parties have not sought.

62. In this appeal, the appellant had pleaded that he had complied with all the terms and conditions of the sale agreement, including being put in occupation for close to over 15 years. A suit for recovery of land may not be brought after 12 years. It is not disputed that the appellant had been in vacant possession of the suit land since 2009, without any notice to vacate or eviction proceedings brought against him. There is evidence that the 1st respondent had consented before a court of law, as per the court order issued in January 2011, that the balance of Kshs.15,000/= had been paid and he was going to transfer the suit land immediately. The 1st respondent is, therefore, in law, estopped from denying apparent facts that the appellant cleared the consideration. His evidence that was not certain of what had not been cleared by the appellant was, therefore, misleading. Clause 7 of the sale agreement was clear on the consequence of default to pay double the consideration in liquidated damages.
63. In the statement of defense dated 5.10.2009, the 1st respondent did not plead frustration of the sale agreement, fundamental breach on the part of the appellant, or impossibility to perform the sale agreement.
- In *Collins vs Ogango* (civil appeal 427 of 2018 (2024) KECA 19 (KLR) (25th January 2024) (Judgment), the court cited Black Laws Dictionary 9th edition page 213, that breach of contract refers to a violation of a contractual obligation by failing to perform one's promise, by repudiating it or by interfering with another party's performance.
64. The court found that the appellant had failed to do what the contract had demanded of her, including following up to refund the respondents the amount. The court said that the actions of the appellant betrayed her intention not to sell the suit property even after the respondents had her by paying more than 10% of the purchase price to ensure the construction was completed. The court cited *Delilah Kerubo Otiso vs Ramesha Chander Ndingra* (2018) eKLR, where the court found the appellant's conduct as apprehensive, high-handed, outrageous, callous, and underhand to the extent that from the word go, he had no intention of honoring the agreement only to re-appear and invoke section 6 and 7 of the [Land Control Act](#) to annul the agreement.
65. The conduct of the 1st respondent in this appeal is not different from the conduct in the *Delilah* case (supra). The 1st respondent is the one who sought to enjoin the 2nd respondent in the suit. He is the one who purported to hide under spousal consent. He did not disclose his marital status in the agreement or when he unilaterally subdivided the land in 2020. The 2nd respondent did not feature in the life of the 1st respondent between 2009 and 2020 until she was brought on board by the 1st respondent to assist him in avoiding his contractual obligations.
66. If the 2nd respondent were vigilant on her overriding rights, she would have demanded that the appellant vacate the land at the earliest opportunity in 2009. The 2nd respondent would have placed a caution on the land based on spousal rights or matrimonial property.
67. The respondents want the court to help them sanction unacceptable conduct and allow the 1st respondent to benefit from both the land and the consideration paid under the barrier of voidability of the contract. A court of law cannot sanction illegality or be a party to it. See *Wambui vs Mwangi* (2024) KECA 248 (KLR). To allow the 1st respondent to retain both the consideration and the land, yet there is evidence that he did not sell the whole of L.R No. Kiirua/Naari/1413 would amount to unjust enrichment. See *Hiram Gathiha* (supra).



68. By taking the consideration of putting the appellant on vacant possession, acquiring his occupation for over 15 years, and letting him develop the land, a proprietary estoppel was created in favor of the appellant, which may not be defeated by Sections 6 and 7 of the *Land Control Act*.
69. This court is also a court of equity, which detests unjust enrichment. See *Macharia Mwangi Maina and others vs Davidson Mwangi Kagiri (2014) eKLR*.
70. As to whether the appellant was entitled to specific performance, the court in *Gharib Suleiman Gharib vs Abdulrahman Mohamed Agil LLR NO. 750 (CAK) Civil Appeal No. 112 of 1998*, held that specific performance is based on the existence of a valid and enforceable contract, and being an equitable relief, it is granted where a party cannot obtain sufficient remedy by way of damages.
71. In this appeal, I have already reached a finding that the respondents have been unable to impeach the sale agreement made between the 1st respondent and the appellant. The appellant, as per the evidence, has performed his part of the bargain. He is willing to complete the sale agreement. The 1st respondent has not pleaded undue hardship, if specific performance was to be ordered. See *Amina Abdul Kabir Hawa vs Rabinder Nath Anand & another (2012) eKLR*.
72. The 1st respondent stood by for over 15 years and let the appellant occupy and develop the portion measuring ½ acre sold to him on the legitimate expectation that he would eventually transfer the land. He cannot turn around and say that the sale agreement is unenforceable. See *Steadman vs Steadman (1976) A.C 536*. The sale agreement has no material defects, illegalities, or mistakes. See *Reliable Electrical Engineers vs Mantrac (K) Ltd (2006) eKLR*. It would be unjust to allow the 1st respondent to retain the benefits of unjust enrichment. See *Chase International Investment Corporation & another vs. Laxman Keshra & others (1978) KLR 143*.
73. In *Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR*, the court cited *Macharia Mwangi Maina (supra)* that the doctrine of constructive trust and proprietary estoppel overlap and both are concerned with equity's intervention to provide relief against unconscionable conduct. The court said that under Articles 10 (2) (b) and 159 (2) (e) of *the constitution*, the court, in exercising judicial authority, must protect and promote the national principles and purposes, one of which is the doctrines of equity.
74. I think the appellant is entitled to specific performance. The appeal is as a result of this allowed. The 1st respondent is directed to excise, subdivide, and transfer a portion equivalent to ½ an acre out of L.R No. Kiirua/Naari/3459 and 3460 the resultant subdivision of L.R No. Kiirua/Naari/1413 within two months from the date hereof in default the deputy registrar of this court to do it.
75. Costs of the lower court and the appeal to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 16TH DAY OF OCTOBER, 2024

In presence of

C.A Kananu

Appellant

Mwirigi for Mwititi for appellant

HON. C K NZILI

JUDGE

