



**Agape Dayspring Academy v Ndungu (Environment & Land Case
107 of 2021) [2023] KEELC 16212 (KLR) (13 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 107 OF 2021**

JG KEMEI, J

MARCH 13, 2023

BETWEEN

AGAPE DAYSPRING ACADEMY PLAINTIFF

AND

SAMMY GODFREY NDUNGU DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant *vide* a Complaint dated the 30/9/2021 and amended on the 12/11/2021. It sought the following orders;
 - a. A declaration that the Plaintiff is entitled to land titles L.R. No. Ruiru Kiu Block/2/4519, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4528, 4529, 4530, 4531 resulting from the subdivision of land parcel No. Ruiru/Kiu/Block 2/4314 bought from the Defendant.
 - b. A declaration that the Defendant is only entitled to the unpaid rent arrears of the buildings he allowed the Plaintiff to occupy on the suit land amounting to Ksh 1,515,000/- now that the Plaintiff has fully paid the land.
 - c. An order of specific performance of the Sale Agreement entered between the Plaintiff and the Defendant compelling the Defendant to sign the transfer forms and Transfer the land titles L.R No. Ruiru Kiu/Block /2/4519, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4528, 4529, 4530, 4531 resulting from the subdivision of land parcel No. Ruiru/Kiu/Block 2/4314 to the Plaintiff and if the Defendant fails to sign the transfer forms the same be signed by the Deputy Registrar of this Honourable Court.
 - d. An injunction restraining the Defendant whether himself, his servants and or agents or whomsoever acting on his behalf from evicting the Plaintiff, alienating, sub-dividing, transferring, offering for sale, selling and or dealing with land titles L.R. No. Ruiru Kiu Block/2/4519, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4528, 4529, 4530,



4531 resulting from the subdivision of land parcel No. Ruiru/Kiu/Block 2/4314 in any manner adverse to the Plaintiff's interest in the land.

- e. The Honourable Court to extend the time within which to apply for the Land Board Consent by the parties herein be extended and the Defendant be compelled to execute the necessary Land Board Consent Application forms within 7 days from the date of delivery of the Judgment and in default the Deputy Registrar to execute such forms.
 - f. General damages for breach of contract in lieu of or in addition to the Order for specific performance.
 - g. Costs of this suit and any other relief that his Court may deem fit and just to grant.
2. It is the Plaintiff's case that it purchased parcel No. Ruiru/Kiu Block 2/4314 comprising of its subdivisions namely parcels Numbers 4519, 1521-4531 numbering 12 plots inclusive of the buildings thereon from the Defendant at the cost of Ksh 2.1 Million in 2006. Prior to the purchase the Defendant had put the Plaintiff into possession as a rent paying tenant having been a tenant on the suit premises of the previous owner of the land. The purchase price was paid in installments and it has been paid in full. It was averred that the rent outstanding to the Defendant stands at Ksh 1,515,000/- which the Plaintiff is ready and willing to pay. The Plaintiff has developed the suit lands to the tune of Ksh 35 Million. That the Defendant has refused to transfer the suit land to the Plaintiff and has instead purported to rescind the agreement *vide* the letter dated the 20/9/2021. That unless the Defendant is compelled by this Court to transfer the suit land to the Plaintiff, the Plaintiff stands to lose its investment and developments it has made on the suit land.
 3. The Plaintiffs claim is denied by the Defendant in his statement of defence filed on the 24/11/2021. He contended that that he sold parcel 4530 to the Plaintiffs at the sum of Ksh 2.1 Million payable in installments over a period of 3 years. The Plaintiff was already occupying the parcel since 1995 as a rent paying tenant of the previous owner of the land. Parcel 4530 was a resultant subdivision of the larger parcel 4514 owned by a Mr Kuria. Upon acquiring the parcel, the Defendant rented the premises to the Plaintiff pending the completion of the purchase agreement. That the Plaintiff failed to pay the purchase price in the sum of Ksh 1,062,802/- as well as the rent amounting to Ksh 1,612,519/-leading to rescission by the Defendant by giving the Plaintiff 15 days to vacate.
 4. In his counterclaim the Defendant sought the following orders;
 - a. Orders to rescind the sale agreement dated the 8/9/2006.
 - b. Damages in breach of the contract
 - c. The Plaintiff be ordered to pay the rent arrears of Ksh 1,612,519/-orders to evict the Plaintiff from parcel 4530 and the OCS Ruiru Police Station to assist in executing these orders.
 - d. Orders to lift all restrictions put on parcels 4519, 4521-4531
 - e. Costs of the suit
 - f. Interest on b and c above
 - g. Any other relief the Court may deem fit to grant.

The evidence

5. At the hearing the Plaintiff called 5 witnesses while the Defendants evidence was led by the Defendant.



6. PW1- Duncan Mbogo Wanjigi adopted his written statement filed on the 5/10/2021 and the second one dated the 16/11/2021 as his evidence in chief. In support of his evidence he produced the documents found on pages 38 – 207 of the Plaintiffs trial bundle and marked as PEX No 1-23.
7. He introduced himself as the Bishop of Christian Church International – Agape -Ruiru and the founding director of the Plaintiff. That the Plaintiff is the brain child of the church which he superintends as a Bishop. The Plaintiff purchased parcels 4519, 1421 – 4531 (being the subdivisions from 4514) from the Defendant vide an agreement of sale dated 8/9/2006 in the sum of Ksh 2.1 M. The agreement was varied vide the minutes of the parties held on the 15/8/2019 and 15/9/2021. Possession was given in 2003. The purchase price was payable in installments and the same has now been fully paid.
8. The witness further stated that the Plaintiff rented the premises on the suit land, pending the completion of the agreement of sale, at the initial rent of Ksh 10,000/- which was later reviewed to Ksh 5000 and that the rent arrears stand at Ksh 1,515,000/- In the process of acquiring the property the Plaintiff with the consent of the Defendant made developments on the land to cater for the school such as borehole, fire assembly point, lavatories classrooms, boarding facilities water and electricity connection. This was done based on the Defendant’s promise that the land was theirs to keep on completion of the purchase.
9. It was his evidence that at some point it lost touch with the Defendant who lived in the United States of America and on the 17/9/2019 the Plaintiff issued a completion notice of the agreement of sale. This was met with the Defendant’s letter dated the 20/9/2021 seeking to rescind the agreement purportedly for breach of contract.
10. In cross the witness stated that he was introduced to the Defendant by a Mr Kuria who was the previous owner of the land before he sold it to the Defendant. He also rented the premises to the Plaintiff before he sold it to the Defendant. That the Defendant allowed them to drill the borehole on the property. That they run a school on the premises since 2003.
11. The witness confirmed that he wrote the agreement dated the 8/6/2006. That the first one was handwritten and was typed the same day in his office for which the parties executed. That he was buying one shamba and not plots. He admitted that in both agreements the land reference number was added by hand - not typed. That it was the Defendant who gave him the parcel number (4314) and he inserted it in the agreement and both the Plaintiff’s representative and the Defendant signed the same. Later he learned that the suit land 4314 had been subdivided into 12 plots.
12. PW1 added that in the meeting held on the 7/9/2021 in which the Defendant was in attendance, the accounts were reconciled and the parties agreed that all the monies received by the Defendant be credited to the land purchase account. The balance of the purchase price was arrived at Ksh 95500/- and the rent arrears stood at Ksh 1,515,000/-. The purchase price was paid to the Defendant on the 22/9/2021 into the account of the Defendant. That the parties had agreed to meet on the 16/9/2021 to reconcile the rent account but the Defendant elected not to honour the same and instead sent a letter purporting to rescind the agreement.
13. PW2- Ephraim Muchiri Mwai took oath and affirmed to tell the truth while relying on his witness statement dated the 10/11/2021. He stated that he is a church elder and a member of Agape church since 1999 and has personal knowledge of the acquisition of the property by the Plaintiff from the Defendant since he has been in attending meetings where the land acquisition was being discussed. He was clear that the Plaintiff purchased the 12 plots and not parcel 4530. That the Plaintiff has developed a school and other facilities as well as fenced the whole property comprising of all the plots it acquired in



2006. That all along the understanding between the Plaintiff and the Defendant was that the Plaintiff was acquiring the whole land comprising of 4314 and not its subdivisions. That the full purchase price has been paid to the Defendant. Asked about the price of Ksh 2.1 million, the witness was emphatic that land in 2006 was going for between Ksh 70,000/- to 80,000/- and that it is not plausible that the Defendant could have sold one plot at Ksh 2.1 M. That the only explanation was that the sum of Ksh 2.1 million was for the whole land and not one plot.
14. In further testimony the witness stated that he was not present when the agreement was entered having joined the church leadership in 1999 by which time the church was already in occupation of the land. That Mr Kuria gifted plot No 4520 to the church which is outside the plots acquired from the Defendant.
 15. PW3- Patrick Kimani Njeru relied on his witness statement dated the 10/11/2021 and stated that he is a Pastor at Agape church since 2001 and therefore has knowledge of the acquisition of the land. That the Plaintiff purchased a shamba namely parcel 4314 and now comprising of 12 plots. That he was present in the meeting held on the 7/9/2021 when the parties reconciled the payments for purchase price and the rentals paid by the Plaintiff. That the church mobilized funds from members and well-wishers as well as sought a bank loan to pay the purchase price. That the Defendant has refused to transfer the suit land to the Plaintiff despite the full payment of the purchase price.
 16. PW4 – John Ochieng Gilo stated that he joined the school in the year 2011 as a school manager and therefore was not present when the acquisition took place. That he deposited the last payment of Ksh 95,500/- on or about the 23/9/2021 in the Defendant’s account pursuant to a meeting held by the parties on 7/9/2021.
 17. PW5 - Bernard Kuria Waweru testified and relied on his witness statement dated the 12/11/2021. The witness stated that he has known the Bishop (PW1) from the early 1990s as a friend and a confidant. That he was the owner of parcel 4314 which he subdivided into several plots in 2001. He donated parcel 4520 to the Church and sold the remaining plots to the Defendant including some building on the land to enable him educate his children in India. That the Defendant was living abroad and he negotiated the sale with his mother, who is a close friend of his. He sold the land at Ksh 850,000/- . That he lett the church one of the rooms in the buildings on the land as they awaited the construction of the church on the plot he had donated.
 18. Later he avers he learned that the Defendant sold the said land to the Plaintiff at Ksh 2.1 million. That she learned from his wife who is a member and worships at the church. He is also a close friend of PW1 who informed him of the acquisition. He stated that he is aware that in 2003 or thereabouts the prevailing market price of plots was around 70,000/- to Ksh 80,000/- for a 50ft X 100ft and therefore not likely that the Defendant could have sold a plot at Ksh 2.1 Million as he claims. That the only explanation is that he was selling the whole land comprising of 12 plots and not one plot as he alleges.
 19. In addition, he added that once he subdivided the mother title into 12 plots, the buildings fell on parcel 4530 which he had previously rented to the church for worship and to run the school.
 20. DW1 – Sammy Godfrey Ndungu relied on his witness statement dated the 24/11/2021 as his evidence in chief. The witness failed to produce any documents in support of his case.
 21. He stated that he purchased 12 plots in 2002 from PW5. On completion of the purchase PW5 introduced him to the Plaintiff who had hitherto been a tenant in parcel 4530 paying a monthly rental of Ksh 10,000/-. That he agreed to let the Plaintiff continue to rent the premises and pay rent to him at the rent of Ksh 10,000/- which was later reviewed to Ksh 5000/- in 2009 and 50,000 in 2019. The Plaintiff was to continue paying rent pending the completion of the acquisition of the property.



That unfortunately the Plaintiff defaulted and on the 8/6/2006 the Plaintiff offered to purchase the property which he agreed and thereupon entered into the agreement for sale of 4530 inclusive of the buildings thereon on even date for the sum of Ksh 2.1 million payable over a period of 3 years. That the parties agreed to pay the rent and the purchase price to two different bank accounts provided by the Defendant. That the Plaintiff paid the rent and stopped at some point and the outstanding amounts stand at Ksh 1,062,802 and Ksh 1,612,519 being the purchase price and the rent respectively. That arising from the failure of the Plaintiff to pay the rent and the purchase price, he issued a rescission notice demanding the rent payment and vacation of the premises within 15 days.

22. The witness stated that he corresponded with PW1 through email and at one point agreed to reduce the rent from Ksh 10,000/- to Ksh 5000/-. That in 2021 he reviewed the rent upwards to Ksh 50,000/- from the 1/1/2020. He stated that he did not enter into any lease agreement with the Plaintiff and the lease was oral. According to him the Plaintiff is in arrears to the tune of Ksh 1,062,802/- for plot 4530 which he rented to the Plaintiff. That he sold parcel 4530 to the Plaintiff and not the 12 plots. That he paid through, his mother, the sum of Ksh 1.5 Million for the plot and buildings in 2002 to PW5. That the land was Ksh 800,000/- while the building was Ksh 700,000/-.
23. DW1 confirmed that he attended the meeting held on the 7/9/2021 and signed the minutes thereon. That the amount paid as at 7/9/2021 was Ksh 2,004,607/- and the outstanding rent was Ksh 1,515,000/-. However, he stated that the figures changed later on reconciliation of the accounts.
24. The witness admitted that he allowed the school to drill the borehole on parcel 4530 which he sold to the Plaintiff. He added that if the Plaintiff drilled the wrong plot then he would not be held responsible.

The written submissions

25. The Plaintiff through the firm of Makuno Gacoya & Co Advocates filed written submissions on the 11/11/2022 while the Defendant filed his on the 14/11/2021. On even date the Defendant filed a notice to act in person in place of his erstwhile advocates who acted for him before. I have read and considered all the submissions.

Analysis and determination

26. The key issues for determination are;
 - a. Which parcel of land did the Defendant sell to the Plaintiff? Which parcel of land was purchased by the Plaintiff?
 - b. Was the agreement breached and by whom?
 - c. Is the Plaintiff entitled to specific performance?
 - d. Whether the Defendant's counterclaim is merited.
 - e. Costs
27. It is not disputed that the mother title parcel 4314 measuring 0.5320 ha or 1.3 acres belonged to Bernard Kuria Waweru. He led evidence and is borne from the copy of the green card and the mutation that the mother title was subdivided on the 5/11/2001 into 13 plots of various sizes. – see the mutation on page 186 – 187 of the Plaintiffs trial bundle.
28. On the 11/12/2001 the subdivisions being parcels 4519, 4521-4531 were registered in the name of Kuria. On the 9/1/2002 the said parcels became registered in the name of the Defendant.



29. It is commonly accepted that the said PW5 had rented some part of the buildings on his land to the Plaintiff for purposes of worship and for the running of a school since 1995. The rent was Ksh 10,000/-. Evidence was led that the Defendant generally resides in the USA. PW5 stated that in 2002 he needed money to pay for his children education abroad and he approached the mother of the Defendant to buy his land. That she agreed and since they knew each other effected the transfers without entering into an agreement of sale. That the mother negotiated and completed the transfers in the sum of Ksh 850,000/- for both the land and the buildings. The titles were registered in the name of the Defendant in 2002.
30. The Plaintiff's case is that he entered into a purchase agreement with the Defendant in 2006, was put in occupation but the Defendant has refused to transfer the land to it despite paying the full purchase price.
31. The case of the Defendant is that he sold a small plot No 4530 to the Plaintiff, took possession and have failed to pay the purchase price alongside the rent for the premises and therefore has rescinded the agreement and orders interalia for eviction against the Plaintiff are met.

Which parcel of land did the Defendant sell to the Plaintiff? Which parcel of land was purchased by the Plaintiff?

32. It is therefore not in dispute that the parties entered into an agreement of sale in 2006 but the issue is what was the land subject of the sale. Was it the mother title comprising of 12 plots or parcel 4530 which comprised of the buildings?
33. The starting point is the agreement of the parties. PW1 led evidence that they entered into an agreement dated the 8/6/2002. He produced two sets of agreements of even date; one that is handwritten and another one that is typed. The difference between the two agreements is that the handwritten one does not have the price of Ksh 2.1 Million. The typed one contains the land ref No 4314 in handwriting. In both agreements the land reference number is disclosed as 4314. The Plaintiff led evidence that he wrote the agreement of sale and was typed in his office and executed the same day. He led unchallenged evidence that the Defendant gave him the land reference as 4314 and inserted in the agreement. That all along they have known that that negotiated and purchased plot No 4314 or the whole land as they occupy and were surprised at the claim of the Defendant that the subject land is parcel 4530.
34. As explained in the preceding paras, by 2006 the mother title had been subdivided into 13 plots being parcels 4519-4531. Parcel 4520 was donated to the church and the remaining plots sold to the Defendant. I have perused the agreement of sale entered by both parties and the land reference number disclosed is 4314. It is signed by the Defendant. By this time the plots are registered in the name of the Defendant. It is not explained why the Defendant being the owner of the parcels would give the land reference being sold as parcel 4314 to the PW1 while he knew or ought to have known that the same had been subdivided and the resultant subdivisions registered in his name about 4 years before. The explanation could be found in the evidence of PW5 where he stated that since the Defendant was away in America, he negotiated the sale of the 12 plots with his mother who paid the purchase price and registered in the name of the Defendant. The other inference that can be made and rightly so is that the whole land was being sold to the Plaintiff and that explains why the Defendant gave the original parcel number to the Plaintiff either with or with the knowledge of subdivision of the same. If he knew that the land had been subdivided that the issue of misrepresentation would come in. This is dispelled because this far no evidence of misrepresentation was placed before me.
35. The Defendant has insisted that he sold parcel 4530 to the Plaintiff. PW5 stated that he had rented the buildings on his land to the Plaintiff since 1995. That after the subdivision the buildings fell on



- parcel 4530. That the Defendant continued leasing the same buildings to the Plaintiff after the sale of the land for which the Plaintiff continued to pay the rent of Ksh 10,000/- like before. It is on record that the Defendant has not disputed signing the agreement for 4314 and also that he failed to table any agreement for sale for 4530 as he claims. There is therefore nothing on record for the Court to make an opinion on as to whether or not there was another agreement entered into by the parties for 4530.
36. It is not in dispute that the purchase price was Ksh 2.1 million. PW5 led evidence that he sold the whole of 12 plots together with the buildings for the sum of Ksh 850,000 in 2002. He also led evidence that in 2002 or thereabouts the market price for plots in the area was in the range of 70,000/- - Ksh 80,000/-. Similar evidence was led by PW1 and PW4. The Defendant led evidence that he purchased the land at Ksh 1.5 Million, 800,000/- being for the plot and Ksh 700,000/- being for the buildings. He did not place any agreement for sale before the Court in support of this averment. I have perused the mutation on page 186 of the trial bundle and note that the plots range from 0.0295 – 0.0435 hectares. Indeed parcel 4530 is one of the biggest being 0.0435 hectares. Taking the evidence of the Defendant that a plot was Ksh 800,000/- then the market price for the 12 plots would have been Ksh 9.6 Million. PW5 led evidence that he was paid Ksh 850,000/- for the 12 plots. I find no reason to disbelieve him as he had no interest in the 12 plots having disposed them to the Defendant. There was no evidence led by the Defendant that he purchased the 12 plots for the sum of Ksh 9.6 Million. Having taken the market price for the 12 plots to have been 850,000/- in 2002 the evidence of PW1, PW4 and PW5 that the market price for plots in the area ranged in the sum of Ksh 70,000- 80,000/- is more plausible and believable on a balance of probability. The purchase price then for the 12 plots and the buildings in 2006 having been Ksh 2.1 is also more plausible.
37. PW1 led evidence that the Plaintiff has developed the land heavily over the years by drilling the borehole, construction of the classrooms, boarding facilities, connection of water and electricity. It is commonly agreed that the Defendant gave permission for the drilling of the borehole in 2015. The Plaintiff led evidence that it has fenced the whole land. If indeed the Defendant had only sold one plot to the Plaintiff why did he not raise an objection when the Plaintiff was fencing the land and carrying out developments thereon. There is no evidence that the Defendant evicted the Plaintiff from the land since 2002 to date, a period of over two decades that the Plaintiff has enjoyed possession and occupation of the whole land. The plausible explanation is that the Defendant through his mother sold the whole land to the Plaintiff.
38. The Defendant stated in evidence that the borehole was dug behind the church plot. Evidence was received from PW5 that he donated parcel 4520 to the church. That he also let the buildings on parcel 4530 to the church awaiting the construction of their plot 4520. I have perused the mutation as to the position of the two plots and it is evident that plot No 4520 measuring 0.561 is situated about 4 plots away from parcel 4530. Depending on the direction one takes behind the church plot would refer to parcel 4522 or the public road or parcel 4519 across the road. If the Defendant had sold parcel 4530 to the Plaintiff then he would have restricted his approval to the said plot 4530. There is no mention of parcel 4530 in his approval further dispelling his evidence that the land he sold and approved the drilling of a borehole was on 12 plots. The only probable answer is that he sold the whole of 12 plots.
39. On a balance of probability, I find that the land sold to the Plaintiff was the whole of 12 plots being parcel 4519, 4521-4531 and not parcel 4530.



Was the agreement breached and by whom?

40. The agreement of the parties is very scanty in details. For purposes of emphasis I shall reproduce it as follows;

“ 8th September 2006

AGREEMENT – MODE OF PAYMENT FOR PURCHASE OF LAND PLOT NO.
Ruiru/Kiu/Block 2/4314

SELLER : SAMMY G. NDUNG’U

PO BOX 13603-00100

NAIROBI

Tel. 0726-851121

Email: atsamnet@yahoo.com

BUYER : AGAPE DAYSPRING ACADEMY

PO BOX 609

Ruiru

C/o BISHOP DUNCAN MBOGO WANJIGI

Tel 0722-366046

THE OFFER : Ksh 2.1m

MODE : ALL MONIES TOWARD THE PAYMENT OF THIS

PLOT TO BE DEPOSITED IN THE SELLER’S A/C AT NATIONAL BANK OF
KENYA Ruiru BRANCH A/C NO. 0124-5593-800-00

SIGNATURES:

SELLER : SAMMY NDUNG’U

BUYER : DUNCAN MBOGO WANJIGI – FOR AGAPE

DAYSPRING ACADEMY

WITNESSES : 1)SIMON WAMAE (PASTOR)

2)STANLEY THUO (CHAIRMAN)

41. It is commonly agreed that the agreement did not contain a completion date nor events of default in the event of one party failing to fulfill their obligations. PW1 and DW1 agreed that they corresponded with each other through email. I have perused the email correspondences and it is evident that the parties agreed that the land would be paid for within a period of 3 years that is to say by 2009. Two accounts were provided by the Defendant, one to receive purchase price and the other to receive rent payments. There is evidence on record led by the PW1 and not disputed by the DW1 that the Plaintiff had challenges raising funds to clear the purchase price from church members, well wishers and donors and at one time even the Defendant was requested to source some donors. There is evidence that the Parties accommodated each other thus varied the agreement as to the completion date. DW1 pleaded with the Plaintiff to wait for him so that he can attend to the completion in person. When he arrived in 2021 there were arrangements to book a Land Consent Board meeting in readiness for the transfer of the



land but in vain. PW1 also stated that the reason why they stopped payments at some point was because the Defendant was unreachable as he disappeared from 2009 resurfaced in 2019 or thereabouts. In the intervening period the Defendants bank asked the Plaintiff to stop paying monies into the account, it was alleged. This shows that there was a range of reasons on both sides why the agreement was not completed earlier.

42. I have seen the minutes of the parties of 7/9/2002 where the matter of reconciling the outstanding purchase price was discussed. The Defendant signed the said minutes. According to the said minutes the outstanding purchase price was found to be 95,393/-. There is evidence that the same was paid in September 2021. Evidence was led by PW4 that he deposited the sums in the account of the Defendant on the 22/9/2021. There is no evidence that the said sums were returned by the Defendant.
43. It is the finding of the Court that the agreement of sale was not breached by either party. The agreement having been open ended, the same was subject to notice by any of the parties who were ready to complete. This notice was issued by the Plaintiff *vide* its letter dated the 9/8/2021. By the time the Defendant is purporting to rescind the agreement on the 22/9/2021, it was too late. Having accepted the monies due what is remaining is the execution of the agreement by the Defendant by transferring the land to the Plaintiff.
44. I find that the agreement is enforceable and that the Plaintiff is not in breach.

Whether the Plaintiff is entitled to specific performance

45. Specific performance is an equitable remedy grounded in the equitable maxim that equity regards as done that which ought to be done and as an equitable remedy it is decreed at the discretion of the Court. The basic rule is that specific performance will not be decreed where the common law remedy such as damages would be adequate to put the Plaintiff in the position, he would have been but for the breach. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.
46. In addition, a person seeking an order for specific performance must show and satisfy the Court that it can comply, that is to say ready willing and able to do so and mere statements are not enough. This is premised on the equitable maxim that he who comes to equity must do equity. In the case of *Palmer v Lark* (1954) 1 Cha 182 and *Openda v Abn* (1984) KLR 2018 the Court held that a purchaser must pay or tender at the time and place of completing the sale the purchase price to the seller and this is a condition precedent for specific performance of the agreement.
47. In this case the Plaintiff having performed his part of the bargain that is to say paid the purchase price in full, and been put in possession, and the Defendant having received the full purchase price, what remained were the formalities of transfer of the land to the Plaintiff. The Defendant held the land in trust for the Plaintiff. I find that this is a case where the principle of constructive trust and proprietary estoppel applies.
48. A constructive trust is a doctrine of equity imposed by Courts to benefit a person who has been wrongfully deprived and requires a person who would be unjustly enriched to transfer the property to the intended party. In this case allowing the Defendant to benefit from the purchase price and hold on the land amounts to unjust enrichment, a situation that is frowned by equity.



49. I find that the Plaintiff is entitled to specific performance as prayed.

Whether the Defendant's counterclaim is merited

50. I have already noted that the Defendant failed to produce any evidence in support of his counterclaim and as such his claim remains unproven. It is dismissed.

51. In the end I grant Judgement in favour of the Plaintiff in the following terms;

- a. That the Plaintiff is entitled to land titles L.R. No. Ruiru Kiu Block/2/4519, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4528, 4529, 4530, 4531 resulting from the subdivision of land parcel No. Ruiru/Kiu/Block 2/4314 bought from the Defendant.
- b. That the Defendant is only entitled to the unpaid rent arrears of the buildings he allowed the Plaintiff to occupy on the suit land amounting to Ksh 1,515,000/- now that the Plaintiff has fully paid the land.
- c. An order of specific performance of the Sale Agreement entered between the Plaintiff and the Defendant compelling the Defendant to sign the transfer forms and Transfer the land titles L.R No. Ruiru Kiu/Block /2/4519, 4521, 4522, 4523, 4524, 4525, 4526, 5426, 4527, 4528, 4529, 4530, 4531 resulting from the subdivision of land parcel No. Ruiru/Kiu/Block 2/4314 to the Plaintiff and if the Defendant fails to sign the transfer forms the same be signed by the Deputy Registrar of this Honourable Court.
- d. An injunction is hereby issued restraining the Defendant whether himself, his servants and or agents or whomsoever acting on his behalf from evicting the Plaintiff, alienating, subdividing, transferring, offering for sale, selling and or dealing with land titles L.R. No. Ruiru Kiu Block/2/4519, 4521, 4522, 4523, 4524, 4525, 4526, 5426, 4527, 4528, 4529, 4530, 4531 resulting from the subdivision of land parcel No. Ruiru/Kiu/Block 2/4314 in any manner adverse to the Plaintiff's interest in the land.
- e. The Honourable Court hereby extends the time within which to apply for the Land Board Consent by the parties herein and the Defendant is hereby compelled to execute the necessary Land Board Consent Application forms within 30 days from the date of delivery of the Judgment and in default the Deputy Registrar to execute such forms.
- f. General damages for breach of contract is declined.
- g. The costs shall be in favour of the Plaintiff.

52. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Gacoya for Plaintiff

Godfrey S. Ndungu in person

Court Assistants – Esther / Kevin

