



**Gachemi v Solio Ranch Limited & another (Environment & Land Case
39 of 2016) [2023] KEELC 15989 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 39 OF 2016**

**JO OLOLA, J
MARCH 9, 2023**

BETWEEN

JAMES MUCHANGI GACHEMI PLAINTIFF

AND

SOLIO RANCH LIMITED 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

JUDGMENT

Background

1. This suit was initially instituted at the Environment and Land Court at Nakuru being Nakuru ELC No. 344 of 2015. It was subsequently transferred to this Court on 29th May, 2016 and given its current reference.
2. By a Plaint dated 30th May, 2015 as amended on 2nd October, 2018 James Muchangi Gachemi (the Plaintiff) prays for Judgment against the two Defendants for:
 - (a) Specific performance for the agreement (together with the correspondences) by an order directed to the Defendant compelling the Defendant to sign all documents and do all acts for purpose of completing the contract between the Plaintiff and the Defendant for sale of the properties known as L.R Number 11571/36 and delineated in Survey Plan Number 361443 and L.R Number 11571/37 and delineated in Survey Plan Number 361444 situate West and South West of Naromoru within Laikipia County in the Republic of Kenya measuring approximately Two Hundred (200) acres each, being as a result of sub-division of L.R Number 11571/6;
 - (b) A permanent injunction restraining the Defendant from alienating, offering for sale in any manner, disposing off, selling or charging the properties known as L.R Number 11571/36



and delineated in Survey Plan Number 361443 and L.R Number 11571/37 and delineated in survey Plan Number 361444 situate West and South West of Naromoru;

- (c) Alternatively and without prejudice to (a) have refund of Kenya Shillings Sixty One Million (Kshs.61,000,000/-) being purchase price paid at the applicable bank rates then of 22% per annum from date of payment and damages for breach of contract;
 - (d) Interest on (c) above at Court rates;
 - (e) Costs of the suit and interest at Court rates on the same; and
 - (f) Any other or better relief that this Court may deem meet and just to grant.
3. Those prayers arise from the Plaintiff's contention that at all times material, the 1st Defendant was the registered proprietor of the two properties situated West and South West of Naromoru being subdivisions of L.R Number 11571/6 situated in the same area. It is the Plaintiff's case that by a Sale Agreement dated 10th December, 2012 and correspondences dated 6th May 2014, 7th May 2014, 16th May 2014 and 28th May 2014 between the Plaintiff and the Defendant through its duly appointed agent – Tysons Limited, the Plaintiff agreed to purchase and the 1st Defendant agreed to sell the suit properties as follows
- (i) L.R Number 11571/36 for Kshs.50 Million which the Plaintiff paid in full; and
 - (ii) L.R Number 11571/37 for Kshs.60 Million for which the Plaintiff paid a deposit of Kshs.11 Million.
4. The Plaintiff asserts that it was an express term of the Agreement that the suit properties would be transferred to him free from any encumbrances and that a formal sale agreement would be prepared based on the terms and conditions in the Agreement dated 10th December, 2012 and the correspondences aforesaid. However despite receiving the monies aforesaid being the purchase price, the 1st Defendant proceeded on 6th May, 2014 to issue a new Letter of Offer to the Plaintiff couched in similar terms as earlier Agreement and the Correspondence between the Parties.
5. It is the Plaintiff's case that on or about 27th May, 2014 upon request by the 1st Defendant, the purchase price of Kshs.61 Million was transferred from the Defendant's agent's account to the Defendant's Advocates – M/s Kaplan and Stratton Advocates. On 19th June, 2014 the Plaintiff requested the Defendant to engross the draft Agreement in respect of L.R Number 11571/36 and also forwarded draft transfers to the Defendant's Advocates for confirmation so as to enable engrossment and execution.
6. The Plaintiff avers that in breach of the Agreement and without any lawful reason, the Defendant failed to complete the Agreement by performing its obligation thereunder and as a result, the Plaintiff has suffered loss and damage thereby necessitating this suit.
7. Solio Ranch Limited (the Defendant) is opposed to the grant of the orders sought by the Plaintiff. In its Statement of Defence dated 22nd February, 2017 as amended on 22nd February 2018 and further amended on 9th November 2018, the Defendant states that by a Letter of Offer and not "an Agreement for Sale" dated 10th December 2012, the Plaintiff and the Defendant agreed to enter into an agreement for the sale and purchase of the suit property subject to "contract by way of formal sale agreement". The Letter of Offer was to remain in force until a written agreement for sale would be negotiated and entered into which would then be binding on the Parties.



8. The Defendant asserts that the two Parties never subsequently entered into any written agreement for sale in respect of the suit properties. It is the Defendant's case that the Parties agreed through e-mail correspondence that the Plaintiff would purchase the suit property simultaneously together with L.R No. 11571/36 – A7, failing which the said Letter of Offer would be rescinded. As a result of the collateral contract, the Defendant sent the Second Letter of Offer dated 6th May, 2014 to the Plaintiff to be signed in recognition of the terms contained in their correspondence.
9. The Defendant asserts that after signing the Letter of Offer dated 6th May 2014, the Plaintiff sent it to the Defendant but the Defendant never signed the same and the failure to sign had the effect of bringing the entire process to a close and terminating the intended sale of the properties.
10. The Defendant avers further that after having failed to accede to the new terms as contained in the collateral contract, the Plaintiff's actions left it with no option but to rescind the offer, which it did by way of an e-mail dated 27th June, 2014.
11. While it admits receipt of the sum of Kshs.61 Million as deposit and other sums payable for the transfer of the suit properties to the Plaintiff, the Defendant asserts that immediately after rescinding the offer, it did offer to refund the said amount to the Plaintiff but the Plaintiff has repeatedly failed/refused and/or neglected to provide his bank account details to facilitate the refund.

The Plaintiff's Case

12. The Plaintiff testified as the sole witness in his case. Testifying as PW1 and relying on his Witness Statement dated 28th May 2015, he told the Court that by an Agreement dated 10th December 2012, the Defendant through its agent Tysons Limited accepted his offer to buy property known as Plot Number L.R No. 11571/36 - A7 measuring 200 acres which was proposed subdivision of L.R Number 11571/6 situated in Naromoru at a consideration of Kshs.50,000,000/-.
13. PW1 told the Court that pursuant to the said agreement he paid the total purchase price of Kshs.50,000,000/- to the Defendant's Agent -Tysons Limited.
14. PW1 testified that subsequently and by a letter dated 6th May 2014, the Defendant purported to offer him the same L.R Number 11571/36 for sale once again. The said letter contained terms similar to the ones in the earlier letter of offer. PW1 told the Court that that notwithstanding, he went ahead and signed the Second Letter of Offer before returning it to the Defendant.
15. PW1 further testified that on the same 6th day of May, 2014, the Defendant sought permission in writing to transfer the purchase price. PW1 granted the permission for the transfer of the said Kshs.50,000,000/- together with the further sum of Kshs.11,000,000/- being a deposit he had paid for the purchase of another plot adjacent to L.R Number 11571/36 and the same was remitted to the Defendant's lawyer M/s Kaplan and Stratton Advocates on 27th May, 2014.
16. PW1 testified that in June 2014, his lawyers requested the Defendant to engross the draft Sale Agreement in respect of the subject parcel of land and to send a draft to the Defendant's lawyers for confirmation to enable the same be engrossed and executed. He told the Court that without any justifiable reason, the Defendant ignored the request and purported to rescind the offer for sale of L.R No. 11571/36 – A7.
17. PW1 further told the Court that the Defendant has subsequently refused to take any steps to complete the sale yet on his part he has been ready and willing to complete the same.



18. On cross-examination PW1 conceded that the Letter of Offer dated 10th December, 2012 was made subject to a Sale Agreement being negotiated and executed by the Parties. He told the Court the Parties went into negotiations but no Sale Agreement was executed. PW1 refuted the Defendant's position that there was a requirement for the Sale Agreements for the two parcels of land to be executed together and told the Court the extension requested for 60 days was for the second parcel of land. The Defendant refused the request for extension.
19. PW1 conceded that the Defendant had asked for his bank details after purporting to rescind the contract. He however told the Court he was dealing with the Defendant's through their agents and not directly.

The Defence Case

20. The Defence did not call any witness to testify at the trial after the Court declined their application to bring an Affidavit by one of their employees on account that their previous witness had left the Company.

Analysis and Determination

21. I have carefully perused and considered the pleadings filed herein, the testimony of the Plaintiff who testified as the sole witness herein as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates acting for the Plaintiff. I was unable to find any submissions filed on behalf of the Defendant. While the Chief Land Registrar was initially named as the 2nd Defendant herein, there was no participation on his part and given the orders sought by the Plaintiff, I was unable to see why he was made a party herein. The matter accordingly proceeded from the beginning as a suit between the Plaintiff and the 1st Defendant to whom I shall liberally refer to herein as the Defendant.
22. By his suit herein, James Muchangi Gachemi (the Plaintiff) prays for an order of specific performance compelling M/s Solio Ranch Limited (the Defendant) to complete and perform the terms of an agreement allegedly entered between himself and the Defendant for the sale of the properties known as L.R No. 11571/36 (also referred to as L.R No. 11571/6 – A7 and L.R No. 11571/36 – A7) and L.R No. 11571/37 (also referred to as L.R No. 11571/6 – A8 and L.R No. 11571/37 – A8) said to be each measuring some 200 acres and situated West and South West respectively of Naromoru within Laikipia County.
23. The Plaintiff also craves an order of a permanent injunction restraining the Defendant from alienating, offering for sale, disposing off, selling or charging of the said properties to any third party. In the alternative the Plaintiff prays for a refund of the sum of Kshs.61 Million being the purchase price said to have been paid to the Defendant in respect of the two properties together with interest at Commercial Bank rates. The Plaintiff also desires to be paid the costs of this suit together with interest at Court rates.
24. Those prayers arise from the Plaintiff's position that the two properties are sub-divisions of L.R No. 11571/6 situated in the said Naromoru and registered in the name of the Defendant and that by an Agreement dated 10th December 2012, and subsequent correspondences between the Parties dated 6th May, 2014, 7th May 2014, 16th May 2014 and 28th May 2014 the Defendant agreed to sell and the Plaintiff agreed to purchase the two properties at the sums of Kshs.50 Million (for L.R No. 11517/36) and Kshs.60 Million (for L.R No. 11517/37) respectively.
25. It is the Plaintiff's case that despite paying the purchase price for L.R No. 11517/36 in full and a deposit of Kshs.11 Million for L.R No. 11517/37, the Defendant has in breach of the agreements and without



any justification whatsoever refused and/or failed to perform its part of the bargain and that as a result the Plaintiff has suffered loss and damage.

26. On the part of the Defendant, it is contended there was no such agreement of sale as purported by the Plaintiff and that all that was there was a Letter of Offer dated 10th December, 2012 wherein the Parties agreed to enter into an agreement for sale and purchase of the suit property subject to “Contract by way of a formal Sale Agreement”. It is the Defendant’s case that the Letter of Offer was to remain in force until a written agreement for sale would be negotiated and entered into which would then be binding on the Parties.
27. The Defendant asserted in its pleadings that the Parties never subsequently entered into any written agreement for sale in respect of the properties. It was further the Defendant’s case that the Parties had agreed that the Plaintiff would purchase the first property simultaneously together with L.R No. 11571/36 – A7 failing which the said Letter of Offer would be rescinded.
28. It was the Defendant’s case that it did not on its part execute the Letter of Offer for the collateral contract after the Plaintiff executed the same on 6th May, 2014 and that its failure to execute the same had the effect of terminating the intended sale and bringing the entire process to a close.
29. The Defendant accuses the Plaintiff of failing to accede to the terms contained in the collateral contract and that as a result it was left with no option but to rescind the offer as they did by e-mail on 27th June, 2014.
30. As it were, an order for specific performance is based on the proof of 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 [See Reliable Electrical Engineers Limited -vs- Mantrac Kenya Limited (2006) eKLR].
31. The gist of the Defendant’s pleadings and arguments herein is the contention that there existed a collateral agreement which required the Plaintiff herein to purchase L.R No. 11517/36 alongside L.R No. 11571/37 failing which the Letter of Offer earlier on issued to the Plaintiff would cease to be of any effect and that thence the transaction would be rescinded. It was the Defendant’s position in this regard that the Plaintiff had failed to accede and adhere to the terms of the collateral agreement thereby forcing the Defendant to rescind the initial Letter of Offer as executed by the Parties on 10th December, 2012.
32. A perusal of the said Letter of Offer dated 10th December, 2012 reveals that the same was prepared by the Defendants disclosed agents Messrs Tysons Limited. The same addressed the Plaintiff in the relevant portion as follows:

Re: Offer of L.R No. 11571/6 Sub-Division Plot No. A.7

We have the pleasure to inform you that following recent discussions, our clients have accepted your offer to buy the above mentioned property subject to contract by way of a formal Sale Agreement to be prepared by the Vendor’s Lawyers on the following main terms and conditions and signed by yourself and the vendor:

1. Vendor: Solio Ranch Limited
PO Box 30595 – 00100
Nairobi
2. Purchaser: Mr. James Muchangi Gachemi



PO Box 96 – 10303

Wang'uru

ID/NO. 3185508

3. Agreed Purchase Price:
Kenya shillings: Fifty Million only (Kshs.50,000/-).
4. Payment:
 - (a) You will pay Kshs.10,000,000/- being 20% deposit, upon signing the letter of offer to be held by us as stakeholder pending completion.
5. The sale is subject to a clear title being given by the Vendor to the purchaser, free from all encumbrances.
6. It is understood that you have inspected the property and have agreed to buy it in the condition in which it stands and the Vendor will not be called upon to improve.
7. ...
8. Date of completion:

Please note that the date of completion shall be on or before the end of 60 days from the date of signing of this Letter of Offer, subject to the Vendor availing copies of titles to the purchaser.
9. ...
10. The formal Sale Agreement mentioned above, when executed, will supersede this Letter of Offer' until then the terms of this letter are binding when both Parties have signed it.
11. If you accept the above mentioned terms, please sign and return the enclosed copy of this letter with the 20% deposit.
12. Unless the said deposit is paid within 14 days from the date of this offer, this offer will automatically lapse and the property will be sold elsewhere without further reference to you.

33. From a perusal of page 7 of the Plaintiff's bundle of documents, it was apparent that the Plaintiff executed the Letter of Offer on the same 10th day of December, 2012 agreeing to buy the said property on the said terms and conditions. Below the Plaintiff's signature, one E.J. Partel for the Vendor signed the offer with the remarks:

“I/we agree to sell the above mentioned property on terms and conditions stated.”

34. Testifying at the trial herein the Plaintiff told the Court that as at the time of execution of the Letter of Offer, he paid the requisite Kshs.10,000,000/- to the Vendor's agents and that he thereafter proceeded to complete payment of the balance of the purchase price as agreed in full.



35. In support of that proposition, the Plaintiff has annexed at Pages 8 and 9 of his bundle receipts of payments made to the Vendor's agents. From a perusal thereof, it was again apparent that a month before the transaction, the Plaintiff had on 24th October, 2012 paid a deposit of Kshs.5,000,000/- for the suit property while another sum of Kshs.5,000,000/- was paid on 10th December, 2012 when the Letter of Offer was executed.
36. Arising from the foregoing, it was evident that the Parties had executed the Letter of Offer with the intention that it was binding upon them as stipulated at Clause 10 of the Offer as seen above. It was further apparent from a perusal of Pages 10 to 13 of the bundle that, acting on the Offer, the Plaintiff paid a further sum of Kshs.51,000,000/- in respect of the suit property to the Defendant's agents between 22nd March, 2013 and 28th June, 2013. The Defendant did not deny receipt of the said sums of money.
37. Explaining the reason for the excess payment of Kshs.11,000,000/- to the Defendant, the Plaintiff told the Court that they had subsequently entered into a tentative agreement with the Defendant that he would buy a parcel of land adjacent to the first property being L.R No. 11571/37 and that the sum of Kshs.11,000,000/- was paid on the understanding that it was a deposit towards the same.
38. It was clear from a perusal of the pleadings and the evidence adduced herein that this second agreement is what the Defendant referred to as the collateral agreement which is said to have required the Plaintiff to purchase the first property simultaneously with the said L.R No. 11571/37 (also referred to as L.R No. 11571/36 – A8) failing which the Letter of Offer would be rescinded.
39. From the material placed before me however it was difficult to find the basis for the contention that the sale of the first property was tied to and was conditioned on the purchase of the second adjacent property by the Plaintiff. As can be seen from the Letter of Offer executed by the parties herein and dated 10th December 2012, there was no reference to any other property therein.
40. From the correspondence placed before the Court, it was apparent that having paid the purchase price for the first property and as they waited for the Vendor's Advocates Messrs Kaplan and Stratton Advocates to engross a formal Sale Agreement for their execution, the Plaintiff sometime in 2013 entered into separate and distinct negotiations with the Vendor's agents Messrs Tysons Limited for the purchase of a parcel of land adjacent to the first property and equally measuring 200 acres.
41. That much can be discerned from the Agent's Letter dated 11th September, 2013 addressed to the Vendor's said Advocates wherein they wrote in the relevant portion as follows:

Re: Offer of L.R No. 11571/6 Sub-division Plot Number A8

Area: Parcel Number A8 – 200 Acres

We have negotiated the sale of the above mentioned property belonging to Solio Ranch Limited of P. O. Box 30595 – 00100 Nairobi to Mr. James Muchangi Gachemi of P. O. Box 96 – 10303 Wang'uru at an asking price of Kshs.60,000,000/- (Kenya shillings: Sixty Million Only) and understand that you will be representing the Vendor while the Purchaser will be represented by Wanjiru Wambugu Advocate, P. O. Box 981, Kerugoya, Ushirika Bank House, 3rd Floor, Room 309.

A 10% deposit amounting to Kshs.6,000,000/- (Kenya shillings: Six Million only) has been paid to us which we hold in our Trust Account as stakeholders pending execution of the Sale Agreement.



We enclose herewith a copy of the Letter of Offer duly signed by the Purchaser for you to proceed and prepare the Sale Agreement accordingly and keep us posted of the progress thereof.”

42. As it were, nothing much appeared to have happened between the Parties until sometime in mid-2014 when the Plaintiff’s new Advocates Messrs Glasscoterose Advocates made enquiries via e-mail on the status of the pending matters. On Wednesday 4th June 2014, one Caroline Etyang Advocates being an Associate at Kaplan and Stratton Advocates responded to the Plaintiff’s Advocates enquiries as follows:

“Dear Nicholas,

We refer to your letter dated 21st May, 2014 addressed to Tysons Limited and copied to us. We confirm that we have now received the Letters of Offer in respect of Plots A7 and A8. We shall forward a duly executed copy in due course.

The documents relating to the Vendor as requested in your said letter will also be provided in due course.

We now attach the draft Agreements for your comments and/or approval. These drafts are subject to our clients further comments (if any).”

43. It was apparent that the Letter of Offer referred to in the e-mail had been earlier prepared by the Vendor’s Agents and forwarded to the Plaintiff for execution. This Letter of Offer dated 6th May, 2014 was addressed to the Plaintiff and read in the relevant portion as follows:

RE: Offer of L.R No. 11571/37 – 200 ACRES

We have the pleasure to inform you that following recent discussions, our client has accepted your offer to buy the above mentioned property subject to contract by way of a formal Sale Agreement to be prepared by the Vendor’s Lawyers based on the following main terms and conditions signed by yourself and the Vendor:

1. Vendor: Solio Ranch Limited
PO. Box 30595 – 00100
Nairobi
2. Purchaser: Mr. James Muchangi Gachemi
O. Box 96 – 10303
Wang’uru
3. The Property: Means all that piece of land known as Land Reference number 11571/37 and containing by measurement 200 acres or thereabout.
4. Agreed Purchase price:
Kenya Shillings: Sixty Million (Kshs.60,000,000/-).
5. Payment:
 - (a) You have paid Kshs.11,000,000/- (Kenya shillings: Eleven Million only) being deposit, which is held by us as stakeholders pending completion.



- (b) The balance of the purchase price being the sum of Kenya shillings: Forty Nine Million Only (Kshs.49,000,000/-) by way of RTGS to the Vendor's bank account shall be paid in accordance with clause 8 herein.

Subject to the provisions of clause 14 herein, the deposit received is refundable on demand provided that the purchaser is not in default and will attract no interest. Upon such refund the Purchaser will have no further claims against the Vendor.

6. ...

7. ...

8. ...

9. Date of completion:

Please note that the date of completion of this sale shall be on or before 15th June, 2014 within which period the balance of the purchase price will become payable subject to the Vendor availing the titles to the Purchaser.

10. ...

11. The Agreement for Sale will be executed by the Parties within 14 days of the date of this Letter of Offer and if not so executed by the Purchaser, the offer may be rescinded at the option of the Vendor. ...”

44. As can be seen from Clause 9 of the Letter of Offer, the date of completion for this particular transaction was 15th June, 2014. Apparently upon realization the period remaining to do other things were short and that he may not raise the balance of Kshs.49,000,000/- within the remaining period, the Plaintiff's Advocates responded to the Vendors Advocates e-mail on Friday 6th June, 2014 stating as follows:

Dear Caroline,

Reference is made to the above matter and your e-mail correspondence of the 4th June, 2014; contents thereof are duly noted.

I note to revert shortly with my comments on the draft Agreements shortly. Accordingly, in the interim I humbly request a copy of the Head Title (a scanned copy shall suffice) which I believe is tenable at this point, for my review and records.

Conversely, per my earlier request from the said copied letter (21/5/14) in reference to the second property being purchased (Plot No. A8).

My client seeks an extension of the completion date in reference to receipt of the full purchase price. He humbly requests for a period of sixty (60) days from said completion date with intermediate payment of Kshs.10,000,000/- before the end of this month. We sincerely hope that your client does grant him the said extension noting that my client is fully committed to acquiring the said property.”

45. As it turned out the Defendant's Advocates informed the Plaintiff on 13th June, 2014 that the request for extension of the completion date had been declined by the Defendant. On 19th June 2014, the Plaintiff's Advocates e-mailed the Defendant's Advocates asking them to urgently engross the Agreement in relation to the first property and to send a duly executed copy. As to the refusal of



extension for the completion date for the second property, the said Advocates requested to be given until 20th June, 2014 to get instructions from the Plaintiff and to revert on the same.

46. The matter was however brought to an abrupt close on 27th June, 2014 when Ms Caroline Etyang responded to the Plaintiff's Advocates e-mail as follows:

“Dear Nicholas,

We confirm receipt of your e-mails below.

Our instructions are that the purchaser was to proceed with the purchase of the two properties on the terms of the letters of Offer. Please see the highlighted section of our e-mail of 13th June, 2014. Your e-mail of 19th June, 2014 does not give us confirmation that we may forward to you the engrossments of the two agreements for execution by your client.

Noting the above, we are instructed to, and we hereby do, rescind the offer for the sale to your client, of the two properties being L.R Number 1157/36 (sic) and L.R Number 1157/37 (sic).

Please confirm the account details to which we should remit the funds we are holding in respect of the two properties.”

47. I was however unable to find any factual or lawful basis for the decision taken by the Defendant. As discernible from the two Letters of Offer sent to the Plaintiff by the Defendant, the properties on sale were separate and distinct. The terms and conditions for the sale thereof were equally separate and distinct from each other.
48. In regard to the first transaction, the evidence on record reveals that the Letter of Offer dated 10th December, 2012 was executed by both Parties. While it is true that the same was subject to the Parties entering into a Formal Agreement, Clause 10 of the Letter of Offer was clear that until the Agreement which was to be prepared by the Defendant's Advocates was prepared and executed, the terms of the letter were binding upon the Parties.
49. Unlike the second Letter of Offer, the first Letter did not give room for rescission of the contract by the Defendant as it had purported to do. The only provision giving the Defendant leeway to abandon the contract was Clause 12 thereof which provided that the offer would automatically lapse and that the first property would be sold elsewhere where the Plaintiff failed to pay the 20% deposit within 14 days from the date of the offer.
50. The evidence on record reveals that the Plaintiff duly complied and that as at the date of execution of the offer on 10th December 2012, the Defendant's agents were already in receipt of Kshs.10,000,000/- from the Plaintiff being the equivalent of 20% deposit that was required to be paid in 14 days. Again, it was clear that as at the time the Defendant purported to rescind the contract, it had been in possession of the Kshs.50,000,000/- purchase price for about one full year and that the Plaintiff was all along only waiting for the Defendant's Advocates to avail title documents and the duly engrossed Agreement for his execution.
51. As Judge Alfred Mabeya stated in *Eldo City Limited -vs- Corn Products Kenya Limited & Another* (2013) eKLR;

“... to uphold a position where a party can pull out of a transaction when the Parties are already at consensus ad idem, will not be prudent in the world of commerce. To my mind, that freedom should be limited up to a point the Parties are still negotiating. Once all terms



have been agreed and settled, that freedom should dissipate. Otherwise mischievous Parties with no intention of selling their merchandise may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage. I think that is not to be encouraged.”

52. In the circumstances of this case, it was clear to me that by the Letter of Offer dated 10th December 2012, and the subsequent correspondence between the Parties they had created a legal and binding contract wherein the Defendant had by all purposes and intent sold the first property to the Plaintiff. As Lord Denning M R stated in *Storer -vs- Manchester City Council* (1974) I WLR 1403:

“In contracts, you do not look into the actual intent in a man’s mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: “I did not intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough.”

53. In the matter herein the Parties had not only executed a valid and enforceable Letter of Offer, they had also demonstrated by subsequent conduct and communication that they were bound thereby. There was otherwise no basis for the Defendant to retain the full purchase price for a whole year if they had no intention of proceeding with the sale. Having acted as it did, it was incumbent upon the Defendant to fulfil its part of the bargain under the contract and to transfer L.R No. 11571/36 to the Plaintiff as per the contract between the parties.

54. In regard to the second Letter of Offer dated 6th May 2014, the Defendant did offer to the Plaintiff L.R No. 11571/37 also measuring 200 acres at a consideration of Kshs.60,000,000/-. As at the time the Letter of Offer was prepared by the Defendant’s Agents – Messrs Tysons Limited, it was acknowledged that a deposit of Kshs.11,000,000/- had been paid by the Plaintiff. Under Clause 9 thereof, the Plaintiff was required to pay the balance of the purchase price being the sum of Kshs.49,000,000/- on or before 15th June, 2014.

55. Shortly after executing the Letter of Offer, the Plaintiff’s then Advocates Messrs Glasscoterose Advocates wrote a letter to the Defendants agents on 21st May, 2014 requesting for extension of the completion date as follows:

“We note that the Purchaser has already remitted to yourselves as stakeholders in the transaction a deposit of Kenya shillings Eleven Million (Kshs.11,000,000/) on account of the purchase price. Accordingly, we enclose herewith the duly executed Letter of Offer (in triplicate). Kindly procure the Vendor’s execution of the same and let us have one (1) counterpart of the same for our client’s records and safe keep.

Accordingly, our client humbly requests an extension of time towards the receipt of the balance of the purchase price in the amount of Kenya shillings Forty Nine Million (Kshs.49,000,000/-). The Purchaser requests that the

Vendor does grant him an extension of sixty (60) days from the completion date being the 15th June, 2014. The Purchaser is ready and willing to see this transaction through, noting he had purchased a property of similar dimensions from your client, with this in mind we believe this request is tenable.

Kindly advise if the Vendor is amenable to above and look forward to your timely revert.”



56. As it turned out, the request for extension of time was rejected by the Defendant vide their Advocates e-mail of 13th June 2014, some 2 days to the completion date. That request is what culminated into the decision to rescind not just the rescind the second but both contracts with the Plaintiff on 27th June, 2014 on the purport that the purchases were to be done simultaneously.
57. As it were, the Defendant did not formally execute the Letter of Offer dated 6th May, 2014 and it was their position that the failure to sign had the effect of bringing the entire process to a close and terminating the intended sale. If that were the case, it was difficult to find the basis upon which the Defendant continued to keep the Plaintiff's deposit of Kshs.11,000,000/- towards the purchase of the second property and why they continued to engage the Plaintiff to adhere to the completion date provided in the said Letter of Offer.
58. It was apparent by their conduct and deed that the Defendant considered both the Plaintiff and itself bound by the second Letter of Offer. That must be the basis upon which they sought to rescind the contract on 27th June, 2014. As it were, and as can be seen from Paragraph 43 hereof, it was Clause 11 of the Letter of Offer which gave the vendor the option to rescind the contract. That option was however only applicable from my reading of the clause, where the Defendant had prepared a Sale Agreement and forwarded the same to the Plaintiff and the Plaintiff had declined to execute the same. That was not the case herein as the final Agreement was yet to be forwarded to the Plaintiff for his execution.
59. From my perusal of the material before the Court, I was not persuaded that the Defendant's decision to unilaterally repudiate the contract which it has tacitly acknowledged to exist between itself and the Plaintiff was reasonable and/or justifiable.
60. The evidence before the Court shows that the Plaintiff paid the deposit for the second property in June, 2013 shortly after he commenced negotiations with the Defendant's recognised agent for the purchase of land that was adjacent to the first property. By a letter dated 11th September 2013, the said agents wrote to the Defendant's Advocates Messrs Kaplan and Stratton acknowledging that they have negotiated the sale at Kshs.60,000,000/- and that they already had received the sum of Kshs.6,000,000/- as deposit.
61. While the said Advocates were by the said Letter asked to prepare a Sale Agreement, none was prepared for another eight (8) months when a new Letter of Offer was prepared on 6th May, 2014 requiring the transaction to be completed by 15th June, 2014. From the conduct of the Defendant and/or its agents, there was nothing to demonstrate that time was of the essence in this transaction and/or that failure to comply with the timelines should lead to an abrupt repudiation of the contract between the Parties.
62. As the Court of Appeal stated while quoting from Halsbury's Laws of England, 4th Edition Vol. 9 page 337 in *Gurdev Singh Birdi and Another -vs- Abubakar Madhubuti (1997) eKLR*:
- “The modern law, in the case of contracts of all types may be summarized as follows; Time will not be considered of essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstance show that time should be considered of essence, or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.”
63. In the mater herein, I did not think, given the period it had taken for the second contract to be concluded, that, the request for a sixty (60) day period of extension was unreasonable and that the Defendant was entitled to repudiate the agreement in the manner it had done. Given that the subject



matter of the dispute is a vast parcel of land, I was not persuaded that there was an adequate alternative remedy that would adequately compensate the Plaintiff in the circumstances.

64. It follows that I am persuaded that the Plaintiff has proved his case on a balance of probabilities and that he is entitled to the orders of specific performance sought in the Plaint. Accordingly, and given that there was a balance of the purchase price due to the Defendant for the second property, I hereby order and direct as follows:

- (a) An order is hereby made directing and compelling the Defendant to forthwith execute all documents and do all acts for purposes of completing the contract between the Plaintiff and the Defendant for the sale of the property known as L.R Number 11571/36 and delineated in Survey Plan Number 361443 situate West and South West of Naromoru within Laikipia County;
- (b) Subject to the payment of the sum of Kshs.49,000,000/- within 60 days from today by the Plaintiff to the Defendant, an order is hereby issued directing and compelling the Defendant upon receipt of the said sum from the Plaintiff to forthwith execute all documents and do all acts for purposes of completing the contract between the Plaintiff and the Defendant for the sale of the property known as L.R. Number 11571/37 and delineated in Survey Plan Number 361444 situate West and South West of Naromoru within Laikipia County;
- (c) In default of such payment by the Plaintiff within the said 60 days, the Defendant to forthwith refund the sum of Kshs.11,000,000/- to the Plaintiff being the deposit paid for the suit land together with interest at the then applicable bank rates of 22% per annum effective 27th June, 2014 until payment in full.
- (d) A permanent order of injunction is hereby issued restraining the Defendant from alienating, offering for sale in any manner, disposing off, selling or charging the properties known as L.R No. 11571/36 and delineated in Survey Plan No. 361443 and L.R No. 11571/37 and delineated in Survey Plan No. 361444 situate West and South of Naromoru.
- (e) The Defendant shall pay unto the Plaintiff the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF MARCH, 2023.

In the presence of:

Mr. Wahome Gikonyo for the Plaintiff

Ms. Onyango holding brief for Fred Ojiambo for the Defendant

J. O. OLOLA

JUDGE

