**Chomba & 3 others v Emco Steel Works Limited & another (Civil Suit 1588 of 2000) [2025] KEHC 6538 (KLR) (Commercial and Tax) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6538 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL SUIT 1588 OF 2000**

**A MABEYA, J**

**MAY 23, 2025**

**BETWEEN**

**WAIHENYA CHOMBA ..... 1ST PLAINTIFF**

**DANIEL KAIRU KIARAHO ..... 2ND PLAINTIFF**

**KAMAU MUCUHA ..... 3RD PLAINTIFF**

**LERA ESTATES LIMITED ..... 4TH PLAINTIFF**

**AND**

**EMCO STEEL WORKS LIMITED ..... 1ST DEFENDANT**

**KENYA COMMERCIAL BANK LIMITED ..... 2ND DEFENDANT**

**JUDGMENT**

1. The plaintiffs instituted this suit vide an amended plaint dated 31/3/2009 seeking judgment against the defendants for special damages in the sum of Kshs. 203,678,760.00 as particularized in paragraph 28 of the amended plaint. In the alternative, they sought compensation for expenses incurred and rendered futile by the defendants' breach in the sum of Kshs. 10,249,587.10 as similarly particularized in the amended plaint.

2. The plaintiffs further sought general damages, Value-Added Tax (VAT) and the costs of the suit. They also sought a declaration that there exists a binding contract between themselves and the defendants pursuant to the Sale Agreements dated 4/3/1999. In the further alternative, they prayed for specific performance to compel the defendants, at their own cost, to transfer the subject properties to the plaintiffs.

3. The plaintiffs' case was that, by an agreement in writing dated 4/3/1999, the 1st , 2nd and 3rd plaintiff entered into a contract with the 1st defendant for the purchase of parcels of land known as LR Nos 12891/3, 12891/4, 12891/5, 12891/6, 12891/7, 12891/8, 12891/9, 12891/10, and 12891/11 ("the suit properties"), formerly comprising Original Nairobi L.R. No. 12034 and Nairobi L.R. No. 12247, which had been amalgamated to form LR No. 12891, Nairobi for a consideration of Kshs. 27,817,000/-.

4. They contended that they agreed to the terms of the sale based on a consent granted by the 2nd defendant, as chargee, to the 1st defendant, as chargor, to amalgamate the charged properties, subdivide them into eleven subplots and sell them to the plaintiffs, who had been identified as interested buyers.

5. The 2nd defendant's consent was granted pursuant to the 1st defendant's exercise of its right of redemption under section 60A of the Indian Transfer of Property Act. The plaintiffs contended that this made the 2nd defendant bound to complete the contract with purchasers who were ready, willing and able to proceed and complete the transaction.

6. The plaintiffs contended that the terms of the sale agreement included; the payment of a 10% deposit, completion within 90 days and, the sale being subject to the Law Society Conditions of Sale (1989 Edition). The plaintiffs further posited that to facilitate the project, they incorporated the 4th plaintiff on 15/4/1999, a limited liability company, with the intention of subdividing and selling the subplots.

7. That the 1st defendant was obliged to amalgamate the properties and subdivide them into eleven plots, of which nine were to be sold to the plaintiffs. That the original properties were charged to the 2nd defendant for a loan of approximately Kshs. 55 million and the 2nd defendant was to provide Discharges of Charge for both properties to enable the registration of the transfers. That in accordance with the arrangement, the 2nd defendant's advocates received and conditionally released the title documents to the 1st defendant's advocates, contingent upon the plaintiffs' professional undertaking to pay specified sums upon registration of the relevant transfers and charges.

8. That despite the arrangements, by a letter dated 25/11/1999, the 2nd defendant's advocates wrongfully demanded the return of the documents thereby disrupting the intended completion process.

9. That by a letter dated 4/2/1999, the 2nd defendant made representations upon which the plaintiffs relied on. These included promises that, upon the plaintiffs' professional undertaking, the 2nd defendant would consent to the amalgamation and subdivision of the properties, release the title documents and discharge of charge and maintain these documents until the conveyance was completed.

10. That the 2nd defendant's actions, including withholding documents, causing delays and demanding the return of the titles amounted to misrepresentation, malice and/or fraud, which subjected the plaintiffs to substantial financial loss and distress.

11. That as a result of these actions, the plaintiffs had suffered damages and losses which they claimed, including special damages for expected gross sales of Kshs. 335,140,000/- from the subdivision of the properties with the total development costs projected at Kshs. 123,502,240/- yielding an estimated net profit of Kshs. 203,678,760/-.

12. In opposition to the suit, the 1st defendant filed an amended defence dated 17/4/2009. It contended that, at the time the sale agreement was executed, the subject properties had already been amalgamated and subdivided contrary to the plaintiffs' suggestion that these steps were to follow as part of the transaction.

13. It acknowledged that the title documents were recalled by the 2nd defendant's advocates, Rachier & Company, on 9/7/1999 and were returned on 13/7/1999. That an undertaking given by Kaplan & Stratton Advocates on 30/8/1999 was conditional upon receipt of funds from Musyimi & Company Advocates and Barclays Bank of Kenya.

14. It confirmed that the title documents were re-released to its advocates a second time, subject to the payment of Kshs. 2,781,700/- to Rachier & Company within seven days of confirmation that the relevant transfer had been registered. It maintained that it was at all material times ready and willing to complete the transaction, and that the failure to do so arose solely due to the 2nd defendant's refusal to execute the discharge and its demand for the return of the title documents. It disputed that the plaintiffs had suffered any damages.

15. It contended that the plaintiffs were aware that completion of the transaction was contingent upon the consent and cooperation of the 2nd defendant as chargee. Relying on Clause 10(h) of the Sale Agreement, the 1st defendant contended that the plaintiffs' deposit, together with accrued interest, was returned to their advocates thereby releasing the 1st defendant from further obligations under the contract.

16. That having accepted the return of the deposit, the plaintiffs were estopped from pursuing the current claim. It challenged the plaintiffs' claims for damages and other reliefs and asserted that no liability arose on its part in the circumstances.

17. The 2nd defendant opposed the suit through a defence dated 3/10/2000. It contended that it was neither aware of nor party to the agreement entered into between the plaintiffs and the 1st defendant. That it was not privy to the arrangement as described by the plaintiffs and distanced itself from any alleged obligations arising therefrom.

18. It acknowledged that certain documents were forwarded to its advocates, Rachier & Company Advocates but it refuted the suggestion that this was done in furtherance of any agreement dated 4/3/2000 or in a manner inconsistent with its rights and interests as Chargee.

19. It admitted that some documents were transmitted but that the professional undertaking given by Kaplan & Stratton Advocates, upon which the plaintiffs rely, was in fact withdrawn prior to the completion of the transaction. That although it took steps to protect its interests in the charged properties, those steps were never intended to create a binding arrangement with the plaintiffs.

20. That the plaintiffs had no enforceable rights from the lending relationship between the 1st and 2nd defendant. That the consent granted by the 2nd defendant to the amalgamation, subdivision and sale of the properties was expressly conditional, aimed solely at preserving its security interests.

21. It denied making or authorizing any representations or assurances to the plaintiffs regarding the completion of the transaction. That the plaintiffs were not entitled to restitution or compensation as their activities in relation to the charged properties amounted to trespass.

22. At the hearing, the plaintiffs called four witnesses in support of their case, while the defendants each called two.

23. (PW1), David Njuguna Kiaraho, an architect by profession, adopted his witness statement dated 13/1/2017 and produced a supplementary bundle of documents dated 23/10/2018. He told the Court how he was approached by the plaintiffs to provide architectural services for the development of various parcels of land described as L.R. Nos. 12891/3, 12891/7, 12891/8, and 12891/9 situated along Komarock Road. Pursuant thereto, he developed several building prototypes, including

maisonettes, bungalows and flats. He stated that the projected construction cost was approximately Kshs. 1,016,788,695/-.

24. In cross-examination, he admitted that the claim for Kshs. 13,816,223/- was a mere estimate and no concrete documentation of payments was provided. He confirmed that the plaintiffs' exhibit largely comprised architectural drawings, with no proof of payments rendered. That the relevant planning approvals had been granted prior to his official engagement and that he was unaware of the exact date of the sale agreement between the plaintiffs and the 1st defendant.

25. PW2, Kamau Mucuha, similarly adopted his witness statement dated 13/1/2017. He reiterated the background to the dispute emphasizing that the 2nd defendant had recalled title documents from the 1st defendant's advocates and, despite being aware of the plaintiffs' intention to finalize the transaction, failed to cooperate. That the plaintiffs relied on the representations made by the bank.

26. In cross-examination, he admitted that the Sale Agreement dated 4/3/1999 had not been signed, yet the plaintiffs had proceeded to incur expenses. He acknowledged that the professional consultants were engaged independently and could not recall whether the deposit paid was eventually refunded. He also failed to produce any documentary evidence of payments made for preparatory works, such as road clearing. Further, he could not demonstrate any legal or managerial connection to the 4th plaintiff company.

27. PW3, Daniel Kiaraho, adopted his statement dated 13/1/2017. He testified that the plaintiffs had fully complied with their obligations under the Sale Agreement, including efforts to amalgamate and subdivide the property. That the transaction was ultimately frustrated by the failure of the 1st and 2nd defendant to facilitate completion, particularly the refusal by the 2nd defendant to discharge the charge over the property.

28. In cross-examination, he conceded that the deposit was refunded along with some interest as provided under the agreement. He admitted that the plaintiffs never obtained ownership of the property and were not granted permission to develop it. He also acknowledged that the funds had remained in their advocate's account during the pendency of the transaction. That no obligation was placed upon the bank to act in a particular manner and that the planning approvals had predated the Sale Agreement.

29. On re-examination, he insisted that the bank's letter dated 7/12/1999, in which it withdrew support for the transaction, was a critical turning point that ultimately frustrated the deal.

30. PW4, Kenneth Mwangi, an accountant adopted his statement dated 13/1/2017 and told the Court that he had been engaged to prepare cash flow projections for the intended development. According to his projections, the plaintiffs stood to earn a surplus of Kshs. 185,108,000/- from the subdivision and sale of the plots. That the figures were based on market values at the material time. However, he could not produce contracts with potential buyers or supporting financial documents to support these projections.

31. In defence, DW1, Sampath Krishna, adopted his witness statement dated 24/3/2017 and produced a bundle of documents dated 18/10/2017. He testified that the agreement provided for a refund in the event the sale did not proceed. Since the sale had collapsed, the plaintiffs were refunded upon demand. He denied any liability for the plaintiffs' expenses and stated that the 1st defendant refused to pursue any claims against the bank, prompting the plaintiffs to enjoin them in this suit.

32. In cross-examination, he stated that attempts were made to obtain a discharge from the 2nd defendant, which were unsuccessful. That the sale failed due to the bank's decision to recall the title documents, not due to any default on the part of the 1st defendant.

33. D2W1, Nancy Gaitho, adopted her witness statement dated 14/11/2023 and produced a bundle of documents dated 18/2/2000. She confirmed that the property was charged to the bank under a facility extended to the 1st defendant. That while the 1st defendant had expressed its intention to sell a portion of the charged property, the bank had required professional undertakings and a bank guarantee as conditions for releasing the title documents.

34. That although some undertakings were provided, the bank later recalled the documents due to unresolved issues relating to the underlying loan and terms of discharge. That there was no direct contractual relationship between the plaintiffs and the bank. On re-examination, she emphasized that the transaction failed because the bank's conditions for discharge were not met and the professional undertakings did not satisfy all stakeholders.

35. I have considered the pleadings, the evidence adduced during the hearing, the submissions by Learned Counsel as well as the authorities cited. The issues that arise for determination are; whether the actions of the 1st defendant led to a breach of contract which caused the plaintiffs financial loss, whether the actions of the 2nd defendant amounted to unlawful interference with the plaintiffs' contractual rights, whether the plaintiffs are entitled to specific performance, damages for loss of profits, or injunctive relief in the circumstances of this case and, who bears the costs of the suit.

36. On the first issue, it is not in dispute that the plaintiffs and the 1st defendant entered into a Sale Agreement dated 4/3/1999. The terms of the contract were that the plaintiffs would purchase nine sub-divided plots carved out of L.R. No. 12891, which was an amalgamation of L.R. Nos. 12034 and 12247. The consideration for the transaction was agreed at Kshs. 27,817,000/-, with the plaintiffs required to pay a 10% deposit and the balance upon completion within 90 days. The transaction was subject to the Law Society Conditions of Sale (1989 Edition), and other terms as agreed in the correspondence and professional undertakings exchanged between the parties' advocates.

37. It was the plaintiffs' case and testimony that their contractual obligations were complied with and they were ready and willing to complete the sale but were prevented to do so due to the 1st defendant's failure to effect the discharge of the charge and further facilitate the registration of the transfers.

38. On its part the 1st defendant admitted to the existence of the agreement and acknowledged receipt of the deposit. It contended that when it was clear that the sale was frustrated, the deposit was refunded upon request by the plaintiffs. That the sale could not proceed due to factors beyond its control.

39. From the evidence on record, particularly the testimonies of PW3 and DW1, it was apparent that the 1st defendant made effort to obtain the discharge from the 2nd defendant and to proceed with the registration of the transfers. The record demonstrates that on numerous occasions, the 1st defendant through its advocates engaged the 2nd defendant on the process of discharge. However, there seemed to have been unresolved issues between the 1st and 2nd defendant that led to stalemate between the two on the discharge of charge.

40. There was no evidence to show that the 1st defendant acted in bad faith, misrepresented its position or intentionally breached the contract. Rather, the breakdown of the transaction appears to have stemmed from the failure to obtain the necessary discharge from the chargee bank, which was a condition precedent for completion and a matter largely outside the 1st defendant's direct control.

41. In Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another (2014) eKLR, the Court of Appeal stated: -

> " This now leads us to the issue of whether the agreement was genuinely frustrated. In Halsbury's Laws of England, Vol. 9(1), and 4th Edition at paragraph 897:-
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> > " As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.'
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> In the case of;- Davis Contractors LTD -vs- Farehum U.D.C, (1956) A.C 696, Lord Radcliffe at page. 729 held:
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> > " ... frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do".

42. In the present case, the agreement between the plaintiffs and the 1st defendant failed because of the failure to procure the discharge of charge. Those were circumstances which were well beyond the control of the 1st defendant. The 1st defendant's inability to perform did not arise from any fault or election on its part. There is no evidence to suggest that the 1st defendant had control over the 2nd defendant's decisions or that it acted in bad faith. The Court therefore finds that the actions of the 1st defendant did not amount to a breach of contract but that the contract, if any, was frustrated by the failure of discharge of charge.

43. The second issue was whether the actions of the 2nd defendant, as chargee, amounted to unlawful interference with the plaintiffs' contractual rights. The plaintiffs contended that the 2nd defendant, as the chargee of the suit property, wrongfully interfered with a valid sale agreement between them and the 1st defendant. According to them, the bank had initially given conditional consent for the sale by

agreeing to release the title documents through its lawyers. However, it later recalled those documents and refused to discharge its charge over the property, which in the plaintiffs' view led to the collapse of the transaction. To them, this was a clear interference with their vested rights.

44. On its part, the 2nd defendant contended that it was never a party to the agreement between the plaintiffs and the 1st defendant. and therefore had no legal obligations to the plaintiffs. It acknowledged that it had engaged in discussions and had allowed conditional release of documents, but that this was subject to several conditions including full payment of the purchase price, registration of a fresh charge and various professional undertakings, some of which were never satisfied.

45. From the evidence on record, the property was still under a charge in favour of the bank when the plaintiffs and the 1st defendant entered into their transaction. This meant the sale couldn't be completed unless the bank agreed to release the title something it was entitled to control as the chargee. The letter from the bank dated 4/2/1999 outlined its conditions, which included a bank guarantee from the plaintiffs' side, proper registration of the new titles, and undertakings from the 1st defendant's lawyers.

46. DW2 testified that the bank only recalled the documents when it became clear that its conditions had not been fully met. It also raised concerns about changes to an earlier loan agreement which had not been resolved. Nothing in the evidence suggested that the bank acted out of spite or tried to deliberately sabotage the transaction. In the end, there was no proof that the bank had made any firm or unconditional promise to the plaintiffs to complete the sale or release the titles. The bank was simply protecting its own interest as a lender, which it had every legal right to do.

47. In this regard, the court finds that the 2nd defendant did not unlawfully interfere with the sale agreement. It was not a party to the transaction and it only acted to safeguard its security over the property. The plaintiffs did not establish any wrongful conduct on the part of the bank. For these reasons, the claim against the 2nd defendant cannot succeed.

48. The last issue is whether the plaintiffs are entitled to specific performance, damages for loss of profits or injunctive relief in the circumstances of this case.

49. Firstly, the court is to determine whether the plaintiffs are entitled to the prayer of specific performance. In Amina Abdulkadir Hawa v Rabinder Nath Anand & Another [2012] eKLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028, where the authors observe as follows: -

> " Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles ... specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party ... severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant

rather than the subject matter of the contract and for which the claimant is in no way responsible."

50. PW1 told the Court that the plaintiffs were willing to complete the agreement. He also acknowledged that the deposit and commission were refunded in accordance with the terms of the agreement. That the plaintiffs were compensated to the extent permitted by the agreement itself.

51. The plaintiffs having been discharged from the agreement, the court finds that the prayer for specific performance cannot stand. The Court has considered the time passage as well as the possibility that the property may no longer be suitable or available for the intended development, specific performance is not a practical remedy. In any event, there was no evidence that the 2nd defendant's Charge had been discharged.

52. On special damages, the plaintiffs pleaded a sum of Kshs. 203,678,760/- said to represent projected profits from the proposed development and sale of the subdivided plots. In the alternative, a sum of Kshs. 10,249,587.10 was claimed for expenses incurred in the preparation for the project.

53. It is trite law that special damages must not only be specifically pleaded but must also be strictly proved. In this case, while the plaintiffs did present some documentation and oral testimony regarding development-related costs and plans, much of the evidence was either unsubstantiated or contained mere. It lacked supporting documentation such as receipts, or payment confirmations.

54. PW1 admitted under cross-examination that the amount claimed was an estimate and that no proof of full payment had been provided. Similarly, there was no verifiable evidence of actual construction or development on the land, nor confirmation that the plaintiffs were lawfully in possession or authorized to undertake the development.

55. The claim of Kshs. 203,678,760, being anticipated profit from an unrealized future development, is inherently speculative and not capable of strict proof. These projected profits cannot form the basis of special damages unless grounded in clear, concrete evidence such as pre-signed contracts with buyers, or detailed expenditure all of which were not furnished in this case.

56. On the alternative claim of Kshs. 10,249,587.10, the same standard applies. While the plaintiffs contended that these were expenses incurred towards planning, approvals and preliminary works, the evidence adduced did not meet the threshold for strict proof. There was no proof of these costs being incurred. Some of them were said to have been incurred even before the agreement was entered into.

57. In the absence of sufficient evidence to verify and quantify the losses claimed, this Court finds that the plaintiffs did not prove their claim for special damages to the required legal standard.

58. Regarding the orders sought to stop the defendants from selling or dealing with the property, the Court notes that injunctive relief is meant to preserve the status quo in situations where a party's legal rights are in danger. Here, the Court has found that the plaintiffs have not established any enforceable right to the land in issue.

59. Accordingly, the Court finds that the plaintiffs have not proved their case to the required standard and their suit is therefore dismissed with costs to the defendants.

It is so decreed.

**DATED AND DELIVERED AT KISUMU VIRTUALLY THIS 23RD DAY OF MAY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**