



**Mureithi t/a PK Mureithi & Co Advocates v Kibe & another (Commercial Suit E421 of 2020) [2025] KEHC 6844 (KLR) (Commercial and Tax) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6844 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E421 OF 2020**

**RC RUTTO, J**

**MAY 16, 2025**

**BETWEEN**

**PATRICK KIMITI MUREITHI T/A PK MUREITHI & CO  
ADVOCATES ..... PLAINTIFF**

**AND**

**ROSE WANJIRU KIBE ..... 1<sup>ST</sup> DEFENDANT**

**NANCY NYOKABI KIBE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Plaint dated 12<sup>th</sup> October, 2020, the Plaintiff brought this suit seeking orders that judgment be entered as follows;
  - a. Specific performance of the agreement dated 12/4/2018.
  - b. ...(Spent)
  - c. An order for sale by public auction of property L.R. No. 5973/240 in Kaiya Estate, Kiambu and any other property owned by the estate of the late David Waweru Kibe for the recovery of advocate fees owed to the plaintiff of Kshs.30,600,000/= plus the costs of the suit and the balance of the proceeds from the sale be remitted to the Estate of the late David Kibe Waweru.
  - d. Compound interest on (c) above at the rate of 12% per annum from the date of filing this suit until payment in full.
  - e. Damages for breach of contract plus compound interest on the said damages at the rate of 12% per annum from the date of judgment until payment in full.
  - f. Any other relief or order as this Honorable Court may deem fit.



- g. Costs of this suit plus compounded interest on the said costs at the rate of 14% per annum from the date of filing this suit until payment in full.
2. The Plaintiff's case is that, in Succession Cause No. 2521 of 2009, the High Court, while confirming the grant, directed that L.R. No. 5973/240 Kaiya Estate in Kiambu (hereinafter referred to as "the suit property"), which forms part of the Estate of the late David Kibe Waweru, be sold. The proceeds from the sale were to be used to settle the Advocates' costs, with the remaining balance remitted to the Estate of the deceased. The Defendants, as administrators of the Estate, were responsible for executing this directive.
  3. That by an agreement of costs dated 12<sup>th</sup> April, 2018 (herein the agreement) between the Plaintiff and Defendants, the Defendants agreed to pay the Plaintiff Advocates fees charged at Kshs.35,000,000/= wherein Kshs.5,000,000/= was paid as partial deposit and a further Kshs. 5 million was paid upon sale of L.R. No. 209/136/21, Nyamakima. That cumulatively, only a deposit of Kshs.10,000,000/= was paid and the balance of Kshs.25,000,000/= was to be paid from the sale of the suit property which remained unsold to date.
  4. It was also contended that the Defendant's intended to sub-divide the suit property into 11 plots to frustrate the agreement and were thus in breach of the agreement. That the Defendants had made no efforts to sell the suit property thus frustrating the Plaintiff. The Plaintiff thus sought Kshs.30,600,000/= being the fees balance owing of Kshs.25 million plus VAT of Kshs.5,600,000/=.
  5. The Defendants filed a joint statement of defence dated 17<sup>th</sup> December, 2020. It was admitted that they were indeed the administrators of the Estate as alleged and also admitted that the suit property was to be sold and proceeds used to partly settle the Plaintiff's costs. It was stated that save for the deposit of Kshs.10 million, no further payment had been made as the property was yet to be sold. It was however contested that Kshs.35 million indicated in the agreement was inclusive of VAT.
  6. The Defendants denied that the sub-division of the suit property was intended to frustrate the terms of the agreement herein. They contended that the agreement did not restrict the Defendants from sub-dividing the property thus there was no breach as such sub-division would benefit the Plaintiff. All allegations of breach were denied and it was averred that the Defendants were making all efforts to find a buyer for the property in order to pay the outstanding Kshs. 25 million. It was contended that the suit disclosed no reasonable cause of action and was meant to intimidate the Defendants. The Defendants maintained that the Plaintiff was undeserving of the orders sought and averred that sale by public auction would be detrimental to both parties.
  7. The Plaintiff filed a Response to the defence dated 2<sup>nd</sup> February 2021 wherein he maintained his case and further averred that the costs were exclusive of VAT and he was entitled to Kshs.5,600,000/= VAT. He added that the survey plan in the Plaintiff's list of documents was evidence that the Defendants intended to sub-divide the property.
  8. The matter proceeded for hearing on 7<sup>th</sup> October 2024 whereby each party called one witness in support of their case.
  9. PW1, the Plaintiff himself, adopted his Witness Statement dated 12<sup>th</sup> October, 2020 through which he maintained his case as summarized above. He also produced the Plaintiff's list of documents dated 12<sup>th</sup> October 2020 as PEXH 1-6. He added that the Court in Misc. Civil Application No. 84 of 2009 upheld the validity of the agreement vide a Ruling dated 21<sup>st</sup> November, 2019 yet years later, the sale of the suit property had not been done contrary to the High Court orders in the succession cause. He testified that he risked losing the balance of the legal fee totaling to Kshs.25 million and that the



Defendants ignored all requests for a status update and had not made any attempt to pay for more than six years necessitating the filing of this suit.

10. During cross-examination, he testified that the property had not been sold within a reasonable time and the Defendants were in breach of the agreement due to unwillingness to sell the suit property despite having sold other properties and failing to pay the balance. That though the agreement did not provide for compound or any other interest, the same was awardable. That the letter dated 24<sup>th</sup> February, 2022 by Pam Holding Properties, in the Defendant's documents was not signed and did not indicate the writer. That though the Defendants had not disputed the agreement, they could not hold on to it as it would expire after six years thus the Plaintiff was enforcing it.
11. In re-examination, he confirmed that he demanded a status update and payment vide demand dated 6<sup>th</sup> February 2020, and sent another letter dated 2<sup>nd</sup> July 2020 and none of these letters was responded to, thus the filing of this suit. That he had never received any updates regarding Pam Holdings or sale of the property. He testified that he sought sale by public auction and that the suit be allowed as per the prayers sought. That marked the close of the Plaintiff's case.
12. DW1, was the 2<sup>nd</sup> Defendant herein and appeared on behalf of all the Defendants. She relied on her witness statement as her examination in chief and also produced the Defendants' list of documents dated 7<sup>th</sup> June 2021. Vide her statement, she testified that the Defendants appointed the Plaintiff to handle the deceased's affairs and entered into the subject agreement dated 12<sup>th</sup> April, 2018 with respect to payment of the Plaintiff's fees. That the agreement provided that Kshs.35 million was all inclusive and they proceeded to pay Kshs.10 million in two equal deposits, and the balance of Kshs.25 million was to be paid upon sale of the suit property. That the Plaintiff was always aware that the property was yet to be sold vide letters dated 2<sup>nd</sup> July, 2020 and 20<sup>th</sup> July 2020.
13. That despite all efforts, the Defendants were yet to find a buyer, more so due to the effects of the Covid-19 pandemic. That the balance was only Kshs.25 million and not the claimed sum of Kshs.30,600,000/= noting that the agreed fees of Kshs35 million was all inclusive. That the claim for breach was not supported by particulars and upon request for particulars, via a letter dated 17<sup>th</sup> December, 2020, the Plaintiff failed to give a satisfactory response to the request. That the intention to sub-divide the property did not amount to breach as the agreement did not bar sub-division and it was a quicker way to find a suitable buyer, though the Plaintiff was at liberty to recommend a buyer. That there was no basis to grant the orders sought and an auction sale was prejudicial. She also testified that the Defendants were willing to pay the Plaintiff as per the terms of the agreement.
14. In cross-examination, DW1 admitted that the Plaintiff had offered legal service for several years and that the subject agreement was valid having been entered around six years ago. That the Defendants hired Palm Holding in February 2022 in an attempt to sell the property then Covid-19 hit and they were not able to sell the suit property. She conceded that she had not produced any correspondence with the Plaintiff to communicate updates and stated that they used to converse on phone. She testified that the land was going through mutation to enable the Defendants sell the same in smaller chunks and the Plaintiff was well aware of the sub-division.
15. In re-examination, DW1 testified that the Plaintiff filed a sub-division plan of the suit property in court and was well aware of it. That the Plaintiff did not raise any issue with Pam Holdings when the Defendants attempted to sell through them. She added that the Defendants were willing to pay the Plaintiff once the sale was completed. She closed the defense case at that point.
16. Parties were directed to file written submissions. The plaintiff filed his dated 11<sup>th</sup> November, 2024. The Defendants' submissions were however not on record when this Court retired to write the judgment.



17. In support of his case, the Plaintiff framed two issues for determination, being: whether the Defendants had breached the agreement for costs, and whether the orders sought could be granted.
18. It was submitted that since 2018, the Defendants had failed to sell the suit property and settle the uncontested balance of Kshs. 25 million and had failed to provide any evidence of any efforts to settle the property. That the letter dated 24th February 2022 was contested as it was not signed by the author, and further, the letter reveals that the company was to market the property in 2019/2020. That 4 years later, there was no evidence of efforts to sell the suit property. It was also submitted that there was no contract or marketing strategy produced to proof that there was an effort to sell. The Plaintiff relied on Halsbury's Law of England (4<sup>th</sup> ed) Vol 9 Para 481, P. 338 to buttress that the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of essence, and a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.
19. It was further submitted that the intended sub-division of the suit property would invalidate the terms of the agreement for costs which provided for the sale of the 4.1 acres portion of land. That the same was not to be inherited by the beneficiaries of the Estate as it was to be sold and proceeds used to cater for legal fees owing from the Estate thus the Defendants ought not to benefit from the sale. That the sub-division was thus tantamount to breach of the agreement as such action was without regard to the agreement. That there was further breach by failing to sell the suit property within a reasonable period to pay the Plaintiff's costs as agreed.
20. The Plaintiff submitted that as per Section 4 (1) of the *Limitation of Actions Act* Cap 22, the agreement had a six-year life span which was almost over and he would suffer irreparable damage if the agreement was not enforced by this Court. He also submitted that the value of the balance was depreciating with time and owing to the breach of the agreement, the Plaintiff ought to have been compensated by way of costs and interest.
21. As to whether the orders prayed for were award-able, it was submitted that specific performance was award-able as damages were not adequate remedy. The Plaintiff relied on *Reliable Electrical Engineers Ltd v Mintrac Kenya Limited* [2006] eKLR to buttress his case that the agreement for costs was valid and any award could only be above Kshs.30,600,000/= and the value lost over the last six years ought to be awarded too. That unless specific performance was awarded, the agreement would be rendered redundant upon expiry of the six-year limitation period. He also cited the case of *Willu Kimutai V. Michael Kibet* [2018] eKLR in that regard. He urged that not difficulty or hardship would be faced by the Defendants and an order for specific performance was in their favor as they were unable to sell the subject property.
22. As regards the order for sale of the suit property by public auction, the Plaintiff submitted that the Defendants admitted that they had been unsuccessful in securing a buyer for the suit property and had initiated sub-division of the property in an attempt to sell it. That such sub-division would invalidate the agreement as it would interfere with the terms therein. That sale by public auction was therefore in the interest of all parties as the Defendants were unable to sell the property and would suffer no prejudice should the property be sold by way of public auction.
23. As for the prayer for damages, it was submitted that the award for damages was a principle remedy under common law for breach of contract to compensate the injured party for the loss suffered as a result of the breach and the same was awardable in the instant suit. That all the ingredients for an award for damages had been met including that there was an existing contract, there was breach of contract, and the Plaintiff had suffered loss as a result of the breach. The Plaintiff relied on *Postal Corporation of Kenya v Gerald Kimondo Njuki T/A Geka general Supplies* NRB CA Civil Appeal No. 65 of 2019



[2021] eKLR to buttress the point that the purpose for damages was to mitigate the loss and put the claimant in the same position he would have been if the breach complained of had not occurred.

24. In conclusion, the Plaintiff submitted that costs follow the events thus the Defendants ought to be ordered to bear the costs of the suit.

### **Analysis and Determination**

25. I have considered those submissions alongside the pleadings, evidence and submissions before me. The main issue for determination is whether the plaintiff is deserving of the orders sought. More specifically, whether orders for specific performance, orders for damages, and orders authorizing sale by public auction ought to issue.
26. There are various uncontested facts in the instant case. It is an uncontested fact that the High Court in Succession Cause No. 2521 of 2009 ordered that the subject property being L.R. No. 5973/240 Kaiya Estate be sold and the proceeds be used to pay the Plaintiff's legal costs and balance be remitted to the Estate of the deceased. It is also not contested that the parties entered into an agreement for costs dated 12<sup>th</sup> April, 2018 wherein the Defendants agreed to pay the Plaintiff's legal fees of Kshs.35 million. It is further uncontested that the Defendants paid Kshs.10 million deposit leaving a balance of Kshs.25 million which was to be paid after the sale of the subject property. Moreover, it is not in contest that vide a Ruling delivered on 21<sup>st</sup> November, 2019 in Miscellaneous Cause No. 84 of 2019, the Court upheld the validity of the agreement of costs and found that the same was a retainer agreement as per Section 45 of the *Advocates Act*, Chapter 16 Laws of Kenya.
27. When the matter came up for hearing, the Defendants did not deny that the balance of Kshs.25 million was owing to the Plaintiff but they maintained that they had not been able to find a buyer since the time the agreement was entered, and they were now in the process of sub-dividing the subject property and sell it as smaller chunks.
28. The Plaintiff took issue with such sub-division stating that it violated the agreement as the subject property was to be sold as 4.1 acres. The Plaintiff also maintained that the agreement was approaching its life span of six years and the Defendants had not shown any willingness to sell the property such that upon expiry of the limitation period, the Plaintiff would remain with a redundant agreement that could not be enforceable. This Court was asked to order specific performance by ordering sale of the subject property by way of public auction. The Defendants' case was that there was no specific time stipulated in the contract thus there was no breach by failure to have sold the subject property by now.
29. Regarding making time of the essence in contracts, Halsbury's Laws of England (4th Edition) Vol. 9 at paragraph 481 elucidates as follows: -

“The modern law, in the case of contracts of all types may be summarized as follows.

Time will not be considered to be of the 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 circumstances show that time should be considered to be of the essence; or
- (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.”



30. It is not in dispute that the agreement did not expressly provide for timelines, however, taking into consideration the nature of the contract and the surrounding circumstances of the case, it is not far fetched to have expected that time was of the essence. It was not in contest that the Plaintiff had offered the Estate of the deceased legal services up to 2018. DW1 did not deny this fact and she admitted that the Plaintiff offered legal services to the Estate for a couple of years. She also confirmed that the Plaintiff was to be paid from the proceeds of the sale of the subject property. It was expected that the legal work done would have been paid for immediately upon sale of the property as the legal services had been rendered to completion.
31. It is not reasonable or just to imagine that six years down the line, the Defendants would still not have performed their part of the contract. I say so noting that the grant in the Succession Cause had been confirmed and distribution was underway. PW1 testified that the Defendants had sold off other properties owned by the Estate but for the subject property. The Defendants did not deny this allegation. Was there good faith on the part of the defendants?
32. DW1 testified that they had attempted to sell the property but could not find a suitable buyer. Though DW1 blamed the COVID-19 pandemic for the delay in the sale, the Court take note that the pandemic started in 2020. The instant agreement was entered into on 12<sup>th</sup> April 2018. Thus, it is clear that the Defendants had made no efforts in the preceding two years to sell off the property.
33. The Defendants also relied on the unsigned letter dated 24<sup>th</sup> February 2022 allegedly from Pam Golding Properties which advised that the land would be more marketable if sold in smaller chunks of land. I do agree with the Plaintiff's submission that the letter was unsigned by the author and therefore unreliable. Be that as it may, the letter was dated 24<sup>th</sup> February, 2022. It was not clear what steps the Defendants took having been so advised that sale by smaller chunks was more effective.
34. Moreover, despite knowing their obligations under the agreement for costs, the Defendants remained silent and there was no evidence of communication with the Plaintiff regarding the difficulty in selling the land or the advice to sell the same in smaller chunks. From PW1's evidence, he found out that the Defendants were intending to sub-divide the same and he took issue with this submitting that the sub-division was tantamount to breach of the agreement which provided for sale of the 4.1 acre subject parcel of land. I have perused the agreement and I note that the agreement only provided for sale of the land without going into further details.
35. I have also looked at the proposed sub-division and survey plan of the subject property produced before this Court. Though DW1 testified that according to that document, the Plaintiff applied for the sub-division, this Court found the same to be untrue. There is nothing in that document that showed that the Plaintiff applied for the sub-division and survey plan. More importantly, the plan is dated July 2018. This signifies two things: first, that even before the unsigned letter from Pam Holding was sent to the Defendants in 2022, the Defendants had already begun the sub-division process. Secondly, the sub-division idea was not a result of the alleged advise from Pam Holding.
36. There was also nothing offered by the Defendants to show how far the sub-division had gone and whether there was any chance of completion in the near future. The Defendants instead relied on that single document which revealed that the process begun in July 2018. Why had it not been completed almost seven years later when it was stated that it would result in quick disposal of the property? Did the Defendants ever follow through the process? What was the status of the sub-division? The Defendants did not clarify any of these questions and this could only lead to one conclusion: that there was no effort to sell the subject property and use the proceeds to settle the admitted balance of Kshs. 25 million owing to the Plaintiff.



37. Considering the foregoing, I do find that even where it was expected that performance would have been completed within a reasonable time considering that the Plaintiff had offered legal services to the Estate of the deceased to completion, the Defendants failed to perform their part of the contract and were therefore in breach of the agreement. It must be noted that even when the Plaintiff attempted to rescind the contract and pursue taxation proceedings, the Defendants vehemently fought the Plaintiff's Bill of Costs and successfully argued that the agreement constituted a retainer agreement and was thus valid. Despite the win, the Defendants still continued to hold on to the agreement without making any attempt to sell the subject property.
38. It is thus safe to conclude that the Defendants did not have the intention or good will to sell the property and settle the Plaintiff's legal fees, even after successfully fighting the alternative recovery mechanism that the Plaintiff had sought to pursue through taxation.
39. As regards whether notice was sent to the Defendants so as to make time of the essence under the agreement, I do note that according to the conditions set out in Halbsury's as quoted above, the party aggrieved by inordinate delay ought to give notice to the party causing the delay so that time can be regarded to be of essence.
40. In *Aida Nunes v John Mbiyo Njonjo and Charles Kigwe* [1962] 1 EA 88 the Court pronounced itself as follows: -
- “When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is the essence, it is clear that, at least in contracts relating to the sale of land and the grant of leases, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence.”
41. In *Simpson v. Connolly* (4), [1953] 2 All E.R. 474, Finmore, J., stated at p. 476 in relation to contracts for the sale of land: -
- “The purchaser or vendor cannot just say: ‘The time has gone and the contract is at an end’. Some kind of notice must be given or what has been called in this case an ultimatum to say that: ‘After a certain time if you do not complete this matter we shall treat the contract as at an end’. No such ultimatum was given in this case, and, therefore (it is argued), when the plaintiff said to the defendant in July that he was no longer bound by this agreement, whatever it was, he was acting wrongly, because he had not the power to do so.”
42. I do note that the contract between the parties herein did not relate to a land contract thus the strict requirement for notice was not applicable. Even then, the Plaintiff issued a 14 days-notice to the Defendants vide the letter dated 2<sup>nd</sup> July 2020 demanding to know the status of the sale of the subject land failure to which he would file a suit for specific performance and orders for sale of the property by public auction. The Defendants responded vide letter dated 21<sup>st</sup> July 2020 only informing the Plaintiff that the property had not been sold and that the balance of Kshs. 25 million was only payable after sale of the property. The Defendants were to again go to slumber until the instant suit was filed as communicated in the demand notice. Even during the pendency of the suit, the Defendants have still failed to perform their end of the contract and the balance remain unpaid to date.



43. I am inclined to agree with the Plaintiff that the contract has a life span of six years after which it cannot be reinforced. The Limitation of Actions Act Cap 22 Laws of Kenya section 4 (1) provides that: -

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued ---

(2) actions founded on contract”

(a)

44. It then follows that the agreement would have expired on 12<sup>th</sup> April 2024 after which the same would not have been enforceable. Again, when the Plaintiff attempted to rescind the contract and file his Bill of Costs, the Defendants successfully argued that the contract was still valid. However, to date, and noting that the expiry date of the contract has since lapsed, the Defendants have still not performed their part of the contract. As submitted by the Plaintiff, it would not be far-fetched to suspect the intention of the Defendants, noting that they had not sold the suit property for more than six years despite acknowledging the validity of the contract and not denying the outstanding balance. Suffices it to conclude that the Defendants intended to box the Plaintiff into a contract that they held to be valid to the exclusion of any other a venue for recovery of the legal fee, but having boxed him in, run down the contract period by not performing it, only for them to raise the defence of limitation of time after the expiry of the requisite period within which the claim could be brought before Court! What other option then did the Plaintiff have than to enforce the contract before this court? I do find that the Plaintiff rightfully filed the instant suit to enforce the contract when it still had a life-span. Indeed, equity aids the vigilant.

45. I say so noting that the agreement herein amounts to a retainer agreement. The term ‘retainer agreement’ is anchored in the Advocates Act and in particular Section 45 thereof. It provides inter alia: -

“45. Agreements with respect to remuneration

(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-

- a. before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;
- b. before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;

c. ....

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.”

46. I do note that the agreement herein was already found to have been a valid retainer agreement within the above description, thus the same was enforceable as against the Defendants. The court in *Wahome & Akedi Advocates v Migwi & 2 others* (Sued as Interim Administrators of the Estate of George



Irungu Karanja - Deceased) (Miscellaneous Application E248 of 2023) [2024] KEHC 8011 (KLR) while finding that such a retainer agreement was enforceable held that: -

“As with any other agreement, the onus of proving the existence of the retainer agreement lies with he that wishes to enforce it. This is in line with the ordinary rules of contracts and evidence. (See Kenya National Capital Corporation Limited v. Albert Mario Cordeiro & Another [2014] eKLR and Section 107 of the Evidence Act Cap 80). Under the proviso to Section 45 (5) of the Act, an advocate who is a party to a retainer agreement and who has acted diligently for the client is entitled to sue and recover for the whole retainer fee should his client default in payment thereof. Infact, as long as the advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax his costs nor give statutory notice to the client prior to his pursuit of the said fee. Consequently, it behooves such advocate to ensure that the retainer agreement once made, is reduced into writing.”

47. It then follows that the Plaintiff had the right to enforce the agreement herein even without notice to the Defendants, though such notice was given on two occasions with an ultimatum which was ignored. Further, the Defendants never complained of the Plaintiff's services and there is no challenge on his diligence.
48. Having found that the Plaintiff was entitled to enforce the retainer agreement herein, the next question to answer was whether orders for specific performance and sale by public auction ought to issue to aid in the enforcement of the contract. The Plaintiff implored this Court to order for specific performance on the part of the Defendants and since they were not willing to sell the suit property, the Plaintiff prayed that orders for sale through public auction be granted to allow him recover his legal fees.
49. The relief of specific performance is an equitable relief. 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 stated 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. In *Gurdev Singh Birdi and Marinder Singh Ghorta v Abubakar Madhubuti* CA No.165 of 1996 it was held that: -

“...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and



complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

51. In *Reliable Electrical Engineers Ltd. v Mantrac Kenya Limited* [2006] eKLR, the court stated that: -

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles”“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

52. In the instant case, it has already been established that a valid contract/agreement exists between the parties. The Plaintiff performed his part of the contract and offered legal services to the Estate of the deceased for years as admitted by DW1 up and till the point that the Defendants were expected to perform their obligations under the agreement. It was a clear term of the agreement that the balance of Kshs.25 million was to be paid upon sale of the suit property and the same had not been done more than six years later, to the Plaintiff’s detriment.

53. It is not disputed that a valid agreement exist between the parties. It is doubtless that there was a meeting of the mind with respect to the terms of the contract. However, after the contract commenced, there appeared to be a slowing down by the Defendants due to lack of interest in the transaction.

54. The Defendants’ reasons for the continued delay for more than six years in completing the transaction is unacceptable noting that the alleged sub-division process begun in 2018 and had not been completed and there was nothing to show that the mutation was ongoing as alleged. In any case, such sub-division, if any, would cause the Plaintiff further delay as the same was not a one-day process. It is too late in the day for the Defendants to ask for more time to complete a process that ought to have been started and completed years ago with the involvement of the Plaintiff. I also note that such a sub-division will compound the delay as it will mean that the Plaintiff will only be able to realise his fees upon the completion of sale of all the sub-divided portion or a substantial number of them.

55. Consequently, I do find that granting orders for specific performance is just and equitable with a view to doing more perfect and complete justice in this matter. Left to themselves, the Defendants are not likely to perform their obligations having delayed for an inordinately long period and they could only offer excuses. Their conduct went against the purpose and intention of the agreement. I also find that an order for specific performance will not be prejudicial to the defendants since, the property was solely set aside for sale so as to meet the Plaintiff’s legal fees and not to directly benefit the Defendants. Further, there has not been proposed and/or submitted any alternative source of money from which it may be drawn to pay the Plaintiff’s fees so as to hold that an order of specific performance ought not to issue as there is an adequate alternative remedy.

56. Further, as to whether damages are adequate remedy for the Plaintiff, the answer is in the negative. There is an admitted balance of Kshs. 25 million owing to the Plaintiff by the Defendants such that any



award for damages must match the figure. It then follows that specific performance is more favorable and rational without causing any hardship on the parts of the Defendants.

57. This then brings me to the question whether orders for sale of the suit property by public auction ought to issue. Not only has this Court found that the Defendants are in breach of the agreement having failed to perform their part of the agreement or show any effort or willingness to complete the agreement within a reasonable time, I also find that the Defendants themselves admitted to the difficulty they were facing in finding a buyer. Through out their pleadings and even in DW1's testimony, the Defendants agreed that they could not find a buyer to purchase the suit property. What good will orders for specific performance do on their own in a situation where the Defendants were admittedly unable to perform their obligations under the contract?
58. Though the Defendants blamed their non-performance on the Covid-19 pandemic, it has already been found that the Defendants could not demonstrate any efforts taken before the pandemic hit, noting that the agreement was entered two years before the pandemic begun. More-over, it has been about four years since the normalcy regained and the Defendants have made no active progress towards selling the suit property. Even upon the alleged advice issued in 2022 by Pam Holdings to sell the property in smaller chunks, the Defendants did not show any tangible plan in place to sell the property as such and it is doubtful whether the Defendants had the goodwill to dispose of the property and settle the Plaintiff's fee. There was no evidence that the Defendants engaged the agency further to begin the process or that they took any further steps in lieu of the advice.
59. In the circumstances, I see no hardship that would be suffered by the Defendants if orders for specific performance and orders for sale by public auction issue. If at all, the orders will come in to aid the Defendants dispose of the suit property having failed to do so themselves over a six-year period. I see no reason to deny those orders as they will see to it that there is full and final completion of the agreement.
60. As to whether orders for damages for breach of contract ought to issue, I do find that issuing such orders would subject the Defendants to double jeopardy. The Plaintiff cannot benefit from both orders for specific performance and orders for damages as the former would put him in the position he would have been in if the breach never occurred. In *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. Similarly in *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR, the court held: -
- “The above decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved.
- Flowing from the above principles of law, the respondent was not entitled to damages for breach of contractual obligations, having raised a specific claim for special damages. The trial court applied wrong principles, and misapprehended the evidence, thus fell into error in awarding general damages to the respondent. This award must be set aside in entirety.”
61. Flowing from the foregoing, I do find that it would be an injustice for the Plaintiff to benefit both from orders for specific performance from which he would recover his outstanding balance, and further benefit from damages that are unquantified.
62. The prayer for an extra Kshs.5,600,000/= for VAT also collapses noting that the agreement provided for legal fees for ‘an all inclusive sum’ of Kshs.35 million wherein Kshs.10 million was paid. The Plaintiff can only recover the outstanding balance of Kshs.25 million.



63. In the end, I do find that the claim is partially successful. The Plaintiff dated 12<sup>th</sup> October, 2020 is allowed and judgment is entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally in the following terms;
- a. Orders for Specific Performance of the agreement dated 12<sup>th</sup> April, 2018 hereby issue.
  - b. For purposes of execution of clause (a) above, the Plaintiff is hereby granted leave to effect execution by way of attachment and sale by Public Auction of property L.R. No. 5973/240 in Kaiya Estate owned by the Estate of the late David Waweru Kibe for the recovery of the advocate fees owed to him of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/=) subject to valuation.
  - c. Pending the sale of property L.R. No. 5973/240 in Kaiya Estate, a prohibitory order is hereby issued, prohibiting the Defendants from transferring or charging, or encumbering or alienating the property in any way and prohibiting all persons from taking any benefit from such purported transfer, charge, encumbrance, or alienation, and the prohibitory inhibition to be registered against the title.
  - d. The Plaintiff to engage a valuer to value the suit property L.R. No. 5973/240 in Kaiya Estate and the said property be sold in a public auction pursuant to the provisions of the Civil Procedure Rules.
  - e. That the above sum of Kshs.25,000,000/= shall attract interest at court rate from the date of judgment till payment in full.
  - f. That the Plaintiff is hereby awarded costs of the suit.
  - g. That the amounts/costs in clause (d), (e) and (f) above be paid/reimbursed from the proceeds of the sale.
  - h. The balance of the proceeds of the sale be remitted to the Estate of the late David Waweru Kibe after the amount of Kshs.25,000,000/= and the costs specified herein are recovered.

64. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF MAY, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....Appellant

.....Respondent

Sam Court Assistant

