



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC NO.855 OF 2015

DAVID MWOSE MWALUKO.....PLAINTIFF

VERSUS

ERASTUS KIARIE GITAU.....DEFENDANT

JUDGEMENT

Background.

1. The Plaintiff's case is that on 25th November, 2010, he entered into an agreement for purchase of a half (1/2) acre of land (hereinafter referred to as the suit property) from the Defendant. The suit property was to be excised out of the parcel of land known as L.R 13459/13. The agreed purchase price was Kshs.10,000,000/=. At the time of signing the agreement, the sum of Kshs.1,000,000/= being 10% of the purchase price was to be paid to the vendor. The Plaintiff actually paid the said amount of Kshs.1,000,000/= upon executing the agreement. The money was acknowledged by the Defendant as paid in the agreement.

2. The balance of the purchase price being Kshs.9,000,000/= was payable on or before the completion date, which was ninety days from the date of execution of the Agreement and in any event in exchange of the completion documents pending the completion and successful registration of the transfer of lease in favour of the Purchaser. The Plaintiff avers that it was the responsibility of the vendor to obtain and avail the completion documents and also cause the excision of the half acre plot from L.R No. 13459/13. By the ninetieth day, the Defendant had not secured the documents neither had he managed to excise the half acre plot as agreed.

3. The Plaintiff in his plaint states that he made further payments to the Defendant, in addition to the 10% deposit aggregating to Kshs.7,500,000/-. The Plaintiff's assertion is that these further payments were made at the request of the Defendant and on the understanding that the Defendant was implementing his obligations under the agreement. The Plaintiff understood that the Defendant was causing a subdivision of the land L.R No. 13459/13 to excise the half acre plot, obtaining the necessary consents to transfer, the land rates and land rent clearance certificates amongst the other completion documents.

4. The Plaintiff claims that he later came to realize that the Defendant was not keen on fulfilling his obligations under the agreement and had deliberately breached the terms and conditions of the agreement. He particularized the breach as follows:-

a) Failing to cause subdivision of land Reference No.13459/13 to make way for the creation of the half acre portion, that was the subject of the sale.

b) Failing to procure and obtain title documents of the said property.

c) Failing to procure the requisite consent to transfer, rates and land rents certificates.

d) Failing to pay for and levy for the procurement of the consent to transfer the property in the name of the purchaser.

5. The Plaintiff prays against the Defendant for :-

I. Specific performance compelling the defendant to complete the contract for sale in respect of the half acre property.

Alternatively.

The Defendant to refund the Plaintiff the current value of the half acre property.

b. General and aggravated damages.

c. Costs of the suit with interest.

6. The Defendant's response to the Plaintiff's claim was by way of the statement of defence dated 5th June 2018.
7. The Defendant reiterated in kind to the Plaintiff's claim accusing the Plaintiff of frustrating the agreement between them. Though the Defendant admits receiving the total sum of Kshs.7,500,000/-, he claims that the payment was made long after the completion date had lapsed. He claims to have refunded the sum of Kshs.7,500,000/= to the Plaintiff after the contract was frustrated.
8. The Defendant denies the particulars of breach enumerated in the Plaint. He avers that he had acquired all the completion documents expected of him and he was therefore not in breach as alleged by the Plaintiff. It is his position that the Plaintiff frustrated the performance of the terms of the agreement. He counter accuses the Plaintiff of breach of the agreement which he particularized as follows:-

a. Failing to complete the payments even after the completion period had been extended.

b. Failing to honour the contents of paragraph 3.1, 3.2, and 4.1 of the sale agreement which were bidding on him.

c. Generally being indolent and sluggish in performing the sale agreement made between him and the Defendant.

9. The Defendant's contention is that the Plaintiff is not entitled to an order of specific performance. He prays for the dismissal of the Plaintiff's case in its entirety with costs.
10. In his reply to Defence, the Plaintiff joins issues with the Defendant and reiterates the contents in his Plaint.
11. The case proceeded to hearing on 12/10/2021. Each party testified in his own case.

The Plaintiff's case.

12. The Plaintiff David Mwose Mwaluko adopted his witness statement dated 1st September 2015 as his evidence in chief. He also produced the documents on his Plaintiff's list of documents as exhibits in support of his case.

13. The Plaintiff in his testimony reiterated the averments in his Plaint. He had paid the Defendant a total of Kshs.7,500,000/= on the understanding that the balance of Kshs.2,500,000/= would be paid upon the Defendant availing the completion documents including a title deed for the half acre property that he was buying .

14. The Plaintiff stated that the Defendant failed to honour his obligations under the agreement. Instead of the completion documents, the Plaintiff was surprised when he received a letter through his then advocates Gichimu Mung'ata and Company Advocates on 12th March 2014 alleging that the Defendant had sent him what he referred to as a 21 days' completion notice on 13/2/2014 through his postal address. The letter sent to the Plaintiff's Advocates alleged that the Plaintiff had failed to honour that alleged completion notice. The Plaintiff however denied ever receiving the completion notice.

15. On 17th March 2014, the Plaintiff's Advocates received another letter from the Defendant's advocates enclosing 8 split cheques amounting to Kshs.7,150,000/=. This, the letter explained was refund of monies paid by the Plaintiff to the Defendant, less the penalty for default purportedly in accordance with clause 4.1 of the agreement between the parties.

16. The Plaintiff through his Advocates on 19th March 2014 promptly replied to the Defendant's letter of 17th March 2014 refuting the Defendant's claims and returning all the 8 cheques. The Plaintiff in the letter of 19th March 2014 denied receiving the alleged completion notice. He too expressed his position that such a notice (if at all) ought to have been sent to his Advocates, Gichimu Mung'ata & Co. Advocates who were actually the Advocates for both parties for purposes of the sale agreement. Secondly, the Plaintiff disputed the Defendant's right to rescind the agreement because he was yet to avail the documents enumerated under the completion clause of the agreement as proof that he was indeed ready to complete the agreement on his part as at the date of that alleged letter, 13th February 2014. The Plaintiff further in the same letter, of 19th March 2014, gave the Defendant 21 days' notice to complete the transaction stating that he (as the buyer) was ready and willing to complete his obligations under the agreement.

17. The Plaintiff maintained that he was ready and has always been ready to complete payment of the balance of the purchase price as soon as the Defendant availed the completion documents. The Plaintiff sought for specific performance of the agreement as prayed for in the Plaint.

18. Under cross-examination, the Plaintiff confirmed that the clause 8.1 of the agreement provided that notices were to be sent by registered post. His postal address was P.O Box 103470-00100 Nairobi. The Plaintiff further stated that the reason why he kept on sending more money to the Defendant was to facilitate the Defendant's movement in the Lands Offices in pursuit of the completion documents.

The Defendant's case.

19. The Defendant too, Erastus Kiarie Gitau took to the witness stand on the same day. He adopted his witness statement of 5th June 2018 as his evidence in chief. He further produced the documents on his Defendant's list of documents as exhibits in support of his case. He

reiterated the averments in his statement of defence.

20. The Defendant stated that he went out of his way and found a surveyor who surveyed his land. LR 13459/13 and placed beacons marking the half acre portion that he was to sell to the Plaintiff. He stated that he proceeded to process a title for the half acre portion and notified the plaintiff and his Advocates through registered mail requiring the Plaintiff to complete the transaction in accordance with the terms and conditions of the agreements. He however, received no response. He instructed his Advocates to write another letter the Plaintiff requesting for his bank account details in order to refund the monies the Plaintiff had paid him. Yet again, he did not receive a response. He therefore instructed his Advocates to refund the money by way of banker's cheques which was done through 8 split cheques. He stated that he got no response from the Plaintiff even after forwarding the cheques. He was therefore pretty surprised when he was served with summons to enter appearance in this suit.

21. In cross- examination, the Defendant agreed that by the expiry of the 90 days after the execution of the agreement, he had not secured the completion documents. He, despite not having had the completion documents received more monies from the Plaintiff. He confirmed that what he had exhibited as "**DE 2**" was not a title document for the half acre plot but a deed plan. Clause 4.2 (b) of the sale agreement required him to produce an original title deed of the suit property (half acre) as one of the completion documents but he had not secured one. He further had not gotten a rates clearance certificate nor the consent to transfer the suit property.

22. The Defendant stated that after subdividing his land, the half-acre portion had been given an L.R No. 13459/85. However, the documents he had exhibited i.e. Application for consent to transfer, application for land rates clearance certificates were for the original undivided portion LR No. 13459/13.

23. The Defendant finally stated that he had sent the completion notice by registered mail to the address "P.O Box 10347-00100, Nairobi" but the agreement had indicated the Plaintiff's address as "P.O Box 103470-00100 Nairobi". At the time of making the agreement, the Plaintiff and the Defendant were using the same Advocates, Gichimu Mung'ata & Co. Advocates. The completion notice that the Defendant sent to the Plaintiff had not been copied to the said Advocates.

Court's Directions.

24. After the close of the hearing, the court directed both parties to put in written submissions. Both parties complied and the court has had the opportunity to read through both set of submissions.

Submissions by the parties.

The Plaintiff's Submissions.

25. The Plaintiff's submissions are dated 25th October 2021. The Plaintiff submitted on the four issues that he identified as the issues for determination in the suit.

26. The Plaintiff's position is that he performed his part with regard to the sale agreement between him and the Defendant. He had even paid more than what was called for in the agreement before the Defendant availed the completion documents with the sole object of helping the Defendant obtain the documents to complete the transaction. He accused the Defendant for failing to honour his obligations under the agreement. The Plaintiff therefore categorically avers that the Defendant purposively breached the agreement with ulterior motives of reselling the half acre plot to another person at a higher price.

27. The Plaintiff cited the case of **Joseph Kang'ethe Irungu Vs Peter Ng'ang'a Muchoki (2018) eKLR** to support his argument that the Defendant was in breach of the terms of the agreement. In that case, the vendor was found to have been in breach of the agreement for failure to obtain the land control board consent to transfer the land because it was a term of the contract. Similarly, the Plaintiff urges the court to find the Defendant in breach of the agreement in this case. He has not obtained the Consent to transfer the lease amongst the other completion documents.

28. On the prayer for damages for breach of agreement for sale, the Plaintiff cited the case of **Millicent Perpetua Atieno Vs Louis Onyango Otieno (2013) eKLR**, where the Court of Appeal quoted with approval *Halsbury's law of England, Volume 12, 4th Edition at paragraph 1183* on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

"...Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain...."

The Plaintiff submits that he is entitled to damages for breach of the agreement. The Plaintiff has however not proposed any figures.

29. In regard to the prayer for specific performance, the Plaintiff submits that, having performed his obligations in accordance with the terms of the agreement, he is entitled to the equitable remedy of specific performance. An award of damages would be inadequate. He cited a number of decided cases in support of his arguments.

30. In the case of **Gharib Suleman Gharib Vs Abdulrahman Mohammed Agil LLR. No. 750 (CAK), Civil appeal No. 112 od 1998**, the Court expounded on the remedy of specific performance . The Court held that the remedy is based on the existence of a valid and enforceable contract. It is an equitable relief and is more often than not granted where the party seeking it cannot sufficiently be

compensated by an award of damages.

31. He too referred to the case of Manoor Vs Baram (2003) EA 580, where the court stated that Courts have for a long time considered an award of damages as an inadequate remedy for breach of contracts for sale of land.

32. The Plaintiff further relied on the following other authorities:-

- Gurdev Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti, Civil Appeal No. 165 of 1996,
- Thrift Homes Ltd Vs Kenya Investments ltd (2015) eKLR.

33. The Plaintiff therefore seeks for specific performance of the sale agreement with the Defendant, General and Aggravated damages for breach of the agreement for sale and costs of the suit.

The Defendants submissions.

34. The Defendant's submissions are dated 29th October 2021. The Defendant on his part identified three issues for determination that he submitted on.

35. The 1st issue was whether the Plaintiff breached the sale agreement. It is the Defendant's position that the Plaintiff breached the terms of the agreement by failing to pay the balance of the purchase price in accordance with the terms of the sale agreement. The Defendant states that, the term on payment of the balance of the purchase price was that he was to deliver the completion documents upon payment of the balance of the purchase price. That is his interpretation of clause 4.1 of the agreement.

36. The Defendant goes further to state that the default by the Plaintiff prompted him to invoke clause 4.4. of the agreement. That was when he put the Plaintiff on notice; to complete the terms of the agreement. He sent the termination notice dated 15th February 2014 through registered post. The Plaintiff did not respond and the Defendant therefore went ahead and rescinded the agreement and applied the penalty stipulated in the agreement (in case of default by the purchaser). He informed the plaintiff of this move by his letter of 17th March 2014.

37. The Defendant under the cover of the letter of 17th March 2014 forwarded to the Plaintiff 8 split cheques less 3.5% of the purchase being liquidated damages for default. The Defendant denies receiving the cheques back from the Plaintiff.

38. The Defendant submits that the payment of the purchase price in full was a condition precedent that had to be met before proceeding to stage 2 i.e release of the completion documents.

39. The Defendant states that since the Plaintiff testified to having paid only Kshs. 7.5 million, as part of the purchase price, he, and not the Defendant was in breach of the terms of the agreement.

40. The Defendant cited the case of Mwangi Vs Kirio that was cited with approval in Thrift Homes Lts Vs Kays Investment Ltd (2015) eKLR. The Defendant particularly quoted the court of appeal holding to the effect that if the purchaser failed to pay the balance of the purchase price on the agreed date, the vendor was discharged from further performance of the contract by the purchaser's failure to pay the balance of the purchase price.

41. The Defendant's submission on the issue of his rescission of the agreement was that he was justified to do so as a consequence of the default by the Plaintiff. He states that he was willing and ready to complete the transaction as evidenced by the fact that he had excised the half acre from LR No. 13459/13 and processed title in respect of the excised portion that was the subject matter of the sale agreement.

42. The Defendant submits further that the Plaintiff had not even considered giving him a professional undertaking as regards the security of the balance of Kshs. 2.5 million. Neither had the Plaintiff sought an extension of time.

43. The Defendant also relied on the case of Kent Libiso & Another Vs Cirkon Trust Co. ltd & 3 others (2020) eKLR. In the said case, the court held that the Defendant had validly rescinded the agreement for sale of land because the 1st plaintiff had failed to pay the balance of the purchase price of Kshs.14 Million when he approached the court for an order of specific performance. The 1st Plaintiff had not paid the balance even after being issued with a completion notice. He also had placed no evidence before the Court to show that he had placed the balance (of the purchase price) with his advocates to enable them issue an appropriate professional undertaking to the 1st Defendant.

44. The Defendant submits that the Plaintiff is not entitled to the remedies he has sought in his suit. That he has not approached the court with clean hands and should therefore not benefit from the equitable remedy of specific performance. The Plaintiff, according to the Defendant's submissions did not demonstrate whether he was in a position to pay the sum of Kshs.2.5 million. The Defendant too relied on the case of Gurder Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti, Civil Appeal No. 165 of 1996, that was cited with approval in Thrift Homes Ltd Vs Kenya Investments Ltd (2015) eKLR.

Issues for Determination

45. The issues for determination in this case are rather clear cut. I say so because it is not in dispute that the parties entered into an agreement for the sale of land. The validity of the agreement is not in issue. The amount of Kshs.1,000,000/= paid by the Plaintiff as the 10% deposit upon execution of the agreement has been acknowledged by the Defendant. The Defendant acknowledges further payments from the Plaintiff totaling to kshs.7.5 million (inclusive of the deposit).

46. The parties have framed the issues for determination in their respective submissions. The court having considered the issues as framed by the parties consolidates the issues for determination in this suit as follows: -

- (a) *Which party is in breach of the terms of the agreement for sale of land?*
- (b) *Whether the Defendant's rescission of the Agreement for sale of land was valid.*
- (c) *Whether the plaintiff is entitled to the reliefs sought in his Plaintiff.*

Analysis and Determination.

47. The Court will proceed to consider and make a determination of each of the issues above in that order.

Which party is in breach of the terms of the sale agreement?

48. As already stated, the existence and validity of the sale agreement between the parties is not in dispute. In their pleadings, each party accuses the other of breach of the terms of the sale agreement.

49. The purchase price payable was Kshs.10,000,000/-. 10% of the purchase price was to be paid upon execution of the agreement. It was paid.

50. The balance of the purchase price, which was Kshs.9,000,000/= under clause 3.1 of the agreement, "**...shall be paid to the advocates to all the stakeholders on or before the completion date and in any event in exchange of the completion documents pending the completion and successful registration of the transfer of lease in favour of the purchaser.**"

51. Clause 4.2 of the agreement identified the completion documents as follows:

- a) Instrument of transfer of lease in triplicate duly executed in favour of the purchaser or the purchaser's nominee.*
- b) The original title deed of the property*
- c) Letter of consent to transfer the property to the purchaser.*
- d) A copy of the vendor's national identity card.*
- e) A copy of the vendors pin certificate.*
- f) The recent passport size colored photos of the vendor*
- g) All documents of title in respect of the property in the vendor's possession.*

52. At this juncture, considering clauses 3.1 and 4.2 of the agreement highlighted above, the obligations of the parties are pretty obvious.

53. The obligation of the purchaser was to pay the balance of the purchase price whereas the obligation of the vendor was to avail the completion documents.

54. The completion date was defined in the agreement to mean the '**ninetieth (90th) day from the date of execution of the agreement or seven days after registration of transfer whichever of earlier or such other date as the parties may mutually agree**'.

55. It is clear from the testimony of both parties that by the ninetieth day from the date of the agreement, the Defendant had not secured the completion documents.

56. The conduct of both parties discloses a sort of mutual agreement to indefinitely extend the completion date. I say so because, from the Plaintiff's testimony, it is clear that he continued paying more money to the Defendant on the Defendant's request to help him subdivide the land and process the title for the suit property. The Defendant on the other hand acknowledged receiving the additional sum of Kshs.6.5 Million from the Plaintiff, after the expiry of the ninetieth day.

57. Again in his statement of defence, the defendant alludes to the extension of the completion period. At paragraph 9(a), the Defendant accuse the Plaintiff of failing to complete the payments even after '**the completion period had been extended.**'

58. The Plaintiff filed his suit in this court on 8th September 2015. By that time, according to the Plaintiff's evidence during the hearing, the

Defendant was yet to secure and or avail the completion documents.

59. The Defendant in his testimony said that he had excised the half acre of land from the L.R 13459/13 and processed a title. However, during the cross examination he clarified that he did not have a title, rather what he exhibited as “**DE2**” was a deed plan and not a certificate of title. Further the Defendant also admitted that he had not procured the other completion documents as well, namely; the consent to transfer the land to the purchaser. He neither had a rates clearance certificates nor did he have a land rent clearance certificate.

60. In his submissions, the Defendant submits that he was not in breach because the purchase price was supposed to have been paid in full first before he became obligated to provide the completion documents. In other words, the full payment of the purchase price was a condition precedent to availing the completion documents.

61. Clause 3.1 of the agreement (highlighted above) provided that the balance of the purchase price was payable on or before the completion date and “**in any event in exchange of the completion documents**”. (emphasis mine).

62. What I understand this clause to mean is that even if the balance of purchase price was not paid on the completion date (i.e. on the 90th day from the date of execution of the agreement) it would, in any case be paid when the completion documents became available for exchange. Both events were to happen simultaneously (supposedly in the offices of the Advocate for the parties).

63. The use of the phrase, ‘in any event’, depicts the parties’ state of mind at the time of making the contract. They were contemplating inability to complete the transaction on the completion date. If that were to happen, the parties agreed that the balance of the purchase price would become payable once the Vendor availed the completion documents in exchange with the money. It was also a clear expression of the parties intention that time was not of essence in their transaction.

64. I do not agree with the submissions of the Defendant that payment of the full purchase price was a condition precedent to him availing the completion documents. The terms of the sale agreement do not state so.

65. Up to and including the date of the hearing of this case, the Defendant had not obtained the completion documents. He admitted as much during the cross-examination by the Advocate for the Plaintiff. What he had only done was to subdivide the land as evidenced by the deed plan.

66. Going by the above, I find that it is the Defendant is the party who was in breach of the terms of the sale agreement. The plaintiff expressed his willingness and readiness at all times to meet his part of the bargain. Having already paid (3/4) three quarters of the purchase price, the plaintiff had demonstrated his ability and willingness to meet his obligations. In his letter of 19th march 2014 (PE7) the Plaintiff, who was the buyer gave the Defendant(seller) a 21 days’ notice to complete the transaction and confirmation that he himself was ready and willing to complete.

Was the Defendant’s rescission valid?

67. The Defendant’s position was that, since the Plaintiff had defaulted, he was justified under the provisions of clause 4.4 of the sale agreement to take the action that he did. He went ahead and issued the Plaintiff a 21 days’ completion notice demanding payment of the balance of the purchase price within the stated time limit failing which he would rescind the agreement.

68. My reasoning of Clause 4.4 of the sale agreement is that it could only be invoked by the vendor **when and only if** he was ready to complete the agreement on his part. It is explicit on that aspect. It states that, the vendor shall only take action after giving twenty-one (21) days’ notice demanding such payment (**the vendor being themselves ready and willing to complete**). (Emphasis is mine).

69. The action of rescinding the sale agreement by the Defendant would only have been valid if he had performed his obligations in full. In this case however, the vendor was yet to procure the completion documents. His purported rescission of the sale agreement was therefore invalid and did not meet the criterion set in clause 4.4 of the sale agreement.

70. Secondly, the completion notice was not sent to the right postal address of the Plaintiff. the issue of the wrong postal address was immediately raised vide the letter of 19th March 2014. That became apparent during cross-examination of the Defendant. The Plaintiff was categorical that he had not received the completion notice. This notice was not even copied to the Advocates for the Plaintiff indicated in the sale agreement. It is interesting to note that all the other letters by the Defendant were addressed to the Advocates.

71. The court’s finding is that the Defendants’ rescission of the agreement was not valid.

Whether the Plaintiff is entitled to the reliefs sought in his Plaintiff.

72. The Plaintiff seeks specific performance of the sale agreement alternatively, compensation at the current market value of the half acre plot.

73. Specific performance is an equitable remedy. From the authorities cited by the parties in this case, it is clear that the remedy will only be granted on proof of the existence of a valid enforceable contract. Even, when the contract is valid, and enforceable, specific performance will however, not be ordered where there is an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source - (**Reliable Electrical Engineers Ltd vs Mantrac Kenya Ltd (2006) eKLR**).

74. Is the remedy of specific performance available to the Plaintiff in this case? Is there an alternative remedy?

75. From the evidence adduced by the Plaintiff in support of his case, the subject matter of the sale agreement was half an acre of land that was to be excised out of L.R 13459/13. The Plaintiff has already paid three quarters of the purchase price. He confirmed his ability, readiness and willingness to pay the balance of the purchase price being Kshs. 2.5 Million.

76. The Defendant's submission was that since the Plaintiff only adduced evidence of payment of Kshs.7,500,000/- without giving an undertaking for payment of the balance of the purchase price, he should not be granted an order for specific performance. Though the Defendant had purported to refund the money paid by the Plaintiff, the Plaintiff rejected the same and through his Advocates promptly returned it to the Defendants Advocate who had forwarded the cheques. The rule of evidence is, that he who alleges proves. It was the Defendants allegation in his statement of defence that he had refunded the money. The allegation was denied by the Plaintiff through a joinder of issues in the reply to defence. The Defendant in his evidence in chief stated that he had not received the returned cheques. Of course they were returned via a letter addressed to his advocates being the one who was alleging it was his responsibility to prove by calling in evidence his advocates to confirm whether they received the returned cheques or not. He did not do so. The court therefore talks the evidence of the Plaintiff that the said cheques were returned through the letter of 19th march 2014 (PE7).

77. The Defendant, who was the seller, on his part confirmed that he had excised the half acre of land from L.R 13459/13. Indeed, he stated that it had an L.R number of its own i.e. LR 13459/85. He exhibited "**DE 2**" being the deed plan of the half acre portion. The land is available, in the Defendant's own words.

78. Neither the Plaintiff nor the Defendant adduced any evidence as to the current value of the half acre parcel of land. The court has nothing before it to guide on the current value of the half acre parcel or its equivalent for that matter.

79. It is worth noting that in the agreement for sale between the parties herein, one of the remedies that they had contemplated in case of default (other than the non-completion caused by the default of the purchaser) under clause 3.2 thereof was - 'to seek specific performance and or damages for breach of contract.'

80. From the foregoing, the court is of the view that the remedy of specific performance is the most appropriate remedy to award the Plaintiff in this case; this being an agreement for sale of land.

81. The Plaintiff also prayed for **general and aggravated** damages for breach of contract (emphasis is mine).

82. The Court of Appeal in **Kenya Tourist Development Corporation Vs Sundowner Lodge Ltd (2018) eKLR** had this to say regarding general damages for breach of contract;

:as a general rule, general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction and with good reason".

83. The Court in the case of **Kenya Power and Lighting Company ltd – vs - Abel M. Momenyi Birundu (2015) eKLR**, was of a similar view that,

"Authorities are legion to the effect that general damages may not be awarded for breach of contract."

84. This court will not deviate from that settled principle of law. The Plaintiff's claim for general and aggravated damages for breach of contract is disallowed.

85. The Plaintiff will have the costs of the suit.

Conclusion.

86. The Court takes cognizance that the balance of the purchase price is Kshs.2,500,000/ which is payable by the Plaintiff. Accordingly, the Plaintiff's claim is therefore allowed in the following terms:

a. An order of specific performance be and is hereby made in favour of the Plaintiff compelling the Defendant to complete the contract of sale of the half acre of land being a portion of the land known as title No. L.R 65385 and being land reference No. 13459/13 upon payment of the sum of Kshs. 2,500,000/- by the Plaintiff in 30 days.

b. Costs of the suit shall be borne by the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2021.

M.D. MWANGI

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MR OLANDO FOR THE PLAINTIFF

M/S NELIMA HOLDING BRIEF FOR KIARIE FOR THE DEFENDANT

COURT ASSISTANT: HILDA

M.D. MWANGI

JUDGE