



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO.230 OF 2019

(FORMERLY CIVIL CASE NO.121 OF 2011)

TOSHIKE CONSTRUCTION COMPANY LIMITEDPLAINTIFF

VERSUS

HARAMBEE CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. Vide Amended Plaint dated the 20th of July 2020, the Plaintiff herein has sought for the following Reliefs:

a) An order for specific performance of the agreement made between the Plaintiff and the Defendant dated the 17th of March, 2006.

(a)(1) An order that the Defendant forward to the Plaintiff or their Advocates all the necessary completion documents in respect of **L.R No.209/7546**, namely:

- (i) Original title for **L.R No.209/7546**
- (ii) A dully executed transfer of **LR.No.7546** in favor of the Plaintiff
- (iii) A valid rate clearance certificate over **LR.No.209/7546**
- (iv) A valid rent clearance certificate over **LR.No.209/7546**
- (v) A dully completed and signed valuation form.
- (vi) A certified copy of the Defendant's certificate of registration and pin certificate.
- (vii) An acknowledgement of payment of capital gains tax or its equivalence.

(i) Any other document required in transferring the suit property

(a) [2]In default of prayer [a] above do order that production of the original title over **209/7546** be dispensed with and that the Deputy Registrar Of the High Court of Kenya do sign the transfer over **LR NO.209/7546** and any other document required in transferring **LR. No. 209/7546** in favor of the Plaintiff.

(aa) An order that costs incurred by the Plaintiff in execution of prayer a(1) [2] herein be discovered from the balance of the purchase price.

(b) All necessary and consequential accounts, directions, are inquiries.

(c) Damages for breach of contract in addition to specific performance.

- (d) Exemplary damages
- (e) Cost of the suit.
- (f) Any other of further relief deemed appropriate by this Honourable court.

2. Upon being served with the Amended Complaint the Defendant herein filed a Further Amended statement of defence and Counter Claim dated the 30th July 2020, whereby the Defendant denied the claims by the Plaintiff and further sought for the following Reliefs:

- a) An order that the Defendant be discharged from its obligations under the Sale agreements dated the 17th March 2006.*
- b) An order that any sums paid by the Plaintiff to the Defendant under the Sale agreement date 17th March 2006 be refunded to the Plaintiff.*
- c) Any other or further orders as the Court deems fit.*
- d) Each party shall bear its own costs.*

3. Following the close of the pleadings, the subject matter proceeded for case conference and thereafter same was set done for hearing and ultimately the hearing in respect of the matter, the hearing of the matter proceeded on the 18th of October, on which date the Plaintiff's witness namely, Felisters Bochaberi Onkware, testified for and behalf of the Plaintiff.

4. On the other hand, the Defendant hearing also summoned one witness, Dr. George Ochiri, who testified for and behalf of the defendant and also produced a bundle of documents, which had been filed by the Defendant and which formed part and parcel of the Defendant's list and bundle of documents dated the 21st of September 2020.

EVIDENCE BY THE PARTIES

PLAINTIFF'S EVIDENCE

5. The Plaintiff's witness, namely, Felisters Bochaberi Onkware, filed two sets of witness statements, the first being dated the 1st of April 2011, while the second, which is elaborate and detailed its dated the 18th of August 2020.

6. Suffice it to say, that the witness herein adopted the two witness statements as her evidence in chief before the Court.

7. On the other hand, the Witness also produced before the Court a total of 22 documentary exhibits, whose details are contained at the foot of the list of documents dated the 1st of April 2011. Besides, the Plaintiff's Witness also produced a further set of documents contained at the foot at the further list of documents dated the 14th August 2020.

8. It was the Plaintiff's Witness testimony that on or about the 8th of January 2004, the Plaintiff read an advert in the Daily Nation, whereby the Defendant herein, had advertised the intent to sell of various properties, both in Nairobi and Mombasa, respectively.

9. According to the Witness, upon reading the advertisement, the Plaintiff herein developed an interest in certain properties, located at Parklands, along Limuru road.

10. It was the further evidence of the Witness that after the development of the interest in the designated properties, the Defendant herein allowed the Plaintiff and/or her representatives to view the properties and thereby be satisfied with the terms thereof.

11. The Witness further testified that after the viewing and all the preliminaries were concluded, the Plaintiff and the Defendant entered into a formal sale agreement, in respect of the designated massionettes namely, G,H and I located on **LR.No.209/7546**.

12. It was the Witness further testimony, that upon the execution of the Sale agreement, the Plaintiff paid to and in favor of the Defendant the sum of Kenya Shillings 2,010,000 only, being the 10 percent deposit, in compliance with the terms of the agreement.

13. The Witness further stated that it was also a term of the sale agreement that the Defendant herein would carry out and/or undertake subdivision in respect of **LR.No.209/7546**, containing the mansionettes, into three portions and thereafter transfer the resultant portions containing each massionettes, as separate Freehold titles to and in favor of the Plaintiff.

14. Further, the Witness also testified that though the completion date was agreed and designated to be 90 days from the date of the execution the sale agreement, there was however a clause, which indicated that in the event the completion was delayed beyond the completion date, for any reason outside the control of the vendor, this agreement shall continue in force until actual completion take place.

15. It was the Witness further statement, that it was also agreed that in the event of any such delay beyond the completion time, the vendor namely the Defendant herein, was not to be liable for any loss and/or Damages suffered by the purchaser as a result of such delay.

16. The Witness herein further testified that during the pendency of completion of the transaction herein, the Plaintiff wrote to and in favor of the Defendant and indicated that same was keen to enter and occupy the premises which were the subject of the sale agreement and therefore the Plaintiff sought the permission of the Defendant to carry out renovations in the suit premises. For clarity, the Witness referred to the letter dated 7th September 2007, contained at page 57 at the Plaintiff's bundles.

17. On the other hand, the Witness further testified that upon requesting the Defendant to allow same to enter upon and carry out renovation, the Defendant herein did not object to such request and in this regard, the Plaintiff commenced and undertook extensive renovations in the premises in question.

18. It was the Witness further statement that upon the completion of the renovations the Plaintiff's representatives and/or directors entered upon and commenced occupation of the subject massionettes.

19. Notwithstanding the forgoing, the witness also testified that in the course of time the parties, namely the Plaintiff and the Defendant, exchanged various correspondence pertaining to and or concerning the completion of the subdivision process, to facilitate the transfer of the suit premises as separate Freehold titles.

20. It was the witness's further evidence that in the course of the exchange of correspondence, the Defendant wrote several letters, including the one dated 12th September 2008, 8th December 2008 and 13th July 2016, respectively, in which the Defendant apologized for the delay to complete the sealed agreement and indeed sought for the indulgence of the Plaintiff.

21. The witness further testified that based on the renovations that were carried out in respect of the suit premises, the entry and occupation thereof, as well as the premises by the Defendant, it is only fair and just that the Defendant be compelled to complete the terms of the sale agreement dated 17th March 2006.

22. In any event, the Witness further testified that during the pendency of the completion of the Sale agreement and based on the assurance by the Defendant that the sale transaction would be completed, the Plaintiff offered to pay the balance of the purchase price to and in favor of the Defendant.

23. However, the witness testified that despite the offer by and behalf of the plaintiff to pay the balance of the purchase price, the Defendant herein, was reluctant to accept the balance of the purchase price but did not give any reason for such reluctance.

24. On cross examination, the Witness maintained that the terms of the sale agreement entered into and executed by the parties, was express and explicit and that the parties knew the true import of what was intended to be sold to and in favor of the Plaintiff.

25. Further, the Witness hearing also testified that in terms of what was to be sold and what was indeed sold, were the (3) three massionettes and the servant quarters well as the ground on which the said developments stood.

26. It was the Witness further answer that according to the sale agreement, the Defendant was to carry out subdivision of **LR.No.209/7546**, where the three (3) massionettes were standing and thereafter to transfer same as separate Freehold titles.

27. Finally, on the question as to whether the sale transaction had been frustrated, the witness responded by stating that the transaction herein had not been frustrated, but it was the Defendant who was keen to violate and/or breach the explicit terms of the Sale agreement.

DEFENDANT'S EVIDENCE

28. The Defendant herein called one witness namely, Dr.George Onchiri, who adopted his witness statement dated the 1st of September 2020 and further adopted the documents contained at the foot of the list and bundle of documents dated the 21st of September 2020.

29. According to the said witness, the Defendant herein duly advertised the sale of various properties at Parklands in Nairobi as well as Nyali in Mombasa, Vide an advertisement in the Daily Nation newspaper in the 8th January 2004, 23rd January 2004.

30. It was the Witness's further statement that the advertisements in question expressed the true intention of the Defendant, in terms of what was to be sold. For clarity, the witness stated that the Defendant intended to sale the three- bedroom massionettes, each with a Carport and staff quarters and not the undeveloped portions of the suit property.

31. On the other hand, the Witness further testified that after the advertisements in question, the Plaintiff herein indeed developed an interest in the purchase or acquisition of some of the advertised properties and in this regard, the Plaintiff communicated interest to the Defendant.

32. Further the Witness herein testified that after the Plaintiff's representatives were granted the opportunity to view and inspect the designated properties and after the Plaintiff developed an interesting respect of massionettes, a Sale agreement was prepared and thereafter executed by the parties.

33. However, the witness further testified that pursuant to the sale agreement, it was incumbent upon the Defendant to subdivide **LR.No.209/7546**, wherein the (3) three massionettes were standing and thereafter transfer same as separate Freehold titles.

34. Besides, the witness also testified that after the execution of the sale agreement, the Defendants engaged one, namely, Mr. Stephen O. Ambani, T/A Kolman Geomatics Consultants, to undertake and/or carry out the subdivisions, in respect of the suit property and thereby

prepare the requisite survey plan, to facilitate registration of the resultant titles and/or subdivisions.

35. It was the witness further testimony that the process of surveying the sued property and generating the resultant subdivisions, including the preparation of the survey plan, to pave way for registration, was expected to take a period of 16 weeks from the 27th March 2006 .

36. Nevertheless, the witness testified that though the process of survey was timely commenced, same took a duration beyond what was anticipated and in any event, the said process has not been completed to date, by the Defendant's appointed Representatives.

37. It was the witness's further statement that despite the efforts by the Defendant, the completion of the sale agreement has become difficult to complete and in any event, the Plaintiff herein, has now started claiming that same is entitled to the entire suit property including the undeveloped parts, contrary to the sale of the agreement.

38. In short, the witness contended that for reasons not originally contemplated it has become impossible to perfect the contract, as what now arises from the terms of the sale agreement are radically different from what the Defendant contemplated.

39. In any event, the Witness has also testified that it would be unjust and unreasonable to compel the Defendant to perform the contract, yet there has been divergence in the interpretation of what the properties which were being sold included and/or envisaged.

40. On cross examination, the Witness was however at pain to explain his understanding of clause 2 of the sale agreement that defined the terms of the property that was being sold by the Defendants herein.

41. Similarly, the Defendants' witness was also unable to address the import and meaning of Special Condition one (1), contained in the sale agreement date the 17th of March 2006.

42. In response to the question that it was the Defendant undertook to subdivide the property and create three separate titles, which were to be transferred to the Plaintiff as separate freehold title, the Defendants witness could only mumble.

43. Be that as it may, the Witness contended that what is contained in the sale agreement is at variance with what the Defendant intended and/or envisaged to sell to and in favor of the Plaintiff.

44. In respect to the various letters written by the Defendant and where the Defendant had promised that the process of subdivision was ongoing and would be concluded soon, the Defendant's witness had no answer as to the change of mind by the Defendant.

45. Finally, when asked as to the reason why the Defendant was no longer able to conclude the contract, the Witness responded that the terms of the contract were radically different from what the Defendant had imagined, contemplated and/or envisaged.

SUBMISSIONS

46. After the close of the hearing, the parties herein sought time to file and exchange written submission, to illuminate their respective cases.

47. Pursuant to the foregoing, the Plaintiff filed her written submissions on the 15th of November 2021, whereas the Defendant herein filed her written submissions on the 29th of November 2021.

48. I must point out that the elaborate submissions herein as well as the various authorities, which have been relied upon by the parties form part and parcel of the court record and same have been dully considered, appreciated and taken into account.

ISSUES FOR DETERMINATION

49. Having evaluated the pleadings filed by the parties, the written witness statements, which were dully adopted, the documentary exhibits as well as the written submissions filed herein, the following issues are germane for determination:

(a) Whether the terms of the sale agreement entered into and executed by the parties on the 17th March 2006, were clear, unequivocal and devoid of ambiguity

(b) Whether the terms of the sale agreement are capable of being complied with and if so, whether an Order for specific performance is desirable and legally tenable.

(c) Whether the contract has been frustrated in any manner, and if so, whether the allegations of frustrations were deliberate and occasioned by the Defendant.

(d) What Reliefs and/or Remedies should be granted.

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE :

Whether the terms of the sale agreement entered into and executed by the parties on the 17th March 2006 were clear, unequivocal and devoid of ambiguity

50. It is common ground that the Defendant herein carried out an advertisement on the 8th of January 2004 and on the 23rd of January 2004 respectively, whereby the Defendant indicated that same was keen to sell and dispose off certain properties located at Parklands, along Limuru road as well as in Mombasa.

51. Pursuant to and by dint of the said advertisements, the Defendant invited interested parties to express interest in specific properties and upon receipt of such expression of interest, the interested parties were requested to view the designated properties.

52. It is also not in contest that pursuant to the advertisement the Plaintiff herein developed and thereby expressed an interest towards purchase and/or acquisition of the massionettes referred to and/or described as massionettes G,H and I, located on **LR.No.209/7546**.

53. It is also common ground that after the preliminaries, including viewing, inspection and pre-contract negotiations, the parties herein ultimately agreed and thereby entered into a Sale agreement dated and executed on the 17th of March 2006.

54. Pursuant to the Sale agreement under reference, the Defendant herein, who is the one who crafted and drafted, the Sale agreement, stipulated and/or expressed the true details of the properties that same intended to sell to and in favor of the Plaintiff.

55. In any event, the Sale agreement date the 17th of March 2006, was produced and adopted by both Parties as a common exhibit. Consequently, the said document became a common evidence and thus binding on both.

56. Having perused and/or examined the terms of the sale agreement, it is my humble view that the said terms are so explicit, express and devoid of any ambiguity.

57. At any rate the terms of the Sale agreement and in particular the true details and description of the property, that was being sold are well described therein.

58. For the avoidance of doubt, it is worthy to reproduce clause [2] thereof which states as hereunder:

“the property sold is all that the massionettes mark for identification as unit number G,H, I and being three such massionettes erected on LR.N.209/7546, which unit includes a servant’s quarter and all developments thereon, registered under the registration of Titles Act Chapter 281 Laws of Kenya As grand 24823 .”

59. On the other hand, it is also important to reproduce the contents of special conditions [1] which has been captured in the Sales agreement as follows:

“the vendor is in the process of subdividing the title LR.No.209/7546, into three separate titles and shall transfer each property including the property herein by separate freehold title from the Commissioner of lands to each of the purchasers.”

60. From the foregoing , there can be no dispute as to what was the description of the properties which the Defendant was selling and which the Plaintiff was buying. Clearly, there was a meeting of minds as to the terms and details of the description, extent and scope of the properties under consideration.

61. During the hearing, the Defendant’s witness referred the Court to the advertisements which were carried out by the Defendant in the Daily newspaper and which contained the details and descriptions of the properties, for which interested parties were invited to express interest on.

62. On the other hand , the Defendant’s witness also alleged that the terms of the contract which was signed by the parties, was radically different from what the Defendant contemplated and/or otherwise envisaged.

63. Be that as it may, it is imperative to note that while interpreting and/or construing a written contract Deed and or written agreements, one must be circumscribed to the scope and the four corners of the impugned document and not to travel yonder, to discern the meaning.

64. In view of the foregoing, the contention by the Defendant herein that the terms of the contract which was signed between the Plaintiff and the Defendant was at variance with the advertisements, is therefore a serious misconception.

65. It is also important to note that the sale agreement was crafted and drafted by the Defendants own Advocate and thereafter the document was signed by the Defendants’ Representatives and whose signatures were attested by an Advocate.

66. In the premises, it is deemed and/or taken that the Defendant appreciated and or understood the import of the entire document, including but not limited to, the description of the properties which were being sold.

67. In support of the foregoing observation, the best I can do is to re-state the position of the law as was enunciated in the case of the **Speaker of Kisii County assembly versus James Omariba Nyaoga [2015] eKLR** where the Court observed as hereunder:

“The 1st appellant’s attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the Evidence Act, Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003] (UR), we cited, with approval, Halsbury’s Laws of England 4th Edition vol. 12, on interpretation of deeds and non-Testamentary Instruments paragraph,1478 as follows:-

” Extrinsic evidence generally excluded:

Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.

Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.”

68. On the other hand, the exclusion of extrinsic evidence in the interpretation and/or construction of a contract was also considered in the decision in the case of **TWIGA CHEMICALS INDUSTRIES LIMITED VERSUS ALLAN STEVENS REYNOLDS [2015] eKLR** where the Honourable Court held as hereunder:

“It is familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence”

69. From the foregoing, the law frowns upon a party who is keen to import and rely on extrinsic evidence to explain the meaning and/or import of a contract.

70. In the premises, the attempt by the Defendant herein to refer to the terms of the advertisement as well as what they subjectively imagined to be the meaning of the contract cannot be entertained and/or condoned, whatsoever. ***See Section 97 and 98 of the Evidence Act Chapter 80 Laws of Kenya.***

ISSUE NUMBER TWO:

Whether the terms of the sale agreement are capable of being complied with and if so whether an Order of specific performance is desirable

71. While discussing issue no[1] above, I have pointed out that the terms of the Sale agreement were clear and explicit.

72. the other hand, during the course of the hearing, the Plaintiff herein rendered and produced various correspondence including the letter dated 2nd September 2008, 12th September 2008, 8th December 2008 as well as 13th July 2016 wherein the Defendant had indicated that they were complying with the terms of the Sale agreement by carrying out the requisite survey and that shortly thereafter same would surrender the documents to facilitate or would otherwise, facilitate the transfer the transfer of separate Freehold titles to the Plaintiff.

73. It is apparent that the Defendant herein had taken steps towards the implementation and/or execution of the Sale agreement and thus it becomes evident that the terms of the contract can be complied with and/or adhered to by the Defendant herein.

74. On the other hand, it is also not in dispute that during of the completion of the contract, the Plaintiff herein sought for the permission of the Defendant to carry on and/or undertake renovations of the suit property and thereafter the Plaintiff indeed commenced and undertook the renovations, while awaiting the formal completion.

75. Besides, evidence was also tendered that the Plaintiff’s herein undertook and completed serious renovation in respect of the suit premises and as a result, the Plaintiff has since spent money to upgrade the quality of the suit property with the concurrence and permission of the Defendant.

76. Notwithstanding the foregoing, the Plaintiff also tendered evidence that same also offered to the Defendant the balance of the purchase price in December 2008, but the Defendant herein was reluctant to accept and/or receive the payment of the said purchase price.

77. In view of the foregoing, what becomes apparent is that the Plaintiff has been ready and willing to complete the transaction so as to actualize and legitimize her occupation and use of the suit premises.

78. In the premises, an Order for specific performance, is appropriate and suffices to issue, in favor of the Plaintiff herein. For clarity, an Order for specific performance is an equitable remedy and therefore equity deems as done, that which ought to have been done, were it not for the breach and infractions by the Defendant.

79. In support of the foregoing position, it is also important to take cognizance of the decision in the case of **Sisto Wambugu v Kamau Njuguna (1983) eKLR**, where the Honourable court observed as hereunder;

“In my judgment the respondent cannot come to the court and obtain an order of the transfer of the land, as he sought in his

counterclaim, which is in effect an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so”

80. In this regard, I further take guidance from the decision in the case of **Thomas Openda v Peter Martin Ahn [1984] eKLR**, where the court observed as hereunder;

“Accordingly, in my judgment, the purchaser was entitled to treat the contract as still in existence and to sue for the remedy of specific performance. As Lord Diplock said in the recent case of Sudbrook v Eggleton, The Times July 15, 1982, the normal remedy in such a case is an action for specific performance, because damages are frequently an inadequate and unjust remedy for a refusal to convey the property concerned.”

81. In the circumstances of this case, an order for specific performance is appropriate desirable and same is hereby granted.

ISSUE NUMBER THREE:

Whether the contract has been frustrated in any manner, and if so, whether the allegations of frustrations were deliberate and occasioned by the Defendant.

82. On the part of the Defendant, same adduced evidence to the effect that the terms of the Sale agreement, appear to have been contradictory to and/or at variance with the terms that had previously been advertised in the advertisement carried out in the Daily Nation on the 8th January 2000 and the 23rd of January 2004.

83. At any rate, the Defendant further contended that the terms of the Sale agreement, were equally diametrical to the contemplation of the Defendant, at the time when the contract was entered into.

84. Owing to the foregoing, the Defendant herein has now contended that it has become impossible, nay, difficult, to conclude and/or complete the sale transaction and/or contract.

85. Consequently, the Defendant has therefore alleged and/or better still contended that the contract Vide the Sale agreement, has been frustrated. In this regard, the Defendant has therefore invited the Court to release and discharge her/same from the Contract.

86. It must be noted, that even as the Defendant impleads the Doctrine of frustration, the Defendant herein, had previously intimated to and in favor of the Plaintiff that same was keen to conclude the Sale agreement in terms of the various letters, dated 2nd September 2008, 8th December 2008 as well as 30th November 2008.

87. Further, the same Defendant herein wrote to and in favor of the Plaintiff a letter dated the 13th Of July 2016, whereby the Defendant further acknowledged the sale of the suit properties to the Plaintiff and was even inviting the Plaintiff to a meeting to discuss and thrush out, certain issues, as pertains to the Contract.

88. Suffice it to say, that at no point in time did the Defendant write to the Plaintiff and indicate to same that it had become difficult and/or impossible to complete the Sale agreement and/or contract.

89. I must point out that if the Defendant was of the opinion that the contract had been frustrated, it was incumbent upon the Defendant to indicate same to the Plaintiff and to particularize, the nature of frustration and the circumstances underlining such frustrations.

90. Nevertheless, the Defendant herein remained quiet and/or silent and the issue of frustration was merely brought to the fore at the first instance, when the Defendant amended her statement of Defence on the 4th of February 2020 and in this regard, it appears that the issue of the contract having been frustrated, was therefore an afterthought.

91. On the other hand, even though the Defendant has now impleaded the Doctrine of frustration, it is also important to note that the Defendant did not provide and/or supply particulars and/or the facts upon which same base the allegation of frustration, whatsoever.

92. I must point out that wherever a person seeks to rely on the Doctrine of frustration, such a person is obliged to provide and/or the particulars of frustrations and/or facts that are sought to be relied on in a bid to prove frustration.

93. In support of the foregoing pronouncement, I find support in the decision in the case of **BILLEY OLUOCH ORINDA versus AYUB MUTHIEE M'IGWETTA and 2 others [2017]eKLR** where the Court of Appeal held as hereunder:

“A party who wishes to rely on a frustrating event cannot as in this case simply mention it in passing as was done in paragraph 11 of the Amended Plaint that I have set above. Particular facts which they seek to rely on resulting in the frustration of the contract must be clearly set out in the pleadings to enable the other side to prepare and defend the same. This not having been done, the learned Judge was clearly wrong.”

94. On the other hand, the Doctrine of frustration and the circumstances that can lead to the invocation of same, were further dealt with and analyzed by the Court Of Appeal in the case of **LUCY NJERI NJOROGI versus KALYAHE NJOROGI [2015]eKLR** where the Court observed as follows:

“For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In Maritime National Fish vs Ocean Trawlers [1935] AC 524., self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of their other trawlers leaving no licence to operate the contracted trawler.

In Davis Contractors Ltd vs Farehum U.D.C. (supra), it was stated thus,

“The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self induced .”

95. From the foregoing, what becomes evident and/or apparent is the fact that before a Party can invoke and rely on the Doctrine of frustration, such a Party must plead particulars of the circumstances leading to frustration.

96. Secondly, it is also important for the Party pleading frustration, to show that the circumstances which are alleged to found frustrations are neither self-induced nor self-inflicted.

97. Nevertheless, the circumstances that are being relied upon by the Defendant herein to constitute frustration is that the terms of the Contract which was drafted by the Defendant’s own Advocate and which was executed and dully sealed by the Defendant are now said to be radically different from the imagination and/or contemplation of the Defendant.

98. Seriously, that allegation cannot be taken at face value. For clarity, the Defendant herein, is not an illiterate natural person, who can say that the terms were not well understood by same at the time of entry into and execution of the Contract.

99. At any rate, it is on record that long after the execution of the Contract, the Defendant herein kept sending promises and assurance to the Plaintiff, that despite the delay to complete the transaction, same was in progress and would be completing and/or finalizing the transaction. For clarity, the Defendant kept on seeking indulgence of the Plaintiff.

100. In the premises, the question that begs an answer is at what point, did it become impossible to implement and/or conclude, that which the Defendant kept assuring the Plaintiff that same would be completed.

101. Be that as it may, what comes out from the Defendant’s is that same is no longer keen to complete the transaction and are now feigning each and every excuse, including purporting, that the Sale did not include, what is deemed to be the undeveloped portions of **LR.No.209/7546**.

102. Truly, what was being sold, was well described in the Sale agreement and it was further amplified in Special condition no.(1) one, that the Defendant herein shall subdivide the Suit property into three portions and thereafter transfer same as separate Freehold titles.

103. In my humble view, a reasonable mind with the assistance of learned Advocates including the Defendant’s own Advocate, who crafted the agreement, knew and understood the meaning of what constituted separate Freehold titles.

104. Notwithstanding the foregoing, the Defendant herself relied on the decision in the case of **CHARLES MUIRIGI MIRITI VERSUS THANANGA GROWERS SACCO LIMITED AND OTHER[2014]eKLR**, where the Honourable Court held as follows:

“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”

105. Despite supplying to the Court, the foregoing decision, the Defendant however did not attempt to bring her case to fit within the legal prescriptions contained therein and even to exonerate herself from the fact that the failure to complete the contract was a deliberate act or election on her part and not otherwise.

106. In view of the foregoing, I find and hold, that the Doctrine of frustration, does not apply to the circumstances of this case and neither does it come to the aid of the Defendant.

ISSUE NUMBER FOUR:

What Reliefs and/or Remedies should be granted.

107. The Plaintiff and the Defendant have sought for various Reliefs as contained at the foot of the Amended Plaintiff, as well as the further Amended statement of Defence, the latter filed by the Defendant herein.

108. On her part, the Defendant has impleaded that the contract was frustrated and therefore same ought to be discharged from the contract.

109. Nevertheless, while discussing issue number (3)three, I have found and held that the Defendant did not sufficiently plead the circumstances and/or particulars constituting frustration.

110. Consequently, I find and hold that the claim by the Defendant that the contract was frustrated, has not been proven and/or established, whatsoever.

111. On her part, the Plaintiff has pleaded Specific performance, surrender of the completion documents, payment of Damages for breach of Contract and Exemplary Damages.

112. I must point out that I have found and held while dealing with the second issue, that the Plaintiff has laid out a basis for the Grant of the Orders of specific performance. For clarity, the circumstances of the subject matter, deserve equitable intervention, to avert injustice and unfairness.

113. In support of the foregoing observation and to authenticate circumstances where equity will intervene, it is appropriate to take cognizance of the decision in the case of **MWANGI MACHARIA AND 87 OTHERS VERSUS DAVIDSON MWANGI [2014] eKLR** which states as follows:

Article 159 (2) (b) of the Constitution requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2) (a) of the Constitution requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.

114. Other than the Claim for Specific performance, the Plaintiff herein has sought for Payment of Damages for breach of contract. However, the Plaintiff has not specified whether what she has sought for, was/is General Damages or Special Damages.

115. To the extent that the Plaintiff has not specified the nature of Damages that are sought for, I am constrained to consider both limbs of Damages, namely:

(a) General Damages

(b) Special Damages

116. As concerns General damages, it is trite and hackneyed that no such damages can arise and/or be granted for breach of Contract. For clarity, the damages that arise from breach of contract are ascertainable, quantifiable and are thus known from the onset.

117. In support of the foregoing proposition, I wish to re-state the decision in the case of **KENYA TOURISM BOARD VERSUS SUNDOWNER LODGES LIMITED [2017]eKLR** as hereunder:

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: 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. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication”

118. As concerns Special Damages, same can and do issue for breach of contract. However, before any amount can be awarded on account of Special Damages, the claimant must particularly plead and thereafter specifically prove same.

119. In support of the foregoing proposition, I can do no better than to reproduce the decision in the case of **JOHN RICHARD OKUKU OLOO VERSUS SOUTH NYANZA SUGAR COMPANY LIMITED[2013]eKLR** where the court decided as hereunder:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

120. As pertains to the subject matter, the Plaintiff neither pleaded nor particularized any Special Damages, that was suffered in respect of breach of Contract, as pertains to the suit Property.

121. At any rate, there was no evidence tendered and/or availed to the Court towards the claim for Special Damages.
122. I am afraid, Special Damages are not awarded merely because a party has mentioned same in passing. To do so would amount to uprooting and destabilizing the well-established principle of the Law.
123. Finally, the Plaintiff also sought for payment of Exemplary Damages. Nevertheless, no evidence was tendered to establish and/or authenticate entitlement to such damages.
124. Suffice it to say, that even the Plaintiff found it a tall calling and therefore gave the issue a wide berth. For clarity no submissions were made to anchor the said claim.
125. Be that as it may, my short answer to the claim for payment of Exemplary Damages is found in clause (3) of the Sale Agreement dated the 17th of March 2006, which provides as hereunder:

“ In the event that completion is delayed beyond completion date for any reason outside the control of the vendor, this agreement shall continue in force until actual completion can take place and the vendor shall not be liable for ant loss or damage suffered by the purchaser as a result of such delay.”

126. In view of the foregoing, the claim for Exemplary Damages was made in vacuum and is not available .

FINAL DISPOSITION

127. Having dealt with all the issues that were set out for determination herein, it is therefore appropriate to summarize the Orders of the Court.

128. Consequently, I now make the following Orders:

(a)An Order for Specific performance be and is hereby issued to compel the Defendant herein to specifically perform the Contract Vide Sale agreement dated 17th of March 2006

(a) The Defendant herein be and is hereby compelled to surrender all the completion documents and/or instruments and to hand same over to the Plaintiff and/or the Plaintiff’s nominee within 60 days from the date hereof.

(b) In default by the Defendant to surrender and hand over the completion documents, the transaction in respect of the Suit property shall be proceeded with and a surrender of the original title document shall be dispensed with.

(c) On the other hand, upon failure to comply with Order (b) hereof, the Deputy Registrar of this Court shall execute the relevant transfer documents to facilitate effective transfer and registration of the suit property, whether in whole or after subdivisions, to the Plaintiff

(d) The claim for Damages of breach of contract be and is hereby Dismissed

(e) The claim for Exemplary Damages is unfounded and is similarly Dismissed.

(f) The counter claim by the Defendant be and is hereby Dismissed

(g) Cost of the suit and the counter Claim be and are hereby awarded to the Plaintiff.

128. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT

MR.A.N NDAMBIRI FOR PLAINTIFF

MS. HELLEN MUTUA H/B FOR MR.MBALUTO FOR THE DEFENDANT