



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 144 OF 2000**

**MARY NANJALA MUHALYA.....PLAINTIFF**

**VERSUS**

**JANE CHELANGAT SINGOEL.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff filed her initial plaint dated **21/11/2000** which she subsequently amended. On **18/2/2021** she filed a further amended plaint pursuant to leave of court granted on **4/2/2021**. In that further amended plaint the plaintiff seeks judgment against the defendant as follows:

- a. **Specific performance of the agreement dated 17<sup>th</sup> November 2000;**
- b. **In the alternative an order that the estate of the deceased defendant refunds the plaintiff the monies paid to her late husband as purchase price and any other monies arising or incidental to the execution of the agreement dated 17<sup>th</sup> November 2000;**
- c. **Costs.**
- d. **Interest from the date of breach of the agreement until payment in full.**

**PLEADINGS**

**The Plaint**

2. In her claim, the plaintiff averred that the defendant is the widow of the deceased Ambrose Kipruto; that she had entered into a series of agreements with the deceased for the sale of some land; that she took possession of the purchased land and planted maize thereon; that the parties went to the land control board and obtained consent to transfer and subdivide; that however the deceased disrupted the payment of the consideration though the plaintiff was willing to pay the entire sum; that the deceased chased away the plaintiff's workers from the suit land in **November 2000** and confiscated seed maize which had been harvested; that by that time, she had paid a substantial amount of the purchase price and was to pay the balance from the proceeds of the seed maize. The plaintiff states that she is ready to pay the balance of the purchase price. In the alternative she prays for an order of refund of the purchase price and special damages for loss of her maize crop as a direct result of the deceased's actions. **Ksh 200,000/-** refund is also sought for monies paid to the deceased's estate through a court order.

**The Defence**

3. The defendant filed her initial defence on **22/11/2000** which she later amended. On **5/5/2021** the defendant filed a further amended defence, counterclaim and set off dated **4/5/2021**. In the further amended defence, counterclaim and set off, the defendant denied all the allegations of facts in the plaint. She admitted entering into an agreement for the sale of **50** acres; she contended however that possession was to be given to the plaintiff upon completion of the land sale contract but the **AFC** who were to fund the plaintiff failed to fund her thus frustrating the contract. She stated that the **AFC** needed to see the land control board consent hence its obtainance before the payment of the agreed consideration; that upon **AFC** delaying the desired funding, it was agreed between the contracting parties that the plaintiff could plant maize and then the maize crop would be shared between the parties. The defendant denied that the balance of the purchase price was intended to be paid from the proceeds of the sale of the maize harvest from the suit land. However after the **AFC** declined to fund the sale the plaintiff attempted to harvest the maize crop in blatant violation of the mutual understanding; that the defendant was intent on selling the land in order to repay the outstanding loan from **AFC** and by reason of the plaintiff's breach the loan continued to incur a lot of interest. The defendant denied the existence of parcel numbers **Kaisagat /Chepkoilel Block 2 /Kipsogon 40** and **42** or that the plaintiff is the owner thereof.

4. The defendant averred that the completion period was **90** days and that time was of essence, and that the claim of specific performance was time barred by statute and that the plaintiff was in breach for non-payment. As for the payment of the **Ksh 200,000/=** claimed by the plaintiff it was averred that the same was a paid pursuant to a consent order recorded in court and it is therefore not recoverable.

5. In the counterclaim the particulars of breach on the part of the plaintiff contained in the defence were reiterated. It was further claimed that the defendant was unable to utilize the **50** acres during the years **2000** and **2001** that he was unable to pay the AFC leading to accrual of **Ksh 215,061.70** being interest plus auctioneers fees and loan collection charges all which are claimed by the defendant from the plaintiff. The defendant claimed that the breach by the plaintiff occasioned the sale to third parties by the defendant of part of the land which had been the subject of the agreement between the two parties. In the counterclaim too the defendant denied having received the sum of **Ksh 1,325,000/=** from the plaintiff. In the prayers he claimed general and special damages of **Ksh 235,630.70** and an order that whatever the plaintiff is owed by the defendant be set off against the defendant's award and in the alternative the plaintiff's suit be dismissed with costs.

#### **Reply to Defence**

6. The plaintiff filed a reply to defence on **8/7/2021**. She reiterates the contents of the further amended plaint. That pleading seems to double up as the defence to the counterclaim for the reason that the plaintiff avers that the defendant is not entitled to set off in as at **24/6/2001** he had received **Kshs.1,325,000/=** which sum of money was enough to repay the loan; the setoff is contained in the counterclaim. The plaintiff maintained that she is entitled to specific performance as consent was obtained within six (**6**) months of the agreement.

#### **The Plaintiff's Evidence**

7. **PW1, Mary Nanjala Muhalya**, the plaintiff, testified on **15/7/2021** and on **22/7/2021**. She adopted her two witness statements dated **27/4/2018** and **5/7/2021** as her evidence-in-chief in the suit. Her evidence is that the deceased sought a buyer for his land and he found her and upon agreement the deceased sold her **50 acres** for the consideration of **Ksh. 5,500,000** and she paid the sum of **Ksh 1,325,000/=**; that the **50 acres** were to be excised from the **Parcels Nos Kaisagat/Chepkoilel Block 2 /Kipsogon /28** and **Kaisagat/Chepkoilel Block 2 /Kipsogon 17**; that she was to get **10** hectares from each of the two parcels; that the deceased executed applications for consent to subdivide land before the Kwanza Land Control Board and letters of consent were issued on **17/1/2000**; that the transaction between the parties was captured in **7** agreements dated **17/1/2000; 19/8/2000; 28/9/2000; 2/10/2000; 12/10/2000;19/10/2000** and **9/11/2000**; that the plaintiff took possession of the said portions of land and planted maize thereon; that however the deceased violently barred her workers from harvesting the maize and harvested it by himself; that the deceased then leased the lands to third parties; that at the time of the transactions the top leadership of the AFC had recommended the plaintiff for issuance of an AFC loan and so she entered into an agreement with the deceased and then made an application to the AFC for the loan for the purchase of the farm; that the parties had agreed verbally that the plaintiff could begin tilling the land upon payment of the sum of **Ksh 400,000/=** as consideration; that the plaintiff was authorized by the Kenya Seed Company to grow seed maize and she planted the **50 acres** with maize; that that plantation when harvested was expected to yield sufficient money; that the deceased employed goons who carted away the plaintiff's maize and harvesting gear leading to damage estimated at **Ksh 443, 327/=**; that during these proceedings the plaintiff was compelled to pay the deceased **Ksh 200,000/=** and subsequently was not able to utilize the land again; that the sum that the plaintiff had paid to the deceased was **Ksh 1,325,000/=** which was sufficient to clear the loan; that though the deceased later became aware that the loan had been cancelled he continued receiving money from the plaintiff until the month of **November 2000**; that it is not true that the agreement stalled upon the plaintiff failing to obtain AFC funding; that the deceased had vide a letter dated **8/11/2000** advised the AFC not to receive money from any other person other than the deceased or his advocate; that despite that letter, on **9/11/2000** the defendant received further monies from the plaintiff which to the plaintiff is a manifestation of bad faith; that the sale agreement therefore did not lapse on **15/7/2000** as a consent to transfer was subsequently sought and obtained; that the plaintiff was entitled to demand the balance of the purchase price and not to cancel the sale agreement as the consent had been obtained within **6 months** as required by the law and the plaintiff had acquired a legal interest in the suit land; that in any event the deceased failed to address the plaintiff on the issue of cancellation of the sale and that the plaintiff is ready to pay the difference. After cross examination the plaintiff then closed her case.

#### **The Defendant's Evidence**

8. **DW1, Jane Chelagat Singoei**, the defendant, testified on **22/7/2021**. She adopted her witness statement and list of documents dated **8/6/2021** as her evidence-in-chief in this case. She stated that both parcels of land subject matter of this case were charged by her late husband to the AFC; that AFC threatened to realize its security in them whereupon the chargor opted to dispose part thereof to defray the outstanding debt. **DW1** admits that the two agreements dated **14/1/2000** were for sale of land to the plaintiff, the latter whom she says pegged hopes of raising the consideration sum from AFC and who also allegedly wanted the land sold to be transferred to her before payment, to facilitate registration of a charge to the institution. Upon receipt of the loan AFC would pay the consideration to the deceased less what he owed it. The parcels were subdivided. Parcel no **28** into **39** and **40** and parcel no **17** into Nos. **41** and **42** pursuant to that agreement whose completion period she claims to be **90** days. According to **DW1**, AFC wrote to the plaintiff informing her she was unsuccessful in getting funding which frustrated the contract. By **November 2000** the loan account stood at **Ksh 1,063,851/** and interest and costs continued to accrue. **DW1** stated that according to the agreement the plaintiff was not to take possession before paying the full consideration. However the delay in securing funding from AFC caused the parties to agree that the plaintiff could take possession and plant maize. Further if AFC declined to fund the purchase, the crop was to be shared by both parties. After AFC failed to fund the transaction the plaintiff's attempt to harvest the maize crop alone was thwarted by the deceased and the plaintiff then filed the instant suit. In an application for injunction a com promise was reached whereby the plaintiff was allowed to harvest the crop but pay **Ksh 200,000/=** to the deceased as loss of user for year **2000**. Also, the deceased sold the land to a ready buyer and the deceased managed to pay **Ksh 1,165,405/=** to AFC. **DW1** blamed the plaintiff for failing to honour her part of the agreement which subjected the deceased to attachment of his property and resultant embarrassment and the additional charges. She states that the special and general damages awardable to the estate should be set off from any money awarded to the plaintiff, and no specific performance orders should issue as it is the plaintiff who was in breach. With the above evidence the defendant's case was closed.

#### **SUBMISSIONS**

9. Submissions were filed on behalf of the plaintiff on **4/8/2021**. The defendant filed her submissions on **11/8/2021**.

## DETERMINATION

### Issues for determination

10. It is common ground that there was an agreement for sale of land between the plaintiff and the deceased. Though the defendant makes heavy weather of the fact that the plaint alludes to an agreement dated **17/1/2000**, it is clear from the proceedings and pleadings, when construed wholistically, that the agreement subject matter of the suit is the one dated **14/1/2000** which the defendant has admitted in her evidence. Besides, numerous original agreements regarding the sale were produced and where both parties have agreed in their pleadings and evidence that there was a land sale transaction this court can not fail to recognize the sale simply due to the absence of only one document. Curiously however there are two agreements in the record, **DExh 3(a)** and **PExh 9** (which is a copy of **DExh 3(b)**); both are dated **14/1/2000** and were executed between the plaintiff and the deceased.

11. Their common features are that the acreage sold and the land parcel numbers involved are the same. **PExh 9** appears to have been made earlier than **DExh 3(a)**.

12. **PExh 9** has the following terms:

- a. **The agreed consideration is Ksh 9,000,000/=.**
- b. **Ksh 3,600,000/= had already been paid to the vendor;**
- c. **Ksh 5,400,000/= less the sum owed by the vendor to AFC;**
- d. **The vendor shall apply for LCB consent;**
- e. **The vendor shall engage a surveyor and subdivide the land at his expense and sign the mutation forms;**
- f. e. **That upon obtaining the consent for transfer the parties shall execute a transfer in favour of the purchaser;**
- g. **The vendor shall clear the loan with AFC and all other liabilities;**
- h. **The purchase shall pay the stamp duty and registration charges;**
- i. **The completion date is 90 days and time shall be of essence;**
- j. **Upon failure to obtain the LCB consent the purchase price would be refunded;**
- k. **The sale is subject to the Law Society conditions of sale.**

13. **DExh 3(a)** which refers to itself as a “*mutual understanding*” rather than “*agreement*” has the following terms:

- a. That contrary to what was stated in **DExh 3(c)**, the actual consideration is **Ksh 5,500,000/=**;
- b. The **Ksh 3,600,000/=** (in **DExh 3 (c)**) has not been paid;
- c. The purchaser would source **Ksh 5,400,000/=** by way of loan from AFC.
- d. The AFC shall deduct the sum owed to it by the vendor from the **Ksh 5,400,000/=**.
- e. The shortfall of **Ksh 100,000/=** shall be paid by the purchaser to the vendor.
- f. If the purchaser pays to the vendor more than **Ksh 100,000/=** the same shall be refunded to her after AFC pays up.

14. The two agreements were attested to by the same advocate. The two agreements have to be construed together to get the full intent of the contracting parties. A perusal of the two agreements reveals that though the first agreement contained consideration and payment terms disowned in the second agreement it contained the substantive terms of the contract. The parties even acquired a land control board consent for the transaction. I find there was a valid sale agreement executed on **14/1/2000** between the parties in the form of **PExh 9** and **DExh 3(a)**.

15. Having determined that an agreement existed between the parties, the main issues remaining for determination in this matter are as follows:

- a. **If there was breach, which of the parties was responsible for it?**
- b. **Whether orders of specific performance can issue in the instant case;**

c. *Whether there is merit in the counterclaim.*

d. *What Orders should issue?*

16. The issues are addressed as hereunder:-

**a. If there was breach, which of the parties was responsible for it?**

17. **Blacks Law Dictionary 8th Edition at Page 200** defines breach of contract as:-

**“Violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance, or by repudiation, or both. Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages. If a court chooses to ignore a trifling departure, there is no breach and no claim arises.”**

18. What emerges from both narratives by the plaintiff and the defendant and the exhibited agreements is that the sale proceeds were to enable the defendant to save the land from auction by the AFC as the corporation had threatened to auction the suit land to realize its security. The plaintiff also admits that the purchase was to be funded by the AFC; and from the contents of the agreement produced as **DExh 3(a)**, the deceased too knew that fact.

19. First, this court must identify the particulars of breach alleged against each party by the other.

20. According to the plaintiff the deceased breached the agreement by disrupting the payment arrangement. Her evidence is that she took possession of the suit lands and after she had paid **Ksh 1,325,000/=** the balance was to be paid from the proceeds of seed maize sale and from a loan by the AFC; that the parties had agreed verbally that the plaintiff could begin tilling the land upon payment of the sum of **Ksh 400,000/=** as consideration.

21. While the plaintiff states that she was given possession, the defendant states that the possession was not given to the plaintiff in absolute but conditionally, and it was allowed simply due to AFC’s delay in supplying funds for the purchase of the land.

22. The plaintiff’s version of events is that she took possession of the suit land after the agreement was entered into; that there was a verbal agreement that she could take possession as long as she paid a minimum of **Ksh 400,000/=**. Since this term is not contained in the text of the agreements produced in evidence the court must seek it elsewhere and it must be in the conduct of the parties. At the time of the execution of the agreement the land was in the hands of the deceased. If the plaintiff took possession before the payment of the full purchase price, it must have been with the deceased’s consent. This court is therefore of the view that the plaintiff obtained possession pursuant to oral agreement and conduct of the parties that altered the terms of the original agreement to include possession.

23. The defendant’s contention that the plaintiff was allowed limited possession subject to funding by the AFC was not proved. It must also be observed here that for a transaction for which an LCB consent had been procured and a substantive amount paid, it would be strange that the deceased would allow the plaintiff only limited possession. I find that there is no proof that the plaintiff’s possession of the suit land was in any way limited.

24. Ordinarily the court examines the agreement before it for the details as to terms. In this case the series of agreements produced as **PExh 1 (a) to (g)** do not evince much save that land was sold and monies were paid as consideration.

25. What were the terms of the agreement which, if the court considers, would enable it to determine between the plaintiff and the deceased who was in breach? These are terms as to:

a. Payment and Possession;

b. Clearing of outstanding loan with AFC.

26. Payment of the consideration and possession are inextricably intertwined issues in this case.

27. **PExh 3(b)** has only two clauses related to payment. One states that the sum of **Ksh 3,600,000/=** had been paid as at execution. The other states that the balance would be paid to M/s Kiarie & Co. Advocates on behalf of the vendor upon obtaining the LCB consent to transfer and upon the execution of the transfer by the vendor. No specific timelines are given in the agreement save in **clause (g)** which states as follows:

**“The completion date is Ninety (90) days and time is of essence.”**

28. The **90 day** period lapsed on or about **14/4/2000**. A receipt dated **2/2/2000** shows that the deceased paid **Ksh 1260** for RIM which should be short for Registry Index Map in land parlance. Executed application forms for consent to subdivide are undated. Both copies of consent to subdivide are dated **17/1/2000**. The executed applications for consent to transfer are dated **14/1/2000** and **17/1/2000** respectively; however, no consent to subdivide was produced, but an undated blank transfer apparently signed by the deceased was produced.

29. By that time the parties had achieved the following payment-wise:

a. Between 17/1/2000 - 19/8/2000 Ksh 867,000/= was paid;

b. Between 29/8/2000 - 28/9/2000 Ksh 280,000/= was paid;

c. On 2/10/2000 Ksh 80,000/= was paid.

d. On 12/10/2000, Ksh 20,000/= was paid.

e. On 19/10/2000, Ksh 13,000/= was paid.

f. On 9/11/2000, Ksh 20,000/= was paid.

30. In total the plaintiff claims to have paid the deceased **Ksh 1,325,000/=** by **9/11/2000**. The fact that documents availed show that payments for hospital bills (presumably for the deceased or his kin) were factored into the consideration demonstrates the great amount of trust that sprouted between the parties herein. However the main fact that is outstanding in all this is that though the deceased obtained land control board consents to subdivide the lands in **January 2000** and apparently subdivided the lands, no consent to transfer was obtained as per **clause (c)** of the agreement. **DExh 5** also shows that by **22/11/2000**, the deceased had not cleared the loan encumbering the property and an amount of **Ksh 1, 063,851/=** remained which **DExh 5** was calling for.

31. It is clear evidence that the deceased never obtained consent to transfer and also never cleared the outstanding balance of loan with AFC between **14/1/2000** and **14/4/2000** yet he continued to receive payments from the plaintiff in respect of the transaction.

32. If the plaintiff was harvesting maize in **November 2000** from the said farm, it then appears that she must have taken possession very early in the year, in fact, between January and **April 2000**. Her taking of possession was not forceful or sudden and was known to the deceased all along. The evidence on record is that she entered into an arrangement with the Kenya Seed Company whereby she was to grow seed maize.

33. The court in the case of **Arnold Wabwile Litalala v Peter Sane Lepatai [2018] eKLR** held as follows:

**“However, the Defendant did not tender any evidence as to whether he had given the Plaintiff notice to resend the sale agreement, but he continued to receive funds after the completion date. According to the Law Society of Kenya conditions of Sale, at clause 4 (4) it requires that the vendor should serve the purchaser twenty one (21) day notice to complete a contract before the same can be rescinded. Further, a defaulting party has to be given ample notice for rescission of contract. Since the Defendant never gave the Plaintiff notice for rescission of contract and continued to receive the purchase price, it is my considered view that he is hence estopped from claiming that the Sale Agreement had lapsed.”**

34. Consequently it must be deemed that parties in this suit and especially the deceased by actual conduct waived the term that completion would be within **90** days; in the same manner they also waived the clause that stated that time was of essence in the transaction.

35. Despite the foregoing and while the plaintiff's maize crop was on the verge of being harvested from the suit land the deceased wrote a letter dated **18/11/2000** to the AFC. By that letter he barred AFC from receiving payment from any other person other than him and his advocate. The letter stated that the agreement had lapsed after **90** days. It alluded to a letter from AFC dated **25/7/2000** vide which the plaintiff had been denied funding.

36. I find the plaintiff's position in the letter dated **18/11/2000** to be incorrect for the reason that this court has already found that the parties waived the completion date by conduct such that as late as **9/11/2000** they were still transacting regarding the land.

37. If the deceased waived such a crucial condition in the agreement, even if he was to rely on delay by the plaintiff to legally rescind the agreement, he would need to issue a proper notice to complete to the plaintiff fixing the period within which the plaintiff needed to remedy any perceived breach. There is no notice to complete that was produced in this case by the defendant and this court can only conclude that such a notice was not issued.

38. It is noteworthy that going by **DExh 7**, the deceased's indebtedness to the AFC by **10/7/2000** was **Ksh 929,774.30** yet going by **PEXh 1(b)** by **29/6/2000** the plaintiff had already paid the deceased in excess of **Ksh 600,000/=**. Though it is not clear whether there was any agreement that all the monies received from the plaintiff would be used for the purpose, the threat of auction by the AFC and the inclusion of a condition in the agreement that the deceased would clear the loan balance with that corporation is clear evidence that it was a priority. The record reads that in any event by **9/11/2000** the deceased had received **Ksh 1,325,000/=** from the defendant. This was considerably more than the indebtedness of the deceased to the AFC by **22/11/2000** which is set by **DExh 5** as **Ksh 1,063,851.00**.

39. In view of the foregoing the deceased's claim that the plaintiff is to blame for failing to honour her part of the agreement which subjected the deceased to attachment of his property and resultant embarrassment and the additional charges in unwarranted; the plaintiff would only be to blame if the notice to complete as described hereinbefore had been issued by the deceased. It therefore follows that the plaintiff having been entitled to possession and having planted a maize crop, the deceased's acts of entry onto the land and harvest and confiscation of the crop to the exclusion of the plaintiff was wrongful and contrary to implied terms of the agreement.

40. The upshot of the foregoing is that the ineluctable conclusion is that the deceased and not the plaintiff was in breach of the sale agreement between them.

**(c) Whether orders of specific performance can issue in the instant case:**

41. Specific performance is an equitable remedy and at the discretion of the court. Are the circumstances of this case of such nature that the equitable relief of specific performance needs be given to the plaintiff as sought?

42. I would adopt the decision in the case of **Amina Abdul Kadir Hawa Vs. Rabinder Nath Anand & Anor [2012] eKLR** where the court enumerated the guiding principles in determination of matters where specific performance is sought:

**(a) The remedy is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it (the court) it is equitable in the interests of both parties to grant the reliefs,**

**(b) It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relief of specific performance the court can withhold it and award damages instead.**

**(c) It is a discretionary relief which discretion should not be exercised arbitrarily but on the basis of applicable principles. The guiding principles applicable to the courts exercise of its discretion which is trite and which this court has judicial notice of is that the discretion has to be exercised judiciously with a reason.**

**(d) Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may none the less be withheld in circumstances where it is likely to cause hardship to the defendant even if circumstance giving rise to the hardship to be suffered by the defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract.**

**(e) The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfill the same.**

43. While the plaintiff had already paid a substantial part of the purchase price sufficient to enable the deceased to secure discharge of the charge in favour of the AFC as stated in the agreement, the deceased breached the agreement between the parties. The deceased had already caused the land to be subdivided pursuant to the agreement and those subdivisions were meant for transfer to the plaintiff.

44. It is not clear whether the plaintiff would have completed her part of the agreement with regard to payment had the deceased issued her with the requisite completion notice and if the plaintiff had desisted from writing the letter to AFC (**PExh 7**) stopping the plaintiff from repaying the loan owed by the deceased to that corporation; however, though the Corporation's letter is dated **25/7/2000**, the letter alleged to have stopped AFC from funding the plaintiff is dated **18/11/2000**. It is not logical that the deceased's letter could have caused AFC to withhold funding for the transaction from the plaintiff as it was written after the stoppage; however the fact remains that four months after the AFC had written **PExh 4**, the parties were still transacting over the land, and the plaintiff was still receiving instalments of the consideration. This court may never know whether after **PExh 4** was written the plaintiff any other alternative recourse had. However she must be accorded the benefit of doubt as she insists even now that she is ready and willing to pay the balance of the purchase price to complete the transaction. In this court's opinion the plaintiff has fully demonstrated by her conduct during the transaction and after the breach by the deceased that she was willing to complete the transaction but for the deceased's interruption of the transaction.

45. The plaintiff stated in her evidence that she caused a caution to be registered over the suit lands as she was not late in effecting the payment of the consideration. No copy of caution was however produced in evidence.

46. The defendant states, but provides no evidence of the fact, that the parcels that had been hived off for the plaintiff have already been sold to third parties; she also never addressed the issue of the caution claimed to have been registered over the suit lands by the plaintiff to secure her interest.

47. Equity will not suffer a wrong to be without a remedy. Doctrines of Equity were developed in the judicial system of England long ago to dull the sharp edges of the law and **Section 3** of the **Judicature Act** envisages the application of doctrines of equity as does **Article 10** of the **Constitution of Kenya 2010**.

48. The transaction herein was of a commercial nature and not for transfer of a gift. Both parties having acquiesced in each other's little failings, there appears to have been no hurry to conclude the transaction until **November 2000** when the deceased took precipitate action and evicted the plaintiff out of the subject land. Having secured the vital consent to subdivide and put the plaintiff in possession of the land and also allowed the contractual relations to be enhanced by his receipt of payments of instalments of consideration made beyond the completion date I find that the plaintiff acquired a legal interest in at least part of the suit land that she was able to pay for by **November 2000**; further, the deceased having benefited from the transaction to the extent of receiving funds sufficient to cover and liquidate his indebtedness to AFC by that date and having not refunded the paid sums prior to his act of repossession, I find that he was unfairly enriched at the expense of the plaintiff who emerged empty handed from the transaction. However, the plaintiff never deposited any monies in court or availed any crucial evidence to show she has any ability to promptly pay the balance. Secondly, the plaintiff failed to demonstrate that the land is still in the name of the deceased or his estate. Thirdly the defendant has indicated in her evidence which I can not dismiss summarily that the land carved out for the plaintiff was sold to third parties after the plaintiff failed to pay the balance of the purchase price. Consequently there is uncertainty as to whether the orders of specific performance sought if granted would mire up the dispute even further after judgment and draw in new parties which event would be quite unhealthy for the administration of justice. For lack of supporting evidence, I therefore find that this is not a case in which the equitable orders of specific performance can issue.

**(d) Whether there is merit in the counterclaim.**

49. The defendant admits that the estate of the deceased owes the plaintiff certain monies by seeking the set-off mentioned in **prayer (b)** of the counterclaim. On her part she seeks **Ksh 235,630.70** being alleged special damages by reason of breach on the plaintiff's part. I think it is a concluded issue that it is not the plaintiff who was in breach but the deceased and so the prayer for damages can not be entertained. Consequently there can be no set-off. In this court's view the counterclaim lacks merit.

**(e) What Orders should issue?**

50. The claim for specific performance by the plaintiff and the claim for setoff by the defendant in his counterclaim have been found to be lacking in merit.

51. What remains to be addressed is the claim for refund of the monies paid to the deceased as purchase price and any other monies arising or incidental to the execution of the agreement between the parties, damages, costs and interest.

52. I have already stated that the conduct of the deceased caused him to be enriched at the expense of the plaintiff. I have also stated that the defence filed appears to admit the monies claimed by the plaintiff were paid to the defendant and a refund having been sought the plaintiff should not be sent away from this court empty handed.

53. It has been noted that the plaintiff signed the consent dated **23<sup>rd</sup> November 2000** but in the light of this court's finding that the deceased's acts of entry onto the land and the harvest and confiscation of the crop to the exclusion of the plaintiff was wrongful and contrary to the implied terms of the agreement, the plaintiff is entitled to a refund of the **Ksh 200,000/=** that was paid to the deceased on **13<sup>th</sup> January 2001**. It also goes without saying that the plaintiff is entitled to be refunded the full purchase price of **ksh 1,325,000/=** paid to the deceased on various dates. In addition, I am persuaded that the plaintiff has proved special damages in the sum of **Ksh 443,327/=** as pleaded in the further amended plaint.

54. I find that the estate of the deceased is liable to refund the plaintiff all the monies that she had paid which are set out in the plaint as well as special damages as awarded by this court.

55. I therefore grant judgment in favour of the plaintiff in the main suit and I dismiss the counterclaim and I issue the following orders:

**a. The defendant as administrator of the estate of the deceased Ambrose Kipruto shall refund to the plaintiff:**

**i. the sum of Ksh 1,325,000/= (in words, Kenya Shillings one million three hundred and twenty five thousands only) paid as consideration for the purchase of the suit land;**

**ii. the sum of Ksh 200,000/= (in words, Kenya Shillings two hundred thousand only) paid to the deceased on 13<sup>th</sup> January 2001;**

**b. The defendant shall pay to the plaintiff special damages in the sum of Ksh 443,327/= (in words, Kenya Shillings four hundred and fourty three thousands three hundred and twenty seven only);**

**c. The amount in paragraph (a) (i) and (a)((ii) above shall attract interests at court rates from the date of filing suit until it is paid in full;**

**d. The amount awarded in paragraph (b) above shall attract interest from the date of filing suit until it is paid in full;**

**e. The defendant in the main suit shall bear the costs of the main suit and of the counterclaim and the said costs shall attract interest at court rates from date of judgment until paid in full.**

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8TH DAY OF DECEMBER, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU.**