REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 74 OF 2019

ROSE NYACHONGI OSINDE (Suing through her Attorney

TRUPHENA NYAGARA OSINDE..APPELLANT

VERSUS

ANN NJOKI WACHIRA..RESPONDENT

(Being an appeal from the judgement of the Senior Principal Magistrate

at Machakos Honourable A. Lorot dated 14th May, 2019

in CMCC No.386 of 2013)

BETWEEN

ROSE NYACHONGI OSINDE (Suing through her Attorney

TRUPHENA NYAGARA OSINDE)..PLAINTIFF

VERSUS

ANN NJOKI WACHIRA...DEFENDANT

JUDGEMENT

1. The Appellant herein sued the Respondent before the trial court seeking the following reliefs:-

> **1. An order for extension of time requiring the Defendant to obtain the requisite land control board consent and in default the Executive Officer does execute such forms necessary for issuance of the Land Control Board consents.**
>
> **2. Specific performance of the sale agreement dated 31st August, 2010 and in default, the Executive Officer do sign all the relevant documents including Mutations and transfers to effect transfer of MACHAKOS/KIANDANI/3146 to the Plaintiff.**
>
> **3. In the alternative, an order do issue compelling the Defendant to pay the Plaintiff Kshs. 5,000,000/- being current value of the land in question plus interest at commercial rates from 31st August 2010 till payment in full.**
>
> **4. An order for payment of damages for breach of contract assessed at Kshs.720, 000/- plus interest at commercial rates from 31st August,2010 till payment in full.**
>
> **5. Costs of the suit plus interest.**

2. According to the Appellant, sometime on 31st August, 2010 the Respondent sold her a portion of land measuring 100ft by 1000ft to be curved from the main land comprised in Title No. Block 3146/Machakos/Kiandani at the purchase price was Kshs.720, 000/-. She accordingly, paid a deposit of Kshs. 370, 000/- with the balance agreed to be paid after the subdivision and transfer and with the consent of the Respondent, she took possession of the land and developed it. The Respondent then commenced the process of obtaining the Land Control Board consent to finalize the sale but later abandoned it. Further, the Respondent failed to have the land surveyed and the Appellant's portion excised from the main title pursuant to the Agreement hence the Appellant sought an order of specific performance against the Respondent and receive the deposit balance of the purchase price.

3. In opposition, the Respondent in her defence pleaded that there is no such parcel of land known as Block 3146/Machakos/Kiandani or any at all. According to the Respondent, the Appellant has never been in occupation, custody and no developments have ever been done on the parcel of land. The Respondent denied that she was in the process of obtaining the said consent. It was her case that the orders sought by the Appellant were not available by operation of law. The Respondent asserted that if any agreement existed, it is unenforceable, voidable and cannot be ventilated before this court.

4. By a counterclaim, the Respondent pleaded that the entry onto the suit property is unlawful since the Respondent did not give consent hence the Appellant's action of leasing the suit property is unlawful. According to Respondent, the Appellant's actions have caused her damage and loss in the sum of Kshs. 147,500/- being the value of the destroyed property and loss of mesne profits. It was her case that the caution placed by the Appellant on parcels of land numbers 4306 and 4307 are illegal. The Respondent therefore sought the following orders:

> **1. Payment of Kshs. 147,500/-**
>
> **2. Mesne profits**
>
> **3. Eviction Order against the Defendant from land parcel No. 4306 excised from Machakos/Kiandani/3136 and /or any other portion excised therefore**
>
> **4. The Plaintiff be ordered to remove the cautions lodged against title No.4306 and 4307 and in default the Machakos Land Registrar to remove the same.**
>
> **5. Permanent injunction against the Plaintiff and/or his agents, servants and/or employees and/or any other person claiming under her title from entering into trespassing, leasing, cultivating, putting up any structures and/or in any other manner from interfering with the Defendants parcel of land known as Machakos/Kiandani/3146 and/or any other portion of land excised therefrom.**

5. Suffice it to note that the Appellant filed a Reply to Defence and Defence to Counter-claim.

6. PW1, **Truphena Nyang'ara Osinde,** testified that she is the representative of her sister **Rose Osinde** (hereinafter referred to as "the vendor") who lives in Geneva, Switzerland and exhibited a power of attorney dated 9th March, 2015.

7. According to her, her colleague **Tom Mutisya** identified for them parcel of land measuring approximately 100 x 100 feet which was to be carved out from land parcel No. Machakos/Kiandani/3146, which her sister, the vendor, intended to buy. The entire acreage of 3146 was about 0.2 Ha and according to the certificate of search which was exhibited, the said parcel belonged to **Anne Nzoki Wacira**. It was her evidence that before the sale agreement dated 31st August, 2010 which she witnessed, several searches were conducted.

8. According to the said agreement, the agreed purchase price was Kshs. 720,000/- out of which Kshs. 370,000/- was paid as down payment, a day later, on 1st September, 2010, through Bank Transfer at KCB from A/c No.1103751158 (Rose Nyanchangi Osinde) to A/c No. xxxxxx (Anne Nzoki Wacira) which Bank Transfer document was exhibited. It was the PW1's testimony that the Respondent did acknowledge payment at Sarit Centre and went with the application for consent to the Land Control Board which they filled and signed and the same was exhibited. The said document was kept by her to enable **Mr. Nene**, a surveyor, conduct the survey since the vendor had already paid Kshs. 4,000/- in advance to facilitate the survey. The expectations of the Plaintiff were that after paying the said Kshs. 4,000.00, the surveyor would undertake the subdivision since the bacons had been placed even before they did the agreement. Contrary to the foregoing, they received a call from the Respondent who claimed 9 meters' path to cross the parcel of land as access to the plots behind. This request was, however, declined by the vendor because when they were on the ground there was rear path behind their plot and no request for the path had been made then.

9. It was her evidence that as a result of further discussions, a week after the agreement, the vendor offered to take only one plot of 50 x 100 feet. However, this offer was declined by the Respondent as a result of which the vendor demanded return of the money immediately. The Respondent however responded that she would refund the money at her own time. Upon making inquiries at the lands office, the vendor found out that the initial land had been subdivided and plot numbers changed and that the Respondent had sold a 50 x 100 feet plot. However, the Respondent had permitted them to fence off the plot and pursuant to the said permission, they took possession thereof, placed a worker and planted maize without disturbance. However, a young man went to disturb the worker by destroying the crops as a result of which no cultivation had been done for two years.

10. Due to the failure on the part of the Respondent to transfer the said property as agreed, the vendor was unable to pay the outstanding balance. It was therefore sought that the said 100 x 100 feet plot be directed to be transferred, and in the alternative, the Respondent be directed to pay Kshs.5, 000,000/- which is the current market price for the plot, meet the costs and pay compensation for breach of contract. It was however disclosed by PW1 that the vendor was still willing to pay the outstanding balance if the seller completed the transfer.

11. In cross-examination, PW1 explained that the vendor had agreed to release 50 x 100 feet for the path an agreement which was done by phone. She testified that the Respondent had agreed that she could use the path on the rear though this was not in the sale agreement which

was never cancelled. She however admitted that she received a text message from an unknown phone No. 0735xxxx, on 5th October, 2010 at 10:19 am stating that the agreement was being cancelled and demanding for the return of the first instalment followed by another message in which the bank details were disclosed. A third message also alluded to the cancellation of the agreement.

12. According to PW1, on instructions of the vendor, she carried out farming on the land and put up a temporary home as indicated in the valuation report. She stated that they did not know where the 1st buyer was residing though there was another purchaser on the ground. Though she was present while the land was being demarcated, PW1 stated that she did not get a copy of the surveyor's report. It was her evidence that while the plots were subdivided into Machakos/Kiandani/4306 and Machakos/Kiandani/4307, since they did not know which one belonged to them, they placed cautions on both plots since the vendor was aware that the Respondent had sold to the same person and there was a communication for refund of Kshs. 370,000/- by their lawyers. Though she admitted that there were negotiations, they did not know the Respondent's intentions since she did not want to refund or transfer. As a result of the collapse of the agreement, the vendor proposed to take 50 x 100 instead of 100 x 100 feet and when this also collapsed, the vendor sought for a refund of Kshs. 370,000/-.

13. Though PW1 insisted that they fenced the land immediately on purchase and on the instructions, she entered the land on 2nd September, 2010 and put someone on the land in October, 2010, she denied destroying anything since the land was bare and further denied having leased the land. It was her evidence that the posts offered by the Respondent were on the plot but since they bought their own posts they removed them while the water tank was removed with the Respondent's authority.

14. In re-examination, PW1 stated that it was stated in the agreement that Kshs. 350,000/- was to be paid after the transfer. To her, the valuation report covered photos of the house and structures. In her testimony, though they were aware there was a buyer for the parcel of land measuring 50 x 100 feet, one Jonathan, they had no dispute against him.

15. PW2, **Joshua Obondo Ochom**, a property valuer visited the site and prepared a valuation report dated March 2018 which related to a vacant parcel of land in Mua area, title number Machakos/Kiandani/4306, Original title No. Machakos/Kiandani/3146. According to him, upon receipt of a copy of the title from Muhatia & Co. Advocates, they conducted a search, obtained a Registry Index Map, identified the parcel of land on ground, did their measurements and confirmed the size corresponded. It was his evidence that the land had an old dilapidated building which was abandoned and that there was a temporary pit latrine which was not in use. He however, did not take them into account in his valuation but only valued the vacant land.

16. To arrive at the valuation, they did comparable approvals by taking dates on sale of similar parcels whereby they found that 1.8 acre plots which is 50 x 100 feet were ranging between 1.5 to Kshs. 2 million. In this case since the plot measured 0.34 acres they adopted a value of Kshs.5 million for parcel No. Machakos/Kiandani/4306. He stated that he was assigned the job by his boss **Nicholas Kimaanthi** of Pro-Land Realtors Limited and that he signed the report which he exhibited and was paid Kshs. 30,000/- for the attendances.

17. In cross-examination, PW2 stated that he was yet to be licensed but he worked under **Mr. Kimanthi**. He stated that he was familiar with the Act that every valuer must be licenced. According to PW2, he visited the property with the lady who claimed to be the owner and he was in the company of his colleague, **Dan Kisalu**, but admitted Dan's name did not appear in the report. However, **Nicholas Kimanthi** was not there. According to PW2, they only do valuation of a property under instructions by an advocate, owner or the bank. In his evidence, the valuer has an assumption of *'willing buyer willing seller'*. He disclosed that the search revealed the presence of a caution and confirmed that LR Nos. 4306 and 4307 resulted from the subdivision of Plot No. 3146 which was the mother title. While he did not get details of 4307, it was his evidence that the caution had been lodged on 4306.

18. PW2 testified that parcel no. 4306 in acreage was 0.34 acres hence more than 100 x 100 feet. Though he required the survey plan he only saw the R.I.M. He however, saw the survey beacons on the boundary of the plots but none was captured in the report. In his report, he applied the comparable date of sale in the area though the report did not indicate this. He insisted that he prepared and signed the report under the guidance of **Nicholas Kimathi**.

19. PW3, **Thomas Kyalo Mutisya** adopted his witness statement in which he stated that on 31st August, 2010, he witnessed a land transaction between **Anne Njoki Wacira** (the seller) and **Rose Nyachongi Osinde** (the vendor) in which the Appellant was purchasing apportion of land measuring 100 by 100 feet which was to be excised from land parcel no. Machakos/Kiandani/ Block 3146 at an agreed purchase price of Kshs 720,000/-. According to him, it was agreed that the purchaser would pay a down payment of Kshs 370,0000/- with the balance of Kshs 350,000/- being payable after the subdivision and transfer thereof. He stated that the seller acknowledged receipt of the said down payment and that the purchase took possession of the land and commenced farming thereon and also built a semi-permanent structures thereon. However, the said land was neither subdivided nor transferred to the purchaser despite the purchaser's willingness to pay the balance of the purchase price.

20. According to him, though there was no surveyor on site, the beacons were placed. However, the surveyor was present during the second visit. According to PW3, the subdivision was done around the end of 2010 while the agreement was done in August, 2010 and the bacons were placed in September, 2010. It was his evidence that there were some developments belonging to the owner who was selling the entire empty space. He was however, not aware that the buyer cancelled the agreement neither was he aware that the land had been sold to some other person. It was his evidence that there was no agreement on time for completion. He stated that the geography of the land is that there were 2 roads on the property and that the two parcels of land had two faces each to the separate roads.

21. On her part, the Respondent, **Anne Nzoki Wacira** who testified as DW1, stated that she lived on plot No. Machakos/Kiandani/4306 since January, 2018 and exhibited the title deed. She disclosed that she has on the land a brick house of 2 big rooms, kitchen and fire place. She admitted that she entered into an agreement dated 31st August, 2010 with the Appellant who was transacting through an agent, in respect of the property which was 2 plots. The said agreement was for 100 x 100 feet which agreement was signed in Machakos Town at a lawyer's office, **P.M Mutuku, Advocate** and not at the site. The said agreement was duly endorsed with the Advocate's stamp. In her evidence, it was agreed that a deposit would be paid and on 1st September, 2010, the Appellant told her they go to the KCB at Sarit Center, Westlands to enable her transfer Kshs.370, 000/- into the Respondent's bank account. Though she gave her Equity Bank account, the Appellant rejected it stating that she did not recognize Equity Bank and made the Respondent to open a KCB Account dated 1st September, 2010 to enable the

Plaintiff remit the deposit. Since the bank needed two days to activate the new account, the deposit which was made on 1st September, 2010 was reflected on 4th September, 2010.

22. It was her evidence that the agreement was that she would go ahead and apply for the subdivision to excise the portion and in this regard, she was to bring a surveyor who would prepare the subdivision and present the same to the relevant bodies since the Appellant stated that she was busy in Nairobi and wanted things to be done fast. According to DW1, on 6th September, she went to the lands office where she picked the application forms for subdivision and transfer and filed them. She then contacted the surveyor in order to excise the portion but unfortunately after a series of two meetings with the Appellant in Westlands, it was impossible to proceed. One of the reasons was that on 6th September,2010 she inquired about the Land Control Board and was informed that the Board meets on 1st Thursday of each month to deliberate which now would have taken them to 7th October,2010.

23. According to the Respondent when she went with the surveyor on the land on 9th September, 2010, to her surprise she found a tight barbed wired fence but there was no gate and no one was on the whole section of 4306 except where her house was. The Respondent denied that she had agreed with the vendor regarding the vendor's entry into the land since possession could only come after subdivision and title. It was her evidence that she could not grant the land before the LCB consent was issued. She stated that one cannot book the LCB meeting before a surveyor report. However, as the land had been fenced the surveyor declined to enter the property and when she called the vendor thrice the vendor didn't pick her calls. Instead, the vendor replied via SMS in the evening insulting DW1 and stating that she had taken possession over the land and the Respondent had no business on the land.

24. In her evidence, on 10th September, 2020, the vendor called her seeking to have a special board to deal with her case but she informed the vendor that the Board had met on 2nd September, 2020, hence the matter had been overtaken by events. According to the Respondent, when she went to Machakos to make inquiries, she was informed that the Special LCB were abolished and they would have to wait for 7th October, 2010 and she briefed the vendor accordingly when they met at Sarit Center on 24th September, 2010.

25. At that meeting, according to the Respondent, when she asked the vendor why she didn't want the surveyor on the land, the Appellant told her that she was incompetent and snatched the forms that the Respondent had filled and stated that she would take over the process. DW1 stated that she waited for the vendor to contacted her but she did not for a while. Later, the vendor called her informing her that the LCB process was becoming impossible and taking a lot of her time hence she was nolonger interested in the Respondent's plot as she was a busy woman and travels a lot. It was the Respondent testimony that on 5th October, 2010, the vendor rescinded the agreement via phone and sent the Respondent a text seeking a refund of the money in instalments. She stated that she had the extract of the text message on her phone which she had in court. In her evidence, the first message was sent on 5th October, 2010 at 10.19 am stating '*We are cancelling the agreement so you return the first trunch as given*' which she understood to mean that the vendor wanted to cancel the sale agreement and refund the full deposit as paid. There were two other messages sent on 16th October,2010 at 1400hours stating; *'Dear Ann, my bank details are as follows; KCB Village Market Branch, Account No. xxxxxx Rose N. Osinde'* and at 15.14 Hours '*It is about returning money and calling a meeting to nullify the agreement with a written document. Will draft the document email you. Lets not go round inn circles as a delay tact'*. The Respondent was permitted to produce the phone as evidence. It was therefore the Respondent's case that the Plaintiff cancelled the transaction after making derogatory remarks against her that was poor. According to the Respondent, by the end of November, 2010, the Plaintiff had cut all communication with her despite the fact that she has always been willing to refund the money despite having used the same.

26. It was the Respondent's case that the house was intact from June, 2010 ahead after it was fenced it was destroyed. Though the tanks were removed, the windows were broken, furniture stolen and roofs destroyed. To her it was a total disaster and she valued the goods destroyed in December, 2010 in the sum of Kshs.147, 500 as per the prices in 2010 and exhibited an inventory thereof.

27. According to the Respondent, prior to meeting the agents of the vendor, she had an agreement with **Jonathan Muria Ndiuku** an athlete who built a storey wall around the 1/8 of the plot 3146 which came out as 4307 after subdivision leaving the part renamed as 4306 which is the one fenced off by the Plaintiff. She exhibited the Index Map and stated that the Plaintiff was buying 2 plots comprising in total 100 x 100. It was her evidence that the surveyor did not come to verify.

28. It was further averred by the Respondent that the Plaintiff fenced a large portion in her absence but no beacons had been placed. In her evidence, the only beacons that existed were from the time she purchased the land. However, though plot 4306 had not been surveyed, 3136 had been surveyed by **Daudi Mutua** who had sold her the land which was what she subdivided to 4306 and 4307. It was her case that it was the Plaintiff who frustrated the entire process.

29. The Respondent stated that though three surveyors had been recommended, it was necessary that there be a surveyor's report (signed by officers), copy of the title, ID number and a copy of the mutation and the subdivision and that the Board's would only be given if all conditions were met. She was therefore unable to book the Board meeting because she was supposed to take a surveyor on the plot to do mutation but since the land had been fenced off they could not access the land and the vendor declined to pick her calls but sent a text at night for them to meet at Sarit Center and that is when the Plaintiff asked for a Special board meeting.

30. The Respondent stated that she is no longer willing to sell the land to the Plaintiff since she is retired and she has nowhere to go. It was her evidence that the value of Kshs.5 million quoted by the Plaintiff is outrageous and she maintained that the plaintiff breached the agreement by preventing her from accessing her land. It her evidence that the damage started after the Plaintiff fenced the land. It was her position that she would consider the refund against the costs but if the court directed so, she would refund.

31. In his judgement, the Learned Trial Magistrate found that the Plaintiff had frustrated the performance of the contract by fencing off the same. She also found that the Plaintiff had rescinded the contract by her own words to the Respondent and by failing to procure the consent or pay the balance of the purchase, all while staying on the land for over three years. He further found that the Appellant frustrated the Respondent's efforts to perform her part of the bargain and cause the transfer by ceasing to communicate with the Respondent by November,

2010. Further, the Appellant proceeded to place a caution on the whole land thus affecting other parties. He proceeded to allow the counterclaim partially by awarding the damages claimed and the removal of the caution. He therefore directed the Appellant to pay the Respondent Kshs 147,500/- with costs and interests directed the removal of the cautions but dismissed the Plaintiff's suit with costs.

32. Aggrieved by the Judgement, the Appellant has appealed to this Court citing the following grounds :-

(1) THE learned Magistrate erred in law and in fact in wholly relying on the evidence and arguments advanced by the Respondent and wholly disregarding and failing to appreciate the arguments by the Appellant before arriving at his decision.

(2) THE Learned Magistrate erred in law and in fact by considering extraneous facts which were not material to the case.

(3) THE Learned Magistrate erred in law and fact by wholly disregarding submissions tendered by the Appellant before arriving at his decision.

(4) THE Learned Magistrate erred in law and fact by making a finding that the Appellant herein is the one who breached the contract between the Respondent and herself and frustrated completion of the same.

(5) THE Learned Magistrate erred in law and in fact in holding that the part payment the agreed upon purchase price of the suit property made by the Appellant to the Respondent is only recoverable as a civil debt subject to any counterclaim the Respondent herein might have.

(6) THE Learned Magistrate erred in law and in fact in dismissing the Appellant's case without attaching the due weight to the Appellant's evidence and submissions effectively locking out the Appellant from the seat of justice.

(7) THE Learned Magistrate erred in fact and in law upholding the Respondent's claim when there was no sufficient evidence to support the same.

(8) THE Learned Magistrate erred in law and in fact in metting out a decision that was extremely harsh to the Appellant without having due regard to intervening factor and the circumstance of the matter before him.

33. The Appellant therefore prays for orders that:-

(a) The court do set aside the Judgement of the learned magistrate and do proceed to allow the Appellant's claim and dismiss the Respondent's counterclaim.

(b) The court do award the Appellant costs of this appeal and costs of the subordinate court.

Appellant's Submissions

34. In this appeal it is submitted that on behalf of the Appellant that the trial Magistrate failed to consider and/or give weight to the Appellant's evidence, arguments and submissions. According to the Appellant, all through the writing of the Judgment, the trial Magistrate trivialized the Appellant's evidence. It was submitted that the trial Magistrate demonstrated clear bias in the approach he took and from the tone of the judgment to the extent that he could not deliver justice to the party who had come to court to seek redress.

35. It was further submitted that the trial Magistrate erred in considering extraneous factors not material to the case. While setting out the remarks made by the learned trial magistrate it was submitted that the said remarks appear to have permeated into the way the Magistrate made the findings and how he arrived at his final decision. To the Appellant, the kind of remarks that were being made while writing the Judgment cannot be ignored and cannot be taken for granted because they influenced the decision of the court.

36. According to the Appellant, the trial Magistrate erred in finding that the Appellant was in breach of the contract. It was submitted that in arriving at his decision the learned trial magistrate relied heavily and entirely on the contents of the purported communication from the Appellant without the court ever making any finding on the admissibility of the electronic evidence tendered by the Respondent as had been expected. It was the appellant's submission that the trial court erred in law and fact in making this finding since there was never any confirmation or evidence to show that the telephone number that was purportedly used to send the text messages ever belonged to the Appellant; it could have belonged to anyone including the Respondent herself. There was also irregular production of the electronic records and for which a finding on admissibility was never made. That situation created by the trial Court stole a match against the Appellant.

37. It was submitted that the trial Magistrate erred in holding that the part payment of the purchase price made by the Appellant was recoverable only as a civil debt. According to the Appellant, the least that the trial Magistrate could have done was to restore the Appellant to the position that she had been but for the transaction, and that would have been by ordering that she be refunded the amount that she had paid as deposit on the purchase price. It was submitted that the trial Magistrate erred in his interpretation of the provisions of Section 7 of the ***Land Control Act*** and practically directed the Appellant to proceed and file another suit in which she would seek to recover the amount paid to the Respondent as the deposit on the purchase price. It would have been fair to grant the Appellant the order for refund in his judgment.

38. In support of her submissions the Appellant relied on the case of **Peter Maina Munina vs. Anne Wanjiru Wachira (suing as Attorney of Samuel Nduati Njuguna) [2020] eKLR** and submitted that even if the Appellant would have to walk away with nothing, she could not be denied the award of the refund of what she paid to the Respondent being Kshs. 370,000.00.

39. It was further submitted that the trial Magistrate erred in upholding the Respondent's claim yet the entire testimony of the Respondent lacked any proof. In particular, it was submitted that the claim for payment of Sh.147,500.00 being compensation for alleged loss or destruction of property was never proved since the tabulation of costs of items was done by the Respondent herself without any supporting evidence, for example receipts, to show how the figures were arrived. There was also no documentary evidence, for example photographs, to show that the items alleged to have been either lost or stolen were ever owned by the Respondent in the first place, or that those items were ever on the property. The Respondent did not even prove to the court that she ever had any structures on the land where she claims to have lived. It was therefore submitted that the trial Magistrate indeed erred in law and fact when he granted the compensation sought by the Respondent. The court ignored the principles on awarding special damages, where the damages have to be strictly proved. In this regard the Appellant relied on **Jackson Mwabili vs. Peterson Mateli [2020] eKLR,** ***Capital Fish Kenya Limited vs. The Kenya Power and Lighting Company Limited*** **[2016] eKLR** and **Kenya Power & Lighting Company Ltd vs. James Muli Kyalo & Another [2020] eKLR** and **Cove Investments Limited vs. Johana Kiprotich Rono & 2 others [2021] eKLR** and submitted that the Respondent did not deserve to be awarded the claim for compensation without having proved it strictly, even if the Appellant had not challenged that claim.

40. It was the Appellant's case that the trial Magistrate erred in meting out a decision that was extremely harsh in the circumstances. The Appellant contended that the decision appears to have been affected by a prejudiced attitude of the trial Magistrate towards the Appellant. It was for example noted that three times in the final orders, the trial Magistrate ordered costs to be paid by the Appellant, some with interest from date of filing suit and that in fact the costs for the suit and counter claim were ordered twice in the same set of final orders.

41. To the Appellant, it was the Respondent who had breached the contract. The sale agreement was clear that the balance of the purchase price would be paid after the consent of the land board was obtained. The agreement also indicated that the ownership documents were to be surrendered to the Appellant. The agreement then expressly invoked and incorporated the Law Society Conditions of Sale to apply in the transaction. Based on condition 7.5.1 of the LSK Conditions of Sale, 2015, it was submitted that, after having been paid more than half of the purchase price by the Appellant, it was the responsibility of the Respondent to pursue the issuing of the land board consent in order to facilitate the transfer of the property and that the Respondent did not do this. Further, it was submitted, the Respondent never issued any Completion Notice to the Appellant if at all she believed that it was the Appellant who was in breach. Had she issued such notice, following which the Appellant failed to act, then she would have some ground to shift the blame, but as it stands, she is the only one to blame for the failure to complete the transaction herein.

42. According to the Appellant, the Respondent breached the contract and cannot now blame it on the Appellant and she ought to be compelled to transfer the property to the Appellant. Therefore, it was wrong for the trial Magistrate to award the Respondent her claim because by doing that, the court allowed the Respondent to benefit from her failure to perform her obligations under the agreement. In support of this submission, the Appellant relied on the case of **Anne Murambi vs. John Munyao Nyamu & Another [2018] eKLR.**

43. According to the appellant, there will be no hardship on the part of the Respondent if the orders for specific performance are granted as she does not live in the property.

44. It was submitted that when the parties entered into an agreement for sale of land, they both intended that the Respondent would sell the property while the Appellant would buy the said property for a consideration. The part payment of the purchase price was made to the Respondent with the intention that she would in due course transfer the property to the Appellant. The Appellant was allowed to take possession before completion in furtherance of the intention. That is why the Appellant was in the land and using it for more than 3 years without interruption. Throughout time, nothing contrary to those original intentions was communicated between the parties. The expectation was therefore that at one point in time, the transaction would be completed as intended. By virtue of the payment received by the Respondent, a constructive trust was therefore created and that trust is enforceable. In this regard, the Appellant relied on the Court of Appeal's decision in **William Kipsoi Sigei vs. Kipkoech Arusei & Another [2019] eKLR** and **Kiplagat Kotut vs. Rose Jebor Kipngok [2019] eKLR**.

45. It was submitted that as far as possible, there ought to be some form of predictability and certainty in land transactions. A person who makes an investment in buying land must surely have a plan on what to do with the land. People do not buy land just for the fun of it; it is a serious investment which affects the life of the investor. This ought not to be taken for granted.

46. This Court was therefore urged to find that a constructive trust was created and a beneficial right accrued to the Appellant once she made her initial deposit which position gives the Appellant the right to demand for specific performance as the constructive trust is enforceable under common law based on the maxims of equity that "*Equity considers as done that which ought to be done*" and "*Equity will not suffer a wrong to be without a remedy*" and to find that the Appellant deserves to have the land transferred to her upon payment of the balance of the purchase price.

47. However, based on the evidence of the valuer, it was submitted that the claim for compensation was therefore proved since no other report was presented to the court by the Respondent to counter the valuation report first submitted by the Appellant. The amount prayed for, being Sh.5,000,000 was the value of property parcel number Machakos/Kiandani/4306, whose size was 100 by 100 feet, according to PW2's testimony. To the appellant, it was wrong and for the trial court to ignore the report which explained in detail how the value was arrived at. He was also wrong to make a finding that the value of Sh.5 Million was for the entire parcel number 3146, a fact that was not true at all.

48. This Court was therefore urged to set aside the trial Court's decision and grant the Appellant the prayers sought in the Further Amended Plaint and more specifically the prayer for Specific Performance and to find that the Respondent's Amended Counter-claim was not proved and dismiss it with

Respondent's submissions

49. On behalf of the Respondent, it was submitted that the trial magistrate clearly applied the evidence present before the court by both parties in reaching his finding and that there was no bias exercised in the language used by the court in its rendered judgment. It was only the style and/or input of the court employed during the exercise of its mandate which is provided under Order 21, Rule 4 of the ***Civil Procedure***

Rules which concerns itself with the contents of judgment.

50. It was submitted that the trial court in reaching its finding correctly made its analysis on the pleadings presented before it by parties in the suit, evaluated the evidence and pronounced its finding as it did. The court also observed some anomalies in the documents relied on by the Appellant especially the land agreement which had many important clauses missing and which are common in drafting of contracts. The Appellant's ground that the trial magistrate erred in considering extraneous factors not material to the case is wrongly observed.

51. According to the Respondent, what was not controverted throughout the trial was that indeed parties entered into a land transaction and the size of the land mentioned throughout was 100ft x 100ft. The sale agreement did not mention which part of the Respondent's entire land the 100ft x 100ft was going to be hived from. The behaviour of the Appellant during the transaction disrupted the implementation of the transaction as she took upon herself to allocate herself the land and denying access to the Respondent's remaining land and home. She did this by fencing off the possible access road making it hers for a period of three years where she was tilling and benefiting therefrom. She went ahead to benefit from the land even after she herself had called off the contract. The court could not be blind and allow the Appellant to benefit from a contract that she herself clearly rescinded.

52. As regards electronic evidence, it was submitted that the trial court heard parties on the oral application in court by both counsel and made a ruling on the same. The Appellant agreed with the trial court's finding in the ruling and the witness who had been stood down was recalled and the hearing continued. The Appellant did not appeal against that particular ruling the court had discretion in admitting evince under the ***Evidence Act***.

53. According to the Respondent, the trial court correctly granted an order for eviction because it could not have allowed the Appellant to continue occupying the suit property once it found no evidence of the Appellant correctly excising a portion of the Respondent's land. It would have been absurdity to allow a stalled transaction to stand. It was submitted that the trial court correctly found that the Appellant be evicted with no refund of the part of the instalment because she had already benefited from the land and that she would continue occupying the suit property had the trial court erred and granted her such orders.

54. According to the Respondent, the trial magistrate could not grant the Appellant orders for specific performance because the parties had not obtained the consent of the land control board to subdivide the suit property and transfer the subdivision to the appellant as required under section 6 of the ***Land Control Act***. From the above provision, it was submitted that any party to the agreement can apply for consent of the Land Control Board and that there is nowhere indicated that the application should be sought by a person seeking to sub-divide or sale the land. While the applicant was capable of meeting these conditions, she instead took documents away from the Respondent who was properly moving until the time she realized she would not manage and chose to terminate transaction as she did.

55. The Respondent also cited section 8(1) of the ***Land Control Act*** and submitted that the Appellant did not make any such application to seek extension orders, but instead chose to terminate and mess the whole transaction. Reliance was placed on in **Isaac Ngatia Kihagi v. Paul Kaiga Githui [2017] eKLR** and **Concepta Nyaboke vs. Peter Muasya Wangaika & 2 Others [2019] eKLR**.

56. To the Respondent, an order for specific performance touching on the sale of land can only be granted when the transaction was found to be valid. In this case the transaction was never completed due to breach by the purchaser (Appellant) who frustrated the entire process and no consent was ever granted. It was submitted that just like any other equitable remedy, specific performance is discretionary and granted on well settled principles based on there being a valid contract and will never be ordered if the contract suffers from some defects, mistakes or illegality.

57. On the alternative prayer of Kshs. 5,000,000/= sought by the Appellant, it was submitted that the prayer is solely based on the valuation Report which is invalid for having been prepared by an unlicensed valuer and is not worthy for the court's further consideration. On the order for payment of damages for breach of contract assessed at Kshs. 720,000/= plus interest, it was submitted that the sale agreement under paragraph 3(iv) specifically expresses the intention of the parties to be bound by the Laws Society of Kenya Conditions of Sale and therefore every provision therein applies.

58. According to the Respondent, the Appellant did not qualify for any costs of the suit and interest because she unnecessarily instituted the claim yet she is the one who is squarely in breach of contract.

59. It was therefore submitted that the prayers sought and the entire appeal should fail with costs to the respondent.

Determination

60. I have considered the material placed on record before me in this appeal.

61. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

62. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the

trial Court had the advantage of hearing the parties.

63. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

64. It was however cautioned in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** by the Court of Appeal that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

65. In this case the Appellant's case was that she entered into a contract for the same of land measuring 100 x 100 with the Respondent. The said parcel was meant to be carved out Title No. Machakos/Kiandani/ Block 3146 at the purchase price was Kshs.720, 000/-. She accordingly, paid a deposit of Kshs. 370, 000/- with the balance agreed to be paid after the subdivision and transfer and with the consent of the Respondent, she took possession of the land and developed it. However, the Respondent failed to obtain the requisite consent and thereby breached the contract.

66. It is not in doubt that there was a contract for the sale of that portion of land. What is in dispute is what led to the same not being completed. According to the Respondent, the said transaction was rescinded by the Appellant who sent her phone message to that effect. It was her case that while she was in the process of obtaining the requisite consent, the Appellant became impatient and forcefully took away the forms but when the Appellant failed to obtain the same, she rescinded the contract and sought for refund of the money. The Respondent however made a counterclaim against the Appellant for the period the Appellant was in occupation of the said land.

67. The Appellant complains that from the language employed by the trial court, it clearly revels bias on the part of the learned trial magistrate. I on my part has considered the record of these proceedings and I must respectfully state that the Appellant's submissions are not entirely without merit. From the record, it is clear that the learned trial magistrate employed the use of unnecessarily strong language such words as "paranoid", "fiat and impunity" and "mad rush" when the same was unwarranted. Dealing with not too dissimilar circumstances the Court of Appeal (**Gachuhi, JA**) in **Haji Mohammed Sheikh T/A Hasa Hauliers vs. Highway Carriers Ltd. [1986-1989] EA 524** expressed himself as hereunder:

> **"It is true that the learned Judge introduced some extraneous matters into the ruling and made derogatory remarks as to his past knowledge of this firm of advocates and of its inefficiency in other matters. Such innuendo and dilatory remarks are unfortunate. He must have been influenced by those remarks in delivering his ruling…The whole ruling appealed against was vitiated by extraneous matters and particularly derogatory remarks of hatred directed to the firm of advocates which remarks were uncalled for. These remarks cannot be expunged due to their tone in the whole ruling whereby injustice is reflected therein. Had the Judge not been carried away by his emotional conduct which tone dominated the whole ruling, and had he considered the interest of the appellant independently from the conduct of his advocates and considering the authorities on the subject, he could have come to a different conclusion. In entering the judgement the Judge was still carried away by his emotion because the defence was applied for. The words recorded imply that it was entered on the Judge's own motion…It must be clear that the Court is to administer justice through the procedure laid down. It is important in administering justice that the suit in court is between two litigants and the counsel is merely putting the case for his client forward. The litigant may not be aware of the failure of his advocates in complying with the rules. He is at the mercy of his advocate. It is the law of agency that the principal is bound by the acts of his agent. Yet in administering justice, why should a litigant suffer due to the mistakes and errors of his advocate…If the Court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights."**

68. On his part, **Apaloo, JA** (as he then was) delivered himself thus:

> **"If the Judge introduced into his consideration of the application extraneous matters and founded his decision either partly or wholly on them, then the exercise of his discretion can properly be faulted. But if there is evidence on record to justify the Judge's feeling that the genuineness of the defence was open to suspicion, there is nothing extraneous in the observation… Since it is not suggested that the Judge did not in truth incur the experience that the firm in two respects had used dilatory tactics and therefore thought very little of the firm's efficiency, that is an expression of opinion which may or may not be shared by other judges and the fact that the Judge had grave reservation about the firm's efficiency, was not the reason why he declined to exercise his discretion in favour of the appellant. Rather that was one of the reasons, which caused the Judge to grant leave to the appellant on terms that the defence be filed by 11 July and that the case be mentioned on 29 July. The appellant or his legal advisers breached both conditions and, in the process, put paid to the Judge's suspicions…There was no suggestion that the Judge denied the appellant a fair hearing on his application to set aside the *ex parte* judgement or that, while hearing that application, the Judge showed hostility or exhibited any attitude or conduct which shows ill-will towards the appellant or his advocates. Throughout all the saga the respondent was entirely blameless and was, in the circumstances, peculiarly deserving of the exercise of the Court's discretion. It would sound odd if a discretion exercised in his favour to reject the application can be justly upset regardless of the facts of the case only because of the way in which the Judge chose to deliver himself when declining to exercise his discretion in the appellant's favour…Unless the learned Judge was relating falsehood, or unless a Judge ought not to relate relevant experience or be guided in the performance of his duties by it, it is difficult to see that any valid exception can be taken to his observation. It is not denied that although the covering letter forwarding the defence states that a blank cheque was being enclosed to meet the cost of filing, no such cheque was enclosed and no explanation of any sort was offered. If the omission to include the cheque was due to oversight, it was clearly the firm's duty to say so but having proffered no explanation of any sort for what can be a misleading or inaccurate statement, there is no basis for taking umbrage at the Judge's belief, borne of past experience that this was a deliberate delaying tactic. It is extravagant and entirely fanciful to suggest that this observation evidences the Judge's hatred for the appellant's advocates…One's experience teaches one that charges of bias or ill-will against a Judge or adjudicator are usually made by defeated litigants often motivated by disappointment at adverse verdicts. Where a party or his advocate's conduct is deserving of judicial censure, strong language by the Judge in condemnation of that conduct cannot properly be stigmatised as bias or judicial hatred. Nor does it justify an appellate Court in substituting its discretion for that of the trial court regardless of the facts, or provide such Court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of it…"**

69. As for **Masime, JA:**

> **"Whereas it is true as the Learned Judge says in his ruling that the suit had been characterised by delays throughout the entire ruling was a criticism of the conduct of the appellant's counsel and the alleged dilatory and inefficient tactics rather than a consideration of the application and the affidavits in its support. Not only has his attitude to the defendant's counsel prevented him from really dealing with the application before him, but it has made him wander so far away from it that it cannot be said that he has exercised his discretion judicially."**

70. In **Ogang vs. Eastern and Southern African Trade and Development Bank (PTA Bank) [2003] 1 EA 217 (COMESA)**, the Court was of the view that:

> **"Interjections by the Judge and his employment of the word "fantasies" in particular instances where they occurred, amount to no more than the expression of disagreement over particular issues, which do not constitute evidence of unchangeable fixed bias…Mere strong language by judge does not establish bias since dialogue between the bench and the bar is commonplace and the views expressed therein do not necessarily amount to a predetermination of issues."**

71. Therefore, while I agree that the words used were unusually strong, I find that the judgement, considered holistically, cannot be vitiated based on that ground.

72. Before the court below, the Appellant sought, inter alia, an order for specific performance. It is however true that that remedy is an equitable remedy and one of the principles of equity is that equity follows the law. In this case the law as prescribed under section 6 of the ***Land Control Act*** is that the consent of the Land Control Board must be obtained within 6 months of the agreement otherwise such a transaction is rendered void. In this case it is agreed that the transaction require the consent of the said Board and that consent was not obtained. It follows that the transaction became void. Whereas there was a window for extension of the said period, in light of what I have stated elsewhere in this judgement regarding the rescission of the contract, that option does not avail the appellant. The consequences of a transaction that has been rendered void as a result of the operation of the said section are provided for under section 8 of the same Act which states that:

> ***If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.***

73. Such a transaction cannot therefore be enforced. That was the position in **Concepta Nyaboke vs. Peter Muasya Wangaika & 2 others [2019] eKLR** where **Angote, J** rendered himself as follows:

> **"The Court of Appeal has made it clear in many decisions that where a statute declares a transaction to be void, a party who relies on the provision of the Act, cannot be accused of committing fraud, and that the only recourse that is open to the purchaser was refund of the purchase price under Section 7 of the Land Control Act (See Leonard Njonjo Kariuki v. Njoroge Kariuki alias Benson Njonjo, Civil Appeal No. 26 of 1979 and David Sironga Ole Tukai vs. Francis Arap Muge & 2**

others). Having not obtained the requisite consent of the Land Control Board within six (6) months, and the Plaintiff having not sought for the extension of the period within which to obtain the consent of the Board, the Agreement of 23rd February, 2010 is not enforceable. The only recourse that the Plaintiff has to recover the amount paid to the 1st Defendant. Considering that the Plaintiff did not seek for a prayer of the refund of the purchase price in his Plaint, and having found and held that the order of specific performance cannot issue in a situation where the Agreement of Sale is void for want of the consent of the Land Control Board, I find and hold that the Plaintiff has not proved his case on a balance of probabilities."

74. While the decision of the Court of Appeal decision in **Kiplagat Kotut vs. Rose Jebor Kipngok [2019] eKLR,** makes sound business sense, it may not necessarily apply to the circumstances of this case. In that case it was held inter alia that:

> **"…24. We hasten to state that the Land Control Act, Cap 302 of the Laws of Kenya was never intended to be an instrument or statute for unjust enrichment. It was never mean to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.**
>
> **…**
>
> **27. We have deliberated on the reasoning by the trial court on validity of the consent of the Land Control Board. Certain pertinent facts are evident and proven from the record. It is indisputable that the sale agreement was entered into between the appellant and the respondent; pursuant to the agreement, the respondent received the purchase price of Ksh. 700,000/= from the appellant. The trial judge correctly held that the respondent is estopped from reneging on the sale agreement. We agree with the judge and add that the doctrine of proprietary estoppel and constructive trust are applicable in the instant case and the respondent cannot renege from her contractual obligations as well as fiduciary duty imposed by law and equity. As Lord Bridge observed in Llyods Bank Plc -vs- Rosset, (1991) 1 AC 107,132, a constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by a claimant.**
>
> **…**
>
> **33. The final orders of this Court is that this appeal has merit and is hereby allowed. The prayers sought in the Plaint dated 4th March 2011 be and are hereby granted. For avoidance of doubt, we hereby issue an order for specific performance compelling the respondent to execute the instrument of transfer and transfer the suit property LR No. Plateau/Plateau Block 2 (UASIN GISHU) 63 to the appellant. In default, we hereby direct and order the Deputy Registrar to execute the instrument of transfer whereof the same shall be deemed sufficient to effect transfer of LR Plateau/Plateau Block 2 (UASIN GISHU) 63 in favour of the appellant. The respondent shall bear costs in this appeal and costs before the Environment and Land Court. It is so ordered…"**

75. In the matter before me trust was never pleaded and the matter did not proceed on the basis of a trust.

76. I agree with the decision in **Anne Murambi vs. John Munyao Nyamu & another [2018] eKLR,** as regards the completion period. In that case the court held inter alia that:

> **"…39. DW1 conceded that they did hot serve any completion/termination/rescission notice. In my view, in the absence of a completion/termination/rescission notice in the manner stipulated, the material contract remained in force and is enforceable subject to the law of limitation of actions. Secondly, failure to complete the contract in 90 days did not terminate the contract because time was not expressed to be of essence in the material contract. Neither did the parties agree that the contract would stand terminated if there was no completion within 90 days. The court finding on this issue therefore is that the contract dated 14/7/2004 was not in any way terminated or rescinded by any of the parties and the contract is enforceable by either party to it.**
>
> **…**
>
> **47. The fifth issue is whether the plaintiff breached the agreement dated 14/7/2004 in any way. No evidence was tendered to suggest that the plaintiff breached any term of the agreement for sale. The deposit was paid at the time of signing the agreement. Balance of the purchase price was to be paid upon the vendor's delivery of completion documents and registration of the charge in favour of the plaintiff's financiers. There is no evidence that completion documents were delivered. DW1 confirmed that they faced challenges which led to the delay. The first challenge was the death of the vendor, necessitating succession proceedings. The second challenge was the fact that the title was held by M/s A H Malik Advocates and the Ntutus had placed a caveat against the title. I therefore find that there was no breach on part of the plaintiff…"**

77. That decision however dealt with the failure to provide for contractual period for completion as opposed to s a period prescribed by statute. Therefore, the only recourse available to the Appellant was to seek for the refund of the purchase price as opposed to specific performance. In this case however, it is contended and the Court found that the Appellant was in breach of the contract for sale and was therefore not entitled to refund. According to the Respondent, the Appellant went into possession of the land and fenced it off. When the surveyor went to undertake the survey, the access was not granted and hence the survey was not possible to be undertaken. The Appellant however stated that she went into occupation of the said parcel with the approval of the Respondent. However, the agreement between the parties did not provide for possession. One fails to understand how the issue of possession could have been agreed upon when the survey

was yet to be undertaken. Though the Appellant contends that there were beacons on the suit land, the Respondent's position was that the said beacons were the ones placed thereon by the initial owner from whom the Respondent acquired the whole property.

78. Based on the evidence on record and in the absence of any provision dealing with possession, I am unable to find that the parties agreed that the Appellant ought to have gone into possession before the survey.

79. Regarding the rescission of the transaction, PW1 stated that she received three text messages from an unknown number. A consideration of the said messages reveal that the sender was purporting to rescind the transaction and asked for the refund and even disclosed the account particulars. The question is from whom the said messages were sent. While the Appellant sought to exclude similar messages which the Respondent alleged to have received, it is clear that the messages were the same. The only point of departure was the person who had sent them. Since it was the Plaintiff who was alleging that the messages did not come from the vendor, it was upon the Plaintiff to prove the same. Nothing would have been easier than for the Appellant to adduce evidence to that effect. Since the Respondent testified that the message came from the vendor and as this evidence was not sufficiently controverted, there is no basis for finding that the learned trial magistrate erred in finding that the agreement was rescinded by the Appellant. Having rescinded the agreement, the Appellant was not entitled to damages. Even had he been so entitled, as the evidence in support of the value of the damage was given by a person who was not qualified to do so, that claim was bound to fail.

80. The Appellant however, contended that even if her claim for specific performance and damages failed, she was entitled to refund of the sum paid. In her counterclaim, the Respondent claimed damages for the period the Appellant occupied the said parcel of land whose value she placed in the sum of Kshs 147,500.00. However, there was no credible evidence adduced to prove this claim as reliance was placed on the evidence of the Respondent without any valuation having been properly undertaken. As was held in the case of **Jackson Mwabili vs. Peterson Mateli [2020] eKLR**:

> **"…The law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing…"**

81. Similar circumstances were the subject of the case of ***Capital Fish Kenya Limited vs. The Kenya Power and Lighting Company Limited*** **[2016] eKLR**, where the Court of Appeal observed that:

> **"The appellant apart from listing the alleged loss and damage, it did not…lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages…"**

82. It was those similar circumstances that led the court in the case of **Cove Investments Limited vs. Johana Kiprotich Rono & 2 others [2021] eKLR** to hold that:

> **"…66. The petitioner also seeks compensation for loss and damage in the sum of KShs 11,335,000 whose details are set out at paragraph 15 above. As I understand it, the claim for compensation is in the nature of special damages. The law is that special damages must be specifically pleaded and strictly proved with a degree of certainty and particularity. See Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR. Beyond claiming that it undertook an audit of loss and damage occasioned by the 1st respondents and their agents' invasion and dispossession, the petitioner has not provided any material to justify the figures. Consequently, that limb of the claim fails for want of proof…"**

83. Accordingly, that award ought not to have been made and cannot stand.

84. In this case the law expressly provides that the Appellant was entitled to a refund of the amount she paid. The Court seemed to have avoided to deal with this case presumably on the ground that that relief was not specifically sought. In my view, there was no basis for the failure by the trial court to award what was awardable under the law while dismissing the unwarranted claims. I associate myself with the decision in **Peter Maina Munina vs. Anne Wanjiru Wachira (suing as Attorney of Samuel Nduati Njuguna) [2020] eKLR,** where the court held *inter alia* that:

> **"24. Section 7 of Land Contract Act provides that if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.**
>
> **25. It is admitted by the Appellant in evidence that the received the sum of the Kshs 1,350,000/ - However in his submissions he submitted that he received only Kshs 1 Million and not the full amount. The Respondent led evidence that the sum of Kshs 330,000/- was paid via bank transfer to the Appellants account by Reuben Henry Muhia. The Appellant has not disputed this payment in particular.**
>
> **…**
>
> **32. That said this Court is both a Court of equity and a Court of law. Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detects 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.

33. It is the finding of the Court that allowing the Appellant to hold the land and the purchase price is inequitable. The justice of the case is that the Appellant must refund the purchase price together with interest. The Court will grant appropriate orders in the end.

34. The Learned Magistrate cannot be faulted in granting the remedy that she did.

…

44. The judgement of the lower Court is substituted with the orders of this Court as follows;

(a) The Appellant shall refund the sum of Kshs 1,330,000/- together with 20% p.a interest as liquidated damages to the Respondent from the time of filing suit until payment in full.

(b) The costs of the Appeal shall be payable to the Respondent…"

85. In the premises, while I set aside the award of Kshs 147,500/- in favour of the Respondent, I hereby set aside the entire dismissal of the Appellant's case and substitute therefor judgement in the sum of Kshs 370,000.00. Considering the conduct of the Appellant and since it is admitted that she took possession of the land before survey, I decline to award her the interest.

86. While I set aside the award of the costs of the suit to the Respondent, the costs of the counterclaim are however awarded to the Respondent. The other reliefs are confirmed. As none of the parties can be said to be wholly successful in this appeal, there will be no order as to costs.

87. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS 14TH DAY OF DECEMBER, 2021

G V ODUNGA

JUDGE

DELIVERED THE PRESENCE OF:

MR NAGWERE FOR MR MUTIA FOR THE RESPONDENT

MRS MUTUA FOR THE APPELLANT

CA SUSAN