

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**MACHAKOS**  
**ELC CASE NO. 60 OF 2016**

**BENARD NDICHU MWAURA .....**  
**.....PLAINTIFF**

**VERSUS**

**GODFREY                      GITAHI                      KEEN.....**  
**.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. In a plaint dated 26<sup>th</sup> July 2016, the plaintiff sought the following prayers against the defendant;

**a) A declaration that the plaintiff is the rightful owner of the parcels of land known as Mavoko Town Block 3 (Waswa) 4279, Mavoko Town Block 3 (Waswa) 4280 and Mavoko Town Block 3 (Waswa) 4281.**

**b) A permanent injunction to restrain the defendant, their servants and or their agents from constructing, developing, trespassing, selling, transferring, giving in exchange,**

**changing or in any other way and encumbering or utilizing land comprised in parcels Numbers Mavoko Town Block 3 (Waswa) 4279, Mavoko Town Block 3 (Waswa) 4280 and Mavoko Town Block 3 (Waswa) 4281.**

**c) The defendant releases the original titles of parcel Numbers Mavoko Town Block 3 (Waswa) 4279, Mavoko Town Block 3 (Waswa) 4280 and Mavoko Town Block 3 (Waswa) 4281.**

**d) The Deputy Registrar of the court execute the transfers in place of the defendant in favor of the plaintiff**

**e) The costs of the suit.**

2. The plaintiff stated that on 20<sup>th</sup> January 2016, he entered into a land sale agreement with the defendant for sale of parcels of land known as Mavoko Town Block 3 (Waswa) 4280 and 4281 at an agreed purchase price of Kshs. 2,600,000/=. That the plaintiff paid a deposit of Kshs. 1,300,000/= at the execution of the agreement which amount the defendant acknowledged receipt. That the balance has to be paid in 90 days after the agreement.

3. The plaintiff further stated that the aforesaid parcel of land was sold with vacant possession to be delivered upon payment of full purchase price.
  
4. He further averred that on 28<sup>th</sup> January 2016, he again entered into another land sale agreement with the defendant in regard to property known as parcel No. Mavoko Town Block 3 (Waswa) 4279 at an agreed purchase price of Kshs. 1,400,000/=. That the defendant was paid a sum of Kshs. 700,000/= at the execution of the agreement which he acknowledged receipt and that the balance of Kshs. 700,000/= was to be paid within 90 days of the agreement. That vacant possession was granted upon payment of the full purchase price. He further stated that on 3<sup>rd</sup> February 2016, the defendant applied for the Land Control Board consent for the transfer of the three suit properties and that on 9<sup>th</sup> February 2016 the plaintiff paid the balance of Kshs. 1, 350, 000/= by RTGS to the defendant. Further that on 10<sup>th</sup> February 2016 the plaintiff paid a direct deposit of Kshs. 650,000/= into the defendant's account being the final and full payment of the outstanding balance of the purchase price. He stated

that having completed payment of the purchase price, he took possession of the suit properties and was planning to develop the same.

5. The plaintiff complained that despite complying with the terms of the two agreements, the defendant has refused to release the original title to him and to sign the transfer documents, for the transaction to be completed. He maintained that he had complied within the agreed 90 days and that the defendant was expected under the agreements to also comply in 90 days, but had failed to do so, while threatening to sell the suit properties to a third party if the plaintiff does not pay an amount in excess of the agreed purchase price.
6. He stated that on 5<sup>th</sup> April 2016, a completion notice was issued and served on the defendant which he ignored.
7. The suit was opposed by the defendant who filed a statement of defence dated 21<sup>st</sup> May 2018 denying the plaintiff's claim. The defendant conceded to the fact that he sold the three suit properties to the plaintiff and stated that the plaintiff had failed to deposit the sum of Kshs.

1,300,000/= into his account Number 045 \*\*\*\*\*60 at Family Bank Githurai branch, having only deposited a sum of Kshs. 750,000/=. He complained that the plaintiff failed to deposit a sum of Kshs. 500,000/=. The defendant confirmed that the plaintiff paid the entire consideration for the land sale agreement for two parcels of land. That he obtained consent for the transfer of the three properties on the basis that the plaintiff promised that he will pay the balance of Kshs. 500,000/= before completion documents were released. He confirmed that a sum of Kshs. 650,000/= was further deposited into his account, but insisted that there is a balance of Kshs. 500,000/= and maintained that unless that amount is paid, he will not transfer the suit properties to the plaintiff.

8. The matter proceeded to hearing by way of oral evidence. The plaintiff presented two witnesses while the defendant presented one witness.

### **Plaintiff's evidence**

9. PW 1 was Bernard Ndichu Mwaura the plaintiff in this suit. He adopted his witness statement dated 25<sup>th</sup> July 2016 as his evidence in chief and produced documents dated and filed on even date. His testimony was that he entered into two land sale agreements with the defendant in regard to parcel Numbers Mavoko Town Block 3 (Waswa) 4279, 4280 and 4281. That the first agreement was entered into on 20<sup>th</sup> January 2016 which was in respect to two properties being Mavoko Town Block 3 (Waswa) 4280 and 4281 at a consideration of Kshs. 2,600,000/=. That at the time of making the agreement, he paid a deposit of Kshs. 1, 300, 000/=, which was acknowledged by the defendant on execution of the agreement. That parties agreed that the balance would be paid within 90 days of the date of the agreement. He further stated that on 28<sup>th</sup> January 2016, he again entered into a second land sale agreement with the defendant regarding parcel No. Mavoko Town Block 3 (Waswa) 4279 at an agreed consideration of Kshs 1, 400, 000/= whereof he made a deposit of Kshs. 700,000/= which was acknowledged by the defendant and the balance was to

be paid in 90 days. That parties agreed that upon payment of the entire balance, the plaintiff would take vacant possession of the properties purchased. It was his testimony that on 3<sup>rd</sup> February 2016, the defendant applied for consent from the Land Control Board which was granted. That on 9<sup>th</sup> February 2016, he paid through RTGS a sum of Kshs. 1,350,000/= to the defendant which was the balance. He stated that on completion of the payment of the purchase price, he took vacant possession of the purchased properties and expected that transfer of the same would be done in 90 days as per the agreements, but that the defendant had deliberately refused to release the original titles and to execute transfers in his favor. He stated that a completion notice had been issued to the defendant on 5<sup>th</sup> April 2016 but that there was no response and that the defendant had threatened to sell the purchased properties to third parties. He complained that his efforts to get the defendant to transfer the suit properties to him were fruitless.

10. He produced copies of sale of land agreements dated 20<sup>th</sup> January 2016 and 28<sup>th</sup> January 2016; Certificates of official searches for parcel Numbers Mavoko Town Block 3 (Waswa) 4279, 4280 and 4281; Land Control Board consents; Bank receipts and completion notice.
  
11. On cross examination, he stated that he purchased three properties from the defendant. That he was present during negotiations. He confirmed that the deposit slip of Kshs. 750,000/= showed that the depositor was one Wamboi who is his family friend. Regarding the date on the agreement, he stated that 2006 was a typographical error as it was supposed to be 2016. He conceded that according to the agreement of 20<sup>th</sup> January 2016, the deposit was supposed to be Kshs. 1, 300, 000/= and that the agreement provided for deposit in a specific bank account. He stated that he did not have a deposit slip. He further stated that the deposit of Kshs. 750, 000/= was made before the agreement was signed because the defendant demanded cash of Kshs. 500,000/= before he signed the sale agreement. He stated that clause two of

the agreement was not amended. That he wrote on the slip but the same was not countersigned by the defendant. That the defendant has never made a demand for the alleged balance of Kshs. 500,000/=. Further that the defendant received cash of Kshs. 500,000/= from the advocate's office in the presence of witnesses. That he later deposited in the defendant's account the sum of Kshs. 500,000/= and made a cash payment of Kshs. 250,000/=. That the defendant even gave a consent from the Land Control Board without any condition. He insisted that the defendant signed the agreement because he had paid all the money. He maintained that there was no balance due to the defendant.

12. In re examination, he stated that his role in the transaction was to ensure that he got into a genuine transaction and that he was present during the signing of the first agreement which was done at the advocate's office. He insisted that the defendant signed on all the pages including the first page of the agreement. He also stated that he was never asked to pay any balance at the Land Control Board and neither was there any demand

when he was entering into the second agreement. That then, there was no complaint on the first agreement. That he learnt of the defendant's new demand after filing this suit.

13. PW2 Was Dennis Odero Olendo, an advocate of the High Court of Kenya practicing under the name and style of Odero Olendo & Company Advocates. He adopted his statement dated 3<sup>rd</sup> May 2017 as his evidence in chief. He told court that he knew the parties in this case who appeared before him. That they appeared before him the first time on 20<sup>th</sup> January 2016 when he drafted a sale agreement but that the defendant refused to sign the same insisting that he had to be given some cash. That the parties left his office, went back to the bank and came back and signed the agreement. He stated that the agreement was signed before him and the parties signed every page thereof. That in the first agreement, the defendant was selling two parcels of land while in the second agreement he was selling the third parcel. That the parties signed all the completion documents but the defendant refused to surrender the original titles for all

the three parcels. He produced the agreements dated 20<sup>th</sup> January 2016 and 28<sup>th</sup> January 2016; three search certificates and consent from the Land Control Board. He stated that he issued the completion notice which he also produced as an exhibit. He stated that having served the completion notice on the defendant, the latter never came back to him.

14. According to this witness, both parties herein approached him to prepare a sale agreement and complete a transfer between them regarding parcel Numbers Mavoko Town Block 3 (Waswa) 4280 and 4281. That at the point of the agreement, the defendant stated that it was customary for him to receive at least part of the purchase price in cash before he signed the agreement but that the rest of the deposit should be deposited in his bank account at Family Bank which he had provided earlier. That he insisted that he would not sign the agreement if that was not done. That after brief discussions with the parties, it was agreed that the plaintiff gives the defendant cash amounting to Kshs. 550,000/= and deposit the rest in the bank amounting to

Kshs. 750, 000/=. This witness stated that the parties had earlier agreed that a deposit of Kshs. 1, 300, 000/= be transferred to the defendant's account Number 045\*\*\*\*\*60 at family Bank before the signing of the agreement. That the parties took a break to allow the plaintiff time to deposit the money to the defendant's bank account and bring Kshs. 550, 000/= in cash for subsequent payment to the defendant. That the parties came to his office later after one hour and the plaintiff handed him a copy of the deposit slip reflecting payment of Kshs. 750,000/= together with the sum of Kshs. 550,000/= in cash which cash he handed over to the defendant, having counted and verified the same. That it was at this point that both parties signed the agreement in his presence. That the defendant acknowledged receipt of Kshs. 1,300,000/=. That parties instructed him to prepare a second agreement regarding parcel No. Mavoko Town Block 3 (Waswa) 4279 which he did on 28<sup>th</sup> January 2016. That parties agreed that a deposit of Kshs. 700,000/= be made and a sum of Kshs. 200,000/= be paid in cash and the rest be deposited to the vendor's bank

account. That on 28<sup>th</sup> January 2016, parties herein appeared before him to execute the second agreement and on that date the plaintiff produced a bank deposit slip of Kshs. 500,000/= and handed him cash of Kshs. 200,000/= and having counted and verified the same, he handed the same over to the defendant who confirmed receipt.

15. The witness also stated that in February 2016, the defendant furnished him with a copy of the Land Control Board consent approving the transfer of the suit properties from the defendant of the plaintiff and that on 10<sup>th</sup> February 2017, the plaintiff furnished him with a copy of the RTGS transfer slip showing that he had transferred a sum of Kshs. 1,350,000/= in favor of the defendant and another copy of the bank slip of Kshs. 650,000/= to the defendant's account. That therefore what remained was for the defendant to supply him with the original titles and to execute the transfer instruments. He stated that the defendant failed to heed repeated calls to furnish him with the original titles and to execute the transfers in favor of the plaintiff. That on 5<sup>th</sup> April 2016

upon expiry of the completion, he issued a completion notice on the defendant but that the defendant never responded to the notice. That the defendant never raised a complaint as regards any amount pending as balance. He said that he was surprised to hear that the defendant was alleging that he was owed some balance of the purchase price because the same has never been raised with him. According to him, the allegation is misplaced and preposterous because he is aware that the defendant was paid the full purchase price for the three parcels of land and the plaintiff does not owe him any amount of money because the plaintiff has performed his side of the contract and is entitled to the orders sought in the plaint.

16. On cross examination, he confirmed preparing the agreement which is dated 2006 but stated that there was a typographical error as the same was supposed to be 2016. That the plaintiff paid his legal fees and the purchase price. That all the parties signed all the pages of the agreement in dispute. That the deposit agreed to be made in the account of the defendant was Kshs. 1,300,000/= and that part of that amount in the sum of

Kshs. 750,000/= was deposited in the defendant's account and Kshs. 550,000/= was paid to the defendant in cash. That the bank required that any transaction above Kshs. 1,000,000/= be explained. According to him, it was the defendant who insisted that he be paid cash in the sum of Kshs. 550,000/= before he signs the agreement. That he did not prepare any other document to show the cash payment. That paragraph two of the agreement shows acknowledgement of payment. He stated that if the defendant had not been paid, he would not have allowed him to sign the agreement. That when he made the agreement of 20<sup>th</sup> January 2016, the assumption was that the entire deposit would be deposited in the defendant's bank account. That as the defendant had confirmed to have been paid the amount of Kshs. 1, 300, 000/=, he saw no reason to amend the said agreement. He also stated that after the agreement of 28<sup>th</sup> January 2016, the defendant never went back to his office to ask for a balance and that the letter written to him was not responded to. In re-examination he stated that a sum of Kshs. 1,300,000/= could not be deposited

without documents, which they did not have because the defendant had refused to sign the agreement. He insisted that the sum of Kshs. 1, 300, 000/= was paid to the defendant but not in the manner stated in the agreement. Further that the second agreement of 28<sup>th</sup> January 2016 was completed and the entire amount paid but that the defendant had not released title in respect of that agreement. That if he had not been paid, when he was issued with the completion notice, he should have complained to the advocate because he was acting for both of them. That marked the close of the plaintiff's case.

### **The defendant's case**

17. DW1 was Godfrey Gitahi Keen, who is the defendant in this case. He adopted his witness statement dated 18<sup>th</sup> May 2017 as his evidence in chief and produced documents filed on the same date. His evidence was that on 20<sup>th</sup> January 2016, he entered into a land sale agreement with the plaintiff thereby selling him three parcels of land being Mavoko Town Block 3 (Waswa) 4279, 4280 and 4281 respectively. According to him, the

purchase price for the three parcels was Kshs. 4,400,000/= payable as per the terms of the agreement and that the amount was to be deposited in his Bank account number 045\*\*\*\*\*60 at Family Bank. He enumerated the paid amounts as follows; Kshs. 750,000/= deposited on 20<sup>th</sup> January 2016; Kshs. 700,000/= deposited on 27<sup>th</sup> January 2016; Kshs. 1,350,000/= deposited on 9<sup>th</sup> February 2016 and Kshs. 650,000/= deposited on 10<sup>th</sup> January 2016; making a total of Kshs. 3,450,000/=. Further that a balance of Kshs. 550,000/= remained outstanding to make a total of Kshs. 4, 400, 000/= as per the sale agreement for the three parcels. The witness stated that the plaintiff was supposed to make the first deposit of Kshs. 1,300,000/= on 20<sup>th</sup> January 2016 but instead, he brought Kshs. 550,000/= less which is the unpaid balance to date. According to him, the first installment was deposited into his account by one Hellen Chege who also desposited other further sums. That he must be paid the aforesaid balance for him to transfer the land to the plaintiff.

18. He produced certificates of search for the three parcels of land Numbers 4279, 4280 and 4281; agreements dated 20<sup>th</sup> January 2016, agreement dated 28<sup>th</sup> January 2016 and his bank statement.

19. In cross examination, he stated that his bank statement was not certified by the bank because it was sent to him by e-mail. He conceded that in his witness statement, he only referred to an agreement dated 20<sup>th</sup> January 2016. He confirmed that both parties had been represented by one advocate known as Odero Olendo Advocate. He further stated that on the agreement of 20<sup>th</sup> January 2016, he signed every page of the agreement and confirmed that the date of 2006 in the agreement was a typographical error because the agreement was done in 2016. That according to clause 2 (a) of the said agreement, he acknowledged receipt of the sum of Kshs. 1,300,000/= and added that he acknowledged receipt on the understanding that the said amount will be deposited on his personal account, but that what was deposited was the sum of Kshs. 750,000/=. That the balance of Kshs. 1,300,000/= was to be paid in 90 days. He confirmed that

time was of the essence according to the agreement and conceded that if there had been non-compliance, he ought to have issued a completion notice. He confirmed that he never issued any completion notice to the plaintiff.

20. The witness also stated that they entered into the second agreement for sale of land parcel No. Mavoko Town Block 3 (Waswa) 4279, eight days after the first agreement. According to him, before signing the second agreement, he raised the issue of the previous agreement with the advocate, but that he had no evidence of his complaint. He further stated that on 28<sup>th</sup> of January 2016, a sum of Kshs. 500,000/= was deposited in his bank account which he confirmed. That the second agreement was to be completed in 90 days and time was of the essence. He further confirmed that he had not transferred the properties in respect of the two agreements. He stated that on 3<sup>rd</sup> February 2016, with the plaintiff, he appeared before the Land Control Board regarding the three properties and obtained consent. That he raised the issue of the balance with the purchaser but did not raise any issue at the Land Control Board. He confirmed that

he had no evidence that he has ever raised any query regarding the alleged balance. That he only saw the completion notice in court and had never seen it before. That the transaction proceeded on the basis of good faith which is why he sought consent from the Land Control Board with the understanding that he will be paid the balance. According to him, he has never raised any complaint because the agreement was based on good faith. That he had not transferred the suit properties because he had not been paid the balance. He maintained that he had no issue with two parcels of land and that although he had presented the titles to his advocate, none of them were handed over to the plaintiff. He stated that the money was supposed to be deposited in his bank account because he had a loan which he needed to pay. That he has never received the sum of Kshs. 550,000/= in cash and has never acknowledged receipt of that sum. That the agreement was never rescinded by the purchaser and he have never been served with a completion notice. That he has no issue with the second agreement but he has to be paid the balance in regard to

the first agreement. He stated that if he is paid the balance he will transfer all the titles to the plaintiff. That marked the close of the defendant's case.

21. Parties filed submissions in support of their respective cases. On record are the submissions filed by the plaintiff on 19<sup>th</sup> January 2024 and the submissions filed by the defendant on 25<sup>th</sup> November 2024.

### **Plaintiff's submissions**

22. Counsel for the plaintiff submitted that the defendant never raised the issue regarding the first transaction even when they entered into a second transaction on 28<sup>th</sup> January 2016 and the defendant acknowledged receipt of Kshs. 700,000/= as a deposit for purchase of land in respect of the second agreement leaving a balance of Kshs. 700,000/= to be paid in 90 days. Further that on 3<sup>rd</sup> of February 2016, the defendant applied for consent of the Land Control Board which was granted. That the defendant availed completion documents but had deliberately failed to execute the transfer when time was of the essence. Counsel also

submitted that several facts were not in dispute including the fact that the parties entered into agreements for sale of the three parcels of land being Mavoko Town Block 3 (Waswa) 4279, 4280 and 4281; that both parties were represented by Odera Olendo Advocate; that the parties signed at the bottom of each page of both agreements; that parties signed the applications for consents which consents were granted regarding the three disputed parcels; that the defendant is holding completion documents in regard to the three parcels; that the defendant filed his defence out of time on 21<sup>st</sup> May 2018 without leave of court contrary to provisions of Order 2 Rule 13 and Order 7 Rule 1 of the Civil Procedure Rules; and that the court on 8<sup>th</sup> May 2019 made a the ruling on extension of time and found that the defendant had admitted filing his defence out of time without leave of court and that the defendant has never filed a proper defence or counterclaim in this case and therefore his allegation that the plaintiff owes him Kshs. 500,000/= is inconsistent with Order 7 Rule 3 hence not enforceable in law.

23. On whether the plaintiff paid the full purchase price for the three parcels of land, counsel submitted that the plaintiff produced the agreements dated 20<sup>th</sup> January 2016 and 28<sup>th</sup> January 2016 duly executed by the parties at the bottom of each page and witnessed by Dennis Odero Olendo Advocate (PW 2). Reliance was placed on the case of **Securicor Couriers (K) Ltd v Benson David Onyango & Another (2008) e KLR** for the proposition that when a party signs any written document or contract, his signature is irrefutable evidence of his assent to the whole contract including completion clauses, unless the signature is shown to have been obtained by fraud or misrepresentation.

24. Counsel referred to the agreement dated 20<sup>th</sup> January 2016 and argued that the deposit of Kshs. 1,300,000/= was received and was acknowledged by the vendor on signing of the agreement leaving a balance of Kshs. 1,300,000/= to be paid in 90 days of that date. Counsel maintained that the evidence presented in court by the plaintiff shows that the defendant demanded part of the deposit being Kshs. 550,000/= to be paid in cash

and the balance of Kshs. 750,000/= to be deposited in his Family Bank account. Reference was made to the case of **Sammy Kuria Ndungu v Samuel Mbugua Ikumbu [2020] e KLR** for the proposition that where it is shown that an amount has been paid and acknowledged, it matters not in what form or manner the payment was made, provided the receiver acknowledged the receipt. Counsel submitted that the defendant breached the agreement by failing to comply with the same in failing to hand over the titles and to sign the transfer documents.

25. It was further contended for the plaintiff that the allegation that there was an outstanding balance of Kshs. 550,000/= was an afterthought and an attempt to hoodwink the court because Mr. Olendo acted for the defendant in the transaction as he did for the plaintiff and the defendant never complained of any outstanding payments before or after completion date and that the defendant never at any point issued a completion notice to the plaintiff as contemplated in the agreement. Counsel argued that if there had been an authentic balance, there was no possibility that the defendant would have entered

a second agreement days later and not complained to the advocate and the plaintiff. That the defendant has also refused to transfer land whose purchase is in regard to the second agreement which is separate and independent of the first agreement and which is not in contest and that the defendant has never filed a counterclaim against the plaintiff.

26. On whether the plaintiff is entitled to the relief sought, counsel relied on the case of **Nelson Kivuvani v Yuda Komora & Another HCCC NO. 956 of 1991** and argued that the plaintiff having complied with the terms of the agreement, he was entitled the orders sought. Further reliance was made on the case of **Orion East Africa Ltd v Ite Farmers Corporation Society Ltd** for the proposition that specific performance being an equitable remedy requires that the plaintiff should have complied with the terms of the agreement. On who should pay costs, counsel submitted that the agreements herein are enforceable in law and the defendant having willfully neglected to comply, ought to pay costs.

### **Defendant's submissions**

27. Counsel for the defendant submitted that the defence dated 21<sup>st</sup> May 2018 which was filed out of time and was regularised through an application dated 7<sup>th</sup> May 2019 and filed on 8<sup>th</sup> May 2019. That a ruling was made allowing the application for extension of time regularising the defence already filed in court. Counsel submitted that parties herein entered into a land sale agreement on 20<sup>th</sup> January 2016 regarding parcel Nos. Mavoko Town Block 3 (Waswa) 4280 and 4281 at an agreed price of Kshs. 2,600,000/= and that the agreement clearly stated that a sum of Kshs. 1,350,000/= shall be deposited in the defendant's bank account number 045\*\*\*\*\*62 at Family Bank at the execution of the agreement. Counsel argued that at the time of signing the sale agreement, the defendant executed his part before confirming the amounts deposited in his account and later discovered only Kshs. 750,000/= had been deposited and not Kshs. 1,350,000/= as agreed. That the plaintiff promised to pay the balance before the Land Control Board consent was issued. That the defendant had all along raised the issue with one Hellen Chege who had acted as an agent of the

plaintiff and that he was promised that the plaintiff was going to make good the balance before the transfer was done. Counsel argued that the agreement dated 28<sup>th</sup> January 2016 regarding parcel No. Mavoko Town Block 3 (Waswa) 4279 for payment of the sum of Kshs. 1,400,000/= was fully complied with and all the sums paid by the plaintiff as per the agreement and that the only dispute is in regard to the first agreement where the defendant never received the sum of Kshs. 550,000/= in cash as alleged and did not acknowledge receipt of the same. Counsel argued that there was no payment in the firm of Olendo Advocates. Counsel also contended that the defendant agreed that the sum of Kshs. 550, 000/= was to be paid on 3<sup>rd</sup> February 2016 at the Land Control Board in exchange with the original titles but that although the consent was given, the defendant could not release the titles because the balance was still owing. Counsel argued that PW 2 confirmed that he did not see money change hands. It was also argued for the defendant that upon discussions by the parties, title documents and transfer documents for the two

undisputed parcels were released to the plaintiff. They relied on the case of **Simba Hills Farm Limited V Sultan Hasham Lalji & Five Others ELC Case No. 17 of 2017** arguing that as the entire purchase price had not been paid, the court should order the balance to be paid with interest. Counsel urged the court to make a finding that the sum of Kshs. 550,000/= was not paid or acknowledged and order that the same be paid with interest.

### **Analysis and determination**

28. The court has carefully considered the pleadings, evidence and submissions as well as the demeanor of witnesses. Although the plaintiff raised the validity of the defence arguing that it was filed out of time without leave of court, the plaintiff having not raised the issue before the trial and having not objected to defendant presenting his evidence on the basis of the filed defence, he is estopped from raising the issue at this stage. He did not point to any prejudice that the delayed filing of the defence occasioned him, the defence having been filed in 2018 and the suit having been heard in 2023. In the

interests of justice, I admit the defence as having been properly and duly filed. The only issue therefore that arise for the court's determination is whether the plaintiff deserves the prayers sought in the plaint.

29. At the core of this dispute is a contract dated 20<sup>th</sup> January 2016, where the parties agreed for the plaintiff to purchase parcel Nos. Mavoko Town Block 3 (Waswa) 4280 and 4281 at a consideration of Kshs. 2, 600, 000/=.

30. A contract binds the parties thereto and each party ought to comply with the terms thereof. In the case of **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] e KLR**, the court stated as follows:

**“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”**

31. In the instant matter, the plaintiff's complaint is that he paid for three plots which he purchased from the defendant, complied with the terms of the two contracts and that the defendant should be compelled to perform

his part of the contracts by transferring the purchased plots to the plaintiff. In short, the plaintiff seeks for orders of specific performance against the defendant.

32. Specific performance is an equitable remedy granted where there exists a valid contract, where the plaintiff has performed his or her obligations under the contract and where an award of damages would be inadequate in the circumstances of the case.

33. In the case of **Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998** the court held that:

**“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”**

34. Similarly, in the case of **Reliable Electrical Engineers Ltd. V Mantrac Kenya Limited (2006)**

**eKLR** the court set out what ought to be considered when determining a claim for specific performance as follows;

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

35. For a sale of land transaction to be valid, section 38 of the Land Act provides as follows;

### **Validity of contracts in sale of land**

**(1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—**

**(a) The contract upon which the suit is founded—**

**(i) Is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.**

**(2) Subsection (1) shall not apply to—**

**(a) A contract made in the course of a public action;**

**(b) The creation or operation of a resulting, implied or a constructive trust; or**

**(c) Any agreement or contract made or entered into before the commencement of this Act, provided that—**

**(i) The verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and**

**ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.**

36. Therefore, a valid land sale agreement should be in written, duly executed by the parties to the agreement and attested by two witnesses.

37. In the instant case, it is not denied that the defendant entered into two written land sale agreements for sale of three parcels of land. Therefore, the agreements herein are valid.

38. Principles for grant of an order for specific performance are well settled. It is an equitable and discretionary remedy that can only be granted where damages may not be an appropriate remedy. A party seeking specific performance must demonstrate that they have complied with the terms of the contract or are willing to comply.

39. Equity will not suffer a wrong without a remedy and no one should benefit from their mischief. In **Macharia Mwangi Maina & 87 others -vs- David son Mwangi Kagiri[2014] eKLR** the Court of Appeal held as follows:-

**“This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound**

**to deliver substantive rather than technical and procedural justice.”**

40. In the instant matter, the plaintiff's complaint is that he bought parcel Nos. Mavoko Town Block 3 (Waswa) 4279, 4280 and 4281 from the defendant vide two land sale agreements which are dated 20<sup>th</sup> January 2016 and 28<sup>th</sup> January 2016 respectively. That he fully paid for the same, but the defendant has failed to transfer the three titles to him. In his defence, the defendant stated that the agreement of 20<sup>th</sup> January 2016 required that a deposit of Kshs. 1, 300, 000/= be made to his bank account No. 045\*\*\*\*\*60 at Family Bank Githurai branch, but that the plaintiff only deposited Kshs. 750, 000/= leaving a balance of Kshs. 500, 000/= which is still owed to date.

41. In his evidence, the defendant stated that the three parcels were sold to the plaintiff at Kshs. 4, 400, 000/=: but that upon making four deposits totalling to Kshs. 3, 450, 000/=: the plaintiff still owed him Kshs. 550, 000/= which, if paid will make a total of Kshs. 4, 400, 000/=: This narrative is erroneous and misleading as the difference between Kshs 4, 400, 000/= and Kshs. 3, 450,

000/= is Kshs 950, 000/= and not Kshs. 550, 000/= as alleged by the defendant. In addition, the consideration for the agreement dated 20<sup>th</sup> January 2016 having been Kshs. 2, 600, 000/= while the consideration for the agreement dated 28<sup>th</sup> January 2016 having been Kshs. 1, 400, 000/=, it follows that the cumulative consideration for the three properties was Kshs. 4, 000, 000/= and not Kshs. 4, 400, 000/= as alleged by the defendant. In addition, the amount stated in the defence as being the balance owed is stated as being Kshs. 500, 000/= while the amount stated in his evidence is Kshs. 550, 000/=. This inconsistency cannot be ignored. While there are two agreements, and the defendant concedes that there is no dispute over the agreement dated 28<sup>th</sup> January 2016, yet without any apparent justification or complaint, he has up to date withheld the original title and refused to transfer parcel No. Mavoko Town Block 3 (Waswa) 4279. This, in my view is not only unlawful, but also callous.

42. I have considered the disputed agreement of 20<sup>th</sup> January 2016. While the agreement states that at the signing thereof, the defendant acknowledged receipt of

Kshs. 1, 300, 000/=, which shall be deposited in his bank account No. 045\*\*\*\*\*60 at Family Bank, the defendant acknowledged having received the deposit stated by signing on every page of the agreement. In my view, this acknowledgment of receipt of the deposit is binding on the defendant. On one hand, while the plaintiff in his evidence gave an account of what transpired on 20<sup>th</sup> January 2016, culminating in the acknowledgment of payment of the deposit of Kshs. 1, 300, 000/= by the defendant, when Kshs. 750, 000/= was deposited, on the other hand, the defendant did not in his testimony in chief give any account on what transpired on that date. The plaintiff maintained that after the agreement had been drawn by the advocate, the defendant declined to sign and insisted that he wanted to be paid part of the deposit in cash first before he signed the agreement. That he was given Kshs. 550, 000/= in cash and that the defendant having acknowledged receipt of the entire sum of Kshs. 1, 300, 000/= the advocate saw no need to amend the agreement.

43. I had the opportunity to see the witnesses and the parties' respective demeanors. The defendant's demeanor when testifying did not project a candid and an honest man. He insisted that he can only transfer the suit properties to the plaintiff after being paid the balance, which is not clear whether it is Kshs. 500, 000/= or Kshs. 550, 000/=. Besides, the defendant confirmed that he had never made any demand for the alleged balance not even by way of counterclaim before this court. Although the defendant stated that at the signing of the sale agreement he thought that the plaintiff had deposited Kshs. 1, 300, 000/= only to realize later that only Kshs. 750, 000/= had been deposited, he neither disclosed the date he allegedly realized this very serious matter nor what he did when he allegedly found out. In my view, it is inconceivable that the defendant would sign a sale agreement without seeing a bank deposit slip for the amount stated therein and after allegedly finding out that the purchaser did not deposit the entire agreed amount which he had already acknowledged receipt, he did not do anything about it and in fact went ahead to enter into a second agreement

with the same purchaser. This is in view of the fact that the defendant confirmed to have never made any demand at any time for the alleged balance. Not even a counterclaim was made in his defence. The conduct of the defendant is therefore inconsistent with his allegation that there was a pending balance owed to him.

44. The evidence herein shows that on 27<sup>th</sup> January 2016, the defendant received a sum of Kshs. 500, 000/= from the plaintiff which was taken into account for the second agreement signed on 28<sup>th</sup> January 2025. If indeed there was a balance as at the time he was entering into the second agreement, it would be expected that he would have raised the issue then and insisted that the sum paid as deposit for the second agreement be applied to the balance in respect of the first agreement. He has not explained to court why he allowed that amount to be applied to the agreement of 28<sup>th</sup> January 2016, when allegedly there was a balance in respect of the deposit for the agreement of 20<sup>th</sup> January 2025. In the agreement of 28<sup>th</sup> January 2016, it was stated that a deposit of Kshs. 500, 000/= shall be made, yet the undisputed evidence

show that the deposit had already been made the previous date of 27<sup>th</sup> January 2016. It is clear to me that not all the nitty gritty were literally captured in the parties' agreements, but the general intent and parties' obligations were duly captured.

45. The defendant signed page one of the disputed agreement showing that he acknowledged receipt of Khs. 1, 300, 000/=. Whether or not the money was entirely in his bank account or some in the bank and some in cash is neither here nor there. What is important is that payment was acknowledged by him.

46. I did not find the testimony of the defendant as truthful. He had no explanation why he refused to transfer the two properties whose payment of the full purchase price he did not dispute. It is my view that the defendant having signed the agreement of 20<sup>th</sup> January 2016 acknowledging the deposit of Kshs 1, 300, 000/=; having not raised the issue of the alleged balance at any time including when he was acknowledging the deposit for the second transaction on 27<sup>th</sup> January 2016; having applied for and obtained consent from the Land Control

Board without raising the issue of the alleged balance; and having never made a demand for the alleged balance nor issued a completion notice contemplated under the terms of the disputed agreement, I find and hold that the issue of the alleged balance owed to the defendant is merely an afterthought and has been raised in bad faith for purposes only of evading the obligation of completing the transactions herein, and the same is hereby rejected as there is no evidence that any balance is due and owed to the defendant. I therefore find and hold that the plaintiff complied with the terms of the two agreements herein within the agreed period and deserves the orders sought.

47. In the premises, I am satisfied that the plaintiff has proved his case on the required standard. I therefore allow the plaintiff's claim and make the following orders;

**a) A declaration is hereby made that the plaintiff is the rightful owner of the parcels of land known as Mavoko Town Block 3 (Waswa) 4279, Mavoko Town Block 3 (Waswa) 4280 and Mavoko Town Block 3 (Waswa) 4281.**

- b) A permanent injunction is hereby issued restraining the defendant, his servants and or agents from constructing on, developing, trespassing, selling, transferring to third parties, giving in exchange, charging or in any other way encumbering or utilizing land comprised in parcel Numbers Mavoko Town Block 3 (Waswa) 4279, Mavoko Town Block 3 (Waswa) 4280 and Mavoko Town Block 3 (Waswa) 4281.**
- c) The defendant is ordered to release to the plaintiff the original titles of parcel Numbers Mavoko Town Block 3 (Waswa) 4279, Mavoko Town Block 3 (Waswa) 4280 and Mavoko Town Block 3 (Waswa) 4281.**
- d) The Deputy Registrar of this court is authorized to execute the transfer instruments in respect of the three properties herein being parcel Numbers Mavoko Town Block 3 (Waswa) 4279, Mavoko Town Block 3 (Waswa) 4280 and Mavoko Town Block 3 (Waswa) 4281 in place of the defendant, in favor of the plaintiff.**
- e) The costs of the suit are awarded to the plaintiff and shall be borne by the defendant.**

48. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
IN OPEN COURT/VIRTUALLY THROUGH  
MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM THIS 16<sup>TH</sup> DAY OF OCTOBER, 2025**

**A. NYUKURI  
JUDGE**

**In the presence of;**

Ms Wangoi for the plaintiff  
Mr. Ogeto for the defendant  
Court Assistant- Delphine