REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KWALE

(KWALE LAW COURT)

ELC SUIT NO. E005 OF 2025

BETH GAKII KINYA KIUNGA……PLAINTIFF/APPLICANT

- VERSUS -

DIETER WELLENDORF……DEFENDANT/RESPONDENT

RULING

I. Introduction

1. Before this Honourable Court for determination is the Notice Motion Application dated 23rd January, 2025 by *Beth Gakii Kinya Kiunga,* the Plaintiff herein; the Notice of Motion application dated 10th February, 2025 by *Dieter Wellendorf*, the Defendant herein and a Notice of Preliminary Objection dated 25th February, 2025 by *Beth Gakii Kinya Kiunga,* the Plaintiff herein.

2. Upon service of the Notice of Motion application dated 23rd January, 2025, the Defendant filed a Replying Affidavit sworn on 10th February, 2025.

II. The Plaintiff's Application dated 23rd January, 2025

3. The Application was brought under Order 40 and 51 of the Civil Procedure Rules, 2010, Sections 3, 3A of the Civil Procedure Act, Cap. 21 and Article 159 of the Constitution of Kenya, 2010.

4. The Applicant sought for the following orders: -

   a) Spent

   b) Spent.

   c) That a temporary injunction be and is hereby granted to prevent the Defendant, his agents, employees, servants and or anybody else and their entities acting on his behalf from trespassing, evicting, distressing, demanding rent, auctioning, selling, encroaching, disposing of or further charging and or in any way interfering with the suit land premises known as in respect of Madina Limited (Certificate No. CPR/2012/65863) in respect of Title Number Kwale/Diani Complex/200 in Diani in Kwale County, pending the hearing and determination of this Suit.

   d) That the costs be in the cause hereof.

5. The application was premised on the grounds, facts and testimony on the face of the application and further supported by the 25 Paragraphed annexed affidavit of BETH GAKII KINYA KIUNGA, the Plaintiff herein averred that:

i. The Affiant made this statement in support of the suit to persuade the Court to grant the reliefs sought herein.

ii. The Defendant and the Affiant entered into a sale agreement dated 16th December, 2022 for Ordinary Shares in respect of Madina Limited (Certificate No. CPR/2012/65863) in respect of Title Number Kwale/Diani Complex/200 (Hereinafter referred to as "The Suit Property") and were associated with two title deeds for the house and adjacent space thereof.

iii. Pursuant to the said agreement, the Affiant carried out extensive renovations and improvements of the suit premises.

iv. The parties agreed to allocate a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) from the Affiant's dues and allocate the same towards making the premises habitable, which was necessitated by its deterioration contrary to the false advertisement by the Defendant.

v. The amount was also to be utilized in securing the premises due to multiple break-ins and its poor condition. The building had significantly deteriorated,

with many mechanical components stolen, including plumbing, electrical, doors and swimming pool equipment, along with household furnishings advertised and negotiated for, based on the assumption that the house was habitable, which it was not. The parties agreed that the deposit be utilized to make the premises habitable.

vi. Upon carrying out renovations, the Affiant realized that the said sum of Kenya Shillings One Million (Kshs. 1,000,000/-) did not suffice and that the repairs cost about a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-), which was to be recovered from the purchase price and a fact the Defendant was well aware of at the time of the agreement.

vii. After the said agreement was duly executed, the Affiant complied with her obligations by renovating the suit premises and seeking appropriate information from the Defendant to enable her to comply with the terms of the said agreement but the Defendant failed to comply as follows:

Particulars of breach of the said agreement on the part of the Defendant

a) The Defendant failed to supply the Plaintiff with bank account details to facilitate payments of the full balance of the purchase price despite numerous WhatsApp messages to do so but kept on giving excuses of being busy with his daughter's wedding and being on vacation with his daughters.

b) The Affiant had been ready and willing to pay the balance of the purchase price less the cost of repairs.

c) The Vendor had not acknowledged the expenses incurred by the Purchaser in respect of the above premises.

d) The Defendant made unreasonable, illegal, outrageous, baseless and fraudulent demand for a sum of Kenya Shillings One Million Six Hundred Thousand (Kshs. 1,600,000/=) purporting to be rent.

e) The Defendant failed to execute and avail all completion documents to the Affiant in exchange for the balance of the purchase price.

f) The Defendant failed to meet the Affiant or her agent to acknowledge the cost of repairs carried out by her for deduction from the purchase price thereof.

g) The Defendant purported to issue an improper notice in breach of Clause 5:2 of the said agreement which obligated the Vendor to issue a proper mandatory Notice of at least Twenty One (21) days.

h) The Defendant failed to issue proper and adequate notice thereof.

i) The Defendant failed and/or refused to comply with the dispute resolution mechanism laid out in the said agreement, to wit, negotiations within 15 days and failure of which arbitration thereof.

j) The Affiant was not a tenant in the suit premises but the owner thereof and the Defendant had no legal basis to demand rent from her.

k) The purported demand letters seeking to terminate the sale agreement breached Clause 5:2 of the said agreement which obligated the Defendant to issue a proper mandatory Notice of at least Twenty One (21) days. Any shorter notice was unlawful and did not accrue.

l) The Defendant was under legal obligations and duty to ensure that the Affiant continued to enjoy quiet and vacant possession of the suit premises.

m) The Defendant violated and infringed the Affiant's right to property as enshrined under Article 40 of the Constitution of Kenya which provided that—

> (1) Subject to Article 65, every person had the right, either individually or in association with others, to acquire and own property:
>
> a. of any description;
>
> b. in any part of Kenya.

n) The State was not to deprive a person of property of any description or of any interest in or right over property of any description unless deprivation—

a) resulted from an acquisition of land or an interest in land or a conversion of an interest in land or title to land in accordance with Chapter 5; or

b) was for public purpose or in the public interest and was carried out in accordance with the Constitution and any Act of Parliament that—

c) required prompt payment in full, of just compensation to the person;

d) allowed any person who had an interest in or right over that property, a right of access to a court of law.

viii. Though the Affiant had possession of the suit premises, she was yet to acquire an absolute and indefeasible title as the owner of the suit property because of the Defendant's breach of the said contract

unless an order for specific performance of the contract was granted.

ix. The Defendant's inaction, omission and actions were unlawful, illegal, highly prejudicial to the Affiant and were tantamount to breach of the contract and trust.

x. The Defendant and his agents subjected the Affiant to great injustice, inconvenience, anguish and financial distress and made her suffer great loss and damage.

xi. The Defendant breached his duty of reasonable care, skill and diligence as provided under the law and agreement.

xii. As a consequence of the above breach by the Defendant, the Affiant was subjected to great injustice, inconvenience, mental anguish and financial distress and suffered great loss and damage.

xiii. The Defendant breached his duty of reasonable care, skill and diligence under the law and the said company Madina Limited (Certificate No. CPR/2012/65863) and ought to have been held liable.

xiv. It was trite law that parties to a contract that they had entered into voluntarily were bound by its terms and conditions.

xv. The Affiant sought and persuaded the Court to grant the reliefs against the Defendant sought herein. Further, she was entitled to damages and compensation.

xvi. The Plaintiff averred that there was no other pending suit and there had been no previous proceedings over the same subject matter between the Plaintiff and Defendant over the same subject matter and the cause of action related to the Plaintiff named herein.

xvii. Annexed hereto and marked BGKK 1 were true copies of the supporting documents annexed to the Plaintiff's List of Documents dated 23rd January 2025.

III. The Response to the Plaintiff's Application

6. The Defendant, DIETER WELLENDORF, responded to the Application through a 31 paragraphed Replying Affidavit sworn on 10th February, 2025 wherein the Affiant averred as followed:

a) The Affiant was the Defendant herein, well conversant with the facts at hand and therefore duly competent and authorized to swear the Affidavit.

b) The Affiant had read and understood the Plaintiff's Application dated the 23rd January, 2025, and where necessary the Affiant's advocates on record, Messrs Okello Kinyanjui & Company Advocates, had enumerated the legal implications and the Affiant responded to the Application as set out hereunder.

c) On the 16th December, 2022, the Plaintiff/ Applicant (Purchaser) and the Defendant/ Respondent (Vendor) entered into a sale agreement (Hereinafter referred "the agreement") for the sale of ordinary shares in Madina Limited in respect of property Title Number Kwale/Diani Complex/200.

d) It was an express term of the contract, particularly under Clause 3, that consideration for purposes of enforcing the sale thereof would be a total of a sum of Kenya Shillings Thirty Five Million (Kshs. 35,000,000/=) only which payment was to be effected by the

Applicant to the Affiant in four monthly installments as follows:

i. First installment, being the deposit of a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) in the form of renovation costs for the suit property to attain habitable standards, to be carried out and borne by the purchaser.

ii. Second installment of a sum of Kenya Shillings Eleven Million (Kshs. 11,000,000/=) to be paid before or on 30th June 2023 from the date of execution.

iii. Third installment of a sum of Kenya Shillings Five Million One Hundred and Fifty Thousand ((Kshs. 5,150,000/=) to be paid on or before 31st December, 2023 from the date of execution.

iv. Last installment of a sum of Kenya Shillings Seventeen Million Eight Hundred and Fifty Thousand Kenya Shillings only (Kshs. 17,850,000/=) to be paid on or before 30th June, 2024.

e) It was a further term of the contract, particularly under Clause 4.3, that the completion date would be eighteen (18) months after execution of the contract,

f) Upon execution of the contract and in fulfillment of the Affiant's contractual obligations, the Affiant granted the purchaser, the Applicant herein, vacant possession, whence she proceeded with the renovations as per Clause 3.1(a) of the Agreement.

g) Despite the Affiant's full compliance with the terms of the contract and commitment to perform on his part, the Applicant did not honour a single installment payment. The Affiant was therefore compelled to instruct his advocates aforementioned to issue and invite the Applicant to fulfill her end of the bargain, which they did, vide completion Notice dated the 4th December, 2024. The purchaser failed, refused and/or neglected to remit any of the installments as part of the agreed consideration pursuant to Clause 3 of the agreement. (Annexed in the affidavit and marked DW-1 was a copy of the Notice).

h) In response to Paragraphs 5, 6, 7, 8, 9 and 10 of the Applicant’s Supporting Affidavit, the Affiant reiterated the contents of the foregoing paragraphs.

i) In further response to Paragraphs 6, 7, 8 and 9 of the Applicant’s Supporting Affidavit, the Affiant was informed by his aforesaid Advocates, whose information he verily believed to be true, that claims by the purchaser of having incurred of Sum of Kenya Shillings Ten Million Kenya Shillings (Kshs. 10,000,000/=) for renovations, an amount outrageously higher than the contractually agreed a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) on the alleged basis of continued deterioration of the property, were an attempt to not only rely on extrinsic evidence but also vary the terms of the contract in violation of Sections 97 and 98 of the Evidence Act, Cap. 80 Laws of Kenya, which prohibit adducing of extrinsic evidence, whether orally or in writing when interpreting contracts, except for. secondary evidence to contracts. In this case, therefore, there is no Deed of Variation to validate the Applicant's actions.

j) Further to Paragraph 9 above, the contention by the Applicant that the terms of the contract were at variance with the advertisements was therefore a serious misconception. There was clearly a meeting of minds between the Applicant and the Affiant and therefore referring to advertisements and inflating the agreed renovation costs was unlawful, unfair and unjust. In fact, at no time did the Applicant inform the Affiant of the need to make the purported improvements nor of the alleged accruing amount, denoting malice on her part. The alleged renovation costs were thus illegal, unlawful and unwarranted.

k) In further response to Paragraphs 6, 7, 8 and 9 of the Plaintiff's Supporting Affidavit, the Affiant stated that pursuant to clause 3.1(a) of the agreement, the 1st installment of a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) being the deposit of the full purchase price, was to be in the form of renovation costs to be borne by the purchaser, a term the purchaser consensually and willingly agreed to, the import whereof was well within her knowledge, having

perused the advertisement, inspected the property and followed a detailed discussion and/or negotiation relating to the agreement. Therefore, the Applicant's allegations that the renovations accrued from her dues, independent from the agreement and that the suit property's condition deteriorated were a ploy to mislead this Honourable Court and unjustly enrich herself as well as escape liabilities.

l) In response to paragraph 10 of the Applicant's Supporting Affidavit, the Affiant reiterated the contents of paragraph 6 above and stated that despite granting the purchaser vacant possession in fulfillment of the Affiant's contractual obligations pursuant to Clause 3.1(a) of the agreement, the Applicant took over possession to undertake renovations but failed, refused and/or neglected to remit the balance of the purchase price as agreed. The Purchaser never showcased the will or readiness to pay the said balance or in any way undertook to meet her end of the bargain despite constant demands, in blatant

violation of her contractual obligations and to the detriment of the Affiant.

m) The Affiant was informed by her Advocates, whose information she verily believed to be true, that by dint of Clause 4.3 of the Agreement, which provided that the completion date would be 18 months from the date of execution, time became of the essence immediately the Applicant and the Affiant appended their signatures. Therefore, the willful failure to remit the balance by the purchaser within the 18 months resulted in a breach of the contract.

n) In response to Paragraph 10(i) of the Applicant's Supporting Affidavit, the purchaser having failed to pay out the remaining installments as agreed, the Affiant, through her then Advocates on record, Messrs. Mungai Kamau and Company Advocates, issued a termination Notice dated the 30th January, 2023, from which followed a series of correspondence and negotiations between them and the Applicant's Advocates on record, all of which did not accrue to a

settlement. (Annexed herewith and marked DW - 2 was a bundle of the correspondence).

o) Owing to the Applicant's continued failure to honour her terms of the Contract, the Affiant, in due compliance with Clause 5.2 of the Contract, issued the purchaser with a completion Notice through her current Advocates, Messrs. Okello Kinyanjui Advocates, dated the 4th December, 2024, outlining the default thereof and provided a 21 - day Notice within which the purchaser ought to comply, clearly indicating the consequences of non-compliance.

p) By reason of Paragraph 13 above and in response to paragraph 12 of the Plaintiff's supporting affidavit as well as Ground 4 of the Plaintiff's Notice of Motion Application, the Affiant was informed by her aforesaid Advocates, whose information she verily believed to be true, that the Completion Notice dated the 4th December, 2024 was a proper Notice for purposes of enforcing the agreement having included the requisite information as per clause 5.2 of the Agreement and further that the Notice period was proper, valid and

sufficient for all its purposes. The reason was that the purported Civil Procedure Rules, as relied on by the Applicant, specifically applied to computation of time during filing, amending and delivery of pleadings and in no way to the contract herein. The Applicant's averments were therefore misconceived.

q) Despite duly serving the Purchaser a proper Notice in accordance with Clause 5.2 of the Contract, the Applicant not only disregarded the Notice but failed to comply with her contractual obligations. In fact, contrary to the Applicant's consistent misleading allegations, there was no attempt nor response by the purchaser to, at the very least, seek an extension of time to pay the balance of the consideration, let alone seek the Affiant's bank details to effect payment, connoting the lack of intention to honor her contractual obligations.

r) The 21 days completion Notice having lapsed as per the terms of the contract, the Affiant was left with the only option of rescinding the contract, wherein the Affiant issued the purchaser with a 7 days' Notice of

Rescission dated the 17th January, 2025. (Annexed in affidavit and marked DW - 3 was a copy of the Rescission Notice).

s) By reason of the foregoing, the Affiant was informed by her Advocates on record, whose information she verily believed to be true, that the Applicant's actions, mis actions and/or omissions amounted to a fundamental breach of the contract.

Particulars of breach of the agreement on the Applicant's part

a. The Applicant's willful failure and/or refusal to pay out the remaining balance of the purchase price, contrary to Clause 3 of the contract.
b. The Applicant's illegal attempt to vary the terms of the contract by undertaking renovation costs ultra vires the contract.
c. The Applicant's failure to seek the Respondent's bank details to effect payment of the balance of the purchase price, denoting a lack of willingness to pay.

d. The Applicant's willful disregard of the Respondent's proper and adequate Completion Notice dated the 4th December, 2025.
e. The Applicant's illegal undertaking of alleged renovations despite failing to pay the balance of the purchase price and being served with a Notice.
f. The Applicant's willful neglect, refusal and/or unwillingness to honour the terms of the contract.
g. The Applicant's continued illegal occupation of the suit property despite issuance of a completion Notice and a Notice of Rescission by the Respondent.
h. Failure and/or refusal by the Applicant to pay the mesne profits accruing from the date of illegal occupation

t) By dint of the above, and as a consequence of the Purchaser's breach of contract and the resultant rescission, the Applicant's occupation of the suit property was illegal, unlawful and invalid.

u) In response to Paragraphs 13, 14, and 15 of the Applicant's Supporting Affidavit, the Affiant stated that the Applicant's continued illegal and/or unlawful possession and occupation of the suit property violated the Affiant's right to property under Article 40 of the Constitution of Kenya, as well as her right to vacant possession as the legal proprietor of the property.

v) In further response to Paragraphs 13, 14, and 15 of the Applicant's Supporting Affidavit, the Affiant stated that the Applicant's continued illegal and/or unlawful possession and occupation of the suit property violated the Affiant's right to property under Article 40 of the Constitution of Kenya, as well as her right to vacant possession as the legal proprietor of the property.

w) In further response to Paragraph 15 of the Applicant's Supporting Affidavit, the Affiant was informed by her Advocates, whose information she verily believed to be true, that the Applicant was not entitled to an order of specific performance for the reason that, it being an equitable remedy, she ought to have honoured her

contractual obligations and for the following other reasons:

a. The sale agreement, subject matter of these proceedings, was no longer valid and enforceable, the same having been terminated by effluxion of time upon the rescission of the agreement by the Applicant herein.
b. An award of specific performance was only applicable when monetary damages were shown to be inadequate.
c. The party seeking specific performance must have performed their part. The Plaintiff had not paid a single coin to the vendor. He who came to equity had to do equity.
d. The remedy of specific performance would cause extreme hardship to the Defendant/Respondent who had been kept off his property and funds since 16th December, 2022.
e. Apart from mere allegations, the Plaintiff/Respondent had not demonstrated by way of deposit of the agreement sums in the

Defendant's account nor sought the creation of an escrow account to which the funds would have been deposited, nor shown the ability to complete the transaction or any readiness/willingness to perform the terms of the agreement.

f. Equity did not act in vain. An order for specific performance was not to be granted when one of the parties lacked capacity to pay or where there was no possibility for mutuality.

x) In response to paragraph (b) and (c) of the Applicant's Notice of Motion application, the Affiant was informed by her Advocates on record, whose information she verily believed to be true, that equity demanded that whoever came to equity had to do equity. Therefore, the Purchaser's willful neglect to pay any of the balance of the purchase price to the detriment of the Affiant disqualified her from enjoying injunctive orders. The Affiant therefore prayed that the temporary injunction order granted by this Honourable Court dated the 23rd January, 2025 be vacated and the Applicant effectively evicted.

y) In response to Paragraph 11 of the Applicant's Supporting Affidavit, the Affiant was informed by her Advocates on record, whose information she verily believed to be true, that the Applicant having illegally and wrongfully deprived the Affiant of the suit property thereby subjecting her to financial loss, entitled the Affiant to mesne profits for the period of the illegal occupation pursuant to Order 21 Rule 13 of the Civil Procedure Rules, 2010.

z) In response to paragraphs 20 and 21 of the Applicant's Supporting Affidavit, the Affiant stated that, unlike the Applicant, who had failed and refused to meet the end of her bargain, the Affiant had exercised reasonable skill and care and fully honoured her contractual obligations as detailed above.

aa) The Applicant's actions and/or omissions subjected the Affiant to great financial loss, mental torture and emotional turmoil, as a consequence whereof she suffered tremendous loss and damage.

bb) In the above premise, the Affiant put forward that the Application therein was not only an abuse of the Court

process but also unmerited, and if the orders sought were granted, the same would result in a miscarriage of justice on her part as she would be unfairly stripped of her right to property to the unjust enrichment of the Applicant who had come to equity with unclean hands, having breached the contract.

cc) The Applicant stood to suffer no harm nor loss if the prayers sought by the Affiant were granted.

dd) It was in the interest of justice that the prayers sought by the Affiant were granted.

ee) The Affiant prayed that this Honourable Court exercised its discretion and evicted the Applicant from the suit property forthwith, consequently vacating the injunction orders of this Honourable Court dated the 23rd January, 2025.

IV. <u>The Defendant's Notice of Motion application dated 10th February, 2025</u>

7. The Application was brought under the provision of Article 40 of the Constitution of Kenya, 2010, Order 2 Rule 15(1) (b) (c) and (d)of the Civil Procedure Rules, 2010 and Section 1A, 1B and 3A of the Civil Procedure Act, Cap. 21.

8. The Applicant sought for the following orders:-

a) That this Honourable Court be pleased to Strike Out the Plaint filed herein by the Plaintiff/Respondent dated the 23rd January, 2025.

b) That on that premise, the suit against the Applicant/Defendant be dismissed with costs to the Applicant/Defendant.

9. The application by the Applicant was premised on the grounds, facts and testimony on the face of the application and further supported by the 27 Paragraphed annexed affidavit of DIETER WELLENDORF, the Defendant herein averred that:

a) On the 16th December, 2022, the Plaintiff/Applicant (Purchaser) and the Defendant/ Respondent (Vendor) entered into a sale agreement (Hereinafter referred to as “the agreement”) for the sale of ordinary shares in Madina Limited in respect of property Title Number Kwale/ Diani Complex/200.

b) It was an express term of the contract, particularly under Clause 3, that consideration for purposes of enforcing the sale thereof was a total of Kenya Shillings Thirty five million (Kshs. 35,000,000/=, which

payment was to be effected by the Respondent to the Affiant in four monthly installments as follows:

a. The 1st installment, being the Deposit, of Kenya Shillings One Million Kenya Shillings only (Kshs. 1,000,000/=) in the form of renovation costs for the suit property to attain habitable standards, to be carried out and borne by the Respondent/Plaintiff.
b. The 2nd installment of (Eleven Million Kenya Shillings only (Kshs. 11,000,000/=) to be paid before or on 30th June 2023 from the date of execution.
c. The 3rd installment of Kenya Shillings Five Million One Hundred and Fifty Thousand (Kshs. 5,150,000/=) Kenya Shillings only) to be paid on or before 31st December, 2023 from the date of execution.
d. The last installment of Kenya Shillings Seventeen Million Eight Hundred and Fifty Thousand (Kshs. 17,850,000/=) to be paid on or before 30th June, 2024.

c) It was a further term of the contract, particularly under Clause 4.3, that the Completion date was to be eighteen (18) months after execution of the contract.

d) Upon execution of the contract and in fulfillment of her contractual obligations, the Affiant granted the purchaser, the Respondent herein, vacant possession, whence she proceeded with the renovations as per Clause 3.1(a) of the Agreement.

e) Despite the Affiant's full compliance with the terms of the contract and her commitment to perform on her part, the Respondent did not honour one singular installment payment. The Affiant was therefore compelled to instruct her advocates aforementioned to issue and to invite the Respondent to fulfill her end of the bargain, which they did, vide Completion Notice dated the 4th December, 2024. The purchaser failed, refused and/or neglected to remit any of the installments as part of the agreed consideration pursuant to Clause 3 of the agreement. (Annexed in the affidavit and marked DW-1 was a copy of the Notice).

f) The Affiant was informed by her Advocates, whose information she verily believed to be true, that claims by the Respondent of having incurred Kenya Shillings Ten Million (Kshs. 10,000,000/=) for renovations, an amount outrageously higher than the contractually agreed One Million Kenya Shillings (Kshs. 1,000,000/=) on the alleged basis of continued deterioration of the property, were an attempt to not only rely on extrinsic evidence but also vary the terms of the contract in violation of Sections 97 and 98 of the Evidence Act, Cap. 80 Laws of Kenya, which prohibit adducing of extrinsic evidence, whether orally or in writing, when interpreting contracts, except for secondary evidence to contracts. In this case, therefore, there was no Deed of Variation to validate the Respondent's actions. The alleged renovation costs were thus illegal, unlawful and unwarranted.

g) Despite granting the purchaser vacant possession in fulfillment of her contractual obligations pursuant to Clause 3.1(a) of the agreement, the Respondent took over possession to undertake renovations but failed,

refused and/or neglected to remit any of the balance of the purchase price as agreed. The Purchaser never showcased the will or readiness to pay the said balance or in any way undertook to meet her end of the bargain despite constant demands, in blatant violation of her contractual obligations and to the detriment of the Affiant.

h) The Affiant was informed by her Advocates, whose information she verily believed to be true, that by dint of Clause 4.3 of the Agreement, which provided that the completion date was to be 18 months from the date of execution, time became of the essence immediately the Respondent and the Affiant appended their signatures. Therefore, the willful failure to remit the balance by the purchaser within the 18 months resulted in a material breach of the contract.

i) Owing to the said breach, the Affiant, through her then Advocates on record, Messrs. Mungai Kamau and Company Advocates, issued a Termination Notice dated the 30th January, 2023, from which followed a series of correspondence and negotiations between

them and the Respondent's Advocates on record, all of which did not accrue to a settlement. (Annexed in the affidavit and marked DW - 2 was a bundle of the correspondence).

j) Further to the above and in due compliance with Clause 5.2 of the Contract, the Affiant issued the purchaser with a Completion Notice through her current Advocates, Messrs. Okello Kinyanjui Advocates, dated the 4th December, 2024, outlining the default thereof and providing a 21-day Notice within which the purchaser was to comply, clearly indicating the consequences of non-compliance.

k) The Affiant was informed by her Advocates, whose information she verily believed to be true, that the Completion Notice dated the 4th December, 2024 was a proper Notice for purposes of enforcing the agreement, having included the requisite information as per Clause 5.2 of the Agreement, and further that the Notice period was proper, valid and sufficient for all its purposes. The reason was that the purported Civil Procedure Rules, 2010 as relied on by the

Respondent, specifically applied to computation of time during filing, amending and delivery of pleadings and in no way to the contract herein. The Respondent's averments were therefore misconceived

l) The Affiant had been informed by her advocates on record, and which advice she verily believed to be true, that the discretionary relief of specific performance as sought by the Plaintiff was not available nor for grant for the following reasons:

a. The sale agreement, subject matter of these proceedings, was no longer valid and enforceable, the same having been terminated by effluxion of time upon the rescission of the agreement by the Applicant herein.

b. An award of specific performance was only applicable when monetary damages were shown to be inadequate.

c. The party seeking specific performance must have performed their part. The Plaintiff had not paid a single coin to the vendor. He who came to equity had to do equity.

d. The remedy of specific performance would have caused extreme hardship to the Defendant/Applicant who had been kept off her property and funds since 16th December, 2022.

e. Apart from mere allegations, the Plaintiff/Respondent had not demonstrated by way of deposit of the agreement sums in the Defendant's account nor sought the creation of an escrow account to which the funds would have been deposited, nor shown the ability to complete the transaction or any readiness/willingness to perform the terms of the agreement.

f. Equity did not act in vain. An order for specific performance was not for grant when one of the parties lacked capacity to pay or where there was no possibility for mutuality.

m) By dint of the above, the Respondent's occupation of the suit property was illegal, unlawful and invalid, thereby violating the Affiant's right to property under Article 40 of the Constitution of Kenya, as well as her

right to vacant possession as the legal proprietor of the property.

n) Principles of equity demanded that whoever came to equity had to do equity, therefore the Respondent's willful neglect to pay the balance of the purchase price to the detriment of the Affiant disqualified such Respondent from enjoying injunctive orders and/or the orders sought therein.

o) The Affiant was entitled to mesne profits for the period of the Respondent's illegal occupation pursuant to Order 21 Rule 13 of the Civil Procedure Rules, 2010.

p) The Applicant's actions and/or omissions subjected the Affiant to great financial loss, mental torture and emotional turmoil, as a consequence whereof she suffered tremendous loss and damage.

q) In the above premise, the suit was not only an abuse of the Court process but also unmerited, and if the orders sought were granted, the same would have resulted in a miscarriage of justice on the part of the Affiant as she would have been unfairly stripped of her right to property to the unjust enrichment of the

Applicant who had come to equity with unclean hands, having breached the contract.

r) The Respondent stood to suffer no harm nor loss if the prayers sought by the Affiant were granted.

s) It was in the interest of justice that the prayers sought by the Affiant were granted.

t) The Affiant prayed that this Honourable Court exercised its discretion and struck out the suit and evicted the Respondent from the suit property forthwith, consequently vacating the injunction orders of this Honourable Court dated the 23rd January, 2025.

V. The Notice of Preliminary objection by the Plaintiff/ Respondent

10. The Plaintiff raised a preliminary objection to the Defendant's Notice of Motion dated 10th February, 2025 and the entire Counter claim on the following principal grounds THAT: -

1. The Defendant's Notice of Motion dated 10th February, 2025 and the entire Counter - Claim do not lie, are Incompetent, superfluous, fatally defective, misconceived, lack merits and tantamount to gross abuse of the court

process and this preliminary objection ought to be heard and allowed in limine.

2. ***The said application dated 10/2/25 and the Counter-Claim offend the provisions of Section 152E of the Land Act which provides that obligates a land owner to serve a person in occupation of land with a notice in writing and in prescribed form of not less than three months before the date if the intended eviction.***
3. ***The Defendant's prayer for Counter - Claim is premature and does not accrue because the Court's jurisdiction cannot be Involved under Sections 152F and 152G if the Land Act until after the Owner/Defendant herein complies with service of the Notice under sections 152C, 152D and 152E if the Land Act.***
4. ***The Applicant/Defendant is seeking mandatory orders at interlocutory stage and the Court ought to reject such invitation at this stage.***
5. ***From the onset, the Notice of Motion dated 10th February, 2025 is incompetent because it seeks orders that are not sought in the Counter-Claim. The orders are mandatory in nature. For an application to be competent, the prayers therein must be sought in the Counter-Claim or main pleadings upon which the application is anchored upon.***
6. ***The Honourable Courts have rightly taken the position that substantive orders cannot be issued in Miscellaneous Applications like the one herein. This is the position adopted by Limo J in Witmore Investment Limited – Versus - County Government of Kirinyaga & 3 others [2016] eKLR:- In Anastacia Wagiciengo – Versus - Ezekiel Wafula[2018]eKLR,the Court held that an order in the nature of a Mandatory injunction must be supported by a substantive relief in the main pleading.***

In Shop & Deliver Limited t/a Betika – Versus - Njagi (Miscellaneius Case E145 of 2022)[2023] KEELRC 228(KLR): Gakeri J held;

……Relatedly, and as submitted by the respondent's counsel, the application before the court raises substantive relief in miscellaneous applications……

This position finds support in the decision in Tatech Housing & Co-operative Sacco Ltd – Versus - Qwetu Sacco Ltd [2021] eKLR where the court expressed itself as follows;

'Without much a do, I agree with the position of the respondent that the appellant cannot seek the orders sought in a miscellaneous application…….'

7. ***The Applicant/Defendant has gravely violated Order 1 and Order 40 of the Civil Procedure Rules and Article 159 of the Constitution because this Honourable Court cannot be invited to grant mandatory and substantive orders against non-parties at interlocutory stage in a Company he holds shares hereof.***
8. ***The Applicant/Defendant is guilty of grave non-disclosure of material facts of pending matters and misleading this Honourable Court. The Applicant/Defendant has committed perjury and contempt of this Honourable Court on the face of record and we urge this court to punish him and his company suo moto.***
9. ***The Application by the Defendant and the Counter - Claim offend the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules which states that '….where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so…'.***

10. ***The Applicant/Defendant has violated Article 10 (2) of the constitution, which provides for the binding national values and principles of governance of the rule of law, democracy, human dignity, equity, social justice, good governance, transparency and accountability.***
11. ***A Preliminary Objection is justified on points of law to save the precious time and frown upon abuse of the court. The principles set out in the case of Mukisa Biscuits Manufacturing Co. Limited – Versus - West End Distributors Limited (1966) EA 696.***

    What constitutes a Preliminary Objection is set out in the case of Mukisa Biscuits Manufacturing Co. Limited – Versus - West End Distributors Limited (supra) where it was held that:

    "A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argues as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the court or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...(emphasis mine).

    The Supreme Court of Kenya, now the highest court in the land has broadly confirmed and extended, the nature and scope of Preliminary Objections and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of the Constitution. Recently, the Supreme Court reconsidered the position of parties resorting to the use of Preliminary Objections and pronounced itself as follows in the case of Independent Electoral & Boundaries Commission – Versus - Jane Cheperenger & 2 others (2015) eKLR" (21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true

Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resource and secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword for winning a case otherwise destined to be resolve judicially and, on the merits.

12. Jurisdiction of the court is everything!

This Honourable Court has NO jurisdiction to hear and determine the Defendant's Counter - Claim because no notice was issued as was held in the locus classicus decision in Kenya on jurisdiction in the celebrated cases below;

1. Owners of Motor Vessel 'Lillian S' – Versus - Caltex Oil (Kenya) Ltd (1989) eKLR where the late Justice Nyarangi of the Court of Appeal held as follows:-

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

2. In Sir Ali Salim vs Shariff Mohammed Sharray(1938) KLR the court held that; "If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect

either as estoppel or otherwise and may not only be set aside at any time by the court in which they are rendered but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver or their part cannot make up for the lack of jurisdiction."

3. In the case of Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank & 2 others (2012) eKLR where the Supreme Court expressed itself as follows;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law..."

13. Legal Provisions in support of the Notice of Preliminary Objection dated 25th February, 2025:

- ***a. Articles 10, 159 and 162 (2) (b) of the Constitution of Kenya***
- ***b. The Land Act.***
- ***c. Civil Procedure Act.***
- ***d. Civil Procedure Act and Rules.***
- ***e. The Law of Contract.***
- ***f. The Companies Act.***

14. The Applicant/Defendant instituted these proceedings with ulterior motive to defeat justice and abuse the court process with grave violation of the Plaintiff's rights hereof.

11. Consequently, they persuaded and urged this Honoutable Court to strike out the Defendant's Notice of Motion dated 10th February, 2025 and the entire Counter Claim with costs to be awarded to the Plaintiff/ Respondent.

VI. Submissions

12. While the Parties were present in Court, they were directed to have the Notice of Motion application dated 23rd January, 2025, Notice of Motion application dated 10th February, 2025 and Notice of Preliminary Objection dated 25th February, 2025 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and the Honourable Court reserved a date to deliver its Ruling accordingly.

A. <u>The Written Submissions of the Defendant/ Respondent's submissions to the Notice of Motion application dated 23rd January, 2025</u>

13. The Defendant through the Law firm of Messrs. Okello Kinyanjui & Company LLP Advocates filed his written submission on 27th June, 2025. Mr. Kinyanjui Advocate commenced his submission by stating that the Defendant/ Respondent opposed the Plaintiff's Notice of Motion application dated 23rd January 2025 as the orders prayed for were not for grant, to a party in Breach of the terms of the Agreement between the parties and contends that the Applicant had approached the Court with unclean hands,

and was therefore undeserving of the discretionary reliefs sought thereat.

14. They proposed to urge the Application under three distinct heads: -

    a. ***Whether the equitable remedy of specific performance is available to the Plaintiff***
    b. ***Whether the Plaintiff merits the injunctive reliefs. Temporary or permanent.***
    c. ***Is the grant of possession upon the execution of Agreement evidence of transfer of ownership?***

15. On the discretionary relief of specific performance available to the Applicant, the Learned Counsel submitted that by an agreement dated and executed on 16th December, 2022 on even date, the Vendor offered and the Purchaser agreed to buy ordinary shares in the company known as Madita Limited situate at Kwale/Diani Complex/200 for a consideration of Kenyan Shillings Thirty Five Million Only (Kshs. 35,000,000/-). The completion period was to be eighteen (18)months from the date of execution. The Plaintiff remained in occupation having been granted vacant possession, upon execution of the agreement.

16. It was an express term of the agreement that, in case either of them defaulted or failed to perform its obligations in

relation to the agreement, the party not in default, and in conformity with Clause 5(2), thereof, was to issue the defaulting party with a 21 (twenty-one) day notice, requiring such party to remedy the breach, failure to which the agreement shall stand rescinded at the option of the party not in breach. The Notice, informing the purchaser of the breach and therefore seeking compliance dated 4th December 2024 was duly issued to the purchaser. Upon the lapse of the period granted in the notice and the non-compliance by the purchaser, the Notice of Rescission, dated 16th January 2025 was duly issued, informing her of the rescission of the agreement due to the breach and requiring of the purchaser to yield vacant possession of the suit premises.

17. An order of specific performance has the effect of ordering the contractual parties to perform what they undertook to do in the Agreement. The same is an equitable remedy which is subject to the Court's discretion and not as a matter of right.

18. The Learned Counsel relied on the case of ***"Freight Forwarders (K) Ltd – Versus – Mumias Sugar Company Ltd [2002] KEHC 609 (KLR)"***, where the Court held that: -

> ***"...an order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. It is equitable and is not available as of right but depends on the courts discretion..."***

19. The Learned Counsel averred that in granting the order of specific performance, the Applicant/Plaintiff must show that she has performed all the terms of the contract. The Court of Appeal in ***"Gurdev Singh Birdi & Marinder Singh Ghatora – Versus - Abubakar Madhubuti, Civil Appeal No 165 of 1996"***, while upholding the underlying principle of specific performance stated that:-

> ***"……The Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action..."***

20. Similarly, the Court of Appeal in ***"Gurdev Singh Birdi & Narinder Singh Ghatora as trustees of Ramgharia Institute of Mombasa – Versus - Abubakar Madhbuti [1997] KECA 400 (KLR)"*** posited thus:-

"...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice."

21. The Court proceeded to cite the learned authors of **Halsbury's Laws of England, Fourth Edition at paragraph 487 of Volume 44** of, on, the duty of a plaintiff seeking the equitable remedy of specific performance of a contract were they posited thus:

"must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action...Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim."

22. And citing the English case where Lord Esher, M. R. in ***"Coatsworth – Versus - Johnson, (1886) 54 L.T.520 at page 523"*** held that:-

"…….The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract…..the court of equity would refuse to grant specific performance and would leave the parties to their other rights. Then if the

court of equity would not grant specific performance, we are not to cons der specific performance as granted. Then the case is at end..."

23. On whether the Applicant had satisfied the principle underlying the grant of the order for specific performance. The Learned Counsel averred that the straight answer was no. The Applicant/Plaintiff to date had not paid any of the singular installments or balance of the purchase price as set out in the Agreement dated 16th December 2022. They had not performed their essential part of the Agreement. The Agreement therefore fails for want of consideration.

24. In the ***"Gurdev case (Supra)"***, the Learned Judges in a similar case, where a party had failed to perform their obligation yet moved the Court for an Order of Specific Performance posited:-

"...When the appellants came to court seeking the relief of specific of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so."

25. And finally held:-

"……In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice..."

26. The party seeking the equitable relief, is required demonstrate that they had done equity to the other party. And in ***"Nabro Properties Limited – Versus - Sky Structures Limited (2002) eKLR"***, the Court of Appeal while citing **Brooms Legal Maxims at page 191**, observed that: -

"..that no man shall take advantage of his own wrong and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity..."

27. An injunction being an equitable remedy anyone who seeks it must come with clean hands and must also do equity. The Court in ***"Kyangavo – Versus - Kenya Commercial Bank Ltd & another [2004] KEHC 2658 (KLR)"***,observed that:-

"...He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies...He admits that he is in default, and yet he is also in possession. He can't have it both ways...He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that Consequently, he has not done equity. In the hands of the plaintiff, a….injunction would

wreak havoc to the first defendant, and that would be inequitable…"

28. The Plaintiff despite the issuance of a valid Notice of Completion by the Defendant, granting her Twenty-One (21) days' notice as contemplated in the Agreement never bothered to so do; and only rushed to Court upon the delivery of a Notice of Rescission of the Agreement. Parties are bound by terms of the Agreement. It is not the duty of the Court to disentangle parties from that which they committed themselves nor rewrite the Contract on behalf of the parties.

29. In the case of:- ***"National Bank of Kenya Ltd – Versus - Pipeplastic Sam Solit (K) Ltd & Another (2002) 2 EA 503"*** the Court held that: -

"……This, in our view, is a serious misdirection on the part of the Learned Judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract…."

30. The Learned Counsel contended that the Applicant/Plaintiff has not met the threshold for the grant of the prayer due to the following: -

- ***The ninety days of completion lapsed on 16th March 2023. No Deed of Variation, nor an extension of the***

period has ever been sought by the Plaintiff/ Applicant.

- ***To date, no attempt has been made to pay up any of the installments provided for in the Agreement, either to the Court after the initiation of the proceedings or to the Respondent.***
- ***No letter bespeaking of the Applicant's/Plaintiff's desire to make good any of the installments has been discovered in the present proceedings.***
- ***No escrow account has been established to pay up the funds so as to prop up the Plaintiff's/Applicant's bona fides.***
- ***All the while since the execution of the Agreement on 16th December 2022, the Plaintiff/ Applicant has been in occupation and engaged in the business of renting out the premises to the detriment of the Respondent/Defendant who has been kept away from the suit premises and without any monetary consideration.***
- ***The Plaintiff/Applicant is in Breach of the terms of the Agreement.***

31. It was Learned Counsel’s submission that the Applicant having failed to complete of pay the purchase price within the completion period and upon service of the requisite notices, requiring completion within the required timelines, was in breach of the Agreement and cannot beseech the Court to grant the reliefs sought, as upon the rescission of the Agreement, as provided under Clause 5 (2) of the same.

There is no Privity of Contract nor any agreement binding

the two parties, as a valid Rescission Notice, duly terminates the contract, which then ceases to exist in the eyes of the law.

32. In the ***"Gurdev case, supra"***, the Learned Judges held that when the party seeking the specific performance is the party in breach, it would be inequitable to grant the relief. They posited thus:-

> ***"……The contract not having been completed in...the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property..."***

33. And where a party had failed to pay the full purchase price, as was the case with the Plaintiff herein, the Court of Appeal in ***"Christine Nyanchama Oanda – Versus - Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 (KLR)"*** posited thus:

> ***"……it is manifest that by...failure to honour the terms of 21 day completion notice, the appellant paved the way for the subsequent rescission of the agreement by the respondent. The appellant was under obligation to pay the balance of the purchase price within 21 days of the notice of completion...The appellant did not also sufficiently demonstrate that she was deserving of an order of specific performance as she had not satisfied her***

obligation as per the agreement, which was full payment of the purchase price. It is trite that a o a rt y se e king the equitable remedy of specific performance of a contract must show that he or she has performed all the terms of the contract which he or she has undertaken to perform whether expressly or by implication, and which he or she ought to have performed. In my judgment the respondent cannot come to the court and obtain an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so..."

34. The Learned Counsel asserted that the Plaintiff having failed to perform one singular obligation arising from the contract is undeserving of the exercise of discretion in her favor.

35. On whether the temporary injunction should be granted. The Learned Counsel submitted that a party seeking a temporary injunction must satisfy the conditions laid out. In ***"Giella – Versus - Cassman Brown (1973) E.A 358"*** where the Court held that:-

"……Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience..."

36. Had the Applicant/Plaintiff made out a prima facie case with a probability of success? The Court of Appeal in ***"Mrao – Versus - First American Bank of Kenya Limited & 2 others (2003)KLR125"***, defined a prima facie case as follows:-

> ***"A prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

37. On what then is the prima facie case laid out by the Plaintiff, the Learned Counsel submitted that time was made of essence in the Agreement, dated 16th December, 2022. Which provided at Clause 4(3), thereof for the completion period of eighteen (18) months, upon the execution of the Agreement or an earlier date as may be agreed by the parties. It read:

> ***"The completion date shall be eighteen (18) months after the execution of the Agreement or such an earlier date as may be agreed by the parties"***

38. Under Clause 5(2) of the same Agreement, the default mechanism was agreed by the parties. It provides:-

“Should the Purchaser fail to complete this transaction for whatever reason, within the stated completion dates or make payments as per the agreed payment plan, the Vendor may issue a Twenty One (21) Days' notice to the purchaser specifying the breach the default, confirming the Vendor's readiness to complete on their part and requiring the Purchaser to remedy the same within Twenty One (21) Days and should the purchaser fail to do so, then the Vendor shall rescind this Agreement...”

39. As was held in the case of:- ***“National Bank of Kenya Limited (Supra)”***, it was not the business of the Court to rewrite Agreements which the parties willingly entered. The Courts in upholding the intention of the parties would always adhere to the timelines provided in the Agreement.

40. **Volume 9 of the Halsbury's Laws of England, Fourth Edition at paragraph 482, in page 338** provides that:

“Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties.”

41. The Learned Counsel relied on the case of ***“Njamunyu – Versus – Nyanga [1983] KLR 282”***, the Court pronounced itself thus:

“.....Completion not having taken place...as intended by the parties the issue between them then was when

thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence...Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. The Plaintiff must have known that the only reason for rescission by the defendant was non-payment by him of the balance of the purchase price..."

42. Pursuant to Clause 3 of the Agreement, time was clearly of the essence and the payment schedule clearly spelt out. The Applicant's/Plaintiff's failure to pay up any of the singular installments within provided the timelines, (or at all to date), amounted to Breach of the Agreement. Clause 3 of the Sale Agreement provided:

    a. ***"Kenyan Shillings One Million (Kshs.1, 000,000/-), being the Deposit shall be paid to the Purchaser in form of renovation cost for the company's property being Kwale/Diani Complex/200. Which renovations shall be carried out by the Purchaser to bring the said property to habitable standards. (The cost of the said renovations, the Vendor hereby approves.***
    b. ***The sum of Kenyan Shillings Eleven Million Only (Kshs. 11,000,000/-) shall be paid by the Purchaser to the Vendor on or before 30th June 2023.***
    c. ***The sum of Kenyan Shillings Five Million One Hundred and Fifty Thousand Only (Kshs.5,150,000/-) shall be paid by the Purchaser to the Vendor on or before 31st December 2023.***

d. The sum of Kenyan Shillings Seventeen Million Eight Hundred and Fifty Thousand Only (Kshs. 17,850,000/-) shall be paid by the Purchaser to the Vendor on or before 30th June 2024".

43. The Court of Appeal in the Case:- ***"MMarete – Versus - Ndegwa & 2 others (Civil Appeal E042 of 2021) [2024]KECA 545 (KLR)"*** pronounced itself on the unavailability of the equitable remedy of Specific Performance to a defaulting party, where time was of the essence in an Agreement and held:-

> ***"...It is settled that 'when time is of the essence there is no leeway for delay Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission..."***

44. Despite time being of the essence upon execution of the Agreement by the parties the Applicant/Plaintiff had failed to pay up any of the singular installments within the stipulated timelines, or at all, to date. The Respondent/Defendant by a letter dated 4th December 2024, notified the Applicant/Plaintiff of his readiness to complete the transaction and gave the Purchaser/Plaintiff a

Twenty-One (21) days' completion notice pursuant to Clause 5.2 Supra, requiring the Purchaser to remedy the same within Twenty-One (21) Days and should the purchaser fail to do so, then the Vendor was at liberty to rescind the Agreement. The Applicant/Plaintiff never complied with the conditions of the letter and as a result, the Respondent/Defendant proceeded to rescind the agreement for sale vide a Rescission Notice dated 16th January 2025 and requiring the yielding of vacant possession by the Applicant/Plaintiff.

45. The provision of Section 39 of the Land Act, 2012 provides that:

> **"If, under a contract for the sale of land, the purchaser has entered into possession of the land, the vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the purchaser by..."**

46. Similarly, the provision of Section 41 of the Land Act, 2012 provides for the procedure for obtaining possession of land upon breach of the terms of an Agreement. It provides that:-

A vendor who proposes to seek to regain possession of private land under section 39, shall serve a notice on the purchaser which shall inform the purchaser..

The fact that the notice served under subsection (1)...shall not-

(a) Render it invalid so long as the purport of the notice is clear; or
(b) Absolve the purchaser from the consequences of not responding to the notice.

47. The Learned Counsel submitted that the completion Notice and the subsequent Rescission Notice were lawful and appropriately issued pursuant to the provisions of Section 39 and 41 of the Land Act, 2012. The Applicant/Plaintiff therefore lacks the bona fides and has come to the seat of equity with unclean hands noting that despite the notices, took no steps to ameliorate the breach nor comply with the same notices. Additionally, the rescission of the Agreement by the Respondent/Defendant was valid in the eyes of the law and in conformity with the express terms of Clause 5(2) (Supra).

48. They took umbrage in the caution; the Court of Appeal gave itself in the ***"Housing Company of East African Ltd – Versus - Board of Trustees National Social Security Fund & 2 Others***

(2018)EKLR" cited in ***"Onyango & another – Versus - Njiriri [2022] KEELC 3701 (KLR)"*** to wit:

> ***"……This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position..."***

49. The Learned Counsel opined that the Applicant/Plaintiff by their failure to remit any of the singular installments, and the continuous breach of the terms of the Agreement, lacked clean hands hence was not entitled to the discretionary relief of injunction. It was the Learned Counsel's further submission that upon rescission of the Agreement any contractual obligations between the parties remained extinguished upon the lapse of the notices dated 4th December 2024 and 16th January 2025. There was therefore no Privity of contract and the allegation by the Plaintiff/Applicant as to the ownership of the suit premises offended the provision of Article 40 of the Constitution of Kenya, 2010, section 26 of the Land Registration Act and

Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.

50. The Learned Counsel contended that Certificate of Title is the prima facie evidence of ownership of property. The Applicant/Plaintiff is in occupation of the suit premises upon being granted vacant possession of the suit property by the Vendor upon the execution of the Agreement. The Plaintiff/Applicant lacked a genuine and arguable case and has therefore failed to establish a prima facie case for the invocation of the Court's discretionary relief in her favor as the Applicant/Plaintiff was to blame for all her misfortunes by failing to pay any singular installments as anticipated under the Agreement.

51. On the question of whether there would be irreparable harm occasioned to the Applicant by failure to grant the injunctive relief. The Learned Counsel submitted that that in **Volume 21 of the Halsbury's Laws of England, Third Edition at paragraph 739, page 352**, with regards to whether the Applicant would suffer irreparable harm states that:-

> **"...By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages..."**

52. The Learned Counsel submitted that it is trite law that he who alleges must prove. The party alleging irreparable harm ought to prove that the harm could not be remedied by monetary compensation. Mere apprehension without tangible evidence will not do. The Plaintiff had not laid out any evidence of the harm that could not be compensated for in damages or which will occur if the orders are not granted. As the party in breach, the discretionary relief cannot be issued in their favor.

53. In the case of:- ***"Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)"***, the Court held that speculative injury or apprehension or fear is insufficient unless there is overwhelming evidence. The Court went ahead and noted:-

> ***"….injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages…"***

54. The apprehension of harm by the Plaintiff remained a fanciful thought as it is not backed by any tangible evidence. The Court ought not to use its discretion in favor of such a party. Is the grant of possession upon the

execution of Agreement evidence of transfer of ownership? Did the proprietary rights of the Parties change upon the execution of the Agreement? The Plaintiff/ Applicant claims ownership of the suit premises pursuant to the execution of the Agreement between the parties and the grant of possession by the Respondent/defendant to the Applicant/Plaintiff.

55. The provision of Article 40 of the Constitution of Kenya, 2010 provides that protection of right to property. Similarly, Section 26 of the Land Registration Act, 2012 provides that Certificate of Title is the prima facie evidence of ownership of property. The mere grant of possession does not amount to ownership unless a valid transfer is executed and completed. The Applicant's/Plaintiff's assertion of irreparable harm due to deprivation of her right to own property is baseless. The Learned Counsel submitted that the Sale Agreement having been rescinded owing to the Applicant’s/ Plaintiff's breach the Court cannot countenance nor be invited to legalize an illegality.

56. The terms of the Agreement remain valid and binding to all the parties unless a Deed of Variation was executed altering

the terms of the previous Agreement. None was executed between the parties here.

57. The Learned Counsel invited this Honourable Court to find that the Applicant/ Plaintiff stood to suffer no harm which could bot be adequately compensated for monetarily. Ironically, the grant of the injunctive relief inclined towards harming the Respondent/Defendant by putting him away from his lawful property contrary to Article 40 of the Constitution of Kenya, 2010.

58. On whether the application could be determined on a balance of probabilities. The Learned Counsel argued that the determination of the third limb was dependent on the first and second limb being in favor of the Applicant/Plaintiff. In ***"Nguruman Limited (Supra)"***, the Court of Appeal held:

> ***"….If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between..."***

59. The Learned Counsel submitted that the Applicant/Plaintiff had failed to prove that they had a prima facie case nor

irreparable harm that would ensue if the orders are not granted. The determination of the second limb is dependent on the first limb being in favor of the Applicant/Plaintiff. The third limb, therefore as stated in the ***"Nguruman case (Supra)"*** remains of an academic nature.

60. The Learned Counsel urged that the Court to exercise its discretionary power in the Defendant/Respondent's favor by rejecting the Applicant/Plaintiff's prayers as it has failed the standards provided for the grant of the said orders as the party in default and breach of the Agreement they cannot beseech the Court for an equitable remedy. In ***"Mrao Limited (Supra)"***, the Court held thus:

> ***"..The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence..."***

61. The Learned Counsel prayed that the Plaintiff's application dated 23rd January, 2025 be struck out with costs to the Respondents as allowing the application the Application with lead to miscarriage of justice. Where a contracting party fails to perform their obligation as per their

Agreement they cannot The Plaintiff had not disputed any obligations under the Agreement nor that she was in Breach thereof by failing to pay a singular coin or installment of the Agreement dated 16th December 2022 seek the Court's sanction nor obtain an injunctive relief. To grant the prayers sought, would be tantamount to relieving the Plaintiff from her obligations.

62. The Court of Appeal in ***"Kenya Breweries Limited & another – Versus - Washington O. Okeyo [2002]KECA 284 (KLR)"*** pronounced itself in respect of an injunctive relief, thus:

> ***'...The Respondent did not dispute his obligation to the second Appellant…..The obvious resultant effect, therefore, of the...injunction granted by the superior court is to relieve the Respondent of his obligation to pay his just debt. He should not be allowed to steal a match by avoiding his just obligations. Moreover, it would certainly be inequitable. It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party..."***

63. The Plaintiff was granted leave by the Court to file submissions in this matter on several occasions to wit:-

- On 27th February,2025, Plaintiff sought and was granted leave to file submissions in regard to the

present Notice of Motion Application dated 23rd January, 2025, NONE was filed.

- Once again when the matter came up for mention on and 2nd April, 2025, for the purposes of confirming the filing of submissions, the Plaintiff sought and was granted further leave to file the submissions. The Court limited the leave to seven (7) days', to which the Plaintiff was required to file and serve the submissions upon the Defendant. The seven (7) days' lapsed on 9th April, 2025. NONE was filed within the timelines granted nor served upon the Defendant.

64. From the Court e-filing system, the submissions to the Plaintiff's Notice of Motion Application dated 23rd January, 2025, were filed surreptitiously on the 20th June, 2025. Clearly, the conduct of the Plaintiff was contemptuous of the Orders of this very Court and is clearly designed to perpetuate further breach of the Agreement by the defaulting party, who remains in occupation of the suit premises and without having paid a single coin in furtherance of the terms thereof.

65. The Learned Counsel therefore submitted that the submissions filed by the Plaintiff without leave, therefore were wrongly before the Court and should be expunged from the record and the present Notice of Motion application be dismissed with costs.

B. <u>The Written Submissions by the Defendant on the Notice of Motion application dated 10th February, 2025</u>

66. The Defendant filed their written submissions dated 12th March, 2025 through the Law firm of Messrs. Okello Kinyanjui & Company LLP Advocates. Mr. Kinyanjui Advocate commenced by stating that the submissions were on the Applicant/Defendant moved the Court vide Notice of Motion application dated 10th February 2025 seeking the orders on the face of the application. It was supported by the annexed affidavit of one Dieter Wellendorf dated on an even date and was premised inter alia on the provisions of the law set out thereof and in particular the provision of Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules, 2010 which provides "*inter alia*":-

(1)At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that...

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court,

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

67. The gravamen of the Defendant/Applicant's application was that the averments in the Plaint dated 23rd January 2025 were scandalous, frivolous and/or vexatious and an abuse of the Court's process. They proposed to urged the Application under the distinct heads to wit: -

a. Defendant non-suited.

b. The discretionary relief of specific performance

c. The discretionary relief of temporary/permanent injunction.

d. Breach of the Agreement dated 16th December, 2022.

68. On the question of whether the Plaintiff's Plaint dated 23rd January, 2025 was vexatious, frivolous and/or scandalous. The Learned Counsel relied on the case of:- ***"Mpaka Road Development Company Limited – Versus - Abdul Gafur Kana***

T/A Anil Kapuri Pan Coffee House [2001] KEHC 43 (KLR)" where Ringera J, held that: -

> ***"…..And I would say a pleading is frivolous if it lacks seriousness. It if is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which were irrelevant to the action or defence..."***

69. And in the case of:- ***"Rachel Wanjiru Ngethe – Versus - Unique Loo Limited & 3 others [2022]KEHC 12997 (KLR)"*** the Court observed that: -

> ***"..The court has power to strike the name of a party in an action..."***

70. In the Case of:- ***"Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) [2000] KECA 427 (KLR)"***,the learned judges of the Court of Appeal while seeking reliance on English cases posited in striking out pleadings thus:

> ***".....it should be confined to cases where the cause of action was 'obviously and almost incontestably bad..."***

71. And citing the case of:- ***"Nagla – Versus - Feilden [1966] 2 QB 633 at 651"*** where it was held:

"…..It is well settled that a Statement of Claim should not be struck out and the Plaintiff driven from the judgment seat unless the case is unarguable..."

72. And went on to cite Sir Gordon Willmer in the case of:- ***"Drammond-Jackson – Versus - British Medical Association[1970] 1 All ER 1094 at 1105"*** where it was held:-

"…..The question whether a point is plain and obvious does not depend on the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result. However, it is not the length of arguments in the case but the inherent difficulty of the issues which they have to address that is decisive..."

73. Striking out of pleading therefore was intended at ensuring that the defendant is not burdened by claims, which due to uncontested facts are bound to fail ultimately. The Court of Appeal in the case of: ***"Sultan Hasham Lalji (Supra)"***, opined thus:

"..Yet, at the same time, it is also true that the object of the summary procedure of striking out is to ensure that defendants are not burdened by claims which ultimately are bound to fail having regard to the uncontested facts..."

74. On what were the Applicant's uncontested facts, the Learned submitted: -

a. The Vendor and the Purchaser vide the Sale Agreement dated 16th December 2022 entered into the sale of ordinary shares in the Company known as Madita Limited, the proprietors of the villas, situate on the parcel of land known as KWALE/DIANI COMPLEX/200.
b. The Vendor was Madita Limited, while the Purchaser was Beth Gakii Kinya Kiunga.
c. That the Agreement was executed by Mr. Dieter Wellendorf for the Vendor and Ms. Beth Gakii Kinya Kiunga, for the Purchaser.
d. The Plaintiff was at all material time aware that they were transacting with a Company and the Defendant herein Mr. Dieter Wellendorf was acting in his capacity as a director of Madita Limited.
e. The Cover page of the Agreement reads:

   AGREEMENT FOR THE SALE OF ORDINARY SHARES IN MADITA LIMITED (CPR/2012/65863).

   The following Clauses are also not disputed:

f. Clause 4(1) of the Agreement reads:

> **"..during the contract period shall be done strictly by the purchaser in her own capacity and not in the name of the Company".**

g. Clause 3(1)(a) of the Sale Agreement reads:

> **"Kenyan Shillings One Million (Kshs.1, 000,000/-), being the Deposit shall be paid to the Purchaser in form of renovation cost for the company's property being Kwale/Diani Complex/200. Which renovations shall be carried out by the Purchaser to bring the said property to habitable standards..."**

75. The Learned Counsel submitted that the Plaintiff was transacting with the Company knowingly and that the Defendant, was a mere director of the vending entity. The Defendant's role in the transaction was that of a director of the vendor. It is trite law that a company upon incorporation is a separate legal entity from it is directors. Capable of suing and being sued, owning property and doing all other things just like a natural person. From the face of the Plaint, the parties in the present suit were:-

> **BETH GAKII KINYA KIUNGA (as the Plaintiff) and DIETER WELLENDORF (sued as the Defendant).**

76. No particular averment or prayer against the director/Defendant has been laid out or established in the Plaint. The Learned Counsel submitted that the Plaintiff instituted the suit against the wrong party and the Plaint ought to be struck out. The Court of Appeal in the case of:-

"Juletabi African Adventure Limited & another – Versus -

Christopher Michael Lockley [2017] KECA 118 (KLR)" cited the English case of ***"Moir – Versus - Wallerstainer [1975]1 All ER 849"*** wherein Lord Denning MR. articulated as follows:-

> ***"…..It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests..."***

77. Where the Plaintiff sues the Applicant in his own capacity, the Court by it is inherent power has the authority to strike the name of a party in an action and as a corollary the Plaint. In the case of:- ***"Rachel Wanjiru Ngethe – Versus - Unique Loo Limited & 3 others [2022] KEHC 12997 (KLR)"*** the Court observed that: -

> ***"…..The court has power to strike the name of a party in an action. In this case, the... defendants were included in this case purely because they are directors of the ...The plaintiff needs to be reminded that a limited liability company... has a separate entity apart from its members/directors..."***

78. The Court while citing the **Halsbury Laws of England 4th Edition, Butterworth, 429** noted thus:-

> **"….the company being a separate entity or legal person apart from its members, who are not even collectively, the company..."**

79. A company normally transacts through authorized persons or directors and such decisions are binding upon the company. The provision of Section 34 of the Companies Act, 2015 Chapter 486 Laws of Kenya reads:

> **Power of directors to bind company**
>
> **(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorize others to do so...**

80. Companies may on their own action or through it is authorized officers enter into a contract. The provision of Section 35 of the Companies Act, 2015 provides that:

> **35.Company contracts**
>
> **(1)A contract may be made-**
>
> **(a)by a company, in writing; or**
>
> **(b)on behalf of a company, by a person acting under its authority, express or implied.**

81. The transaction in contestation was made on behalf of Madita Limited and not on the Defendant's behalf. Directors were not personally liable for the actions of the company since the entity is clothed with legal personality. The Court of Appeal in the case of:- ***"Stephen Njoroge Gikera & Punit Dipak Vadgama t/a Gikera &Vadgama Advocates – Versus -***

Econite Mining Company Limited & 7 others [2018] KECA 310 (KLR)" observed that: -

> ***"...a company is a separate juristic person in the eyes of the law; capable of acting in its own name, suing and/or being sued... In this regard, the company is said to be cloaked in a 'veil of incorporation' which means that in its dealings, it is directly and independently responsible for its acts and its directors are not personally liable..."***

82. In the case of:- ***"Ngethe Supra"***, the Court while striking out the suit similarly filed in the name of a director who represented the Company held thus: -

> ***"...The Plaintiff through her Plaint has not pleaded any blameworthiness on the part of... Defendants...In the body of the Plaint, there are no particulars...attributed to ... It is clear that the fate of this suit as against the ... Defendants is sealed. It is as provided under Order 2 Rule 15 (1) (a), that it discloses no reasonable cause of action against those Defendants. That Rule provides that at any stage of the proceedings, the court can order a suit to be struck out what is relevant here is provision of Rule 15(1) (a) which empowers the court to strike out pleading for disclosing no reasonable cause of action..."***

83. And citing the Wikipedia, the free encyclopedia, the Learned Judges posited thus:

> ***"…….the person who abuses process is interested only in accomplishing some improper purpose that is collateral to***

the proper object of the process and that offends justice..."

84. The Court summarized itself with the Nigerian case thus:

"...it is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and/or oppressive...but it is one feature is the improper use of judicial powers by a party in litigation..."

85. On the Plaintiff's breach of the agreement and what were the Plaintiff's bona fides in initiating the present proceedings, the Learned Counsel submitted that the Plaintiff now moved the Court vide Plaint dated 23rd January 2025. The Applicant submitted that the proceedings filed herein are an abuse of the Court's process. He who comes to equity must come with clean hands. A party in breach could not beseech the Court for discretionary relief of specific performance.

86. It was not in doubt that no single coin had been by the Plaintiff pursuant to the Agreement dated 16th December 2022. The valid Notices pursuant to Sections 39 and 41 of the Land Act,2012 were duly issued to the Plaintiff pursuant to Clause 5 (2) of the Agreement. The completion period provided for a completion period of eighteen (18) months. The clauses were to run sequentially on timelines provided

thereat. Upon the lapse of the completion period, the Plaintiff was duly issued with a Notice of Completion requiring of her to complete the transaction as per the Agreement within twenty one (21) days. She did not. Upon failure to complete, a notice of Rescission was issued requiring the vacant possession of the suit premises. To date, there has been no singular payment effect ted by the Plaintiff and she remained in occupation despite the Breach of the clear and unequivocal terms of the Agreement.

87. At all material time, time was of essence. The completion period was never in doubt and was expressly stated in Clause 4 (3) of the agreement. It read: -

> **“The completion date shall be eighteen (18) months after the execution of the Agreement or such an earlier date as may be agreed by the parties”.**

88. The parties in their wisdom presented onto themselves a default clause. Clause 5 (2) of the Agreement provided for the default mechanism. It read:

> **“Should the Purchaser fail to complete this transaction for whatever reason, within the stated completion dates or make payments as per the agreed payment plan, the Vendor may issue a Twenty One (21) Days’ notice to the purchaser specifying the breach the default, confirming**

the Vendor's readiness to complete on their part and requiring the Purchaser to remedy the same within Twenty One (21) Days and should the purchaser fail to do so, then the Vendor shall rescind this Agreement."

89. The two notices in contemplation, were, Notice of Completion, giving the defaulting party Twenty-One (21) days within which to complete the transaction and a Rescission Notice upon failure to comply. Both notices were duly issued by the vendor as provided for in the Agreement. To date, nine (9) months after the completion period lapsed the Plaintiff has not paid up a single coin nor a singular installment in performance of the Agreement. Similarly, the Plaintiff did not respond to any of the notices issued pursuant to Clause 5 (2) of the Agreement. Nor have they so far, showed the ability or willingness to complete their part of the Agreement by opening an escrow account or depositing such funds in Court.

90. In the case of:- ***"Gurdev Singh Birdi & Narinder Singh Ghatora as trustees of Ramgharia institute of Mombasa – Versus - Abubakar Madhbuti [1997] KECA 400 (KLR)"***, the Court of Appeal while dismissing the Plaintiff's claim held:

"….Indeed, the Appellants did not evince their ability to complete their part of the agreement. They did not keep

to the agreement alive and could not therefore have hoped to obtain the equitable relief of specific performance of the same. Clause 3 of the Agreement reads..."

91. The Court proceeded to cite **paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition**,

"…..a Plaintiff seeking the equitable remedy of specific performance of a contract, must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action,..."

92. The Court further held in relation to a party that had failed to pay the balance of the purchase price similarly to the case at hand, that the equitable relief was not for grant. It pronounced itself thus:

"..<u>When the Appellants came to court seeking the relief of specific of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property</u>...In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice.

<u>Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the</u>

court does not accept his undertaking to perform in lieu of performance, but dismisses the claim...”

93. Time being of essence, a party which has failed to keep up with their timelines cannot drag the other party to ensure their compliance. The Learned Judges posited:

> ***“…..Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed... the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property ...”***

94. Time was made of essence in the Agreement upon the execution of the Agreement. Clause 4(3) of the Agreement provided for the completion period to be eighteen (18) months upon the execution of the Agreement or an earlier date as may be agreed by the parties. The Courts in upholding the intention of the parties would always adhere to the timelines provided in the Agreement. **Volume 9 of the Halsbury’s Laws of England, Fourth Edition at paragraph 482, in page 338** provides that:

> **“Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances**

of the case indicate that this would fulfill the intention of the parties."

95. In the case of:- ***"Njamunyu – Versus - Nyaga [1983]KLR 282"***, the Court pronounced itself thus:

> ***'...Completion not having taken place...as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence...Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. The plaintiff must have known that the only reason for rescission by the defendant was non-payment by him of the balance of the purchase price..."***

96. The Court of Appeal in the case of:- ***"Marete – Versus - Ndegwa & 2 others [2024] KECA 545 (KLR)"*** pronounced itself by holding that:

> ***"...It is settled that 'when time is of the essence there is no leeway for delay Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission..."***

97. Despite time being of essence upon execution of the Agreement by the parties, the Plaintiff did not pay up, any

of the singular installments, within the stipulated timelines and had continued to default the terms of the Agreement, to date, while still in occupation of the suit premises. The Applicant by a letter dated 4th December 2024, notified the Plaintiff of his readiness to complete the transaction and issued a 21days' Completion Notice pursuant to Clause 5.2 Supra, requiring the Purchaser to remedy the same within Twenty One (21) Days and in the event of failure to complete within the said period, then the Vendor was at liberty to rescind the Agreement.

98. The Learned Counsel submitted that the Plaintiff never complied with the conditions of the letter and as a result, the Applicant proceeded to rescind the agreement vide a Rescission Notice dated 16th January 2025 and further required the yielding of vacant possession by the Plaintiff. The Plaintiff's failure to observe the completion timelines, non-compliance with the completion and rescission notices amounted to Breach of the Agreement. The provision of Section 39 of the Land Act, 2012 provides that: -

> ***"If, under a contract for the sale of land, the purchaser has entered into possession of the land, the vendor may exercise his or her contractual right to rescind the***

contract by reason of a breach of the contract by the purchaser by..."

99. The Court of Appeal in the ***"Housing Company of East African Limited – Versus - Board of Trustees National Social Security Fund & 2 Others (2018) eKLR"***, cited in ***"Onyango & another – Versus - Njiriri [2022] KEELC 3701 (KLR)"*** the Court held thus: -

"…..in view of our holding that the trial court was right in holding that the 1st respondent was entitled to rescind or repudiate the agreement following the fundamental breaches of the same by the appellant..."

100. Similarly, the provision of Section 41 of the Land Act, 2012 provides for the procedure for obtaining possession of land upon Breach of the terms of an Agreement. It provides that:-

"A vendor who proposes to seek to regain possession of private land under section

39, shall serve a notice on the purchaser which shall inform the purchaser...

The fact that the notice served under subsection (1).... shall not-

(a) Render it invalid so long as the purport of the notice is clear; or

(b) Absolve the purchaser from the consequences of not responding to the notice".

101. The Learned Counsel asserted that the completion notice and the subsequent rescission notice were lawful and appropriately issued pursuant to the provisions of Sections 39 and 41 of the Land Act, 2012. The Plaintiff lacked bona fides and came to the seat of equity with unclean hands noting that despite the notices, she took no steps to ameliorate the Breach nor comply with the same notices.

102. On whether there is a discretionary relief of specific performance available to the Applicant. The Learned Counsel submitted that by an agreement dated 16th December, 2022 and executed on even date, the vendor offered and the Purchaser agreed to buy ordinary shares in the company known as Madita Limited situate at Kwale/Diani Complex/200 for a consideration of Kenyan Shillings Thirty Five Million Only (Kshs. 35,000,000/-). The completion period was to be eighteen (18)months from the date of execution. The plaintiff was granted vacant possession, upon execution of the agreement. She remains in occupation to date. It was an express term of the agreement that, in case either of them defaulted or failed to perform its obligations in relation to the agreement, the

party not in default, and inconformity with clause 5(2), thereof, was to issue the defaulting party a 21(twenty one)day notice, requiring such party to remedy the breach, failure to which the agreement shall stand rescinded at the option of the party not in breach.

103. The notice, informing the purchaser of the Breach and therefore seeking compliance dated 4th December 2024 was duly issued to the purchaser. Upon the lapse of the period granted in the notice and the non-compliance by the purchaser, there being noncompliance on the part of the purchaser, the vendor, duly issued a notice of rescission, dated 16th January 2025 informing her of the rescission of the agreement due to the Breach and requiring of the purchaser to yield vacant possession of the suit premises. An order of specific performance has the effect of ordering the contractual parties to do what they undertook to do. However, this remedy is subject to the Court's discretion and not as a matter of the Plaintiff’s right.

104. In the case of:- ***“Freight Forwarders (K) Limited – Versus - Mumias Sugar Company Ltd (Supra)”***, the Court held that:-

"...an order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. It is equitable and is not available as of right but depends on the courts discretion..."

105. The Court went ahead and noted the elements to be met in the request for the prayer:

"……First is to consider whether damages would be adequate remedy, would the injured plaintiff be.....if given damages. The injured party here couild get another servant and seem to have even returned the subject property to the proprietor..."

106. The Learned Counsel contended that in granting the order of specific performance, the Plaintiff must show that she has, on her part, performed all the terms of the contract, required of her. The Court of Appeal in ***"Gurder Singh Birdi (Supra)"***, while upholding the underlying principle of specific performance stated that:-

"…….The Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action..."

107. Additionally, the Court of Appeal in the case of:- ***"Gurdev Singh Birdi (Supra)"*** posited thus:

"...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

"must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim."

108. And citing the English case where Lord Esher, M. R. in ***"Coatsworth – Versus - Johnson, (1886)54 L. T.520 at page 523"*** held that: -

"...The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract...the court of equity would refuse to grant specific performance and would leave the parties to their other rights. Then if the court of equity would not grant specific performance, we

<u>are not to consider specific performance as granted. Then the case is at an end...</u>"

109. On whether the Plaintiff had satisfied the principles underlying the grant of the orders for specific performance. The Learned Counsel submitted that to date the Plaintiff had not paid any of the singular installments or balance of the purchase price as set out in the Agreement dated 16th December 2022. They have not performed their essential part of the Agreement. The Agreement therefore fails for want of consideration. In the ***"Gurdev case, Supra"***, the learned judges held:

> ***"..In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice..."***

110. The Plaintiff must also demonstrate that she has done equity for the grant of an equitable remedy. Therefore, the Learned Counsel contended that the Plaintiff lacks cleans hands hence unworthy of the prayer. Parties are bound by terms of the Agreement. It is not the duty of the Court to disentangle parties from that which they committed

themselves nor rewrite the Contract on behalf of the parties.

111. It was the Learned Counsel’s submissions that ,the Plaintiff has not met the threshold for the grant of the prayer due to the following: -

- The ninety days of completion lapsed on 16th March 2023. No deed of variation, nor extension of the period has ever been sought by the Plaintiff.
- To date, no attempt has been made to pay up any of the installments provided for in the Agreement, either to the Court, after the initiation of the present proceedings or to the Respondent.
- No letter bespeaking of the Plaintiff's desire to make good any of the installments has been discovered in the present proceedings.
- No escrow account has been established to pay up the funds so as to prop up the Plaintiff's bona fides.
- All the while since the execution of the Agreement on 16th December 2022, the Applicant has been in occupation and engaged in the business of renting out the premises, commercially to the detriment of the

Applicant who has been kept away from the suit premises and without any monetary consideration.

- The Plaintiff is in Breach of the terms of the Agreement.

112. An order for specific performance being an equitable remedy which, like all such reliefs, is available at the court's discretion. It is an order that is however rarely granted unless the Plaintiff is able to show that damages would not be an adequate remedy. In the present case, and from the foregoing the Plaintiff has not demonstrated why the remedy of specific performance, should be in her favour, hence grant of the relief would invite the Court to continue perpetuating an illegality.

113. The Plaintiff having failed to complete or pay the purchase price within the completion period and upon service of the requisite notices requiring their completion within the required timelines was in Breach of the Agreement and cannot beseech the Court to grant the reliefs sought as upon the rescission of the Agreement, as provided under Clause 5(2) of the same. There was no Privity of contract binding the two parties as a valid rescission notice duly

terminates the contract which then ceases to exist in the eyes of the law.

114. In the ***"Gurdev case (Supra)"***, the learned judges held that when the party seeking the specific performance it is the party in breach, it would be inequitable to grant the relief. They posited thus:

> ***"..The contract not having been completed in...the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property more than...years after the event when its current value has materially appreciated..."***

115. And where a party has failed to pay the full purchase price, the Court of Appeal in ***"Christine Nyanchama Oanda – Versus - Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 (KLR)"*** posited thus: -

> ***"..it is manifest that by...failure to honour the terms of 21 day completion notice, the appellant paved the way for the subsequent rescission of the agreement by the respondent. The appellant was under obligation to pay the balance of the purchase price within 21 days of the notice of completion...The appellant did not also sufficiently demonstrate that she was deserving of an order of specific performance as she had not satisfied her obligation as per the agreement, which was full payment of the purchase price. It is trite that a party seeking the***

equitable remedy of specific performance of a contract must show that he or she has performed all the terms of the contract which he or she has undertaken to perform whether expressly or by implication, and which he or she ought to have performed. In my judgment the respondent cannot come to the court and obtain an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so..."

116. The Learned Counsel submitted that the Plaintiff having failed to perform one singular obligation arising from the contract is undeserving of the exercise of discretion in her favor.

117. On whether on the temporary and permanent injunction and whether there is a prayer for grant to the Plaintiff, the Learned Counsel was of the view that a party seeking an injunction must satisfy the conditions laid out. In the celebrated case of ***"Giella – Versus - Cassman Brown (1973) E.A 358"*** where the Court held that:

"...Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience..."

118. Further, the Court of Appeal in ***"Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014]KECA 606 (KLR)"***, reiterated the conditions in the ***"Giella – Versus - Cassman case (Supra)"*** on the principles to be met by a litigant who seeks injunctive relief and held as follows: -

> ***"...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially..."***

119. What then was the prima facie case laid out by the Plaintiff/Respondent? Time was made of essence in the Agreement upon the execution of the Agreement. Under Clause 4(3) of the Agreement provided for the completion period to be eighteen (18) months upon the execution of the Agreement or an earlier date as may be agreed by the parties. It read: -

> **"The completion date shall be eighteen (18) months after the execution of the Agreement or such an earlier date as may be agreed by the parties".**

120. Under Clause 5(2) Supra, the default mechanism was agreed by the parties. The Courts in upholding the intention of the parties would always adhere to the

timelines provided in the Agreement. **Volume 9 of the Halsbury's Laws of England, Fourth Edition at paragraph 482**, in page 338 provides that: -

> **"Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties."**

121. The Court of Appeal in ***"Gatere Njamunyu – Versus - Joseck Njue Nyaga [1983] KECA 76 (KLR)"***, cited the ***"Onyango case (Supra)"*** Court pronounced itself on time being of essence thus:

> ***"...before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify it...once notice of default has been issued, failure to rectify will result to rescission of the Contract..."***

122. Pursuant to Clause 3 (Supra), time was clearly of essence and the payment schedule clearly spelt out. The Respondent/Plaintiff's failure to pay up any of the singular installments within provided the timelines, (or at all to date), amounted to Breach of the Agreement. The Court of Appeal in ***"Marete case (Supra)"*** pronounced itself by holding that: -

"...It is settled that '<u>when time is of the essence there is no leeway for delay Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract</u>. In such circumstances, <u>the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission...</u>"

123. Despite time being of essence upon execution of the Agreement by the parties the Respondent/Plaintiff never paid any of the singular installments within the stipulated timelines. The Applicant/Defendant by a letter dated 4th December 2024, notified the Respondent/Plaintiff of his readiness to complete the transaction ad gave 21 days' completion notice pursuant to Clause 5.2 Supra, requiring the Purchaser to remedy the same within Twenty One (21) Days and should the purchaser fail to do so, then the Vendor was at liberty to rescind the Agreement. The Respondent/Plaintiff did not comply with the conditions of the letter and as a result, the Applicant/Defendant proceeded to rescind the agreement for sale vide a Rescission Notice dated 16th January 2025 and requiring the yielding of vacant possession by the Applicant/Plaintiff.

124. The provision of Sections 39 and 41 (Supra) provides that upon the issuance of a rescission Notice, a party can rescind the contract on premises of breach by the defaulting party. The Learned Counsel argued that the completion notice and the subsequent rescission notice were lawful and appropriately issued pursuant to the provisions of Section 39 and 41 (supra). The Learned Counsel submitted that the completion notice and subsequent rescission notice were lawful and appropriately issued pursuant to the provisions of Section 39 and 41 (Supra).

125. The Learned Counsel submitted that the applicant that the Respondent/Plaintiff lacks bona fides and has approached the seat of equity with unclean hands, noting that despite the notices, no steps to ameliorate the Breach nor comply with the same notices, have been taken to date. Additionally, the rescission of the Agreement by the Applicant/Defendant was valid in the eyes of the law and in conformity with the express terms of Clause 5(2)(Supra) of the agreement. An injunction being an equitable remedy

anyone who seeks it, must come with clean hands and must also do equity.

126. The Court in the case of:- ***"Kyangavo – Versus - Kenya Commercial Bank Limited & another [2004] KEHC 2658(KLR)"***, observed that:-

> ***"...He that comes to equity must come with clean hands and must also do equity...He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently he has not done equity. In the hands of the plaintiff, a...injunction would wreak havoc to the first defendant, and that would be inequitable..."***

127. It was the Learned Counsel's further contention that upon rescission of the Agreement any contractual obligations between the parties remained extinguished upon the lapse of the notices dated 4th December 2024 and 16th January 2025. There is therefore no Privity of Contract, between the parties and the allegation by the Plaintiff/Applicant as to the ownership of the suit premises, offends Article 40 of the Constitution of Kenya, 2010 and section 26 of the Land Registration Act and sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.

128. The Learned Counsel contended that a certificate of title is the prima facie evidence of ownership of property. No such transfer of title was in contemplation, in the agreement dated 16th December 2022 the objects of the same, and was the sale of ordinary shares in Madita limited. The Respondent/Plaintiff gained and came into occupation of the suit premises upon being granted vacant possession of the suit property, by the vendor immediately upon the execution of the Agreement. Where a litigant fails to establish a prima facie case, the, injunctive relief ought not to be granted.

129. In the case of"- ***"Kenya Power & Lighting Co. Limited – Versus - Sheriff Molana Habib[2018] KEHC 5027 (KLR)"***, the Court held that: -

> ***"……in the case at hand the Respondent did not establish a prima facie case or demonstrate likelihood of irreparable damage to warrant the grant of injunctive orders..."***

130. The Learned Counsel submitted that the Plaintiff/Respondent lacks a genuine and arguable case and has therefore failed to establish a prima facie case for the invocation of the Court's discretionary relief in her

favor as the Applicant/Defendant was to blame for all her misfortunes by failing to pay any singular installments as anticipated under the Agreement.

131. On the question on whether irreparable harm be occasioned to the litigant by failure to grant the injunctive relief. The Learned Counsel posited that in **Volume 21 of the Halsbury's Laws of England, Third Edition at paragraph 739, page 352**,with regards to whether the Applicant would suffer irreparable harm states that:-

> **"...It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question..."**

132. The Counsel held that it is trite law that he who alleges must prove. The party alleging irreparable harm ought to prove that the harm could not be remedied by monetary compensation. Mere apprehension without tangible evidence would not do. The Plaintiff/Respondent had not laid out any evidence of the harm that could not be compensated for in damages or which will occur if the orders are not granted. As the party in Breach, the discretionary relief could not be issued in their favor. In ***"Nguruman Limited (Supra)"***, the Court held that speculative injury or apprehension or fear is insufficient unless there is overwhelming evidence. The Court went ahead and noted:-

> ***"...injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages".***

133. It was the submission by the Learned Counsel that they injury contemplated by the Plaintiff/ Respondent was speculative and mere apprehension based on no tangible evidence.

134. On whether the grant of possession upon the execution of agreement evidence of transfer of ownership. The Learned Counsel submitted that the Plaintiff/Respondent claimed ownership of the suit premises pursuant to the execution of the Agreement between the parties and the grant of possession by the Applicant/Defendant to the Respondent/Plaintiff. The provision of Article 40 of the Constitution of Kenya, 2010 and Section 26 of the Land Registration Act,2012 provides that Certificate of Title is the prima facie evidence of ownership of property. The mere grant of possession never amounted to ownership unless a valid transfer is executed and completed. The Respondent/Plaintiff's assertion of irreparable harm due to deprivation of her right to own property is baseless.

135. The Learned Counsel submitted that the sale agreement having been rescinded owing to the Plaintiff/ Respondent's breach the Court could not countenance nor be invited to legalize an illegality. The terms of an Agreement remained valid and binding to all the parties unless a Deed of Variation was executed, thereby, altering the terms of the previous Agreement. None was executed between the

parties here. The Learned Counsel invited this Court to find that the Respondent/Plaintiff stood to suffer no harm which could not be adequately compensated for monetarily. Ironically, the grant of the injunctive relief inclined towards harming the Applicant/Defendant by putting him away from his lawful property contrary to Article 40 of the Constitution of Kenya, 2010.

136. On whether the Court was in doubt, to determine the case on a balance of probabilities. The Learned Counsel averred that the determination of the third limb was dependent on the first and second limb being in favor of the Respondent/Plaintiff. In ***"Nguruman Limited (Supra)"***, the Court of Appeal held: -

> ***"..If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in between..."***

137. The Learned Counsel submitted that the Respondent/Plaintiff had failed to prove that they had a prima facie case nor irreparable harm that would ensue if the orders was not provided. The determination of the

second limb was dependent on the first limb being in favor of the Respondent/Plaintiff. The third limb, therefore as stated in the ***"Nguruman case (Supra)"*** remains of an academic nature.

138. On whether there was any compelling factors that would warrant the granting a permanent injunction to the Plaintiff/ Respondent. The Learned Counsel urged that the Court do exercise its discretionary power in rejecting the Respondent/Plaintiff's prayer for the grant of the discretionary relief as it has failed the standards provided for the grant of the said orders as the party in default and Breach of the Agreement they could not beseech the Court for an equitable remedy. In ***"Mrao Limited (Supra)"***, the Court held thus:

> ***"…..The power of the Court in an application for an... injunction is discretionary. Such discretion is judicial...***"

139. Thus, the Learned Counsel submitted that the grant of permanent injunction would lead to miscarriage of justice. Where a contracting party fails to perform their obligation as per their Agreement, they cannot they cannot seek the Court's sanction nor obtain an injunctive relief. The Court

of Appeal in ***"Kenya Breweries Limited & another – Versus - Washington O. Okeyo [2002] KECA 284 (KLR)"*** pronounced itself in respect of an injunctive relief, thus:-

> ***".....The Respondent did not dispute his obligation to the second Appellant...The obvious resultant effect, therefore, of the... injunction granted by the superior court is to relieve the Respondent of his obligation to pay his just debt. He should not be allowed to steal a match by avoiding his just obligations. Moreover, it would certainly be inequitable. It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party..."***

140. A permanent injunction is granted to a litigant where a right exists. A party in breach forfeits all such rights in relation to the object of the agreement. The Plaintiff had not paid up any singular installment, nor a single coin pursuant to the Agreement dated 16th December 2022 and continued in Breach of every singular and particular clause of the same and therefore had no color of right nor cause of action against the Vendor.

141. The Learned Judge in the case of:- ***"Margaret Nguhi Mbugua – Versus - Ruth Karii Kagwe, Mary Njoki Gichuru & another [2019] KEELC 3922 (KLR)"*** observed thus: -

"…..a Plaintiff must establish the existence of a right and violation of that right by the Defendant..."

142. A permanent injunction was meant to perpetually restrain the commission of an act by the Defendant for the protection of the Plaintiff's rights. The rights must exist, the Plaintiff must not be the party in default. In the case of:- ***"Mogo Auto Limited – Versus - Otianga [2024] KEHC 13055 (KLR)"*** the Court held that:

"……A permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the defendant in order for the rights of the Plaintiff to be protected..."

143. The Learned Counsel submitted that the Plaintiff lacked any legal right which would necessitate the grant of permanent injunction having established that it is them who violated the Sale Agreement dated 16th December 2022.

144. On the question of whether the Plaint dated 23rd January, 2025 be struck out. The Learned Counsel relied on the case of ***"Muchanga case (Supra)"***, where the Court citing the Nigerian case ***"Attahiro – Versus - Banguo 19983 NWLL"*** posited thus:

"…..the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive..."

145. The Court proceeded to hold:

"...Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice..."

146. Whereas Striking out of a Plaint was a drastic remedy, which should only be used in the rarest of occasions and where the case was hopelessly irredeemable, frivolous and an abuse of Court's process thus vexing the innocent litigant. The party in Breach was the Purchaser herein, the innocent party was the Vendor. In the case of:- ***"Mpaka Road Development Co. Ltd (Supra)"*** the Court held that:-

"……And although striking out a pleading is a drastic remedy to be exercised only in plain and obvious cases, I consider this to be such a case and accordingly order the said defence and the set off and counterclaim to be struck out with costs to the applicant..."

147. The Court had the inherent power to promote access to justice by striking out pleadings which abuse the Court's

process. This power was aimed at promoting administration of justice and avoiding the wastage of time which is a sparing judicial resource. The Learned Judges in the Muchanga case (Supra), quoted their own previous decision of:- ***"Fremar Construction Company Limited - Versus - Mwakisiti Navi Shah 2005 eKLR"*** at page 6 where the Court said:-

> ***"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."***

148. The Plaintiff being the party at fault and in Breach of the Agreement had abused the Court's judicial process by bringing litigation whose main purpose was to facilitate the pursuit of extraneous objectives not captured in the agreement dated 16th December 2022.

149. The Learned Counsel invited this Court to strike out the Respondent/Plaintiff's Plaint as it was wanting in bona fides, frivolous and an abuse of the Court's process.

C. The Written Submission by the Defendant to the Plaintiff's Preliminary Objection dated 25th February, 2025.

150. The Defendant through the firm of Okello Kinyanjui & Company LLP Advocates filed his written submission on 27th June, 2025. Mr. Kinyanjui Advocate submitted that the Defendant opposed the Preliminary Objection dated 25th February, 2025 as it was unmeritorious and never met the set threshold for grant of a Preliminary Objection. In the celebrated case of ***"Mukisa Biscuit Manufacturing Company Limited – Versus - West End Distributors Limited [1969) EA 696"***, the Court held that: -

> ***".....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit..."***

151. The Court went on and added the following:

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."***

152. The determination of a Preliminary objection was premised on meeting the set threshold. The Court of Appeal in ***"Attorney General and another – Versus - Andrew Maina Kithinji, Civil Appeal No.21 of 2015"***, held thus: -

> ***"..The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is...first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained..."***

153. On whether the Plaintiff's preliminary objection met the set threshold or in the alternative whether the Plaintiff's objection was merited. The Learned Counsel submitted that it is trite law, that where the facts of the case have to be interrogated, the Court ought not to allow the preliminary objection. The Plaintiff/Purchaser upon the execution of the Sale Agreement dated 16th December 2022, was at all material times, aware that time was of the essence. However, he reiterated that the Purchaser never paid up any of the singular installments within the eighteen (18) months' timeline as provided under Clause 3 of the Agreement for completion. Resultantly, the Defendant issued a Completion Notice dated 4th December

2024, inviting her to complete pursuant to the express provision of Clause 5 (2) of the Agreement and section 41 of the Land Act, 2012. There was no compliance. Thereafter, the Defendant issued a Rescission Notice dated 16th January, 2025, rescinding the Agreement for non-compliance. They reproduced the relevant portions of the two notices issued herein above.

154. The Completion Notice dated 4th December 2024 read:

> **"..TAKE FURTHER NOTICE therefore, that pursuant to Clause 5.2 of the Agreement and in accordance with the law governing contracts, we hereby issue this Completion Notice, requiring you to:-**
>
> **1) Remit the outstanding balance/purchase price amounting to Kenya Shillings Thirty Five Million only (Kshs. 35,000,000/-) within 21 (Twenty-One) days from the date of this notice, and**
>
> **2) Settle all accrued interest, if any, in accordance with the agreement.**
>
> ***Failure to comply with the above within the stipulated timeline will leave our client with no alternative but to:-***
>
> ***a. Exercise their discretion to terminate and rescind the Agreement without further reference to you.***
>
> ***b. Proceed to put up the property for Sale and evict any person(s)in occupation.***

c. Pursue legal action to recover the purchase price and/or any balance whereof, interest and costs incurred.

This letter serves as a formal demand and is issued without prejudice to any other rights and remedies available to the vendor under the agreement, at law or in equity.

We trust that you shall treat this matter with the urgency it deserves to avoid any further escalation".

155. The Purchaser having failed to comply within the stipulated timelines in the Completion Notice above, the Vendor duly instructed his Advocates to issue a Notice of Rescission of the Agreement which they did. The Notice of Rescission dated 16th January, 2025 read:-

"…..The Sale Agreement executed between your Client and ours on the 16th December 2022 provided at Clause 4.3, that the Completion Period:

"Shall be eighteen (18) months after the execution of this Agreement"

The said period lapsed on 30th June 2023. Time was clearly of the essence.

Clause 3 of the Sale Agreement under the head 'Purchase Price' provided the consideration for the sale of shares for the total sum of Kenya Shillings thirty five million (Kshs. 35,000,000.00/-) payable in four (4) instalments as stipulated under Clauses 3.1 (a, b, c, and d). <u>None of the installments due and payable have been received by our Client to date</u>.

Under the head 'Default Clause' the parties at Clause 5.2 thereof agreed that:

> **"Should the Purchaser fail to complete this transaction for whatever reason within the stated completion date or make payment as per the agreed payment plan, the Vendor may issue a twenty one (21) day Notice to the Purchaser specifying the default... and requiring the Purchaser to remedy the same within twenty one (21) days... should the Purchaser fail to do so then the Vendor shall rescind this Agreement...".**

The Default Clause, therefore, contemplated a 2-tiered default mechanism, to wit,

a) Issuance of a Notice of Completion, notifying the Purchaser of the default and requiring of her to remedy the same within twenty one (21) days) If(a) above is not adhered to, the Rescission of the Agreement.

Our Client, therefore, and in conformity with the provisions of the said Clause, duly served yours with a Notice of Completion dated 4th December 2024, requiring the completion of the transaction within the next twenty-one (21) days from the date of that letter. To date, your Client has not so complied.

Consequently, we have been instructed to Rescind this Agreement as your Client is in breach of the Terms thereof and to immediately seek your Client's yielding of the vacant possession of Kwale/Diani Complex/200 within the next seven (7)days from the date of this letter, failure to which your Client shall be liable for damages/trespass..."

156. According to the Learned counsel, the rescission notice, clearly provided for: -

a. Rescission of the Agreement dated 16th December 2022.

b. Yielding of vacant possession

157. Those then were the gravamen of the Letter dated 16th January 2025. On the question of the objections the Plaintiff laid before the Court. The Learned Counsel submitted that they quoted in verbatim, the Plaintiff's objections at paragraphs 2 and 3 respectively, which are premised on inter alia:-

> **"The said application dated 10/2/2025 and the Counter-Claim offend the provisions of Section 152E of the Land Act which provides that (sic) obligates a land owner to serve a person in occupation of land with a notice in writing and in prescribed form of not less than three months before the date (sic) if the intended eviction".**
>
> **"The Defendant's prayer for Counter-Claim is premature and does not accrue because the Court's jurisdiction cannot be involved under Sections 152F and 152G if (sic) the Land Act until after the Owner/Defendant herein complies with service of the Notice under sections 152C, 152D and 152E if (sic) the Land Act".**

158. The provision of Section 152C, 152D and 152E of the Land Act, 2012 provide for the procedure for eviction of

individuals in unlawful possession of public, private and/or community land. The sections provide:

> **152C.Eviction Notice to unlawful occupiers of public land**
>
> **"The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons..."**
>
> **152D. Eviction Notice to unlawful occupiers of community land.**
>
> **"..County Executive Committee Member responsible for land matters shall cause a decision relating to an eviction from unregistered community land to be notified to all affected persons..."**
>
> **152E. Eviction Notice to unlawful occupiers of private land.**
>
> **".. respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction..."**

159. The Plaintiff objects to the Counter-Claim on account of the same being premature as it allegedly offends the mandatory requirements of the provision of Sections 152C, 152D and 152E of the Land Act, 2012, in that the requisite notices were not issued before eviction. Consequently, the Plaintiff averred that the Court had no jurisdiction to

adjudicate over the matter. The Objections maybe divided into two:-

a. Applicability of Section 152 of the Land Act, 2012.

b. Jurisdiction of the Court in view of the Counter – Claim.

160. The provision of Section 152B of Land Act, 2012 was headlined evictions to be undertaken in accordance with the Act. The proviso thereto provides:

> **"an unlawful occupant of private, community or public land, shall be evicted in accordance with this Act."**

161. The provision of Section 152E of the Land Act, provides for modes and procedure for evictions of persons unlawfully in occupation of private land. Section 152B and 152E are therefore relevant and applicable, only when the occupation is unlawful. On the contrary, the Plaintiff's occupation of the suit premises was lawful and pursuant to Clause 3 (1) (a) of the Sale Agreement. The Purchaser came into possession upon the execution of the Agreement and was granted vacant possession of the premises to undertake the necessary renovations. Clause 3 (1) (a) of the Sale Agreement reads as follows:-

“Kenyan Shillings One Million (Kshs. 1,000,000/=) being the Deposit shall be paid by the Purchaser in form of renovation costs for the company's property Title Number Kwale/Diani Complex/200. Which renovations shall be carried out by the Purchaser to bring the said property into habitable standards...”

162. The Sale Agreement was for the purchase of ordinary shares by the Plaintiff in Madita Limited, the proprietors of villas situate in KWALE/DIANI COMPLEX/200.The Agreement was for sale of ordinary shares and not, the land upon which the villas were domiciled. The eviction sought in the Defendant's Counter - Claim was a Court's sanctioned one. It flowed from an order of the Court, having fully deliberated on the matter. No notices have been issued evicting the Plaintiff from the suit premises. The Rescission Notice only required of the Plaintiff to yield vacant possession and provided for consequential reliefs upon default.

163. The Court in the case of:- ***“Mary Wangui Karanja & another – Versus - Rhoda Wairimu Karanja & another [2021] KEELC 1033 (KLR)”*** cited the decision of Eboso J, while dealing with a similar question in the case of:- ***“Muthithi***

Investments Limited – Versus - Andrew S Kyendo & 22 others [2020] eKLR" had this to say:-

> ***"….. the Applicant's reliance on Section 152E of the Land Act are misplaced because that framework does not relate to evictions carried out in execution of court decrees..."***

164. The provision of Section 152 (Supra) was very much inapplicable as it deals with unlawful eviction. The Plaintiff's occupation was lawful hence the eviction must flow from the default Clause 5(2) of the Agreement and be governed by the provisions of Sections 39 and 41 of the Land Act, 2012 which provide for the mode of eviction of the Plaintiff. No evidence of any eviction or a notice thereof had been demonstrated or availed by the Plaintiff.

165. The Learned Counsel relied on the case of ***"Muthithi (supra)"*** where the Learned Judge while dismissing a similar matter held:-

> ***"……there is no evidential material presented to the court to demonstrate that the decree holder has or is about to violate the eviction procedure spelt out in Section 152E of the Land Act or any other Section of the Land Act..."***

166. The Court final determined itself thus:-

"……However, where the court directs that a party should give vacant possession of the suit without mentioning the applicability of section 152 E of the Land Act,

And proceeded to hold:

"...The reading of the provisions of sections 152 A to 152 G of the Land Act are applicable in respect to evictions of persons occupying... private land that may be carried without a court order. In those instances, it is a requirement that notices be issued by...the owner of private land... However, the said provisions are not applicable in a situation where the court gives an order for eviction, unless the court itself states that the provisions of Section 152 of the Land Act are applicable..."

167. The requisite Notices issued pursuant to Clause 5 (2) of the Agreement and Section 39 and 41 of the Land Act, were not eviction notices and therefore Sections 152 of the Land Act has no relevancy to the yielding of vacant possession as provided thereof.

168. On the jurisdiction of this Court to entertain the Counter – Claim. The Learned Counsel submitted that the jurisdiction of the Court is conferred by the Constitution and/or a legislation. In the case of:- ***"Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011"***, the Court observed that: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law..."

169. The Learned Counsel submitted that jurisdiction of the Court was a matter of law and not the Plaintiff's twist of events to fit their narrative. The Environment and Land Court Act under Section 13, read along the provision of Article 162(2)(b) of the Constitution of Kenya, 2010, grants the Environment and Land Court, a Court of equal status to the High Court the power to adjudicate on matters touching on ownership of land.

170. The provision of Section 13 of the Environment and Land Court Act provides:-

"(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-

...(e) any other dispute relating to environment and land"

171. The Learned Counsel submitted that the jurisdiction of the Court is a matter of law and not the Plaintiff's twist of

events to fit their narrative. The Plaintiff disputes on his authority to swear the affidavit on behalf of Madita Limited. Where a company is a party to a suit, the affidavit must be sworn by an officer duly authorized. This provided for under the provision of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010.

172. Order 4 rule 1(4) provides as follows: -

> **"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."**

173. The requirement of affixing a company seal by a Company was repealed by the by Section 30 of the Business Laws (Amendment) Act No. 1 of 2020 which provided: -

> **"Section 37 of the Companies Act, 2015 is amended by deleting subsection (1)".**

174. What were the previous provisions of Section 37 of the Companies Act, 2015 that were repealed by the above amendment? The section previously provided:

> **"1) A document is executed by a company-**
>
> **(a) by the affixing of its common seal (if any) and witnessed by a director".**

175. A casual reading of the sub - section, provides that the seal was not mandatory. The use of the words ‘if any’ clearly made it optional. Presently and subsequent to the amendment of Section 37 of the Companies Act, 2015 by Section 30 of the Business Laws (Amendment) Act (2020), the Companies Act reads:

> **“37.Execution of documents**
>
> **(1)Deleted by Act No. 1 of 2020, s.30.**
>
> **(2)A document is validly executed by a company if it is signed on behalf of the company-**
>
> **(a)by two authorised signatories; or**
>
> **(b)by a director of the company in the presence of a witness who attests the signature.**
>
> **(3)A document in favour of a purchaser is effectively executed by a company if it purports to be signed in accordance with subsection (2).**
>
> **(4)For purpose of subsection (3), ‘purchaser’ means a purchaser in good faith for valuable consideration, and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.**
>
> **(5)If a document is to be signed by a person on behalf of more than one company, it is not effective for the purposes of this section unless the person signs it separately in each capacity.**
>
> **(6)A reference in this section to a document being, or purporting to be, signed by a director or secretary is, if**

that office is held by a firm, to be read as a reference to its being, or purporting to be, signed by a natural person authorised by the firm to sign on its behalf.

(7)This section applies to a document that is, or purports to be, executed by a company in the name of, or on behalf of, another person (whether or not that person is also a company)"

176. The Companies Act, 2015 was a Statute. The requirements of Order 4 are rules of procedure. The hierarchy of laws provide that Statutory/Provisions take precedence over Rules of Procedure. And in the words of Justice Ringera in the locus classicus ***"Microsoft Corporation – Versus - Mitsumi Computer Garage Ltd & another [2001] KEHC 846 (KLR)"***.

> ***"…..Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it.."***

177. The rationale of Order 4 Rule 1(4), is to protect companies from unwarranted and fraudulent decrees arising from proceedings not sanctioned by the company rather than being a procedural technicality. The Court of Appeal in the case of:- ***"Spire Bank Limited – Versus - Land Registrar & 2***

others [2019] KECA 530 (KLR)" while explaining the rationale for Order 4 Rule 1(4) (Supra) stated that:

> ***"……It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court...With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized..."***

178. Where a company files a suit, the only requirement, as set out in the Companies, Act is the swearing of a verifying affidavit by a duly authorized officer whom must depone to his authorization. Paragraph 1 of the Supporting Affidavit and that of the Verifying Affidavit accompanying the Counter-Claim clearly state that the deponent of the same, is duly authorized.

179. Similarly, the Court of Appeal in the case of:- ***"Makupa Transit Shade Limited & Another – Versus - Kenya Ports Authority & Another [2015] eKLR"*** clarified the position on authorization by holding that:-

"…..In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that 'they were duly authorized.' It was then up to the appellants to demonstrate by evidence that they were not so authorized..."

180. In the case of:- ***"Spire Bank Limited (Supra)"***, the Court went ahead and stated:

"...So that it was sufficient for the authorized person to depone that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority..."

181. The Plaintiff had not demonstrated that the person verifying the affidavit was not authorized nor that the said person lacked the requisite capacity to execute the documents on behalf of the company. It is trite law that he who alleges must proof and the incidence of burden rests upon him throughout.

182. On whether the preliminary objection was purely on points of law. The Learned Counsel submitted that in ***"Spire Bank Limited (Supra)"*** the Court also held that: -

> ***"..As such for a preliminary objection to be successful it must be based on a pure point of law, and further, it cannot be a requirement of its foundation that evidence be produced in its support. In other words the objection does not lie if the objector requires to demonstrate that a party is unauthorized or if in response a resolution or other document under seal requires to be produced as proof of its existence. This effectively defeats the principles behind a preliminary objection, in which case, it ought not to succeed..."***

183. The Court would be required to interrogate:-

   a. ***The nature and compliance of the Notices dated 4th December 2024 and 16th January 2025.***
   b. ***The nature of the company's authorization in execution of documents.***
   c. ***The veracity of the Counter-Claim***

184. The Learned Counsel invited the Court to find that the preliminary objection was not merited nor based on pure points of law and should be dismissed with costs. A Counter - Claim was a suit on it is own. Under the provision of Order 7 Rule 7 of the Civil Procedure Rules, 2010, any grounds supporting a Counter - Claim should be set out in the Statement of Defence. Order 7 Rule 7 (Supra) reads:

> **"Where any Defendant seeks to rely upon any grounds as supporting a right of Counter - Claim, he shall, in his statement of defence, state specifically that he does so by way of Counter - Claim"**.

185. The Learned Counsel submitted that the grounds in support of the Counter - Claim were laid out in the Statement of Defence. The documents to accompany a Counter - Claim was provided for under Order 7 Rule 5(Supra). It reads:

> **“The Defence and Counter - Claim filed under rule 1 and 2 shall be accompanied by-**
>
> **(a) an affidavit under Order 4 rule 1(2) where there is a Counter - Claim.**
>
> **(b) a list of witnesses to be called at the trial;**
>
> **(c) written statements signed by the witnesses except expert witnesses; and**
>
> **(d)copies of documents to be relied on at the trial...”**

186. The Learned Counsel submitted that the rules do not provide for the issuance of a Demand Note in regard to a Counter-Claim. The Plaintiff's objection on that ground therefore failed. The Plaintiff's Preliminary objection was unmerited as the same was based on facts and not pure points of Law and invited the Court to disallow it. The Plaintiff was granted leave by the Court to file submissions in this matter on several occasions to wit:-

- On 27th February, 2025, Plaintiff sought and was granted leave to file submissions with regard to the present Preliminary Objection, NONE was filed.
- Once again when the matter came up for mention on and 2nd April, 2025, for the purposes of confirming the filing of submissions, the Plaintiff sought and was granted further leave to file the submissions. The Court limited the leave to seven (7) days', to which the Plaintiff was required to file and serve the submissions upon the Defendant. The seven (7) days' lapsed on 9th April, 2025. NONE was filed within the timelines granted nor served upon the Defendant

187. From the Court e-filing system, the submissions to the Plaintiff's Preliminary Objection were filed surreptitiously on the 20th June, 2025. Clearly, the conduct of the Plaintiff was contemptuous to the Orders of this very Court and was clearly designed to perpetuate further breach of the Agreement by the defaulting party, who remained in occupation of the suit premises and had failed to pay a single coin in furtherance of the terms thereof.

188. The Learned Counsel therefore submitted that the submissions filed by the Plaintiff without leave, therefore, were wrongly before the Court and should be expunged from the record and the present objection be dismissed with costs

D. <u>The Defendant's submissions limited to the Failure to refer this matter to Arbitration</u>.

189. The Defendant through the Law firm of Messrs. Okello Kinyanjui & Company LLP Advocates filed his written submission on 27th June, 2025. Mr. Kinyanjui Advocate submitted that the Plaintiff has in the submissions dated 25th April, 2025 but filed without leave of the Court, 20th June, 2025, made fair weather remarks that the Defendant had thwarted all the Plaintiff's efforts to resolve the alleged dispute through negotiations and arbitration. Nothing could be further from the truth.

190. According to the Learned Counsel, arbitration was pegged on the invocation of an arbitral clause contained in an Agreement. The Defendant vide the letter dated 11th April, 2024, sought vacant possession of the suit premises due to the Plaintiff's failure comply with Clause 3 of the Sale

Agreement dated 16th December, 2022. The Plaintiff vide letter dated 19th August, 2024, had previously referenced the matter for arbitration, and sought appointment of an Arbitrator by the Chairman of the Chartered Institute of Arbitrators Kenya Limited. Vide the letter dated 20th August, 2024, the Institute of Arbitrators Kenya Limited, responded and instructed the Plaintiff to have the parties herein review the Dispute Clause, on the appointing authority, as it was silent, on, the mode of appointment of arbitral tribunal or who it was, that was mandated so do. In the alternative, the Plaintiff was instructed to move the Court for the appropriate orders to that effect. The Plaintiff chose to ignore the advice and opted to file the present suit. (Letters referred herein, though forming part of the Plaintiff's documents included herein for ease of reference).

191. On whether the matter was capable of reference to arbitration. The Learned Counsel submitted that the answer was simply No. It is trite that for arbitration to ensue, there must be a dispute. The provision of Section 6(1) of the Arbitration Act, provides as follows:-

> **"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-**
>
> **a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
>
> **b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration..."**

192. It was therefore imperative that reliance on the Arbitration clause, could only come into effect and/or was only available if:-

- at the point of entering appearance, or acknowledgment of the claim;
- a dispute exists.

193. On what point of entering appearance or acknowledgment of the claim, the Learned Counsel submitted that it was not in dispute that the Plaintiff instituted the present suit on 23rd January, 2025. The Plaintiff's conduct herein automatically waived the right to arbitration, and was therefore estopped from resoling from the position. It is

trite law that where an arbitration clause exists, the first step would be to seek appointment of an arbitrator.

194. The Court of Appeal while pronouncing itself on estoppel in the case of:- ***"Serah Njeri Mwobi – Versus - John Kimani Njoroge [2013] eKLR"*** held thus:

> ***"...In our understanding, the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person..."***

195. The Learned Counsel submitted that by filing the Plaint together with the Application seeking an injunction dated 23rd January, 2025, Preliminary Objection dated 25th February, 2025 and Reply to Defence dated 27th February, 2025, the Plaintiff implied that they wished the suit, be adjudicated, upon by this Honorable Court. It is trite law that upon entering appearance and filing a defence and/or response to an application filed by the Plaintiff (in our case, prayer for injunction and the Preliminary Objection) reference of the matter to Arbitration is automatically waived. At that point the Court to which the matter was

filed is seized of the matter and the procedure for stay of the proceedings is lost, the moment a step is taken in the matter. Any other attempt otherwise is an attempt at resailing from the action taken. The arbitration option is therefore not available to a party which brings itself to the jurisdiction of the Court by filing suit.

196. The Court of Appeal in the case of:- ***"Adrec Limited – Versus - Nation Media Group Limited [2017] KECA 106 (KLR)"***, held thus:-

> ***"...it should be emphasized that the right to seek and obtain stay of proceedings under Section 6 (1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position..."***

197. Similarly, on the waiving of the right to rely on the Arbitration Clause, the Court of Appeal in the case of:- ***"Kisumuwalla Oil Industries Limited – Versus - Pan Asiatic Commodities Pte Limited & another [1997] KECA 107 (KLR)"*** posited thus:-

> ***"...On the other hand...had in fact waived the right to refer the matter to arbitration and have the legal proceedings stayed in the meantime by filing a defence***

(Plaint sic)...The...conduct therefore disentitled...from relying on the Scott v Avery clause..”

198. And concluded that:-

“..if the... wished to take advantage of clause 29 of the contract, it was obliged to apply for stay of proceedings after entering appearance which it never did..”

199. The Court went on to cite the learned authors:

Mustill and Boyd at page 164 as follows:-

“The second situation where a Scott v Avery clauses is not available as a defence exists where the conduct of the Defendant disentitles him from relying on it. The reported cases disclose two distinct instances...Where the Defendant has waived reliance on the clause by defending the action without relying on the clause...”

200. And the learned authors posited:-

“..Once the parties have submitted to the jurisdiction of the court they cannot blow hot and cold and subsequently without consent of each other rely upon the condition precedent in the arbitration clause...”

201. And further cited **Russel on the Law of Arbitration 18th Ed. At p.137** thus:

“...if the Defendant has abstained from asking it to do so, the court has seizing of the dispute and it is by its decision and by its decision alone that the rights of the parties are settled...’

202. Where the Defendants filed a defence without referring the matter to Arbitration, the Arbitration was deemed as waived and parties cannot revert to its application after such waiver. The Court of Appeal in the case of:- ***"Eunice Soko Mlagui – Versus - Suresh Parmar & 4 others [2017]KECA 736 (KLR)"*** where the defence had been filed without reference to the Arbitration posited thus:-

> ***"..In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision..."***

203. And went on to hold:-

> "***...In such a case the court cannot ignore the conditions set out in section 6(1), which must be satisfied before the dispute is referred to arbitration...***"

204. The Learned Counsel submitted that no application was made by the Plaintiff within the prescribed timelines and also, upon the Defendant's entering appearance, filing a Statement of Defence and Counter-Claim dated 10th February, 2025. The matter was effectively removed from the purview of Arbitration. Where a party wishes to have a matter referred to arbitration, an application for stay of the proceedings must be made without any inordinate delay. The suit herein was filed on 23rd January, 2025,

contemporaneously an Application seeking injunctive reliefs and a Preliminary Objection filed on 25th February, 2025.

205. The Defendant in response thereto filed its Statement of Defence and Counter - Claim and a Replying Affidavit to the Plaintiff's Application seeking injunctive reliefs and a Response to the Preliminary Objection, all dated on the 10th February, 2025. That act constituted a response to the Claim as contemplated by the Arbitration Act. The Court of Appeal in ***"Mt. Kenya University – Versus - Step Up Holdfing (K) Ltd [2018] KECA 125(KLR)"***, delivered itself:-

> ***"...Critically the Appellant's response to the Respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process..."***

206. The Court of Appeal in the case of:- ***"Stratogen Limited – Versus - County Government of Kisii (Civil Case 1 (E002)of 2021)[2023] KEHC 25071 (KLR)"*** cited its own decision in ***"Civil Case No. 1756 of 2000 between Bedouin Enterprises Ltd. – Versus - Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments"*** in which while rejecting an application for stay of proceedings held thus:-

"..the application should have been made at the time of entering appearance, not long after appearance and filing of defence.."

207. And a status of the matter, the Court emphasized that, the same was now seized of the same and proceeded to pronounce itself thus:-

"..with the result that H.C.C.C. No... is still pending and alive in the High Court..."

208. The Learned Counsel thus submitted that the parties herein based on their conduct implied that they were agreeable to Court proceedings and thus neither could claim interest in arbitration thereof.

209. On whether the dispute existed as contemplated in the Arbitration clause or the alternative being if there is a dispute between the parties. The Learned Counsel submitted that Clause 13 (b) of the Sale Agreement provided:-

'should any dispute arise between the Parties hereto with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement, the Parties shall in the first instance attempt to resolve such dispute by amicable negotiation'

210. The Court of Appeal in ***"Eunice Soko Mlagui case (Supra)"*** held:-

"..the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non-existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration..."

211. Similarly, the gravamen of the Plaintiff's claim was premised upon the Defendant's request for vacant possession, a matter within the Court's province and not the realm of Arbitration. In the case of ***"Diocese of Marsabit Registered Trustees – Versus - Technotrade Pavilion Limited [2014] eKLR"*** the Court held thus: -

"..The situation the Applicant has placed itself offends section 6(1) of the Arbitration Act in its entirety and cannot succeed in its quest for stay of proceedings and referral of the subject matter to arbitration. In spite the general arbitration clause, the circumstances of this case are that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.."

212. And delivered itself holding that matters vacant possession are not for the Arbitral Tribunal, but of the Court of law, the judge bespoke thus:-

"..On those grounds the court would still have refused to refer the matter to arbitration. Accordingly, matters of vacant possession or eviction or renewal and payment of

rent against a tenant who is holding over fall within the province of this court and not arbitration..."

213. The parties hereto entered into an Agreement for the sale of ordinary shares dated 16th December, 2022, the schedule and mode of the payment of the instalments of the aggregate figure was also reduced into writing. To date, the 27th June, 2025, no singular instalment has (ever) been made by the Purchaser/Plaintiff. The Plaintiff remains in occupation and has been as such since the date of the Agreement, despite the clear breach of the terms of the Agreement.

214. According to the Learned Counsel, what was at stake here was a debt, arising from the Purchaser's/Plaintiff's failure to meet its obligations, arising out of and from the Agreement. The claim is a result of a breach of a contract. The debt has not been denied nor disputed by the Plaintiff.

215. The Learned Counsel submitted that a debt was not a dispute as contemplated by the Arbitration Act nor did it arise from the interpretation of the Arbitration Clause, the parties granted unto themselves in the Agreement. Courts of law seized with similar matters, where a party sought to

have a debt deemed as a dispute in arbitration, had rejected the applications for stay where the debt remained undisputed and had the matters proceed as a normal suit for recovery. The Plaintiff plainly refuses to pay.

216. In the case of:- ***"Aecom South Africa Holdings (PTY) Limited – Versus - Kenya National Highways Authority [2023] KEHC 21849 (KLR)"***, while rejecting the application for stay of the proceedings held as follows: -

> ***"..The Plaintiff has presented Invoices and demand letters showing that the Defendant is indebted. On its part, the Defendant has not presented any correspondence or evidence between the parties either intimating or actually demonstrating that it disputes the Plaintiff's claim..."***

217. The Court proceeded to hold in respect of undisputed debt thus:-

> ***"..The Defendant has not stated why it disputes the Plaintiff's claim in order for the court to determine even on a prima facie basis that there is a dispute worthy of resolution by arbitration. Therefore hold that there is no dispute in fact that ought to proceed for resolution by arbitration as the debt due to the Plaintiff appears to be undisputed. It is on this ground that / reject the Defendant's application..."***

218. Further in the case of:- ***"A to Z Textile Mills Limited – Versus - East Africa Portland Cement Company PLC [2024] KEHC 4697 (KLR)"*** the Learned Judge cited the Court of Appeal's decision in the case of: ***"Niazsons (K) Limited – Versus - China Road & Bridge Corporation Kenya [2001] KLR 12"*** where it was held thus:-

> ***"……It is the Plaintiff/ Respondents position that there is no dispute... It was just that the Defendant/Applicant has declined to settle the balance due..."***

219. And proceeded to hold:-

> ***"...The issue is what happens when there is no dispute between 7 A and B, but B just declines to pay..."***

220. And reinforced its holding with the English decision of ***"Earl of Halsbury LC in the House of Lords London and North Western and Great Western Jointly Rly Cos – Versus - J H Billington Ltd (1899) AC79 at 31"*** where it was stated:-

> ***"..That a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen..."***

And proceeded to hold:-

> ***"..If a debtor agrees that money is due, but simply fails to pay it, there is obviously no dispute, the creditor can and must proceed by action, rather than by arbitration..."***

221. And citing the learned authors **The Law and Practice of Commercial Arbitration in England, by Sir Mustill and Prof Boyd page 96** for the proposition that:-

> **"....It is settled law that mere refusal to pay upon a claim, which is not really a dispute, does not necessarily give rise to a disputed calling an arbitration clause into operation..."**

222. And on the Court's jurisdiction to arbitrate over the matter, the learned authors posited:-

> ***"..It must follow, therefore, that courts can be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which... merely persists in not paying..."***

223. The Plaintiff was granted leave by the Court to file submissions in this matter on several occasions to wit:-

- On 27th February, 2025, Plaintiff sought and was granted leave to file submissions with regard to the present Preliminary Objection, NONE was filed.
- Once again when the matter came up for mention on and 2nd April, 2025, for the purposes of confirming the filing of submissions, the Plaintiff sought and was granted further leave to file the submissions. The Court limited the leave to seven (7) days', to which the Plaintiff was required to file and serve the submissions upon the Defendant.

- The seven (7) days' lapsed on 9th April, 2025. NONE was filed within the timelines granted nor served upon the Defendant.

224. From the Court e-filing system, the submissions to the Plaintiff's Preliminary Objection were filed surreptitiously on the 20th June, 2025. Clearly, the conduct of the Plaintiff is contemptuous to the Orders of this very Court and is clearly designed to perpetuate further breach of the Agreement by the defaulting party, who remains in occupation of the suit premises and has failed to pay a single coin in furtherance of the terms thereof.

225. The Learned Counsel therefore held that the submissions filed by the Plaintiff without leave therefore, were wrongly before the Court and should be expunged from the record and the present objection be dismissed with costs.

VII. Analysis and Determination

226. I have keenly considered the filed Notice of Motion applications herein and the Preliminary Objection, the comprehensive written submissions, the myriad of authorities cited, the relevant provisions of the Constitution of Kenya, 2010 and the statures.

a) For the Honourable Court to arrived at an informed, reasonable, Equitable and Just decision, it has condensed the subject matter into the following five (5) salient issues for its determination. These are:-

a). Whether the Preliminary Objection dated25th February, 2025 by the Plaintiff herein meets the threshold based on principles of Law and Precedents?

b) Whether the Plaintiff has met the threshold for grant of a temporary injunction.

c) Whether the Defendant's application to strike out the Plaint is merited.

d) Whether the parties are entitled to the prayers sought in their various applications.

e) Who bears the Costs of the Notice of Motion application dated 23rd January, 2025, Notice of Motion application dated 10th February, 2025 and Notice of Preliminary Objection dated 25th February, 2025.

ISSUE No. a). Whether the Preliminary Objection dated25th February, 2025 by the Plaintiff herein meets the threshold based on principles of Law and Precedents?

227. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the objection raised pure points of law. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a

finding on whether what has been raised herein fits the said description.

228. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> ***"In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary……."***

229. According to Black's Law Dictionary 11th Edition, a Preliminary Objection is an objection that if upheld would render further proceedings before the tribunal impossible or unnecessary. Courts have various defined Preliminary objection as one that consists of a point which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary point my dispose of the suit.

230. The above legal preposition has been made graphically clear in the now famous case of ***"Mukisa Biscuits (Supra)"***, the court observed that: -

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise***

of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue."

231. This statement of the law has been echoed time and again by the courts: see for example, ***"Oraro – Versus - Mbaja [2007] KLR 141"***.

232. The same position was held in the case of ***"Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257"*** where the Court held that;

"A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion."

233. Similarly in the case of ***"United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396"***, the Court held that;

"A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed ."

234. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure

point of law and no fact should be ascertained from elsewhere. See also the case of ***"In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003"*** where the Court held that;

> ***"A Preliminary Objection cannot be raised if any facts has to be ascertained."***

235. I have further relied on the decision of ***"Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR"*** as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia:-*

> ***(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.***
>
> ***(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and***
>
> ***(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.***

236. In this case, the Plaintiff's Preliminary Objection challenges the Defendant's application and conduct of notices, alleging breach of Clause 5.2 of the contract and improper reliance on Civil Procedure Rules, 2010. However, whether

the Defendant issued proper notices, whether the Plaintiff was in breach, and whether renovations can offset the purchase price are contested factual matters requiring evidence.

237. If the objection is framed as ***"the Defendant's application is incompetent for want of jurisdiction" or "the suit is barred by limitation,"*** it would raise a pure point of law. But if it requires the Court to interrogate whether notices were properly served, whether payments were made, or whether renovations exceeded agreed sums, then it ceases to be a pure point of law because those are questions of fact mixed with law.

238. The Honourable Court strongly finds that the Plaintiff's Preliminary Objection does not raise a pure point of law within the meaning of ***"Mukisa Biscuit – Versus - West End Distributors (Supra)"***. On the contrary, it touches on contested facts (validity of notices, compliance with contract terms, alleged payments/renovations). Such matters must be determined through evidence at trial, not by way of preliminary objection. For this very reason, the raised objection must fail.

ISSUE No. b). Whether the Plaintiff has met the threshold for grant of a temporary injunction.

239. Under this sub – title, the main issue here is whether the Plaintiff is entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows:-

> **Order 40, Rule 1**
> **Where in any suit it is proved by affidavit or otherwise—**
> **a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
> **b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.**

240. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of

"Giella – Versus - Cassman Brown & Co Limited (1973) EA 358", where it was stated: -

> ***"First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

241. The three conditions set out in ***"Giella (supra)"***, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of ***"Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR"***: -,

> ***"These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and***

the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

242. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case "***MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125"*** of: -,

> ***"So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"***

243. Now applying these principles to the present case. The Court tak, the Court notes that the Plaintiff is in possession of the es cognizance that it one aspect that the Learned Counsel for the defendant has expended considerable resources by placing immense emphasis on. Therefore, the Court will not belabour the point on it. However, it is noted that the suit property and has undertaken renovations. Be that as it may, she has not demonstrated payment of any

of the contractual installments under Clause 3 of the sale agreement. The Defendant has exhibited evidence of proper Completion and Rescission Notices. In line with ***"Mrao Ltd – Versus - First American Bank of Kenya Ltd [supra]"***, a prima facie case requires demonstration of infringement of a right. The Plaintiff's failure to perform her contractual obligations disentitles her from equitable relief.

244. In the case of ***"Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1"***, the court held that;

> ***"In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."***

245. Similarly, in the case of ***"Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd"*** the court held that;

> ***"In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."***

246. In the instant case, the Plaintiff has placed before this Court an sale agreement dated 16th December 2022, terms and conditions stipulated thereof, coupled with evidence of possession and substantial renovations undertaken on the

suit property. While the Defendant vehemently contests the validity of the Plaintiff's occupation and insists on non-payment of the contractual installments, the Plaintiff's claim is not frivolous. The Court views them as which raises serious triable issues as to whether the renovations were part of the contractual consideration, whether the Defendant's notices of completion and rescission were validly issued, and whether the Plaintiff's proprietary rights under the provision of Article 40 of the Constitution of Kenya, 2010 have been infringed.

247. Here, the Honourable Court is of the position that the Plaintiff has demonstrated possession, investment in renovations, and alleged interference by the Defendant. These facts, taken together, disclose an arguable case that warrants elaborate interrogation and ventilation which can only be adequately undertaken during a full trial by the Court. Applying that principle, the Plaintiff's claim of breach of contract, unlawful demands for rent, and interference with quiet possession clearly meets the threshold of a prima facie case.

248. Accordingly, I am persuaded that the Plaintiff has established "***a prima facie case'*** with a probability of success. The Defendant's allegations of breach and non-payment, though, weighty and reasonable, are matters for trial and cannot at this stage defeat the Plaintiff's right to seek protection of her possession and proprietary interests.

249. The second principle in ***"Giella – Versus - Cassman Brown & Co. Ltd (Supra)"*** requires the applicant to demonstrate that they stand to suffer irreparable injury which cannot be adequately compensated by an award of damages if the injunction is withheld. With regards to the second limb of the Court of Appeal in ***"Nguruman Limited (supra)",*** held that,

> ***"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that***

cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

250. Having established that the Plaintiff has demonstrated a prima facie case, the Court must now consider whether she stands to suffer irreparable injury if the injunction is not granted. It is not indispute and the Plaintiff has shown that she is in possession of the suit property and has invested substantial sums in renovations. As a quick remedy, the Defendant has vigorously urged Court to grant mandatory orders of eviction of the Plaintiff from the suit property. I hold a contrary view. Eviction or interference at this stage would deprive her of quiet enjoyment and expose her to loss that cannot be easily quantified. As held in ***"Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others [supra]"***, irreparable injury refers to harm that is substantial and cannot be adequately remedied by damages. The Plaintiff's proprietary rights, once interfered with, cannot be restored by mere monetary compensation.. The judicial decision of ***"Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR"***

provides an explanation for what is meant by irreparable injury and it states;

> ***"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."***

251. Further in the case of ***"Kenya Breweries Ltd & Another – Versus - Washington Okeyo [2002] eKLR"***, the Court of Appeal held that where a party's proprietary rights are threatened, damages are not always an adequate remedy. On the adequacy of damages, while the Defendant argues that any loss can be compensated financially, the Court is persuaded that damages would not sufficiently vindicate the Plaintiff's proprietary rights under Article 40 of the Constitution of Kenya, 2010, which guarantees the right to acquire and own property.

252. In the case of ***"Olympic Sports House Ltd v School Equipment Centre Ltd [2012] eKLR"***, the Court held that interference with possession and business operations constitutes irreparable harm.

253. Quite clearly, the Applicant would not be able to be compensated through damages being the land according to them was fraudulently subdivided hence the same has to be determined through a full trial having preserved the suit property. The Applicant has therefore satisfied the second condition as laid down in ***"Giella's case"***.

254. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of ***"Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)"*** which defined the concept of balance of convenience as:

> ***"The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.***
>
> ***In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".***

255. In the case of ***"Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR"***, the court dealing with the issue of balance of convenience expressed itself thus:-

> ***"Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."***

256. In this case, the status quo is the Plaintiff's continued possession pending trial. Evicting her at this interlocutory stage would occasion greater hardship than maintaining her occupation until the substantive issues are resolved.

257. If the injunction is not granted and the Defendant continue to interfere with the property, the Plaintiff risks permanent

dispossession, waste, and alienation of its land. Conversely, if the injunction is granted and the Defendant is later found to have valid claims, he will only have been delayed in exercising his rights, which can be compensated by damages.

258. The balance of convenience in this case clearly tilts in favour of the Plaintiff. The Plaintiff is the registered proprietor with original Certificates of Lease, while the Defendants' titles are prima facie impeachable. Preserving the Plaintiff's possession and restraining further interference ensures that the subject matter of the suit is not wasted or alienated before trial. The decision of ***"Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR"*** where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated; -

> ***"The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."***

259. The balance of convenience lies in favour of granting the injunction and maintaining the status quo pending the hearing and determination of the suit. I am convinced that there is a lower risk in granting orders of temporary injunction than not granting him, as I wait to hear the suit

on its merits. This is especially so because I have not had the opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicant and it will be in the interest of both the Applicant and the Respondents that the suit property is preserved until the hearing and determination of the suit.

260. In the case of:- ***"Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR"*** where the court in deciding on an injunction application stated;

> ***"circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."***

261. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff has met the criteria for grant of orders of temporary injunction.

ISSUE No. c). Whether the Defendant's application to strike out the Plaint is merited.

262. Under this sub - title, the Court is to examine whether the suit the suit by the Plaintiff should be struck out. The Defendant's Notice of Motion dated 10th February 2025 seeks to strike out the Plaint on the grounds that it is frivolous, vexatious, and an abuse of the Court process. The application is premised on the provision of Order 2 Rule 15(1)(b)(c)(d) of the Civil Procedure Rules, 2010, which empowers the Court to strike out pleadings that disclose no reasonable cause of action, are scandalous, frivolous or vexatious, may prejudice or delay the fair trial of the action, or are otherwise an abuse of the process of the Court.

263. I have previously held in the case of:- ***"Pwani Maoni Limited – Versus - Sosplashed Limited & 2 others [2025] KEELC 18231 (KLR)"***, (Hon. LL. Naikuni J) held that: -

> ***58. Under this Sub – heading, the Honourable Court did not need to have belaboured on the matter having struck out the Preliminary Objection herein above. However, for good order, the Court will deal with the issue but very briefly. The 1st, 2nd and 3rd Defendants have further submitted on the prayer for dismissal of the suit for offending the provisions of Order 2 Rule 15 Sub - Rule 1***

(a-d) of the Civil Procedure Rules, 2010. They stressed that the present suit was frivolous, vexatious and an abuse of the Court Process and was made to embarrass this Honourable Court.

59. The main issue was whether the threshold has been met as per the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 which deals with striking out of pleadings, and provides as follows:-

> ***"15.(1)At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-***
> ***(a) It discloses no reasonable cause of action or defence in law; or***
> ***(b) It is scandalous, frivolous or vexatious; or***
> ***(c) It may prejudice, embarrass or delay the fair trial of the action; or***
> ***(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."***

264. The principles guiding the striking out of pleadings and cases are now well settled. These principles, were set out in ***"D.T. Dobie & Company (Kenya) Limited – Versus - Joseph Mbaria Muchina & Another [1980] eKLR"*** thus:-

> ***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested***

by cross-examination in the ordinary way". (Sellers, L.J. (supra)).

As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.

Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XTV" rule 2."

265. The Court of Appeal in the case of:- "***Blue Shield Insurance Company Limited – Versus - Joseph Mboya Oguttu [2009] eKLR"*** and whose findings it concurred with established that striking out of pleadings was a drastic remedy that should only be resorted to where a pleading was a

complete sham. Similarly, in the case of:- "***Crescent Construction Co. Limited – Versus - Delphis Bank Limited (2007) eKLR"*** the same court stated thus:-

> ***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non - starter. "We submit that the suit herein has a reasonable cause of action based on the brief history that was outlines above herein on what the gist of the matter in. our humble submission is that the preliminary objections be dismissed and for the court to proceed and determine the matter on merit."***

266. The Defendant reiterated and the umpteenth times argued that the Plaintiff has not paid any of the contractual installments under Clause 3 of the sale agreement and therefore has no enforceable claim. He further contends that the Plaintiff's reliance on renovation costs beyond the agreed for a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) is contrary to the provision of Sections 97 and 98 of the Evidence Act, Cap. 80, which bar extrinsic evidence to vary written contracts.

267. The Plaintiff, on the other hand, asserts that she is in possession of the suit property, has invested substantial sums in renovations, and that the Defendant's notices of completion and rescission were defective. She also alleges infringement of her proprietary rights under the provision of Article 40 of the Constitution of Kenya, 2010.

268. The Court notes that the Plaintiff's pleadings raise triable issues, including:

    a. Whether renovations beyond a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) can be offset against the purchase price;
    b. Whether the Defendant's notices complied with Clause 5.2 of the agreement;
    c. Whether the Plaintiff's possession and investment confer equitable protection pending trial;
    d. Whether the Defendant's demands for rent were lawful in the context of a sale agreement

269. Practically speaking, and based on fundamental principles of law and facts, these issues cannot be definitely determined summarily at the interlocutory stage. As held in the case of:- ***"Co - operative Merchant Bank Limited –***

Versus - George Fredrick Wekesa [1997] eKLR", striking out is a draconian remedy that should only be exercised in plain and obvious cases. The present suit raises contested questions of fact and law that require full ventilation at trial.

270. As already indicated, the Honourable Court is not persuaded at all there exists any exceptional grounds to take such drastic and draconian decision to strike out this suit. For that reason, and with the guidance of "***the Ratio decidendi"*** of the above authorities, therefore, that ground must fail.

271. Further, the Defendant has raised the issue of the arbitration clause contained in the sale agreement dated 16th December 2022, which provided that disputes arising between the parties were to be resolved first through negotiation within fifteen (15) days, and failing that, by reference to arbitration. The question before this Court is whether, in light of this clause, the present dispute ought to be referred to arbitration.

272. The law governing arbitration in Kenya is the Arbitration Act, No. 4 of 1995 (as amended in 2009). Under the provision of Section 6(1) of the Act provides: -

> **"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance, stay the proceedings and refer the parties to arbitration unless it finds—**
> **(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
> **(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."**

273. The principles applicable were discussed in the case of:- ***"UAP Provincial Insurance Co. Ltd – Versus - Michael John Beckett [2013] eKLR"***, where the Court of Appeal held that once parties have agreed to arbitration, courts are enjoined to respect that agreement unless the arbitration clause is shown to be invalid or incapable of being performed. Similarly, in the case of: ***"Nyutu Agrovet Limited – Versus - Airtel Networks Kenya Limited [2019] eKLR"***, the Supreme Court emphasized the autonomy of parties to choose arbitration as their dispute resolution mechanism**.**

274. In the present case, the Plaintiff contends that the Defendant failed to comply with the agreed dispute

resolution mechanism, particularly the requirement for negotiation within fifteen (15) days before resorting to arbitration. The Defendant, on the other hand, argues that the Plaintiff's breach of contract disentitles her from invoking arbitration.

275. The Court notes that the arbitration clause is valid and binding, and there is no evidence that it is null, void, or incapable of being performed. The dispute between the parties—whether the Plaintiff performed her obligations, whether renovations can offset the purchase price, and whether notices of completion and rescission were valid—falls squarely within the scope of the arbitration clause.

276. However, the provision of Section 6(1) of the Arbitration Act requires that an application for stay and referral to arbitration be made ***"not later than the time when that party enters appearance."*** In this case, the both the Plaintiff and the Defendant have already extensively participated in the interlocutory proceedings vide filed an Notice of Motion Application seeking other diverse orders and a Replying Affidavit and submissions. Despite of this, the application for stay of proceedings and referral of the

matter to arbitration was therefore not made at the earliest opportunity. As held in ***"Niazsons (K) Limited – Versus - China Road & Bridge Corporation [2001] KLR 12"***, a party who submits to the jurisdiction of the Court may be deemed to have waived the right to rely on the arbitration clause.

277. Accordingly, while the arbitration clause is valid, the parties conduct in fully participating in these proceedings without promptly seeking referral to arbitration disentitles them from invoking Section 6 of the Arbitration Act at this stage. In the given circumstances, therefore, the matter shall proceed before this Court for determination on merits.

278. For these reasons, I discern that the dispute will not be referred to arbitration. Instead, the suit shall proceed to full hearing before this Honourable Court.

ISSUE No. d). Whether the parties are entitled to the prayers sought in their various applications.

279. Under this sub title, the Court shall examine whether on whether the Plaintiff is entitled to specific performance or damages. The Plaintiff has prayed for an order of specific performance compelling the Defendant to complete the

sale agreement dated 16th December 2022 and to transfer the suit property. Specific performance is an equitable remedy governed by principles of fairness and discretion. It is not granted as a matter of course but only where the Plaintiff demonstrates that she has performed her part of the bargain or is ready and willing to do so.

280. In the case of: ***"Reliable Electrical Engineers Limited – Versus - Mantrac Kenya Limited [2006] eKLR"***, the Court held that specific performance is only available where monetary damages are inadequate and where the party seeking it has fulfilled their contractual obligations. Similarly, in the case of:- ***"Thrift Homes Ltd – Versus - Kenya Investment Authority [2015] eKLR"***, the Court emphasized that equity will not assist a party who has failed to perform their obligations under the contract.

281. In the present case, the Plaintiff admits that she has not remitted any of the contractual installments stipulated under Clause 3 of the agreement. While she contends that renovation costs of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) should offset the purchase price, the contract expressly provided for only a sum of One Million

(Kshs. 1,000,000/=) as renovation deposit. The provision of Sections 97 and 98 of the Evidence Act, Cap. 80 bar extrinsic evidence to vary written contracts unless by deed of variation. No such variation has been exhibited.

282. The equitable maxim **"he who comes to equity must do equity**" applies in the instant case. The Plaintiff, having failed to pay the agreed consideration, cannot invoke equity to compel specific performance. As held in the case of:- ***"National Bank of Kenya Limited – Versus - Pipeplastic Samkolit (K) Ltd [2001] eKLR"***, courts cannot rewrite contracts for parties.

283. On the alternative prayer for damages, the Court notes that damages are a legal remedy available where breach of contract is established. The Plaintiff alleges financial loss and distress arising from renovations and interference with possession. However, whether she is entitled to damages depends on proof of breach by the Defendant, which is a matter for trial. With all due respect, the Court cannot conclusively determine liability at this interlocutory stage.

284. In the case of: ***"Kenya Breweries Ltd – Versus - Washington Okeyo [Supra)"***, the Court held that damages are the

appropriate remedy where specific performance would cause hardship or where the contract has been fundamentally breached. In this case, damages may be available to the Plaintiff if she proves that the Defendant unlawfully interfered with her possession or breached the agreement.

285. Accordingly, the Court finds that the Plaintiff is not entitled to specific performance at this stage, having failed to perform her contractual obligations. The question of damages remains open and shall be determined upon full trial based on evidence of breach and loss.

ISSUE No. e). Who bears the Costs of the Notice of Motion application dated 23rd January, 2025, Notice of Motion application dated 10th February, 2025 and Notice of Preliminary Objection dated 25th February, 2025.

286. Under this sub - title the Honourable Court shall examine the issue of costs on the applications and the Notice of Preliminary objection. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The

Proviso of ***Section 27 (1) of the Civil Procedure Rules Cap. 21*** holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***"Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR"*** and ***"Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR"***, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***"Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR"***, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

287. In the present matter, the Plaintiff's Notice of Motion application dated 23rd January 2025 seeking interlocutory injunction has succeeded. Ordinarily, she would be entitled to costs of that application. On the other hand, the Defendant's Notice of Motion application dated 10th February 2025 seeking to strike out the Plaint has been

dismissed. Ordinarily, the Plaintiff would be entitled to costs of that application as well. The Plaintiff's Preliminary Objection dated 25th February 2025 has been found not to raise pure points of law and therefore fails. Ordinarily, the Defendant would be entitled to costs of that objection.

288. However, given the nature of the dispute, the ongoing contractual relationship, and the fact that the substantive suit is yet to be heard and determined, the Court is persuaded that it is in the interest of Justice, Equity and Conscience to order that costs of all three applications to be in the cause. This will ensure that the issue of costs is determined comprehensively at the conclusion of the main suit, depending on the ultimate outcome.

289. Accordingly, the Court orders that the costs of the Notice of Motion application dated 23rd January 2025, the Notice of Motion application dated 10th February 2025, and the Notice of Preliminary Objection dated 25th February 2025 shall abide the outcome of the main suit.

VIII. Conclusion and Disposition.

290. Ultimately, in view of the foregoing detailed and expansive analysis to the applications and objection herein, the

Honourable Court arrives at the following decision and makes the orders below:-

a) **<u>THAT</u> the Plaintiff's Notice of Motion application dated 23rd January, 2025 seeking interlocutory injunction be and is hereby found to be meritorious thus allowed.**

b) **<u>THAT</u> an order of interlocutory injunction do and is hereby granted restraining the Defendant, his agents, servants, employees, or any persons acting under his authority from trespassing upon, interfering with, alienating, disposing of, or otherwise dealing with the suit property pending the hearing and determination of the main suit.**

c) **<u>THAT</u> the Notice of Motion application dated 10th February, 2025 by the Defendant seeking to strike out the Plaint be and is hereby found to be without merit hence it is dismissed entirely. The Plaint discloses triable issues suitable for determination at full trial.**

d) **<u>THAT</u> the Notice of Preliminary Objection dated 25th February, 2025 by the Plaintiff be and is hereby found not to raise pure points of law within the meaning of "*Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Ltd (1969) EA 696*" and is hereby dismissed.**

e) **<u>THAT</u> the Plaintiff is not entitled to specific performance at this interlocutory stage, having failed to demonstrate performance of her**

contractual obligations. The question of damages remains open and shall be determined upon full trial.

f) **<u>THAT</u> the Honourable Court holds that although the sale agreement contained an arbitration clause, the Defendant's conduct in fully participating in these proceedings without promptly seeking referral to arbitration disentitles him from invoking Section 6 of the Arbitration Act at this stage. The matter shall therefore proceed before this Court for determination on merits**

g) **<u>THAT</u> there be a Mention on 20th April, 2026 for conducting a Pre – Trial Conference on case management pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There shall be a hearing on 29th September, 2026 preferably through Physical Means.**

h) **<u>THAT</u> the costs of the Notice of Motion dated 23rd January, 2025, the Notice of Motion dated 10th February, 2025, and the Notice of Preliminary Objection dated 25th February, 2025 shall be in the cause.**

<u>IT IS SO ORDERED ACCORDINGLY</u>.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS…… 29TH ……DAY OF ……JANUARY……2026.

……

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT
AT
KWALE

291.

Ruling delivered in the presence of:

(a) Mr. Daniel Disi, the Court Assistant;

(b) Mr. Kurauka Advocate for the Plaintiff; and

(c) Mr. Kinyanjui Advocate for the Defendant.