

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC CASE NO. 26 OF 2020

SIMION ABEL YANO 1ST
PLAINTIFF
JOHN N. BENARD 2ND
PLAINTIFF

-VERSUS-

JAN CHRIS ASSELINK 1ST
DEFENDANT

JUDGMENT:

1. The Plaintiffs herein instituted the present suit vide a Plaint dated 12th June, 2020, against the Defendant, seeking the following orders:-
 - i. **An order of specific performance of the sale agreement dated 20th December, 2018 entered into between the defendant and the plaintiffs.**
 - ii. **A declaration that the plaintiffs are the lawful owners of the suit land measuring 60 acres or 24.21Ha.**
 - iii. **Orders requiring the defendant to execute all necessary documents to transfer the suit land to the plaintiffs and failure to which the Deputy Registrar of the Environment and Land Court of Kenya - Eldoret be authorized to execute such documents.**

- iv. **An Order compelling the defendant to excise land equivalent to the amount of Kshs. 50,000,000/= already received by the defendant as per the amount agreed per acre as at 20th December, 2018 and the defendant to execute transfer documents.**
- v. **An order of permanent injunction restraining the defendant, his servants and/or agents from selling, leasing, charging, trespassing upon the suit land and/or in any other way dealing with the land in a manner that will interfere with the interests of the plaintiffs.**
- vi. **General damages for breach of contract and trespass.**
- vii. **Orders of eviction against the defendant, his agents and/or servants on the suit land.**
- viii. **An order of reimbursement as per paragraph 21 of the plaint.**
- ix. **Costs of this suit.**
- x. **Any other relief this honourable court might deem fit to award.**

Plaintiff's Case:

2. The plaintiffs stated that the defendant is the registered owner of parcel of land known as **ELDORET MUNICIPALITY (ILULA) 6101/1** (hereinafter referred to as the '**suit land**')

measuring approx. **60 acres/24.21Ha** and previously known as L.R. No. 6101/1 as delineated on land survey plan number 156721 and as per title No. I.R. 64947.

3. It is their claim that vide the sale agreement dated 20.12.2018; the defendant agreed to sell to them the suit land at an agreed consideration price of Kshs. 90,000,000/=.
4. Pursuant to the said agreement, the plaintiffs aver that they paid a deposit of Kshs. 50,000,000/= at the execution of the said agreement, whose receipt was duly acknowledged by the defendant.
5. They stated that it was an express term of the agreement that the balance of the purchase price was to be paid on or before 30.12.2019.
6. It is however their claim that despite the express term on the payment of the balance of the purchase price within the strict timelines, efforts to reach the defendant in a bid to clear the balance of the consideration have been to no avail and the defendant has totally avoided them.
7. It is further their claim that despite being in possession of the suit land, the acts of the defendant is meant to frustrate the contract and dispossess them of the suit land.
8. The plaintiffs therefore contend that the acts of the defendant breached the express and salient terms and conditions of the contract dated 20.12.2018 and is hence unlawful and illegal. They outlined the particulars of breach

of the contract thereof as well as the particulars of unlawfulness and illegality.

9. They are now apprehensive that the acts of the defendant of leasing the suit land without any color of rights and in total disregard of the agreement of sale in force, amounts to trespass and will occasion them untold losses hence the need for the court to grant the orders sought.
10. In conclusion, they urged the court to allow their claim and grant the orders sought against the defendant in the plaint.

Defendants' Case;

11. The plaintiffs' case was opposed. The Defendant filed a Statement of Defence and Counter-claim dated 07.07.2020 in response to the averments made in the plaint.
12. He admitted that he is the registered proprietor of the lease over all that parcel of land known as L.R. No. TEMBELIO/ILULLA NO. 6101/1; comprised in the Certificate of Title registered as I.R. No. 64947, measuring approx. 24.21Ha and situate in Eldoret Municipality.
13. In response to the allegations of sale of the suit land vide the sale agreement dated 20.12.2018, he denied entering into any sale agreement in respect to the suit land and further averred that he had no intention of selling the same. He maintained that he is a stranger to the purchasers in the purported agreement and the contents thereof and invited the plaintiffs to strict proof thereof.

14. He further denied in toto the contents of paragraphs 5 and 6 of the plaint and maintained that he has never received Kshs. 50,000,000/= as deposit of the consideration price in respect of the purported sale agreement as alleged by the plaintiffs. He added that he is a stranger to any term thereon to the effect that the balance of the consideration price was to be paid on or before the 30.12.2019 and invited the plaintiffs to strict proof thereof.
15. The contents of paragraphs 7,8,9 and 10 were denied in toto and the plaintiffs put to strict proof thereof. The defendant further averred that the plaintiffs have never been in occupation or possession of the suit land and therefore issues of dispossession of the suit land and frustration of the contract cannot arise. He invited the plaintiffs to strict proof of the contrary.
16. In further response to paragraph 10 of the plaint, he stated that he has been enjoying peaceful and quiet possession of the suit land since he was issued with the certificate of lease and went on to list the 4 dispositions of Lease Agreements diversely dated which he made with various third parties, for specified period spanning 08.02.2017 to 31.12.2020, in respect to the suit land.
17. He thus contends that the particulars of breach of contract, unlawfulness and illegalities as contained in paragraph 11 of the plaint are denied on totality and invited the plaintiffs to strict proof thereof.

18. The claims made by the plaintiffs that his acts of leasing out the suit land amounts to trespass were denied in toto. In addition, he stated that he leased out the suit land legally as the registered proprietor thereof and that the lease agreement for the period 01.01.2019 to 31.12.2019 was made on the 06.12.2018, and concluded before the purported sale agreement.
19. In conclusion, he stated that he shall request for further and better particulars from the plaintiffs, generally and specifically on how and when the deposit of Kshs. 50,000,000/= was allegedly paid to him and the manner and extent to which the plaintiffs have been in possession of the suit property and further, the extent to which he and/or third parties have trespassed into the suit land.
20. He thus urged the court to strike out the suit for being frivolous, vexatious, scandalous and otherwise an abuse of the court process.
21. In his Counter-claim dated 07.07.2020 against the plaintiffs (defendants in the counter-claim), the defendant (counter-claimant) sought the following orders: -
 - i. A declaration that the defendant is the registered proprietor of the lease from the Government of Kenya over the suit property.
 - ii. A Permanent Injunction restraining the plaintiffs whether by themselves, their agents, servants and/or whomsoever acting on their behalf or pursuant to their

instructions, from interfering with the defendant's quiet and peaceful possession of the suit property.

iii. Costs and interests.

iv. Any other relief the honourable court deems appropriate.

22. In his counter-claim, the defendant/counter-claimant reiterated the contents of the statement of defence and maintained that he is registered as the proprietor of lease from the Government of Kenya, over the suit property and he is therefore the indefeasible owner thereto.

23. It is his claim that his title to the suit property can only be subject to challenge on grounds of fraud or misrepresentation, which is proved that he was a party. He maintained that he acquired the title to the suit land legally through a process that was devoid of fraud, misrepresentation and/or procedural issues.

24. He further reiterated that he has never entered into any agreement in respect of the suit land and that he does not intend to sell the same. He stated that the only dispositions he has ever made in respect to the suit land and which he duly acknowledges are as outlined in paragraph 8 of the statement of defence.

25. He averred that the sign on the purported sale agreement relied upon by the plaintiffs is not his handwriting and the

same points to a well calculated scheme by the plaintiffs to fraudulently defeat his title over the suit land through forgery and uttering a false document. He outlined the particulars of fraud and misrepresentation on the part of the plaintiffs.

26. In addition, it was his contention that one Alvin Kipkoech Birgen is currently in legal possession of the suit land as the lessee for a period of 1 year from 01.01.2020 to 31.12.2020.
27. It was his claim that he would move the court to make an order that the purported sale agreement dated 20.12.2018 be submitted to an independent document examiner for purposes of confirming whether he signed the same and further whether the details of the witness thereto, national identity card number as well as the signature of one Joan Jesang belonged to her.
28. In conclusion, he averred that he has suffered loss and damage for which he holds the plaintiffs accountable/responsible. He therefore urged the court to allow his claim and enter judgment against the plaintiffs/defendants in the counter-claim.

Trial:

29. The Plaintiff's case proceeded for hearing on 03.12.2025 John Njuguna Benard, the 2nd plaintiff herein, testified as PW1 on his own behalf and on behalf of the 1st plaintiff and thereafter closed their case. The matter proceeded ex-parte

in the absence of the defendant and/or his advocates, who despite being duly served with the hearing notice, failed to attend court.

30. PW1 adopted his witness statement dated 12.06.2020 as his evidence in chief.
31. He also produced the documents in their list of documents dated 12.06.2020 and Further List of Documents dated 16.09.2025 as plaintiff's exhibits marked as **Pexhibits 1 - 5** respectively in support of their case as follows: -
 - i. Sale Agreement dated 20.12.2018 - **Pexh. 1***
 - ii. Certificate of Title for the suit land - **Pexh. 2***
 - iii. Demand Letter dated 02.12.2019 - **Pexh. 3(a)***
 - iv. Demand Letter dated 03.02.2020 - **Pexh. 3(b)***
 - v. Bundle of Photographs - **Pexh. 4***
 - vi. Agreement dated 20.12.2018 - **Pexh. 5***
32. Upon close of the examination in chief, the plaintiffs thereafter closed their case.
33. On a perusal of the Affidavit of Service dated 22.09.2025, I confirmed that the firm of Terer & Co. Advocates, who are on record for the defendant, were duly served with the Hearing Notice.
34. Despite being duly served and notified of the hearing date and an affidavit of service duly filed to that effect, neither the defendant nor his advocate on record was present in court on the said date.

35. Consequently, in the absence of the both the defendant and/or his advocate on record without any sufficient explanation for their absence, the defendants' case was marked as closed.
36. Upon close of the defence case, I issued directions on the filing of final written submissions. On a perusal of the court record, only the plaintiffs filed their submissions on 8.12.2025 together with authorities, which I have read and considered. Even though the defendant did not adduce evidence or challenge the plaintiffs' evidence, it is incumbent upon the plaintiffs to prove their case on a balance of probabilities. I will therefore proceed to render my decision as hereunder.

Analysis and Determination:

37. Having considered and reviewed the pleadings filed herein, the testimony in court together with the respective exhibits produced by the plaintiffs as well as the submissions in totality, this court identifies the following issues for determination: -
- a. *Whether the plaintiffs are entitled to the reliefs sought in the plaint.*
 - b. *Whether the defendant is entitled to the reliefs sought in the counter-claim.*
 - c. *Who shall bear the costs of the suit and the Counter-claim.*

Whether the plaintiffs are entitled to the reliefs sought in the plaint;

38. The plaintiffs in their plaint sought orders of specific performance, a declaration that they are the lawful owners of the entire suit land measuring 24.21Ha, permanent injunction, orders of eviction, general damages for trespass and that the defendant be directed to execute all the necessary documents for purposes of transferring the suit land in favor of the plaintiffs.
39. In the alternative, the plaintiffs sought an order compelling the defendant to excise land equivalent to the amount of Kshs. 50,000,000/= that was already received as per the amount agreed per acre as at 20.12.2018, the transfer documents to be executed and an order of reimbursement of the amount of Kshs. 50,000,000/= paid with interest from 20.12.2018 until full payment.
40. The question that this court therefore seeks to determine, is whether the plaintiffs have proved their case to the required standard to warrant the grant of the orders sought above.

Specific Performance;

41. The plaintiffs have urged the court to issue an order of specific performance in respect to the sale agreement dated 20.12.2018, between the defendant and themselves. It is their claim that they have been and/or are ready and willing

to complete the balance of the purchase price amounting to Kshs. 40,000,000/=

42. It is not in dispute that there was an agreement for sale of the suit land between the plaintiffs and the defendant. This is evidenced by pexh. 1.
43. Even though the defendant disputed the said sale agreement and maintained that he never entered into any sale agreement with the plaintiffs in respect to the suit land, he did not challenge the sale agreement produced as pexh. 1. He did not adduce any evidence to the contrary or in support of the allegations of forgery and fraud as alleged in the statement of defence and counter-claim. Pexh. 1 thus remains uncontroverted and is on a balance of probabilities proof of the averments of sale made by the plaintiffs.
44. It is also the Plaintiffs' case that the payment of the purchase price was not completed within the strict timelines as outlined in paragraph 1(b) of the Sale Agreement. Thus, in essence, the plaintiffs did not fulfil their obligation under the contract, whether or not the same was attributed to the defendant. The question that therefore follows is whether this court can issue an order of specific performance as sought.
45. In ***Reliable Electrical Engineers Ltd. vs Mantrac Kenya Limited (2006) eKLR***, the court in discussing the jurisdiction of specific performance stated as follows: -

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles.

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

46. Thus, guided by the decision above and further supported by the plaintiffs’ own reliefs as contained in prayer (iv) and (vii), this court finds that there exists an alternative adequate

remedy and therefore the order for specific performance will not issue as sought.

47. Be that as it may, this court finds that in view of the circumstances and the fact that the defendant did not adduce any evidence to the contrary challenging the claims that he received an amount of Kshs. 50,000,000/= whose receipt was duly acknowledged upon the signing of the sale agreement (pexh.1), it is my considered view that prayer no. (iv) is merited.
48. Consequently, if the sale of the entire suit land measuring approx. 60 Acres was Kshs. 90,000,000/=; the equivalent amount for one acre is Kshs. 1,500,000/=. Thus, the amount of Kshs. 50,000,000/= paid by the plaintiffs as deposits amounts to 33.33Acres.
49. Thus, in respect to prayer (iv) sought in the plaint, this court finds that the plaintiffs are entitled to 13.33 Ha to be excised from the entire suit land.

Declaration of ownership;

50. The plaintiffs have urged this court to declare them as the lawful owners of the entire parcel of land measuring approx. 60 Acres.
51. However, as stated hereinabove, the plaintiffs admitted that they have not finalized the payment of the agreed purchase price as per the sale agreement dated 20.12.2018 and

cannot therefore be declared as the lawful owners of the entire consideration price without the full and final payment thereto having been made.

52. In light of the findings in paragraph 48 and 49 above, this court finds that the plaintiffs can only be declared as lawful owners of a portion of the suit land measuring 33.33 Acres only and not the entire suit land as sought.
53. With regard to the orders of permanent injunction and eviction against the defendant, his agents, servants, employees and/or anyone claiming through him, this court finds that the same is justified only to the extent of the 33.33 Acres, which portion is to be excised and determined upon subdivision of the entire suit land.
54. Upon the said exercise, of excising, subdivision and transfer of the said portion, the plaintiffs' right will only be limited to the said portion and the remainder therefore shall delve to the estate of the defendant.

General Damages for trespass;

55. Section 3 (1) of the Trespass Act, Cap 294 provides that:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

56. From the above, trespass is an intrusion by a person into the land of another who is in possession and ownership. Other than simply stating that the acts of the defendant amounts to trespass, the plaintiffs did not demonstrate the entry of either the defendant or other third parties into the suit land. In any case, at paragraph 10 of the plaint, the plaintiffs stated that they are in possession of the suit land.
57. It is therefore my considered opinion that the plaintiffs are not entitled to an award of general damages as sought.
58. In view of the foregoing, it is the finding of this court that the plaintiffs have partially proved their claim to the required standard and to the satisfaction of the court.

Whether the defendants are entitled to the reliefs sought in the counter-claim;

59. The defendant herein filed a counter-claim seeking orders of permanent injunction against the plaintiffs from interfering with his quiet and peaceful possession, a declaration that he is the lawful owner and registered proprietor of the lease in respect to the suit land as well as costs of the suit.
60. However, the defendant did not attend court to prosecute his case despite being given an opportunity to do so. Section 107 - 109 of the Evidence of Act is clear on the burden and standard of proof required in a suit. The burden of proof lies with the defendant and he had the duty of adducing

evidence in support of his claim and to the satisfaction of the court to warrant the grant of the orders sought.

61. In essence therefore, the defendant having failed to attend court to prosecute his claim and to adduce evidence in support of his case, this court thus finds that he is not entitled to the reliefs sought in the counter-claim.
62. Consequently, it is the finding of this court that the counter-claim is not proved and is therefore dismissed with costs.

Who shall bear the costs of the suit and the Counter-claim;

63. The general rule is a successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise, as provided under section 27(1) of the Civil Procedure Act.
64. In this case, having held that the Plaintiffs have sufficiently partly proved their case against the Defendant, it is the finding of this court that the plaintiffs are entitled to costs of the suit.
65. Since the plaintiffs did not file any response to the counter-claim, I find no reason to award them the costs of the counter-claim.

CONCLUSION:

66. In view of the foregoing, it is the finding of this court that the Plaintiffs' claim against the defendants is partially merited and is accordingly allowed on the following terms: -
- i. An order be and is hereby issued compelling the defendant to excise land equivalent to the amount of Kshs. 50,000,000/= already received by the defendant as payment of the consideration price, being 33.33 acres as per the amount agreed per acre as at 20.12.2018 and to subsequently execute the relevant transfer documents to facilitate the transfer of the said portion in favor of the plaintiffs.**
 - ii. A declaration be and is hereby made that the plaintiffs are the lawful and bonafide owners of a portion of the suit land measuring approx. 33.33 Acres to be excised from the suit land.**
 - iii. The defendant be and is hereby ordered to execute all the necessary documents for purposes of facilitating the transfer of the said portion measuring 33.33 Acres in favor of the plaintiffs within a period of 60 days from the date of this judgment.**
 - iv. In default, the Deputy Registrar of the Environment and Land Court Eldoret, be and is hereby directed to execute the said transfer documents.**

- v. **Consequently, an order of permanent injunction be and is hereby issued in respect to the portion of the suit land as excised in order (i) above only.**
- vi. **The Counter-claim by the Defendant dated 07.07.2020 be and is hereby dismissed with no orders as to costs.**
- vii. **Costs of the suit to be borne by the defendant.**

67. It is so ordered.

DATED, SIGNED and DELIVERED in open court at **ELDORET** on **12TH** day of **MARCH, 2026.**

HON. C. K. YANO
JUDGE

In the virtual presence of: -

Mr. Mathai for the Plaintiffs.

No appearance for Terer Kibii for the Defendant.

Court Assistant – Laban