REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. E001 OF 2023

ALFRED ADAGI CHATA.................................... APPELLANT

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA....1ST RESPONDENT

THE BOARD OF MANAGEMENT

NZOIA BRIDGE PRIMARY SCHOOL..........2ND RESPONDENT

ATTORNEY GENERAL................................3RD RESPONDENT

(Being an appeal against the judgment of Hon. Z.J. Nyakundi, (SPM) delivered on 10th November 2022 in Butali ELC Case No. 167 of 2018)

JUDGMENT

Introduction

1. This appeal arises from the judgment of Hon. Z.J. Nyakundi (Senior Principal Magistrate) delivered on 10th November 2022 in Butali ELC Case No. 167 of 2018. In the impugned judgment, the learned Magistrate dismissed the appellant's suit and held that he had failed to prove his case on a balance of probabilities. The trial court held that the appellant was in breach of the sale agreement dated 7th December 2016 for failure to avail the requisite completion documents within the stipulated period. The court further held that eviction of the 2nd respondent, a public primary school, would be contrary to public interest, and directed the appellant to present the requisite documents to facilitate transfer of the suit property to the 2nd defendant. Aggrieved by that decision, the appellant lodged the present appeal seeking to have the judgment of the trial court set aside.

Background

2. By an amended plaint dated 7th October 2019, the plaintiff (appellant herein) instituted a suit in the lower court against the defendants (respondents herein) seeking for nullification of the agreements dated 7th December 2016 and 21st

February 2017 for want of consideration, damages for breach of contract, eviction of the 2nd defendant from parcel Kakamega/Lugari/3691, a permanent injunction restraining interference with his proprietary rights, mesne profits, and costs of the suit.

3. The plaintiff pleaded that he was the registered proprietor of land parcel No. Kakamega/Lugari/3691 and that he had entered into a land sale agreement dated 7th December 2016 with the Lugari Sub-County Government for the sale of the suit property, for a consideration of Kshs. 1.2 million, payable within thirty (30) days. He stated that notwithstanding the agreement, and before payment of the purchase price, the defendants entered upon the land and constructed temporary school structures thereon. The plaintiff further contended that the defendants failed, refused, or neglected to pay the agreed consideration, and subsequently attempted to vary the purchase price through a further agreement dated 21st February 2017.

4. In response to the plaint, the defendants filed an amended joint statement of defence and counterclaim dated 13th September 2018 in which they denied purchasing the suit

property from the plaintiff, contending instead that the transaction was with a third party, the then registered proprietor, Jonah Wafula Simiyu, from whom they lawfully acquired the land and were granted vacant possession. They averred that they had always been ready, able, and willing to pay the purchase price upon the plaintiff's acquisition and presentation of proper title documents, and that any delay in payment was attributable solely to the plaintiff's failure to obtain and avail such documents in time. The defendants further stated that they took possession of the suit property and developed it with the plaintiff's knowledge and consent, and therefore denied all allegations of unlawful occupation or breach of contract.

5. In the counterclaim, the defendants asserted that they had purchased the land from both the plaintiff and Jonah Wafula Simiyu for a consideration of Kshs. 1.2 million through an agreement dated 7th December 2016. They averred that, prior to reducing the agreement into writing, the plaintiff and Jonah Wafula had agreed to give vacant possession of the land to the defendants and had obtained the relevant Land Control Board consent by letter dated 11th November

2016. That pursuant to the terms of the written agreement, the defendants took possession of the land and constructed classrooms and other structures for use by pupils of the 2nd defendant's school. They further averred that the school continued to operate, and that the plaintiff unilaterally transferred the land into his name in breach of the agreement, frustrating the defendants' efforts to comply with the terms of the contract.

6. The defendants sought the following orders in their counterclaim:

    i. **An order for dismissal of the suit with costs**

    ii. **An order of specific performance for the transfer of LR. KAKAMEGA/LUGARI/3691 into the names of the defendants**

    iii. **A declaration that the only interest the plaintiff has in the suit land is the purchase price**

iv. **Costs of the counter claim be awarded to the defendants.**

v. **Interests and costs at court rates.**

7. The suit proceeded to hearing through *viva voce* evidence. Both the plaintiff and defendants called two witnesses each in support of their respective cases.

Plaintiff's evidence.

8. PW1, Alfred Adagi Chata, the plaintiff, adopted his witness statement dated 11th May 2018 as his evidence in chief and produced his list of documents filed on even date. He testified that he purchased the suit property, land parcel No. Kakamega/Lugari/3691, from Jona Wafula Simiyu and acquired beneficial interest therein, and that the Lugari Sub-County Government subsequently agreed to purchase the land for purposes of reserving it for the 2nd respondent school. He stated that due to financial constraints, he entered into a sale agreement dated 7th December 2016 which provided that the purchase price of Kshs. 1.2 million would be paid within thirty (30) days, and that he executed the agreement in good faith.

9. PW1 further testified that notwithstanding the agreement, the defendants entered upon the suit land and constructed temporary school structures without paying the purchase price, and that no payment was made, despite follow-ups and written demands. Further, that no payment was made to Jona Wafula Simiyu, the previous registered owner either. That he later secured registration of the land in his name after the defendants failed to honor the agreement. He stated that the defendants were in breach of contract and unlawfully occupying his land, and sought nullification of the agreements and eviction of the 2nd respondent. In cross examination, he stated that the vendor was to avail completion documents.

10. PW2 was Jona Wafula Simiyu. He adopted his witness statement dated 2nd July 2018 as his evidence in chief and testified that although the suit land was originally registered in his name, he had sold a portion thereof to the plaintiff, who became the beneficial owner of land parcel No. Kakamega/Lugari/3691 f[ollowing subdivision. He stated that he witnessed the agreements under which the defendants agreed to purchase the suit property from the

plaintiff for Kshs. 1.2 million, payable within thirty (30) days, and that he executed documents on the plaintiff's behalf as the title had not yet been transferred. He further testified that no payment was made to either himself or the plaintiff, prompting him to write to the County Government on 7th June 2017 directing that payment be made to the plaintiff. He stated that due to non-payment, he later transferred the suit property to the plaintiff and maintained that the plaintiff was the rightful owner, having not been paid the agreed consideration. That marked the close of the plaintiff's case.

Defence evidence

11. DW1 was Esther Awinja Ombisi, the Head Teacher of Nzoia Bridge Primary School. She adopted her witness statement dated 13th December 2018 as her evidence in chief and testified that the County Government agreed to purchase the suit property from the then registered owner, Jonah Wafula Simiyu, for purposes of establishing the school. That following a search and execution of the sale agreement dated 7th December 2016, the school took possession of the land and constructed classrooms and

related facilities, and that land control board consent was obtained. It was her evidence that the purchase price was processed through cheques in favor of the vendor but payment was not effected to the plaintiff as he had not obtained or presented title documents at the material time. On cross-examination, DW1 acknowledged that the agreement provided for payment to the plaintiff and that attempts were made to effect payment after acquisition of title, including issuance of cheques in 2019, which she stated the plaintiff declined to receive.

12. DW2 was Jane Naliaka, an officer of the County Government. She adopted her witness statement as her evidence in chief and testified that the County Government of Kakamega purchased the suit property in 2016 for establishment of the 2nd respondent school following public participation, inspection and valuation. She insisted that the school should continue to use the suit property. On cross examination, she stated that the plaintiff was supposed to be paid the consideration and that they did not pay because the plaintiff did not avail the title deed. She conceded that at

the time they were sued they had not paid the consideration and that they attempted to pay in 2019.

13. Upon consideration of the pleadings, the evidence adduced at trial, and the submissions of the parties, the trial court held that under the sale agreement dated 7th December 2016, payment of the purchase price was conditional upon the plaintiff availing the requisite completion documents, which he failed to do within the stipulated period. That the plaintiff was therefore in breach of the agreement and that eviction of the 2nd respondent, a public primary school, would be inimical to public interest. Accordingly, the suit was dismissed with no orders as to costs.

14. Having been dissatisfied with the trial court's decision, the appellant lodged the present appeal vide a Memorandum of appeal dated 3rd July 2023, citing the following six grounds of appeal:

a) **THAT the trial Magistrate erred in dismissing the plaintiff's case for failing to find that the appellant was within his rights to reclaim his land back.**

b) **THAT the trial Magistrate erred in not finding that the appellant was the current registered owner of the suit property with rights capable of any legal protection.**

c) **THAT the learned trial Magistrate erred in failing to consider the evidence of the appellant and his witnesses on the aspect of payment of the consideration price and breach of contract.**

d) **THAT the learned trial Magistrate erred in finding that the appellant had not supplied the 1st respondent with the documents for transferor title when the respondents had already obtained the land control board consent.**

e) **THAT the learned trial Magistrate erred in not finding and holding that the 2nd respondent had used the appellant's land without paying a single cent and as such the appellant was entitled to payment according to the current market value of land.**

f) **The learned Magistrate erred in failing to acknowledge the fact that the suit property was private land.**

15. Consequently, the appellant prayed that the appeal be allowed and the decision of the trial Magistrate be set aside with costs.

16. The appeal was canvassed by way of written submissions. On record are submissions by the appellant dated 8th April 2025 and submissions dated 13th October 2025 filed by the 1st respondent; both of which this court has carefully considered.

Appellant's submissions.

17. Counsel for the appellant isolated and submitted on six key issues for determination. On whether there existed a valid contract between the parties, counsel submitted positively, stating that all essential elements of a valid contract, namely; offer, acceptance, consideration, and intention to create legal relations, were present. That the dispute arose from a sale agreement dated 7th December 2016 between the appellant and the respondents' agents, executed under the oversight of PW2, Jona Wafula Simiyu. Counsel argued that the agreement provided that the consideration of Kshs. 1,200,000/- was to be paid to the appellant within thirty (30) days. That the payment was to be made to the appellant and not to the then registered proprietor, Jona Wafula, as the appellant had already purchased the land but had not yet received registration.

That the appellant later became the registered proprietor of the suit parcel, a fact which the respondents were aware of at all material times. They relied on the case of **Garvey v Richards [2011] JMCA.**

18. On whether the contract was breached, counsel submitted that the respondents took possession of the suit land but failed and/or declined to pay the agreed consideration within the stipulated period. That the first attempt to pay was made only after the appellant instituted the suit. That this non-payment constituted a fundamental breach of the agreement, entitling the appellant to damages. Counsel further submitted that the respondents' reliance on documentation and Land Control Board consent was misplaced, as they obtained consent without providing the appellant with payment, thereby acting in bad faith and in breach of the contract. To buttress their arguments, counsel relied on the cases of **National Bank of Kenya Ltd v Pipe Plastic Samkolit [2002] e KLR** and **Pius Kimaiyo Langat v Cooperative Bank of Kenya [2017] e KLR** and submitted that courts cannot rewrite contracts for parties.

19. As to whether there was proof of payment, counsel averred that no payment was ever made to the appellant despite the express terms of the agreement. That attempts to pay via cheques to the appellant's advocates in 2019 were ineffective and did not constitute valid discharge of the obligation. Accordingly, counsel submitted that the appellant remained unpaid for the use and occupation of his land by the respondents

20. On whether the appellant is entitled to the suit property, counsel submitted that the appellant, as the registered proprietor, is protected under Section 26 of the Land Registration Act, which presumes that the registered owner is the absolute and indefeasible owner. Counsel further submitted that the respondents' failure to pay the purchase price rendered the agreements void for want of consideration, and any counterclaims by the respondents lacked merit and prayed that the appeal be allowed with costs awarded to the appellant.

1st respondent's submissions.

21. Counsel for the 1st respondent invited the court to focus on five issues for determination, namely:

i. **whether the appeal is competent;**

ii. **whether the trial Magistrate erred in law or fact in finding that the appellant had failed to prove his case on a balance of probabilities;**

iii. **whether the two directives issued by the trial Magistrate are in contention in this appeal;**

iv. **whether the appeal is merited; and**

v. **who should bear the costs of the appeal and those of the lower court.**

22. On the question of competence, counsel submitted that the appellant filed a memorandum of appeal dated 3rd July 2023, and subsequently a record of appeal on 1st February 2024, which included an index of documents. However, conspicuously absent from the index was a certified copy of the decree, a jurisdictional requirement necessary to confer a right of appeal from the subordinate court. Counsel argued that the omission rendered the appeal fatally defective and incompetent, citing Order 42 Rule 2 of the Civil Procedure Rules 2010, which requires an appellant to

file a certified copy of decree together with Memorandum of appeal or as soon as possible. Reference was made to **Lucas Otieno Masaye v Lucia Olewe Kidi (2022) KEEL C498 (KLR)** and **Chege v Suleiman (1988) eKLR**, which emphasized that failure to attach a decree is a jurisdictional defect affecting competency of an appeal. Consequently, counsel urged that the appeal be struck out with costs.

23. Counsel further submitted, in the alternative, that even if the court were to find the appeal competent, the appellant had failed to discharge the burden of proof on a balance of probabilities, as required under Sections 107 to 109 of the Evidence Act, Cap 80. It was contended that general damages are not a proper remedy for breach of contract claims and that no evidence was led to establish permanent injunctive relief. That the requirements for an injunction, namely *prima facie* case, probability of success, irreparable injury, and balance of convenience, were not demonstrated, particularly as the school on the suit land served the public interest of over six hundred students.

24. On the issue of nullification of the agreements of 7th December 2016 and 21st February 2017, counsel submitted

that the Land Act No. 6 of 2012 provides mechanisms for a vendor to regain possession and claim damages for breach of contract, including serving notice under Section 41. That while the appellant issued an eviction notice, it did not comply with the statutory requirements, and that the trial Magistrate correctly declined to rescind the agreements or evict the 2nd respondent.

25. Regarding mesne profits and claims for damages for trespass, counsel submitted that such reliefs must be pleaded and proved. That the appellant failed to demonstrate that the respondents were in wrongful possession or had derived profits from the property. That any delay in payment of the purchase price was attributable to the appellant's failure to supply the requisite completion documents as stipulated in the agreement, and as such, the respondents' occupation was lawful pending completion of the transaction.

26. On the directives issued by the trial Magistrate, counsel submitted that the trial court had ordered the appellant to present all documents listed in paragraph 9 of the 7th December 2016 agreement to facilitate transfer, and upon

presentation, the 1st respondent was to effect payment. That these directives were not challenged in the appeal and are therefore not in contention. Counsel further argued that raising issues related to the respondents' counterclaim at the appellate stage constitutes an improper introduction of new issues, which ought to be disregarded.

27. On whether the appeal is merited, counsel submitted that it is not. He averred that the appeal is incompetent for want of a certified copy of the decree, and none of the alleged errors in law or fact in the six grounds of appeal have been established, urging that the appeal be dismissed with costs for both the appeal and the lower court proceedings awarded to the respondents.

Analysis and determination.

28. This court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to reanalyze, reassess and re-evaluate, the evidence before the trial court and make its own independent conclusions bearing in mind that it had no

advantage of seeing or hearing witnesses and therefore make due allowance for that.

29. The duty of the first appellate court was discussed in the case of ***Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR,*** where the Court of Appeal stated as follows;

> **''An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."**

30. Besides submitting on the merits of the appeal, the respondent questioned the competence of the appeal citing provisions of Order 42 Rule 2 of the Civil Procedure Rules. That rule requires an appellant to file a decree or order appealed against together with the Memorandum of appeal or as soon as possible and within the time ordered by the court. Where a decree or order appealed against is not filed,

the court ought not to admit the appeal. Therefore, a question on compliance with Order 42 Rule 2 of the Civil Procedure Act ought to be raised before admission of appeal at the preliminary stage before directions on the hearing of the appeal are taken. In the present appeal, the respondent did not contest the jurisdiction of the court or raise the aforesaid matter as a preliminary issue. This appeal was admitted to hearing. The directions on how the appeal should be heard were given and the judgment appealed against is on record and therefore I find and hold that the objection raised by the respondent has come too late in the day, the same is an afterthought and is dismissed.

31. I now turn to the merits of the appeal. Having considered the grounds of appeal raised in the Memorandum of Appeal, the same raises one issue for the court's determination, which is whether the trial court was right in dismissing the appellant's claim and allowing the respondents' counterclaim.

32. At the core of this appeal is the agreement dated 7th December 2026. This appeal turns on whether the trial court properly interpreted the terms of the said agreement.

The fact that there are two agreements in regard to the suit property involving the plaintiff, one Jona Wafula Simiyu and Lugari sub-county Government for the benefit of Nzoia Bridge Primary School; dated 7th December 2016 and 21st December 2017 is not disputed. It is also not disputed that the entire purchase price has never been paid to date. The respondent argued that the consideration could only be paid after the appellant had supplied them with completion documents upon being registered as proprietor of the suit property; while the appellant argued that the respondents were obligated to pay him the consideration in 30 days of the date of the agreement of 7th December 2016. In other words, this appeal turns on when the purchase price ought to have been paid.

33. Where a dispute arises in regard to a contract, the role of the court is to enforce the parties' intentions and not to rewrite the terms of the contract. In the case of **National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another [2001] e KLR**, the court held as follows;

> **"The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."**

34. Similarly, in the case of **Savings and Loan Kenya Limited v Mayfair Holdings Limited [2012] e KLR,** the court held as follows;

> **"Therefore, the intention of the parties should be construed with reference to the object and the terms of the agreement. If the words used in the agreement are clear they should be construed in their ordinary meaning so as to establish the intention of the parties."**

35. In the instant case, the agreement between the parties stated the parties to the agreement; the role of each of the parties; the beneficiaries of the terms of the agreement; the consideration to be paid; to whom it should be paid; the period within which the consideration should be paid and all the obligations of each party to the agreement. That agreement had no grey areas or clauses that needed an in depth interrogation to ascertain the parties' intentions as everything was in black and white and written in plain, simple and clear English language. The agreement of 21st

February 2017 was an addendum with the effect that the consideration stated in the agreement of 7th December 2016 was reduced by Kshs. 150, 000/= for reasons that the actual acreage of the land sold was 0.7 hectares and not 2 acres stated in the earlier agreement. All other covenants remained the same, with no alterations.

36. The respondent's amended defence raised two contentions, namely that; the agreement in dispute is incapable of enforcement as the plaintiff sold the land when he did not have good title to pass at the time of sale. The second contention was that the respondents have been ready, able and willing to pay the purchase price provided the plaintiff obtained proper title documents which he did in March 2018, and that he has failed to receive the purchase price. They sought among other prayers for specific performance and for the plaintiff to transfer the suit property to them

37. The court has looked at the agreement dated 7th December 2016. In that agreement, it was clearly stated that the seller of the suit property was Jona Wafula Simiyu. That the land being sold did not belong to the vendor but

was registered in his name. That the land being sold was lawfully owned by Alfred Adagi Chata the appellant, who had given authority to Jona to enter into the sale agreement, but the entire consideration was to be paid to the equitable owner of the land who is the appellant.

38. Most importantly, it was agreed that the consideration of Kshs. 1, 200, 000/= was to be paid to the appellant in 30 days of the date of signing the agreement. Thus, the payment of consideration was not on condition that the land is registered in the appellant's name. It was also agreed that the vendor (Jona Wafula Simiyu) was to avail to the respondents, original title documents; original identity card; copy of pin, passport size photographs; duly executed Land Control Board forms and spousal consent if applicable. The vendor was also to attend the land control board. Therefore, the trial court was wrong in its findings that it was the appellant's duty to avail ownership documents in 30 days, when the agreement stated that the registered owner Jona Wafula was the one to avail the said documents because the land was in his name.

39. That being the case, the allegation by the respondents that the delay in the payment of consideration was due to the failure by the appellant to obtain title documents of the suit property in time is a mere excuse. The correct position is that at the time of the agreement in 2016, the suit property was properly registered in the name of the vendor, namely Jona Wafula Simiyu and it is this person according to the agreement who was obligated to avail to the respondents all completion documents including title. Apart from receiving the consideration in 30 days, the appellant had no other duty to do in favour of the respondents. There is no where in the agreement where the appellant was to obtain registration before he is paid the consideration. Therefore the trial court was wrong in finding that payment of consideration was pegged on presentation of completion documents, because it is a procurement procedure; when there was no evidence that procurement was done in regard to the transaction herein.

40. As the respondents concede not to have paid the consideration within 30 days or at all, it is clear that they have breached the sale agreement and their continued

occupation of the suit property violates the appellants rights of ownership as provided for in sections 24, 25 and 26 of the Land Registration Act, and have no business being on private land where they have been unwilling to pay the consideration thereof. Being a school and the respondent being a County Government does not cloth them with rights to violate the appellant's proprietary rights. Theirs was a sale agreement and not the exercise of the state's coercive power of compulsory acquisition, and therefore a situation of equal footing between the parties. The fact that the beneficiary of the agreement was a public school did not mean that the school could unlawfully acquire private land without payment of agreed consideration.

41. In the matter before me, the respondents who have never paid consideration for the suit property, sought and were granted orders of specific performance by the trial court. It is trite that specific performance is an equitable remedy granted to enforce a valid contract, where the plaintiff has performed his or her obligations under the contract and where an award of damages will not be an effective remedy in the circumstances of the case.

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

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

43. Similarly, the case of **Reliable Electrical Engineers Ltd. V Mantrac Kenya Limited (2006) e KLR** the court set out what ought to be considered regarding a claim for specific performance, as follows;

> **"The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is**

valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant."

44. In the instant matter, no payment of the consideration was made within 30 days as required in the agreement of sale. The appellant was registered as owner of the suit property in 2018. Up until the filing of the suit in 2018, no attempt to pay the consideration had been made. The respondent's allegations that the appellant declined to receive the consideration, making reference to cheques issued in 2019, shows that they were not candid in their pleadings and evidence, as they stated in their defence in 2018 that they were waiting for the appellant to be registered as owner of the suit property for them to pay the consideration, yet in the entire 2018, no payment was made. The question of where the nearest school was in relation to

the suit property, although given weight and taken into account by the trial court in allowing the respondents' counterclaim, in my view, had no bearing in this matter, where the 2nd respondent failed to pay consideration.

45. For the trial court to grant specific performance where no consideration was paid, holding that evicting the school from the suit property will serve the interests of an individual, but retaining it on the suit property will serve public interest and that public interest should prevail over individual interest, amounted to interpreting the sale agreement herein, not as an agreement but as a compulsory acquisition, which was not the case herein. I take the view that the law frowns on circumstances such as those obtaining in the present case; where a Government obtains private property from a citizen not by compulsory acquisition but through a sale agreement which is not even subjected to public procurement procedures; and in the name of public interest, fails to pay consideration. If this were to be allowed, it would amount to a grave injustice. It would be akin to the Biblical story narrated in 1st Kings 21; of King Ahab forcefully taking over Naboth's vineyard, for

no other reason, but just because it was convenient to the King. Such injustice cannot be countenanced by this court.

46. Therefore, the trial court was wrong to dismiss the plaint and allow a counterclaim which in effect caused unlawful enrichment to the respondents. The appellant had sought nullification of contract for want of consideration. As consideration was not paid, that contract is declared null and void. The respondents having failed to pay the consideration have no right whatsoever to use or occupy the suit property and therefore the appellant is entitled to a permanent injunction as sought and orders of eviction. On damages for breach of contract, it is clear that the appellant was denied the use of his land and the non-payment of consideration due to acts of the respondents which are in breach of the agreement between the parties. Therefore, I am satisfied that the appellant is entitled to damages for breach of contract as he suffered financial loss. In the premises, I award a sum of Kshs. 300, 000/= for damages for breach of contract to the appellant as against the 1st respondent. As the 2nd respondent school was only to benefit from the purchase of the suit property by the 1st respondent,

the non-payment of the consideration thereof means that there is no basis and justification for its continued occupation of the suit property and therefore ought to vacate.

47. The appellant also sought mesne profits. The Black's Law Dictionary 11th Edition defines mesne profits as profits of an estate received by a tenant in wrongful possession between two dates. Essentially, mesne profits are damages which a trespasser might have received for the period the trespasser has deprived the real owner the use of his or her land. Mesne profits being special damages, ought not only be pleaded, but must also be strictly proved.

48. In the case of **Attorney General v Halal Meat Products Limited [2016] eKLR** The Court of Appeal stated as follows: -

> **"It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42."**

49. Similarly, in the case of **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] e KLR,** the court defined mesne profits as follows;

> **"Mesne profits are the rents and profits which a trespasser has or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated while a claim for mesne profits is always unliquidated.**
>
> **In Bramwell vs. Bramwell, Justice Goddard stated that "... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant." Similarly, in an Australian case, Williams & Bradley v Tobiasen it was stated that these words: "Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.**
>
> **The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with.**

A more useful description of mesne profits can be found in Halsbury's Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.

Halsburys, op. cit, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The Black's Law Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." The Concise Oxford English Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in

wrongful possession and recoverable by the Landlord."

50. In the instant suit, the plaintiff sought mesne profits but in both his pleadings and evidence failed to state the profits that the defendants received or would have received as profits in regard to their use of the suit property. In the premises, I therefore find and hold that the claim for mesne profits in this matter was not proved and therefore, that claim is hereby rejected.

51. For those reasons, this appeal succeeds. The trial court judgment is hereby set aside and substituted with an order dismissing the respondents' counterclaim and allowing the appellant's claim as against the respondents as follows;

a) **Agreements dated 7/12/2016 and 21/2/2017 are hereby declared null and void for want of consideration.**

b) **Damages for breach of contract are awarded to the appellant in the sum of Kshs. 300, 000/= and shall be paid by the 1st respondent.**

c) **In view of the provisions of Article 53 (2) of the Constitution of Kenya which requires this court to place paramount importance on the child's best**

interest, when dealing with matters concerning a child, and taking into account this year's School calendar and the fact that children who attend the 2nd defendant's school, have found themselves in the chaos and consequences of fundamental breach of contract occasioned by the 1st respondent, I order that the 2nd respondent shall vacate land parcel No. Kakamega/Lugari/3691 (suit property) by 30th November 2026. In default, eviction orders to issue.

d) **A permanent injunction is hereby issued restraining the defendants, their agents, servants, employees and anyone acting on their behalf from interfering with the plaintiff's use and enjoyment of his rights on land parcel No. KAKAMEGA/LUGARI/3691. For avoidance of doubt, this order shall take effect from 1st December 2026.**

e) **The costs of this appeal and those of the suit in the court below shall be borne by the 1st respondent**.

52. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 25TH DAY OF FEBRUARY 2026

A. NYUKURI

JUDGE

In the presence of

Mr. Biketi holding brief for Mr. Mamadi for the 1st respondent

No appearance for the appellant

No appearance for the 2nd and 3rd respondents

Court Assistant: Delphine