

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELCLOS E015 OF 2024

IN THE MATTER OF THE PROPERTY KNOWN AS

KAJIADO/KITENGELA/91437

ORIGINATING SUMMONS (UNDER ORDER 37 RULES 3,14,19 AND
20 OF THE CIVIL PROCEDURE RULES; SECTION 1A, 1B AND 3A OF THE
CIVIL PROCEDURE ACT; ARTICLE 159 OF THE CONSTITUTION AND ALL
OTHER ENABLING PROVISIONS OF THE LAW)

BETWEEN

ALICE JEPKOECH YANO..... PLAINTIFF

-VERSUS-

PETER KIMUTAI KIPTOO.....1ST DEFENDANT

RAEL JEPKEMBOI CHELANGA.....2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff, **Alice Jepkoech Yano** approached this court on 25th November, 2024 through an Originating Summons of even date inviting the court to

determine the following issues and questions based on her assertions that she is registered owner of **KAJIADO/KITENGELA/91437** which is the subject matter of this case:

- a) *Whether the Plaintiff is the registered owner of the property known as KAJIADO/KITENGELA/91437?*
- b) *Whether the parties herein entered into a valid sale agreement dated 4th October, 2019 in respect of the property known as KAJIADO/KITENGELA/91437?*
- c) *Whether the Defendants are in breach of the terms of the said sale agreement dated 4th October, 2019?*
- d) *Whether the Plaintiff in terms of the sale agreement dated 4th October, 2019 issued a "Completion Notice" which the Defendants did not comply with as required?*
- e) *Whether the Plaintiff is entitled to 10% forfeiture plus interest of the contractual amount by virtue of the Defendants' failure to honour the terms of the contract?*
- f) *Whether the Defendants have declined to vacate the suit premises?*
- g) *Whether the Plaintiff is entitled to mesne profits by virtue of rent accruals as per the previous tenancy agreement?*

- h) Whether the Plaintiff has been rendered homeless by virtue of the unfulfilled terms of the contract?*
- i) Whether the suit premises are in total disrepair and being wasted?*
- j) Whether an eviction order of the Defendants from the property known as KAJIADO/KITENGELA/91437 should issue?*
- k) Whether the orders sought in this summons should issue?*

2. The Plaintiff seeks issuance of the following orders:

- a) A declaration that the Defendants have breached the terms of the contractual agreement dated 4th October, 2019.*
- b) A declaration that the Plaintiff is entitled to 10% plus interest forfeiture of the contractual amount of Kshs.35,000,000/=.*
- c) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of occupation/possession of ALL that property known as KAJIADO/KITENGELA91437 and/or vacant possession.*
- d) A declaration that the Defendants whether by themselves or their servants or agents or otherwise howsoever are wrongly in occupation of the suit property known as KAJIADO/KITENGELA/91437 and are accordingly trespassers and creating nuisance and as a result have*

wasted and continue to waste the suit premise which is now in total disrepair.

- e) This Honorable court be pleased to grant orders of eviction against the Defendants herein from the Plaintiff's property, KAJIADO/KITENGELA/91437 and that the County Commissioner, Kajiado County as well as the Officer Commanding Station (OCS), Ongata Rongai and/or the Court Bailiff of the area where the property is situated to ensure compliance of this order.*
- f) The Plaintiff to enter and enjoy her property/premises peacefully.*
- g) A Permanent Injunction restraining the Defendants whether by themselves, their servants or otherwise howsoever from remaining or continuing in possession/occupation of the property known as KAJIADO/KITENGELA/91437 and/or trespass on them and continued nuisance.*
- h) Mesne profits calculated from 31/12/2020 at the rate of Kshs 100,000/- per month with an escalation of 10% per annum.*
- i) General Damages for trespass and nuisance.*

j) Costs of this suit together with interest thereon at such rate and such period of time as the Honorable court may deem just and not to grand.

k) Any further relief as this honorable court may deem appropriate

3. The summons is supported by an affidavit sworn on 25th November 2024 by Alice Jepkoech Yano, who states that she is the lawful owner of land parcel KJD/KITENGELA/91437, measuring two acres and located at Tuala/Ongata Rongai in Kajiado County. She explains that the property includes a six-bedroom maisonette in which she has lived since 2003. The Plaintiff further states that under a sale agreement dated 4th October 2019, the Defendants agreed to purchase the property for Kshs. 35,000,000. After the 2nd Defendant paid a deposit of Kshs. 3,000,000, she granted them vacant possession of the suit property. She adds that although the Defendants later paid an additional Kshs. 500,000 toward the purchase price, they failed to pay the remaining balance of Kshs. 29,000,000 by the completion date of 31st December 2020, and no formal extension of the payment period was agreed upon by the parties.

4. The Plaintiff also claims that the Defendants misrepresented that they would raise the outstanding balance from the sale of their properties in Eastland's, Nairobi, and Chepkanga, Eldoret. She states that their failure to clear the balance before the completion date prompted her to issue them with a notice to vacate the property, after having repeatedly reminded them of the completion requirements verbally, through WhatsApp messages, and by email. According to the Plaintiff, the Defendants have refused, without justification, to surrender vacant possession of the property. She further alleges that the 1st Defendant warned her to stay away from the property, stating that he is a police officer attached to the Directorate of Criminal Investigations in Nairobi.

5. She further avers that the Defendants requested that she hands over the title to the suit property and stop sending messages demanding that they vacate. She however, insisted on vacant possession the Defendants having failed to pay the full purchase price. The Plaintiff states that she reported the 1st Defendant to the Deputy DCIO at Kitengela Police Station following threats and an altercation, during

which he allegedly told her that she would not be able to take any action against him.

6. The Plaintiff contends that the Defendants' breach of the agreement and their continued occupation of the property have caused her significant loss and damage, as the property is allegedly being neglected and has fallen into disrepair. She maintains that the Defendants should not continue enjoying the property and their occupation amounts to illegal and unlawful trespass.
7. She further asserts that under Clause 9 of the agreement, the Defendants forfeited 10% of the purchase price. In addition, she claims monthly rent of Kshs. 1,000,000, subject to an annual escalation of 10%, effective from 4 October 2019, when she notified the Defendants to vacate the property. In conclusion, the Plaintiff states that unless the orders sought are granted, she will suffer undue prejudice, adding that she is currently without a home.

The Defendants' case

8. The Defendants opposed the Summons through a Replying Affidavit sworn on 18th March 2025 by Peter Kimutai Kiptoo. In the affidavit, he relies on Order 37 Rule 19 of the Civil Procedure Rules and argues

that the matter should be converted into an ordinary suit because it raises substantially disputed issues and material questions of fact. These issues include the validity of the sale agreement dated 4 October 2019, whether the agreement was breached and by which party, the amount of purchase price already paid, the alleged service of notice by the Plaintiff, differing interpretations of the contractual terms, claims of misrepresentation and breach of duty, allegations of trespass and threats against the Plaintiff, the condition of the suit property and whether it is being wasted or falling into disrepair, whether the Plaintiff should release completion documents, and whether the Defendants should vacate the property.

9. The deponent further states that the Defendants would suffer prejudice if the case were determined solely on the basis of affidavit evidence, as this would limit their ability to fully present their case, including giving oral testimony and cross-examining witnesses. He maintains that determining the dispute through affidavits alone would be unjust and could undermine the parties' right to a fair hearing, particularly in light of the conflicting accounts presented. For that

reason, the Defendants also contend that the nature of the proceedings prevents them from filing a counterclaim.

10. During the proceedings, the Defendants filed a Notice of Motion dated 18th March 2025 seeking orders to convert the Plaintiff's Originating Summons into an ordinary suit and requesting directions on the filing of a plaint, defence, and counterclaim, as well as the exchange of witness statements and documentary evidence. However, the application was later withdrawn following an oral request made by Mr. Musa, learned counsel for the Defendants. Counsel also sought leave to file a supplementary affidavit in response to the Summons. After the court granted leave, Peter Kimutai Kiptoo filed a supplementary affidavit sworn on 27th March 2025 opposing the Plaintiff's claims and reiterating that the matter should be determined through viva voce (oral) evidence.

11. In the affidavit, the Defendants explain that they agreed to purchase the suit property from the Plaintiff for Kshs. 35,000,000 under a sale agreement dated 4th October 2019. Under the terms of the agreement, a deposit of Kshs. 3,000,000 was payable upon execution, a further Kshs. 3,000,000 was to be paid by 31st December 2019, and

the remaining balance of Kshs. 29,000,000 was due by 31st December 2020. They state that they paid Kshs. 3,000,000 upon signing the agreement and later paid an additional Kshs. 1,000,000 in two instalments on 22nd and 23 January 2021. The Defendants claim that the outbreak of the COVID-19 pandemic severely affected their financial position, which led to a temporary halt in further payments. They assert that, following discussions with the Plaintiff, it was agreed that payments would be paused until they were financially able to continue.

12. The Defendants further allege that the Plaintiff later refused to accept the remaining portion of the second instalment amounting to Kshs. 2,000,000, allegedly after realizing that the value of the property had increased following substantial improvements carried out by them. They contend that despite their continued attempts to make payments, the Plaintiff declined to accept them because she intended to terminate the sale, evict them from the property, and regain vacant possession to their detriment. The Defendants also deny having been served with any notice to vacate. They maintain that the property is

now in a better condition than when they first took possession due to the improvements they undertook.

13. Additionally, they state that under Clause 8 of the agreement, the Plaintiff declined to provide completion documents to their bank, which were necessary for the bank to issue a professional undertaking and facilitate a loan to settle the outstanding balance, despite their requests.

14. The Defendants accuse the Plaintiff of attempting to rescind a valid agreement on the basis of an alleged breach, while also seeking vacant possession of the property and forfeiture of the Kshs. 4,000,000 already paid. They further claim that the Plaintiff intends to sell the property at a higher value because the structural improvements they carried out—valued at Kshs. 12,549,495—have significantly increased its worth.

15. The Defendants state that they remain ready and willing to pay the outstanding balance of Kshs. 31,000,000 on the condition that the Plaintiff provides all necessary completion documents to their bank so that a charge can be registered in their favour and the funds released to her. Alternatively, they contend that if they are required to give

vacant possession of the property, the Plaintiff should first refund Kshs. 4,000,000 being the purchase price already paid, together with Kshs. 12,549,495 spent on renovations and improvements to the property.

Evidence adduced during hearing

16. Alice Jepkoech Yano (PW1) testified that she is the registered proprietor of land parcel KJD/KITENGELA/91437, measuring two acres and located at Tuala/Ongata Rongai in Kajiado County. The property contains a six-bedroom maisonette, and she produced the title deed registered in her name to support this claim. She stated that through a sale agreement dated 4 October 2019, she agreed to sell the property to the Defendants for Kshs. 35,000,000. The agreement, which was subject to the LSK Conditions of Sale, 2015, provided for a completion date of 31 October 2020, by which time the full purchase price was to be paid. Under Clause 9 of the agreement, if the purchaser failed to complete the transaction, the vendor could rescind the agreement after issuing a 21-day written notice. In such a case, the purchaser would forfeit 10% of the purchase price already paid, while any amount exceeding that 10% would be refunded within three days of rescission.

17.PW1 further explained that the 1st Defendant was related to her late husband and that the 2nd Defendant is his wife. She informed the court that the Defendants initially paid a deposit of Kshs. 3,000,000 upon execution of the agreement and later made an additional payment of Kshs. 1,000,000. To demonstrate that she had invoked Clause 9 of the agreement after the Defendants failed to complete payment by 31st December 2019, she produced a completion notice dated 26th February 2020. Since the notice was neither complied with nor responded to, she subsequently issued an eviction notice dated 20th June 2022, followed by a second eviction notice dated 1st October 2022, which also referenced threats she allegedly received from the 1st Defendant after they were asked to vacate the property. According to PW1, the Defendants replied through their advocates' letter dated 3rd October 2022, requesting that she releases the title to enable them obtain a loan facility to settle the outstanding balance.

18.PW1 stated that by that time the relationship between the parties had already deteriorated and that she had rescinded the agreement. Nonetheless, she responded through a letter dated 11th October 2022 indicating that she would only release the title upon receipt of a

professional undertaking. She denied ever receiving Kshs. 1,000,000 from the Defendants to cater for her son's school fees in South Africa. She also maintained that the Defendants could not have undertaken major developments on the property since they had not paid even a quarter of the purchase price, adding that the only improvements they made were a cowshed and a sheep pen.

19. She further testified that before filing the present Originating Summons, she had previously instituted Kajiado Chief Magistrate's ELC Case No. E051 of 2023 seeking eviction orders against the Defendants. However, she withdrew that case after they promised to complete payment of the outstanding amount, a promise she says they failed to honour. PW1 also stated that due to the Defendants' failure to meet their contractual obligations, she was forced to rent a house after selling another property where she had been staying to meet her financial commitments.

20. During cross-examination, PW1 acknowledged that she sold the property to the Defendants and received a deposit of Kshs. 3,000,000. She also admitted that an additional Kshs. 1,000,000 was deposited into her account in two installments of Kshs. 500,000 each

on 22nd July 2021 and 23rd July 2021, bringing the total amount paid by the Defendants to Kshs. 4,000,000. She testified that under Clause 8 of the agreement, if the purchase price was to be financed by a financial institution, completion documents would only be released after the financier's advocates issued a professional undertaking. She further confirmed that she paid the 1st Defendant a brokerage fee of Kshs. 250,000 when he initially approached her about selling the property, noting that the house was habitable at the time as she had been living there.

21.PW1 explained that she issued the completion notice after the Defendants failed to pay the second instalment. When shown the Defendants' advocates' letter dated 3rd October 2022 demanding completion documents, she maintained that the Defendants had already breached the agreement by then. She also stated that she was not willing to accept any further undertaking from the Defendants' bank and had not offered to refund Kshs. 500,000 that was above the forfeitable 10% of the purchase price. Additionally, she denied that the Defendants ever offered to pay an additional Kshs. 2,000,000 or attempted to settle the matter through intermediaries.

22. PW1 further testified that the Defendants authorized her valuer to conduct a valuation of the property. Regarding the earlier case filed in the Chief Magistrate's Court, she explained that the Defendants had challenged the court's jurisdiction through a preliminary objection. She added that she communicated with the Defendants through telephone calls, SMS, and verbal discussions, and expressed concern that no action was taken by authorities after she reported the 1st Defendant.

23. Upon re-examination, PW1 stated that the Defendants never gave any express communication indicating that a particular financial institution would pay the remaining balance, nor did they make a specific request for completion documents to be forwarded to any institution. She therefore maintained that the Defendants breached the agreement.

24. Concerning the additional Kshs. 1,000,000 deposited into her account, she indicated that she was uncertain about the exact time the funds were received. She reiterated that the Defendants acknowledged receipt of her completion and eviction notices in their advocates' letter. She also explained that the earlier suit before the Chief Magistrate's Court was withdrawn by consent after the jurisdictional

challenge. Lastly, she stated that although she had lodged a complaint against the 1st Defendant, she did not understand why no action was taken despite his being a police officer.

25. The Defendants' witness, Peter Kimutai Kiptoo (DW1), an Inspector of Police attached to the Directorate of Criminal Investigations headquarters, testified that he had known the Plaintiff for a long time as a distant relative through her late husband. He stated that he decided to purchase the property after the Plaintiff approached him to help her find a buyer for two of her properties. According to him, the sale agreement dated 4th October 2019 fixed the purchase price at Kshs. 35,000,000, out of which Kshs. 4,000,000 was paid by his wife, the 2nd Defendant.

26. He acknowledged that the transaction was not completed within the agreed timelines, explaining that the COVID-19 pandemic affected their financial capacity. He further claimed that after explaining their situation to the Plaintiff, the parties verbally agreed to extend the completion timelines, but that the Plaintiff later refused to accept an additional payment of Kshs. 2,000,000 in January 2023.

27. DW1 denied ever using his position as a police officer to threaten or intimidate the Plaintiff. He explained that the complaints she made at various police stations and to his supervisors were dismissed because the matter was considered civil in nature. He also denied receiving any completion notice from the Plaintiff. Referring to an email 19th September 2022 between himself and the Plaintiff, he stated that she had encouraged him to obtain a mortgage to enable him settle the outstanding balance. He therefore asked the court to grant him additional time to negotiate with the Plaintiff and arrange payment of the remaining Kshs. 31,000,000, noting that he had invested substantial resources in the property, as indicated in a valuation report dated 9th May 2022 which he produced as an exhibit.

28. During cross-examination, DW1 reiterated that he was related to the Plaintiff's late husband and confirmed the existence of the sale agreement dated 4th October 2019. He acknowledged that the agreement required payment of a deposit of Kshs. 3,000,000 upon execution, a further Kshs. 3,000,000 by 31st December 2019, and the balance of Kshs. 29,000,000 by the completion date unless the

timelines were formally extended by consent. He admitted that the additional Kshs. 2,000,000 was never paid despite Clause 2(d) requiring payments to be made through bank deposits. He also confirmed that, under the agreement, completion documents would only be released after his advocate issued a professional undertaking to facilitate financing from a financial institution.

29. DW1 acknowledged breaching the agreement but maintained that he verbally communicated with the Plaintiff to extend the completion timeline. He added that he was aware that time was of the essence because the Plaintiff intended to use the proceeds to pay her son's school fees in South Africa. Despite this, he testified that his advocates, Kipkirui Kemboi & Associates Advocates, wrote the letter dated 3rd October 2022 requesting the Plaintiff to release the title after they were served with an eviction notice dated 20 June 2022, although he denied receiving those notices. He also admitted that his counsel never issued a professional undertaking to the Plaintiff.

30. Regarding the valuation report presented to show improvements made on the property, DW1 conceded that the report was unsigned and that he had no receipts, county approvals, or a

certificate of electronic evidence to support it. When referred to affidavits he had filed in the Chief Magistrate's Court indicating that the property was valued at Kshs. 40,000,000, he stated that those figures were based on his own estimate. He added that the improvements he made were done with the Plaintiff's verbal consent.

31. When asked about a lease agreement dated 1st January 2017 between the Plaintiff and Gideon Kipkirui relating to the property, DW1 described it as questionable, stating that he could not determine the rent payable or whether the property had been rented prior to his occupation. He reiterated that he was seeking more time to complete the transaction, explaining that he was currently unable to do so. He also maintained that he had never threatened the Plaintiff nor used his office to interfere with investigations. Although he claimed not to use WhatsApp, he acknowledged that the pleadings in the suit had been served on him through that platform.

32. On re-examination, DW1 maintained that he did not consider himself to have breached the agreement because, in his view, the completion date had been verbally extended without a specific timeline. He also stated that although the Plaintiff had been asked to

provide the title to facilitate creation of a charge in favour of the Defendants, she later changed her position.

33. While confirming that only Kshs. 4,000,000 had been paid, he reiterated that the additional Kshs. 2,000,000 was not paid because the Plaintiff allegedly failed to acknowledge receipt of an earlier payment of Kshs. 500,000. He concluded by stating that he believed the transaction was still within the completion period.

34. Rael Jepkemboi Chelanga (DW2) testified that she made part payments towards the purchase price, depositing Kshs. 500,000 on 22nd July 2021 and another Kshs. 500,000 on 23rd July 2021. She stated that the Plaintiff only acknowledged one of the payments, which made her hesitant to make further deposits. She also claimed that the Plaintiff refused to accept an additional Kshs. 2,000,000 that they attempted to pay.

35. DW2 acknowledged that under the agreement, a purchaser who breached the contract would forfeit 10% of the purchase price. She explained that the Defendants failed to complete the transaction within the stipulated time mainly because of the COVID-19 pandemic, although they were in discussions with banks to obtain financial

assistance. She further stated that the Plaintiff verbally granted them an extension verbally after they were unable to complete the transaction within the timeframe initially agreed on.

36. According to DW2, when they took possession of the property two months after executing the agreement, it was not habitable. She therefore maintained that, based on the developments reflected in their valuation report, the Plaintiff should compensate them for the improvements they made. Nonetheless, she requested additional time to enable them complete payment of the purchase price, relying on what she described as an implied extension of the completion date.

37. During cross-examination, DW2 confirmed that the agreed purchase price was Kshs. 35,000,000 and that a deposit of Kshs. 3,000,000 had been paid through bank transfer. However, the additional Kshs. 3,000,000 that was due by 31st December 2019 was never paid within that period. She admitted that the remaining balance was supposed to be paid by the completion date and that any extension of time required a written agreement between the parties. Although she maintained that they had not breached the agreement because they remained in communication with the Plaintiff, she had

no written evidence to support this claim, including proof of their alleged attempt to pay an additional Kshs. 2,000,000 around 2021 or 2022.

38. While DW2 initially testified that the property was uninhabitable at the time of the agreement, she later acknowledged that the agreement indicated that they accepted the property “as is” after inspection and viewing. She stated that they carried out improvements to make the property habitable and generate additional income. However, she admitted that she had no receipts to substantiate the alleged improvements stated in their valuation report. She further stated that during the valuation process, they did not provide the valuer with structural or architectural plans but only informed him of the improvements they claimed to have made. She also had no evidence to show that they repaired or improved the borehole which was allegedly not functioning when they took possession.

39. DW2 acknowledged that before they moved into the property, it had been occupied by a tenant, although she could not confirm the amount of rent previously charged. She also admitted that she received several notices to vacate from the Plaintiff, communicated

verbally and through SMS. She reiterated that, if granted more time, they were willing to pay the outstanding balance, noting that they had been in discussions with the Plaintiff for about six years. However, she had no written consent extending the validity of the agreement or evidence showing engagement with a financial institution to finance the balance.

40. DW2 also denied the allegation that they were deliberately taking advantage of the Plaintiff by failing to complete the transaction.

41. On re-examination, DW2 stated that they expected to receive a response from their financial institution within three months regarding funding to complete the purchase. Regarding the valuation of the property, she indicated that the valuer relied on the limited receipts provided to him by the Defendants when preparing the report.

Analysis of Submissions

42. At the conclusion of the hearing, counsel for both parties were directed to file written submissions. Both sides complied filing the submissions which now form a part of the record of this court.

43. In her submissions dated 18th November 2025, the Plaintiff reiterated that the issues raised in the Originating Summons were

sufficient to fully resolve the dispute. She maintained that the matter was properly commenced through an Originating Summons since it concerns an alleged breach of a contractual agreement between herself and the Defendants. In support of this position, reliance was placed on Order 37 Rule 3 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, as well as the case of Cyril J. Haroo & Another v Uchumi Services Limited & 3 Others (2014) eKLR. The Plaintiff argued that the court had the necessary jurisdiction to determine the matter, particularly after directing that it proceed by way of viva voce evidence.

44. The Plaintiff urged the court to find that a valid sale agreement dated 4th October 2019 existed between herself and the Defendants in respect of the suit property. She contended that her ownership was demonstrated through the title deed issued in her name, her valuation report, and admissions made by the 1st Defendant in his supplementary affidavit. According to the Plaintiff, the Defendants breached the agreement—particularly Clauses 1, 2, 4, 9, and 10—by failing to pay the full purchase price of Kshs. 35,000,000 by the completion date of 31st December 2022, despite being aware that

time was of the essence. She further submitted that no written agreement was made to extend the completion period, even though the Defendants acknowledged having paid only Kshs. 4,000,000.

45. The Plaintiff also submitted that the Defendants were served with completion notices in accordance with Clause 9 of the agreement, together with several reminders, yet they failed to remedy the breach. Consequently, she argued that the Defendants forfeited 10% of the purchase price under Clause 9(a). Despite this breach and the issuance of notices requiring them to vacate, the Defendants have allegedly continued to occupy the property.

46. On that basis, the Plaintiff claimed entitlement to mesne profits at the rate of Kshs. 100,000 per month starting from 20th March 2020, being the date when the 21-days' period expired following the issuance of the completion notice dated 20th February 2020. She explained that this figure was derived from a prior tenancy agreement dated 1st January 2017 showing that the property had previously been rented at that amount before the Defendants took possession in 2019. She further noted that the Defendants themselves acknowledged that

the property had been occupied by a tenant prior to their entry and that they had to wait for about two months before moving in.

47. Based on this calculation, the Plaintiff argued that the Defendants should pay mesne profits amounting to Kshs. 6,900,000 for 69 months, together with additional sums accruing until they vacate the property. She maintained that their continued occupation amounts to unlawful possession and detention of the property after breaching the agreement and ignoring completion and vacation notices. In support of her claim for mesne profits, she cited Section 2 of the Civil Procedure Act, Order 21 Rule 13 of the Civil Procedure Rules, *Attorney General v Halal Meat Products Ltd (2016) eKLR*, and definitions of the term “mesne profits” from Black’s Law Dictionary and the Concise Oxford English Dictionary.

48. The Plaintiff further submitted that the Defendants’ actions have left her without a home, as the suit property is the only residence available to her. She stated that she had been compelled to sell some of her properties due to financial difficulties. Reliance was placed on *Julius L. Marten v Caleb Arap Rotich (2021) KEELC 195 (KLR)* to support the argument that she had satisfied the requirements for the

issuance of eviction orders, particularly since the Defendants allegedly refused to vacate the property despite being served with proper notices and knowing that they had breached the agreement. Additionally, she pointed out that the 1st Defendant is a senior police officer attached to the DCI Headquarters and serves as a personal assistant to the Director of the DCI. She argued that no action was taken against him despite complaints she lodged with his supervisor and at Kitengela Police Station after he allegedly threatened her. Consequently, the Plaintiff proposed that any eviction order be enforced by the Kajiado County Police Commander due to the 1st Defendant's seniority within the National Police Service.

49. Regarding costs, the Plaintiff argued that they should be awarded to her because, in her view, the Defendants have consistently delayed the resolution of the matter since the suit was filed.

50. In their submissions dated 28th October 2025, the Defendants identified five key issues for determination: whether the parties entered into a valid and binding sale agreement; whether the Defendants breached the agreement; whether the Plaintiff is entitled to rescission, forfeiture, and vacant possession; whether the

Defendants are entitled to specific performance or, alternatively, a refund of the deposit and the value of improvements; and whether the case involves factual disputes requiring determination through viva voce evidence.

51. The Defendants maintained that a valid and enforceable sale agreement dated 4th October 2019 concerning the suit property valued at Kshs. 35,000,000 still subsists between the parties. They argued that they had performed part of their obligations by paying a deposit of Kshs. 3,000,000 and an additional Kshs. 1,000,000 to the Plaintiff. They denied breaching the agreement, contending that because the parties were closely related, they had verbally agreed to pause payments and extend the timelines after the Defendants' financial situation was adversely affected by the COVID-19 pandemic. They also asserted that the Plaintiff never disputed the numerous discussions and arrangements made regarding extension of time.

52. The Defendants further submitted that their conduct and correspondence demonstrate that they have always been ready and willing to complete the transaction, but that the Plaintiff frustrated their efforts. In particular, they claimed that she refused to accept a

further payment of Kshs. 2,000,000 and other sums toward the purchase price. They argued that the Plaintiff also hindered completion by failing to provide the necessary completion documents required by their bank to register a charge over the property and secure financing to pay the remaining balance. According to the Defendants, any delay or breach was therefore attributable to the Plaintiff's own actions. They maintained that they would finalize their financial arrangements with their lending institution and settle the outstanding amount once the Plaintiff complies with Clause 8 of the agreement.

53. The Defendants also accused the Plaintiff of attempting to unjustly enrich herself by reclaiming the property while retaining their part payment of Kshs. 4,000,000, particularly after the property's market value allegedly increased due to substantial improvements they claim to have made. They invoked equitable principles, urging the court not to allow the legal process to be used in a manner that would be fraudulent or exploitative. According to them, the Plaintiff approached the court with unclean hands and should therefore not be allowed to rescind the agreement, evict them, or forfeit the Kshs.

4,000,000 already paid. They further argued that these remedies are inappropriate because the Plaintiff verbally extended the payment timelines, approved improvements on the property valued at Kshs. 12,549,495, rejected further payments, and failed to provide completion documents to facilitate financing by a bank.

54. The Defendants added that if the court were to allow rescission of the agreement, the Plaintiff should be required to restore them to their previous position by refunding Kshs. 4,000,000 together with Kshs. 12,549,495 spent on improvements. In support of this position, they relied on *Anne Murambi v John Munyao Nyamu & Another (2018) KEELC 2375 (KLR)* for the proposition that a party cannot rely on the non-fulfilment of a condition precedent where that party contributed to or prevented its fulfilment.

55. They also alleged that the Plaintiff deliberately misrepresented the amount she received, claiming Kshs. 3,500,000 instead of Kshs. 4,000,000, in order to support her claim for forfeiture of 10% of the purchase price. On the issue of eviction, the Defendants argued that granting such orders would cause them irreparable loss and severe hardship because they had invested Kshs. 12,549,495 in improving the

property and remained willing to complete the transaction once the completion documents are made available and financing secured, especially given what they described as the Plaintiff's verbal extension of time.

Issues for Determination

56. Having considered the pleadings, the evidence on record and the submissions before this court, I find that the following issues arise for determination:

- I. Whether a valid and binding sale agreement dated 4 October 2019 existed between the Plaintiff and the Defendants in respect of the suit property.*
- II. Whether the Defendants breached the terms of the sale agreement by failing to pay the full purchase price within the agreed completion period.*
- III. Whether the Plaintiff is entitled to the reliefs sought, including rescission of the agreement, forfeiture of part of the purchase price, vacant possession of the property, and/or compensation for mesne profits.*

Analysis and Determination

57. Before addressing these issues substantively, the court must first dispose of a procedural contention raised repeatedly by the Defendants. The Defendants submitted that this matter should have been converted into an ordinary suit due to the alleged existence of highly contested factual issues. As noted in the introduction to this judgment, this argument had previously been raised in their Notice of Motion dated 18th March 2025 which was however withdrawn orally by their counsel. Subsequently, on 24th April 2025, the court directed that the matter proceed by way of **viva voce evidence**, treating the affidavits filed as witness statements. The Defendants were thus afforded a full opportunity to present their evidence and cross-examine witnesses.

i. *Whether a valid and binding sale agreement dated 4 October 2019 existed*

58. It is common ground that the Plaintiff is the registered owner of the suit property, as evidenced by the title deed in her. The Plaintiff and the Defendants entered into a written agreement on 4th October 2019 for the sale of the property at Kshs. 35,000,000/= . The terms of the agreement stipulated payment of a deposit of Kshs. 3,000,000/= upon execution, a further Kshs. 3,000,000/= by 31st December 2019,

and the balance of Kshs. 29,000,000/= by 31st December 2020. All payments were to be made into the Plaintiff's designated bank account. Clause 4 of the agreement provided that time was of the essence, and Clause 9 outlined the procedure and consequences for failure to complete, including rescission and forfeiture of part of the purchase price.

59. The Plaintiff produced the title deed, the executed sale agreement, and her valuation report, while DW1 admitted under oath that the agreement existed and that the Defendants made partial payments totaling Kshs. 4,000,000/=. In accordance with settled law, a written contract voluntarily executed by parties is binding and enforceable. The Court of Appeal in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR* observed that:

“Courts adopt the objective theory of contract interpretation... since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement.”

60. The evidence before the court establishes that indeed a **valid and binding sale agreement existed between the Plaintiff and the Defendants in respect of the suit property.**

ii. **Whether the Defendants breached the terms of the sale agreement**

61. The Defendants paid Kshs. 3,000,000/= upon execution of the agreement and a further Kshs. 1,000,000/= in July 2021, long after the due date for the second installment. The remaining balance of Kshs. 31,000,000/= was never paid. The Plaintiff issued a completion notice on 26th February 2020, requiring payment of the second installment within 21 days, but the Defendants failed to comply.

62. The Defendants contended that the Plaintiff verbally extended the timelines due to the COVID-19 pandemic, but no evidence was adduced to demonstrate any formal extension, no correspondences or undertakings were produced. The law is clear that where time is of the essence, failure to perform entitles the non-defaulting party to rescind after giving notice. As stated in *Sisto Wambugu v Kamau Njuguna* [1983] KECA 69 (KLR):

“...contracts for the sale of land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day.

The law is that this right can only be exercised where time is of the essence, or if it is not, after the party who is not at fault has given reasonable notice to the defaulting party making time of the essence.”

63. The Defendants have not demonstrated willingness and ability to perform their obligations under the contract. Despite being in communication with the Plaintiff over several years, they did not produce any evidence showing that they engaged financial institutions to facilitate payment of the balance. Their inaction for six years constitutes a clear breach of the agreement. The Plaintiff was fully prepared to provide completion documents upon proper undertaking in accordance with Clause 8, which the Defendants failed to furnish.

64. In light of the evidence, I find that the **Defendants breached the terms of the sale agreement by failing to pay the full purchase price within the agreed completion period.**

iii. *Whether the Plaintiff is entitled to the reliefs sought*

65. The Plaintiff seeks rescission of the agreement, forfeiture of 10% of the purchase price, and vacant possession of the suit property. Clause 9 of the agreement expressly provides for rescission and forfeiture in the event of default by the purchaser. The Plaintiff

complied with the contractual requirements by issuing the 21-days' completion notice. The Defendants' failure to perform entitles the Plaintiff to lawfully rescind the agreement. In *Gatere Njamunyu v Joseck Njue Nyaga [1983] KECA 118 (KLR)*, it was held that:

“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.”

66. The Plaintiff issued the requisite notice, and the Defendants failed to cure the breach.

67. Regarding forfeiture, Clause 9(a) provides for forfeiture of 10% of the purchase price, with the balance to be refunded to the purchaser. The Defendants' contention that they cannot forfeit any amount is inconsistent with the express terms of the agreement, which they voluntarily executed.

68. With respect to vacant possession, the Defendants remain in occupation of the property despite rescission. It is settled law that an owner is entitled to regain possession where the purchaser is in wrongful occupation. In *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR*, the Court

emphasized that wrongful occupation justifies eviction to restore the property to the rightful owner.

69. The Defendants also sought reimbursement for alleged improvements amounting to Kshs. 12,549,495/=. The court notes that their valuation report is unsigned and unsupported by receipts. The Defendants too did not produce any approvals from relevant authorities authorizing the undertaking of the alleged developments. Consequently, the claim for reimbursement fails for want of proof.

70. Finally, the Plaintiff sought mesne profits. However, as held in *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR:

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne profits... must be pleaded and proved.”

71. The Plaintiff did not provide evidence of actual rental income or profits from the property during the Defendants' occupation. Accordingly, she is **not entitled to mesne profits.**

72. That said and considering the circumstances of this case, the court will award the Plaintiff general damages for trespass in the sum

of Kshs.1,000,000/- only with interest at court rates from the date of this judgement until payment in full.

73. The Plaintiff has established that a valid sale agreement existed; that the Defendants breached the agreement by failing to pay the balance of the purchase price; and that she is entitled to rescind the agreement; retain 10% of the purchase price; and regain vacant possession of the suit property. The Defendants' claims for reimbursement of improvements fails for lack of evidence.

74. The court hereby enters judgment in favour of the Plaintiff against the Defendants jointly and severally in the following terms:

a. **The sale agreement dated 4 October 2019 is rescinded. The Plaintiff is entitled to retain 10% of the purchase price, being Kshs. 3,500,000/- with the balance, if any, to be refunded to the Defendants in accordance with Clause 9(a).**

b. **It is hereby declared that the Plaintiff is entitled to exclusive and unimpeded right of occupation/possession of all that property known as KAJIADO/KITENGELA91437 and/or vacant possession.**

- c. The Defendants, whether by themselves or through agents, are evicted from the suit property known as KAJIADO/KITENGELA/91437. They are to vacate in the next ninety (90) days failure to which the Plaintiff is at liberty to evict them without any further reference to this court.
- d. The Officer Commanding Station (OCS), Ongata Rongai, is directed to provide security during the eviction and ensure compliance with this order.
- e. The Defendants whether by themselves, their servants or otherwise howsoever are restrained by way of a permanent injunction from trespassing onto or interfering with the Plaintiff's possession, remaining or continuing in possession/occupation of the property known as KAJIADO/KITENGELA/91437 a after the expiry of ninety (90) days from the date of this judgement.
- f. The Plaintiff is awarded general damages for trespass in the sum of Kshs.1,000,000/- only with interest at court rates from the date of this judgement until payment in full.

g. The Plaintiff shall have the costs of this suit against the Defendants jointly and severally with interest at Court rates from the date of assessment until payment in full.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 3rd Day of March 2026.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ngaira for the Plaintiff

Ms. Jillo h/b for Mr. Kithi for the Defendants

Court Assistant: Mpoye

M.D. MWANGI

JUDGE