

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC LC NO. E005 OF 2025

SAMUEL KUNGU MBUGUA.....1st PLAINTIFF

ADAN MOHAMED.....2nd PLAINTIFF

VERSUS

SADIQ HUSSEIN MOHAMED.....DEFENDANT

JUDGMENT

A. Background

1. Vide a Plaint dated the 10th January, 2025, the Plaintiffs seek the following reliefs as against the Defendant:

- a. The Honorable Court be pleased to cancel and/or revoke the certificate of title issued in favour of the defendant dated 26/9/2024, entry of records in the proprietorship section, being entry no 4 and 5 dated 26/9/2024.**
- b. The Honourable Court be pleased to direct the Land Registrar to revert the proprietorship of the certificate of title in favour of the**

plaintiffs, and a certificate of title be issued in their names, with the defendant meeting costs for the same.

c. The Honorable Court be pleased to order the defendant to pay Kshs 1,700,000/= as agreed liquidated damages as per terms of the contract.

d. The Honorable Court be pleased to order the defendant in paying a sum of Kshs 5,250,000/= Being refund for the monies used in transfer of the suit property in his name by the plaintiffs.

e. General damages and costs of the suit

2. The Plaintiffs' case is that they were the previous registered proprietors of Land Parcel No. Nairobi/Block 37/85 (*suit property*) situated in Nairobi, and that they have at all material times remained in possession and control of thereof.
3. On the 4th September, 2024, they entered into a duly executed agreement with the Defendant for the sale of the suit property at a consideration of Kshs. 35,000,000/=. Vide a deed of variation executed on the 21st November 2024, they amended the terms relating to payment of the purchase price.
4. Thereafter, on 2nd December, 2024, they executed an addendum to the deed of variation, under which the purchase price was revised to Kshs.

32,100,000/=, with the agreed sum payable on or before 17th December 2024.

5. According to the Plaintiffs, the parties further agreed that in the event the Defendant failed to honour the payment obligations under the agreement, the suit property would revert to them.
6. The Plaintiffs aver that despite transferring the property to the Defendant, who is now the registered proprietor, the Defendant has failed to pay the agreed purchase price, thereby breaching the terms of the sale agreement.
7. They further state that they have made several attempts, including meetings and formal engagements, to persuade the Defendant to honour the agreement and settle the outstanding purchase price. The same has however been futile.
8. The Plaintiffs maintain that the Defendant's conduct amounts to breach of contract the particulars of which include failure to honour the terms of the sale agreement, including the payment of the agreed purchase price, deliberately ignoring requests for compliance, falsely representing that the purchase price is available and payable, yet failing to pay the same.
9. The Plaintiffs also assert that the Defendant has purported to deal with or dispose of the property to third parties despite the purchase price remaining

unpaid, and has refused to execute the necessary documents to facilitate reversion of the property to the Plaintiffs.

10. The Defendant filed a Defence dated 3rd February, 2025, denying the Plaintiffs' allegations. While admitting to the existence of the sale agreement dated 4th September, 2024 and the subsequent deeds of variation, the Defendant contends that the agreements contained warranties which the Plaintiffs themselves breached.
11. The Defendant states that he is currently in possession of the suit property and had paid the Plaintiffs a sum of Kshs 4,900,000/= prior to discovering issues relating to the transaction.
12. He further alleges that the Plaintiffs misrepresented material facts during the transaction. In particular, he claims that the 1st Plaintiff presented himself as Samuel Kungu Mbugua, but was later discovered to be Kelvin Musyoki, and that the Plaintiffs failed to disclose that the property was allegedly the subject of a legal dispute with third parties, namely Laikatali Shah and Halima Sheikh Hirsi.
13. The Defendant also questions the authenticity of the 1st Plaintiff's signature on the sale agreement, suggesting that it may have been forged.

14. On that basis, the Defendant maintains that he withheld further payment pending clarification of those issues. He nevertheless admits the jurisdiction of this court and acknowledges that several meetings took place between the parties regarding the transaction.

B. Hearing And Evidence

1. The matter proceeded for hearing on 6th October 2025, during which PW1, Ali Adan Mohamed, testified. He adopted his witness statement dated 10th January, 2025 as his evidence-in-chief and produced the documents filed on the same date as PEXHB1 1–10.
2. In his oral testimony, PW1 stated that the Plaintiffs had complied with the terms of the sale agreement and had transferred the suit property to the Defendant. However, despite the transfer, the Defendant had failed to pay the agreed purchase price of Kshs. 35 million.
3. He explained that the deposit was to be paid through the advocate and that the 1st Plaintiff was aware of the transaction. He further clarified that Kevin Musyoki is his friend and not a party to the agreement.
4. PW1 also stated that Mr. Shah and Halima had laid claim to the property but had failed to substantiate their claims or appear when summoned by the Lands Office. He therefore urged the court to cancel the title issued to the Defendant and revert the property to the Plaintiffs.

5. During cross-examination, PW1 conceded that the demand letter dated 18th December 2024 referred to an outstanding balance of Kshs. 32,100,000/=.
- He also acknowledged that no evidence had been produced to show payment of capital gains tax. He confirmed that the Defendant had paid the deposit and that under clause 10 of the agreement, he had given warranties that third-party claims to the property had been resolved as at April 2024.
6. He further stated that the 1st Plaintiff had executed a power of attorney in his favour, although the same had not been included among the filed documents.
7. During re-examination, PW1 explained that the sum of Kshs. 2.9 million related to his commission as a broker, which had not been paid. He also testified that the Plaintiffs had instituted proceedings against the advocate for breach of a professional undertaking.
8. PW1 further maintained that at the time the parties entered into the agreement on 4th September, 2024, the Defendant had been informed of the third-party claims and had been provided with copies of correspondence from the DCI and the DPP relating to those claims. He added that the Defendant did not refuse to execute the deed of variation.
9. The Defendant did not call any witnesses.

C. Submissions

10. The Plaintiffs filed submissions on 18th November 2025. Counsel submitted that the parties executed a valid sale Agreement, deed of variation, and addendum in compliance with **Section 3(3)** of the **Law of Contract Act**.
11. They argued that the Defendant failed to fulfil his contractual obligations, thereby breaching the agreement and entitling them to cancellation of the title to Nairobi/Block 37/85 and reversion of the property to them.
12. On liquidated damages, Counsel relied on the terms of the deed of variation and addendum, which provided for forfeiture of 10% of the deposit upon breach asserting that since the agreed deposit was Kshs. 17,000,000/=, Kshs. 1,700,000/= will suffice.
13. With respect to reimbursement of Kshs. 5,250,000/= being the sums used in the transfer, Counsel submitted that the documentary evidence demonstrated that the suit property had in fact been transferred to the Defendant as defined under **Section 37(2)** of the **Land Registration Act**. Counsel also relied on **Law Society of Kenya vs Kenya Revenue Authority & another [2017] eKLR**, which cited **Underwood v Revenue and Customs Commissioners**, for the proposition that disposal occurs upon actual transfer of property.
14. On the applicable burden of proof, Counsel relied on **Sections 107, 108 and 109** of the **Evidence Act, Cap 80** and the decisions in **Mumbi M’Nabea v**

David M. Wachira [2016] eKLR and **Maria Ciabaitaru M'mairanyi & others vs Blue Shield Insurance Co. Ltd [2005] 1 EA 280**, to submit that civil claims are determined on a balance of probabilities and that once a party establishes a prima facie case, the evidential burden shifts to the opposing party.

15. It was urged that as the Defendant neither testified nor adduced evidence in support of his defence, his pleadings remained mere averments. Reliance in this regard was placed on **CMC Aviation Ltd vs Kenya Airways Ltd (Cruisair Ltd) [1978] KLR 103**.

16. Finally, Counsel submitted that the Defendant's breach deprived the Plaintiffs of the benefit of their property without receipt of consideration, thereby entitling them to damages. Reliance was placed on **Anson's Law of Contract, 28th Edition**.

23. The Defendant filed submissions on 24th December 2025. Counsel submitted that under **Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya**, the burden of proof lies with the party asserting a fact, and the standard in civil cases is proof on a balance of probabilities. It was asserted that as expressed in **Peter Kariuki v Attorney General [2015] eKLR**, the Plaintiffs bore the obligation to prove their case notwithstanding that the Defendant did not call a witness.

24. On the issue of damages for breach of contract, Counsel submitted that the primary remedy is compensation intended to place the injured party in the position they would have been had the contract been performed.
25. Where no actual loss is proved, only nominal damages are awardable. Cited in support was **Standard Chartered Bank Limited v Intercom Services Ltd & Others, Civil Appeal No. 37 of 2003 [2004] eKLR**, and **Rwakahaya v Attorney General [2009] eKLR**.
26. Counsel further submitted that the Plaintiffs' claims for Kshs. 1,700,000/= and Kshs. 5,250,000/= constituted special damages that were neither specifically pleaded nor strictly proved. In support of this position, reliance was placed on **Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177**, **Charles Chege Kimani v Kenya Commercial Bank Ltd [2014] eKLR**, and **Mochama v Ogoti [2025] KEHC 1468 (KLR)**, where the courts affirmed the principle that special damages must be expressly pleaded and strictly proved.
27. It was also argued that the Plaintiffs could not simultaneously seek rescission of the contract and enforcement of monetary claims arising from the same transaction. Counsel relied on **Samuel Kamau Macharia v National Bank of Kenya Ltd [2018] eKLR** and **National Bank of Kenya**

Ltd v Pipeplastic Samkolit (K) Ltd [2001] eKLR for the principle that a party cannot approbate and reprobate or pursue inconsistent remedies.

28. On costs, Counsel urged the court to exercise its discretion judiciously guided by the exposition in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others, Supreme Court Petition No. 4 of 2012 [2014] eKLR.**

D. Analysis and determination

29. Having considered the pleadings and evidence, the sole issue that arises for determination is:

I. Whether the Plaintiffs have established their case on a balance of probabilities?

30. In this suit, the Plaintiffs seek cancellation or revocation of the certificate of title in respect of Land Parcel No. Nairobi/Block 37/85 issued to the Defendant on 26th September, 2024 and reversion of the suit property to them and attendant damages arising from what they deem breach of the contract for the sale of the suit property.

31. On his part, the Defendant does not deny the existence of the sale agreement and the subsequent variations, nor does he deny that the suit property was transferred into his name. His defence is that he withheld further payment

after allegedly discovering breaches of warranties by the Plaintiffs, including alleged misrepresentation as to the identity of the 1st Plaintiff and the existence of a dispute over the suit property involving third parties.

32. **Halsburys Laws of England, Vol. 17** at paragraph 260 defines proof as follows:

“Proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

33. Under **Sections 107, 109 and 112** of the **Evidence Act, Cap 80**, the party asserting a fact must prove its existence, and the burden regarding particular facts lies with the party who seeks the court to believe it, especially where such facts fall within that party’s knowledge.

34. Kenyan jurisprudence affirms that the applicable standard in civil cases is proof on a balance of probabilities, meaning the court evaluates the evidence

to determine which version of events is more probable. [See **Mumbi M’Nabea v David M. Wachira**[2016] KECA 773 (KLR), and **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others, Presidential Election Petition No. 1 of 2017** [2017] eKLR.

35. It must also be borne in mind that even if a Defendant does not testify, as in this case, a Plaintiff is not relieved of his duty to establish his case. As the Court of Appeal observed in **Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau** [2016] eKLR, that the failure by a defendant to adduce evidence does not, without more, mean that the plaintiff’s case is automatically proved on a balance of probabilities.

36. As aforesaid, the Defendant did not file any witness statement and did not call any witness to adduce oral evidence. From the statement of defence filed, he does not deny that the suit property, Nairobi/Block 37/85, was initially registered in the name of the Plaintiffs before the transfer to his name.

37. He also admits the existence of the sale agreement dated 4th September, 2024, and the deeds of variation of the agreement dated 21st November, 2024, on the same terms of payments. A further addendum was executed on

2nd December 2012, which changed the purchase price to Kshs 32,100,000/=.

38. So why does the Defendant contest the claim by the Plaintiffs? The answer is found in paragraph 9 of the statement of defence, where he states thus:

“He has already deposited with the plaintiffs an amount totalling Kshs 4,900,000.00 when the defendant realised that the plaintiff is in breach of warranties in the agreement dated the 4th September 2024 as below:

a. The gentleman who presented himself and signed documents as SAMUEL KUNGU MBUGUA, the 1st Plaintiff herein, was a man known as KELVIN MUSYOKI. This was discovered after the defendant sent money via M-pesa to the purported 1st Plaintiff and made this discovery.

b. The plaintiffs were in breach of warranties, (a), (c) and (e) among others in the sale agreement dated the 4th of September 2024 since the defendant discovered that the property was the subject of a legal tussle as late as 15th November 2024 between the “plaintiffs” and 3rd parties, namely Laikatali Shah and Halima Sheikh Hirsi.”

39. These statements in the defence remain mere allegations which were not supported by any evidence. Despite this status, the Defendant was right to submit that the burden of proof remains on the Plaintiff. He supported this argument, citing the holding of the Court of Appeal in **Peter Kariuki v Attorney General [2015] eKLR**, which restated the principle that the legal burden never shifts; the party who would fail if no evidence were adduced remains responsible for proving their case.

40. In an effort to establish their case, the Plaintiffs produced the three contractual instruments executed between the parties, including the sale agreement dated 4th September, 2024. Clause 9 of the agreement, titled “failure to complete,” sets out the circumstances constituting default and the consequences or penalties arising from such default. It provided that:

a. 10% of the deposit of the price being the agreed liquidated damages shall accrue and be payable to the vendor from the monies held by the Vendor. Subsequently, the sale agreement shall stand rescinded.

b. Cover the cost of transferring the property back to the Vendor.

41. In this case, there is no denial that the suit property was transferred to the name of the Defendant. The Plaintiffs produced a copy of the title bearing his name. There is also no denial that the Defendant did not pay the balance

of the purchase price despite the Plaintiffs having performed their obligations. The Plaintiffs also extended the time for the Defendant to comply, but he still neglected and or failed to comply.

42. The non-performance of the Defendant's obligation thus invokes implementation of the penalties, first an order of refund for the cost of registration of the suit property into his name, second for him (Defendant) to meet the costs of retransfer the suit title into the name of the Plaintiffs at the Defendant's costs and third to pay the Plaintiffs the liquidated damages.

43. The Defendant submitted should the Plaintiffs succeed, they will recover the property in full while the Defendant, having already paid part of the purchase price amounting to Kshs. 2,900,000/=, loses both the property and the sums paid. This is indeed the position and the court finds that the Plaintiffs suffer no loss capable of compensation beyond nominal damages. Any order requiring the Defendant to pay additional sums would amount to unjust enrichment of the Plaintiffs.

44. The Defendant does not oppose that the retransfer will incur a cost, but he did not suggest an alternative method of registration that would avoid payment of statutory fees. There was no evidence to demonstrate that the transfer and registration of the title into the Defendant's name was at his

expense. Therefore, I find no reason why the Plaintiffs should not be the ones to bear both costs merely because the Defendant is losing the land.

45. It has been held that Courts cannot rewrite contracts nor import terms and conditions that do not form part of a contract. Scrutton L. J in **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592**, held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract.”

46. The Court is bound to give effect to the intention of the parties as expressed in their agreement. This position was affirmed by the Court of Appeal in **Andrew Kiprof Ronoh v Vitalis Sunguti Ligare & Another [2018] eKLR**, where the Court awarded interest upon breach after finding that the parties had expressly provided for a penalty in the event of default, and the trial court had failed to enforce that contractual provision.

47. Although the Plaintiffs did not specify the costs of retransfer amounting to Kshs 5,250,000/= in the body of the plaint, the agreement clearly stipulated that the defaulting party should bear the costs of retransfer. Furthermore, the Plaintiff included this amount within the reliefs, thereby informing the

Defendant of the sum being claimed for transferring the title into his name and subsequently registering it back in the Plaintiffs' name.

48. The Plaintiff did not produce all the receipts for the previous transaction, except a bank transfer of Kshs 1,400,050 dated 26.9.2024, paid as stamp duty. The Defendant did not plead that he made this payment. This, besides evidence of the suit title reading the Defendant's name, is proof that there were costs incurred and future costs of the retransfer. I am therefore convinced that the Plaintiff has established a basis for the claim of Kshs 5,250,000/=.

49. Although it was pleaded as special damages and therefore required under the law to be strictly proved, I am persuaded to grant the award despite want of proof of all receipts for the first transaction. This is on two accounts, first that the Plaintiffs cannot produce receipts for retransfer yet to be effected. Second, I am guided by the decision in *Kimani v Attorney General* (1969) E. A 502, where Sir Charles Newbold said thus;

“There are a number of decisions in East Africa to the nature and measure of damages. Broadly, they are to this effect; that whether it be contract or tort, damages are to be compensatory, save in exceptional circumstances. They are compensatory when they give back to the Plaintiff what he has lost. In other words, the Plaintiff so far as money

is concerned is to be put in the position in which he was immediately prior to the wrongdoing which gave rise to his complaint.”

50. On the liquidated damages, the sale agreement also stipulated how it was to be calculated at 10% of the deposit, and in this case, the monies held as a deposit is Kshs 17,000,000/=. Hence, the Plaintiffs’ claim for the sum of Kshs 1,700,000/= is merited.

51. The conclusion of the foregoing analysis is that I am satisfied the Plaintiffs have proved their case.

52. Accordingly, I enter judgment in their favour by granting the reliefs under **(a) to (d)** in the Plaint. They are also awarded the costs of the suit. The Defendant is allowed 30 days to comply with the decree. Failure to do so, the Plaintiffs are at liberty to execute.

Dated, signed and delivered at Kisii virtually this 12th day of March, 2026, and uploaded on CTS.

A. OMOLLO

JUDGE