



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MILIMANI LAW COURTS, NAIROBI**  
**ELC CASE NO E146 OF 2025**

**TRIDEV BUILDERS COMPANY LIMITED.....**  
**PLAINTIFF**

**-VERSUS-**

**ASOOL TRADING AND INVESTMENT LIMITED.....**  
**DEFENDANT**

**JUDGEMENT**

**Background**

1. This matter is in relation to land title No 21688/6 herein referred to as the suit property.
2. The plaintiff avers that they entered into a sale agreement with the defendant for purchase of the suit property for a consideration of one hundred and eleven million (Kshs.111, 000,000/=
3. That the defendant paid a deposit of Kshs.11, 100,000/= with the agreement indicating that the balance was to be paid on or before 90 days. That the 90 days completion period ended and the defendant had failed to own up to their obligation and pay up the balance.
4. That at the time of the agreement the defendant was a tenant and it was agreed that the tenancy would merge with the sale hence the

defendant was to pay the rent and still pay up the balance which to date the defendant has not done and continues to enjoy the property without honoring his part of the agreement necessitating the need to issue a notice on recession of the contract and necessitating the filing of this suit through the plaint dated 4<sup>th</sup> March 2025 on grounds of breach of contract seeking for the following orders

- i. An order for Specific performance against the defendant pursuant to the agreement
- ii. Rental income arrears of Kenya shillings seven million six hundred and eighty thousand (Ksh 7,680,000/=) plus VAT being rent arrears from the 15<sup>th</sup> February 2024 to the 15<sup>th</sup> February 2025
- iii. Rent plus VAT till the date of vacant possession of the suit property is obtained by the plaintiff
- iv. Plaintiff's advocates scale fees towards drawing and preparing the agreement for sale dated 15<sup>th</sup> February 2024 and deed of variation.
- v. Interest on (a), (b), (c) and (d) above
- vi. Payment in full of all utility bills till the date vacant possession of the suit property is obtained by the plaintiff
- vii. Vacant possession of the suit property in tenantable condition
- viii. Costs of the suit
- ix. Any other relief as the court may deem appropriate

5. The defendants were duly served with summons to enter appearance but failed to enter appearance or participate in the hearing despite service of the hearing notice evidenced by the filing of affidavit of service of one Lila Koki Kyalo sworn on the 13<sup>th</sup> May 2025

6. The Matter proceeded for formal proof hearing on 4<sup>th</sup> December 2025 Manji Kanji Patel (PW1) adopted his witness statement dated 24<sup>th</sup> April 2025 as his evidence in chief. He also indicated that he had the authority to testify on behalf of the plaintiff company evidenced by the letter of authority dated 10<sup>th</sup> January 2025. He stated that plaintiff entered into sale agreement with the defendant over the suit property and that the defendant had breached the terms of the agreement dated 15<sup>th</sup> February 2024 by failing to pay the balance price within 90 days as stipulated in the agreement. That the defendant was a tenant and decided to purchase the suit property and the agreement was that the tenancy would merge in favour of the purchaser upon payment of the deposit hence the defendant was still required to pay rent.

He indicated that the defendant has failed to clear the balance price and also pay the rents and asked the court to order that they pay the balance or they move out.

#### Plaintiff's submissions

The plaintiff filed submissions dated 27<sup>th</sup> January 2026. They submitted that as in their plaint the main prayers were for specific performance having proved breach of contract by the defendant.

Counsel relied on the court of appeal case of **National Bank of Kenya Vs Pipelastik Samkolit K Limited** where the court indicated that the parties were bound by their contract and that the defendant was bound to pay up the balance in the contact agreement

The other issue submitted on was on the giving of vacant possession as an alternative remedy and the plaintiff submitted that the defendant having failed to honour his part in the agreement should not benefit from the same agreement and should give back possession to the plaintiff. That further the defendant had not been paying rent as well and benefitting at the expense of the plaintiff. Counsel also quoted and relied on section 107 of the evidence act and the case of **Alghussein treatment Vs Elton College 91991** **1 All ER 267** .

He submitted since the issue was not based on ownership determination the court is called upon to make a determination on specific performance and issuance of vacant possession

### **Analysis and Determination**

7. Having looked at the pleadings filed by the Plaintiffs herein, the written submissions, the authorities cited, the issues for determination is

Whether the plaintiffs are entitled to the orders sought in the plaint of specific performance?

8. In spite of the fact that the evidence was uncontroverted the court still has to be satisfied that the Plaintiff has proved that the court

should grant the orders sought. This was captured in the decision in **Kenya Power & Lighting Company Limited vs Nathan Karanja Gachoka & Another [2016] eKLR**, in which the Court stated *"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not."* The same sentiments were echoed in the case of *Gichinga Kibutha vs Carooline Nduku (2018) eKLR* *"It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."*

9. From the uncontroverted evidence before the court, it is clear that the Plaintiff is the registered proprietor of suit property .Further, the Plaintiff's testimony and the official records establish that the Defendant did enter into a sale agreement dated and has only paid the deposit of Kshs.11, 100,000/=/leaving an outstanding balance of Kshs.99,900,000 /= which was to be paid within 90 days a signing the agreement and which balance has not been paid implying breach of the contract.

The plaintiff has further attached to his list of documents correspondences as between the plaintiff and defendant's advocates where they had made intentions to sign the deed of

variation of the agreement but the defendant did not get back on the same frustrating the entire process until the completion date. The plaintiff demonstrated willingness to engage the defendant who unfortunately was not desirous of meeting the terms of the agreement. The correspondences show lost interest in the transaction and that the defendant had no intention of completing the same. I would rely on the case highlighted by the plaintiff that is **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another [2001] eKLR where it was held as follows:**

*“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported): “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”*

The subject matter agreement stipulates in Clause 14.3 that in the instance of the purchaser’s failure to pay up the balance price upon the expiry of the completion date, the vendor shall issue a 21 days completion notice to the purchaser to remedy the same before expiration of the notice.

It is only upon the purchaser's failure to comply with the notice that the vendor may rescind the agreement and refund the balance.

From the correspondences it is clear that the lack of communication from the defendant frustrated the plaintiff to the extent that the plaintiff served a notice of recession of contract. The defendant did not participate in these proceedings hence has given no reason for the continued delay for not paying the balance of the purchase price more than two years after the completion date in February 2024. The upshot is that the notice issued by the plaintiff purporting to rescind the Sale Agreement was lawfully issued. It therefore follows that there is no contract in place to warrant for specific performance. **In Reliable Electrical Engineers Ltd. vs Mantrac Kenya Limited (2006) eKLR**, the court stated that: *“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles ”“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages 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.”*

In this case there are other alternative remedies that can be given hence the prayer for specific performance fails.

Whether the defendant should grant vacant possession

Having established that there was breach of contract, the plaintiff is therefore entitled to have his property back in his possession as the defendant cannot continue benefiting on what he has rights over. The agreement that gave provision for the tenancy having been terminated, the tenancy also terminated making the occupation of the defendant illegal It is therefore in order for the plaintiff to be given back vacant possession and be restored back to the position it was in before the entering into the contract. Since the property was already in the possession of the defendant was lost in the cause of the period was the monthly rental income from the time of completion date to when vacant possession is to be given.

**Final disposition**

For the foregoing reasons, the plaint dated 4<sup>th</sup> March 2025 is allowed on the following terms

- a) The defendant to settle the Rental income arrears of Kenya shillings seven million six hundred and eighty thousand (Kshs.7,680,000/=) plus VAT being rent arrears from the 15<sup>th</sup> February 2024 to the 15<sup>th</sup> February 2025.

- b) The defendant to pay rent plus VAT till the date of vacant possession is given to the Plaintiff.
- c) Interest on (a), and (b) above.
- d) The defendant to deliver Vacant possession of the suit property in tenantable condition within 30 days of this judgment.
- e) Costs of the suit awarded to the plaintiff.

**It is so ordered.**

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **23<sup>rd</sup>** day of **March, 2026.**

**MOHAMMED N. KULLOW**  
**JUDGE**

**Judgment delivered in the presence of: -**

**Ms. Koki**..... for the Plaintiff

**N/A**..... for the Defendant

**Philomena W.**..... Court Assistant