

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. E075 OF 2022**  
**CONSOLIDATED WITH ELC CASE NO. 139 OF 2022**

**HANIEL KINYUA GAIMU**

**HOLINESS SAMBO KICHOI**

**MOSES WELIME SIBWECHÉ**

**BENARD WAMBUA MAKENZI**

**ROSENDANU MWANZAU**

**PATRICK WILSON OBOGO**

**BELLAH QUEEN OKOTH**

**PAUL KARIUKI NGUNJIRI**

**MARY WANJUGU WAWERU ..... PLAINTIFFS**

**VERSUS**

**DAVID MUREITHI T/A KENYA PROJECTS**

**BUDGET & EXECUTIVE HOMES .....**

**DEFENDANT**

**JUDGMENT**

**Background**

1. By a Complaint dated 8<sup>th</sup> June 2022, as filed in Mombasa ELC Case No. E075 of 2022; Haniel Kinyua Gatimu and Eight (8) others (the 1<sup>st</sup> set of the Plaintiffs) prays for judgment

against David Mureithi Kanyi T/A Kenya Projects Budget & Executive Homes (the Defendant) for an order of specific performance to issue compelling the Defendant herein to forthwith supply the Plaintiffs with the lease title documents for Bungalow Numbers 3, 40, 59, 52, 54, 55 and 56 situated on sub-division Number MN/1/343.

2. In the alternative, the Plaintiffs pray for an order that in default of the Defendant supplying the said leases to the Plaintiffs, the Court Registrar be authorized to execute any documents that will lead to the sub-division of the said parcel number MN/1/434 and grant of the leases to the Plaintiffs.
3. By another Plaint dated 21<sup>st</sup> November 2022 as filed in Mombasa ELC Case No. 139 of 2022; Noel Ngomeni Mbaru and three (3) others (the 2<sup>nd</sup> set of the Plaintiffs) sought for similar orders against the same David Mureithi Kanyi (the Defendant) in relation to Maisonette Numbers 65, 53, 63, and 819 situated on the same parcel of land, MN/1/343.
4. The prayers by the two sets of Plaintiffs arise from the Plaintiffs' contention that on diverse dates they had entered

into a separate agreement with the Defendant for the purchase of the said houses. It was their case that the Defendant was to develop the purchased properties on the suit property and thereafter hand over vacant possession and title documents thereof to the Plaintiffs.

5. The Plaintiffs aver that despite performing their obligations as stipulated in their agreements with the Defendant, the Defendant has failed to sub-divide the property and to grant them their respective leases as agreed. In addition, the Plaintiffs aver that the Defendant has in breach of his contractual obligations, failed to actuate the operation of the Management of the Company as required under the agreements.
6. Despite entering appearance, David Mureithi Kanyi (the Defendant) did not file a Statement of Defence in response to the Plaintiffs' claims.
7. On 27<sup>th</sup> April 2023, the two suits-Mombasa ELC Case No. E075 of 2022 and ELC Case No. 139 of 2022 were consolidated with ELC Case No. E075 of 2022 as the lead file.

8. At the trial herein, the Plaintiffs called a total of nine (9) witnesses in support of their case. The Defendant neither testified at the trial nor did he call any witnesses in his defence.
9. I have carefully perused and considered the pleadings filed herein, the testimonies made by the Plaintiffs' witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions placed before the Court by Mr. Jengo, Learned Counsel for the Plaintiffs.

### **Analysis and Determination**

10. The Plaintiffs herein have collectively sought for orders of specific performance following various separate sale agreements and addenda entered into between them and the Defendant on diverse dates between the years 2015 and 2018.
11. It was the Plaintiffs' case that the agreements entered into with the Defendant had required the Defendant to develop the purchased bungalows/maisonettes on the parcel of land known as MN/1/343 (the suit property) and thereafter handover vacant possession and title documents thereof to

the Plaintiffs. The Plaintiffs told the Court that despite performing their obligations as required under the agreements executed with the Defendant, the Defendant has to-date failed to sub-divide the suit property and to grant them their respective leases. In addition, the Plaintiffs told the Court that the Defendant had in breach of his contractual obligations, failed to actuate the operation of the management company that was to run their estate as required under the agreements.

12. In support of their case, the Plaintiffs produced copies of various agreements executed between themselves and the Defendant. In addition, the Plaintiffs produced copies of various correspondences exchanged between themselves and the Defendant in respect of the subject matter herein.
13. A perusal of all the Sale Agreements exhibited by the Plaintiffs reveals that Clause A to F of the introductory section provided as follows:

**“WHEREAS:**

- A. The vendor has erected or is in the process of erecting one maisonette and other facilities which comprise part of the estate on the land;**
- B. The Vendor will sell and the Purchaser will purchase the property for the purchase price subject to the terms and conditions hereinafter provided;**
- C. The transfer of the property from the vendor to the purchaser is in consideration of the payment of the purchase price and shall be by way of the Lease;**
- D. The construction of (the) Maisonettes will be in accordance with or substantially in accordance with the Building Plans;**
- E. The Vendor has formed a management company (hereinafter referred to as the “Management Company”) for the purpose of receiving service charge payments from owners and occupiers of the maisonettes and for the purpose of managing the Estate on behalf of the Maisonettes and to which the reversionary interest in the land shall be passed; and**
- F. The Vendor following the transfer of the property to the Purchaser will transfer or allot one (1) share in the Management Company to**

**the Purchaser in accordance with the terms hereof.”**

14. In regard to the Sale of the Property, Clause 3.3 of the sale agreements provided thus:

**“3.3. The property is sold with vacant possession following the Completion Date and upon the full Purchase Price and all outgoings including interest together with legal charges and all other disbursements including stamp duty and other incidental costs as set out in special condition (A) below having been paid in full by the Purchaser.”**

15. From a further perusal of the agreements each one of them provided a “Completion Date” which was listed in the “First Schedule” to the Agreement. It was apparent that the Defendant had been unable to comply with those dates in terms of completion and that a number of the parties had to execute an addendum to their respective sale agreements revising the Completion Dates. Frustrated by this state of affairs, and by a demand letter dated 22<sup>nd</sup> June 2020, the Plaintiffs caused their Advocates on record to demand that

the Defendant specifically performs his obligation under the agreements as pertaining to completion of the transaction and to supply the required leases to the Plaintiffs.

16. In response to the said demand, the Defendant's Advocates - Maina Kalee & Co. wrote back on 20<sup>th</sup> July 2020 denying that their clients were on the wrong and informing the Plaintiffs that the Defendant was still on course in fulfilling his contractual obligations and that he had no intention whatsoever of breaching his obligations. It was apparent that some two (2) years later when this suit was filed, the Plaintiffs were yet to be supplied with the registered leases for the portions of land they had occupied between the years 2015 and 2018.

17. As the Court of Appeal observed in ***Gharib Suleiman Gharib -vs- Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998:***

**“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.”**

18. Speaking to the same issue in ***Reliable Electrical Engineers (K) Ltd -vs- Mantrac Kenya Limited (2006) KEHC 2855 KLR*** Maraga J., (as he then was) held as follows:

**“Specific Performance, like any other equitable remedy, is discretionary and the Court will only grant it on the well settled 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 some mistake or illegality, which makes the contract invalid or unenforceable. Even where 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 claimants can readily get the equivalent of what he contracted for from another source. Even where damages**

**are not an adequate remedy specific performance may still be refused on the grounds of undue influence or where it will cause severe hardship to the Defendant.”**

19. In the matter herein, the Defendant did not challenge the averments made in the Plaintiffs pleadings and the testimonies of the Plaintiffs’ witnesses. The Plaintiffs’ evidence that they are home owners in occupation and possession of sections of the suit property thus remains uncontroverted. Land as it were is a peculiar item and I am not persuaded in this instance that damages can be deemed as an adequate remedy for the Defendant’s breach.
20. The Plaintiffs herein have demonstrated that they entered into various agreements with the Defendants, that they had performed their side of the bargain and that the Defendant had refused, failed and/or neglected to perform his part. The Defendant has not stated that he will have any difficulty in performing his obligations under the agreements. He has also not claimed non-compliance on the part of the Plaintiffs with any clause in the executed agreements.

21. In the premises, I was persuaded that the Plaintiffs have proved their case to the required standards. Accordingly, I hereby enter judgment for the 13 Plaintiffs in terms of prayers 'a' to 'f' of the Plaint dated 8<sup>th</sup> June 2022 and Prayers 'a' to 'd' in the consolidated suit dated 21<sup>st</sup> November 2022, with costs.

22. For the avoidance of doubt I decline to grant the prayers expressed in the alternative.

23. It is so ordered.

**Judgement dated, signed and delivered in open court and virtually at Mombasa this 30<sup>th</sup> day of April, 2026.**

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**J.O. OLOLA  
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Jengo Advocate for the Plaintiffs
- c) No Appearance for the Defendants