



**Ogutt v Kairu Enterprises Limited (Environment & Land Case
E203 of 2022) [2024] KEELC 986 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 986 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E203 OF 2022**

JO MBOYA, J

FEBRUARY 26, 2024

BETWEEN

SIMON MANNON OGUTT PLAINTIFF

AND

KAIRU ENTERPRISES LIMITED DEFENDANT

JUDGMENT

Introduction And Background

1. The Plaintiff herein has approached the Honourable court vide Plaint dated the 14th June 2022; and in respect of which the Plaintiff has sought for the following reliefs [verbatim]
 - i. A declaration that the Plaintiff is the bona fide owner of House Number 32 of Nairobi/Block 82/2775.
 - ii. A permanent injunction restraining the Defendant, its agents, successors or assigns from selling, transferring, disposing or in any other way offering House Number 32 of Nairobi/Block 82/2775 to any other Party except the Plaintiff.
 - iii. An order of Specific Performance compelling the Defendant to facilitate the processing and issuance of the title of House Number 32 of Nairobi/Block 82/2775 to the Plaintiff.
 - iv. Costs of the suit and Interests at court rates
2. Upon being served with the Plaint and summons to enter appearance [STEAs], the Defendant herein duly entered appearance, but neither filed a Statement of Defense nor List of Documents and witness statement.



3. Be that as it may, the subject matter came up for pre-trial directions on the 20th November 2023, whereupon the Plaintiff intimated to the court that same has duly filed and served all the requisite documents; as well as the witness statement to be relied upon by the Plaintiff during the trial.
4. Upon being satisfied that the Plaintiff has duly filed the requisite documents and the witness statement, the instant matter was set down for hearing/formal proof.

Plaintiff's Case:

5. The Plaintiff's case revolves around the Evidence of one witness; namely, Simon Mannon Ogutt, who testified as PW1.
6. It was the testimony of the witness that same received a Letter of offer dated the 12th May 1993; from the Defendant herein, who offered to sell to and in favor of the Plaintiff House Number 32 situate on Nairobi/Block 82/2775, [hereinafter referred to as the suit property]. Furthermore, the witness averred that the Letter of offer intimated that the designated house would be sold at a consideration of kes.1, 600, 000/= only.
7. It was the further testimony of the witness that upon receipt of the Letter of offer, same proceeded to and indeed accepted the terms thereunder. In addition, the witness also averred that prior to and before the execution of the sale agreement, the Defendant herein also showed unto the witness a copy of the Certificate of lease, which confirmed that the suit property, [wherein the designated house was situated], belonged to and was registered in the name of the Defendant.
8. On the other hand, the witness testified that upon being shown the copy of the Certificate of lease and on the assurance of the Defendant that the suit property was not subject to any encumbrance, same [witness] proceeded to and executed the sale agreement.
9. Other than the foregoing, the witness also averred that same thereafter proceeded to and paid the sum of Kes.1, 600, 000/- only, which was the total purchase price/ Consideration, alluded to and agreed upon at the foot of the sale agreement.
10. Be that as it may, the witness testified that despite having fully paid the agreed consideration, the Defendant herein failed and/or neglected to transfer the ownership of the named house to and in favor of the witness. In any event, the witness averred that same made various endeavors to procure and obtain the completion documents from the Defendants but to no avail.
11. Nevertheless, the witness averred that after several endeavors to procure and obtain the completion documents, albeit without success, the witness discovered that the suit property was indeed charged to Pan African Bank Ltd [in liquidation]. In any event, the witness added that the fact that the title of the suit property was charged to the named banking institution was never disclosed by the Defendant.
12. Furthermore, it was the testimony of the witness that upon discovery that the title of the suit property was charged to Pan African bank [in liquidation] same (witness) instructed his advocate to write a letter to the Director, Deposit Protection Fund [who were the liquidating agents] with a view to ascertaining the status of the title.
13. It was the further evidence of the witness that the Director, Deposit Protection Fund, thereafter responded to his [witness] request to ascertain the status of the title of the suit property by confirming that indeed the title of the suit property was under the custody of the deposit protection fund and that same had been charged to Pan African Bank [in liquidation].



14. Additionally, the witness testified that on or about the 14th February 2019, the liquidating agent, namely, the Deposit Protection Fund, again confirmed that the title of the said property was still under her custody pursuant to the charge that had hitherto been registered in favor Pan African bank [in liquidation]. Furthermore, the witness added that the liquidation agents advised him (witness) to liaise with the Defendant with a view to have the charge discharge.
15. Other than the foregoing, the witness testified that on the 27th May 2019, the Defendant herein acknowledged and confirmed receipt of the entire purchase price which was agreed at by the Parties. At any rate, the witness added that after acknowledging receipt of the full purchase price, the Defendant herein requested him [witness], to draw the transfer instrument and also to prepare Deed of Indemnity, towards procuring the transfer and registration of the suit property in his favor.
16. Nevertheless, the witness averred that his [witness] advocate could not prepare the transfer instrument and the Deed of Indemnity, either as proposed by the Defendant or at all because same [witness] had not been issued with the requisite completion documents relative to the transfer of the designated house in his favor.
17. On the other hand, the witness averred that the Defendant herein is malicious and is guilty of breach of the sale agreement insofar as same neither disclosed nor informed the witness that the title of the suit property was at the material point in time charged to Pan African Bank [in liquidation].
18. Other than the foregoing, the witness referred to the witness statement dated the 14th June 2022; and thereafter sought to adopt and rely on same. For coherence, the witness statement under reference was thereafter duly adopted and admitted as the Evidence- in- chief of the witness.
19. Additionally, the witness alluded to the List and Bundle of documents dated the 14th June 2022; containing a total of 56 documents and thereafter implored the court to adopt and admit same as Exhibits. Instructively, the various documents alluded to at the foot of the List and Bundle of documents were thereafter admitted and constituted as Exhibit P1 to P56, respectively.
20. Having adopted the witness statement, as well as the various documents itemized at the foot of the List of documents dated the 14th June 2022, the witness herein thereafter implored the court to proceed and grant the reliefs sought at the foot of the Plaintiff dated the 14th June 2022.
21. With the foregoing testimony, the Plaintiff's case was duly closed.

Defendant's Case:

22. Suffice it to point out that the Defendant herein duly entered appearance, but neither filed a Statement of Defense nor any List and Bundle of documents.
23. Furthermore, even though the Defendant was at liberty to attend court and cross examine the Plaintiff on the basis of entering appearance, same failed to attend court and participate in the proceedings. For good measure, the Defendant's case was duly closed without any evidence having been tendered and/ or offered.

Parties' Submissions:

Plaintiff's Submissions:

24. The Plaintiff herein filed written submissions dated the 6th February 2024; and wherein same has highlighted and canvassed three [3] salient issues for due consideration by the Honourable court.



25. Firstly, Learned counsel for the Plaintiff has submitted that upon receipt of the Letter of offer, the Plaintiff herein proceeded to and accepted same. Furthermore, Learned counsel added that thereafter the Plaintiff paid the agreed purchase price which payment was duly acknowledged and confirmed by the Defendant.
26. To the extent that the Plaintiff duly paid the purchase price agreed upon at the foot of the sale agreement, Learned counsel for the Plaintiff has thus submitted that the Plaintiff herein is therefore a bona fide purchaser for value in respect of the designated house, situate on the suit property.
27. In support of the submissions that the Plaintiff is a bona fide purchaser for value, Learned counsel for the Plaintiff has cited, inter-alia the holding in the case of Lawrence Mukiri vs Attorney General & 4 Others (2013)Eklr; as well as Black's Law Dictionary, 8th Edition, pertaining to the definition of a bona fide purchaser for value.
28. Secondly, Learned counsel for the Plaintiff has also submitted that insofar as the Plaintiff complied with and/or adhered with the terms of the sale agreement, including payment of the entire purchase price, the Plaintiff herein is therefore entitled to be protected by the court.
29. Further and in addition, Learned counsel for the Plaintiff has similarly contended that the Plaintiff has made a proper case for the grant and issuance of an order of Permanent injunction, to restrain the Defendant from interfering with the Plaintiff's possession and occupation of the designated house situate o the suit property.
30. To buttress the position that the Plaintiff has established a case to warrant the grant of an order of Permanent injunction, Learned counsel for the Plaintiff has cited, inter-alia the decision in the case of Giella vs Cassman Brown (1973) EA 358; Nguruman Ltd vs Jan Bonde Nielson & 2 Others (2014)eKLR and Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003)eKLR, respectively.
31. Thirdly, Learned counsel for the Plaintiff has submitted that the Plaintiff herein has established and demonstrated a basis to warrant the grant of an order for Specific performance, to compel the Defendant to perform her part of the bargain and essentially, to execute the requisite transfer instrument to facilitate the transfer and registration of the designated house in favor of the Plaintiff.
32. To buttress the submissions anchored on the plea of specific performance, Learned counsel for the Plaintiff has cited and relied on, inter-alia, the case of Amina Abdulkadir Hawa versus Rabinder Nath Anand & Another (2012)eKLR and Reliable Electrical Engineering Ltd vs Mantrac Kenya Ltd (2006)eKLR, respectively.
33. On the basis of the foregoing submissions, learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Plaintiff has duly established and demonstrated his claim to the requisite standard.
34. Further and in any event, Learned counsel for the Plaintiff has thereafter invited the court to grant the reliefs sought at the foot of the Plaint dated the 14th June 2022.

Defendant's Submissions:

35. Other than the fact that the Defendant did not file any Statement of Defense, it is also imperative to underscore that same [Defendant] also did not file any written submissions or at all.



Issues For Determination:

36. Having reviewed the pleadings filed and upon consideration of the Evidence tendered [both oral and documentary] and finally upon taking into account the written submissions filed on behalf of the Plaintiff, the following issues for emerge and are thus worthy of determination;
- i. Whether the Defendant was seized of the requisite capacity to sell and/or alienate House No. 32 situate on L.R No. Nairobi/Block 82/2775 or otherwise.
 - ii. Whether the Plaintiff herein has established and demonstrated a basis for the grant of an Equitable order of Specific Performance or otherwise.

Analysis And Determination:

Issue Number 1 Whether the Defendant was seized of the requisite capacity to sell and/or alienate House No. 32 situate on L.R No. Nairobi/Block 82/2775 or otherwise.

37. It was the Plaintiff's testimony that the Defendant herein generated and issue a Letter of offer dated the 12th May 1993; and wherein the Defendant offered to sell to and in favor of the Plaintiff House No. 32 situate on L.R No. Nairobi/Block 82/2775 [hereinafter referred to as the suit property].
38. Furthermore, the Plaintiff testified that upon being issued with a Letter of offer, same proceeded to and accepted the terms thereunder. In any event, the Plaintiff added that same subsequently paid the entire purchase price which was alluded to and highlighted at the foot of both the Letter of allotment and sale agreement.
39. Subsequently, the Plaintiff averred that a sale agreement was prepared and thereafter executed between himself [Plaintiff] and the Defendant.
40. Be that as it may, the Plaintiff testified and intimated to the court that even though at the onset, the Defendant herein represented to the Plaintiff that the suit property was clear and devoid of any encumbrance, the Plaintiff later discovered that the suit property was indeed charged to Pan African Bank Ltd [in liquidation].
41. In any event, the Plaintiff added that the fact that the suit property was indeed charged to Pan African Bank Ltd [in liquidation] was confirmed and authenticated by the Director, Deposit Protection Fund, who were/are the Liquidation agent in respect of Pan African Bank Ltd.
42. On the other hand, the Plaintiff also averred that on or about the 14th February 2019; the Liquidation agent, namely, The Deposit Protection Fund, further reiterated and confirmed that the title of the suit property was still under her custody and possession, on account of charge which had hitherto been registered in favor of Pan African Bank Ltd [in liquidation].
43. Perhaps and with a view to putting the Plaintiff's evidence into perspective, it is appropriate to reproduce certain and salient features of the Plaintiff's evidence as enumerated in the body of the witness statement dated the 14th June 2022.
44. For ease of reference, the salient features are reproduced as hereunder;
- (8) My advocates and I made numerous request to the Defendant's advocate to prepare the transfer and submit completion documents only to be informed that the suit property was charged to Pan African Bank Ltd [in liquidation].



- [9] That I discovered the encumbrance through the Defendant's advocate vide a letter dated the 18th September 1995. There was no disclosure of the encumbrance by the Defendant prior to the execution of this agreement for sale.
- [10]] That I instructed my advocate to write a letter to the director, Deposit Protection Fund, to inquire about the status of the title. Vide a letter dated 3rd November 2004, the liquidation agent confirmed that the suit property was charged and that the tile documents cannot be released to the Defendant unless the amount due and owed to them is fully paid.
- (12) That vide a letter dated the 14th February 2019, the liquidation agent responded to my advocates letter dated the 11th February 2019 confirming that the title to the suit property is in their possession and that they are liaising with the Defendant on the aid matter and promised to revert.
- (19) The Defendant is malicious in the sense that it failed to disclose to me that the property was charged to Pan African Bank Ltd and failed to keep promises to transfer the suit property to me since the year 1994 to date.
45. From the excerpts which have been highlighted in the preceding paragraph[s], it is evident and apparent that the title of the suit property was indeed charged to Pan African Bank Ltd [in liquidation] by and at the instance of the Defendant.
46. Furthermore, it is also crystal clear that the title of the suit property remains under the custody and possession of the Deposit Protection Fund, who are the liquidation agent on behalf of Pan African Bank Ltd [in liquidation]. Simply put, the title of the suit property remains charged and is thus encumbered.
47. Whereas the Plaintiff contends that the information that the title of the suit property was charged was not availed unto him (Plaintiff), however, there is no gainsaying that it was incumbent upon the Plaintiff to carry out and undertake due diligence over and in respect of the suit property prior to and before entering into the impugned transaction.
48. However, from the evidence tendered by the Plaintiff, what comes out clear is that the Plaintiff failed to exercise due diligence or at all; and instead chose to ride on the representation[s] which were made by the Defendant herein.
49. To my mind, having failed to exercise due diligence and to undertake the requisite search, prior to and/or before entering into the impugned transaction, the Plaintiff herein must stand or fall on the basis of his own choices.
50. Be that as it may, it is not lost on this Honourable court that where the title of a property is charged and/or mortgaged to a banking institution, the charge or mortgage supersedes the rights of the registered owner, subject only to the equity of redemption.
51. Nevertheless, prior to and before redemption of a charged property, it suffices to point out that the registered owner is prohibited and precluded from alienating, disposing of and/or otherwise dealing with the title of the property, albeit without the consent of the chargee.
52. As pertains to the subject matter, there is no evidence that the consent and/or concurrence of Pan African Bank Ltd [in liquidation], was ever sought for and/or obtained beforehand.
53. To the contrary, what is discernable from the Plaintiff's evidence is that same entered into and executed the sale agreement oblivious of the fact that the title of the suit property was charged.



54. Arising from the foregoing, the question that must now be addressed and answered, is whether the Defendant had the requisite capacity to sell and/or dispose of House No. 32, situate on the suit property, during the life span of the charge.
55. To my mind, the answer to the question alluded to in the preceding paragraph, is in the negative. For coherence, for as long as the title to the property was charged, the Defendant had no legal interest capable of being sold and/or conveyed to and in favor of the Plaintiff herein.
56. To be able to appreciate the foregoing exposition, it is important to take cognizance of the provisions of Sections 69 of the Registered *Land Act*, Chapter 300 Laws of Kenya, [now repealed], which was relevant at the material point in time.
57. For ease of reference of the said provisions are reproduced as hereunder;
69. There shall be implied in every charge, unless the contrary is expressed therein, agreements by the chargor with the chargee binding the chargor –
- a. to pay the principal money on the day therein appointed and, so long as the principal money of any part thereof remains unpaid, to pay interest thereon, or on so much thereof as for the time being remains unpaid, at the rate, at the times and in manner therein specified;
 - b. to pay all rates, taxes and other outgoings which are at any time payable in respect of the charged property;
 - c. to repair and keep in repair all buildings and other improvements upon the charged land or comprised in the charged lease and to permit the chargee or his agent, at all reasonable times until the charge is discharged and after reasonable notice to the chargor, to enter the land and examine the state and condition of such buildings and improvements;
 - d. to insure and keep insured all buildings upon the charged land or comprised in the charged lease against loss or damage by fire in the joint names of the chargor and chargee with insurers approved by the chargee to the full value thereof;
 - e. in the case of a charge of agricultural land, to farm the land in accordance with the rules of good husbandry within the meaning of any law for the time being in force governing agricultural tenancies;
 - f. in the case of a charge of land or of a lease, not to lease the charged land or any part thereof, or sublease the whole or any part of the land comprised in the charged lease, for any period longer than one year without the previous consent in writing of the chargee, but such consent shall not be unreasonably withheld;
 - g. not to transfer the land, lease or charge charged or any part thereof without the previous written consent of the chargee but such consent shall not be unreasonably withheld;
 - h. in the case of a charge of a lease, during the continuance of the charge to pay the rent reserved by the lease and observe and perform the agreements and conditions thereof, and to keep the chargee indemnified against all proceedings, expenses and claims on account of the non-payment of the said rent or any part thereof, or the breach or non-



observance of the said agreements and conditions or any of them, and, if the lessee has an enforceable right to renew the lease, to renew it;

- i. where the charge is a second or subsequent charge, that the chargor will pay the interest from time to time accruing due on each prior charge when it becomes due, and will at the proper time repay the principal money due on each prior charge; and
- j. where the chargor fails to comply with any of the agreements implied by paragraphs (b), (c), (d), (e), (g) and (h) that the chargee may spend such money as is necessary to remedy the breach, and may add the amount so spent to the principal money, and that thereupon the amount shall be deemed for all purposes to be part of the principal money secured by the charge.

58. Currently, the restriction from selling, disposing and/or alienating a property which is the subject of a Charge is governed by the provisions of Section 88 of the [Land Act, 2012](#) [2016].

59. For brevity, it suffices to reproduce the contents of the said provisions.

60. Consequently, same are reproduced as hereunder;

Implied covenant by the chargor.

88.

- (1) There shall be implied in every charge covenants by the chargor with the chargee binding the chargor—
 - a. to pay the principal money on the day appointed in the charge agreement, and, so long as any of the principal money or any part thereof remains unpaid, to pay interest on the money thereon or on so much of the money that for the time being remains unpaid at the rate and on the days and in the manner specified in charge agreement;
 - b. to pay all rates, charges, rent, taxes and other outgoings that are at all times payable in respect of the charged land;
 - c. to repair and keep in repair all buildings and other improvements upon the charged land or to permit the chargee or chargee's agent to enter the land and examine the state and condition of such buildings and improvements at after a seven days notice to the chargor until the charge is discharged;
 - d. to ensure by insurance or any other means that may be prescribed or which are appropriate, that resources will be available to make good any loss or damage caused by fire to any building on the land, and where insurance is taken out, it is done so in the joint names of the chargor and chargee with insurers approved by the chargee and to the full value of all the buildings;
 - e. in the case of a charge of land used for agricultural purposes, to use the land in a sustainable manner in accordance with the principles and any conditions subject to which the land or lease under which the land is held, and in compliance with all written laws and lawful orders applicable to that use of the land;
 - f. not to lease or sublease the charged land or any part of it for any period longer than a year without the previous consent in writing of the chargee, which



consent shall not be unreasonably withheld; (g) not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld;

- g. in the case of a charge of a lease, during the continuance of the charge, to pay, perform and observe the rent, covenants and conditions contained in or implied by and in the lease contained and implied and on the part of the lessee to be paid, performed and observed and to keep the chargee indemnified against all proceedings, expenses and claims on account of non-payment any part of the rent or part of it or the breach or non-observance of any covenants and conditions referred to above, and, if the lessee has an enforceable right to renew the lease, to renew it;
 - (i) if the charge is a second or subsequent charge, that the chargor will pay the interest from time to time accruing on each prior charge when it becomes due and will at the proper time repay the principal money or part of it due on each prior charge at the proper time;
 - (j) if the chargor fails to comply with any of the covenants implied by paragraphs (b), (c), (d), (e) and (h) of this subsection, that the chargee may spend any money which is reasonably necessary to remedy the breach and may add the amount so spent to the principal money and that amount shall be deemed for all purposes to be a part of the principal money secured by the charge.
- (2) Reference to the obligation of the chargor in subsection (1) (b) to keep all buildings upon the charged land in repair shall be taken to be an obligation to keep such buildings in a reasonable state of repair as set out in section 65.
- (3) The provisions of section 66 shall apply to an application by a chargor to a chargee for consent under paragraphs (f) and (g) of subsection (1).

61. My understanding of the relevant provisions of the law [whose details have been highlighted in the preceding paragraphs], drives me to the conclusion that for as long as a property is subject to a charge or mortgage, same cannot be dealt with, disposed of and/or otherwise alienated without the consent/concurrence of the chargee.
62. Additionally, where a person, in this case the Defendant purports to deal with the charged property, albeit without the consent of the chargee, any resultant dealing is void and thus incapable of conveying any interest in favor of the purported beneficiary.
63. In a nutshell, my answer to issue number one herein is two-fold. Firstly, the Defendant herein had no capacity or at all to purport to sell and/or alienate (sic) House No. 32 situate on the suit property during the life-span of the charge.
64. Secondly, the impugned sale agreement that was entered into and executed between the Plaintiff and the Defendant, albeit on the face of an existing charge, did not convey in favor of the Plaintiff any lawful and/or legitimate rights, over the designated house.

Issue Number 2 Whether the Plaintiff herein has established and demonstrated a basis for the grant of an equitable order of specific performance or otherwise.

65. As pertains to the plea of Specific Performance, it is imperative to state from the onset that an order of Specific Performance is an Equitable relief and thus dependent on the exercise discretion by the court.



66. Additionally, it is worth pointing out that the Jurisdiction of the court to grant an order of specific performance is anchored on, inter-alia, the existence of a valid and enforceable contract, which does not suffer from any legal defect and/or better still, which is not vitiated by mistake and/or illegality.
67. Furthermore, it is common ground that even where there exists a valid and enforceable contract, the grant of an order of specific performance would still be dependent on whether or not there exists a suitable alternative remedy, which ought to be granted in lieu of specific performance.
68. Suffice it to point out that the circumstance under which an order of Specific Performance can and does issue, has been the subject of a legion decisions, which have elaborated on the requisite ingredients that underpin the grant of same.
69. To start with, the Court of Appeal in the case of *Gurdev Singh Birdi & Narinder Singh Ghatora As Trustees Of Ramgharia Institute Of Mombasa versus ABUBAKAR MADHBUTI* [1997] eKLR stated and observed as hereunder;

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury’s Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

“must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim.”

70. Similarly, the consideration[s] to be taken into account prior to and/or before granting an order of Specific performance were also elaborated upon in the case of *Reliable Electrical Engineering Ltd versus Mantrac Kenya Ltd* (2006)eKLR, where the court stated and held thus;

“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 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 claimant 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 ground of undue influence or where it will cause severe hardship to the defendant.”



71. Having taken into account the principles that bely the grant of an order of specific performance, it is now appropriate to revert to the subject matter and discern whether indeed the Plaintiff has met and/or satisfied the threshold to warrant an order of specific performance.
72. Firstly, it is worthy to recall that whilst discussing issue number one [1] herein before, the court found and held that the sale agreement/contract was illegal and thus vitiated, insofar as the title of the suit property was at the point in time charged to and in favor of Pan African Bank Ltd [in liquidation].
73. To the extent that the title of the suit property stood charged in favor of Pan African Bank Ltd, it is therefore common ground that the contract which undergird specific performance was wrought with serious and substantial defects that renders same invalid.
74. Secondly and for the sake of arguments only, the title of the suit property remains charged to and in favor of Pan African Bank Ltd [in liquidation] and hence even if the court were to decree specific performance, in the manner sought, such an order would neither be enforceable nor legally tenable.
75. Thirdly, even though the Plaintiff herein acknowledges and confirms that the title of the suit property remains charged and is currently held by Deposit Protection Fund, who are the Liquidation agents in respect of Pan African Bank Ltd [in liquidation]; the Plaintiff did not find it expedient to implead Deposit Protection Fund Board.
76. Where the plea for specific performance is bound to culminate into and/or occasion grave injustice, [like in the instant case], where the title is charged; then the court must decline to grant such an order.
77. Lastly, there is no gainsaying that courts of law and of Equity loathe issuing orders in vanity and in futility. Nevertheless, the Plaintiff in respect of the instant matter seems to be minded to procure an order of specific performance, which in substance cannot be enforced against and/or by the Defendant or at all.
78. In view of the foregoing, my answer to issue number two [2] is to the effect that the Plaintiff herein has neither met nor satisfied the requisite threshold that underpin the issuance and/or grant of an order of specific performance.
79. In the circumstances, [even though I have great sympathy and empathy for the Plaintiff herein], taking into account the totality of the evidence, it must nevertheless be stated that court orders are neither influenced by nor granted on the basis of Empathy.

Final Disposition:

80. From the foregoing analysis and upon consideration of the relevant and applicable principles of the law, it is evident that the Plaintiff herein has not established his claim to the requisite standard.
81. Further and in any event, it is worth pointing out that even where a matter proceeds on the basis of formal proof, [like the instant one], it is still incumbent upon the Plaintiff to place before the court credible evidence and thereafter prove his case to the requisite standard.
82. Simply put, the Legal burden of proof is not diminished by the mere fact that the adverse party neither entered appearance nor filed a statement of defense[see Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi (2014)eKLR].
83. Consequently and in the premises, I come to the conclusion that the Plaintiff's case is devoid and bereft of merits. In this regard, same be and is hereby dismissed with no orders as to costs.
84. It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF FEBRUARY 2024.

OGUTTU MBOYA

JUDGE

In the Presence of;

Court Assistant: Benson.

Mr. Obonyo h/b for Mr. Apollo for the Plaintiff.

N/A for the Defendant.

