



**Eighty-Four Investments Limited v Irungu & 4 others (Civil Appeal
122 of 2019) [2025] KECA 1365 (KLR) (25 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1365 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 122 OF 2019
W KARANJA, SG KAIRU & LA ACHODE, JJA
JULY 25, 2025**

BETWEEN

EIGHTY-FOUR INVESTMENTS LIMITED APPELLANT

AND

EUNICE NYAMBURA IRUNGU 1ST RESPONDENT

JAMES CHEGE MUNENE 2ND RESPONDENT

LIBEY NJOKI MUNENE 3RD RESPONDENT

**FACKSON WAINAINA KAGWE (SUED JOINTLY AS THE ADMINISTRATORS
OF THE ESTATE OF JAMES FLAVIAN CHEGE MUNENE) ... 4TH RESPONDENT**

BALWANT SINGH 5TH RESPONDENT

*(Being an appeal against the Judgment and Decree of the Environment and Land Court
of Kenya at Nairobi (M. Njoroge, J.) dated 8th May 2018 in ELC Case No. 664 of 2019)*

JUDGMENT

1. In this appeal, the appellant, Eighty-Four Investments Limited, is challenging the judgment delivered on 21st May 2018 by the Environment and Land Court at Nairobi (ELC) (Mwangi Njoroge, J.). In that judgment, the ELC, among other orders, nullified the transfer in favour of the appellant by the 2nd to 3rd respondents (as the administrators of the estate of James Flavian Chege Munene, deceased) of the property known as L.R. No. 7699/2 (the property) on grounds that the sale and transfer of the property to the appellant was unlawful.
2. In the same judgment, the ELC granted an order compelling the administrators of the estate of the deceased, by an order of specific performance, to complete the sale, and transfer the property to the 1st respondent, Eunice Nyambura Irungu, in terms of a sale agreement dated 25th November 2004. Under



the terms of that agreement, the 1st respondent had agreed to purchase the property from the deceased and the 5th respondent, Balwant Singh as the vendors. The court ordered the administrators to put the 1st respondent in possession of the property and to facilitate the transfer of the property in favour of the 1st respondent.

3. The appellant has challenged that judgment on twelve grounds set out in its memorandum of appeal.
4. The chronology of events leading up to this appeal will provide context. The 5th respondent, Balwant Singh (Singh), and the deceased, James Flavian Chege Munene, became registered as the owners, as tenants in common in equal shares, of the property pursuant to a transfer in their favour registered on 30th December 1986. Contemporaneously with the transfer, a charge in favour of the deceased was registered against the title to the property to secure Kshs. 518,000 repayable by Singh to the deceased.
5. By an agreement for sale dated 25th November 2004, the deceased and Singh as vendor agreed to sell the property to the 1st respondent, Eunice Nyambura Irungu (Eunice), who agreed to purchase the same for the price of Kshs.11,000,000.00. Although in his statement of defence Singh denied that he executed that sale agreement, he did subsequently during his testimony, concede that he signed ‘an agreement’.
6. That agreement for sale provided that a deposit of Kshs.1,000,000.00 had been paid “to the vendors...before signing...[the] agreement” and that the balance of the purchase price in the amount of Kshs. 10,000,000.00 “shall be paid by the purchaser to the vendors on the completion date.” The sale was expressed to be subject to the Law Society Conditions of Sale (1989) edition and the “completion date is the 24th day of February 2005.”
7. Of relevance to this appeal, the agreement for sale contained the following Special Conditions:
 - A. If for any cause whatsoever other than non-completion caused by an act or default of the vendors the transaction shall not be completed on the completion date then the purchaser shall pay interest on the balance of the purchase price due from the completion date until the date of payment of the entire purchase price at the rate of 10% per annum.
 - B. All rates and other outgoings shall be paid by the purchaser.
 - C. The purchaser shall take possession immediately.We shall advert to those conditions later in the judgment.
8. On 6th October 2005, Eunice lodged a caveat which was registered against the title to the property claiming a purchasers’ interest. Not much is documented as to what transpired regarding completion between November 2004 when the agreement was entered into, and October 2005 when Eunice lodged the caveat. However, in her testimony Eunice explained that during that period she was involved in some unsuccessful attempts to obtain possession of the property which were frustrated by the deceased’s manager at the property.
9. A few years later, on 13th March 2007, the deceased on his own as vendor (excluding Singh) entered into an agreement for sale of the property with the appellant. Under that agreement, the deceased agreed to sell the property to the appellant, which agreed to purchase the same, for the purchase price of Kshs. 21,798,580.00. A deposit of Kshs. 8,117,355.00 was acknowledged in the agreement as having been paid upon execution of the agreement. That amount of deposit comprised of amounts paid by the appellant to Municipal Council of Thika in respect of land rates as well as land rent paid to the Commissioner of Lands in respect of the property. The agreement further provided that the balance of the purchase price shall be paid before completion; that “the completion date is subject to the mutual



agreement of the parties hereto but shall not be later than 28th February 2010”; and that the property is sold with vacant possession.

10. On the 23rd of December 2007 the deceased died.
11. Almost a year after the death of the deceased, on 14th October 2008, Ms. J. K. Ngaruiya & Company Advocates as “advocates of the administrator of the estate” of the deceased, issued a statutory notice in respect of the property to Singh reciting the instrument of charge registered on 30th December 1986 (to which we have already referred) and demanded from Singh “the charge debt amounting to Kshs. 1,823,360.00”. In the same notice, the advocates threatened that if the said amount and interest is not paid at the expiry of three months, the statutory power of sale would be exercised.
12. By a letter dated 3rd December 2008, Singh, through the firm of Ms. Oraro & Company Advocates demanded from Ms. J. K. Ngaruiya & Company Advocates an account of the sums he allegedly owed noting, in the same letter his interest in the property as co-owner and his entitlement to monthly rents derived from the property.
13. On 23rd March 2009, a Grant of Probate of written will of the estate of the deceased issued to Libey Njoki Munene, James Chege Munene, and Fackson Wainaina Kagwe, the 2nd, 3rd and 4th respondents respectively was confirmed and on 9th October 2009, the Grant was registered against the title to the property. We shall continue to refer to the 2nd, 3rd and 4th respondents as administrators of the estate although they are executors under the will. It emerged during the hearing of the appeal that, James Chege Munene (the 3rd respondent) died in 2022 and the appeal against him has since abated and further that the 4th respondent renounced executorship. In effect, only the 2nd respondent remains as the administrator/executor of the estate of the deceased.
14. According to Eunice, she conducted an official search of the property on 15th October 2009 from which she established that the said Grant of Probate in favour of the administrators was registered on 9th October 2009 and subsequently learnt that the administrators of the estate of the deceased had entered into an agreement for sale of the property with the appellant. She became apprehensive.
15. On 23rd December 2009 Eunice instituted suit before the High Court at Nairobi (HCC No. 664 of 2009) in which she named the administrators as 1st defendant; Singh as the 2nd defendant and the appellant as the 3rd defendant. In the suit, Eunice sought declarations that she has a purchaser’s interest in the property pursuant to the sale agreement dated 25th November 2004 and that she was entitled to immediate possession of the property; a mandatory injunction directed at the administrators for specific performance; and a permanent injunction restraining all the named defendants from disposing or dealing with the property. At the same time, Eunice moved the High Court with an application for interlocutory injunction to restrain dealings in the property during the pendency of the suit. That application was however unsuccessful.
16. By an instrument of Transfer dated 22nd December 2009(?) and registered on 13th January 2010 during the pendency of the said suit, the administrators of the estate of the deceased, “in exercise of the statutory power of sale conferred on [them] by the ITPA and the Charge” and in consideration of the sum of Kshs. 5,000,000.00 paid to them by the appellant, transferred the property to the appellant “free from all encumbrances and discharged from the right of redemptions and from all claims equities and demands under the charge.”
17. In their statement of defence to the suit the administrators while acknowledging that the deceased and Singh offered the property to Eunice in 2004 for Kshs. 11,000,000.00 averred that the balance of the purchase price was payable on or before 24th February 2005 but that Eunice defaulted in the payment



of the balance of the purchase price; that the deceased was entitled to treat the sale as rescinded on account of her failure to complete; that by her conduct, Eunice had repudiated the sale and that the administrators proceeded to negotiate with new purchasers; that in the alternative the administrators exercised their statutory power of sale on account of Singh's default in repayment of the monies secured under the charge and sold and transferred the property to the appellant.

18. On its part, the appellant in its statement of defence averred that it commenced the process of purchasing the property under an agreement dated 13th March 2007 after being informed that the Eunice had forfeited her deposit by failing to discharge her obligations under the sale agreement; and that Eunice has no interest in the property having failed to complete her end of the bargain under the agreement for sale.
19. On 28th April 2010, Singh instituted suit before the High Court (ELC No. 197 of 2010) in which he named the administrators as the 1st to 3rd defendants and the appellant as the 4th defendant. Singh asserted in that suit that he is a co-owner, with the deceased, of the property; and that subsequent to the death of the deceased, the administrators of the estate of the deceased attempted to unlawfully disentitle him of his 50% share in the property and had unlawfully and fraudulently transferred the property to the appellant on 13th January 2010 under the guise of exercise of non-existent statutory power of sale. He sought declarations that the sale and transfer of the property to the appellant was fraudulent and illegal; and in the alternative, general damages for the loss occasioned by the illegal and fraudulent sale of the property.
20. In their statement of defence to Singh's suit, the administrators admitted that Singh was a co-owner of the property but asserted that he had not paid "a single cent" towards its purchase; that his share of the purchase price was secured by a charge in favour of the deceased; that Singh failed to pay the monies secured under the charge; that his title or interest in the property was vitiated by lack of consideration and his registration "as a tenant in common in equal shares stands to be cancelled" as he has no legal or equitable claim to the property; and that they duly exercised their statutory power of sale under the charge.
21. In the alternative, the administrators pleaded that Singh's title to the property, was extinguished by prescriptive rights accruing to the deceased, because, they averred, the deceased was in exclusive, uninterrupted occupation of the property since 1986.
22. In its statement of defence, the appellant denied Singh's claim and averred that it lawfully acquired the property commencing with the sale agreement between it and the deceased which culminated in the transfer by the administrators of the estate "after exercising the power of sale by private treaty conferred on them by a charge instrument".
23. Although attempts to consolidate the two suits was not successful, they were heard together. However, separate judgments were issued. Although the trial Judge found that Singh's claim in ELC 197 of 2010 was merited, to ensure that the orders in that suit "rhyme" with the orders in HCCC No. 664 of 2009, the Judge directed that the judgment in ELC No. 197 of 2010 would abide by the judgment in HCCC No. 664 of 2009 and Singh's remedy lay in sharing "proceeds of the sale" to Eunice.
24. Eunice testified as PW1 and adopted her written witness statement. She stated that she purchased the property, which is situated in Thika and measures approximately 18 acres under the agreement of sale dated 25th November 2004 signed by the deceased and by Singh; that she paid 10% deposit by bankers cheque before the agreement was executed and was supposed to take possession; and that the agreement was to be completed in three months, i.e. by 24th February 2005.



25. She stated that she approached the deceased with a view to being put in possession of the property; that there were rental houses on the property and she tried several times to take possession without success; that the deceased introduced her to the caretaker one Mr. Matu who was supposed to give her the lease documents; that the tenants were introduced to her; that she later deposited building materials on the property, namely, sand, ballast etc., intending to renovate the houses but she was forcibly removed from the ground by Mr. Matu; that a few months later she returned to the property and found that her building materials had been utilized; that on inquiring from the deceased, he (the deceased) stated that he would handle the matter; that she contacted the deceased variously who referred her to “their lawyers” to whom she spoke but was never put in possession; that she then decided to “put a caveat against the land claiming a “purchasers interest” and the same was registered on 6th October 2005.
26. She stated further that on account of the challenges in obtaining possession of the property, she did not pay the balance of the purchase price as possession was a pre-condition to payment of the balance of the purchase price; that unfortunately before the issue of possession of the property was resolved, the deceased died in December 2007.
27. Eunice testified further that following the death of the deceased, she often met with some members of the family in a bid to persuade them to facilitate the handover of the possession of the property; that on one occasion in May 2009, she met with the deceased’s son, one Dr. Kenneth Munene at Blue Post Hotel in Thika, at which representatives of the appellant, introduced to her as directors of the appellant and their advocate were present; that the said Dr. Munene informed her of his desire to facilitate the sale of the property to the appellant; that the object of the meeting was to discuss the way forward in respect of the property and that she re-affirmed her interest in the property, making it clear that she was intent on completing the purchase.
28. She stated further that she conducted a search of the title to the property and learnt that a grant of probate in favour of the administrators of the estate had been registered against the title; and that she learnt of the agreement between the administrators and the appellant but her attempts to obtain details of the transaction were not successful.
29. She stated that the purported sale and transfer in favour of the appellant is a fraud; that the sale agreement between the deceased and the appellant does not indicate that it was in exercise of the deceased’s power of sale; that there was no discharge of charge and neither was Singh’s 50% interest in the property vested in estate of the deceased; and that her caveat was still registered against the title and that she was unaware how the transfer in favour of the appellant was effected. She stated further that she was ready to complete the transaction in the shortest time possible and prayed to the court to grant her prayers for completion of the transaction in her favour. She stated further that she agreed with Singh’s prayers in his suit.
30. Under cross examination, Eunice stated that she dealt with the deceased from the onset and did not at the time meet Singh, the deceased’s co-owner, but believed that he consented to the sale of the property to her; she maintained that she did not pay the balance of the purchase price because possession was a pre- condition; that it was her desire to use the property to generate the balance of purchase price and also “had other moneys”; that she was willing to complete the transaction and pay interest; that no notice was given to her rescinding her agreement and there was no provision in the agreement that default in payment would terminate the same. She maintained that the transfer of the property to the appellant was a fraud; that in entering into the agreement for sale with the appellant, the deceased was not exercising his statutory power of sale under the charge and the bid by administrators to do so is a fraud. With that, Eunice closed her case.



31. Singh, testified as PW2 and adopted his witness statement. He stated that he and the deceased are and had been co-owners of the property as tenants in common and were registered as such on 30th December 1986; that prior to 1986, the property was owned by Leather Industries from whom they purchased it for Kshs. 1,000,000.00; that although he was to buy the property with his brother, he substituted his brother's name with that of the deceased who advanced him a loan Kshs. 518,000.00; that he secured the repayment of that amount by charging his interest in the property in favour of the deceased which he eventually repaid.
32. He stated that he renovated the houses on the property to be habitable and started generating Kshs. 25,000.00 rent per month but that he never got any rent money after the year 2002; and that the deceased was receiving all the rent.
33. He further testified that one day, the deceased went to his workshop with two people and that he "signed the papers he had" and that "after signing the sale agreement" he never heard from his "co-proprietor" and neither did he receive a share of the payment.
34. He stated that the deceased died on 23rd December 2007 and upon the administrators obtaining a grant of letters of administration for the estate of the deceased, they sought to disentitle him to his 50% interest in the property; that he learnt in 2010 that the administrators had without his consent illegally and unlawfully transferred the property to the appellant under a non-existent power of sale; that the appellant had gone to him but he "refused to talk to them" and that he never gave his consent to the deceased to sell the property to the appellant; and that when a claim for Kshs. 1,823,360.00 was made against him, he disagreed and approached Ms. Oraro and Company Advocates who requested for a breakdown of the amount claimed in addition to pointing out his entitlement to rent.
35. He stated that he was not aware of, nor was he invited to the Blue Post meeting to which Eunice referred, but that the appellant approached him to sell his shares in the property, but he declined. He pointed out that although the agreement for sale in favour of the appellant provides a purchase price of approximately Kshs. 21 million, the transfer is misleading as it indicates a price of Kshs. 5,000,000.00; that he engaged a valuer, who valued the property at Kshs. 77,115,000.00 in terms of a valuation report dated 28th April 2011.
36. He prayed that the property should be returned to him in the same state as it was when the deceased was alive.
37. Under cross examination, Singh acknowledged that he executed the charge in favour of the deceased but that he was able to pay the loan advanced to him by the deceased; that when demand was made, he disputed the figures and instructed Ms. Oraro and Company advocates who queried the claim but no reply was received adding that the deceased took the rent from the property. He conceded that he signed the agreement for sale in favour of Eunice, but he was not aware of the agreement between the deceased and the appellant. He stated that the deceased did not give him anything from the purchase price paid by the appellant. He reiterated that "I want the land title as it was before. The names of myself and Dr. Munene and no charge as Dr. Munene has already collected the money."
38. The next witness was Zacharia M. Ndeti (PW3) a property valuer who testified before the trial court on 25th May 2017. He produced a valuation report placing the value of the property as at 28th April 2011 at Kshs. 77,115,000.00 but adding that "the current value is Kshs. 442,500,000.00." He explained that the property measures approximately 18 acres, 13 of which are industrial and 5 acres residential and that it is located within walking distance of Thika Town. With that, Singh's case was closed.



39. For the defence, James Chege Munene (DW1), the 3rd respondent and the first-born child of the deceased testified for the administrators. In his examination in chief, he adopted his witness statement dated 13th March 2017 and that of Libey Njoki Munene dated 28th April 2016. He pointed out that the 4th respondent, Fackson Wainaina Kagwe had since renounced his executorship of the estate of the deceased.
40. It was his testimony that the deceased and Singh became registered as owners of the property in 1986; that the deceased advanced a loan to Singh to fund the purchase of his share of the property and a charge was registered against the title in favour of the deceased to secure Kshs. 518,000.00 and interest payable by Singh; that Singh defaulted in the re-payment “in which event his registration as a co-purchaser...was not supported by any consideration and was open to reversal/cancellation for consideration which had totally failed.”; that as a result “a constructive trust was constituted” in which Singh held his interest in the property in trust for the deceased; that as executors of the estate of the deceased they were entitled to exercise the statutory power of sale under the charge and dispose of Singh’s share of the property.
41. It was his further testimony that in 2004 the deceased offered the property for sale to Eunice for a price of Kshs. 11,000,000.00; that Eunice neither paid the deposit nor the balance of the purchase price which was due on or before 24th February 2005 and the sale agreement therefore failed for want of consideration “and the same was rescinded”; that Eunice did not take possession of the property for the failure to pay the purchase price; that after expiry of a long period of time, it was clear to the deceased that Eunice had repudiated the contract and proceeded to negotiate with new purchasers, namely the appellant, to whom the deceased sold the property by an agreement of sale dated 13th March 2007; that after the death of the deceased, the administrators were obligated to execute the transfer of the property in favour of the appellant in whose favour a transfer was registered on 12th January 2010.
42. Although Libey Njoki Munene did not testify, in her witness statement dated 28th April 2016 which substantially echoed DW1’s statement, she introduced a different dimension in asserting that Singh’s interest in the property was “extinguished by the prescriptive rights accruing to the deceased ... by virtue of the deceased having been in exclusive, uninterrupted occupation” of the property since 1986 and that Singh was therefore not required to sign any sale agreement or transfer in favour of the appellant.
43. Under cross examination, DW1 stated that the appellant paid “most of the purchase price” to the deceased during his lifetime, and some was paid to the administrators after his death, but the full purchase price was paid; that the sale to the appellant was already done when the deceased passed on 23rd December 2007; that his (DW1’s) role was to append a signature as required; and that he became aware of the sale to Eunice after the death of the deceased. He stated that the property was not part of the assets in the deceased’s will as the deceased “had already sold it”; that between 2008 and 2009, the administrators of the estate of the deceased had received approximately Kshs. 9-10 million; and that to him, Singh was not a co-owner of the property.
44. Cross examined further, he stated that he recognized his father’s signature on the agreement for sale in favour of Eunice; that Eunice paid a deposit of Kshs. 1,000,000.00 and that he got to know of that transaction after the death of this father. He stated that he signed documents in favour of the appellant in his capacity as an executor and that the transfer to the appellant was done pursuant to exercise of statutory power of sale but that by the time the statutory notice of 14th October 2008 was issued the grant in favour of the executors had not been confirmed.
45. John Ndungu Muiru (DW2) a shareholder and director of the appellant testified for the appellant. In his witness statement dated 22nd March 2017 which he adopted, he stated that he was approached by a son of the deceased, one Dr. Kahiga Munene, also a director and shareholder in the appellant company



- who indicated that his father, the deceased, wished to sell the property; that following a meeting with the deceased, the agreement for sale dated 13th March 2007 was concluded; that the appellant made payments in accordance with the sale agreement and was granted possession; that the appellant, which intended to put up a housing scheme on the property, carried out a preliminary survey of the property, changed the user; and marketed sub-divisions and received purchase price from various individuals for their share of the scheme. He stated that all completion documents were duly acquired, stamp duty paid, and the property was duly transferred to the appellant. He stated the appellant invited shareholders who got plots, some of which have been sold to other parties.
46. Under cross examination DW2 maintained that the appellant paid the full purchase price and the property transferred to it; that the deceased assured the appellant that the property was his; that the appellant conducted a search of the property which “revealed the duos (sic) ownership” and that “there was a charge and a caveat in favour of Eunice”; and that they were concerned there was a charge and caveat on the title and sought and obtained legal advice that “the chargee’s power of sale superseded any caveat”; that his “lawyers drew the sale agreement” and that “they did not include both owners”; that on enquiring about the charge, the appellant was informed that Singh had not paid “the charge loan for 20 years” and that they did not look for the co-owner and that they “never denied that he (Singh) was a co-owner”; that they still proceeded in the absence of the co-owner and signed the agreement for sale which excluded the co-owner.
47. He stated further that as the suits instituted by Eunice and by Singh were pending before the court, the appellant changed the user of the property which had since been subdivided and titles issued, and plots sold to third parties. He stated that although the appellant paid the purchase price of approximately Kshs. 21,000,000.00, the transfer in favour of the appellant indicated the consideration as Kshs. 5,000,000.00. With that the appellant closed its case.
48. Upon considering the evidence and the submissions tendered before him, the learned trial Judge found that the deceased and Singh executed the sale agreement dated 25th November 2004 in favour of Eunice; that Eunice did pay the deposit of Kshs. 1,000,000.00 in accordance with the agreement; that the balance of the purchase price was not paid by the completion date due to failure or default by the deceased to grant Eunice possession of the property; and that the administrators of the estate were obligated to honour the sale agreement in favour of Eunice and to complete the sale of the same not having been rescinded.
49. The learned Judge further found that the sale of the property by the deceased to the appellant, in exclusion of Singh, was grossly irregular and of no effect and that the purported exercise of statutory power of sale by the administrators of the estate of the deceased was unlawful; that having regard to the deceased’s lack of capacity to sell Singh’s share of the property, and by reason of operation of the doctrine of Lis Pendens, the court concluded that the transfer of the property to the appellant was fraudulent and therefore illegal.
50. In the end, the learned trial Judge declared the transfer in favour of the appellant, and all consequential entries/subdivisions, as null and void; ordered the Chief Land Registrar to cancel the aforementioned transfer and all consequential entries/subdivisions; declared that Eunice has a purchaser’s interest in the property based on the agreement for sale dated 25th November 2004 and that she is entitled to vacant possession, and ordered the administrators give her vacant possession of the property within 14 days; ordered Eunice to pay the balance of the purchase price of Kshs. 10,000,000.00 to the administrators within 7 days of receiving vacant possession; ordered that the administrators shall hold such sums in trust for Singh “as he is entitled to by virtue of the sale” to Eunice; ordered that the “the aggregate of the proceeds of sale” be “shared equally” between the administrators on the one hand and Singh,



on the other hand; ordered that in default of Eunice paying the balance, the sale agreement dated 25th November 2004 agreement shall be deemed automatically rescinded.

51. In effect, the trial court granted mandatory injunctions directed at the administrators of the estate of the deceased for specific performance of the agreement for sale dated 25th November 2004 including handing over of possession and execution of all necessary documents to complete the sale; a permanent injunction restraining the administrators and the appellant from disposing or interfering with the property to the detriment of Eunice; and for the sharing equally between the administrators of the estate of the deceased and Singh of the purchase price paid/payable by Eunice. The administrators of the estate of the deceased and the appellant were ordered to jointly and severally meet the costs of the suit.
52. As already stated, the appellant has challenged that judgment on twelve grounds set out in its Memorandum of Appeal asserting that the Judge erred in: ordering specific performance of a contract after the lapse of more than 14 years and when Eunice had not discharged all her obligations under the agreement for sale including tendering the balance of the purchase price; re-writing the contract between the deceased and Eunice by extending time for completion; ignoring the remedy of damages available to a chargor under Section 99(4) of the *Land Act* upon finding that the exercise of statutory power of sale by the administrators was improper; ignoring the rights of the appellant and other third parties as innocent purchasers for value without notice of any defect in the title; ordering cancellation of entries and transfers of titles to third parties without a fair hearing or due process; misapplying the doctrine of *Lis Pendens*; dealing with issues not placed before him for determination; and ignoring the presumption of validity of title and shifting the burden of proof of title to the appellant.
53. During the hearing of the appeal, the parties were represented by learned counsel. Mr. James Ochieng Oduol appeared for the appellant; Mrs. Wambugu appeared for Eunice; Mr. Edwin Koech appeared for the administrators of the estate of the deceased; and Ms. Jane Okoth for Singh. Counsel relied on their respective written submissions which they orally highlighted.
54. Counsel for the appellant narrowed down the complaints against the judgment to three, namely, that the learned Judge erred in failing to recognise that the appellant had a valid title to the property; finding that the appellant's valid title was affected by Eunice's prior interest in the property; and in holding that the statutory power of sale was improper and in ignoring available remedies under Section 99(4) of the *Land Act*, 2012.
55. It was submitted that the learned Judge erred by not recognizing the appellant's title to the property; that the appellant acquired a valid and indefeasible title through the sale agreement dated 13th March 2007, the subsequent payments, and the registration process; that by dint of Section 26(1) of the *Land Registration Act*, 2012, the registration of the appellant as a proprietor of the property vested in it the absolute ownership. In that regard counsel cited decisions of this Court in *Joseph N. K. Arap Ngok vs. Justice Moiyo ole Keiuwa & 4 Others*, Civil Application No. 60 of 1996 and *Chemei Investments Limited vs. The Attorney General & Others*, Petition No. 94 of 2005 for the proposition that the registration of a title protects the sanctity of title to land.
56. It was urged that the title of such an owner can only be challenged on grounds of fraud or misrepresentation; that the appellant's acquisition of the property in this case was legitimate and that no fraud or misrepresentation was demonstrated on its part; that there was no basis for impeaching the appellant's genuine title as a purchaser for value without any notice; and that there was no prior interest registered against the title when the appellant contracted with the deceased to purchase the property.



57. It was submitted that prior to the appellant contracting to purchase the property, the deceased disclosed that there were outstanding rates and land rent on the property; and that a prior sale agreement with Eunice had fallen through as she had not fulfilled her obligations and had failed to complete the agreement.
58. Counsel referred to the decision of the Court in *Gurdev Singh Birdi & Narinder Singh Ghatora as trustee of Ramgharia Institute of Mombasa vs. Abubakar Madhbuti* [1997] eKLR in urging that the Judge erred in granting the equitable remedy of specific performance which was not available to Eunice because she had failed to perform an essential part of her agreement with the deceased; that a clear completion date of 24th February 2005 had been agreed upon between Eunice and the deceased and it was mandatory for Eunice to have paid the balance of the purchase price by that date; that the learned Judge effectively re-wrote the contract between the deceased and Eunice thereby violating the principle in *National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Limited & Another*, Civil Appeal No. 35 of 1999 [2001] eKLR which provides that parties are bound by the terms of their contract and prohibits a court re-writing contracts for the parties.
59. Regarding the exercise of statutory power of sale by the administrators, it was submitted that Singh defaulted in paying the amount secured under the charge to the deceased; that the deceased was therefore entitled to exercise his remedies as a chargee; that in the same vein, the High Court in issuing a grant in respect of the deceased recognised that the property was an asset of the deceased; and that Singh never objected to the grant of probate.
60. It was urged that there was no evidence to support the claims that the appellant acquired the property by fraud; and that fraud is a question of fact which ought to be proved, which was not done in this case. In that regard the decision of this Court in *Charles Karaithe Kiarie & 2 Others vs. Administrators of the Estate of John Wallace Mathare (Deceased) and 5 Others* [2013] eKLR was cited.
61. Supporting the appeal, counsel for the administrators submitted that the trial Judge erred in granting an order of specific performance over 20 years after the agreement was entered into yet Eunice has never paid the balance of the purchase price; that it was not open to the trial court to re-write the contract by extending the completion date which the parties had set; that Eunice could not stay for over 20 years without paying the balance of the purchase price and then offer to pay interest. It was submitted that Eunice was unable to complete the sale, and the deceased was therefore within his right to contract to sell the property to the appellant. The High Court decision in *Thrift Homes vs. Kay Investments* [2015] KEHC 5591(KLR) was cited in support of the proposition that for the relief of specific performance to issue, Eunice was obliged to demonstrate that she was ready, able and willing to complete the sale and that she failed to do so.
62. It was submitted that following the death of the deceased, the administrators were duty bound to complete the sale of the property in favour of the appellant, and they did so by signing the transfer in its favour. Regarding Singh's interest in the property, it was urged that on account of his having defaulted in repaying the secured debt to the deceased, the administrators were entitled to exercise the power of sale under the charge, and Singh's equity of redemption was thereby extinguished.
63. Counsel for Eunice on the other hand submitted that the sale agreement in respect of the property in favour of the appellant was illegal; that the purported sale in favour of the appellant failed to acknowledge that the property was jointly owned by the deceased and Singh; and that the transfer in favour of the appellant was registered when a caveat registered against the title by Eunice was subsisting.
64. It was submitted that based on the evidence, the decision of the learned trial Judge cannot be faulted as the transaction and transfer in favour of the appellant was tainted with fraud and irregularities.



65. Moreover, counsel submitted, the Judge was right in upholding the common law principle of *Lis Pendens* as the transfer in favour of the appellant was made during the pendency of the suit. The decision in *Carol Silcock vs. Kassim Sheriff Mohamed* [2013] eKLR / was cited in support. *
66. It was submitted that the Judge was right in upholding and enforcing the sale agreement in favour of Eunice because “to date the sale of the suit land to her has not been rescinded by the deceased or by the 2nd to 4th respondents...” and the Judge was right in granting the discretionary remedy of specific performance. In that regard the decision in *Butuli Hassan vs. James Njuguna Njoroge* [2016] eKLR was cited.
67. It was submitted further that the agreement for sale in favour of Eunice accords with the provisions of the *Law of Contract Act*, is valid and enforceable; that Eunice performed her obligations under the agreement but the deceased failed to perform his obligation of handing over vacant possession; that in any event the agreement was not rescinded as the vendor, himself being ready, able and willing to complete the sale, was required to issue a 21 days completion notice to the purchaser in default for rescission to be effective. The case of *Gatere Njamunyu vs. Joseck Njue Nyaga* [1983] eKLR was cited.
68. Counsel for Singh identified two issues for determination, namely, whether the trial court erred in upholding the agreement for sale in favour of Eunice; and secondly, whether the court erred in nullifying the transfer in favour of the appellant. In that regard, it was submitted that the Judge erred in upholding the agreement for sale in favour of Eunice; that whereas Singh is a co-owner of the property, Eunice did not pay any money to him and having regard to the essentials of a valid contract, no consideration passed to Singh and the agreement for sale therefore “stood as vitiated and unenforceable.”
69. Moreover, it was submitted, Eunice did not meet Singh prior to entering into the sale agreement and therefore there was “no meeting of the mind” between them; that on the strength of the decision of this Court in *Alfred M. O. Michira vs. Ms. Gesima Power Mills Limited*, Civil Appeal No. 197 of 2001, where there is no meeting of minds of the contracting parties, the contract is incapable of performance.
70. As to whether the court erred in nullifying the transfer in favour of the appellant, it was submitted that the court did not err as that transfer was registered during the subsistence of ELC No. 664 of 2009 in breach of the doctrine of *Lis Pendens*.
71. In the end, counsel for Singh urged the Court to dismiss the appeal and set aside the judgment of the High Court and order that the property do revert to the name of the deceased and Singh as tenants in common and that the agreements for sale dated 25th November 2004 and 13th March 2007 in favour of Eunice and the appellant respectively be declared null and void.
72. We have considered the appeal and the submissions in keeping with our mandate on a first appeal. In our view, the first issue for determination is whether the trial court erred in nullifying the transfer in favour of the appellant. In that regard there is the question whether the transfer was vitiated by the doctrine of *lis pendens*. The second issue is whether the Judge erred in ordering specific performance of the agreement for sale between the deceased and Eunice. Related to that is the question whether the agreement was rescinded and whether Eunice repudiated the agreement. Finally, there is the question of the appropriate reliefs.
73. We begin with the issue whether the trial court erred in nullifying the transfer in favour of the appellant. We have already set out above the factual background and the evidence tendered demonstrating how the appellant became registered as proprietor of the property. As submitted by the appellant, Section 23(1) of the since repealed Registration of Titles Act conferred an absolute and indefeasible title to



- the owner of the property and the same can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. See Dr. Joseph Arap Ngok vs. Justice Moiyo Ole Keiwua & 5 Others (above); and, *Boniface Awour & another vs. Victor Otieno Nyadimo & 2 Others [2017] eKLR.
74. Section 26 of the *Land Registration Act* is substantially to the same effect that a certificate of title issued by the Registrar upon registration, or to a purchaser upon a transfer shall be taken by all courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner and the same shall not be subject to challenge except on ground of fraud or misrepresentation to which the person is proved to be a party or the certificate of title has been acquired illegally, un- procedurally, or through a corrupt scheme. In that regard, the appellant contends that it is an innocent purchaser of the property for value and the trial court erred in nullifying its title.
75. As stated by the Supreme Court of Kenya in the case of Torino Enterprises Limited vs Attorney General (Petition 5(E006) of 2022) [2023] KESC 79 (KLR), an innocent purchaser for value denotes one who is aware of what they were purchasing. In the case of Dina Management Limited vs. County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) the Supreme Court of Kenya adopted Black’s Law Dictionary definition that a bona fide purchaser is one who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”
76. Earlier, in Samuel Kamere vs. Land Registrar, Kajiado, Civil Appeal No. 28 of 2005 [2015] eKLR this Court stated that “...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property ...”
77. Against those principles, there is no dispute that the deceased and Singh became registered as proprietors of the property, as tenants in common in equal shares in 1986. A tenancy in common, as defined in Blacks Law Dictionary, 8th edition is a “tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship.”
78. By the time the deceased entered into the sale agreement dated 13th March 2007 with the appellant, Singh was undoubtedly a co-owner of the property. Yet, Singh was not a party to the sale agreement, nor did he give his consent to the sale to the appellant. The agreement for sale dated 13th March 2007 made absolutely no reference to Singh and nor was his registered interest as a co-owner in the property mentioned in that agreement. The deceased could not, to the exclusion of Singh, sell the property to the appellant, or to any other person for that matter as he purported to do.
79. Due diligence in the form of a simple search of the title of the property by the appellant would easily have revealed Singh’s interest as co-owner in the property. And even without a search, it emerged from the evidence that one of the directors and shareholders of the appellant who initiated the process of acquisition of the property by the appellant is the son of the deceased. It is inconceivable that he would have not known that Singh was a co-owner of the property. The appellant is not an innocent purchaser without notice as it contended.
80. As already indicated, the deceased died on 23rd December 2007 and a grant of probate of written will of his estate was registered against the title to the property on 9th October 2009. Intent on completing the already flawed sale of the property to the appellant (flawed because Singh, a co-owner was not privy),



the administrators devised what can only be referred to as a stratagem. On the strength of that grant, the administrators instructed J. K. Ngaruiya & Company Advocates to issue a statutory notice to Singh asserting that he had defaulted in the payment of the debt to the deceased that was secured by the charge. Demand was made upon Singh for Kshs. 1,823,360.00 and interest and notice given to him that if the said amount was not paid within three months, “the chargee shall hereafter immediately proceed to exercise his statutory power of sale in accordance with the laws of Kenya.” That notice was dated 14th October 2008. In effect it was issued approximately 22 years after registration of the charge.

81. Nothing on record shows or suggests that during the lifetime of the deceased (the chargee), Singh had defaulted in payment neither is there any evidence of the deceased having demanded payment from Singh. For over twenty years during the lifetime of the deceased, there is no evidence that he attempted to exercise his statutory power of sale. Why did he not do so for so long? As the learned trial Judge noted in his judgment, “the first occasion in which the statutory power of sale is being seen to be exercised is not by the deceased during his lifetime but by the executors of his will.”
82. Nonetheless, despite Singh having responded to, and contested the statutory notice through his advocates Oraro & Company Advocates, to which the administrators did not respond, they went ahead to transfer the property to the appellant, “in exercise of the statutory power of sale” by an instrument of transfer dated 22nd December 2009 which was registered against the title on 13th January 2010.
83. Based on the foregoing, we endorse fully, the finding by the learned Judge that the purported exercise of statutory power of sale by the executors had not crystallized and was irregular. We entirely agree with the learned Judge that:

“...the statutory notice was designed as a mere cloak meant to veil the continuance of a fraud that had (been) conceived and partially executed before its issuance.”

84. The creativity or perhaps innovativeness of the appellant and the administrators in their attempt to justify their actions and diminish Singh’s interest in the property is discernible from pleas that were not seriously pursued such as that his interest in the property “was extinguished by prescriptive rights accruing to the deceased...” as well as invoking the doctrine of constructive trust, thrown in for good measure in an attempt to defeat Singh’s interest in the property.
85. Moreover, and as already indicated, Eunice instituted Civil Suit No. 664 of 2009 before the High Court on 23rd December 2009. The appellant was privy to that suit, named, as it was, as the 3rd defendant. By the time the transfer in favour of the appellant was registered on 13th January 2010, that suit was pending in court.
86. In *Naftali Ruthi Kinyua vs. Patrick Thuita Chege & Another*, Civil Appeal No. 44 of 2014 [2015] KECA 911 (KLR), this Court considered at length the application of the doctrine of *Lis Pendens* and stated as follows:

“Black’s Law Dictionary 9th edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA) - now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows:-

‘It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail.



The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

87. In the case of *Mawji vs. US International University & Another* [1976] KLR 185, Madan, J.A. weighed in on the subject stating that:

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

88. In the same case as it was observed inter alia that:

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

89. And in addressing the question whether the doctrine remained relevant in light of the ITPA having been repealed, the Court relied on Section 107(1) of the *Land Registration Act* which provides that, “Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act” and expressed that:

“The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107

- (1) (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of lis pendens would remain applicable to the circumstances of this case.”

90. See also decision of this Court in the case of *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others* [2017] KECA 79 (KLR) and *Bruce Joseph Bockle vs. Coquero Limited* [2017] KECA 265 (KLR) on applicability of the doctrine post repeal of the ITPA.

91. Based on the foregoing, we uphold the conclusion by the learned Judge that the transfer of the property in favour of the appellant was also caught up by that doctrine. In effect, we hold that the trial court did not err in nullifying the transfer in favour of the appellant.

92. We turn now to consider the second issue, namely whether the Judge erred in ordering specific performance of the agreement for sale between the deceased and Singh (as vendors) and Eunice (as



- purchaser). Related to that is the question whether the agreement was rescinded and whether Eunice repudiated the agreement by nonperformance of her obligations.
93. In this regard, the learned trial Judge found that the deceased and Singh executed the agreement for sale dated 25th November 2004 in favour of Eunice; that Eunice paid the deposit of the purchase price in accordance with the agreement; that the deceased defaulted in failing to give possession of the property to Eunice; and that the administrators of the estate of the deceased were obligated to honour the sale agreement in favour of Eunice.
94. Singh was less than forthright on the question whether he, alongside the deceased, executed the sale agreement in favour of Eunice. Although in his statement of defence to the claim by Eunice he denied signing the agreement, during his testimony, he tacitly acknowledged having done so when he alluded to the deceased having gone to his workshop with two other people and that “he signed the papers he had” and further that he did not hear from the deceased “after signing the sale agreement.” The finding of fact by the learned Judge that the sale agreement was duly executed by the deceased and Singh is supported by the evidence and is not assailable.
95. It was the case of the administrators and the appellant that Eunice evinced an intention to no longer be bound by the agreement by failing to perform her obligations under the agreement, namely, failure to pay rates and other outgoings on the property and the balance of the purchase price and thereby repudiated the agreement. Alternatively, they asserted that the agreement stood rescinded on account of default by Eunice to pay the balance of the purchase price.
96. Rescission is a party’s unilateral unmaking of a contract for a legally sufficient reason, such as the other party’s material breach. (See Black’s Law Dictionary, 8th edition at page 1332).
97. In the present case, the agreed purchase price under the agreement for sale dated 25th November 2004 was Kshs. 11,000,000.00 of which Kshs. 1,000,000.00 was acknowledged as having been paid before signing of the agreement notwithstanding the belated claim by Singh that he did not receive his share of that deposit. The agreement provided that the balance of Kshs. 10,000,000.00 “shall be paid by the purchaser to the vendors on the completion date.” Completion date was set at “24th day of February 2005.”
98. The Law Society Conditions of Sale (1989) edition were incorporated into the agreement by reference. Pertinent special conditions provided that “all rates and other outgoings shall be paid by the purchaser” and that the “purchaser shall take possession immediately.” In relation to the completion date, the circumstances in this case are not dissimilar to those in *Gurdev Singh Birdi & Another as Trustees of Ramgharia Institute of Mombasa vs. Abubakar Madhbuti* [1997] KECA 17 (KLR) where Tunoi, JA. stated as follows:
- “The agreement was unambiguous document. It was drafted in a very simple language. It spelled the contractual relationship between the appellants and the respondent. The most important condition as far as this appeal is concerned is:- “Balance to be paid on or before 31st January, 1993.” This condition only specified the time within which the balance of the purchase price was to be paid. This fixation of period per se does not make time of the essence of the contract.”
99. In the same case, the learned Judge expressed that “in a situation where time has not been made the essence of contract, no court of law will allow one party suddenly to turn to the other and say: “time has elapsed, the agreement has been cancelled, and the deposit has been forfeited.” The parties in the present case did not make time of the essence.



100. In as far as the appellant and the administrators claim that the agreement was rescinded, the agreement required the vendors to serve a completion notice. Eunice was clear in her testimony that she did not get any notice and no evidence of that having been done was tendered before the trial court. As the Judge in the above cited case stated:

101. Similarly, in the case of Sisto Wambugu vs. Kamau Njuguna [1983] KECA 69 (KLR) this Court expressed that:

“...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.” [Emphasis added]

102. Based on the foregoing, there is no evidence that the agreement with Eunice was terminated by rescission. There remains to consider, the contention that the agreement with Eunice came to an end by implied repudiation.

103. Repudiation, as we understand it, occurs when one party to a contract clearly indicates, either through words or actions, an unwillingness or inability to perform their contractual obligations. That is to say, words or actions that indicate an intention not to perform the contract. In the case of Kirpal Singh vs. Qurbanlite Limited [1978] KECA 16 (KLR), Wambuzi, JA. adopted with approval, the following passage from Volume 8 of the Third Edition of Halsbury at page 203. Paragraph 344 provides:

“Repudiation. Where a contract is to be performed on a future day, or the performance is dependent on a contingency, and one of the parties repudiates the contract by showing that he does not intend to perform it, the other party is entitled to sue him for breach of the contract without waiting for the time fixed for performance and is absolved from further performance of his part of the contract, and if he elects to do this the party in default is not entitled to an opportunity of changing his mind. In such a case the contract is completely determined, and the party who is in default cannot insist upon the performance by the other party even of a stipulation which is collateral to the main purpose of the contract.

In order to amount to repudiation there must be conduct showing clearly an intention not to fulfil the contract when the time comes, and a party is not bound before the time fixed for performance to give a definite answer as to whether he intends to fulfil the contract or not.....

The repudiation of the contract by one party does not of itself discharge the contract, but the other party has the option of treating the contract as at an end, or of waiting until the time for performance has arrived, before making any claim for breach of contract. The party to whom the right of election falls must signify his election to rescind in and unqualified manner and with every reasonable dispatch.”

104. As already indicated, it was contemplated and provided in the agreement for sale dated 25th November 2004 that completion would be in three months, that is by 24th February 2005.

Eunice’s obligations under the agreement, in addition to payment of the balance of the purchase price included the obligation to pay all rates and other outgoings and she was to take possession of the property immediately.

105. Eunice explained the efforts that she made to take possession, including depositing building materials on site with a view to fencing of the property, attempts which were thwarted or frustrated by the



- deceased's caretaker; and that when she approached the deceased in that regard she was eventually referred to lawyers. It is not entirely clear from the record when Eunice made those efforts.
106. What is clear is that by the time the deceased died on 23rd December 2007, slightly over three years after the agreement for sale was entered into, Eunice had neither paid "the rates and other outgoings" on the property as she was obligated to do, and neither had she secured the balance of the purchase price. Evidence shows that land rent and the rates in respect of the property were subsequently settled by the appellant. It was indeed her evidence that in March 2007, she informed "Mr. Munene" that she "would soon be leaving the country." It is noteworthy that in that same month of March 2007, the deceased entered into the sale agreement of the property with the appellant dated 13th March 2007 under which it was acknowledged that the appellant had paid land rates to the Municipal Council of Thika and land rent to the Commissioner of Land, which were otherwise the obligation of Eunice to pay under her agreement. The inference is of course that the deceased had by this time treated the agreement with Eunice to be at an end.
107. The foregoing discussion on repudiation ties in with the question whether the Judge erred in granting Eunice the equitable remedy of specific performance. Specific performance is an equitable remedy. It is a remedy at the discretion of the court. In *Nabro Properties Limited vs Sky Structures Limited & 2 Others* [2002] eKLR, E. Owour, JA. stated that "a party seeking specific performance must show and satisfy the court that it can comply i.e. it must be ready, willing and able to do so."
108. Similarly, Gicheru, JA. in *Gurdev Singh Birdi & Another as Trustees of Ramgharia Institute of Mombasa vs. Abubakar Madhbuti (above)* stated about a prayer for specific performance in that case that:
- "When the appellants sought the relief of specific performance of the agreement of sale of the respondent's property registration Number L. R. MN/1/7673 measuring in area 2. O40 Hectares and situated in Mombasa Mainland North in their plaint dated and filed in the superior court on 25th January, 1995 they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement referred to above which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement."
109. As already noted, counsel for the appellant and for the administrators faulted the Judge for ordering specific performance of a contract after the lapse of more than 14 years and when Eunice had not discharged all her obligations under the agreement for sale including payment of rates and other outgoings or by tendering the balance of the purchase price.
110. Eunice on the other hand maintained that she did not pay the balance of the purchase price because possession was a pre- condition. We have already set out above the explanation given by Eunice of her efforts to take possession and that when she approached the deceased she was eventually referred to lawyers and possession was never given. That may well be so, and the learned Judge cannot be faulted for having found as a fact that Eunice established that she was not put in possession of the property as required by the agreement.
111. That notwithstanding, it bears repeating that the agreement for sale in favour of Eunice stipulated a completion date of 24th February 2005. It was clearly the intention of the parties to that agreement that by that date both the vendor and the purchaser would have fulfilled their respective obligations. As Eunice put it in her evidence in chief, "we were to complete the agreement in 3 months i.e. 24.2.2005." Both parties should demonstrably have been in a position to complete by that date.



112. At any rate, in seeking specific performance, it was incumbent upon Eunice to demonstrate that she was ready, able and willing to perform her obligations under the agreement. In that regard she stated in her evidence that “I am ready to complete the transaction in shortest time possible.”
113. Under cross examination on 22nd May 2017, Eunice reiterated that she did not pay the balance of the purchase price because she was not put into possession and went on to state “it was my desire to use the property to generate money balance of purchase price. I had other moneys. It is not contained in the agreement. The balance of the purchase price would have been available.”
114. Eunice did not however back up her claim of her ability to pay and did not present any evidence whatsoever of her ability to perform her obligation under the agreement to pay the balance of the purchase price. Such would have for instance taken the form of bank statements or advocates professional undertaking. Neither did the learned Judge consider Eunice’s ability to pay the balance of the purchase price before granting the relief of specific performance.
115. We are in the circumstances entitled to interfere with the exercise of discretion by the learned Judge (see *Mbogo vs. Shah* [1968] EA 93) as it has been shown that the Judge failed to consider matters that he should have considered. In the result, we uphold the argument that the Judge erred in granting the order for specific performance.
116. Having said that, we bear in mind, in making the final orders, that the deceased also breached the agreement for sale with Eunice by failing to put her in possession of the property.
117. The upshot of all the foregoing is that the appeal partially succeeds. We hereby set aside the following orders made by the trial court:
- a. A declaration that the 1st respondent has a purchaser’s interest in the land situate in Thika Municipality and comprised in Land Reference Number 7699/2 pursuant to the agreement dated 25th November 2004.
 - b. A declaration that the 1st respondent is entitled to vacant possession of the land situate in Thika Municipality and comprised in Land Reference Number 7699/2.
 - c. An order that the 1st respondent shall pay to the administrators the entire balance of purchase price, being the sum of Kshs. 10,000,000/= within 7 days of delivery of possession.
 - d. An order that the administrators shall hold such sums in trust for the 5th respondent as he is entitled to by virtue of the sale to the 1st respondent.
 - e. An order that in default of payment of the sum stipulated in paragraph (c.) above within the stipulated time the agreement dated 25th November 2004 shall be deemed automatically rescinded.
 - f. A mandatory injunction directed at the Administrators for the specific performance of the terms of the agreement dated 25th November 2004 including handing over possession of the land situate in Thika Municipality and comprised in Land Reference Number 7699/2.
 - g. A mandatory injunction directed at the Administrators to execute any and all the necessary documents for the completion of the agreement dated 25th November 2004.
 - h. A permanent injunction restraining the Administrators or the appellant or any of them, from disposing or in any way interfering with the land situate in Thika Municipality and comprised in Land Reference Number 7699/2 to the detriment of or in a manner that may obstruct or further delay the 1st respondent interest therein.



- i. An order that the aggregate of proceeds of the sale to the 1st respondent in accordance with the agreement dated 25th November 2004, which computation shall include sums already paid on that agreement and sums payable after this judgment, shall be shared equally between the Administrators herein on the one hand and the 5th respondent herein on the other.
 - j. An order that the costs of the suit shall be met by the Administrators and the 5th respondent jointly and severally.
118. We substitute therefor an order dismissing the 1st respondent's suit. We further make the following necessary consequential orders:
- a. The ownership of the property shall revert to the joint names of the Administrators of the estate of James Flavian Chege Munene and Balwant Singh as tenants in common in equal shares.
 - b. The Chief Land Registrar is hereby directed to cancel all entries registered against the title to the property after the registration of grant of probate and revert the property to the Administrators of the estate of James Flavian Chege Munene and Balwant Singh.
 - c. The Administrators shall immediately refund to the appellant the amount of Kshs.21,798,580.00 acknowledged as having been received under the nullified agreement, together with interest thereon at court rates from the date of the judgment of the ELC until payment in full.
 - d. The Administrators shall immediately refund to the 1st respondent, the amount of Kshs.1,000,000.00 being the deposit paid, together with interest thereon at court rates from the date of the judgment of the ELC until payment in full.
119. For the avoidance of doubt, we uphold and confirm the following orders made by the trial court:
- a. A declaration that the transfer dated 22nd December 2009 between the Administrators on the one hand and appellant on the other and all consequential entries made on the title by the Registrar of Titles pursuant to that transfer or any subdivisions made after the transfer are null and void.
 - b. An order directing the Chief Land Registrar to cancel the entry registering the transfer dated 22nd December 2009 between the Administrators on the one hand and the appellant on the other and all consequential entries made on the title pursuant to that transfer or any subdivisions made after the transfer.
120. The Administrators shall bear the costs of the suit before the ELC and the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2025.

W. KARANJA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

L. ACHODE



.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

