



**Kobilo Farm Limited & another v Elfam Limited; Commodities Fund (Interested Party)
(Environment & Land Case 24 of 2020) [2024] KEELC 1567 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 24 OF 2020**

**EO OBAGA, J
MARCH 14, 2024**

BETWEEN

KOBILLO FARM LIMITED 1ST PLAINTIFF

METROPOLE HOLDINGS LIMITED 2ND PLAINTIFF

AND

ELFAM LIMITED DEFENDANT

AND

COMMODITIES FUND INTERESTED PARTY

JUDGMENT

Introduction And Background

1. The plaintiffs are sister companies who have common directors. The interested party is a company which advanced a loan of Kshs 22,500,000/= to the 1st Defendant company. The 1st Defendant charged its property known as Sergoit/Koiwoptaoi Block 13/4 measuring 18.62 hectares as security for the loan advanced. I shall herein after refer to the 1st and 2nd Plaintiffs as Kobilo and Metropole respectively and the 1st Defendant as Elfam.
2. On 9.7.2018, Elfam entered into two sale agreements with Metropole. In one of the agreements, Metropole was purchasing 100 acres out of LR No 7217/1 at a consideration of Kshs 150,000,000/= . In another agreement, Metropole was purchasing 33.3. acres out of LR No 7217/1 at a consideration of Kshs 50,000,000/=
3. The two agreements were made on the understanding that LR No 7217/1 which is the mother title was undergoing subdivision. The completion date for the two agreements was 90 days. As at the expiry of 90 days, Metropole had only paid Kshs 60,000,000/= out of the Kshs 200,000,000/=



4. After the expiry of the 90 days in respect of the agreements between Elfam and Metropole, Kobilo entered into fresh agreements with Elfam. These new agreements were backdated to the initial date for the agreements between Elfam and Metropole. The completion date was now 365 days from 9.7.2018. The fresh agreements now stipulated that Kobilo was purchasing LR No Sergoit/Koiwoptaoi Block 13/9 measuring 36.7 hectares and LR No Sergoit/Koiwoptaoi Block 13/4 measuring 18.62 hectares. The fresh agreements superseded the previous agreements. The purchase price now increased to Kshs 205,000,000/= This is because Block 13/9 reduced to 90 acres whereas Block 13/4 increased to 46 acres.
5. The directors of Elfam transferred LR No Sergoit/Koiwoptaoi Block 13/9 to Kobilo who now have title for this property which was issued on 3.9.2019. The directors of Elfam pushed for the balance of the purchase price for LR No Sergoit/Koiwoptaoi Block 13/4 but the directors of Kobilo did not clear the balance. The directors of Elfam then gave a 21 days' notice to which there was no compliance. The agreement in respect of this property was considered as having been rescinded.
6. As at the time of filing this suit, Kobilo had paid a total of Kshs 194,000,000/= leaving a balance of Kshs 11,000,000/= The plaintiffs through their amended plaint dated 18.6.2020 sought the following reliefs:-
 - a. That the plaintiffs be allowed to repay all the outstanding loan arrears owing to the interested party with corresponding order of reimbursement of the same by the defendant herein.
 - b. Order of specific performance compelling the defendant to effect transfer of LR No Sergoit/Koiwoptaoi Block 13/4 immediately by supplying discharge of charge, duly transfer forms in triplicate, original title deed, valid rates clearance certificate, certificate of incorporation, KRA PIN, copies of identity cards and coloured passport size photographs of the directors of the defendant herein.
 - c. Further and in the alternative to prayer (a) above the Deputy Registrar of the Honourable court to execute the transfer forms whereof the same be deemed sufficient to effect transfer of LR No Sergoit/Koiwoptaoi Block 13/4 in favour of the plaintiffs herein.
 - d. A declaration that the plaintiffs are the lawful and legal owners of that parcel of land known as LR No Sergoit/Koiwoptaoi Block 13/4.
 - e. Permanent injunction restraining the Defendants, its agents and servants from encroaching, subdividing, or interfering with the plaintiff's property known as LR No Sergoit/Koiwoptaoi Block 13/4.
 - f. Damages for the value of the trees illegally harvested and all improvements thereon.
 - g. General, punitive and exemplary damages.
 - h. Special damages of Kshs 70,000/= being costs for valuation report.
 - i. In the alternative and without prejudice to the above an order for refund of the consideration with interest at court's rates.
 - j. Cost of the suit.
 - k. Any other relief that the honourable court deems just and fit to grant.
7. The Defendant raised a defence and counter claim in which it seeks the following reliefs:-



- a. A declaration that the Defendant is the Legal bona fide and indefeasible owner/proprietor of the title with respect to land parcel title LR No Sergoit/Koiwoptaoi/Block 13/4 and ownership by the Defendant be and is hereby upheld as true, genuine and lawful.
- b. A declaration that the Defendant lawfully transferred land title Sergoit/Koiwoptaoi/Block 13/9 and is registered in the Plaintiffs names and not land title Sergoit/Koiwoptaoi/Block 13/4.
- c. A declaration that the plaintiffs have breached the terms of the sale agreement dated 9th July, 2018 by defaulting in completion of payment for land title LR No Sergoit/Koiwoptaoi/Block 13/4.
- d. A mandatory order that the sale agreement between the plaintiffs and the Defendant be and is hereby rescinded/revoked and the plaintiffs be and are hereby ordered to forfeit the 10% deposit of the purchase price plus accrued interest and the Defendant to refund the plaintiffs amount received less the 10% deposit of the purchase price, plus accrued interest and elect to resell its property.
- e. A permanent injunction restraining/prohibiting the plaintiffs, their agents, servants and/or any person whatsoever from trespassing, entering, selling, transferring, charging and/or dealing in any manner with land parcel LR No Sergoit/Koiwoptaoi/Block 13/4.
- f. General damages.
- g. Costs of this suit.
- h. Interest on (d) & (g) at court rates until full payment.
- i. Any other or further relief as the Honourable court shall deem it just and fit to grant in the circumstances.

Plaintiffs' case;

8. PW1 Teresa Chebet Maina and her husband Wilson Kipkosgei Maina are directors in both Kobilo and Metropole. It is Teresa Chebet Maina who testified on behalf of Kobilo and Metropole. Part of her evidence has been captured in the background hereinabove and I do not wish to rehash the same.
9. It is Kobilo and Metropole's case that the two properties that is Sergoit/Koiwaptaoi Block 13/9 and 4 were purchased as one block as the two are adjacent to one another. Elfam transferred parcel 13/9 for which title was issued in the name of Kobilo.
10. It is PW1's evidence that they were ready and willing to clear the balance of Kshs 11,000,000/= but that the directors of Elfam refused to clear the outstanding loan to the interested party and give them completion documents.
11. At one time, PW1 was going to Iten when she saw people felling blue gum trees which were on LR No Sergoit/Koiwaptaoi Block 13/4 (suit property). She immediately called Sotie Marie Biwott and inquired what was happening. Ms. Biwott told her that whoever was cutting down the trees was doing so as the sale agreement in respect of the suit property had aborted.
12. It is PW1's evidence that they learned that Elfam's directors were in the process of subdividing the suit property and selling it to unsuspecting third parties. It was her further evidence that though they had purchased the suit property at Kshs 1.500,000/= per acre its value is higher as the land is arable. On the other hand, LR No Sergoit/Koiwoptaoi Block 13/9 for which they have title is rocky and marshy.



13. Kobilo commissioned the services of a valuer who valued the suit property at Kshs 100,000,000/= The surveyor was paid Kshs 70,000/= as his fees. The valuer also prepared a status report in respect of the suit property for which he was paid Kshs 40,000/=

Defendant's case;

14. The two directors of Elfam and their farm manager testified on behalf of Elfam. Professor Margaret Kamar testified that in 2017, they decided to sell a portion of their land. She received a call from Wilson Maina who indicated that he wanted to purchase a portion of their land. He came with his wife and they viewed the land. The two told her that they wanted to take a portion of 100 acres which was swampy as they wanted to build a dam and put other facilities. They also wanted a portion which was arable and was adjacent to the one which was swampy.
15. Elfam and Metropole entered into two agreements on 9.7.2018 for purchase of 100 acres and 33.3 acres at Kshs 150,000,000/= and 50,000,000/= respectively. Metropole was to clear the purchase price within 90 days. As at the end of the 90 days, Metropole had only paid Kshs 60,000,000/=. When the actual measurements were carried out, the 100 acres which Metropole intended to purchase reduced to 90 acres. The 33.3 acres increased to 46 acres.
16. Elfam and Kobilo entered into fresh agreements where Kobilo took LR No Sergoit/Koiwoptaoi Block 13/9/measuring 36.7 hectares and Sergoit/Koiwoptaoi Block 13/4 measuring 18.62 hectares. The completion date was 365 days but the agreements were backdated to 9.7.2018. As for parcel Block 13/9, Kobilo was to pay 30% on the completion date.
17. The directors of Kobilo defaulted at the expiry of six months. As there was enough money to cover the purchase of Block 13/9 a transfer in favour of Kobilo was made and they obtained title for this parcel. Prof. Margaret Kamar wrote messages to Wilson Maina to clear the balance but he went quiet. As at 11.2.2019 Kobilo and Metropole had paid a total of Kshs 190,000,000/= leaving a balance of Kshs 15,000,000/=
18. After the expiry of the 365 completion period, a 21 days' notice was given to the plaintiffs' directors. There was no response to the 21 days' notice from Kobilo. As the directors of Elfam had pressing financial needs to be made, they sold Sergoit Koiwoptaoi Block 12/24 which raised Kshs 100,000,000/= Prof. Margaret Kamar continued asking Wilson Maina to clear the balance. She even asked him to consider reducing the acreage to what he had paid for.
19. A default notice and termination notice were prepared and served upon Wilson Maina but he did not respond. In 2020, Mr. Maina's lawyer contacted them and informed them that he had Kshs 11,000,000/= being the balance which he wanted to pay but as they had rescinded the agreement in respect of the suit property in 2019, they did not bother to go for the balance.
20. The directors of Kobilo forcefully invaded the suit property where they cut down trees, destroyed dairy structures and put up their own structures and a pit latrine. They were acting on the basis of an order for maintenance of status quo. As at the time the orders of maintenance of status quo were given, it is Elfam which was on the suit property.
21. Prof. Margaret Kamar denied the allegations by Kobilo that they had subdivided the suit property. She stated that the portion subdivided was a different one and that no fraud was committed against Kobilo and Metropole.
22. On 15.6.2020 some persons in the company of Wilson Maina went to the suit property and started putting up structures. Efforts by DW2 Donald Cheminingwa to stop them fell on deaf ears. On



18.6.2020, DW2 reported the trespass to Chepkanga police station. Wilson Maina confiscated tractors and a pickup and took them to Chepkanga Police station. When the County Commander summoned him and Wilson Maina, the court order was interpreted to them by the County Commander. It is at this time that Wilson Maina left the matter. The confiscated tractors and pick-up were released and the oats which the manager had planted on the suit property were not interfered with.

23. The money which Kobilu paid for the suit property was deposited in court but the court directed that it be deposited in a joint interest earning account in the name of the Advocates for the parties. The sum of Kshs 58,000,000/= is deposited in a joint interest earning account in the name of Alice Yano & Co. Advocates and Limo R. K and Company Advocates.

Submissions by the plaintiffs;

24. The Plaintiffs submitted that it is Elfam who was in breach of the sale agreement in respect of the suit property as they failed to discharge the title to the suit property which had been charged to the interested party. It was further submitted that there was no evidence tendered by the directors of Elfam to prove that they had done anything to clear the amount owed to the Interested party.
25. The plaintiffs further submitted that they were ready and willing to pay the balance of the purchase price and that the amount had been deposited in their Advocates office but that the directors of Elfam refused to collect the money and have the suit property transferred to Kobilu.
26. The plaintiffs further submitted that the agreement in respect of the suit property was not rescinded as provided for in the sale agreement. They submitted that during the hearing PW1 was categorical that she did not see any notices rescinding the sale agreement and that if there was any which was issued, then that must have been manufactured by Prof. Margaret Kamar.
27. The plaintiff further submits that the prayers in the counter-claim by Elfam go to confirm that the agreement was not rescinded because Elfam is asking the court to make a declaration that the agreement be rescinded and that they retain 10% of the amount so far paid as well as accrued interests. They submit that if this were to happen, the court would have descended to the arena and rewrote a contract for the parties. Reliance was put in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and another* (2001) eKLR where the Court of Appeal held as follows:-

“ A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...

As was stated by Shah JA in the case of *Fina Bank Limited v Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported).

It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”

Defendant's submissions;

28. The Defendant submitted that the plaintiffs are the ones in breach of the sale agreement in respect of the suit property. There was no evidence tendered to show that the plaintiffs were ready and willing to pay the balance of the purchase price.
29. The particulars of fraud attributed to the defendant were never proved. The director further submitted that though the director of the plaintiffs Mr. Wilson Kipkosgei Maina recorded a witness statement, and filed replying affidavits in support of interlocutory applications, he did not come to court to testify.



The notices for termination of the agreement were sent to him and as he did not come to deny that he received the same, the court should draw an adverse conclusion that if he came to testify, his evidence will have been adverse to his case.

30. The defendant further submitted that failure to pay the balance made defendant to sell another parcel of its property to meet the financial obligations which its directors had. The defendant submitted that if specific performance was to be ordered, it will cause hardship to the defendant. The defendant cited the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR where Justice Maraga (as he then was) stated as follows:-

“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or 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.

Specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

Analysis and Determination;

31. I have carefully gone through the evidence adduced herein as well as the submissions of the parties. It is not in contention that initially Elfam entered into two agreements on 9.7.2018 for sale of 100 acres and 33.3 acres out of LR No 7217/1 at a consideration of Kshs 150,000,000/= and 50,000,000/= respectively.
32. It is also not contested that the completion date was 90 days and that as at the completion date, Metropole had only paid 60,000,000/= It is further not in contention that the parties entered into fresh agreements wherein Kobilo was introduced as purchaser who was now buying LR No Sergoit/ Koiwoptaoi Block 13 /9 measuring 37.6 hectares and LR No Sergoit/Koiwoptaoi Block 13/4 measuring 18.62 hectares at Kshs 136,000,000/= and Kshs 69,000,000/= respectively.
33. There is also no contention that LR No Sergoit/Koiwoptaoi Block 13/9 has been transferred and is registered in the name of Kobilo. The only contested property is LR Sergoit/Koiwoptaoi Block 13/4.
34. The parties had filed their separate list of issues for determination. A look at the lists and the evidence adduced in this case shows that the following are the issues for determination;
1. Who was in breach of the agreement in respect to LR No Sergoit/Koiwoptaoi Block 13/4;
 2. Was the balance of the purchase price subject to discharge of charge over LR No Sergoit/ Koiwoptaoi Block 13/4;
 3. Was the agreement lawfully rescinded;
 4. Are the plaintiffs and the defendant entitled to their respective claims in the amended plaint and counter-claim;
 5. Which order is to be made on costs.



Who was in breach of the agreement in respect to LR No Sergoit/Koiwoptaoi Block 13/4;

35. As has been stated herein above the initial agreements which were signed between Elfam and Metropole had a completion date of 90 days. As at the expiry of the completion date only Kshs 60,000,000/= had been paid to Elfam. Fresh agreements were entered into but were backdated to 9.7.2018 the date of the initial agreements. The new agreements superseded the earlier agreements.
36. The firm which was introduced into the new agreements was Kobilo. Payments towards the purchase price were made by Metropole, Wilson Maina and on the other occasions by Teresa Chebet Maina. Though the directors of Elfam claim that the balance was Kshs 15,000,000/= in their evidence before court, this is not supported by their pleadings which acknowledge the fact that the plaintiffs had paid 194,000,000/=. The balance therefore is 11,000,000/=.
37. The plaintiffs are contending that they were ready and willing to pay the balance but were only held back by the fact that the defendant had not discharged the suit property. According to the agreement in respect of the suit property, the plaintiffs were to pay 10% of the purchase price on or before execution of the agreement. As for the agreement in respect of parcel No Sergoit/Koiwoptaoi Block 13/9, a deposit of Kshs 30% was to be made on or before execution of the agreement.
38. This therefore means that if the terms of the agreement were to be met, Elfam would have received Kshs 6,900,000/= and 40,800,000/= on 9.7.2018. This makes a total of Kshs 47,700,000/=. The schedule of payments produced by the plaintiffs and supported by receipts show that the first payments were made on 11.7.2018 for Kshs 20,000,000/=. The second payments of Kshs 30,000,000/= were made on 23.8.2018. The fourth payment of 5,000,000/= was made on 28.9.2019. The fifth payment of Kshs 5,000,000/= was made on 2.10.2018. It therefore shows that before the expiry of the 90 days, Kshs 60,000,000/= had been paid.
39. After the expiry of the 90 days, fresh agreements were made which gave completion date of 365 days. The date was however to run from the date of the initial agreements that is 9.7.2018. This therefore means that completion date was to expire in July, 2019. Before the expiry of the fresh completion date, the plaintiffs made a further payment of Kshs 130,000,000/= between 30.11.2018 and 11.2.2019 making a total of Kshs 190,000,000/=. The Plaintiffs made a further payment of Kshs 4,000,000/= on 9.9.2019. This was outside the 365 days. This however made a total of Kshs 194,000,000/=. This amount is admitted in the pleadings by Elfam though in court during hearing, Prof. Kamar could not verify whether this amount was credited to Elfam as Transnational Bank changed its name to Access Bank and the accounts were changed.
40. It is therefore clear that Kobilo has a balance of Kshs 11,000,000/= which is yet to be paid. The question which then emerges is whether Kobilo has been ready and willing to clear the balance. The evidence on record is that Prof. Kamar is the one who was dealing with Mr. Wilson Maina who is a director of both plaintiffs. There is evidence that Professor Kamar used to communicate with Mr. Maina on Whatsapp. The screen shot of the messages were produced as defence exhibit 3 on 17.10.2022. On this date, it is Mr. Kibii who was appearing for the plaintiffs. He did not object to the production of the whatsapp messages. Prof. Kamar was stood down to 20.2.2023.
41. On 20.2.2023, Mr. Kibii appeared together with Mr. Masika for the Plaintiffs. Mr. Masika now took charge of leading Mr. Kibii. When Prof. Kamar referred to the messages on whatsapp, Mr. Masika objected to the reliance on these messages on the ground that the phone number from which they were retrieved had not been given and that there was no certificate as required by the law on electronic evidence. The court upheld the objection.



42. The court at this time was not aware that the same messages had been admitted in evidence 3 as defence exhibits 3 and there was no objection. Mr. Kibii ought to have informed the court that the documents had already been admitted. He failed in his duty to assist the court in dispensing justice. I will therefore go with the proceedings of 17.10.2022 where the WhatsApp messages had been admitted as defence exhibit 3.
43. The WhatsApp message of 15.10.2019 show that Prof. Kamar had brought the issue failure to clear the balance as well as the element of interest and Mr. Maina promised to clear the balance by end of October 2019. Mr. Maina then went quiet. It is only until April 2020 when Mr. Kibii called DW3 and informed her that he had the balance of Kshs 11,000,000 and that he was ready to complete the transaction. DW3 told him that the agreement had been rescinded two months later this suit was filed.
44. The director of Kobilu had promised that he was to clear the balance by end of October 2019. He did not do so. There was no evidence that the balance of Kshs 11,000,000 had been deposited in the Plaintiff's Advocate's account and that they were ready to disburse the same. The WhatsApp messages are clear that Elfam was ready to have the agreement carried through but the Plaintiffs refused to clear the balance. It is therefore clear that it is Kobilu which was in breach of the agreement by failure to clear the balance on the completion date.

Was the balance of the Purchase Price Subject to discharge of charge over LR No Sergoit/Koiwoptaoi Block 13/4

45. The Plaintiffs have tried to argue that the payment of the purchase price was subject to Elfam discharging the suit property. A look at the agreement shows that there was no clause in that agreement which stipulated that the balance was to be paid upon discharge of charge over the suit property. The Plaintiffs cannot therefore be heard to claim that they could not pay the balance before the discharge. The Plaintiffs should have cleared the balance and if the defendant was unwilling to give completion documents, then Kobilu would have had the basis of moving the court for orders of specific performance.

Was the agreement lawfully rescinded;

46. The manner in which the parties herein proceeded is that they were not following the clauses in the agreement strictly as it was required. This is clear from the manner in which the first set of agreements were entered into. The agreements were entered on the assumption that Metropole was purchasing 100 acres and 33 acres respectively from LR No 7217/1. These agreements were entered into on 9th July, 2018. Though the Plaintiffs testified that they were given a copy of the mother title, that copy was not produced in evidence.
47. The mutation which was produced by the Plaintiffs was in respect of LR No Sergoit/Koiwoptaoi Block 13/2. A look at the mutation shows that it is the one which gave rise to Sergoit/Koiwoptaoi Block 13/9 measuring 36.7 hectares and Sergoit/Koiwoptaoi Block 13/4 measuring 18.62 hectares. The titles came out on 25.5.2016. It is not clear why the parties who entered into agreements on 9.7.2018 could not straightaway refer to the properties which already had titles as opposed to agreements which were only specifying the acreage and from a different parcel.
48. Despite the second set of agreements stipulating that 30% deposit and 10% deposit for parcel 13/9 and parcel 13/4 respectively was to be made on or before execution of the agreements, the first payments were made on 11.7.2018. This therefore shows that the parties were not strictly going by the terms in the agreement. This is what happened when Prof. Kamar on behalf of Elfam wrote a letter dated 15.10.2019 which gave Kobilu and Metropole 21 days' notice of default and asked the plaintiffs to



pay up the balance. Again on 27.11.2019 Elfam wrote a letter communicating the termination of the agreement. The notice and the letter of 27.11.2019 was addressed to Mr. Wilson Maina. The notice and letter of 27.11.2019 referred to the messages which were exchanged between Prof. Kamar and Wilson Maina.

49. The plaintiffs cannot therefore claim that the 21 days' notice was not given in accordance with the terms of the agreement. The parties had therefore conducted their business outside the strict terms of the agreement. They were acting in their individual capacities. In the case of *Kairu v Shaw* (1986 – 1989) EA 221 Madam C.J held as follows:-

“When interpreting a contract, the court ought to give effect to the intention of the parties as far as possible, and, in particular, avoid deviating interpretations however easy or plausible they may appear to be.”

50. The parties behaved in a manner to show that they were not strictly following the clauses in the agreement. It is clear that Prof. Kamar was talking more with Mr. Mania. The 21 days notice was sent to Mr. Maina. Though Mr. Maina recorded a witness statement and was active during the inter-locutory applications, he did not come to court to testify and the only inference which this court makes is that if he were to come, his evidence would have been adverse to the plaintiff's case. I therefore find that the agreement was lawfully terminated time having been made of essence by issuance of the notice of 15.10.2019.

Are the plaintiffs and the defendant entitled to their respective claims in the amended plaint and counter-claim;

51. The plaintiffs are asking the court to allow them to repay all the outstanding loan arrears owing to the interested party by Elfam with corresponding order for reimbursement of the same by Elfam. There is no basis for granting this relief. There was no clause in the agreement that repayment of the loan owed to interested party was a condition for the plaintiffs clearing the loan owed by Elfam. Granting such an order will amount to the court rewriting a contract for the parties.

52. In the case of *Gatobu M'Ibuutu Karatha v Christopher Muriithi Kubai* (2014) eKLR where the court cited the decision of the Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (2002) EA 503, the court held as follows:-

“This, in our view, is a serious misdirection on the part of the learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.”

53. The plaintiffs are seeking an order of specific performance. As has been shown hereinabove it is Kobilu which was in breach of the agreement. The remedy of specific performance can only be given where it has been shown that the plaintiff was ready and willing to clear the purchase price but that the defendant did not want the contract to be carried through. In the instant case, it is clear that the defendant was ready to carry through the agreement but the Plaintiffs were not keen. Mr. Maina gave promises to clear by end of October 2019 but he did not do so. It is only in April 2020 when his lawyer claimed that he had the balance. This was too little too late as the agreement had already been rescinded. The money which had already been paid was deposited in a joint interest earning account in the names of the Advocates for the parties.



54. The Plaintiffs are seeking a declaration that they are the lawful owners of the suit property. They are also seeking for injunctive orders and damages for trees which were allegedly illegally felled, general damages as well as exemplary damages and special damages of Kshs 70,000/=. These reliefs cannot be granted. The Plaintiffs are the ones in breach of the agreement. The Plaintiffs had not been granted possession and the felling of the trees was done after the agreement had aborted. One cannot pay damages for what lawfully belongs to him or her. Equally an owner cannot be enjoined from his or her own land.
55. The Plaintiffs can only get a refund of what was paid by them less what the sale agreement stipulated in case of default. The sale agreement in respect of the suit property stipulated that if the default was on the part of the purchaser and the agreement is rescinded then the vendor was to forfeit and retain the 10% deposit. This was clearly spelt under clause G(i) (a) of the agreement.
56. The defendant tendered evidence to show that the plaintiffs trespassed into the suit property and dug a pit latrine and put up structures which are there upto date. The trespass was reported to Chepkanga police station. Mr. Maina a director of the Plaintiffs confiscated tractors which were taken to Chepkanga police station. The tractors were only released on the intervention of the County Commandeer Uasin Gishu who upon reading the order which had been given by the court regarding maintenance of status quo, advised Mr. Maina to keep off the suit property. The defendant has therefore proved that there was trespass to the suit property.
57. The defendant having proved that there was trespass it is entitled to general damages for trespass. The structures which Mr. Maina put up on the suit property are still there. The defendant will have to restore the suit property to its original state. The plaintiffs caused a valuation which put the value of the suit property at Kshs 100,000,000/=. The status report prepared by Real Appraisal Limited clearly shows the structures which plaintiffs erected on the suit property are still there. Taking into account that the trespass is continuous in that the structures which the plaintiff put up are still there. Further taking into account that there were trees which were cleared and considering the value of the land trespassed into, I find that general damages in the sum of Kshs 10,000,000/= will be adequate.

Disposition;

58. Having analysed the evidence adduced by both parties, I find that the plaintiff's claim fails save for refund of the amount paid less the 10% forfeited deposit. On the other hand, I find that the defendant has proved its case on a balance of probabilities. I grant the following final orders:-
 1. The Plaintiffs shall be refunded the amount paid in respect of the aborted agreement for LR No Sergoit/Koiwoptaoi Block 13/4 less the 10% deposit which is forfeited to the defendant.
 2. A declaration is hereby given that the defendant is the legal, bonafide and indefeasible owner of LR Number Sergoit/Koiwoptaoi Block 13/4.
 3. A declaration that the plaintiffs breached the terms of the sale agreement dated 9th July, 2018 in respect of LR No Sergoit/Koiwoptaoi Block 13/4 by failing to complete the purchase price.
 4. A declaration that the agreement between the plaintiffs and the defendant stands rescinded and the 10% deposit paid stands forfeited to the defendant together with the accrued interest at court rates.
 5. The defendant is at liberty to sell LR No Sergoit /Koiwoptaoi Block 13/4 pursuant to the aborted agreement.
 6. General damages of Kshs 10,000,000/= (Ten million).



7. A permanent injunction restraining the plaintiffs, their agents, servants and/or any person whatsoever from trespassing, entering, selling, transferring, charging and/or dealing in any manner with land parcel LR No Sergoit/Koiwoptaoi/Block 13/4.
8. Costs of the suit and counter-claim.
9. Interest on (4) (6) and (8).

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF MARCH, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

.....

.....

Court Assistant –Laban

E. O. OBAGA

JUDGE

14TH MARCH, 2024

