



Otundo & 5 others v Creek Marketing and Development Limited (Civil Appeal E132 of 2022) [2024] KECA 353 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 353 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E132 OF 2022
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
APRIL 12, 2024**

BETWEEN

**BERNARD ONKUNDI OTUNDO 1ST APPELLANT
BARNABAS KIPRONO BWAMBOK 2ND APPELLANT
KEFA NYAMONGO OENGA 3RD APPELLANT
KENNETH ODUOL ESAU 4TH APPELLANT
DANCAN OCHENGE OYARO 5TH APPELLANT
JAMES KAMBO MUTHUSI 6TH APPELLANT**

AND

CREEK MARKETING AND DEVELOPMENT LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (Nelly Matbeka, J.) delivered on 27th September 2022 in E.L.C No. 14 of 2013)

JUDGMENT

1. By a Sale Agreement dated 21st July 2011 (the Agreement), the appellants agreed to jointly purchase from the respondent, Creek Marketing and Development Limited, a parcel of land situate in Mtwapa and known as Kilifi/Mtwapa/403 (the suit property) for the sum or price of Kshs. 33,500,000 on terms and conditions therein stipulated. It was a term of the said Agreement that the appellants pay a deposit of Kshs. 3,350,000 upon execution of the Agreement and the balance of Kshs. 30,150,000 on or before the completion date, to wit, the 120th day from the date of the Agreement.
2. It was also a term of the said Agreement that, on or before the completion date aforesaid, the respondent's advocates were mandated to deliver to the appellants the completion documents specified



in clause 5.3 of the Agreement. Under clause 8.1, the respondent was bound to deliver the property in vacant possession within fourteen (14) days after the completion date.

3. Consequent upon delay in completion of the transaction in terms of the Agreement, the completion date lapsed on 15th November 2011, whereupon, the parties entered into a “Supplementary Sale Agreement” dated 15th December 2011 (the supplementary agreement) thereby extending the completion date to 30th December 2011 as appears in clause 1 thereof. Under clause 2, the parties reviewed the terms stipulated in clauses 5.2 and 5.3 of the Agreement to the effect that the appellants’ advocates were obligated to deliver to the respondent’s advocates an irrevocable professional undertaking from M/s. Miller & Co. Advocates in terms acceptable to the respondent’s advocates in exchange for the documents specified in clause 5.3 of the Agreement.
4. Under clause 3 of the supplementary agreement, the appellants were bound to pay interest on the balance of the purchase price at the rate of 30% with effect from 19th November 2011 until full payment not later than 31st December 2011. Delivery of vacant possession of the suit property was conditional upon payment by the appellants of the outstanding sums together with interest thereon.
5. Under clause 4, the deposit stood to be forfeited as at 18th November 2011 in the event that the appellants failed to complete the transaction within the contracted period in terms of the supplementary agreement.
6. By a plaint dated 22nd January 2013, the appellants sued the respondent in the High Court of Kenya at Mombasa in ELC Case No. 14 of 2013 claiming that they had paid the 10% deposit to the respondent’s advocates; that they had secured payment of the balance of the purchase price in the sum of Kshs. 30,150,000 from their financier (M/s. Housing Finance Company of Kenya); that the financier’s advocates, M/s. Miller & Company, had issued to the respondent’s advocates an irrevocable professional undertaking to pay the balance of the purchase price on or before expiry of 14 days of successful registration of the Transfer in favour of the appellants together with a Charge in favour of their financier; that the undertaking was communicated in a letter dated 5th January 2012; that, in breach of the Agreement, the respondent refused or failed to avail the completion documents specified in clause 5.3 of the Agreement in consequence whereof the parties were unable to complete the sale on or before expiry of 120 days from the date of execution of the Agreement; and that the respondent refused to hand over vacant possession of the suit property despite payment to them of the balance of the purchase price and due registration of the Transfer in favour of the appellants together with a Charge in favour of their financier.
7. In addition to the foregoing, the appellants lamented that the respondent was demanding payment of Kshs. 6,540,005 on account of alleged interest due and owing to it as a condition for handing over vacant possession of the suit property; that they (the appellants) were unable to enjoy mesne profits from the suit property to enable them repay Kshs. 45,000,000 advanced by their financier to facilitate purchase of the suit property; that the respondent had no proprietary interest in the suit property, the same having been extinguished upon registration of the Transfer and Charge aforesaid; and that the respondent’s continued occupation of the suit property was unlawful and amounted to trespass.
8. In view of the matters aforesaid, the appellants prayed for: (i) a declaration that the appellants are the registered proprietors of the suit property and that the respondent is a trespasser thereon; (ii) an order of vacant possession of the suit property;
 - (iii) an Order of eviction against the respondent, its agent and/or servants from the suit property;
 - (iv) an Order of Mandatory Injunction compelling the respondent, its agent and/or servants to hand over vacant possession of the suit property to the appellants;
 - (v) a Permanent Injunction



restraining the respondent, its agent and/or servants from trespassing on, entering upon or in any manner howsoever interfering with the suit property; (vi) general damages for trespass; (vii) mesne profits from 22nd August 2012 until delivery of vacant possession to the appellants; and (viii) costs of the suit.

9. In its amended statement of defence and counterclaim dated 1st March 2013, the respondent denied the appellants' claims, stating: that, after execution of the Agreement and payment of the requisite deposit, the appellants attempted to unilaterally vary the terms of the Agreement by introducing Housing Finance Corporation as their financier in the transaction; that the variation gave way to introduction by the said financiers of terms not contemplated in the Agreement; that, consequently, and in breach of the Agreement, the appellants were unable to complete the purchase by the completion date; that the respondent was at all material times ready to complete the transaction, and that it had secured the completion documents, which it could not release to the appellants before payment by the appellants of the balance of the purchase price; that the parties entered into fresh negotiations in a bid to save the transaction, resulting in the supplementary agreement dated 15th December 2011; that, despite the rescheduled timelines, the appellants were unable to complete the transaction on or before 30th December 2011; that the delayed completion was solely attributable to the appellants; that, despite registration of the Transfer in favour of the appellants on 21st June 2012, they paid the outstanding balance of the purchase price on 8th August 2012; that, despite demand, the appellants refused, failed or neglected to pay the accrued interest at the contracted rate of 30% on the balance of the purchase price amounting to Kshs. 6,540,005; that, in the circumstances, the respondent was entitled to withhold vacant possession of the suit property pending performance by the appellants of their obligations under the Agreement; and that the respondent has had to incur security charges in the sum of Kshs. 10,000 per month on account of the suit property.
10. In view of the foregoing, the respondent prayed that the appellants' suit be dismissed with costs, and that its counterclaim be allowed as prayed for:
- “(a) The sum of Kshs. 6,540,005/= being interest on the balance of the purchase price of Kshs. 30,150,000/= at the rate of 30% p.a from 19th November, 2011 to 8th August, 2012.
 - b. Further interest on (a) above, at the rate of 30% p.a from 9th August, 2012 until payment in full.
 - c. Security charges at the rate of Kshs. 5,000/= per month from 19th November, 2011 until the Plaintiffs obtain possession.
 - d. Interest.
 - e. Further or any other relief that the Honourable Court may deem just and fit to grant.”
11. In their Reply to Defence and Defence to Counterclaim dated 6th March 2013, the appellants denied the respondent's counterclaim and averred that the averments in the respondent's Statement of Defence constituted a misinterpretation and misunderstanding of the Agreement; that the respondent was at no time ready, able or willing to complete the transaction in accordance with clause 5.3 of the Agreement; and that the respondent had not obtained the Presidential consent, which was allegedly a mandatory requirement for transfer of the suit property.
12. In addition to the foregoing, the appellants denied the respondent's averment that it was the appellants' obligation to pay land rates and land rent in respect of the suit property. They averred that the



agreement did not provide that an irrevocable professional undertaking to pay interest at the rate of 30% be provided; that they did not authorise the firm of M/s. Steve Kithi & Company to issue an irrevocable professional undertaking to pay any interest on late payment of the purchase price before transfer of vacant possession of the suit property; and that section 24 of the *Land Registration Act* provided that, upon registration of Transfer of the suit property, all proprietary rights and interests vested in the appellants, and that the respondent's continued occupation thereof was unlawful. According to them, they did not owe the sum of Kshs. 6,540,005 as claimed in the respondent's counterclaim.

13. The appellants averred further that, under clause 2.1 of the Agreement, the Law Society of Kenya Conditions of Sale, 1989 were incorporated into the Agreement; that, under clause 4(7) thereof, the respondent's position was not one of being ready, able and willing to complete the transaction as at 18th November 2011 or 30th December 2011; that the respondent never served on the appellants with the mandatory 21 days' completion notice as required in law to complete the transaction or face sanctions for failure to complete; that the terms of clause 3 of the supplementary agreement were vague and inconsistent with the terms of clause 2.1 as read with clause 5.3 of the Agreement, and that such inconsistency ought to be resolved in favour of the appellants in accordance with the contra proferentem rule; that the respondent continued to unlawfully collect rent in the sum of Kshs. 200,000 per month from the suit property to the appellants' detriment; that the respondent had failed to mitigate its losses (if any), and had instead sought to unjustly enrich itself by filing the counterclaim for the unsubstantiated sum of Kshs. 6,540,005 while at the same time unlawfully collecting and wasting rental income from the suit property since August 2012 to date; and that, if there was any interest or amount due on account of the balance of the purchase price, the same should be deducted from, and settled against, the rental income and mesne profits that have accrued on the suit property with effect from 8th August 2012 until transfer of vacant possession to the appellants.
14. In its judgment dated 27th September 2022, the trial court (N. A. Matheka, J.) dismissed the appellants' suit with costs and allowed the respondent's counterclaim as prayed, save for security charges, which she allowed at the rate of Kshs. 10,000 with effect from 1st March 2015 to 1st May 2022 in place of the sum of Kshs. 5,000 per month with effect from 19th November 2012 until transfer of vacant possession as prayed in the counterclaim.
15. Aggrieved by the trial court's decision, the appellants moved to this Court on appeal on a whopping 20 grounds against the grain of rule 88(1) of the Court of Appeal Rules, which requires that "a memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against"
16. In summary, the appellants essentially fault the learned Judge for: finding that the appellants were in breach of the Sale Agreement and of the Supplementary Sale Agreement; failing to find that the respondent was not ready, able and willing to complete the transaction on the completion date, or otherwise to serve the completion notice and invoke the remedies of forfeiture or payment of interest on the balance of the purchase price under the Agreement; concluding that the respondent was not obligated to serve a completion notice contrary to the express terms of the Agreement; holding that the requirement for a Presidential consent as one of the completion documents to facilitate registration of the Transfer and Charge was illegal and unconstitutional despite the express and mandatory requirement in the Agreement; failing to find that the condition for payment of interest in terms of the supplementary agreement was unenforceable; allegedly rewriting the contract between the parties in respect of the terms as to payment of interest on the balance of the purchase price; failing to appreciate that the respondent had accepted an irrevocable professional undertaking from the appellants' financiers to pay the respondent the sum of KShs. 30,150,000 being the balance of the



- purchase price, and that there was no basis for payment of further sums as interest thereon; failing to appreciate that, if the appellants were in breach of the Agreement as claimed, the respondent had the option of rejecting the professional undertaking and invoke the remedy of forfeiture of the deposit; relying on the professional undertaking by M/s. Steve Kithi & Company in the absence of any provision therefor in, and in contravention of, the Agreement and the supplementary agreement; failing to appreciate that the said professional undertaking was without the appellants' authority, and was therefore void and of no contractual effect; failing to find that the respondent failed to provide completion documents or, otherwise, issue the requisite completion notice pursuant to which it would have been entitled to invoke appropriate remedies; allowing the respondent's counterclaim for interest on the balance of the purchase price at 30%, being KShs. 6,540,005; failing to find that, as registered proprietors, the appellants were entitled to vacant possession with all rights appurtenant to the suit property, including recovery of mesne profits, from the date of registration of the Transfer, and on receipt of the balance of the purchase price on 21st July 2012; failing to find that the respondent was a trespasser on, and in unlawful occupation of, the suit property from 21st July 2012; awarding the respondent Kshs. 10,000 per month on account of security charges without any basis; and for failing to give efficacy to the terms of the Agreement and of the supplementary agreement.
17. Supporting the appeal, learned counsel for the appellants, M/s. Kosgey & Masese, filed written submissions, list of authorities and case digest, all dated 13th June 2023 citing the cases of Kinyanjui vs. Thande (1995-1998) 2 EA 159 for the proposition that it is the vendor's duty to provide completion documents in a contract for sale of immovable property; Taj Mall Limited vs. Helen Njambi Mbugua [2019] eKLR, highlighting the principle that, where the terms of an agreement are vague, the inconsistency must be resolved against the party that draws the agreement; Kenya Hotel Properties Limited vs. Willesden Investments Limited [2009] eKLR, submitting that, upon registration of the Transfer in respect of the suit property in the appellants' favour, and upon receipt of the balance of the purchase price, the respondent had no basis to continue in occupation of the suit property, but became a trespasser thereon; and Nabro Properties Limited vs. Sky Structures Limited & 2 Others [2002] eKLR where this Court held that "it is a maxim of law that no man shall take advantage of his own wrongs to gain some favourable interpretation of the law."
 18. On their part in opposition to the appeal, learned counsel for the respondent, M/s. Njoroge & Katisya, filed written submissions, list of authorities and case digest dated 1st December 2023 citing the case of Sagoo & Another vs. Mwicigi & 3 Others [2022] KECA 83 (KLR) where this Court rejected an appeal by an appellant who had come to court with unclean hands when the contract was rescinded on failing to raise the balance of the purchase price. Counsel submitted that the respondent was ready to complete the transaction; that it was the appellants who did not have the funds ready; and that they introduced new demands through their financier who was not party to the sale agreement.
 19. Further, counsel cited two cases of Mohamed Balala & 11 Others vs. Attorney General & 7 Others [2012] eKLR and Attorney General & 6 Others vs. Mohamed Balala & 11 Others [2014] eKLR where, on appeal, this Court held that the learned Judge in the first case was correct in holding that the requirement of Presidential consent was an illegal and discriminative practice against owners of the 1st and 2nd row beach plots, and that it was in contravention of national values and principles enshrined in Article 10 of [the Constitution](#).
 20. On the authority of John Mburu vs. Consolidated Bank of Kenya [2018] eKLR, counsel highlighted the doctrine of estoppel by conduct and submitted that, at the time the supplementary agreement was executed, the issue that the respondent had not provided all completion documents was not raised by the appellants and that, by their own conduct, they are now estopped from raising the same having proceeded with the transaction and had the property registered in their favour.



21. Counsel went on to cite the cases of William Kipsoi Sigei vs. Kipkoech Arusei & Another [2019] eKLR and Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR, submitting that, the appellants having proceeded with the transaction, the doctrines of proprietary estoppel and constructive trust were applicable until the accrued penalty interest was paid in full.
22. Finally, counsel cited the decision in Mwangi vs. Kiiru [1987] eKLR, submitting that time was of the essence of the contract vide clause 15.7 of the Agreement, and that all the warranties and confirmations in the two agreements remained in force even after the completion date specified in clause 15.8 thereof.
24. We need to point out right at the outset that, this being a first appeal, it is also our duty, in addition to considering the rival submissions of learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions on the issues falling to be determined in the appeal. This approach was adopted by this Court in Arthi Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR citing the case of Selle v Associated Motor Boat Co. [1968] EA 123.
25. In Selle’s case (ibid), the Court held:

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
26. In addition to the foregoing, this Court clarified the circumstances under which it would be constrained to interfere with the decision of a superior court in Alfarus Muli v Lucy M Lavuta & Another [1997] eKLR where the learned Judges held that:

“The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”
27. Having considered the record as put to us, the impugned judgment, the grounds of appeal, and the rival submissions of the respective learned counsel, we find the following to be the broad issues that commend themselves for our determination, namely: (i) what were the express and implied terms of the Sale Agreement dated 21st July 2011; (ii) what was the legal effect of the Supplementary Sale Agreement dated 15th December 2011;

(iii) whether the respondent discharged its obligations under the Sale Agreement aforesaid as varied in terms of the subsequent Supplementary Sale Agreement; (iv) whether the appellants performed their part in terms of the Agreement as varied by the supplementary agreement and, if the answer is in the affirmative, whether they were entitled to the remedies sought in the plaint; (v) whether the respondent was entitled to the reliefs sought in its counterclaim; (vi) what orders ought we to make in determination of the appeal, including orders on costs.
28. On the 1st issue, the Sale Agreement dated 21st July 2011 set out the express terms of sale of the suit property from the respondent to the appellants at the sum or price of Kshs. 33,500,000 payable in the



terms set out in clauses 4 and 5.4, namely: (i) an initial deposit of Kshs. 3,350,000 on or before the date of the Agreement, to wit, 21st July 2011; and (ii) the balance of Kshs. 30,150,000 on receipt by the appellants of the completion documents.

29. Under the Agreement, the completion date was set as the 120th day from execution thereof, namely the 18th day of November 2011 by which the respondent was obligated to provide the following completion documents:

- i. Original documents of title in respect of the Property;
- ii. The duly executed by the Vendor Transfer of Property (in triplicate) in respect of the Property in favour of the Purchaser;
- iii. Kilifi County Council rates receipts in respect of the fully paid up rates in respect of the Property together with a Rates Clearance Certificate valid for at least thirty (30) days from the Completion Date;
- iv. Consent to Transfer of the said property from the Land Control Board or such other consents and documents as may be necessary to procure registration of the transfer in favour of the Purchasers.
- v. All previous documents in possession of the Vendor.
- vi. Copies of the Pin Certificate for the Vendor and the Directors.
- vii. The duly executed by the Vendor's Directors transfer of shares (in triplicate) in respect of the company, Notification of Change of Directors and secretaries or in their particulars and company resolutions."

30. We hasten to observe that the agreed list of completion documents did not include any Presidential consent to facilitate registration of the Transfer and Charge. Yet, the appellants claimed that the respondent was in breach of the Agreement in failing to provide such a consent as one of the completion documents. On this account, the appellants contend that the Learned Judge was at fault in holding that the requirement for a Presidential consent as one of the completion documents to facilitate registration of the Transfer and Charge was illegal and unconstitutional. In our view as shortly elucidated, their claim that there was an express and mandatory requirement for such consent in the Agreement does not hold.

31. We take to mind this Court's decision in Attorney General & 6 Others vs. Mohamed Balala & 11 Others [2014] eKLR where it was held that any requirement of Presidential consent as a condition for transfer of any property falling within the 1st and 2nd row beach plots, as was the suit property in this case, was illegal and discriminatory against owners of such property, and that it was in contravention of national values and principles enshrined in Article 10 of *the Constitution*.

32. On the 2nd issue as to the legal effect of the supplementary agreement, it is common ground that the undisputed terms of the Agreement aforesaid were varied by mutual consent of the parties 27 days after the completion date in the express terms of the supplementary agreement entered into on 15th December 2011. The variation terms were that: (i) the completion date be extended to 30th December 2011; (ii) M/s. Miller & Company (the appellants' financier's Advocates) do furnish the respondent with a professional undertaking on terms acceptable to the respondent's advocates, M/s. P. A. Osino; (iii) the appellants do pay interest on the balance of the purchase price at the rate of 30% from 19th November 2011 until payment in full, but not later than 31st December 2011; (iv) the respondent do deliver vacant possession of the suit property on payment by the appellants of the outstanding balance



- together with the agreed interest thereon not later than 31st December 2011; (v) the deposit of Kshs. 3,350,000 be forfeited in the event that the transaction is not completed within the agreed period, to wit, on or before 30th December 2011; and (vi) that the appellants do pay to the respondent's advocates the legal fees due and payable on the supplementary agreement in the sum of Kshs. 30,000.
33. It is not lost to us that, in principle, all contracts are liable to mutual variation of terms as may be subsequently agreed between the parties. In effect, duly executed supplementary agreements (as was the case here) are legally binding and enforceable in their express terms. They serve as a record of any changes or additions made to the original agreement. Put differently, a supplemental agreement is entered into to modify or add to the provisions of an existing agreement. It is a legally binding contract that adds, alters, or clarifies the terms and conditions of an existing agreement. Consequently, the parties herein were bound by the terms of the Agreement as added or altered in the express or implied terms of the supplementary agreement.
34. The relevant events leading to the execution by the appellants and the respondent of the supplementary agreement by whose terms they were bound in equal measure were: that pursuant to the Sale Agreement dated 21st July 2011, the appellants paid to the respondent the 10% deposit vide four Banker's cheques enclosed in their advocates' letter dated 19th July 2011; that the appellants introduced its financier, the Housing Finance Company of Kenya Limited, vide a letter by the financier's advocates, M/s. Miller & Co Advocates, dated 25th October 2011; and that the respondent's advocates, M/s. P.A. Osino & Company, alerted the financier's advocates that the completion date was the 10th day from 21st November 2011.
35. By their letter dated 26th October 2011, the financier's advocates gave to the respondent's advocates their professional undertaking to facilitate payment of the balance of the purchase price in the sum of Kshs. 30,150,000 within 14 days of successful registration of the Transfer in favour of the appellants together with a Charge in favour of the financier subject, however, to the respondent releasing the requisite completion documents specified in their letter, and in terms of the Agreement.
36. Further, the financier's advocates wrote a letter dated 3rd November 2011 to the respondent's advocates indicating that the Sale Agreement did not envisage the balance of the purchase price being financed and the suit property being used as security. It also stated that the financier would only release the balance of the purchase price upon successful registration of the Transfer and Charge. They requested the respondent's and the appellant's advocates to map and agree on the way forward.
37. It was not until after extensive back-and-forth correspondence and negotiation between the parties' advocates that the parties eventually executed the Supplementary Sale Agreement dated 15th December 2011. Briefly stated, the legal effect of the Supplementary Sale Agreement was to: extend the completion date to 30th December 2011; require a professional undertaking from the appellants' financier's advocates (to release the end finances before the completion date); impose a condition on the appellants to pay interest at 30% of the balance of the purchase price if due and outstanding during the period therein specified; introduce a condition for forfeiture of the deposit failing completion by the appellants on or before the agreed timelines; and to obligate the appellants to pay legal fees on the supplementary agreement.
38. The express terms on which the supplementary agreement was executed leaves no doubt in our minds that the learned Judge was not at fault in considering the newly introduced contractual obligation on the appellants' part to furnish the respondent's advocates, M/s. P. A. Osino, with their financier's advocates', M/s. Miller & Company, professional undertaking on acceptable terms to secure completion of the transaction. To our mind, the very fact that the appellants' financiers were not party to the two Agreements made it necessary for the respondent to require that the undertaking aforesaid



be backed by a similar undertaking by the appellants' advocates, M/s. Steve Kithi & Company, as is the custom and usage in similar conveyancing transactions.

39. Accordingly, the appellants' contention that the learned Judge was at fault in considering the aforesaid requirement for a professional undertaking in reaching her decision in this regard does not hold. Their assertion that there was no provision therefor in the original and supplementary sale agreements, and that such a requirement was in contravention of the two agreements cannot stand. Indeed, the assertion aforesaid is contradictory to the appellants' further contention that the learned Judge failed to give efficacy to the terms of the original and supplementary agreements. With all due respect to the appellants, their position in this regard is untenable.
40. We form this view cognisant of the fact that a court will often assume that certain terms not expressly stipulated in a contract are nonetheless implied so as to allow the court to enforce the contract and follow through with the parties' intent and purpose. In principle, their implication is suitably designed to give efficacy to the express terms of the contract. Likewise, implication of the terms as to professional undertakings in this case was suitably intended to give efficacy to the Agreement as varied by the supplemental agreement. It is such undertakings that secure and lend assurance to the party to whom moneys are owed that payment will be made, an assurance without which they would be entitled to withhold performance.
41. It is also noteworthy that, by a letter dated 3rd February 2012, the appellant's advocates likewise gave an irrevocable professional undertaking to transfer to the respondent's advocates the sum calculated as interest at the rate of 30% annualized on the balance of the purchase price with effect from 19th November 2011 until the outstanding amount was paid in full before surrender by the respondent to the appellants of vacant possession of the property in issue. In view of the foregoing, the appellants' contention that their advocate's professional undertaking was required by the respondent without their authority, and that it was void and of no contractual effect on that score, defeats good reason. Moreover, the parties and their advocates did what was necessary to give efficacy to the Sale Agreement as varied by the supplementary agreement, both of which were not designed to make detailed provision for or to micromanage every incidental and necessary step on the way towards completion. And that settles the 2nd issue before us, save for the related question as to whether time was of the essence of the contract in terms of the Agreement to which we now turn.
42. Clause 15.7 of the Sale Agreement provided that time shall be of the essence in respect of the corresponding obligations of the parties, and shall not be extended. Notwithstanding this express provision, the parties executed the supplementary agreement and, inter alia, extended the completion date to 30th December 2011. Read together, the two agreements evidently intended to make time of the essence as agreed under the Sale Agreement as mutually varied in terms of the Supplementary Sale Agreement. Consequently, the parties were bound to discharge their respective obligations on or before 30th December 2011 having regard, as a matter of course, to the requisite steps that the parties were bound to take to facilitate perfect performance by the completion date as varied from the 18th day of November 2011 to 30th December 2011.
43. Turning to the 3rd and 4th issues, which are closely linked, the question is whether the respondent and the appellants discharged their respective obligations under the Sale Agreement aforesaid as varied in terms of the subsequent Supplementary Agreement. The appellants' case is that the respondent acted in breach by, inter alia, failing to provide them with the requisite completion documents in good time to facilitate performance on their part of the terms of the Agreement as varied by the Supplementary Agreement.



44. In particular, the appellants contended that the respondent failed to timeously obtain the Rates Clearance Certificate from Kilifi County Council, thereby compelling the appellants to procure the same. They cited the case of *Kinyanjui vs. Thande* (1995-1998) 2 EA 159 where the Court stated:

“It was upon the Vendors to obtain the deed plan subdivision. Even if one of the purchasers helped in obtaining the same, the contractual obligation to obtain the same remained upon the Vendors. They cannot rescind the contract unless they can show a breach on the part of the Purchasers, and even then, they must serve the requisite condition 26 notice of rescission which they never did as pointed out to us earlier.”

45. On their part, the respondent submitted that the Clearance Certificate was ready as agreed on terms of the two agreements; but that, vide a letter dated 20th September 2011 addressed to the respondent by learned counsel for the appellants’ financier, M/s. Miller & Co., counsel stated that they would not be able to give the requisite letter of undertaking or complete the transaction by 30th December 2011. According to the respondent, it was the appellants who were not ready to perform. M/s. Miller & Co.’s letter read in part:

“Further please note that we closed our offices for the holidays on 16th December 2011 and shall resume on 5th January 2012. We are therefore unable to meet your condition that the balance of the purchase price is paid by 31st December 2011.”

46. It is also noteworthy that, in its amended Statement of Defence, the respondent’s case was that the appellants had not timeously availed the Land Rates or paid the Land Rent for the year 2012 despite having agreed to do so. In addition, the respondent submitted that, if the appellants were of the view that completion documents had not been supplied in terms of the two Agreements, they had the option to rescind the contract for sale, but did not; and that, having proceeded with the transaction, and having had the property registered in their favour, the appellants were now estopped by their conduct from raising the issue.

47. In its submissions, the respondent underscored the defence of estoppel by conduct citing the case of *John Mburu vs. Consolidated Bank of Kenya* [2018] eKLR where this Court aptly stated thus:

35. The Court in that case considered estoppel by conduct and estoppel by election or waiver. The latter is an intentional relinquishment or abandonment of a known right or privilege. A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. In the case of *Sita Steel Rolling Mills Ltd vs. Jubilee Insurance Company Ltd* [2007] eKLR, Maraga, J. (now Chief Justice) stated:

i. ‘A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.’

36. As for estoppel by conduct, both parties in this case relied on *D & C Builders vs Sidney Rees* (1966) 2 QB 617 where Lord Denning, M.R. stated: -



- ii. ‘the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.’”

48. It is instructive that the respondent had on hand a Clearance Certificate from the Kilifi County Council dated 28th July 2011, which was valid until 30th December 2011. That certificate would have served the purpose of completion and registration of transfer in favour of the appellants within the completion period that was originally agreed under the Agreement, but for the Supplementary Agreement by which the completion date was extended to 30th December 2011 on account of the appellants’ inability to secure the end finances as previously anticipated. In the circumstances, the appellants’ contention that the learned Judge was at fault in failing to find that the respondent acted in breach and failed to provide completion documents or, otherwise, issue the requisite completion notice pursuant to which it would have been entitled to invoke appropriate remedies is defeatist in the face of the mutually agreed variation of terms at their instance as aforesaid.
49. The other terms varied under the Supplementary Agreement were that the financiers’ advocates (M/s. Miller & Company) were to provide to the respondent an irrevocable professional undertaking to remit the outstanding balance of the purchase price so as to secure release by the respondent of the completion documents to facilitate registration of the transfer in the appellants’ favour, and of the charge in favour of the financier.
50. To this end, the financier’s advocates gave their professional undertaking on 5th January 2012 by which time the extended completion date had lapsed. While the respondent was at that point in time entitled to rescind the Agreement, it nonetheless elected to continue with the transaction notwithstanding non-performance on the part of the appellants within the extended period for completion.
51. The legal effect of the respondent’s willingness to perform the contract of sale despite delay on the appellants’ part to discharge their obligations thereunder on or before the extended completion date cannot reasonably be construed as waiver of the stipulation as to time being of the essence. Neither was the learned Judge at fault in declining to find that, in view of the fact that the appellants were in breach, the respondent had the option of rejecting, or should have rejected, the professional undertaking and invoke the remedy of forfeiture of the deposit. In any event, the respondent had the right to forfeit the deposit and rescind the Agreement or, as it elected, to pursue complete performance as urged by the appellants subject, however, to payment of the agreed 30% interest on the balance of the purchase price.
52. In view of the appellants’ breach in that regard, they could not rightfully rely on the doctrine of estoppel by conduct to avoid liability to pay the agreed interest on the balance of the purchase price in accordance with clause 3 of the Supplementary Agreement. In effect, the extension of the completion date did not of itself signify departure from the strict provisions of the Agreement in relation, inter alia, to the completion date as varied by the Supplementary Agreement, or to the appellants’ liability to pay interest on the outstanding balance of the purchase price in respect of which we find them to be in continued breach.
53. Turning more specifically to the 4th issue as to whether the respondent acted in breach of the Agreement as varied in terms of the Supplementary Agreement, we begin by observing that the completion date as extended was by no means unreasonable. To our mind, the delay in completion was solely attributable to the appellants, who were unable to secure the end finances in good time to meet both the original and the extended completion dates.



54. We take to mind the fact that the transaction in issue was in terms different from cases where time is not of the essence of the contract. Seen in different light, the respondent's agreement on payment of interest on account of delayed completion was of itself sufficient notice that it would treat time as of the essence of the contract, and that it would not relinquish vacant possession of the suit property until full payment. Indeed, it is maintaining such possession that the respondent took comfort in light of the appellants' belated discharge of their obligations under the Agreement and the subsequent variation under the Supplementary Agreement.
55. In Halsbury's Laws of England (4th Edition) at p.340, the learned authors state thus at para 485:
- “In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at time when the notice is given.”
56. It is noteworthy that, when giving their professional undertaking vide their letter dated 5th January 2012, the appellants' financier's advocates did not expressly state the time within which the respondent's advocates were required to release the requisite completion documents to facilitate registration of the Transfer and Charge. However, they indicated that they would transfer the balance of the purchase price within 14 days of successful registration of the Transfer and Charge. It is also indubitable that they did not serve any notice to the respondent's advocates to fix a reasonable time for delivery of those documents. That notwithstanding, they received the valid Clearance Certificate and other completion documents 29 days later on 3rd February 2012 and proceeded with registration.
57. In an attempt to explain the apparent belated performance on their part, the appellants sought to lay blame on the respondent and alleged that it had failed to secure and deliver to them a Presidential consent, which they erroneously viewed as necessary to facilitate registration of the Transfer and Charge. According to them, it was the respondent that was compelled to apply for and obtain it.
58. In response vide their letter dated 21st February 2012, counsel for the respondent rightly posited that the appellants' allegation that the Presidential consent was a requirement had no legal basis. On the authority of *Mohamed Balala & 11 others vs. Attorney General & 7 others* (Supra) where Kasango, J. held that such a Presidential consent was discriminatory and illegal, and in contravention of the principles enshrined in Article 10 of *the Constitution*, counsel submitted that the respondent was by no means in breach of contract. (see also *Attorney General & 6 others vs. Mohamed Balala & 11 others* (Supra); and - In *Mohamed Siaka Ali (Through Mohamed Shaibu Shosi – Personal Legal Representative) vs. Sunpalm Limited & 3 others* [2015] eKLR.)
59. We agree with counsel for the respondent that the Presidential consent alluded to by the appellants was not a mandatory legal requirement necessary for completion of the sale and registration of the Transfer and Charge. As counsel for the respondent correctly stated in their letter dated 21st February 2012, such a consent was not among the agreed completion documents. According to counsel, previous transactions had been registered on the suit property without the Presidential approval, and that it was not part of the requisite completion documents that the respondent was obligated to deliver to the appellants or to their financier's advocates.
60. It is clear to our mind that the respondent had the requisite completion documents before and after extension of the completion date, which was intended to allow the appellants time to secure the



balance of the purchase price. In the circumstances, the respondent was by no means in breach of the Agreement as varied or at all, and that settles the 4th issue.

61. Turning to the 5th issue as to whether the respondent was entitled to the reliefs sought in its counterclaim, the answer turns on the question as to whether the appellants were bound to pay interest on the balance outstanding on account of the purchase price beyond the completion date.
62. Clause 3 of the Supplementary Agreement is couched in no uncertain terms which, at the risk of repeating ourselves, we yet again take the liberty to underscore. The appellants were thereby obligated to pay interest on the balance of the purchase price at the rate of 30% with effect from 19th November 2011 until full payment in the agreed sum of Kshs. 6,540,005. That amount became due and payable not later than 31st December 2011. We also hasten to add that only after payment of the balance of the purchase price and the agreed interest thereon were the appellants entitled to delivery of vacant possession of the suit property.
63. Notwithstanding the express provision of clause 3 of the Supplementary Agreement, the appellants contend that they were not obligated to pay interest under the Agreement as varied; that the respondent's advocates accepted the professional undertaking given by the financier's advocates after the financier's advocates informed them vide a letter dated 20th December 2011 that their instructions strictly concerned payment of the balance of the purchase price; that they were not in a position to issue an undertaking to pay interest as proposed; and that they were unable to meet the condition that the balance of the purchase price be paid by 31st December 2011 as they had closed their offices for the holidays.
64. The appellants further submitted that, the respondent having accepted their financier's advocates' professional undertaking, they were thus precluded from demanding further payment on account of interest. What the appellants have not told us is on what legal basis their contention that the express term as to late-payment interest stipulated in clause 3 of the Supplementary Agreement is vague and no longer enforceable is anchored. That term is not a creation of the learned Judge, but an express term contracted by, and binding on, the parties.
65. On their part, the respondent submitted that the stipulation as to payment of interest was not vague as claimed in the appellants' submissions, but that it was clearly stipulated in Clause 3 of the Supplementary Agreement; that the obligation to pay the penalty interest lay squarely with the appellants while the balance of the purchase price was to be secured by the professional undertaking from M/s. Miller & Company Advocates; that delivery of vacant possession of the suit property was conditional upon payment of the penalty interest; that the respondent merely held onto possession on the basis of the two agreements; and that the doctrine of proprietary estoppel was now applicable until the penalty interest was paid in full.
66. We call to mind the decision in *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Limited* [2017] eKLR where this Court stated that:
 - “ 38. We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
67. In the absence of fraud, coercion or undue influence, and none was pleaded or otherwise alluded to, the parties were bound by the provisions of clause 3 of the Supplementary Agreement, the appellants had an obligation to pay penalty interest in the sum of Kshs. 6,540,005 not later than 31st December



2011. They failed to do so even after the respondent gave a 7 days' notice vide its advocates' letter dated 10th September 2012.

68. In *Gatere Njamunyu vs. Joseck Njue Nyaga* [1983] eKLR, where a sale agreement stipulated that the balance of the purchase price was to be paid immediately after consent of the Land Control Board was obtained, but the same was not paid, Madan JA stated that:

“Consent having been obtained, the defendant was not to be left standing indefinitely saying like Henry V: ‘How long, O Lord, how long.’ The principle to be acted upon in such a case is stated in 9 Halsbury’s Laws (4th edn) p 338, para 482, i.e.: ‘Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties.’ Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. 9 Halsbury’s Laws, para 481 (ibid).”

69. The appellants’ contention that their financier’s advocates’ undertaking did not allude to any obligation to pay the late- payment interest does not hold. In our view, theirs were to secure the end finances as requested by the appellants, and that did not in itself invalidate or waive the effect of clause 3 of the Supplementary Agreement by which the appellants were bound. That clause was not unenforceable, and neither was its language ambiguous or susceptible to more than one meaning as claimed by the appellants so as to import the ratio decidendi in *Fidelity Commercial Bank Limited vs. Kenya Grange Vehicle Industries Limited* [2017] eKLR where the court held that parole evidence was admissible in cases where the contractual document did not express the whole intention of the parties (see also *Gillepsie Bros. & Co. vs. Cheney, Eggar & Co.* (1896) 2QB 59; and United Kingdom House of Lords case of *Reardon Smith Line vs. Hansen-Tangen* (1976) 1 WLR 989).
70. In view of the foregoing, we do not agree with the appellants that by upholding the provision of clause 3 of the Supplementary Agreement in the face of the appellants’ financier’s advocates’ professional undertaking constituted a re-writing by the learned Judge of the contract between the parties in respect of the terms as to payment of interest on the balance of the purchase price. Accordingly, the learned Judge was by no means at fault for allowing the respondent’s counterclaim for interest on the balance of the purchase price agreed at 30%, and being KShs. 6,540,005.
71. Closely related to the 5th issue and the appellants’ related assertion aforesaid is the question as to whether they were automatically entitled to possession of the suit property or to mesne profits thereon in the event that the respondent declined to deliver vacant possession on payment of the balance of the purchase price and registration of the Transfer and Charge.
72. In their submissions, the appellants contended that, upon registration of the suit property in their favour, and upon payment of the balance of the purchase price, the respondent had no basis or justification to continue in occupation of the suit property, and that it became a trespasser thereon. To bolster their contention, they cited sections 24(a) and 26(1) of the [Land Registration Act](#) which, in our view, must be construed in light of the express contractual rights and obligations of the parties under the Agreement as varied by the supplementary agreement.
73. In reply, the respondent submitted that the suit before the trial court was not over title, but possession; that the appellants’ right to possession was conditional to payment of penalty interest in accordance with clause 3, and which remains unpaid to this day; that, having breached the precondition that would entitle them to delivery of possession, the right to mesne profits would not accrue; that sections 24 and



26 of the [Land Registration Act](#) on which the appellants rely relate to title to the suit property subject, however, the terms of the law of contract concerning agreements creating are governed by section 25(2) of the [Land Registration Act](#), which provides:

25. Rights of a proprietor

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

74. In addition, the respondent cited section 28 of the [Land Registration Act](#), and submitted that the provision restricts the appellants' right to title on the respondent's overriding interests of possession which need not be registered by virtue of section 28(b), (c) and (j); that a constructive trust arose until the penalty interest is paid in full; and that the property had been vacant, and in consequence of which the respondent incurred costs on security. It cited the case of Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR where a vendor sold a 2 acre portion of his land comprising 2.44 hectares and gave possession to the purchaser, but the vendor later caused the entire parcel to be registered in his name, and where this Court observed that:

“(18) The doctrines of equity are part of our laws although Section 3 of the [Judicature Act](#) subordinates common law and the doctrines of equity to [the Constitution](#) and written law in that order. Sections 3(3) of the [Law of Contract Act](#) and Section 38 (2) of the [Land Act](#) as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in Yaxley v. Gotts [2000] Ch. 162 (Yaxley's case) on which the Court in Macharia Mwangi Maina Decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity's intervention to provide relief against unconscionable conduct.

... ..

(27) By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.”

75. In ordinary cases, where a purchaser pays the balance of the purchase price, he/she is entitled to vacant possession. However, the Supplementary Agreement in this case expressly stipulated that the respondent would deliver vacant possession to the appellants upon payment of interest on the delayed balance of the purchase price.

76. The case before us compares with the case of Lydia Wanjiku Wanyee suing as the administrator of the estate of the Late George Wanyee vs. George Nyanja [2015] eKLR where this Court stated that:

“Reliance was also placed on the treatise, Gibson's Conveyancing 20th edition which, at page 142, states:

‘As to possession, in the absence of stipulation, the purchaser is entitled to possession and to the rents and profits of the property from the time fixed for completion, on paying the purchase money.’



... ..

77. The same position also obtained in *Harvela Investments Ltd. –v- Royal Trust Company of Canada (C.I.) Ltd and Others* [1986] ALL E.R. 221.
78. Those authorities are however distinguishable from the present appeal. In all the circumstances discussed in those authorities, the vendors were blameworthy unlike the vendor herein. In *Harvela Investments (Supra)*, it was acknowledged that each case must be judged on its merits. In this appeal, the completion date was given as 30th May, 1990. By that time the purchaser should have paid the purchase price in full. He did not do so until 22nd March, 2004. No fault can be attributed to the vendor for that willful default of the agreement.
79. The parties engaged in correspondence over the issue of interest which correspondence was contained in the bundle of agreed documents put before the learned trial Judge.
80. From the correspondence, it is clear that the parties understood between themselves that interest was payable on the delayed part of the purchase price, and that the respondent would deliver vacant possession on settlement of that account.
81. The appellants cannot have their cake and eat it. They cannot on the one hand seek to enforce specific performance by the respondent and assert delivery of vacant possession but, on the other hand, withhold payment of the agreed late-payment interest. In *Christine Nyanchama Oanda vs. Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR, this Court held that:

“It is trite that a party seeking the equitable remedy of specific performance of a contract must show that he or she has performed all the terms of the contract which he or she has undertaken to perform whether expressly or by implication, and which he or she ought to have performed...”
82. Similarly, in the case of *Sisto Wambugu (Supra)* it was observed:

“In my judgment the respondent cannot come to the court and obtain an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so.” [Emphasis ours]
83. That said, all we need to state here is that, having considered the rival submissions and the afore-cited authorities, the learned Judge was at fault in failing to appreciate that, upon registration as proprietors of the suit property with a charge in favour of their financier, the appellants were entitled to vacant possession with all rights appurtenant to the suit property, including recovery of mesne profits from the date of registration of the Transfer, and on receipt by the respondent of the balance of the purchase price on 21st July 2012. The fact that the Supplementary Agreement was clear that those rights would only accrue on payment by the appellants of the contracted default interest did not of itself confer on the respondent the liberty to hold the appellants at ransom by clinging onto possession of not only the suit property but also insisting on enjoying the benefits thereof at the appellants’ loss on account of mesne profits.
84. While the learned Judge was not in error in declining to find that the respondent was a trespasser on, or in unlawful occupation of, the suit property from 21st July 2012 as claimed, the respondent was nonetheless accountable to the appellants for mesne profits of which it had not right to appropriate.
85. The only other question closely related to possession is whether the learned Judge was at fault for allowing the respondent’s counterclaim for the sum of Kshs. 10,000 per month on account of security



charges. The respondent claimed in its Amended Statement of Defence and Counterclaim that it incurred security charges at the rate of Kshs. 10,000/= per month from 19th November 2012, and that the same amount continued to accrue until settlement by the appellants of the penalty interest and delivery of vacant possession of the suit property.

86. We hasten to observe that this particular claim was in the nature of special damages, which were specifically pleaded as evident from the amended defence and counterclaim. The only issue is whether it was specifically proved as pleaded. It was. As the learned Judge correctly observed, the respondent had demonstrated that it spent the sum claimed as security charges during the period between 1st March 2015 and 1st May 2022 by producing receipts on account thereof. The decisive question is whether the respondent is entitled to recover such expenses incurred on account of a property the possession of which it ought to have surrendered to the appellants.
87. To our mind, the trial court was at fault in awarding the respondent special damages on account of security charges. Its right under the Agreement as varied by the Supplementary Agreement was limited to recovering the purchase price and the interest on the delayed payment. We find nothing in the Agreement to suggest that the respondent had the right to reap the benefits of the suit property by way of mesne profits or to incur any expenses on its security. If anything, it did so at its own peril. Consequently, there is good reason to disturb the trial court's finding and award of security charges in the above- stated monthly sum and for the period aforesaid.
88. Having considered the record as put to us, the rival submission of the parties, the cited authorities and the law, we reach the inescapable conclusion that:
- a. The appellants failed to perform their part in the contract within the period agreed for completion in accordance with the Sale Agreement as varied by the Supplementary Agreement;
 - b. Despite extension of time for completion, the appellants failed to discharge their obligation to pay the agreed 30% interest on the outstanding balance of the purchase price;
 - c. The appellants were and are obligated to pay to the respondent Kshs. 6,540,005 on account of late-payment interest;
 - d. No further interest accrued after full payment of the outstanding balance of the purchase price then due in the sum of Kshs. 30,150,000;
 - e. In any event, the respondent was not obligated to serve the completion notice and invoke the remedies of forfeiture and payment of interest on the balance of the purchase price under the Agreement as varied by the Supplementary Agreement;
 - f. The appellants' contention to the contrary is tantamount to disowning the Supplementary Agreement and disregarding the respondent's election to accommodate them while they strived to secure finances towards completion of the transaction;
 - g. Indeed, the appellants held on and did all they could to secure completion albeit way after the extended completion date;
 - h. in the circumstances, the respondent was by no means in breach of the Agreement or of the Supplementary Agreement;
 - i. the respondent is not entitled to recover security costs incurred in respect of the suit property as awarded in the impugned judgment;



- j. the appellants were nonetheless entitled to vacant possession of, and mesne profits in respect of the suit property as from the date of registration of Transfer and Charge as aforesaid, and on full payment to the respondent of the purchase price and late payment interest; and
- k. for the avoidance of doubt, the respondent took the risk of, and were bound to take responsibility for, the security costs for the period during which they withheld possession of the suit property, and therefore they were not entitled to recover such costs from the appellants.

89. In conclusion, we find that the learned Judge erred in dismissing the appellants' suit in its entirety, and in allowing the whole of the respondent's counterclaim. Consequently, the appeal partially succeeds.

90. Accordingly, the judgment and decree of the Environment and Land Court of Kenya at Mombasa (Nelly Matheka, J.) delivered on 27th September 2022 is hereby set aside and substituted for the following orders:

- a. the appellants do pay to the respondent late payment interest, of Kshs 6,540,005 subject to which the respondent do forthwith deliver vacant possession of the suit property to the appellants;
- b. the respondent is not entitled to mesne profits in respect of the suit property from the date of registration of Transfer and Charge over the suit property;
- c. the respondent shall bear the cost of the security charges incurred on the suit property at the rate of Kshs. 10,000 with effect from 1st March 2015 to 1st May 2022 as awarded; and
- d. each parties' shall bear their own costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

