



**Wainaina v Waibara (Environment & Land Case E006 of 2021)
[2024] KEELC 3581 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3581 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E006 OF 2021**

JG KEMEI, J

APRIL 12, 2024

BETWEEN

JOSEPH MUTURI WAINAINA PLAINTIFF

AND

CLEMENT KUNGU WAIBARA DEFENDANT

JUDGMENT

1. Vide an Amended Complaint dated the 12/2/2021 the Plaintiff sued the Defendant seeking the following orders;
 - a. That an injunction restraining the Defendant his servants and /or agents from in any way interfering with the Plaintiff's quiet enjoyment of the property known as Ruiru/ Ruiru East Block 7/649 (suit land).
 - b. A declaration that the agreement entered into by Joseph Muturi Wainaina and Clement Kungu Waibara on the 28/6/18 is rescinded.
 - c. A refund of Kshs 915,000/- being the rent and deposits collected illegally from Geoffrey Kuria upto date.
 - d. Kshs 36,000/- per month w.e.f January 2021 being the extra security cost that the Plaintiff is incurring until the time the Defendant shall desist from interfering with the suit property.
 - e. Mesne profits.
 - f. General damages.
 - g. Cost of the suit
 - h. Any other relief the Court may deem fit to grant.



2. The Plaintiff pleaded that he and the Defendant entered into an agreement of sale and purchase of the suit land at an agreed sum of Kshs. 25 Million out of which Kshs. 24 Million was received from the Defendant leaving the balance of Kshs. 1 Million, which balance was to be paid by the Defendant to the Plaintiff within a period of 90 days. It was also a term of the agreement that possession would be given upon payment of the full purchase price.
3. The Plaintiff avers that the Defendant attempted to take over possession of the suit land by force contrary to the terms of the agreement by demanding rent from one of the tenants in the suit land namely Geoffrey Kuria amounting to Kshs. 915,000/-. It is averred by the Plaintiff that as a result of default in completion of the transaction, the Plaintiff issued a 21-day notice calling for the balance of the purchase price in default the agreement would be rescinded. That arising from the Defendant's acts of interference with the tenants in the suit land the Plaintiff expended Kshs. 36,000/- being costs for hiring security guards at the suit land.
4. On the 19/1/2022 the Defendant filed his statement of defence and counterclaim against the Plaintiff's claim. Whilst admitting the sale agreement, he added that the completion date was set within 90 days. That he paid the full purchase price for the property. It was his case that the terms of the agreement were altered with respect to the payment of the balance of the purchase price in the sum of Kshs. 1.0 Million with the effect that the balance owed to the Plaintiff would be settled through the rent income. That pursuant to that understanding, the Plaintiff deducted the rent towards the `balance of the purchase price in full and remitted rent to the Defendant for the months of November 2019 to January 2020. That later the Plaintiff changed his mind and refused to remit the rent collected from the rented units. That upon one of the units falling vacant in January 2020, he took possession renovated it and put in a tenant one Geoffrey Kuria and entered into a tenancy agreement with him in February 2020. Further the Defendant stated that the 21-day notice was a tactic employed by the Plaintiff to avoid transferring the land to him. That having fully paid for the suit land, he is entitled to the ownership and full enjoyment of the same.
5. In addition, the Defendant stated that the Plaintiff has collected over and above the sum of Kshs. 1 Million from the rented units which rent is yet to be remitted to him. Consequently, the Defendant sought the following orders in the Counterclaim;
 - a. An order of specific performance of the sale agreement dated the 20/6/2018 requiring the Plaintiff to transfer the suit land.
 - b. Damages for breach of contract.
 - c. Mesne profits
 - d. Costs of the suit and any other orders as the Court may deem fit to grant.
6. On the 11/10/22 the Plaintiff withdrew prayer c of the Plaint which prayer sought for the refund of Kshs 915,000/- from the Defendant.
7. PW1 – Joseph Muturi Wainaina testified and relied on his witness statement dated the 18/2/2021 as well as produced the documents marked as PEX No 1-7 contained in pages 20 of the trial bundle. The witness admitted the existence of the Agreement of Sale and the receipt of Kshs. 24 Million leaving a balance of the sum of Kshs. 1.0 Million. That the Defendant defaulted in completing the transaction and instead started harassing the tenants on the suit land forcing him to house them in a hotel and eventually the tenants vacated the suit land. That contrary to the pleadings of the Defendant, there was no oral agreement between him and the Defendant with respect to the payment of the balance of the purchase price being Kshs. 1 Million. He led evidence that the Defendant requested him to advance



- him a loan in the sum of Kshs. 130,000/- and Kshs. 65,000/- which he obliged and paid through the Defendant's wife's bank account in line with his request. That the Defendant has not refunded the said amounts.
8. In addition, the witness stated that after two years since the commencement of the transaction, he issued a 21-day notice to complete the transaction before filing suit, a notice that was not complied with by the Defendant. That at the time he issued the notice he had not obtained the documents of completion contemplated under the agreement of sale. Asked whether the completion notice dated the 21/1/2021 was received by the Defendant he stated that he was not aware as he was not the maker of the said letter. In addition, he stated that he has not refunded the sum of Kshs. 24 Million received from the Defendant. That the balance of the purchase price having been paid in installments over a period of time, he continued collecting rent from the rental units in the sum of Kshs. 130,000/- monthly. He stated that he cannot estimate the period the houses were occupied but denied the sum claimed by the Defendant being unremitted rent in the sum of Kshs 3,315,000/-
 9. PW2 - John Kaingati Kamonjo stated that he is an Advocate of the High Court of Kenya practicing in the name and style of Kaingati Kamonjo & Co Advocates. That he is also an associate in the firm of Gathii Irungu & Co Advocates who acted for the parties in the agreement of sale. The witness stated that he signed the letter dated the 21/1/2021 and caused it to be served upon the Defendant through a process server. The letter was a 21 - day notice calling for the payment of the balance of the purchase price in default the Plaintiff would terminate the contract.
 10. DW1 – Clement Kungu Waibara relied on his witness statement dated the 2/8/2021 and produced the documents marked as DEX No 1-12 in defense of the Plaintiff's claim and in support of his counterclaim. The witness informed the Court that he was not served with the 21-day notice contained in the letter dated the 21/1/2021. That there was an arrangement between him and the Plaintiff where the Plaintiff was to collect rent from the rental units in the suit land and settle the balance of the purchase price and upon satisfaction of the same, remit the rent to him. He stated that the said rent was collected from August 2018 – December 2018. That he is owed the sum of Kshs. 2,315,000/- by the Plaintiff on account of unremitted rent. That he received Kshs. 185,000/- from the Plaintiff being part of the rent due to him. He refuted asking nor receiving a loan from the Plaintiff. That he has fully paid the Plaintiff and that explains why he took possession of the suit land. He explained that the suit in Kikuyu filed by the Plaintiff with respect to the suit land was dismissed. He denied attending any meeting on the 21/1/21 at the offices of Gathii Irungu Advocates.
 11. The Plaintiff submitted that there was no addendum to the agreement of sale entered by the parties with respect to recovering the balance of the purchase price from the rents collected. He submitted that the Defendant was in default of the agreement of sale in the payment of the balance of the purchase price in the sum of Kshs. 1.0 Million. That the Court should be guided by the documents of the parties which in this case speak for themselves. Reliance was placed in the case of Jinaro Mamo Mugambi Vs. Josephat Kahure Ndungu (2014) eKLR.
 12. The Plaintiff submitted that he remained the owner of the suit land pending the completion of the transaction. That the Defendant was not entitled to rents from the suit land prior to the payment of the balance of the purchase price. That the Plaintiff is entitled to rents illegally collected by the Defendant since 2018 to date on the ground that the Defendant is not the legal owner and therefore not entitled to derive any benefits arising from the suit land. In addition, the Plaintiff submitted that the Defendant is not entitled to orders of specific performance because of the breach of agreement.
 13. As to whether there was a valid agreement over the suit land the Defendant submitted in the positive. As to whether the Defendant is entitled to an order of specific performance the Defendant submitted



that on the basis of a valid sale agreement he paid the full purchase price. That on the basis of the arrangement between the Plaintiff and the Defendant, the Defendant allowed the Plaintiff to collect the sum of Kshs. 1.0 Million in form of rent from the tenants in occupation making the total of Kshs. 25 Million. The Plaintiff has not denied collecting the said rent and neither did he object to the Defendant taking possession of the unit that fell vacant in January 2020 when he renovated and rented it out to a Mr. Kuria.

14. It was further submitted that the notice was issued one year after the Defendant had taken over possession of one of the units and two years after the execution of the agreement of sale. It was submitted that the Defendant has since taken possession and leased the units to third parties and therefore terminating the agreement of sale will occasion unnecessary hardship on the part of the innocent tenants. That the order of specific performance in this case is necessary to obviate the hardship that would otherwise result from the non-enforcement of the sale agreement.
15. Relying on the case of Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa Vs. Abubakar Madhbuti [1997] eKLR the Defendant submitted that he has performed all the terms of the agreement through the payment of the balance of the purchase price. Interalia, that the contract does not suffer from any taint. The Court was urged to exercise its discretion in favour of the Defendant.
16. On the question of damages, the Defendant stated that the Plaintiff admitted collecting rent which on tabulation totals Kshs. 3,315,000 for the period from August 2018 and October 2021 and after deducting the amount of Kshs. 1 Million the balance of Kshs. 2,315,000 should be remitted to the Defendant.
17. On the order of injunction, the Defendant submitted that the inequitable conduct of the Plaintiff cannot entitle him to an equitable remedy. Further that the Defendant is already in full possession of the property and hence the remedy of injunction is overtaken by events.
18. Having considered the pleadings, the evidence led, the written submissions and all the material placed before the Court the issues for determination are;
 - a. Whether there is a valid agreement of sale between the parties.
 - b. Whether there was breach of Agreement of Sale and if yes who breached the agreement.
 - c. Whether the Defendant is entitled to specific performance.
 - d. Is the Plaintiff entitled to orders of injunction?
 - e. Is the Plaintiff entitled to mesne profits and general damages?
 - f. Is the Defendant entitled to damages for contract and mesne profits
 - g. Who meets the costs of the suit
19. It is not in dispute that the parties entered into an agreement of sale and purchase of the suit land on the 20/6/18 for the sum of Kshs. 25 Million. The sum of Kshs. 5 Million was due on the signing of the agreement. The balance of the sum of Kshs. 20 Million was to be paid in accordance with Clause 4 of the agreement which is within 90 days of the date of the agreement. Other terms of the agreement were that completion was agreed as 90 days from the date of the agreement meaning by the 20/9/2018. Time was of the essence in the agreement.



20. The parties provided for events of breach under Clause 6 of the agreement which was expressed as follows;

“Breach Of Agreement

- a. If the purchaser fails to comply with any of the conditions hereof or any of the conditions subject to which this sale is made including the condition relating to the completion of the sale, the Vendor may give the Purchaser at least Twenty One (21) days’ notice in writing confirming the Vendor’s readiness to complete the sale in all respects and specifying the default and require the Purchaser to remedy the same before the expiration of such notice and if the Purchaser shall fail to comply with such notice the Vendor shall at the Vendor’s sole option be entitled to rescind this Agreement and the Purchaser shall forfeit 10% of the deposit paid and the Vendor/ Vendor’s Advocates shall on demand refund to the Purchaser any balance thereof without further deductions.
 - b. If the Vendor shall fail to comply with their obligations under this Agreement, the Purchaser may give the vendor Twenty One (21) days’ notice in writing to comply with his obligation and such notice shall specify the default and require the Vendor to make it good within Twenty One (21) days of such notice (time being of the essence) and if the Vendor then fails to comply with the notice, the Purchaser may (at their discretion) rescind the Agreement and the Vendor shall refund the full deposit paid.”
21. Further the Plaintiff was obligated to avail the following documents on completion to facilitate the transfer of the suit land to the suit land to the Defendant under Clause 16 of the agreement which states as follows;

“The Schedule Of The Completion Documents

On or before the Completion Date, the Vendor shall provide the following documents to facilitate transfer in favour of the Purchaser:-

- a. The Original Title Deed Document relating to the property.
 - b. Transfer in Duplicate duly executed by the Vendor in favor of the Purchaser with the passport size photos of the Vendor affixed thereon and certified to be the true likeness of the Vendor.
 - c. Certified copies of Vendor’s Identity Card and PIN Certificate.
 - d. Consent of the Vendor’s spouse to transfer or affidavit of single status.
 - e. Certified copies of Vendor’s spouse identity card (if necessary).
 - f. Certified copy of the practicing certificate of the Advocate witnessing.
 - g. The original and duplicate Land Control Board Consent for the transfer together with the original application form duly completed.
 - h. Such other documents, approvals e.t.c as are required to complete this transaction.”
22. According to the agreement the Plaintiff warranted, represented and undertook to the Defendant the following;



- a. The property is not a buffer zone, road reserve or public land and its ownership thereof is not subject to any challenge whatsoever from the Government of Kenya, any local authority (including but not limited to County Government) or any third party whatever.
- b. There is no law or decree or similar enactment binding on them so far as they are aware which would conflict with or prevent them from entering into or performing and observing the terms of this Agreement.
- c. The Vendor is not engaged in nor to best of the Vendor's knowledge threatened by any litigation, arbitration or administrative proceedings relating to this property.
- d. There is no adverse claim on the property, dispute regarding ownership boundary, easements, rights of way or any other such matters.
- e. The Vendor has not given any right of way, easements or any overriding interest and has no intention of so doing.
- f. The Vendor has to the best of her knowledge disclosed to the purchaser all material information relating to the property.
- g. The Vendor has not received any notice from government or municipal authority or from owners of adjoining properties which remain to be complied with and has disclosed all such notices received to the purchaser.
- h. The Vendor will immediately disclose in writing on the purchaser any event or circumstance which may arise or become known to him after the date of this Agreement and prior to completion which is inconsistent with any of the warranties or which had it occurred on or before the date of this agreement would have constituted a breach of the warranties or which is material to be known by a purchaser for the value of the property.

Validity of contract

23. Validity of a contract is provided for in law. Section 3 (3) of the Law of Contract provides as follows;

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

24. Section 38 of the *Land Act* contains similar provisions as stated as follows;

- (1) No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—



- (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
- (2) Subsection (1) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.”
25. Arising from the above legal provisions the Court finds that there indeed exists a valid contract between the parties seeing that the sale agreement dated the 28/6/18 is in writing, signed by both parties and the signatures of the parties have been duly attested by their joint counsel.
- Whether there was breach of contract and if yes who breached the agreement
26. It is trite law that Courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale Vs. Umon Manufacturing Co. (Ramsboltom) (1918)* L.R 1KB 592, Scrutton L.J. held as follows:
- “The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract.”
27. Similarly, in the case of *Attorney General of Belize et al Vs. Belize Telecom Ltd & Anoter (2009)*, 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973)* I WLR 601 at 609, held as follows:
- “The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable.”
28. The importance of interpreting contracts strictly was further reiterated in the case of *Curtis Vs Chemical Cleaning & Dyeing Co. Ltd (1951)*, ALL ER 631 in which Lord Denning held as follows:
- “If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception Clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”
29. In determining this issue, the Court will examine the agreement of the parties together with the conduct of the parties. According to the agreement the completion was 90 days from the 28/6/2018 that is to say 27/9/2018, time being of the essence. Time is of the essence means that, should the terms of a contract not be met by a specific deadline, one or more parties could be negatively impacted. Where the deadline is not honoured the aggrieved party is entitled to issue notice demanding compliance and in default the consequences of default agreed by the parties kick in.
30. According to the evidence of the Plaintiff by the 27/9 /2018, the only payment received from the Defendant was Kshs. 5 Million. Essentially it entitled the Plaintiff to terminate the agreement at this



point. The Plaintiff elected not to terminate the agreement as he continued to receive the purchase price of 10 Million on the 19/10/18. Subsequently he received Kshs. 5.0 Million, Kshs. 2.0 Million and another Kshs. 2 Million on the 11/3/19, 10/7/19 and 25/11/19 respectively.

31. As stated earlier in the preceding paragraphs, the parties contemplated events of default and agreed to incorporate a default Clause in the agreement. The Court finds that the Plaintiff did not invoke the said Clause to terminate the agreement and so the parties by their conduct altered the terms of the Agreement.
32. Evidence was led by the Plaintiff that he issued a 21-day notice dated the 21/1/2021 expressed as follows;

“ Our Ref: GI/JMW/2021 Your Ref: TBA Date: 21/01/2021

Clement Kungu Waibara

Box 543-001030

Gatundu

Dear Sir,

RE: Sale Agreement Between Yourself & Joseph Muturi Wainaina

Refer to the above mentioned matter.

We have been informed by Joseph Muturi Wainaina that you entered in the premises and threatened the tenants.

This is after our meeting and negotiations on Tuesday 19th January 2021 at our offices.

Mr. Muturi requests that you pay the outstanding balance of the purchase price within Twenty One (21) Days from the date hereof so that you can take possession including the tenants.

Further Note that failure to do so within the said Twenty One (21) Days the vendor shall institute legal proceedings against yourself and/or termination of the contract at your own risk and costs arising therefrom.

Thank you,

Yours faithfully

Gathii Irungu & Co. Advocates

cc:

Joseph Muturi Wainaina”

33. It is instructive to note that the amount in default has not been stated nor the nature of default disclosed. Further despite issuing the 21-day notice, it would appear that the Plaintiff panicked and instead of waiting for the 21 days to expire rushed to Court and filed this suit. In addition, the Defendant has denied receiving the notice. The Plaintiff failed to prove service of the notice upon the Defendant. Needless to state that the said notice was issued one year and about two years after the last installment and signing of the agreement of sale. The Plaintiff has not proffered any reason why he never sought to terminate the agreement all this while. It is not lost on the Court that the Plaintiff did not afford the Defendant the opportunity to either comply or breach the contract in the sense that the notice was not allowed to run its course.



34. The Court concludes that no proper notice was issued as contemplated by the terms and conditions of the agreement under Clause 12 which stated as follows;

“Notices

Any notice required to be given hereunder shall be sufficiently served on the Vendor if forwarded to them by registered post to their last known postal address in Kenya and shall be sufficiently served on the Purchaser if forwarded to their last known postal address in Kenya by registered post. A notice given by post shall be deemed to have been served three days after the date of posting.”

35. The Court finds that the agreement of the parties was not breached and for purposes of compliance remained open ended.

Whether the Defendant is entitled to Specific Performance

36. In the case of Gurdev Singh (supra) Gicheru, JA (as he then was) expressed himself as thus:

“When the appellants sought the relief of specific performance of sale of the Respondent’s property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement...It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver up to the Respondent the balance of the purchase price of the suit property...as stipulated in the agreement. There was, however, no express stipulation nor any indication in the agreement that time was of the essence in the agreement. The appellant’s failure to deliver up the balance of the purchase price of the suit property by the appointed date...did not bring the agreement to an end...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The Court does not bar a claim on the ground that the Plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation...Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the Court does not accept his undertaking to perform in lieu of performance, but dismisses the claim... The moment the Plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the Court of equity would refuse to grant specific performance and would leave the parties to their other rights...When the appellants came to Court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior Court, they had not done so. In these circumstances, no Court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice.” (emphasis is mine).



37. Specific performance on the other hand is an equitable remedy grounded in the equitable maxim that equity regards as done that which ought to be done. It is decreed at the discretion of the Court and the basic rule is that specific performance will not be decreed where the common law remedy such as damages would be adequate to put the Plaintiff in the position he would have been but for the breach. The jurisdiction for the grant 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, mistake or illegality, which makes the contract invalid or unenforceable. Even when 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 opposite party.
38. Before I discuss the issue of specific performance, it is important to discuss the issue whether or not the parties agreed to an oral arrangement that the balance of the purchase price would be settled through rent. The Defendant thinks so while the Plaintiff has insisted that he was still the owner of the land and therefore was entitled to rent and that secondly the sums of Kshs. 130,000/- and Kshs. 65,000/- were loans advanced to the Defendant. Going by the evidence on record the last installment of Kshs. 2 Million was paid on the 25/1/2019. According to the unchallenged evidence on record the sums of Kshs. 130,000/- and Kshs. 65,000/- was paid to the Defendant's wife's bank account on the 11/12/19 and 10/1/2021 respectively. Why would the Defendant pay colossal funds in the sum of Kshs. 2 Million and in less than a year borrow small amounts from the Plaintiff? In any event the Plaintiff failed to table documentary evidence such as a loan agreement with respect to the alleged loan. It is not in dispute that the rent for each unit was Kshs. 65,000/- per month and for two units it is Kshs. 130,000/-. The Defendant has led unchallenged evidence that Kshs. 130,000/- was with respect to rent for two units for the month of December 2019 and one unit for the month of January 2020. The Court finds that the averment that the parties agreed to settle the Kshs. 1 Million with rental income is more probable given the reasons above.
39. Evidence was led that the Defendant took over possession of one of the houses from January 2020, renovated and let it out to a tenant in February 2020. The Plaintiff continued to receive rent from the second house from the period February 2020 to October 2021, a period of 21 months totaling the sum of Kshs. 1,365,000/-. The Court finds that pursuant to the arrangement of the parties the Defendant fully paid the balance of the purchase price and is therefore entitled to full ownership.
40. Having found as I did that there is a valid agreement between the parties, the balance of the purchase price in the sum of Kshs. 1 Million having been satisfied through the rent, the Defendant having fully complied with his obligations under the contract, what remained was for the Plaintiff to complete the contract by submitting the completion documents and transferring the land to the Defendant. It is not available to the Plaintiff to receive the full purchase price, collect rent that is not due to him and turn around and seek eviction of the Defendant.
41. The Court finds that orders of specific performance are tenable.

The question of mesne profits and general damages

42. It is trite that mesne profits just like special damages must be pleaded and proved. It is on record that on the 11/10/2022 the Plaintiff withdrew the prayer (c) in the Plaint. That settles the prayer and I see no necessity to discuss the same. Equally the prayer (d) seeking special damages of Kshs. 36,000/- was not proved and is equally disallowed.
43. On the part of the Defendant, the Court having held that the alleged breach of contract is not founded, mesne profits in the sum of Kshs. 2,315,000/- has not been proven. Having analyzed the suit, the



arrangement to settle the balance of the purchase price in the sum of Kshs. 1.0 Million could only have been from the 25/1/2019 on receipt of the last instalment of Kshs. 2 Million. It has taken 21 months as the Plaintiff continued receiving rent in the sum of Kshs. 1,365,000/- less the amount received in the sum of Kshs. 185,000/- leaving the sum of Kshs. 315,000/- which is due to the Defendant. It is therefore not correct to calculate the amount from 2018 as by then the parties were still actively transacting having agreed to abandon the Clause on time being of essence. I therefore find that the only amounts due to the Defendant is only Kshs. 315,000/- being the excess rent collected by the Plaintiff.

44. In the end I find that the Plaintiffs claim is unmerited. The Defendant's counterclaim succeeds partially and I make orders as follows;
- a. The Plaintiff's case fails. It is dismissed.
 - b. An order of specific performance of the sale agreement dated the 20/6/2018 requiring the Plaintiff to transfer the suit land to the Defendant be and is hereby issued within a period of 30 days in default the Deputy Registrar of this Court shall be mandated to execute all necessary documents to effectuate the orders herein.
 - c. Damages for breach of contract in favour of the Defendant is declined.
 - d. Mesne profits is disallowed.
 - e. The Plaintiff is ordered to pay the Defendant the sum of Ksh. 315,000/- within a period of 30 days being the excess of rent collected in satisfaction of the balance of the purchase price in default it stands recoverable summarily.
 - f. The Defendant shall have the costs of the suit and the counterclaim.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 9TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Waweru for the Plaintiff

Owuocha for the Defendant

Court Assistants – Phyllis/Oliver

