



Menengai Stores Limited v Blue Nile Wire Products Limited & another (Environment & Land Case 41 of 2020) [2024] KEELC 4957 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4957 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 41 OF 2020**

**JO MBOYA, J
JUNE 13, 2024**

BETWEEN

MENENGAI STORES LIMITED PLAINTIFF

AND

BLUE NILE WIRE PRODUCTS LIMITED 1ST DEFENDANT

KCB BANK KENYA LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein approached the Honorable court vide Plaintiff dated the 27th February 2020 albeit filed in court on the 28th February 2020; and in respect of which the Plaintiff sought for a plethora of reliefs.
2. Be that as it may, the original Plaintiff [details in terms of the preceding paragraph] was amended vide amended Plaintiff dated the 8th September 2021 and which amended Plaintiff was subsequently re-amended with leave of the court. For coherence, the operative pleading which anchors the Plaintiff's case is therefore the re-amended Plaintiff dated the 28th September 2022; and wherein the Plaintiff has sought for the following reliefs;

AS AGAINST THE FIRST DEFENDANT

- i. Specific performance of the Sale Agreement dated 23rd March 2016 made between the Plaintiff and the 1st Defendant for the sale by the 1st Defendant to the Plaintiff of the said Property.
- ii. Further, or Alternatively, damages for breach of contract, such damages to include the reimbursement of all amounts paid to the 1st Defendant and all outgoings together with interest thereon as provided for under the terms of the Sale Agreement.



- iii. Further, or-alternatively, a declaration that by reason of the repudiation-of the Sale Agreement dated 23rd March 2016 by the 1st Defendant holds the Property on constructive trust for the Plaintiff the Plaintiff is relieved of any further liability to the 1st Defendant under the terms of the said Sale Agreement.
- iv. Further, or alternatively, a declaration that the Plaintiff is entitled to a lien on, and an Occupationary right over, the Property pending payment of the amounts referred to in prayer 2 above and any additional damages and costs as may be awarded in this action.
- v. An order of Permanent Injunction restraining the 1st Defendant from interfering with the Plaintiffs peaceful enjoyment of the Property.

AS AGAINST THE 2ND DEFENDANT

- vi. An order that the 2nd Defendant forthwith delivers up to the Plaintiff the original title deed to the Property known as Land Reference Number 12815 together with a duly and properly executed Discharge of Charge discharging all the charges that the 2ND Defendant holds over the said Property immediately upon payment made to it of the balance of the purchase price in the sum of Kshs. 120,000,000.00 or such other sum as the Court determines is appropriate in the circumstances.

AS AGAINST BOTH DEFENDANTS JOINTLY AND SEVERALLY

- vii. Any further or alternative relief which the Court deems just and/or expedient to grant.
 - viii. Costs of and incidental to this suit.
3. Upon being served with the original Plaint and summons to enter appearance, the 1st Defendant duly entered appearance on the 11th March 2020 and thereafter filed a statement of defense and counterclaim dated the 16th September 2020. Be that as it may, the statement of defense and counterclaim by the 1st Defendant was subsequently amended resting with the amended statement of defense and counterclaim dated the 25th March 2021 and wherein the 1st Defendant has sought for the following reliefs;
- i. That the Plaintiff's suit against the 1st Defendant be struck out and or dismissed with costs.
 - ii. Land Reference Number 12815 (Original Number 4955/19/1) situated in North of (b) THAT the Plaintiff be ordered to forthwith vacate the Plaintiff's property known as Kikuyu Station in Kiambu County within thirty (30) days from the date of judgement thereof an eviction order to issue.
 - iii. That Judgment be entered for the 1st Defendant against the Plaintiff for the sum of Kshs. 63,138,747 being the outstanding rent arrears as at 30th November, 2019 together with interest at Court rates from the date of filing of this counterclaim until full payment.



- iv. That in the alternative to Prayer (c) above the outstanding rent due from the Plaintiff to the 1st Defendant be set off against the purchase price paid by the Plaintiff and the credit thereof be remitted to the 1st Defendant.
 - v. That the 1st Defendant be awarded costs of the Counterclaim.
4. Suffice it to point out that upon being served with the amended statement of defense and counterclaim, the Plaintiff herein filed a Reply to defense and defense to counterclaim dated the 8th September 2021. For good measure, the Plaintiff denied the averments alluded to and contained at the foot of the counterclaim.
5. On the other hand, the 2nd Defendant duly entered appearance and filed a statement of defense dated the 18th May 2020 and in respect of which the 2nd Defendant denied the averments at the foot of the Plaintiff by the Plaintiff herein. Furthermore, the 2nd Defendant contended that the suit by the Plaintiff herein does not raise and/or espouse a reasonable cause of action as against same [2nd Defendant].
6. Following the close of pleadings, the instant matter was listed for case conference on the 14th October 2021 whereupon the advocates for the respective parties confirmed to the court that same [advocates for the parties] had filed and exchanged all the requisite pleadings and bundle of documents as well as the witness statement. Besides, the advocates for the parties also confirmed that the suit was ready for hearing.
7. Arising from the foregoing, the court proceeded to and confirmed the matter for hearing and thereafter scheduled the 1st hearing on the 7th December 2021.

EVIDENCE BY THE PARTIES'

a. PLAINTIFF'S CASE

8. The Plaintiff's case gravitates and revolves around the evidence of two [2] witnesses, namely, Vakash Anil Kumar Gudka and Michael Kiruti, who testified as PW1 and PW2, respectively.
9. It was the testimony of PW1 [Vakash Anil Kumar Gudka], that same is the general manager of the Plaintiff company and thus same [witness] is mandated and authorized to testify on behalf of the Plaintiff. Furthermore, the witness averred that same is conversant with the facts pertaining to and in respect of the instant matter.
10. It was the further testimony of the witness that same has recorded a witness statement over and in respect of the instant matter. In this regard, the witness adverted to the witness statement dated the 27th February 2020 and which statement the witness sought to adopt and rely on as his evidence in chief.
11. Suffice it to point out that the witness statement under reference was thereafter admitted and constituted as the evidence in chief of the witness.
12. On the other hand, the witness also alluded to a list and bundle of documents dated the 27th February 2020 containing a total of 187 documents and which documents the witness [PW1] sought to adopt and produce before the court as exhibits. Instructively, the documents at the foot of the list dated the 27th February 2020 were thereafter tendered and produced before the court as Exhibit[s] P1 to P187, respectively.
13. Other than the foregoing, the witness herein intimated to the court that the Plaintiff Company entered into negotiations with the 1st Defendant Company pertaining to and concerning the purchase of the



suit property which negotiations culminated into the execution of a Memorandum of understanding [M.O.U] dated the 13th December 2015.

14. For good measure, the witness averred that the Memorandum of understanding was duly executed by and on behalf of both the Plaintiff and the 1st Defendant. Additionally, the witness averred that subsequently, the Plaintiff and the 1st Defendant proceeded to and executed a sale agreement dated the 23rd march 2016 and which sale agreement contained the various terms which were agreed upon by the parties pertaining to and concerning the sale of the suit property.
15. Furthermore, the witness intimated to the court that arising from the contents of the memorandum of understanding as well as the sale agreement, the Plaintiff herein proceeded to and indeed paid to the 1st Defendant various amounts inter-alia Kes.10, 000, 000/= only on account of deposit of the purchase price; as well as Kes.20, 800, 000/= only, which constituted value added tax in accordance with the sale agreement.
16. Other than the foregoing, the witness adverted to the amended Plaint dated the 8th September 2021 and the verifying affidavit attached thereto and thereafter same [witness] implored the court to grant the reliefs sought at the foot of the said amended Plaint.
17. On cross examination, by learned counsel for the 1st Defendant the witness [PW1] stated that same [witness] is aware of another case which relates to the instant matter but however pointed out that the case, namely, Nairobi HCC 318 of 2018, has been filed by a sister company to the Plaintiff herein. In any event the witness averred that the said case does not concern the said cause of action.
18. It was the further testimony of the witness that the Plaintiff herein and the 1st Defendant entered into an agreement and furthermore, the witness added that the said agreement contained a clause intimating that the suit property was sold with vacant possession.
19. Whilst still under cross examination, the witness averred that the purchaser [Plaintiff] was given vacant possession of the suit property prior to and before the completion date. Besides, the witness added that by the time the Plaintiff was given vacant possession same [Plaintiff] had not paid the entire purchase price.
20. Other than the foregoing, the witness averred that the Memorandum of understanding which was entered into and executed by both the Plaintiff and the 1st Defendant contained a clause which indicates that the suit property was charged to the 2nd Defendant, namely, Kenya Commercial Bank Limited.
21. Be that as it may, the witness clarified, that the bank [2nd Defendant] was not a party to the memorandum of understanding.
22. On the other hand, it was the testimony of the witness that the Plaintiff and the 1st Defendant subsequently entered into a Deed of variation. Instructively, the witness pointed out that the Deed of variation is part of the documents which has been tendered and produced before the court.
23. On further cross examination, the witness [PW1] testified that though the Plaintiff and the 1st Defendant entered into a Deed of variation, the Plaintiff herein did not have a signed copy of the deed of variation.
24. Furthermore, the witness averred that same [witness] has tendered and produced before the court an email correspondence wherein the Plaintiffs' advocate were requesting the 1st Defendant to return a signed copy of the Deed of variation.



25. It was the further testimony of the witness that the 1st Defendant herein did not send any invoices for rent. Nevertheless, when pressed further the witness stated that the 1st Defendant indeed sent rent invoices.
26. Whilst under further cross examination, it was the testimony of the witness that the completion date for the sale agreement was stipulated as June 2016. However, the witness added that the completion date was subsequently extended beyond June 2016.
27. Other than the foregoing, it was the testimony of the witness that the Plaintiff Company thereafter generated and issued a completion notice dated the 26th March 2019. For good measure, the witness averred that the completion notice was in respect of the sale agreement dated the 23rd March 2016.
28. Additionally, it was the testimony of the witness that the 2nd Defendant herein intimated the reasons why same [2nd Defendant] declined to discharge the title in respect of the suit property.
29. On the other hand, it was the testimony of the witness that the Plaintiff herein has not been paying rents. In any event, the witness admitted that the Deed of variation which is at page 51 of the 1st Defendant's bundle of documents is signed by the Plaintiff.
30. On cross examination by learned counsel for the 2nd Defendant, the witness averred that the bank [2nd Defendant] was not a party to the sale agreement. Furthermore, the witness added that by the time when the Plaintiff and the 1st Defendant were entering into and executing the sale agreement, the suit property was indeed charged to the 2nd Defendant.
31. Whilst under further cross examination, by learned counsel for the 2nd Defendant, the witness stated that before executing the sale agreement the Plaintiff herein did not call for a copy of the charge. In any event, the witness added that same [witness] is not aware whether the Plaintiff's advocate wrote to the bank [2nd Defendant] seeking to know the terms of the charge.
32. Other than the foregoing, the witness averred that by the time the Plaintiff and the 1st Defendant were executing the sale agreement, the Plaintiff herein was not shown a copy of the charge instrument. In any event, the witness stated that the Plaintiff herein also did not seek to know the loan portfolio attendant to the charge.
33. Whilst under further cross examination, it was the testimony of the witness that the Plaintiff company did not procure and/or obtain a written consent from the 2nd Defendant. Besides, the witness averred that the Plaintiff herein has no contract with the 2nd Defendant pertaining to and concerning the suit property.
34. It was the further testimony of the witness that there is no clause in the sale agreement that allows the Plaintiff to sue the 2nd Defendant bank in the event of default by the 1st Defendant.
35. On the other hand, the witness averred that the memorandum of understanding was duly signed and executed by both the Plaintiff and the 1st Defendant. However, the witness clarified that clause 6 of the memorandum of understanding intimates that the transaction was subject to the Bank's Consent.
36. On further cross examination by learned counsel for the 2nd Defendant, the witness averred that the purchaser [Plaintiff] was granted the liberty by the 1st Defendant to have access to the suit property. For good measure, the Witness reiterated that the Plaintiff was granted vacant possession by the 1st Defendant.



37. It was the further testimony by the witness that the charge over and in respect of the suit property was executed between the 1st Defendant and the 2nd Defendant. Instructively, the witness clarified that the Plaintiff herein had no nexus with the bank [2nd Defendant].
38. Other than the foregoing, it was the testimony of the witness that the Plaintiff herein did not procure and/or obtain the discharge of charge from the 2nd Defendant.
39. The second witness who testified on behalf of the Plaintiff was Michael Kiruti. Same testified as PW2.
40. It was the testimony of the witness [PW2] that same is an advocate of the High court of Kenya. Furthermore, the witness averred that same had been instructed as pertains to the transaction relating to the purchase/acquisition of the suit property. In this regard, the witness averred that same [witness] is thus conversant with and knowledgeable of the facts of the instant matter.
41. Other than the foregoing, the witness averred that same has since recorded a witness statement in respect of the instant matter. For coherence, the witness adverted to the witness statement dated the 26th November 2021 and which witness statement same [witness] sought to adopt as his evidence in chief.
42. Instructively, the witness statement dated the 26th November 2021 was thereafter adopted and constituted as the evidence in chief of the witness.
43. Other than the foregoing, the witness averred that same is privy to and knowledgeable of the Deed of variation of the sale agreement which was entered into between the Plaintiff and the 1st Defendant. However, the witness added that the Deed of variation was sent to the 1st Defendant for purposes of execution but the 1st Defendant failed to return the duly executed Deed of variation.
44. On the other hand, the witness averred that owing to the failure by the 1st Defendant to return the duly executed Deed of variation, the Plaintiff herein instructed same [witness] to write to the 1st Defendant and inform same [1st Defendant] that the Plaintiff herein was no longer keen to be bound by the terms of the Deed of variation.
45. It was the further testimony of the witness that same wrote the letter to the 1st Defendant and that the letter under reference had been tendered and produced by the Plaintiff.
46. To this end, the Witness referenced the document at page 207 of the Plaintiff's bundle of document. Other than the foregoing, it was the testimony of the witness that the Deed of variation was never returned to him. In any event, the witness added that same [witness] wrote several email correspondence to the 1st Defendant as pertains to the Deed of variation.
47. It was the further testimony of the witness that insofar as the deed of variation was never returned to the Plaintiff Company, there is no basis upon which the 1st Defendant can seek to be paid rents.
48. On cross examination by learned counsel for the 1st Defendant, the witness averred that same did not receive the duly executed Deed of variation from the 1st Defendant. Furthermore, the witness averred that same was privy to and aware of the email correspondence which has been tendered before the court and wherein same [witness] was requesting for the duly executed Deed of variation.
49. Whilst under further cross examination, the witness averred that no rents were paid to and in favor of the 1st Defendant. In any event, the witness added that no rents were paid to and in favor of the 1st Defendant because the Deed of variation had been rescinded.



50. On the other hand, the witness herein acknowledged and admitted that possession of the suit property was granted to and in favor of the Plaintiff. In any event, the witness added that possession was granted to the Plaintiff on account of clause 1.6 of the Sale agreement.
51. On further cross examination, the witness averred that same [witness] did not write to the chargees advocates as pertains to the status of the loan. For good measure, the witness confirmed that the advocates for the chargee [Kenya Commercial Bank] were M/s Mohamed Madhani & Co Advocates.
52. It was the further evidence of the witness that same [witness] was aware that the suit property was charged to the 2nd Defendant. However, the witness added that same did not procure or obtain the consent from the 2nd Defendant [chargee] before the sale agreement was entered into.
53. Whilst under further cross examination, it was the testimony of the witness that same [witness] was to act for the financier in respect of the transaction in question. For good measure, the witness clarified that the financier was Guardian Bank Ltd.
54. Other than the foregoing, it was the testimony of the witness that the bank herein was in order to pursue the chargor as pertains to the outstanding debt attendant to the charge in question.
55. On cross examination by learned counsel for the 2nd Defendant, the witness averred that the suit property was indeed charged to and in favor of the 2nd Defendant. For good measure, the witness acknowledged that the charge in favor of the 2nd Defendant was duly registered and same was evident on the face of the certificate of official search contained at page 8 of the 2nd Defendant's bundle of documents.
56. Furthermore, the witness averred that the 2nd Defendant [Kenya commercial bank] was not privy to the sale agreement. Nevertheless, the witness confirmed that it was necessary to obtain the consent of the chargee before entering into the sale agreement.
57. Whilst under further cross examination, the witness averred that the 1st Defendant herein had given an undertaking to procure and obtain the discharge of charge from the 2nd Defendant prior to the completion of the transaction.
58. Other than the foregoing, the witness averred that same [witness] is not aware whether the consent of the 2nd Defendant [chargee] was ever obtained.
59. On re-examination by learned counsel for the Plaintiff, the witness clarified that possession of the suit property was given to and in favor of the Plaintiff. In any event, the witness added that possession was agreed on and same was contained in the body of the memorandum of understanding.
60. Whilst under re-examination, the witness averred that clause 1.6 of the sale agreement also adverts to and confirm that the Plaintiff was entitled to take possession of the suit property.
61. With the foregoing testimony, the Plaintiff's case was duly closed.

DEFENDANT'S CASE:

62. The 1st Defendant's case revolves around the evidence of one [1] witness, namely, Botu Jagannadha Rao. Same testified as DW1.
63. It was the testimony of the witness, [DW1] that same is a director of the 1st Defendant and that by virtue of being a director of the 1st Defendant same [DW1] is duly authorized to testify on behalf of the



- 1st Defendant. Furthermore, the witness averred that same is also conversant with and knowledgeable of the facts of the suit.
64. Additionally, the witness averred that same has since recorded a witness statement dated the 25th March 2021 and which witness statement same [DW1] sought to adopt and rely on as his evidence in chief.
65. Suffice it to point out that the witness statement dated the 25th March 2021 was thereafter adopted and constituted as the evidence in chief of the witness.
66. Other than the foregoing, the witness adverted to the list and bundle of documents dated the 30th March 2021 containing 11 documents and thereafter sought to produce and tender same as exhibits before the court. There being no objection to the admission of the documents under reference, same [documents] were produced and admitted as Exhibits D1 to D11, respectively, on behalf of the 1st Defendant.
67. It was the further testimony of the witness that Exhibit D3 is a copy of the Deed of variation of the sale agreement dated the 27th March 2017. Furthermore, the witness averred that the said Deed of variation was submitted for stamping and same bears the revenues stamp thereon. In any event, it was the testimony of the witness that the Deed of variation was duly signed by the parties thereto.
68. It was the further testimony of the witness that the Plaintiff and the 1st Defendant entered into and executed a sale agreement dated the 23rd March 2016 and that the sale agreement indeed adverted to the completion date.
69. Besides, the witness stated that the sale agreement also contained a clause relating to breach of the said agreement. For good measure, the witness pointed out that the clause relating to breach of the sale agreement stipulated the various remedies if any available to the parties.
70. Other than the foregoing, it was the evidence of the witness that the Plaintiff herein generated and issued a notice of completion. For good measure, the witness confirmed that the notice to complete the sale in respect of the suit property was received by the 1st Defendant on the 27th March 2019.
71. It was the further testimony of the witness that the Plaintiff herein did not pay any rents to the 1st Defendant in accordance with the Deed of variation or at all.
72. On cross examination by learned counsel for the Plaintiff, the witness averred that the 1st Defendant and the Plaintiff duly entered into and executed a Memorandum of understanding. Besides, the witness confirmed that the Memorandum of understanding stipulated that the purchase price of the suit property was kes.130, 000, 000/= only.
73. Whilst under further cross examination, the witness averred that the memorandum of understanding stipulated the purchase price to Kes.130 Million. Besides, it was the testimony of the witness that while executing the memorandum of understanding there were no rents that was agreed upon to be paid by the Plaintiffs.
74. Furthermore, the witness confirmed that clause 9 of the Memorandum of understanding [MOU] clarified that no rents were to be charged in respect of the suit property.
75. On further cross examination, it was the testimony of the witness that the sale agreement which was entered into and executed by the parties contained all the terms of the relationship between the Plaintiff and the 1st Defendant.



76. At any rate, it was the testimony of the witness [DW1] that the sale agreement also contained a clause that a party who was not in breach was entitled to issue a rescission notice. For good measure, the witness added that the issuance of the rescission notice was at the discretion of the party not at fault.
77. On the other hand, the witness stated that clause [L] of the sale agreement also states and stipulates that the sale agreement was to remain in force. For clarity, the witness averred that the party who was at fault was at liberty to sustain the sale agreement.
78. It was the further testimony of the witness that the 1st Defendant's advocate at the time when the agreement was crafted was the firm of M/s Mohamed Madhani & Co Advocates. However, the witness pointed out that the said advocate[s] are not part of the witnesses to testify before the court.
79. Whilst under further cross examination, the witness averred that the sale agreement alluded to the purchase price over and in respect of the suit property. In this regard, the witness pointed out that the suit property was being sold at Kes.105 Million only while the fixtures and fittings were to cost the sum of Kes.25 Million; making an aggregate total of Kes.130 Million.
80. Additionally, the witness testified that there was also the aspect of VAT and same was agreed at in the sum of Kes.20, 800, 000/=. For good measure, the witness confirmed that the amount at the foot of VAT was duly paid by the Plaintiff and same was acknowledged by the 1st Defendant.
81. While under further cross examination, the witness stated that the transaction as pertains to the suit property was not concluded in accordance with the terms of the sale agreement entered into and executed on the 23rd March 2016.
82. On further cross examination, the witness averred that there was indeed a draft transfer instrument which was generated and forwarded to the 1st Defendant. For good measure, the witness added that the draft transfer instrument was sent prior to and before the scheduled completion date.
83. On the other hand, it was the testimony of the witness that the Plaintiff herein wrote to the 1st Defendant a reminder letter a copy of which has been tendered and produced before the court at pages 106 of the Plaintiff's bundle of documents. For good measure, the witness clarified that the reminder letter was in respect of a request for approval of an undertaking.
84. Furthermore, the witness pointed out that same [witness] is not aware whether the undertaking in question was ever availed by the 1st Defendant. Other than the foregoing, it was the testimony of the witness that the 1st Defendant herein sought for and obtained an extension of the completion date by 30 days.
85. Besides, the witness averred that the 1st Defendant subsequently sought for further extension. Nevertheless, the witness confirmed that despite the extensions that were sought for by the 1st Defendant, the transaction was not completed by the time which had been agreed upon.
86. Whilst under further cross examination, the witness averred that same however does not have any reason why the 1st Defendant did not complete the transaction.
87. Other than the foregoing, it was the testimony of the witness that the Plaintiff and the 1st Defendant held a meeting pertaining to and concerning the sale agreement. In this regard, the witness ventured forward and stated that the Deed of variation was executed on the 20th March 2017. Besides, the witness added that the Deed of variation was signed on the same date.
88. Nevertheless, when pressed further, the witness changed tune and stated that same [witness] is not aware of the date when the 1st Defendant executed the Deed of variation of the sale agreement.



- However, the witness averred that the Deed of variation was dispatched to the 1st Defendant on the 29th March 2017.
89. Whilst under further cross examination, on the issue of the Deed of variation, the witness admitted that there were various correspondence that were issued by the Plaintiff herein and which were calling upon the 1st Defendant to return the executed Deed of variation. However, the witness added that the 1st Defendant was reluctant to execute the Deed of variation.
 90. On the other hand, it was the testimony of the witness that the 1st Defendant herein was demanding for rents. For good measure, the witness stated that the Deed of variation contained a clause pertaining to and concerning payments of rents.
 91. Other than the foregoing, it was the testimony of the witness that there was a delay on the part of the 1st Defendant to execute the Deed of variation.
 92. Whilst under further cross examination by learned counsel for the Plaintiff, the witness averred that same is aware that the Plaintiff herein signaled her withdrawal from the Deed of variation of the sale agreement. For clarity, it was the testimony of the witness that the purchaser indeed withdrew from the Deed of variation.
 93. In further cross examination, the witness averred that by the 20th April 2017 the Deed of variation had not been signed. In any event, the witness added that by the time the Plaintiff withdrew from the Deed of variation, same [Deed of variation] had not been signed.
 94. Nevertheless, it was the testimony of the witness that the 1st Defendant herein is still claiming rents from the Plaintiff insofar as the Plaintiff has been in possession of the suit property. Instructively, the witness averred that the purchaser ought to pay the rents because same [purchaser] was granted possession of the suit property.
 95. Whilst under further cross examination, the witness herein conceded and admitted that it is the 1st Defendant who was in default as pertains to the terms of the sale agreement.
 96. Other than the foregoing, it was the testimony of the witness that the Deed of variation of the sale agreement was eventually sent back to the Plaintiff on the 16th September 2016. In any event, the witness clarified that the Deed of variation was time bound and same was scheduled to lapse on the 30th September 2017.
 97. It was the further testimony of the witness that by the time the 1st Defendant returned the Deed of variation, there was only two [2] weeks prior to the lapse of the term of the Deed of variation.
 98. Other than the foregoing, it was the testimony of the witness that the 2nd Defendant declined to release the discharge of charge over the suit property and that as a result of the refusal of the 2ND Defendant to discharge the suit property, the transaction over and in respect of the suit property could not proceed.
 99. On cross examination by learned counsel for the 2nd Defendant, the witness averred that at the time when the Plaintiff and the 1st Defendant executed the sale agreement, the suit property was duly charged to the 2nd Defendant. Besides, the witness admitted that there were further charges which were executed by the 1st Defendant in respect of the suit property.
 100. Furthermore, it was the testimony of the witness that the charges including the further charges over and in respect of the suit property were duly registered in the land registry. Besides, the witness also added that the memorandum of understanding which was executed between the Plaintiff and the 1st Defendant was executed without notice to and/or involvement of the 2nd Defendant.



101. Whilst under further cross examination, it was the testimony of the witness that the Memorandum of understanding was entered into and executed at the time when the suit property was charged to the 2nd Defendant.
102. Additionally, it was the evidence of the witness that the 2nd Defendant herein was neither informed nor notified of the transaction relating to the sale of the suit property. For good measure, it was the testimony of the witness that the consent of the 2nd Defendant was neither sought for nor obtained prior to and before the execution of the sale agreement.
103. Other than the foregoing, it was the testimony of the witness that the sale and the vesting of possession of the suit property to the Plaintiff herein were undertaken contrary to and in contravention of the terms of the charge and further charge which were existing over the suit property.
104. At any rate, it was the evidence of the witness that subsequently the 1st Defendant wrote to the 2nd Defendant seeking to implore the 2nd Defendant to discharge the title of the suit property but the 2nd Defendant declined to do so. In any event, it was the testimony of the witness that the debts/loan for which the suit property was charged remains owing and outstanding to date.
105. Whilst under further cross examination, the witness averred that the 1st Defendant herein has no claim against the 2nd Defendant. For good measure, the witness averred that the counterclaim mounted by 1st Defendant relates to the Plaintiff herein and not otherwise.
106. On re-examination by learned counsel for the 1st Defendant, the witness averred that by the time the suit property was being sold to the Plaintiff same [suit property] was indeed charged to the 2nd Defendant. For good measure, the witness averred that both the memorandum of understanding and the sale agreement contained clauses confirming that the suit property was indeed charged to the 2nd Defendant.
107. As pertains to the Deed of variation, the witness averred that same [deed of variation] had been signed by the time the suit herein was filed.
108. On the other hand, it was also the testimony of the witness that the sale agreement which was entered into and executed by the parties also contained a clause relating to the remedies in the event of breach thereof.
109. With the foregoing testimony, the 1st Defendant's case was duly closed.

2. DEFENDANT'S CASE:

110. The 2nd Defendant's case is similarly anchored on the evidence of one [1] witness namely, John Wagecha Nga'ng'a. For coherence, same testified as DW2.
111. It was the testimony of the witness [DW2] that same is a banker working with the 2nd Defendant [Kenya Commercial Bank]. In this regard, the witness averred that same is conversant with the facts of the instant matter.
112. Furthermore, it was the testimony of the witness that same has since recorded a witness statement dated the 3rd May 2021 and which witness statement, same [witness] sought to adopt and rely on as his evidence in chief. For good measure, the witness statement dated the 3rd May 2021 was thereafter adopted and constituted as the evidence in chief of the witness.
113. Other than the foregoing, the witness adverted to the list and bundle of documents dated the 18th May 2020, containing five [5] documents and thereafter same sought to tender and produce the documents



- as exhibits before the court. There being no objection, the documents under reference were duly produced and admitted as Exhibits D1 to D5, respectively on behalf of the 2nd Defendant.
114. Other than the foregoing, it was the testimony of the witness that the 2nd Defendant has also filed a statement of defense dated the 18th May 2020 and in respect of which same [2nd Defendant] seeks to have the Plaintiff's suit dismissed.
 115. On cross examination by learned counsel for the Plaintiff, the witness [DW2] averred that same is conversant with the facts of the instant matter. Besides, the witness averred that the 2nd Defendant has dealt with the 1st Defendant for more than 20 years. For good measure, the witness added that the 1st Defendant is a good client/customer of the 2nd Defendant.
 116. Other than the foregoing, it was the evidence of the witness that same is aware that the suit property was and remains duly charged in favor of the 2nd Defendant. However, the witness added that the suit property belongs to the 1st Defendant who is the one who caused same [suit property] to be charged in favor of the 2nd Defendant.
 117. Whilst under further cross examination, the witness averred that the Plaintiff herein was indeed aware and knowledgeable of the existence of the charges which were registered in favor of the 2nd Defendant bank. In any event, the witness testified that the monies secured vide the charge and further charges over the suit property are still owing due and payable.
 118. While under further cross examination, it was the testimony of the witness that the 2nd Defendant herein was never a party to the Memorandum of understanding [MOU] and the sale agreement that were entered into and executed between the Plaintiff and the 1st Defendant. For good measure, the witness clarified that the suit property which was being transacted upon was at the material point in time charged to the 2nd Defendant.
 119. On further cross examination, the witness averred that the aggregate amounts at the foot of the various charges registered over and against the suit property is more than Kes. 1 Billion.
 120. Whilst under further cross examination, the witness averred that other than the suit property, the 1st Defendant has also charged other properties to secure the banking facility offered/granted by the 2nd Defendant. Be that as it may, the witness averred that the 2nd Defendant has not disclosed the details of the other properties which have been charged by the 1st Defendant. In any event, the witness clarified that the other properties which have been charged by the 1st Defendant are not relevant in respect of the instant suit.
 121. It was the further testimony of the witness that the 2nd Defendant received the letter dated 3rd September 2019 from the Plaintiff herein and furthermore, the witness added that the letter under reference was responded to by the 2nd Defendant. Nevertheless, it was the testimony of the witness that the bank was not obligated to accept the proposals alluded to and contained at the foot of the letter dated 3rd September 2019.
 122. Whilst under further cross examination, the witness averred that the 1st Defendant herein approached the 2nd Defendant to implore same [2nd Defendant] to discharge the title of the suit property. However, it was the testimony of the witness that the 2nd Defendant declined the request because the banking facility was still outstanding.
 123. It was the further testimony of the witness that the consent of the 2nd Defendant was necessary and paramount before the suit property could be sold. Nevertheless, the witness clarified that the consent of the 2nd Defendant was neither sought for nor procured at all.



124. On the other hand, it was the evidence of the witness that the 2nd Defendant herein did not take part in the negotiations between the Plaintiff and the 1st Defendant. For good measure, the witness averred that the 2nd Defendant was neither privy to nor aware of the negotiation between the Plaintiff and the 1st Defendant.
125. On cross examination by learned counsel for the 1st Defendant, the witness averred that the suit property was duly charged to and in favor of the 2nd Defendant at the time of execution of the sale agreement. Besides, it was the testimony of the witness that the decision as pertains to the discharge of the security before full payment of the facility belonged to the 2nd Defendant and not otherwise.
126. Whilst under further cross examination, the witness averred that it is evident both from the memorandum of understanding and the sale agreement that was executed between the Plaintiff and the 1st Defendant that the suit property was indeed charged to the 2nd Defendant. Nevertheless, it was the testimony of the witness that the 2nd Defendant did not grant any written consent towards and in respect of the sale of the suit property.
127. On further cross examination, it was the testimony of the witness that all the parties, namely, the Plaintiff and the 1st Defendant were knowledgeable of the facts that the suit property was duly charged.
128. Furthermore, the witness averred that the 1st Defendant wrote to the 2nd Defendant seeking to have the title of the suit property discharged but the 2nd Defendant declined the request by the 1st Defendant. In any event, the witness added that the request by the 1st Defendant was at the discretion of the 2nd Defendant bank owing to the fact that the debt secured by the suit property was still outstanding.
129. On re-examination, by learned counsel for the 2nd Defendant, the witness averred that the 1st Defendant herein approached the 2nd Defendant and sought for a banking facility which facility was granted in favor of the 1st Defendant. Furthermore, the witness averred that the banking facility was secured vide charge which was registered against the suit property.
130. It was also the evidence of the witness that the debt/facility which was granted to the 1st Defendant on the security of the charge remains due and outstanding. In this regard, the witness averred that the 2nd Defendant was not under obligation to execute a discharge of charge over the suit property when the facility was still outstanding.
131. Other than the foregoing, the witness averred that same [witness] is aware that the bank held various discussions with the 1st Defendant as pertains to the release of security, but the discussions were not successful. For good measure, the witness clarified that the bank conveyed her position that same [bank] was not willing to release the security before the loan facility was fully liquidated.
132. With the foregoing testimony, the 2nd Defendant's case was duly closed.

PARTIES' SUBMISSIONS:

133. At the close of the hearing, the advocates of the respective parties covenanted to file and exchange written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions.
134. Pursuant to and in line with the directions of the court, the Plaintiff proceeded to and filed three [3] sets of written submissions. For good measure, the Plaintiff filed the maiden submissions dated the 19th December 2023 as well as the rejoinder submissions dated the 13th March 2024 and 13th May 2024, respectively.



135. On the other hand, the 1st Defendant filed written submissions dated the 7th March 2024 whilst the 2nd Defendant filed written submissions dated the 7th February 2024. For coherence, the submissions filed by and on behalf of the respective parties forms part of the record of the court.
136. Additionally, it is imperative to state and underscore that though the court has not reproduced and/or rehashed the contents of the written submissions, same [written submissions] have however been appraised and considered by the court and in any event the contents thereof shall inform the decision of the court.
137. Furthermore, the court wishes to appreciate and acknowledge the depth of research and the illuminating arguments that have been canvassed at the foot of the various written submissions. However, it suffices to also observe that the learned advocates for the respective parties have mostly referenced decisions from foreign jurisdictions albeit at the expense of local [indigenous] jurisprudence.
138. For the avoidance of doubt, I beg to single out learned for the 1st Defendant who has entirely cited and relied on decisions from other jurisdictions without adverting to and/or highlighting any local decision despite the fact that Kenyan courts inter-alia the Court of Appeal and the Supreme court of Kenya [the apex court] have since generated rich and illuminating jurisprudence on pointed issues that touched on and concerned the subject matter.
139. Nevertheless, I must also confirm that despite reference to decisions from the foreign jurisdictions [which similarly adverts to common law system] I have nevertheless considered the contents of the said decisions and the ratio decidendi espoused thereunder.

ISSUES FOR DETERMINATION:

140. Having reviewed the pleadings filed by the parties [whose details were highlighted at the onset of the judgment] the evidence tendered [both oral and documentary] and having taken into account the written submissions filed on behalf of the respective parties, the following issues crystalize [emerge] and are thus worthy of determination;
- i. Whether the Plaintiff's suit discloses a reasonable case of action as against the 2nd Defendant or otherwise.
 - ii. Whether the Plaintiff herein is entitled to the equitable remedy of Specific performance either in the manner sought or at all.
 - iii. Whether the Plaintiff herein is entitled to ownership of the suit property on the basis of the plea of Constructive trust or otherwise.
 - iv. Whether the 1st Defendant is entitled to rents and rent arrears on the basis of the deed of variation of the sale agreement which was entered into on [sic] the 27th March 2017 or otherwise.
 - v. What reliefs, if any ought to be granted?

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1



Whether the Plaintiff's suit discloses a reasonable case of action as against the 2nd Defendant or otherwise.

141. The dispute beforehand arises from the Memorandum of understanding which was entered into and executed between the Plaintiff and the 1st Defendant on the 13th December 2015; as well as the sale agreement dated the 23rd March 2016. For coherence, both the memorandum of understanding and the sale agreement touched on and concerned the sale of L.R No. 12815 [original number 4955/19/1] hereinafter referred to as the suit property.
142. Notably, the suit property which was the subject of the memorandum of understanding and the sale agreement [details in terms of the preceding paragraph] was and remains lawfully registered in the name of the 1st Defendant herein.
143. Nevertheless, it is worth pointing out that though the suit property belongs to and is registered in the name of the 1st Defendant same [suit property] is however charged to and in favor of the 2nd Defendant to secure a banking facility that was advanced to the 1st Defendant by the 2nd Defendant.
144. Additionally, it is imperative to underscore that at the time when the Plaintiff and the 1st Defendant entered into and executed both the Memorandum of understanding [MOU] and the sale agreement, respectively, the suit property was indeed charged to and in favor of the 2nd Defendant.
145. For coherence, the fact that the suit property was charged to and in favor of the 2nd Defendant is highlighted at the foot of both the Memorandum of understanding and the sale agreement.
146. From the foregoing explication, it is therefore common ground that both the Plaintiff and the 1st Defendant entered into and executed the Memorandum of understanding and the sale agreement over and in respect of the suit property whilst aware of the fact that the suit property was indeed charged to and in favor of the 2nd Defendant.
147. At any rate, during the hearing of the instant matter PW1 who testified on behalf of the Plaintiff confirmed that the Plaintiff was aware and knowledgeable of the fact of the existing charge in favor of the 2nd Defendant. For good measure, it is imperative to reproduce the salient aspects of the evidence of PW1 whilst under cross examination by learned counsel for the 2nd Defendant.
148. Same PW1 stated as hereunder;
- “The bank was not a party to the sale agreement. By the time of executing the sale agreement, the suit property was duly charged to the bank. Before executing the sale agreement I had not seen the charge document”
149. Whilst under further cross examination, PW1 ventured forward and stated thus;
- “I don't know whether our advocates wrote to the bank seeking to know the terms of the charge. By the time of executing the sale agreement we were not shown the charge instrument. The Plaintiff did not seek to know the status of the loan portfolio. The Plaintiff did not obtain the written consent from the bank”



150. On further cross examination by learned counsel for the 2nd Defendant, PW1 stated thus;
- “The Plaintiff has no contract with the bank pertaining to the suit property herein. There is no clause in the agreement that allows the Plaintiff to sue the bank in the event of default by the 1st Defendant”
151. From the foregoing testimony, there is no gainsaying that the Plaintiff herein was privy to and knowledgeable of the existence of the charge in favor of the 2nd Defendant. Furthermore, it is also evident that the Plaintiff knew and appreciated that the consent of the 2nd Defendant was critical and paramount before entry into and execution of the sale agreement.
152. Nevertheless, it is worth pointing out that despite being aware and knowledgeable of the necessity to procure and obtain the written consent of the 2nd Defendant, neither the Plaintiff nor the 1st Defendant ever sought for the written consent prior to or before the execution of the sale agreement.
153. Other than PW1 whose evidence has pertinently been highlighted in the preceding paragraph[s], there is also the evidence of PW2, namely, Michael Kiruti. For good measure, PW2 testified and confirmed to the court that same is an advocate of the High court Kenya who majorly deals in conveyancing.
154. Suffice it to point out that by virtue of being an advocate of the High court of Kenya and who specializes in conveyancing, no doubt PW2, was conversant with the relevant and applicable laws inter-alia the provisions of Section[s] 87 and 88 of the Land Act, 2012 [2016].
155. Pertinently, one of the conditions that PW2 ought and should have been aware of is the legal position that a property which is charged to a banking institution or such other financing institution cannot be the subject of a sale agreement for purposes of alienation and/or disposal albeit without prior written consent of the chargee.
156. Nevertheless, it was the evidence of PW2 that the transaction beforehand was carried out albeit without obtaining the prior written consent of the chargee namely, the 2nd Defendant.
157. For the sake of brevity, it is important to reproduce salient features of the evidence of PW2 whilst under cross examination by learned counsel for the 1st Defendant. Same stated as hereunder;
- “I was aware that the suit property was charged to the 2nd Defendant. I did not obtain the consent from the chargee before entering into the sale agreement”
158. On the other hand, PW2, while under further cross examination by learned counsel for the 2nd Defendant, PW2 stated as hereunder;
- “The suit property was duly charged to the 2nd Defendant. The charge was duly registered and reflected in the title of the suit property. the official search shows that the suit property was charged”.
159. Furthermore, whilst still under cross examination, PW2 stated as hereunder;
- “The 2nd Defendant was not privy to the sale agreement. It was necessary to obtain the consent of the chargee. I am not aware whether the chargees consent was obtained”.
160. To start with, it is trite and established that the Plaintiff herein can only succeed in her case on the basis of the strength of her evidence and not on the basis of the weakness of the defense.[See the holding of the Court of Appeal in *Caroget Investments Limited versus Aster Holdings Limited* [2019]eklr]



161. Consequently, in evaluating whether the Plaintiff's case discloses a reasonable cause of action as against the 2nd Defendant it is imperative to appraise the evidence placed before the court by and on behalf of the Plaintiff.
162. Arising from the totality of the evidence of the Plaintiff, what becomes apparent is that the Plaintiff engaged and indulged in a transaction pertaining to the suit property whilst knowing that the suit property was lawfully charged to and in favor of the 2nd Defendant.
163. Notwithstanding the foregoing, now that the transaction has failed to materialize the Plaintiff has approached the court and same is seeking that the court be pleased to order and direct the 2nd Defendant to execute a discharge of charge over and in respect of the suit property even though the banking facility that is secured by the title of the suit property remains owing, due and outstanding.
164. The question that the court must grapple with and endeavor to answer is whether the Plaintiff herein has any contract with the 2nd Defendant which can underpin not only the suit beforehand, but also the remedies that are sought against the 2nd Defendant.
165. Quite clearly, the contract which the Plaintiff entered into and executed was between herself [Plaintiff] and the 1st Defendant. Consequently, the doctrine of privity of contract only binds the Plaintiff and the 1st Defendant and not otherwise.
166. To this end, it suffice to take cognizance of the decision of the Court of Appeal in the case of Savings and Loans Kenya Ltd vs Karangaita Kanyenje Gakombe Company Ltd [2015]eKLR, where the court stated and observed as hereunder;

In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In *DUNLOP PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD* [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD* (supra), *KENYA NATIONAL CAPITAL CORPORATION LTD V ALBERT MARIO CORDEIRO & ANOTHER* (supra) and *WILLIAM MUTHEE MUTHAMI V BANK OF BARODA*, (supra).

Thus in *AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD* (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”



167. Arising from the foregoing analysis, I hold the humble view that in the absence of any contractual relationship between the Plaintiff and the 2nd Defendant, the Plaintiff herein is non-suited as against the 2nd Defendant.
168. Other than the import and tenor of the doctrine of privity of contract, there is yet another aspect that merits mention and a short discussion. For coherence, the aspect herein touches on the acknowledgement by PW1 that there was no clause in the sale agreement that allows the Plaintiff to sue the 2nd Defendant in the event of breach of Contract by the 1st Defendant.
169. Whilst reproducing the salient aspects of the evidence of PW1 elsewhere hereinbefore, the court reproduced the portion of PW1's evidence where same admitted that there is no clause in the sale agreement that allows the Plaintiff to sue the Bank [the 2ND Defendant] in the event of default by the 1st Defendant.
170. My understanding of the testimony by PW1 [who testified as the general manager] of the Plaintiff is to the effect that same is confirming and acknowledging that there is no nexus between the Plaintiff and the 2nd Defendant.
171. To the extent that there is no nexus between the Plaintiff and the 2nd Defendant as pertains to the contract leading to the suit beforehand, the question that arises and comes to the fore is whether there is any cause of action established by the Plaintiff or otherwise.
172. Before venturing to interrogate the question beforehand, it is important to discern and decipher what constitute a cause of action. In this respect, the decision of the Court of Appeal in the case Kigwor Company Limited versus Samedy Trading Company Limited [2021] eKLR, is succinct and apt.
173. For coherence, the court stated and held thus;

36. In the Court of Appeal case of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR Justice Waki held that:-

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J. in the case of Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs. Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.”

Lord Diplock, for his part in Letang vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ...”

174. Arising from the definition of what constitutes a cause of action, it is therefore imperative to underscore that before a litigant, the Plaintiff herein not excepted, can proceed forward to have his/her case heard, same [litigant] must establish a set of facts that underpin [sic] her claim against the adverse party.



175. To my mind, it is not enough for a litigant [the Plaintiff herein not excepted] to merely file a suit against a party merely because of the thinking of the litigant that party ought to be joined in the proceedings, irrespective of whether there is a cause of action known to law or otherwise.
176. Notably, from the evidence tendered by the Plaintiff, same acknowledges and confirms that same [Plaintiff] had no dealing and/or contract with the 2nd Defendant. Besides, the same Plaintiff acknowledges that there was no clause in the sale agreement that same [Plaintiff] entered into with the 1st Defendant that would allow her [Plaintiff] to implead the 2nd Defendant in the event of default by the 1st Defendant.
177. Quite clearly, the Plaintiff herself concedes and acknowledges that there is no nexus [affinity] between herself and the 2nd Defendant and in the absence of such nexus, there certainly is no reasonable cause of action as against the 2nd Defendant.
178. Finally, it is also imperative to point out that by the time the Plaintiff and the 1st Defendant were entering into the sale agreement, same were aware that the suit property was charged to the 2nd Defendant. Furthermore, neither the Plaintiff nor the 1st Defendant procured and obtained the written consent of the 2nd Defendant.
179. Having failed to procure and obtain the written consent of the 2nd Defendant prior to and before entering into the impugned sale agreement, what becomes evident is that the sale agreement [contract] which was entered into between the Plaintiff and the 1st Defendant was illegal as pertains to the 2nd Defendant.
180. Similarly and in view of the provisions of Section 87 and 88 of the *Land Act* 2012 [2016], I come to the conclusion that the terms of [sic] the sale agreement which was entered into between the Plaintiff and the 1st Defendant is not enforceable as against the 2nd Defendant.
181. In a nutshell, my answer to issue number one [1] is to the effect that the Plaintiff's suit does not disclose any reasonable cause of action known to law as against the 2nd Defendant.
182. Consequently and in the premises, the suit as against the 2nd Defendant is not only premature and misconceived, but same is legally unenforceable.

ISSUE NUMBER 2

Whether the Plaintiff herein is entitled to the Equitable remedy of specific performance either in the manner sought or at all.

183. Having disposed of the issue pertaining to the involvement of the 2nd Defendant in respect of the instant suit, it is now apposite to venture forward and consider the other reliefs that have been raised by the Plaintiff as against the 1st Defendant herein.
184. Firstly, the Plaintiff herein has laid a claim for specific performance to be decreed as against the 1st Defendant and essentially to compel the 1st Defendant to perform her part of the bargain as pertains to the sale agreement entered into and executed on the 23rd March 2016.
185. Put differently, what I hear the Plaintiff to be seeking is that the court should order and direct the 1st Defendant to execute the requisite transfer instrument and thereafter facilitate the transfer and registration of the suit property in favor of the Plaintiff. For the avoidance of doubt, that is what constitutes specific performance.



186. Nevertheless, before ordering and/or decreeing specific performance, it is imperative to underscore that specific performance is an equitable relief and its issuance is at the discretion of the court. Simply put, the grant of an order of specific performance is dependent on the exercise of discretion of the court albeit taking into account the obtaining circumstances including, but not limited to the adequacy of damages as a basis of recompense.
187. Furthermore, it is trite and established that before a court of law, can venture forward and grant an equitable remedy of specific performance, the court must be satisfied that there is indeed a valid, lawful and enforceable contract and not otherwise.
188. As pertains to the ingredients to be met and/or satisfied before an order specific performance can issue, it suffices to adopt and reiterate the erudite position espoused in the case of *Reliable Electrical Engineers (K) Ltd versus Mantrac Kenya Limited* [2006] eKLR, where the court held as hereunder;

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

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

189. Other than the foregoing position, the circumstances that must be met and satisfied before an order of specific performance can issue were also highlighted and amplified by the Court of Appeal in the case of *GURDEV SINGH BIRDI & NARINDER SINGH GHATORA as Trustees of RAMGHARIA INSTITUTE OF MOMBASA v ABUBAKAR MADHBUTI* [1997] eKLR, where the court stated and held thus;

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

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

190. Flowing from the ratio decidendi espoused in the decision [supra], it is now appropriate to venture forward and consider whether the Plaintiff herein has met and/or satisfied the requisite threshold to warrant the grant of an order for specific performance.



191. To start with, it is not lost on this court that the Plaintiff herself admitted and acknowledged that the suit property was duly charged to and in favor of the 2nd Defendant at the time of entering into and executing the impugned sale agreement.
192. To the extent that the sale agreement was being entered into and executed on the face of an existing charge, it suffices to point out that the vendor of the suit property [1st Defendant] had no rights over the suit property capable of being sold and/or conveyed, subject only to the equity of redemption.
193. Pertinently, even though the 1st Defendant [vendor] was and remains the registered owner of the suit property, her rights to and in respect of the suit property were encumbered and thus same could not purport to enter into the impugned sale agreement.
194. For ease of reference, it suffices to highlight and underscore the import and tenor of the provisions of Section 25 of the *Land Registration Act, 2012*.
195. Given the significance of the said provisions, same are reproduced as hereunder;
- Rights of a proprietor.
25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (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.
196. To the extent that the title of the suit property was charged and remains charged to the 2nd Defendant to date and taking into account the import and tenor of Section 25 of the *land registration Act, 2012* as read together with the provisions of Sections 87 and 88 of the *land Act, 2012* [2016], it is my finding and holding that the contract upon which specific performance is being sought was and remains an enforceable.
197. In any event, it is not lost on the court that a court of law cannot grant an order which is incapable of being actualized and/or enforced. Instructively, it is common knowledge that the title of the suit property remains charged to and in favor of the 2nd Defendant as pertains to a banking facility in the sum of Kes.1 Billion.
198. Consequently, the question that I must ask myself is how an order of specific performance will arise yet the 1st Defendant herein cannot convey the title of the suit property to the Plaintiff on the basis of an existing charge.
199. Without belaboring the point, I am afraid that the plea for specific performance sought for by the Plaintiff herein is legally untenable and hence same cannot issue.

ISSUE NUMBER 3



Whether the Plaintiff herein is entitled to ownership of the suit property on the basis of the plea of constructive trust or otherwise.

200. The other claim that has been raised by and adverted to relates to the plea of constructive trust. In this respect, the Plaintiff contends that the 1st Defendant holds the property beforehand on constructive trust for the Plaintiff.
201. Three thing[s] do arise as pertains to the claim founded and anchored on constructive trust. Firstly, there is no gainsaying that the amendment that brought forth the relief/remedy/prayer founded on constructive trust was undertaken on the 28th September 2022 long after the Plaintiff's case had been closed. For coherence, the Plaintiff's case was heard and closed on the 7th June 2022.
202. To the extent that the amendment was done long after the Plaintiff's case had been closed and taking into account that the Plaintiff's witnesses were not recalled, it suffices to point out that no evidence were tendered and or adduced before the court as pertains to constructive trust.
203. Nevertheless, I must point out that constructive trust is the kind of trust that arises by operation of the law. However, before a court of law can engage with the construction, there must be evidence tendered. Simply put, the construction and endeavor to discern the existence of constructive trust cannot be taken in vacuum.
204. To my mind, it was incumbent upon the Plaintiff and her learned counsel to place before the court evidence upon which the court could proceed to calibrate on the question of constructive trust. Instructively, no such evidence was tendered.
205. To this end, I beg to adopt and reiterate the holding of the Court of Appeal in the case of *Kazungu Fondo Shutu & another v Japhet Noti Charo & another* [2021] eKLR, where the court stated and held as hereunder;

28. The concept of trust must however be proved. This Court in the case of *Mumo v Makau* [2002] 1EA.170, held that "trust is a question of fact to be proved by evidence....." See also *Kanyi Muthiora v Maritba Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 1982*.

29. In *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, this Court dealt with the issue of trust at length. The Court made reference to *Twalib Hatayan Twalib Hatayan & Anor v Said Sagar Ahmed Al-Heidy & Others* [2015] eKLR and re-stated the law on trusts as follows: -

"According to the Black's Law Dictionary, 9th Edition; a trust is defined as

"1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."

Under the *Trustee Act*, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand.



A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...

This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)."

206. Furthermore, the court ventured forward and stated thus;

32. The onus to prove existence of a trust lay squarely on the appellants. Section 107 of the *Evidence Act* further provides that:
"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

207. Suffice it to point out that the burden of proving and/or establishing constructive trust lay on the shoulders of the Plaintiff and such burden could only be discharged by way of adduction of credible and plausible evidence before the court. However, as pointed out elsewhere herein before, no evidence was tendered to propagate the plea of constructive trust.

208. To the contrary, what the court has been treated to is a re-amended Plaintiff dated the 28th September 2022 [which is merely a pleading] and not evidence.

209. It is trite and established that a case before a court of law cannot be proved on the basis of pleadings. To the contrary, a case can only be proven on the basis of credible, cogent and plausible evidence tendered in the conventional manner.

210. Suffice it to point out that the pleadings filed by the parties, though critical and paramount, same have however cannot replace and/or take the stead [place] of evidence or at all.

211. Secondly, even assuming for the sake of arguments that evidence had been tendered ex-post the filling of the re-amended Plaintiff [which is not the case] it is still not lost on the court that the suit property remains charged to the 2nd Defendant and for as long as the charge remains in existence, the rights



secured vide the charge cannot be affected and/or otherwise negated. For good measure, the said rights are only subject to the Equity of redemption.

212. From the foregoing observations, I beg to point out and underscore that even if evidence was tendered [which is not the case], it would still be impracticable to decree constructive trust.
213. Thirdly, there is no gainsaying that at the time the Plaintiff and the 1st Defendant entered into the sale agreement [contract] upon which the plea of constructive trust is premised, same [Plaintiff and the 1st Defendant] were aware that the impugned transaction was vitiated for want of the written consent of the chargee [2nd Defendant].
214. The question that then arises is whether a plea of constructive trust can arise and/or ensue on the face of a transaction that both the contracting parties knew and properly understood to be illegitimate.
215. In my humble view, I am not persuaded that the plea of constructive trust can issue and/or be declared, taking into account the totality of the circumstances obtaining in and surrounding the dispute beforehand.
216. Before departing from the question of constructive trust, it suffices to take cognizance of the holding of the Supreme Court of Kenya [the apex court] in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment), where the court stated and held thus;

72. As has been established therefore, trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Like in the instant case, where it is not expressly stated, the trust may be established by operation of the law.

73. From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

217. In sum, I am unable to find any lawful or legitimate basis upon which to proclaim that the 1st Defendant holds the suit property on trust for the Plaintiff herein, taking into account that no evidence was ever tendered in this respect and coupled with the fact that even the total purchase price has never been paid.

ISSUE NUMBER 4

Whether the 1st Defendant is entitled to rents and rent arrears on the basis of the deed of variation of the sale agreement which was entered into on [sic] the 27th March 2017 or otherwise.

218. Other than the claims that have been propagated by and on behalf of the Plaintiff herein, the 1st Defendant on her part also filed a counterclaim and in respect of which same has sought for inter-alia payment of rents and rent arrears amounting to the sum of Kes.63, 138, 747/= only.
219. Instructively, the 1st Defendant's claim to and on account of rents and rent arrears is premised and anchored on the Deed of variation of the sale agreement which was negotiated and entered into on the 27th March 2017.
220. Nevertheless, even though the Plaintiff and the 1st Defendant negotiated the Deed of variation of the agreement and which deed of variation was thereafter reduced into writing, a debate ensued as pertains



to whether or not the Deed of variation under reference was duly executed and if so whether the execution came long after the Plaintiff had written to signal her [Plaintiff's] withdrawal from the Deed of variation.

221. First and foremost, it was the evidence of PW1 that the Plaintiff and the 1st Defendant negotiated and thereafter entered into a Deed of variation of the sale agreement and which Deed of variation was reduced into writing. However, it was the evidence of PW1 that the Deed of variation was executed by the Plaintiff and thereafter remitted to the 1st Defendant for execution on her part.
222. Be that as it may, PW1 testified that despite the fact that the Deed of variation was forwarded to the 1st Defendant for purposes of execution on her part, the 1st Defendant was reluctant to execute the Deed of variation and in any event frustrated the execution of same [deed of variation].
223. Furthermore, PW1 ventured forward and stated that owing to the conduct by and on behalf of the 1st Defendant and coupled with concerted efforts to implore the 1st Defendant to execute the Deed of variation and return the duly executed counterparts to the Plaintiff [which efforts were not honored]; the Plaintiff wrote to the 1st Defendant and signaled her withdrawal from the Deed of variation.
224. On her part, the 1st Defendant herein contended that same [1st Defendant] received the Deed of variation from the Plaintiff and thereafter executed same [deed of variation] and hence the terms of the deed of variation are binding on the parties.
225. Additionally, DW1 testified that a copy of the duly executed Deed of variation has been tendered and produced before the court. In this regard, DW1 invited the court to take cognizance of the copy at pages 45 to 51 of the 1st Defendant's bundle of documents.
226. Be that as it may, DW1 was at pains to explain the timeline when the Deed of variation was executed by the 1st Defendant and more particularly, whether the purported execution was undertaken after the Plaintiff signaled her withdrawal from the terms of the Deed of variation.
227. Nevertheless, when DW1 was pressed further during cross examination by learned counsel for the Plaintiff same testified and stated thus;

“The deed of variation was executed on the 29th March 2017. The deed of variation of agreement was signed on the same day. I now say that I don't know when the 1st Defendant executed the deed of variation agreement. However, upon being referred to page 185 of the Plaintiff's bundle of documents, the witness admits that the deed was dispatched to us by the purchaser's advocate on the 29th March 2017”.

228. Whilst still under cross examination by learned counsel for the Plaintiff, DW1 stated thus;

“I do admit that there were correspondence following up on the deed of variation of agreement. It is true that the 1st Defendant was also reluctant to execute the deed of variation agreement. I also do confirm that the 1st Defendant was demanding rents. I do confirm that the deed of variation agreement contained a clause in respect of rents. I do confirm that there was a delay on the part of the 1st Defendant. I now confirm that the purchaser indeed signaled her withdrawal from the deed of variation. The purchaser indeed withdrew from the deed of variation”



229. On further cross examination, DW1 stated thus;

“I do confirm that by the 20th April 2017 the deed of variation had not been signed. Further, I agree that by the time the Plaintiff withdrew from the deed of variation the same had not been signed”

230. From the evidence which was tendered by and on behalf of the 1st Defendant herein, it is crystal clear that the 1st Defendant frustrated the execution and signing of the Deed of variation. Notably, the Deed of variation of the sale agreement was signed by the Plaintiff and there after transmitted to the 1st Defendant but same [First Defendant] sat on the deed of variation and refused to execute same.

231. What is also clear is that after various endeavors to procure the execution of the deed of variation by the 1st Defendant, the Plaintiff formally wrote to and signaled to the 1st Defendant her withdrawal from the Deed of variation of the sale agreement.

232. At any rate, DW1 conceded and acknowledged that the withdrawal by the Plaintiff from the Deed of variation of the sale agreement was received by the 1st Defendant long before the 1st Defendant executed the Deed of variation.

233. Suffice it to point out that by the time the 1st Defendant was executing the Deed of variation agreement [which same had frustrated] the 1st Defendant knew that the Plaintiff had long withdrawn from same [Deed of variation].

234. To my mind, the execution of the Deed of variation on the part of the 1st Defendant and the purported affixation of the revenue stamp thereto was dishonest endeavor on the part of the 1st Defendant to dupe the court and worse still, to attract unjust enrichment from the Plaintiff arising out from a process that same [1st Defendant] had frustrated.

235. In my humble view, the conduct of the 1st Defendant, particularly, executing the Deed of variation long after same were notified of the withdrawal therefrom, the affixation of the revenue stamp and the deployment of same [Deed of variation before the court], were all intended to defeat and/or defraud the cause of justice.

236. To my mind, such behavior and/or conduct by and on behalf of a party must not only be frowned upon but must be denounced by a conscientious court of law.

237. Simply put, the rent and rent arrears could only be claimed on the basis of the Deed of variation and not otherwise. However, to the extent that the Deed of variation was not executed by the 1st Defendant culminating into the withdrawal of the Plaintiff from the terms thereof, there is no foundation and/or legal basis for which the 1st Defendant can lay a claim for rent[s] and rent arrears.

238. In a nutshell, it is my finding and holding that the claim founded on rent[s] and rent arrears amounting to kes.63, 138, 747/= only is misconceived and legally untenable.

ISSUE NUMBER 5

What reliefs, if any; ought to be granted?

239. Despite having addressed the various perspective[s] pertaining to the claim by and on behalf of the Plaintiff and the 1st Defendant on the other hand, two [2] issues that remain for consideration and determination by the court.



240. Firstly, there is the prayer by and on behalf of the Plaintiff for payment of damages for breach of contract, such damages to include reimbursement of all amounts paid to the 1st Defendant and all outgoings together with interest thereon as provided for under the sale agreement.
241. To start with the prayer in terms of clause 2 at the foot of the re-amended Plaintiff is omnibus. However, I beg to break it down into three [3] perspective[s] and thereafter deal with same seriatim.
242. To start with, the Plaintiff herein has sought for an award of damages for breach of contract. However, it is trite and established that the only damages that can accrue and or arise from breach of contract are special/liquidated damages, which must nevertheless be pleaded, particularized and thereafter specifically proved. [See the decision of the Court of appeal in Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR].
243. As pertains to the instant matter, there is no gainsaying that the claims for damages for breach of contract have neither been pleaded nor particularized. Furthermore, no evidence was tendered to prove [sic] such damages. In short, I find and hold that the Plaintiff is not entitled to what has been claimed as damages for breach of contract.
244. Secondly, the Plaintiff has claimed reimbursement of monies that were paid at the foot of the memorandum of understanding executed on the 13th December 2015; as well as the sale agreement entered into on the 23rd March 2016. For good measure, it was conceded by DW1 that the Plaintiff paid the sum of Kes10 Million on account of deposit towards purchase price as well as Kes.20 Million on account of Value Added Tax [VAT].
245. Suffice it to point out that the total sums of monies that were paid to and in favor of the 1st Defendant amounts to Kes.30, 800, 000/= Only, and which monies are indeed refundable to the Plaintiff, taking into account that the contract in question was vitiated and beset by several illegalities.
246. Further and at any rate, it is not lost on the court that DW1 also conceded and admitted that the 1st Defendant was responsible for breach of the said contract.
247. Given the foregoing position, it is my finding and holding that the Plaintiff is entitled to refund of the sum of Kes.30, 800, 000/= only [being the total amount of monies that were admittedly paid to and received by the First Defendant].
248. As concerns interest on the monies paid to and acknowledged by the 1st Defendant, it is my finding and holding that such monies shall attract interests at the rate of 18% per annum [being the contractual rate that was covenanted to vide clause G at the foot of the sale agreement dated the 23rd March 2016].
249. In any event, there is no gainsaying that interests is payable and the import of such payment is to indemnify the claimant from the depreciation in the value of money overtime. [See the Court of appeal decision in Highway Furniture Mart Limited v Permanent Secretary Office of The President & another [2006] eKLR].
250. Other than the foregoing claims, which I have serialized and addressed, there is also the prayer by the 1st Defendant for recovery of vacant possession and/or eviction of the Plaintiff and/or the Plaintiff's agents from the suit property.
251. I beg to point out that the sale agreement [contract] having collapsed on the basis of various reasons [which have been highlighted whilst discussing issues two and three herein before], there is no basis upon which the Plaintiff and her agents can remain in occupation of the suit property.



252. At any rate, the court has elsewhere herein before decreed that the Plaintiff is entitled to refund of all the monies that were paid to and in favor of the 1st Defendant herein together with interests at contractual rates.
253. Consequently and arising from the foregoing, it then means that the Plaintiff cannot remain in occupation of the suit property whilst at the same time partaking of and benefitting from Refund.
254. Quite clearly, it is therefore evident that the 1st Defendant is entitled to recover vacant possession of the suit property despite her conduct and fraudulent endeavors [which substantially] led to the collapse of the suit transaction as well as the Deed of variation of the sale agreement].

FINAL DISPOSITION:

255. Having calibrated upon the thematic issues [whose details are highlighted elsewhere herein before] it must have become crystal clear that the Plaintiff's suit as against the 2nd Defendant was premature, misconceived and hence legally untenable.
256. On the other hand, it is worth pointing out that the Plaintiff has partially succeed on her claim as against the 1st Defendant. For clarity, the success relate[s] to the limb pertaining to refund/recoveries of the monies that were paid at the foot of the contract.
257. Moreover, the 1st Defendant is also partially successful as pertains to the segment of the counterclaim relating to recovery of vacant possession. Consequently, as between the Plaintiff and the 1st Defendant, the scales are evenly balanced.
258. Having made the foregoing observations, it is now appropriate to bring the Judgment to closure. Consequently and in this regard, I hereby proceed to and do make the following orders;
- i. The Plaintiff's suit as against the 2nd Defendant be and is hereby struck out for non-disclosure of a reasonable cause of action.
 - ii. The Plaintiff shall bear the 2nd Defendant's costs of the suit.
 - iii. The Plaintiff be and is hereby granted an order for refund of the sum of Kes.30, 800, 000/= only [being the monies that were paid to and acknowledged by the 1st Defendant].
 - iv. The monies in terms of clause [iii] herein above shall attract interests at 18% per annum [being the contractual rate] w.e.f 23rd March 2016 until full payment.
 - v. Nevertheless, the 1st Defendant's counterclaim is partially successful and same is hereby allowed as pertains to the prayer for vacant possession.
 - vi. Consequently, the Plaintiff be and is hereby ordered to vacate the suit property and hand over vacant possession thereof to the 1st Defendant within 180 days from the date hereof.
 - vii. In default to vacate and hand over vacant possession of the suit property in terms of clause [vi] hereof the 1st Defendant shall be at liberty to levy eviction against the Plaintiff. In this regard, an Eviction order shall issue without further reference to the court.
 - viii. In the event that the Plaintiff herein and/or her agents are evicted by the 1st Defendant, the costs/expenses incurred in levying such Eviction shall



be certified by the Deputy registrar and thereafter be recoverable from the Plaintiff.

- ix. The Plaintiff shall bear own costs of the suit.
- x. The 1st Defendant shall bear own costs of the counterclaim
- xi. Any other relief [remedy] not expressly granted is declined.

259. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Samir Inamdar and Kimani Mungai for the Plaintiff

Mr. Bundotich for the 1st Defendant

Mr. Paul Wanga for the 2nd Defendant

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