



REPUBLIC OF KENYA



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**Riria v Muthuri (Environment and Land Case Civil Suit E001 of 2023)  
[2025] KEELC 744 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 744 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E001 OF 2023**

**CK YANO, J**

**FEBRUARY 20, 2025**

**BETWEEN**

**JENNIFER NKUENE RIRIA ..... PLAINTIFF**

**AND**

**JEDIEL MWIREBUA MUTHURI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed a Complaint dated 26<sup>th</sup> January, 2023 praying for judgment against the Defendant and in the following terms: -
  - a. Payment of Kshs. 30,000,000/- same being the market value L.R. No. Nyaki/mulathankari/276.
  - b. In the Alternative transfer of another piece of land equivalent in size and value and located within the immediate location of the suit land.
  - c. Costs and interests of the suit.
2. The Plaintiff's case is that vide agreement dated 22<sup>nd</sup> February, 2016 she bought LR No. Nyaki/mulathankari/276 (hereinafter "the suit property") from the Defendant. The Plaintiff averred that she paid the purchase price of Kshs. 12,000,000/- in full, after which the land was transferred and registered in her name and she was issued with a title deed. She averred that the ownership of the suit property was challenged in Meru H.C. Succession Cause No. 3 of 1985, where the Defendant was the administrator of his deceased father's estate. The court directed that the suit property be transferred to Joyce Kinya Marangu and Fredah Tirindi Nturibi to hold in trust for the family of the late Daudi M'Mwirebua.
3. The Plaintiff claimed that the agreement dated 22<sup>nd</sup> February, 2016 had been frustrated and rendered un-operational due to the Defendant's fault. She further claimed that the Defendant had breached the agreement and she set out the particulars of the alleged breach. The Plaintiff averred that as a result



of the Defendant's actions, she had suffered loss of bargain since the suit land is now more valuable than at the time of purchase. The Plaintiff therefore claims for payment at the current market value of the land, which at the time of filing suit had appreciated to KShs. 30,000,000/-. In the alternative, the Plaintiff sought to be given land of the same size and in the same area.

4. The Defendant entered appearance on 4<sup>th</sup> April, 2023 and filed his defence on 12<sup>th</sup> April, 2023 denying every allegation in the Plaintiff save for express admissions. The Defendant admitted selling the land and explained that at the time of the agreement, he was the lawful owner of the land with powers to transact. The Defendant admitted that the ownership of the land was challenged as averred in the Plaintiff. He however claimed that the reason for the change of ownership was outside his control. The Defendant averred that he honoured the terms of the agreement and denied breaching it. He also denied the particulars of breach set out in the Plaintiff. The Defendant denied the alleged loss of bargain or that the value of the land is now KShs. 30,000,000/-. The Defendant averred that the agreement never envisaged alternative land or valuation in the event the land was repossessed. He denied that the Plaintiff made a claim against him and prayed that the suit be dismissed with costs.
5. The Plaintiff filed a Reply to Defence stating that the Defence did not disclose any trial issues. The Plaintiff averred that the Defendant had failed to fulfil his part of the bargain due to Meru H.C. Succession Cause No. 3 of 1985, despite receiving the entire purchase price. The Plaintiff averred that the Defendant was the registered owner at the time of purchase, but he acted in bad faith by not revealing that the land was subject to a succession cause challenging his ownership. The Plaintiff reiterated that the value of the suit property had appreciated from KShs. 12,000,000/- paid under the agreement, to a current value of KShs. 30,000,000/-. The Plaintiff therefore asked that judgment be entered as prayed in the Plaintiff.

### **Hearing and Evidence:**

#### **The Plaintiff's Case;**

6. When hearing of the case commenced, the Plaintiff testified as PW1. She adopted her witness statement dated 26<sup>th</sup> January, 2023 as her evidence-in-chief. She produced the documents in her List of Documents of even date as PEXb1-13 respectively, and No. 11 was marked PMFI11. The Plaintiff testified that the Defendant did not disclose that he had stolen the land from his father's estate. She testified that she had never used the suit property because the court forbid her from doing anything on the land. She prayed for the orders sought in the Plaintiff.
7. PW1 was cross-examined by Mr. Mutunga for the Defendant and testified that she knew there was a loan because the Defendant informed her about it. She testified that she looked at the records at the ministry of lands. She testified that she bought land that she thought was clean. She said that she has held the title since 26<sup>th</sup> May, 2016 when it was transferred from the Defendant, and it is still in her name to date. She explained that she has done nothing on the land as the court forbade them from interfering until further determination of the succession cause. She testified that she is not a party to the succession case and does not know the outcome thereof but her name was mentioned, and the plot number referred to in the succession case is the one she bought. She testified that the valuer was instructed by her advocates. PW1 testified that aside from the cutting down of trees in the land in 2016, which she reported to the police, she has suffered no other damage.
8. PW1 said that she found out in 2022 that the land was being transferred to the Defendant's relatives. She testified that she bought the land for KShs. 12,000,000/- but it is currently valued at KShs. 30,000,000/-. She said that the value of land does not depend on development but that it keeps appreciating even though she has done nothing on it. She testified that she employed professional



valuers to value the land. PW1 added that the land is about 800 yards from a tarmac road and it is on a murrum road. She explained that the property is in her name but it was given to the Defendant's relatives to hold in trust for the family members. She told this court that she had suffered a lot of damage as she cannot use the land, which impedes on her rights. She also said that she was asking the court to give back her land, or get land of the same value in the same area, or get her money back at the current value of the land.

9. PW1 was re-examined and she testified that per the consent order, the suit property is for Joyce Kinya Marangu & Freda Tirindi Nturibi. She stated that although the title is in her name, it is clear from the court order that the land is not hers. She asserted that there is no dispute that she bought the land and holds the title. She testified that she had seen no application by the Defendant and his relatives in H.C. Succ. No. 3/1985 to revert the land to her. Further, that the order meant that she should stay away from the land.
10. The Plaintiff's second witness was Nicholas Nganga Mbugua (PW2), the valuer who prepared the Valuation Report dated 20<sup>th</sup> January, 2023. He confirmed that he valued the land at KShs. 30,000,000/-. He testified that he used the comparative approach, where he compared with land sales in the area during that period. PW2 testified that they also look at the location of the land and the services within. He explained that the suit land is situated at Kaaga, and institutions within the area are Kaaga Girls, Meru School, Meru Teachers College, Kaaga Primary School and Mwitumwiru Primary and Secondary School. He testified that they were instructed to value the land for book purposes, not for mortgage. PW2 testified that the land must have appreciated since 2016. He produced the valuation report as PEXb11.
11. PW2 was cross-examined and he testified that he was instructed by M/s Mwirigi Kaburu & Co. Advocates. He testified that he valued the land by comparing it with other properties in the same locality such as Parcel Nos. 2765, 1079, 1080 and 3312 which had been sold recently. PW2 testified that he found at the Lands Office that the land is registered under the Plaintiff's name, it measures 1.38 Acres and is used for agricultural purposes. PW2 further testified that the current use of the land was agricultural, but the area was residential. He said that maize, bananas and eucalyptus trees had been planted. He told the court that he accessed the land without objection from the Defendant, and that he was not aware who was the user of the land then. PW2 testified that valuers do not manipulate reports.
12. On re-examination, PW2 testified that when doing a report, they must go to the neighbouring properties to know the value. He explained that the raw data includes the aforementioned parcels, which need not be included in the report, but is part of the records in their office.

### **The Defendant's Case;**

13. The Defendant testified under oath as DW1 and relied on his Defence dated 4<sup>th</sup> April, 2023. He admitted that he had an agreement with the Plaintiff, and that after she obtained title a problem arose in Succession Cause No. 3 of 1985. DW1 testified that he sold the suit land but the court ordered that the family negotiate on how to share all the properties listed in the succession cause. He testified that this order has not been implemented, but explained that his family intends to give the Plaintiff the land, and is in the process of doing so. DW1 testified that neither he nor his family have ever interfered with the Plaintiff's possession since he sold the land. Further that nobody has tried to remove the Plaintiff from the land. DW1 told this court that he has no other land in the area. DW1 did not agree with the valuation report, explaining that the Plaintiff has not done anything on the land since purchase. He testified that he was absent when the valuation was done. DW1 testified that the user of the land has always been agricultural and he never changed it. He testified that he wants the Plaintiff to maintain the land.



14. On cross-examination by Mr. Mwirigi Kaburu, DW1 testified that the purchase price of KShs. 12,000,000/- was paid into Bank of Africa where he had a facility. He reiterated that the problem arose in Succ. Cause No. 3 of 1985, his late father's estate. He denied distributing the land to himself. He confirmed that from the green card, the land moved from the deceased to him (DW1) and Grace Mukoruguru as administrators and on 30<sup>th</sup> December, 1988 was transferred to him (DW1). He further testified that vide a consent dated 12<sup>th</sup> March, 2020 in Succ. Cause No. 3 of 1985 the land was given to Joyce Kinya Marangu and Fredah Tirindi to hold in trust.
15. DW1 testified that the land reverted back to the late Daudi M'Mwirebua, but denied that the Plaintiff's ownership of the land had been taken away. DW1 agreed that the Plaintiff is not a daughter of the late Daudi M'Mwirebua. He however explained that all the members of his family had agreed to give the land to the Plaintiff. He acknowledged that they had not set aside the consent order in the succession cause. He also conceded that he had no written consent or memorandum showing the family agreed to let the Plaintiff keep the suit land. DW1 also testified that he had not instructed another valuer to value the land because it was not necessary.
16. DW1 was re-examined and he testified that he became the owner of the suit land through succession in 1988. That he sold the land in 2016, but around 2018/2019, his sisters filed an application to remove him as an administrator. He testified that the Plaintiff was not part of the consent dated 12<sup>th</sup> March, 2020, which he admitted, has not been set aside. He testified that the Consent has only been partially implemented, but that they had not touched the suit land. He testified that the family has mutually agreed to let the Plaintiff keep the land, but reiterated that he had no consent or memorandum by the family. He reiterated that he and his family have not entered the land since he sold it. DW1 testified that he never saw any necessity to do a valuation.

## **Submissions:**

### **Plaintiff's Submissions;**

17. At the close of the hearing, the court directed the parties to file their written submissions. The Plaintiff's submissions are dated 8<sup>th</sup> November, 2024. Counsel for the Plaintiff cited Collins vs Ogango (2024) KECA 19 (KLR) where it was held that every breach gives rise to a claim for damages among other remedies. Counsel submitted that the title sold to the Plaintiff was taken away by another court, which constitutes a breach of the agreement. He relied on Joseck Ikai Mukuha vs James Irungu Kanyuga (2021) eKLR. Counsel further submitted that although the Defendant pleads frustration, the change of ownership in the land was made with his knowledge and participation. He urged the court to find that the Defendant breached the agreement. He cited Dormakaba Limited vs Architectural Supplies Kenya Limited (2021) KECA.
18. Counsel also submitted that the Plaintiff paid the purchase price of KShs. 12,000,000/- in full. He added that the suit land has appreciated in value from 2016 when it was sold and in 2023 it was valued at KShs. 30,000,000/-. Counsel submitted that the High Court in Meru H.C. Succ. Cause No. 3 of 1985 took away the Plaintiff's land and the Defendant has failed to refund the purchase price, yet the Defendant seems unconcerned by the Plaintiff's plight. He asked the court to issue a remedy that will compensate the Plaintiff accordingly. Counsel urged the court to allow the Plaintiff's claim and award the amount sought, plus costs and interest. Counsel relied on Symon Manyara & Another vs Pauline Mahugu T/A Mianda Investments (2019) eKLR, Chege vs Naku Dwellers Ltd & Another (2023) KEELC 16531 (KLR) and Chai Housing Co-operative Society Ltd vs John Mark Karuria (2021) KEHC 1588 (KLR).



## **Defendant's Submissions;**

19. In the Defendant's submissions dated 29<sup>th</sup> November, 2024 Counsel started by giving a summary of the case herein. He then submitted that the suit is premised on fears that the Defendant's family would implement the order dated 22<sup>nd</sup> February, 2016 despite assurances by the Defendant that his sister would not interfere with the Plaintiff. Counsel pointed out that the land is registered in the Plaintiff's name and the records at the Land Registry are intact. Counsel submitted that there is no proof the Defendant's family has demanded that the Plaintiff vacate the land, or that the title is not in her name. Counsel submitted that the valuation over-valued the land thus the suit is aimed at self-enrichment.
20. Counsel further submitted that the Defendant honoured the agreement and that there is no proof of the alleged breach. In addition, that the claim for KShs. 30,000,000/- is not based on the non-completion clause in the agreement, which would require the vendor to refund the purchase price and 5% thereof as liquidated damages. Counsel argued that the parties did not envisage engaging an independent valuer to determine the value of the land in case of breach, thus the claim for KShs. 30,000,000/- is not founded on the agreement. Further, that the Plaintiff admitted that she never developed the land since 2016 yet she claims the value has increased by 250% in six years. Counsel asked the court to note the Defendant's desire to revert the land to the Plaintiff and deem the suit premature. Counsel urged that the suit is premised on breach of contract, which has a remedy under the agreement.

## **Analysis and Determination;**

21. I have considered the pleadings, the testimonies of the witnesses, evidence tendered and the submissions filed by both parties, and I am of the considered view that the main issues that arise for determination are:-
  - i. Whether there exists a valid contract for sale of land between the parties herein;
  - ii. Whether there was breach of the said contract;
  - iii. Whether the plaintiff is entitled to the orders sought; and
  - iv. Who should bear the costs of this suit?
    - a. Whether there exists a valid agreement between the Plaintiff and Defendant for sale of the suit land;
22. The law applicable is the Law of Contract Act chapter 23 of the laws of Kenya which provides in section 3 that;

No suit shall be brought upon a contract for the disposition of an interest in land unless

  - (a) the contract on which the suit is founded—
    - (i) is in writing.
    - (ii) is signed by all 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.
23. The above provisions are also echoed in section 38(1) of the *Land Act* 2012. It is the Plaintiff's case that on 22<sup>nd</sup> February, 2016 she entered into an agreement with the Defendant for sale of the suit land. At the hearing, she produced as part of her evidence, an Agreement for Sale dated 22<sup>nd</sup> February,



2016 which was marked as 'PEXB1' between Jennifer Nkuene Riria, the Plaintiff herein, and Jediel Mwirebua Muthuri, the Defendant. The Agreement for Sale is clear that it was in respect of Lr. No. Nyaki/mulathankari/276, the suit property herein. The said Agreement was duly signed by both of the Plaintiff and Defendant and was witnessed by one John Mworira Advocate.

24. The Defendant has not denied the existence of the agreement or that he indeed signed it. On the contrary, he expressly admitted the agreement. Based on the foregoing, this court can make only one finding, which is that there exists a valid agreement for sale dated 22<sup>nd</sup> February, 2016 between the Plaintiff and the Defendant over the suit property.

b. Whether there was breach of the said contract;

25. There is no dispute that the Plaintiff bought the suit land from the Defendant herein. It is also clear that the Plaintiff performed her obligations under the agreement and she paid the purchase price in full. The Defendant had been advanced a facility by Bank of Africa, where the purchase price was paid in full and a discharge of charge obtained. The suit land was thereafter transferred to the Plaintiff and she was issued with a title deed on 26<sup>th</sup> August, 2016. However, by a consent order entered and adopted on 12<sup>th</sup> March, 2020 and duly extracted/issued on 13<sup>th</sup> March, 2020 the Defendant herein and the other parties in Meru H.C. Succession Cause No. 3 of 1985, agreed to have the suit property transferred to Joyce Kinya Marangu and Fredah Tirindi Nturibi to hold in trust for the family of the late Daudi M'Mwirebua.

26. As a result, the Plaintiff seeks KShs. 30,000,000/-, which she claims is the current value of the land on grounds that the Defendant is in breach of the Agreement for Sale dated 22<sup>nd</sup> February, 2016. The Defendant has denied any breach on his part and the itemised particulars thereof. He claims that he fulfilled his part of the bargain and has repeatedly referred to the fact that the suit property to date is still registered in the name of the Plaintiff.

27. On whether or not there is breach, the Black's Law Dictionary 11<sup>th</sup> Edition at page 232 defines the term breach of contract as:

“Violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance.”

28. In any agreement for sale of land such as this one, parties proceed on the belief that the Vendor has the right and/or authority to sell the land. It is this right that enables the title in the land to pass to the Purchaser at the point of transfer. For this reason, there is assumed in every contract for the sale of land a warranty of title and of quiet possession thereto. Under this warranty, the Vendor guarantees that they have the legal right to sell the property, and that the Purchaser will, after purchase, enjoy quiet possession of the land, such that, where it is later found that the Vendor is not the owner of the land, this would constitute a breach of the said warranty, even if the buyer has already taken possession of the land. These warranties are explained in McGregor on Damages 19<sup>th</sup> Edition, paragraphs 25-009 as follows:

“Analogous to the warranties in the sale of goods are the various covenants for title which are commonly found in sales of land. The four usual covenants for title are (1) for good right to convey, (2) for quiet enjoyment, (3) for freedom from incumbrances, and (4) for further assurance.

The first two are those to which most consideration need be given here. The main difference between the two is this. The first covenant operates in praesenti and therefore, if there is a defect in title, the covenant is broken immediately on conveyance and an action lies there



and then without any interference with the buyer's possession; furthermore, it has been held that the breach is single, entire and complete upon the execution of the conveyance.

The second covenant operates prospectively and there is no breach until some disturbance of the buyer's enjoyment of the land takes place; and it is a continuing covenant upon which damages may be recovered from time to time as they accrue. Where there has been disturbance of possession, by eviction and the like, there will generally be a breach of both covenants and therefore it is best to deal with the covenant for quiet enjoyment first, as it will bring in many cases where the action was also on the covenant for good right to convey.

The third covenant, like the first, operates in praesenti and in many respects may be considered as part of, or a continuation of, the first. But, also like the first, it will often be joined with an action under the second covenant, namely for quiet enjoyment, where the buyer's enjoyment has been disturbed by an incumbrancer. It will therefore be best to consider the third covenant partly in conjunction with the second and partly in conjunction with the first.

The fourth covenant does not need consideration on the question of damages."

29. Lord Russell C.J. while on circuit in *Monforts vs Marsden* 14. 12 R. P. C. 266, 269, which although a case on sale of goods, aptly captures the essence of the warranty of title. Lord Russell C.J. held that:-

"I think that all that the first implied condition as to title meant was that the man had a right to sell the thing as it was in the sense of being able to pass the property in the thing to the vendee, and in the sense that nobody had a title superior to that of the vendor, so that the possession of the vendee might be disturbed ..."

30. On the other hand, the Doctrine of frustration and the circumstances that can lead to the invocation of same, were dealt with and analysed by the Court of Appeal in the case of *Lucy Njeri Njoroge versus Kalyahe Njoroge* (2015) eKLR where the court observed as follows: -

"For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In *Maritime National Fish vs Ocean Trawlers* (1935) AC 524., self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of three of their other trawlers leaving no licence to operate the contracted trawler.

In *Davis Contractors Ltd Vs Farehum U.D.C* (supra), it was stated thus:-

"The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self-induced."

31. In a bid to understand the dispute herein, I have taken time to read the Judgment in *Meru H.C. Succession No. 3 of 1985* dated and delivered on 31<sup>st</sup> May, 2018. In it, the Hon. Justice Mabeya explained the history of the property. I gather therefrom that the suit property initially belonged to the late Daudi M'Mwirebua, who had a total of 4 parcels of land. On his demise, the 4 parcels were all registered jointly in the names of Grace Mukoruguru, his widow, and the Defendant herein, his son, in trust for all the other beneficiaries. Grace Mukoruguru died in 2009, leaving the Defendant as the sole Trustee. One of the beneficiaries of the estate, Gladys Karoki, filed an Application in the succession cause seeking to inhibit the titles constituting the estate.



32. On 13<sup>th</sup> March, 2017, the parties in the succession cause entered a consent that the Defendant herein, as trustee of the estate, file search certificates for the 4 properties. The Defendant failed to file the searches despite being given several opportunities to do so. Consequently, the court granted leave to the Applicant (Gladys Karoki) to apply for revocation of the Grant. The Application was filed, on grounds that the Defendant had failed in his duties as trustee and had sub-divided and disposed of the properties. The Court found that the Defendant had not acted bona fides and had breached the terms of his appointment as trustee. He was thus removed from that position and he was directed to file a detailed account within 30 days.
33. In a ruling delivered on 21<sup>st</sup> February, 2019, the Court noted that the Defendant had failed to comply with the terms of the judgment, being the filing of the account and the surrender of the titles. The court also noted that the beneficiaries opted to have the properties held in trust distributed to the beneficiaries, but the Defendant herein opposed the proposed mode of distribution. The matter was to be heard by way of viva voce evidence and it is no clear what the final outcome is.
34. There is no order terminating the trust and/or directing that the suit land be registered in the name of the Defendant. However, despite the absence of such an order, the Defendant managed to have the suit land registered in his name as the sole proprietor. From the foregoing, it is clear that the Defendant had no good title that he could pass to the Plaintiff. As a result, the Defendant in claiming that he was the registered owner of the suit land was not being truthful. He had no right or authority to sell the suit land to the Plaintiff as he purported to do, and this in and of itself, amounts to a breach of implied warranty of title and of quiet possession.
35. The Defendant cannot claim to have been unable to foretell that in future the land would be claimed and the title would revert to the estate. He has always been very much aware that he was only registered as a trustee for the estate of his late father. He has not come clean on how he came to be registered as the sole proprietor of the suit land. The Defendant ought to have known therefore that since the land belonged to the estate, it was not available for sale to the Plaintiff. The Defendant, however, knowingly concealed this fact and went ahead to purport to sell the land to the Plaintiff.
36. That aside, third Clause at page 3 of the Agreement for Sale dated 22<sup>nd</sup> February, 2016 provides as follows:
- “No Encumbrances
- The property is sold subject to the Acts, Covenants and stipulations as more particularly set out in the documents of the Title relating to the property but otherwise free from any mortgage, charge, lien, encumbrances or adverse claim whatsoever.”
37. The trust under which the Defendant was registered as proprietor for the land qualifies as an encumbrance on the title recognised under Section 28(b) of the Registered *Land Act*. The interests held by the beneficiaries of the said trust over the suit property constitute adverse claims on the land. Therefore, the failure to disclose the information on its very existence was a breach of the said provision of the agreement.
38. The Defendant also cannot be heard to argue that the change of ownership was outside of his control. In the Consent of Settlement dated 27<sup>th</sup> January, 2020, the parties to Meru H.C. Succ. Cause No. 3 of 1985, all agreed to have the suit property herein registered in the names of Joyce Kinya Marangu and Fredah Tirindi Nturibi to hold in trust for the family of the late Daudi M’Mwirebua. The Consent was filed in court on 12<sup>th</sup> March, 2020 and was on the same day adopted as an order of the Court. An order to that effect was extracted and issued on 13<sup>th</sup> March, 2020. By a separate order also issued on 13<sup>th</sup>



March, 2020 the further Court directed that there would be no further dealings on the suit property until further orders of the court.

39. The consent can only have been made with the Defendant's knowledge and participation, without which the court would not have been able to adopt it as an order of court. The Defendant is named as the 1<sup>st</sup> Respondent in the Succession Cause and must therefore have consented to the making of the order. He indeed appended his signature to the Consent dated 27<sup>th</sup> January, 2020 where the family as well as the other parties in the suit agreed to have the suit property registered in the names of his sisters in trust for the family. He did so even knowing he had already sold it to the Plaintiff herein. The Defendant is thus in breach of the agreement.
40. Moreover, one of the particulars of breach pleaded in the Plaint, the Plaintiff accused the Defendant of failing to disclose that the suit property was subject to a succession cause. The Plaintiff testified that the Defendant only notified her of an outstanding loan at the time of purchase. No mention was made of the succession cause herein. It is clear that the Defendant falsely misrepresented that he was the registered owner of the land with the sole aim and intention of inducing the Plaintiff to transact with him.
41. In the Certificate of Official Search dated 26<sup>th</sup> February, 2016, the Defendant is named as the proprietor of the land at the time, having been registered as such on 30<sup>th</sup> December, 1988. Under the inhibitions, cautions and restrictions, the search indicates that rights under Section 87 were reserved. The encumbrances section shows that there is a Charge by Bank of Africa Limited for KShs. 8,500,000/- with rights under Sections 82 and 83 reserved. This court is convinced that the Plaintiff had no notice of the succession cause, having undertaken the necessary due diligence by conducting a search on the title and found it seemingly in order, save for the charge by the Bank.
42. In his defence, the Defendant's case is that he had not breached the agreement since he had honoured the terms thereof. The general rule is that a contract cannot be considered to have been breached after both parties have fully performed their obligations under the contract. This is because at this point, the contract is considered executed and no further breach can occur. However, in a contract for sale of land, a breach can occur even after both parties have seemingly performed their obligations. This is especially so where it is later discovered that the Vendor did not actually own the land.
43. It is for this reason that most land sales agreements have a survival clause. This is a clause which is meant to specify which terms or provisions will remain in effect even after the contract officially ends or is terminated. A survival clause ensures that certain key obligations under the contract continue to be binding on the parties involved, even after the contract. In PEXb1, the survival clause is at page 4 and reads:
- “Save with regard to matters which require to be fulfilled and are in fact fulfilled prior to or at the Completion Date, this agreement shall continue to be full force and effect.”
44. Accordingly, the terms, conditions, assurances and warranties in the agreement remained in full force and effect even after the completion of the agreement and transfer of the land to the Plaintiff. The discovery that the Defendant had no title over the land which he sold to the Plaintiff thus constitutes a breach of the Agreement for Sale dated 22<sup>nd</sup> February, 2016.
- c. Whether the plaintiff is entitled to the orders sought;
45. With the above background, I find it hard to believe that the Defendant's family members are agreeable to allowing the Plaintiff herein keep the suit property. Maybe this court would have been convinced if there had been a consent to that effect made by the Defendant's family. However, none was presented



to this court, and the Defendant confirmed that he had neither a consent nor a memorandum from his family members to prove his assertions. He also confirmed that the Consent Order dated 13<sup>th</sup> January, 2020 in Meru H.C. Succession Cause No. 3 of 1985 has not been discharged.

46. The fact that the land is still registered in the name of the Plaintiff is immaterial and it is only a matter of time before the status quo changes. As has been stated in the aforementioned judgment and ruling of the High Court in Meru, the Defendant has refused to surrender the title to the current Trustee of the land and/or Administrator of the Estate. It is possible that this refusal to surrender the title is the reason why the suit property has not been transferred to the new trustees of the estate.
47. The Defendant submitted that the agreement did not envisage the remedies the Plaintiff seeks in this suit. However, page 4 of the Agreement for sale provides as follows:-

“Any remedy or right conferred upon the Vendor or the Purchasers for breach of this Agreement including the right to recession shall be in addition to and without prejudice to all other rights and remedies available to them.”

48. This court has jurisdiction to award such reliefs as it deems fit for breach of contract donated to it by virtue of Section 42(3) of the Land Act which provides that:-

The court may grant relief on such terms as it considers appropriate, including relief for breach of any term or condition of the contract that is not capable of being remedied.

49. The Plaintiff seeks a sum of KShs. 30,000,000/- which she claims is the current market value of the suit property. The Plaintiff conceded that she has been unable to undertake any developments on the suit land since she purchased, owing to the orders of the court. She claimed that land appreciates even if nothing is done to develop it. It is her case that she undertook a valuation of the suit property through the firm of Ni-Light Consultants Limited, who received instructions from her Advocates on record. The said firm valued the land at Kshs. 30,000,000/- as at 20<sup>th</sup> January, 2023.
50. The Valuer testified as PW2, stating that he pegged the value of the land by comparing with land sales that had been done in the area at the time. The Defendant opposed the value but did not produce an alternative valuation to counter the Plaintiff's proposal, although he alluded to the fact that the Contract has its own provisions in the event of breach. I note that at page 3 of the Agreement, the parties agreed that failure to complete on the part of the Vendor would result into a refund of the deposit as well as 5% of the purchase price as agreed liquidated damages. Notably, however, this is not a breach arising from non-completion of the agreement. As he has affirmed in his defence, completion of the sale occurred. This breach occurred after the said completion, and the Non-Completion clause does not therefore apply.
51. Aside from the remedy for non-performance, the agreement did not provide for damages for any other instance of breach of contract. It is undisputed that the Plaintiff paid the purchase price in full and the same has been acknowledged by the Defendant. There is no dispute that the suit property is no longer available to the Plaintiff since it reverted back to the estate. It has always been part of the properties comprised in the Estate of the late Daudi M'Mwirebua. The Defendant cannot remain entitled to the land as a beneficiary of the said estate, and still retain the purchase price paid by the Plaintiff. This court has found that the Defendant breached the terms of the agreement. It follows therefore that the Plaintiff is entitled to a refund of the purchase price as well as damages.
52. The question therefore is how much the Plaintiff is entitled to receive in this instance. I note that the Plaintiff made a claim for damages for loss of bargain, but no prayer was made arising out of that claim. I also note that even though a prayer for damages for loss of bargain was not included separately, the



Plaintiff sought for an award of the purchase price at current market rates. She justified this amount by asserting that the value of land automatically appreciates even when nothing is done to the land. It is indeed common knowledge that the value of land always appreciates and even then, the figures are always constantly rising every other year. The land was bought in 2016 and the suit herein was filed in 2023. The value cannot have remained constant in the 7 years it took to bring this suit. Moreover, it is now 2 years after the filing of the suit, bringing the total period to 9 years from the date of purchase.

53. In the case of *Millicent Perpetua Atieno vs Louis Onyango Otieno* (2013) eKLR, the Court explained that:-

“The main issue before the court is the type and measure of damages recoverable by the Plaintiffs. The principles governing the loss that is recoverable and the measure of damages upon breach by a seller of land are stated in *Halsbury’s Laws of England*, Volume 12, 4<sup>th</sup> Edition at paragraph 1183 as follows:

‘...Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain...’.”

54. As to the fact that the prayer for damages for loss of bargain was not expressly made, I am persuaded by the finding of the High Court in *Kenya Women Finance Trust vs Squareddeal Kenya Limited* (Civil Appeal 36 of 2021) [2023] KEHC 17234 (KLR), where the court held that:-

“28. It therefore follows that the principle that parties are bound by their pleadings applies *mutatis mutandis* to the Court. It is true that there are exceptions to this general rule as was set out in the case of *Odd Jobs vs Mubea* (1970) E.A 476, where the then Court of Appeal of East Africa held that a Court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed by the parties. Regarding this issue, the Court of Appeal commented as follows in the case of *Ann Wairimu Wanjohi vs James Wambiru Mukabi* [2021] eKLR:

(33) We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties.

In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, *Odd Jobs vs Mubia* (*supra*) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will



not extend to determining or awarding a relief that was not specifically sought in the pleadings.”

55. I believe this to be one of those rare cases, and my belief is bolstered by the fact that the issue of the alleged appreciation of value of the suit property was conclusively canvassed by the parties not only in the pleadings, but also during the hearing and in their respective submissions. I therefore have no hesitation in reaching the finding that the exception in the *Odd Jobs vs Mubia Case (Supra)* applies to this instant suit.
56. As to how much ought to be refunded to the Plaintiff, I find guidance in the case of *Gami Properties Limited vs National Social Security Fund Board of Trustees & Chief Land Registrar (2021) eKLR*, where the Court of Appeal held that:-
- “56. In our view, the rationale in English cases on which the appellant relied, namely *Wroth vs. Tyler* and *Malhotra vs. Choudhury* for considering the value of the property as at the date of judgment is on account of the fact that taking normal measure the value of the land at the time contractually fixed for completion “could be grossly unfair to a buyer if prices had escalated between the contractual date for completion and the date of judgment...as the award he obtains will fall far short of giving him the means of acquiring an equivalent property.”
57. The *Wroth* case decision represents a departure from “the general principle of compensation” that the value of the property is to be taken “at the time of breach.” In *Southern Shield Holdings Ltd vs. Estate Building Society [2013] eKLR* for instance, where it had been urged that a purchaser is entitled to damages beyond return of deposit for loss of bargain, this Court proceeded on the basis that the decision in *Malhotra vs. Choudhury* which had been cited in support was decided on its facts. Furthermore, in the *Wroth* the court invoked the equitable jurisdiction established by Lord Cairns ‘Act to grant damages in substitution for specific performance’.
58. In the present case, the learned Judge did not, as counsel for the appellant appears to suggest, pronounce that the value of the property the subject of the suit cannot be the value on the date of trial or date of judgment for purposes of determining the loss of bargain. Rather, we understand the learned Judge to have pronounced that each case must be decided on its own facts and circumstances and that in the circumstances of this case, it was not appropriate to take the value of the property beyond when the deposit was refunded.”
57. I have endeavoured to give a brief summary of the events leading up to the breach of the agreement by the Defendant. I must reiterate that the Plaintiff has repeated that she was unable to develop the land due to the orders of the High Court. It is not clear what plans she had for the land, but it is trite that land appreciates in value. Having due consideration for the circumstances surrounding this case, I am convinced that the Plaintiff’s claim for an award at the current value of the land is merited.
58. I therefore find that the Plaintiff is entitled to a refund of the total purchase price of KShs. 12,000,000/-. She is also entitled to the difference in the purchase price paid at the time of contracting and the proposed current value of the land, which is KShs, 18,000,000/- as damages for loss of bargain. In total therefore, the Plaintiff is indeed entitled to the prayer for KShs. 30,000,000/- which is the current value of the suit land.



59. In the alternative, the Plaintiff sought transfer of another piece of land in the same locality and of the same value and size. This court is not convinced of the intention of the Defendant's family to transfer the land to the Plaintiff. However, it is up to the Defendant to see if he is able to procure the necessary consents with his family and the other parties in Meru H.C. Succession Cause 3 of 1985 to have the land released to the Plaintiff.

60. This court is however not in a position to grant the alternative prayer herein. First, because the Defendant testified that he had no alternative property in the same locality to give to the Plaintiff. There is all likelihood therefore that even if that order is made, it will not be able to execute it, and it is not the business of courts to grant orders in vain. But, even if the court were to overlook the Defendant's contention, this court is not at liberty to grant both reliefs simultaneously. See the decision of the court of Appeal in Alex Wainaina t/a John Commercial Agencies vs Janson Mwangi Wanjihia (2015) eKLR, where it was held that:-

“On the first issue, we think it is trite law that where relief is prayed for in the alternative, a court of law has to choose, on the facts, whether to grant the main relief or the alternative and give reasons either way. Both ought not be granted in a blanket form. On this the trial court was in error.”

61. Citing the Alex Wainaina Case (Supra), the Court of Appeal, differently constituted, reiterated this position in Olive Mwhiki Mugenda & another vs Okiya Omtata Okoiti & 4 others (2016) eKLR, and held that:-

“68. The next issue for our determination is whether the trial court erred in granting both the main and alternative reliefs sought in the Notice of Motion dated 7<sup>th</sup> December 2015. It is not in dispute that the trial court granted the main and alternative prayers in the Motion. The decision of this Court in Alex Wainaina t/a John Commercial Agencies vs Janson Mwangi Wanjihin (2015) eKLR, is good law. This Court held there that “where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so. Both cannot be granted in blanket form.” The 1<sup>st</sup> respondent has not demonstrated to our satisfaction or at all that the principle in Alex Wainaina (supra) is bad law. We are inclined to follow the same and we hereby make a finding that in the Ruling delivered on 18<sup>th</sup> December 2015, the trial court erred in granting both the main and alternative prayers in the Motion.”

62. Therefore, having granted the prayer for refund of the purchase price, the court cannot again grant the alternative prayer requiring the Defendant to transfer another parcel of land to the Plaintiff.

d. Who should bear the costs of this suit?

63. With regards to costs of this suit, it is trite that costs are awarded to reimburse a party for the various lawful and legitimate steps taken in the case in pursuit of remedy. Costs are awarded pursuant to Section 27 of the *Civil Procedure Act* which provides that:-

“27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the



necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

64. Under Section 27, the court has discretion as to whether costs are payable by one party to another in the suit. Since the court has an absolute and unfettered discretion to award or not to award them, a party has no right to costs unless and until the court makes an award for costs in their favour. This discretion must be exercised judicially and in accordance with reason and justice.

65. Flowing from the provisions of Section 27, it is also trite that costs follow the event. In *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review application no 6 of 2014 court held as follows:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

66. See also the writing by Justice (Retired) Kuloba *Judicial Hints on Civil Procedure*, 2<sup>nd</sup> Edition, (Nairobi) Law Africa) 2011, page 94 that: -

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

67. The event, where litigation is concerned, is the successful outcome of the litigation. The Plaintiff herein sued the Defendant seeking a refund of the purchase price paid under an agreement for sale of land. Since the Plaintiff has succeeded in proving her case, she is entitled to the costs of the suit. I see no good reason to justify any departure from the general rule that costs follow the event. Therefore, I will award the Plaintiff the costs of the suit as prayed.

68. Consequently, the Plaintiff’s suit succeeds and judgment is entered in her favour against the Defendant in the following terms: -

a. The Defendant shall be liable to pay to the Plaintiff KShs. 30,000,000/-, the same being the market value L.R. No. Nyaki/mulathankari/276.

b. Costs and interests of the suit.

69. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025 VIDE MICROSOFT TEAMS.**

**HON. C. K. YANO**

**ELC, JUDGE**

In the presence of;

No appearance for the plaintiffs.

No appearance for the Defendants.



Court Assistant – Laban.

