Kasinga & 22 others v Kikambala Housing Estate Limited & another; Bank of Africa Kenya Limited (Interested Party) (Environment and Land Case 207 of 2015) [2024] KEELC 5478 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5478 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND CASE 207 OF 2015

EK MAKORI, J

JULY 18, 2024

CONSOLIDATED WITH MALINDI ELC NUMBER 61 OF 2015, 227 OF 2015, 234 OF 2015, 16 OF 2016,202 OF 2016, 128 OF 2018 & 147 OF 2018

BETWEEN

AMINA MOHAMED KASINGA & 22 OTHERS ..... PLAINTIFF

AND

KIKAMBALA HOUSING ESTATE LIMITED ..... 1ST DEFENDANT

THE LAND REGISTRAR, KILIFI COUNTY ..... 2ND DEFENDANT

AND

BANK OF AFRICA KENYA LIMITED ..... INTERESTED PARTY

JUDGMENT

1. This Judgment is concerning several files listed below:

    a. Malindi Environment & Land Court Number 202 of 2016 (Formerly Malindi High Court Miscellaneous Application Number 58 of 2015) Mshiki Victoria David v Kikambala Housing Estate Limited & The Land Registrar, Kilifi County.

    b. Malindi Environment & Land Court Number 207 of 2015 Amina Mohamed Kasinga & 22 Others v Kikambala Housing Estate Limited & The Land Registrar, Kilifi County.

    c. Malindi Environment & Land Court Number 61 of 2015 Lucy Mwihaki Njuguna & 6 Others v Kikambala Housing Estate Limited & The Land Registrar, Kilifi County.

d. Malindi Environment & Land Court Number 234 of 2015 Eunice Esther Mulwa & The Land Registrar, Kilifi County v Kikambala Housing Estate Limited & The Land Registrar, Kilifi County.

e. Malindi Environment & Land Court Number 128 of 2018 Amina Mohamed Kasinga & 4 Others v Kikambala Housing Estate Limited & The Land Registrar, Kilifi County.

f. Malindi Environment & Land Court Number 147 of 2018 Daniel Mwangangi Kilonzo v Kikambala Housing Estate Limited & The Land Registrar, Kilifi County.

g. Malindi Environment & Land Court Number 16 of 2016 Anke Jenkins v Kikambala Housing Estate Limited & The Land Registrar, Kilifi County.

2. The above matters were consolidated, with the lead file being Malindi Environment & Land Court Number 207 of 2015, Amina Mohammed Kikambala and 22 others versus Kikambala Housing Estate Limited, The Land Registrar, Kilifi County, and Bank of Africa Kenya Limited (Interested Party).

3. This Court (Oloa J.) ordered that the consolidated matters be heard simultaneously with Malindi, ELC. No. 355 of 2016—Bank of Africa Limited v Kikambala Housing Estate Limited and another, on 29th May 2017, as the orders emanating from this suit, will ultimately bind the suit mentioned above and vice versa.

4. In the lead file ELC Case No. 207 of 2015, by the Plaint filed on the 12th day of November 2015, the following prayers were sought significantly:

a. An Order of Inhibition be issued inhibiting the Defendants either by themselves, their agents, their employees, and any other person claiming under them or on their behalf whomsoever and howsoever from charging, selling, disposing of, and or dealing in any way whatsoever and howsoever interfering with the parcel of land known as Kilifi/ Mtwapa/ 867 till after transfer and registration of the suit houses in favour of Plaintiffs and into their names individually as per the purchase agreement hereinabove.

b. An order of Specific performance does issue compelling the 1st Defendant to take steps and facilitate the transfer and registration of the Plaintiffs as owners of their specific houses.

c. In default of compliance with (b) within thirty (30) days order, the 2nd Defendant be ordered to effect registration of and transfer to be executed by the Deputy Registrar of the Environment and Land Court in favour of the Plaintiffs and titles to be issued in their favour pursuant to a survey whose costs shall be on account of the 1st Defendant.

d. An order be issued directing the 1st Defendant to refund the total purchase prices to the Plaintiffs and any other costs incurred by the Plaintiffs to develop and improve the Housing units; alternatively, an order be issued that the Houses be valued at current market rates by a reputable court valuer, the same be sold by a public auctioneer, and the proceeds therefrom to be paid to the Plaintiffs, respectively.

e. Costs and interest at Court rates.

5. The prayers seem to be generic in all the consolidated suits, including ELC 61 of 2016.

6. The Plaintiffs aver that at all times material to the suit, the 1st Defendant was the registered proprietor of all the parcel of land known as Kilifi/ Mtwapa/ 867. They also averred that they did individually, on diverse dates in the years 2012, 2013, and 2014 enter into agreements for sale with the 1st Defendant for the purchase of various houses as elaborately listed in the consolidated suits, which were being

constructed by the 1st Defendant on the parcel of land known as Kilifi/Mtwapa/867 measuring about 6.5 Hectares.

7. They alleged that the Plaintiffs duly paid the total purchase price for the various housing units they purchased. Still, the 1st Defendant herein failed and neglected to take steps to complete the transfers of the suit houses to the Plaintiffs and register them in the plaintiffs' names.

8. They further stated that the first Defendant was in dire financial constraints, necessitating the Interested Party, Bank of Africa Limited, to recall loans that they had advanced the 1st Defendant and that the Bank had threatened to take over and sell the 1st Defendant's assets, which had been charged as security by the 1st Defendant.

9. In response, the 1st Defendant filed a Statement of Defence on the 21st day of March 2018, admitting that an agreement existed for selling various housing units with all the Plaintiffs in the amalgamated suits. According to it, the delay in transferring and issuing subleases to the Plaintiffs was caused by the Interested Party's inaction in obtaining the leasehold title of the suit property.

10. According to the 1st Defendant, the original Freehold Title over the suit property was handed over to the Interested party by the 1st Defendant in 2012 for onward transfers to the government for issuance of a 99 years Leasehold Title deed, and after that charge, the Leasehold Title with a disputed loan amount that had been advanced to the 1st Defendant by the Interested Party for construction of all the 308 houses erected on the suit property.

11. In addition to the fact that the Plaintiffs in Malindi ELC 207 of 2015 and Malindi ELC 61 of 2015 had already obtained and registered an inhibition order against the suit property, the Interested Party also received a prohibitory order over the suit property issued on 28th December 2016 through Malindi ELC 355 of 2016 which orders prevented the 1st Defendant from proceeding to execute the surrender instrument and lease to enable issuance of the Leasehold Title for onward transfer of subleases to the Plaintiffs herein.

12. It also asserted that the Plaintiffs herein have contributed to the delay in issuance of the Leasehold Title for the sole reason that they registered an inhibition order on the suit property. The 1st Defendant has been keen to issue sublease titles to the Plaintiff, and if there are any liabilities to the 1st Defendant, the same should be attributed to the Interested Party. As such, the Interested Party should be accountable and settle all financial liabilities emanating from the Plaintiffs' losses.

13. The 2nd Defendant, on the other hand, filed their Statement of Defence on the 18th day of November 2022, alluding to the fact that they are strangers to most of the contents of the plaint, that the Plaintiff has failed to disclose any wrongdoing on the part of the Government of Kenya, and that they have no reasonable cause of action against the 2nd Defendant.

Plaintiffs' Case

14. PW1 Mercy Nyambura, the Plaintiff in ELC Case No. 61 of 2015, told the Court that she recorded a statement dated 16th November 2016, which was adopted as her evidence in chief. She also told the Court that she had filed a further witness statement dated 27th April 2023, adopted as her further evidence in chief. She further told the Court that the Plaintiff's documents were exhibited as Plaintiff Exhibit 1-20, which were produced and marked as Plaintiff Exhibit No. 1-20. She testified that the matter was about a transaction they entered under a sale of agreement with Kikambala Housing Limited, and they paid the purchase price in full. Each one of them was allocated houses as set out in the agreement.

15. She testified that they did not take possession of the houses and were not in occupation upon paying for them. According to her, the houses were now dilapidated. They later entered variations and took possession of the improved houses. She stated that the houses were charged, and they were seeking orders of specific performance plus those sought in the amended plaint.

16. On Cross-examination by Mr. Aziz, she informed the Court that they paid the total purchase price of 1.8 million each. The documents produced, pages 70 to 73, show evidence of payment. The sale agreements are from pages 2 to 69 in the bundle list of documents. She also informed the Court that any dispute as per Clause 11 was to be referred to arbitration, but they did not file for arbitration.

17. On Cross-examination by Mr. McCourt, she told the Court that she represented 7 Plaintiffs. She also told the Court that the total purchase price was paid, and they later came to learn of the financial crisis with the 1st Defendant, and in fact, they found out that the property was charged. She further stated that according to the agreement, a partial discharge was to be signed by the Interested Party, and 125 units were to be released.

18. On Re-examination by Mr. Mogaka, she said that they had all the houses after they had made full payment and obtained the keys. According to her, they did not go for arbitration because the 1st Defendant was in financial chaos, so they chose to come to Court.

19. Amina Mohammed Kasinga—PW2—told the Court that she signed a witness statement dated 12th November 2018, which was adopted as her evidence in chief. She further stated that sometime on the 16th day of September 2016 or thereabouts, she and the 2nd Plaintiff agreed to the sale and purchase of a house, namely C53, which was amongst those being constructed on land known as Kilifi/ Mtwapa/ 867. She testified that before the transaction, they did an official search on 23rd March 2015 and confirmed that the parcel of land owned by the 1st Defendant had no encumbrances. They later proceeded to transact. She confirmed that all the plaintiffs had paid the purchase price, and they had receipts as evidence.

20. She testified that some units were not included despite consent in the initial partial settlement. It had been eight years since the units were purchased without legal ownership documents. The documents dated 8th November 2022 were produced as exhibits in support of the case.

21. On cross-examination by Mr. McCourt, she informed the Court that she represented persons with 51 units and had purchased C53 and C54. She also informed the Court that she knew Mr. Mogaka had signed the consent agreement, but the lawyer, Mr. Ananda, had not. She confirmed that she was not a party to the agreement of 11th June 2018. She further told the Court that she was unaware of anything between the 1st Defendant and the Interested Party.

22. On Re-examination by Mr. Ananda, she stated that the persons she represented and herself filed claims against Kikambala Housing Estate Limited and that she was unaware of the transaction between the 1st Defendant and the Interested Party. She also said that she had no claim against the Bank. Further, they had no agreement with the Bank. In addition, she told the Court that the consent agreement that was supposed to have been signed did not invoke the interests of all the parties, which is why, through their lawyer, they declined to endorse it.

Defence Case

23. DW1 Shamed Aziz Mudani, Finance Manager of the 1st Defendant, told the Court that he filed a Replying Affidavit sworn on the 21st day of March 2015. He further told the Court that he filed a witness statement dated 5th February 2018, which was adopted as his evidence in chief. The documents

filed on 20th April 2013 were produced as evidence in the manner listed in the list of documents. It was his evidence that the issues raised in this matter arose from the delays occasioned by the Interested Party's failure to convert the Freehold title to leasehold title for the transfer of the subleases to the plaintiffs and also the inhibitions placed in various cases pending here and in the Mombasa Law Courts.

24. On cross-examination, by Mr. Mogaka, he told the Court that eight houses are involved in file No. 61. D5, D6, C10, C11, B69, B26, and D57 were all paid in full, and the owners had the houses and were fully in occupation, and he had no objection to the issuance of the subleases to the plaintiffs in that suit.

25. On Cross-examination by Mr.Ananda, he also admitted that the plaintiffs in the lead file had also completed payment of the purchase price and had no objection to the issuance of the subleases.

26. On cross-examination by Mr. McCought, he said he admitted piecemeal payment of the purchase monies and that since the filing of this suit, more have paid and completed the purchase price. He agreed there was a partial settlement, which ought to have been effected. He also admitted that an audit was to happen, and no further sale was to happen, but the 1st Defendant continued to receive purchase money despite the pendency of the audit.

Plaintiffs' Submissions.

27. The Plaintiffs, through their advocate, M. Ananda & Company, filed submissions on the 13th day of July 2023. Counsel submitted that in the present and consolidated suits, the Plaintiffs have no dealings whatsoever with the Interested Party as there is no contract between the Plaintiffs and the Interested Party. As such, the Interested Party had no cause of action against the Plaintiffs in this matter and the consolidated suits.

28. Counsel relied on the authority of Nairobi ELC No. 565 of 2015 *Joseph Kiprono Maswan v Veronica Mukami Nkatha Reithi*, and another where the Court held that the relief of specific performance is a discretionary remedy. In *Amina Abdulkadir Hawa v Rabinder Nath Anand & another* [2012] eKLR, the Court cited *Chitty on Contract*, 28th Edition (Sweet & Maxwell, 1999) Chapter 28. The Court held as follows:

> 'As I have stated above, Plaintiff performed his part of the agreement for sale between him and the 1st Defendant. I am satisfied that the Plaintiff has met the conditions for granting an Order for Specific performance. The 1st Defendant did not give evidence at the trial. Therefore, there is no evidence that the 1st Defendant will have any difficulty performing the agreement for sale date 4th October, 1995. In any event, no such difficulty was pleaded in the 1st Defendant's Defence.'

29. Mr. Ananda submitted that the Court should conclude that the Plaintiffs had fulfilled their part of the Agreement by fully paying for the houses, as held in the cited case. That by the 1st Defendant's admission in Court, the Plaintiffs in this suit and the consolidated suits are entitled to an order of specific performance. It was also his submission that in the interest of justice and as the 1st Defendant has so admitted, the Court should enter judgment in this case, No. 207 of 2015, together with the consolidated ELC No. 61 of 2015, ELC No. 16 of 2016, ELC No. 234 of 2016, ELC No. 237 of 2015, ELC No. 58 of 2015(referred as ELC No. 202 of 2016) and later ELC No. 128 of 2016 and ELC No. 147 of 2018.

1st Defendant's Submissions

30. The 1st Defendant filed written submissions on the 7th day of August, 2023. They identified five (5) issues for determination: why and who caused the delay in issuing sublease titles to the Plaintiffs herein, whether the 1st Defendant took deliberate efforts to issue sublease titles to the Plaintiffs, who ought to bear the liabilities for failure and delay in issuing the sublease titles to the Plaintiffs, whether the Plaintiffs are entitled to the prayers sought and a determination on costs.

31. 1st Defendant submitted that it completed the Change of User on or before May 2012 and that the Interested Party was aware of the same. Therefore, the 1st Defendant trusted and assumed that the Interested Party would act accordingly. According to them, there was a legitimate expectation that the 1st Defendant, upon receiving all the completion documents and the freehold title, would first convert the freehold title and then charge the leasehold title with the change of user endorsed thereon. The following cases were cited by the 1st Defendant in support of that proposition - *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* as cited in *Five Forty Aviation Limited v Kenya Revenue Authority & 3 others* [2017] and *Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex Parte Soweto Residents Forum CBO* [2019]eKLR where the Court found that - legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill.

32. 1st Defendant further argued that in light of the decision in Five Forty Aviation Limited v Kenya Revenue Authority, the Interested Party ought to have asked whether, by charging the Freehold title deed, there would have been any unfair or inordinate delays and damages occasioned to the 1st defendants and its customers by its unlawful charging of a Freehold title instead of the Leasehold title, when the 1st Defendant handed over all the Change of User documents and the original Freehold documents to the Interested Party, it made it sign blank page documents that it retained.

33. It was asserted that the 1st Defendant had handed over all Change of User documents and the original Freehold title by May 2012, and therefore, the Interested Party herein had had ample time to complete the conversion of the Freehold Title to Leasehold title, with the Change of User endorsed thereon, and ultimately charge the Leasehold title. 1st Defendant further stated that the delay was caused by the charging of the Freehold title on 24th September 2012 and the subsequent four-year delay of the Interested Party herein to rectify its negligence.

34. 1st Defendant proceeded to avow that it did not have any objection to the Plaintiffs herein having their sublease titles issued save for the delays beyond its control, as narrated. This Court was invited to disallow the Plaintiffs' claim for any damages in the form of a survey report, valuation report, or any damage generalized as they had not been proved. 1st Defendant contended that the Plaintiffs were under a duty to prove any damages arising as held in the case of Bi*d Insurance Brokers Limited v British United Provident Fund* [2016]eKLR as cited in *Moses Njane Ngendo v Josiah Anyangu Omutoko & another* [2022]eKLR where the Court held that a Plaintiff must prove a claim for damages as pleaded and that it is not enough simply to put before the Court a great deal of material and expect the Court to make a finding in ones favour. Further, the Plaintiff must understand that in an action for damages, it is not enough to write down particulars and throw them at the head of the Court saying - 'this is what I have lost; I ask you to give me these damages.'

35. On the issue of costs, the Court was implored to find that since the delays were attributed to the Interested Party herein, it does pay all the costs and any other liabilities, such as interests, to the Plaintiffs and the 1st Defendant.

Interested Party's Submissions.

36. The Interested Party filed submissions on the 25th day of August through the firm of Kairu & McCourt Advocates. Counsel submitted that the Interested Party is aware that the instrument of surrender of the freehold interest in the suit property to the government and the lease in respect of the suit property awaits execution by the 1st Defendant to complete the Change of User process since January 2016. Subsequently, the Interested Party could register its interest as a chargee over the new title to the suit property. Still, the 1st Defendant refuses to execute the said documents to date. Hence the circumstances obtained in these consolidated suits.

37. Mr. McCourt submitted that the Sale Agreement presented as evidence is unstamped, and, as it were, they are subject to the present dispute are instruments chargeable with Stamp Duty as specified under the *Stamp Duty Act*, Cap 48, Laws of Kenya. Under Section 19(1) of the *Act*, it is mandatory that any instruments chargeable with Stamp Duty and required to be produced in Court should have a revenue stamp for admissibility. In his view, the law intends that the Court should not be used by parties who seek to avoid the payment of duty. He relied on the case of *Leonard Nyongesa v Derrick Ngula Rigba* [2013] eKLR, where the Court, held that an instrument for which payment is required of Stamp Duty is admissible in evidence on condition that the person issuing the same takes it for Stamp Duty assessment before the Court can attach any probative value to it.

38. He submitted that the Plaintiffs cannot be allowed to benefit from their own wrongdoing. The sale agreements should have been registered upon execution by both parties and as such, the Plaintiffs cannot rely on the sale agreements to categorically prove that they purchased the housing units claimed in this suit.

39. On whether the Plaintiffs have provided sufficient evidence, counsel argued that the Plaintiffs allege full payment of the amount stated in their respective sale agreements, yet from the schedule provided in their submissions, based on the evidence they adduced at trial in their bundle, that was not the case. He pointed the Court's attention to Sections 107 and 108 of the *Evidence Act* – he who asserts must prove.

40. In the further submissions that the Interested Party filed on the 25th day of August 2023, Mr. McCourt identified three issues for determination of this Court: whether the Interested Party unlawfully charged the Freehold title, whether the 1st Defendant acknowledged that the Interested Party was not to blame for the delay, and whether the Interested Party is a party to the suit.

41. On the 1st issue for determination, it was his submission that the 1st Defendant failed to offer this Court sufficient evidence to prove that the Interested Party unlawfully charged the Freehold title. According to him, it was the duty of the 1st Defendant to inform the Interested Party that the Change of User had been approved, and it would be proper to first convert the property to a Leasehold Title before registering the charge. Further, the 1st Defendant's conduct was dishonest and deceitful, and, as such, the Interested Party cannot be held liable for the 1st Defendant's intentional acts in any way.

42. On the 2nd issue for determination, Mr. McCourt stated that the charge having been discharged on the 28th day of October 2013, the 1st Defendant and Interested Party mutually agreed that the Interested Party's advocate be tasked with handling the Change of User process. Almost a year later, there was no progress on the conversion process. On 24th March 2015, the Interested Party, through its advocates, kept updating the 1st Defendant on the status of the Change of User, and thus, the 1st Defendant cannot claim that the Interested Party intentionally delayed the Change of User process.

43. He also contended that the 1st Defendant's assertions as to why there was a delay was that the Interested Party charged the Freehold title as there was no information of the Change of User Approval. In any

event, as soon as they were informed of the Change of User, the Interested Party discharged the charge to enable the conversion of the title.

Analysis and Determination

44. I have considered the pleadings, the evidence by all the parties, and the submissions by counsels. From the materials, the evidence, and the parties' submissions, I frame the issues for this Court to determine: whether the Interested Party unlawfully charged the Freehold Title, whether the Plaintiffs are entitled to the prayers sought in the plaint, and who should bear the costs of the suit.

45. The Plaintiffs assert that the 1st Defendant was the registered proprietor of all the parcel of land known as Kilifi/ Mtwapa/ 867. They also assert that they did, individually, on diverse dates in the years 2012, 2013, and 2014, enter into agreements for sale with the 1st Defendant whereby they purchased various housing units, as elaborately enumerated in these consolidated suits. The units were being constructed by the 1st Defendant on the parcel of land known as Kilifi/Mtwapa/867, measuring about 6.5 Hectares.

46. The Plaintiffs also contend that they duly paid the full purchase price for the various houses they purchased. Still, the 1st Defendant herein has failed and neglected to take steps to complete transfers of the suit houses to the Plaintiffs and register subleases in the Plaintiffs' names. According to them, the 1st Defendant was in dire financial constraints necessitating the Interested Party, The Bank of Africa, to recall loans which they had advanced the 1st Defendant and that the Bank threatened to take over and sell the 1st Defendant's assets which had been charged as security by the 1st Defendant.

47. The 1st Defendant, on the other hand, contends that the delay in transferring and issuing a sublease to the Plaintiffs was caused by the delay on the Interested Party to obtain the Leasehold title of the suit property. Further, according to the 1st Defendant, the original Freehold Title over the suit property was handed over to the Interested party by the 1st Defendant in 2012 for onward transmission to the government for issuance of a 99 years Leasehold Title deed, and after that charge, the Leasehold Title with a disputed loan amount that had been advanced to the 1st defendant by the Interested Party for construction of all the 308 housing units erected on the suit property.

48. The events leading up to the filing of this suit are as follows: The Interested Party initially advanced a sum of Kshs. 20,000,000/- for purchasing the suit property Kilifi/ Mtwapa/ 867; subsequently, the Interested Party made an additional facility to the 1st Defendant. Before the registration of the charge, the 1st Defendant applied for a Change of User of the suit property from Agricultural to Residential purposes and obtained all necessary approvals, and what remained was the surrender of the freehold title. In a letter dated 25th October 2013, the 1st Defendant requested the Interested Party to discharge the Original Charge to complete the Change of User. As it were, it was agreed between the 1st Defendant and the Interested Party that the latter would discharge the charge over the suit property for purposes of issuance of a new leasehold title on condition that upon obtaining the new title, the 1st Defendant would execute a new charge in favour of the Interested Party to be registered against the new title. The Interested Party further states that the Instrument of Surrender of the freehold interest in the suit property to the government and the lease in respect of the suit property awaits execution by the 1st Defendant to complete the Change of User process since January 2016.

49. On the other hand, the 1st Defendant contends that the Change of User was completed by the 1st Defendant on or before May 2012 and that the Interested Party was aware of the same; therefore, the 1st Defendant trusted and assumed that the Interested Party would act accordingly. According to them, there was a legitimate expectation that the Interested Party, upon receiving all the completion

documents and the Freehold title, would first convert the freehold title and thereafter charge the leasehold title with the Change of User endorsed thereon.

50. It is not disputed that the Interested Party advanced a loan to the 1st Defendant to enable it to purchase the suit property and later construct housing units. Reference is made to the letter of 7th May 2012 in the Interested Party's List and Bundle of Documents, which stated that the Ministry of Land had approved the application tendered by the 1st defendant seeking a Change of User. Still, the Interested Party asserts that the said letter was not addressed to it. The 1st Defendant should have informed the Interested Party of this to enable a conversion of the Freehold title before registering the charge. The 1st Defendant does not dispute the fact that the Change of User was completed and that the Interested Party was aware of that development, and according to it, there was a legitimate expectation that the Interested Party would first convert the Freehold title and then charge the Leasehold title.

51. Going by the evidence that has been tendered before this Court, I reckon that there was an agreement (Agreement to Create Security dated 28th October 2013) between the 1st Defendant and the Interested Party, in which the Interested Party would discharge the charge over the suit property for the sole purpose of issuance of a new Leasehold Title on condition that upon obtaining the new title, the 1st Defendant would execute a new charge over the suit property in favour of the Interested Party. In my view, the evidence presented to the Court points to liability on the part of the 1st Defendant.

52. Although the 1st Defendant assumed that it was the duty of the Interested Party to convert the Freehold title and, after that, charge the Leasehold Title, there was no evidence to suggest that it made any further steps to ensure that what was charged was the Leasehold title. Similarly, although there appears to have been no prompt intervention by the Interested Party, there was no sufficient evidence to warrant an order of liability on the part of the Interested Party.

53. The doctrine of Specific Performance, constructive trust, and unjust enrichment has been thoroughly discussed in the elaborate judgment of this Court in ELC. No. 355 of 2016—Bank of Africa Limited v Kikambala Housing Estate Limited and another, paragraphs 29 to 34. This comprehensive analysis provides a strong foundation for the conclusions drawn.

> " In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR, the Court of Appeal observed that:
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> " We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable, and the respondent cannot renege. As Lord Bridge observed in *Llyods Bank Plc – v- Rosset*, (1991) 1 AC 107,132, a constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the

common intention. As was stated by Lord Reid in *Steadman – v- Steadman* (1976) AC 536, 540,

> " If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable."

I believe that despite the agreement having no signature by the 1st Defendant, the doctrine of constructive trust applied to the agreement between the Plaintiff and the 1st Defendant. Based on my analysis and the fact that upon request from the 1st Defendant, Plaintiff agreed to make available certain banking facilities to the 1st Defendant with a term loan in the maximum principal sum of Kshs. 364,000,000/-. Further, Plaintiff, as security for the various banking facilities, advanced to the 1st Defendant, and the latter charged the suit property to Plaintiff by way of a first fixed legal charge dated 19th September 2012. The original Charge was duly registered on the register and title of the suit property on 24th September 2012. As it were, all these agreements are not disputed by the 1st Defendant, and as such, it cannot claim that the Agreement was a nullity. The evidence and documents presented by the Plaintiff and the 1st Defendant unequivocally demonstrate their clear commitment to the suit property, which I find compelling and unambiguous.

On the 2nd issue for determination on whether the Plaintiff is entitled to the prayer of specific performance sought in the Plaint, the Plaintiff herein has tendered evidence and established before the Court that it discharged its legal charge over Kilifi/ Mtwapa/867 (Suit Property) to enable the 1st Defendant present an unencumbered freehold title to the Chief Land Registrar to allow the surrender of the freehold estate to the Government of Kenya in exchange for a leasehold interest and title. I also reckon from the record that the Plaintiff's discharge was conditional upon the execution and registration of another charge immediately upon issuing the Certificate of Lease to the Plaintiff. As it were, the Plaintiff and the 1st Defendant's agreement on the terms of the Discharge of Charge was set out in the Agreement to Create Security dated 28th October 2013. The 1st Defendant failed to execute the surrender instruments and lease to complete the change of user process.

In support of the preceding proposition, I have been persuaded by the Court of Appeal's observation in the case of *Gurdev Singh Birdi & Narinder Singh Ghatora As Trustees of Ramgharia Institute ofMombasa v Abubakar Madhbuti* [1997] eKLR. The Court of Appeal emphasized that the underlying principle in granting equitable relief of specific performance is to do more perfect and complete justice under all the circumstances obtained in the particular case:

"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 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. Where a condition or essential term ought to

have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim."

In this case, the 1st Defendant has continued to receive proceeds from the sale of the housing units at the expense of the loan facility that Plaintiff advanced; this runs contra the doctrine of unjust enrichment, which is a legal principle that prevents a person from retaining money or some benefit derived from another, against their conscience that he should keep it and, in justice, restore it to the Plaintiff. In this case, the 1st Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to make restitution. In the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, the Court of Appeal held, among other things, that:

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

In conclusion, In determining this issue, I will also be guided by the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006], where Maraga J. (as he then was) stated:

"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 not be ordered without an adequate alternative remedy. In this respect, damages are considered 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 because of undue influence or where it will cause severe hardship to the defendant."

54. The Court applies those doctrines herein and finds them applicable in these suits mutatis mutandis. The Plaintiffs performed their part of the bargain, purchasing the various housing units at a consideration. Some had paid in full the purchase price as at the time of filling suit, significantly in Malindi Environment & Land Court Number 61 of 2015 *Lucy Mwihaki Njuguna & 6 Others v Kikambala Housing Estate Limited & The Land Registrar,* Kilifi County and taken possession, and the other Plaintiffs continue to perform their part of the bargain, as at the hearing of this matter, the 1st defendant admitted on oath that all had paid their respective purchase price and entitled to subleases in their names. They are, therefore, entitled to orders of specific performance directed against the 1st Defendant as prayed in the respective plaints.

55. Article 159 (2) (c) of the *Constitution* identifies Alternative Dispute Resolution as one of the pillars in the Court's exercise of judicial authority. Courts are encouraged to promote modes of ADR, and it is not inconsistent with Articles 22 and 23 to insist that statutory processes are adhered to where they intend to realize, promote, and protect certain rights, as was held in the case of Dickson

Mukwelukeine v Attorney General & 4 others Petition No. 390 of 2012. I have taken cognizance that the parties attempted an out-of-court settlement, and there was a partial settlement reached in the Alternative Dispute Resolution mechanism forum agreed by the parties herein; significant in this discussion is the Partial Settlement Agreement dated 11th June 2018, which committed the 1st Defendant to sign the Surrender Instruments and the lease of the suit property to enable the release of the lease Certificate and registration of 125 subsequent sub-leases and further that the 1st Defendant would charge the lease Certificate in favour of the Interested Party for Kshs. 364,000,000.00/-, in the Agreement to Create Security format dated 28th October 2013. The Interested Party, on the other hand, committed to executing Partial Discharge on 125 units, and the parties agreed not to sell the remaining 183 units pending the decision in Mombasa HCCC No.58 of 2015 as consolidated with Mombasa HCCC No.2 of 2018. If honoured by the 1st Defendant, the Partial Settlement Agreement would have progressively resolved all issues raised in these consolidated suits under consideration in this judgment because as at the time of entering the said agreement, which Mr. Mogaka and Mr. McCourt endorsed for the Interested Parties, but declined by Mr. Ananda for the Plaintiffs in the Lead file. In the Partial Settlement Agreement, the 1st Defendant agreed to Charge the lease Certificate for Kshs. 364,000,000.00 (the disputed principal amount) and further amend the charge once an audit and the Auditor Reports on a new principal amount were conducted. It is also noteworthy that any proceeds of the sale of units ought to have been forwarded by the 1st Defendant to an escrow account held with the Plaintiff. However, the 1st Defendant failed to do so. This agreement was entered voluntarily, and this Court will recognize and endorse it for enforceability on the parties who supported it; importantly, immediate Partial Discharge on 125 units, and the parties agreed not to sell the remaining 183 units. As agreed by the 1st Defendant, the other Plaintiffs in the consolidated suit have long paid their purchase monies to fulfill the sale agreement and are also entitled to the orders of specific performance.

56. The other damages pleaded by the plaintiffs were not quantified or proved; in case of any damages incurred by the Plaintiffs, the parties are to resile to the provisions of their respective agreements.

57. The Court finds that the Plaintiffs have proved their case against the 1st Defendant. Consequently, the plaintiffs are entitled to reliefs as follows:

    a. Subject to the fulfillment of orders issued in ELC 355 of 2016, an order of Specific Performance be and is hereby issued compelling the 1st Defendant to take steps and facilitate the transfer and registration of the Plaintiffs (in the suits as consolidated) as owners of their specific Housing Units.

    b. In default of (a) above, an order be and is hereby issued directing the 1st Defendant to refund the total purchase prices to the Plaintiffs and any other costs incurred by the Plaintiffs to develop and improve their respective Housing Units or as per their respective sale agreements.

    c. Costs of this suit and interest at Court rates are to be borne by the 1st Defendant for the Plaintiffs, the 2nd Defendant, and the Interested Party herein.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 18TH DAY OF JULY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Ananda, for the Plaintiffs in the Lead file

Mr. Mogaka for the Plaintiffs in ELC 61 of 2015

Ms. Mosiara, for the 1st Defendant

Mr. Munga for the 2nd Defendant

Mr. McCourt, for the Interested Party

Happy: Court Assistant