



Githongo (Suing on Behalf of the Estate of the Late Joseph Muiruri Githongo - Deceased) & another v Chief Land Registrar & 3 others (Environment & Land Case 223 of 2016) [2024] KEELC 6227 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 223 OF 2016
OA ANGOTE, J
SEPTEMBER 26, 2024**

BETWEEN

PETER GITAU GITHONGO (SUING ON BEHALF OF THE ESTATE OF THE LATE JOSEPH MUIRURI GITHONGO - DECEASED) 1ST PLAINTIFF

MARY WAIRIMU GITHONGO 2ND PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

ALLAN DUNCAN 2ND DEFENDANT

GEORGE THEODORE ZIBARRA & CAROL ANNE ZIBARRAS 3RD DEFENDANT

DAVINDER S. VIRDEE T/A RAFFMAN DHANJI ELMS & VIRDEE ADVOCATES 4TH DEFENDANT

JUDGMENT

1. Vide a Further Amended Plaint dated 17th November, 2022, the Plaintiffs seek as against the Defendants jointly and severally for the following orders:
 - a. A declaration that the registration of the leases entered on the suit property on 16th March 2012 was procured by fraud and or irregularly hence the same is declared null and void.
 - b. An order directing the 1st Defendant to cancel the registration of the leases entered on 16th March 2012 on the suit property and the rectification of the register and title to reflect the name of the Plaintiffs as the joint proprietors of the suit property.



- c. A permanent Injunction restraining the 1st, 2nd, 3rd and 4th Defendants, whether acting by their directors, officers, servants, agents or otherwise howsoever, from restoring the registration of the lease entered on 16th March, 2012 on the suit property.
 - d. General damages.
 - e. Cost of and incidental to this suit; and
 - f. Such further or other relief as to this Honorable Court may seem fit.
2. The Plaintiffs assert that at all material times relevant to this suit, they were registered as joint proprietors for an estate in fee simple of all that parcel of land situated in the Nairobi Area of the Republic of Kenya Containing by measurement two decimal four three nought hectares (2.430 Ha) or thereabouts known as Land Reference Number 1160/281 (hereinafter ‘the suit property’).
 3. It is their case that on or about 16th March, 2011, they entered into a sale agreement with the 2nd and 3rd Defendants for the sale and purchase of a portion of the suit property comprising by measurement nought decimal seven (0.7) and nought decimal seven nought five seven (0.7057) of a hectare or thereabouts demarcated more or less on the proposed subdivision plan respectively and that the sale by subdivision, which is a requirement in the area where the suit property is located, became impossible as approvals from the City Council were not forthcoming.
 4. They aver that on or about 26th August 2011, they entered into supplemental agreements with the 2nd and 3rd Defendants for the sale and purchase of the portion of the suit property on similar terms as the previous agreement save that the sale would be by way of long term leases for 99 years and that they executed the leases and the same were submitted for registration by the 4th Defendant.
 5. It is their case that on 28th October 2011, the Assistant Commissioner of Lands informed the 4th Defendant, acting for 3rd Defendant, that leases for undeveloped land would not be registered; that actual subdivision was required to be carried out and that subsequently, they opted to have the transaction terminated on account of frustration as leases could not be registered on undeveloped land.
 6. The Plaintiffs maintain that on 16th March 2012, the 4th Defendant presented the lease together with other documents for registration which falsely and fraudulently asserted that the plots being purchased by the 2nd and 3rd Defendants had villas built on them and that the 1st Defendant, went ahead and had the lease registered in the 2nd and 3rd Defendants name.
 7. They urge that the registration aforesaid constitutes fraud, the particulars of which include, the 4th Defendant colluding with the 2nd and 3rd Defendants to procure photographs and building plans to show that the portions of the suit property being leased to the 2nd and 3rd Defendants had Villas built on them knowing the same to be false and the 1st Defendant, irregularly registering leases on the suit property while having knowledge that the registration of the portions of the suit property being leased had been earlier rejected on grounds of being undeveloped land.
 8. Further particulars of fraud were set out as the 1st, 2nd, 3rd and 4th Defendants colluding with each other to register the fraudulent and irregular leases, to the detriment of the Plaintiffs, knowing that the suit property was undeveloped and the leases could not be registered on undeveloped land.
 9. The Plaintiffs state that through the firm of A.R Kapila & Company Advocates, they made an application to the 1st Defendant inviting him to cancel the registration of the three leases which application was allowed and leases cancelled on the basis of fraud; that the 2nd Defendant went ahead and filed *Petition No 449 of 2013* seeking orders to have the cancellation of registration of the leases



- declared null and void on the basis that due process was not followed and that the Court found in favour of the Petitioner and declared the cancellation of the leases as void for want of due procedure.
10. According to the Plaintiffs, on or about 14th December 2015, they wrote to the 1st Defendant requesting it to summon the 2nd and 3rd Defendants as required by law to explain why the registration of their leases should not be cancelled having been procured fraudulently and that the 1st Defendant has since failed, refused and /or neglected to proceed with the process of cancellation despite the Plaintiffs' pleas.
 11. The 1st Defendant did not participate in the proceedings.
 12. The 2nd Defendant filed his statement of Defence on 1st March, 2022. The 2nd Defendant denied the assertions by the Plaintiffs stating at the outset that the suit is res judicata Nairobi ELC 449 of 2013 and that the suit does not disclose any cause of action against the 2nd Defendant and is a collateral attack on the Judgement of the Court in ELC 449 of 2013.
 13. It is his case that by a lease agreement dated 26th August, 2011 and duly registered on 16th March, 2012, he became the registered as proprietor as lessee of Plot No B being a portion of land reference number L.R 1160/281 Nairobi and that the sale agreement executed between him and the Plaintiffs was dated 13th March, 2007 and contemplated the sub-division of L.R 1160/281 into three sub-plots being A, B & C out of which plot B was duly transferred him.
 14. The 2nd Defendant averred in the Defence that a supplemental agreement for sale was entered into between him and the Plaintiffs on the 8th November, 2010 which replaced the agreement of 13th March, 2007; that by the supplementary agreement, it was agreed that the Plaintiffs would sell to him all that parcel of land measuring 0.7075Ha or thereabouts of L.R No 1160/281 by way of lease for a term of 99years from 6th February, 2011 and that he duly executed the lease and the same was presented for registration by the 4th Defendant on behalf of the 2nd Defendant.
 15. According to the 2nd Defendant, the purported termination of the sale transaction by the Plaintiffs was without any basis and that the 4th Defendant duly presented the pre-agreed and by consent mutually executed leases for registration to the 1st Defendant who duly registered the aforesaid leases in favour of the 2nd and 3rd Defendants on L.R No 1160/281.
 16. The 2nd Defendant maintains that the lease was registered without alteration of the pre-agreed contents and form; that the registration of the leases was undertaken by the 1st and 4th Defendants and that he is a stranger to allegations of fraud in that respect.
 17. It is the 2nd Defendant's case that the 1st Defendant purported to cancel the registration of the leases in respect of the 2nd and 3rd Defendants which action he successfully challenged in ELC 449 of 2013.
 18. The 3rd Defendants filed a statement of Defence and Counterclaim on the 24th February, 2020. They denied the assertions by the Plaintiffs stating that by virtue of a lease dated the 26th August, 2011 between the Plaintiffs and themselves duly consented to by the management company and registered on the 16th March, 2012, by the 1st Defendant, the Plaintiffs ceased to be the registered owners of the suit property.
 19. They conceded that the initial sale of the property by way of sub-division as set out in the agreement of 16th March, 2007 became untenable and vide a supplementary agreement dated 8th November, 2010, it was agreed the sale transaction would be adjusted from one involving sale of sub-divided parts of the Plaintiffs former property L.R No 1160/281 by transfer of a portion thereof, to transfer by way



- of granting leases to each of the three (3) parties, the Plaintiffs nominee, (Spanish villa Limited) the 2nd and 3rd Defendants.
20. It was their assertion that the sale aforesaid was for the portion of land known as portion C, on L.R 1160/281 for a consideration of Kshs 12, 040,000/= and that the sale process was undertaken between the Plaintiffs and themselves through their respective Advocates Messrs. A.R Kapila & Co Advocates and Messrs. Raffman Dhanji Elms & Virdee Advocates.
 21. According to the 3rd Defendants, the lease in their favour was duly registered and the reversionary interest over the lease in the Plaintiffs' former property was to be duly transferred from the Plaintiffs, to a management company incorporated by the Plaintiffs, the 2nd and 3rd Defendants, Messrs Mbagathi Heights Management Limited following registration of all the other leases.
 22. The Defendants assert that the Plaintiffs attempted to repudiate the sale agreements which was rejected by them and the 2nd Defendants thus sustaining the parties' rights and obligations thereunder; that all the documents were executed after consensus was reached by the parties and allegations of fraud are baseless and that the 1st Defendant duly approved the form and content of the lease and duly registered the same pursuant to the provisions of Section 33 of the Registration of Titles Act.
 23. They maintain that their Advocates duly presented the registrable documents to the 1st Defendant's predecessor and the alleged photographs and/or construction plans are not documents required for registration of instruments and that in any event, the 1st Defendant must have established the physical location of the suit property and the other two sections L.R 1160/281 A and L.R No 1160/281 B during the valuation and physical verification of the suit property for purposes of assessing the stamp duty payable prior to the registration.
 24. The 3rd Defendant contends that nonetheless, vide the decision in ELC 449 of 2013, the 1st Defendant was directed to restore the registration of the leases previously registered on 16th March, 2012; that no Appeal was raised as against the decision aforesaid and that the Plaintiffs' sale and transfer to the 2nd and 3rd Defendants has been effected and is irreversible.
 25. It was urged that the 1st Defendant's statutory duty does not include the right to cancel a valid registration of a lease without any challenge to the legality of the agreements and the transfer of the suit property; that the jurisdiction of this Court is denied as the matter is res judicata and constitutes an abuse of the Court process and that no demand and notice to sue was served upon the 3rd Defendant prior to the institution of the suit and consequently, no costs that would otherwise be payable to the Plaintiffs in connection to the suit are due from the 3rd Defendant.
 26. According to the 3rd Defendant, the Plaintiffs' attempt to frustrate the sale has occasioned them great loss and injury as they lost the opportunity to use and enjoy rental income which they legitimately expected upon completion of the suit property and that the Plaintiffs seeks to use and abuse the Court to sanitize their breach of contract.
 27. Vide the Counterclaim, the 3rd Defendant seek for the following orders:
 - i. An order dismissing the Plaintiffs suit herein with costs to the Defendants.
 - ii. An order of specific performance compelling the Plaintiffs to perform their obligations under the agreement for sale dated the 16th March, 2007, the supplementary agreement for sale dated the 4th November, 2010 and the lease dated 26th August, 2011 and complete the sale and transfer of the suit property L.R No 1160/281 C to the 3rd Defendant who has been and still is willing and able to complete the transaction.



- iii. An order of specific performance compelling the Plaintiffs to perform their obligations under the agreement dated the 30th November, 2011 and more specifically to complete the lease and to facilitate the transfer of shares in the said management company to the 3rd Defendant and facilitate the transfer of the reversionary interest in the property known as L.R No 1160/281 to the management company in the manner specifically agreed and intended by the said executed agreements.
 - iv. An order directing the Plaintiffs to quit, vacate and/or deliver vacant possession of the suit property, L.R 1160/281 C to the 3rd Defendant within 30 days of delivery of judgement failing which an order of eviction and contempt of Court shall issue against the Plaintiffs.
 - v. An order of permanent injunction restraining the Plaintiffs, whether by themselves, their servants, agents and/or employees or anyone claiming under them from evicting, being a nuisance or in any way interfering with the 3rd Defendants peaceful enjoyment of the suit property, L.R 1160/281 C.
 - vi. General damages for loss of opportunity, loss of use and enjoyment of, or potential rental income from the suit property since 16th March, 2012.
28. The 4th Defendant filed his Defence on 24th February, 2020. He denied the Plaintiffs' assertions stating that by virtue of a lease dated 26th August, 2011 between the Plaintiff and the 3rd Defendant, executed before their respective Advocates, and duly consented to by the management company and registered on the 16th March, 2012, the Plaintiffs ceased to be the registered owners of the suit property.
 29. In almost identical averments to the 3rd Defendant, the 4th Defendant asserted that vide the initial agreement dated 16th March, 2007, the Plaintiffs agreed to sell to the 3rd Defendant, portion C of L.R 1160/280 for the consideration of Kshs 12, 040,000/=; that the sale of the suit property by sub-division became untenable and they entered into a supplementary agreement dated 4th November, 2010 in which it was agreed that the sale would be by way of granting leases to each of the three parties, the Plaintiffs' nominees being Spanish Village Kenya Limited, and the 2nd and 3rd Defendants.
 30. He contended that the supplementary agreement was duly amended and executed by the Plaintiffs and the 3rd Defendant before their respective Advocates; that it was mutually agreed that he would undertake the process of registration and that after the registration, the reversionary interest over the lease in the Plaintiffs former property was to be duly transferred from the Plaintiffs to a management company incorporated by the Plaintiffs, the 2nd and 3rd Defendants, being Messrs Mbagathi Heights Management Limited following registration of all the other leases.
 31. The 4th Defendant averred that upon learning of the 1st Defendant's position with respect to leases for undeveloped land, they, through Advocate Margaret Kinyanjui in charge of the transaction and Samuel Kaweesa, the clerk, and with the knowledge of the Plaintiffs and the 2nd Defendant Advocates engaged the 1st Defendant and its officers in numerous correspondence and official visits to the Registry with a view to finding a solution to the illegal condition aforesaid.
 32. According to the 4th Defendant, they thereafter established that sometime in October, 2011, the 1st Defendant had reversed its decision not to register long-term leases provided they were accompanied by the plan identifying the suit property which was registered at the Registry of documents and that it duly presented the leases for registration to the 1st Defendant who registered the same but thereafter refused to release the registered documents due to manipulation and influence at the lands registry by the Administrator of the Estate of the 1st Plaintiff.



33. He contends that the firm duly presented the registrable documents to the 1st Defendant's predecessor and the alleged photographs and/or construction plans are not documents required for registration of instruments and that in any event, the 1st Defendant must have established the physical location of the suit property and the other two sections L.R 1160/281 A and L.R No 1160/281 B during the valuation and physical verification of the suit property for purposes of assessing the stamp duty payable prior to the registration.
34. The 4th Defendant maintains that they are aware of the proceedings and outcome of ELC 449 of 2013 where the 1st Defendant was directed to restore the lease previously registered on 16th March, 2012, thereby restoring the 2nd and 3rd Defendant's property rights and that the Plaintiffs did not appeal against the aforesaid suit and subsequently, the Plaintiffs sale and transfer to the 2nd and 3rd Defendants has already been effected and is irreversible.
35. It was urged that the 1st Defendant's statutory duty does not include the right to cancel a valid registration of a lease without any challenge to the legality of the agreements and the transfer of the suit property; that the jurisdiction of this Court is denied as the matter is res judicata and constitutes an abuse of the Court process and that the suit is intended to soil the 4th Defendant's reputation and the reputation of the firm whose sole role was to oversee the completion of the sale and transfer of the suit property.

Hearing and Evidence

36. The matter proceeded for hearing on 30th March, 2023. PW1, Peter Gitau Githongo, adopted his witness statements dated 8th August, 2019 and 6th April, 2021 as his evidence in chief and produced the bundle of documents dated 8th August, 2019, 6th February, 2021 and 8th March, 2021 as PEXHB 1, 2 and 3.
37. It was his evidence that he was involved in the discussions leading to the sale of the suit property in 2006; that the leases were to be registered by Raffman Dhanji Advocates; that there were delays in the aforesaid registration leading to his following up on the same; that this follow up led to his discovery that the copies of the leases registered were not the ones they signed and that they got the aforesaid copies from the Registrar of Lands.
38. It was his evidence that whereas the land is undeveloped, the Registrar informed him that the leases were in respect of developed land; that most variations were amendments on the front page and the wording portion was cancelled and the word villa inserted; that the acreage was different; that the parcel marked plot C was incorrect, it referred to the price for plot B and that there was an interchange of plot B and C.
39. PW1 stated that plot B made reference to Walter Kontoa whereas the correct name is Walter Kontos; that the reference of the land was cancelled; that the acreage and the purchase price were not altered; that the other contradictions are in the statement; that they have pictures in the documents of 8th March, 2021; that the pictures show that there are no developments on the land and that the land has remained so.
40. According to PW1, the Ministry of Lands also wrote a letter to Raffman Dhanji informing them that they could not register the leases because the properties were not developed and that they asked for cancellation of the leases and that the cancellation should occur to have the land revert to its original state.



41. In cross-examination, PW1 stated that he is the Administrator of his father's Estate; that they undertook succession though it was not concluded; that he has a certificate from the succession Court; that he does not know who undertook alteration of the leases and can only speculate that they were done by the 4th Defendant and that the letter on the non-registration of leases on undeveloped land was not copied to them but given to them by the Ministry of Lands.
42. PW1 stated that he doesn't know if the documents listed in the application for registration were provided by the 4th Defendant; that he has no problem with the lease at page 110 of the 2nd Defendant's bundle and the one at page 83 of the 3rd Defendant's bundle as it is the correct one; that he is unsure whether the agreement provided for termination and that he had no evidence to show that the leases were submitted and rejected.
43. According to PW1, the reversionary interest was transferred vide the agreement of 30th November, 2011; that the 21-day completion notice provided for in the agreement was not issued and that the leases that he signed are different from the leases that were registered.
44. PW2 was a Land Registrar attached to the Chief Land Registrar's office, Court Section. She stated that she received summons to be in Court to provide copies of the documents at the lands office. She produced the bundle of documents as 2PEXHB1. It was her evidence that the leases that were registered and cancelled are not part of the record and that the said leases were returned to the person who lodged the documents.
45. On cross-examination, she stated that they don't have in their records the letter of 28th October, 2011 although it should be in their deed file; that the leases were registered; that the Senior Registrar of Titles commented and directed that the documents be amended and that the documents were collected for amendments by the firm that presented them for registration.
46. She noted that they usually have a separate file for registration; that she doesn't have the booking form for the amended documents; that it is the Senior Registrar of Titles who prepared the amendments and that she has no evidence of the amended documents.
47. It was her evidence that she doesn't have evidence of stamp duty payment; that she has no correspondence file because the same is with the land administrator; that she doesn't have the leases and came to testify if there was any irregularity and that they sometimes delay the release of registered documents because they have to go through other departments for validation.
48. It was the evidence of PW2 that as a Registrar, she has the discretion to cancel an entry that has been made after a complaint several years down the line; that the letters did not accuse anyone of any forgery or alteration; that all copies are normally left in the deed file but she did not have the same and that she did not know the Registrar who made the comments on the application.
49. It was her evidence on re-examination that even in exercising the discretion to register or cancel a registration, one has to abide to the rules and regulations; that the day they received the documents is the same date of registration unless it is rejected and rebooked and that they have the booking form; that they can release a document for amendment.
50. DW1 was George Zibarras, one of the 3rd Defendants. He adopted his witness statement dated 24th February, 2020 as his evidence in chief and the documents of an even date as DEXHB 3. It was his evidence that he lives in Mbagathi-Ridge Karen and the Plaintiffs are his next door neighbors and that the 4th Defendant was their Advocates and did the right thing in lodging the leases for registration.



51. It was the evidence of DW1 that him and his wife are joint lessees of all that property known as part C of L.R No 1160/281 having purchased the same by virtue of the sale agreement dated 16th March, 2007 and supplementary agreement dated 4th November, 2010 for the price of Kshs 12,040,000/=; that the deposit payable upon execution of the agreement was 10% of the purchase price and that the exact plan of the sub-divided plot was annexed and their property was clearly defined.
52. It was his evidence that the two agreements were signed by the parties in the presence of their Advocates and they paid the 10% deposit as per the agreement and that before completion of the transaction, they were informed that the 1st Defendant had made a general decision that they would no longer register long term leases, a position communicated informally.
53. In view of the foregoing, it was the evidence of DW1 that after a two year delay in the sub-division of the property, they sought for solutions from their Counsel and it was mutually agreed that the parcels would be transferred to them by way of long term leases; that a further consensus was reached that the three parties would register a management company to which the reversionary interest in the main property would be transferred by the Plaintiffs following registration of the long leases and that it was further agreed that the company would be owned by the Plaintiffs, the 2nd Defendants and themselves.
54. It was his evidence that to facilitate the registration of the intended lease, their Advocates registered the plan with the Registry of Documents clearly demarcating the 3 parcels as A, B and C duly registered on 5th May, 2011; that vide the letters of 24th August, 2011 and 28th October, 2011, they established that the 1st Defendant had reversed its decision not to register long term leases; that sometime in 2011, their lawyers, having received stamp duty by then, caused valuation of the suit property and paid stamp duty to the Commissioner of Domestic Taxes.
55. He stated that upon completion of the payment of stamp duty, their conveyancing lawyers presented the documents for registration including the ones belonging to the Plaintiffs' company, Spanish Villa Kenya Limited; that the leases were registered but the 1st Defendant refused to release the same to their Advocates on account of manipulation by the Plaintiffs and that vide a letter dated 24th August, 2012, they were informed that the leases had been cancelled.
56. According to DW1, the cancellation led to their filing of a suit to wit ELC 449 of 2013, in which the Court found that the cancellation was illegal and directed the restoration of the leases; that the Plaintiffs herein despite being parties in the case aforesaid did not appeal against the same and this suit is subsequently res judicata and that the suit has been brought in bad faith and should be dismissed.
57. Upon being cross-examined, he testified that the lease was signed four years after the signing of the agreement; that the purchase price remained the same and that everything was done lawfully.
58. DW2 was Davinder Singh, an Advocate practicing in the firm of Raffman Dhanji Elms & Virdee Advocates having been admitted to the bar in 1997. He adopted his witness statement dated 26th September, 2023 as well as statements by Margaret Kinyanjui and Samuel Kaweesa both dated 24th February, 2020 as his evidence in chief. He produced the documents dated 24th February, 2020 and the supplementary bundle dated 26th September, 2023 as DEXB4 and 5.
59. It was his testimony that the firm acted for the 3rd Defendant in the transaction; that the Advocate handling the matter was Margaret Kinyanjui who was involved from the onset; that the clerk was Sammy but he has since left the firm and that he doesn't know why he was the only one who was sued.
60. According to DW2, the documents were presented for registration by consent of the Advocates acting for all the parties; that the leases executed by the parties were in the format of the draft lease in the



supplementary agreement for sale; that after presentation, they realized that the registry had made a decision that was not formally communicated to them and that they thereafter received a letter informing them that the leases were not registrable.

61. DW2 stated that they consulted other Advocates who informed them that although such leases had been rejected, after appeal, the same were accepted; that as they were engaging the registry, Kapila Advocates wrote them a letter informing them that the leases could not be registered due to the lapse of time; that they also became aware that the Plaintiffs had accessed the documents at the registry and that they informed the registry that the land was undeveloped and asked the Chief Land Registrar to ensure registration was undertaken without any alteration.
62. It was the evidence of DW2 that he was not aware of the comments that were made on the application for registration; that the only plan that was presented was the one for the intended development; that parties who have not lodged documents cannot access documents lodged for registration and that they received the letter purporting to terminate the contract before they presented the lease for registration.
63. According to DW1, it was true that the leases are different and have alterations; that they have building plans which is a material alteration; that the word ‘portion’ was replaced with the word ‘villa’; that they must have given Sammy the drawings for the intended development and that the lease they presented for registration were not the same leases that the Plaintiffs have adduced.
64. By consent, it was agreed that the evidence of DW2 would apply to the evidence to be adduced by the 2nd Defendant and the bundle of documents dated the 1st March, 2022 were produced as DEXHB2.

Submissions

65. The Plaintiffs’ Counsel submitted that the law on res judicata is found in Section 7 of the Civil Procedure Rules and restricts the Court from re-trying any issue, between the same parties, previously decided by a Court of competent jurisdiction and that the restoration of registration of leases in ELC *Petition No. 449 of 2013* was purely on the basis that the right to fair hearing had been breached a non-issue in this case. Reliance in this respect was placed on the case of *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).
66. It was submitted that the evidence adduced by the Plaintiffs reveals that there were differences between the leases that were signed by the parties and the leases that were presented for registration by the 4th Defendant on behalf of the parties and that the differences aforesaid constituted a material alteration because they were done without the consent of the Plaintiffs, and with the aim to misrepresent that the suit property was developed and had villas, so as to have them registered.
67. Counsel urged that as expressed by the Court in *Housing Finance Co. of Kenya Limited vs Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999*, and in *Nicolene Ltd vs Simmonds* [1953] 1 QB 543, where one party varies a contract without the other, it may mean there is no contract at all as parties have not agreed on the same; that it is apparent that the registration of the leases was procured through irregular and fraudulent means and the same is liable to be cancelled pursuant to Section 26 of the *Land Registration Act* and that consequently, the Plaintiffs are entitled to the reliefs sought in the Plaint.
68. The 2nd Defendant filed submissions on the 23rd April, 2024. Counsel submitted that the doctrine of res judicata as espoused in Section 7 of the *Civil Procedure Act* and explained in *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, expressly prohibits a Court from determining any matter which was the subject matter of a previous suit between the same parties; that the issues herein, were issues in ELC 449 of 2013 and/or are issues that could have been raised in ELC



- 449 of 2012 and that consequently, they are deemed to have been so in issue rendering this suit res judicata.
69. Counsel noted that if granted, the orders herein would contradict the orders made in ELC 449 of 2013 and would amount to reviewing the decision of a Judge of similar jurisdiction, a position untenable in law. Reliance in this respect was placed on the case of Supreme Court in Kenya Hotel Properties Ltd vs Attorney General & 5 Others [2022] eKLR.
 70. Counsel submitted that the Plaintiffs have not proved their assertions of fraud on a balance of probabilities and as against the threshold set out in Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, to wit, being distinctly alleged and proved and that the standard of proof in this regard being higher than that required in ordinary civil cases as explained in Kinyanjui Kamau vs George Kamau [2015] eKLR has not been met.
 71. According to Counsel, similarly, allegations that the agreements with the 2nd Defendant were frustrated does not also hold any water; that the Court of Appeal in Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd & another [2014] eKLR explained that frustration refers to a situation where events render the performance of a contract impossible or possible in a very different way from that contemplated and that in the circumstances, the Plaintiffs purported reliance on the letter dated 28th October, 2011 to plead frustration before their presentation of the leases cannot lie.
 72. It was submitted that guided by the decisions in National Bank of Kenya Ltd vs Pipe Plastic Samkolit(K) Ltd & Anor[2001]eKLR and Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd[2017]eKLR, the parties having voluntarily executed agreements for sale in respect of the property, the Court is duty bound to give effect to the text and tenure of the aforesaid agreements by ordering specific performance by the Plaintiffs and that the suit should be dismissed and Judgement entered against the Plaintiffs.
 73. The 3rd and 4th Defendants filed submissions on the 23rd April, 2024. Counsel submitted that as affirmed by the Court of Appeal in Independent Electoral and Boundaries Commission & Anor vs Stephen Mutinda Mule & 3 Others [2014] eKLR, it is trite that parties are bound by their own pleadings and that the Plaintiffs herein have not identified the suit property and as such any orders granted in this regard would be incapable of being granted.
 74. Counsel posited that no evidence has been adduced by the Plaintiffs to support the alleged fraudulent registration of the leases and that there was any alteration of the leases or significant amendment thereto and that in any event, the inclusion of the word “Villa” does not change the agreement and is inconsequential. Reliance in this respect was placed on the case of South Nyanza Sugar Company Ltd vs Margaret A Ogola [2019] eKLR.
 75. It was submitted that the Plaintiffs were not entitled to rescind the agreements, supplemental agreements and leases having admitted to not having served the 2nd and 3rd Defendants with a 21 days-notice as per special condition I of the agreement. Reliance in this respect was placed on the cases of Housing Company of East Africa Limited vs Board of Trustees National Social Security Fund & 2 Others [2018]eKLR.
 76. Counsel posited that the effect of the judgement and decree in ELC *Petition 449 of 2013* was to restore the leases that had been registered on the 16th March, 2012 and subsequently cancelled by the Chief Lands Registrar; that following the restoration of the leases and the transfer of the reversionary interests in favour of the Plaintiffs, and the 2nd and 3rd Defendants, the mischief by the Plaintiffs was defeated and that the 3rd Defendant has proved that the Plaintiffs ought to be compelled to perform their contractual obligations through specific performance.



77. The Plaintiffs filed further submissions on the 24th June, 2024 wick I have considered.

Analysis and Determination

78. Having considered the pleadings, evidence and submissions, the issues that arise for determination are:

- i. Whether the Plaintiffs' suit is res judicata?
- ii. Whether the registration of the leases in respect of plots B and C on Land Reference Number 1160/280, on the 16th March, 2012 was fraudulent?
- iii. Whether the 3rd Defendant is entitled to the orders sought?
- iv. What are the appropriate orders to issue?

Whether the Plaintiffs/ suit is res judicata?

79. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#), which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

80. The Act has further expounded on the principle setting out explanations 1-6 thus:

Explanation (1) — The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) — For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) — Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

81. In the case of [John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others \(Petition 17 of 2015\)](#) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus:

“... The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special



circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case^{3/4}to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:

- (i) the matter in issue is identical in both suits;
- (ii) the parties in the suit are the same;
- (iii) sameness of the title/claim;
- (iv) concurrence of jurisdiction;
- (v) finality of the previous decision.”

82. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four corners set out above, namely; the matter directly and substantially in issue in the subsequent suit was the same matter which was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they claim; the parties litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
83. The Defendants contend that the present suit is res judicata ELC Petition [449 of 2013](#) determined by this Court [L. Gacheru J] on 12th June, 2015. They assert that if this Court is to grant orders as prayed by the Plaintiffs, it would contradict the orders made in Nairobi ELC No. 449 of 2013 and would be tantamount to reviewing the decision of a Judge of similar jurisdiction, a position untenable in law.
84. On their part, the Plaintiffs contend that the suit is not res judicata, the issues for determination herein having never been previously conclusively determined by a Court of competent jurisdiction; that the restoration of registration of leases by the Court in ELC 449 of 2013 was purely on the basis that the right to fair hearing had been breached and that neither the breach of the right to a fair hearing nor breach to any of the constitutional rights and or freedoms is an issue in the present matter.
85. The Court has considered the two suits. ELC 449 of 2013 was instituted by Allan Duncan as the Petitioner, against the Registrar of Titles and the Attorney General as Defendants and Joseph and Mary Githongo as Interested Parties.
86. The present suit has been instituted by Joseph and Mary Githongo as the Plaintiffs as against the Chief Lands Registrar, Allan Duncan and three other parties who were not parties to ELC 449 of 2013. Apart from the 3rd and 4th Defendants herein who were not parties to ELC 449 of 2013, the other parties are common parties in both suits. They are however not litigating under the same title.



87. Vide the Petition dated 18th July, 2013, the Petitioner inter-alia sought for a declaration that the Registrar of Title's purported cancellation of the registration entered on 16th March, 2012 of the lease dated 26th August, 2011 was unconstitutional, null and void and occasioned loss to the Petitioner and an order that the Registrar aforesaid restores the lease.
88. It was the Petitioner's case that he entered into an agreement with the Interested Parties for the purchase of a portion of their land known as Plot B on L.R 1160/281; that upon payment of the deposit and an undertaking given for the payment of the balance by its Advocates, the lease was registered on 16th March, 2012 and that the transaction could not be completed as the Registrar of Titles refused to release the registered leases.
89. He stated that the failure to release the leases was occasioned by a cancellation upon the unilateral request of the Interested Parties and that the aforesaid cancellation was undertaken arbitrarily with no legal basis and was manifestly unlawful.
90. In response, the Registrar stated that they received complaints from the vendor that the documents presented for registration did not comply with the terms of the agreement and they asked the parties to iron out their differences before registration.
91. The Interested Parties on their part contended that while they initially entered into an agreement for the sale of a portion of the property to the Petitioner, the same became untenable having failed to get approval for sub-division of the land and that the parties abandoned the same and agreed to sell the property by way of long term leases.
92. In rendering its determination, the Court set out as the sole issue for determination, the power of the Registrar of Titles to cancel the lease under Section 60 of the Registration of Titles Act. In this respect, the Court found that the Registrar was mandated to summon the person in whose name the instrument is registered before cancelling a grant, certificate of title or another instrument. Having not done so, the Court found that the cancellation was irregular and subsequently void.
93. In the present case, the Plaintiffs are seeking, inter-alia, for a declaration that the registration of the leases entered on 16th March 2012 as void having been procured by fraud; cancellation of the aforesaid leases and rectification of the register as well as permanent injunctive orders restraining the 1st Defendant from restoring the registration of the lease entered on the 16th March, 2012.
94. Taking into account the narration in the Complaint, which I have summarized in the preceding paragraphs, it is evident that in ELC 449 of 2013, the Court was solely dealing with the question of whether the cancellation of the leases by the Registrar of Lands, was in accordance with Section 60 of the Registration of Titles Act.
95. In contrast, the question before this Court is whether or not the registration of the leases was procured by fraud and the consequences thereof. The Defendants contend that the question of fraud should have been raised in ELC 449 of 2013 and is deemed to have been an issue therein.
96. The Court disagrees. The Court in ELC 449 of 2013, sitting as a constitutional court, was purely dealing with the constitutional violations alleged, as against the Respondents, the Registrar of Titles and the Attorney General.
97. Indeed, the Interested Parties in that suit maintained then, as they do now, that there was fraud in the registration of the leases. The court declined to grant any damages on account of the fact of allegations of forgery and alteration of the documents presented for registration by the Petitioner.



98. It is clear that the Court was alive to the allegations of fraud but did not interrogate the same, that being not the question before it. In the end, the Court finds that this suit is not res judicata.

Whether the registration of the leases in respect of plots B and C on Land Reference Number 1160/281 was fraudulent?

99. Vide the present suit, the Plaintiffs seek, inter-alia, for a declaration that the registration of the leases entered on 16th March 2012 is void having been procured by fraud; cancellation of the aforesaid leases and rectification of the register as well as permanent injunctive orders restraining the 1st Defendant from restoring the registration of the lease.

100. Briefly, it is the Plaintiffs' case that they entered into an agreement for the sale of a portion of the suit property to the 2nd and 3rd Defendants; that the sale, initially by way of sub-division became untenable as they failed to get approvals and that it was mutually agreed and set out in supplemental agreements that the sale would be by way of long term leases.

101. According to the Plaintiffs, they were informed by the lands registry that leases for unregistered land could not be registered and opted to have the transaction terminated due to frustration; that the above notwithstanding, on 16th March, 2012, the 4th Defendant presented the impugned leases for registration and that the aforesaid leases were different from those signed by the parties.

102. It is the Plaintiffs' case that they complained to the Registrar of titles who cancelled the registration but the same was restored by the Court in ELC 449 of 2013 upon making a finding that the Registrar did not follow due process in the cancelation.

103. The Plaintiffs adduced into evidence, the title to the suit property, the sale agreements dated 13th March, 2007 and 16th March, 2007; supplemental agreements dated 4th and 8th November, 2010; copy of the lease agreements dated 26th August, 2011; letters dated 28th October, 2011, 9th December, 2011 and 5th June, 2012; cover page of the lease agreement of 26th August, 2011 and copies of the pleadings and judgement in ELC 449 of 2013.

104. The Plaintiffs also adduced photos of the suit property as well as various correspondence with respect to the sale of the suit property.

105. The 2nd Defendant admitted that it entered into an agreement with the Plaintiffs for initially the sale of a portion of the suit property(B) by way of sub-division and thereafter by way of long-term lease. He asserts that all the parties duly executed the lease which the 4th Defendant presented for registration on its behalf and that the aforesaid lease was registered without alteration of the pre-agreed contents and forms.

106. According to the 2nd Defendant, the 1st Defendant purported to cancel the registration of the leases in favour of the 2nd and 3rd Defendants which action was successfully challenged in ELC 449 of 2013.

107. The 2nd Defendant adduced into evidence a copy of the sale agreement dated 13th March, 2007; correspondence on the Plaintiffs failure to procure approvals for sub-division; email dated 18th August, 2009; sale agreement dated 8th November, 2010; letter forwarding the lease to the 4th Defendant; documents showing payment of stamp duty; letters dated the 14th and 16th November, 2011; lease dated 26th August, 2011 and the pleadings and judgement in 449 of 2013.

108. Similarly, the 3rd Defendant stated that they entered into an agreement with the Plaintiff for the purchase of portion C of the suit property first by way of sale of sub-divided portions and thereafter by way of granting of leases to the Plaintiffs' nominees, Spanish Village Limited, as well as the 2nd and



- 3rd Defendants; that the lease in this respect was registered on 16th March, 2012 and that the registered lease was identical to the draft lease agreed upon and allegations to the contrary are unfounded.
109. By way of Counterclaim, the 3rd Defendants seek inter alia to have the Plaintiffs compelled to complete the sale agreement and grant it vacant possession of the suit property, permanent injunctive orders restraining the Plaintiffs from interfering with the suit property and damages for loss of opportunity, use and enjoyment of the property and potential rental income.
110. The 3rd Defendant adduced into evidence a copy of the sale agreement dated 16th March, 2007, sale agreement dated 4th November, 2010, registered lease dated the 26th August, 2011; plan registered with the Registry of Documents on the 5th May, 2011; certificate of title over L.R 1160/281; transfer of the reversionary interest agreement dated 30th November, 2011 and judgement and decree in ELC 449 of 2013.
111. The 4th Defendant stated that he was Counsel on record for the 3rd Defendants in the transaction. He reiterated the sequence of events as narrated by the 3rd Defendant contending that it was mutually agreed by the parties that he would undertake the process of registration and in so doing, he presented the leases as duly executed by the parties for registration to the 1st Defendant. he asserted that any claim that the presented leases were different from the agreed upon leases is unfounded.
112. The 4th Defendant adduced into evidence copies of correspondence between the Counsel for the parties and the Chief Land Registrar, valuation requisition for stamp duty; stamp duty declaration, assessment and pay in slip form; stamp duty declaration, assessment and pay in slip form and application for registration dated 25th October, 2011.
113. This dispute turns on the legitimacy of the leases registered in the names of the 2nd and 3rd Defendants and subsequently the ownership of the suit property. There are conflicting positions in this respect and the parties are obligated to establish their respective claims. This finds root in the cardinal evidentiary principle of law that he who alleges must prove. This principle is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:
- “ (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
114. And Sections 109 and 112 of the same Act states as follows:
- “ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”



115. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

116. The Court will be so guided.

117. At the onset, the 3rd and 4th Defendants allege that the suit property herein has not been identified by the Plaintiffs and as such, the orders sought by them are not capable of being granted. Looking at the orders sought by the Plaintiffs, they do indeed only make reference to “the suit property”. However, the suit property has been clearly described in the body of the further Amended Plaint and there is no dispute in this regard. Nothing much falls on this assertion.

118. The background leading to this dispute is largely undisputed, to wit, the Plaintiffs entered into sale agreements with the 2nd and 3rd Defendants for the sale and purchase of portions of the suit property and thereafter supplemental agreements of sale which changed the nature of the sale to one by way of a long term lease.

119. What is in issue is the legitimacy of the registration of the leases on the 16th March, 2012. The evidence before the Court shows that the impugned leases, in favour of the 2nd and 3rd Defendants were registered on the 16th March, 2012 pursuant to the provisions of the Registration of Titles Act.

120. Consequently, and by dint of the provisions of Section 107 of the *Land Registration Act*, 2012, the law applicable to the lease is the retired Registration of Titles Act (repealed). In this regard see the said provision of the law provides as follows:

“ 107.

- (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”



121. Section 23 (1) of the retired Registration of Titles Act (RTA) embodied the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. It provided thus:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

122. In the case of Charles Karaathe Kiarie & 2 Others -vs- Administrators of Estate of John Wallace Mathare (deceased) & 5 others [2013] eKLR the Court of Appeal, considering the application of the doctrine of indefeasibility of title stated that:

“The Registration of Titles Act is entirely a product of the Torren system of registration. The Word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and Pioneer and authors of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register, which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss, arising from an error in registration the person affected is guaranteed of government compensation. This statutory; presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved”

123. The Plaintiffs assert that the registration of the lease in the 2nd and 3rd Defendants’ name was procured fraudulently. The Black’s Law Dictionary defines fraud thus:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other...”

124. The prevailing jurisprudence on fraud is that any allegations thereof must be pleaded and strictly proved. As expressed by the Court of Appeal in case of Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000]eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must



be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

125. As regards the standard of proof, the Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the Estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* [2020] eKLR, observed as follows:
- “...Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities..”
126. According to the Plaintiffs, the particulars of fraud as against the Defendants include the 4th Defendant, in collusion with the 2nd and 3rd Defendants procuring photographs and building plans to show that the portions of the suit property being leased to the 2nd and 3rd Defendants had Villas built on them knowing the same to be false and the 1st Defendant registering the leases on the suit property while having knowledge that the registration of the portions of the suit property being leased had been earlier rejected on grounds of being undeveloped land.
127. The Court has keenly considered the evidence in this regard. The Plaintiffs have adduced into evidence two sets of leases in respect to the sale to the 2nd and 3rd Defendants.
128. Beginning with the 2nd Defendant’s lease, the Plaintiffs have set out the valid leases vis the altered leases. In this respect, the Plaintiffs contend that the valid lease is the one at page 112[109] of the 2nd Defendant’s bundle [DEXHB2]. It was PW1’s evidence on cross that he has no issues with this lease.
129. On the other hand, the Plaintiffs set out the altered lease as the one at page 142 of their bundle [PEXHB1]. A casual look at the two adduced leases confirms the alteration referred to by the Plaintiffs. The lease in PEXHB 1 indicates it has been drawn by Walker Kontoa, has the word ‘portion’ replaced with ‘Villa’, the purchase price has been omitted and the premises make reference to plot A as opposed to B. Critically though, the lease adduced at page 142 is partially un-executed.
130. Similarly, with respect to the 3rd Defendant’s lease, the Plaintiffs assert that the lease adduced at page 91-118 of PEXHB1 makes reference to the altered lease while the lease adduced by the 3rd Defendant at page 82 makes reference to the valid lease. The impugned lease has instead of a demarcation plan, an architectural plan showing houses/villas; purchase price set as Kshs 12, 201,000/= and the premises is referred to as plot B rather than C whose acreage is 0.7057 and the word villa inserted.
131. In the valid leases, under plan, it is noted that the same is registered in Volume D1, Folio 81/1649 file MMX1 whereas in the altered leases, the same is registered in volume D1, folio 42/685 and file MMX11 in respect to the 3rd Defendant’s lease and volume D1, folio 42/685 and file MMX111.
132. Having confirmed that there indeed existed two different set of leases, the next question is which one was presented to the lands registry for registration. PW2, the lands registrar, and the person best placed to answer this question was of no assistance in this regard. She did not produce copy of the leases presented to the Registry. Further still, and complicating matters is the fact that the two sets of leases have stamps indicating their registration, a position that is untenable and factually impossible.
133. Having carefully considered the leases, the Court notes that stamps indicating registration of the leases are identical in both the valid and altered leases in respect of plots B and C. These stamps were imposed on the first pages of both sets of leases which are equally identical. The only explanation for this is that one set had the original stamps while the other set has copies.



134. Whereas PW2 did not adduce the lease presented to them, they produced the application for registration which the Court has carefully considered. This document shows that the leases were first presented for registration on 25th October, 2011. A comment has been made on the application stating “The documents have to be amended to read villas because the building plans are attached to the leases; plots need deed plans.”
135. This note has been countersigned as having been written on 25th October, 2011. This tallies with the 1st Defendant’s position as indicated in the letter dated 28th October, 2011 that “no leases will be issued for undeveloped land.”
136. PW2 conceded that as per the comments on the application for registration, there was an amendment to the leases although she did not have the same. She also stated that ordinarily, the leases are registered on the same day of presentation unless rejected. Indeed, these leases were registered on 16th March, 2012 despite there being evidence that they were presented in October, 2011, meaning that they were initially rejected.
137. Further still, there is no evidence of the change of position as asserted by the Defendants with respect to the 1st Defendant’s position as communicated in the letter of 28th October, 2011. Based on the totality of the foregoing, the Court is persuaded on a balance of probabilities that the leases that were presented for registration were the altered leases adduced by the Plaintiffs in PEXHB1.
138. Considering the other evidence in this respect, it is undisputed that pursuant to the letter of 28th October, 2011, the Land Registrar wrote to the 2nd and 3rd Defendants’ Counsel informing them that no leases will be registered for undeveloped plots. Pursuant to this letter, the Plaintiffs wrote to the 2nd and 3rd Defendants’ Counsel on 14th November, 2011 and reiterated vide the letter of 9th December, 2011, that the contract was frustrated and had become discharged.
139. The Court opines that notwithstanding the legality of the Plaintiffs’ position in this respect, the communication of the discharge of the contract, was tantamount to a withdrawal of their consent for the registration of the varied lease. Therefore, even if there were no changes to the leases, there was no longer a meeting of the minds as regards their registration.
140. The remedy open to the 2nd and 3rd Defendants in this respect was to cite the Plaintiffs for breach of contract and seek remedies thereunder, or indeed seek specific performance in that regard. Not, to unilaterally procure the registration of the altered leases.
141. Ultimately the Court finds that the registration of the leases was procured fraudulently and through misrepresentation.

Whether the 3rd Defendant is entitled to the orders sought?

142. Vide its Counterclaim, the 3rd Defendant seeks inter-alia, specific performance, vacant possession of the suit property and injunctive orders restraining the Plaintiffs’ interference therewith.
143. It is trite that specific performance, like any other equitable remedy, is discretionary and the Court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid, and enforceable contract. As expressed in the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* [2006] eKLR;

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid 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 when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

144. A party seeking the relief of specific performance must show that they performed and/or are willing to perform their part of their bargain under the agreement. This was aptly stated by the Court of Appeal in *Gurdev Singh Birdi & Narinder Singh Ghorta as Trustees of Ramgharia Institute of Mombasa vs Abubakar Madhubuti* [1997] eKLR which stated thus:

“When the appellants sought the relief of specific performance of the respondent's Property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the agreement....”

145. Further, in *Thrift Homes Ltd vs Kenya Investment Ltd* [2015] eKLR, the Court stated that:

“Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”

146. The 3rd Defendant has pleaded that the Plaintiffs be compelled to complete their obligations under the agreements dated 16th March, 2007, 4th November, 2010 and the lease of 26th August, 2011, as well as to transfer shares in the management company to it and facilitate the transfer of the reversionary interest to the management company in the manner agreed.

147. They assert that the rescission of the contracts by the Plaintiffs was invalid and did not extinguish their obligations.

148. Nonetheless, the Court maintains that once the Plaintiffs communicated that the contract had been discharged, there was no longer a meeting of the minds. It was at this point that the 3rd Defendant ought to have approached the Court seeking to have it declare the purported rescission unlawful. Upon such a declaration, the 3rd Defendant would have been entitled to either specific performance as sought or damages.

149. However, by unilaterally proceeding to register the altered leases, the 3rd Defendants acted unlawfully. Having “unclean hands” in this regard, the 3rd Defendant cannot benefit from the equitable remedy of specific performance.

150. The claim for specific performance having failed, the 3rd Defendant's other pleas fail. Ultimately, the 3rd Defendant's Counterclaim fails in its entirety.



What are the appropriate orders to issue?

151. The Plaintiff seeks several reliefs including a declaration that the registration of the leases was fraudulent and cancellation of the same, rectification of the register in their names and permanent injunctive orders restraining the 1st Defendant from restoring the registration of the lease entered on the suit property.

152. The Court has found that the registration of the leases was actuated by fraud and misrepresentation and the same are amenable to be cancelled as provided under Section 64 of the Registration of Titles Act (repealed) which provides as follows:

“In any proceedings respecting any land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorial or other entry affecting any such land, the court may, by order, direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register, or otherwise to do such acts or make such entries as may be necessary to give effect to the judgment or order of the court.”

153. The Plaintiffs also seek general damages. In *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177, the Court of Appeal stated thus:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it.”

154. The Plaintiffs have not set out the quantum of the general damages they seek. Indeed, no evidence was led by the Plaintiffs on how the damages should be arrived at by the court. Consequently, the prayer for damages fails.

155. In conclusion, the Court finds that the Plaintiffs have established their case on a balance of probabilities and proceeds to make the following final orders:

- a. A declaration be and is hereby made that the registration of the leases registered on L.R No 1160, on 16th March 2012 are null and void.
- b. An order does hereby issue directing the 1st Defendant to cancel the registration of the leases entered on 16th March 2012 on L.R No 1160/281 and rectify the register and title to reflect the name of the Plaintiffs as the joint proprietors.
- c. The 2nd, 3rd and 4th Defendants shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mwangi for 3rd and 4th Defendant

Mrs Ouma for Oluoch for Plaintiff



Mr. Kuria for Mwawera for 1st Defendant

Mr. Otiar for Wafula for 2nd Defendant

Court Assistant - Tracy

