



REPUBLIC OF KENYA



**Ndumba v M'Atugi & another (Environment and Land Appeal  
E029 of 2024) [2024] KEELC 6067 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6067 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E029 OF 2024**

**CK NZILI, J**

**SEPTEMBER 18, 2024**

**BETWEEN**

**PAUL NDUMBA ..... APPELLANT**

**AND**

**FELIX MWEBIA M'ATUGI ..... 1<sup>ST</sup> RESPONDENT**

**RODAH MUKAMI PETER ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Before the court is a memorandum of appeal dated 25.4.2024 by the appellant, who was the plaintiff at the lower court. He had, by a plaint dated 31.7.2013, sued the respondent for breach of contract dated 24.1.2013, where he had offered to sell and transfer 1/8 of an acre of his L.R No. Nyaki/Kithoka/511 to the 1<sup>st</sup> respondent for Kshs.750,000/=
2. The appellant averred that contrary to the sale agreement, the 1<sup>st</sup> respondent subdivided his land into five portions, failed to pay the balance of the consideration, dwelt with his land fraudulently transferred and registered into the names of the 2<sup>nd</sup> & 3<sup>rd</sup> respondents without written consent or approval.
3. The appellant sought inhibition and permanent injunction over L.R No's Nyaki/Kithoka/4258 –42 62, invalidation of the subdivisions and cancellation of the resultant title deeds, and general damages for breach of contract.
4. The 1<sup>st</sup> & 2<sup>nd</sup> respondents opposed the claim by a statement of defense dated 9.9.2013. They averred that it was the appellant who sought and obtained consent to subdivide L.R No. Nyaki/Kithoka/511 without their involvement, after which L.R No. Nyaki/Kithoka/4258, measuring 1/8 of an acre, was duly excised and a title deed was issued to them. The 1<sup>st</sup> & 2<sup>nd</sup> respondents denied breaching any contract regarding their portion or any resultant subdivisions as alleged or at all.



5. The 1<sup>st</sup> & 2<sup>nd</sup> respondents further denied the alleged fraud. On the contrary, the 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that the appellant refused to avail himself to collect the final payments as per the sale agreement and hence was not entitled to any damages otherwise; the appellant was out to unjustly enrich himself for wanting to eat his cake and at the same time have it. The 3<sup>rd</sup> defendant to the initial plaint opposed the suit by a statement of defense dated 15.10.2013. He admitted the ownership of L.R No. Nyaki/Kithoka/4361 & 4359, which were resultant subdivisions of L.R No. Nyaki/Kithoka 3134. The 3<sup>rd</sup> defendant denied that the suit disclosed a cause of action against him. Further, the 3<sup>rd</sup> defendant averred that if there was any alleged problem or mistake in the registration of parcel numbers, the same could only be attributed to the lands office.
6. The appellant filed a reply to the 1<sup>st</sup> & 2<sup>nd</sup> respondents' statement of defense dated 16.9.2013. He termed the content thereof as diversionary, full of half-truths, and raising no triable issues. Regarding the 3<sup>rd</sup> defendant's statement of defense, the appellant filed a reply to the defense dated 30.10.2013. He termed the circumstances under which the 3<sup>rd</sup> defendant obtained registration of L.R No. Nyaki/Kithoka/4261 are both strange and irregular.
7. With leave of court, the 1<sup>st</sup> & 2<sup>nd</sup> respondents filed an amended statement of defense and counterclaim dated 23.11.2016. As plaintiffs in the counterclaim, the 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that the 1<sup>st</sup> respondent entered into a sale agreement dated 24.1.2013 for 1/8 of an acre of land out of L.R No. Nyaki/Kithoka/511, to which he paid Kshs.400,000/= to the appellant, who applied for and obtained a land control board consent and subdivided the land into L.R No's. Nyaki/Kithoka/4258 – 4262.
8. The 1<sup>st</sup> respondent averred that the appellant sought and obtained a land control board consent on 6.3.2013 to transfer L.R No. Nyaki/Kithoka/4262 and on 7.5.2013 executed a transfer form, following which a title deed came out under their name on 9.5.2013. The respondents averred that the appellant was the one who refused to accept the payment of Kshs.350,000/=. Additionally, the respondents averred that the appellant breached the sale agreement dated 24.1.2013 by refusing to give vacant possession or enjoyment of the suit land and instead instituted a suit to avoid his obligations. The respondents prayed for specific performance and, in the alternative a refund of Kshs.400,000/= plus liquidated damages as per clause 9 of the sale agreement.
9. In reply to the amended defense and counterclaim dated 13.1.2019, the appellant, as the defendant in the counterclaim, pleaded that the plaintiffs to the counterclaim refused to pay the balance and instead took the liberty to subdivide the land and fraudulently transferred a portion of his land to third parties. The appellant averred that due to the fraud, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were charged and convicted in Meru CM Cr. Case No. 306 of 2016 for forgery, making false documents and obtaining title through pretenses.
10. Similarly, the appellant averred that the 1<sup>st</sup> & 2<sup>nd</sup> respondents did not deposit any balance to his bank account as they did with the initial deposit and hence could not be entitled to the reliefs sought.
11. The 1<sup>st</sup> – 2<sup>nd</sup> respondents filed a reply to the defense dated 20.2.2019. They averred the appellant used all means to avoid receipt of the balance of the consideration. They denied the alleged criminal charges and conviction.
12. With further leave of court, the 1<sup>st</sup> & 2<sup>nd</sup> respondents filed a further amended statement of defense and counterclaim dated 26.5.2022 introducing paragraph 17A thereof that the appellant should pay Kshs.59,550/= as per clauses 5 & 6 of the sale agreement dated 24.1.2013. The appellant denied the contents vide a reply to the 1<sup>st</sup> & 2<sup>nd</sup> respondent further amended defense and counterclaim dated 10.6.2022, terming the interpretation of clauses 5 & 6 of the sale agreement by the 1<sup>st</sup> & 2<sup>nd</sup> respondents as wrong and biased.



13. At the trial, Paul Ndumba testified as PW 1. He relied on witness statements dated 7.7.2013 and 26.3.2018 as his evidence in chief. PW 1 told the court that he was selling land to the 1<sup>st</sup> respondent vide a sale agreement dated. Unfortunately, PW 1 said that the 1<sup>st</sup> respondent tried to short-change him by attending a land control board meeting alone and solely subdividing his land into five portions; the 1<sup>st</sup> respondent, being a land surveyor by profession, used his influence to effect the processes. PW 1 denied signing the transfer forms or appearing at the alleged land control board meeting on 6.3.2013 or signing any such papers as confirmed by the forensic document investigation report at the Criminal Case No. 306/2016 against the respondents.
14. PW 1 told the court that the 1<sup>st</sup> respondent paid him Kshs.4,00,000/= as a deposit, but unfortunately did the subdivisions while he was in the hospital and took away a portion he was not entitled to through a mutation form that he never signed. He denied selling or transferring any portion of his land to the 2<sup>nd</sup> or 3<sup>rd</sup> respondents but clarified that the latter transferred L.R No. 4261 to him after he was sued.
15. The appellant relied on an agreement dated 24.1.2023, an official search for L.R No's. Igoki/Kithoka 4258 – 4262, O.B. reports dated 19.7.2013, photographs, hospital treatment notes dated 6.3.2013, a letter from Kenya Revenue Authority dated 30.10.2014, charge sheet in Meru CM Cr Case No. 306 of 2016, bank statement dated 24.12.2018, official search certificate dated 3.2.2021 for L.R No. Nyaki/Kithoka/4261 & 62, forensic examination report dated 12.1.2016 & 5.10.2020, a copy of KRA Pin certificate and judgment in Meru CM Cr. Case No. 306 of 2016 dated 2.9.2021 as P. Exh No's. 1 – 14, respectively.
16. In cross-examination, PW 1 denied signing the transfer forms, mutation forms, or receiving any balance from the 1<sup>st</sup> respondent, even though he surrendered the original title deed, a copy of his I.D and a passport photo to the 1<sup>st</sup> respondent. He termed the land transferred to the 1<sup>st</sup> respondent as larger than 1/8 of an acre. Similarly, PW 1 denied handing over vacant possession to the 1<sup>st</sup> respondent. PW 1 denied refusing to collect the balance of Kshs.350,000/=, otherwise the 1<sup>st</sup> respondent knew his account number, where he could have deposited.
17. Nancy Gicuku Gititu testified as PW 2. Relying on a witness statement dated 31.7.2013 as her evidence in chief, she told the court that there was no agreement on the exact locality or the position of the 1/8 of an acre that they were selling to the 1<sup>st</sup> respondent. Similarly, PW 2 confirmed that the 1<sup>st</sup> respondent did not clear the purchase price.
18. John Muthomi testified as PW 3. Relying on his witness statement dated 21.7.2013 as his evidence in chief, he told the court that on 31.7.2013, the 1<sup>st</sup> respondent quarreled with PW 2 out of alleged malicious damage to some banana crop trees. Peter Riungu M'Mbwiria testified as PW 4. Relying on his witness statement dated 14.8.2022, he told the court that he was aware that the 1<sup>st</sup> respondent did not clear the purchase price.
19. Felix Mwebia M'Atugi testified as DW 1 and relied on his witness statement dated 18.9.2011 as his evidence in chief. He told the court that he was a land surveyor by profession, while the 2<sup>nd</sup> respondent was his wife. Relying on a witness statement filed on 21.9.2015 as his evidence in chief, he said that he entered into a sale agreement with the appellant on 24.1.2013, who later on subdivided his land L.R Nyaki/Kithoka/511 to excise a portion measuring 1.8 acres, the subject matter of the sale agreement. DW 1 said that the appellant applied for land control board consent; hence, he had no role to play in the process but was aware that the appellant appeared before the land control board meeting on 6.2.2013. He denied being involved in the entire process of subdivisions, transfers and registration.



20. Further, DW 1 told the court that once the appellant obtained the land control board's consent, he came to his office on 11.2.2013 and accompanied a land surveyor to the land to subdivide it. DW 1 said that the appellant and his wife showed the land surveyor how to subdivide the land and later signed the mutation form, which was forwarded to the district land surveyor for necessary action and approval on 20.2.2013, resulting in five new portions and their parcel number.
21. Additionally, DW 1 told the court that the appellant showed him his portion on the grounds measuring 0.05 ha subsequently registered as L.R No. Nyaki/Kithoka/4258, which he took possession of on 1.3.2013, while awaiting the transfers as per clause 4 of the sale agreement after the appellant excised his portion.
22. DW 1 told the court that it was the appellant who also executed the application for the land control board consent for the transfer on 6.3.2013 and appeared with him at the land control board meeting from which consent was issued to them. DW 1 told the court that after obtaining the land control board's consent, the appellant voluntarily surrendered to him copies of an I.D. card, passport-size photograph, PIN certificate, they appeared before Gichunge Muthuri advocate and executed the land transfer form, which documents were handed over to him to process a title deed.
23. Again, DW 1 told the court that he proceeded with the transfer, paid all the requisite stamp duty and transfer fees, and obtained a title deed with his wife on 9.5.2013, leaving the rest of the portions for L.R No's. Nyaki/Kithoka/4259 – 4262 in the names of the appellant who obtained the title deed for them. DW 1 said that after obtaining a title deed, he deposited building materials on the land, prepared it, and planted maize therein. He denied destroying any of the appellant's trees, otherwise, it was the Kenya Power & Lighting Company who felled them while installing electricity in the area.
24. Further, DW 1 told the court that he was surprised to be summoned to the police to answer a fraud claim on 23.7.2013. He denied any alleged fraud. As to the duplication of numbers during the registration, DW 1 blamed the mistake on the district survey office, who, after the discovery of the same, wrote a letter dated 4.7.2013, which resulted in the remarking and issuance of fresh numbers for subdivision L.R No. 3134. He confirmed that by a letter dated 4.7.2013, the duplicated numbers were rectified.
25. DW 1 also stated that after the execution of the transfer forms on 7.5.2013, the appellant did not come to collect his balance; otherwise, he only saw him at the police station on 24.7.2013. He termed the appellant as out to jump the sale agreement and defraud him Kshs.400,000/=. As DW 1 produced a copy of the sale agreement dated 24.1.2013, as D. Exh No. (1) title deed for L.R No. Nyaki/Kithoka 511 as D. Exh No. (2), mutation form as D. Exh No. (3), land control board application and the resultant land control board consent for as D. Exh No. (4), letter dated 4.7.2013 as D. Exh No. (5), land control board applications for consent and the resulting consent for L.R No. Nyaki/Kithoka/4258 as D. Exh No. (6) transfer form for L.R No. Nyaki/Kithoka/4258 as D. Exh No. (7), letter dated 30.7.2013 by Gichunge Muthuri & Co. Advocate as D. Exh No. (8), amended petitions of appeal in Meru H.C Cr. Case No. E 157 of 2021 as D. Exh No's. (10) certified copies of land control board minutes for L.R No. Nyaki/Kithoka/511 and 4258 as D. Exh No. 11 & 12, respectively. DW 1 said that he was always ready to pay the balance of the purchase price, which the appellant had been evading to collect at their mutual advocate's offices.
26. In cross-examination, DW 1 told the court that after he paid the deposit, the appellant was supposed to come for the balance which he declined and had never sought for the balance in writing until he filed the suit.



27. DW 1 told the court that he paid the deposit of Kshs.400,000/= as per a slip dated 24.1.2013, but the appellant refused to collect the balance by acknowledging receipt of it at his advocate's offices. Again, DW 1 insisted that clauses 3 & 7 of the sale agreement had authorized him to take vacant possession, which he did on 1.3.2013 after the appellant removed his seasonal plants.
28. DW 1 in addition stated that clause 4 of the sale agreement had authorized the transfer to take place before the balance was cleared. He denied transferring the land to the 3<sup>rd</sup> defendant. DW 1 also denied undertaking any survey works during the subdivision process or visiting the ground to effect the subdivisions save for half ware facilitating clause 6 of the sale agreement. DW 1 said that it was the appellant who attended the land control board meeting and eventually surrendered the original title deed for the subdivisions to be effected.
29. Given that the appellant did not clear half of the survey works cost, DW 1 told the court that the land surveyor who undertook the works surrendered the record to him so that the applicant may come to collect his balance as well as the resultant title deed. DW 1 said that after the transfer, the land belonged to him; hence, he started utilizing it.
30. DW 1 admitted that he was convicted on all four counts at the lower court but appealed against both the conviction and sentence. He denied interacting or transacting with the 3<sup>rd</sup> defendant.
31. John Mbuga Jane, a land administrator at Meru Central, testified as DW 2 and produced D. Exh No. 13 & 14, which were land control board minutes for 6.3.2013 regarding L.R No. Nyaki/Kithoka/511 & 4258. DW 2 told the court that the minutes indicated six attendees to the land control board chaired by the DCC, Mr. Moses Mbogo, and the secretary, Mr. Japhet Murithi, who signed the minutes. D.W. 2 confirmed that after the documents were subjected to forensic examination, it was found that the seller had not signed them contrary to the standard procedure. DW 2 confirmed that the title deed for L.R No. Nyaki/Kithoka/4258 was surrendered to the lands office. DW 2 clarified that she had no transfer documents for the suitlands.
32. Haron Mworira Mwenda testified as DW 3. Relying on his witness statement dated 13.7.2018 as his evidence in chief, he denied knowledge of the subject suit land for he was never involved in the said transaction, and therefore the appellant had no basis to sue him before the court.
33. In cross-examination, DW 3 denied signing any sale agreement over the L.R No. Nyaki/Kithoka/4261, nor was he aware of its locality. He similarly denied knowing neither the appellant nor the 1<sup>st</sup> respondent nor being party to the alleged land transaction.
34. Duncan Gichunge Muthuri, an advocate, testified as D.W. 4. He told the court that he was aware of a letter dated 30.7.2013, which he produced as D. Exh No. (9). He said that he wrote the letter to the appellant, which address he had given to him during the preparations and execution of a sale agreement produced as P. Exh No. (1), at his office. DW 4 confirmed that he was the one who prepared and witnessed the signing of the transfer form by the appellant. After writing the demand letter. Moreso, DW 4 stated that the appellant failed to come for his balance of the purchase price.
35. At the close of the defense, the trial court delivered its judgment on 25.3.2024, dismissing the appellant's case and allowing the 1<sup>st</sup> and 2<sup>nd</sup> respondents counterclaim.
36. The appellant faults the trial court for:
  - i. Failing to appreciate the failure of the 1<sup>st</sup> – 2<sup>nd</sup> respondents to perform their obligations in the sale agreement dated 24.1.2013.



- ii. Not applying the law of the contract correctly and ordering for specific performance when the sale was vitiated by fraud.
  - iii. Misapprehending the facts and arriving at a decision contrary to the evidence available.
  - iv. Allowing the counterclaim despite finding the respondents guilty of fraudulent registration of titles to the suit land.
  - v. Treating the appellant's suit as if it was aimed at capitalizing and overturning the sale agreement.
  - vi. Basing his determination on the suit solely on a misguided finding, the appellant failed to receive the balance, yet that was not the case.
  - vii. Not appreciating the legal principle that the respondents could not benefit from an illegality that they deliberately and maliciously committed.
  - viii. Being biased against him.
  - ix. Basing the decision on irrelevant issues.
37. With leave of court, the appeal was canvassed through written submissions. The appellant relied on written submissions dated 10.7.2024. It is submitted that the 1<sup>st</sup> respondent did not honor the sale agreement by paying the balance on 31.5.2013 and 30.9.2013, as agreed or at all but instead fraudulently transferred the land to himself and the 2<sup>nd</sup> respondent only to purport to write a letter dated 30.7.2013, through DW 4 claiming that he was the one who failed to collect the balance.
38. The appellant submitted that specific performance was an equitable remedy given only to a party who has honored his part of the contract. In this instance, the appellant submitted that the 1<sup>st</sup> respondent not only failed to honor the sale agreement but also committed illegality and fraud in effecting the transfer and registration. Therefore, the appellant submitted that he who comes to equity must come with a clean hand and, hence, did not deserve specific performance. Reliance was placed on *Gurdev Singh Birdi & another vs Abubakar Madhubuti C.A No. 165 of 1996*. And *Reliable Electrical Engineers Ltd vs Mantrac (K) Ltd (2006) eKLR*.
39. The appellant submitted that there were no errors in the sale agreement contrary to what the trial court seemed to insinuate and instead dodged the questions of whether the 1<sup>st</sup> respondent's conduct was fraudulent in acquiring a portion of his land different from what he was shown initially as per clause (1) of the sale agreement. The appellant submitted that L.R No. Nyaki/Kithoka/4258 had no seasonal plants and was where his matrimonial home stood, hence demonstrating the fraud committed by the 1<sup>st</sup> respondent to acquire a different land, which fact was apparent during the trial that parties could not agree in the location of the portion sold going by his evidence and that of DW 2.
40. The appellant submitted that given the discrepancies in the locality of the portions, the 1<sup>st</sup> respondent could not be allowed to benefit from the illegality, and the court should not give a seal of approval to such conduct. Reliance was placed on *Omega Enterprises (K) Ltd vs Kenya Tea Development Corporation & others C.A No. 59 of 1993*.
41. The appellant submitted that from the record, the 1<sup>st</sup> respondent did not prosecute his counterclaim, yet it was allowed. He also submitted that no evidence was tendered on dishonest conduct, unlike the 1<sup>st</sup> respondent who took advantage of his skills as a lands surveyor and connections at the land ministry to acquire his land unjustly and also fail to pay the balance. The appellant submitted that the trial



court was irrational to turn the tables and say that he wanted to benefit twice, which was not a valid conclusion.

42. The appellant submitted that it was the 1<sup>st</sup> respondent who fraudulently registered his land L.R No. 4258, which was prime land near the tarmac. Reliance was placed on [Patel vs Singh C.A Civil Appeal NRB No. 64 of 1985](#) citing with approval Archbalds Freight-age Ltd vs Spanglett Ltd (1961) 1 QB 374.
43. The appellant submitted that the whole process, from the survey, subdivision consents and registration, was barred with illegalities, which he proved during the trial, including in the criminal cases, only for the trial court to favor the 1<sup>st</sup> respondent and rubber stamp illegality.
44. As to bias, the appellant submitted that it was open on page 114 despite a clear letter from KRA on a forged PIN certificate and the insinuation the trial court made on benefitting twice. The appellant submitted that his evidence was clear and cogent and proved the claim, which, unfortunately, the trial court misunderstood or ignored in favor of the 1<sup>st</sup> respondent. The appellant urged the court to find the appeal with merits and proceed to cancel the title deeds issued in favor of the respondents guided by Arithi Highway Developers Ltd vs West End Butchery Ltd (2015) eKLR.
45. The respondents relied on written submissions dated 29.7.2024. While admitting that a sale agreement took place on 24.1.2013 and Kshs.400,000/= was paid as deposit, the respondent submitted that the appellant applied for a land control board consent to survey the land into five portions as per the mutation form and the resultant portions to the extent of including the 2<sup>nd</sup> respondent as a beneficiary to the title.
46. Further, the respondent urged the court to find there was no dispute on the survey, application for the land control board consent to subdivide, the resultant land control board consent, executions of the mutation form, transfer forms, and its registration for the issuance of new title numbers.
47. In addition the respondent submitted that since courts do not re-write contracts as held in South Nyanza Sugar Co. Ltd vs. Leonard Overa (2020) eKLR, therefore, as per clause 4 of the sale agreement, the transfer of 1/8 of an acre was lawfully effected before full payment was made. Consequently, it was submitted that it was wrong for the appellant to refuse to accept the balance despite requests to do so and a letter dated 30.7.2013. The respondents submitted that the parties' intentions were expressed in the sale agreement; they paid a substantial deposit, met the survey costs as per clause 6 therein, and made efforts to clear the balance.
48. The respondents also submitted that if the appellant were to keep the deposit, the land and survey fees paid would amount to unjust enrichment. Reliance was placed on Joel Mwangangi Kithure vs Priscah Mukorimburi (2022) eKLR, more so when the appellant did not plead willingness to refund the deposit or settle half fees of survey works as per clause 6 of the sale agreement. The 1<sup>st</sup> respondent submitted that he was always ready and willing to pay the balance of the purchase price and hence had no intention to commit any fraud going by the expressed intention as per a letter dated 31.7.2013.
49. A first appellate court has the jurisdiction to reverse or affirm the findings of a trial court. Parties before such a court have a right, unless restricted by law, to subject the whole case to rehearing afresh both on questions of law and fact. The court approaches the case with an open mind and arrives at its findings with reasons for all issues arising therefrom. Given that such a duty makes the court a final determinant of facts, a litigant is entitled to full, fair, and independent considerations of the evidence as set out in Section 78 of the [Civil Procedure Act](#). See also Gitobu Imanyara & others vs. A.G. (2016) eKLR and Peters vs Sunday Post (1958). Having carefully gone through the lower court record, pleadings, evidence tendered, grounds of appeal, and written submissions, the issues calling for my determination are:



- i. Whether the appellant proved breach of contract by the 1<sup>st</sup> respondent.
  - ii. Whether the appellant pleaded and proved fraud against the respondents and the 3<sup>rd</sup> defendant in subdividing, transferring and registering L.R No. Nyaki/Kithoka/4258 and 4261 from the initial L.R No. Nyaki/Kithoka/511.
  - iii. If the appellant was entitled to the reliefs in the plaint dated 31.7.2013.
  - iv. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents lawfully and procedurally acquired L.R No. Nyaki/Kithoka/4258 from the appellant.
  - v. If the appellant breached the sale agreement between him and the 1<sup>st</sup> and 2<sup>nd</sup> respondents by declining to collect and acknowledge receipt of the balance of the purchase price.
  - vi. If the 1<sup>st</sup> & 2<sup>nd</sup> respondents were entitled to specific performance or, in the alternative, a refund of the deposit, liquidated damages and Kshs.59,550/= as per clauses 5 & 6 of the sale agreement.
  - vii. If the appellant had a cause of action against the 3<sup>rd</sup> defendant.
  - viii. If the appeal has merits.
50. It is trite law that parties have the freedom to contract and that courts of law do not re-write contracts and only enforce the same unless vitiated by fraud, illegality, or procured through duress. In *Margaret Njeri Muiruri vs. Bank of Baroda (K) Ltd* (2014) eKLR, the court cited with approval *NBK vs Pipeplastick Sankolit (K0 Ltd Civil Appeal No. 95 of 1999*, that parties are bound by their contract and courts only interfere or refuse to enforce contracts which are unconscionable unfair or oppressive due to procedural abuse during the formation.
51. A land sale agreement has to conform with Section 3(3) of the *Law of Contract Act* as read together with Section 38 of the *Land Act*. In *Okoth vs Nyaberi & another (Civil Appeal 248 of 2018)* (2024) KECA 427 (KLR) (26<sup>th</sup> April 2024) (Judgment). The court observed that Section 3 of the *Law of Contract Act* requires that all contracts for the disposition of an interest in land shall be signed by the parties to it, and each signature must be attested.
52. In *Century Engineers & Builders Ltd vs. Kenya Bureau of Standards* (Civil Appeal E 398 of 2021 (2023) KECA 1289 (KLR) 27<sup>th</sup> October (2023) Judgment, the court reiterated that the terms and conditions in a contract bind parties to it. The court cited with approval *Jiwaji vs jIwaji* (1986) E. A 547 that where there is no ambiguity, an agreement must be construed according to the precise words used by the parties.
53. In *Euromec International Ltd vs Shandong Taikai Power Engineering Co. Ltd* (2021) eKLR, the court stressed the principle that public policy demands that contracts which are freely and consciously entered into be honored save for very peculiar circumstances when equity may be prepared to relieve a party from a bad bargain as held in the *County Government of Migori vs Hope Self-Help Group* (2020) eKLR.
54. Regarding time limitations in contracts of sale, in *Housing Co. of East Africa Ltd vs Board of Trustees NSSF & others* (2018) eKLR, the main issue for determination was whether or not the rescission or repudiation of the contract by the 1<sup>st</sup> respondent was valid and the consequences arising from it. To answer the question, the court had to determine whether time was or was not of the essence and, if so, whether or not a completion notice was issued. The court observed that it was settled law that contracts were voluntary undertakings, and when parties do contract, the court does not have the right or ability



- to substitute its judgment for that of the parties and that if the contract is clear and unambiguous, the court's role is to interpret the contract as written and cannot re-write it for it can only be substituted with another agreement.
55. The court relying on *JEM Construction Ltd & Nyamuyu vs Nyaga* (1983) KLR 282 held that where a purchaser drags his feet and has been guilty of unnecessary delay, the vendor was at liberty to serve a notice to the purchaser limiting time at whose notice expiry, he could treat the sale agreement as rescinded. The court cited *Nabro Properties Ltd vs Sky Structures Ltd & others* (2002) 2 KLR 299 that no man shall take advantage of his wrongdoing.
  56. Applying the preceding caselaw and principles to the sale agreement dated 24.1.2013, the subject matter of sale was 1/8 an acre out of L.R No. Nyaki/Kithoka/511, the purchase price was Kshs.750,000/= Kshs.400,000/= deposit was paid at the signing of the agreement, Kshs.200,000/= was to be paid by 31.5.2013 while Kshs.150,000/= was to be paid by 30.9.2013 subdivision process was to commence upon execution of the sale agreement fencing of the portion upon signing transfer was to take place upon subdivision even before payment of the balance.
  57. Parties had agreed to equally share all expenses up to the finalization of the transaction purchaser was to pay all the expenses up to the processing of the two titles, with the vendor to pay ½ of the costs through reduction from the final installment on or before 30.9.2013; vacant possession was to take place on or before 1.3.2013 after removal of seasonal crops by the vendor. Any breach was to attract an agreed liquidated damages of Kshs.1,500,000/= to be paid by the defaulter or offender to the sale agreement.
  58. From the plaint, the appellant pleaded that he willingly handed over the original title deed to the 1<sup>st</sup> respondent to proceed with the subdivisions and the excision of the sold portion only for the 1<sup>st</sup> respondent to illegally, secretly, wrongly, and unlawfully subdivide the land into five portions and transfer to himself and his wife and other third parties such as the 3<sup>rd</sup> defendant, contrary to the sale agreement and for not paying the balance, breaching his fiduciary trust, effectively changing the terms of the contract, unprocedurally transferring the land, failing to return his title deed and lastly refusing to clear the balance.
  59. In the further amended defense and counterclaim, the 1<sup>st</sup> & 2<sup>nd</sup> respondents denied the alleged fraud or illegality, stating that the appellant was party to all the processes of subdivisions, survey, transfer, registration and was the one who declined to collect the balance of the purchase price.
  60. It is trite law that when a title deed is under attack, every paper trail towards its acquisition has to be produced to show that the process of acquisition was regular, lawful, and procedural. In *Wambui vs Mwangi and others* (Civil Appeal 965 of 2019(2021) KECA (KLR) (19<sup>th</sup> November 2021 (Judgment), the court observed that Section 80 of the *Land Registration Act* does not provide succor for fraudsters such as the appellant in the appeal and that his claim for the suit property could not be considered as a standalone issue without interrogating the root of his title and manner of acquisition. The court held that no court should sanction and pass as valid any title to property founded on fraud, deceitfulness, a construed decree, illegality, nullity, irregularity, unprocedural, or was otherwise a product of a corrupt scheme.
  61. From the evidence tendered by the parties at the lower court, it is apparent that clear timelines to complete the transaction were agreed upon and set out in the sale agreement. The 1<sup>st</sup> & 2<sup>nd</sup> respondents obtained a title deed for L.R No's. Nyaki/Kithoka/4258 on 9.5.2013. Title deed for L.R No. Nyaki/Kithoka/4259, 4260, and 4261 & 4262 in the name of the appellant were issued on 21.3.2013. D. Exh No. 13 & 14 were issued on 6.2.2013. The land transfer form for L.R No. 4258 was signed on 7.5.2013. The date of presentation to the land registry for registration is not clear or indicated. Receipts



- for payment of transfer fees, registration, and stamp duty were not availed to the trial court by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The consideration paid was not indicated in both the applications for land control board consents as well as in the transfer forms.
62. How the names of the 2<sup>nd</sup> respondent, who was not a party to the sale agreement, became a co-owner of the suitland with the 1<sup>st</sup> respondent was not clarified by DW4. A contract can only bind parties to it and not third parties. The consideration was omitted in the land control board consents dated 6.2.2013 and 6.3.2013. The mutation form dated 11.2.2013 lacked the date it was presented for registration, the registration date, the stamp and the signature of the land registrar. The pin used to lodge the transfer form had been disputed by the issuing authority, the KRA, in a letter dated 30.10.2014 to the DCIO.
  63. According to the 1<sup>st</sup> & 2<sup>nd</sup> respondents, the consent to transfer the land was issued on 6.3.2013, the transfer form was completed and registered on 7.5.2013, and a title deed was issued on 9.5.2013. All these facts were pleaded in paragraph 15 of the amended defense and counterclaim. Going by clause 2 of the sale agreement, Kshs.200,000/= should have been paid by 31.5.2013 and the balance of Kshs. 150,000/= cleared by 30.9.2013, which was to be the completion date.
  64. By the time the 1<sup>st</sup> & 2<sup>nd</sup> respondents acquired their title deed on 9.5.2013, they knew of the due date to pay Kshs.200,000/= to the appellant. Evidence to the effect that the 1<sup>st</sup> respondent tried to either deposit the Kshs.200,000/= with DW 4 or to the known bank account of the appellant on its due date was not availed before the trial court. The explanation that the appellant needed to acknowledge receipt of the money lacks basis for a deposit slip to the known account would have sufficed.
  65. In his evidence, DW 1 said that it was the appellant who handed over vacant possession on 1.3.2013, hence enabling him to deposit building materials on the land. So, if the 1<sup>st</sup> respondent acquired a title deed on 7.5.2013 and obtained vacant possession on 1.3.2013, it was apparent that nothing was stopping him from clearing the entire purchase price or, at the very least, Kshs.200,000/= on its due date.
  66. In the initial statement of defense dated 9.9.2013, the 1<sup>st</sup> & 2<sup>nd</sup> respondents did not plead the manner in which they sought to comply with the sale agreement by clearing the installment due on 31.5.2013 and or offering to deposit the entire balance in court.
  67. In the affidavit sworn on 10.9.2013, the appellant indicated that he signed blank papers and left them with the 1<sup>st</sup> respondent on the understanding that they were for subdivisions since he was working away in Maragua district. The 1<sup>st</sup> & 2<sup>nd</sup> respondents did not put any questions to PW 1 & 2 as to when they demanded the collection of the balance of the purchase price from the appellant.
  68. As to the exact locality of the portion sold vis a vis the appellant's matrimonial house, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were unable to clarify the position. Clause no. 1 of the sale agreement merely indicated that the 1<sup>st</sup> respondent had seen the material parcel of land and purchased it free of any encumbrances. The recital to the sale agreement merely talked of 1/8 of an acre to be excised from the mother title.
  69. The exact locality of the sold portion was not captured in the sale agreement and only came up for the first time in the mutation form dated 11.2.2013, which the appellant disputed signing. The maker of the mutation form was not a party to the sale agreement. He was also not called to testify by the 1<sup>st</sup> respondent, to clarify whether the appellant was present in picking the ground locality of the excised portion and consented to it.
  70. The medical report by the appellant shows the dates he was attending treatment at Muranga Hospital as 1.3.2013, 6.3.2013, 7.3.2013, 23.4.2013, and 7.5.2013. It, therefore, left many doubts as to whether he was present before the land control board, at the land surveyor's office, and at the offices of



- Gichunge Muthuri advocate at the same time. Similarly, there was no evidence tendered to show that the duplication of numbers as per the district land registrar's letter dated 4.7.2013 and the district land surveyor's letters dated 14.8.2013 involved the appellant, yet the same affected his parcels of land.
71. Regarding the letter dated 30.7.2013 by the law firm of DW 4, again the due date for Kshs.200,000/= was on 31.5.2013. The letter was written almost five months after the deadline. The 1<sup>st</sup> & 2<sup>nd</sup> respondents lodged a counterclaim for specific performance or, in the alternative, a refund on 23.11.2018, which was close to five years after the issuance of the title deed in their favor and two years after they had been charged in Meru CM Cr. Case No. 306 of 2016 for forgery and obtaining title registration by pretenses.
  72. The appellant pleaded that no payment was effected at his bank account the same way the initial deposit was made. In reply to the defence to the counterclaim dated 20.7.2019, the 1<sup>st</sup> & 2<sup>nd</sup> respondents were silent on why the balance was not paid to the said bank account. The 1<sup>st</sup> & 2<sup>nd</sup> respondents, equally in their testimony, did not offer a satisfactory answer as to why they opted not to use the known method to deposit the balance, since its due date to the filing of the suit and their counterclaim.
  73. Fraud or illegality must be specifically pleaded and proved to a balance higher than in the ordinary suits. See *Arithi Developers vs West End Butchery* (supra). The appellant had pleaded the particulars of fraud, illegality, and procurement of the title deed through corrupt means. The burden of proof under Sections 107-111 of the *Evidence Act* was on the appellant to prove the existence of those facts. The appellant relied on a forensic document examination report dated 5.10.2020, conviction in Meru CM Cr Case No. 306 of 2016 and a letter from KRA alluded to above. The document examiner ruled out the signing of the transfer form and the application for land control consent by the appellant. The forensic document examination report was not challenged through a rival report by the 1<sup>st</sup> & 2<sup>nd</sup> respondents.
  74. In *Dick Omondi Ndiewo T/A Ditech Engineering Service vs Cell Care Electronics* (2015) eKLR, the court observed that the evidence of an expert can only be challenged by evidence of another expert. In *Ali Mohamed Sunkar vs Diamond Trust Bank (K) Ltd Misc Application No. 427 of 2010*, the court observed that a handwriting expert's report can only be challenged by a counter-expert report.
  75. In this appeal, the oral evidence of DW 1 and DW 2 could not be used to discredit the report that the signatures appearing in the transfer and application for land control board consents were not made by the appellant. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not call for the chairman and secretary of the land control board, as well as the land surveyor who witnessed the appellant attending the two sessions and the ground during the subdivisions, to lead credence to their version that the appellant consented to the survey workers and subdivisions.
  76. Additionally, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not call the land registrar, the land surveyor who prepared, lodged, and registered the mutation forms, processed or who registered the new numbers and issued the title deed with the full consent and approval of the appellant. Moreover, the 1<sup>st</sup> & 2<sup>nd</sup> respondents failed to avail before the trial court documents showing when and who paid for the transfer fees, stamp duty, and registration fees for the issuance of the title deed. Similarly, even as the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought Kshs.59,850/=, which were special damages, official receipts for the same were not produced before the trial court.
  77. Acquisition of registration of title through unprocedural means makes a title deed impeachable in law, as held in *Zachary Omondi Odongo vs Barnard Stephen Omollo & others* (2022) eKLR. Transfer of land cannot be undertaken without payment of stamp duty and registration fees. An allegation of fraudulent and criminal conduct must be proved on a degree higher than a mere balance of probability



- as held in *Vijay Morjaria vs Darbar Madhusingh* (2000) eKLR, *Elias Njue Ireri vs Kubu Benson Nderi & others* (2019) eKLR and *Elias & another vs Hezekiah & others* (2023) KEELC 429 (KLR) (1<sup>st</sup> February 2023) (Judgment).
78. In *Zachary Wambugu Gathimu & another vs John Ndungu Maina* (2019) eKLR, the court cited *Elijah Makeri Nyagwara vs Stephen Mungai Njuguna & another* (2013) eKLR, that a title can be impeached if obtained unprocedurally.
79. In my considered view, the 1<sup>st</sup> & 2<sup>nd</sup> respondents failed to shake the overwhelming evidence tendered by the appellant showing irregularities and illegalities in the process of acquiring the title deed to the suit land. Once the appellant discharged the legal burden, the onus was on the 1<sup>st</sup> and 2<sup>nd</sup> respondents to avail all the paper trail to show that the survey subdivision, transfer, and registration of L.R No. Nyaki/Kithoka/4258 was procedural, regular and lawful in the first instance and secondly, they obtained the title deed for valuable consideration.
80. The 1<sup>st</sup> and 2<sup>nd</sup> respondents would have absolutely nothing to lose if they availed the land surveyor who prepared the mutation form, conducted the survey works and the the chairman and secretary who prepared not only D. Exh No. 14 & 15 but also the two land control board consents. Similarly, the 1<sup>st</sup> & 2<sup>nd</sup> respondents failed to call the land registrar/surveyor who received and registered both the mutation forms and the transfer forms. The failure to pay the balance of the consideration to the account of the appellant for close to five months after the due date and in court when the suit was filed showed that the 1<sup>st</sup> respondent had no intention to complete the land sale agreement. He was the one who breached the sale agreement and failed to involve the appellant in the entire process of survey, subdivision, transfer, and registration. See *Kagiri Wamarwe vs Samuel Kibuu Maina & another* (2009) eKLR and *Sailowua vs Ologeso & another* (2023) KEELC 20885 (KLR) (24<sup>th</sup> October 2023) (Judgment).
81. Breach of a contract refers to a violation of a contractual obligation by failing to perform one's promise by repudiating it or by interfering with another party's performance. It gives rise to other remedies. See *Black Law's Dictionary* 9<sup>th</sup> Edition, page 213.
82. In *Collins vs Ogango* (Civil Appeal 427 of (2018) (2024) KECA 19 (KLR) (25<sup>th</sup> January 2024) (Judgment) the court found the appellant was in breach of the contract by purporting to amend it to suit herself, failing to do what the contract demanded of her especially the acquisition of completion certificate and proper communication to the respondents and for not being keen to adhere to the terms and conditions, hence betraying the intention of the parties.
83. The court cited *Delilah Kerubo Otiso vs Ramesh Chander Ndingra* (2018) eKLR that where the conduct is oppressive, callous, highhanded, outrageous and underhand as bordering on fraud with no slightest intention to honor the agreement, general damages could be tenable to avoid the court sanctioning the unacceptable conduct of a party and allow him to benefit from his mischief.
84. The court found the agreed liquidated damages in case of a default after issuance of a notice, an appropriate sanction for the unbridled mischief guided by the *Supreme Court Practice* (1985) Vol. 1, page 33. The court on damages in lieu of specific performance cited *Ritho vs Karithi & another* (1988) KLR 237 and *Gharib Suleman Gharib vs Abdulrahman Mohamed Agil* (CAK) Civil Appeal No. 112 of 1998 that specific performance is based on the existence of a valid and enforceable contract and is not granted where the party who seeks it can obtain sufficient remedy by an award of damages the focus is whether or not specific performance will do more perfect and complete justice than an award of damages.
85. From the evidence, it is clear that the parties herein are unable to agree on the exact locality of the land that they intended to transact. The meeting of minds is missing in so far as the critical aspect of the



transaction is concerned. Therefore, I find there would be no basis to order for specific performance where also the 2<sup>nd</sup> respondent was not contemplated in the sale agreement in the first instance and was not a party or a witness to it. Secondly, the court has found no evidence of willingness by the 1<sup>st</sup> respondent to complete the transaction by way of a tender of the balance before the trial court. The upshot is that I find there was no basis, given the overwhelming evidence, facts and the law, to dismiss the appellant's suit and to allow the counterclaim in the manner it was done by the trial court.

86. The appeal herein succeeds in terms of invalidating the survey, subdivisions of L.R No. 511 and the resultant transfers and registration of L.R No's. 4258 – 4262. The title deeds subsequently issued as a result of this are cancelled for the land to revert to its original status. The 1<sup>st</sup> & 2<sup>nd</sup> respondents are permanently restrained from interfering, trespassing, selling, utilizing, building, or in any way interfering or dealing with the same. There will be no general damages payable to the appellant. Costs at the lower court to the appellant.
87. The counterclaim by the 1<sup>st</sup> respondent succeeds in terms of being refunded the consideration by the appellant.
88. Given the non-issuance of any notice of completion, repudiation, or breach of the sale agreement the 1<sup>st</sup> respondent is not entitled to any interest in his deposit.
89. Each party is to bear the costs of this appeal.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18<sup>th</sup> DAY OF SEPTEMBER, 2024.**

In presence of

C.A Kananu

1<sup>st</sup> respondent

Paul Ndumba in person

Mr. Mwirigi Kaburu for the respondent

**HON. C K NZILI**

**JUDGE**

