Ray Power Limited & another v Richmond Company Limited & another (Land Case 33 of 2022) [2024] KEELC 7060 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7060 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

LAND CASE 33 OF 2022

LL NAIKUNI, J

OCTOBER 22, 2024

BETWEEN

RAY POWER LIMITED ..... 1ST PLAINTIFF

HUSSEIN HASSAN AMIN ..... 2ND PLAINTIFF

AND

RICHMOND COMPANY LIMITED ..... 1ST DEFENDANT

SIMON MUKUNYU MWANGI ..... 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a suit instituted through a Plaint dated 22nd March, 2022 filed on 23rd March, 2022 by Ray Power Limited and Hussein Hassan Amin, the Plaintiffs herein against Richmond Company Limited and Simon Mukuyu Mwangi the 1st and 2nd Defendants herein.

2. Despite of the service of the pleading and summons to enter appearance, through substituted means under the provision of Order 5 Rule 17 of the Civil Procedure Rules, 2010 by publication of a notice in one of the local newspapers – "The Standard" the edition of 3rd June, 2022 with a wide national circulation and the 1st and 2nd Defendants never filed a Statement of Defence or produced any documents. Subsequently, after conducting a Pre – Trial Conference under the provision of Order 11 of the Civil Procedure Rules, 2010 and taking direction under Order 10 Rule 4, 5 & 6 of the Civil Procedure Rules, 2010 the matter was slated for hearing.

II. Description of the Parties in the suit

3. The Plaintiff was described as limited liability company incorporated under the *Companies Act*, Cap. 486 of the Laws of Kenya in the Republic of Kenya; the 2nd Plaintiff was described as a male adult of sound mind residing and working for gains in Kenya.

4. The 1st Defendant was described as a male adult of sound mind residing and working for gain in the Republic of Kenya. The 2nd Defendant was described as a Limited Liability Company incorporated under the *Companies Act* laws of Kenya.

III. Court directions before the hearing

5. Nonetheless, on 15th June 2022, the Honourable Court fixed the hearing dated on 4th May, 2023 with the Plaintiffs having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the Honourable Court putting into consideration that the Defendant has failed to Enter Appearance as required by law under Orders 6, 7 and 11 of the Civil Procedure Rules, 2010 the Honourable Court directed that the matter proceed on for formal proof hearing under Order 10 Rules 4 and 8 of the Civil Procedure Rules, 2010 on 17th November, 2022 in open court. On 1st February, 2024, the matter was set for formal proof hearing on 30th April, 2024.

6. This matter proceeded on for hearing by way of adducing "viva voce" evidence with the Plaintiff's witness (PW - 1) testifying in Court on 30th April, 2024 at 2.00 pm.

IV. The Plaintiff's case

7. From the filed pleadings, at all material times relevant to this suit and upon conducting its due diligence, it entered into a binding agreement with the Defendants for the sale and purchase of ALL THAT piece of land known as MMS/BLOCK V/49. (Hereinafter referred to as "the Suit Property"). At all times relevant to this suit, the 2nd Defendant was the registered owner of the suit property while the 1st Defendant was the Director of the 2nd Defendant who negotiated on behalf of the 2nd Defendant.

8. The Plaintiff having viewed the suit property and having liked the same instructed the law firm of Messrs. Sachdeva Nabhan and Swaleh Advocates who prepared a sale agreement dated 27th January, 2017 wherein the purchase price was agreed at a sum Kenya Shillings Thirty-Two Million Eight Hundred Thousand (Kshs. 32,800,000.00/=) but pursuant to a duly executed deed of variation the purchase price was revised to a sum of Kenya Shillings Twenty-Seven Million (Kshs. 27,000,000.00/=). The Plaintiff through its advocates then made a payment of a sum of Kenya Shillings Twelve Million One Hundred and Fifty Thousand Three Thirteen Hundred (Kshs 12,150,313.00/=) personally to the 1st Defendant upon execution of the sale agreement. This amount was paid from 10th February, 2017 to 26th February, 2018. The Plaintiffs prior to executing the said agreement had made a payment of Kenya Shillings Five Hundred Thousand (Kshs. 500,000.00/=) personally to the 1st Defendant on 30th January, 2017 which amount was duly acknowledged as part of the purchase price.

9. Having paid a substantial sum of money and being eager to complete the sale, the Plaintiff became uneasy when the Defendants could not complete the sale. The Plaintiffs thus holds the Defendants especially the 2nd Defendant in breach of the agreement. The Plaintiffs relied on the following particulars of breach by the 1st & 2nd Defendants: -

    a. Failure to furnish the Plaintiff with the sale completion documents.

    b. Failure to execute the transfer documents

c. Deliberately attempting to frustrate the Plaintiff in this sale agreement

d. Attempting to sale the suit property to unsuspecting their parties.

e. Taking inordinately long time to conclude its end of the transaction

f. Others particulars to be furnished during the trial.

10. The Plaintiffs lodged a complaint and recorded a statement at Director Criminal Investigation Officer (DCIO) Likoni police station, however up to date the issue is yet to be resolved. The Plaintiffs further averred that in the circumstances, it has no other alternatives or efficacious remedy other than to approach this Honourable court for the protection of his proprietary rights to the suit property. Despite demand and notice of intention to sue being served upon the Defendants, the Defendants have refused, ignored and neglected to make good the Plaintiff's claim hence this suit.

11. The Plaintiffs stated that there was no suit pending and that there have been no previous proceedings in any Court between the Plaintiff and the Defendants over the subject property. The suit property is situated in Mombasa County therefore the Plaintiffs submitted to the jurisdiction of the court.

12. The Plaintiffs stated that in the circumstance, the Plaintiffs' claim against the 1st & 2nd Defendants was therefore for;

a. A permanent injunction to issue restraining the Defendants whether by themselves, their agents, servants or persons acting under their authority from sub - dividing, leasing, selling, disposing off in or any way interfering with the Plaintiffs rights to property MMS/BLOCK V/49.

b. Specific Performance of the Sale Agreement dated 27th January, 2017 and varied on 12th October, 2017, between the Plaintiff and the 1st Defendant.

c. A declaration that the suit property belongs to the Plaintiff.

d. Such other or further relied that this Honourable Court may deem fit and just to grant.

13. The Plaintiff called their witness PW - 1 on 30th April, 2024 at 2.00 pm where he averred that: -

A. Examination in Chief of PW - 1 by Mr. Waziri Advocate.

14. PW - 1 testified under oath in Swahili language. He identified HUSSEIN HASSAN AMIN, a citizen of Kenya holding the national identity card bearing all the relevant particulars. He was born in the year 1960. The said identification card was issued at Mandera. His occupation was construction of houses and resided in Nairobi. According to him the suit land was shown to them by the Land brokers. They conducted an official search and took it to their lawyer. They found that the land was registered to Richmond Company Limited and Mr. Simon Mukunyu Mwangi was a director.

15. PW 1 confirmed that they entered into a sale agreement. They agreed to sell it at a sum of Kenya Shillings Thirty Two Million Eight Hundred Thousand (Kshs. 32,800,000/-) dated 12th October, 2017, the transfer was signed on October 2017. They paid Richmond Company Limited almost a sum Seventeen Million (Kshs. 17,000,000/-) as purchase price. There was also a lot of money paid. They would pay through the Advocate, some cash and MPESA.

16. Ray Power Limited was his company; he was a director in it. He urged the court to have the title deed to be registered in their names. They were ready to have the outstanding balance deposited in court. They had possession of the land but they could not undertake any development as it had not yet been

registered in their names. The title deed was being held by Mr. Naban Swale Advocate. He was the one who was undertaking the transaction on behalf of the purchaser and the vendor.

17. On 30th April, 2024 the Plaintiff marked his case closed through his Counsel Mr. Waziri Advocate.

V. Submissions

18. On 30th April, 2024 after the Plaintiffs marked the close of this cases, the Honourable court directed that the Plaintiffs to file their submissions within stringent timeframe thereof on. Pursuant to that on 30th May, 2024 the Honourable court reserved a date to deliver its Judgement on 22nd October, 2024.

A. The Written Submissions by the Plaintiffs

19. The Plaintiffs through the law firm of Messrs. Waziri Omollo & Co. Advocates filed their written submissions dated 29th May, 2024. Mr. Omollo Advocate commenced the submissions by stating that the Plaintiffs filed this suit on 23rd March 2022 vide a Plaint dated the 22nd March 2022.In the Plaint, the Plaintiffs averred that the 1st Plaintiff-through its Director, the 2nd Plaintiff-entered into a binding agreement with the Defendants for the sale and purchase of all that parcel of land known as MMS/ BLOCK V/49 (Hereinafter referred to as "the Suit Property") after conducting due diligence.

20. The Plaintiffs also averred that the 1st Defendant was the registered owner of the suit property while the 2nd Defendant was the director of the 1st Defendant Company who negotiated on behalf of the 1st Defendant. The Plaintiffs further averred that they instructed the Law Firm of Sachdeva Nabhan and Swaleh Advocates who prepared a Sale Agreement dated 27th January 2017 wherein the purchase price was agreed at a sum of Kenya Shillings Thirty-Two Million Eight Hundred Thousand (Kshs. 32,800,000/-) but pursuant to a duly executed Deed of Variation, the purchase price was revised to a sum of Kenya Shillings Twenty-Seven Million (Kshs. 27,000,000/-)

21. The Learned Counsel averred that the Plaintiffs, through their Advocates, made a payment of a sum of Kenya Shillings Twelve Million One Hundred and Fifty Thousand Three Thirteen Hundred (Kshs. 12,150,313/-) to the Defendants upon execution of the sale agreement. This amount was paid from 10th February 2017 to 26th February 2018. Prior to executing the said Agreement, the Plaintiffs had made a payment of a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-) personally to the 2nd Defendant on 30th January 2017 which was amount duly acknowledged as part of the purchase price.

22. Having paid a substantial sum of money and being eager to complete the sale, the Plaintiffs became uneasy when the Defendants did not complete the sale. The Plaintiffs thus hold the Defendants in breach of the Agreement. The Plaintiffs further averred that as a result of the foregoing, they suffered a great loss. They pray for a permanent injunction restraining the Defendants from interfering with their proprietary rights over the suit property, specific performance of the Sale Agreement dated 27th January 2017 and varied on 12th October 2017, a declaration that the suit property belongs to the Plaintiffs and any further relief the Court may deem fit and just to grant.

23. On the Plaintiffs case, the Learned Counsel submitted that in the 2nd Plaintiff's statement, the Plaintiff states that the 2nd Defendant informed him that he was the owner of the suit property although it had been registered, in the 1st Defendant Company's name. The 2nd Defendant furnished a copy of the Title Deed as document as proof of ownership. During the formal proof hearing, the 2nd Plaintiff testified as PW - 1. The 2nd Plaintiff testified that they had conducted a search that showed the 1st Defendant as the registered owner of the suit property. The 2nd Plaintiff testified that he negotiated with the 2nd Defendant at the Plaintiffs' Advocates (Sachdeva Nabhan & Swaleh Advocates) offices. On the 27th

January 2017, while at the office they signed a Sale Agreement for the sale and purchase of all that parcel of land known as MMS/BLOCK V/49 at an agreed purchase price of a sum of Kenya Shillings Thirty-Two Million Eight Hundred Thousand (Kshs. 32,800,000/-). The Plaintiffs had conducted a search that showed the 1st Defendant as the registered owner of the suit property.

24. The Plaintiffs authorized Sachdeva Nabhan & Swaleh Advocates to make payments on their behalf. Between 10th February 2017 and 26th February 2018, they were able to pay the Defendants a total of a sum of Kenya Shillings Twelve Million One Hundred and Fifty Thousand Three Thirteen Hundred (Kshs. 12,150,313/-). The Purchase price was later revised to a sum of Kenya Shillings Twenty-Seven Million (Kshs. 27,000,000/-) vide a duly executed Deed of Variation dated 12th October 2017. The 1st Plaintiff testified that they have been pursuing the Defendants for completion of the sale transaction but the 1st Defendant kept on giving excuses and the 1st Defendant was now in the USA and the transaction has not been completed.

25. According to the Learned Counsel, despite having vacant possession of the suit property and Vendor having executed transfer documents which are held by their mutual Advocate for the conveyancing transaction the Plaintiffs cannot develop it since they have no Title Deed and were informed that land brokers wanted to sell the property to a third party.

26. The 2nd Plaintiff adopted his witness statement as part of his evidence. He submitted the following documents into evidence:

    a. A copy of the 2nd Plaintiff's National Identity Card.

    b. A copy of Certificate of Incorporation for the 1st Plaintiff.

    c. A copy of CR - 12 Form for the 1st Plaintiff.

    d. A copy of the Title Deed.

    e. A copy of Sale Agreement dated 27th January 2017.

    f. Variation Agreement dated 12th October 2017.

    g. Certificates of Official Search dated 2nd February 2017, 16th June 2017 and 28th June 2017.

    h. Deed of Acknowledgment dated 10th February 2017 signed by the 2nd Defendant.

    i. Copy of Transfer

    j. Copy of Cheque of a sum of Kenya Shillings Three Million Eight Hundred (Kshs. 3,800,000/-) dated 26th September 2017 from Gulf African Bank.

    k. Copy of Cheque of a sum of Kenya Shillings Five Thousand (Kshs. 500,000/-) dated 12th October 2017 from Diamond Trust Bank Kenya.

    l. Copy of Cheque of a sum of Kenya Shillings Three Hundred and Ten Thousand Five Hundred (Kshs. 310,500/-) dated 7th November 2017 from Gulf African Bank.

27. The Learned Counsel further submitted that the Defendants did not file a Statement of Defence or produce any evidence. The Learned Counsel relied on the following issues for determination:

    a. Whether the Plaintiffs have proved their case

    b. Whether the Plaintiffs are entitled to the prayers sought

28. According to the Learned Counsel, the Plaintiffs prayed for a permanent injunction against the Defendants, specific performance of the Sale Agreement dated 27th January 2017 and varied on 12th October 2017, and a declaration that the suit property belongs to the 1st Plaintiff due the Defendants' breach of the said Sale Agreement. The provision of Section 107 of the *Evidence Act*, Cap. 80 stipulates as follows regarding the legal burden of proof:

> " 107. Burden of proof
>
> (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.

29. The provision of Sections 109 and 112 of the *Evidence Act*, however, provides as follows regarding the evidential burden of proof: -

> " 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.
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> 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."

30. The Learned Counsel relied on the case of "Stanley Maira Kaguongo – Versus - Isaac Kibiru Kinuthia (2022) eKLR" which discussed the standard of proof in civil cases as follows in Paragraph *29*:

> " The standard of proof in cases is the legal standard to which a party who holds the burden of proof is required to prove his/her case. Mativo J in the above case stated that the standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases such as the present one, the standard of proof is the balance of probabilities. Justice Mativo cited with approved Lord Denning in Miller – Versus - Minister of Pensions |194212 ALL ER 372 as follows:
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> > "The .....(standard of proof).....is well settled. It must carry a reasonable degree of probability..... If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not."

31. The Learned Counsel averred that the Plaintiffs had proved with sufficient evidence that they had entered into a binding agreement with the Defendants for the sale and purchase of all that parcel of land known as MMS/BLOCK V/49. The Plaintiffs have also proved that they performed their obligations under the contract while the Defendants are in breach of the contract.

32. The Plaintiffs had produced as evidence a copy of the duly executed Sale Agreement dated 27th January 2017 and the duly executed Variation Agreement dated 12th October 2017 to prove that there was a contractual relationship between the Plaintiffs and the Defendants. The Plaintiffs had also produced copies of cheques to the Defendants and a Deed of Acknowledgement dated 10th February signed by the 2nd Defendant to prove that the Plaintiffs performed their obligations by paying consideration. The

evidence provided by the Plaintiffs has not been controverted by the Defendants. This means that the Defendants have failed to discharge their evidential burden of proof as required by the provisions of Section 112 of the *Evidence Act*, Cap. 80. .

33. The Learned Counsel contended that the law regarding uncontroverted evidence was very clear. They relied on the case of "Gateway Insurance Co. Limited – Versus - Jamila Suleiman & another (2018) eKLR" where the Court stated that:-

> " 54. What are the consequences of a party failing to adduce evidence" In the case of *Motex Knitwear Limited – Versus - Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*, Lesiit, J citing the case of Autar Singh Bahra And Another – Versus - Raju Govindji, HCCC No. 548 of 1998 appreciated that:
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> > "Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".
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> 55. Again in the case of Trust Bank Limited – Versus - Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No.1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.
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> 56. In the case of Karuru Munyororo – Versus - Joseph Ndumia Murage & Another Nveri HCCC No. 95 of 1988, Makhandia, J (as he then was) held that:
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> > "The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon".

34. In conclusion, the Learned Counsel submitted that the Plaintiffs had discharged their burden of proof under the law and met the required standard of proof by adducing evidence to support their claims. The Defendants, meanwhile, had not challenged the Plaintiffs claims and evidence. The effect of the Defendants failing to produce any evidence contrary to the Plaintiffs was that the Plaintiffs case stands. Therefore, they urged this Honourable Court to hold that the Plaintiffs have proved their case.

35. On whether the Plaintiffs were entitled to the prayers sought, the Learned Counsel submitted that on the permanent injunction, that the Plaintiffs have met the threshold for the issuance of a permanent injunction restraining the Defendants from interfering with the suit property. The Learned Counsel

relied on the case of "Jacob Ernest Ambala Odondi – Versus - Violet Shikuku (2021) eKLR" in which the Court granted a permanent injunction against the Defendant as follows:-

> " 9. Both the district land registrar and the land surveyor in their reports indicated that the defendant is occupying an excess of0.18Ha which is approximately 1/2acres. Since those reports were not disputed by the Defendant, they corroborate the plaintiff's claim of trespass and this court finds that the defendant has encroached into the plaintiff's land known as South Teso/ Angoromo/1459 by a portion measuring 0.18ha. The court finds that the plaintiff has proved his case on the required standard of balance of probabilities and is therefore entitled to prayer (a) and (b) of the plaint being a permanent and mandatory injunction against the defendant."

36. Similarly, in this case, the Plaintiffs had provided sufficient evidence (Sale and Variation Agreements, cheques, searches, Title Deed, Deed of Acknowledgement of payment) that was not disputed by the Defendants to enable this Honourable Court to find that the Plaintiffs had proved their case on the required standard of balance of probabilities and were therefore entitled to prayer (a) of the Plaint being a permanent injunction against the Defendants.

37. On the issue of specific performance, the Learned Counsel submitted that the Plaintiffs have met the threshold for the issuance of a permanent injunction restraining the Defendants from interfering with the suit property. They sought to rely on the case of "Joseph Kiprono Maswan – Versus - Veronica Mukami Nkatha Reithi & another (2021) eKLR" where the Court granted the Plaintiff an order for specific performance in Paragraphs 23 and 25 as follows:-

> " 23. The law is settled that a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. In *Gurdev Singh Birdi and Marinder Singh Ghatora – Versus - Abubakar Madhubuti CA No.165 of 1996* it was held that:
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> > "...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.
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> 25. As I have stated above, the Plaintiff had performed his part of the agreement for sale between him and the 1st Defendant. I am satisfied that the plaintiff has met the conditions for grant of an order for specific performance. The 1st Defendant did not give evidence at the trial. There is therefore no evidence that the 1st Defendant will have any difficulty in performing the agreement for sale dated 4th October, 1995. In any event no such difficulty was pleaded in the 1st Defendant's Defence."

38. According to the Learned Counsel, in the present case, the Plaintiffs had performed their obligations under the Sale Agreement by paying the deposit and consideration as required but the Defendants have

refused and/or failed to perform their obligations of furnishing the Plaintiffs with the sale completion documents, executing the transfer documents and completing the transfer.

39. On the declaration that the 1st Plaintiff was the owner of the suit property, the Learned Counsel submitted that the Plaintiffs had adduced sufficient evidence for the 1st Plaintiff to be declared as the owner of the suit property. The Plaintiffs had produced uncontroverted documentary evidence that they entered into a valid Sale Agreement with the Defendants for the purchase of the suit property. The Plaintiffs have also produced evidence showing they have performed their obligations under the Agreement by paying deposit and monetary instalments as consideration. Meanwhile, the Defendants have refused and/or failed to perform their obligations of furnishing the Plaintiffs with the sale completion documents, executing the transfer documents and completing the transfer.

40. Having proved their case on the balance of probabilities and also proved that the Plaintiffs were entitled to orders of specific performance and permanent injunction as discussed above, the Learned Counsel submitted that the Plaintiffs had already established that the 1st Plaintiff was entitled to a declaration that it was the owner of the suit property.

41. In conclusion, the Learned Counsel submitted that it was clear from the foregoing that the Plaintiffs had proved their case on the balance of probabilities and are entitled to the prayers that they seek. They urged this Honourable Court to find the Defendants jointly and severally liable for breach of contract and grant the Plaintiffs the reliefs sought.

VI. Analysis and Determination

42. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. Before making an in depth analysis of the issues in this suit; it is important to take note that despite the Defendants being served through all means possible they neither entered appearance nor filed their statement of defence.

43. In the case of:- "Samson S. Maitai & Another – Versus - African Safari Club Ltd & Another [2010] eKLR", Emukule J observed: -

> "..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

44. Further, in the case of "Rosaline Mary Kahumbu – Versus - National Bank of Kenya Ltd [2014] eKLR", the Court held: -

> "In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits."

45. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth. The suit before Court is based on an alleged breach of an agreement between the plaintiffs and defendants. The Plaintiffs adduced evidence of the existence of the agreement by producing a copy of the same. The claim by the Plaintiffs therefore as it stands it is uncontroverted.

46. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -

    a. Whether the Plaintiffs suit has merit to wit – whether there was a valid agreement between them and the Defendants and whether the Defendants breached the sale agreement dated 27th January, 2017?

    b. Whether the Plaintiffs are entitled to the orders sought in the Plaint?

    c. Who bears the costs of the suit?

Issue No. a). Whether the Plaintiffs suit has merit to wit – whether there was a valid agreement between them and the Defendants and whether the Defendants breached the sale agreement dated 27th January, 2017

47. Under this sub – title, the Honourable Court deciphers that the main substratum in this matter is whether the sale agreement was breached. Disposition of Land is based on contract. At this juncture, it's instructive to note that whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of contract and Section 38 (1) and (2) of the *Land Act*, No. 6 of 2012. Both of these provisions of the Law which are materially and in nature identical are based on the validity of contract. The provision of Section 3(3) of the Law of Contract reads as follows: -

> " No suit shall be brought upon a contract for the disposition of an interest in land unless-
>
> (a) The contract upon which the suit is founded:
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust"

48. While the provision of Section 38 (1) and (2) which are more specific on the validity of contract in sale of land reads as follows: -

    1. Other than as provided by this Act or any other write law no suit shall be brought upon a contract for the disposition of an interest in land: -

        (a) The contract upon which the suit is founded:

        (i) is in writing;

        (ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

49. It is not in dispute that the Plaintiffs' case is uncontroverted as despite of service no defence was filed by the Defendants. Thus, the herculean task here by this Honourable Court is to determine whether the Defendants breached the agreement for sale or not. To begin with, the Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as:

> "a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

50. The provision of Section 39 of the *Land Act* No. 6 of 2012 further extrapolates on the validity of contract on sale of land and the breach of contract by stating as follows:

> "If, under a contract for the sale of land, the purchaser has entered into possession of the land, the vendor may exercise his contractual right to rescind the contract by reason of a breach of the contract by the purchaser by: -
>
> a. Resuming possession of the land peacefully; or
>
> b. Obtaining an order for possession of the land from the Court in accordance with the provision of Section 41.

51. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of "Rufale – Versus - Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592", Scrutton L.J. held as follows:-

> "The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

52. Equally in the case of "Attorney General of Belize et al – Versus - Belize Telecom Limited & Another (2009), 1WLR 1980 at page 1993", citing Lord Person in the case of: "Trollope Colls Limited – Versus - Northwest Metropolitan Regional Hospital Board (1973) I WLR 601 at 609", held as follows: -

> "The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

53. Based on the above decision, the starting point of the Honourable Court will be to critically assess the sale agreement between the Defendants and the Plaintiffs entered into on 27th January, 2017 which was varied on 12th October, 2017 that the parties duly executed and the terms and conditions stipulated therein. The Plaintiffs' case is that they entered into a binding agreement with the Defendants for the sale and purchase of all that parcel of land known as MMS/BLOCK V/49. The Plaintiffs have also

proved that they performed their obligations under the contract while the Defendants are in breach of the contract.

54. The Plaintiffs had produced as evidence a copy of the duly executed Sale Agreement dated 27th January 2017 and the duly executed Variation Agreement dated 12th October 2017 to prove that there was a contractual relationship between the Plaintiffs and the Defendants. The Plaintiffs had also produced copies of cheques to the Defendants and a Deed of Acknowledgement dated 10th February signed by the 2nd Defendant to prove that the Plaintiffs performed their obligations by paying consideration.

55. The Plaintiffs viewed the suit property and having liked the same instructed the law firm of Sachdeva Nabhan and Swaleh Advocates who prepared a sale agreement dated 27th January, 2017 wherein the purchase price was agreed at a sum of Kenya Shillings Thirty Two Million Eight Hundred Thousand (Kshs. 32,800,000.00/=) but pursuant to a duly executed deed of variation the purchase price was revised to a sum of Kenya Shillings Twenty Million (Kshs. 27,000,000.00/=). The Plaintiff through its advocates then made a payment of a sum of Kenya Shillings Twelve Million One Hundred and Fifty Thousand Three Thirteen Hundred (Kshs 12,150,313.00/=) personally to the 1st Defendant upon execution of the sale agreement. This amount was paid from 10th February, 2017 to 26th February, 2018. The Plaintiffs prior to executing the said agreement had made a payment of a sum of Kenya Shillings Five Thousand (Kshs. 500,000.00/=) personally to the 1st Defendant on 30th January, 2017 which amount was duly acknowledged as part of the purchase price.

56. Having paid a substantial sum of money and being eager to complete the sale, the Plaintiff became uneasy when the Defendants could not complete the sale. The Plaintiffs thus holds the Defendants especially the 2nd Defendant in breach of the agreement. The Defendants failed to furnish the Plaintiffs with the sale completion documents; failure to execute the transfer documents; deliberately attempting to frustrate the Plaintiff in this sale agreement; attempting to sale the suit property to unsuspecting their parties and; taking inordinately long time to conclude its end of the transaction and others particulars to be furnished during the trial. Resultantly, it was from this acts of commission and omission in terms of the breach of contract that necessitated the Plaintiffs to institute this suit accordingly.

57. Based on the foregoing surrounding facts and inference, I discern that this suit is therefore necessary in order to protect the Plaintiffs' interests. Thus, in conclusion, the Honourable Court strongly finds that the Defendants to have breached the agreement of sale by not delivering the suit property to the Plaintiffs after the execution of the agreement. The suit by the Plaintiffs succeeds.

ISSUE No. b). Whether the Plaintiffs are entitled to the orders sought in the Plaint

27. Under this Sub - heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaint, herein. Having held that the Defendants were in breach of the agreement of sale, the next thing I need to determine is the questions of prayers in the Plaint. On whether the orders of specific performance can issue against the defendant for breach of the terms of agreement it was submitted that the Plaintiffs have met the threshold for the issuance of a permanent injunction restraining the Defendants from interfering with the suit property.

28. I will be guided by the case of "Reliable Electrical Engineers (K) Ltd – Versus - Mantrac Kenya Limited [2006] eKLR" where Maraga J as he then was stated;

'Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such

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

27. In the present case, the Plaintiffs had performed their obligations under the Sale Agreement by paying the deposit and consideration as required but the Defendants have refused and/or failed to perform their obligations of furnishing the Plaintiffs with the sale completion documents, executing the transfer documents and completing the transfer. As it is, the Defendants are hereby expected to complete the transaction and furnish the Plaintiffs with the sale competition documents.

28. Being that the Plaintiffs made the deposit and the consideration and in consideration that the agreement itself and the variation indicated that the title of the property shall pass upon completion of purchase price. The Defendants having not controverted the claims by the Plaintiffs this court makes a declaration that the Plaintiffs having paid the purchase price according to the terms expressed in the agreement are the bona fide owners of the suit property.

29. On whether a permanent injunction can issue, being that the Plaintiffs are the bona fide legal and absolute proprietor of the suit property with all the indefeasible rights, title and interest vested on them by law, then the same are granted with accordance to the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012. The upshot of it all is that the case by the Plaintiffs has been well established and hence they are entitled to the reliefs sought.

ISSUE No. c). Who bears the costs of the suit

27. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

28. In the case of:- "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held;

> "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

27. In the present case, I reiterate that the Plaintiffs have been able to establish their case as pleaded from the filed pleadings against the Defendants therefore, I proceed to award her the costs of this suit.

VII. Conclusion and Disposition

27. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiffs have established their case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:

a. THAT Judgment be and is hereby entered in favour of the Plaintiffs as pleaded in Plaint dated 22nd March, 2022 filed on 23rd March, 2022.

b. THAT an order of permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their agents, servants or persons acting under their authority from subdividing, leasing, selling, disposing off in or any way interfering with the Plaintiffs rights to property MMS/BLOCK V/49.

c. THAT an order of specific performance be and is hereby issued of the Sale Agreement dated 27th January, 2017 and varied on 12th October, 2017, between the Plaintiffs and the 1st Defendant.

d. THAT a declaration be and is hereby issued that the suit property belongs to the Plaintiffs.

e. THAT the costs of this suit vide the Plaint dated 22nd March, 2022 be borne by the 1st & 2nd Defendants jointly and severally and awarded to the Plaintiffs.

IT IS SO ORDERED ACCORDINGLY

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....22ND ....DAY OF .....OCTOBER.....2024.

.....

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of: -

a. M/s. Firdaus Mbula – the Court Assistant.

b. Mr. Iddi Advocate holding over for Mr. Waziri Advocate for the Plaintiffs.

c. No appearance for the Defendants.

JUDGMENT: LAND CASE NO. 33 OF 2022 Page 9 of 9 HON. JUSTICE L.L. NAIKUNI (ELC JUDGE).