



**Ngoi v Kariuki (Environment & Land Case 15 of 2024) [2024] KEELC 13377 (KLR)
(Environment and Land) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 15 OF 2024
MC OUNDO, J
NOVEMBER 21, 2024
(FORMERLY NAKURU ELC LAND CASE NO. 542 OF 2013)**

BETWEEN

DAVID NJUGUNA NGOI PLAINTIFF

AND

ANNE WAMUYU KARIUKI DEFENDANT

JUDGMENT

1. Vide a Plaint dated 24th September, 2013, the Plaintiff herein sought for the following orders:
 - i. An order for specific performance to issue upon the Defendant to hand over to the Plaintiff all the completion documents as set out under clause 7 of the Agreement for Sale dated 30th January, 2013 and to transfer land parcel Numbers Naivasha/Mwichiringiri Block 4/3634 and 3635 to the Plaintiff.
 - ii. An order of injunction restraining the Defendant by herself, her agents and her servants from selling, transferring, disposing, alienating or in any manner interfering with the Plaintiff's possession and occupation of land parcel Numbers Naivasha/Mwichiringiri Block 4/3634 and 3635. (suit properties)
 - iii. The Defendant be condemned to meet all the costs of the suit.
2. The Defendant filed her Defence dated 23rd October, 2013 in which she denied the contents of the Plaint putting the Plaintiff to strict Proof. That the Variation Agreement that had been executed on 30th May, 2013 had been at the instance of the Plaintiff as he had been unable to raise the balance of Kshs. 5,500,000/= and had even agreed to pay a consideration of Kshs. 200,000/= so that the extension could be granted. That the cheques had been issued by Turitu Service Station Ltd, an entity unknown



- to her and a stranger to both the Sale Agreement dated 30th January, 2013 and the Variation Agreement dated 30th May, 2013. That issuance of the cheques by a stranger was a fundamental breach going to the root of the contract.
3. She refuted the allegation that the Plaintiff had stopped the cheques that had been issued by M/s Turitu Service Station Ltd and stated that the said cheques had been dishonoured for insufficient funds in the drawers account. That indeed, it was the Plaintiff who had behaved dishonestly and in the most suspicious manner by inter alia introducing strangers in the sale agreement and issuing cheques that had been dishonoured hence failing to meet the set deadlines.
 4. That she was no longer interested in disposing the suit properties as the purpose for which she had intended to use the money realized from the sale had already been met elsewhere after the Plaintiff had failed to meet the agreed deadline. That further, the Plaintiff had never been in possession and occupation of the suit properties hence the provisions of Sections 39, 41 and 42 of the Land Act, 2012 did not apply. That as of 9th October, 2013 to 23rd October, 2013, the Plaintiff had not taken the physical possession or erected any fence on the suit properties.
 5. That she had never looked for other buyers since the Defendant had lodged a caution on the suit properties. That the sale agreement that had been executed on 30th January, 2013 was void as no consent had been sought from the Land Control Board.
 6. That the order of specific performance sought by the Plaintiff was unavailable to him hence he should pursue the statutory remedy provided for under the provisions of Section 7 of the Land Control Act. That in any case, the Plaintiff having breached the terms of the Sale Agreement, he was coming to court with unclean hands and was disentitled to an equitable remedy of specific performance.
 7. That the whole suit as filed had been misconceived, bad in law and incompetent and should be dismissed with costs.
 8. After a failed attempt to settle the matter out of court, the same had proceeded for hearing on the 6th February, 2023 wherein Daniel Njuguna Ngoi, the Plaintiff herein adopted his witness statement dated 27th May, 2018 as his evidence-in-chief and proceeded to testify and as PW1 to the effect that he lived and worked in Kiambu. That he had been in Naivasha for a Christmas holiday in December 2012 when he saw on a post with a telephone number therein, an advertisement for sale of land in Mwachiringiri area. That he called the said number which had been answered by one Solomon Njoroje Kimani working with Mega agencies who had been contracted to sell the land.
 9. That they had met after two days in Naivasha at Enashipai hotel and he had physically inspected the land and found that the same touched the main road, near Mwachiringiri area. That said agent had demanded for Kshs. 250,000/= to link him up with the seller wherein he had paid him Ksh.100,000/= in form of a cheque. That the said agent had acknowledged receipt of Kshs.100,000/= in the letter dated 30th January, 2013 stating that the balance should be paid to him upon completion. He produced the said letter as Pf exh 6.
 10. That he had then been linked him up with the caretaker of the land one Mr. Matheri who was to take him to the owner.
 11. That subsequently he then instructed SM Chege Advocate to carry out due diligence wherein he had found out that the land was registered in the name of Grace W. Kagutu and that the same had no encumbrances or restrictions.
 12. His evidence was that the land that comprised two parcels measuring approximately 3 acres each had been vacant without a fence. That together with Solomon, Chege and Matheri, they had arranged



for a meeting at Waterbuck Hotel in Nakuru where they had found the Defendant herein who been introduced to them by Matheri and the agent. That while negotiating the purchase price, the Defendant had disclosed to them that she was not the real owner of the suit properties but a holder of a power of Attorney donated by the owner one Grace Kabutu. He produced a copy of the power of Attorney as Pf exh 3.

13. That they had subsequently agreed on a purchase price of Kshs.6,500,000/= for both parcels of land since the power of Attorney had been registered for both parcels (suit properties) and that they were to share the agency fee.
14. That after his Advocate had confirmed with the drawer of the power of Attorney that it was indeed genuine, he drew an agreement dated 30th January, 2013 in his office at Nairobi. That according to the said Agreement, the completion period was to be within 90 days and the purchase price was Kshs. 6,500,000/=. That he was to pay a sum of Kshs.1,000,000/= on execution which amount he had paid by a cheque. That the balance of Kshs. 5,500,000/= was to be paid in exchange of the completion documents being Original title deed, copy of KRA Pin Certificate, Identity Card, passports and duly signed transfers. He produced the said agreement as Pf exh 1 before explaining that to opt out of the said agreement, one had to go to S. M. Chege Advocate and give a 21-days' Notice. That 10% of purchase price was the penalty for breach.
15. That however, after 30 days from the date of the agreement, the agent had informed him that the Defendant had financial problems in getting completion documents and that he should pay some additional money. That upon agreeing that the caretaker should hold the completion documents, he had paid a sum of Kshs.635,000/= via a cheque signed on 30th May, 2013 to the agent to assemble the completion documents on behalf of the seller. He produced a copy of the said cheque as Pf exh 7. That subsequently, the balance of the purchase price had reduced to around Kshs. 4,600,000/=. He explained that he had also paid to the agent some funds for beacons identification which amount had been distinct from the agency fees
16. His evidence was that they had later gone to Nakuru with S. M. Chege Advocate wherein he and the Defendant had executed the agreement at Waterbuck hotel. That accordingly, he had written two cheques dated 30th January, 2013 and 31st January, 2013 in the Defendant's name which cheques he produced as Pf exh 9(a) and 9(b). That his wife, one Hannah Wairimu Mutura who had also been present was the one who had drawn the said cheques which had been honoured. He explained that the issue of payment of Kshs.635,000/= for completion documents had arisen before completion because the agent had warned him that the seller had been looking for and had found a higher bidder hence if he was not careful, the suit properties would be sold. That the agent had even asked if he was willing to share the sum above Kshs. 6, 500,000/= with the seller were the land to be sold but he had insisted that he only wanted the land.
17. That subsequently, he had disposed of one of his properties in Kiambu to clear the balance wherein he had contacted the caretaker as agreed, that he keeps the title deed pursuant to an undertaking dated 30th January, 2013. That caretaker had however informed him that the Defendant had already taken the original title deed. That he contacted the Defendant who informed him that she had taken the titles to enable her prepare the completion documents. He produced the undertaking dated 30th January, 2013 as Pf exh 5 and proceeded to testify that whereas he did not have any objection to her taking the titles, when he asked her if it was true that she was going to sell the suit properties to another person, she had told him that she would refund him his money.
18. That he then requested for a meeting between he, the Defendant, her agent and her caretaker wherein they had met in Nakuru at a place that he could not recall. That whereas the 90 days' completion



period had expired, they had agreed that no other buyer would be sought and that he would add a sum of Kshs.200,000 above the Kshs.6,500,000/= to prevent the Defendant from selling the land. That accordingly, vide a Variation Agreement dated 30th July, 2013 the Purchase Price had been varied to Kshs.6,700,000/= and now a balance of Kshs. 4,865,000/= was to be paid in exchange of the completion documents. That further, the sum of Ksh.635,000/= that had been paid to the agent would not be deducted from the purchase price if he failed to complete the agreement. That the completion date was then extended by 2 months from 30th May, 2013 to 30th July, 2013. He produced the Variation Agreement as Pf exh 8.

19. That whereas the new completion date had been 30th July 2013, this did not happen because when he sent his manager to Nakuru to deposit the balance of the Purchase price which was to be in exchange of completion documents, he had been given scanned copies of the title documents without all the other necessary completion documents to facilitate the transfer of the title deeds. That since there had been a breach of the Variation Agreement, his Advocate advised him to stop the payment of the cheques until they could get the full commitment by the vendor that she was ready to complete the transaction since it had been her obligation to initiate and get the completion documents.
20. He testified that after about one week, he had called the Defendant inquiring on the progress wherein they had agreed to meet at Naivasha Lands office to process the consent and other necessary documents. That he had gone to Naivasha to the Defendant's Agent's hotel with Mr. Matheri wherein after the vendor/Defendant failed to show up, that Mr. Matheri had informed him that she was no longer interested in selling the suit properties. That he had gone back to Nairobi wherein he had tried talking to the vendor/Defendant and they had agreed to meet in Nakuru for further deliberations. The Defendant failed to show up again at Waterbuck hotel the meeting venue.
21. That the Defendant had asked him to go with a banker's check of the balance of Kshs. 5,300,000/=, however, since she had failed to turn up for the meeting, he had returned the original copies to the bank and secured other cheques which he had given to his Advocate, M/s Karanja Mbugua and Co. Advocate as the balance of the purchase price. He produced the copies of the cheque totalling to Kshs. 5,300,000/= as Pf exh 9 (a-g).
22. His testimony was that after the Defendant's failure to turn up for the meeting or pick up his calls, he had gone to Nakuru, Naka area where he used to drop her, wherein he had traced her husband's motor cycle shop upon which her husband had directed him to their home.
23. That when the Defendant learnt that he was at her home, she had told him to leave all the original cheques with her daughter and that he should not divulge any information to her husband. That he instead left the copies as there had been completion documents to be given in exchange. That later the Defendant had sent him a message to the effect that she had found another buyer and that the best that he could do was to agree that she sells the suit properties to another party and then share what was going to be above the Kshs. 6,500,000/=. He rejected the proposal reminding her of the sale agreement that was still in force.
24. That it had been through his Advocate's advice that he had then placed a caution on the land and initiated the instant case. That subsequently he had been asked to deposit the balance of the purchase price of Kshs. 5,300,000/= as proof of his readiness to complete the transaction, which balance he had deposited with his Advocate Karanja Mbugua.
25. When he was referred to a letter dated 6th September, 2013 which he had received on 12th September, 2013, from Kamonjo Kiburi & Co. Advocate, wherein he confirmed that the contents of the same were to the effect that the vendor was no longer interested in selling the suit properties as she was in the



- process of selling the land to another person. He produced the said letter as Pf exh 10 and explained that the mode of seceding the agreement had been by way of a Notice to his Advocate.
26. Upon being referred to Clause 8(v) of Pf exh 1, he stated that the letter from Kamonjo Kiburi & Co. Advocates did not give him the 21 days' notice as stipulated in the agreement.
 27. He thus prayed that the court orders for specific performance by the vendor upon release of the balance of the purchase price which was ready in exchange of all completion documents since he had performed his part of the agreement. He also sought for the costs of the suit.
 28. On cross-Examination, he testified that whereas he was a hotelier and a farmer who lived and worked in Kiambu, he had other business interests outside Kiambu being Eldoret, Naivasha, Maai Mahiu and Thika. That he was also a director of Turitu Service Station Limited that was based in Kiambu and in Nairobi West. That further, they had a hotel owned by his brother in Ngara. He confirmed that he had been having issues with banks on recovery of debts which happens often to an extent where the bank would threaten to sell his properties.
 29. That the first person that he had met in regard to the instant transaction was the agent Solomon Njoroge Kimani who had introduced him to the caretaker of the suit properties one Mr. Matheri. He confirmed that he had visited the suit properties and found the same vacant. That Mr Matheri was to connect them to the vendor upon payment of a commission of Kshs. 150,000/= to be paid by himself. He admitted that the direct link to the vendor had been Mr. Matheri.
 30. When he was referred to Pf exh 1, he confirmed that once he had identified the suit properties, they had gone to Nakuru and agreed on all the terms wherein they had gone back to Nairobi to draw the agreement which had then been executed in Nakuru.
 31. On being referred to clause 2.2.2 of the Pf exh 1, he confirmed that the agreement had a condition to the effect that the balance of the purchase price was to be paid in exchange of completion documents.
 32. That paragraph 7 of Pf exh 1 showed that the completion documents were to be given to his Advocate Mr. Stephen M. Chege in exchange of the balance of the purchase price. That however vide Pf exh 8, a Variation Agreement he had sought for an extension of time wherein he had undertaken to pay the balance of the purchase price within two (2) months. That it had also been agreed that the sum of Kshs. 635,000/= which he had given to the Agent would not be considered as part of the purchase price in case he defaulted. That the extension in the Variation Agreement was to be a final one.
 33. He explained that the Defendant had asked for a financial assistance of Kshs. 635,000/= to procure the completion documents and therefore they had agreed that since the money was to be spent on getting the documents, were he to fail in completing the balance of the purchase price, the said money was not to be recovered. He nonetheless, admitted that the said assertion had not been captured in the deed of variation.
 34. When referred to Pf exh 8 at line 10, he stated that since he needed the land, he had agreed to pay a sum of Kshs. 200,000/= as a penalty for breach of the agreement. That after the Variation Agreement, he had prepared the bankers cheque and delivered the copies to the Defendant's home. His explanation was that whereas the completion/exchange was to take place at the Advocate's office when the Defendant failed to comply, he had taken the cheque to her home.
 35. He confirmed that the cheque that he had issued using Turitu Station was dated 30th July, 2013 which was same date of the Variation Agreement, but that the document had been signed on 30th May 2013 and printed on 30th July, 2013.



36. He confirmed that the cheques by Tiritu Station had been issued after the Variation Agreement. That there were also personal/company cheques that had been taken to Nakuru by his manager, which cheques were dated 30th July, 2013, the completion date in the Variation Agreement. That they had been received by the Defendant /Vendor but had been stopped. That whereas they had an agreement that the Defendant would give him the original documents or certified copies, the clause on the ‘certified copies’ had not been included in the agreement.
37. His response when he was referred to Defence document 4 marked as DfMFI 1, the dishonoured cheques, he responded that the total amount of the cheques that had been issued by Tiritu was Kshs. 4,865,000/= and that he had called and asked the bank to stop the payment of the cheques. That whereas he did not attach his bank statement as proof, when he had issued the cheque, he had sufficient funds in his account were he to be allowed to produce his statement.
38. That whereas Code 62 “effects not cleared” meant that he had not cleared the bank to honour the cheques, it did not mean that he was waiting for funds. That further, in their agreement with the Defendant, there had not been established, a specific mode of payment as the main issue had been to clear the balance.
39. He confirmed that he had looked for the Defendant and had gone to her home with banker’s cheques of Pf exh 9 totalling to a sum of Kshs.5,300,000/= having paid a sum of Kshs. 1,000,000/= prior, thus bringing the balance to Kshs 6,300,000/=. That a sum of Kshs. 200,000/= had been paid in cash by the time of writing the Variation Agreement and that if the main issue had been a deficit of Ksh. 200,000/= after calculations, he was ready to pay the same.
40. That the sum of Kshs. 635,000/= stipulated in the Variation Agreement was to be deducted from the sale agreement which meant that he would have paid more since the same was not to be considered as part of the purchase price because it was to be paid if he breached the agreement. He confirmed that he had moved the court for specific performance of the transaction. That the banker’s cheque amounting to Kshs. 5,300,000/= was dated 10th September 2013.
41. When he was referred to Pf exh10, he confirmed that the same was dated 10th September, 2013 and that the same had been delivered to his sister through hand delivery. On being referred to document No. 6 of Defendant’s bundle of documents filed on 23rd October, 2013 (DMFI 2), he confirmed that it was a letter by G4S addressed to him. That the said letter was dated 6th September, 2013 and allegedly delivered on 9th September 2013. He however denied ever receiving the said letter. He refuted that the bankers’ cheques dated 10th September, 2013 had been prompted by the said letter. That it would have been better had the Defendant received the cheques, but she had failed to meet her end of the bargain.
42. When he was referred to Defence document item 2 filed on 23rd October, 2023 (DMFI 3), he confirmed that he was aware of the said note that had been to the effect that the Defendant had received the unpaid cheques wherein she had refused to release the completion documents until the cheques had been cleared. He confirmed that he did not pay the sum of Kshs. 200,000/= and that he had instructed his manager to get the certified copies if he could not get the original documents. He also confirmed that the said manager had deposited the cheques. PW1
43. His response on being referred to Defence Documents No. 3 (DMFI 4) and No. 7 (DMFI 5) was that the same was the land which was the subject matter in the instant suit and that whereas they had agreed that should there be a breach of the agreement, the Defendant would pay 10%, he was not aware that the Defendant had prepared a cheque of Ksh. 900,000/=. He was further referred to DMFI 6 (document 2) and DMFI 7, a letter dated 25th November 2013 wherein he denied having been aware of the said letter and explained that he wanted to give the firm of Karanja Mbugua Advocate the cheques



as a demonstration that he had the money. That the said Advocate had then advised him to deposit the unpaid money to M/s Kamonjo Kiburu & Co. Advocate which had been a condition for an injunction. He maintained that he had complied with the condition of the agreements.

44. In re-examination and in reference at paragraph 18 of his witness statement, he reiterated that as at the date of the Variation Agreement, the balance owing had been Ksh. 4,865,000/=. That he had drawn a banker's cheque of Kshs. 5,300,000/= which he had taken to Nakuru. That initially, he had paid a sum of Kshs. 1,000,000/= and that there was a sum of Kshs. 200,000/= that was pending.

The Plaintiff thus closed his case.

45. The Defence case opened with a testimony from DW1, the Defendant Ann Wamuyu Kariuki, confirmed that she was a lecturer at Egerton University Njoro and living at Naka Estate Nakuru. She who adopted her Witness Statement dated 28th October 2013 before testifying that she had met the Plaintiff sometime around January 2013 in Naivasha when she had been introduced to him by her caretaker by the name Jeffrey Kifiro Matheri. That she had a power of attorney given to her by her sister Grace Wanjiku Kabutu, to sell her pieces of land (suit properties). That Mr. Matheri had called her to meet a prospective buyer who had been introduced to him by an agent whom she did not know.
46. That they had met at Mr. Matheri's business premises within Naivasha town but she could not remember the exact location. That they discussed about the both parcels being Naivasha/Mwichiringiri Block 4/3634 and 3635 (suit properties) which the Plaintiff had already seen. That each parcel of land was approximately 3 acres giving a total of 6 acres.
47. That they had negotiated on the purchase price before agreeing on a figure of Kshs. 6,500,000/= for both parcels of land, the period of payment, a down payment and on drawing of an agreement for the same. That subsequently, they had agreed to meet at an Advocate's office to draw the agreement wherein they had met at the M/S. S. N. Chege Advocate in Nairobi.
48. She confirmed that Pf exh 1 was the agreement dated 30th January, 2013 which had been to the effect that the purchase price was Kshs. 6,500,000/= and that the deposit was Kshs.1,000,000/= which the Defendant had paid in two cheques Pf exh 9 (a-b). That the Defendant was supposed to clear the balance of Kshs. 5,500,000/= within 90 days which was to lapse sometime on 30th April, 2013. That it was also a term of the agreement that were any party to default, they would return 10% of the Purchase Price. That they had also agreed that she would deposit the original documents with M/S Chege Advocate on being alerted that the Plaintiff had deposited the balance of the purchase price.
49. That the Plaintiff was to take possession of the suit properties after the completion of payment. That further, the transaction was to be concluded in the Advocate's office in Nairobi. She explained that they had signed the agreement in the Advocates office in Nairobi and that the agreement that had been signed in Nakuru at the Waterbuck Hotel had been the Variation Agreement. That however, by 30th April, 2013, the Plaintiff had not paid the balance of the purchase price, he had instead requested for an extension of time to get the funds which had led to the drafting of the Variation Agreement produced as Pf exh 8 for an extension of the completion date by two (2) months being the 30th July, 2013.
50. That the Variation Agreement was executed on 30th May, 2013 and wherein the extension date was to end on 30th July 2013. That they were about 4 to 5 people present when the Variation Agreement had been executed wherein the Plaintiff was to clear the balance of the purchase price on or before 30th July, 2013.
51. That whereas the said balance had been about Kshs. 4,865,000/=: the Plaintiff had agreed to pay Kshs. 200,000/= extra for the extension which was like a penalty since he was the one at fault. That further,



- the Plaintiff had not paid any other amount apart from the initial deposit of Kshs. 1,000,000/=. She however acknowledged that there was an amount of Kshs. 635,000/= which the Plaintiff had paid vide a cheque which was to facilitate the putting up of a fencing on the suit properties to demarcate them and to facilitate procurement of the other documents. That the said money had been paid to a third party who was supposed to do the work.
52. That they had thus agreed that since he had not complied with the terms of the agreement, he was to forfeit the Kshs. 635,000/=: if he did not pay up within the period extended as per their Variation Agreement without any further extension. That nonetheless, the Plaintiff still did not pay within the stipulated date hence on 30th July, 2013 instead of them meeting at the Advocates office in Nairobi, the Plaintiff had called her to inform her that he would send somebody in Nakuru with cheques.
 53. That the said person called her and when they met, he gave her about 6 personal cheques which had been drawn by a 3rd party being Turitu Service Station whom she neither knew and nor did the Plaintiff give any explanation. That the said cheques were Nos; 001221 for Kshs. 800,000/=: 001222 for Kshs. 865,000/=: 001217 for Kshs. 800,000/=: 001218 for Kshs. 800,000/=: 001219 for Kshs. 800,000/=: and 001220 for Kshs. 800,000/= all totalling to a sum of Kshs. 4,865,000/=:
 54. That the Plaintiff had asked her to bank the cheques but being cautious, and since it had been late, she took the cheques and agreed with the messenger that they meet the following day so that she could acknowledge receipt of the cheques.
 55. That subsequently, they had met on 31st July, 2013 wherein she had acknowledged receipt of the cheques vide an acknowledgment note dated 31st July, 2013 herein produced as Df exh 3 which she had signed and attested by two witnesses. That there had been a condition that before releasing the completion documents, the personal cheques had to be cleared and a sum of Kshs. 200,000/= was to be paid either in cash or by bankers' cheques.
 56. That she had deposited the cheques on 31st July, 2023 as per a deposit slips from Bank of Baroda No. 012145 and 012144 herein produced as Df exh 4 (a-b) and then proceeded to testify that after she had deposited the cheques, the bank manager had called her after about 2 or 3 days wherein he had informed her that the cheques had bounced. She had gone to the bank and picked the cheques.
 57. She identified DMFI 6 as the 6 cheques that she had been given wherein there contained on a 'Returned Cheque Advice'. That the reason for non-payment via a code 62 was "effects not cleared." meaning that there were insufficient funds in the account. She produced the return cheques as Df exh 6 (a-f) and explained that whereas the Plaintiff had said that he had stopped the cheque because she had refused to release the documents, the inquiries for the reason for stopping the cheque, shows that the code would have been "79" and not "62".
 58. That it was not true that she was re-selling the land after 30 days, since the Plaintiff had gone to her after 90 days, for an extension. That they had not looked for another purchaser because they had trusted that he would pay. That it was also not true that after entering into the Variation Agreement for extension, they had sold the suit properties to a 3rd party since they did not even advertise the said suit properties. That after the Plaintiff defaulted payment, they did not had any further communication with him thus it was not true that they had several other meetings wherein she had refused to collect payment.
 59. That further, after 30th July, 2013, she had communicated with the donor of the power of Attorney and explained to her what had transpired and about the bounced cheques wherein she had told her to inform the Plaintiff that the agreement stood rescinded because he had breached the same. That subsequently, she had consulted her lawyer for advice on how to communicate to the Plaintiff which



resulted into the letter dated 6th September, 2013 for rescission of the sale agreement of the suit properties.

60. That in the said letter, they had addressed the issue of refund to the effect that they would invoke the provisions of clause 8 (IV) of the sale agreement and refund him Kshs. 1,000,000/= less the 10% of the Purchase Price being the penalty for the breach. That the said letter had been delivered to the Plaintiff by G4S after she had personally sent it on 9th September 2013. That she believed the Plaintiff had received the letter because G4S delivered. She produced the said letter together with the receipt from G4S as Df exh 5 and 2 respectively. That whereas the Plaintiff had stated that he did not receive the letter because it had been delivered to his sister, he had finally received it. She maintained that the issue of refund had been addressed in the said letter.
61. That she had thereafter made a banker's cheque of Kshs. 900,000/= No. 002023 dated 1st November, 2013 in the name of David Njuguna Ngoi, the Plaintiff after which she had deposited the same at her Advocate's office with instructions to forward the same to the Plaintiff. Her Advocate had complied. She produced a copy of the said cheque as Df exh 8.
62. That at paragraph No. (ii), of a letter dated 25th November 2013 herein produced as Df exh 7, which had been addressed to her by M/s Kamongo Kiburi & Co. Advocate, had confirmed that the cheque drawn in favour of the Plaintiff which had been left in their office, had been given to the Plaintiff.
63. Her evidence was that the owner Grace Wanjiku Kabutu was now in possession of both the suit properties herein. That whereas they had agreed that the Plaintiff fences the suit properties, wherein he had facilitated for the same, he had neither fenced the land nor had he taken possession and or occupation of the same. She produced the photographs as Df exh 9 (a-c).
64. She explained that Jeffrey Kibiru was the caretaker of the suit properties because he resided in Naivasha where the said land is situated while the owner was in the United States of America. That she resided in Nakuru.
65. She thus urged the court to dismiss the instant case with costs in light of the fact that it had taken a very long time in court.
66. Her response on cross examination was that everything had been going on well from the date they wrote the agreement until 30th July, 2013. When she was referred to Df exh 3, she confirmed that the term of the Variation Agreement was that the agreement was to expire on 30th July 2013 which was the day she had received the last cheques.
67. Upon being referred to Clause 7 of Pf exh 1, she confirmed that the completion documents were to be exchanged for the balance of the purchase price. However, she explained that Pf exh 1 had been with regards to the initial agreement and not the Variation Agreement which had extended the agreement to 30th July, 2013 which was to be the final date of the said transaction.
68. She confirmed that she could not surrender the completion documents after she had received the personal cheques. That it would have been different had she been issued with the bankers' cheque. That since she had received the said cheques in the evening of 30th July, 2013, they had agreed that she would acknowledge the same on 31st July, 2013 and had communicated her decision with the Plaintiff upon receipt of the cheques.
69. When she was referred to Df exh 5, her response was that the said letter had rescinded the agreement because the cheques that the Plaintiff had issued had bounced. She was referred to clause 8 (iv) of Pf exh 1 wherein she had admitted that they did not send a Notice within 21 days. That she had however communicated with the Plaintiff over the phone and had given him more time.



70. She maintained that the cheques that she had been given had bounced pursuant to Code 62. That whereas she did not bring anything to show what Code 62 meant, she had consulted with the bank via WhatsApp.
71. When she was referred to Df exh 8, she confirmed that whereas she had sent the cheques to the Plaintiff on 21st November, 2013, the Plaintiff's suit had been instituted on 23rd October, 2013. That they had sent the cheques after they had communicated with the Plaintiff to withdraw the suit so that they could continue with the transaction, but he had refused. That subsequently, her Advocate, Kamonjo Kiburi & Co. Advocates had advised her to write the bankers cheque so that they could close the case. That they had written a letter dated 25th November, 2013 but she was not sure whether the Plaintiff had been given the cheque or whether the same was with her lawyer.
72. In reference to Df exh 9 (a-c), she confirmed that photographs had been taken in the farm that they had been produced in court to show that the Plaintiff had not fenced the suit properties. That were the court to visit the suit properties, it could ascertain the scenario therein.
73. In re-examination, on the Variation Agreement, she confirmed that she was not required to send any other Notice since it was the Plaintiff who had sought for an extension of time. That she had made the cheque because they wanted to proceed with the transaction if the Plaintiff was ready to purchase. That whereas the Plaintiff had told the court that he had left the cheques in her house, she had not seen the said cheques.
74. That after the Plaintiff's request that they proceed with the transaction, the owner of the suit properties was not willing to proceed with the sale even after the Plaintiff had called her.
75. DW2, one Godfrey Kibiro Matheri introduced himself as a resident of Naivasha who carried out businesses in a butchery, posho Mill and a Hotel. He adopted his Witness Statement dated 10th October, 2013 before proceeding to testify that in the year 2012, Grace Wanjiku Kehuto, who lives in the United States of America (USA) had contacted him and instructed him to sell her two pieces of land being Naivasha/Mwichiringiri Block 4/3634 and 3635 (Suit Properties). That subsequently, he had looked for a buyer through his friends wherein one Samuel Njoroge had informed him that he had a buyer wherein they had arranged on how to meet the said buyer.
76. That accordingly, he had met the buyer whose name was David Njuguna Ngoi, the Plaintiff herein wherein he had explained to him that seller was in USA but had had given the power of Attorney to her sister, the Defendant herein to sell. That they had thus arranged on how they would meet with the Defendant wherein the three of them, that is, he, the Defendant and the Plaintiff met in Naivasha at his workplace and agreed to go to Nairobi on 30th January, 2013 to meet the Plaintiff's lawyer S. N. Chege Advocate to complete the transaction. That after discussion, an Agreement for Sale had been drafted and signed at the Advocates office in Nairobi.
77. He confirmed that when they met at his work place, Solomon Njoroge Kimani was not there and that the said Solomon had no relationship with the Defendant. That apart from selling the suit properties, he was supposed to make the transfer accessible. That he had been the caretaker of the suit properties from the year 1985 to date. That the Plaintiff had neither fenced nor occupied the suit properties.
78. When he was referred to Pf exh5, he confirmed that he was aware of the said undertaking and that the same was to smoothly facilitate transaction of the suit properties since he was the caretaker. That he had given the original title deeds to the Defendant since he had no business with the said documents after the agreement had expired. That he had called the Plaintiff twice to tell him that the agreement had expired wherein the said Plaintiff had told him that his Advocate had been busy wherein he had



called him (Chege Advocate) who had told him that if they were ready, he was willing to close the deal. That he was not aware that the Plaintiff had deposited any money.

79. That subsequently, he contacted the Defendant and together they called the Plaintiff and told him that they would rescind the agreement wherein the Plaintiff had promised that he would pay the balance of the Purchase Price on 30th May, 2013. That they met at the Waterbuck hotel but instead of the Plaintiff giving them the money, he had asked for an extension of the completion date by 60 days because he had a problem with either his bank or business. That he was at Waterbuck and witnessed the extension agreement wherein the Defendant had agreed to extend the time so that the Plaintiff could get the money.
80. That however, in the said Variation Agreement, they had agreed that the 60 days extension period would be the final extension. That when the Plaintiff was given the said extension period, he had been happy and had promised that he would penalize himself and pay sum of Kshs. 200,000/=. He however was not aware if the Plaintiff had paid the said money.
81. He explained that the Defendant could not have sold the suit properties after 30 days because she had given the Plaintiff an extension. That he was also not aware that the Defendant was trying to sell the suit properties to a third party. That further, he had neither approached the Plaintiff nor asked that they sell the suit properties and share the money in excess of Kshs. 6,500,000/=. That indeed he had been surprised to hear such allegations. That he had just heard evidence in court that the Plaintiff had prepared the bankers cheques, and was looking for the Defendant with his help.
82. On cross-examination, confirmed that he was the one selling the land, and that there was no commission. That the money that had been paid was to fence the suit properties which had been an arrangement between the Plaintiff and Solomon and that it had been Solomon who had been given the sum of Kshs. 635,000/= to fence the suit properties which properties were not fenced. That since the arrangement had been between the Plaintiff and Solomon, he did not know whether the cheque had matured or the money had been refunded.
83. That whereas the Defendant had told him that the cheques had bounced, he did not know if the cheque given to Solomon was among the ones that had bounced. He confirmed that he had been a witness on both the Initial Agreement and Variation Agreement.
84. When he was referred to part 2 of the Variation Agreement, he confirmed that the expiry date had been extended to 30th July, 2013. That since the cheques issued by the Plaintiff had been personal cheques, he and the Defendant had agreed not to release the completion documents until the cheques had been cleared.
85. He confirmed that in the initial Agreement for Sale, they had agreed that the completion documents be taken to the lawyer but the same be released after the payment of the balance of purchase price. He explained that the Plaintiff was to fence the suit properties to identify that the same had been taken but not to occupy the same.
86. In re-examination, he maintained that the payment of the sum of Kshs. 635,000/= had been between the Plaintiff and Solomon and that he did not know whose agent Solomon was. That however, it was the said Solomon who had brought the Plaintiff to him. That since the term of the Initial Agreement was that the Completion documents be released in exchange of the money, they could not have released the completion documents before the cheques had been cleared. He confirmed that they were to exchange the money with the completion documents in the Advocate's office in Nairobi.

The Defendant thus closed his case.



Parties then filed their respective submissions which I shall summarize as herein under: -

Plaintiff's Submissions.

87. The Plaintiff, vide his submissions dated 12th August, 2024, summarized the factual background of the matter and submitted that he had been ready and willing to abide by the terms of the contract and that it had been the Defendant who had decided to breach the said contract. He particularized the breach of the contract by submitting that;
- i. The Defendant had on completion date failed to issue the completion documents that had been in custody of the agent,
 - ii. Secondly she had decided to alter the terms of the agreement by further extending the period without consultation or seeking the Plaintiff's consent.
 - iii. Third that she had purported to adopt a method of completion that had not been intended, agreed upon or even contemplated by the parties by refusing to hand over the completion documents and instead handing over copies of title deeds devoid of other completion documents.
 - iv. fourth that the purported method of completion would have further delayed the period in which the Plaintiff would have transferred the suit properties to himself whereas time had been of essence.
88. That the Defendant's acts of omission by failing to allow the Plaintiff to take possession of the suit properties, failing to fence off the same even after the Plaintiff had paid for the said fencing after both parties had agreed to that effect had made the Plaintiff to perform his part of agreement with caution by cancelling the cheques that had been issued to the Defendant until he could understand what the Defendant had been up to. He placed reliance on the case of *Steadman vs Steadman* (1976) 536, 540.
89. His submission was that the Defendant would have expected some pressure to ensure that the process was completed by cancelling the cheques after she had failed to release the documents. The Defendant had completely refused to communicate with the Plaintiff wherein she had on 6th September 2013 sent a letter from the firm of M/s Kimomnjo Kiburi Advocates indicating that she was no longer interested in continuing with the said transaction.
90. Reliance was placed in the case of *Simpson v Comnnoy* (4), [1953] 2 ALL E.R 474 to submit that the Defendant herein had not issued any notice to the Plaintiff to the effect that if he did not act accordingly, the contract would come to an end.
91. His further submission was hinged on the decision in the case of *Jackline Njeri Kariuki v Moses Njung'e Njau* [2021] eKLR to submit that it was trite law that a party who executes a contract was bound by the terms and should honor the contract. That the Plaintiff had produced before the court proof that whereas he had been fulfilling the terms of the agreement, the Defendant had decided to cancel the contract without following the due procedure since she did not issue a 21 days' notice to notify the Plaintiff of the default. That further, it had been established that the agreement that had been executed by the parties herein had not made time of essence after the Defendant had taken the cheques and deposited the same a day after the expiry of the Variation Agreement indicating that the time had been extended to unknown period. That the Plaintiff had demonstrated that he still had the balance of the purchase price and was ready to release the same in exchange for the completion documents since he did not enter into the agreement in bad faith.



92. In conclusion, he submitted that the Plaintiff's prayers sought in the Plaint dated 24th September, 2013 be allowed and the Defendant be ordered to issue him with all the completion documents as set out under clause 7 of the Agreement for Sale dated 30th January 2013 and thereafter transfer land parcel numbers Naivasha/Mwichiringiri Block 4/3634 and 3635 to him.

Defendant's Submission

93. The Defendant on the other hand vide her submissions dated 14th August, 2024 first summarized in detail the factual background of the matter as well as the evidence adduced in court by both parties before hinging her submission in the decided case of Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) (31 January 2014) (Judgment) to submit that it was trite law that parties were bound by their pleadings hence the issues for determination by the court should flow from the pleadings. That the primary pleadings herein were the Plaint dated 24th September, 2013 and the Defence dated 23rd October, 2013. That it was also trite law that the burden of proof lay with the Plaintiff as he was under an obligation to discharge the said duty on a balance of probabilities pursuant to the provisions of section 107 and 108 of the *Evidence Act*.

94. She thus framed her issues for determination as follows: -

- i. Whether there existed a valid and enforceable contract for sale of land between the parties.
- ii. Whether or not the rescission or repudiation of the agreement of sale by the Defendant was valid and the consequences.
- iii. Whether the Plaintiff is entitled to an order of specific performance.
- iv. Who should bear the costs of the suit.

95. On the first issue for determination as to whether there existed a valid and enforceable contract for sale of land between the parties, her submission was that whereas there had been no doubt that the Sale Agreement dated 30th January, 2013 and a Variation Agreement dated 30th May, 2013 had met the legal threshold under Section 3 of the *Law of Contract Act*, the Defendant had at paragraphs 14 and 15 of her Defence stated that the Agreement dated 30th January, 2013 was void hence unenforceable for lack of the Land Control Board consents to sell and transfer. That the parties should have applied and obtained the consents by 30th July, 2013 being a period of 6 months from the date of the agreement.

96. She hinged her reliance on the provisions of Section 6(1) of the *Land Control Act* to submit that the failure to obtain consents from the Land Control Board had rendered the Agreement for Sale of an agricultural land void. That whereas she was alive to the fact that there had been consensus with the Court of Appeal decisions that post *the Constitution* of Kenya 2010, the doctrine of constructive trust and estoppel may be applicable notwithstanding the above provisions, the said doctrine was only applicable where the seller had received the full purchase price and the buyer had been put in possession of the land thereby creating overriding interest in favour of the purchaser. Reliance was placed in the decided case of Koech & Another v Ruto (Civil Appeal 2 of 2019) (2023) KEELC 18354 (KLR) (15 June 2023) (Judgment) where the court had cited the Court of Appeal case of William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR to submit that in the present case, the Plaintiff had failed to pay the balance of the purchase price and did not enjoy the possession of the suit properties. That subsequently, the doctrine of constructive trust or estoppel was inapplicable hence the Agreement of 30th January, 2013 was void and unenforceable.



97. While placing reliance in the decided case of *Barclays Bank of Kenya Ltd v Josephat Githinji Gichobi* [2021] eKLR, she submitted that the existence of a valid and enforceable contract was a principle element for the grant of specific performance. That it was thus clear that a transaction that fell within the purview of Section 6(1) of the *Land Control Act* required consent to sell unless the Plaintiff had paid full purchase price and had been put in possession. Reliance was placed in the decided case of *Moses Kamande Nyambura vv Francis Munyua Ngugi* [2018] eKLR.
98. On the second issue for determination as to whether or not the rescission or repudiation of the agreement of sale by the Defendant was valid and the consequences thereof, she maintained her assertion to the effect that the Agreement dated 30th January, 2013 had been void and unenforceable for lack of consent from the Land Control Board. That whereas the Plaintiff had accused the Defendant of having unlawfully and illegally rescinded the agreement by failing to issue the mandatory notice of 21 days as had been stipulated under Special Condition 8 of the Agreement, at the Plaintiff's own request, the completion of the agreement dated 30th January, 2013 had been extended to 30th July, 2013 vide a Variation dated 30th May 2013 to enable him pay the balance of the purchase price in the sum of Kshs. 4,865,000/=. That the said date of 30th July, 2013 had been expressly stated to be the final date of the transaction. That indeed, the Plaintiff had even agreed to pay a sum of Kshs. 200,000/= as a penalty for the failure to comply within the period of ninety (90) days that had been provided for in the Agreement for sale of 30th January, 2013.
99. It was thus her submission that time had been made of the essence in respect to the completion date of 30th July, 2013 at the Plaintiff's own request for a final extension of sixty (60) days which had been granted in the Variation Agreement. That subsequently, the requirements for completion notice had, by mutual agreement been waived by the parties hence the Defendant had not been under any obligation to issue the 21 days' notice. Reliance was placed in the decided case of *Housing Company of East Africa Ltd v Board of Trustees, National Social Security Fund & 2 Others* [2018] eKLR.
100. On the third issue for determination as to whether the Plaintiff was entitled to an order of specific performance, her submission was that notwithstanding that she had demonstrated that the Agreement dated 30th January, 2013 had been void and unenforceable for lack of Land Control Board consent, specific performance was a discretionary and an equitable remedy which may be refused even where the contract was valid and enforceable. Her reliance was hinged on the decision in the case of *Joseph Gichuhi Kamau & another v Salome Wacheke Kanyingi* [2021] eKLR to submit that in the instant case, the Plaintiff did not pay the balance of the purchase price. That he had given out cheques that had been dishonored by the bank and had failed to pay the Kshs. 200,000/= that he had undertaken to pay under the Variation Agreement. That his claim that he had stopped the cheques because the Defendant had failed to release the completion documents was calculated to destruct attention from his inequitable conduct of issuing bouncing cheques.
101. That in any case, there had been overwhelming evidence that the cheques had been dishonored for lack of funds in the drawer's account and that the return cheque advice slip bore the words "effects not cleared". She placed her reliance on the meaning of "effects not cleared" as had been explained in the decided case of *Southern Credit Bank Corporation v Dilraj Bhui* [2011] eKLR to submit that if one deposits a cheque to his/her bank account and issues a cheque to a third party against the incoming cheque, the bank may elect to pay the cheque he/she had issued pending clearance and payment of the cheque deposited, that is, before the effects have been cleared. That however, if the bank pays outgoing cheques against the incoming cheque whose effect have not cleared and the drawer of the incoming cheque stops the cheque, a deposit is created in the drawers account which was not a desirable situation for the bank. That it was common in banking sector and a matter of public notoriety that without



- proper arrangement with one's bank, the bank would return the outgoing cheque(s) with the Return cheque advise slip bearing the words "effects not cleared" meaning that the bank had declined to pay the cheque(s) against un-cleared cheque(s). That often, the words "effect not cleared" were used by the bank to protect their customers' reputation.
102. She also placed reliance in the Central Bank Data Specification Template Validation Rules, 2018 which outlines the standard codes for reasons for dishonoring cheques. That in the instant case, the Plaintiff's cheques had been returned unpaid and the reason that had been given was that of "effects not cleared" that is code 62. That whereas the Plaintiff claimed to have stopped the cheques, if indeed that had been true, then the words would have been "Cheques stopped" pursuant to code 79. That on the other hand, the Defendant had explained that she could not release any of the completion documents before the cheques had been cleared on account of the Plaintiff's previous delay, the cheques having been personal but issued by a stranger and further that the completion of the agreement was to take place at their joint Advocates. That subsequently, the Defendant could not be blamed for exercising caution. Reliance was placed in the decided case of *Kihumba Holdings Limited v Charo Karisa Ngulu* [2021] eKLR.
103. While placing reliance in the case *Joseph Gichuhi Kamau* (supra), she submitted that specific performance being an equitable remedy, it demanded the Plaintiff to approach the court with clean hands, however, it could be discerned from the evidence that the Plaintiff had decided to be economical with the truth. That accordingly, his inequitable conduct did not entitle him to the remedy of specific performance since he had not demonstrated that his past dealing with the Defendant was through clean hands. That in any case, urging the court to order the Defendant to accept the balance in the manner that the Plaintiff was proposing was simply asking the court to re-write the contract between the parties yet it was not the business of the court to re-write the contract which had been freely entered into by the parties. That subsequently, it would be difficult, harsh and extremely unjust to order the Defendant to accept the balance of the purchase price in a manner suggested by the Plaintiff when the Defendant had expressly stated that she was not willing to sell her land.
104. That owing to the passage of time, the value of the land had appreciated while the Plaintiff had kept money at his disposal hence it would be unfair noting that the non-completion of the agreement had been solely caused by the Plaintiff. Reliance was placed in the decided case of *Mary W Gitonga v Samuel Kago Mutura & another* [2015] eKLR. That whereas it was trite that a party was bound by his pleadings, the Plaintiff did not plead any breach or outlined particulars thereof as required by the law but had instead attempted to plead his case through written submissions yet it was trite law that submissions cannot take the place of evidence and pleadings.
105. That further, whilst the Plaintiff had alleged that the Defendant had unilaterally extended the completion period beyond 30th July, 2013 by depositing the cheques after the said date, the said cheques which had later been dishonored had been given to the Defendant late on 30th July, 2013 hence the Defendant could not have cashed the same before midnight of 30th July, 2013. That subsequently, the Plaintiff's argument was unintelligible as he had deliberately delivered the cheque late and should not expect to benefit from his wrongful act. That further in his submissions, the Plaintiff had admitted that he had neither taken possession nor fenced the suit properties as he had claimed in his pleadings.
106. With regards to costs, she placed reliance on the provisions of Section 27 of the *Civil Procedure Act* and the decided case of *Kiska Ltd v De Angelis* (1969) EA 6, to the effect that the same follow event. That since the Plaintiff did not meet the threshold for granting of specific performance, the court should dismiss the instant suit with costs to the Defendant.



Determination.

107. I have considered the parties case as pleaded and the evidence as adduced in proof thereof, the submissions by Counsel for the parties, the law and the authorities cited.
108. Briefly, the Plaintiffs' case is that vide a Plaint dated the 24th September 2013, the Plaintiff sought for an order for specific performance to issue upon the Defendant to hand over to him all the completion documents as set out under clause 7 of the Agreement for Sale dated 30th January, 2013 and to transfer land parcel Numbers Naivasha/Mwichiringiri Block 4/3634 and 3635 to him.
109. He also sought for an order of injunction restraining the Defendant by herself, her agents and her servants from selling, transferring, disposing, alienating or in any manner interfering with the Plaintiff's possession and occupation of land parcel Numbers Naivasha/Mwichiringiri Block 4/3634 and 3635. (suit properties) and finely that the Defendant be condemned to meet all the costs of the suit.
110. In support of his claim, the Plaintiff's evidence was that vide a Sale agreement of 30th January, 2013, the Defendant, being was a donee of the Power of Attorney to deal with Naivasha/Mwichiringiri Block 4/3634 and 3635, had agreed to sell the said portions of land to him at a purchase price of Ksh. Kshs.6,500,000/=. The completion period was to be within 90 days wherein he was to pay a sum of Kshs.1,000,000/= on execution which amount he had paid by a cheque. That the balance of Kshs. 5,500,000/= was to be paid in exchange for the completion documents being: the Original title deed, a copy of KRA Pin Certificate, the Identity Card, passport photos and duly signed transfers. That to opt out of the said agreement, one had to go to S. M. Chege Advocate and give a 21 days' Notice. That 10% of purchase price was the penalty for breach.
111. That after 30 days from the date of the agreement, on the request of the Agent, he had paid a sum of Kshs.635,000/= via a cheque signed on 30th May, 2013 to the agent to assemble the completion documents on behalf of the seller. The balance of the purchase price had reduced to around Kshs. 4,600,000/=. That he had also paid to the agent some funds for beacon identification which amount had been distinct from the agency fees. That he had written two cheques dated 30th January, 2013 and 31st January, 2013 in the Defendant's name amounting to Ksh.1,000,000/= which cheques had been honoured.
112. That after the 90 days' completion period had expired, they had executed a Variation Agreement dated 30th July, 2013 where the Purchase Price had been varied to Kshs.6,500,000/=. He agreed to pay an extra sum of Kshs.200,000/= above the Kshs.6,500,000/= for the variation and now a balance of Kshs. 4,850,000/= was to be paid in exchange of the completion documents wherein the completion date was then extended by 2 months from 30th May, 2013 to 30th July, 2013.
113. That on 30th July 2013 when he sent his manager to Nakuru to deposit the balance of the Purchase price in exchange of completion documents, he had been given scanned copies of the title documents without all the other necessary completion documents to facilitate the transfer of the title deeds. That his Advocate then advised him to stop the payment of the cheques until they could get the full commitment by the vendor that she was ready to complete the transaction. That after about one week, he had been informed that the Defendant was no longer interested in selling the suit properties.
114. In response, the Defendant in her defence dated 23rd October, 2013 had denied the contents of the Plaint. That the Agreement for Sale dated 30th January, 2013 had been varied with a subsequent Variation Agreement that had been executed on 30th May, 2013 for extension of time, at the instance of the Plaintiff as he had been unable to raise the balance of Kshs. 5,500,000/= .



115. That vide the Variation Agreement the completion date had been extended by 2 months from 30th May, 2013 to 30th July, 2013. That the Plaintiff did not pay within the stipulated date of 30th July, 2013 and instead of them meeting at the Advocate's office in Nairobi, that evening, the Plaintiff had sent somebody to Nakuru with 6 personal cheques which had been drawn by a 3rd party being Turitu Service Station, all totalling to a sum of Kshs. 4,865,000/= . That being cautious, and since it had been late, she had taken the cheques and agreed with the messenger to meet the following day so that she could acknowledge receipt of the cheques which event had taken place as planned. That there had been a condition that before releasing the completion documents, the personal cheques had to be cleared and a sum of Kshs. 200,000/= for the extension granted was to be paid either in cash or by bankers' cheques. This was not done.
116. That she had deposited the cheques on 31st July, 2013 wherein the same had bounced and returned unpaid and the reason that had been given was that of "effects not cleared" that is code 62 meaning that there were insufficient funds in the account.
117. That the issuance of cheques by a stranger to the agreement by name Turitu Service Station Ltd was a fundamental breach going to the root of the contract. That the said cheques had been dishonoured for insufficient funds in the drawers account. That the Plaintiff had behaved dishonestly and in the most suspicious manner which was contrary to the terms of their agreements wherein he had failed to meet the set deadlines.
118. That further, the Plaintiff had never been in possession and occupation of the suit properties hence the provisions of Sections 39, 41 and 42 of the Land Act, 2012 did not apply. That the sale agreement that had been executed on 30th January, 2013 was void as no consent had been sought from the Land Control Board.
119. That the order of specific performance sought by the Plaintiff was unavailable to him hence he should pursue the statutory remedy provided for under the provisions of Section 7 of the Land Control Act. That in any case, having breached the terms of the Sale Agreement, he had come to court with unclean hands and was disentitled to an equitable remedy of specific performance. That the suit was misconceived, bad in law and incompetent and should be dismissed with costs.
120. Having given a brief history of the matter herein, I must transgress a little by stating that as was held by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR, that submissions cannot take the place of evidence. This said and done, I find the issues arising therein for determination as follows:
- i. Whether there existed a valid and enforceable contract for sale of land between the parties.
 - ii. Whether there was a breach of the Sale Agreement and by whom.
 - iii. Whether the Plaintiff is entitled to an order of specific performance.
 - iv. Whether an injunction order can issue restraining the Defendant from interfering with the Plaintiff's possession and occupation of suit parcels of land.
121. It is common ground that the Plaintiff herein desired to purchase the suit property and the registered owner desired to sell the suit property through a Power of Attorney donated to the Defendant herein. In order to fructify the desires of both parties they had to comply with the mandatory requirements



of the law. The relevant applicable law is Section 3 of the Contract Act Cap 23 laws of Kenya which provides as follows:-

- “(3) 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 found is
 - (i) 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 a party....”

122. I have considered the said Sale agreement had been for the sale of two portions of land being Naivasha/ Mwachiringiri Block 4/3634 and 3635 at a purchase price of Ksh. Kshs.6,500,000/= wherein the vendor was to pay a sum of Kshs.1,000,000/= on execution of the agreement, and the completion period for the sale and purchase was to be within 90 days of the date of execution of the agreement.
123. In pursuance to compliance with the legal requirements above, the parties executed an Agreement for Sale dated 30th January, 2013. Considering that the Sale Agreement herein was in writing, contained the names of the parties, the description of the property, the Sale premium, and the Special conditions thereto and was signed by the parties herein and attested by their advocate, I find that it conformed to the requisite of a valid contract as per the law herein above and was therefore a valid Sale Agreement, enforceable by the parties.
124. It is not disputed that after the expiry of the 90 days’ completion period (Clause 5 of the Sale Agreement) and at the instance of the Plaintiff, that the parties had subsequently executed a Variation Agreement dated 30th July, 2013 wherein;
125. The facts of this case thereof, are that each side blames the other for breach. The Plaintiff has blamed the Defendant for breach on account of failing to deliver the completion documents in exchange of the deposit of the full balance of the purchase price on 30th July 2013. That she had instead issued scanned copies of the title documents without all the other necessary completion documents to facilitate the transfer of the title deeds. That it had been in this regard that he had stopped the payment of the cheques until they could get the full commitment by the vendor.
126. The Defendant on the other hand blamed the Plaintiff for breach on account that whereas the Agreement for Sale dated 30th January, 2013 had stipulated for completion of the agreement within 90 days of its execution, by the 30th April, 2013, the Plaintiff had not paid any other amount apart from the initial deposit of Kshs. 1,000,000/= made on the day of the execution of the agreement. That he had instead requested for an extension of time to get the funds which had led to the drafting of the Variation Agreement on 30th May, 2013 for an extension of the completion date by two (2) months, without any further extension, to clear the balance of the purchase price on or before 30th July, 2013. That whereas the said balance had been about Kshs. 4,865,000/=, the Plaintiff had agreed to pay an extra Kshs. 200,000/= for the extension which was like a penalty for defaulting.
127. That on 30th July, 2013 instead of them meeting at the Advocate’s office in Nairobi, that evening, the Plaintiff had sent someone to her in Nakuru with about 6 personal cheques drawn by a 3rd party M/s Turitu Service Station all totalling to a sum of Kshs. 4,865,000/=. She had banked the cheques the following day the 31st July 2013 which Cheques had bounced and had been returned via a code



62, “effects not cleared” meaning that there were insufficient funds in the account. That further the Plaintiff had breached the condition that had stipulated that the completion documents would only be released upon clearance of the personal cheques and payment of the sum of Kshs. 200,000/=.

128. Now this then brings me to the second issue for determination as to whether there had been a breach of the contract and by whom.

129. Section 97 of the *Evidence Act* provides as follows;

“(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.”

130. I thus find that the terms and conditions of the sale transaction which are to be considered when determining which party is to blame for the non-completion of the sale transaction are those contained in the sale agreement of 30th January 2013 and the variation agreements of 30th May 2013 herein produced as Pf exh 1 and 8 respectively.

131. The agreement stipulated as follows;

“2.1. The Vendor as the registered owner shall sell and the Purchaser shall purchase the Property for the sum of Kenya Shillings Six Million Five hundred Thousand (Kshs.6,500,000/=) only.

2.2. The purchase price shall be paid in the following manner:

2.2.1 An initial deposit of Kenya Shillings One Million (Kshs.1,000,000/=) only to be paid to the Vendor at the time of execution of this Agreement and receipt whereof the vendors nominee hereby acknowledges.

2.2.2 The balance of the purchase price of Kenya Shillings Five Million Five Hundred Thousand (Kshs.5,500,000/=) only to be paid to the vendor on or before the completion date.

4. Possession

The Property is sold with vacant possession and possession shall be given to the Purchaser on payment of the full purchase price but the Vendor shall show or cause to be shown the beacons to the Purchaser before giving possession and where necessary repair and/or replace any missing beacons.

5. Completion date

The completion of the sale and purchase herein shall take place within Ninety (90) days from the date hereof (hereinafter called “the Completion Date”).

7. Completion Documents

On or before the Completion Date, the Vendor’s Nominee shall hand over the following documents (hereinafter called the “Completion document”) to the



parties Advocates in exchange of the balance of the purchase price as provided in clause 2.2.2.....”

132. It is clear from the evidence herein adduced by both parties that save as what is contained in clause 2.2.1 of the sale agreement, due to the Plaintiff's inability to pay up the purchase price as was stipulated in Clause 5 of the sale Agreement, within Ninety (90) days from the date of execution, the parties had executed a second agreement herein termed as a Variation Agreement dated the 30th of May 2013 herein under produced:

“That the payment period be extended by TWO MONTHS effective from 30th May 2013 to the 30th July 2013.

That this will be the final date for the said transaction.

That the total sum of Kshs. 4,865,000/= be paid on or before 30th July, 2013.

That all the terms of the previous agreement still hold.

That the sum total of Ksh.635,000/= paid to the sale agent by the name of Solomon Imani will not be part of the said amount of the land sale in case the purchaser defaults or changes his mind on the deal.

That the purchaser will pay the seller a sum up a sum of 200,000/= as a penalty of the extension period.”

133. After the execution of the variation Agreement, it is on record that the Plaintiff had, on the last date of compliance being the evening of 30th July 2013, presented to the Defendant at her home 6 personal cheques drawn by a 3rd party being Turitu Service Station, cheques were Nos; 001221 for Kshs. 800,000/=, 001222 for Kshs. 865,000/=, 001217 for Kshs. 800,000/=, 001218 for Kshs. 800,000/=, 001219 for Kshs. 800,000/= and 001220 for Kshs. 800,000/= all totalling to a sum of Kshs. 4,865,000/= and which cheques had bounced for lack of sufficient funds. It is further on record that the sum of Ksh. 200,000/= as a penalty of the extension period had not also been factored.
134. The Plaintiff was obligated to pay the outstanding purchase price as well as the penalty of the extension period in exchange for the completion documents and within a specified period of time which he never did and now he seeks from the court an order for specific performance.
135. Extracts from Halisburry laws of England 3rd edition Vol36 paragraph 444 have the following observation:-

“ A Plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed or been ready and willing to perform all the terms which ought to have been performed or been ready and willing to perform all the terms which ought to have been performed by him; and also that he is ready and willing to perform all future obligations and or the contract...”

(At paragraph 450)...”The Plaintiff must all show performance by him of all terms of the contract which he has under taken to perform whether expressly or by implication and which he ought to have performed at the date of the commencement of the action...”



136. Chitty on Contract, 30th edition Volume 1 at paragraph 27-003 has a useful discussion on the size of specific performance to the effect that:

“The jurisdiction to order 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 formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”

137. In Joseph Gichuhi Kamau & another v Salome Wacheke Kanyingi [2021] eKLR the Court of Appeal held that:

“The Appellants, who did not pay the whole of the purchase price for the portions they claimed to have bought were underserving of orders of specific performance. The Judge was right to award the appellants a refund of money they proved to have paid to the respondent.”

138. In Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa vs. Abubakar Madhbuti [1997] eKLR the Court of Appeal held that:

“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.....

.....Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim.....

.....When the appellants came to court seeking the relief of specific of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice.....”

139. From the above captioned authorities it can clearly be discerned that the conduct of the party applying for relief is always an important element for consideration. Therefore specific performance may be refused if the claimant fails to perform a promise which he made in order to induce the Defendant to enter into the contract.

140. In this case, the written Agreement for sale and the Variation Agreement exhibited by the Plaintiff and admitted by the Defendant is the governing binding instrument between the disputants. These contracts clearly set out the duties and obligations of each party wherein the Plaintiff had met the first prerequisite by paying Ksh.1,000,000/= as the initial deposit at the time of execution of the agreement.

141. Both parties knew that time was of the essence and were obligated to work towards the time line set to wit Agreement for Sale dated 30th January, 2013 had stipulated for completion of the agreement within 90 days of its execution, by the 30th April, 2013, the Plaintiff had not paid any money. He being the defaulting party thus sought for an extension of time wherein parties executed a Variation Agreement wherein the payment period was extended by Two Months effective from 30th May 2013 to the 30th July 2013. At clause 7 of the Agreement for Sale dated 30th January 2013, it had been agreed that on



or before the completion date, the Vendor's Nominee shall hand over the completion document to the parties Advocates in exchange of the balance of the purchase price. By 30th July 2013, the Plaintiff had not paid the balance but sent a messenger in the evening to the Defendant's house to hand over personal cheques of the balance of the purchase price of Kshs. 4,865,000/= and which cheques had bounced for lack of sufficient funds.

142. The said Cheques had also excluded the sum of Ksh 200,000/= which had been agreed upon in the Variation Agreement as a penalty of the extension period. There had been no evidence of any effort were made by the Plaintiff to honor the payment of the balance of the purchase price.
143. The Plaintiff was obligated to pay the balance of the purchase price and an additional Ksh 200,000/- as penalty for the extension period in exchange for the completion documents which he never did. There had been no correspondences indicating that failure to progress the transaction to completion was as a result of the Defendant's failure to comply with the terms of either of the their agreements and nothing has been exhibited by the Plaintiff to show that he had made efforts to facilitate the completion of the contract and therefore it is my finding that the Plaintiff was responsible for the non-completion of the contract of sale of the suit properties from the Defendant to himself and therefore I decline to grant an order for specific performance.
144. Upon declining to grant an order for specific performance for the reasons given herein above, and having considered the evidence herein adduced which has not been controverted that the Plaintiff neither took possession nor occupation of the suit properties herein, it follows that an order of Injunction restraining the Defendant by herself, her agents and her servants from selling, transferring, disposing, alienating or in any manner interfering with the Plaintiff's possession and occupation of land parcel Numbers Naivasha/Mwichiringiri Block 4/3634 and 3635. (Suit properties) is also declined.
145. In the end, I find that the Plaintiff's suit has no merit and the same is dismissed.
146. The Defendant will have costs of the suit.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 21ST DAY OF NOVEMBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

