# Peters v Nderitu (Environment & Land Case 66 of 2015) [2024] KEELC 13756 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13756 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 66 OF 2015**

**JA MOGENI, J**

**NOVEMBER 20, 2024**

**BETWEEN**

**JOEL VICTORIE FRANCOIS PETERS .................................................. PLAINTIFF**

**AND**

**PAUL WANYIRI NDERITU ................................................................. DEFENDANT**

## JUDGMENT

1. The plaintiff filed a plaint dated 23/01/2015 seeking judgment against the defendant for:

    i. A permanent injunction restraining the Defendant whether by himself, his servant or agents or any of them from wasting, damaging, alienating, selling, disposing of or in any other way interfering with the interests of the Plaintiff in three (3) acres of the Property known as Land Reference Number 5842/17

    ii. An order of Specific Performance of the agreements dated 31st January 2007 and 24th November 2009 against the Defendant.

    iii. In the alternative to (ii) above, damages for loss of bargain in the property measuring three (3) acres of the Property known as Land Reference Number 5842/17

    iv. In further alternative to (ii) above, an order for refund of Kshs. 4,448,013.60 together with interest as hereunder:

        Amount Date

        (Kshs)

        777,084.60 Together with interest at Commercial rates from 31.1.2007

        80,000 Together with interest at Commercial rates from 10.5.2007

        40,000 Together with interest at Commercial rates from 6.6.2007

200,000 Together with interest at Commercial rates from 12.7.2007

600,000 Together with interest at Commercial rates from 16.7.2007

90,000 Together with interest at Commercial rates from 21.1.2008

734,370 Together with interest at Commercial rates from 10.6.2008

100,000 Together with interest at Commercial rates from 12.1.2009

100,000 Together with interest at Commercial rates from 3.2.2009

550,000 Together with interest at Commercial rates from 20.3.2009

500,000 Together with interest at Commercial rates from 24.6.2009

71,254 Together with interest at Commercial rates from 30.6.2009

299,375 Together with interest at Commercial rates from 03.9.2013

305,255 Together with interest at Commercial rates from 22.5.2014

v. Compensation and/or Damages for loss of use of the suit property from the date the sale agreement in lieu of or in addition to specific performance

vi. Costs of the suit

vii. Interest on (ii) and (v) above; and

viii. Any other or further orders or remedies that this Court may deem fit to grant

2. The defendant filed a defence and counterclaim. He admits agreeing to sell to the plaintiff a portion of the suit property but avers that he was not able to secure the completion documents due to factors beyond his control a fact that the plaintiff was well aware of. That the failure to secure completion documents was a condition precedent to the Sale Agreement which led to a supplementary Sale Agreement and time lapsed and the said Agreement abated. That the sub-division of the suit property to facilitate the Sale Agreement could not be undertaken without the pre-requisite documents and the plaintiff was aware of the Defendant's predicament in attempt to get the Completion documents which bore not fruit. Thus the defendant denies frustrating the said completion of the transaction. He averred that it is the plaintiff who has never paid the balance of the purchase price as provide by the Agreement for Sale on or before the completion date which has now lapsed twice which in itself constitutes a breach of a condition of the Agreement for Sale.

3. He avers that the order for permanent injunction sought by the plaintiff cannot be issued while the sale was properly repudiated and the plaintiff was properly notified of the same. That the defendant has and is always ready to refund all and any monies paid by the plaintiff towards the purchase price if any be found. Further that the order for specific performance is not enforceable as the sale was frustrated due to inability of the defendant to get the completion documents on time. Also due to the boundary and road surrender disputes which have never been resolved and the lapse of time for completion of the agreement.

4. In his counterclaim, he reiterated that it is the plaintiff who is in breach of the terms and conditions of the Agreement for Sale dated 31/01/2007 and the Supplementary Agreement dated 24/11/2009 which has led to the defendant suffering loss. He avers to be willing and ready to refund any monies that may be proved to have been paid towards the purchase price but without interest. He asked for the following orders: -

1. Damages for loss of bargain in the property for money to be paid

2. Damages for breach of Agreement for Sale;

3. A declaration by this Honorable Court that the Agreements for Sale dated 31st January 2007 and the Supplementary Agreement for Sale dated 28th November 2009 had abated and/or were frustrated and are unenforceable as against the Defendant;

4. An order the rescission and termination of the Agreements for Sale dated 31st January 2007 and 28th November 2009 by the Defendant be and is hereby declared valid, proper and/or lawful by this Honorable Court;

5. Cost of this Counter-claim and interest thereupon at such rate and for such period of time as this Honorable Court may deem fit to grant; and

6. Such further or other reliefs as may be appropriate in the circumstances.

5. The plaintiff filed a reply to defence and defence to counterclaim. He averred that he paid Kshs 777,084.60 as part of his obligation under the agreement in partial settlement of the consideration. This was to enable the defendant to undertake his obligation under clause 1 and 5 of the agreement which included obtaining the appropriate sub-division approvals and titles so as to complete the sale.

6. He pleaded that at the material time paid the defendant Kshs 2,577,084.00 in partial payment of the agreed purchase price. That the value for the money at the material time has substantially changed and hence the claim herein warrants an order for specific performance.

7. That the boundaries of the suit property were clearly demarcated and/or known and further the Laws of riparian land could not affect the known boundaries and/or beacons. Thus the plaintiff pursues completion of the transaction of sale of 3 acres although the defendant has continued to delay and failed to take the necessary steps towards completion.

8. That the time of payment for Kshs 1,800,000 towards stamp duty, registration fees and other disbursements payable is only possible upon the transfer of the main property and therefore that time has not crystalized despite the fact that the plaintiff has made numerous payments in line with the defendant's request. This includes professional fees to facilitate completion of the transaction but the defendant has failed to undertake his obligations.

9. The plaintiff admits that his advocates are holding the original title for the suit property with the intention of securing the plaintiff's interests. That all partial payments made were on the defendant's request through his advocates. The allegations of fraud are vexatious and unfounded since particulars have not been provided. That the defendant seeks to unjustly enrich himself by benefiting from the payments made and also he has come to equity with unclean hands.

10. In response to the counter-claim he reiterates the contents pleased in the reply to the defence and denies all allegations of fact and law pleaded by the defendant in the counter-claim. He avers that the defendant made the plaintiff believe and that is why he paid substantial amounts of money as already pleaded believing that the subdivision of the suit property had commenced and higher deposit was necessary. Thus the plaintiff claims that the defendant is guilty of material non-disclosure because the plaintiff did not know there were difficulties or any challenges for that matter.

11. That the defendant failed to secure the completion documents despite the substantial amounts paid to him by the plaintiff and that he also did not take steps as was expected to disclose, mediate and / or resolve any dispute that may have come about. Thus the plaintiff avers that the counter-claim is vexatious, malicious and bad in law and should be dismissed and judgment entered as prayed for in the plaint.

**Evidence of the Parties**

12. PW-1 was the plaintiff himself, Joel Peters. He adopted his witness statement and testified that they entered into the sale agreement with the defendant on 31/07/2007 where he was buying three (3) acres of ten (10) acres of suit property in Kerarapon for Kshs 12.25 million. The completion was to be within 90 days which however expired and this necessitated the parties coming up with a Supplementary Agreement dated 24/11/2009. The plot was identified as Land Reference Number 5842/17 (Original No. 5842/2/16) (hereinafter referred to as suit property.)

13. Of the purchase price of Kshs 12,250,000 the plaintiff was to pay Kshs 777,084.60 to facilitate the payment of land rates and incidentals for the acquisition of title to the suit property and balance was to be paid in instalments as follows; Kesh 1,800,000 to be paid on or before 28/02/2007 and Kshs 9,672,916 to be paid on or before completion provided the parties may extend the date by mutual consent.

14. The parties had a mutual advocate who acted for both the Vendor and the purchase and the plaintiff paid him his fees but he was also requested to pay the fees for the vendor which would be offset from the purchase price which he did. At the same time he stated that apart from the legal fees of Kshs 299,375, he paid and Kshs 305,225 legal fees he paid for the vendor, he testified that so far he had paid a total of Kshs 4.6 million but he was never given the completion documents. He also stated that he deemed it necessary to bring in a surveyor because the vendor had told him he had a problem in subdividing the 3 acres out of the 10 acres. It was his testimony that he was seeking specific performance to enable them complete the contract.

15. On being cross-examined, he testified that whereas he was to pay Kshs 1.8 million by 28/02/2007 he had not done so. That the completion date was 90 days which however lapsed and the Supplementary Agreement dated 24/11/2009 was for 24 months which also lapsed. He asserted that as at the lapse of 24 months of the Supplementary Agreement he had not paid the balance and even as at the time of coming to court he had not paid the balance.

16. He testified that he was also not aware whether his lawyer gave any professional undertaking and that he has an outstanding balance towards purchase of the suit property which he has never paid since the Special Condition No. 1 states that he pays the balance on or before completion date. He stated that Clause 11 of the Agreement bound him to pay the balance on or before completion date but the said balance has not been paid. He also stated that after the 24 months for the extension lapsed there was no agreement in existence and that he had not signed any transfer document.

17. He testified that he received a termination letter as shown by the document at page 51 and there was also an undertaking to refund the monies paid so far. He further stated that the subdivision which was to be undertaken was rejected by the Nairobi City Council vide and they communicated so through their letter dated 6/10/2010 carried at page 220 of the Defendant's bundle. Further that the Deed of Variation that was prepared by his lawyers was never signed by the vendor.

18. When he was re-examined he stated that the defendant suffered a stroke and he started dealing with the defendant's son Mr Kimondo who had a Power of Attorney. He reaffirmed seeing the letter from the Nairobi City Council but stated that he had no idea in 2007 that there was a boundary dispute between the two neighbours of LR 5842/17 and LR 5842/18. He confirmed that the variation deed was never signed. It was his testimony that whereas Kimondo stated vide the email dated 11/12/2013 at page 82 that he would honor the contract, since 2013 he has never been shown the completion documents.

19. Following an adjournment, the hearing resumed on 21/06/2023 PW2- Eric Nyadimo a Licensed Surveyor testified that he was contracted on 1/02/2008 by the plaintiff to carry out a due diligence survey to establish facts about the suit property. He testified that as a result of the due diligence their report show that the suit property has been converted from LR 5842/17 to parcel No. Nairobi/Block 47/745. That there is a road which provides access to the suit property where both the neighouring parcel and the defendant's parcel had to surrender 6 metres each in order to have a 12 metre road. It was his opinion that the river on the suit property does not affect the sub-division anticipated.

20. Being cross-examined he stated that the never conducted a survey in 2007 nor 2009 and the facts in the report cover the period as at 2023. He also acknowledged that the river he had referred to in his report if it were to change course it may affect a riparian reserve. He confessed not having interviewed neighbours for his survey and also he stated that for any subdivision to happen the County must give approval without which no subdivision can happen. He stated that the suit property is abutted by LR 5842/18 and LR 5842/12.

21. On re-examination he reaffirmed the history of the transaction that has taken place on the suit property and the neighbouring parcels LR 5842/12, 17 and 18.

22. PW-3 was an advocate Esther Njiru Omulele testified inter alia that she was the one who drafted the sale agreement and she acted as the joint advocate for the parties. She testified that she took over the conduct of the transaction when the purchaser has already executed an agreement for sale which was pending sub-division. She gave a brief history of the legal transactions including the fact that they developed the power of Attorney that Mr Kimondo was having. She confirmed that the purchaser paid the legal of fees of Kshs 305,225.00 which was to be subtracted from the balance of the purchase price. She further confirmed that the Sale Agreement lapsed and so did the Supplementary Agreement dated 24/11/2011 and that the plaintiff has not paid the entire balance for the purchase price.

23. She stated that whereas their law firm drafted the Deed of Variation it was not signed. That whereas the plaintiff moved to another law firm in 2014 her law firm retained the original title and the court ordered the release of the title to Nyaguthie Advocates. There is a letter at page 171 of the plaintiff's bundle which is demanding the release of the title. In her testimony she told the court that upon the lapse of the two agreements there was an intention for sale of land in the form of letters but not in the form of an Agreement and that a sale agreement for land must always be in writing.

24. She informed the court the purchaser assumed the responsibility for appointment of surveyor and planner but there was no agreement with the vendor.

25. Re-examined, she affirmed that despite the lapse of 24 months the parties continued to engage and the Purchaser paid fees for the Law Firm of Wanjama and their Law Firm. She stated that they were never asked to give an undertaking and that balance was to be paid upon the sub-division. In the end she stated that it was the vendor's obligation to undertake the approvals but the purchaser requested to do it due to the length of time it took. That no approval was ever obtained.

26. That whereas at page 16 the plaintiff has listed the record of payments made to the defendant, there has been no refund on the fees nor portion of the purchase price. With this the plaintiff closed his case.

27. The defendant had three witnesses testifying. DW1- Clement Muia Nderitu being a son of the defendant and having a Power of Attorney adopted his witness statement dated 31/01/2023 and list of documents as exhibits produced on the defendant's trial bundle from pages 65 to 225. It was his testimony that whereas the Sale Agreement was for Kshs 12,250,000 the plaintiff who is the purchaser only managed to pay Kshs 4,548,013 leaving a balance of Kshs 7,701,986.40 which has not been paid to

date. That the completion date was provided to be 90 days from the date of the Agreement which was 31/01/2007 and a supplementary agreement which was extended for 24 months until 24/11/2009.

28. He stated that the property was 10 acres and the 3 acres was supposed to result from a sub-division. That the sale was conditional as it states at clause one and the condition was subject upon the vendor obtaining the sub-division approvals. It was his testimony that the City Council declined to grant the sub-division as shown by the letter at page 220 of the defendant's bundle. Further that the neighbor who was to cede 6 meters for the road was also not interested and when he died the sons became administrators in 2018 and by the then the agreement had lapsed.

29. It was his testimony that whereas the defendant was willing to sell the land the City Council did not approve the sale due to failure for the ceding by the neighbor of the 6 meters. He also stated that they were willing to refund all the monies paid and that their lawyer has already given the undertaking as stated in the document at page 100 Clause 3 of the defendant's bundle.

30. He told the court that since the agreements have abated the prayer for specific performance cannot hold and also there is a 3rd party on the suit property. On the issue for the Deed for Variation he testified that whereas there was email communication between Mr. Kimondo who is his brother and he also has a Power of Attorney, the emails were not meant to bind the family into a new agreement since the earlier one had lapsed.

31. That the title was only released to the Defendant after they sued the law firm of MMC and this led to the defendant terminating the sale agreement and by the time the plaintiff had given the defendant 21 days notice to complete the sale, the defendant had already terminated the sale agreement in writing and therefore the defendant could not complete what had been terminated. That the two payments for legal fees namely Kshs 305,225 to MMC and Kshs 299,375 to Wanjama were made after the sale agreement had lapsed. So the payments were not meant to extend validity of the sale agreement.

32. Cross-examined, the witness told the court that his evidence was based on the Power of Attorney registered on 14/01/2022. He testified that the sub-division was not done in 90 days as was anticipated and the reasons for failure were beyond the defendant's ability. That after the abatement of the sale agreement the neighbor to the defendant got approvals for subdivision in 2018 but that the defendant did not take any steps to do the sub-division since the sale had abated. That whereas the suit property is freehold the defendant never discussed if they could change the sale to a leasehold since the plaintiff was a foreigner since this was not the issue at hand.

33. Re-examined, he stated that whereas the sale of one acre is costed at Kshs 4.5 million an acre, they cannot transfer the one acre to the plaintiff since there is no sale agreement to support the transfer. It was his testimony that communication between his brother Kimondo also with a Power of Attorney with the plaintiff was not binding.

34. DW2- David Mathenge (via video link) testified that he is a land surveyor. He testified that he authored a report in 2023. In cross-examination he stated that he was not a licensed surveyor. When re-examined he stated that he had legal capacity to author the report and that he was a physical planner.

35. DW3- Mr Joseph Kimondo Nderitu (via video link) testified that he was testifying on behalf of his father and that he had registered Power of Attorney. He stated that he communicated with the plaintiff mainly by email but the communication was never intended to constitute an agreement. Further that all communications after 24.11.11 was done after the lapse of the sale agreement.

36. Cross-examined he testified that the portion the plaintiff was meant to buy in 2007 had the river boundary shown as centre line. In his testimony he stated that he was not aware that his father's title was at risk leading to the plaintiff coming to his rescue and paying Kshs 3 million since this was the

obligation of plaintiff in ensuring that the title was sub-divided. That in Clause 1 of the Sale Agreement the sub-division was to be done by the defendant's father within 90 days.

37. He stated that he was aware that the plaintiff paid Kshs 777,084 .60 to facilitate the payment for land rates and incidentals to facilitate acquisition of the title for the main property whereas his father's obligation was the sub-division. Despite the efforts the plaintiff was also in breach and various clauses in the lapsed agreements show this such as page 103 of the defendant's bundle and clauses B and D and page 99 of the Bundle and Clause 6 which show how much the plaintiff ought to have paid but he was in breach.

38. He further testified that the Supplementary Agreement confirmed that the title had been obtained by the purchaser had not paid Kshs 1.8 million but that he had paid Kshs 3,843,413.60 by the time the second agreement was being signed but not the Kshs 1.8 million as was required by the 1st Sale Agreement. He affirmed that the approval only came from the City Council in 2018 and by then the Agreement had lapsed. That the sale was made conditional hinging it on the sub-division. He stated that despite the plaintiff having paid Kshs 4,548,013 to date he never offered to transfer one acre to him since there is no agreement.

39. Upon re-examination, he stated that the river boundary has changed its course on the ground and this materially affects the sale and also the size of three acres. He reaffirmed that the sale was conditional and the approval was to be given by third parties. That whereas there is a schedule of payments made by the plaintiff at page 16, it shows that the plaintiff made small amounts in payments and not the whole Kshs 1.8 million as was stated in Clause 6 of the Agreement.

40. It was his testimony that the surveyor appointed by the defendant, Mr Heinz was acting on directions of the purchaser without the approval of the defendant. Further that he did not work for City Council and therefore had no power to approve the sub-division.

41. He stated that through the emails he made it clear that they needed a new agreement and whereas a new one was prepared it was never signed by the parties. On the payments to MMC advocates he states that these were made under duress since MNC had refused to hand over their case file to Iseme Kamau Advocates. Most payments made by the purchaser were to third parties and not to the defendant only Kshs 2,84,370 was paid to the defendant. With this the Defendant closed his case.

42. At this point the plaintiff's counsel sought to have the statement at pages 24-35 of the defendant's bundle to be expunged from the court record since they had not had the benefit to cross-examine the maker. The defendant's counsel did not object and the court expunged it from the record.

**Analysis and Determination**

43. Following the close of the trial the court directed the parties to file their written submissions. All the parties complied and filed their submissions. Upon a review of the pleadings, the evidence adduced by the parties and consideration of the submissions filed by the parties the following issued arise for determination.

    i. Whether the sale agreement dated 31/07/2007 and Supplementary Agreement dated 24/11/2009 which extended the original sale agreement for 24 months entered into between the plaintiff and the Defendant, Paul Wanyiri Nderitu was valid, and if so, whether the sale was rescinded by the vendor?

    ii. Whether the contract has been frustrated in any manner, and if so, whether the allegations of frustrations were deliberate and occasioned by the Defendant.

iii. Whether the remedy of specific performance of the agreement of sale dated 31/01/2007 and Supplementary Agreement on 24/11/2019 is available to the plaintiff?

iv. What reliefs and remedies should be granted?

v. Who should bear the costs of the suit?

44. On the evidence adduced there is no contestation that there was a sale agreement entered dated 31/01/2007 and extended through a Supplementary Agreement for 24 months dated 24/11/2009 between the plaintiff on one hand and the defendant on the other. The agreement was for a portion of 3 acres comprising parcel of land known as Sub plot B, C, D, E, F, and G marked on subdivision scheme of LR No.5842/17. A sketch of the subdivision scheme was attached to the agreement and hence the property the subject of the sale was appropriately identified and it was bordered in red. The purchase price was Kshs.12,250,000= out of which the purchaser paid the vendor a sum of Kshs. 777,084 to facilitate the payment of land rates and incidentals for the acquisition of title to the main property.

45. The purchaser was also to pay Kshs 1,800,000 on or before 28/02/2007 to facilitate payment of all stamp duty, Registration Fees and other disbursements payable with respect to the Transfer of the main property to the Vendor. Then the balance of Kshs 9,672,916.000 was to be paid on or before the completion date provided that the parties may extend the completion date by mutual consent. The entire sale was subject to the Law Society Condition of sale (1989 Edition). Both parties do not deny there was the agreement between them. The plaintiff's position was that though there was an agreement, the defendant delayed and/or failed to take steps to conclude the transaction and also frustrated steps and efforts to conclude the said transaction.

46. Upon examination and review of the sale agreement dated 31/01/2007 and Supplementary Agreement dated 24/11/2009 I am satisfied that it met the threshold of what amounts to a valid agreement as envisaged under section 3(3) of the *Law of Contract Act*, Cap 21 Laws of Kenya which before the 2003 amendment was in the following terms: -

> 3(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

47. In the instant matter the land the subject of the sale was aptly described, the consideration was set out amongst other terms. The agreement was signed by the purchaser and was signed by the vendor. The agreement was thus a valid and enforceable agreement.

48. Having determined that the plaintiff and the defendant had entered into a valid and enforceable sale agreement, I now turn to consider whether the agreement was rescinded and/or cancelled as alleged by the defendant. At the same time the plaintiff has stated at paragraph 25 of the plaint that the defendant by a letter dated 13/11/2014 through communication vide a letter from the defendants' advocate purported to repudiate and/or terminate the agreement. The defendant in his evidence asserted that he was unable to there was delay in the completion of the agreement but the delay was attributable to the vendor's inability to avail the documents necessary to complete the transaction. The plaintiff maintained there were active efforts to finalize the sale save that the defendant fell sick and his son who had a power of attorney stepped in and this led to collapse of all the efforts.

49. Rescission is the act where a contract is cancelled, annulled, or abrogated by the parties, or one of them. Rescission may be consensual or by way of notice usually to the defaulting party by the other party to

the contract. Halsbury's Laws of England 4th Edition volume 42 at paragraph 242 provides as follows as relates to rescission:

> " If the contract contains a condition entailing the vendor to rescind on the happening of certain events and those vents happen, the vendor may rescind. In the absence of such a condition the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract and the parties can be restored to their former positions.."

50. The plaintiff being dissatisfied with the manner in which the defendant rescinded the agreement for sale, filed this suit seeking for relief of specific performance alleging breach on the part of the defendant while the defendant on its part claimed in the counter-claim damages for loss of bargain the property and damages for breach of agreement for sale and that the two agreements for sale were frustrated and unenforceable as against the defendant. Further that the rescission and termination of the sale agreement dated 31/01/2007 and 28/11/2009 is valid, proper and lawful.

51. It is the defendant's contention that the plaintiff failed to pay the balance of the purchase price Kshs 9,672,916 before or on the actual completion date. Further that the plaintiff failed to pay Kshs 1,800,000 on or before 28/02/2007as the sale agreement had stipulated in clause 6 and that the advocate for the plaintiff Muriu Mungai refused to release the title documents which were vital to completion. It is also not in dispute that the sale agreement was subject to the Law Society Conditions for sale 1998 in so far as they were not inconsistent with the clauses in the sale agreement.

52. In the Court of Appeal case of Njamunyu –vs-Nyaga (1983) KLR 282 cited with approval in the case of Elijah Kipkorir Barmalel & another –vs- John Kiplagat Chemweno & 3 others ( 2010) eKLR the court considered when rescission may be applicable and inter alia stated :-

> " 7. Where completion does not take place as intended by the parties ( in this case after the consent was obtained), the option open to the concerned party is to give notice to the party in default therefore making time of the essence . Where there is no express agreement or notice making time of the essence the court will require precise compliance with stipulations as to time whenever the circumstances of the case allow.
>
> Before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given failure to rectify will result in rescission of the contract".

In the case of Elijah Kipkorir Barmalel & Another – Vs- john Kiplagat Chemireno & 3 others ( supra) the court of Appeal on the issue of rescission stated :-

> " 25. We have carefully considered the evidence on record, the findings of the superior court and the submissions of counsel and we think the superior court cannot be faulted in its conclusions on the issue of rescission.
>
> As stated by this court on the Njamunyu case, although the parties to a sale agreement upon which consent has been obtained may choose to terminate it, in the absence of an express agreement on time being of the essence, notice must be served on the defaulting party before any assertion can be made that time was of the essence .In this case there was an express provision ( clause 8(2) as to when time would become of the essence but the clause was never invoked

> by the vendor . It was not the vendor's case in the superior court either in his pleadings or evidence , that the refusal to accept the balance of the purchase price made time of essence. There was no counterclaim for rescission either. His case was rather that he had served notice in 1980 which was not complied with and therefore he was not obliged to accept the balance of the purchase price. As correctly held by the superior court the notice was a nullity and therefore of no consequence to the agreement between the parties. We would for those reasons agree with Mr. Machiro that there was no valid rescission of the sale agreement.

53. In the instant suit there was evidence adduced that the plaintiff was served with a notice to rescind the agreement. In the letter dated 14/08/20151exhibited at page 51 of the trial bundle the purchaser there is a letter authored by the advocate of the vendor titled; Termination of Agreements for Sale and Purchase of Land. In the said letter the advocate writes; "Further the completion date and new completion date for the said Agreements has long expired and abated due to the difficulties in obtaining the requisite approvals for subdivision and in any event you have never paid the balance of the Purchase Price on or before the completion dated and/or the new completion date"

54. In the same letter the vendor's lawyer quotes Clause 3 of the Agreement for Sale dated 31/07/2007 where the vendor is obligated to give an undertaking to refund the purchaser all amounts advanced to the vendor in the event that he is unable to obtain the required approvals for sub-division. Therefore, on the evaluation of the evidence it is my finding that the agreement the plaintiff had entered into with defendant was not lawfully rescinded by the vendor.

**Frustration**

55. The Defendant has alleged and/or better still contended that the contract Vide the Sale agreement, has been frustrated. In this regard, the Defendant has therefore invited the Court to release and discharge him from the Contract.

56. It must be noted, that in impleading the doctrine of frustration the defendant wrote on different occasions to the plaintiff and intimated to the plaintiff that whereas he was keen to conclude the Sale agreement in terms of the various letters, his effort was frustrated due to the failure to get approval from the County.

57. I must point out that even the plaintiff sensed that the contract had been frustrated, and he indicated this to the plaintiff when while acknowledging that the Agreements had lapsed vide the letters dated 7/12/2012, 10/12/2012 and 4/08/2014, the plaintiff requested for a Deed of Variation of Agreement for Sale and Supplementary Agreement for Sale to Extend the Completion date. When it became apparent that the contract was frustrated and the sale had abated and was unenforceable the defendant issued the plaintiff with a letter terminating the Sale Agreement.

58. In support of the foregoing pronouncement, I find support in the decision in the Court Of Appeal case of Lucy Njeri Njoroge versus Kalyahe Njoroge [2015]eKLR where the Court observed as follows:

> " For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In Maritime National Fish vs Ocean Trawlers [1935] AC 524., self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of their other trawlers leaving no licence to operate the contracted trawler.

In Davis Contractors Ltd vs Farehum U.D.C. (supra), it was stated thus, "The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self induced ."

59. From the foregoing, what becomes evident and/or apparent is the fact that before a Party can invoke and rely on the Doctrine of frustration, such a Party must plead particulars of the circumstances leading to frustration.

60. Secondly, it is also important for the Party pleading frustration, to show that the circumstances which are alleged to found frustrations are neither self-induced nor self-inflicted. In the instant case the Defendant was able to show and demonstrate that the events leading to the frustration of the agreements were not self-induced. For example the approvals by Nairobi City Council were not issued with the stipulated time despite follow up. This effort was recognized by none other than the plaintiff when he proposed for the Supplementary Agreement dated 24/11/2009.

61. In the case of Charles Muirigi Miriti Versus Thananga Growers Sacco Limited And Other[2014]eKLR, the Honourable Court held as follows:

" As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea"

62. It is my considered view that the Defendant did bring his case to fit within the legal prescriptions contained therein and even to exonerate himself from the fact that the failure to complete the contract was not a deliberate act or election on his part.

63. In view of the foregoing, I find and hold, that the Doctrine of frustration, does apply to the circumstances of this case and it does come to the aid of the Defendant.

**Specific performance**

64. For a party to be entitled to an order of specific performance of a contract, such party must demonstrate and /or prove that they had performed all the terms of the contract either expressly and /or impliedly as at the time of the institution of an action and that the opposite party had no reason not to perform their

part of the bargain. Indeed specific performance is an equitable remedy and thus a party approaching the court for such remedy must come to court with clean hands. Gicheru, J.A ( as he then was) in the case of Gurden Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa –vs- Abubaka Madhubuti (1997) eKLR in considering in what instances specific performance, may be ordered expressed himself as follows:-

> " It cannot be gainsaid that the underlying principles 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 as is set out in paragraph 487 of volume 44 of Halsbury's Laws of England Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of contract :-
>
> > " must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action . However this rule applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non- essential or important term. Although in such cases it may grant compensation.
> >
> > Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim"

65. In the same case Gicheru, JA went on to state as follows"-

> " when the appellant came to court seeking the relief of specific performance of their 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"

66. In the present suit, the agreement dated 31/07/2007 and 24/11/2009 which the plaintiff seeks specific performance of provided for a completion date and conditions that had to be fulfilled for subdivision to happen. The plaintiff at the execution of the agreement paid a deposit of Kshs 777,084.60 to facilitate payment of land rates and a further Kshs 1,800,000 was required to be paid on 28/02/2007 for payment of stamp duty, registration fees and other disbursement. The balance of Kesh 9,672,916.00 was to be paid on or before the completion date. It is evident that the plaintiff admitted during the trial that he had not paid the balance to date.

67. Payment of the balance of the purchase price in my view was an essential condition of the agreement which the plaintiff ought to have fulfilled before he could approach the court for the equitable remedy of specific performance. Although the plaintiff contended the vendor had not availed the completion documents, and that was the reason he had not paid the balance that was no reason for him not to tender the balance of the purchase price as the agreement provided. The plaintiff could not insist that the vendor performs his obligations yet he had not on his part performed his obligations under the agreement. In those circumstances the remedy of specific performance would not be available to the plaintiff.

68. Further the contractual obligation that the Agreement provided had to be fulfilled by the plaintiff on one hand and the defendant on the other.

69. The Court of Appeal in Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited went on to posit;

> " The principle undergirding this rule flows from the notion of freedom of contract that is central to the law of contract; that it would be perverse and directly inconsistent with the intention of the parties after reaching a bargain and choosing to record that bargain in writing, for any court to resort to the prior history of exchanges and negotiations in order to resolve a dispute arising from the interpretation of the terms of the written bargain; and that the parties by consensus have themselves chosen not to give their prior negotiations contractual force and instead they have reached an agreement, and documented it."

70. On consideration of the evidence at hand, the agreement is clear and the plaintiff breached the contract when they failed to pay the balance on or before the completion date as the Sale Agreement provided. The Deed of Variation that the Plaintiff proposed was not signed by both parties thus there was no Deed of Variation to the Terms of the Sale Agreement. There was no attempt by the plaintiff to deposit the balance in court and no evidence that the defendant out of his volition frustrated the Sale Agreement as alleged. May I state that it is not the duty of courts to rewrite contracts entered into between parties. The only duty of the court is to interpret the terms of the contract as they are. This was the position taken by the Court of Appeal in the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited (2017) eKLR when it rendered that:

> " We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

71. 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 vs 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."

72. Again in the case of Attorney General of Belize et al vs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West 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."

73. Given the foregoing it is my position that the remedy of specific performance is not available for the plaintiff in the instant case.

**Reliefs and Remedies sought in the plaint and in the counter-claim**

74. As already stated, the plaintiff has sought specific performance against the defendant. Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid, 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. The plaintiff has sought to have specific performance but has he shown that he was ready, able and willing to complete the transaction on 31/01/2007 and 24/11/2009?

75. Halsburys Laws of England (4th Edition) at paragraph 487 vol. 44 states that,

> " A plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications ad which ought to have been performed at the date of the wit in the action. However this rule only applies to term as which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance or is in default in some non-essential or unimportant term although in such cases it may grant compensation"

76. The Court of Appeal in Civil Appeal No. 165 of 1996 between Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti, in which Gicheru, JA (as he then was) expressed himself thus:

> " When the appellants sought the relief of specific performance of sale of the respondent's property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement...It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property...as stipulated in the agreement. There was, however, no express stipulation nor any indication in the agreement that time was of the essence in the agreement. The appellant's failure to deliver up the balance of the purchase price of the suit property by the appointed date...did not bring the agreement to an end...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. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation...Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim... The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract......the court of equity would refuse to grant specific performance and would leave the parties to their other rights...When the appellants came to court seeking the relief of specific performance 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 these 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".

77. On his part Tunoi, JA (as he then was) said:

> "However, the appellants' conduct has been such as to render it inequitable for specific performance to be granted…There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated".

78. In this case, the plaintiff indicated that he was ready and willing to complete the transaction but he did not show how he would comply. The plaintiff has not even shown that he attempted to pay the defendant the purchase price and was rejected. It is not enough to state that you were ready to comply and willing to comply in a letter. This statement is echoed in the case of Nabro Properties Limited –vs- Sky Structures Limited & 2 others (2002) 2 KLR 300 where the Court held that, "A party seeking specific performance must show and satisfy court that it can comply and be ready and able a mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast upon the appellant".

79. The defendant signed a conditional agreement that stated as follows; "The vendor's advocate shall give an undertaking to the purchaser to refund him all the amounts advanced to the vendor in the event that the Vendor is unable to obtain the required approval for the proposed subdivision of the main property and is unable to obtain a separate Title of the Sale Property before the Completion Date……" The vendor is required to refund any monies paid. Therefore, it is my finding that since the plaintiff had paid some money towards the Sale Agreement, then since the Sale Agreement was rescinded the defendant is not entitled to retain the monies paid to him.

80. The final result is that the plaintiff is entitled to a refund of Kshs. 4,448,013.60 plus interest at court rates from the last payment made. The defendant is not entitled to the award for damages as claimed.

**Who bears the costs of this suit?**

81. Lastly, on the prayer for costs, the applicable law is found in section 27 (1) of the *Civil Procedure Act* which provides that costs largely follow the event, and the court is given discretion to determine which party will meet the costs and to what extent. With the above facts, I find that it is only appropriate that each party bears it's on costs.

**Final Disposition**

82. Having dealt with all the issues that were set out for determination herein, it is therefore appropriate to summarize the Orders of the Court. From the analysis it is notable that the plaintiff's case succeeds in part and so does the defendant's counter-claim and consequently, I now make the following Orders:

    a. That the court orders that the defendant refunds the plaintiff Kshs 4,448,013.60 together with interest from the date of filing of this suit until payment in full.

    b. A declaration is hereby issued the Agreements for Sale dated 31st January 2007 and the Supplementary Agreement for Sale dated 28th November 2009 had abated and were frustrated and are unenforceable as against the Defendant;

    c. An order is hereby issued that rescission and termination of the Agreements for Sale dated 31st January 2007 and 28th November 2009 by the Defendant is valid, proper and lawful.

    d. On the question of costs I have taken account of the attendant circumstances in this matter. It is evident the parties have been dilatory in pursuing their rights and all have been guilty of laches. As a result there was prolonged and convoluted litigation. Therefore I direct that each party bears their own costs of the suit and the counterclaim.

    It is so Ordered

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.**

**....................................**

**MOGENI J.**

**JUDGE**

**In the Virtual presence of: -**

Ms. Nyaguthie for Defendant

No appearance for Plaintiff

Caroline Sagina - Court Assistant

**....................................**

**MOGENI J.**

**JUDGE**