



REPUBLIC OF KENYA



**KENYA LAW**

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**Lakeview Investment Limited v Ndege & 2 others (Environment and Land  
Case Civil Suit 211 of 2011 & Environment & Land Case 156 of 2018  
(Consolidated)) [2025] KEELC 2919 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2919 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE CIVIL SUIT 211 OF 2011 &  
ENVIRONMENT & LAND CASE 156 OF 2018 (CONSOLIDATED)**

**CA OCHIENG, J**

**MARCH 27, 2025**

**BETWEEN**

**LAKEVIEW INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**JENNIFER WAITHIRA NDEGE ..... 1<sup>ST</sup> DEFENDANT**

**MANWAH BWOSIEMO MAGARA ..... 2<sup>ND</sup> DEFENDANT**

**AL RUHIA ESTATES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. ELC 211 of 2011 and ELC No. 156 of 2018 were consolidated pursuant to this court's orders issued on 13<sup>th</sup> June, 2019, in ELC No. 156 of 2018. Further, ELC 211 of 2011 became the lead file.

**Pleadings**

2. Through a Plaint dated the 17<sup>th</sup> August 2011 and amended on 31<sup>st</sup> January 2022, the Plaintiff prays for Judgement against the Defendants for:
  - a. A permanent injunction restraining the defendants jointly and severally, their agents and/or servants from alienating, trespassing on, transferring and /or in any other manner dealing adversely with the land parcel known as LR No.25695 situate within Mavoko Municipality in Machakos county.
  - b. An order declaring the sale agreement dated 16<sup>th</sup> December 2010 between the 3<sup>rd</sup> defendant and the 1<sup>st</sup> and 2<sup>nd</sup> defendants null and void.



- c. An order for cancellation of the title and registration of the 3<sup>rd</sup> defendant as proprietor of the land parcel known as LR No. 25692 situate at Mavoko Municipality in Machakos County.
  - d. An order of specific performance against the 1<sup>st</sup> defendant to transfer the parcel of land known as LR No. 25692 situate at Mavoko Municipality to the plaintiff and in default, the Deputy Registrar of the High court do sign all the transfer or necessary documents on behalf of the 1<sup>st</sup> defendant to the plaintiff.
  - e. Damages for breach of contract as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  - f. Cost of the suit.
  - g. Any relief that this Honourable court deems fit and just to grant.
3. The Defendants opposed the suit vide their joint statement of defence dated the 7<sup>th</sup> March 2022.
  4. ELC Case No. 156 of 2018 was commenced vide a Plaint dated the 8<sup>th</sup> August 2018 and amended on 3<sup>rd</sup> December 2021. The Plaintiff therein prays for judgment against the Defendant for:
    - a. An injunction to restrain the defendant, its servants or agents from trespassing, entering, remaining, fencing, selling, offering for sale, transferring, charging and/or in any way whatsoever interfering with the Plaintiff's quiet enjoyment of property LR No.25692 – Mavoko Municipality.
    - b. An eviction order against the defendant and its agents including demolition of the illegal structures on the suit land.
    - c. Refund of ksh. 7,000,000/=
    - d. An order that the officer commanding Mlolongo Police Station to enforce.
    - e. Mesne profits.
    - f. General damages.
    - g. Cost of the suit.
    - h. Interest on (f) and (g) at court rates.
  5. The Defendant in ELC Case No. 156 of 2018 opposed the suit vide its statement of defence dated the 2<sup>nd</sup> February 2022.
  6. The matter proceeded for hearing where the Plaintiff in the lead suit called one witness while the Defendants had three witnesses.

#### **Evidence of the Plaintiff**

7. PW1 Joseph Oduor Okwaro, who is the Plaintiff's Director, testified that the Plaintiff purchased LR No. 25693 hereinafter referred to as the 'suit land', from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants vide sale agreements dated the 16<sup>th</sup> November 2009 and 22<sup>nd</sup> January, 2010 respectively. He produced the Plaintiff's bundle of documents dated the 2<sup>nd</sup> March, 2020 as P. Exhibit 1-10.
8. He claimed that at the time of executing the Sale Agreement dated the 16<sup>th</sup> November 2009, parties were in agreement that the Plaintiff was purchasing 3.598 Ha (10 acres) of the suit land at a consideration of Ksh.8 million out of which sum, it paid a deposit of ksh.1 million in cash to the 2<sup>nd</sup>



- Defendant and the balance was to be paid within a period of 180 days, from the date of execution and upon receipt of the completion documents from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
9. He testified that the Plaintiff took possession of the suit land in January 2010 and started erecting a perimeter fence when its representatives were accosted by the 1<sup>st</sup> Defendant who ordered them to vacate the said land as she was its owner and had not sold it.
  10. It was his testimony that it is the 2<sup>nd</sup> Defendant and his daughter who had signed the Sale Agreement dated the 16<sup>th</sup> November 2009 and not the 1<sup>st</sup> Defendant, who is the 2<sup>nd</sup> Defendant's wife. Further, that upon realization, parties agreed to enter into a fresh Sale Agreement dated the 22<sup>nd</sup> January 2010 for the sale of seven (7) acres of the suit land at a consideration of Kshs. 5.6 million.
  11. It was PW1's further testimony that the Plaintiff paid the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Kshs.1.2 million as deposit for the second sale agreement and the balance of ksh.4.4 million was to be paid within 180 days from the date of execution but by 13<sup>th</sup> August 2010, the Plaintiff had paid Kshs. 5,481,000/= and a further ksh.1,747,000/= was paid via Mpesa bringing the total amount paid to ksh.7,228,000/= which was more than the agreed purchase price.
  12. He further testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants breached the second Sale Agreement as they did not deliver completion documents within 180 days prompting the Plaintiff's lawyers to write to the 1<sup>st</sup> Defendant and issue her with a twenty - one (21) days' completion notice.
  13. He claimed that while the Sale Agreement dated the 22<sup>nd</sup> January 2010 was subsisting, the 1<sup>st</sup> Defendant entered into another Sale Agreement dated the 16<sup>th</sup> December 2010 with the 3<sup>rd</sup> Defendant without rescinding the earlier agreement. He averred that despite the fact that there was an interim order of injunction in force restraining the Defendants from dealing adversely with the suit land, the 1<sup>st</sup> Defendant transferred the suit land to the 3<sup>rd</sup> Defendant on 8<sup>th</sup> May 2012.
  14. During cross examination, PW1 stated that the Plaintiff's deposit of Kshs.1 million paid pursuant to the Sale Agreement dated the 16<sup>th</sup> November 2009 was not refunded despite their belief that it would form part of the purchase price for the Sale Agreement dated the 22<sup>nd</sup> January 2010. It was his further testimony that, at the time of purchase, the suit land only had a Letter of Allotment thus part of the purchase price was to be used to process a title deed but they had agreed the Plaintiff would take possession immediately.
  15. He contended that the Plaintiff purchased seven (7) acres at Kshs.800, 000/= per acre, so the total purchase price was Kshs.5.6 million and the completion date was to be July 2010. He revealed that the Plaintiff entered into another Sale Agreement with the 3<sup>rd</sup> Defendant, of which it was to sell subdivisions of the suit land. He insisted that the 3<sup>rd</sup> Defendant knew that the suit land did not have titles. He averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants became jealous after they realized that the Plaintiff was selling the suit land to the 3<sup>rd</sup> Defendant at a higher price so they entered into a Sale Agreement dated the 16<sup>th</sup> December 2010 with the 3<sup>rd</sup> Defendant, yet the 2<sup>nd</sup> Defendant was well aware that the Plaintiff was purchasing the suit land, so as to sell the resultant subdivisions to third parties. PW1 confirmed that the Plaintiff undertook subdivision of the suit land in 2009 before the 2010 Sale Agreement and received Kshs. 2,650,000/= from the 3<sup>rd</sup> Defendant.
  16. In reexamination, PW1 clarified that the Plaintiff undertook proposed subdivision of the suit land while awaiting for its title deed and later sought approval for selling the subdivided plots. He reiterated that the 1<sup>st</sup> Defendant neither gave the Plaintiff a termination notice of the sale agreement dated the 22<sup>nd</sup>



January, 2010 nor completion documents despite paying the full purchase price, yet the 3<sup>rd</sup> Defendant obtained its title around 2012.

### **Evidence of the Defendants**

17. The 2<sup>nd</sup> Defendant as DW1 adopted his witness statement dated the 20<sup>th</sup> February, 2020 as his evidence in chief and produced documents contained in the Defendants' List and Bundle of Documents dated the 3<sup>rd</sup> December 2021 as Defendants' Exhibits No. 1-46.
18. DW1 testified that he is wrongly sued because even though he witnessed the two Sale Agreements in dispute dated the 16<sup>th</sup> November 2009 and 22<sup>nd</sup> January 2010, he was not the registered proprietor of the suit land and had no legal right to deal with it. He was aware that the Plaintiff failed to honour the terms of the Sale Agreement dated the 22<sup>nd</sup> January 2010, leading to its collapse.
19. During cross examination, DW1 stated that by consent of the parties, he received Kshs.1,7477,000/= on diverse dates on behalf of his wife towards the Sale Agreement dated the 16<sup>th</sup> November 2009 and that he had given the Plaintiff authority to fence seven (7) acres out of the suit land for security purposes. He insisted that the Plaintiff disregarded his instructions and fenced off, the entire ten (10) acres following which, he wrote it a letter to inform it that it had acted contrary to the said Sale Agreement.
20. He averred that the Sale Agreement dated the 22<sup>nd</sup> January 2010 was deferred by consensus of the parties pursuant to the letter dated the 12<sup>th</sup> July 2011 addressed to the District Commissioner, Athi River by the 1<sup>st</sup> Defendant, following which the 1<sup>st</sup> Defendant took control of her land. He was not sure if the Plaintiff had paid him and the 1<sup>st</sup> Defendant ksh.5,481,000/= out of ksh,5,600,000/= which was the purchase price.
21. He contended that the 1<sup>st</sup> Defendant did not breach the Sale Agreement dated the 22<sup>nd</sup> January 2010, but insisted that it is the Plaintiff that failed to pay the balance of the purchase price, of which, it was given a 21 days' notice to complete vide a letter from messrs Mutunga advocates addressed to messrs Mwangambo & Okonjo Advocates but he did not have a copy of it in court. He confirmed that the 3<sup>rd</sup> Defendant is in possession of the suit land. It was his testimony that he refunded Kshs.200, 000/= to messrs Mwangambo & Okonjo advocates, twice.
22. DW1 denied receiving a deposit of Kshs.1 million in respect of the Sale Agreement dated the 16<sup>th</sup> November 2009 but admitted to receiving payments as enumerated on PW1's witness statement from Nos. 2-8 contained at page 53 of the Plaintiff's bundle. He claimed that the Plaintiff had agreed to a refund of the purchase price but later retracted. He explained that as for the Sale Agreement dated the 22<sup>nd</sup> January, 2010, the Plaintiff did not pay the deposit of Ksh.1.2 million.
23. The 1<sup>st</sup> Defendant as DW2 adopted her witness statement dated the 20<sup>th</sup> February 2020 except for paragraphs 1, 2, 3 and 4 which she sought to recant. She denied being a party to the Sale Agreement dated the 16<sup>th</sup> November 2009 but got knowledge of it, when she found people subdividing the suit land. Further, she confirmed engaging them, culminating in her executing the Sale Agreement dated the 22<sup>nd</sup> January 2010, with the Plaintiff for the sale of the suit land.
24. She explained that the purchase price was Kshs.5.6 million comprising of a deposit of kshs.1.2 million, which the Plaintiff never paid. She however admitted that she received about Kshs.1,795 ,000/= from the Plaintiff on diverse dates between the 21<sup>st</sup> January 2010 and 18<sup>th</sup> August 2010. She insisted that the Sale Agreement dated the 22<sup>nd</sup> January 2010 was not completed because she realized that the Plaintiff



- had already entered into another agreement with the 3<sup>rd</sup> Defendant and started subdividing the suit land.
25. She denied receiving any demand notice dated the 21<sup>st</sup> June 2011 and confirmed that she never gave any Notice of Termination of the Sale Agreement dated the 22<sup>nd</sup> January 2010 because the Plaintiff's agreement with the 3<sup>rd</sup> Defendant had made their agreement null and void.
  26. She admitted that she entered into an agreement dated the 16<sup>th</sup> December 2010 with the 3<sup>rd</sup> Defendant and that it was finalized, the suit land was surveyed and the 3<sup>rd</sup> Defendant granted possession. She was categorical that the Plaintiff had only been authorized to fence its portion of seven (7) acres for security purposes but in total breach, it proceeded to subdivide the suit land and sell portions of it, without her consent.
  27. During cross-examination, DW2 stated that her husband (2<sup>nd</sup> Defendant) was included as vendor in the agreement dated the 22<sup>nd</sup> January 2010 just as respect for him and they jointly received monies from the purchaser. It was her testimony that by the time she entered into a sale agreement with the 3<sup>rd</sup> Defendant, she had received about ksh.3 million from the Plaintiff which she verbally offered to refund but there was no documentation to that effect, hence the refund issue was left in abeyance.
  28. She insisted that at the time of executing the Sale Agreement of 22<sup>nd</sup> January, 2010, she did not have a title to the suit land and that she did not avail completion documents to the Plaintiff as it had not finished paying the purchase price. She however admitted that, she transferred the suit the land to the 3<sup>rd</sup> Defendant on 18<sup>th</sup> May 2012 during the pendency of this suit but explained that the transfer had been signed earlier, before the court case.
  29. During reexamination, DW2 clarified that they received ksh.3 million from the Plaintiff in respect to the Sale Agreement dated the 22<sup>nd</sup> January 2010. Further, after she received a further payment of Kshs. 750,000, she realized that there were other deals happening behind their back thus she never presented completion documents to the Plaintiff. She clarified that she did not pay stamp duty as she sold the suit land to the 3<sup>rd</sup> Defendant.
  30. DW3 Hussein Hassan Mohamed adopted his witness statement dated the 20<sup>th</sup> February 2020 and his further witness statement dated the 3<sup>rd</sup> December 2021 as his evidence in chief. He produced the bundle of documents dated the 3<sup>rd</sup> December 2021 as 3<sup>rd</sup> Defendant's exhibits. It was his testimony that in late 2009, the Plaintiff's directors approached him with a proposal to sell to the 3<sup>rd</sup> Defendant part of LR No. 25692 and LR 25693 consisting of 80 plots measuring 80 by 40 feet for Kshs. 250,000/= each, all totaling to Kshs.20 million.
  31. It was his testimony that after negotiations, they paid the Plaintiff a deposit of ksh. 2.5 million but by the time the 3<sup>rd</sup> Defendant came to know of the registered owner of the suit land, it had paid the Plaintiff Kshs.7 million, which it still retains. He claimed that the 3<sup>rd</sup> Defendant's efforts to fence the suit land were thwarted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who claimed to be the registered owners following which they realized the Plaintiff had duped them, that it was the owner of the said land and collected monies from them. He testified that after consultations, the 3<sup>rd</sup> Defendant accepted to purchase the suit land directly from the 1<sup>st</sup> Defendant, who is the registered owner, thus a fresh Sale Agreement was executed on 16<sup>th</sup> December 2010 and the suit land was transferred to the 3<sup>rd</sup> Defendant.
  32. During cross-examination, DW3 explained that the 3<sup>rd</sup> Defendant first purchased the 80 plots from the Plaintiff in 2009. He admitted that the 3<sup>rd</sup> Defendant did not conduct due diligence nor have a lawyer to oversee the transaction. He insisted that they paid the Plaintiff Kshs.7 million which included Kshs.2.5 million as deposit but the Plaintiff did not issue them with receipts. He claimed that the Plaintiff gave



the 3<sup>rd</sup> Defendant a Deed Plan but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stopped it from fencing the suit land, on the basis that the 1<sup>st</sup> Defendant was owner. Further, that the 1<sup>st</sup> Defendant did not disclose she had sold the suit land to the Plaintiff.

33. It was his further testimony that when he presented the Deed Plan which the Plaintiff gave them to Mavoko Survey Office, they told him that the said Deed Plan was fake but he did not have correspondence to that effect. Further, that he reverted to the Plaintiff to confirm ownership and the representatives told him that they had disagreed with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and ten (10) months later, the 3<sup>rd</sup> Defendant purchased the suit land from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pursuant to a Sale Agreement dated the 16<sup>th</sup> December 2010.
34. He clarified that the 3<sup>rd</sup> Defendant purchased the whole of the suit land, which is ten (10) acres and is currently in possession but it has fenced seven (7) acres which it has not developed. Further, that the Plaintiff is in possession of three (3) acres but the title is in the 3<sup>rd</sup> Defendant's name. DW3 also informed the court that he lodged a complaint with the DCI and one of the directors of the Plaintiff was charged with forcible detainer in Machakos CMC Criminal Case No. E177 of 2020 but the suit was stayed pending determination of the instant suit. He confirmed that there is another criminal case filed in Mavoko against the Plaintiff's employee, who was charged with trespass and he is the complainant.

### **Submissions**

35. The Plaintiff in its submissions dated the 24<sup>th</sup> October 2024 provided the background of the dispute herein and relied on the evidence as presented. The court was urged to make an order for specific performance as PW1 demonstrated that it paid the full purchase price in terms of the Sale Agreement with the 1<sup>st</sup> Defendant. The Plaintiff argued that the 3<sup>rd</sup> Defendant could not claim to be a purchaser for value without notice as DW3 admitted in evidence that it had previously entered into a Memorandum of Understanding dated the 25<sup>th</sup> February 2010 with the Plaintiff, wherein the Plaintiff intended to sell it several sub-plots upon the conclusion of the sale transaction between the Plaintiff and the 1<sup>st</sup> Defendant.
36. It further submitted that the allegation by the Defendants that the Plaintiff submitted a fake subdivisional scheme for approval was not backed by any evidence and that the 3<sup>rd</sup> Defendant did not exhibit any evidence indicating that it paid the Plaintiff the alleged Kshs.7 million it claims herein. It contended that since the 3<sup>rd</sup> Defendant was incorporated on 17<sup>th</sup> April 2010, it had no capacity to execute the Memorandum of Understanding dated the 25<sup>th</sup> February 2010. It urged the court to cancel the transfer between the 3<sup>rd</sup> Defendant and the 1<sup>st</sup> Defendant on the basis that it was effected on 8<sup>th</sup> May 2012, during the pendency of the suit, which was meant to defeat justice and offend the doctrine of lis pendens. To buttress its averments, it relied on the following decisions: Carol Silcock v Kassim Shariff Mohamed [2013] eKLR and Anne Njeri Mwangi v The Co-operative Bank of Kenya [2013] eKLR.
37. The Defendants in their submissions dated the 4<sup>th</sup> December 2025 also provided a background of the dispute herein and relied on the evidence as presented. They argued that the Plaintiff is not entitled to an order of specific performance as the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's agreement dated the 22<sup>nd</sup> January 2010 was vitiated due to misrepresentation and material non-disclosure being that by the time the said agreement was executed, the Plaintiff had already subdivided the suit land into 80 plots and sold the same to the 3<sup>rd</sup> Defendant.
38. They submitted that Clause 7 of their agreement provided that time was of essence and completion date was 180 days such that completion date was 21<sup>st</sup> July 2010 and if a Notice to complete dated the



21<sup>st</sup> June 2010 was issued, it was premature. Further, that the Plaintiff made some payments on 13<sup>th</sup> August 2010, a clear act of waiver of notice. It reiterated that the Plaintiff sold the suit land to the 3<sup>rd</sup> Defendant when it had no capacity to do so as plots purportedly sold had no approvals and they purported to give completion documents, which they did not have thus the agreement is voidable at the option of the 3<sup>rd</sup> Defendant, which is entitled to mesne profits. They reiterated that parties are bound by their pleadings and the initial agreement dated the 16<sup>th</sup> November 2009 is not in issue, since it was not pleaded.

39. To buttress their averments, they relied on the following decisions: Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR and Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 Others [2014] eKLR.

### **Analysis and Determination**

40. Upon consideration of the two Plaints, respective Statements of Defence, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination: Whether the Plaintiff is entitled to orders of specific performance in respect to the Sale Agreement dated the 22<sup>nd</sup> January, 2010. Whether the 3<sup>rd</sup> Defendant is entitled to the suit land and should evict the Plaintiff therefrom. Whether the Plaintiff is entitled to the prayers as sought in its amended Plaintiff dated the 31<sup>st</sup> January 2022. Whether the 3<sup>rd</sup> Defendant is entitled to the orders as sought vide its amended Plaintiff dated the 3<sup>rd</sup> December 2021.

As to whether the Plaintiff is entitled to orders of specific performance for the Sale Agreement dated the 22<sup>nd</sup> January, 2010 and if the 3<sup>rd</sup> Defendant is entitled to the suit land and should evict the Plaintiff therefrom.

41. The Plaintiff sought for various orders against the Defendants which are enumerated above. The Plaintiff's director as PW1 claimed that vide a Sale Agreement dated the 22<sup>nd</sup> January 2010, the Plaintiff agreed to purchase from the 1<sup>st</sup> Defendant, seven (7) acres out of the suit land at a consideration of Kshs.5.6 million out of which Kshs.1.2 million was payable upon execution and Kshs.4.4 million within 180 days, which date completion documents also became due.
42. PW1 claimed that in total breach of the contract, the 1<sup>st</sup> Defendant failed to complete the transaction and sold the suit land to the 3<sup>rd</sup> Defendant vide a Sale Agreement dated the 16<sup>th</sup> December 2010. It was DW3's testimony that in 2009, the Plaintiff conducted a "proposed subdivision" of the suit land and entered into a Memorandum of Understanding with the 3<sup>rd</sup> Defendant to sell to it eighty (80) plots at Kshs.250, 000/= each, totaling to a consideration of Kshs.20 million, of which the 3<sup>rd</sup> Defendant paid Kshs.7 million. Further, that this was done before the Plaintiff could acquire completion documents relating to the suit land from the 1<sup>st</sup> Defendant. The Plaintiff however insisted that the 3<sup>rd</sup> Defendant was well aware that it did not have title documents to the suit land.
43. The Plaintiff has now sought for an Order of Specific performance of the Sale Agreement dated the 22<sup>nd</sup> January 2010 between the 1<sup>st</sup> Defendant and itself. On perusal of the Sale Agreement dated the 22<sup>nd</sup> January, 2010, as per Clause 4, the vendor was to deliver completion documents and simultaneously therewith, the purchaser was to deliver to the vendors the balance of the purchase price. While Clause 6 provided that a party was entitled to terminate the agreement upon breach of the other party, after giving a twenty (21) days' Notice. Further, Clause 7 provided that time was of essence and the Agreement was to be completed in 180 days.
44. PW1 claimed that the Plaintiff sent out a completion notice dated the 21<sup>st</sup> June 2010 to the 1<sup>st</sup> Defendant, giving her twenty (21) days' notice to complete the Sale Agreement. PW1 in his testimony



insisted that the Plaintiff continued to pay the purchase price after the completion date had lapsed as evident by the acknowledgement receipt at page 30 of the Plaintiff's bundle indicating that the 1<sup>st</sup> Defendant received Kshs. 750,000/= on the 13<sup>th</sup> August 2010. It emerged that the completion period should have been July 2010. I opine that completion notice dated the 21<sup>st</sup> June, 2010 was hence premature as the completion date contemplated in the Sale Agreement had not reached. What is baffling is how could the Plaintiff send a completion notice then pay some more monies three months later, toward the purchase price.

45. Be that as it may, since the Plaintiff did not pursue completion further, the only remedy available to it as per Clause 6 of the Sale Agreement, was to rescind the sale and seek for a refund of the deposit as there was no evidence tendered of a written document on variation of the contract as stipulated in Clause 18 of the said Sale Agreement. Further, Clause 15 of the Sale Agreement clearly stated that delay did not constitute a waiver. In my view, I find that Clause 4 on completion was not waived by the fact that the Plaintiff continued to pay and the 1<sup>st</sup> Defendant continued to receive the purchase price.
46. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR it was held as follows:

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

47. In the foregoing, while associating myself with the decision cited, I find that both the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were bound by the terms of the Sale Agreement dated the 22<sup>nd</sup> January, 2010 and this Court cannot rewrite the terms for them. Further, I find that all the parties breached the terms of the Sale Agreement as they failed to perform their obligations within the requisite completion period. I note the Plaintiff also proceeded to subdivide the suit land and sold plots to third parties in breach of the Sale Agreement. The Plaintiff now seeks specific performance.
48. On specific performance, in the case of *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR, the Court held that:

“It is trite that a party seeking the equitable remedy of specific performance of a contract must show that he or she has performed all the terms of the contract which he or she has undertaken to perform whether expressly or by implication, and which he or she ought to have performed.”

49. In the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR Maraga J as he then was stated that:

“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.” (emphasis is mine).



50. From the evidence before court, I find that the Plaintiff proved that he paid the 1<sup>st</sup> Defendant Kshs. 3,191,000/= though DW1 and DW2 admitted to only receiving Ksh. 1,991,000/= and disputed receipt of Kshs.1.2 million. From the Sale Agreement dated the 22<sup>nd</sup> January, 2010, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants actually admitted to receiving Kshs.1.2 million at the point of executing it and as a court I cannot disregard this point. In the foregoing, it can only be entitled to a refund of what it paid the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
51. In respect to the Agreement between the Plaintiff and the 3<sup>rd</sup> Defendant over sale of the 80 plots, DW3 admitted that the 3<sup>rd</sup> Defendant never conducted due diligence prior to purchase. DW3 claimed that the 3<sup>rd</sup> Defendant paid the Plaintiff a total of Ksh.7 million but PW1 admitted that the Plaintiff only received Kshs. 2,650,000/=. I opine that the burden of proof was upon the 3<sup>rd</sup> Defendant to prove it paid a total of Kshs. 7 million to the Plaintiff, but it has failed to discharge it.
52. From the foregoing, I opine that the Plaintiff had no capacity to sell the suit land to the 3<sup>rd</sup> Defendant as it had not acquired a full interest on the suit land to sell it as neither did it have title to the suit land nor had it completed paying the full purchase price. Further, it was also improper for it to take vacant possession before paying the full purchase price as this was contrary to Clause 10 of the Sale Agreement. I note the Plaintiff commenced subdivision of the suit land and sold plots to 3<sup>rd</sup> Defendant, yet the land did not belong to it as Letter of Allotment including Sale Agreement, which it sought to rely on did not confer any transferable interest to it. See the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment).
53. On the issue of cancellation of the 3<sup>rd</sup> Defendant's title as sought by the Plaintiff. I note the 3<sup>rd</sup> Defendant entered into a Sale Agreement dated the 16<sup>th</sup> December, 2010, with the 1<sup>st</sup> Defendant for purchase of the whole of the suit land. The 1<sup>st</sup> Defendant as DW2 admitted that they received the full purchase price and transferred the suit land to the 3<sup>rd</sup> Defendant in May, 2012. I note by the time the 1<sup>st</sup> Defendant was selling land to the 3<sup>rd</sup> Defendant on 16<sup>th</sup> December, 2010, the 180 days completion period for the Sale Agreement dated the 22<sup>nd</sup> January, 2010 had lapsed.
54. On proof of ownership of land, Section 26 of the [Land Registration Act](#) of 2012 provides as follows:

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.Emphasis Mine



55. In the case of *Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwua & 5 Others*, Nai. Civil Appeal No. 60 of 1997 the court categorically declared that:

“Section 23 (1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the *Land Registration Act*) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.” Emphasis Mine

56. Based on the evidence before me while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that the 3<sup>rd</sup> Defendant was able to prove it legally acquired the suit land from the 1<sup>st</sup> Defendant. I opine that even though it initially had a Memorandum of Understanding with the Plaintiff dated the 25<sup>th</sup> February, 2010, since the Plaintiff was not the owner of the land and had not acquired any interest to it, it did not bar the 3<sup>rd</sup> Defendant from entering into an Agreement with the 1<sup>st</sup> Defendant who was the owner of the land. In the circumstance, I find that the 3<sup>rd</sup> Defendant is indeed the absolute proprietor of Land Reference Nos. 25692 and will proceed to uphold its title.

57. In the foregoing, I find that the Plaintiff is only entitled to a refund of purchase price including interest, which it paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but not to the rest of the orders as sought in the Plaintiff. Further, I note the Plaintiff never sought for a refund of the purchase price as per their Sale Agreement and as held in *Adetonn Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002* where Judge Pius Aderemi J.S.C expressed himself as follows:

“.....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

(See also the case of *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR), I am hence unable to grant the orders of refund as it was not sought herein but direct the Plaintiff to file a fresh claim in that regard.

58. I further find that the Plaintiff should indeed grant the 3<sup>rd</sup> Defendant vacant possession of the portion of the suit land it occupies, failure of which it should be evicted therefrom. In the foregoing, I find the Plaintiff has not proved its case on a balance of probability and will proceed to dismiss ELC 211 of 2011 with no order as to costs.

59. The 3<sup>rd</sup> Defendant who is the Plaintiff in ELC 156 of 2018 had sought for refund of the purchase price being Kshs. 7,000,000/= which it paid to the Plaintiff. On the refund of the monies paid to the Plaintiff, I note except for PW1’s admission of receipt of Kshs. 2,650,000/=, the 3<sup>rd</sup> Defendant did not tender any evidence on the other payments it made. Further, the 3<sup>rd</sup> Defendant failed to tender any evidence to prove their claim for damages and mesne profits and will decline to grant them.

60. On costs, since the 1st and 2nd Defendants were responsible for the dispute herein, they should bear the costs of both the Plaintiff and 3rd Defendant.



61. In the foregoing, I find that the Plaintiff in ELC 156 of 2018 has proved its case on a balance of probability and will enter judgement in its favour in the following terms:
- i. An injunction be and hereby issued restraining the defendant (Lakeview Investment Limited), its servants or agents from trespassing, entering, remaining, fencing, selling, offering for sale, transferring, charging and/or in any way whatsoever interfering with the Plaintiff's quiet enjoyment of property LR No.25692 –Mavoko Municipality.
  - ii. An eviction order be and hereby issued against the defendant (Lakeview Investment Limited) and its agents including demolition of the illegal structures on property LR No. 25692 – Mavoko Municipality in 90 days.
  - iii. The Defendant (Lakeview Investment Limited) to Refund of Kshs. 2,650,000/= to the Plaintiff.
  - iv. The officer commanding Mlolongo Police Station to enforce order i & ii above.
  - v. Cost of the suit awarded to the Plaintiff and Defendant (Lakeview Investment Limited) to be borne by the 1st and 2nd Defendants (Jennifer Waithira Ndege and Manwah Bwosiemo Magara)

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MARCH 2025.**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Anyoka for Plaintiffs in 156 of 2018 and for Defendants in 211 of 2011

Owang for Plaintiff in 211 of 2011 and for Defendant in 156 of 2018

Court Assistant: Joan

