Eastwest Holdings Limited v Hutchinson (Sued in her Capacity as Administratix of the Estate of Raphael Alfonso Hutchinson - Deceased and also beneficiary of such Estate) & 5 others (Environment & Land Case 815 of 2013) [2023] KEELC 683 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 683 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 815 OF 2013

JA MOGENI, J

FEBRUARY 15, 2023

BETWEEN

EASTWEST HOLDINGS LIMITED ..... PLAINTIFF

AND

JEAN WANJIKU HUTCHINSON (SUED IN HER CAPACITY AS ADMINISTRATIX OF THE ESTATE OF RAPHAEL ALFONSO HUTCHINSON - DECEASED AND ALSO BENEFICIARY OF SUCH ESTATE) .... 1ST DEFENDANT

ELIZABETH HUTCHINSON (SUED IN HER CAPACITY AS ADMINISTRATIX OF THE ESTATE OF RAPHAEL ALFONSO HUTCHINSON - DECEASED AND ALSO BENEFICIARY OF SUCH ESTATE) ..... 2ND DEFENDANT

ALISON HUTCHINSON ..... 3RD DEFENDANT

ARLENE HUTCHINSON ..... 4TH DEFENDANT

ROBERT ANDREW HUTCHINSON ..... 5TH DEFENDANT

JEAN ELIANOR ALBRITTON ..... 6TH DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 5/07/2013, the Plaintiff herein sought for Judgment against the Defendants for the following orders: -

    a. A declaration that the 1st - 6th Defendants hold L.R. No. 21/1/39 upon trust for the Plaintiff.

    b. An order for specific performance of the said Sale Agreement dated 24th January, 2012.

c. An injunction restraining the 1st - 6th Defendants from selling, charging, or parting with possession of L.R. No. 21/1/39 until exercise by the Plaintiff of its option to purchase in accordance with the contract of sale.

d. A permanent injunction restraining the 1st - 6th Defendants from selling, charging, or parting with possession of Parcels C and D of L.R. No. 21/1/39.

e. All necessary and consequential accounts and inquiries.

f. Damages for breach of contract.

g. Further and other relief.

h. Costs.

Plaintiff's Case

2. It was the Plaintiff's case that at all material times, the Defendants were holders of a confirmed grant of representation in respect of the estate of the said Raphael Alfonso Hutchinson (deceased) who at the time of his death was the registered proprietor of L.R. No. 21/1/39, an estate in fee simple. By virtue of section 79 of the *Law of Succession Act*, the Defendants were, following the issuance of a grant of representation to them, the owners of the said L.R. No. 21/1/39 and could, upon confirmation of the grant, with consent of all beneficiaries dispose of any portion of the said L.R. No. 21/1/39.

3. It was their case that on 24/01/2012, the 1st and 2nd Defendants, with consent of the 3rd, 4th, 5th and 6th Defendants, entered into an Agreement for Sale for two parcels of land known as C and D whose area was 1.29 acres with the Plaintiff. The said parcels were to be excised from the said L.R. No. 21/1/39. Inter alia, the terms of sale were that:

a. the purchase price was Kshs. 32, 500, 000/-;

b. the Plaintiff was to pay the Defendants' advocates Kshs 3,250,000/-before or upon execution of the said sale agreement;

c. the sum of Kshs 3,250,000/- was to be held by the 1st and 2nd Defendant's Advocates as stake holders;

d. the balance of the purchase price Kshs 29,250,000/- was to be paid by the Plaintiff upon completion of the sale;

e. the sale was conditional on the 1st and 2nd Defendants obtaining a sub-division certificate and registered deed plans for the property;

f. if the condition precedent referred to was not obtained within 120 days the Plaintiff had the option to proceed or not proceed with sale;

g. the parties were to co-operate fully in all actions necessary to procure the satisfaction of the condition precedent pleaded in (d) above;

h. the advocates of the vendors were M/s Waruhiu K'owade & Nganga Advocates whilst those of the Plaintiff were M/s Hamilton Harrison and Mathews Advocates;

i. the completion date was the fourteenth calendar day after the satisfaction of the condition precedent pleaded in paragraph (d) above;

j. the purchaser had the first option to purchase all the other parcels of land.

k. in the event the Vendors were in breach of the contract of sale, the Purchaser was entitled to specific performance;

l. if any dispute arose between the parties in regard to the interpretation, rights, obligations and or implementation of any one of the provisions of the agreement, it was to be referred to arbitration.

4. The Plaintiff avers that before the execution of the said sale agreement, the Plaintiff deposited with Defendants' said advocates Kshs. 3,250,000/. Thereafter, the Defendants embarked on the excision of the said parcels of land known as C and D from L.R. No. 21/1/39.

5. The Plaintiff further avers that on 31/01/2012, the Defendants requested it to authorize their advocates to release to the Defendants from the Kshs. 3.25 million deposit, Kshs 355, 000/- to the surveyor to enable him to facilitate the excision of Parcels C and D from L.R. No. 21/1/39. The Plaintiff gave the authority for the release to the surveyor of the said Kshs 355, 000/- on 1/02/2012.

6. The Plaintiff further avers that on 6/07/2012, the Defendants who had an urgent need of Kshs. 1.5 million requested it to authorize their said advocates to release that amount to them from the balance of the Kshs 3.25 million deposit. The Plaintiff agreed and authorized the release of to the Defendants of the said Kshs 1.5 million on the same 6/07/2012.

7. The Plaintiff avers that the condition precedent was satisfied in or about January, 2013. On 30/01/2013, the 1st and 2nd Defendants' advocates confirmed, in writing, that the condition precedent pleaded above had been satisfied but informed the Plaintiff that they would not complete the sale because the contract allegedly embodied an unfair bargain to them in that the Plaintiff was to pay only Kshs 32,500,000/- for parcels C and D and not Kshs. 52,250,000/- which was the true value. They purported to rescind the contract of sale and to offer the same parcels C and D to the Plaintiff for Kshs. 52,250,000/-. The Plaintiff contends that:

a. the agreement dated 24/01/2012, was at all material times including 30/01/2013, binding on the parties;

b. the 1st and 2nd Defendants were obliged to transfer parcels C and D within 14 days of the satisfaction of the condition precedent;

c. the purported rescission of the contract of sale made on 24/01/2012 is null and void;

d. the 1st and 2nd Defendants have breached the contract of sale and the Plaintiff is entitled to an order for specific performance.

8. The Plaintiff further avers that it was under the said agreement made on 24/01/2012 entitled to the first option to purchase all the other parcels of land on L.R No. 21/1/39 and the Defendants are in breach of the said contract of sale by failing to offer the Plaintiff the first option to buy the other parcels of land on the property. In the premises, the plaintiff is entitled to a permanent injunction to restrain the 1st and 2nd defendants from selling, charging, leasing or parting with possession of the whole of the said L.R. No. 21/1/39.

9. The Plaintiff avers that the 3rd, 4th, 5th and 6th Defendants have been registered as the proprietors of L.R No. 21/1/39 subsequent to the subdivision and have approached other parties with a view to selling Parcels C and D in breach of the contract of sale.

10. The Plaintiff avers that on 6/05/2013, it requested the Defendants, in writing, to join it in the reference to arbitration of the dispute touching the interpretation of the said sale agreement and the respective

rights of the parties under the same. On 20/06/2013, the Defendants declined to join the Plaintiff in referring the matter to arbitration claiming that the sale agreement had expired. The Plaintiff contends that the Defendants committed a further breach of the contract of sale dated 24/01/2012 by declining to join the Plaintiff in referring their disputes to arbitration.

11. The Plaintiff avers that by their conduct the Defendants through their advocates led the Plaintiff to believe that they were prepared to honour the arbitration clause in the contract thereby gaining time to seek alternative purchasers.

12. The plaintiff avers that in further breach of the contract of sale of Parcels C and D made on 24/01/2012, the defendant endeavored to enter into a contract with a Mr. Shah for sale of the same parcels for Kshs. 61.5 million.

13. The Plaintiff avers that it is, and at all materials times has been, ready and willing to complete the purchase of the said parcels C and D excised from L.R. No. 21/1/39 but the Defendants have, in breach of their contractual obligations, under the said agreement of sale dated 24/01/2012 declined to complete the same.

14. The Plaintiff has on several occasions filed cautions in this matter with the Ministry of Lands, Lands Department, to maintain the status quo pending the resolution of the disputes in accordance with the terms of the contract of sale and on each occasion the applications have been rejected on spurious grounds.

15. The Plaintiff avers that despite its demand that the Defendants transfer the said plots C and D excised from L.R. No. 21/1/39 to it, the Defendants have refused to do so thereby making this suit necessary.

Plaintiff's Evidence

16. PW1 – Rajesh Maneklal Rughani testified that he is an accountant by profession, but he manages his family's assets. He adopted his witness statement dated 13/05/2022 and a further statement dated 8/08/2019 as his evidence in chief. He also produced a list of documents marked as PExh.1.

17. In cross examination, he testified that he could identify one defendant, Mr. Alison, the 3rd Defendant. He is aware that the suit property is L.R No. 21/1/39 and is situated off Limuru Road Opposite Lone Tree Estate. He was told the Defendants live on the property. He manages Rughani family businesses, there is a property off Mathenge drive, the property is known as Harmony Centre and another property is on Peponi Road, it is a piece of land. He does not manage Sarit Centre. He testified that he adopted the documents which include the sale agreement. The size of the property they were to purchase was 1.29 acres. At page 22, it says that it measures 069 acres. Sale price is Kshs. 32,500,000.00. The initial offer was Kshs. 50 million. The price changed because they saw the property and were willing to pay and they had told the seller they wanted to build offices there. So, they told the sellers agent that they were not interested since they established that getting approval for construction of offices would be hard. After a few weeks, the seller approached them again, but they said they did not want the property since they could not do offices. In their discussions he mentioned that unless the price was Kshs. 30,000,000.00 or thereabout since they could not put-up offices. After a few weeks, the agent came back and said the owner was willing to have a cost of Kshs. 32,000,000.00 and that they also said the Plaintiff could only pay not more than 10% of the purchase price.

18. It was his testimony that he knows Mr. Mohamed, at page 21 there is an email with the initial offer price of Kshs. 50 million was made for approval to be gotten of office construction but when they realized that the approval would not be gotten, they met on the day he made the offer and they stated

that they could only purchase by paying Kshs. 32,000,000.00. see page 26 of the Defendants' bundle and page 108 of the Plaintiff's bundle.

19. He testified that he met the 3rd Defendant after the first offer dated 22/10/2011. He met her regarding their offer of Kshs. 32,500,000.00 which the broker had mentioned. She needed to know how soon they could take the property and also to pay. She asked PW1 to put it in writing right away. In their discussion, the 3rd Defendant said they will need help in paying for the sub-division and PW1 agreed, and she also requested that he writes to her immediately he sends to her a covering email and letter. See page 107 of the Plaintiff's bundle. It is not true that Mr. Mohamed wrote saying that they revert back to the original offer. He wrote to her on 28/11/2011 and the response was immediate. The company East West Holdings Ltd was incorporated on 14/06/2011. The directors were two, Philip Loseno Kingai and Rose Wamaitha Ng'ote. He added that he does not know them. They purchased the company from them, soon after incorporation from commercial registrars, they changed directors on 15/07/2011. The purpose was to have a vehicle ready for business transaction. The new directors at page 130 and 131 Pushkarrai Jani and Tanvir Mughal were invited to the meeting and Philip Loseno and Rose Wamaitha resigned. At page 94, this is a letter from the defendants' advocate's office to the registrar of companies. Rose and Philip resigned on 15/07/2011. It is not true that the defendants entered into a contract with Rose Wamaitha and Philip but with the new directors Pushkarrai Jani and Tanvir Mughal. Pw1 added that he had no document to show that there an affidavit or transfer of share of stock. The company incorporates transfer of share of stock as per documents at page 129, it is stamped 25/07/2011. Rose Wamaitha and Philip Loseno represented commercial registrars the significant date is 15/07/2011 when they had purchased the company. There are two sale agreements, one for Kshs. 50,000,000.00 and Kshs. 32,500,000.00.

20. It was PW1's testimony that the sale agreement dated 24/01/2012 states that LR 21/1/39 would be subdivided as a condition. See page 24 and the approximate size is 5.6 acres. Page 18 shows that their purchase was for 1.2 acres. That the letter at page 55 is the conditions precedent, there is an email dated 6/07/2012 where the email discusses the sub division. The condition precedent was extended to 15/08/2012. It is incorrect to say that the contract was frustrated following the 15/08/2012. In July 2012 the seller called PW1 and stated that they had an urgent family need. He became aware about the need when she called him. It is not true that he took advantage of the defendant's mothers' sickness because the email was written in July and the contract was signed in January. They had signed the contract in January, so the favor sought was in July. He confirmed that he is a director now of the Plaintiff company although he had no document. On the agreement of 24/01/2012, there is a signature by two directors, he is not any of the two directors and they are not available, Mr. Jani died, and Mr. Mughal is available, but they are not in court.

21. The current directors are both in Kenya. He confirmed that he is a director of the company officially registered. Two directors of which he is one. PW1 added that the CR12 will show his name. The other director joined in 2015 February after the death of Mr. Jani. So, there are two directors. Mr. Rhughani and himself. He confirmed that he is a shareholder. He was not director at the he negotiated the price alone. He does not have possession. There was another negotiated price of Kshs. 32,500,000.00. He came to know her sickness in July 2012 while the agreement was signed in January 2012. He testified that he came to know about the names of the family members during this case, he only knew Alison. The company paid a deposit of Kshs. 3,250,000.00 and thus was paid to the lawyers, 10%. This agreement has not been completed. For this agreement to be completed there was a condition that subdivision had to be completed. By 15/08/2012, the subdivision was not completed. At page 25, the condition precedent was provided in clause 5.1. "Completion.... after satisfaction of the conditions or such date...as the parties may agree in unity." The subdivision was to be completed on 30/01/2013. See page 55, the letter from Waruhiu stated the completion there. There was no need for the new date of

completion since the sale agreement had a clear provision. Provision of clause 4.3 of the sale agreement gives a right to the purchaser to proceed with the sale or not if the subdivision has not been achieved within 120 days. The vendor has not enabled him to get the property he has discussed with her but there has been no proper offer. The vendor kept in communication. There was a notice of default to the vendor dated 15/03/2013. A page 59. He confirmed that he never paid.

22. To date, the vendor does not have the balance of the purchase price and so he is in court asking for specific performance. Clause 4.3 of the agreement had other options, but he is not taking that choice. This was a right given to the purchaser by the vendor. He is aware and it is his case that he should get the property at the price of Kshs. 32.5 million as at the cost in 2012. There is no question of renegotiation since the delay is from the vendor's side. Schofield wrote to the vendor's lawyer asking for negotiation to sit and resolve the matter, but they have been frustrated. They are saying the specific performance is for the sale agreement. He is not willing to vary. He wants the property sold at the purchase price. After subdivision, he was asked to agree on a new price, but the vendor lawyers were not agreeable to other negotiated conditions except their conditions. There has never been a call for a meeting. The Plaintiff's lawyers tried to resolve the issues but there was never a call for a meeting – letter on page 55 does not call for a meeting.

23. In re-examination, it was PW1's testimony that at page 21, his email asks for due diligence as he confirmed Kshs. 50 million which he had not done before his first offer. He added that he has not received any letter from the Registrar of companies about inconsistencies of their company. The document at page 57 of the defendant's bundle shows the shareholders and the company was registered on 13/06/2011. There is an affidavit of the former director Philip at page 83 which states his resignation was from 15/07/2011 and at page 84, the document also shows the resignation of Rose Wamaitha Ng'ote. At page 24, clause 4.3, the had a sole discretion not to proceed with the purchase if they felt that the vendor was not doing their part. It was their wish not to proceed if they so choose but they chose to proceed. At page 123, there is a directors' resolution dated 5/03/2019. He confirmed that he is mentioned in clause 4. At the time of signing of the sale agreement he was a beneficial owner. At page 59, there is a letter dated 15/03/2013, from his lawyers where he gave his notice to vendor. At age 57, there is a letter from his lawyers dated 6/02/2013 where his lawyers are seeking bank details of the vendor. The bank details were never provided. At page 59, letter dated 15/03/2013 is from his lawyers giving an undertaking from Prime Bank after they failed to provide the Plaintiff's lawyer with bank details. At page 25, clause 5.3 required PW1 to give an irrevocable undertaking to the vendor and so they provided what was asked for. Page 27, clause 9.2, the purchaser was to give 21 days' notice in writing and the reliefs sought. He has two remedies and he exercised remedy no. A. at page 29, clause 12.1.

24. With that evidence, the Plaintiff closed its case.

Defendants' Case

25. The Defendants entered appearance and filed a statement of defence dated 15/08/2013.

26. The defendants deny each and every allegation contained in the Plaint. They further aver that:

    a. Prior to the execution and conclusion of the Agreement on 24/01/2012, the Defendants had negotiated for the sale of the Property to one Rajesh Rughani and agreed on a purchase price of Kshs. 50,000,000/=:

    b. When the draft Agreement for Sale was sent to the Purchaser's (Rajesh Rughani's) lawyers, Zarqa Ahmed Advocate, it was returned to the Defendants' advocates by a different firm of

advocates and with vast changes chief among them being the Purchaser (now indicated as the Plaintiff) and the Purchase Price (reduced to Kshs. 32,500,000/=); and

c. Despite it being an unconscionable bargain, the Defendants were forced to accede to the changes owing to accrued estate debts and medical bills for the ailing 1st Defendant.

27. They further aver that:

a. Clause 4.3 of the Agreement for Sale provided that unless the condition precedent therein was fulfilled within 120 days of the date of the Agreement (or such later date agreed by the parties in writing) then the Plaintiff would not be obliged to proceed with the Purchase of the Property.

b. The purport and effect of the said Clause 4.3 of the Agreement for Sale was merely to shield the Plaintiff from liability for specific performance if the Defendants were inclined to continue with the sale transaction.

c. The period for satisfaction of the Condition Precedent expired in or around the 26/05/2012 without extension in writing and the Agreement thereby lapsed.

d. Following the said lapse of the Agreement for Sale, the parties thereafter by exchange of emails of 6/07/2012 between their advocates mistakenly purported to extend the time for satisfaction of the Condition Precedent to 15/08/2012; and

e. There was no further extension of the period for satisfaction of the Condition Precedent.

28. Further to paragraphs 4 and 5 above, the Defendants aver that the sale transaction was affected by fraudulent misrepresentation in that while the Defendants were led to believe that the Purchaser was the Plaintiff herein being the alter ego of Rajesh Rughani, in actual fact it has emerged that the Plaintiff is the alter ego of one Pushkar Jani.

29. The Defendants admit the contents of paragraphs 6 and 7 of the Plaint. The Defendants admit the contents of paragraph 8 of the Plaint and aver that the request for use of part of the Deposit was made in the circumstances set out at paragraph 4(c) and 5(d) hereinabove.

30. Save for the Plaintiff's contentions therein enumerated as (a) to (d) which the Defendants deny, the Defendants otherwise admit the rest of the contents of paragraph 9 of the Plaint. The Defendants otherwise reiterate the contents of paragraph 5 hereinabove.

31. In response to paragraph 10 of the Plaint, the Defendants deny that the Plaintiff is entitled to an injunction over any part of the Defendants property LR. No. 21/1/39 and further aver that;

a. The Agreement was an unconscionable bargain; and

b. The right of first option to purchase other subdivisions in the Defendants' property lapsed with the Agreement on or about 26/05/2012.

32. Save for the contention that the Defendants are in breach of the contract of sale, the Defendants otherwise admit the contents of paragraph 11 of the Plaint.

33. Save for the contention that the Defendants were in breach of the contract of sale by declining to join in referring the matter to arbitration, the Defendants otherwise admit the contents of paragraph 12 of the Plaint.

34. The Defendants aver that the Sale Agreement having lapsed, the same could not constitute a basis for arbitration proceedings or even action for specific performance.

35. They further Deny that the Plaintiff has been ready and willing to complete the purchase. The Defendants reiterate that the Agreement was an unconscionable bargain which in any event lapsed on or about 26/05/2012.

36. The Defendants aver that the lands office registry rejected the purchaser's application for registration of a caveat against the suit property because the completion date had already lapsed. This is in fact the correct interpretation of clause 4.3 of the Sale Agreement by an independent and impartial governmental authority well versed in land law.

37. The Defendants further aver that there is absolutely no cause of action disclosed against them in the circumstances herein and the Plaintiff's suit is defective and incompetent for the reasons that:

    a. No resolution under seal authorizing the institution of the suit has been exhibited as required by the Rules of this court; and

    b. There are reasonable grounds for believing that the Plaintiff does not exist and did not exist at the time of execution of the Agreement for Sale, as a registered limited liability company.

38. Lastly, the Defendants pray that the Plaintiff's suit be dismissed with costs.

Defendants' Evidence

39. DW1 – Alison Hilda Gathoni Hutchinson testified that she is the 3rd Defendant and administrator in the estate of the 1st Defendant. She confirmed that she filed a defence dated 15/08/2013 and a list of documents dated 15/08/2013 as well. She adopted her witness statement dated 15/08/2013 as her evidence in chief. She also produced documents filed on 25/01/2022 and marked as exhibits.

40. It was her testimony that on 24/01/2012, she was the one who got into the sale agreement. It was signed by her mother and her siblings, and she was the one who supported her. It was first registered in her father's name, and she was the administrator. This was a family property, and they still live there. She did not see the people who she got into the sale agreement with. She did not know the two people in whose name the agreement is written. She met Mr. Rughani in 2011, 2012 and 2013 about three or four times.

41. In cross examination, she testified that at paragraph 19 of page 43 of the Defendants documents, it states that they had a meeting on 28/11/2012. She does not recall discussing the purchase price of Kshs. 32.5 million. At page 25 and page 26, there is an email and an offer letter from Rajesh Rughani addressed to Alison where the offer is for Kshs. 32.5 million. The response to Mr. Mohammed from Alison is true that she acknowledged receipt of the letter. She added that she never indicated she shocked that the offer was now Kshs. 32.5 million and not Kshs. 50 million. She believes that the situation was desperate and not clear minded that is why she never complained. She confirmed that she met Mr. Rajesh when the offer of Kshs. 32.5 million was made and she told him it was not plausible. At page 3 of the supplementary bundle, there is an email from DW1 to Mr. Ng'ang'a which is dated 28/01/2013, the sale agreement was signed on 24/01/2012. She has no document before she signed the sale agreement. At page 43, paragraph 20, she stated about the medical bill, if she did not have those challenges, she would not have entered into the sale agreement. At page 43A paragraph 27, her advocate forwarded he first versions on 8/12/2011 and the agreement was signed by parties on 24/01/2012. At page 27, there is an email dated 8/12/2011 and the advocate stated that the deposit shall not be used to settle the rates. There is an email from Mwaura his brother to herself. There was other communication about the price, but it is not before this court. At page 31, it talks about rates being an existing problem. As of 21/12/2011, there was arrangements to settle the council rates and by this time the Agreement had not been signed. The only reason they went into the agreement was medical bills. According to the

lawyer, he was not comfortable with her move that would make the purchaser to fill uncomfortable with going ahead with the sale. At item 6, the lawyer raised the issue of ensuring that the vendor went into the sale in good faith.

42. In re-examination, she testified that she works for refugees and on 4/07/2011, she received a call from her older sister telling her that her mother was in ICU, she arrived and went to see her and so they decided that they needed to find a way to support her mother, the bill was too high. Around August 2011, they were being told that her mum would not be around by Christmas 2011. Her mum passed away on 12/09/2013. Her mother signed the sale agreement when they were in hospital. The understanding they had was that they could negotiate the rates, but it was not the reason for them to sell. She communicated her reservations on the price to the plaintiff. They had agreed to sell the property at Kshs. 50 million and the Plaintiff said he would do some investigation at which point he came back with the offer of Kshs. 32.5 million. She went and begged him and discussed with him. She asked him herself and he agreed that he would go back and talk to his people. They were walking in good faith; she and her brother have a background in law. They asked for Kshs. 15 million deposit and a price of Kshs. 50 million. These monies were to allow them to undertake the tasks. They still went on to subdivide and continued to communicate with PW1. It was clear that the property was a prime property, and it is where her parents have been laid to rest. She met many people in this time, but they do not know who they were. They have always had good faith with humane communication.

43. With that evidence, the Defendants closed their case.

Written submissions

44. At the close of hearing on 23/05/2022, the Court gave directions on filing of written submissions. Parties submitted and I have duly considered them and will refer to them in the resolution of the issues raised. The Plaintiff's filed its submissions dated 5/08/2022 on the even date, rejoinder submissions dated 10/11/2022 and filed on the even date and the Defendants filed their submissions dated 5/10/2022 on 6/10/2022.

Issues for determination

45. I have considered the pleadings, the submissions and the evidence adduced and the exhibits thereto and the following arise as the issues for determination before this Court:-

    i. Whether there was a resolution authorizing the institution of this suit as required by law.

    ii. Whether the Plaintiff Company was incorporated as at the time of execution of the sale agreement dated 24/01/2012.

    iii. Whether the Sale Agreement dated 24/01/2012 is valid.

    iv. Whether the Defendants were in breach of contract.

    v. Whether the Plaintiff is entitled to the order of specific performance as prayed.

    vi. Whether the Plaintiff is entitled to prayers sought in the Plaint.

    vii. Who shall bear the costs of the suit.

Analysis and determination

Whether there was a resolution authorizing the institution of this suit as required by law

46. The Defendants averred that the Plaintiff's suit is defective and incompetent on grounds that no resolution under seal authorizing the institution of the suit has been exhibited as required by the Rules of this Court.

47. Order 4 rule 1(4) of the Civil Procedure Rules provides as follows:

> " Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

48. The Plaintiff describes itself as a limited liability company and therefore the deponent of the verifying affidavit ought to annex the authority as provided for under Order 4 Rule 1(4) of the Civil Procedure Rules.

49. The Court of Appeal in the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR stated as follows: -

> " ...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

50. In the present matter, I note that whereas the Plaintiff filed a board resolution dated 5/03/2019 (see page 123 of the Plaintiff's bundle), the suit was instituted in 2013. The Plaintiff filed its Plaint on 5/07/2013. Although the Board Resolution was filed 6 years after the institution of this suit, the mere fact that there was no board resolution filed together with the Plaint sanctioning the filing of the suit cannot render the suit fatally defective.

51. In the case of Fidelity Commercial Bank Limited v Simon Maina Gachie [2016] eKLR, it was the Court's finding that "the plaintiff was not bound to file the board resolution at the time of filing the suit and could do so at any time before the suit was heard."

52. I am also guided by the case of Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR Odunga, J was in agreement with the decision of Kimaru J in the case of Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR where the court stated: -

> " ...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit."

53. The Court is in agreement with the above holding. Failure to file a resolution authorizing filing of the suit does not invalidate the suit. To hold otherwise would be to elevate procedural technicalities to a point where they would be an impediment to the administration of justice. Article 159 (2) (d) of *the constitution* which Section 19(1) of the *Environment and Land Court Act*, 2011 echoes, enjoins the court to administer justice expeditiously and without undue regard to technicalities of procedure considering the same was rectified and the board resolution was properly on record as it was filed before the suit was set down for hearing.

54. I would opine that just as parties are permitted to amend their pleadings in the course of the proceedings, a party ought to also be permitted to correct a misstep in the procedure adopted in the institution of the suit when no prejudice and/or injustice is occasioned to the opposing party. The significance of a board resolution authorizing the filing of a suit by a corporate entity is to ensure that they do not have unauthorized persons instituting suits on behalf of companies in respect of which the companies may have no knowledge about yet when liabilities ensue, they would be expected to shoulder the same.

Whether the Plaintiff Company was incorporated as at the time of execution of the sale agreement dated 24/01/2012.

55. The Defendants further averred that the Plaintiff's suit is defective and incompetent on grounds that there are reasonable grounds for believing that the Plaintiff does not exist and did not exist at the time of execution of the Agreement for sale, as a registered limited liability company.

56. The Defendants allege fraudulent misrepresentation on the part of the Plaintiff Company. From the evidence before me, the Defendants adduced various documents relating to the Plaintiff Company and various letters wherein the Defendants' counsel purported to report alleged inconsistencies regarding the Plaintiff Company. The Defendants received a response from the Registrar of Companies vide letter dated 14/05/2019 wherein they were advised that although Mr. Jani and Mr. Mughal are directors of the Plaintiff Company, the proper lodgment of documents with the registrar for their appointment can only be deemed to have been done after 25/07/2013 among other things. the documents lodged. The Plaintiff on the other hand adduced a form of annual returns as at 30/06/2012 at page 115, a notice of change of directors at page 110 of their bundle which indicated the change of directors with effect from 15/07/2011 and receipts No. 0549558 at page 114. These documents all indicate the company number as CPR/2011/5000.

57. It appears that the Plaintiff Company was incorporated on 13/06/2011, as seen on the CR12 at page 57 of the Defendants' bundle. The sale agreement of 24/01/2012 was thus between the Defendants on the one part and the Plaintiff Company on the other. It is obvious that this is before the execution of the sale agreement dated 24/01/2012. However, as per the law, until a company has been incorporated, it cannot contract or do any act. See Civil Appeal 189 of 2016 Clement Muturi Kigano v Kibera Development Company Limited [2019] eKLR. Therefore, I find that the Plaintiff Company did exist as at the time of executing the said contract.

58. Regarding the allegations of fraudulent misrepresentation, it is trite law that he who alleges must prove. Evidence of fraud must be proved beyond a balance of probabilities. The burden shifted to the Defendants to prove that there was fraudulent misrepresentation on the part of the Plaintiff. In Black's Law Dictionary 9th Edition at page 731 fraud is defined as: "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

59. In the case of RG Patel vs Lalji Makanji (1957) EA 314, the court expressed itself as follows: -

> " Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required".

60. Further, in Jennifer Nyambura Kamau vs Hampherey Nandi (2013) eKLR, the court of appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence, and, more importantly that standard of proof is beyond a balance of probabilities. This is the same position found in Koinange & 13 Others vs Nyati (1984) EA 425, Gudka vs Dodhia CA No 21 of 1980 and Richard Ekwesera Onditi vs Kenya Commercial Finance Co. Ltd: CA No 329 of 2009, Nairobi."

61. In the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR Tunoi JA stated that: -

> " It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts"

62. Unfortunately for this Court to be able to determine whether there was fraud and in essence misrepresentation by the Plaintiff, it has been left to decide whether the Defendants' evidence is credible. This so because there is no sufficient documentation by the Defendants to support the allegations that have been brought forth as to whether there was fraudulent misrepresentation on the part of the Plaintiff. Allegations have been made and this Court has no option but to make a determination. The registrar's office indicated that although Mr. Jani and Mr. Mughal are directors of the Plaintiff Company, the proper lodgment of documents with the registrar for their appointment can only be deemed to have been done after 25/07/2013. However, the Defendants only left it at that. There is no evidence in form of a DCI report of complaint of the Plaintiff's alleged fraudulent misrepresentation has been filed. No suit has been preferred by the Defendants for the said allegations. Their counsel only sent a letter to the Registrar of Companies requesting them to place the file in the strong room. I am not satisfied that the Defendants have proved the allegations of fraudulent misrepresentation. This Court finds that the Defendants have not established that there was indeed fraud and misrepresentation by the Plaintiff.

Whether the Sale Agreement dated 24/01/2012 is valid

63. Validity of a contract is provided for in law. Section 3(3) of the *Law of Contract Act* read together with Section 38 of the *Land Act*, 2012 provide that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested by a witness who is present when the contract was signed. This was the decision of the Court in the case of Machakos District Cooperative Union Vs Philip Nzuki Kiilu CA No 112 of 1997.

64. Whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of contract.

65. Section 3(3) of the Law of Contract reads as follows; -

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

66. It is on record and undisputed that the parties executed the agreement for sale dated 24/01/2012. This agreement contains the full description of the Parties; the property being sold are two parcels described as C and D measuring 1.29 acres, to be excised from the said L.R No. 21/1/39; the purchase price was Kshs. 32,500,000.00; The parties covenants including the special conditions of sale, the warranties, the obligations of the parties, the default clauses and inter-alia general provisions which the parties agreed to bind themselves. Earlier the offer was made by the Defendants and accepted by the Plaintiff leading to the execution of the said agreement for sale.

67. According to the deed of conveyance in respect of LR No. 21/1/39, the suit property is registered in the name of the late Raphael Alfonso Hutchinson. Under Section 26 of the *Land Registration Act* a certificate of title is taken by the Courts as prima-facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject only to the limitations permitted by law.

68. According to the evidence of both PW1 and DW3, the agreement was signed by Jean Wanjiku and Elizabeth Hutchison (administrators of the estate of Raphael Alfonso Hutchinson) on behalf of the Defendants and by P.P Jani and Tanvir Mughal as directors of the Plaintiff Company.

69. A perusal of the Agreement for Sale dated 24/01/2012 and produced as Plaintiff's exhibit confirms that the above requirements of the law were complied with at the point of preparing the Agreement for Sale.

70. It is therefore the holding of the Court that the existence of a valid agreement of sale has not been assailed. The consequence of the compliance above therefore makes the Agreement for Sale dated 24/01/2012 legal and binding on the Parties in this suit and can be relied upon by the Court in the determination of this suit.

Whether the Defendants were in breach of contract.

71. A Court of law does not re-write a contract between the parties. Its duty is just to enforce it. In National Bank Of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another (2002) E.A 503, the Court of Appeal held that:-

> " A Court of law cannot rewrite 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".

72. The case of the Plaintiff is that it together with the 1st and 2nd Defendants entered into a contract of sale on 24/1/2012 of two parcels described as C and D measuring 1.29 acres, to be excised from the

said L.R No. 21/1/39 and for a purchase price of Kshs. 32,500,000/-. That all the beneficiaries of the estate of the said Raphael Alfonso Hutchinson consented to the sale. Further, that pursuant to the said agreement, the Plaintiff through its advocates, deposited Kshs.3,250,000/- with the 1st and 2nd Defendants' advocates. Subsequently, that the process of excising the parcels C and D commenced. Further, that on the Defendants' request, the Plaintiff consented to the release of Kshs.355,000/- on 31/1/2012, for the surveyor who was undertaking the excision process. Successively on 6/7/2012, upon the 1st and 2nd Defendants' request, the Plaintiff consented to the release of Kshs.1,500,000/- from the deposit of the purchase price.

73. The Plaintiff contended that the condition precedent was satisfied in or about January, 2013. On 30/01/2013, the 1st and 2nd Defendants' advocates confirmed, in writing, that the condition precedent pleaded above had been satisfied but informed the Plaintiff that they would not complete the sale because the contract allegedly embodied an unfair bargain to them in that the Plaintiff was to pay only Kshs 32,500,000/- for parcels C and D and not Kshs. 52,250,000/- which was the true value. They purported to rescind the contract of sale and to offer the same parcels C and D to the Plaintiff for Kshs. 52,250,000/-.

74. The Plaintiff stated the Defendants in essence purported to rescind the sale agreement dated 24/1/2012 stating that they were arranging to refund the deposit of Kshs.2,250,000/-.

75. Further that despite the delays in the condition precedent contained in clause 4 of the sale agreement, he did not exercise the option to rescind the agreement.

76. The Plaintiff contended that they then, by way of a letter dated 15/3/2013, forwarded to 1st and 2nd Defendants an undertaking dated 13/3/2013 from Prime Bank Ltd to pay the balance of the purchase price under Clause 5.3 of the agreement and demanded to be supplied with the completion documents. It was the deponent's disposition that the Plaintiff has endeavored on several occasions to register a caveat over L.R. No. 21/1/39 with no success.

77. The Plaintiff avers that the 3rd, 4th, 5th and 6th Defendants have been registered as the proprietors of L.R No. 21/1/39 subsequent to the subdivision and have approached other parties with a view to selling Parcels C and D in breach of the contract of sale.

78. The Plaintiff deponed that in further breach of the contract of sale of Parcels C and D made on 24/01/2012, the Defendants endeavored to enter into a contract with a Mr. Shah for sale of the same parcels for Kshs. 61.5 million.

79. In support of their claim, the Plaintiff adduced the following documents: a conveyance indicating that the property measuring 6.68 acres belongs to Raphael Alfonso Hutchinson; Agreement of Sale dated 24/1/2012 drawn by Waruhiu K'Owade & Ng'ang'a Advocates indicating the purchaser as East West Holdings Limited and Kshs. 32,500,000/- as the purchase price; correspondence between advocates on the request and subsequent release of Kshs. 355,000/- for the sub-division process, additional funds of Kshs. 1.5 Million; correspondence over the notice of rescission and an alternative offer to purchase the property at Kshs.52,250,000/-; a letter forwarding the undertaking from Prime Bank Ltd; a bundle of applications for registration of a caveat over the property; correspondence on the subject of arbitration; and a copy of an official search revealing the present status of the property.

80. On the other hand, it is the Defendants' case that prior to the execution and conclusion of the Agreement dated 24/01/2012, the defendants had negotiated for the sale of the property and agreed on a purchase price of Kshs. 50,000,000.00. The Court notes that the Defendants also adduced a draft sale agreement with this amount as the purchase price. They aver that when the draft sale agreement

was sent to the purchaser's lawyers, it was returned with vast changes among them being the purchase price (reduced to Kshs. 32,500,000.00).

81. It is also their contention that Clause 4.3 of the Agreement for Sale provided that unless the condition precedent therein was fulfilled within 120 days of the date of the Agreement (or such later date agreed by the parties in writing) then the Plaintiff would not be obliged to proceed with the Purchase of the Property. To them, the purport and effect of the said Clause 4.3 of the Agreement for Sale was merely to shield the Plaintiff from liability for specific performance if the Defendants were inclined to continue with the sale transaction. That the period for satisfaction of the Condition Precedent expired in or around the 26/05/2012 without extension in writing and the Agreement thereby lapsed. Following the said lapse of the Agreement for Sale, the parties thereafter by exchange of emails of 6/07/2012 between their advocates mistakenly purported to extend the time for satisfaction of the Condition Precedent to 15/08/2012. That there was no further extension of the period for satisfaction of the Condition Precedent.

82. In support of their case, the Defendants adduced a draft sale agreement, various email correspondences and various letters.

83. It appears that the Defendants' main argument is that the Agreement was an unconscionable bargain which in any event lapsed on or about 26/05/2012.

84. An unconscionable bargain is defined in Black's Law Dictionary; 9th Edition as follows:

> " A bargain is said to be unconscionable in an action at law if it was such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other".

85. The Court of Appeal decision in Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited (2014) eKLR cited with approval the case Commercial Bank of Australia Ltd Vs Amadio [1983] 51 CLR 447 the Court in Australia stated that:

> " Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues. [Such disability includes] ... "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary". ... the common characteristic of such adverse circumstances "seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other."

86. In the same decision, the Court of Appeal cited with approval the UK decision in Strydom Vs Vendside Ltd [2009] EWHC 2130 (QB) which set out the necessary ingredients for finding a clause to be unconscionable:

> " In summary, therefore, before the court will consider setting a contract aside as an unconscionable bargain, one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. No single one of these factors is sufficient – all three elements must be proved,

otherwise the enforceability of contracts is undermined.... Where all these requirements are met, the burden then passes to the other party to satisfy the court that the transaction was fair, just and reasonable."

87. In the case of Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited (2014) eKLR it was stated:-

> " It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd Vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.
>
> Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case."

88. The Defendants averred that they were forced to accede to the reduced purchase price owing to the accrued estate debts and medical bills for the ailing 1st Defendant. PW1 testified and denied that he did not know about the 1st Defendant's condition as at the time of execution of the agreement dated 24/01/2012. He denied that he took advantage of the defendant's mother's sickness because the email was written in July and the Contract had been signed in January. That he only became aware of the urgent family need when the 3rd Defendant called him in July 2012.

89. The Court has reviewed the agreement and noted that it was not one sided. Clauses 9.1 and 9.2 of the contract are captured below for emphasis:

> 9. 1 If the purchaser fails to comply with any of the conditions hereof, or of any condition subject to which the sale is made including the conditions relating to the completion of the sale the Vendors may give to the Purchaser at least 30 business days' notice in writing requiring the Purchaser to remedy the same before the expiration of such notice AND if the Purchaser fails to comply with such notice the Vendors shall at the Vendors' sole option be entitled to do any of the following:
>
> 9.1.1 To rescind the contract and the Purchaser shall forfeit to the Vendors, the sum of Kenya Shillings Three Million Two Hundred Fifty thousand Only (Kshs. 3,250, 000/-) and to this extent the Law Society Conditions of Sale shall be deemed to be varied Mutatis Mutandis; or
>
> 9. 2 In the event that the Vendors fails to perform any of the conditions of this Agreement relating to completion, the Purchaser shall give the Vendors Twenty-One (21) days' notice in writing requiring the Vendors to remedy the same before the expiration of such notice AND if the Vendors fails to comply with such notice the Purchaser shall without prejudice to any of its other rights and remedies be entitled at its sole discretion to either:
>
> (a) To sue the Vendor for specific performance of this Agreement together with such loss or damage as the Purchaser may have suffered as a result of the Vendor's default; or
>
> (b) To rescind this Agreement in which, case the Vendor will refund immediately on notice from the Purchaser's Advocates to the Vendors' Advocates the Deposit and any other monies that may have been paid pursuant to this Agreement together with interest thereon at the Interest Rate from the date of payment by the Purchaser: without any

deductions whatsoever together and further the Vendors shall pay to the Purchaser a further amount of Kenya: Shillings: Two Million Two Hundred and Fifty Thousand (Kshs.2,250,000/=) by way of agreed liquidated damages as compensation for an loss of opportunity or other loss or damage suffered by the Purchaser by not being able to complete the purchase of the Property as a result of vendor's default and thereafter this Agreement and everything contained herein shall be rendered null and void and neither party shall have any claim against the other.

9. 3 In the event the registration of the Transfer of the Property in favour of the Purchaser and Charge in favour of the Financier (if any) is not possible through defects in the title or otherwise then the Deposit and any other monies that may have been paid pursuant to this Agreement together with interest thereon at the Interest Rate, from the date of payment of such monies by the Purchaser shall be returned to the Purchaser forthwith in full without any deduction whatsoever upon demand and the professional undertaking issued pursuant to this Agreement shall forthwith stand automatically revoked.

90. The attempt by the Defendants therefore to show that they were in a weaker bargaining position and was thus taken advantage of cannot stand. It is clear that should the tables have turned; it would be the Plaintiff who would be asked to forfeit the purchase price deposit that has already been paid. Following the decision in Strydom Vs Vendside Ltd [2009] EWHC 2130 (QB) captured above, courts interference is justified to stop one party from oppressing the other weaker party. From the facts of the case and the contents of the contract, the Parties held equal bargaining power and the Courts intervention is therefore in my opinion, unjustified. Succor is found in the Court of Appeal decision in Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited (2014) eKLR, which cited with approval Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298:

> " Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. The jurisdiction of the court to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident."

91. There is no evidence before this court to support the allegations of the estate debts and medical bills for the ailing 1st defendant. The Defendants did not even adduce a valuation report to demonstrate the value of the suit property at the time of sale to enable the Court to appreciate and compare the purchase price to the market price in an attempt to understand whether the contract was indeed an unconscionable bargain. It is this Court's finding therefore that the Defendants ought to honour the agreement of sale dated 24/01/2012.

92. Despite alleging that the Contract was an unconscionable bargain, it a condition precedent in the contract that the Defendants were to obtain the subdivision certificate and registered deed plans.

93. Evidence before this Court has shown that the Defendants' counsel confirmed that there was a delay in obtaining the same owing to the file going missing at the Land's office as at 5/07/2012. The Defendants purport that the Sale Agreement lapsed on 26/05/2012. I also note that there is an email suggesting the extension of satisfaction of the conditions. The Defendants' advocate confirmed the same vide email dated 6/07/2012. The same was extended to 15/09/2012. If anything, time should have been calculated from this date.

94. Vide a letter dated 30/01/2013 to the Plaintiff's counsel at the time, the Defendants' counsel confirmed, in writing, that the subdivision was complete and that they had been issued with a deed plan as seen on page 42 of the Plaintiff's bundle. They also purported to rescind the agreement on 30/01/2013 in the same letter. It was their assertion that the 3rd Defendants siblings were of the view that the suit property was being sold below market sale price. Again, no one adduced a valuation report to demonstrate this. The letter informed the Plaintiff that there were instructions to rescind the agreement and refund the deposit of Kshs. 3,250,000.00 together with liquidated damages of Kshs. 2,250,000.00. This letter dated 30/01/2013 was the notice that the sale agreement dated 24/01/2012 was rescinded.

95. The Defendants' advocates wrote a further letter dated 14/02/2013 to the Plaintiff's counsel wherein they informed them that the sale agreement lapsed on 26/05/2012 and that all that remained was a refund and the payment of the liquidated damages.

96. Clause 4 of the Agreement for sale dated 24/01/2012 provided as follows:

    4. 1 The sale of the Property is conditional on the Vendors completing the subdivision of L.R No 21/1/39 and obtaining a sub division certificate and registered deed plans (issued by the Director of Surveys) for the Property.

    4. 2 The parties shall cooperate fully in all actions necessary to procure the satisfaction of the Condition including, but not limited to, the provision by all parties of all information reasonably necessary to make any notification or application that the Purchaser of the Vendors deem to be necessary or as requested by any relevant authority, keeping all parties informed of the progress of any notification and providing such assistance as may reasonably be required.

    4. 3 In the event that the Conditions shall not have been fulfilled (or waived by the Purchaser, if legally possible) prior to the 120th day from the date of this Agreement (or such later date as the parties may agree in writing) then the Purchaser shall (at its sole discretion) not be obliged to proceed with the purchase of the Property, the Deposit with interest accrued thereon shall be refunded to the Purchaser and further the Vendors shall pay to the Purchaser a further amount of Kenya Shillings Two Million Two Hundred and Fifty Thousand (KShs.2,250,000/=) by way of agreed "liquidated damages as compensation for any loss of opportunity or other loss or damage suffered by the Purchaser by not being able to complete the purchase of the Property, and all rights and liabilities of the parties hereunder shall cease, and no party shall have any claim against the other save in respect of any antecedent breach of this Agreement. In the event of termination, the provisions of the following clauses shall continue to be binding upon the parties: 13, 14, 15, 16 and 17"

97. From the above, it was a condition precedent that the Vendors would obtain the subdivision certificates and registered deed plan of the property. It was also a condition that the parties shall cooperate fully in all actions necessary to procure the satisfaction of the Condition. That keeping all parties informed of the progress of any notification was also a condition precedent to this sale.

98. As stated before, the Defendants counsel informed the Plaintiff's counsel of the delay in obtaining the subdivision certificate and registered deed plan. He communicated that this was the position as at 5/07/2012. This was in alignment with clause 4.3 which provided inter alia "In the event that the Conditions shall not have been fulfilled (or waived by the Purchaser, if legally possible) prior to the 120th day from the date of this Agreement (or such later date as the parties may agree in writing)". There is also evidence on record that the extension of satisfaction was pushed to 15/09/2012.

99. From the evidence before me, it is clear that the Defendants were the ones causing the delay in the satisfaction of condition under clause 4.1. It is a finding of this Court that this constituted a breach of contract. It was a condition that the Plaintiff (at its sole discretion) was not obliged to proceed with the purchase of the Property, the deposit with interest accrued thereon shall be refunded to the Purchaser and further the Vendors shall pay to the Purchaser a further amount of Kenya Shillings Two Million Two Hundred and Fifty Thousand (KShs.2,250,000/=) by way of agreed "liquidated damages" as compensation for any loss of opportunity or other loss or damage suffered by the Purchaser by not being able to complete the purchase of the Property. The Plaintiff did not choose to go this route. They were still interested in completing the sale.

100. The Defendants then fulfilled condition under clause 4.1 even though late and confirmed the same in writing vide letter dated 30/01/2013. They also gave notice and rescinded the Agreement twice both on 30/01/2013 and on 14/02/2013. Clause 9.1 (as reproduced above) of the impugned contract provided guidelines regarding breach of contract. In this instant case, the Defendants purportedly issued the Plaintiff with a notice on 30/01/2013. As per the Contract, the Defendants were to issue the Plaintiff with a 30 days' notice.

> " 9.1 If the purchaser fails to comply with any of the conditions hereof, or of any condition subject to which the sale is made including the conditions relating to the completion of the sale the Vendors may give to the Purchaser at least 30 business days' notice in writing requiring the Purchaser to remedy the same before the expiration of such notice"

101. In addition to the provisions the contract herein, by law, an aggrieved party can issue a Notice stating the breach or default by the defaulting party and pointing out that time is of essence. If the defaulting party fails to remedy the default issued hereinabove, then a proper Completion Notice of Twenty (21) days as per the Law Society Conditions of Sale should be issued and either party thereof will be at liberty to terminate the said Agreement for Sale.

102. In the case of William Kazungu Karisa Vs Cosmus Angore Chanzera, (2006) eKLR it was held that:-

> " The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them.....However, when a specific date is mentioned, then times becomes of essence and completion must be within that date as it becomes a condition which goes to the root of the contract".

103. If the Defendants were of the opinion that the Plaintiff was in breach and/or the sale agreement had lapsed, they were obligated to issue a notice as per the terms of the contract and a completion notice. Even if the contract was not clear, Clause 4(7) (b) & (c) of the Law Society Conditions of Sale provides, in part, that:

> " (b) If the sale shall not be completed on the completion date, either party (being himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition.
>
> (c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within Twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract."

104. In Bernard Alfred Wekesa v John Muriithi Kariuki & 2 Others HCCC Nairobi 1059 of 1995 [2000] eKLR, Kasanga Mulwa J (as he then was) made the following observation as to the purpose of a completion notice:

> " The completion notice is important in such a transaction as it puts the purchaser on guard as to the consequences of non-compliance of the notice and it also gives the vendor a right of action against the purchaser."

105. In my view, it is clear that the Defendants did not issue a valid 30 days' notice. Not to mention, they did not sufficiently establish how the Plaintiff was in breach of contract and/or give the Plaintiff the opportunity to remedy any alleged breach, if any. They issued the first notice on 30/01/2013 and the second notice on 14/02/2013, fifteen (15) days apart. Both letters made no reference to 30 days' notice which is a condition precedent and of vital importance. The omission would, in my view, render the notice invalid if the said letters purported to be notices under Clause 9.1. The 30 days required in the contract were not met. It is also important to make a finding that both the notices dated 20/01/2013 and 14/02/2013 were unprocedural and incapable of rescinding the agreement for sale.

106. Consequently, this Court finds the Defendants to have breached the Agreement of sale by failing to fulfill the conditions precedent and subsequently issuing invalid notices as required.

107. Whereas I sympathize with the predicament that occasioned the sale of the suit property by the Defendants, this Court notes that the Defendants DID enter into a Sale Agreement with the Plaintiff and executed the same thereby cementing the terms therein as agreeable to both parties. Consequently, the parties are bound the terms of their contract despite any underlying issues that have been raised in the pleadings herein.

Whether the Plaintiff is entitled to the order of specific performance as prayed.

108. Before this court determines whether it should award the order of specific performance, it must first satisfy itself that the sale agreement that the Plaintiff seeks to rely on meets the requirements of a contract of sale of land. The Court has already held and found that there was a valid sale agreement as per section 3(3) of the Contract Act.

109. The Granting of the equitable remedy of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case-to-case basis and whether there is an adequate alternative. See the Case of Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR, wherein Justice Maraga (as he then was) stated that:-

> " Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid 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 enforceable. Even when 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 when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant."

110. In Mangi v Munyiri & Another [1991] eKLR it was held that a claim for specific performance is not granted as a matter of course. Being an equitable remedy, the court has to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant is entitled to equitable relief.

111. In addition, in Openda v Ahn, [1984] KLR 208 the Court of Appeal held inter alia that a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such persons as he directs at the time and place of completing the sale.

112. The granting of the equitable remedy of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case-to-case basis and whether there is an adequate alternative. See the Case of Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited (2006) eKLR, wherein Justice Maraga (as he then was) stated that:

> "Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles."

113. 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 enforceable. 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.

114. Even when damages are inadequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

115. As already found and held by this Court, there was a valid sale agreement by the parties that was duly signed. Further, the allegation of misrepresentation on the part of the Plaintiff was not proven therefore the said agreement has not been vitiated by any facts nor have the allegations or form of illegality that has been alluded to been proven.

116. In deciding whether or not to grant the order of specific performance the Court should be careful not to order the grant of specific performance where it will cause severe hardship to the Defendants.

117. This Court has been provided with evidence regarding the proprietorship of the suit property. As it stands, the deceased Raphael Alfonso Hutchinson was and is the registered proprietor of the suit property as seen on the title document adduced before this court. Alison Hilda Gathoni Hutchinson and Arlene Joy Nyambura Hutchinson (as administratratrix of the Estate of Jean Wanjiku Hutchinson and also beneficiaries of the Estate of the late Raphael Alfonso Hutchinson) are the testators as per the agreement. In that regard therefore, this Court can grant an order of specific performance as the Defendants, having been sued on behalf of the Estate of the late Raphael Alfonso Hutchinson, are in the position to complete the sale and effect the transfer of the suit properties to the Plaintiff. The award of Specific performance will not prejudice the Plaintiff nor the Defendants at all. Consequently, the Court is satisfied that the remedy of Specific performance is the proper order to be granted. I therefore grant prayer (b).

Whether the Plaintiff is entitled to prayers sought in the Plaint.

118. In a case such as this one where the parties have reduced their agreement in writing, the duty of the Court is to look at the agreement itself and give appropriate remedy.

119. Looking at the outcome of issues discussed hereinabove, it is clear that the Defendants have breached the terms of the Agreement for sale. Clearly, the Defendants are at fault in this matter and the court is duty bound to make directions in an effort to uphold the intention of the parties contained in the Agreement for Sale.

120. One clear intention contained in the Agreement for Sale is the disposition of the suit property. It is no wonder the Plaintiff has prayers of specific performance of the contract.

121. An over view of the pleadings, oral evidence adduced at the hearing and documentary evidence produced, the Court is of the view that the Agreement for Sale under litigation can be completed as per the intentions of the parties thereof.

122. The Plaintiff has sought for a declaration that the Defendants are holding the property in trust for the Plaintiff Company. In the case of Juletabi African Adventure Limited & another ...Vs...Christopher Michael Lockley [2017] eKLR the Court relied on the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, where the same Court of Appeal held that;

> " According to the Black's Law Dictionary, 9th Edition; a trust is defined as
>
> "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."
>
> Under the *Trustee Act*, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."
>
> In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...
>
> A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)."

123. That in this case, it is evident that a trust arose in the current case as affirmed by the payment of Kshs. 3,250,000.00 in the purchase of the suit property. I have equally analyzed the evidence presented by both sides. I do agree there is a trustee relationship which was created. Further, the Court having made a finding that the Agreement for sale dated 24/01/2012 is valid and binding and further granted an order of specific performance, it would not hesitate to further hold that the Defendants then hold the suit property in trust for the Plaintiff.

124. With regard to the prayer for injunction, the principles that guide the court in granting an order of injunction are set out in the celebrated case of Giella V Cassman Brown & Company Limited 1973. E.A 358 as follows:

> " First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience."

125. From the evidence on record, it is my finding that the plaintiff has proved its case on a balance of probabilities, and it is thus entitled to some prayers (c), and (d) as stated in the plaint.

126. Regarding damages for breach of contract, as a general rule general damages are not recoverable in cases of alleged breach of contract-see Court of Appeal decision in Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR. The reason for such was explained by the court in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR as follows:

> " The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)".

127. The law is that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages.

128. In Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR, the appellant had agreed to give the respondent a loan of Kshs, 15,000,000 for construction of a hotel. However, the appellant unilaterally withdrew that offer. The respondent filed a suit claiming general damages of

Kshs. 421,760,000 in the form of opportunity costs and loss of business following breach of contract. The High court awarded general damages of Kshs. 30,000,000 for breach of contract. On appeal, the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract. Damages for breach of contract are compensation to the aggrieved party and a restitution of what he has lost by the breach.

129. The above decision affirms the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved. It is trite law that special damages must be pleaded and proved. See Mohammed Ali & another v Sagoo Radiators Limited [2013] eKLR (Civil Appeal No. 231 of 2005) wherein the Court adopted the holding of the Court in Hahn vs Singh [1985] KLR 716 that:

> " ... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."

130. The plaint did not contain the prayer for specific damages, and neither were the damages that were claimed by the Plaintiff particularized. In the circumstances therefore, this could not have been a prayer for special damages.

131. As a general rule, "a purchaser is entitled to recover damages at large where a seller refuses to implement an agreement for any reason other than a defective title and compensation contemplated by the contract or which could reasonably have been in the contemplation of the parties as likely to be wasted if the contract is broken." See Openda v Ahn [1984] KLR 208.

132. In Ritho v Kariithi and another [1988] KLR 237, the Court of Appeal held that it has the power to award damages in lieu of specific performance in the following terms:

> " In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it thinks fit, to award damages to the party injured, either in addition to or in substitution for an injunction or specific performance and such damages may be assessed in such manner as the court shall direct."

133. See also Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 where the Court of Appeal held that:

> " The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages."

134. As somewhere in this Judgment, the prayer for specific performance was granted by this Court.

135. The prayer for damages was couched as follows:

> " Damages for breach of contract.

136. The other prayer was couched as follows:

> " Further and other relief."

137. Halsbury's Laws of England in Volume 29 (2014)) 317 distinguishes special and general damages, and states that general damages are

> " those which will be presumed to be the natural and probable consequence of the wrong complained of, with the result that the plaintiff is required to assert that such damage has been suffered."

138. Flowing from the above principles of law, the Plaintiff is not entitled to damages for breach of contractual obligations as there is an adequate alternative remedy in form of specific performance. Additionally, a prayer for damages must be specifically pleaded and particularized because the Plaintiff has suffered as a result of the wrong that is complained of.

Who shall bear the costs of the suit?

139. There are no special circumstances to warrant departure from the general principle that costs follow the event. The Defendants will therefore bear costs of this suit.

Disposal Orders

140. Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved on the required standard of balance of probabilities that it did pay Kshs. 3,250,000.00/= to the Defendants for purchase of the suit property but the Defendants are in breach of the Sale Agreement entered between the two parties.

141. Consequently, the Court enters Judgment for the Plaintiff against the Defendants in the following terms: -

a. A declaration be and is hereby issued that the 1st - 6th Defendants hold L.R. No. 21/1/39 upon trust for the Plaintiff.

b. The Court grants an Order of Specific Performance as per the terms of the Sale Agreement dated 24/01/2012.

c. An injunction be and is hereby issued restraining the 1st - 6th Defendants from selling, charging, or parting with possession of L.R. No. 21/1/39 until exercise by the Plaintiff of its option to purchase in accordance with the contract of sale.

d. A permanent injunction be and is hereby issued restraining the 1st - 6th Defendants from selling, charging or parting with possession of Parcels C and D of L.R. No. 21/1/39.

e. Further, the Plaintiff is awarded costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF FEBRUARY 2023

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MOGENI J

JUDGE

In the virtual presence of:

Mr Abdullahi for Plaintiff

Ms Njoroge holding brief for Mr Ekedi for 1st – 6th Defendants

Caroline Sagina: Court Assistant

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MOGENI J

JUDGE