



Mwitia & another v Lydia Mburugu (Suing as the Legal Representative of the Estate of the Late Daniel Mathiu Mbiti) & another (Environment and Land Appeal E022 of 2021) [2022] KEELC 2606 (KLR) (20 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E022 OF 2021**

**CK NZILI, J
JULY 20, 2022**

BETWEEN

GAMALIEL RIUNGU MWITIA 1ST APPELLANT

MIRIAM NKTHA KIREMA 2ND APPELLANT

AND

LYDIA MBURUGU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE DANIEL MATHIU MBITI) 1ST RESPONDENT

DISTRICT LAND REGISTRAR – MERU 2ND RESPONDENT

(Being an appeal from the judgment and Order of the chief magistrate's court at Meru by Hon. S.N Abuya dated 14.12.2020 in CM ELC case no. 66 of 20218)

JUDGMENT

A. The grounds of Appeal and Cross Appeal

1. This judgment relates to the appeal and a cross appeal brought by the appellant and the respondent dated January 11, 2021 and January 29, 2021 respectively over the judgment of the trial court delivered on December 14, 2020.
2. The appellant complaints are that; the trial court made erroneous findings unsupported by evidence; framed erroneous issues and made wrong findings; failed to enforce the sale and variation agreements despite making findings that they were binding; erred in finding the sale agreement dated April 5, 2011 void in spite of the evidence on the applicability of the doctrine of estoppel and constructive trust; failed to appreciate the appellant had taken possession of the land, developed it in March 2012; misinterpreted the *Land Control Act* and the *Land Registration Act*; erred in finding both parties had breached the agreement yet it was the respondent who had failed to issue a completion notice despite



willingness of the appellant to complete the sale; failed to order for specific performance; failed to appreciate there was no counterclaim for any refund and arrived at the wrong decision despite evidence in support of the appellant's claim.

3. On the other hand part the respondent in her cross appeal faults the trial court for making an award of interests at court rates from the date of filing suit until payment in full on the amount to be refunded to the respondent whereas it was clear the said respondent in the cross appeal had been in exclusive use, possession and occupation of the suit land before the suit was filed and secondly for misdirecting itself in making such an award of interest. She sought for the said award to be set aside.
4. This being a first appeal the court under Section 78 *Civil Procedure Act* is mandated to rehearse and reappraise itself on the lower court record and come up with its independent findings as to facts and law while at the same time mindful of the fact that lower court had the opportunity of hearing and seeing the witnesses firsthand.

B. Pleadings

5. By a plaint dated February 6, 2015 the appellant sued the respondent and the District Land Registrar Meru as defendants in the lower court in which they alleged the 1st respondents had breached a sale agreement dated April 5, 2011 over sale of L.R No. Nyaki/Thuura/817 for Kshs.3.9 million in which he had paid a sum of Kshs.2.3 million with a completion period of 90 days during which time the 1st respondent was to secure and avail the original title deed then charged with Standard Chartered Bank Ltd herein after the bank.
6. The appellant averred despite efforts to have the bank release the original title deed and or a replacement of the lost title deed made on January 2, 2015, the 1st respondent had reneged on the sale agreement. He instead placed a caution on the title on January 9, 2015. The respondent formally made a notice dated February 2, 2015 abandoning the transaction and gave the appellants five days to come up with new terms of the sale of the same property.
7. The appellant therefore sought for orders of permanent injunction, inhibition and specific performance. In support of the plaint the appellant filed witness statement, list of documents dated September 23, 2020 and filed on September 25, 2020. The 1st respondent entered appearance while the 2nd respondent did not though served on May 11, 2015 and a return filed. In a defence dated May 14, 2015 the 1st respondent admitted entering a sale agreement with the appellant but insisted it was the appellant who was totally unable to honour his obligation as per the sale agreement and in particular for failing to pay the balance of the purchase price.
8. Further, the 1st respondent averred that the appellant having caused a search knew the title was held by the bank hence he had to act against it after it failed to discharge the title and avail the original title deed. The 1st respondent averred after the appellant failed to demonstrate willingness to complete the transaction, the sale agreement became void and null for lack of a land control board consent, the caution was unlawful and illegal, he was no longer bound by the terms and conditions of the sale agreement, the appellant recourse was the recovery of the sum paid; was no longer ready and willing to proceed with the sale; he was always ready and willing to refund the sum received as notified in writing; the prayer for specific performance was unavailable under the circumstances; the appellants were trespassers to the land as they lacked proprietary rights on it to claim the prayers for injunction and inhibition in view of the void sale agreement and breach thereof. The defence was accompanied by a list of witness statements and a list of documents dated October 9, 2020.



9. The appellants made a reply to defence dated September 13, 2015 and averred by a variation agreement dated February 9, 2015 the previous agreement was validated and amended.
10. The record indicates that on September 30, 2020 the appellants through an oral application withdrew the claim against the 2nd defendant to the suit and the same was allowed with no orders as to costs by the trial court.
11. Thereafter parties were ordered to comply with order 11 Civil Procedure Rules before a hearing listed for October 28, 2020. None of the parties filed any list of issues before the said trial date.

C. Testimony

12. PW 1 adopted his two witness statements dated February 6, 2015 and September 23, 2020 and produced a copy of green card dated February 16, 2011 as P. exh (1), banking slip for Kshs.105,375, as P. exh (2), sale agreement dated April 5, 2011 as P. exh (3), letter to the bank dated June 22, 2011 as P. exh (4), acknowledgement dated March 13, 2012 P. exh "5", ruling and judgment P. exh (6) & (7) written statement in NRB suit as P. exh (8) gazette notice dated August 27, 2014, as P. exh (9), discharge of charge dated November 27, 2014 as P. exh (10) caution dated January 9, 2015 as P. exh (11), defendants letter dated February 2, 2015 as P. exh (12), variation agreement dated February 9, 2015 as P.exh (14), letter dated March 12, 2015 P. exh (15) respectively. In cross examination the PW 1 confirmed that he paid the deposit as per the sale agreement though Kshs.2,590,000 as per part 1 (e) of the agreement was not paid within 90 days since there was no transfer made and the original title deed was unavailable.
13. PW 1 confirmed that they took vacant possession in March 2012 till the time of testimony before the court. On the land control board consent PW 1 testified parties did not attend since the 1st respondent failed to book it. PW 1 confirmed he signed the variation agreement after learning that the respondent was offering the suit land to other third parties for sale. He said despite the variation agreement and the payment of money for the land control board through Mpesa, the respondent failed to book it as agreed.
14. Regarding the debt at the bank, PW 1 admitted that he knew the suit property was charged with the bank though he had been told there were no outstanding loans. However, upon visiting the bank he found out Kshs.105,535 was outstanding and gave the respondent Kshs.200,000 to clear it and thereafter paid Kshs.1.1 million as per paragraph (d) of the sale agreement.
15. Further PW 1 said he did not pay Kshs.2,590,000 as per clause (4) of the sale agreement since the bank did not release the title deed immediately following which he paid a lawyer to sue the bank as per the ruling and judgment produced as exhibits. Eventually the bank was ordered to release the title and a gazettment was made to that effect. PW 1 said the title deed eventually came out in 2015 only for the respondent to become abusive and change his mind leading to a caution and the suit which led to a variation agreement after the respondent was served with summons to enter appearance. PW 1 testified despite the variation agreement and the facilitation to book the land control board, the respondent failed to obtain a consent to transfer the land.
16. The respondent through Lydia Mburugu, the wife adopted the witness statement dated October 9, 2020 and produced a copy of a title deed for L.R Nyaki/Thuura/817 as D.exh (1), sale agreement as Dexh (2), variation agreement as D. exh (3), letter dated March 12, 2015 as D. exh (4), letter dated 20.3.2015 as D. exh (5) and letter dated March 27, 2015 as D. exh (6) respectively.



17. In cross examination the respondent admitted she had not produced any letters of grant over the estate of the deceased seller. She testified she knew it was the deceased obligation to seek and obtain a land control board consent, as per the sale agreement.
18. Regarding the variation agreement, DW 1 stated the subsequent letters written by the deceased did not indicate any coercion or harassment before executing the agreement. However, DW 1 said the appellant had not sought from the High court for an extension of the time to seek and obtain a land control board consent even though as a family they had objected to the sale. She stated she was not party to both the sale & variation agreement though to her the variation agreement seemed ambiguous.
19. She could not however confirm whether the seller received the monies as alleged or ever wrote a completion notice to the appellants. She was euphoric however that the seller cancelled or stopped the transaction and was willing to refund the money received. Regarding the caution DW 1 testified her late husband through his lawyers filed a case for its removal and further that the original title deed was held by the parties' joint lawyer Mr. Gitonga in order to protect the interests of the parties.
20. In re-examination DW 1 said the deceased was initially willing to attend a special board meeting on mid-February, 2015 after the variation agreement but his family objected to the same until he was given the balance hence the reason that D. exh 5 & 6 indicated that negotiations over the deposit were going on. Eventually DW 1 said the appellants failed to pay the deposit and stopped any further communication until the seller passed on. She blamed the appellants for failing to honour the agreements but nevertheless took the view she was willing to refund the money.

D. Written Submissions

21. With leave of court parties filed written submissions to the appeal, dated February 20, 2022 and March 9, 2022 respectively. According to the appellants the issues for determination are:- if the trial court failed to enforce the two agreements or was wrong to find the initial agreement void yet vacant possession had taken place; if the court misinterpreted the applicable laws; if both parties had shared blame on breach; if the court was wrong in failing to appreciate lack of completion notice and if the trial court was wrong in failing to order for specific performance given there was no counter claim and an offer for a refund.
22. On the 1st issue of enforcement, the appellants submit the court having found at page 265, 267 of the record of appeal that the agreements were binding it should have proceeded to enforce the same and not otherwise. Reliance was placed on *Eldo City Ltd Corn Products (K) Ltd and another* (2013) eKLR on the sacred duty to uphold contracts.
23. The appellants submitted the court based on the doctrine of proprietary estoppel and constructive trust should have enforced the sale agreements as held in *Joseph Kuyo Legei vs Kuntai Ole Ntusero* (2019) eKLR, *Kiplagat Kotut vs Rose Jebor Kipugok* (2019) eKLR, *Willy Kimutai Kitilit vs Michael Kibet* (2018) eKLR *David Ole Tukai vs Francis Arap Muge & 2 others* (2014) eKLR.
24. As regards vacant possession the appellants submitted going by *Willy Kimutai Kitilit supra* the trial court was wrong and should have applied the said doctrine in their favour. Concerning the *Land Control Act*, Law of Contract Act and the *Land Registration Act*, the appellants submitted the trial court was too stringent and archaic in its interpretation of the laws.
25. Reliance was placed on *Isaac Ngatia Kibagi vs Paul Kaiga Githui* (2017) eKLR that failure obtain a consent only rendered a transaction voidable but not void hence should not be used by the court to create an illegality otherwise it would be against the doctrines of equity.



26. On the issue of breach by both parties the appellants submitted the trial court should have captured all the facts that it was the bank which derailed the process by failing to produce the title deed on time till January 2015 hence the court should not solely have found non-payment of Kshs.1.1 million by the appellants as the sole cause.
27. As to the completion notice, the appellants submitted clause 8 of the sale agreement was subject to Condition 4 (7) of the Law Society on condition of sale (1989) which ought to have been followed in terminating or rescinding the agreement on account of non-completion by a party to an agreement which the respondent had failed to comply with.
28. Concerning the failure to grant an order for specific performance, the appellants submitted they had performed all the terms of the contract expressly or by implication hence they were entitled to the prayer. Reliance was placed on *Andrew Karemi Kingori vs Joseph Waweru Njoroge* (2018) eKLR.
29. Regarding the lack of a counterclaim and offer for a refund, the appellants submitted the trial court was wrong to grant orders not prayed for a refund of Kshs.2.3 million. Reliance was placed on *Otieno, Ragot & Co. Advocate vs NBK Ltd* (2020) eKLR.
30. On the other hand, the respondent submitted that as at the hearing the appellants admitted that only Kshs.2.3 million had been paid and the balance of Kshs.259,000 remained. As a way of explaining the delay in not clearing the balance the respondent submitted the same could not be permissible in law otherwise it would amount to asking the court to rewrite a contract.
31. As to the agreement it was submitted the date of vacant possession was unclear but nevertheless the appellants took vacant possession according to them in March 2012.
32. Regarding the variation agreement executed on February 9, 2015 it was submitted it did not serve any purpose and was eventually cancelled by the seller for he was coerced into it, was ambiguous and crafted with sinister motives from the appellants.
33. As concerns the cancellation and a refund, it was submitted D. exh 5 & 6 were clear and the fact that there was no land control board consent the sale agreements were unenforceable. The respondent therefore submitted the trial court was right in interpreting Section 6 (1) & (2) of the *Land Control Act* since there was no application for an extension of time to comply with that section.
34. Reliance was placed on *Albert Cheboi & another vs Insurance Regulatory & another vs Insurance Regulatory Authority* (2020) eKLR.
35. On specific performance the respondent was submitted a court could not enforce an agreement which was illegal, null and void as held in *Mapis Investment (K) Ltd vs Kenya Railways Corporation* (2006) eKLR *Koyumkei Multipurpose Cooperative Society Ltd & 17 others vs Rael Chepngetich Koech* (2019) eKLR.
36. On constructive trust the respondent submitted it was neither pleaded nor proved through evidence in court otherwise it was a fishing expedition.
37. On the cross appeal the respondent urged the court to find the appellants had been in exclusive, actual use and occupation of the suit premises since March 2012 to the present enjoying all the benefits and income from the land to the exclusion of the respondent hence were not entitled to interest at all.

E. Issues for determination

38. The court has gone through the pleadings, the record of the appeal, grounds of appeal and cross appeal and written submissions by the respective parties. The issues calling for determination are:



- (i) If the sale agreement dated April 5, 2011 was valid in law.
- (ii) If parties abided by its terms and conditions
- (iii) If there was breach of the terms and conditions of the aforesaid sale agreement.
- (iv) If there was any notification of breach by the parties after the expiry of the 90 days contemplated the completion date.
- (v) If parties by their conduct varied, amended and or acquiesced on the variation.
- (vi) If the variation agreement dated February 9, 2015 was legally executed and valid in law.
- (vii) What were the consequences of the breach, acquiescence and or variation of the sale agreement.
- (viii) If the appellants were entitled to specific performance, injunction and or refund of the deposit with costs and interests.

F. Determination

39. It is trite law that parties to a suit are bound by their pleadings and issues for courts determination flow from the pleadings. See *IEBC vs Stephen Mutinda Mule* (2014) eKLR.
40. In *Raila Amolo Odinga & another vs IEBC & 2 others* (2017) eKLR the Supreme Court of Kenya held no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them and that pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for consideration. Further the court stated the issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party and hence the court is not permitted to frame an issue not arising from the pleading.
41. In this appeal the primary pleadings before the trial court were the plaint dated February 6, 2015 the defence dated May 14, 2015 and a reply to defence dated July 13, 2015.
42. In the aforesaid pleadings the appellants pleaded and the respondents admitted that the sale agreement dated April 5, 2011, receipt of Kshs.2.3 million that the completion period of 90 days was impossible on account of the delays by the bank in availing the original title deed and discharge of charge as required in the agreement.
43. The respondent completely failed to specifically deny or admit the contents of paragraphs 7 & 8 of the plaint where the appellants stated they had been ready to complete the transaction and that they had the balance to the purchase price intact, and that they had never breached the sale agreement.
44. Further the appellants pleaded how they assisted the respondent to acquire the original title deed in order to complete the sale agreement until June 19, 2014 when the court in Nairobi HCCC 108 of 2012 compelled the bank to hand over the original title deed and or in the alternative provide evidence of its loss leading to an application by the respondent for a replacement through gazettment.
45. Further the respondent did not deny that eventually original title deed it came out on January 2, 2015 which was more than 3 ½ years down the line. The appellants despite the inordinate delay averred immediately the title deed came out the respondent became uninterested, and by a letter dated February 2, 2015 he gave a notice to abandon the sale agreement and sought for a negotiated new sale agreement.



46. On the other hand, in the defence dated May 14, 2015 at paragraph 3 the respondent pleaded that the appellants had totally failed to pay the balance of the purchase price as agreed and that they had failed to demonstrate willingness to complete the sale agreement.
47. At paragraph 6 of the defence, the respondent raised the issue of the sale agreement being void, null, while at paragraph 8, 9, 10 & 11 thereof the respondent expressed his unwillingness to proceed with the sale and instead sought to refund the sum already received from the appellants.
48. At paragraph 16 of the defence, the respondent acknowledged that the appellants were in occupation of the suit premises but termed them as trespassers who could not be allowed to perpetuate the illegality or criminal activities.
49. Further at paragraph 12 of the defence the respondent admitted receiving a demand letter from the appellants as well as writing D. exh 5 & 6 rescinding by the sale agreement and offering a refund.
50. In their reply to defence dated July 13, 2015 the appellants at paragraph 3 thereof pleaded that on February 9, 2015 parties had executed a variation agreement validating and or amending the sale agreement dated April 5, 2011. The respondent did not file any subsequent pleading denying the existence of the variation agreement or challenging its legality and or pleading its voidability and or rescission.
51. In compliance with Order 11 Civil Procedure Rules parties filed list of witness statements and documents. The appellants filed theirs on September 29, 2020 and listed the variation agreement as document No. 15 thereof and a letter from the respondent dated March 12, 2014 acknowledging the aforesaid agreement but cancelling it on account of objection from his family.
52. Further the respondent filed a list of documents dated October 9, 2020 listing the variation agreement as document no. 3 and correspondence thereafter as document no. 4, 5 & 6.
53. The basis of the appellants claim was the sale agreement dated April 5, 2011 and the subsequent variation agreement dated February 9, 2015. The basic features of the two agreements are the subject matter as L.R No. Nyaki/Thuura/817, the consideration being Kshs.3,900,00 payable at Kshs.10,000 on April 4, 2011, Kshs. 200,000 on 5.4.2011, Kshs.1,100,000 by April 19, 2011 and balance of Kshs.2,530,000 within 90 days from April 5, 2011.
54. At clause 8 the sale agreement states it was subject to the Law Society of Kenya Conditions of sale so far as the same were not inconsistent with the terms and conditions. The sale agreements were duly executed and witnessed by Ms. Gitonga Muriuki & Co. Advocates.
55. The Law Society Conditions of Sale and the agreement for sale (1989) edition provided a general guideline for conveyancing lawyers and parties with salient features such as the (a) deposit (3) completion date (4), possession (5) appointment (7), interest on purchase price (8), delivery of title (9), objection and requisitions and (10), tenancy.
56. In *National Bank of Kenya Ltd vs Pipeplastic Sunkolit (K) Ltd & another* (2003) 2 E.A 503 the Court of Appeal held that a court of law cannot rewrite a contract between the parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.
57. In *William Kazungu Karisa vs Cosmas Angore Cnzera* (2006) eKLR, the court held the basic rule of law of contract is that parties must perform their respective obligations in accordance with terms and conditions of the contract executed by them and an agreement could only be amended or varied by the consent of the parties.



58. Further in *Kanyango vs KCB Ltd & another* (2004) 1 KLR 126, the court held it was not the duty of courts to make contracts but to construe any such contracts and arbitrate on them.
59. In this suit parties set out the timelines for the payment of the deposit and the completion date which was 90 days from April 5, 2011.
60. One of the key issues left out in the sale agreement was the issue of the original title deed allegedly held by the bank at the time.
61. The appellants blame the respondent for the delay in completing the initial sale agreement while the respondent pleads that the appellants knew the suit property was charged with the bank at the time. The two parties blame each other for the delay in completing the initial sale agreement on time or at all.
62. The sale agreement did not provide for issuance of notice of either party should one default. The Law Society of Kenya Conditions therefore come into play. Clause 7 (b) thereof provides for service of a completion notice of 21 days. In *Elijah Kipkorir Barmatel & another vs John Kiplagat Chemweno & 3 others* (2010) eKLR the court held a notice must be served on the defaulting party before any assertion can be made that time was of essence.
63. In *Sisto Wambugu vs Kamau Njuguna* (1983) eKLR the court held contracts for sale of land gives the vendor the right to rescind the sale if the purchaser does not pay on the appointed day after giving a reasonable notice to the defaulting party making time of essence. In this suit the main contributing factor for the delay was the non-availability of the original title deed from the bank. This appears to have been brought to the attention of the appellants who went out of their way to facilitate the procurement of the same including a court sanctioned process as evidenced by the ruling and judgment produced as P. exh 6-9 respectively.
64. The original title deed was only available to the respondent on January 2, 2015 which was close to 3 ½ years after the expiry of the envisaged completion date in the sale agreement.
65. Soon thereafter the appellants showed their willingness to complete the sale agreement notwithstanding the unreasonable delay occasioned by the respondent in procuring the original title deed. The appellants pleaded the respondent became evasive and or unwilling to complete the transaction despite the availability of the original title deed and by that time having obtained at least Kshs.1.9 million from them. This made the appellants to lodge a caution on January 9, 2015. The respondent on his part wrote a letter dated February 2, 2015 giving an ultimatum to complete the transaction but on revised terms.
66. It is trite law extrinsic evidence is not allowed to vary or qualify a written contract. See *Thrift homes Ltd vs Kays Investment Ltd* (2015) eKLR.
67. In the letter dated February 2, 2015, the respondent says he was willing to sell the land at the market rate after going through a market survey. He gave a figure of Kshs.2.5 million per acre and asked the appellants to top up the difference. From what they had paid initially in the alternative allow him to resale the land and make a refund. He also requested for the removal of the caution as a matter of urgency to facilitate the process.
68. The variation agreement dated February 9, 2015 clearly refers to the earlier agreement dated April 15, 2011. the consideration was revised upward to Kshs.4.9 million Kshs.1.6 million was to be paid immediately the land control board consent was secured and the balance of Kshs.1,000,000 was to be paid in two instalments within 60 days from the date of the land control board consent.



69. At Clause 4 the second agreement was specific that it had validated and amended the sale agreement dated April 5, 2011.
70. The variation agreement was duly executed and witnessed by the parties. Similarly stamp duty of the variation agreement was duly paid. The defence by the respondent was filed on May 15, 2015 long after the variation agreement was signed and registered. If at all the respondent had rescinded the variation agreement on account of coercion, illegality and or objection from his family there was nothing difficult in pleading those facts in his defence. Further the appellants raised the issue through the reply to defence in July 13th 2015. Still the respondent did not plead to the same. Parties as indicated in *Raila Amolo Odinga case supra* are bound by their pleadings and issues flow from the pleadings.
71. The variation agreement in my view was legally binding on the parties and by extension brought fresh life and revived the initial sale agreement made on April 5, 2011. In their own words the parties said they had validated the earlier agreement and put in new timelines.
72. The court must also take into consideration the efforts of the parties since 2011 in trying to keep alive the transaction by securing the original title deed. That intention came into fruition by signing the variation agreement on February 9, 2015 and revising both the consideration and the timelines. As held in *Eldo City Ltd (supra)* parties' intentions are outwardly conveyed through contracts. The respondent is the one by his own letter who sought to revise the sale agreement. The appellants agreed to his terms and willingly executed the variation agreement.
73. Once the respondent executed the variation agreement, the next step was to book for a land control board so that the consent could be obtained. DW 1 admitted that the deceased had actually taken the land control board form and was to appear before the land control board were it not for the objection by the family. The nature of the objection was not pleaded in the defence at all. Again, if the respondent wanted to walk away from the variation agreement and for that matter from the transaction he had to abide by clause 4 (7) of the Law Society of conditions of sale. He did not give a proper and valid notice to rescind the variation agreement.
74. In *Anne Murambi vs John Munyao Nyamu & another* (2018) eKLR the court held parties had voluntarily incorporated the LSK conditions of sale including the issue of possession of the subject land before the completion date. The respondent is deemed to have known the implications of the variation agreement including the fact that the appellants had been in possession of the suit land since March 2012. He cannot therefore purport to deny elementary facts which were within his knowledge prior to the variation agreement. Similarly, he did not give a notice to vacate and or address the issue in the notice to purportedly rescind the sale agreement.
75. DW 1 has given evidence that the alleged variation agreement was procured through coercion and undue influence. She did not however call the advocate who witnessed the variation agreement as her witness. DW 1 also alleged she had complained to the Law Society or the Advocates Complaints Commission over the said advocate. There was no such pleading in the defence on fraud, illegality and coercion evidence produced for such a complaint.
76. Nothing was brought for this court to doubt that the said variation agreement was lawfully executed and or legally binding to the parties.
77. DW 1 was not a party to the said variation agreement and therefore to take her oral word would be allowing parole evidence to vary or change a valid contract if the court were to believe her version to rescind the said agreement. DW 1 is therefore under Section 120 of the *Evidence Act* estoppel from denying those facts.



78. The respondent knew the appellants had taken vacant possession and were on the suit land. He did not pray for any vacant possession or eviction orders. The respondent in my view consented and or at the very least acquiesced to the appellants possession for over three years. He is therefore estopped in law from terming such occupation as illegal, a trespass and a nullity in law. He could not therefore call off the agreements under the circumstances for the second time. See *Rose Wambui Kamu & 2 others vs Cecilia Mou Charles Harris* (2017) eKLR. The notice to cancel the variation agreement did not also abide by the Law Society of Kenya conditions for sale as provided under Clause 4 (7).
79. In *Syedna & others vs Jamil Engineering Co. Ltd* (1973) E.A 294 the court held the general principle is that where a buyer has paid but is unable to complete the contract the seller having rescinded the agreement he may sue for damages but must return the deposit.
80. In *Gurdeo Singh Birdi vs Murinder Singh Ghatora vs Abubakar Madhbuti* the Court of Appeal held for a party to be entitled to an order for specific performance he must be prepared to demonstrate performance of his part of the terms or willingness to perform them and further to show that they had not acted in contravention of the essential terms of the said agreement. In that case the court held the failure to deliver up the balance of the purchase price by the appointed time did not bring the agreement to an end.
81. In this suit the appellants went ahead in spite of being asked to pay more to sign a variation agreement. That act by itself showed their willingness to effectuate the sale agreement. The respondent also went ahead to procure documents for the Land Control Board. He cannot therefore turn around and say his family was objecting to the sale yet no such objection written by either DW 1 or any of his children was produced before this court or at before the chairman of the land control board. DW 1 has also not brought that objection duly written by herself and or her children.
82. Therefore, if the process of the land control board consent had been started by none other than the respondent and given he had revived the sale agreement of April 5, 2011 DW 1 cannot possibly turn around and say the variation agreement which had just revived the earlier agreement was null and void on account of Section 6 (1) and (3) of the *Land Control Act*.
83. Similarly, new timelines on the balance of the purchase price had been agreed upon. DW 1 could not therefore claim that the appellants had failed to pay the balance and were therefore in breach of the sale agreement.
84. The doctrine of proprietary estoppel and section 120 of the *Evidence Act* is therefore applicable to this suit and this court in enforcing it is merely implementing what the parties exercising their freedom of contract intended to achieve.
85. Similarly, contrary to the holding in *Mapis Investment* (*supra*) the respondent has not pleaded and or proved any illegalities or irregularities in both the sale agreement and the variation agreement.
86. Having found the two agreements valid and legal the next question is whether the respondent was entitled to rescind and or renege on the variation agreement on account of breach on the part of the appellants.
87. The sale agreement incorporated clause 4 (7) of the Law Society of Kenya conditions of sale. The notice given was inadequate. Similarly, there was no evidence tendered that the respondent had secured a consent and sought for the appellants to pay Kshs.1.6 million and they declined. Again, if the issue was an objection by the family, there is nothing on record that indeed the family had made such an objection at the Land Control Board.



88. Therefore, my finding is that the appellants did not breach the variation agreement at all. On the contrary it was the respondent who without any reasonable justification purported to issue a notice of termination of the variation agreement.
89. The initial sale agreement having been revived, it was still within the six months under the *Land Control Act*. The appellants were already in possession of the suit property. The title deed was already under the custody of their mutual law firm who witnessed the variation agreement. The duty was upon the respondent to procure the consent from the Land Control Board to complete the transaction.
90. Consequently, my finding is that the appellants were right in seeking to enforce the sale agreements and hence entitled to an order for specific performance. DW 1 did not give any evidence on the difficulties likely to be incurred if the court was to enforce the intentions of the parties by way of specific performance.
91. In the premises I find the appeal with merits and disallow the cross appeal. The same is allowed with costs to the appellants. The lower court suit is allowed. The respondent shall seek and obtain a land control board consent within 3 months from the date hereof to effect the transfer. In default the Deputy Registrar of the court to sign them. Similarly, the appellants shall pay the balance as per the terms in the variation agreement. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 20TH DAY OF JULY, 2022

In presence of:

Tiwei for Kirimi for appellant

Kariuki for respondents

HON. C.K. NZILI

ELC JUDGE

