



**Wainaina v Sunrise Synthetics Limited (Environment & Land Case
225 of 2018) [2023] KEELC 21669 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 225 OF 2018
BM EBOSO, J
NOVEMBER 2, 2023**

BETWEEN

SOLOMON WANYOIKE WAINAINA PLAINTIFF

AND

SUNRISE SYNTHETICS LIMITED DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around the question as to whether the plaintiff is entitled to, among other reliefs, an order of specific performance relating to a sale of land contract dated 20/9/2009, pursuant to which the defendant sold to the plaintiff two (2) acres that were to be excised out of LR No 4953/1192/1 situated within Thika Municipality [the suit land]. The said land measures approximately 12.41 hectares [approximately 30.6 acres]. The plaintiff urges the court to grant him the order, among other reliefs. The defendant contests the claim and urges the court to find that the plaintiff breached the agreement, and that the plaintiff be condemned to pay them Kshs 40,000,000, being the sums due to them as a result of the plaintiff's possession of the land "after the lapse of the sale agreement". I will briefly outline the parties' respective cases, evidence and submissions before I dispose the concise issues that fall for determination in the suit.

Plaintiff's Case

2. Through a plaint dated 9/8/2018, the plaintiff alleged that on 20/9/2009, he entered into a land purchase agreement with the defendant, pursuant to which the defendant sold to him 2 acres that were to be excised from LR No 4953/1192/1. The plaintiff contended that at the time of sale, the land was charged to Investments and Mortgages Bank. The agreed purchase price was Kshs 4,000,000 per acre, making a total of Kshs 8,000,000 for the two acres. The agreed completion period was 90 days from 20/9/2009. The plaintiff averred that, simultaneous with their transaction, the defendant entered into



- two other similar transactions with the following purchasers: (i) Mama Millers Limited for purchase of 4 acres; and (ii) Peter Maina Nganga and Bernard Wainaina Mwangi for joint purchase of 2 acres.
3. The plaintiff contended that he paid the agreed deposit of Kshs 800,000 on 20/8/2009. The defendant was, however, unable to procure the completion documents within 90 days. The plaintiff further contended that parties elected to “suspend the completion date to the date when the subdivision process would be completed.” He added that subsequently, parties held a meeting on 3/2/2011 during which it was agreed that the plaintiff would pay a further sum of Kshs 6,400,000 and would be given possession of the 2 acres, adding that it was agreed that the balance of the purchase price [Kshs 800,000] would be paid on completion of the subdivision process. The plaintiff added that it was agreed in the meeting of 3/2/2011 that a sum of Kshs 3,600,000 which had been paid by Peter Maina Mwangi and Bernard Wainaina Mwangi on account of their 2 acres would be assigned to the plaintiff and credited to the plaintiff’s account. He added that, through M/s Mama Millers Limited, he paid a further sum of Kshs 2,800,000 making a total of Kshs 7,200,000 and leaving a balance of Kshs 800,000 which was to be paid upon completion of the subdivision process. He contended that he was given possession of the 2 acres in February 2011 upon payment of a total of Kshs 7,200,000 which constituted 90% of the agreed purchase price.
 4. The plaintiff further contended that he enjoyed quiet possession of the 2 acres from February 2011 to July 2018 in anticipation of completion of the subdivision process. However, when he sought completion documents from the defendant through a letter dated 5/6/2018, the defendant intimated to him, through a letter dated 23/7/2018, that they wanted to refund the purchase price paid to them, as opposed to availing completion documents.
 5. The letter dated 23/7/2018 triggered this suit, through which the plaintiff sought the following reliefs: (i) a permanent injunction restraining the defendant against charging, alienating, selling, transferring or otherwise dealing with the suit property until the 2 acres are excised; (ii) a permanent injunction restraining the defendant against evicting the plaintiff from the 2 acres; (iii) an order of specific performance; (iv) an order compelling the defendant to carry out subdivision; (v) an order allowing the plaintiff to deposit the sum of Kshs 800,000 in court; (vi) an order authorizing the Deputy Registrar of this court to execute necessary conveyance documents in the event the defendant declines to do so; (vii) damages for breach of contract; and (viii) costs of this suit.

Defendant’s Case

6. The defendant filed a statement of defence and counterclaim dated 11/1/2019. They admitted entering into the sale agreement. At paragraph 10 of the defence, they admitted receiving a total of Kshs 7,200,000 as purchase price from the plaintiff as detailed in paragraph 10 of the plaint. They however, denied giving vacant possession of the 2 acres to the plaintiff, adding that they only granted vacant possession of 4 acres to M/s Mama Millers Limited and that at the time of fencing their 4 acres, M/s Mama Millers also fenced off the 2 acres that are the subject matter of this suit [the suit property]. They averred that the plaintiff “misconstrued and took possession of the two acres” despite knowing that the defendant lacked capacity to transfer the suit property without prior consent from the Commissioner of Lands.
7. The defendant further averred that the completion notice issued by the plaintiff was inconsequential because a period of six years had already lapsed since the signing of the contract. The defendant faulted the plaintiff for lodging a caveat against the title, adding that the contract had been rendered void by operation of the law. They further averred that the material contract was subject to the *Law Society of Kenya Conditions of Sale* [1989 Edition] which did not obviate the plaintiff’s duty to yield possession of the suit land.



8. By way of counterclaim, they pleaded that the plaintiff owed them Kshs 40,000,000 being the sums due to them as a result of possession of the suit land by the plaintiff after the lapse of the sale agreement, based on a monthly rental of Kshs 500,000. They prayed for the following reliefs against the plaintiff: (i) an order striking out the plaintiff's suit; (ii) an order decreeing the plaintiff to pay them the sum of Kshs 40,000,000; and (iii) interest on the above sum.

Plaintiff's Evidence

9. The Plaintiff, Solomon Wanyoike Wainaina, testified as PW1. He adopted his witness statement dated 9/8/2018 and his supplementary witness statement dated 15/1/2019 as part of his sworn evidence-in-chief. He produced fourteen exhibits contained in the bundle of documents dated 9/8/2018.
10. PW1 testified that in the year 2009, his friend and business partner, Bernard Wainaina Mwangi, a director of Mama Millers Limited, approached him and his brother, one Peter Maina Nganga, and proposed that they buy part of Land Reference Number 4953/1192/1, situated in Thika, which the defendant had put on sale at Kshs 4,000,000 per acre. PW1 added that at the time, the suit property was charged to Investments & Mortgages Bank Limited (now known as I & M Bank Limited). PW1 stated that parties agreed to purchase 8 acres out of the suit property in the following portions: (i) Mama Millers Limited was to purchase 4 acres at Kshs 16,000,000; (ii) Solomon Wanyoike Wainaina (the plaintiff) was to purchase 2 acres at Kshs 8,000,000; and (iii) Bernard Wainaina Mwangi and Peter Maina Nganga to jointly purchase 2 acres at Kshs 8,000,000.
11. PW1 stated that despite parties executing sale agreements on 20/9/2009 in relation to all the aforementioned purchases, the defendant only returned fully executed agreements relating to Mama Millers Limited and Solomon Wanyoike Wainaina [himself]. He added that the executed agreement between the defendant and Bernard Wainaina Mwangi and Peter Maina Nganga was never issued and it was later abandoned by consent of the parties and the deposit that had already been paid in relation to that transaction was credited to the plaintiff's account. PW1 stated that according to the sale agreement, he was to pay Kshs 800,000 upon signing of the agreement, which he did, and the balance of Kshs 7,200,000 was to be paid within 90 days from the date of execution of the sale agreement, in exchange for completion documents. PW1 added that clause 5 (b) of the sale agreement stipulated that he was to take possession of the suit property after payment of the full purchase price.
12. It was PW1's testimony that on 3/2/2011, he and his business partners met the defendant's director, Mr Jayantil Shah, to inquire about the status of the subdivision process of the suit property. He added that it was at that meeting that the defendant agreed to give him vacant possession of his 2 acre portion upon him paying 90% of the purchase price. PW1 stated that it was at that meeting that it was agreed that the sum of Kshs 3,600,000 paid towards the purchase of 2 acres by Bernard Wainaina Mwangi and Peter Maina Nganga would be credited to his account, making the total payments on his account to reach Kshs 7,200,000, which was 90% of the purchase price. He was to pay the balance of Kshs 800,000 upon completion of subdivision of the land. PW1 added that payments used to be made through Mama Millers Limited's account.
13. He further stated that despite the defendant requesting to be given time to complete the subdivision process, in July 2018 they reneged on the earlier agreement in that, vide a letter dated 23/7/2018, they repudiated the said agreement and offered to refund all monies paid towards the purchase of the 2 acres. He added that the defendant reneged on the contract because the value of the land had appreciated. He further stated that the defendant's director had verbally asked him to pay the market value of the property as at 2018. PW1 urged the court to grant him judgment in terms of the plaint.



14. During cross-examination, PW1 stated that he was aware that the sale agreement was signed by two directors of the defendant and that he had held past meetings with one of the directors, Mr. Jayantil Shah. He added that he was to pay balance of the purchase price within 90 days of the execution of the sale agreement in exchange for completion documents. He further stated that he did not make payment within 90 days because the completion documents were not ready. PW1 testified that he was to get possession of the suit property after completing payment. He added that at the time of filing the case, he had paid 90% of the purchase price and that the defendant had not availed to him the completion documents. PW1 added that he did not have written evidence confirming that he was given vacant possession. He stated that they verbally discussed and agreed that because the process of acquisition of the completion documents was taking long, he would take vacant possession after paying 90% of the purchase price.
15. Joseph Muchiri Muchugu testified as PW2. He stated that he was a registered and practising valuer. He testified that on 6/5/2019, Solomon Wanyoike Wainaina instructed him to inspect and advise on the market value of land portions "C" and "D" as indicated on the sub-division plan of Land Reference Number 4953/1192/1 comprised in Title Number. IR 30835. He added that he conducted an inspection of the aforementioned property on 6/5/2019 and subsequently prepared a report dated 14/5/2019 in which he assessed the market value of the property at Kshs 66,500,000 and the value of the improvements on the land at Kshs 21,000,000. He produced a valuation report dated 14/5/2019.
16. Peter Maina Nganga testified as PW3. He adopted his witness statement dated 9/8/2018 as part of his sworn evidence-in-chief. He stated that the plaintiff and Bernard Wainaina Mwangi were his brothers and business partners. He added that despite him and Bernard Wainaina Mwangi executing a sale agreement in which the defendant agreed to sell to them a 2-acre portion of the suit land, the transaction was terminated due to failure by the defendant to execute the agreement. He added that it was later agreed by all the parties in a meeting held on 3/2/2011 that the sum of Kshs 3,600,000 which they had paid to the defendant would be credited to the plaintiff's account. He further stated that he was aware that the defendant received Kshs 7,200,000 from the plaintiff, towards purchase of a 2 acre portion of the suit land.
17. Bernard Wainaina Mwangi testified as PW4. He adopted his witness statement dated 9/8/2018 as part of his sworn evidence-in-chief. He stated that he was the managing director of Mama Millers Limited. He testified that when the defendant's director approached him in the year 2009 to purchase land from them, he called the plaintiff and Peter Maina Nganga who are his brother and business partner and they agreed to buy 8 acres out of the suit land as a team. PW4 stated that the purchase price for the plaintiff's portion, measuring 2 acres, was paid through Mama Millers Limited's account. PW4 further stated that the defendant attributed his failure to avail completion documents within 90 days to delays in the Lands Office. PW4 added that after several meetings with the defendant; the defendant, the plaintiff, Peter Maina Nganga and himself agreed in February 2011 that: (i) the sale of 2 acres to himself and Peter Nganga was to be abandoned and the money paid in relation to that particular transaction was to be credited to Solomon Wanyoike Wainaina's account; and (ii) the plaintiff was to pay a further sum of Kshs 2,800,000 (to make a total of Kshs 7,200,000 constituting 90% of the purchase price) so that he would take possession of the property; (iii) the balance of Kshs 800,000 relating to the plaintiff's contract was to be paid to the defendant after subdivision process was completed. He added that the defendant was paid a total of Kshs 7,200,000 on account of the plaintiff's 2 acres. PW4 added that after giving the plaintiff and Mama Millers Limited possession of the suit property, the defendant repeatedly promised to complete the subdivision process.
18. Florence Wanjiru Mwai testified as PW5. She adopted her witness statement dated 9/8/2018 as part of her evidence-in-chief. She stated that she was an advocate of the High Court of Kenya practising



under the name of M/s Wanjiru Mwai & Company Advocates. She testified that on 11/3/2009, her client, Bernard Mwangi Wainaina [the Managing Director of Mama Millers Limited together with one Jayantilal Kachra Shah who was introduced to her as a director of the defendant visited her office and instructed her to draw sale agreements relating to sale of portions of land to be hived off Land Reference Number 4953/1192/1. PW5 added that the parties informed her that part of the suit land would be sold in the following portions: (i) 4 acres was to be sold to Mama Millers Limited; (ii) 2 acres was to be sold to Solomon Wanyoike Wainaina; and (iii) 2 acres was to be sold to Peter Maina Ng'ang'a and Bernard Wainaina Mwangi jointly. She stated that the portions were to be hived off the suit land, adding that one acre was to be sold at Kshs 4,000,000. She added that the salient features of the agreements were that 10% of the purchase price was to be paid on or before execution of the agreement and the balance [90% of the purchase price] was to be paid within 90 days of execution of the sale agreement in exchange for completion documents. She further stated that the plaintiff was entitled to possession of the land after paying the full purchase price.

19. It was PW5's testimony that the plaintiff subsequently informed her that the defendant had persuaded him to pay the balance of the purchase price even though the completion documents were not ready, upon which she advised that the defendant should give possession of the land even though the subdivision of the suit property was not complete. PW5 stated that she was instructed by the plaintiff to issue the defendant with a completion notice and to register a caveat against the title. PW5 added that she spoke to two of the directors of the defendant, one Mr. Jayantilal Shah and Ms Khilna Shah on the issue of subdivision of the suit property but was met with empty promises, prompting her to issue the defendant with a notice to complete in June 2018. In response to the said notice, the defendant sent her a letter on 23/7/2018 indicating that they wished to cancel the sale of the 2 acres portion of the suit property to the plaintiff and that they wished to refund the amount already paid.

Defence Evidence

20. Khilna Shah testified as DW1. She adopted her witness statement dated 11/1/2019 and her further witness statement dated 12/11/2021 as part of her sworn evidence-in-chief. She produced seven exhibits contained in the bundle of documents dated 11/1/2019. She stated that she was one of the directors of the defendant.
21. She testified that Sunrise Synthetics Limited [the defendant] was the registered proprietor of land known as Land Reference Number 4953/1192/1 [the suit property]. She contended that on 20/9/2009, the plaintiff and the defendant entered into an agreement for the sale of a 2-acre portion of the land. She added that the Plaintiff paid a 10% deposit amounting to Kshs 800,000. She testified that the defendant faced delays in obtaining consent from the Commissioner of Lands at Ardhi House. DW1 testified that the plaintiff was not granted possession of the 2 acres by the defendant, adding that the plaintiff moved onto the 2 acres and begun developing the land without the defendant's consent.
22. DW1 added that by a letter dated 27/6/2016, the plaintiff, through his advocate, issued a completion notice. DW1 stated that the plaintiff placed a caveat on the entire suit property which disrupted the defendant's use of the suit property, including the part which was not subject to the agreement. DW1 added that through a letter dated 23/7/2018, the defendant expressed its offer to refund the purchase price paid by the plaintiff, given that the plaintiff had not honoured the terms and conditions of the contract. DW1 added that it was not until August 2018 that the plaintiff filed this suit and asked the court to order that the plaintiff does deposit some money in court, purporting it was the balance of the purchase price. She added that having occupied the defendant's property for six years, the plaintiff was a tenant and had accrued rent arrears amounting to over Kshs 40,000,000 computed at the rate of Kshs 500,000 per month.



Plaintiff's Submissions

23. The plaintiffs filed written submissions dated 18/11/2022 through M/s J. K Mwangi & Company Advocates. The plaintiff's counsel deciphered the following as the key issues that fell for determination in the suit: (i) Whether the plaintiff or the defendant breached the sale agreement dated 20/9/2009; (ii) Whether the plaintiff's case is time barred in terms of the *Limitation of Actions Act*, Cap 22, Laws of Kenya; (iii) What is the status of the plaintiff in regard to the suit property; (iv) Whether the defendant is at liberty to refund the purchase price to the plaintiff as stated in its letter dated 23/7/2018; (v) Whether the plaintiff is entitled to judgment as prayed in the plaint and whether the defendant is entitled to judgment in terms of the counterclaim; and (vi) Who is entitled to the costs of the suit and the counterclaim.
24. On whether either of the parties breached the sale agreement, counsel submitted that courts must refer to the express terms of the contract in considering obligations of parties under a written contract. Counsel contended that the evidence on record showed that the plaintiff had fulfilled his obligation of paying the purchase price. Counsel submitted that, in paragraph 10 of its defence, the defendant admitted that the plaintiff had paid a sum of Kshs 7,200,000 as at February 2011. Counsel added that DW1 admitted that the plaintiff deposited the balance of the purchase price of Kshs 800,000 in court on 20/12/2018. Counsel argued that the defendant's assertion that the plaintiff had breached the sale agreement by paying the purchase price after the completion date was false, given that the 'completion date' was stated to be either 90 days after the execution of the sale agreement or a date after the defendant obtained completion documents. Counsel added that the completion date had not yet crystallized given that the defendant was yet to obtain the completion documents. Counsel argued that the defendant had breached the subject sale agreement by failing to provide completion documents and by purporting to refund the purchase price while aware that the plaintiff had been in possession of the suit property from February 2011 and had developed the suit property.
25. On whether the plaintiff's suit is time-barred, counsel submitted that the cause of action accrued on 23/7/2018 when the defendant breached the sale agreement dated 20/9/2009 by writing a letter to the plaintiff stating that it wished to refund the purchase price instead of completing the sale transaction. He added that the plaintiff filed the suit on 10/8/2018, less than a month after the cause of action accrued, which fell within the 6 year limitation period for actions founded on contract and the 12 years envisaged under Section 7 of the *Limitation of Actions Act*. Counsel relied on Sections 4(1) and 7 of the *Limitation of Actions Act* and the decision in the case of *Diana Katumbi Kiio v Reuben Musyoki Muli* [2018]eKLR to support his submissions.
26. On the status of the plaintiff vis a vis the suit property, counsel submitted that the plaintiff was the owner of the two acres, having acquired them under the sale agreement dated 20/9/2009 and having paid the agreed purchase price. Counsel added that the subject sale agreement met the criteria stipulated under Section 3 (3) of the *Law of Contract Act* and Section 38 (1) of the *Land Act* No 6 of 2012 and was therefore valid. He added that the contention by the defendant that the sale agreement was void ab initio for lack of the Commissioner of Land's consent was incorrect because of the following reasons: (i) the plaintiff had an overriding interest in the suit property, having taken possession of the same in February of 2011; and (ii) the defendant held the suit property in trust for the plaintiff. Counsel relied on Section 28 of the *Land Registration Act* No 3 of 2012 and the Court of Appeal decision in *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014]eKLR in which the court held that because the vendor had created a constructive trust in favour of the purchaser, the sale agreement was still enforceable notwithstanding lack of consent of the Land Control Board. Counsel urged the court to find that the plaintiff was the owner of the suit property and not a tenant or licensee, by virtue of



the constructive trust created in the plaintiff's favour as an overriding interest. Counsel added that the remedy of rescission of a sale agreement as purported by the defendant was not available to a party who was in breach of a contract. Counsel relied on the decision in the case of *Abu Chiaba v Mohamed Bakari & 2 Others* [2005] eKLR to support the point.

27. On whether the counterclaim was merited, counsel submitted that the counterclaim lacks merit for the following reasons: (i) it is not supported by a verifying affidavit contrary to the provisions of Order 4 rule 1 (4) of the *Civil Procedure Rules*; (ii) the plaintiff was given possession of the suit property by the defendant pursuant to a meeting held on 3/2/2011, a fact which was corroborated by PW3, PW4 and PW5 during the hearing; (iii) the defendant had neither tendered evidence to prove that the plaintiff was its tenant nor had it tendered evidence to show how the counter-claim of Ksh 40,000,000 was computed; (iv) it was suspicious that the defendant had neither made a plea for an eviction order against the plaintiff in its counterclaim nor had it given an explanation for not attempting to evict the plaintiff from the suit property or attempting to collect the alleged rents from February 2011 to date; and (v) the counterclaim was a red herring meant to distract the court from the real issue in dispute. Counsel added that the counterclaim was not proved. He urged the court to dismiss the counterclaim.
28. On whether the plaintiff was entitled to judgment in terms of the plaint and whether the defendant was entitled to judgment in terms of the counterclaim, counsel submitted that the plaintiff had demonstrated that he fulfilled the terms of the sale agreement dated 20/8/2009 by paying the purchase price while the defendant had not demonstrated that it had fulfilled its obligations under the sale agreement. Counsel added that the equitable remedy of specific performance was the only just remedy that should be awarded to the plaintiff given that he had paid the entire purchase price; he had taken possession of the suit property in 2011; and he had developed the suit property by building a fuel storage depot and a workshop, all valued at Kshs 21,000,000. Counsel relied on the decisions in the cases of *Robert Kiptanui Kitur v Jackson Kiprptich* [2022] eKLR and *Mama Millers Limited v Sunrise Synthetics Limited* [2022] eKLR. On costs, counsel relied on the principle that costs follow the event and urged the court to award costs to the plaintiff.

Defendant's Submissions

29. The defendant filed its submissions on 11/1/2023 through M/s John Ogada & Company Advocates. The defendant's counsel deciphered the following as the issues that fell for determination in the suit: (i) Whether the plaintiff's claim is for breach of contract or recovery of land; (ii) Whether the plaintiff's claim is time-barred; (iii) Whether the sale agreement was ever amended and whether the letters dated 26/5/2010 and 7/6/2010 by advocates relate to the plaintiff and whether they constitute an amendment; (iv) Whether there was breach of contract by one or both parties and if so what are the consequences of the breach of contract; (v) Whether the plaintiff was given permission to develop the property or had done so at its own risk; (vi) Whether the plaintiff is a trespasser, tenant and/or licensee of the defendant; (vii) Whether the plaintiff and/or the defendant is entitled to judgment, and to what extent; (viii) Whether any damage arise and what value; and (ix) Who should bear the costs of the suit.
30. On whether the plaintiff's claim was for breach of contract or recovery of land, counsel submitted that it was clear from the pleadings and from the evidence provided by the plaintiff that his claim was for breach of contract and not for recovery of land. Counsel added that the plaintiff could not claim recovery of land given that he had neither become an owner of the suit property nor had he obtained title or completed paying the purchase price. Counsel argued that the case of *Diana Katumbi Kii v Reuben Musyoki* [2018] eKLR which the plaintiff relied on was not applicable because in the said case, the plaintiff had paid the full purchase price; the defendant had signed transfer forms; and possession had been yielded, which was not the case in the present suit. Counsel contended that leave



being granted to deposit money in court was not an exercise in completion of payment and that the plaintiff was simply trying to secure the money in order to use it as evidence. Counsel added that it was unfair for the court to grant the order to deposit the balance of the purchase price in court when the suit had not been heard and determined. Counsel argued that Section 7 of the *Limitation of Actions Act* was not applicable in the present case given that the plaintiff's claim was not one for recovery of land but was an action founded on contract.

31. On whether the plaintiff's claim was time-barred, counsel submitted that the cause of action accrued when both parties breached the terms of the sale agreement dated 20/9/2009 and did not do anything to extend completion date. He submitted that completion was supported to be on 19/12/2009 which was 90 days after the execution of the agreement but both parties failed to fulfill their obligations under the sale agreement and therefore neither of the parties was under an obligation to "specifically perform" the agreement. Counsel added that the present suit was filed 9 years after the date of breach contrary to the six year limitation period envisaged under Section 4 of the *Limitation of Actions Act*. Counsel argued that it was not the duty of the court to assist a litigant by allowing him to fulfil his obligations under an agreement by giving an order directing him to deposit the balance of the purchase price in court before determination of the issues in the suit.
32. On whether the sale agreement was ever amended and whether the letters dated 26/5/2010 and 7/6/2010 constituted amendments or deeds of variation, counsel submitted that it was clear that there was no deed of variation or amendment executed and attested to in accordance with the provisions of the clause relating to amendments. Counsel added that the letters which the plaintiff relied on solely related to Mama Millers Limited and did not relate to the plaintiff. Counsel relied on the cases of *Kenya Breweries Ltd v Kiambu General Transport Agency Ltd* [2000] 3 EA and *Helga Christa Obany v ICEA Lion General Insurance Company Ltd* [2022] eKLR.
33. On whether there was breach of contract by one or both of the parties, counsel submitted that the evidence tendered in court demonstrated that the plaintiff did not pay the balance of the purchase price within the period stipulated in the sale agreement. Counsel further submitted that the plaintiff was in breach of his obligation, adding that he tried to remedy the breach by depositing the balance of the purchase price of Ksh 800,000 in court nine years later when the value of the suit property had astronomically risen. Counsel contended that the defendant similarly breached the sale agreement by failing to perform its obligations within the stipulated time in that they failed to provide the completion documents within 90 days. He added that the sale agreement was therefore invalidated as a result of the actions, inactions and omissions of both parties.
34. On whether the plaintiff was given permission to develop the suit property or whether he did so at his own risk, counsel submitted that the plaintiff was never given possession of the suit property, adding that the plaintiff lacked permission to develop it. Counsel added that possession did not legalize an invalid contract.
35. On whether the plaintiff was a tenant, licensee or a trespasser on the suit property, counsel submitted that the sale agreement provided that the sale was subject to the Law Society of Kenya Conditions of Sale (1989) which provide that possession does not confer ownership of the property. He added that the plaintiff did not have any overriding interest in the suit property by virtue of his occupation because he was a trespasser or a licensee who had assumed he had the defendant's permission. Counsel argued that a constructive trust can only be created where the vendor receives full purchase price and where the vendor actually puts the plaintiff/purchaser in actual possession of the suit property but fails to transfer the property. Counsel relied on the decision in the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR.



36. On whether or not the plaintiff and/or the defendant is entitled to judgment, counsel submitted that the plaintiff's suit was time-barred and should be dismissed with costs. Counsel further submitted that none of the reliefs sought by the plaintiff should be granted given that the plaintiff was in breach of the sale agreement dated 20/9/2009 and the said contract was unenforceable. Counsel added that the defendant having demonstrated that the plaintiff had been a licensee and/or a trespasser on the defendant's property, the defendant was entitled to the prayers sought in the counterclaim.
37. On costs, counsel relied on the principle that costs follow the event and urged the court to award costs of the suit and the counterclaim to the defendant.

Analysis and Determination

38. I have considered the pleadings, evidence and submissions in the suit. I have also considered the legal frameworks and the jurisprudence relevant to the key issues that fall for determination in the suit. Parties did not agree on a common statement of issues that are to be determined by the court. Secondly, it is noted from the court record that prior to the commencement of trial, the defendant brought a notice of preliminary objection dated 26/9/2018 and this court [Gacheru J] directed that the issues that had been raised in the preliminary objection be canvassed during trial and be disposed through this court's final determination of the suit. Indeed, some of the issues which were raised in the notice of preliminary objection were similarly raised in the defence and in the parties' submissions.
39. Taking into account the parties' pleadings, evidence, and submissions; and further taking into account the key issues that were raised in the preliminary objection dated 26/9/2018, the following are the eight key issues that fall for determination in this suit: (i) Whether the plaintiff's suit is statute-barred under Section 4(1) of the *Limitation of Actions Act*; (ii) Whether the agreement dated 20/9/2009 contravened Section 34 of the repealed *Government Lands Act*, Cap 280 and was therefore void ab initio; (iii) Whether the plaintiff breached the agreement dated 20/9/2009; (iv) Whether the defendant breached the agreement dated 20/9/2009; (v) Whether taking of possession and occupation of the 2 acres by the plaintiff was illegal; (vi) Whether the plaintiff is entitled to any of the reliefs sought in the primary suit; (vii) Whether the defendant is entitled to any of the reliefs sought in the counterclaim; (viii) What order should be made in relation to costs of this suit. I will analyse and dispose the eight issues sequentially in the above order.
40. The first issue is whether the plaintiff's suit is statute-barred under Section 4(1) of the *Limitation of Actions Act*. It is the case of the defendant that the plaintiff's suit is founded on the contract comprised in the sale agreement dated 20/9/2009 and that it is subject to the limitation period of six years that is stipulated under Section 4(1) of the *Limitation of Actions Act*. The defendant contends that the six year limitation period lapsed in September 2015, and because this suit was brought in August 2018, it is statute-barred under Section 4(1) of the *Limitation of Actions Act*.
41. The plaintiff does not agree with the view taken by the defendant on the issue. The position of the plaintiff is that a cause of action in relation to a contract accrues on the date of breach of the contract; not on the date when the contract is entered into. The plaintiff contends that the limitation period should be reckoned from the date of breach, adding that the cause of action in this suit accrued on 23/7/2018 when the defendant wrote a letter purporting to cancel the contract and refund the purchase price which had been paid to them between 2009 and February 2011. Further, the plaintiff contends that this suit is comprised of a claim for recovery of land hence the applicable limitation period is the 12 year period that is provided under Section 7 of the *Limitation of Actions Act*.
42. I have reflected on the rival arguments. Section 4(1) of the *Limitation of Actions Act* provides as follows:



- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
43. Section 7 of the *Limitation of Actions Act* provides as follows:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
44. The question as to the limitation period applicable to a cause of action founded on breach of a contract relating to land has been the subject of pronouncements by our superior courts. Not too long ago, the question was the subject of consideration by the Court of Appeal in *Diana Katumbi Ktio v Reuben Musyoki Muli* [2018] eKLR. The Court of Appeal adopted the following exposition that had been outlined in the *Journal of International Banking and Financial Law* [2007] II JIB FL 642:
- “In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage.”
45. The Court of Appeal further adopted the following exposition by Lord Diplock in *Letang v Cooper* [1964] 2 All ER 929 at Page 934 on what constitutes a cause of action:
- “A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”
46. On my part, I would add that, a plain reading of both Section 4 and Section 7 of the *Limitation of Actions Act* clearly points to the fact that the date of accrual of a cause of action is the date when time starts running. Put differently, limitation period in a claim founded on contract is reckoned from the date when the cause of action accrues; not the date when the parties entered into the contract. Consequently, a party invoking the statute of limitation in a claim founded on contract is obligated to demonstrate to the court the date when the breach occurred and, further, demonstrate to the court that at the time the impugned suit was initiated, the prescribed limitation period had lapsed. The limitation should be reckoned from the date when the alleged breach occurred.
47. The defendant in this suit has not demonstrated to the court that the breach alleged by the plaintiff occurred on 20/9/2009. To the contrary, the evidence presented to the court reveals that the contract is what was entered into on 20/9/2009. On his part, the plaintiff pleaded at paragraph 14 of the plaint that the breach occurred on 23/7/2018. Further, the plaintiff tendered, as part of his evidence, the defendant’s letter dated 23/7/2018 through which the defendant conveyed their intention to cancel the contract. He demonstrated that 23/7/2018 is the date when the breach occurred.



48. That is not all. From the evidence that was tendered by the plaintiff and by DW1, it does emerge that the plaintiff has been in possession of the suit property from 2011. It does also emerge that notwithstanding the fact that the 90 days period lapsed in December, the parties mutually agreed that the completion period was to be extended. Indeed, the defendant accepted purchase price in the sum of Kshs 6,400,000 from the plaintiff in February 2011 and did not object to the plaintiff's taking of possession of the suit land in February 2011. The plaintiff, as a purchaser, enjoyed quiet possession of the land without any objection from the defendant from February 2011 up to the time of filing this suit. Further, there was no evidence of termination of the contract by either party. Clearly, there was no evidence tendered to suggest that the cause of action in the plaintiff's suit accrued prior to 23/7/2018.
49. For the above reasons, it is the finding of this court that the cause of action in this suit accrued in July 2018 and that this suit having been initiated in August 2018, it is not statute- barred.
50. The second issue is whether the agreement dated 20/9/2009 contravened Section 34 of the now repealed Government Lands Act. It is important to observe that whereas the defendant raised the issue of consent of the Commissioner of Lands in paragraph 11 of the defence and subsequently raised it in the notice of preliminary objection dated 26/9/2018, they neither led evidence relating to the issue nor submitted on the issue. In the absence of both evidence and submissions on the issue, the contention by the defendant cannot be said to have been proved. Put differently, the court has no basis upon which to uphold the position of the defendant on the issue. I will nonetheless examine the framework alluded to in the notice of preliminary objection.
51. The framework in Section 34 of the repealed *Government Lands Act* provided as follows;
- “this Act a covenant by the lessee not to divide the land and assign or sublet any portion thereof except with the previous written consent of the Commissioner and in such manner and upon such conditions as he may prescribe and subject to the provisions of Part V:
- Provided that—
- (i) no application for the consent shall be entertained unless the whole of the purchase price in respect of the lease has been paid;
 - (ii) the annual rent reserved for each portion shall be at the rent prescribed in section 29 and shall not be less than ten shillings;
 - (iii) the immediately foregoing proviso shall apply to every lease granted under the Crown Lands Ordinance, 1902, for grazing or agricultural purposes or both in the event of the property held under that lease being subdivided and the portions assigned.
- 23 Restriction on subdivision, assignment and subletting. 21 of 1953, s. 10, 39 of 1968, Sch. (2) Every application for consent under this section shall be made to the Commissioner and shall—
- (a) contain the applicant's proposals for apportionment of any development conditions in the original lease and for the development and maintenance of development of each portion of land to be assigned or sublet; and
 - (b) be accompanied by suitable plans in quadruplicate on durable material showing the proposed subdivisions.



- (3) Every applicant for consent under this section shall furnish such further or other information or particulars as the Commissioner may require.

52. The *Government Lands Act* was repealed in 2012 when the new land statutes came into force. Secondly, my understanding of the above framework is that it empowered the Commissioner of Lands to regulate the subdivision of Government land that was privately held on leasehold basis. The framework did not outlaw sale and subdivision of land that was privately held on leasehold basis. Moreover, under clause 7 of the agreement, the defendant covenanted to procure consent from the Commissioner of Lands. There was clearly, no illegality in that arrangement.
53. The defendant received 90% of the purchase price on the understanding that they were going to procure the consent as provided under Section 34 of the *Act*. During trial, they did not lead any evidence to demonstrate that they made any attempt to apply for the consent. There was no evidence suggesting that the Commissioner of Lands objected to the sale or to the subdivision. The contention by the defendant who had received 90% of the purchase price, that the contract was voided by the lack of the Commissioner's consent is clearly a red herring. No attempt was made to procure consent from the Commissioner of Lands. Further, there was no evidence to suggest that the Commissioner of Lands objected to the subdivision or to the transfer. For the above reasons, my finding on the second issue is that the agreement dated 20/9/2009 did not contravene Section 34 of the repealed *Government Lands Act*. It is my further finding that the agreement remained binding on the parties.
54. The third and fourth issues relate to the question as to whether either of the two parties to the agreement breached it. The two issues are related. For this reason, I will dispose the two issues simultaneously.
55. The plaintiff's obligations under the agreement were two fold: (i) to pay the deposit of Kshs 800,000 on or before execution of the agreement; and (ii) to pay Kshs 7,200,000 in exchange of completion documents. From the totality of the evidence that was placed before this court, the plaintiff paid a total of Kshs 7,200,000 between 20/8/2009 and February 2011. The defendant received the money without any objection. The plaintiff took possession of the two acres without any objection from the defendant.
56. The obligation of the defendant under the contract was to undertake the excision of the two acres and to avail to the plaintiff the completion documents itemized under clause 7 of the agreement. The defendant received 90% of the agreed purchase price. They did not, however, lead evidence to demonstrate that they discharged the above obligations under the agreement. The defendant led evidence by one of its directors who testified as DW1. It is clear from the totality of the evidence on record that the defendant executed the agreement; they received 90% of the purchase price; they let the plaintiff to take possession of the two acres; they used the purchase price to discharge the title; they elected to let the plaintiff take and enjoy quiet possession of the land; and they purported to cancel the agreement in July 2018, nine years later, and refund the purchase price. It is clear from the above evidence that in purporting to unilaterally cancel the agreement seven years after they had allowed the plaintiff to take possession and develop the suit property, the defendant were in breach of the agreement which neither party had terminated as at July 2018.
57. The defendant contended that the agreement dated 20/9/2009 lapsed at the expiry of 90 days. Based on the evidence that was tendered during trial, this view cannot be correct. I say so because the 90 days period lapsed on or about 19/12/2009. There was evidence indicating that parties to the agreement mutually agreed to extend the completion period up to the time the defendant would obtain completion documents. Indeed, the defendant received the additional 80% of the purchase price in



February 2011 which was more than 13 months after the lapse of the 90 days. In paragraph 10 of the defence, the defendant admitted that pursuant to a meeting held on 3/2/2011, a sum of Kshs 6,400,000 was paid, directly and through assignment, to make a total payment of Kshs 7,200,000. It cannot therefore be correct that the agreement pursuant to which the defendant was receiving payment in February 2011 had lapsed in December 2009. If it had lapsed, the defendant had no business receiving purchase price in February 2011.

58. It is therefore clear from the evidence on record that the plaintiff discharged his contractual obligations. It is also clear that in purporting to cancel the agreement seven years after they received 90% of the purchase price and seven years after they allowed the plaintiff to take possession and develop the purchased property, the defendant had breached the sale agreement. As noted earlier, there was no breach by the plaintiff. Those are my findings on issue number three and issue number four.
59. Was the taking of possession and occupation of the two acres by the plaintiff illegal? The plaintiff testified that they held a meeting with the defendant's director, one Jayantlal K. Shah on 3/12/2011 during which it was agreed that upon the plaintiff paying 90% of the purchase price, he would be allowed to take possession of the two acres. PW3 and PW4 confirmed that, indeed, the meeting took place and it was pursuant to the agreement reached during the meeting that the plaintiff made a further payment to reach 90 % of the purchase price so that he could take possession of the two acres. They further testified that it was during the meeting that it was agreed that the sum of Kshs 3,600,000 which had been paid by Peter Maina Mwangi and Bernard Wainaina Mwangi was to be credited to the plaintiff's account, a fact which the defendant admitted in paragraph 10 of the defence.
60. Evidence was tendered showing that upon taking possession of the two acres in 2011, the plaintiff fenced the two acres and developed a fuel depot on the two acres. All the above happened without any objection from the defendant. Further, the plaintiff remained in possession of the two acres from February 2011 up to the time of instituting this suit, without any objection or protestation from the defendant. The plaintiff testified that he was allowed to take possession after paying 90% of the purchase price. Receipt of the sum of Kshs 7,200,000 was acknowledged in the defence and by DW1. Taking into account the corroborating evidence of PW3 and PW4; and further taking into account the conduct of the defendant in allowing the plaintiff to take possession and develop the suit property and remain in occupation of the suit property for over 7 years without any objection, it is clear that the defendant permitted the plaintiff to take possession and develop the suit property after the plaintiff had paid 90% of the purchase price. It is therefore the finding of this court that possession and occupation of the suit property by the plaintiff was lawful.
61. Is the plaintiff entitled to any of the reliefs that were sought in the primary suit? Based on the above findings, it is the further finding of this court that the plaintiff has proved the primary claim on the balance of probabilities.
62. Through his submissions, the plaintiff abandoned the plea for damages for breach of contract. Further, the plaintiff observed that the plea for an order authorizing him to deposit the balance of the purchase price (800,000) was granted at the interlocutory stage of disposing the application for interlocutory injunction. I will make a brief analysis on the plea for an order of specific performance of the contract dated 20/9/2009 before I dispose the question relating to the reliefs available to the plaintiff.
63. Jurisdiction to grant the equitable remedy of specific performance is exercised on well-settled principles. In their book *The Law Of Real Property*, Seventh Edition, The Rt Hon Sir Roberty Megarry



and Sir William Wade set out the following principles that govern the exercise of jurisdiction to grant the equitable remedy of specific performance in land disputes:

“This remedy is purely equitable, and in principle is confined to cases where the common law remedy of damages is inadequate. But land is always treated as being of unique value, so that the remedy of specific performance is available to the purchaser as a matter of course; and even though the vendor is merely concerned to obtain the purchase-money, so that he could be adequately compensated in damages for the purchaser’s refusal to complete, the remedy of specific performance is equally available to him”

64. The two authors add thus:

“Like other equitable remedies, specific performance is discretionary. However, the court’s discretion is governed by settled principles. Examples of where the remedy may be refused include the following:

- i. in proper cases where there is mistake or great hardship, even though these do not invalidate the contract at law.
- ii. where there has been delay causing injustice to the other party
- iii. whether the vendor would be required “to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession.
- iv. where the property is being used for illegal purposes, which would make the purchaser liable to prosecution, even though on this ground he has no right to terminate the contract; or
- v. where the vendor’s title is doubtful but he has failed to disclose the known cause of that doubt and the purchaser has agreed to accept any defects that there may be.

In these cases the contract will remain binding at law, so that the party in default will be liable in damages, but equity will not assist with a decree of specific performance. On the other hand, specific performance may be decreed before the legal time for performance has arrived if there has been an anticipatory breach, e.g. by repudiation”

65. In *Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Mabhubuti* Court of Appeal No 165 of 1996, the Court of Appeal outlined the following principle which guides our courts when exercising jurisdiction to grant the remedy of specific performance:

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

66. In the present suit, the plaintiff paid 90% of the purchase price in February 2011 and was allowed to take possession and develop the two acres in February 2011. The 10% balance of the purchase price was deposited in court at the time of initiating this suit. The plaintiff took possession and has developed



- the two acres. He runs a fuel depot on the two acres. He has been in possession of the two acres for the last 7 years. His developments on the land were valued in May 2019 by PW2 at Kshs 21,000,000.
67. Secondly, the legal charge which existed as an encumbrance on the title was discharged. The plaintiff contended that the purchase price which he and other purchasers paid as purchase price is what was used to redeem the title. At the moment, there exists a caveat lodged by the plaintiff to protect his interest as a purchaser. No evidence was tendered to indicate that the land is no longer available. Taking the foregoing into account, it is the view of the court that the circumstances of the plaintiff's suit justify the granting of the equitable remedy of specific performance.
68. The defendant, on the other hand, did not prove the counter claim of Kshs 40,000,000. It emerged from the evidence that was presented before the court that the plaintiff entered and occupied the land after paying 90% of the purchase price. Occupation and development of the two acres has been without any objection from the defendant. The only reason why the plaintiff had not paid the 10% balance of the purchase price is that the defendant had not availed the completion documents. The defendant failed to prove breach of contract by the plaintiff. The defendant having failed to prove their counterclaim, it is the finding of the court that they are not entitled to any of the reliefs that were sought in the counter-claim.
69. On costs, no special circumstances were demonstrated to warrant a departure from the general principle in Section 27 of the *Civil Procedure Act* that costs follow the event. Consequently, the defendant will bear costs of this suit.

Disposal Orders

70. For the above reasons, the primary suit by the plaintiff succeeds and the counterclaim by the defendant fails. The primary suit and the counterclaim are disposed as follows;
- a. The counterclaim by the defendant is dismissed for lack of merit.
 - b. Judgment is hereby entered in favour of the plaintiff against the defendant in the following terms:
 - i. A permanent injunction is hereby issued restraining the defendant from charging, alienating, selling, transferring or otherwise dealing with the 2 acres that were sold to the plaintiff and that form part of Land Reference Number 4953/1192/1.
 - ii. A permanent injunction is hereby issued restraining the defendant from evicting or attempting to evict the plaintiff or interfering with the plaintiff's quiet user and enjoyment of the 2 acres.
 - iii. An order of specific performance is hereby issued decreeing the defendant to excise the 2 acres from Land Reference Number 4953/1192/1 through subdivision at his own cost and to avail completion documents to the plaintiff within 60 days from today.
 - iv. In default of (iii) above, the plaintiff shall undertake the excision, subdivision and procurement of completion documents at the cost of the defendant.
 - v. Should the defendant default to do the above, the Deputy Registrar of this court shall execute all documents and instruments necessary for the excision and for the conveyance of the 2 acres to the plaintiff.
 - c. The defendant shall bear costs of the primary suit and the counterclaim.



- d. Upon the defendant availing to the plaintiff all completion documents, the Court Registry shall release to him the sum of Kshs 800,000 which was deposited in court at the time of prosecuting the application for interlocutory injunctive orders.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 2ND DAY OF NOVEMBER 2023.

B M EBOSO

JUDGE

