



**Brook Villas Estate Limited v Gatu & another (Environment & Land Case  
25 of 2016) [2023] KEELC 16677 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16677 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 25 OF 2016**

**AA OMOLLO, J  
MARCH 28, 2023**

**BETWEEN**

**BROOK VILLAS ESTATE LIMITED ..... PLAINTIFF**

**AND**

**DUNCUN MACHARIA GATU ..... 1<sup>ST</sup> DEFENDANT**

**URITHI HOUSING CO-OPERATIVE LTD ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff first brought the suit vide a plaint dated 18<sup>th</sup> January, 2016 against the 1<sup>st</sup> defendant. The plaint was subsequently amended on 7<sup>th</sup> October, 2016 to include the 2<sup>nd</sup> defendant. The Plaintiff pleaded that the 1<sup>st</sup> Defendant is the registered owner of all that parcel of land known as LR Juja/Komo Block 1/25 measuring approximately 30 acres (herein after referred to as the suit property).
2. By an agreement dated 14<sup>th</sup> May, 2015, the 1<sup>st</sup> defendant agreed to sell and the plaintiff agreed to buy a portion of land measuring 12 acres that was to be carved out and subdivided from the suit property at the purchase price of Kenya Shillings Eighty Four Million (Kshs.84,000,000/=) only. The terms of the payment was set out as follows:-
  - i. Kenya Shillings Eight Million Four Hundred Thousand (Kshs.8,400,000/=) only, being a deposit of 10% of the purchase price, payable to the 1<sup>st</sup> Defendant on or before the execution of the Sale Agreement, receipt of which the 1<sup>st</sup> Defendant acknowledged.
  - ii. A further sum of Kenya Shillings Thirty Three Million Six Hundred Thousand (Kshs.33,600,000/=) representing 40% of the purchase price payable within 60 days upon execution, after which payment the plaintiff shall



take possession and be at liberty to further subdivide and erect beacons for the further subdivided plots.

- iii. The balance of Kenya Shillings Forty Two Million (Kshs.42,000,000/=) payable on completion.
3. The Plaintiff pleaded that it paid to the 1<sup>st</sup> defendant a sum of Kshs. Ten Million (Kshs.10,000,000) on 15<sup>th</sup> May, 2015 and a further payment of Kshs.5,000,000/= on 8<sup>th</sup> September, 2015. It is pleaded further that after the payment of the deposit, it was incumbent upon the 1<sup>st</sup> defendant to start the process of subdivision to excise the plaintiff's portion pursuant to clause B of the sale agreement after retrieval of the title deed from Family Bank.
4. The plaintiff pleaded further that it got wind of an intended plan of subdivision not as agreed despite the 1<sup>st</sup> defendant pocketing Kshs.15 million. That the plaintiff through their advocates wrote to enquire about the subdivision as they were desirous of completing the transaction. Later and contrary to the express provisions of the sale Agreement, the plaintiff learnt that the 1<sup>st</sup> defendant had subdivided the land into 2 comprised in Juja/Komo Block 1/3452 and Juja/Komo Block 1/3451 with the 18 acres portion touching the Bob Harris Road. That the intention was to push the plaintiff into the inner portion contrary to their agreement which amounted to breach of the agreement.
5. The plaintiff levelled particulars of breach against the 1<sup>st</sup> Defendant as follows:
  - a. Failing to commence and confirm the subdivision of the suit property on time to create the portion subject of the transaction, which subdivision would enable the plaintiff pay the balance of the purchase price, take possession and further subdivide its portion.
  - b. Failing to point out the beacons on the Suit property after subdivision.
  - c. Failing to discharge and/or inform the plaintiff whether the charge of Kshs.7,500,000/= registered against the plaintiff's Title Deed had been discharged despite persistent enquiries.
  - d. Purporting to rescind the Sale Agreement on an alleged breach by the Plaintiff when he has not performed his part of the bargain.
  - e. Purporting to refund part of the Purchase Price and withhold the 10% deposit of Kshs.8,400,000/=.
  - f. Otherwise subdividing the land contrary to the express provisions of the sale agreement.
6. The plaintiff pleaded that by reason of the matters aforesaid, it has suffered and continuous to suffer loss and damage as the 1<sup>st</sup> defendant refuses to complete the transaction when the plaintiff is willing to carry out its obligation. It is added that the plaintiff entered the suit property and offered it for sale to 3<sup>rd</sup> parties with knowledge of the 1<sup>st</sup> defendant and that it was stated expressly in clause 2(b) of the agreement that the property was being purchased with intention to resell.
7. That it has come to the knowledge of the plaintiff that the 1<sup>st</sup> defendant has offered the same portion of the property sold to them for sale to the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant having moved in with intent to subdivide and offering to sell to more third parties. Efforts made by the plaintiff to reach amicable settlement has not borne fruits. The plaintiff now wants the court to enter judgment in their favour and against the defendant as follows;-



- a. a permanent injunction Order restraining the 1<sup>st</sup> Defendant, whether acting by himself or through his agents, servants and/or workers, from further breaching the Sale Agreement dated 14<sup>th</sup> May, 2015 by entering into any other contracts with any third parties and more so the 2<sup>nd</sup> Defendants, offering for sale, leasing, mortgaging, charging, disposing, transferring, assigning, developing and/or otherwise dealing with all that parcel of land known as Title Number Juja/Komo/Block 1/25 Juja/Komo/Block 1/3452 in a manner inconsistent with the Plaintiff's interest.
  - b. Specific Performance of the Contract dated 4<sup>th</sup> May, 2015 as against the 1<sup>st</sup> Defendant.
  - c. Damages for Breach of Contract.
  - d. A declaration that any contract entered into between the Plaintiff and the 2<sup>nd</sup> Defendant is null and Void and the same be voided as such.
  - e. Costs of the suit.
  - f. Any other further relief that the Honourable Court may deem fit to grant.
8. The 1<sup>st</sup> defendant filed a statement of defence on 18<sup>th</sup> October, 2016 denying the claim. The 1<sup>st</sup> defendant admitted the payment details stated in paragraph 6 and 7 of the amended plaint but denied the rest of the allegation of the circumstances of the payment. He stated that he relied on the terms of the sale agreement which the Plaintiff has referred to in the plaint. The 1<sup>st</sup> defendant denied that he was indebted to Family Bank thus he did not require any funds to discharge the title. That any payments made by the plaintiff were purely under the sale agreement.
  9. The 1<sup>st</sup> defendant denied the contents of paragraph 9A of the amended plaint and instead pleaded that the plaintiff having breached the terms of the agreement, the 1<sup>st</sup> defendant was no longer bound to the rescinded agreement. He averred that he had every right to deal with the property in any manner he deemed fit. He stated further that their sale agreement had a mandatory arbitration clause hence this case filed was premature. The defendant denied every allegation levelled against him and asked this court to dismiss the suit with costs.
  10. The 2<sup>nd</sup> defendant filed its statement of defence on 22<sup>nd</sup> November, 2018 which denied the plaintiff's claim and put it to strict proof. The 2<sup>nd</sup> defendant denied the contents of paragraphs 6 – 13 of the amended plaint stating that it (the 2<sup>nd</sup> Defendant) was not privy to the alleged contractual agreement nor its terms between the plaintiff and the 1<sup>st</sup> defendant. It further denied the particulars of breach of agreement pleaded in paragraph 14 of the plaint.
  11. The 2<sup>nd</sup> defendant pleaded that there existed an agreement between the plaintiff and the 1<sup>st</sup> defendant but the plaintiff failed to fulfil its obligation by declining to pay Kshs.33,600,000/= after 60 days after execution of the said agreement. That as a result, the 1<sup>st</sup> Defendant offered the property for sale to the 2<sup>nd</sup> defendant, the property being Juja/Komo Block 1/3452 measuring 18 acres. That this suit is merely aimed at distorting and derailing the course of the agreement of sale between the defendants.
  12. The 2<sup>nd</sup> defendant also issued a notice of claims against the 1<sup>st</sup> defendant under paragraph 15 of its defence. The 2<sup>nd</sup> defendant prayed that the plaintiff's suit be dismissed with costs. In the alternative, if the plaintiff's suit succeeds, the 2<sup>nd</sup> defendant prayed for judgment against the 1<sup>st</sup> defendant for;
    - a. Reimbursement of the total deposit paid to the 1<sup>st</sup> defendant.
    - b. Legal fees on the conveyance process



- c. General damages for breach of contract
  - d. Costs of this suit
  - e. Interest on a, b and c above.
13. The hearing commenced on 28<sup>th</sup> June, 2021 with the evidence of Charles Kaniaru who is the Chairman of plaintiff testifying as PW1. PW1 stated that he is a resident of Ruiru along the Eastern by Pass and has been dealing in real estate for 13 years. That he knew the 1<sup>st</sup> defendant who sold him land located at Juja Komo. The witness then adopted his written statement together with the documents he had filed both dated 18<sup>th</sup> January, 2016. A copy of certificate of title of the land being sold to them was produced as P ex 1 and the agreement of sale produced as P ex 2.
  14. PW 1 in his testimony referred to clause B of the agreement stating that he identified the location of where the 12 acres sold was to be since what was below the 12 acres was a quarry. That given the land was being acquired for real estate, a quarry would not have been ideal. He added that the portion sold to the Plaintiff touched Bob Harris Road. The witness produced as P ex 3 the document showing payment of the deposit of Kshs.10 million. It was PW 1's further evidence that the letter dated 14<sup>th</sup> May, 2015 showed the property was charged and the bank had no objection to their transaction.
  15. PW1 admitted that the plaintiff did not pay the whole of 40% because the 1<sup>st</sup> defendant was to provide some documentation and subdivide the land. PW 1 continued in evidence that after they paid Kshs.5m, they realised there was a problem on the ground as while taking their members to the ground, they learnt there was several people who were also interested in the land. The plaintiffs thus decided to instruct their advocates to do the letter dated 22<sup>nd</sup> June, 2015 addressed to the 1<sup>st</sup> defendant's advocate to get the clear status.
  16. It is the plaintiff's additional evidence that this letter was not responded to and they wrote another letter dated 26<sup>th</sup> August, 2015. The 1<sup>st</sup> defendant replied to the latter vide their letter dated 31<sup>st</sup> August, 2015. PW1 continued that they were not provided with the mutation for subdivision of the suit property. That on 19<sup>th</sup> October, 2015, they were served with a completion notice alleging the plaintiff had defaulted. According to PW1, at this date they had not been given any documentation or discharge of charge.
  17. PW 1 further stated that he received information of intention of selling the suit property to the 2<sup>nd</sup> defendant since he is a member of the 2<sup>nd</sup> defendant. That this information formed part of the Plaintiff's reason for not paying the next instalment to protect their members. That in the 1<sup>st</sup> defendant's documents produced before this Court shows the discharge of charge was registered on 1<sup>st</sup> September, 2015 which time is outside of the 60 days they were to pay the 40% instalment and also outside the 120 days showing the 1<sup>st</sup> defendant was not ready to complete the transaction.
  18. The plaintiff stated that the subdivision was eventually done but opposite of what was agreed as the size sold to them was pushed to the quarry while what was shown to them was now included in the portion sold to the 2<sup>nd</sup> defendant. In buttressing this evidence, PW 1 referred to the mutation attached to the affidavit sworn on 7<sup>th</sup> October, 2016 in support of the amended motion. That the subdivision plan shows plot A which is measuring 12 acres is not touching the road and it is plot B which is touching the road and is measuring 18 acres. This mutation was approved on 16<sup>th</sup> October, 2015, 3 days before they reclined the letter of completion notice.
  19. The plaintiff stated that the 1<sup>st</sup> defendant's advocate asked them not to worry but they had every right to worry so as to protect their investors. That the 2<sup>nd</sup> defendant bought land that was sold to them. Pw1



stated that the 1<sup>st</sup> defendant refunded Kshs.6.6 million 21 days after the completion notice and retained 8.4 million accusing them of breaching the agreement. The plaintiffs denied they were in breach of the agreement as stated in their letter of 11<sup>th</sup> December, 2015. That they are still reading to complete the contract.

20. Mr. Kaniaru was put to cross-examination by Mr. Chege learned counsel for the 1<sup>st</sup> defendant. The witness admitted making reference to clause 2 (terms of payment) under paragraph 5 of the amended plaint. That clause 2 provided that the balance of Kshs.33,600,000/= was payable within 60 days upon execution of the agreement and there was no conditions attached to the payment. That the 60 days lapsed on 15<sup>th</sup> July, 2015 by which time they had not paid the Kshs.33.6 million. He contended that they had not received a mutation or discharge of charge which was why they had not paid the 40%.
21. PW 1 admitted the agreement did not provide that they be supplied with mutation and discharge of charge before making the payment. That the letter from Family Bank which bore the same date as the agreement (14<sup>th</sup> May, 2015) confirmed the property had been discharged. PW 1 admitted being aware that the 1<sup>st</sup> defendant was not indebted to Family Bank. That it was not expressly stated in the impugned agreement that the 1<sup>st</sup> defendant had to subdivide the property on receipt of the 10%. Clause 10A of the agreement dealt with the issue of identification of beacons which stated that the beacons were to be pointed out before the completion date.
22. PW 1 confirmed the agreement allowed their possession only after payment of 50% of the purchase price. That they physically went to show their clients the land but denied placing anything on the land for marketing. That what appears at paragraph 30 of the 1<sup>st</sup> defendants bundle is a business plan which they put on the road. PW 1 interested they were interested in the land and had paid over 10% of the price however authority to enter the land was until they had paid 50% of the purchase price. He confirmed that the letter of 19<sup>th</sup> January, 2016 in the 1<sup>st</sup> defendant's bundle complained of trespassers who had erected a bill board on the road reserve to market their business plan.
23. The witness denied that they had pitched a tent in the suit property. He was shown the text messages at page 33 of the bundle where PW 1 promised to remove the tent adding that they did not want to offend the 1<sup>st</sup> defendant. PW 1 was also referred to the letter dated 31<sup>st</sup> August, 2015 at page 62 which letter assured them of being given completion documents as per the agreement. He also confirmed receipt of the completion notice and that they did not comply with the notice. That the 1<sup>st</sup> defendant did not subdivide the land as they had agreed as it is the 18 acres now touching the road and their 12 acres in the wrong location.
24. PW 1 confirmed that this suit was filed on 18<sup>th</sup> January, 2016 while the sale agreement between the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant is dated 10<sup>th</sup> August, 2016. That the 1<sup>st</sup> defendant's property was up for sale and they were just one of those interested. That the mutation dated 16<sup>th</sup> October, 2015 is also before the sale to the 2<sup>nd</sup> defendant. That is was possible to get their 12 acres from plot B (which was measuring 18 acres). That title arising from the subdivision were issued on 10<sup>th</sup> November, 2015 which was before the sale to the 2<sup>nd</sup> defendant. That they also received their refund before the sale to the 2<sup>nd</sup> defendant. PW 1 admitted they did not issue the 1<sup>st</sup> defendant with default notice.
25. The plaintiff's witness was further cross-examined by Ms. Wamuyu learned counsel for the 2<sup>nd</sup> defendant. Counsel referred the witness to clause 9 of the impugned sale agreement to which PW1 conceded that they did not pay the entire purchase price. PW1 averred that they responded to the completion notice vide a letter dated 27<sup>th</sup> October, 2015 which enquired whether a subdivision had been done and if the property had been discharged.



26. During re-examination, PW 1 stated that in their response to the Notice, they indicated that the 1<sup>st</sup> defendant was not ready to complete the transaction. That it was not possible for the 1<sup>st</sup> defendant to give them 12 acres curved out of the 18 acres. That he saw the agreements between the defendants for the 1<sup>st</sup> time on 26<sup>th</sup> February, 2019 after they were joined to these proceedings. That by 2017, they were already aware the suit property was being sold to the 2<sup>nd</sup> defendant. That the plaintiff did not elect to rescind the contract because what he wants is specific performance.
27. PW1 asserted that they did not pay the 40% purchase price because they had a duty to protect their investors and they were not prepared to buy a quarry. That clause 10(g) provided that the agreement was subject to LSK conditions of sale. That the public road where the plaintiff erected the beacons did not belong to the 1<sup>st</sup> defendant and they never received any complaint before the completion notice. That the tent was also erected on a road reserve.
28. He averred that the letter of 14<sup>th</sup> May, 2015 showed the suit property was charged to the Bank which charge had not been discharged. PW1 urged that the business plan referred to by the 1<sup>st</sup> Defendant was a marketing tool not a subdivision of the suit land. The witness said he made efforts to resolve the matter with the 1<sup>st</sup> defendant before coming to court as evidenced in the messages filed at pages 32 and 33 of the 1<sup>st</sup> defendant's bundle.
29. The court also put questions to the witness who answered that the Plaintiff was to pay Kshs.33,600,000 within 60 days. That after payment of the deposit of Kshs.10,000,000, they paid Kshs. 5 million on 8<sup>th</sup> September, 2015. That they learnt the 1<sup>st</sup> defendant was selling the land and what was left to them was a quarry. That they added Kshs.5 million when they were told not to worry. This evidence brought to a close the plaintiff's case.
30. The 1<sup>st</sup> defendant gave his evidence on 24<sup>th</sup> October, 2022. He opened his evidence by stating he is a resident of Kahawa Sukari and a business man. He adopted his witness statement dated 25<sup>th</sup> February, 2019 and documents filed in the list of same date which were produced as D ex 1 – 13. He stated that the dispute arose after the plaintiff were unable to pay the agreed amount. He therefore refunded them the money less the percentage agreed. According to the 1<sup>st</sup> defendant, he honoured his part of the bargain.
31. In his statement the 1<sup>st</sup> defendant averred that it was open to the plaintiff to conduct a search to confirm the status of the title hence the allegation that DW 1 did not confirm the status has no merit or basis in law. He urged that he relied wholly on the provisions of the sale agreement. he denied sanctioning the transactions between the plaintiff and 3<sup>rd</sup> parties so he should not be dragged into their issues.
32. The witness stated that the plaintiff entered his land without his permission and planted beacons before coming to court thereby committing acts of trespass and violating his rights to property. That the plaintiff having failed to meet the terms of the said, DW 1 exercised his right to rescind the agreement. That the subdivision of his land did not have any bearing on the breach by the plaintiff. Ultimately that DW 1 had every right to deal with his property and he rightfully offered part of it for sale to the 2<sup>nd</sup> defendant against whom the plaintiff has no right of action.
33. The 1<sup>st</sup> defendant was put to cross-examination by Mr. Gachie learned Counsel for the plaintiff. He stated that his obligation in the agreement were done. That the responsibility to subdivide the land was his and he knew the process to be followed and which he was yet to start. DW 1 admitted the completion days was 120 which ended on 14<sup>th</sup> September, 2015. That at the time of executing the agreement, the title was held with Family Bank. He received the title and the discharge of charge although he could not remember the date of receipt. That the discharge was registered on 1<sup>st</sup> September,



- 2015 – 14 days to completion date. That at the time of terminating the agreement, he had not subdivided the land.
34. DW 1 admitted subdividing the land after refunding the plaintiff. According to the mutation produced by the plaintiff, it had subplot a measuring 12 acres touching the road and B – 18 acres at the peripheral. That the mutation was approved on 16<sup>th</sup> October, 2015. That as at 19<sup>th</sup> October, 2015 when the completion notice was issued, he had not sold the land but he had instructed the surveyor to curve out 18 acres touching the road.
  35. The 1<sup>st</sup> defendant admitted that by 10<sup>th</sup> November, 2015 when the opposite subdivision was approved, their agreement with the plaintiff was still alive. That clause 2 (b) allowed the plaintiff to subdivide the sold portion. He did not remember communicating with the plaintiffs via email – DW 1 admitted that he had nothing to show that before October, 2015 he had started the subdivision process. Further he conceded selling to the 2<sup>nd</sup> defendant 12 acres of the land touching the road. He denied that he began selling land to the 2<sup>nd</sup> defendant before terminating the agreement.
  36. In further cross-examination by Ms. Wambui for 2<sup>nd</sup> defendant, DW 1 said he completed his part of the bargain. That when the plaintiff did not honour, he served notice. That when selling to the 2<sup>nd</sup> defendant, his title was free from all encumbrances.
  37. Under re-examination, DW 1 said at the time of executing the agreement, the suit title was held with Family Bank although he owned them no money. That the bank gave them the letter at page 8 of his bundle to confirm he was not indebted. The witness asserted that there was no clause requiring him to subdivide the land before payment of the Kshs.33,600,000/=. That nothing stopped him from subdividing the land as he wished once the plaintiff failed to fulfil its bargain. That possession was not permitted before payment of the 40%. He stated that the plaintiff has provided evidence that he was selling to 3<sup>rd</sup> parties before termination. This also marked the close of 1<sup>st</sup> defendant's case.
  38. Kevin Kuria Thuo gave evidence on behalf of the 2<sup>nd</sup> defendant. He adopted his witness statement dated 7<sup>th</sup> December, 2020 as his evidence. In DW 2 averred that they entered into an agreement of sale with the 1<sup>st</sup> defendant on 16<sup>th</sup> August, 2016 after doing due diligence. That they paid 10% as deposit but the transaction was not concluded because they found a caution on the title dated 15<sup>th</sup> September, 2014 (found at page 41 of 1<sup>st</sup> Defendant's list). DW 2 stated that the 2<sup>nd</sup> defendant was oblivious of any previously existing agreement between the plaintiff and the 1<sup>st</sup> defendant at the point of entering the sale agreement. That this suit is intended to distort and derail their agreement of sale.
  39. In cross-examination, DW 2 said they were buying the land at Kshs.8 million per acre and they were not aware the plaintiff had purchased at Kshs.7 million a year earlier. That the 2<sup>nd</sup> defendant had not produced evidence of paying the 10%. The witness was not aware of the ground being advertise for sale to 3<sup>rd</sup> parties nor were they aware of the order challenging the sale. That they took possession after payment of the deposit. DW 2 was not aware of any cases filed against them by 3<sup>rd</sup> parties.
  40. In further cross-examination by counsel for the 1<sup>st</sup> defendant, DW 2 said there was no encumbrance registered on the title when they entered the sale. That what they agreed with the 1<sup>st</sup> defendant was personal between them. That they have no issue as between the defendants.
  41. Parties took time to file their respective closing submissions. The plaintiff filed its submissions on 28<sup>th</sup> November, 2022 which submissions opened by giving a brief background of the details of pleadings filed by the parties. The plaintiff submitted that it was ready and willing to perform its obligations until it later learnt that the 1<sup>st</sup> defendant had subdivided the property other than by the agreed mode by having the 12 acres at the backside and 18 acres touching the road.



42. In answering the question of who was in breach of the sale agreement, the plaintiff submitted that the 1<sup>st</sup> defendant's obligation was to subdivide the land and excise the 12 acres touching the Bob Harris Road being sold. That by the time the 1<sup>st</sup> defendant terminated the agreement he had not excised the 12 acres. In support of their argument, they cited the case of *William Kazungu Karisa v Cosmos Angore Chanjera* (2006) eKLR which held thus;

“The basic rule of law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them. For instance, the contract must be performed at the time and place agreed upon.....”

43. The plaintiff continued that the 1<sup>st</sup> defendant had not obtained title from Family Bank together with the discharge of charge until about 1<sup>st</sup> September, 2015 which was 13 days to the competition date. That the 1<sup>st</sup> defendant was given the title when he had already embarked on subdivision process as he confirmed during the hearing and therefore he was not ready to complete. That since the plaintiff's directions were already on the land, they had information that the land was being subdivided contrary to what was agreed. That the 1<sup>st</sup> defendant did not fulfil by the completion date as stipulated in clause 2(b) of the sale agreement thus in breach.

44. It is submitted that the plaintiff retained the money as a reaction to the breach by the 1<sup>st</sup> defendant. They cited the case of *Joseph Mwangi Gitundu v Gateway Insurance Co. Ltd.* (2015) eKLR where the court took time to explain the duty to mitigate own losses to be;

“In law a claimant is expected to mitigate his losses by taking such measures which will bring down his losses.”

and *African Highlands & Produce Ltd v John Kisorio* (2001) eKLR where the court held thus;

“The guiding principle; It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See *Halsbury's Laws of England* Vol 11, Page 289, 3rd Edn 1955”

45. The plaintiff argued that the subdivision of the property was fraudulent in size and location to buttress this argument, the plaintiff relied in the decision in *Boniface Kevin Omondi & Another v Malborough Properties Ltd.* (2015) eKLR where Mabeja J stated thus;

“To my mind, when a party issues a completion or termination notice as in this case, that party must himself be ready, able and willing as at the date of that notice to complete the contract. It was never contended or even suggested during trial, that the Defendant was ready, able and willing to complete the contract in terms of Clause 12 of the Agreement. In the case of *British and Common Wealth Holdings PLC v Quadrex Holdings Inc* (1989) 3 All ER 492, the Court of Appeal of England held at page 507 that:-



“As I have mentioned, it is a pre-condition to the service of a valid notice to complete that the giver of the notice is ready, willing and able to complete the contract..... But the fact that, after one party has committed a repudiatory breach, the other elects to affirm the contract does not mean that he has waived the breach in general. It is a common occurrence in such cases for the innocent party to affirm the contract but sue for damages for the breach.”

46. The plaintiff also placed reliance in clause 4(7) of the LSK conditions of sale which provide that:
- “Once one of the parties gives a completion notice time becomes of the essence and must be completed within 21 days as provided for under Condition 4 (7) (c).”
47. The plaintiff concluded that it had provided evidence to prove their case and urged the court to grant the orders of specific performance.
48. The 1<sup>st</sup> defendant filed its submissions dated 2<sup>nd</sup> February, 2023. The 1<sup>st</sup> defendant raised similar issues as the plaintiff for determination. The 1<sup>st</sup> defendant prior to the parties entering the sale agreement, the plaintiff obtained the letter from Family Bank dated 14<sup>th</sup> May, 2015 which stated that there was no liability outstanding to the bank. The 1<sup>st</sup> defendant was categorical that he was at liberty to register the discharge of charge at any time and had maintained the charge for his own security of title. That there was no nexus with the plaintiff's failure to pay the 40% and the registration of the discharge of charge.
49. The 1<sup>st</sup> defendant stated that his obligations were set out in clause 4 (vacant possession) and clause 5 on encumbrances. The 1<sup>st</sup> defendant denied the subdivision he undertook was contrary to agreement because the 12 acres could still be carved out of the 18 acres' portion touching the road of the plaintiff performed their part of the contract the 12 portion would be excused. According to the plaintiff, it is the plaintiff who breached clause 2(b).
50. The 1<sup>st</sup> defendant argued there was no condition attached to the payment of the 40% of the purchase price, instead the plaintiff was pleading for valuation of the terms of the sale agreement. That the allegations of the plaintiff mitigating the loss are misplaced. The 1<sup>st</sup> defendant submitted that he rightfully terminated the agreement and to sell his property. He urged the court to dismiss the suit with costs. The 1<sup>st</sup> defendant relied in the decisions of *Samuel Ngige v Djowamu Construction Co. Ltd. & another* (2019) eKLR and *Kibuba Holdings Ltd v Charo Kasisa Ngulu* (2021) eKLR.
51. The 2<sup>nd</sup> defendant filed their submissions on 6<sup>th</sup> February, 2023. The 2<sup>nd</sup> defendant raise two questions which they addressed in their submissions i.e
1. Whether the rescission of the agreement for sale of land dated 14<sup>th</sup> May, 2015 is justified
  2. Whether the 2<sup>nd</sup> defendant is a bonafide purchaser for value without notice.
52. The 2<sup>nd</sup> defendant submitted that the 1<sup>st</sup> defendant rescinded the agreement after the plaintiff failed to pay 40% of the price within 60 days as provided for in clause 2(b). Consequently, the completion notice issued on 19<sup>th</sup> October, 2012 was in order and after the expiry of 21 days, the agreement stood rescinded. The 2<sup>nd</sup> defendant cited the case of *Gudrey Singh Birdi & Another v Abubakar Madhbuli* in emphasizing the essence of time in performing the contractual obligations by parties.
53. On the question of bonafide purchaser, the 2<sup>nd</sup> defendant made reference to the Ugandan case of *Katende v Haridar Cor. Ltd* (2008) 2 EA 173 which highlighted the requirements to be fulfilled for a party to qualify as a bonafide purchaser. The 2<sup>nd</sup> defendant stated that although they do not hold a certificate of title, they are indeed bonafide purchaser. They urged this court to dismiss the plaintiff's suit with costs.



54. After considering the pleadings and the evidence adduced together with the submissions rendered, there is only one question arising for determination;
- a. whether or not the plaintiff was in breach of the terms of sale agreement executed on 14<sup>th</sup> May, 2015.
  - b. Who bears the costs of the suit?
55. To answer the question, I will start by quoting clause 2(b) of the sale agreement which stated as follows;
- “A further sum of Kenya Shillings Thirty Three Million Six Hundred and Sixty Thousand (Kshs.33,600.000) representing 40% of the Purchase Price shall be payable within 60 days upon execution after which payment the Purchaser shall take possession and be at liberty to further subdivide and elect beacons for the further subdivided plots.”
56. Clause 4 of the sale agreement stated thus;
- “The property is sold with vacant possession and free from all encumbrances. The Vendor shall give possession of the said property to the purchaser only upon receipt of all payment payable to the Vendor as stipulated in this Agreement and the full and unconditional release of the full purchase price to the vendor in clear funds.”
- and Clause 5;
- Encumbrances
- “The portion of the land to be subdivided is sold with vacant possession and free of all encumbrances but subject to all subsisting easements, Quasi-easements and rights of way (if any) and the acts, reservations, stipulations and conditions contained or implies in the vendor’s title to the property, save for the charge registered as an encumbrance which the vendor warrants to have discharged save for registration of the Discharge.”
57. There is no dispute that the plaintiff and the 1<sup>st</sup> defendant agreed to be bound by the terms of this agreement. The terms of default were also set out in clause 10B of the agreement. The 1<sup>st</sup> defendant stated that his obligations were contained in clause 4 and 5 of the agreement and which he complied with. It is not contested that the suit property was in vacant possession at the time the agreement was signed as well as at the time the completion notice was served.
58. On the questions whether the property was free from encumbrances, the 1<sup>st</sup> defendant referred to a letter dated 14<sup>th</sup> May, 2015 written by Family Bank and which he averred was collected from the bank by the plaintiff’s advocate. The said letter is founded at page 8 of the 1<sup>st</sup> defendant’s bundle of documents. At paragraph 1 of that letter, the bank stated that title deed for LR Juja/Komo Block 1/25 is in their custody but neither part nor whole of it is used to secure a loan facility at the moment. That a legal charge of Kshs.7.5 million is registered against the title deed but which can be discharged on request.
59. The contents of the letter dated 14<sup>th</sup> May, 2015 from Family bank did indicate the land was sold free from encumbrances. It is therefore not true when the plaintiff stated in his evidence that they helped the 1<sup>st</sup> defendant to get the suit title from the Bank. The plaintiffs fear brought out in paragraph 8 of amended plaint and during re-examination that the suit property had not been discharged by September, 2015 as part of the reason for not paying the 40% was unfounded as they were aware at the time of executing the agreement that there was no debt owed to Family Bank.



60. This court then asks, were there any conditions imposed on the 1<sup>st</sup> Defendant in compliance of clause 2B of the agreement? The plaintiff pleaded and stated there was. The plaintiff pleaded in paragraph 9 of the plaint that it was incumbent upon the 1<sup>st</sup> defendant after payment of the deposit of 10% to start the subdivision process and excise the sold portion. Clause B of the agreement said in part ..... “a portion of 12 acres to be subdivided out of the said property and the said portion to be excised touching Bob Harris Road at the price upon terms and conditions set herein.
61. Clause 10A required the vendor to point out the beacons of the property to the purchaser on or before the completion date. The purchaser (read plaintiff) was entitled to put beacons after the subdivision after having paid 50% of the purchase price. The clause 10A read together with 2B in my opinion and I so hold that the plaintiff could only complain of no subdivision if after payment of the additional 40% within the set time of 60 days the 1<sup>st</sup> defendant did not put them into possession of the sold portion.
62. Clause 2B did not attach any obligation to be met by the 1<sup>st</sup> Defendant. According to the agreement, the 60 days would lapse on 13<sup>th</sup> July, 2015. Post the payment of the Kshs.10 million on execution of the agreement, the plaintiff made an additional payment of Kshs.5 million on 8<sup>th</sup> September, 2015 which time was beyond the 60 days. PW 1 referred this court to their letters dated 22<sup>nd</sup> June, 2015 and 26<sup>th</sup> August, 2015 asking how far the subdivision process had gone. By the 26<sup>th</sup> August, 2015 when the second letter was done, 60 days had elapsed and the plaintiff made no mention that they had not paid the 40% because they had not been updated with the progress of the subdivision of the suit property. They also did not serve any notice on the 1<sup>st</sup> Defendant for being in breach.
63. The 1<sup>st</sup> defendants advocate responded to the letter of 26<sup>th</sup> August, 2015 by their letter of 31<sup>st</sup> August, 2015 where they stated that they will seek confirmation from their client. The advocates added that the terms of the agreement required the 1<sup>st</sup> defendant to issue the plaintiff with a registered mutation for the subdivision and transfer hence they did not see why the plaintiffs were anxious.
64. The plaintiff asserted that they were careful not to release the balance of the 40% because they had every obligation to protect the rights of their investors. PW 1 said he had information that the 1<sup>st</sup> defendant had instructed a surveyor to carry out a survey process which instructions were contrary to the agreed mode of subdivision. This piece of evidence contradicts the plaintiff’s case on two fronts. First, that the witness wants this court to rely on hearsay evidence as the surveyor who gave him the information was not called to corroborate his evidence nor his/her details provided. Neither did PW 1 inform this court whether the information was received before the expiry of the 60 days.
65. The second contradiction is that the plaintiff became aware that the 1<sup>st</sup> defendant had commenced the subdivision process albert contrary to the agreed mode. Yet they argue that one of the reasons the 40% was not paid was because the 1<sup>st</sup> defendant had not commenced the subdivision. The plaintiff is thus approbating and re-probating. This then confuses this court as to the real reason why the Plaintiffs did not comply with Clause 2B of the sale agreement of 14<sup>th</sup> May, 2015. Is it because the subdivision process had not commenced or it had commenced contrary to the terms of the agreement?
66. It is an established principle of law that parties are bound by the terms of their contracts and courts do not re-write contracts between parties. This principle was given life by the Court of Appeal in the case of *Rus Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR when it stated this;

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



67. Further, the Court of Appeal in the case of *National Bank of Kenya Ltd v Pipe Plastic Sawkoti (K) Ltd.* (2011) eKLR state thus;

“It is clear beyond peradventure that save for those special cases where equity right be prepared to release a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.

68. The plaintiff in the case before me may have felt unsecure to put in their money before the 1<sup>st</sup> defendant had excised the portion of 12 acres sold. Yet having agreed to make the 40% payment unconditionally could not run away from the obligation and the law cannot protect it when it failed to do so. Whether the subdivision subsequently undertaken is contrary to what was agreed did not change the breach which had already occurred. In the case of *Jackline Njeri Kariuki v Moses Njung’e Njau* [2021] eKLR, Justice Ngenye-Macharia (as she then was) stated thus:

“45. In my understanding, a breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing.”

69. In any event, the argument that what was sold to plaintiff now fell on a quarry is explained away by the 1<sup>st</sup> defendant that nothing stopped him from excising 12 acres out of the 18 acre portion. The plaintiff argued that they did not serve default notice because he wanted specific performance. The plaintiff had already mounted what they called marketing tools/business plan on the road reserve along the suit premises. The plaintiff does not however explain why they did not make the 40% payment either upon discovery of the “illegal subdivision” and or on receipt of the completion notice.

70. In light of analysis of the evidence adduced and documents produced in support, I find that it is the plaintiff who breached clause 2B of the agreement dated 14<sup>th</sup> May, 2015. The 1<sup>st</sup> defendant duly served completion notice as provided in the said agreement. There is evidence that refund of the monies paid was also done in accordance with the terms of their agreement. Consequently, when this suit was filed on 18<sup>th</sup> January, 2016, the plaintiff had no cause of action as against the 1<sup>st</sup> defendant.

71. After expiry of the completion notice on or about 10<sup>th</sup> November, 2015, the 1<sup>st</sup> defendant was thus free to deal with his property as he deemed fit. The plaintiff joining the 2<sup>nd</sup> defendant to these proceedings was without any just cause. Therefore, I hold that the Plaintiff’s suit is without merit and in conclusion, the suit is dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2023**

**A. OMOLLO**

**JUDGE**

In the presence of

Ms Wangari h/b for Gachie for the Plaintiff

Ms Chege for the 1<sup>st</sup> Defendant

Ms Wambui for the 2<sup>nd</sup> Defendant

