REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 118 OF 2003

CYKA HOLDINGS LIMITED…….....….....PLAINTIFF

VERSUS

JOHNSON JOSHUA KINYANJUI.....1ST DEFENDANT

VIBUBHAI VIRPALSHAH .....…….....2ND DEFENDANT

HARIT SHETH t/a HARIT SHETH ADVOCATE ….....3RD DEFENDANT

JUDGMENT

1. **CYKA HOLDINGS LIMITED** (Cyka) is a limited liability company incorporated under the Companies Act. Cyka filed this case in the year 2003. It sued **JOHNSON JOSHUA KINYANJUI** (Kinyanjui) and **VIBUBHAI VIRPALSHAH** (Shah) (who are sometimes collectively referred to as the defendants). **HARIT SHETH t/a HARIT SHETH ADVOCATE** (Harit) is the 3rd defendant. Before the commencement of the trial Cyka withdrew the case against Harit. Since Cyka and Harit could not agree on who should bear the costs of the 3rd defendant parties agreed that this court should determine who would bear those costs when delivering this judgment.

2. Events relating to this case took place as far back as 1992.

3. It is not denied that Kinyanjui and Shah purchased property LR. No. 2250/20 from Michael Ndichu Ndungi. Before that property was transferred to Kinyanjui and Shah they agreed to sell to Cyka plot identified as B,C and D. If that was to happen Kinyanjui and Shah had to subdivide the property into various plots. When they did so plot B had the land reference No. 2250/73, Plot C had no 2250/74, and D had no 2250/75. The purchase price which was agreed, is evidenced in the various agreements for sale. The price was for L.R. No. 2250/73 (Plot B) Ksh 1 Million, LR 2250/74 (Plot C) Ksh 950,000 and LR No 2250/75 (Plot D) Ksh 900,000.

4. Cyka alleges that in 1997 it paid in full the purchase price for all the three pieces of land and further, and at the request of the defendants, paid Ksh 110,000 as stamp duty and transfer registration fees. On 16th June 1997 Harit who was then the advocate for Kinyanjui and Shah, in the sale transaction, forwarded to the firm of Ndungu Njoroge & Kwach Advocates, the advocates acting for Cyka in the sale transaction, titles in respect to LR. No. 2250/74 (Plot C) and LR No. 2250/75 (Plot D). It is the case of Cyka that in breach of the agreement for sale the defendants failed, neglected or refused to transfer LR No 2250/73 (hereinafter Plot B) to Cyka but instead had the said plot transferred into the name of Kinyanjui. That subsequently, on 11th July 1997 Kinyanjui and Shah transferred Plot B to another person, namely Johnson Kamau Maguchia for Ksh 2.2 million, who inturn sold the plot to Charles Khakahi Olenja and Joyce Muhenge Olenja for Ksh 3,050,000 on 16th July 1999. Cyka pleaded, by its plaint, that the subsequent sales were in breach of the agreement of sale between it and Kinyanjui and Shah.

5. Cyka therefore by its present case sought judgment for special damages of Ksh 75,904 being its legal fees in respect to the failed transaction, Ksh 110,000 being the stamp duty and Ksh 1 million the purchase price of Plot B.

6. Kinyanjui and Shah pleaded admitting that plots 'C' and 'D' were transferred to Cyka and further pleaded that that Cyka made late payment for purchase price of Plot B, which payment was outside the contractually prescribed period, was in fundamental breach of the agreement of sale and was therefore not entitled to have that plot transferred to it. Kinyanjui and Shah further denied having sold Plot B as pleaded by Cyka Kinyanjui and Shah therefore pleaded that if Cyka suffered any loss or damage that the same was due to Cyka's failures to honour the terms and conditions of agreement of sale of plot B.

7. On Cyka making an application for summary judgment to be entered, in its favour against the defendants, the court by its Ruling of 12th November 2008 entered judgment for Cyka against Kinyanjui and Shah for Ksh 1,185,904 being the special damages claim, and the court ordered that Cyka's claim for damages for loss of bargain to proceed for determination at the trial. It follows that what is now before me, in

view of the withdrawal of the suit against Harit, is the determination of Cyka's claim for damages for loss of bargain.

ANALYSIS

8. Before I identify the issue(s) for my determination I wish to deal with two matters raised by the defence.

9. The first matter is that the suit before me is invalid for want of written resolution by Cyka, since it is a Limited liability company. Defence has argued that it is trite law that a suit filed by a company must be preceded by written resolution of that company authorizing the filing of such a suit. The defence relied on an old case of **Bugerere Coffee Growers Ltd v Sabaduka Ltd & Another (1970) EA 147.** In that case it was held:

> ***"(c)(i)When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, no such resolution had been passed authorizing these proceedings;***
>
> ***(ii) Where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action (Danish Mercantile Co. Ltd vs Bearmont (1) adopted;)***
>
> ***(iii) the advocates should be ordered to pay the costs***
>
> ***Action dismissed. Costs to be paid by the advocates for the purported plaintiff"***

10. The above holding was relied upon in the High Court case **East African Portland Cement Ltd v Capital Market Authority & 4 others (2014) eKLR**. I too have had occasion to hold the same point of view as held in the case of **Bugerere Coffee Growers Ltd** (*supra*) when I decided that an advocate was liable to pay costs where such an advocate had filed a case without the authority, by resolution or minute, of the board of directors or the company. See **Tavuli Clearing & Forwarding Limited v Charles Kalujjee Lwanga (2006) eKLR**.

11. Indeed whether a company should authorize a suit before it is filed on its behalf has not been without controversy. Justice Munyao Sila grappled with the same in the case **Siokwei Tarita Ltd v Dr Charles Walekwa (2012) eKLR**. When an objection was raised, before the learned judge, that the plaintiff company had not authorized the filing of the suit by the company's resolution this is what the learned judge stated in that case:

> "***I have agonized over this point but my research has not led me to any provision either in the statutes or in the Rules which requires that every Plaint filed by a company is supposed to be filed alongside a resolution authorizing the filing of the suit. Indeed both counsels as I pointed out earlier were agreeable that this requirement is not in any written law.....***
>
> ***I have also looked at the Companies Act[20], and there is nowhere in the Companies Act that provides that a plaint by a corporation must be accompanied by a resolution.***
>
> ***I am at a loss where the idea cropped up that it is a requirement that a plaint by a corporation must be accompanied by a resolution .....***
>
> ***Unless some material is placed before me by the defendant clearly evidencing that the institution of this suit was contrary to the Articles of Association of the plaintiff company, I am not prepared to hold that this suit was instituted without the requisite authority by the plaintiff company."***

The learned judge resolved the issue before him as follows:

> ***"It is not for the court to speculate whether or not the requisite authority has been obtained by the company. In my view, it is also not for the court to demand a resolution by the plaintiff company, for the Articles of the company may probably not require one. Indeed the assumption should be that the suit has been duly authorized by the company and the court can only be put into inquiry if the defendant or an authorized agent of the company puts material before the court that the suit has not been duly authorized. This is because the authority to institute a suit is an internal matter of the company emanating from its Articles of Association."***

12. The finding of **Justice Munyao Sila** is in Keeping with the current and correct jurisprudence as will be seen in the court of appeal decisions. In the case **Arthi Highway Developers Limited –v- West End Butchery Limited & 6 others [2015]eKLR** the court of appeal had this to say on the submissions of necessity of a company's resolution before a suit is filed on behalf of the company:

> *44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time;**Bugerere CoffeeGrowers Ltd v Sebaduka & Anor(1970) 1 EA 147.**The court in that case held:-*
>
> > ***"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."***

45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the ***Bugerere cas****e has since been overruled by the Uganda Supreme court. The authority is* ***Tatu Naiga& Emporium vs. Virjee Brothers Ltd*** ***Civil Appeal No 8 of 2000****.*

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the ***Bugerere case*** *was no longer good law as it had been overturned in the case of* ***United Assurance Co. Ltd vAttorney General: SCCA NO.1 of 1998.*** *The* ***latter case restated the law as follows:-***

> ***"…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."***

The decision has since been applied in Kenyan courts, for example, in ***Fubeco China Fushun v Naiposha Company Limited & 11 others[2014] eKLR.***

13. Similarly in the case **Spire Bank Limited v Land Registrar & 2 Others (2019)eKLR** the Court of Appeal had this to say:

"*Clarifying the position on the question of authorization in the case of* ***Makupa Transit Shade Limited & Another vs Kenya Ports Authority & Another*** ***[2015] eKLR*** this Court stated thus;

> ***"In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that*** *"they were duly authorized."* ***It was then up to the appellants to demonstrate by evidence that they were not so authorized."***

So that it was sufficient for the authorized person to depone that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority, the onus being on the party making the allegation to prove it. A bare statement that the plaintiff or applicant was not authorized would not be sufficient."

14. In this present case the verifying affidavit, in support of the amended plaint was sworn by Cyrus Waithaka. This is what he stated in that affidavit:

> **VERIFYING AFFIDAVIT**
>
> I, **CYRUS WAITHAKA** residing at Langata, Nairobi and of Post Office Box Number 18047-00500 Nairobi in the Republic of Kenya do hereby make oath and state as follows:-
>
> ***1. THAT*** *I am the Managing Director of the Plaintiff/Applicant Company duly authorised and having knowledge of the facts hence competent to swear this Affidavit.*
>
> ***2. THAT*** *I have read and understood the averments contained in the Amended Plaint and verify the same to be true and correct to the best of my knowledge.*
>
> ***3. THAT*** *there is no other suit pending in court between the parties over the same subject matter.*
>
> ***4. THAT*** *the matters deponed to herein is true to the best of my knowledge, information and belief.*

15. Following the decisions of the Court of Appeal, cited above, it becomes clear that the filing of this suit by Cyka was authorized to be filed by Cyrus Waithaka its managing director. It is for that reason that I reject the submissions of the defence, that this suit is invalid for lack of a resolution by the company or the board of directors of Cyka. That argument is in my view, no longer good law.

16. The second matter to consider is the submissions by the defendants that they were not in breach of the agreement of sale, but that rather it was Cyka which was in breach by failing to tender the balance of the purchase price.

17. I have considered the submissions made on behalf of Cyka and the defendants on whether the plaintiff breached the agreement by failing to pay the balance of the purchase price. One thing that remains a puzzle to me is the defendants in all their submissions, on that issue, did not state what amounts the Cyka failed to pay. Even in the amended defence of the 1st and 2nd defendants there is no mention, nor is there particulars, of the alleged breach by Cyka. On that ground I would reject the defendant's submission.

18. Over and above that I wish to remind the defence that the issue of liability was decided on by Justice L. Kimaru, when the learned judge delivered his ruling, in this matter, on an application for summary judgment. The learned judge in that ruling held as follows:

> **CYKA HOLDINGS LIMITED v JOHNSON JOSHUA KINYANJUI & 2 others [2008] eKLR**
>
> "***From the pleadings filed, it was apparent that the 1st and 2nd defendants, instead of transferring the suit property to the***

plaintiff, sold the same to a third party for a higher consideration than the one it had obtained from the plaintiff. The agreements in respect of the said three parcels of land were entered into between 1992 and 1994. Although the 1st and 2nd defendants denied that they were paid the said purchase consideration by the plaintiff, from the evidence which was adduced under oath by the witnesses who testified the criminal proceedings that arose from the said frustrated transaction, it was evident that the plaintiff, through its director, Cyrus Waithaka paid the amount pleaded in the plaint to the 1st and 2nd defendants, either directly or through the 3rd defendant who was the advocate for the said defendants.

The plaintiff annexed documents in support of its application, particularly the letters by the 3rd defendant dated 10th March 1993, 28th February 1994 and 14th March 1994. The plaintiff further annexed copies of the cheques that he either paid directly to the 1st defendant or to the 3rd defendant on behalf of the said defendants. The 1st and 2nd defendants wrote a letter to the plaintiff on 23rd February 1993 acknowledging receipt of the sum of KShs.949,375/= from the plaintiff being in respect of the purchase consideration of the suit property. It was therefore evident that the 1st and 2nd defendants protestations that they had not received the said purchase consideration from the plaintiff lacked any factual basis. The plaintiff was able to establish, to the required standard of proof on a balance of probabilities, that it paid the full price for the purchase of the suit land. The 1st and 2nd defendants failed to fulfil their part of the bargain by failing to transfer the suit property to the plaintiff. Instead, the 1st and 2nd defendants sold the suit property to a third party for a higher consideration.....

The upshot of the above reasons is that the plaintiff established that it paid to the 1st and 2nd defendants the amounts pleaded in the amended plaint being the purchase price for the suit property which the said defendants failed to transfer to the plaintiff. The agreement for the purchase of the suit property was therefore frustrated. The defence filed by the 1st and 2nd defendants does not raise any triable issue. I therefore enter summary judgment in favour of the plaintiff as against the 1st and 2nd defendants in respect of the amount it established to have paid to the said defendants. For the avoidance of doubt, the 1st and 2nd defendants are hereby ordered to refund to the plaintiff the sum of KShs.1,185,904/= being the purchase consideration paid, the stamp duty/registration fees and the legal fees paid in respect of the frustrated agreement. I will not enter judgment for the sum of KShs.2,050,000/= which the plaintiff claims as damages for loss of bargain. The plaintiff will be required to adduce oral evidence in support of its claim for damages. Damages cannot be awarded in an application for summary judgment."

19. I have reproduced the above ruling because it seemed to me that the learned counsels for the parties, in this matter, mis-apprehended the determination of Justice L. Kimaru, as above, and also mis-apprehended the issue that remained for determination in this case. The issue for determination in this case, that was unresolved by the ruling of Justice L. Kimaru, is the determination of the claim for damages for loss of bargain. The issue of breach of contract was determined by Justice L. Kimaru, by the learned judges ruling on summary judgment and as far as I am aware there has not been an appeal filed against that ruling. Indeed the court was informed by the learned counsel of Cyka and it was confirmed by Kinyanjui that the amount determined as due to Cyka, by that ruling of Justice L. Kimaru was paid by the 1st and 2nd defendants. It follows the issue of liability or the issue of breach of contract are not before me. This was determined by that ruling.

20. The submissions made by learned counsel for Kinyanjui and Shah (1st and 2nd defendant) seems to have misconstrue what the remaider of the claim of Cyka is what Cyka seeks before me is to be put in the same position so far as money can, as if the defendants had not breached the agreement of sale. Cyka does not seek general damages for such breach. And that is where the defence misapprehended the issue before court. In the case **Kopec v. Pyret and Borys, 1987 CanLII 4859 (SK CA),** where the Canadian court was considering what the court should do when it declined an award for specific performance held as follows:

"***The rule at common law, where one suffers loss by reason of breach of contract, was stated as follows in Robinson v. Harnan, [1848] 1 Exch. 850, at 855.***

"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

21. It follows that due to that misapprehension by the learned counsel for the defendants the authority he cited, where the court had awarded general damages in a claim for breach of contract is not relevant. See the case **Kenya Tourist Development Corporation v Sundowner Lodge Limited (2018) eKLR**.

Cyka's outstanding claim is for damages for loss to it incurred for failure of Kinyanjui and Shah to transfer plot B to it. I am persuaded by the holding in the case **Symon Manyara & another (Both appealing through Attorney Francis Gichobi Manyara) v Pauline Mahugu t/a Mianda Investments [2019] eKLR** where **Justice B.M. Eboso** stated:

"*My interpretation of the appellants' claim is that it was what in common law is a form of general damages called purchaser's claim for loss of bargain.* ***The Right Honourable Sir Robert Megarry*** *and* ***Sir William Wade*** *in their work* ***"The Law of Real Property, 8th Edition, Page 694*** *have the following exposition on this kind of claim;*

a) The General Rule.

An action for damages is the primary remedy under the law of contract, though it is less important in relation to contracts for the sale of land than specific performance. The measure of damages is the loss to the claimant from the non-performance of the contract. A vendor, for example can recover the difference between the price agreed to be paid and the net value of the property left on his hands, giving credit for any deposit paid by the purchaser. A purchaser can claim for the loss of a bargain, i.e the amount by which the net value of the property when conveyed to him at the due date would have exceeded the purchase price. But the court may order such damages to be assessed at some other date where justice so requires; this may be the date of the hearing if the property has risen in value meanwhile. Where the purchaser claims damages for his loss of bargain he cannot in addition recover his costs, e.g. for investigation of title. If he is to be placed in the position in which he would have been had the contract been performed, he would necessarily have incurred those costs.

Damages may be assessed on a "costs of cure" basis where the claimant can establish that his loss consists of or includes the cost of doing work that in breach of contract the defendant failed to do. Thus where a vendor of land fails to carry out work that he contracted to do to the property prior to sale, the claimant may recover the cost of that work if either he does it himself or he can show that he intends to do so. However, the court may refuse to award damages assessed on this basis if to do so would be unreasonable: the question in every case is to determine the loss that the claimant has actually suffered."

22. The fact that there is a finding of breach of contract on the part of Kinyanjui and Shah has already been determined, as I stated above. What then is the proof of loss of bargain?

23. Cyka relied the valuation report of LLoyd Masika Limited who are registered Valuers and estate agents. That valuer gave the value of plot B as at 2nd September 2011 at Ksh 22,500,000. Cyka, through it managing director Denis Mithamo Kariuki, stated from the valuation Cyka was claiming was ksh 11,999,157.60 as the value of Plot B as at the date of filing this suit.

24. The valuation by Dantu Valuers Ltd, which was presented on behalf of defendants valued Plot B at Ksh 1.5 million and further the valuer gave the loss of use as Ksh 1,288,320/=.

25. I do find that the court is confined, in determining the loss of bargain, by Cyka's pleading in its amended plaint. In that amended plaint Cyka prayed for Ksh 2,050,000 as the loss of bargain for plot B. Cyka's claim for loss of bargain was, I believe, from the alleged price obtained by the subsequent seller of plot B, as pleaded in paragraph 12 of the amended plaint. That allegation on the purchase price was denied by the defendants.

26. I must begin by saying, as stated before, that the court is bound by the pleading of Cyka. This trite principle of law and it was restated by the court of appeal in the case **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited (2015) eKLR** thus:

"*This Court in **Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others** **(supra)** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC** SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:*

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

The judges in that case also stated:

"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."**.....**

We are of the respectful opinion that the learned judge, after holding correctly that parties were bound by their pleadings erred in holding that the appellant was entitled to credit on sums which were not pleaded in the defence at all. The appellant was bound by its pleading in the defence where it claimed that it had issued three cheques in replacement of dishonoured cheques which its witness admitted, and the trial court so found, that they were cheques issued in respect of other independent transactions.

Learned counsel for the appellant is with due respect to him, wrong in his submission that the appellant was entitled to proceed on a case that ran contrary to the pleading in its defence. The appellant was bound by the pleading in the defence which was not amended to allow for the learned judge to consider issues that the appellants witness was introducing through evidence in court."

27. It is clear therefore that although Cyka seeks Ksh 11,999,157.60 for loss of bargain the court cannot award more than is pleaded in the amended plaint.

28. The question then is; has Cyka proved the amount claimed in the amended plaint of Ksh 2,050,000/=. In my view it has. I am guided in that finding by the valuation of LLyod Masika, which I find more credible that the one relied on by the defendants. The defendant's valuer, Dantu valuers, failed to state what comparables they used to reach the value they gave plot B. In comparison LLyod Masika gave four comparable of properties, in Karen, that had been sold. Further Dantu Valuers, in a self serving manner, referred to plot B as being in Langata. This is despite Plot B being in Hardy area. This fact was confirmed in their own report. Hardy as stated by Lloyd Masika in Karen area.

29. It is disheartening for professionals to fail to give their genuine professional opinion uninfluenced by their instructing client. This is the impression I got in respect to the report presented by Dantu valuers. It is even telling that Mr. J. J. Wahome, the one who was supposed to present Dantu's valuation failed to attend court and instead the valuation was presented by Mr. Gichangi. Although Mr Wahome was said to have been unwell, nothing was placed before court to prove so. On the whole I found the valuation of Dantu Valuers unreliable.

30. The valuation of LLyod Masika, which was in my view reliable, clearly showed that Plot B had appreciated in value and as at 2011 it was valued at Ksh 22,500,000. It follows that although the price of plot B as at 6th July 1992, as shown in the agreement of sale, was Ksh 1 million as at today's date that plot has appreciated in value. I find and hold that the amount claimed by Cyka of Ksh 2,050,000 as loss of bargain is proved. That is the value Cyka estimated for plot B as at the date of filing suit year 2003. That was 11 years after the date of the agreement for sale of plot B. The claim of Cyka is not unreasonable. I will award it that amount.

31. I need to state that had if this court's hands were not bound by Cyka's pleading for loss of bargain I would have awarded it Ksh 22,500,000 as stated to be the value of plot B as at September 2011 by LLoyd Masika.

32. In my view Cyka is entitled to the costs of the suit as against Kinyanjui and Shah. There is no reason why costs should not follow the event.

33. The last issue to determine is who bears the costs in respect to the now withdrawn case against Harit (the 3rd defendant).

34. As stated before Harit was the advocate for Kinyanjui and Shah in the transaction of sale of the plots to Cyka. It is uncontroverted that at the time Kinyanjui and Shah agreed to sell the plots to Cyka those plots had not yet been transferred to the names of Kinyanjui and Shah by the previous owner. The fact also seemed to be in the knowledge of Cyka and its advocates, Ndungu Njoroge & Kwach.

35. At this point I will make reference to the Supreme Court decision in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai and 4 others (2014) eKLR** where the court had this to say an award of costs:

> ***"18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice.....***
>
> ***22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."***

36. Harit, by admission of the advocate who handled this transaction, release to Kinyanjui the transfer forms of Plot B, C and D. This is what that advocate stated in his statement to the police when the alleged fraud, was reported, of Kinyanjui in altering those transfer forms to reflect that he, Kinyanjui, was the buyer of plot B:

> *"Meanwhile the subdivision scheme submitted by Vinubhai Virpal Shah and Johson Joshua Kinyanjui through Mr Michael Ndicu Ndungi who was still the registered owner of the land was finally approved in April 1994 and the certificate of sub-division registered in June 1994.*
>
> *The deed plans for the four portions into which the land had been sub-divided were issued in April 1994 making it possible to then draw the transfers of each of the sub-divisions.*
>
> *On Mr. Kinyanjui's instructions I prepared the three transfers of the plots being bought by Cyka Holdings Limited which were signed by Mr Ndungi as he was still the registered owner of the land. Mr Ndungi and Mr Kinyanjui had agreed that Mr Ndungi would execute transfers directly to the purchasers of the sub-plots but the transfer documents to be executed by Mr Ndungi would have to reflect the price at which Vinubhai Virpal Shah and Johnson Joshua Kinyanjui had brought the land from Mr Ndungi.*
>
> .....
>
> *Since my firm had dealt with Mr Kinyanjui in respect of many transactions previously and many times he had collected documents for registration and registered and returned the same we saw nothing wrong in handing over these transfers to him which we then did in April 1994."*

37. It needs to be stated that the handing over of the transfers to Kinyanjui to take to the land office to process the titles of Cyka was without reference to Cyka learned advocates. It is Cyka's advocates who should have carried out that process of obtaining these titles. This is more so because it was admitted by Harit that by the time the transfers were prepared and handed to Kinyanjui Cyka had paid the full purchase price of the three plots.

38. There is no doubt in my mind Cyka was failed by the advocates who acted in the sale transaction. Harit failed Cyka by handing over the transfers to Kinyanjui who inturn altered them and transferred to himself plot B. Consequently Cyka did not get the title of Plot B and hence this case. Why then should Cyka bear the costs of Harit, in those circumstance, even if Cyka eventually withdrew the case against Harit. Cyka would not have had to file this case had the firm of Harit done what it was required to do. And it is no defence to say the Managing director of Cyka was agreeable to such transfer being carried out by Kinyanjui. Harit as the advocate, who ought to have known the right thing to do bore all the obligation to ensure that the transactions were carried out properly and legally.

39. Ndungu Njoroge & Kwach advocates also failed Cyka. It was not right for them to 'sit back' waiting for the vendor's lawyers process the titled when it was their obligation to do so.

40. The above being my finding I find that Harit (the 3rd defendant) is not entitled to an award of costs, even though Cyka withdrew this case against him.

DECISION

41. In the end the judgment of this court is as follows:

a. Judgment is hereby entered for the plaintiff for Ksh 2,050,000 against 1st and 2nd defendants. That amount shall attract interest at court rate from the date of filing suit until payment in full.

b. The 1st and 2nd defendants shall bear the costs of the suit.

c. There shall be no award of costs in respect to the case against the 3rd defendant which case was withdrawn on 6th May 2019.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29th** day of **April, 2020.**

MARY KASANGO

JUDGE