



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO 91 OF 2013**

**WALTER OMWENGA MAKWORO.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**OAKPARK APARTMENTS MOMBASA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 15<sup>th</sup> March 2013, the Plaintiff seeks for judgment against the Defendants jointly and severally for:

- a) *A permanent order restraining the 1<sup>st</sup> defendant, its agents and/or servants and/or all those acting under it from releasing to the 2<sup>nd</sup> defendant and/or its agents, bankers, financiers and/or servants and all those claiming under it including; the East Africa Development Bank Limited; a sum of Kenya Shillings Thirteen Million Two Hundred Thousand (KES 13,200,000) or any portion thereof;*
- b) *An order declaring the contract between the plaintiff and the 2<sup>nd</sup> defendant with respect to the sale of apartment number 402, null and void and rescinding or cancelling the same; forthwith and ordering the title relating to apartment number 402, do revert to the 2<sup>nd</sup> defendant at their own expense;*
- c) *The 2<sup>nd</sup> defendant do refund to the plaintiff; Kenya Shillings Five Million Eight Hundred and Seventy-Three Thousand Six Hundred and Ninety-Three, forty Cents (Kshs 5,873,693.40) made up of Kshs 3,650,000, being the 22.12% deposit, Kshs 1,338,380, being legal fees, Ksh 80,000, valuation fee; Kshs 660,040, being stamp duty on transfer, USD 1,384 or Kshs 132,033.39, on account of non-refundable mortgage facility appraisal fee, and Kshs 13, 240, on account of stamp duty on charge;*
- d) *The 2<sup>nd</sup> defendant do refund to the plaintiff all monies paid as fees on account of; consent for sale and transfer of apartment 402, consent to charge the said property, registration fees on transfer and charge as well as legal and registration fees for deed of assignment of rental income for the said apartment 402;*
- e) *The 2<sup>nd</sup> defendant to pay general damages to the plaintiff for breach of contract;*
- f) *Costs of this suit;*
- g) *Interest on (b), (c), (d), (e) and (f) above at court rates;*
- h) *Any other or further order as the Honourable court may deem fit and just to award*

2. The Plaintiff avers that, he approached the 2<sup>nd</sup> Defendant with a view of purchasing an apartment at Oak Park Apartment Project situated on; land reference sub-division, No. 3854(original Number 1080/2) Section 1, Mainland North CR No 17990/1 Mombasa. The subject property is owned by the 2<sup>nd</sup> Defendant. After viewing the property, he settled on Apartment No. 109; due to inter alia; its design, location and availability of full front beach view, and finishes.

3. On or around 15<sup>th</sup> August 2011, he expressed his intention to purchase the apartment and the 2<sup>nd</sup> Defendant gave him a letter of offer on the same day. He duly accepted it and agreed to purchase the apartment at a sum of; Kshs 16,500,000. The letter of offer was then executed on the same day.
4. However, the 2<sup>nd</sup> Defendant subsequently in less than a month's period thereafter notified him that, the apartment number 109 had been sold and offered to sell him apartment number 402. The Plaintiff avers that, the 2<sup>nd</sup> Defendant informed him that, the two apartments were the same in all aspects, with full sea view, as a result, he agreed to purchase apartment number 402, before viewing it.
5. Further, as a consequence of the information given, he executed a sale agreement in relation to apartment number 402. He then paid a deposit of Kshs 1,650,000 being 10% of the purchase prices, the legal fees, stamp duty and other related expenses. In furtherance of the sale, he secured a mortgage facility from the 1<sup>st</sup> Defendant and secured the same by a legal charge over the suit property.
6. The Plaintiff avers that, however, he visited the subject apartment and discovered that, the apartment is wanting in material particulars in that its design is different from that of apartment number 109; and it has no; full beach front view; balcony access from the bedroom; suitable and convenient balcony access from the living room; partition separating the kitchen from the living room and bathtub. Further, all its rooms including the kitchen, living room and bedroom are much smaller in size than earlier indicated to him by the 2<sup>nd</sup> Defendant.
7. That all the representations made to him by the 2<sup>nd</sup> Defendant were fraudulent. As a result thereof, he has suffered loss and damage in the form of; legal fees amounting of; Kshs 1,218,380, stamp duty on transfer of lease; Kshs 660,040, valuation fees of; Kshs 80,000, stamp duty on the charge of; Kshs 13,240, mortgage facility appraisal fee in the sum of; USD 1384 or its equivalent in Kenya shillings amounting to Kshs 132,033.39, fees for consent and registration of the charge of the apartment in favour of the 1<sup>st</sup> Defendant and legal fees for preparation and registration of deed of assignment of rental income in favour of the 1<sup>st</sup> Defendant.
8. That, despite executing the letter of offer, an agreement for sale and a lease with the 2<sup>nd</sup> Defendant as well as a charge, deed of assignment and other relevant instruments with the 1<sup>st</sup> Defendant relating to the sale, transfer and charge of apartment number 402, the Defendants have jointly and severally refused and/or failed to release duly signed and registered copies of the respective deeds to him.
9. Yet, the 1<sup>st</sup> Defendant intends to remit the purchase prices to the 2<sup>nd</sup> Defendant. That, if the said amount of money is so released he will suffer irreparable loss. Hence the prayer that, the Honourable court, restrain the 1<sup>st</sup> Defendant releasing the money and declare the contract between him and the 2<sup>nd</sup> Defendant null and void on grounds of breach of contract by the 2<sup>nd</sup> Defendant.
10. However, the 1<sup>st</sup> Defendant filed its statement of defence dated 16<sup>th</sup> August 2013 and averred that sometimes in October 2011, the Plaintiff approached it with the intention of obtaining a loan of Kshs 13,200,000, to finance the purchase of apartment number 402, being the suit property herein from the 2<sup>nd</sup> Defendant. A valuation was done after which the 1<sup>st</sup> Defendant prepared a letter of offer dated 14<sup>th</sup> November 2011 which the Plaintiff accepted and executed.
11. On 21<sup>st</sup> March 2012, acting on representation by the Plaintiff that he had viewed the property, the 1<sup>st</sup> Defendant provided an undertaking to the 2<sup>nd</sup> Defendant to pay the balance of the purchase price of; Kshs 13,200,000. The 1<sup>st</sup> Defendant then created a charge over the suit property for Kshs 13,200,000. The 1<sup>st</sup> Defendant averred that, it has always been ready and willing to honour the undertaking; until new developments emerged as to the description of the suit property.
12. The 2<sup>nd</sup> Defendant filed a statement of defence and counterclaim dated 10<sup>th</sup> April 2013 and denied all the allegations in the plaint. It averred that, the Plaintiff visited and spent two nights at its property at its expenses, for the purposing of viewing the property on sale and did view all the properties on offer for sale by the 2<sup>nd</sup> Defendant, being apartment numbers; 109 and 402. The Plaintiff elected to purchase apartment number 109 and an offer was made to him for the same.
13. However, he failed to accept the same and pay a deposit within the stipulated time and as a consequence, the property was sold to a third party. The Plaintiff accepted the offer to purchase apartment number 402 and made deposits for it on; 23<sup>rd</sup> September 2011 and 3<sup>rd</sup> April 2012. That, following the agreement by the 1<sup>st</sup> Defendant to finance the purchase of the property, the 1<sup>st</sup> Defendant by a letter dated; 26<sup>th</sup> March 2012, issued an unconditional and irrevocable undertaking to; the 2<sup>nd</sup> Defendant's financiers; East African Development Bank, that, it would transfer by way of; Real Time Gross Settlement (RTGS) into the said EADB'S account number; 0108025879200, held at Standard Chartered Bank Moi Avenue Branch, a maximum of; Kshs 13,200,000, being the balance of the purchase price, within fourteen (14) days of the receipt by the 1<sup>st</sup> Defendant of duly executed partial discharge of charge for the premises.
14. The unconditional and irrevocable professional undertaking was re-issued on 3<sup>rd</sup> April 2012. Pursuant to the issuance of the undertaking, the 2<sup>nd</sup> Defendant gave a ninety-nine (99) year lease over the property premises to the Plaintiff. The partial discharge of charge, the lease and the charge over the premises were subsequently stamped and registered on 14<sup>th</sup> January 2013 in favour of the Plaintiff and the 1<sup>st</sup> Defendant. The documents were released to the 1<sup>st</sup> Defendant's Advocates; M/s Mamicha & Co. Advocates, whereupon the 1<sup>st</sup> Defendant's obligation to pay of the balance of the purchase price crystalized for payment.
15. The 2<sup>nd</sup> Defendant avers that, despite the aforesaid, the 1<sup>st</sup> Defendant has failed, refused and/or neglected to make the payment. The 2<sup>nd</sup> Defendant in support of the counter claim averred that, the Plaintiff's agents; Kenval Realtors E.A Limited; Registered Valuer, Land Development Consultants, Estate and Managing Agents, inspected the property and prepared a valuation report on 3<sup>rd</sup> October 2011, prior to the Plaintiff acceptance of the offer to purchase the property and issuance of the professional undertaking herein. That, contrary to the Plaintiff's assertions, the valuation report prepared by Kenval Realtors Limited states that, the suit property faces the pool and the ocean.

16. Further, the Plaintiff having satisfied himself with the property; duly executed an agreement to lease and the lease for the purchase of the suit premises. The suit premise is now duly registered in favour of the Plaintiff and the 1<sup>st</sup> Defendant. Thus the 2<sup>nd</sup> Defendant's rights therein are duly extinguished.

17. On 1<sup>st</sup> March 2013, the 1<sup>st</sup> Defendant through its manager; Victoria Sabula, held a meeting attended by the Advocates of; 1<sup>st</sup> Defendant, the Plaintiff, and the 2<sup>nd</sup> Defendant and prayed for indulgence for a period of two weeks to enable it obtain approvals to effect payment. By a letter dated 1<sup>st</sup> March 2013, the 1<sup>st</sup> Defendant's Advocates M/s Mamicha & Co. Advocates, who also acted for the Plaintiff in the purchase of the suit property, wrote to the Plaintiff and demanded the Plaintiff to institute legal proceedings against the 2<sup>nd</sup> Defendant and obtain court orders stopping the 1<sup>st</sup> Defendant from effecting payment of the balance of the purchase prices as per the terms of the explicit bank to bank undertaking given by the 1<sup>st</sup> Defendant.

18. The 2<sup>nd</sup> Defendant averred that, the Plaintiff and the 1<sup>st</sup> Defendant are colluding to defeat the its claim. As a consequence, the 2<sup>nd</sup> Defendant is paying interest on the sums borrowed at the rate of 16.75% and is therefore suffering loss and damage. As such, judgment be entered against the Plaintiff for, an order of; specific performance of the contract dated 13<sup>th</sup> June 2012, damages for breach of contract and the costs of the suit.

19. However, the Plaintiff filed a reply to the Defendant's statements of defence and a defence to the counter claim. He reiterated his averments in his plaint and denied having made representation to the 1<sup>st</sup> Defendant that, he had viewed the suit property. He further denied knowledge of the undertaking given by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant to pay the balance of the purchase price as alleged and averred that any arrangement made was without his direction or authority.

20. Further, the 1<sup>st</sup> Defendant is not under any legal obligation to honour any undertaking given by it due to the fraudulent misrepresentation of material facts by the 2<sup>nd</sup> Defendant. That, the 2<sup>nd</sup> Defendant does not have equitable or legal justification for seeking to enforce a contract tainted with fraud and is preclude from relying on their own breach of contract to seek specific performance of the same or claim any rights or benefits under the contract. He averred that, he visited the property where he viewed apartments on offer for sale by the 2<sup>nd</sup> Defendant, he was not shown apartment 402.

21. The case proceeded to a full hearing. The Plaintiff and the 1<sup>st</sup> Defendant did not testify in court but the Plaintiff's lawyer participated in the proceedings and cross examined the 2<sup>nd</sup> Defendant's witness. He informed the court that, he would rely on the documents filed by the Plaintiff, a visit to the premises and submissions. The 2<sup>nd</sup> Defendant relied on the statement of its director; Yesse Achoki Oenga dated 10<sup>th</sup> April 2013 and list of documents filed on 12<sup>th</sup> June 2013. He literally reiterated the averments in the statement of defence.

22. In cross examination by the Plaintiff's lawyer, he stated that, he did not deal with the Plaintiff directly. That the difference between the two letters of offer over the two premises was two days and both were executed. However, the 1<sup>st</sup> offer lapsed. That the lease was executed on 13<sup>th</sup> June 2012. In re-examination, he stated that, the Plaintiff paid the deposit of the purchase price but the balance has not been paid.

23. The parties filed their final submissions which I have considered herein alongside all the evidence adduced and I find the following issues have arisen for consideration, whether: -

- a) *The 2<sup>nd</sup> defendant sold apartment number 109 or 402 to the plaintiff;*
- b) *The 2<sup>nd</sup> defendant fraudulently misrepresented the material facts on the subject apartment to the plaintiff;*
- c) *The 1<sup>st</sup> defendant is liable to honour the alleged undertaking;*
- d) *The orders sought for by either party should be granted;*
- e) *Who will bear the costs of the suit?*

24. As regards the first issue, I find that, by a letter dated 15<sup>th</sup> August 2011, the 2<sup>nd</sup> Defendant offered the Plaintiff an apartment number 109, Insulae Africanus at a cost of; Kshs 16,500,000. The letter stated inter alia that, upon signing it, the Plaintiff was expected to make a deposit of; Kshs 3,300,000, being 20% of the amount of the purchase price; on or before 31<sup>st</sup> August 2011.

25. The 2<sup>nd</sup> Defendant avers that, the Plaintiff failed to pay the deposit as such the offer lapsed and the apartment was sold to a third party. The Plaintiff did not rebut this evidence of the failure to pay the deposit within the stipulated time. Be that as it may, the contract in relation to apartment number 109, did not materialize. In fact, the Plaintiff is not claiming either in the pleadings or the prayers, apartment number 109.

26. The Plaintiff conceded that, he was informed of the sale of apartment number 109 and on 17<sup>th</sup> August 2011, the 2<sup>nd</sup> Defendant offered him apartment number 402 and he agreed to buy it. He paid the deposit and other payments related to the purchase thereof. He further obtained a mortgage facility from the 1<sup>st</sup> Defendant using the apartment as collateral. It is therefore not in dispute that, the apartment sold to the Plaintiff was apartment number 402.

27. The second issue, relates to the alleged fraudulent misrepresentation by the 2<sup>nd</sup> Defendant; of the material facts relating to apartment 402. The Plaintiff avers that, he accepted to purchase apartment 402, based on the oral and written email communications with the 2<sup>nd</sup> Defendant.

That, he became aware of the misrepresentation in December 2012, when he visited and inspected the apartment for the first time. The 2<sup>nd</sup> Defendant has of course denied the allegation of fraudulent misrepresentation.

28. I have considered the pleadings, the averments and the evidence adduced plus the submissions on the subject issue and I find that, first and foremost, it is in evidence that, the Plaintiff visited the project and/or property on sale and spent two nights there. These facts are confirmed by the Plaintiff, who avers at paragraphs 6 and 7 of the plaint that, he met with the 2<sup>nd</sup> Defendant's Resort Manager and Head of Marketing and Hospitality, who took him on visit to the resort, including the hotel and residential apartments and "gave him an opportunity to view a number of apartments with a view to deciding if to purchase any".

29. Therefore, it is clear that, the Plaintiff had an opportunity to view the property being offered by the 2<sup>nd</sup> Defendant for sale; including apartment number 402, before he settled on apartment number 109. The 2<sup>nd</sup> Defendant's witness stated in his statement that, at the time the Plaintiff visited the premises, only two apartments being apartment 109 and apartment 402, were ready for sale. That, when the Plaintiff did not take up the offer for apartment number 109, and it was sold, the only remaining apartment was number 402.

30. It is therefore probable that, the Plaintiff viewed both apartments numbers 109 and 402, before settling on apartment number 109. Therefore, the Plaintiff's allegation that, he saw the apartment number 402, for the first time when he returned to Kenya and after executing the letter of offer, is not tenable and/or sincere. Secondly although he avers that, part of the misrepresentation was made to him through emails, he has not produced evidence of a single email, as he did not produce any documents in evidence to support his case or alleged communication. He also led no oral evidence to support alleged fraudulent misrepresentation.

31. Thirdly, it is in evidence that, the 1<sup>st</sup> Defendant on 3<sup>rd</sup> October 2011, instructed Kenval Realtors (E.A) Limited, to carry out a valuation on apartment 402. The valuation report gives detailed particulars of the property. It indicates that, the lounge cum dining room has windows facing the "pool and the ocean", and the property "fronts Shanzu beach/cliff with steps down to the Indian Ocean". The valuation dated 1<sup>st</sup> October 2011, must have been brought to the knowledge of the Plaintiff by the 1<sup>st</sup> Defendant before signing the charge.

32. Further, it is clear that, the Plaintiff's complain came late in the day. The letter of offer of the apartment number 402 was made on 17<sup>th</sup> August, 2011. The Plaintiff paid the 1<sup>st</sup> deposit on 29<sup>th</sup> September 2011, and the property valued on 1<sup>st</sup> October 2011. The subject undertaking herein was given by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant on 26<sup>th</sup> March 2012, and the 2<sup>nd</sup> deposit paid on 3<sup>rd</sup> April 2012. The documents transferring the property to the Plaintiff were forwarded to the 1<sup>st</sup> Defendant's lawyers on 14<sup>th</sup> January, 2013. The Plaintiff's complain come much later on 25<sup>th</sup> January, 2013. In my considered opinion, the horse had bolted by the time the complaint was raised and indeed the respective contracts between the parties had been fully executed.

33. It is also noteworthy that, although the main reason advanced by the Plaintiff to avoid the transaction herein in relation to apartment number 402, is fraudulently misrepresentation, the Plaintiff did not adduce evidence to support the same or rebut the 2<sup>nd</sup> Defendants denial of that allegation. Instead the Plaintiff's lawyer has taken to submissions to submits that; during cross-examination of the 2<sup>nd</sup> Defendants witness admitted that, the Plaintiff did not get a chance to view apartment 402 and make an independent decision and that, the Plaintiff did not sign a letter of offer for the said apartment because he was not around. Further the witness revealed that, the Plaintiff accepted to purchase apartment 402, on the advice of the 2<sup>nd</sup> Defendant and signed an agreement of lease without executing a letter of offer for that apartment. However, the Plaintiff cannot lead evidence through submissions. Submissions are analysis of the facts and issue of law in the subject matter.

34. Be that as it may, it is clear that, if the Plaintiff was diligent before committing himself to the purchase of apartment number 402, he would not be pleading "fraudulent misrepresentation" (if any). The purchaser of a property cannot fully rely on the vendor. He is supposed to conduct the relevant initial consideration; searches, site visit, inspection, and/or valuation. Hence the principle of "caveat emptor". Based on the aforesaid, I find and hold that, there is no evidence to support the allegation of fraudulent misrepresentation by the 2<sup>nd</sup> Defendant, and the claim is an afterthought.

35. The next issue to determine is whether; the 1<sup>st</sup> Defendant is liable to honour the alleged undertaking. The documents produced indicates a partial discharge dated 9<sup>th</sup> January 2013 was effected; in respect of apartment number 402, and a lease dated 9<sup>th</sup> January 2013; registered in favour of the Plaintiff for a term of 99 years from 1<sup>st</sup> November 2008 (less last 7 days). All this process was based on the letter dated 4<sup>th</sup> April 2012, where the 1<sup>st</sup> Defendant agreed to give the Plaintiff a mortgage facility for USD 138,365 equivalent to Kshs 13,200,000, to purchase the apartment number 402 and then granted the facility vide a letter of 26<sup>th</sup> March 2012. It undertook to remit payment of Kshs 13,200,000 to the 2<sup>nd</sup> Defendant.

36. That letter reads as follows: -

*"Kindly procure from your client East African Development Bank (EADB) the original head title for L.R No 3854/1/MN (original Number 1080/2) Mombasa and the duly executed Partial Discharge of Charge for Apartment No 402 on subdivision No. 3854 Section 1 Mainland North Mombasa (the title documents) and register the same simultaneously with the lease drawn in favour of the purchaser and the charge in favour of our client both over apartment 402 on subdivision No 3854 section 1 mainland North Mombasa on our unconditional and irrevocable professional undertaking to transfer by RTGS into your clients account a maximum sum of Kenya Shillings Thirteen Million Two hundred thousand only (13,200,000) (without any set-off or deduction) being the portion of the balance of the purchase price being financed on account of the sale herein of the above quoted property within seven (7) days from the date of our receipt from your firm of the duly registered Partial Discharge of charge, the lease registered in favour of Walter Omwenga Makworo and the charge registered in favour of Kenya Commercial Bank Ltd all over apartments No 402 on subdivision No 3854 Section 1 Mainland North Mombasa"*

37. Pursuant to the aforesaid, by a letter dated 14<sup>th</sup> January 2013, the East African Development Bank lawyers sent the following documents to the 1<sup>st</sup> Defendant's lawyers: -

- a) *Photocopy of certificate of title Numbers C.R 17990 with endorsement of lease for apartment 402;*
- b) *Application for registration;*
- c) *Duly registered Original and duplicate Partial Discharge of Charge dated 9<sup>th</sup> January 2013;*
- d) *Duly registered Original and duplicate lease dated 9<sup>th</sup> November 2012;*
- e) *Duly registered Original and duplicate Charge dated 9<sup>th</sup> November 2012;*
- f) *Original Stamp duty declaration, assessment and pay in slip Numbers 1060527 & 1059876 for Kshs 660,140 & Kshs 13, 340 respectively;*
- g) *Photocopy of stamp duty declaration, assessment and pay in slip Number 883400 for Kshs 580; and*
- h) *Photocopy of NBK customer transaction voucher Number 390300 for Kshs 100 and Kshs 480 respectively.*

38. Indeed, the 1<sup>st</sup> Defendant perfected the security and registered charge signed by the Plaintiff on 2<sup>nd</sup> October 2012, on 9<sup>th</sup> January 2013. An affidavit of consent of spouse by the Plaintiff's wife giving consent to the creation of the charge was given dated 5<sup>th</sup> September 2012. The suit property is registered in the name of the Plaintiff and title has passed to him. The liability to pay has arisen and so is the obligation to honour the 1<sup>st</sup> Defendant's irrevocable undertaking to pay the balance of the purchase price.

39. The 1<sup>st</sup> Defendant did not give any evidence in court or cross examined the 2<sup>nd</sup> Defendant's witness to rebut its evidenced nor filed any submissions. However, it is noteworthy from paragraph 5 of the 1<sup>st</sup> Defendant's statement of defence filed herein, it does not deny that, it did give an undertaking to the 2<sup>nd</sup> Defendant to pay the balance of the purchase prices amounting to; Kshs 13,200,000. It further avers that it has always been ready and willing to honour the undertaking, until it emerged that there was a dispute on the description of the property. Therefore, unless the court finds the contract between the Plaintiff and the 2<sup>nd</sup> Defendant void and/or voidable, the 1<sup>st</sup> Defendant is obliged to honour the undertaking.

40. The Plaintiff however, submitted that the 2<sup>nd</sup> Defendant remains in occupation of apartment number 402 and therefore it will be unequitable and unfair enrichment for 2<sup>nd</sup> Defendant to seek for an order of specific performance of contract, without any obligation of accounting to the Plaintiff for income earned by it. However, this issue of income has been raised in the submissions. It has not been raised in the pleadings nor canvassed during the cross examination of the 2<sup>nd</sup> Defendant's witness, or supported by a substantive prayer.

41. Be that as it were, if any income has been derived from the property the same needs to be accounted for, if not legally but morally and/or in the interest of commercial business etiquette. If any interest is payable on the balance of the purchase price, then the income derived from the property (if any) should be considered in the interest of justice. In the alternative the Plaintiff is at liberty to pursue recovery thereof in any other lawful avenues.

42. I shall now consider the prayers by the parties. In that regard, I find that the Plaintiff's case was not supported by evidence due to his absence from court. He did not officially tender his evidence, be cross examined and/or produce the documents filed. The 2<sup>nd</sup> Defendant submitted that, the suit should be dismissed for none attendance pursuant to; Order 12 rule 3 of the Civil Procedure Rules, 2010.

43. However, the Plaintiff submitted that under these provisions where only the Defendant appears for hearing, and does not admit any part of the claim, the suit shall be dismissed except for good cause to be recorded by the court. That, these provisions should be read together with; Order 9 Rule 1 of the Rules which provides that, any appearance to act in any court required or authorized by law to be made or done by a party may except where it is expressly provided for in any law be made by the party in person or a recognized agent, appointed to act on his behalf.

44. The Plaintiff's lawyer submitted that in this instant case, the lawyer duly acted for the Plaintiff and cross examined the witnesses. In the circumstances therefore, the court cannot dismiss the Plaintiff's suit as he still has a substantive claim against the 2<sup>nd</sup> Defendant and not in breach of; Order 12 Rule 3 aforesaid.

45. I have considered the arguments by the respective learned counsels and I find that, right from the outset a party is supposed to formally attend court, present its evidence in chief, be cross examined and re-examined for the authenticity and/or veracity of the evidence. The Party's lawyer cannot descend into the arena of litigation and testify on the client's part. Part IV of the Evidence Act (cap 80) Laws of Kenya deals with evidence of witnesses and/or production of documents. Therefore, Plaintiff having failed to testify, his evidence is of no evidential or probative value.

46. In that regard, I find that there is no evidence to support the Plaintiff's case on the standard required of the balance of probabilities and I dismiss it in its entirety.

47. As regards the counter claim, I have already held that, there is no evidence of fraudulent misrepresentation as alleged and subsequently

dismissed the Plaintiff's case. I have also observed that indeed, the property is already transferred to the Plaintiff. In the absence of any reasonable and sufficient cause to avoid the contract, the Plaintiff should pay the balance of the purchase price.

48. The 2<sup>nd</sup> Defendant prays for an order of specific performance. As stated in the Halsbury's Laws of England, 3<sup>rd</sup> edition Vol. 36 paragraph 444: -

***“A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed or been ready and willing to perform all the terms which ought to have been performed by him; and also that he is ready and willing to perform all future obligations and or the contract...”***

49. The same sentiments were expressed in the case of; Reliable Electrical Engineers (K) Ltd, v Montrac Kenya Limited (2006) eKLR.

Further the remedy of specific performance is a discretionary relief, but the discretion should be exercised on the basis of applicable principles of law and/or judiciously with a reason but not arbitrary. Similarly, being is an equitable remedy, the court has to satisfy itself that on the facts presented to it, that it is equitable in the interests of both parties to grant the relief. (see; Nabro Property Limited Versus Sky Structures Limited and 2 others (2002) KLR.

50. However, the remedy will not be granted where damages will be an adequate compensation, thus, if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relief of specific performance, the court can withhold it and award damage instead.

51. In view of the fact that, the property has already passed to the Plaintiff and the contract between him and the 2<sup>nd</sup> Defendant being valid and the 2<sup>nd</sup> Defendant having performed its contractual obligation, it is only fair and just that an order of specific performance be granted and therefore, I enter judgment in favour of the 2<sup>nd</sup> Defendant as against the Plaintiff as prayed for being; an order for specific performance of the contract dated 13<sup>th</sup> June 2012. However, I did not find evidence in support of the prayer for general damages for breach of contract. In the circumstance therefore, I dismiss that prayer.

52. Finally, an issue has risen on the consolidation of this suit with civil suit number 125 of 2013 (OS). The 2<sup>nd</sup> Defendant argues the suits were consolidated but the Plaintiff alleges the court merely stated inter alia: “since the 2 suits relate to the same property they should be consolidated and heard before one court to avoid the issuance of conflicting orders” The order was merely directional. That, on 17<sup>th</sup> February 2017, the parties herein by consent agreed to have Originating Summons number 125 of 2013, which is related to this suit, be availed to the court hearing this suit. No formal consolidation was done.

53. I however, note that the prayer in that matter is merely enforcement of the undertaking herein, therefore, the order for specific performance granted is sufficient to cover that prayer and there is no need to go into the arguments advanced, but even then the order of the court referring the case for consolidation is sufficient.

54. All in all, I allow the counter claim in relation to prayer (a) of paragraph 36 of the defence and counter claim with costs to the 2<sup>nd</sup> Defendant. It is so ordered.

Dated, delivered and signed on this 26<sup>th</sup> day of October, 2020

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Ombogo for the Plaintiff

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

Mr Masese for the 2<sup>nd</sup> Defendant

Robert the Court Assistant.