REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 379 OF 2008

FRANCIS MWAURA NJINU.....PLAINTIFF

VERSUS

1. HANNAH WANJIKU MBURU.....1ST DEFENDANT

2. G.M. MUHORO ADVOCATE.....2ND DEFENDANT

3. JULIUS MUTUKU MUMINA.....3RD DEFENDANT

4. JAMES KANGETHE MUMINA.....4TH DEFENDANT

5. MUTHOKI BROTHERS COMPANY LTD.....5TH DEFENDANT

JUDGMENT

1. By a plaint dated 7th July 2008 and amended on 19th April 2010, the plaintiff is seeking for judgment and orders against the defendants jointly and severally as follows:-

(a) That the sale and conveyance of the suit property to the 5th defendant be recalled and cancelled;

(b) That the 1st and 2nd defendants do specifically perform their contract with the plaintiff and that the defendants do deliver up all documents of title and those documents necessary to complete the conveyance of the suit property to the plaintiff within a specified period;

(c) If the consent of the relevant Land Control Board is required, the parties are hereby granted leave to apply for the same outside the stipulated time;

Or in the alternative

(d) Refund of Kshs. 2,432,000 with interest at court rates from 16th June 2005; until full settlement;

(e) Damages on the footing of loss bargain being Kshs. 43,500,000 with interest at court rates from the date of filing until full payment;

(f) Other or further relief the court may deem fit to grant;

(g) Costs of this suit.

2. The background facts are that, by a sale agreement dated 16th June 2005, the 1st defendant sold all that property known as L.R. No. 7583/66, situate in Karen area (herein "the suit property"), to the plaintiff for a consideration of Kshs. 16,500,000. It was a term of the agreement that the plaintiff would pay a deposit of Kshs. 1,650,000 through the 2nd defendant. The deposit was to be held by the 2nd defendant, pending the successful registration of the conveyance of the suit property in favour of the plaintiff or his nominees. At the time in

issue, the suit property was registered in the names of the late Elijah Wohoro Mureithi, but the deceased's estate had executed all necessary documents to convey the proprietary interest therein to the 1st defendant.

3. The plaintiff paid the deposit. However, as the 1st defendant was unable to raise sufficient money to pay stamp duty on the conveyance of the suit property, she requested through the 2nd defendant, who was acting as her lawyer in the transaction that, she be allowed to utilize the deposit to pay the stamp duty. The plaintiff consented to the use of the deposit on condition that, the 1st defendant executes all documents necessary to transfer the suit property to him and upon strict professional undertaking from the 2nd defendant, not to release the original title to any party until the suit property is transferred to the plaintiff or the deposit is refunded. The 1st defendant consented to these terms.

4. The sale was to be completed within ninety (90) days from the date of the registration of the title in favour of the 1st defendant. The 2nd defendant by a letter dated 24th April 2006, confirmed the conveyance had been stamped and lodged for registration. In the meantime the plaintiff requested for authority to sub-divide and sale the suit property pending the completion date. The parties continued to exchange correspondence on the registration of the conveyance. In that regard, the plaintiff through a letter dated 9th June 2006, sought to know the status of the said registration of conveyance, and also requested for copies of the new title and clearance certificate to conclude sub-division plans and stated that he was ready to complete the sale transaction.

5. On or about 13th June 2006, the 3rd and 4th defendants approached the plaintiff with offer to buy 2.75 acres of the suit property, at a price of Kshs. 15,812,500 but insisted on the particulars of the sale agreement between the plaintiff and the 1st defendant before the payment of 50% of the purchase price. The plaintiff avers that, he disclosed to them the details of the sale agreement between him and the 1st defendant in good faith.

6. The 3rd and 4th defendants informed the plaintiff that the 5th defendant would hold the suit property on their behalf. Subsequently, the Advocates for the 3rd to 5th defendants through a letter dated 14th June 2006, to the Advocates for the plaintiff sought for a draft sale agreement and copy of the proposed sub-division documents. The documents were provided.

7. The plaintiff avers that, the 3rd and 4th defendants having known the names and the whereabouts of the 1st and 2nd defendants and the details the contract entered into between him and the 1st defendant, fraudulently and/or unlawfully interfered, procured and induced the breach of that contract and the 1st and 2nd defendants refused to perform or conclude the sale of the suit property to him, instead they wrongfully transferred it to the 5th defendant, at a the consideration of Kshs. 28,000,000 vide a sale agreement made on 24th July 2006.

8. The plaintiff avers that he subsequently conducted a search at lands office and discovered that the suit property had been transferred to the 5th defendant on 28th December 2006 and the 1st defendant was actually represented in the transaction by the 2nd Defendant. That despite the sale of the property to the 5th defendant, the 1st and 2nd defendants with intention to deceive, fraudulently misrepresented to him that, they were seeking for completion documents to transfer the suit property to him and allowed him in the meantime to undertake sub-division and enter sale agreements with 3rd parties.

9. The plaintiff avers that, as a consequence of the aforesaid matters, he has lost the benefit of his bargain, his interest in the sale contract and the profit he would have otherwise made from the ownership and re-sale of portions to the 3rd parties and is greatly injured in his business, reputation. That the 3rd to 5th defendants have retained the services of; Latida Enterprises, to market and dispose the suit property to 3rd parties and thereby remove it or the proceeds from his reach, or the orders of the court.

10. However, 1st and 2nd defendants filed a joint defence dated 3rd September 2008 and denied each and every allegation of fact in the plaint. It was averred that, the suit is bad in law, due to non compliance with the provisions of the Land Control Act (Cap 302) laws of Kenya. The 3rd, 4th and 5th Defendants filed a joint amended statement of defence dated 3rd May 2010 and denied all the allegations in the amended Plaint, in particular the alleged fraud arguing that, the decision by the 3rd 4th and 5th defendants to abandon the transaction with the plaintiff was not motivated by an intention to induce a breach of contract but upon realizing that, the plaintiff was not the registered owner of the suit property but a mere speculator and/or broker.

11. Further the 3rd and 4th defendants have been wrongly enjoined to this suit as they all along acted as agents and/or directors of the 5th defendant and that personal liability cannot attach to them, therefore, the suit against them ought to be struck out with costs. That the 5th defendant conducted the usual due diligence on the suit property, after receiving an offer for the sale of the whole of the suit property and ascertained that the title was free from any encumbrances. It paid the agreed consideration and procured the registration of the parcel of the land in its name, hence all the allegations of fraud, unlawful, interference, procurement and/or inducement of breach of contract against the defendants are spurious and without any factual or legal basis.

12. The 3rd to 5th defendants argued that, the existence of an agreement for sale between the plaintiff and the 1st and 2nd defendants over suit property if at all, did not bestow upon the plaintiff any rights or interests exercisable in law or in equity, against the 3rd, 4th and 5th defendants and/or prevent the 3rd, 4th and 5th defendants from purchasing the subject property. The Plaintiff is only entitled to a claim for damages for breach of contract and a refund of any deposit paid and/or losses incurred, from the 1st and 2nd Defendants. He is not entitled to any equitable remedy, because in failing to register a caveat over the property prior to the transfer to safeguard his alleged purchaser's interest, for a period exceeding one and half years, he slept on his rights and is guilty of laches.

13. It was argued that, in as much as the Plaintiff seeks orders for the cancellation of registration effected by the Registrar of Titles in the exercise of powers conferring on him under statute, the Registrar has not been enjoined to this suit, therefore the suit is fatally defective and the orders sought are incapable of being granted.

14. Finally it was argued that, agreement for sale dated 16th June 2005 between the Plaintiff and the 1st Defendant, which constitutes the basis of the Plaintiff's claim, is void for want of the Land Control Board Consent. That neither the Plaintiff nor the 1st Defendant sought the consent within the stipulated six months and the Plaintiff has failed to demonstrate any sufficient reasons for failing to do so.

15. However the Plaintiff filed a Reply to the 3rd to 5th Defendants amended defence dated 17th May 2010, and averred that in view of the admission made of deliberate interfering with the due performance of the sale agreement reached between him and the 1st Defendant and in the totality of the circumstances of this case, the best and appropriate remedy is specific performance. That the 3rd to 5th Defendants interpretation of privity of contract is erroneous and their illegality is celebrated throughout their pleadings.

16. The parties closed the pleadings and the case proceeded to a full hearing. The plaintiff case was supported by the evidence of the Plaintiff who testified on 11th May 2015, basically reiterating the averments in the plaint and relied on the statement he filed in court. The plaintiff also called John Mulwa a valuer to testify on its behalf. The first defendant testified on 17th March 2016 and similarly relied on the joint statement of defence filed and adopted her statement filed in court 28th July 2015.

17. The 2nd Defendant opted not to testify and similarly the 3rd and 4th Defendants did not testify. Finally the evidence of the 5th Defendant was supported by the evidence of Mr. Mumina who testified on 22nd November 2018 and relied on the statement he recorded on 16th October 2014. I shall not reproduce the witness evidence herein but shall refer and rely on it herein.

18. I have considered the subject matter herein in the light of the arguments and the submissions advanced and I find that the issues that arise for determination are whether;

(a) There is a valid agreement for sale between the Plaintiff and the 1st Defendant;

(b) If so, whether it was breached by either party?

(c) If there was any breach by the 1st Defendant, whether the Plaintiff is entitled to the prayers sought for against the 1st Defendant and/or all the Defendants; and

(d) Who should bear the costs?

19. As regards the first issue I find that there is no dispute the Plaintiff and the 1st Defendant entered into an agreement for sale of the suit property on 16th June 2005. The purchase price was agreed at Kshs. 16,500,000 only. The Plaintiff was to pay 10% thereof upon signing of the agreement. It was paid. The balance of the purchase price of Kshs. 14,850,000 was payable upon successful registration of the conveyance and/or mortgage in favour of the purchaser or his nominee. It was not paid. The completion period for the transaction was 90 days from the date of issuance of the title or such other date as would be agreed on in writing between the parties. Thus it should have been concluded by 16th August 2005.

20. It is evident from the correspondence between the parties, that the sale transaction was not completed within the ninety (90) days. This is informed by the fact that on 3rd July 2005, the Plaintiff's lawyer wrote to the 2nd Defendant to inquire on the progress of the transfer of the title to the 1st Defendant. The 2nd Defendant replied vide a letter dated 26th September 2005, requesting for a signed application for; the Land Control Board consent and the consent to utilize part of the deposit to pay stamp duty on conveyance to the vendor.

21. By a letter dated 4th October 2005, the Plaintiff's lawyer conceded to the request of the utilization of the stamp duty on condition that all documents necessary to the transfer of the land be executed and on the professional undertaking of the 2nd Defendant not to release the original title to the 1st Defendant or other party until the money is repaid or transferred to the is completed. The 2nd Defendant agreed to the same vide a letter dated 7th October 2005.

22. On 7th December 2005, the Plaintiff's lawyer send a letter to the 2nd Defendant seeking to be updated on the progress made in the transfer of the land to the 1st Defendant. By 10th January 2006, the stamp duty had not been paid, as evidenced by a letter of the even date from the Plaintiff's Counsel to the 2nd Defendant. According to the receipt issued by Kenya Revenue Authority, the stamp duty of Kshs. 195,000 was eventually paid on 12th January 2006. However by 20th April 2006, the title had not been issued in favour of the 1st Defendant as evidenced by a letter of the even date from the Plaintiff's lawyer. In response to this letter, the 2nd Defendant informed the Plaintiff that stamp duty had been paid and he had re-lodged and was waiting for a response.

23. The correspondence continued and on 9th June 2006, as the Plaintiff's counsel wrote to the 2nd Defendant requesting to be supplied with a copy of the new title and clearance certificate if registration of the transfer had gone through to enable his client proceed with sub-division of the property. That was not done and subsequently, the Plaintiff's lawyer wrote to the 2nd Defendant on 21st November 2007, to inquire on the progress in obtaining the necessary clearances or consents. It is not clear whether the 2nd Defendant responded to this letter although there is a letter dated 28th February 2008, written by G.M. Muhoro to the Ministry of Lands requesting to be furnished with a copy of the Land Control Board consent for the subdivision or the necessary waiver of the requirement for consent so that transfers of the portions of sub-division could be presented for registration. It suffices to note that, by this time, a period of almost one year had gone by and the transaction had not been concluded. It is therefore clear the sale transaction was not concluded within the timeline set.

24. Be that as it were, the question therefore is whether there is a valid contract and/or agreement of sale of the suit property between the Plaintiff and the 1st Defendant. Other than the inability to transact within the time set, the Defendants have faulted the validity of the

agreement on the ground that, the parties did not obtain the required consent from the Land Control Board as required under the Lands Control Act.

25. However, the Plaintiff submitted that the 1st and 2nd Defendants by a letter dated 26th September 2005, undertook to obtain the relevant consent, whereby all relevant forms were signed and given to them but no action was taken. That it was the responsibility of the 1st Defendant to obtain the consent and that she "cannot be heard to deny the validity of the agreement freely entered into by him by pleading lack of consent". The plaintiff relied on the case of; *Mushunga V Rwekanika [1974]Ea 318.* The Plaintiff further submitted argued that the Land Control Act, Cap 302, requires consent to be sought after entering the sale and within six (6) months of the agreement, but more importantly, the Act under section 8, grants the court the jurisdiction to extend time for such an application.

26. It is clear that the parties concede to the fact that the consent was required herein. The letter dated 26th September 2005, written by the 2nd Defendant to the Plaintiff's lawyer states that the subject suit property is Agricultural land within the meaning of the Land Control Act. In that regard, section 2 of the said Land Control Act (Cap 302), defines Agricultural land to mean (i) land not within a municipality, township or market or (ii) land in Nairobi area, municipality or township or urban centre that is declared by the Minister by notice in the Gazette to be Agricultural land for purposes of the Act.

27. Similarly, Section 6 of the Land Control Act, provides that consent is required for:-

> *"(1) Each of the following transactions that is to say—*
>
> *(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*
>
> *(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;*
>
> *(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.*

28. The Land Control Act further provides under section 8 that, the application for consent of the Land Control Board is supposed to be made within six (6) months of the agreement. It states as follows:-

> *"8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:*
>
> *Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit".*

29. Indeed the necessity of the consent is demonstrated by the fact that the 1st Defendant and the 5th Defendants jointly applied to the Land Control Board for the consent to transfer the suit property between them and was granted. The approval was granted on 21st September 2006 accordingly. Therefore it is evident that the subject property required the consent of the Land Control Board for effective transfer of rights from the 1st Defendant to the Plaintiff. Apparently the Plaintiff in a letter dated 16th August 2007, states that he had completed sub-division of the suit property and was drawing the necessary transfers and requested that the 2nd Defendant obtain the necessary consents and clearances. However, there is no evidence that the consent was obtained.

30. The question that arises is; what is the legal effect of the absence of the consent. The purpose of the Land Control Board consent is to facilitate the transfer of proprietary rights from the vendor to the transferee or purchaser. It is an issue of enforceability of the contract. It goes to the performance and/or breach of the contract. Indeed the Land Control Act provides that it is an offence for any person to take possession of the land before the consent is issued. In that regard Section 22 of the Act states as follows :-

> *"Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—*
>
> *(a) pays or receives any money; or*
>
> *(b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.*

31. I take cognizance of the decisions of the Court of Appeal in several decisions on the consequences of failure to obtain the subject consent but these decisions (see; *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri (2014) eKLR* a *Willy Kimutai Kitili vs Michael Kibet (2018)eKLR and David Sironga ole Tukai vs Francis arap Muge & 2 Others (2014) eKLR*) held opposite views in that one bench held

the sale agreement is invalid and the other held otherwise.

32. Be that as it were, it is clear in the instant matter that the land control board consent was not obtained, therefore there is no valid sale agreement between the Plaintiff and the 1st Defendant. The next question is; what were the terms in the contract between the Plaintiff and the 1st Defendant, in the absence of a conveyance registered in favour of the purchaser within three (3) months. Clause 9 of the agreement provided that provided that, "either purchaser or the vendor may upon giving not less than thirty (30) days notice in writing of intention to do so, rescind the agreement".

33. Further clause 10 of the same agreement stated that:-

> *"entitled party not in breach of the contract to serve a twenty one (21) days notice to complete the agreement on his part, if the breach is not remedied, within the twenty one (21) days period, the aggrieved party would be at liberty to extent the time for completion or immediately rescind the agreement by notice in writing to the other party."*

34. I note that, although the Plaintiff gave notice of completion on 26th March 2007, this was after a period of one (1) year, three months from the date of signing of the agreement on 16th June 2005. Even then, the Plaintiff did not extent the time of completion nor rescinded the agreement. The correspondence reveals that, up to the time the Plaintiff filed this suit on 7th July 2008, he had not rescinded the contract. The 1st Defendant on her part signed the subject agreement and was immediately paid the 10% deposit, which she utilized to pay stamp duty but did nothing more. Therefore none of the parties rescinded the contract upon default and/or breach.

35. Be that as it may it is evident that even as the agreement between the Plaintiff and the 1st Defendant was still subsisting, the 1st Defendant and the 2nd Defendant on one part and the 5th Defendant on the other, embarked on the sale of the same suit property. The sale between the Plaintiff and the 5th Defendant having aborted, the 5th Defendant pulled out of the sale transaction as evidenced by a letter written from its lawyer dated 22nd June 2006.

36. Mr. Fidel Mumina on behalf of the 5th Defendant stated that he was discouraged from getting into any transaction or commitment with any agent or broker without the involvement of the owner of the property. He then decided to contact the owner of the suit property after getting the details from the neighbor and on contacting the 1st Defendant she disowned knowledge of the sale of the property. As such in the absence of any legal instrument to prove, sustain or entertain the Plaintiff's proprietary rights over the suit property, he pulled out of the transaction.

37. Subsequently, the Land Control Board granted the consent on 21st September 2006 and rates demanded the Nairobi City Council vide a letter of 15th December 2006, in the sum of Kshs. 71,841, were paid alongside stamp duty on the suit property of Kshs. 1,120,000 as evidenced by a letter dated 14th December 2006, the lawyer informed him by a letter dated 6th March 2007, from the purchaser's lawyers, transfer of the suit property from the 1st Defendant to the 5th Defendant was successful.

38. The said letter forwarded to the 5th Defendant title documents which included, inter alia;

(a) Rates clearance certificate;

(b) Letter of consent of the Land Control Board, Nairobi;

(c) Indenture of Conveyance executed by the Vendor;

(d) Indenture of Conveyance dated 24th November 1998

39. To demonstrate that the 1st and 2nd Defendant pulled a match at the Plaintiff, the Plaintiff's lawyer unaware of the transfer of the property to the 5th Defendant wrote a letter dated 9th March 2007 to the 2nd Defendant inquiring as to who was carrying out the construction works on the suit property and whether it was the 1st Defendant. This letter was followed by another letter dated 26th March 2007, written by the Plaintiff's lawyer indicating that the Plaintiff was still ready to complete the agreement and gave a twenty one days' notice to the 1st Defendant to provide all completion documents to facilitate the transfer.

40. On 16th August 2007, the Plaintiff's lawyer wrote to the 2nd Defendant indicating that the sub-division was complete and they were drawing the necessary transfers and requested that the 2nd Defendant to obtain the necessary consents and clearances. It is surprising that, despite the fact that, the 2nd Defendant acted for the 1st Defendant in the transaction of the sale of the suit property, between the 1st Defendant and the 5th Defendant, he did not disclose to the Plaintiff that the property had actually been sold to the 5th Defendant. Instead, the 2nd Defendant wrote to the Counsel for the Plaintiff on 20th August 2007, in response to the letter of 16th August 2007 requesting for the following documents;-

(a) Subdivision certificate;

(b) Copies of deed plans (for transfer);

(c) Surrender deed plan (roads);

(d) Copies of ID Nos. for your clients;

(e) Copies of PIN Nos. for your clients

41. By this time the Plaintiff had sold portions of the property to two of 3rd parties namely; Mary Anne Obondo Gallo vide an agreement for sale dated 28th December 006 and with Erastus Muturi Kirongothi vide an agreement dated 15th November 2006, with full with knowledge of the 1st and 2nd Defendants.

42. Indeed, this is a classic case of; intrigues of misrepresentation, collusion, conspiracy and a hide and seek game. A case of dishonest by all the parties. In fact, in my considered opinion none of the parties can claim to meet the equitable principle of clean hands. To put this in perspective, the Plaintiff embarked on sub-division of a parcel of land that he had only paid 10% of the purchase price. Although he argues that he had the blessing and authority of the 1st Defendant, there is no evidence to that effect. He went further to sell the parcel of land to third parties as aforesaid, when he had no title to the property. He produced an email dated 14th June 2006 written to his lawyer stating that he met one Mumina, a prospective purchaser of part of the suit property.

43. On the part of the 1st defendant, it is clear that, she signed an agreement referred to herein to sell the suit property to the Plaintiff. She received the Kshs. 1,650,000 and she utilized the same to pay stamp duty to transfer the property to herself. She did not transfer the property to the Plaintiff. She did not refund the deposit, she did not rescind the contract with the Plaintiff, she did not notify the Plaintiff of the sale of the property to the 5th Defendant. Her conduct speaks of nothing less than sheer "ravenousness".

44. The 2nd Defendant is the chief architect of the entire script. He was the catalyst of the whole transaction. He played out on the minds of all the parties herein. He acted for the 1st Defendant in the transaction between her and the Plaintiff and knowing that it was not concluded, he led the 1st Defendant to enter into another transaction with the 5th Defendant, over the same property. He then continued to lure the Plaintiff to stay on, through continued communication with the Plaintiff, encouraging the Plaintiff to sub-divide the land already sold. It is unfortunate that a person of the 2nd Defendant's caliber, a professional lawyer, could engage in such clandestine activities. In my opinion his conduct amounts nothing else to professional misconduct. He was not even ready to defend his conduct and/or action at the trial.

45. As for the 5th Defendant, its lawyer by a letter dated 22nd June 2006 withdrew from the sale agreement with the Plaintiff citing lack of title and was masquerading as the son of the 1st Defendant and/or several people were visiting the suit premises, but no evidence was led in support thereof, in my opinion once the 5th Defendant discovered the sale between the Plaintiff and the 1st Defendant was not complete and he could get the property at a cheaper price from the 1st Defendant, it undercut the Plaintiff.

46. Be that as it may, before I consider the prayers herein an issue was raised by the counsel of the 3rd and 4th Defendants to the effect that they died during the pendency of the suit and therefore the suit herein abated as against them. However, the evidence of death of a person is a death certificate. Although the Counsel for the 3rd to 5th Defendants submitted that the two Defendants are demised, no death certificates were produced. He relies on alleged oral address to the court in the year 2017. The particular date is not indicated. It is therefore not possible to establish from the court record whether indeed the death of the two Defendants was brought to its notice.

47. The Counsel further alleges that, a letter dated 25th April 2018 was filed in court on 10th May 2018 forwarding burial permits. I have gone through the court record but I have not seen a copy thereof. It is therefore not certain whether the letter was received. However, the Plaintiff's counsel has denied knowledge thereof. Even if the letter was filed and served, it would still not be conclusive evidence of the death of the two Defendants. Even then, several questions arise namely; why did the law firm representing the 3rd to 4th Defendants continue representing them as though they were alive. The submissions filed on 14th February 2019 clearly indicated as filed on behalf of the 3rd and 4th Defendants, yet the 3rd Defendant is alleged to have died on the 18th September 2010 and the 4th Defendant on 22nd September 2017.

48. Further, the provisions of Order 24 Rule 4 of the Civil Procedure Rules 2010, provides that, if a Defendant to a suit dies and the cause of action survives or continues, the Court on application made in that behalf shall cause the legal representative of the deceased Defendant to be made a party, and shall proceed with the suit. These provisions do not stipulate as to party would make the application. In that case, either party that has knowledge of the same would make the application.

49. That begs the question as to whether the Plaintiff herein knew of the death of the Defendants. I find the answer in the negative in the absence of evidence to prove the same. The Rule (4) referred to above clearly states that, if the subject application is not made within a period of one (1) year, the suit abates as against the deceased Defendant. However in the absence of evidence that the two Defendants are deceased, the court is unable to hold and/or find that the suit against them has abated.

50. In that regard, the submissions by the Counsel for the 3rd to 5th Defendants that the abatement of the suit against the 3rd and 5th Defendants means that the court cannot pronounce itself on the claims of fraud interference, and inducement which were made personally by the 3rd and 4th Defendants fall by the way. The Counsel further argued that the court should expunge all references by the Plaintiff to the 3rd and 4th Defendants including any evidence adduced against them from the record, which will then leave the claim against the 5th Defendant as a mere shell. However, I find that the Learned Counsel acquiesced in the prevailing circumstances herein. From the time he knew of the death of the two Defendants, he did not move the court in any way. He did not even apply for expunging of the documents he now seeks to be expunged. The issue is only raised in the submissions. Submissions cannot provide ground to canvass issues whose procedure is well stipulated under both substantive and procedural law.

51. In fact, the evidence of the Plaintiff was recorded on 11th May 2015 five (5) years after the alleged death of the 3rd Defendant. The court record does not show that the court was informed of that death; instead the Learned Counsel Mr. Gathera is on record as appearing for the 3rd to 5th Defendants, to the conclusion of the case. It is also noteworthy that, the Learned Counsel alleges that the court was notified of the

deaths in the year 2017, yet the 3rd Defendant alleged died in the year 2010 and the 4th Defendant in 2017. The suit against the 3rd Defendant would naturally have abated by 18th September 2011. The letter of notice to the court is allegedly dated 25th April 2018 and filed on 10th May 2018, a period of seven (7) years after the 3rd Defendant's death and seven (7) months after the alleged death of the 4th Defendant. In conclusion, I hold that the suit against the 3rd and 4th Defendants has not abated.

52. However the role played by the 3rd and 4th Defendants in this matter is not clear. In the email referred to herein, in which the Plaintiff informs his lawyer, he met, a Mr. Mumina, he states therein, he met one person. He does not state he met two people. He states that, he had scanty information on him. He actually states he had knowledge that, the property would be bought in the name of the 5th Defendant. He alleges that, he met the 3rd and 4th Defendants at a Hotel but there is no evidence to that effect. I therefore find no culpability on the part of the 3rd and 4th Defendants.

53. I shall now consider whether the Plaintiff has proved its case on the balance of probabilities and whether I should grant the orders sought. The plaintiff seeks that the sale and conveyance of the suit property to the 5th defendant be recalled and cancelled; and the 1st and 2nd defendants do specifically perform their contract with the plaintiff and that the defendants do deliver up all documents of title and those documents necessary to complete the conveyance of the suit property to the plaintiff within a specified period.

54. However I have found and hold that, no valid contract was executed between the Plaintiff and the 1st Defendant. To the contrary, the contract between the 1st and 5th Defendant has not been challenged. At the time of the sale of the suit property, the suit property to the 5th Defendant was in the name of the 1st Defendant not the Plaintiff, and the 5th Defendant paid the total consideration of Kshs. 28,000,000. The property was transferred to it as far as 2006. A period of over ten (10) years. The Plaintiff had not paid full purchase price nor put any record of encumbrance on the property. Therefore the prayers sought cannot be granted as the tide tilts in favour of the 5th Defendant. The order for specific performance cannot be granted.

55. The alternative prayer seeks for a refund of; Kshs. 2,432,000. comprising of; Kshs. 1,650,000 paid as deposit; Kshs. 300,000 spent on sub-division, Kshs. 250,000 paid to the Counsel representing him and Kshs. 232,000 fees of the sale agreement with third parties. I have seen a receipt at page 78 and 79 of the Plaintiff's bundle of documents dated 9th April 2007 and agreements at pages 53 to 62. Having considered the same and declined to grant the order for specific performance, I find that the only remedy left for the plaintiff under Section 7 of the Land Control Board, is restitution which provides as

> *"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."*

56. Therefore, the deposit of Kshs. 1,650,000 is recoverable from the 1st defendant from the date of payment to the date of refund until payment in full with interest at court rates. Payment in any case should be made within twenty one (21) days of this order. The refund of Kshs. 300,000 on sub-division and Kshs. 250,000 legal fees is recoverable from the 1st and 2nd Defendants who led the Plaintiff to believe the agreement was subsisting all through but is recoverable without interest. Kshs. 232,000 is not recoverable, as the Plaintiff could not sell what he did not have, hence the concept of: "nemo dat quod non habet." If anything, there was no evidence from the parties. Similarly, there is no basis and/or proof of loss of bargain as the Plaintiff participated fully in the transaction and did not exercise his right to terminate the agreement.

57. Finally, in view of the findings herein, each party to meet its own costs

58. It is so ordered.

Dated, delivered and signed in an open court this 25th day of September 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Makambo for the Plaintiff

Mr. Kimeria for the 1st Defendant and holding brief for Mr. Kihoro for the 2nd Defendant

Mr. Victor Lando for the 3rd, 4th and 5th Defendants