



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

IN KILGORIS

CASE NUMBER 8 OF 2021

(FORMERLY NAROK ELC CASE NO.E003 OF 2020)

PRECEPTS HOLDINGS LIMITED.....PLAINTIFF

VERSUS

NGENO KIPYEGON JOHANA.....DEFENDANT

JUDGMENT

The Plaintiff herein filed a suit dated 19th November 2020 against the Defendant seeking for the following Prayers:-

- a) An Order of Permanent injunction restraining the Defendant from interfering with the Plaintiff's quiet possession and trespass on Land registered as TRANSAMARA/KIMINTET "C"/65 (hereinafter referred to as "the suit property").
- b) To vacate and/or handover vacant possession of the parcel of land registered as TRANSMARA/KIMINTET "C"/65 to Precepts Holding Limits with immediate effect.
- c) Mesne profits from the date of expiry of the occupation of the parcel of land till possession is delivered up to the Plaintiff.
- d) Special damages of Kenya Shillings Four Million (KShs 4,000,000/-).
- e) General Damages for breach of contract at 20% as per the agreement dated 14th July 2020.
- f) Interest on (d) above at Court rates from the date of filing the suit herein.
- g) An Order of eviction be issued against the Defendant from the parcel of land registered as TRANSMARA/KIMINTET "C"/65 and the officer in charge Kilgoris Police station to provide security and ensure compliance of the Order.
- h) In the alternative to prayer a-f above, the Honourable Court be pleased to grant an order for specific performance of the contract.
- i) Interest on (g) above.
- j) Costs of the Suit; and
- k) Any other relief the Court deems fit to grant.

The Plaintiff also filed a List of Documents dated 19th November 2020 attaching the documents that support the Plaintiff herein.

The Defendant on the other hand filed a Defence and Counter-Claim dated 25th January 2021.

In the Defence, the Defendant denied any wrong doing as per the Plaintiff dated 19th November 2020 and instead accused the Plaintiff for breach of Contract as well as withholding virtual information regarding the suit property.

As a result of the Plaintiff's actions, the Defendant filed a Counter-Claim seeking for the following Orders against the Plaintiff'-

- a) That an Order of specific performance be issued against the Plaintiff compelling him to transfer the suit property in favour of the Defendant.
- b) The Plaintiff be ordered to discharge the loan to Agricultural Finance Corporation to facilitate performance of the Sale Agreement dated the 14th day of July 2020.
- c) Damages for breach of Contract assessed at 20% as per the Agreement dated the 14th of July 2020.
- d) Costs of the suit.
- e) Interest on (b), (c) and (d).

The Plaintiff responded to the Statement of Defence and Counter-Claim on the 19th of February 2021 disputing the allegations in the Counter-Claim and put the Defendant to strict proof thereof.

The Pleadings were subsequently closed and the matter proceeded for full hearing thereof.

PLAINTIFF'S CASE.

At the hearing of the Plaintiff's case, the Plaintiff attended court and gave evidence in support of his case and also defended the allegations contained in the Counter-Claim.

The Plaintiff stated that indeed he is the registered owner of the suit property measuring approximately 100 Acres.

It was the Plaintiff's evidence in chief that he offered for sale the suit property to the Defendant.

The Defendant was a person known to the Plaintiff having grown up together and even have some family based relationship between them.

The Defendant accepted the offer to sale by the Plaintiff and a consideration of Kenya Shillings Three Hundred Thousand (KShs 300,000/-) per acre duly accepted by both parties.

The Plaintiff instructed the firm of Kandie Mutai Mudeizi & Company, Advocates to prepare the appropriate Sale & Purchase of Land Agreement (hereinafter referred as "the Agreement for Sale") with the following Special terms and conditions.

1. The Agreed Purchase Price was Kenya Shillings Thirty Million (KShs 30,000,000/-).
2. A Defendant would pay a sum of Kenya Shillings Eight Million (KShs 8,000,000/-) on execution of the Agreement and the balance of Twenty-Two Million (KShs 22,000,000/-) within Sixty (60) days upon execution of the Agreement.
3. The Defendant was to take possession of the suit property immediately.
4. The Plaintiff shall procure smooth transmission of the suit property to the Defendant by signing relevant consent and transfer forms upon clearing the balance.
5. The Costs of the conveyance shall be shared equally between the two parties.
6. The Agreement is absolute and irrevocable and any party in breach shall be dealt with in accordance to the law prescribed and to pay the other party loss and damages at 20% of the purchase price.

The firm of Kandie Mutai & Mudeizi & Company, Advocates presented for execution the Agreement for Sale on the 14th of July 2020. **(The Sale & Purchase of Land Agreement dated 14th July 2020 was produced as Plaintiff's Exhibit 2ⁿ)**

However, the Plaintiff states that on the date of execution, the Defendant did not have the deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) but promised to pay the same immediately after the execution of the Agreement for Sale.

Based on the trust from the long relationship the parties herein enjoyed, the Plaintiff executed the said Agreement for Sale with expectation that the Defendant would fulfill the condition of paying the deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) on the same day the Agreement For Sale was executed.

Unfortunately, the Defendant failed to do so and instead has been making staggered payments which in total up to the time of hearing this suit was only Kenya Shillings Six Million Five Hundred Thousand (KShs 6,500,000/-) **(Statements of Bank Accounts in Co-operative Bank and Equity Bank were produced as Plaintiff's Exhibit 6)** to prove the same.

In addition to the above breach, the Defendant unlawfully and forcefully took possession of the suit property from the Plaintiff and has been utilizing the same for commercial purposes to the detriment of the Plaintiff.

Upon the lapse of the Completion period provided in the Agreement for Sale, the Plaintiff through the firm of Bob Okumu & Company, Advocates wrote a letter dated 30th September 2020 (**produced as Plaintiff Exhibit 3**) to the Defendant outlining the various breaches that had arisen and the Plaintiff's decision to terminate the entire Purchase Agreement including prohibiting the Defendant from undertaking further activity on the suit property.

Despite the Letter dated 30th September 2020 being properly served on the Defendant, no steps have been taken by the Defendant to remedy the breaches and or hand over possession back to the Plaintiff necessitating the filing of this suit.

In conclusion the Plaintiff asked the Court to grant the prayers sought in the Plaint dated 19th November 2020.

DEFENDANT'S CASE.

The Defendant in support of this Defence and Counter-Claim appeared in person to give evidence.

The Defendant confirmed that indeed there was an offer to purchase made by the Plaintiff as pertains the suit property.

The Defendant confirmed that all the terms and conditions in the Agreement for Sale were duly accepted by the execution of the Agreement For Sale dated 14th of July 2020.

The Defendant in his evidence in chief states that the full deposit of Kenya Shillings Eight Million (Kenya Shillings 8,000,000/-) was paid on execution of the Purchase Agreement.

The Defendant testified that indeed the Plaintiff acknowledged receipt of the deposit of Kenya shillings Eight Million (KShs 8,000,000/-) on the face of the Agreement for Sale under Clause 2 in the Special Terms and conditions therein.

The Defendant further testified that having duly complied with the requirement regarding the Deposit, the possession of the suit property became vested in the Defendant as per Clause 3 of the Terms and Conditions of the Agreement For Sale.

The Defendant testified that he has invested massively in the suit property since taking possession and any dispossession of the suit property would result to massive losses to him.

As regards the balance of Kenya Shillings Twenty-Two Million (KShs 22,000,000/-) the Defendant admits that the same has not been paid as provided in the Agreement For Sale.

According to his testimony, the Defendant stated that upon payment of the initial deposit of Kenya Shillings Eight Million (KShs 8,000,000/-), the Defendant initiated a process to clear the balance through a facility offered by a financial institution.

As a requirement of due diligence, the financial institution required an official search of the suit property to establish the details and legal ownership.

To the surprise of the Defendant, the official search regarding the suit property revealed that it was charged to the Agricultural Finance Corporation by the Plaintiff for a sum of about Kenya Shillings Ten Million (KShs 10,000,000/-). (**The official search dated 27/11/2021 is produced as Defence Exhibit 1**).

As a result of the encumbrance of Kenya Shillings Ten Million (KShs 10,000,000/-) by the Agricultural Finance Corporation, the Defendant states that he has not been able to secure the facility to clear the balance of Kenya Shillings Twenty-Two Million (KShs 22,000,000/-)

The Defendant blames the Plaintiff for failure to make full disclosure of the suit property which has frustrated his ability to access the Original title to the suit property or obtain the relevant consents from the various government offices to charge the suit property and clear the balance of the Purchase Price.

In conclusion thereof, the Defendant prayed that the Plaint dated 19th November 2020 be dismissed and the prayers in the Counter-Claim dated 25th January 2021 be granted.

ANALYSIS OF EVIDENCE & THE LAW.

As a legal practice, parties are required to prepare and file a list of issues for determination by the Court prior to commencement of the hearing but in this particular case, none of the parties filed any issues for determination.

The Court however has noted that each party has identified various issues for determination in their respective submissions and have considered them in coming upon with those issues that will guide the Court in determining in this matter.

There are a number of issues that the Court has identified as Core issues for determination which are as follows:-

A) DID THE DEFENDANT COMPLY WITH THE REQUIREMENT REGARDING THE DEPOSIT AS PROVIDED UNDER THE SPECIAL TERMS & CONDITIONS OF THE AGREEMENT FOR SALE?

B) IS THE DEFENDANT ENTITLED TO POSSESSION AND OCCUPATION OF THE SUIT PROPERTY?

C) DID THE PLAINTIFF FAIL TO DISCLOSE A MATERIAL FACT AS REGARDS THE OUTSTANDING LOAN TO AGRICULTURAL FINANCE CORPORATION PRIOR TO EXECUTION OF THE AGREEMENT FOR SALE?

D) DID THE PLAINTIFF FAIL TO PRODUCE THE COMPLETION DOCUMENTS AT THE COMPLETION DATE AS REQUIRED BY THE AGREEMENT FOR SALE?

E) WAS THE LETTER DATED 30/09/2020 BY THE FIRM OF BOB OKUMU & COMPANY ADVOCATES PROPER TO TERMINATE THE AGREEMENT FOR SALE DATED 14TH JULY 2020?

F) WHAT REMEDIES ARE ENTITLED TO THE PLAINTIFF AND THE DEFENDANT?

It is on the background of the above issues that the Court proceeds to make a determination of these proceedings.

A) DID THE DEFENDANT COMPLY WITH THE REQUIREMENT REGARDING THE DEPOSIT AS PROVIDED UNDER THE SPECIAL TERMS & CONDITIONS OF THE AGREEMENT FOR SALE?

Whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of contract.

Section 3(3) of the Law of Contract reads as follows;-

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) The contract upon which the suit is founded:

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”

A perusal of the Agreement For Sale dated 14th July 2020 and produced as Plaintiff’s Exhibit 2 confirms that the above requirements of the law were complied at the point of preparing the Agreement for Sale.

The consequence of the compliance above therefore makes the Agreement for Sale dated 14th July 2020 legal and binding on the Parties in this suit and can be relied upon by the Court in the determination of this suit.

The key Terms and Conditions of the Agreement For Sale dated 14TH JULY 2020 were as follows;-

1. The Agreed Purchase Price was Kenya Shillings Thirty Million (KShs 30,000,000/-).
2. A Defendant would pay a sum of Kenya Shillings Eight Million (KShs 8,000,000/-) on execution of the Agreement and the balance of Twenty-Two Million (KShs 22,000,000/-) within Sixty (60) days upon execution of the Agreement.
3. The Defendant was to take possession of the suit property immediately.
4. The Plaintiff shall procure smooth transmission of the suit property to the Defendant by signing relevant consent and transfer forms upon clearing the balance.
5. The Costs of the conveyance shall be shared equally between the two parties.
6. The Agreement is absolute and irrevocable and any party in breach shall be dealt with in accordance to the law prescribed and to pay the other party loss and damages at 20% of the purchase price.

The first issue by the Plaintiff is that the Defendant failed to comply with Clause 2 of the Special Terms and Conditions contained in the Agreement For Sale dated 14th July 2020.

According to the Plaintiff’s testimony, the Defendant was required to pay a sum of Kenya Shillings Eight Million (KShs 8,000,000/-) on or before execution of the Agreement for Sale.

However, on the date of signing the Agreement For Sale, the Defendant had not paid the deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) but promised to transfer the same once the Agreement for Sale was executed.

Based on trust and the long relationship which existed between the Plaintiff and Defendant herein, the Plaintiff proceeded to execute the Agreement for Sale with a belief that the deposit would be transferred by the Defendant immediately thereafter.

Unfortunately and in contravention of the Agreement For Sale, the Defendant failed to deposit the entire amount of Kenya Shillings Eight Million (KShs 8,000,000/-) as per the term of the Agreement For Sale and has never complied with this term up to when the matter was being heard by this Court.

Instead, the Defendant made various staggered deposits to the Plaintiff's accounts in Equity Bank and Co-operative Bank amounting to Kenya Shillings Six Million Five Hundred Thousand (KShs 6,500,000/-) only. ***(The Plaintiff relied on the Plaintiff's Exhibit 6 to prove the payments received.)***

The Defendant on the other hand testified and confirmed that the initial deposit to be paid on execution of the Agreement For Sale was Kenya Shillings Eight Million (KShs 8,000,000/-)

The Defendant testified that the entire deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) had indeed been paid at the execution of the Agreement For Sale and duly acknowledged on the face of the Agreement For Sale under Paragraph 2 of the Special Terms and Conditions thereof.

Clause 2 in the Special Terms and Conditions provided in the Agreement For Sale provides as follows;-

“The Seller acknowledges a receipt of Kenya Shillings Eight Million (KShs 8,000,000/-) only on signing of this Agreement leaving a balance of Kenya Shillings Twenty-Two Million (KShs 22,000,000/-) the same to be paid within Sixty (60) days upon execution of this Agreement.”

Clearly therefore, the Court's first issue is whether or not the deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) was indeed paid by the Defendant and received by the Plaintiff as provided in Clause 2 of the Agreement For Sale?

The Plaintiff has provided two bank accounts from namely account No. 114xxxxxxx (Equity Bank) and Account No.011xxxxxxxxxxxxx (Co-operative Bank).

The amounts received in the two accounts being operated by the Plaintiff are as follows;-

a) Account 114xxxxxxx- 15th July 2020- Cash Deposit – KShs 411,000/-

15th July 2020- Cash Depoist – KShs 589,000/-

6th August 2020-Transfer- KShs 800,000/-

7th August 2020- Transfer- KShs 900,000/-

7th August 2020- Transfer- KShs 300,000/-

b) Account 011xxxxxxxxxxxxx- 15th July 2020- Cheque- KShs 1,000,000/-

7th August 2020- Transfer – KShs 2,500,000/-.

The total amount received in these two accounts produced as Plaintiff's Exhibit 6 is Kenya Shillings Six Million Five Hundred Thousand (KShs 6,500,000/-).

The Defendant in his evidence in chief and on Oath stated that the required deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) was paid on or before execution of the Agreement For Sale.

The Defendant's position is that the Plaintiff duly acknowledged the same on the face of the Agreement For Sale under Clause 2 and repeated the same acknowledgement in the Demand letter dated 30/09/2020 from the firm of Bob Okumu & Company, Advocates.

During cross-examination and again under Oath, the Defendant altered his evidence by saying that on the date of execution, a deposit of Kenya Shillings Four Million (KShs 4,000,000/-) was made in cash, then a further Kenya Shillings Two Million Five Hundred Thousand (KShs 2,500,000/-) at a latter date and the last payments were done through Pesalink amounting to Kenya Shillings Seven Hundred Thousand (KShs 700,000/-). ***(The Defendant produced as Defence Exhibit 2 (B, C & D) screen shots of the confirmation text messages regarding the transfers.***

However, the Defendant was unable to produce any proof of payment as appertains the Deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) at the hearing but instead insisted that the same had been fully paid and acknowledged even in the Demand Letter done by the

Plaintiff dated 30th September 2020 by the Advocate Bob Okumu & Company, Advocates.

It is a settled principle of law that **“HE WHO ALLEGES MUST PROVE”**.

The Plaintiff’s evidence is clear that the deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) was not paid on the 14th July 2020 and has never been paid up to date as envisaged in Paragraph 2 of the Special Terms and Conditions of the Agreement For Sale.

The Plaintiff admits that the Defendant sent some payments through Pesalink upon exchange of some text messages through their telephone numbers but denied the same to be Kenya Shillings Seven Hundred Thousand (KShs 700,000/-) as pleaded by the Defendant and instead acknowledges Kenya Shillings Five Hundred Thousand (KShs 500,000/-).

The Court has gone through the Text Confirmation messages produced by the Defendant as Defence Exhibit 2 (a-d) and identify the Defendant indeed undertook the following transactions in favour of the Plaintiff:-

- a) REF: 100399098683- Amount- KShs 200,000/-
- b) REF: 100399100726-Amount – KShs 200,000/-
- c) REF: 100399101419-Amount – KShs 100,000/-

The Court takes notice that the transaction REF: 100399100726 for the sum of Kenya shillings Two Hundred Thousand (KShs 200,000/-) has been printed twice but reflect one and the same transaction in terms of the transaction code and the amounts therein.

Looking at the above payments proved at the hearing of this matter, the total monies that have exchanged hands is a total of Kenya Shillings Seven Million (KShs 7,000,000/-).

The Plaintiff in his testimony admitted to executing the Agreement For Sale without receiving the Deposit of Kenya Shillings Eight Million (KShs 8,000,000/-).

However, his explanation was that having known the Defendant for all those years, he had not reason to doubt that the deposit was would be effected immediately upon execution as promised by the Defendant.

The Court believes that this is an innocent resumption by the Plaintiff and the Defendant should not now take undue advantage of it.

Referring to the Defendant’s Exhibit 2 (a-d), the text message of Saturday 8th August at 10.05 clearly points to an understanding that the amount paid by the Defendant to the Plaintiff as at that time was Kenya Six Million Five Hundred Thousand (KShs 6,500,000/-) which would be increased to Kenya Shillings Ten Million (KShs 10,000,000/-) by the following Wednesday.

Clearly therefore, the Defendant can not run away from the fact that the sum of Kenya Shillings Eight Million (KShs 8,000,000/-) was not made at the time of execution of the Agreement For Sale or as promised immediately thereafter.

The Plaintiff’s act to execute the Agreement For Sale even without actually receiving the intended Deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) demonstrates the level of trust the Plaintiff had with the Defendant.

It is therefore the finding of this Court that the Defendant has only paid a sum of Kenya shillings Seven Million (7,000,000/-) and not the agreed Kenya Shillings Eight Million (KShs 8,000,000/-) as demanded under Clause 2 of the Special Terms and Conditions in the agreement For Sale.

It is also important to make a finding that the amount of Kenya Shillings Seven Million (KShs 7,000,000/-) so far paid was not done on the date agreed upon which is 14th July 2020.

In Conclusion therefore, the Court finds the Defendant to have breached the Agreement For Sale by failing to pay the deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) by the 14th of July 2020 as required.

B) IS THE DEFENDANT ENTITLED TO POSSESSION AND OCCUPATION OF THE SUIT PROPERTY?

Clause 3 of the Agreement For Sale provided as follows:-

“ The Purchaser shall take immediate possession of the aforesaid land”

The Plaintiff in his evidence in chief confirmed that the Defendant took possession of the suit property around 30th September 2020.

According to the Plaintiff, the Defendant’s forceful entry and occupation of the suit property is illegal and as a result of that, a report was made at Junction Police Post.

Similarly, a Demand Letter was done by the firm of Bob Okumu & Company, Advocates which in part prohibited the Defendant from taking possession of the suit property or undertake any activities thereof.

The Defendant on his part claimed to be in lawful possession due to the fact that Clause 3 expressly granted him possession of the suit property without any limitations once the Agreement For Sale is fully executed.

The question therefore that begs to be answered in this issue is at what point was the Defendant entitled to take possession of the suit property?

Looking at the sequence of the terms contained in the Special Terms and Conditions of the Agreement For Sale, the issue of possession was a resultant action after the payment of the Deposit as required in Clause 2 thereof.

The Court's view is that the Defendant was to satisfy and/or comply with Clause 2 of the Special Terms and Conditions as regards payment of Kenya Shillings Eight Million (KShs 8,000,000/-) to gain possession of the suit property.

The Defendant through the pleadings filed in Court, the evidence adduced during the hearing and evidence produced herein (Defence Exhibit 3 (i-xiv) which are Photographs), has confirmed that indeed he took possession of the suit property and is now in occupation.

The question therefore that begs to be answered is whether or not the Defendant's occupation and possession on the suit property is lawful and legal.

The Courts finding is that the Defendant's occupation and possession of the suit property is not lawful and/or legal.

The Court having made a finding that the Defendant failed to comply with Clause 2 of the Special Terms and Conditions by failing to pay the initial deposit of Kenya Shillings Eight Million (KShs 8,000,000/-), the resultant right to take possession envisaged under Clause 3 of the Special Terms and Conditions in the Agreement of Sale could not be initiated and/or enjoyed by the Defendant.

In essence therefore, the Defendant's occupation, possession and/or utilization of the suit property is illegal and unlawful as per the Agreement For Sale.

C) DID THE PLAINTIFF FAIL TO DISCLOSE A MATERIAL FACT AS REGARDS THE OUTSTANDING LOAN TO AGRICULTURAL FINANCE CORPORATION PRIOR TO EXECUTION OF THE AGREEMENT FOR SALE?

Clause 4 of the Agreement For Sale places an obligation on the Plaintiff to procure the relevant completion documents and ensure smooth transmission of the suit property to the Defendant.

Clause 4 reads as follows;

“The Seller shall procure smooth transmission of the aforesaid property to the Purchaser by signing relevant consent and transfer forms upon being cleared of the balance.”

Clause 2 of the Agreement For Sale bounds the Purchaser (Defendant) to pay the balance of Kenya Shillings Twenty-Two Million (KShs 22,000,000/-) within Sixty (60) Days upon execution of the Agreement For Sale.

Clause 2 reads as follows;-

“A Defendant would pay a sum of Kenya Shillings Eight Million (KShs 8,000,000/-) on execution of the Agreement and the balance of Twenty-Two Million (KShs 22,000,000/-) within Sixty (60) days upon execution of the Agreement.”

The Defendant in the Defence and Counter-Claim dated 25th January 2021 has blamed the Plaintiff for material none disclosure and inability to complete the Agreement For Sale.

The Defendant during the hearing adduced evidence to the effect that in an effort to pay the balance of Kenya Shillings Twenty-Two Million (KShs 22,000,000/-), he approached a financial institution to access a financial facility.

According to the Defendant, the Loan approval requirements needed various documents which were in the possession of the Plaintiff.

These various documents included an Original Search, Original Title Deed and Consent To Sell from the Land Control Board which ideally are the completion documents provided in Clause 4 of the Agreement for Sale.

The Defendant states in his evidence in chief that he tried to reach the Plaintiff and obtain the same but the Plaintiff become elusive thereby prompting the Defendant to conduct an independent search on the title to ascertain the legal status thereof.

It is only on conducting an official search with the Ministry of Lands on the 27/11/2020 that the Defendant discovered that the suit property had been charged to Agricultural Finance Corporation for a debt of Kenya Shillings Ten (10) Million on the 30.09.19, a fact that was not disclosed to him by the Plaintiff.

The net effect of the encumbrance on the Title was that the Defendant was not able to get an approval of the financial facility and therefore has not been able to clear the balance of the Purchase Price.

The Court in tackling this issue has perused the Agreement For Sale thoroughly and indeed note that the issue of the Kenya Shillings Ten Million (KShs 10,000,000/-) encumbrance was not captured in the Agreement For Sale.

Both parties during the hearing gave contradicting evidence with the Plaintiff stating that he had disclosed the fact to the Defendant and on the other hand the Defendant stating that he discovered the encumbrance through the search done on the 30.09.2019.

The question that arises is whether or not the existence of the Charge on the suit property was a material fact which required to be disclosed to the Defendant?

Clause 4.1. Of the Law Society Of Kenya Conditions of Sale provides as follows:-

“Unless any encumbrances are precisely pointed out in the Agreement, it is presumed that the Vendor sells the property free from any encumbrances.”

In the Court’s view, the existence of an encumbrance is an important fact which any Vendor must disclose to a Purchaser before beginning any disposition in land.

An encumbrance is a legal interest securing rights of a third party as regards a property or asset and therefore any disposition thereof must be in accordance to the instruments creating such an encumbrance.

The Agreement For Sale was done on the 14th of July 2020 which was after 30th September 2019 when the encumbrance was registered.

However, it is strange that the mutual Counsel representing both parties failed to mention the existence of this encumbrance which now has found its way into this litigation.

Be as it may, the Court’s finding is that Plaintiff herein has not produced any evidence either written or through oral evidence by a witness that there was disclosure of the encumbrance to the Defendant prior to the execution of this Agreement For Sale.

In conclusion therefore, the Court agrees with the Defendant that there was no disclosure of a material fact by the Plaintiff as regards the existence of the Charge of Kenya Shillings Ten Million (KShs 10,000,000/-) prior to execution of the Agreement For Sale.

D) DID THE PLAINTIFF FAIL TO PRODUCE THE COMPLETION DOCUMENTS AT THE COMPLETION DATE AS REQUIRED BY THE AGREEMENT FOR SALE?

The Defendant has also raised another issue to the effect that the Plaintiff was unable to provide and/or avail the relevant Completion documents at the Completion date under Clause 7 of the Defence and Counter-Claim dated 25th January 2020.

The Defendant in his evidence in chief stated that all the appropriate arrangements had been done by a financial institution to finance and clear the balance of the Purchase Price once the Completion documents were availed by the Plaintiff.

The Defendant emphatically and categorically stated that he is still capable of completing the balance of the Purchase Price of Kenya Shillings Twenty-Two Million (KShs 22,000,000/-) if the Plaintiff will avail the appropriate Completion documents.

According to Clause 4 in the Special Terms and Conditions of the Agreement For Sale, the Completion documents can only be availed upon full payment of the Purchase Price.

The fact that the Defendant has not completed the Deposit of Kenya Shillings Eight Million (KShs 8,000,000/-) in the first place or the balance of the purchase price thereof dismantles the Defendant’s demand that the Completion Documents should be made available.

The Court’s view is that the Completion Documents can only be made available by the Plaintiff on full payment of the Purchase Price or issuance of an appropriate and acceptable professional undertaking from either a financial institution or an Advocate of the High Court of Kenya on behalf of the Defendant.

In essence therefore, the Defendant’s allegation that the Plaintiff has not availed the Completion documents to enable him Complete the transaction is not valid or accepted by this Court.

E) WAS THE LETTER DATED 30/09/2020 BY THE FIRM OF BOB OKUMU & COMPANY ADVOCATES PROPER TO TERMINATE THE AGREEMENT FOR SALE DATED 14TH JULY 2020?

Another issue that has featured over and over this matter is the Demand Letter dated 30/09/2021 (hereinafter referred as “the Plaintiff’s Demand Letter”) by the firm of Bob Okumu & Company, Advocates.

The Plaintiff in his evidence in chief indicated that upon the Defendant failing to adhere to the Special Terms and Conditions of the

Agreement For Sale, he instructed a lawyer to write and serve the Defendant with the Plaintiff's Demand Letter.

The Plaintiff's Demand Letter in principle notified the Defendant of the failure to clear the balance of the Purchase Price amounting to Kenya Shillings TwentyTwo Million as required by the Agreement For Sale.

Consequently thereof, the Plaintiff's Demand Letter drew the Defendant's attention to Clause 6 of the Special Terms and Conditions of the Agreement For Sale regarding the penalty of 20% levied upon any breach and further prohibited the Defendant from staying in possession of the suit property or undertaking any activities thereof.

The Defendant upon receipt of the Plaintiff's Demand Letter failed to comply with the same on the ground that the Agreement For Sale specifically provided that it was absolute and irrevocable.

In other words, the Plaintiff can not rescind the Agreement For Sale save for damages at 20% of the Purchase Price if any party is in breach thereof.

This maybe explains why the Agreement For Sale has no provisions for the termination of the Agreement For Sale or rescinding.

The Agreement For Sale also omitted to provide that time is of essence in terms of compliance in the terms and conditions thereof.

In the cited Case of the *Court Appeal known as Njamunya Vs Nyaga (1983) KLR 282*, the Court held as follows;-

“where it is not stipulated in the contract that time is of essence, the notice must be given to the defaulting party and that notice is what will make time to be of essence.”

Clearly, it is not strange for an Agreement For Sale to be prepared and/or executed without an express provision that time is of essence.

However, that omission to include that time is of essence does not render the parties therein helpless.

According to the Court of Appeal finding hereinabove, an aggrieved party can correct this omission by issuing a Notice stating the breach or default by the defaulting party and pointing out that time is of essence.

If the defaulting party fails to remedy the default issued hereinabove, then a proper Completion Notice of Twenty (21) days as per the Law Society Conditions of Sale should be issued and either party thereof will be at liberty to terminate the said Agreement For Sale.

Looking at the Plaintiff's Demand Letter, if fails to comply with either a Notice making time to be of essence or a Completion Notice under the Law Society Conditions of Sale.

In conclusion therefore, the Plaintiff's Demand Letter is unprocedural and incapable of terminating any legal rights under the Agreement For Sale.

F) WHAT REMEDIES ARE AVAILABLE TO THE PLAINTIFF & DEFENDANT?

Looking at the outcome of the issues discussed hereinabove from A-D, it is clear that both parties in the suit have breached the terms of the Agreement For Sale or the Legal Provisions of the Law.

Clearly, both parties to the Agreement for Sale are at fault in this matter and the court is duty bound to make directions in an effort to uphold the intention of the parties contained in the Agreement For Sale.

One clear intention contained in the Agreement For Sale is the disposition of the suit property.

It is no wonder both parties in this matter have prayers of Specific Performance of the Contract.

An over view of the pleadings, oral evidence adduced at the hearing and documentary evidence produced, the Court is of the view that the Agreement For Sale under litigation can be completed as per the intentions of the parties thereof.

The Court therefore makes the following Orders as regards the dispute herein;-

1. The Sale & Purchase of Land Agreement dated 14th July 2020 is valid and binding to the Plaintiff and Defendant.
2. The Defendant has only paid a sum of Kenya Shillings Seven Million Only (KShs 7,000,000/-) under the Sale & Purchase of Land Agreement dated 14th July 2020.
3. The outstanding Purchase Price under the Sale & Purchase of Land Agreement dated 14th July 2020 is Kenya Shillings Twenty Three Million (KShs 23,000,000/-)

4. The Defendant be and is hereby directed to Complete the entire Purchase Price of Kenya Shillings Twenty Three Million (KShs 23,000,000/-) within Sixty Days (60) from today's date.
5. The amount of Kenya Shillings Twenty Three Million (KShs 23,000,000/-) shall be deposited into a joint interest earning account to be opened and operated by advocates on record.
6. Upon depositing of the balance of Kenya Shillings Twenty Three Million (KShs 23,000,000/-) by the Defendant in the Joint Account, the Advocates shall transfer the outstanding monies owing to Agricultural Finance Corporation within Seven (7) Days thereof and procure the Original Title of the suit property together with the appropriate discharge documents duly executed.
7. The Plaintiff shall be required to procure and surrender the relevant Completion Documents as regards the suit property within Fourteen (14)Days from the time of receipt of the Original Title and discharge documents from the Agricultural Finance Corporation and ensure smooth registration of the suit property into the name of the Defendant and/or his nominee(s).
8. Upon successful registration of the suit property into the Defendant's name or its nominees, the Advocates on record shall transfer all the funds in the joint account to the Plaintiff within Seven (7) Days from the date of registration of the Transfer from the Plaintiff to the Defendant.
9. In the event that the Defendant is not able to comply with direction No.4 hereinabove, the Plaintiff shall be at liberty to terminate the Sale & Purchase of Land Agreement dated 14th July 2020 upon issuance of a Twenty One (21) days Completion Notice to the Defendant, time being of essence.
10. Upon expiry of the Completion Notice issued hereinabove No.9, Plaintiff shall be entitled to withhold 20% of the Purchase Price amounting to Kenya Shillings Six Million (KShs 6,000,000/-) and refund the balance of Kenya Shillings One Million (KShs 1,000,000/-) within Thirty (30) Days from the date of expiry of the Completion Notice.
11. Similarly, upon expiry of the Completion Notice issued hereinabove No.9, an eviction Order shall automatically issue against the Defendant and its enforcement shall be done through an authorized Court Bailiff with the Officer in Charge of Kilgoris Police Station providing the necessary security accordingly.
12. Each party shall bear its own costs of these proceedings.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 24TH DAY OF JANUARY, 2022.

HON. EMMANUEL. M. WASHE

JUDGE

In the presence of:

Court Clerk: Matiko

Counsel for Plaintiff: Mugumya

Counsel for defendant: No appearance