



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NYAMIRA**

**ELC CASE NO 69 OF 2021**

**(FORMERLY KISII ELC CASE NO. 240 OF 2016)**

**RAEL MORAA ONDIKA.....PLAINTIFF**

**VERSUS**

**1. SWANYA LTD**

**2. ZADOK EAST AFRICA LTD.....DEFENDANTS**

**JUDGMENT:**

The Plaintiff filed this suit on **10.08.2016** against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants seeking for the following orders: -

- i. A declaration that the sale agreement executed between the Plaintiff and the 1<sup>st</sup> Defendant be rescinded, repudiated and/or abandoned owing to material breach on the part of the 1<sup>st</sup> Defendant.**
- ii. An Order directing the Defendants to return the Title issued to them in respect of the suit land and the land Registrar to rectify, and/ or alter the register in respect of parcel number GESIMA SETTLEMENT SCHEME/1075 and revert and/or restore the Plaintiff's name in the register and issue a Title Deed to that effect.**
- iii. An order that the Defendants have forfeited the deposit paid to the Plaintiff owing to the breach of the agreement on his part.**
- iv. Costs of the suit and interests.**

Both Defendants filed a joint amended statement of Defence and a counterclaim dated 20/7/2020 seeking the following orders: -

- (a) A declaration that the 2<sup>nd</sup> defendant is the lawful registered proprietor of the parcel of land known as L.R. NO. GESIMA SETTLEMENT SCHEME/1075.**
- (b) An Order directing the Plaintiff to surrender the original Title deed of GESIMA SETTLEMENT SCHEME/1075 and eviction of the Plaintiff from the suit land.**
- (c) An Order directing that the balance of the purchase price be paid into Court for collection by the Plaintiff.**
- (d) An order directing the Plaintiff to give vacant possession of the suit property.**
- (e) An eviction order against the Plaintiff in default of vacant possession within reasonable time as the Court may deem fit.**
- (f) A permanent injunction directed against the Plaintiff either by herself or through any of her agents and/or servants or anyone acting on her behalf from trespassing, entering, erecting, constructing of any form of structures alienating and/or disposing off the parcel of land known as GESIMA SETTLEMENT SCHEME/ 1075.**

At the Hearing of the case all the parties called their witnesses who testified, adopted their witness statements and produced documents to support their respective cases.

The Plaintiff adopted her written statement dated 10/8/2016 and a supplementary one dated 18/1/21. She testified that she acknowledges that

she sold a portion of GESIMA SETTLEMENT SCHEME/904 measuring 4 Acres and a shop measuring 50 by 100 feet to the 1<sup>st</sup> Defendant all at a total purchase price of Kshs. 5,000,000/=. The Plaintiff says that she was obligated to sell part of the 10 Acre piece of land known as GESIMA SETTLEMENT SCHEME/904 to get money to meet the medical needs of her husband who was ailing from a kidney failure and who later succumbed. The sale agreement is dated 15/5/15. She received the deposit of Kshs. 1,000,000/= on 13/5/2015 before signing the sale agreement which money was deposited in her Bank Account number 01109361871360, Co-operative Bank. A further Kshs. 1,000,000/= was paid to her by way of 2 cheques one for Kshs. 900,000/= and the other one for Kshs. 100,000/= upon the signing of all the Transfer forms in favour of the 1<sup>st</sup> Defendant. She also gave the Title Deed to the 1<sup>st</sup> Defendant to enable her do a search at the Lands office. The balance of the purchase price was payable within 90 Days upon presentation of the Title Deed in the names of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was then invited to get his own Surveyor to confirm the measurements of the portion he was buying. The 1<sup>st</sup> Defendant was to take immediate vacant possession of the Suit land awaiting payment of the full purchase price. Immediately the 2<sup>nd</sup> payment of Kshs. 1,000,000/= was made the Plaintiff signed the documents for sub-division as well as blank Transfer forms in favour of the 1<sup>st</sup> Defendant. She further handed to Obwocha Advocate's offices copies of her passport size photographs. The balance of the purchase price has never been paid to date. The Plaintiff testified that since then she never set her eyes on the Representative of the 1<sup>st</sup> Defendant, Mr. Victor Swanya Ogeto with whom she had all along dealt. Her efforts to trace him through his telephone number given to her bore no fruit. She was also not even allowed entry to Mr. Swanya's house. The sale Agreement states clearly that the firm of Obwocha & Company Advocates of P.O. Box 605 was acting for the 1<sup>st</sup> Defendant. She testified that Mr. Swanya, the 1<sup>st</sup> Defendant's representative in the contract advised her against taking another Advocate because it would have been very expensive for her. There is no mention of the Plaintiff's Advocates in the Sale Agreement. The Plaintiff said in cross-examination that she knows nothing about the 2<sup>nd</sup> Defendant with whom she has never dealt. After failing to get the balance of the purchase price as well as failing to trace Mr. Swanya, the Plaintiff wrote 2 Demand letters through her Advocates, O.M. Otieno & Company, i.e. on 10/6/2016 and 8/8/2016 respectively. By this time the land had already been sub-divided and L.R. Number transferred to the 2<sup>nd</sup> Defendant, a sister company of the 1<sup>st</sup> Defendant with Mr. Swanya as a Director of both. She testified that she is not aware of ever turning to the office to sign a second sale agreement dated 6/6/2015 or at all. This was done without the Plaintiff's knowledge and/or consent. While the first letter of 10/6/2016 demanded the completion of the sale agreement on the part of the 1<sup>st</sup> Defendant the 2<sup>nd</sup> letter of 8/8/2016 communicated the rescission of the agreement on the Plaintiff's part. Both letters were dispatched to the 1<sup>st</sup> Defendant's Advocates, the proprietor of which is now Deceased. Whereas the 1<sup>st</sup> letter was well received the 2<sup>nd</sup> one was received under protest with the following remarks:

**“Received under protest as we are not party to the said agreement. Kindly address the purchasers directly”.**

The Plaintiff concludes her evidence by testifying that when she visited the late Mrs. Obwocha, Advocate in her office to seek assistance the Advocate said that she could also not reach Mr. Swanya the only known Director of the 1<sup>st</sup> Defendant known to her. He was out of reach even electronically. In an interesting twist Mrs. Obwocha handed over a new Title Deed to the Plaintiff. The same read GESIMA SETTLEMENT SCHEME/1075 measuring 2.0 Hectares. It was pryingly and questionably in the name of the 2<sup>nd</sup> Defendant. The late Advocate said that she no longer represented the 1<sup>st</sup> Defendant. The Plaintiff said on cross-examination by Mr. Onkangi, for the 2<sup>nd</sup> Defendant, that she was never invited to the Land Control Board after signing the sub-division documents. She laments that she did not know that she was tricked by the 1<sup>st</sup> Defendant and her Advocates to hand over the Title Deed for purposes of doing a search for the suit land yet the main purpose was mischievous, to actualize the transfer to a person who was not party to the agreement.

The Plaintiff's only witness, one Mr. Charles Ndege Omae adduced evidence to the effect that he witnessed the agreement being signed and the 2 cheques totaling Kshs. 1,000,000/= being handed over to the Plaintiff on behalf of the 1<sup>st</sup> Defendant but never witnessed any other payment nor refund of any monies.

The Plaintiff produced the following exhibits in support of her case;

S/No.	Name/Description	Exhibit No.
a.	Land Sale Agreement dated 15.05.2015	‘pExh-1’
b.	Certificate of Title to 2 <sup>nd</sup> Defendant	‘pExh-2’
c.	Official Land search on 2 <sup>nd</sup> Defendant	‘pExh-3’
d.	Certified Copy of Green Card	‘pExh-4’
e.	Application for registration of caution	‘pExh-5’
f.	Demand notice dated 10.06.2016	‘pExh-6’
g.	Letter of repudiation dated 08.08.2016	‘pExh-7’

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On its part, the 1<sup>st</sup> Defendant, through its Director, **MR. VICTOR SWANYA OGETO**, who is an Advocate of the High Court of Kenya, Deputy chairman of Wiper Democratic party and the founder of Swanya Foundation which sponsors orphans, testified as the main witness and also called 2 other witnesses. Mr. Swanya adopted his written statement dated 9/11/2017 as his evidence in chief. He says that sometime in March 2015 he was approached by one Reuben Nyasani who informed him that he had a friend who was going through challenges in the family and who wished to dispose off some property in order to settle some medical Bills. He developed interest. The land was registered in the Plaintiff 's name. Her husband then explained to Mr. Swanya that the Plaintiff was his second wife who had had problems with her co-wife and wanted to sell her portion so that she could buy land in Nakuru and relocate there. Time was indicated not to be of the essence because of the anticipated resistance by the first wife and her family. It was later agreed that the acreage would be increased to 5 Acres and the 1<sup>st</sup> Defendant then paid a total of Kshs. 2,500,000/=. He then paid all the transfer expenses upon which Titles were issued including other Titles for some other purchasers. Then came in the 2<sup>nd</sup> Defendant who wanted to purchase the land from the Plaintiff because the 1<sup>st</sup> Defendant was having financial challenges but unfortunately the Plaintiff took away the Title Deed from the 1<sup>st</sup> Defendant's Advocates. The 1<sup>st</sup> Defendant was "willing to pay the balance of Kshs.1,900,000/=" but the Plaintiff now demanded that it had to be Kshs. 10,000,000/=. He said the 1<sup>st</sup> Defendant company was all along willing to complete the contract and that the company never received any Demand Notice. He continued with his testimony by saying that the 1<sup>st</sup> Defendant had counterclaimed for the confirmation of the transfer to the 2<sup>nd</sup> Defendant, quiet possession and a permanent injunction against the Plaintiff from evicting the 2<sup>nd</sup> Defendant from the suit property. He said it is not true the 1<sup>st</sup> Defendant received the Demand letter. He concluded his evidence by testifying that given 3 more months the Defendants are willing to complete the agreement. On cross-examination by Mr. Were for the 2<sup>nd</sup> Defendant, Mr. Swanya said that the agreement was that the transfer and sub-division expenses were to be deducted from the purchase price and that the 1<sup>st</sup> Defendant had no objection to the transfer of the suit land to the 2<sup>nd</sup> Defendant. On cross-examination by Mr. Otieno for the Plaintiff, Mr. Swanya said that the firm of Obwocha & Company Advocates was acting on the 1<sup>st</sup> Defendant's instructions but with the obligation to do what was right. He said that it is the Plaintiff who breached the agreement but admitted that the Defendants have never issued any Notice to the Plaintiff. The firm of Obwocha & Company Advocates never brought to the Defendant's attention the receipt of the 2 Demand letters. Finally, he admitted that the disputed agreement of 6/6/2015 was never attested to and that the 2<sup>nd</sup> Defendant was an Assignee of the 1<sup>st</sup> Defendant. When asked by the Court, Mr. Swanya said that the direct transfer to the 2<sup>nd</sup> Defendant was with the mutual agreement with the Plaintiff and that the Assignment was done on 6/6/2015. He also said that when the Plaintiff signed the Transfer forms they were in the name of the 2<sup>nd</sup> Defendant. He admitted that during the first agreement at the Advocate's offices she only signed the sale agreement and not Transfer forms or any other document. On re-examination by Mr. Were, Mr. Swanya said that the terms of the first agreement were explained to the Plaintiff before she appended her signature.

**PW2, YUNUKE KERUBO OKEYO**, told the Court that she is a neighbour to the Plaintiff and the latter approached her and asked her if she could get a buyer for her parcel of land. She got one Reuben Nyasani and passed over the brief to him. After the purchaser was identified, she brought Mr. Swanya and the Plaintiff together and even witnessed the negotiations and later accompanied the two to the Advocate's offices but that she remained outside the office when the agreement was being signed. She testified that it was Mr. Swanya who looked for the lawyer. She concluded that the suit premises is unoccupied to date and that she has never witnessed any refund of the deposit of the purchase price. On cross-examination by Mr. Onkangi for the 2<sup>nd</sup> Defendant, the witness said that Mr. Swanya told her (the witness) that the 1<sup>st</sup> Defendant had paid to the Plaintiff a total of Kshs. 1,900,000/= and that the 1<sup>st</sup> Defendant did not pay any more money because the Plaintiff demanded more. On cross-examination by Mr. Otieno for the Plaintiff, Yunuke admitted in her statement filed in Court that she claimed the acreage sold by the Plaintiff to the 1<sup>st</sup> Defendant was 2 Acres and that they never took minutes during their several meetings.

**PW3, KEVIN MOSIONGO** testified and described himself as Mr. Swaya's personal Assistant. He said that sometime in October 2017 his employer called him and asked him to accompany him to the Plaintiff 's home to deliver some money to her. On arrival they met the Plaintiff and her husband. He was left in the car outside to guard some Kshs. 1,900,000/= in cash carried in a bag. He further said that the Plaintiff refused the money because it fell short of Kshs. 10,000,000/=. They then left and that the 1<sup>st</sup> Defendant has never taken possession of the suit property. He said on cross-examination by Mr. Onkangi that he knew the purchase price to be Kshs. 5,500,000/=. On cross-examination by Mr. Otieno, for the Plaintiff, PW3 said that he had no evidence to show that he was involved in the transaction and that Mr. Swanya opened the bag to him and that the money was in 1,000/= notes.

The 1<sup>st</sup> Defendant produced the following documents in support of her testimony and case;

S/No.	Name/Description	Exhibit No.
a.	Certificates of Incorporation	'pExh-1 <sup>A</sup> & B'
b.	Land Sale Agreements	'DExh-2 <sup>A</sup> & B'
c.	Copy of Title to Gesima S/Scheme 1075	'DExh-3'
d.	Certificate of Search	'DExh-4'

e.	2 Certificates of incorporation 1 for the 1 <sup>st</sup> Defendant and the other one for the 2 <sup>nd</sup> Defendant.	
f.	Power of Attorney from the 2 <sup>nd</sup> Defendant in favour of Victor Swanya Ogeto.	
g.	Transaction Receipt from Co-operative Bank.	
h.	A copy of a cheque for Kshs. 900,000/= in favour of the Plaintiff .	
i.	A copy of a cheque for Kshs. 100,000/= in favour of the Plaintiff.	
j.	A copy of Bank Statement for Swanya Limited.	

The 2<sup>nd</sup> Defendant's sole witness, Caren Nyaboke Moracha, described herself as a Director of the 2<sup>nd</sup> Defendant. She testified that Mr. Swanya is the Managing Director of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant is now the registered owner of the suit property after the same was assigned to her by the 1<sup>st</sup> Defendant after an agreement between the 2 Defendants and that the 2<sup>nd</sup> Defendant has never been given the Title Deed to the same. On cross-examination by Mr. Otieno, Ms Moracha said there were no resolutions by either company on the assignment. She also said that since the 1<sup>st</sup> Defendant was unable to finalize the sale for lack of money, she requested the 2<sup>nd</sup> Defendant to take over the sale but did not involve the Plaintiff. The assignment idea was mooted in June 2015, a month after the sale agreement was entered into. She admitted that at the time of executing the Agreement in May 2015, the transfer forms were not signed. She said that she was not there when Mr. Swanya went to pay the balance but Mr. Swanya said he was going to pay by cash for reasons she did not understand.

#### **What are the Issues for Determination?**

- 1) Whether there was any sale of land agreement entered between the Plaintiff and the 1<sup>st</sup> Defendant for the sale of 4 Acres out of GESIMA SETTLEMENT SCHEME / 904 and was the same properly executed?
- 2) Whether there was any assignment of the sale agreement dated 15/5/2015 between the Plaintiff, the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant in respect of the 4 Acres out of GESIMA SETTLEMENT SCHEME /904?
- 3) Was there any money paid to the Plaintiff by any of the Defendants and if so, how much?
- 4) If the above is in the affirmative, what was the mode of payment?
- 5) Was there any breach of the contract?
- 6) If so, which party is to blame for the breach?
- 7) Was the contract ever rescinded?
- 8) If the above is in the affirmative were there proper notices to rescind the contract served on the breaching party?
- 9) Was the Title Deed for the parcel of land known as No. GESIMA SETTLEMENT SCHEME/1075 registered in the name of the 2<sup>nd</sup> Defendant acquired lawfully.
- 10) Which orders would be appropriate to issue in the circumstances?
- 11) Who bears the costs of the Suit?

#### **Analysis and Determination:**

Parties are bound by their terms of contract and the court only gives effect to the said terms but it has no business inserting any terms and/or conditions to an agreement. The Court cannot even rewrite a Contract between parties.

#### **What were the salient features of the Sale Agreement dated 15/05/2015?**



not concern us. The Plaintiff signed for the Sale Agreement and transfer forms. Kshs. 1,000,000/= was deposited in the Plaintiff's Account No. 01109361871300, Co-operative Bank while Kshs. 1,000,000/= was paid to her in 2 cheques of Kshs. 900,000/= and 100,000/= respectively. I do not buy the Defendants' evidence that the total payment made was Kshs. 2,500,000/= in the absence of any deposit slips. Even arithmetically the 2 don't add up. If the 1<sup>st</sup> Defendant had paid to the Plaintiff Kshs. 2,000,000/= as he testified how come that the balance ended being Kshs. 1.9M. The balance would then have been Kshs. 2.5M and not Kshs. 1.9M. The balance was therefore Kshs. 3,000,000/=. There is also no evidence to show that the Plaintiff entered into a second agreement to sell the land to the 2<sup>nd</sup> Defendant. She was not party to the assignment between the 2 Defendants and the 1<sup>st</sup> Defendant had no capacity to assign and go ahead to transfer to the 2<sup>nd</sup> Defendant what she had not fully paid for. It is also clear that there is no mention of the consent of the Land Control Board meeting that sanctioned the Sub-division of LR. NO. GESIMA SETTLEMENT SCHEME/904 and /or the transfer of LR. NO. GESIMA SETTLEMENT SCHEME/1075 to the second Defendant. These 2 parcels of land are agricultural for which consent is required under the Land Control Act, CAP 302 Laws of Kenya. The Plaintiff testified that she tried to look for the Representative of the 1<sup>st</sup> Defendant, Mr. Swanya with whom she transacted but all in vain. When she went to the 1<sup>st</sup> Defendant's Advocates to persuade the latter to help her trace the 1<sup>st</sup> Defendant, the late Mrs. Obwocha, Advocate responded by saying that she could not also trace Mr. Swanya on phone. Mrs. Obwocha then handed over the Title to L.R. NO. GESIMA SETTLEMENT SCHEME/1075 to the Plaintiff which curiously was now in the name of the 2<sup>nd</sup> Defendant with whom the Plaintiff had no contract.

Mr. Swanya testified that he went to pay the balance of Kshs. 1,900,000/= to the Plaintiff at her home. The 2 witnesses, the 1<sup>st</sup> Defendant Yunuke Kerubo Okeyo and Kevin Mosioma repeated the same in their written statements and orally in court. But curiously, none of the 3 can remember the actual date or month it was. Only Kevin Mosioma mentions that it was in 2016. Not even the 2<sup>nd</sup> Defendants' witness Carren Nyaboke Moracha who also said that Mr. Swanya, the Managing Director of the 2<sup>nd</sup> Defendant, had carried money from the office to pay the Plaintiff, could tell when it was. The Assignee Agreement dated 6/6/2015 is not attested to on the part of the Plaintiff and she has disowned it. This Assignee Agreement goes against condition No.18 which reads as follows: -

**“No amendment to the Agreement shall be effective unless signed in the same manner as this Agreement.”**

Even without being a signature expert one can easily tell that the one appended to the Agreement of 15/5/2015 differs completely with the one signed on the alleged Assignment. Whereas the same reads that Mr. Victor S. Ogeto and Janet N. Ogeto being joint Directors of Swanya Limited and Caren Moracha, a Director of Zadok East Africa Limited did appear before Obwocha & Co. Advocates and Wilfred A. Mutulwa Advocate, respectively and were identified by the respective Advocates, no space was typed and printed providing for the Plaintiff to be identified by an Advocate or anybody else.

On the issue of payment of the balance, one Question that arises here is, if it is indeed true that the 1<sup>st</sup> Defendant went to clear the balance, why did he have to carry cash for such a huge amount of money yet the first payment of Kshs. 1,000,000/= was deposited in the Plaintiff's Account while the second one was made by way of 2 cheques. The 1<sup>st</sup> Defendant was by now aware of the Plaintiff's Account Number 01109361871300 and therefore could have deposited the money therein. Why was the Plaintiff not invited to the 1<sup>st</sup> Defendant's Advocate office to receive the money there? Who in this day and age would want to receive Kshs. 1,900,000/= at a rural set up home? Was there any letter written to the Plaintiff prior to the visit or even a word of mouth informing the Plaintiff that the 1<sup>st</sup> Defendant was going to pay money to her on such and such a day? Assuming that the Plaintiff declined to receive the money, why didn't the 1<sup>st</sup> Defendant then deposit the money in the Plaintiff's Bank Account or to the Advocates' offices for onward remittance? Isn't it also the Defendant's evidence on record that she was unable to raise the balance of the purchase price because she had financial difficulties. Assuming it is true that the 1<sup>st</sup> Defendant visited the Plaintiff's home in 2016 as Kevin Mosioma, the only witness who indicated it was 2016, told the court, even assuming it was 1/1/2016, this was way outside the 90 days agreed upon on 15/5/2015. From 15/5/2015 to the end of the 2015, this was 240 days, 150 days after the agreed completion date. There is no evidence that any Notice or request of extension of time was ever made by the 1<sup>st</sup> Defendant. It is also clear from the Title Deed in favour of Zadok East Africa Limited that the same had been transferred long on 2/10/2015, 91 days before 2016. This was way out of the completion date. And also, the transfer had been effected on a third party who was not party to the contract and as said earlier, without consent from the Land Control Board. Thereafter it would have been expected that the 1<sup>st</sup> Defendant would have written a protest letter to the Plaintiff to the effect that she had refused to accept the balance of the purchase price.

On her part, the Plaintiff wrote 2 Demand letters to the 1<sup>st</sup> Defendant dated 10/6/2016 and 8/8/2016 the first one demanding the completion of the agreement and the second one rescinding the contract. The 2 were not responded to. The first one was even copied to both Defendants. This was in accordance with clauses 9, 16.1, 16.2 and 19.1 of the sale agreement dated 15/5/2015 respectively. None of the letters elicited any response.

Even though Clause 15 of the Sale agreement states that time was not of the essence, it was clear that the completion date was 90 days within which the Plaintiff was to give the transfer documents to the 1<sup>st</sup> Defendant's Advocates. She had done so immediately after signing the sale agreement. On her part, the 1<sup>st</sup> Defendant was to pay the balance of Kshs. 3,000,000/= which to date has never been paid. She could not have been expected to wait for over 6 years for a contract that was supposed to be completed within  $\frac{1}{4}$  of a year just because there is a clause in the sale agreement making time not to be of the essence. That would be the wrong way to construe a contract. The court's hands cannot be untied to give life to a contract that stopped breathing 6 years ago. The same must be treated as such. No amount of resuscitation would bring it back to life.

### **Who then breached the Contract?**

The 1<sup>st</sup> Defendant by going into hiding and not paying the balance of the purchase price and further having the suit land transferred to a third party without the consent of the Plaintiff in a contract that never provided for assignment fits in this category. Clause 9 then comes into play.

As to the accusations of not giving vacant possession, the 1<sup>st</sup> Defendant's witness YUNUKE KERUBO OKEYO, an immediate neighbour to the Plaintiff with proximity to the suit land, in her evidence in chief in Court said that **“.....No one is on the land.....”** It is therefore not

true that the 1<sup>st</sup> Defendant was not given immediate vacant possession due to the alleged demand that the full purchase price be cleared.

Under paragraph 9 of the Sale Agreement, the default clause, the Purchaser was to forfeit to the Vendor 10% of the deposit already paid. The same translates to Kshs. 200,000/= . And in this case the 1<sup>st</sup> Defendant was the one at fault.

Under the un-conscionability analysis, each party should be held to his bargain. They were the creators of the Penalty/Default Clause and all the parties agreed to the Penalty Clause and all of them signed the agreement. The Plaintiff, although self-represented, cannot be protected for having signed a forfeiture clause that was weaker than that of the 1<sup>st</sup> Defendant.

### **Was there any fraudulent Transaction?**

As to the 2<sup>nd</sup> Defendant's prayer that she be given Judgment by way of a Declaration that she is the lawful registered proprietor of the suit land and that the Plaintiff be ordered to surrender the original Title Deed of the Suit land to her as well as eviction orders and an injunction against the Plaintiff the **Court of Appeal in Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR**, quoting the *Halsbury's Laws of England*, 3rd Edition, Volume 8 at paragraph 110 with approval, had this to say:

***“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”***

The 2<sup>nd</sup> Defendant never entered into any Sale Agreement with the Plaintiff. She was a beneficiary of fraud and as rightly argued on the 2<sup>nd</sup> Defendant's behalf, the former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** stated that:

***“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”***

The Defendants have argued that none of them was involved in fraud and that the 2<sup>nd</sup> Defendant has a good Title to the land known as L.R. NO. GESIMA SETTLEMENT SCHEME/1075.

Section 26 (1) of the Land Registration Act, No. 3 of 2012, provides that:

**26. (1)** The certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the Title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.

Where there was an agreement of sale of an agricultural land between the Plaintiff and the 1<sup>st</sup> Defendant, the parties execute an agreement, they don't appear before a land control Board nor make an Application for consent to transfer but later a transfer is effected in favour of the 2<sup>nd</sup> Defendant (a stranger) without the knowledge of the Vendor, then nothing short of collusion, fraud or misrepresentation between the Transferee and the Lands office could have enabled the said transaction to take place. The transfer of the Title to a total stranger, the 2<sup>nd</sup> Defendant has been shown above the normal balance of probabilities to have been effected illegally, unprocedurally or through a corrupt scheme. The legal threshold of proving fraud has been met by the Plaintiff.

In the circumstances the proviso to Section 26 of the Land Registration Act, No. 3 of 2012 would defeat the conclusiveness of the holding of a Title as evidence of proprietorship.

### **What about the Refund of the Deposit of purchase price already paid?**

This now leaves me with the Question of what happens to the already paid Deposit of Kshs. 2,000,000/=.

The Plaintiff has raised the issue of whether the 1<sup>st</sup> Defendant is entitled to a refund of the deposit since the same has not been pleaded for nor prayed for. Parties are bound by their own pleadings. Maybe the 1<sup>st</sup> Defendant was so hopeful that she was going to succeed in her main prayer in the counterclaim such that she did not see the need for an alternative prayer.

I believe that the cases **of Wambua Mwangangi v Samuel Kamunye Gichigi [2013] e KLR and Philmark Systems Co. Ltd v Andermore Enterprises [2018] e KLR** relied upon by the Plaintiff are distinguishable here. In the case of **GALAXY PAINTS COMPANY LIMITED V. FALCON GUARDS LIMITED, Court of Appeal Case Number 219 of 1998**, the Court of Appeal stated that:

***“issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from***

*the pleadings or such issues as the parties have framed for the court's determination."*

In **Fernandes v. People Newspapers Ltd** [1972] EA 63 Law Ag V.P. said:

"A civil case is decided on issues arising out of the pleadings. No allegation of negligence against the appellant has ever been made, and it was not open to the court to find negligence on his part."

One issue that keeps flowing in this Suit is the Sale Agreement dated 15/5/2015. The same is not in dispute. In her prayers, the Plaintiff would want the same to be rescinded and repudiated owing to the material breach on the part of the 1<sup>st</sup> Defendant. What are the consequences of the rescission of the Sale Agreement under clauses 10 and 16 of the Agreement respectively. Where the Defaulter is the Purchaser, then he only forfeits 10% of the deposit of the purchase price. Though the refund is not pleaded, the Court cannot close its eyes on this issue. It would be tantamount to misinterpreting the sale agreement in favour of the Plaintiff. This Court has been invited by the Plaintiff to give effect to the Sale Agreement of 15/5/2015, not to unmake or rewrite it.

I understand the cases of **Wambua Mwangangi v Samuel Kamunye Gichigi [2013] e KLR and Philmark Systems Co. Ltd v Andermore Enterprises [2018] e KLR** to mean that if an issue is not pleaded at all and does not fall part of the substratum of the case then there should be no pronouncement of same. The phrase

*".....Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or Defence not made by the parties....."*

**to me does not mean "if the issue is not among the prayers" then no pronouncement on the issue should be made. I interpret these 2 cases to mean that a pronouncement is being made that does not have any relevance to the pleadings in totality. A Court should not allow evidence that is not supported by the pleadings in order to found a new cause of action not pleaded. You therefore look at the entire pleadings in totality and not just the prayers at the end.**

Having said so, the court makes the following observations:

1. The Plaintiff only received Kshs. 2,000,000/= in respect LR. NO. GESIMA SETTLEMENT SCHEME/1075 together with a shop measuring 50 x 30 ft thereon.
2. The balance of Kshs. 3,000,000/= was never paid to her.
3. The Plaintiff never entered into any contract or assignment with the 2<sup>nd</sup> Defendant who is a stranger to the contract.
4. The transfer to the 2<sup>nd</sup> Defendant was carried out fraudulently for lack of consent from the Land Control Board thus being an agricultural land and also because the Plaintiff never signed any transfer forms in favour of the 2<sup>nd</sup> Defendant.
5. The transfer of LR. NO. GESIMA SETTLEMENT SCHEME/1075 to the 2<sup>nd</sup> Defendant was also illegal, perpetuated by fraud and a nullity.
6. The Plaintiff having given enough time to the 1<sup>st</sup> Defendant to complete the agreement rightly rescinded the contract under clause 16 of the sale agreement dated 15/5/2015 and duly notified the 1<sup>st</sup> Defendant under Clause 19 (1) of the same vide her 2 letters dated 10/6/2016 and 8/8/2015, respectively.

Having made the above conclusions what are the remedies for the parties herein. The upshot of the above is that the Plaintiff has proved her case on a balance of probabilities while the Defendants have failed in their claims.

1. The Court dismisses the Defendants' Counterclaims with costs to the Plaintiff.
2. Judgment is hereby granted to the Plaintiff in the following terms:

**(a) A declaration be and is hereby issued directing that the sale agreement executed between the Plaintiff and the 1<sup>st</sup> Defendant on 15/05/2015 is hereby rescinded, repudiated and/or abandoned owing to material breach on the part of the 1<sup>st</sup> Defendant.**

**(b) An Order be and is hereby issued directing the Defendants to return the Title Deed issued to them in respect of the parcel of land known as L.R. number GESIMA SETTLEMENT SCHEME/1075.**

**(c) The land Registrar, Nyamira is hereby ordered to rectify the register in respect of the parcel of land L.R. number GESIMA SETTLEMENT SCHEME/1075 and revert and/or restore the Plaintiff's name in the register and issue a Title Deed to that effect.**

**(d) Upon rectification of the Register in respect of the parcel of land L.R. number GESIMA SETTLEMENT SCHEME/1075 the Plaintiff do refund the sum of Kshs. 1,800,000/= to the 1<sup>st</sup> Defendant being the deposit paid to the Plaintiff less Kshs. 200,000/=, 10% of the Kshs. 2,000,000/= so far paid to the Purchaser in forfeiture for breach of the**

**agreement of sale dated 15/5/2015.**

3. The costs of this Suit in addition to the Costs of the Defendants' counterclaims are awarded to the Plaintiff against the Defendants jointly and severally.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF FEBRUARY, 2022.**

**MUGO KAMAU**

**JUDGE**

**IN THE PRESENCE OF: -**

**COURT ASSISTANT: SIBOTA**

**PLAINTIFF: MS. OPUNDO**

**DEFENDANTS: MR. WERE FOR THE 1ST DEFENDANT**

**MR. OKANGI FOR THE 2ND DEFENDANT**