



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1512 OF 1998

THRIFT HOMES LIMITED.....PLAINTIFF

VERSUS

KAYS INVESTMENT LIMITED.....DEFENDANT

JUDGMENT

The plaintiff brought this suit by way of a plaint dated 7th July 1998 and filed on 8th July 1998. It contended that by a sale agreement dated 1st March 1997 between the plaintiff and defendant, the defendant undertook and agreed to sell to the plaintiff a portion of land comprising about 60 acres to be subdivided from L.R. No. 13136/11 and which was subsequently subdivided into and known as L.R. No.13136/34 at an agreed price of Kshs. 12 Million. That pursuant to the sale agreement, the plaintiff had paid the defendant a sum of Kshs. 1,200,000/- as part payment of the purchase price on or about 26th February 1997. That the sale agreement provided that the completion of the sale would take place on or before 90th day from the date of the said agreement or the fifteenth day (15) after the date on which the Deed plan in respect of the said portion and the letter of consent from the Land Control Board concerned were delivered to the plaintiff's advocates whichever would be later. That the said sale would be subject to the Law Society conditions of sale in so far as they were not inconsistent with the conditions of the sale agreement of the Law Society Conditions of sale 1989 Edition. That sometime in September 1997 the defendant through its' advocates purported to counsel the sale agreement allegedly on the grounds that the agreement had expired by effluxion of time and was now intent to sell the suit property to someone else at a far much higher price than the price agreed on between the parties. That this rescission was not only illegal and unlawful, but it was also highly fraudulent and meant to defeat the plaintiff's interest in the suit premises and particularised the fraud and illegality.

It further averred that on or about 10th September, 1997 the plaintiff registered a caveat against the suit premises L.R. No 13136/34 being sub-divisional portion of L.R. No 13136/11 for purposes of protecting the plaintiff's interest in respect of the suit premises. That the plaintiff was purchasing the suit premises because of its unique topographical, central location and infrastructure and thus most ideal for the purpose of constructing middle class residential houses for re-sale and the plaintiff would suffer irreparable loss and damage should the defendant sell the property to a third party. That it is ready and willing to complete the sale and have the suit premises transferred in its favour. The plaintiff therefore prays for judgment against the defendant for:-

- a. **An order of specific performance to direct the Defendant to transfer the suit premises to the plaintiff**
- b. **A declaration to the effect that the defendant's purported rescission and or termination of the sale agreement is illegal, unlawful and therefore null and void under the provisions of the law.**

c. Costs of this suit.

The defendant filed its statement of defence and counterclaim on 26th July 2007 wherein it stated that indeed there was a sale agreement between the plaintiff and the defendant for a consideration of a sum of Kshs. 12,000,000/- and a payment of Kshs. 1,200,000/- was made. That the completion date would take place on or before the 90th day of the agreement or the fifteenth day after the date on which the deed plan and letter of consent from the Land Control Board were delivered whichever would be later and that the agreement would be subject to the Law Society Conditions of sale 1989 Edition in so far as they were not inconsistent with the conditions of sale. On the allegations of illegality and fraud, the defendant states that:-

- a. That according to clause 5 of the Agreement of sale, the actual specific date was specifically designated to be on or before the 90th day from the date of the said agreement or the 15th day after the date on which the deed plan in respect of that parcel of land which was being sold and the letter of consent from the relevant Land Control Board were delivered to the purchaser's advocate which was the later.
- b. That special condition No 2 of the agreement stipulated that on the actual date of completion and upon payment of the purchase price and other monies the vendors shall deliver to the advocates for the purchaser a valid transfer duly executed by the vendors in favour of the purchaser, a valid clearance certificate issued by the local authority if any, a valid land rent certificate from the commissioner of lands if any, a valid certificate of subdivision and a duly completed and signed valuation form and consent from the relevant Land Control Board .
- c. That Special Condition No 6 of the sale agreement provided in express terms that in the event that the purchaser failing to complete the subject transactions for no fault of the vendor then the purchaser shall pay the vendor an agreed liquidated damages of 20% of the purchase price. Further it was stipulated that in the event of the vendor failing to complete the subject transactions without the fault of the purchaser then in any such event the vendor shall refund to the purchaser any deposit paid in pursuance of the said agreement whereupon the subject transactions shall cease.
- d. That pursuant to the terms of the said agreement the plaintiff upon execution paid the defendant an agreed deposit of Kshs. 1,200,000/- leaving a balance of Kshs. 10,800,000/- to be paid in the said agreement.
- e. That on 11th August 1997, the defendant's advocates Messes Mbugua & Mbugua Advocates forwarded to the plaintiff advocate Mr. Rajinder Kapila a letter of consent from the Thika Land Control Board and deed plan No. 213356 in respect of the suit premises which documents were duly received by the plaintiffs advocates on 11th August 1997.
- f. That by the terms of that letter the plaintiffs advocate's attention was drawn to the terms in clause 5 of the said agreement regarding completion which according to the said clause 5, as the 90th date of the said agreement had passed, the actual completion date being the 15th day after the deed plan and letter of consent had been forwarded to the plaintiff's advocate was 26th August 1997.

The defendant avers that the plaintiff breached the terms of the said agreement and failed to meet its obligations thereunder and particularised the said breach as:-

- i. The plaintiff failed to pay the balance of the purchase price as required under the special condition No 2
- ii. The plaintiff failed to secure due payment of the balance of the purchase price in any manner whatsoever.
- iii. The plaintiff in a unilateral departure from the terms of the agreement demanded documents including the transfer and title deeds which were not due.
- iv. That the plaintiff purported to rely on the Law Society of Kenya Conditions of sale yet the said agreement in clause 4 expressly subordinated the said Law Society conditions of sale to itself.
- v. The plaintiff allowed the time which had been mutually agreed by the parties for the performance and completion of the transaction to lapse and expire before the plaintiff discharged its obligations under the agreement and frustrated the completion of sale resulting in its demise.
- vi. That although the defendant was ready able and willing to complete the said agreement it was not

possible to do so as the said agreement had expired by effluxion of time on 26th August 1997 which was communicated to the plaintiff vide a letter dated 3rd September 1997 where they called for the return of the letter of consent and deed plan.

That defendant states that it was justified in terminating or rescinding the agreement as the time mutually agreed upon for its performance and completion had expired. That it had no intention of selling the suit property to another party at a far much higher price as alleged therefore the alleged illegality and fraud have no basis in law and it responded that:-

- a. The defendant according to Special Condition No 2 of the agreement avers that it was only upon payment of the balance of the purchase price would the defendants have been obliged to release to the plaintiff the various completion documents therefore it was not in breach.
- b. The defendant met and discharged all its obligations under the said agreement and that it was ready, able and willing to complete the same in the terms specified in the agreement.
- c. It is manifest that time was of essence in the performance and completion of the agreement the parties having mutually set specific times and dates by which particular obligations were to have been discharged by the respective parties. Therefore no completion notice was necessary.
- d. That the caveat registered by the plaintiff over the suit premises was completely unjustified in the premises and ought to be removed.
- e. That the deposit of the purchase price in the sum of Kshs. 1,200,000/- which was retained by the defendant is only part of the liquidated damages agreed upon in special condition No (6) which at 20% the purchase price would amount to Kshs. 2,400,000/-

The defendant averred that in view of the circumstances it outlined, that the plaintiff is not entitled to any of the reliefs sought. The defendant further added that the remedy of specific performance was not available to a party in default as is the plaintiff.

In its counterclaim, the defendant stated that it is entitled to and prayed for judgment against the plaintiff that:-

- a. A declaration that the said agreement lapsed after 26th August 1997 therefore the defendant was entitled to rescind the same.
- b. An order for the return of the deed plans no 213356 which is still in the possession of the plaintiff.
- c. An order for the immediate removal of the caveat registered as I.R. No 43112/5 against the title to the suit premises
- d. A declaration that the defendant was entitled to retain the deposit of Kshs. 1,200,000/- and is entitled to liquidate damages in the terms agreed upon by the parties in special condition No (6) of the said agreement.
- e. An award of liquidated damages in the net sum of Kshs. 1,200,000/- together with interest thereon at the commercial rates prevailing from 27th August 1997 when the said agreement expired until payment in full.

In response to the defendant's statement of defence and counterclaim the plaintiff reiterated the contents of the plaint.

EVIDENCE

PW1: Daniel Kimita Gichuhi testified that he was a director of the plaintiff company together with Josephine Kabura Gichuhi. He stated that he was aware of the sale agreement dated 1st March 1997 between the plaintiff and defendant where the plaintiff was purchasing 60 acres of land from the defendant and the agreement related to the purchase. The defendant was to subdivide the land and from the subdivision the plaintiff was to purchase 60 acres. The land to be subdivided was L.R. No. 133136/11 and the price of the 60 acres was Kshs.12 million. After the land was excised from the original piece giving rise to a new number L. R. No. 13316/34. They paid Kshs. 1.2 million to the vendors advocate which was part of the purchase price as stated in clause 3 of the sale agreement adding that the sale

agreement incorporated the Law Society Condition of sale as contained in clause 4 of the sale agreement; the said Kshs.1.2 Million was paid before signing the agreement. That after signing the sale agreement, no copies of the documents were released to their advocates who prompted their advocate to write to the vendor's advocates in a letter dated 11th August 1997 seeking for the documents since they wanted to prepare the draft transfer for the approval by the vendors. According to the agreement the vendor's advocates were supposed to forward the documents to their advocates within 14 days from the date of signing of the sale agreement but it was not done. That when their advocates sought for the documents on 11th August 1997 the vendor forwarded the deed plan and the letter of consent. These two documents were not sufficient to commence a transfer and meant that the transfer could not be completed. That the documents were required by the 14th March 1997 the vendor's lawyer forwarded the deed plan and letter of consent. These two documents were not sufficient to prepare a transfer as they needed the original title or copies. He further stated that the agreement was silent on who was to prepare the transfer. On the issue of a valid transfer as stated in the special conditions was never mentioned in the correspondence between the lawyers. On the 11th August 1997 the vendor purported to cancel the transaction. That the defendant's lawyers never intimated to their lawyer that they would release the document on the payment of the purchase price in accordance to clause 2 of the special conditions of the agreement. He stated that the agreement did not state anywhere that the transfer would be prepared by the vendor's advocates and not the purchaser's advocate neither did it state that the transfer would be paid after the payment of the purchase price. That the vendor did not supply the certificate of subdivision, the rent and rate clearance certificate to him and a valid transfer executed by the vendor in favour of the purchaser. That he did not pay the balance of the purchase price because at that time the transfer and the documents had not been made available even though their lawyer had asked for them and at no time did the vendors advocate state that they had all the completion documents. That even if it would not have been possible to register without the rate clearance certificate. That his advocate made a demand of the document and he does not know why they refused to deliver them. That in the agreement time was not made the essence in the contract. According to him, he was not served with the 21 days' notice as provided under clause 4 (7) of the Law Society Conditions of sale. That the completion date is not synonymous to a clause stating that time is of essence. He therefore seeks specific performance of the agreement for sale and that the vendor did not refund part of the purchase price he paid even though all the necessary steps had been undertaken. That to protect his interest he registered a caveat against the title on 13th July 1998 as the lawyers engaged the vendor to complete the transaction. That on the 5th September 1997 Mrs Christine Pratt informed him that they had found out about the caveat and that she was in discussion with other parties who wanted to purchase the property and they were negotiating and that the other party was not ready to pay Kshs. 400,000 per acre but she would not sell the property to them and instead wanted the plaintiff to remove the caveat. He insisted that he wanted to complete the transaction even though she offered to give them some other land and negotiate the same. That he never agreed to increase the purchase price to three million.

He confirmed that the dispute was on the completion of the sale agreement. He agreed that every sale agreement must have a completion date and that the sale agreement also had special conditions. He agreed that there was no valid transfer when the vendor purported to rescind the sale agreement. He added that it would not have been possible to pay the balance of the purchase price as no transfer had been drawn by his counsel in conjunction with the vendors counsel. That the vendor did not supply the documents or copies of the documents to enable his advocates to prepare the documents for approval by the vendors advocates though he stated that he was ready to pay the balance of the purchase price if granted the order of specific performance. He added that he recalled the alleged breach of the terms of sale agreement but defended himself that they were unable to complete paying the purchase price adding that no notice was given to them before the recession of the sale agreement. He added that they should have been given a 21 days' notice since it was one of the requirements. He stated that the sale agreement did not state that time was of essence in the contract.

PW2: Paul Nderitu Ndungu an advocate of the High Court of Kenya having practised law for about 46 years in conveyance. He testified that he had drawn sale agreements, transfers, assignments and leases and noted that every agreement should have a completion date. That an agreement is not synonymous with the time limit unless it states so and that if time is of essence, they will make a specific provision that

time is of essence; that the Law Society Conditions of sale provide the frame work within which the parties conduct the transaction rather than have a detailed document. That the sale agreement of the parties in this suit was subject to the Law Society conditions of sale and explained that if the parties had an issue which required interpretation, then they would make reference to the Law Society Conditions so long as the particular condition in the Law Society condition is not excluded. On Clause No 5 of the sale agreement, he stated that the transaction was to be completed on the 90th day from the date of the agreement which was 1st March 1997 or the 15th day after the vendor has been provided with a deed plan and a letter from the board consent whichever of the two was earlier. He further added that when there is a default one serves 21 days' notice and time becomes of essence once the notice has been served adding that the vendor cannot terminate the contract without serving the 21 days notice. He clarified that if one does not want to comply with the 21 days' notice he provides for a specific clause that time will be of the essence failing which the parties will make reference to the Law Society Conditions of sale. That the provisions making time of essence would be the same clause that provides for the completion date. He also stated that ordinarily, people serve notice as a matter of practice. When referred to Clause 5 of the agreement for sale, which was the deed plan and the letter of consent form the Land Control Board, he stated that they were documents that are delivered to the purchaser's advocate. He added that the advocate of the purchaser would prepare the transfer in a draft form and then endorse it for purposes of signature by the parties adding that if he were the vendors advocate, he would give the purchaser a copy of the title and in a case like this where there is a subdivision a deed plan is provided. He stated that the two documents would not enable the purchaser's advocate prepare the transfer form. That if the clause does not state that the vendors advocate will provide the title deed, then you refer to the Law Society conditions where there is such a provision that the vendors advocate would provide either the original copy of the title deed. If it is not stated who would prepare the draft you refer to the provisions in the Law Society condition to the clause that states who will prepare the transfer. When referred to clause 24 and 9 of the sale agreement he stated that the purchasers advocate did not have to ask for a release of the title once the parties have signed the agreement adding that the vendors advocate must provide the title or copies of it to enable the purchaser's advocate prepare the transfer. When shown special condition No. 2 he stated that one important document that was missing was the vendor's title which should be the first document sought in condition No. 2. He added that because the vendor's title was registered under the Registration of Titles Act one can only register the transfer listed against the head title of the vendor and since the property that was being sold was a subdivision title, a certificate of subdivision would be provided. He stated that in the absence of the transfer document, the vendor was not ready to complete the agreement. There was no complete and signed valuation form. He added that he would not forfeit the sum paid unless the parties have gone through the process to complete and would not terminate the agreement unless he had served the termination notice to the purchaser's lawyer. Turning to the Law Society conditions, he stated that a party could only serve a completion notice if the party was ready, able and willing to complete the transaction. When shown a caveat filed by Thrift Homes Ltd registered against the vendor's title claiming purchaser's interest, he stated that it was normal for a purchaser to register her interest in a sale of a property. He also stated that there was nothing to stop a party seeking to amend an agreement already in place and that there was nothing to stop a party asking for more money as to whether they request for more money is legal or justified under the provisions of the agreement for sale the answer was no.

He stated that if he was representing the purchaser, he would do a search on the property adding that the current practise was that the registrar would endorse on a copy of the title. That the practise to do a search on the title was up to the advocate of the purchaser or vendor and that if the advocate did not do so, he failed in his professional obligation. He stated that if a file went missing at the registry, you would get on with the transaction on behalf of the purchaser. If there are encumbrances, the burden falls on the vendor to remove them. Money does not change hands until the transfer is registered in that case. The title has to exist and the seller holds the original title deed. He submitted that the agreement of sale of March 1997 envisaged a subdivision of L.R. No. 13136 /11 that subdivision seems to have been done in 1999 and a separate certificate of title form a portion referred to in the agreement was issued. He stated that the agreement referred to the sale of a portion of L.R. No 13136/11 which would have been excised out of the main portion and a title issued and the numbers would not have been the same. The sale agreement was drawn by the vendor's advocate and reflected the negotiated and agreed terms of the agreement. He added that when signing the sale agreement, a deposit of 10% would be paid to the vendor's advocate as

stakeholders. The advocates hold it in trust and do not pass it on to the vendor until completion takes place. He confirmed that at times parties agreed that the deposit be released to the vendor when the purchaser is comfortable with the title and they feel safe to release the money. He agreed that parties adopt the Law Society Conditions of sale in so far as they are not inconsistent with the conditions of the agreement and if the agreement made a certain condition then they did not need to refer back to the Law Society Conditions of sale. That clause 5 stipulated the actual date of completion adding that it was a very specific date on the date of completion. He maintained that there was a gap on the transfer to be registered by the purchasers advocate. That it was the advocate's professional responsibility that his client get registered on valid transfer therefore that advocate whose duty is to give the valid transfer must have participated in its preparation. He stated that where there is a gap one looks at the practice or the Law Society conditions. Though he explained that they are model terms that parties may choose to take up and do not bind parties who have not adopted then or qualified their adoption. He confirmed that the agreement was silent as to where completion was to take place therefore the fall back is on the Law Society conditions of sale. He averred that on the date of completion, the vendor was to deliver the documents to the advocate of the purchasers. The vendor advocate could have made them aware that the documents were available adding that payment of the balance purchase price was a key competence of the agreement. He stated that it can be a cash purchase or one financed by borrowed funds and when being financed professional undertaking comes in. He averred that the exchange of documents was to be substituted with the receipt of funds from the purchaser. He would not advise the vendor's counsel to part with the documents before they received the cash. He stated that when one receives the land control board consent and the deed plan, a draft transfer is forwarded to the vendor's lawyer but he cautioned that a draft transfer was not a working document. He acknowledged that when there is failure on step one it impacts the entire process. He stated that if the purchaser has not paid the vendor can complain and that is where one can then go to the Law Society condition and invoke the completion clause. When referred to the sale agreement on liquidated damages he stated that it was a specific sum as agreed between the parties meant to penalize that party in default. He pointed out that parties agreed to 20% of the purchase price which amounted to 2.4 million.

PW3 Joseph Kimani Mbugua testified that the Director of the plaintiff company called and inquired about a property he had put up for sale in the newspapers. That he had been asked by Ms. Christine Pratt of Keys Limited to put it up for sale. He stated that he was to sell 60 acres at Kshs. 250,000/-an acre but they agreed at Kshs 200,000/- A surveyor carried out the necessary subdivision for Kays Investments Ltd land M/s Mbugua and Mbugua advocates. That they later had a meeting at Mr. Gichuhi office along Aga khan walk where they discussed and confirmed the purchase price. That Mr. Gichuki also confirmed that he wanted to develop an estate and they agreed on the development and that each house was to be in $\frac{1}{4}$ of an acre. Thrift homes wrote back confirming acceptance of the offer see the letter dated 18/11/96 at pages 25 of the defendants List of Documents. They had agreed on all the issues. They agreed on the 10% of deposit of the sale price which is 1.2 million Kenya shillings and one of our agendas in the meeting was because Mrs. Pratt wanted to use the deposit. She said the money would be used to facilitate the subdivision and issuance of the title and that was the reason the deposit was released to her. I got her a buyer who was willing to buy and a deposit was paid. I also introduced her to the surveyor.

The defendant called 2 witnesses.

DW1: Christine Wambui Pratt testified that she was director of Kays Investment Limited which was incorporated in 1997. She stated that the property in question L.R. No. 13136/11 belonged to her company. She added that the mother title was L.R. No. 1224 which was about 300 acres which was transferred to her company on 10th October 1998. That in 1996, her company wished to sell 60 acres of land and this necessitated a subdivision to hive off the 60 acres. She confirmed that she engaged Kimson Holdings Ltd to sell the land on her behalf. She stated that she gave him documents to show she owned the property and gave a copy of the title deed when he said he had a buyer. She testified that her reason for selling the land was because she has taken a loan at H.F.C.K. adding that she had defaulted on the payment. That a copy of the title was given to Mr. Gichuhi since it was normal for a prospective buyer to want to see a copy of the title of the land. She agreed that the letter captured what was agreed at that meeting she also said that she had made it clear that if there was to be a subdivision it was not going to be less than a quarter of an acre. Also in the agreement we have stated it would not be smaller than a $\frac{1}{4}$.

She confirmed that Mr. Gichuhi had indicated that his company wanted to develop and sell units. She stated that a copy of a title was given to Mr. Mbugua Advocate. The subject matter is the sale of the 60 acres and they agreed upon the deposit of Kshs.1.2 million be released for the subdivision. That after the signing of the agreement it took almost 3 months then they returned the agreement without any amendments. She did not understand the delay in signing the agreement yet there was urgency in completing the matter. On being shown clause No. 4 of the sale agreement she stated that the agreement suspended the Law Society Conditions of sale because there was urgency and time was of the essence and there was a clear completion date on the agreement adding that if there was any conflict the between the Law Society Conditions and the agreement would have precedence over it. She agreed that there was a reference to the actual completion date and that there are two actual completion dates. The 1st alternative was on or before the 90th days from the date of the agreement and the 90 days would take them to the end of May 1st June 1997 or 31st May 1997. The 2nd alternative was the 15th day after the date on which the deed plan in respect of the said portion and letter of consent from the lands control board concerned are delivered to the purchasers advocates whichever is later. When referred to clause 5 she stated that the 90 days had been overtaken by event and that the actual completion date would have been 15 days from the date of receipt of above stated 2 documents. She further confirmed that one of the transactions to take place on 26/8/97 was payment of the balance of the purchase price and other monies and the 2nd step was the delivery of the documents but what was to come first was payment of the balance of the purchase price. That upon payment of the purchase price the documents would be released and what would be left would be the transfer to the buyer as long as there is purchase price is paid. She stated that the agreement did not state where the completion was to take place therefore they would fall back to the Law Society Conditions of sale. When referred to clause 4(4) she said that it was clear as to the place of completion which was at the vendors office She confirmed that parties were free to get into a contract and that they entered into negotiations where they agreed to sell 60 acres to the plaintiff at Kshs. 200,000/- per acre. She added that both parties were represented by an advocate when they had each chosen. She added that a party cannot change the agreement without the consent of the other party. When shown the special conditions No. 2 of the agreement she said that the 2 parties agreed on the documents to be released by the 26/8/97 and that they declared the documents required to the purchaser. She confirmed that one document was a valid transfer duly executed by the vendors in favour of the purchaser which was procured by her advocates on the 26/8/97 but the purchaser did not turn up to complete the transaction the 26th of August 1997. She confirmed that it was only at the completion meeting that the list of documents would have been availed to the purchaser. Having failed to attend the completion meeting they would not have taken possession of the documents. She contended that there was no letter from the plaintiff's lawyer on professional undertaking that they had secured or were ready to secure the documents and the balance of the purchase price. She stated that at no time did the purchaser tender the balance of the purchase price and no professional undertaking was given to secure the money. She referred to the letter dated 9th September 1997 where it talked of the fate of the deposit where Mr. Mbugua stated that it was paid to her. She also referred to paragraphs 6 of the sale agreement on payment of 20% of the purchase price was 2.4 Million on default. That if credit for the Kshs.1.2 million is taken into consideration it leaves a balance of Kshs. 1.2 million. She denied the allegation that she wanted to sell the land to another party for a higher price. She also stated that she filed a counter claim and seeks that the plaintiff's suit be dismissed and a declaration that the sale agreement had lapsed. She also sought a return of the deed plan and letter of consent which was still in the plaintiff's possession and a discharge of the caveat. She wants Kshs.1.2 Million plus interest and costs of the suit at the prevailing rate of 18%.

DW2 Joseph Njoroge Mbugua an advocate testified that he has been involved in land transactions and has reasonable experience in land matters. He acknowledged that he had been instructed by Kays Investment in 1987 to draft a sale agreement dated 1st March 1997 between Kays Investment Limited and Thrift Household limited for L.R. No. 13136/11 which was drawn by his firm. When referred to a letter dated 5th December 1996 he acknowledged that there was a three months delay in returning the sale agreement. That as per the agreement in this case any conflict the agreement would prevail not the law society conditions of sale. That there was pressure on the seller by H.F.C.K. He stated that the reason with what the dates noted gives the agency and the parties did not anticipate going beyond the dates stated and agreed that time was of essence. That they forwarded the letter of consent and the deed plan and after the 15 days of receipt of the two document the defendant was to forward the balance of the purchase price. That when they wrote back acknowledging the receipt of the documents, he expected the balance of

the purchase price on the 26th August 1997. That the Law Society Conditions of sale state that the completion was to take place at the vendors office. He added that the purchaser was to deliver the balance of the purchase price upon receipt of the money the vendor was to deliver the six (6) documents stated. He further stated that the purchaser's advocates never gave a professional undertaking to pay the balance of the purchase price that is the completion date. That Mr. Kapila did not engage him on the issue to secure the balance and that the parties had consented that the money was to be delivered before the delivery of the documents. He added that once one parts with the documents he losses on the balance of the purchase price adding that the payment of the purchase price was precondition to the release of the documents. That he would not have known what Mr. Kapila would have done after payment was done and his release of the documents but the expectation would be that he would have registered the documents adding that Mr. Kapila did not suggest to him that the documents were insufficient for any purpose. When shown the letter dated 11th August 1997 he stated that he was surprised that the author sought for the title deed when the title deed was part of the six documents which were to be released upon payments of the purchase price. Hereferred to his letter dated 3rd September 1997 that stated that "the agreement has expired by affluxion of time" On the letter dated 5th September 1997 the Law Society Conditions of sale offers where the sale agreement is silent. He stated that by the time the letter was sent the purchaser had been given a copy of the title to do a search and the transfer and by then the sale agreement had expired and didn't see the need to provide any. That a Notice to terminate or completion would issue if the completion date is uncertain. That in this agreement the date was specific and that was the reason why they did not give a Notice of completion. He agreed that he sought the return of the two documents which were returned to him. He stated that clause 6 of the sale agreement where it stated that if the purchaser defaulted he would give 20% of the purchase price he would pay Kshs. 2,400,000/=.

SUBMISSIONS

Parties filed written submissions as ordered by the court. The Plaintiff submitted that the Defendant's purported rescission and cancellation of the sale was illegal and unlawful and of no effect in law. That time was not of essence as the Agreement for Sale did not make time of the essence of contract. Learned Counsel highlighted Clause 4 of the agreement which stated that "*the sale is subject to the Law Society Conditions of Sale in so far as they are not inconsistent with the Conditions in this Agreement*". It was submitted that since time had not been made of essence of Contract in the Sale Agreement, the Law Society Conditions of Sale regarding "Completion" become operative. To buttress this issue reliance was made on sub clause (7) of the Law Society Conditions of Sale which states that, "*This sub-condition applies unless a Special Condition provides that time is of the essence in respect of the completion date*". It was submitted that the effect of Sub Clause (7) (a) to (d) was that the Defendant was legally bound to serve 21 days Completion Notice to the Plaintiff before purporting to rescind and/or cancel the sale transaction. The plaintiff relied on the case of **Elijah Kipkorir Barmalel & Another vs. John Kiplagat Chemweno & 3 Others (2010) eKLR** where the court held that, "*.....although the parties to a sale agreement upon which consent has been obtained may choose to terminate it, in the absence of an express agreement on time being of the essence, notice must be served on the defaulting party before any assertion can be made that time was of the essence. In this case there was an express provision (clause 8(2)) as to when time would become of the essence but the clause was never invoked by the vendor. It was not the vendor's case in the superior court, either in his pleadings or in evidence, that the refusal to accept the balance of the purchase price made time of the essence. There was no counter claim for the rescission either. His case was rather that he had served notice in 1980 which was not complied with and therefore he was not obliged to accept the balance of the purchase price. As correctly held by the superior court, the notice was a nullity and therefore of no consequence to the agreement between the parties. We would for those reasons agree with Mr. Machio that there was no valid rescission of the sale agreement.*"

The plaintiff also cited the Court of Appeal case of **Sisto Wambugu Vs. Kamau Njuguna (1983) eKLR** on time being of essence where it was held that "*.....but the relevant statement says that contracts for the sale of land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day. The law is that this right can only be exercised where time is of the essence, or if it is not, after the party who is not at fault has given reasonable notice to the defaulting party making time of the essence.....In this case the agreement of 1958 did not state that time was of*

the essence nor did the appellant give the necessary notice making time of the essence. In my view in 1966 when the appellant received the two amounts of Kshs.600 and Kshs.900 he affirmed the contract with new additional conditions that he would be paid Kshs.2, 400 extra and the respondent would complete by January 1967. The respondent did not do anything to rectify his failure to complete in January 1967 until possibly by 1974 when, Micah said; there was a fruitless attempt to take Kshs.2,000 to the appellant. In my opinion as the appellant had taken the necessary steps to make time of the essence he could not repudiate the contract on the ground of unreasonable delay by the respondent to perform.”

It was submitted that since the Defendant purported to rescind and cancel the Sale Agreement without giving the Plaintiff any Completion Notice, the purported cancellation and rescission of the Sale Agreement was null and void and of no effect in law; that the defendant was not ready to complete the sale transaction and therefore it was not open, in the circumstances for the Defendant to purport to rescind and cancel the sale; that the completion of the transaction was tied up to Special Condition No. 2 which stated that *“On the actual date of completion and upon payment of the balance of the purchase price and other moneys the Vendor shall deliver to the Advocates for the Purchaser;*

- a. A valid Transfer duly executed by the Vendors in favour of the Purchaser;*
- b. A valid Clearance Certificate issued by the Local Authority concerned, if any;*
- c. A valid Land Rent Certificate from the Commissioner of Lands; if any;*
- d. A valid Certificate of Subdivision; and*
- e. A duly completed and signed Valuation Form.*
- f. Consent of the relevant Land Control Board.”*

It was submitted that the said documents were not availed to facilitate completion neither did the defendant put them in their List and Bundle of Documents. That **DW 2**, Mr. Njoroge Mbugua Advocate who was the defendant’s lawyer in the transaction stated that he had all the Completion Documents except a valid Transfer duly executed by the Vendor in favour of the Purchaser which was not a true fact since they were not able to produce the stated documents in court. Learned Counsel further stated that the only documents forwarded by the defendant were two i.e. the Deed Plan and the Land Control Board Consent to the sale transaction and this pointed to the fact that the Defendant itself was not ready to complete the sale transaction as the Completion Documents were not ready; that Defendant could not accuse the Plaintiff of being in default whereas the Defendant itself was in default adding that it was the Defendant’s duty and obligation to have the Completion Documents ready before the Completion date to facilitate the Completion. The plaintiff relied on the case of **Cassam Vs. Sachania (1982-88) 1 KAR 41**, where Law J held that, “that time was not of the essence of the contract in respect of payment of the balance of the purchase price, so as to justify repudiation of the agreement of sale by the appellants. The obligation as to payment of the balance of the purchase price was to pay that balance by banker’s draft on or before 31 January 1980 ‘on execution of the transfer’. The Appellants have never executed the transfer, and it was not open to them to declare the agreement null and void on the ground that payment of the balance of the purchase price was not made by banker’s draft until 4th February 1980. Time was not specifically made of the essence in the agreement, nor did it become of the essence in this respect until it was made of the essence by the respondents’ Advocates’ letter of 26th March 1980, calling upon the appellants to perform their obligation to execute a transfer within 21 days. This was reasonable stipulation, with which the appellants chose not to comply.

It was argued that in this case, the necessary Completion Documents were neither available nor had the Defendant executed the Transfer in favour of the Purchaser. Therefore, the Defendant’s purported rescission and repudiation of the sale transaction was legally unjustified and therefore a nullity and the Plaintiff was entitled to an Order of Specific Performance as prayed. That the balance of the purchase price was expected to be paid once the Defendant was ready with all the Completion Documents. Learned Counsel referred to the evidence of DW. 1 Mrs. Christina Pratt, who on cross examination, told the Court that, *“I am not qualified to say if there was a Transfer document. A valid clearance (b) and (c) More of the documents are in the Defendant’s BOD i.e. I have them here. But they are not before the Court. I cannot confirm that the Firm of Mr. Mbugua drew the Transfer. I have not seen any Transfer. I cannot say if it was there or not”* and added that it was very clear that

completion documents were not there and there was no any valid Transfer that was either executed by the Defendant or otherwise.

On specific performance the plaintiff cited the case of **Manzoor Vs. Baram (2003) 2 E.A. Page 580** where the Supreme Court of Uganda dealt with the issue of Contract and Specific Performance where it made a holding that, *“Specific performance is an equitable remedy grounded in the equitable maxim that “equity regards as done, that which ought to be done”. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance. In the result, I would allow the appeal, and set aside the judgments and decrees of the Court of Appeal and the High Court, and substitute a judgment and decree of specific performance of the suit agreement, ordering the respondent to transfer the suit property to the appellant. I would order the respondent to pay to the appellant costs of this appeal as well as costs in both courts below.”* Learned Counsel submitted that as the Parties executed a formal Sale Agreement, which is now a subject of interpretation of this Court, the Court should confine the Parties within the four corners of the Sale Agreement. Learned Counsel’s view was that the critical issue and dispute between the Parties was whether time was of essence in the said Sale Agreement.

The Plaintiff further submitted that it was purchasing the suit premises because of its unique topography, central location and infrastructure, and thus being most ideal for the purposes of constructing middle class residential houses for re-sale. That the said averment was not denied by the Defendant. That being the case, and considering that the suit premises is a sizeable piece of land measuring 60 acres, and considering that it is the Defendant who breached the Sale Agreement between the Parties, it was the plaintiff’s submission that the it deserves an Order for Specific Performance as prayed in the Plaint. Plaintiff relied on the case of **Civil Appeal No. 165 of 1996 – Gurdev Singh Birdi and Narinder Singh Ghorta as Trustees of Ramgharia Institute Of Mombasa –Vs- Abubaker Madhbuti** where Justice A. B. Shah, J.A. which summed up his decision as follows:-“..... *What I have said so far is enough to dispose of this appeal. To summarize I say that as time was not of the essence of the contract, and as time was not made of the essence of the contract in writing, and as it cannot be inferred that the respondent wanted to make the time of such essence the learned judge erred in stating simply that the letter of 29th March, 1993 by Mr. Karimbhai was in order. Also that although there was a delay of some seven months in the actual undertaking given by Mr. Obhrai for payment of the balance of the contractual sum, from the date of the rescission of the contract by the respondent, the contract still remained open until the respondent made time of the essence of the contract. Also that the only ground which I consider which Mr. Gautama can properly argue for affirmation of the decision, is not available to him as I have earlier endeavoured to point out. I would therefore allow this appeal with costs and I would order specific performance as prayed in the plaint in the superior court. I would dismiss with costs the notice of grounds for affirming the decision.”*

On the issue of the deed plan, it was submitted that it is trite law that where the property being sold is a sub-divisional portion, under the Provisions of the Registration of Titles Act (now repealed) or the Government Lands Act, now repealed, the Transfer/Conveyance regarding the sub-divisional portion must be accompanied by a Deed Plan. Similarly, as the suit premises was registered under the Provisions of **The Registration of Titles Act** Chapter 281 Laws of Kenya, now repealed, **Section 70** of the Act comes into play and it reads:-

1. *Upon the application of any proprietor of land held under separate grants or certificates of title or under one grant or certificate of title, and the delivering up of the grant or grants, certificate or*

certificates of title, the registrar may issue to the proprietor a single certificate of title for the whole of the land, or several certificates each containing a portion of the land in accordance with the application, and as far as this may be done consistently with any Act for the time being in force respecting the subdivisions of grants that may be included in one certificate of title or respecting the subdividing of the grants.

- 2. Upon issuing a certificate of title, the registrar shall enter on the new certificate all the memorials to which the piece of land is at the time subject, and shall cancel the grant or previous certificate of title of the land so delivered up, and shall endorse thereupon a memorandum setting forth the occasion of the cancellation and referring to the certificate of title so issued.*

Therefore, the purpose of procuring the Deed Plan was not only to effect and procure subdivision, but also to enable the Defendant to procure a new Certificate of Title for the portion that was being sold. It was submitted that the Defendant neither obtained a new Certificate of Title for the portion being sold and nor did it facilitate preparation for the Transfer, using the new Deed Plan. Therefore no transfer would have been prepared by either Party's Advocates, without the availability of the Deed Plan and the New Certificate of Title for the portion of land being sold. That it was the Deed Plan which showed the layout Plan of the Plot being sold, the area/acreage of the piece of land being sold, and all other necessary details regarding the piece of land being sold, including the Survey Deed Plan Number which must be cited in the Transfer being drawn; that the Plaintiff's then Advocates, on 11th August, 1997 wrote to the Defendant's Advocates, not only acknowledging the (2) documents but also made a request to be given the Title Deed of the property to enable him prepare the draft Transfer. The Defendant's Advocates on receipt of the letter of 11th August 1997 chose to keep quiet for a period of three (3) weeks until 3rd September 1997 when the Defendant's Advocates wrote back to stating that the Agreement had expired by effluxion of time and that the Defendant had treated the Agreement as at an end. Learned Counsel further submitted that the Defendant purported to rescind the Sale Agreement so that it could fetch a higher price than the agreed price of Kshs.12 million. He relied on a letter dated 15th July, 2002 which was produced before in court which read:- *"..... If your client is still willing to complete this transaction as stated in its Defence, our client is willing to transfer the suit property subject to your client paying a further sum of Kshs.3,000,000/= as additional purchase price given that the value of the property has appreciated considerably over the years. We would expect the entire purchase price be paid within thirty (30) days, from the date on which parties enter a formal agreement on the proposed settlement."*

The Plaintiff, knowing that he was not on the wrong, declined to increase the price as demanded and chose to proceed with this suit. He opined that the letter demonstrated beyond any reasonable doubt that the Defendant and its Advocates hurriedly purported to rescind the Sale Agreement with a hope of securing a higher purchase price.

As regards the Caveat that had been registered against the Title, Learned Counsel submitted that the Caveat was justified and it was reinforced by a Ruling of this Court where an Injunction was issued against the Defendant to prevent the Defendant from alienating the suit premises pending the hearing and determination of this Suit; that it paid the defendant a deposit of the purchase price; that the Law Society Conditions of Sale stated very clearly what a Deposit was, how it was paid and who held it. Clause 2 (1) (f) states: - *"Deposit means (10) per centum of the purchase money.*

"The Purchaser shall, on or before entering into the contract, pay to the vendor's advocate or the estate agent negotiating the sale on behalf of the vendor as stakeholder such a sum as will, together with any preliminary deposit paid to the vendor or such agent, amount to ten (10) per centum of the purchase money (excluding any separate price to be paid for movables, livestock, chattels, fittings and other separate items). Such sum or sums shall be paid either by banker's draft or by a cheque drawn upon an advocate's client account."

It was submitted that the sum of Kshs.1.2 million was paid directly to the Vendor as part of the purchase price as stated at Clause 3 of the Sale Agreement and the same cannot be regarded as deposit; that DW 1 stated in her evidence that she had some financial constraints with Housing Finance Company of Kenya and needed money urgently and hence the payment directly to her.

The rest of the submissions were the plaintiff views on the authorities relied on by the defendant.

The defendant in its submission too gave a background of the genesis of the case which I need repeat as the same has been set out in the evidence as summarised in this judgment. In response to the plaintiff's submissions it was submitted that time was not of essence of the contract as clause 4 of the Sale Agreement was clear that the Law Society Conditions of Sale were clear in the manner they were to be incorporated into the sale agreement and was only to apply only to the extent that the same were not inconsistent with the terms of the Sale Agreement and that the Sale Agreement was not subordinate to the Law Society conditions of sale. That the plaintiff failed to prove that the recession of the sale agreement by the defendant was fraudulent. That the defendant was entitled to terminate the sale agreement as the plaintiff committed the fundamental breach of the agreement.

On the defendant's case it was submitted that the defendant was justified in terminating/rescinding the sale agreement as time mutually agreed by the parties for its performance and completion had expired. That the defendant met and discharged all its obligations under the agreement and that it was ready to complete the same. That the plaintiff was in breach as it failed to pay the balance of the purchase price as required in the agreement on or before the 26th of August 1997 and that upon payment the defendant was to deliver the completion documents as stated in the Special Condition No.2; that the defendant exercised its right to rescind the agreement. That payment of the purchase price was a condition precedent that had to be met by the parties before they could proceed to the 2nd stage of release of the completion documents. That the parties through their counsels settled on the specific document that would be required as spelt out in Clause 5 and special Condition No.2 and thus they were bound by their written agreement. The defendant relied on the case of **National Bank of Kenya Limited –vs- Pipeplastic Samkolit (K) Limited and Another (2002) 2 E.A. 503** where the Court of Appeal held that a court of law cannot rewrite a contract between the parties and that the parties are bound by the terms of their contract unless coercion, fraud or undue influence are proved or pleaded. The plaintiff also relied on the case of **William Kazungu Karisa –vs- Cosmas Angore Chanzera (2006) eKLR** where the court held that, “**The basic rule of the law of contract is that parties must perform their respective obligation in accordance with the terms of the contract executed by them**”. That the agreement could only be amended by seeking consent from the defendant. That prior to signing the agreement the plaintiff had held the sale agreement for 3 months from the 5/12/96 to 28/2/97 and that the plaintiff did not make any proposal to amend the agreement to include additional completion document; that the only amendment that was done was at clause 5 by replacing the word *earlier* with *later*. To emphasize this the defendant relied on the case **Rajdip Housing Development Limited –vs- Wacira Wambugu T/A Wambugu & Company (1996) eKLR**. That the plaintiff request for the original title in response to the defendant letter dated 11/8/97 which gave the completion notice was a unilateral departure from the terms of the sale of agreement. That time was of essence in the contract and that the plaintiff was aware of the defendant's director undertaking to discharge a loan obligation she had with Housing Finance Company of Kenya Limited. It was submitted that the caveat entered by the plaintiff was unmerited and should be removed forthwith.

Further submission made by the defendant were as follows; that as per the sale agreement the sum of Kshs. 1,200,000/- was a deposit of the purchase price, this was evident in the letter dated 28/2/97 which forwarded the sale agreement. That there was a mutual agreement by the parties that the said sum was to be utilised in defraying initial expenses relating to the sub-division as evidenced in the letter dated the 5/12/96 and that in the circumstance clause 3 the L.S.K conditions of sale cannot apply to contradict the express terms of the sale agreement and the intention of the parties as documented; that as per the sale agreement at clause 6 the purchaser was to pay liquidated damages upon default that this clause amended the L.S.K Conditions of sale that the vendor would repay the purchaser the deposit paid. That the sum of Kshs. 1,200, 000/- was has been utilised for the sub division and that the defendant is entitled to retain any deposit already paid. The defendant relied on the case of **Syedna & others –vs- Jamil's Engineering Company 91973)254** the court observed that, “The general principle would appear to be that complete pg 25.

It was submitted that the defendant is entitled to a sum of Kshs.1, 200,000/- being the balance of the liquidated damages payable to it as per clause 6 of the sale agreement. That by virtue of clause 11 of the Law Society Conditions of sale the plaintiff was required to return to the defendant the Deed Plan and the

Letter of Consent that had been delivered to it. That clause 11 come into play since the sale of agreement is silent on what would happen to the documents.

That the issue of the defendant being ready with the completion documents was a non-issue as the conditions set out in clause 5 were clear and further that the plaintiff had breached the agreement. That since the condition precedent in the 1st stage was not met then the 2nd stage of delivery of the completion documents was rendered moot by the plaintiff's own default.

It was further submitted that though the sale agreement did not specifically provide that time was of essence in the said precise words it was the mutual understanding and intention of the parties that the sale would be completed not only in the shortly time possibly but also on actual and specified date. That clause 5 of the sale agreement describes the actual completion date. That the court in determining whether time was of essence should look at the totality of facts and the circumstances pertaining to a particular transaction. That in this case it can be reasonably be inferred that the parties intended that time be of essence. That in the meeting of 14th November 1996 all the parties were made aware of the agency of concluding the transaction owing to the indebtedness of Mrs. Pratt to H.F.C.K. That it was the plaintiff's obligation to draw the transfer and failure to do so was fatal to the transaction coupled by the failure to pay the balance of the purchase price. That the sale agreement was silent on the issue of professional undertaking to secure the balance of the purchase price or to hold onto the title and therefore Clause 4 (2) (b) of the L.S.K Conditions of sale comes in place. That the plaintiffs advocate did not give any professional undertaking to pay the purchase price nor to hold onto the original title neither did they seek an intention of time as this is what is done in practice. There was no evidence was availed by the plaintiff to show that it had any funds to complete the purchase price therefore he cannot claim for specific performance.

On the issues of law applicable, it was submitted that it was not the duty of the court to make contracts for the parties but to construe any such contract and arbitrate on them as was held in the case of **Kanyango – vs Kenya Commercial Bank Limited & Another (2004) 1 KLR 126**. The defendant was discharged from the liability of the contract when the plaintiff failed to pay the purchase price. For this argument the defendant relied on the case of **Mwangi –vs- Kirio**. Where the Court of Appeal held that if the purchaser failed to pay the balance of the purchase price on the agreed date, the vendor was discharged from further performance of the contract by the purchaser's failure to pay the balance of the purchase price. Counsel submitted that the defendant was only obliged to release the completion documents upon payment by the plaintiff of the balance of the purchase price which was not done. Submissions were made on the meaning of rescission and repudiation.

On the affluxion of time it was submitted that a party may be discharged from its obligations under a contract by affluxion of time. A contract may be determined after the expiry of the definite term by notice given after the end of the term. He stated that in this case the defendant did not purport to terminate the sale agreement before the expiry of its term and that the defendant terminated the sale agreement once the time mutually agreed upon by the parties for its performance had lapsed therefore he was justified in doing so.

On specific performance it was submitted that it was equitable remedy that required a party seeking to approach the court with clean hands and it was held in the case of **Nabro Properties Limited vs. Sky Structures Limited** that a party seeking specific performance must show and satisfy the court that it can comply and be ready and able to perform its part of the contract. That in this case since the plaintiff had failed to discharge his part of the bargain he was not entitled to specific performance.

DETERMINATION

Having read and considered the parties pleadings, evidence in court made by the parties, submissions and the authorities cited, this court has narrowed the issues for the following determination:-

1. **Was time of essence in the completion of the sale agreement dated 1st March 1997?**
2. **Was the sale agreement validly rescinded?**

3. **Was the defendant required to issue Notice before rescinding the sale agreement?**
4. **Whether the defendant should refund the 10% deposit received by the plaintiff and whether clause 6 of the special conditions for sale should apply in this case.**
5. **Whether the plaintiff is entitled to the remedy sought in the plaint and the defendant in the counterclaim?**
6. **Who bears the costs of this suit?**

It is not in dispute that there was a sale agreement dated 1st March 1997 between the plaintiff and the defendant whereby the plaintiff was the purchaser and the defendant the vendor. It is also not in dispute that the plaintiff paid the Kshs. 1,200,000/= as the deposit towards the 10% as required under clause 3 of the sale agreement. The parties are also in agreement that the two documents indicated in clause 5 of the sale agreement were to be obtained by the defendant and availed to the plaintiff in a letter dated 11th August 1997. It is also not in dispute through the said letter the defendant brought to the attention of the plaintiff's advocates the fact that in line with clause 5 of the sale agreement the completion date would be 15 days of the receipt of the two documents which was 26th August 1997. The plaintiff did not pay the balance of the purchase price and no transfer document was availed for the defendant to sign which prompted the defendants to rescind the contract for sale of land.

The plaintiff being dissatisfied with the manner in which the defendant rescinded the agreement for sale, filed this suit seeking for relief of specific performance alleging breach on the part of the defendant while the defendant on its part claimed that the plaintiff failed to pay the balance of the purchase price on the actual completion date of 26th August 1997. It is also not in dispute that the sale agreement was subject to the Law Society Conditions for sale 1998 in so far as they were not inconsistent with the clauses in the sale agreement.

Before making a determination of the issues herein this court is guided by the decision of the Court of Appeal in **National Bank Kenya Limited –vs- Pipeplastic Samsolit (K) Limited and Another [2002] 2.EA 503** where the court held that a Court of law cannot rewrite a contract between the parties and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract. I also must remind the parties that they are bound by their pleadings as filed. Now to the issues.

Was time of essence in the completion of the sale agreement?

This was a contentious issue in this matter. The sale agreement provided for a period of 90 days from 1st March 1997 as the completion date or 15 days after the date of which the deed plan in respect of the said portion and Letter of Consent from the Land Control Boards concerned are delivered to the purchaser's advocates whichever was later.

I have looked at the sale agreement and find that there is no specific or express clause with the words that "time was of essence". Therefore the Law Society Conditions of Sale become operative and in particular clause 7. This sub-condition applies unless a special condition provides that time is of essence in respect of the completion date. In **Sagoo-vs-Dourado [1983] KLR 365** the Court cited with approval Halsbury's Laws of England, 4th Edition, paragraph 481 that states as follows;

"The modern law in the case of contracts of all types may be summarized as follows. Time will not be considered to be of essence unless:

- (1) *The parties expressly stipulate that conditions as to time must be strictly complied with;*
- (2) *The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or;*
- (3) *A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence".*

Further, in Chitty on Contracts 27th Edition Volume 1 General Principles, Sweet & Maxwell 1994 at page 1029 the author states that ***“At law, time is always of the essence of the contract when any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will be for breach of it---stipulations as to time were generally of the essence of the contract, so that a party could treat the contract as repudiated if the other party’s performance was not completed on the date stipulated by the contract.”***

The sale agreement was a contract between the parties. My understanding is that when a party to a contract promises to do a certain thing at a specified time but fails to do it the contract becomes avoidable. If the intention of the parties was that time should be of essence then both parties were to ensure that due and proper compliance of the terms of the agreement were in order to complete the transaction within a reasonable time. The question therefore that stands out is whether time was of essence and whether the plaintiff was able to complete the transaction within the stipulated time or within reasonable time. That is the question that requires proper answer in order to determine the liability and responsibilities of each party. To determine this question, I must look at the nature of the agreement, the character of the breach alleged so as to make a proper finding. The real test is whether from the totality of the facts and circumstances pertaining to a particular transaction it may be reasonably inferred that the parties intended that time is of essence. In determining this issue it is paramount that this court considers the correspondence between the parties. The letter dated 11th August 1997 drawn by the defendant’s advocate and addressed to the plaintiff’s advocate at paragraph 2 states that, ***“We would invite your attention to paragraph 5 of the sale agreement which prescribes the completion date to be the 15th day after the date on which the deed plan and the letter of consent are delivered to you”***.

Clause 5 of the sale agreement stated that the actual completion date would be 90 days from the date of the agreement or 15 days after the date of which the deed plan in respect of the portion and letter of consent from the Land Control board is delivered to the purchaser’s advocate whichever is the later. It is obvious that the agreement was not completed within 90 days and therefore the parties were to comply with the later part of this clause. In the letter dated 11th August 1997, the vendors advocate forwarded a letter of consent from Thika Land Control Board and the deed plan and also drew the attention of the purchaser to the 15 days that was stated in clause 5. My understanding of this letter is that the plaintiff’s advocate had 15 days within which to draft the transfer document and pay the balance of the purchase price. It is noted that the same day the purchaser’s advocate wrote the letter dated 11th August 1997 seeking the title deed of the property. Did this discharge the purchaser from the 15 days indicated in the agreement. In my view it did not. It was expected of the defendant to have forwarded the transfer document once the balance of the purchase price was paid even though time was not expressly made of essence, it was expected that each party would perform his part of the bargain. **DW1** in her evidence informed this court that the purpose for selling the suit property was to enable her clear a loan at Housing Finance Corporation of Kenya. In my view time became of essence in completion of the agreement once the purchaser’s attention was drawn to the later part of clause 5 of the agreement.

Was the defendant required to issue Notice before rescinding the sale agreement

The sale agreement did not provide for issuance of notice of either party should one default. My understanding therefore was that the Law Society Conditions came into play. Clause 7(b) of the Law Society Conditions of Sale provide that ***“If sale shall not be completed on the completion date either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed ready and willing to complete.”*** Further Clause 7 (c) states that, ***“Upon service of a completion notice it shall be become a term of the contract that the transaction shall be completed within twenty one (21) days of service and, in respect of such period, time shall be of the essence of the contract”***

In **Elijah Kipkorir Barmalel & Another –vs- John Kiplagat Chemweno & 3 Others (2010) e KLR** the Court held that, ***“...although the parties to a sale agreement upon which a consent has been obtained may choose to terminate it in the absence of an express agreement on time being of essence, notice must be served on the defaulting party before any assertion can be made that time was of essence. “In Sisto Wambugu –vs- Kamau Njuguna (1983) e KLR*** the Court held that, ***“Contracts for the sale of land***

commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day. The law is that, this right can only be exercised where time is of essence or if it is not after a party who is in default has given reasonable notice to the defaulting party making time of essence. This position is explained in Halsbury's Laws of England (4th Edition) paragraph 485. In cases where there is unreasonable delay by a notice from the party who is not in default fixing a reasonable time for performance and stating that the event of non-performance with the time so fixed he intends to treat the contract as broken." It was therefore incumbent upon the defendant to serve the plaintiff with the 21 days notice before rescinding the sale agreement. The failure to serve notice was in breach as per the Law Society Conditions of sale.

Was the sale agreement validly rescinded?

In **William Kazungu Karisa –vs- Cosmas Angore Chanjera [2006] e KLR** the Court held that, "*The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them*"

The plaintiff contends that the defendants rescinded the agreement for sale without issuing Notice and therefore the rescission of the sale agreement was not valid. The defendants on the other had submitted that in their letter dated 11th August 1997 their advocate notified the plaintiff's advocate that the completion date would be 15 days after the delivery of the deed plan and the later of consent from the Land Control Board. The sale agreement was silent on who between the parties was to draw the transfer document therefore I will fall back to the Law Society Conditions for sale. Clause 24(1) states that, "The conveyance shall be prepared by the purchaser and deliver to the vendor for perusal and approval not less than Fourteen days before the completion date" Clause 24 (5) states that, "On payment of the purchase money the vendor will execute a proper conveyance of the property to purchaser and will deliver to the purchaser a rates clearance certificate and where applicable a land rent clearance certificate in respect of the property valid for a period expiring not earlier than the completion date." When the plaintiff's advocate received the letter from the defendant's advocate on 11th August 1997 he responded the very day seeking for the title. The defendant choose to ignore his request until mandatory 15 days had as per the sale agreement had lapsed then they wrote back to the plaintiff rescinding the sale agreement. It is incumbent to note that one of the documents needed by the plaintiff in drafting the transfer document is a copy of the title. Clause 9 of the Law Society Conditions for sale state that, "*Within 14 days of the date of the contract the vendor shall deliver to the purchaser either the title deeds or copies to the property or an abstract of the title to the property.*" There is no evidence that the defendants never forwarded to the plaintiff a copy of the title and the allegation made by DW1 that she gave the director of the plaintiff company a copy of the title is unsustainable for the reasons that pre contract agreements which were not specifically made part of the subsequent formal agreements is not binding upon the parties as long as they have not been incorporated in the sale agreement. **Chitty on Contract 29th Edition Vol. – General Principles 12.096** defines the principle that, "*It is often said to be a rule of law that if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract ... The rule is usually known as the "parol evidence" rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation. The rule has been justified on the ground that it upholds the value of written proof the finality intended by the parties in recording their contract in written form and eliminates great inconvenience and troublesome litigation in many instances.*" It is therefore my findings that since the defendants did not avail the title deed in time to the plaintiff to enable its advocate prepare transfer documents it cannot purport to rescind the contract on the grounds that the plaintiff failed to pay the balance of the purchase price. The balance of the purchase price could only be paid upon execution of the transfer documents. I am guided by the Court of Appeal case of **Cassam -vs- Sachania** where Law JA held that, "*Time was not of essence of the contract in respect of payment of the balance of the purchase price so as to justify the repudiation of the agreement of sale by the appellants. The obligation as to payment of the balance of the purchase price was to pay the balance upon the execution of the transfer. The appellants have never executed the transfer and it was not open to them to declare the agreement null and void on the ground that payment of the balance of the purchase price was not made*" Therefore the defendants did not validly rescind the contract and to that point it cannot escape the blame in frustrating the sale agreement as to a larger extent

authored this trouble by not availing the title document to the plaintiff to enable it prepare the transfer documents in time as per the Law Society Conditions of Sale.

Whether the defendant should refund the 10% deposit received by the plaintiff and whether clause 6 of the special conditions for sale should apply in this case.

Clause (6) of the Special Conditions in the sale agreement states that , “*It is hereby agreed between the parties hereto that in the event of the purchaser failing to complete these transactions for no fault of the vendor, then the purchaser shall pay to the vendor an agreed liquidated damages of twenty per centum of the said purchase price. **In the event of the vendor failing to complete these transactions without the fault of the purchaser then in any such event the vendor shall refund to the purchaser any deposit paid in pursuance of this agreement whereupon these transactions shall cease**”* {emphasis mine}. I have already made a finding above that the defendant should have issued a Notice to the plaintiff before rescinding the agreement. It also failed to avail the title documents to the plaintiff within the prescribed 14 days and even after the plaintiffs advocate had demanded for it in his letter dated 11th August 1997. Having failed on its obligations, I find that the defendant must refund the 10% deposit to the plaintiff. In **Syedna & Others –vs- Jamil’s Engineering Co. Limited [1973] 244** where the court held that, “*The general principles would appear to be that where a buyer had paid but is unable to complete a contract ,the seller upon rescinding it may sue for damages but must return any money that may have been paid. The general principle however must yield to the intention of the parties....if the payment was part payment on default and reasons the seller must return the money.”*

Whether the plaintiff is entitled to the remedy sought in the plaint and the defendant in the counterclaim?

The plaintiff has sought specific performance against the defendant. Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. The plaintiff has sought to have specific performance but has he shown that he was ready, able and willing to complete the transaction on 24th August 1997?

Halsburys Laws of England (4th Edition) at paragraph 487 vol. 44 states that, “*A plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications ad which ought to have been performed at the date of the wit in the action. However this rule only applies to term as which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance or is in default in some non-essential or unimportant term although in such cases it may grant compensation”*

The Court of Appeal in Civil Appeal No. 165 of 1996 between **Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti**, in which **Gicheru, JA** (as he then was) expressed himself thus:

“When the appellants sought the relief of specific performance of sale of the respondent’s property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement...It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property...as stipulated in the agreement. There was, however, no express stipulation nor any indication in the agreement that time was of the essence in the agreement. The appellant’s failure to deliver up the balance of the purchase price of the suit property by the appointed date...did not bring the agreement to an end...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the

obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation...Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim...The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the court of equity would refuse to grant specific performance and would leave the parties to their other rights...When the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”.

On his part **Tunoi, JA** (as he then was) said:

“However, the appellants’ conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated”.

In this case, the plaintiff indicated that it was ready and willing to complete the transaction but it did not show how it would comply. The plaintiff has not even shown that it attempted to pay the defendant the purchase price and was rejected. It is not enough to state that you were ready to comply and willing to comply in a letter. This statement is echoed in the case of **Nabro Properties Limited –vs- Sky Structures Limited & 2 others (2002) 2 KLR 300** where the Court held that, *“A party seeking specific performance must show and satisfy court that it can comply and be ready and able a mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast upon the appellant”.*

The defendant also breached the terms of the agreement by rescinding the agreement without issuing notice and not availing the title documents to the plaintiff to enable it draft the transfer documents. It is my finding that both parties breached the terms of the agreement and therefore the prayer for specific performance cannot be granted. Further I note from the plaintiff’s list of supplementary documents sold a portion of the larger part of the land that was under subdivision to Kenyatta University Boma Housing Society Limited on 21st December 2005 for a consideration of Kshs.21 million. The said co-operative society was not enjoined as a party to this suit. It shows the caveat registered on I. R. 416/6, 11, 14. On the defendant’s counter claim I find that they are entitled to a return of the deed plan No. 213356 and letter of consent. The caveat as per document No. 5 of the plaintiff’s supplementary list of documents filed on 22nd February 2010 the caveat too should be lifted. Having made a finding that the defendant unlawfully rescinded the contract the defendant is not entitled to retain the deposit nor is it entitled to liquidated damages.

The final result is that the plaintiff is entitled to a refund of Kshs. 1,200,000/-. The defendant shall pay the said sum within 30 days from the date of judgment. The plaintiff shall return to the defendant the Deed Plan No. 213356 and the letter of consent in its possession. I also order the removal of the Caveat registered as **L. R. No. 43112/5** against the title of the suit premises (i.e. **L. R. No. 13136/64**, original No.

13136/11/2). The defendant is not entitled to retain nor the award for damages as claimed.

Who bears the costs of this suit?

Lastly, on the prayer for costs, the applicable law is found in section **27 (1) of the Civil Procedure Act** which provides that costs largely follow the event, and the court is given discretion to determine which party will meet the costs and to what extent. With the above facts, I find that it is only appropriate that each party bears it's on costs.

Orders accordingly.

Dated, signed and delivered this 20th of February 2015.

R.E OUGO

JUDGE

In the presence of

.....**Plaintiff**

.....**Defendant**

Mr. Makori Court Clerk.