



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 367 OF 2009

LOISE M. WAMBUA.....PLAINTIFF

-VERSUS-

KENYATTA UNIVERSITY.....1ST DEFENDANT

**KENYATTA UNIVERSITY BOMA CO-OPERATIVE SOCIETY LIMITED.....2ND
DEFENDANT**

JUDGMENT

Plaint

1. By a Plaint dated 27/7/2009, the Plaintiff avers having entered into a sale agreement with the 1st Defendant on 22/5/1998 for the purchase of a plot to have been excised from L.R. No. 13136. Thereafter, the 1st Defendant incorporated the 2nd Defendant as a supervisory body to foresee and facilitate the development of the property for the different employees who also had purchased plots the same. Further the Plaintiff contended that the objective of the 2nd Defendant was to provide its members with living accommodation together with such ancilliary services as roads, drainage water and light together with other amenities at fair and reasonable prices.
2. The Plaintiff averred that upon incorporation, the 2nd Defendant purported to forcefully take over the entire suit property as its capital, forcing the 102 plot owners to become its members without their consent. The Plaintiff contends that she is not a member of the 2nd Defendant and neither did she authorize it to take over her plot or undertake any works on her behalf. Further, that without any authorization from herself, the 2nd Defendant has on several occasions employed strangers to carry on works at the suit property and thereafter demanded exorbitant payments which monies she has declined to pay.
3. It is the Plaintiff's claim that she has demanded from the 1st Defendant to be allocated her acquired plot with no success. Additionally, that the 2nd Defendant has put up for sale her plot on

the ground of alleged debt incurred as a result of management of the society and procuring infrastructure all of which was done without her authorization. The Plaintiff contends that the intended sale is illegal for being undertaken without due course to the supposed 2nd Defendant's by-laws and in contravention of the spirit of the Co-operative Societies as envisaged in Cap 490, being the Cooperative Societies Act.

4. Thus, the Plaintiff prayed that judgment be entered against the Defendants for:
 - a. An order of permanent injunction restraining the 1st and 2nd Defendants whether by themselves individually or jointly, their servants and/or agents or any of them from doing the following acts
 - i. Entering into any Sale Agreement, selling, transferring, disposing of, pledging, leasing, charging in any other manner howsoever alienating or dealing with that piece of land known as LR No. 13136, Nairobi.
 - ii. Effecting any change whatsoever in the state, condition, ownership and occupation of the Plaintiff's portion or any party thereof.
 - iii. Interfering in any manner whatsoever in the Plaintiff's interest in the suit property including the Plaintiff's right of occupation and enjoyment of the suit property.
 - b. Allocation of the Plaintiff's plot to the Plaintiff by the 1st Defendant
 - c. General Damages
 - d. Costs of the suit together with interests thereon at court's rate.
 - e. Any such further order as the court may deem fit to grant in the circumstances.

Defence

5. In response to the Plaintiff's claim the 1st and 2nd Defendants filed a joint statement of defence dated 7/1/2011. The Defendants denied the allegations contained in the Plaintiff's claim and averred that the incorporation of the 2nd Defendant was carried out independently by employees of the 1st Defendant who wished to own property and sought their employer's assistance in obtaining a parcel of Land. Thereafter, the property was directly transferred to the 2nd Defendant from the previous owners prior to the sub-division of the plots to its members. It is the Defendant's averment that the Plaintiff's actions of attending meetings held by the 2nd Defendant and participating in making some payments makes her a society member. Further that at no time did the Plaintiff raise any objection to the services provided by the 2nd Defendant.
6. The Defendants contend that there is no specific plot allocated to the Plaintiff as a result of her refusal to meet the requirements enabling her to ballot for a plot. The 1st Defendant states that it is not involved in the business of buying and selling land and that its involvement was to assist its employees acquire the property pending the incorporation of the 2nd Defendant. It is also averred that the 2nd Defendant's operations are governed by its by-laws in tandem with the Co-operative Societies Act. The Defendants thus prayed that the Plaintiff's suit be dismissed with costs.

Litigation history

7. Prior to the main trial, the Plaintiff had on 29th July, 2009 also filed an application for temporary relief by way of an interlocutory injunction. The application which was opposed by the Defendants was heard and determined on 1st October, 2010. The court then issued restraining orders against the Defendants either singularly or jointly or through servants, agents or otherwise from entering into any sale agreement, selling, transferring, disposing off, pledging, leasing, charging or in any manner whatsoever dealing with or alienating the parcel of land known as LR No. 13136 pending determination of the suit.
8. The parties thereafter prepared for trial. the Plaintiff filed her list and bundle of documents on 28th

January, 2011. The list contained some 30 documents. Prior, the Defendant had filed a list and bundle of documents on 10th January, 2011. This list run some nine documents. Subsequently on 2nd April, 2012, the Defendants filed two witness statements signed by Mrs. S. W. Muiruri and Dr. Karanja Thiongo. This was notwithstanding the fact that the Defendant had on 10th January, 2011 filed a list of witness containing three prospective witnesses. The Plaintiff did not file any witness statement but opted to rely on her affidavit filed in court on 27th July, 2009.

9. The case finally came up for trial on 8th October, 2014. When only the Plaintiff testified to support her case while the Defendant called two witnesses. As a case management strategy the parties agreed to admit the documents on record, whilst also adopting the witnesses' statements. The Plaintiff was to be cross examined while the Plaintiff opted not to cross examine the Defendant's witnesses. The hearing lasted a single day and thereafter the parties filed their final written submissions.

Plaintiff's evidence

10. The Plaintiff adopted the contents of her supporting affidavit sworn on 27/7/2009 as her examination in chief. Consequently, her testimony may be summarized as follows: That she was an employee of the 1st Defendant from 30/11/1990 until 30/6/2007. That in the year 1998 the 1st Defendant advertised for the purchase of the property on behalf of its employees who were to apply for the same and would be allocated on a first come first serve basis. The Plaintiff paid an application fee of Kshs. 500/= and thereafter made payments for the plot through the 1st Defendant. After paying a total of Kshs. 216,750/- towards the purchase price, she was successfully allocated a plot. It was her evidence that the 1st Defendant mandated that the 2nd Defendant be formed to foresee and facilitate the development of the property but that at no time did she become a member of the 2nd Defendant.
11. The Plaintiff admitted that she was made aware of the by-laws of the society and made to understand that the society would provide infrastructure and other related amenities on behalf of the plot owners. The Plaintiff testified that on reading the by-laws, she learnt that the 2nd Defendant had taken over the property which was contrary to her wishes as she had not signed up as a member thereto. Thus, in the event that she was made a member, the same was not voluntary. It was her evidence that she expressed her sentiments in one of the AGM meetings that she did not want to be a member of the 2nd Defendant and neither did she want her plot to be used as collateral by the 2nd Defendant. The Plaintiff stated that she has not made any payment as demanded by the 2nd Defendant towards the infrastructure or constructions undertaken.
12. Upon being cross-examined, the Plaintiff admitted that she attended the meeting on 2nd August, 2002 when members discussed the formation of the 2nd Defendant wherein it was agreed that the employees who had contributed would be members of the 2nd Defendant, to which proposal she declined. She also stated that until 2007 when she left employment, her salary was not being deducted and in the event that it was, the same was done without her authorization. The Plaintiff admitted that the 2nd Defendant is the registered proprietor of the land but stated that it owns the land fraudulently. The Plaintiff also admitted to attending the 2nd Defendant's subsequent meetings but added that she did not do so because she had an interest. The Plaintiff did admit that she had no document to show that she bought the land Reference No. 13136 except for payment receipts for ½ acre. The Plaintiff also confirmed that besides payment of Kshs. 216,750/= the Plaintiff had paid an additional sum of Kshs. 100,000/= through her son. On re-examination, the Plaintiff confirmed that all the receipts had been annexed to her affidavit.

Defendants' evidence

13. The Defence called two witnesses who adopted their written statements both sworn on 7/3/2012 as

evidence in chief. Dr. Joseph Karanja Thiong'o (DW1) stated that he is the Chairman of the 2nd Defendant and also one of its pioneers and a promoter of the project, subject matter of the suit. He testified that the Plaintiff was a founding member of the 2nd Defendant and that she paid Kshs. 1,100 in October 2003 and a monthly subscription of Kshs. 200 from November 2003 – May 2007 towards the purchase of the land and also for survey fees. However, the Plaintiff failed to pay for all other services including drilling of the borehole, putting up the perimeter fence and construction of roads within the development.

14. It is his evidence that the 1st Defendant organized its employees including the Plaintiff to purchase land. At the inception of the project, the 1st Defendant's employees did not have a vehicle to put into effect their ideas and thus approached their employer who assisted in the transaction up to the point of transfer by which time the 2nd Defendant had been registered and the property transferred to it. Further that the 1st Defendant guaranteed the members in obtaining the loan facilities to purchase the land whereafter the money was recovered by the financier through a check off system with the 1st Defendant until the loan was fully paid.

15. DW1 stated that the decision to form the 2nd Defendant was by consent of its members who were interested in the housing project. Further that the members agreed to meet the costs of sub-division and processing of individual titles as well as contribute funds towards communal facilities such as: Perimeter wall, service roads within the property, borehole and electricity supply. Subsequently, DW1 testified, that the members agreed on a timeline within which contributions were to be made and those who met the timelines were allowed to ballot for their plots. Extensions were made on three occasions to afford an opportunity to those who did not meet the deadline.

16. DW1 testified that it was thereafter resolved in an Annual General Meeting of the 2nd Defendant that those who failed to pay the agreed amounts be deemed no longer interested in the project and their monies be refunded. Thus, that the Plaintiff was issued with several notices to comply and finally was offered her refund of contributions as a result of failure on her part to co-operate with the rest of the members. DW1 stated that it was unjust for the Plaintiff to insist to be allocated a plot when she did not undertake the ballot exercise due to lack of payments. Further that with no further payment of subscription fees from May 2007, the Plaintiff ceased to be a member of the 2nd Defendant.

17. Mrs. Salome Wanjiku Muiruri (DW2) stated that she is the treasurer of the 2nd Defendant. It was her testimony that each member of the 2nd Defendant was supposed to make payments as follows:

i. Purchase of Application forms from

Kenyatta University (non-refundable)	500.00
ii. Payment for the Plot	205,883.25
iii. Survey Fees	8,000.00
iv. Services – 1 st Installment	215,000.00
v. Services – 2 nd Installment	120,000.00

DW2 testified that the parcel of land was sub-divided into 102 plots and that each member had to pay Kshs. 428,883.25 in order to be allowed to ballot. It was her evidence that the Plaintiff paid a total sum of Kshs. 316,250.00 and thereby fell short of the required amount. The Plaintiff did not qualify to ballot. DW2 testified further that the facilities agreed on by the members, to wit, borehole, Perimeter wall, roads and electricity cost every member Kshs. 335,000.00 to which the Plaintiff only paid Kshs. 102,366.75. DW2 stated that acting on the resolution of the members of the 2nd Defendant, a cheque was drawn for the refund of Kshs. 316,250.00 in favour of the Plaintiff which was passed on to the 2nd Defendant's Advocates for collection.

18. The two defence witnesses were not cross-examined.

Documentary evidence

19. Both parties filed documents to support their urgings. By consent the parties agreed to admit and rely upon the documents on record without calling any maker.

20. The Plaintiff availed a bundle of receipts as proof of payment for the purchase of a plot and survey fees; a copy of the 2nd Defendant's by-laws; copies of demand letters from the 2nd Defendant; a copy of the 2nd Defendant's Chairman's report of the 2005 AGM held on 31/3/2006; the 2006 AGM resolutions which authorized the members who had finished making payments to ballot, extensions to be given to those with arrears and those that had not made payments be deemed to have no interest in the project; a notice for Plot for Sale for one ½ acre plot inviting eligible members to tender; and copies of minutes of various meetings including an Annual General Meeting.

21. The Defence availed a copy of the 2nd Defendant's Certificate of Registration No. CS/10072 dated 25/3/2003; an extract of a ledger showing the deductions of the Plaintiff's membership subscription fee which she ceased paying in June 2007; Minutes of several meetings and that of an AGM showing that the Plaintiff was in attendance on every occasion; a copy of the site plan showing the sub-division of the land to 102 plots; a bundle of transfer documents showing that the property was directly transferred to the 2nd Defendant; demand letters addressed to the Plaintiff giving notice of compliance with the requirements; and a copy of the cheque in favour of the Plaintiff for the refund of her contributions.

Submissions

22. The Plaintiff's counsel made brief oral submission once the Defendant closed their case. The matter was further canvassed by way of written submissions wherein the contents of the pleadings and affidavits were reiterated.

23. The Plaintiff submitted that it was not contested that there was an agreement to sell land to the Plaintiff. Plaintiff also submitted that she was always opposed to the formation of the 2nd Defendant and was never a member of the 2nd Defendant. Further it was submitted that the Plaintiff had proved her case to the required standard and was entitled to the prayers sought especially for the allocation of the Plaintiff's plot to the Plaintiff by the 1st Defendant. The Plaintiff submitted that the Defendants had deceitfully conspired to defraud the Plaintiff by transferring the property to the 2nd Defendant without involving the Plaintiff.

24. The Defendants on the other hand submitted that the Plaintiff had not proved her case on a balance of probabilities. Further the Plaintiff had not sufficiently identified the property and that the Plaintiff was a member of the 2nd Defendant but failed or neglected to honour the terms of engagement leading to the Plaintiff not being allotted any plot within the suit property. The Defendant further submitted that the Plaintiff had failed to not only plead any particulars of fraud but also prove the allegations of fraud to the required standards. Relying on the two cases of **Mzar Virani –v- Phoenix of East Africa Assurance Co. CACA 88 of 2002 (2004 Eklr)** and **Esther Akinyi Odidi & Another –v- Sagar Hardware Stores Ltd [2006] eKLR**, the Defendants urged the court to dismiss the suit with costs.

Issues

25. From the pleadings and the oral as well as written submissions of the parties, the following three main issues can be easily isolated for determination:

- a. Was there a Sale Agreement between the Plaintiff and the 1st Defendant for the purchase of a plot in LR No. 13136? If so what were the terms thereof?
- b. Was the Plaintiff a member of the 2nd Defendant? If so what membership did she hold?
- c. Is the Plaintiff entitled to the reliefs sought?

Analysis and Determination

26. The Plaintiff pleaded that there was a Sale Agreement between the Plaintiff and the 1st Defendant for the purchase of a plot in LR No. 13136 Nairobi (paragraph 4 of the Plaintiff). The Plaintiff was put to strict proof on this allegation vide the Defendants' defence statement (paragraph 4). To prove that the Plaintiff had an agreement with the 1st Defendant, the Plaintiff produced receipts for allocation of plot (land application fees of Kshs. 500/=) purchase price (sale of Plot Kshs. 208,250/= and survey fees receipt of Kshs. 8,000/=).
27. In cross-examination, the Plaintiff admitted that she had no evidence to show that she had bought land referenced as 13136. In her submissions, however, the Plaintiff sought to rely on the interlocutory finding by the court on 1st October, 2010 when the court stated that "*the sale agreement is not denied, neither has it been alleged that the Plaintiff did not pay the purchase price in respect of the said land*". For that, the Plaintiff seeks the court's aid in finding that there was a Sale Agreement.
28. The starting point should be Section 108 of the Evidence Act (Cap 80) Laws of Kenya as read together with Section 109 of the same statute. The burden was always on the Plaintiff to prove the existence of the sale agreement between the Plaintiff and the 1st Defendant. I do not hold the view that the Plaintiff has discharged this burden for the following reasons.
29. Firstly, the court's holding and findings at an interlocutory stage are not binding upon the trial court. Indeed, many a time it has been stated that the court determining an interlocutory application must be reticent in making final findings. That is the reclusiveness of the trial court. I do not for one moment believe that Hon. Justice Msagha Mbogholi who determined the interlocutory application on 1st October, 2010 intended to bind the trial court that there existed a sale agreement between the 1st Defendant and the Plaintiff. Such a finding could only be made after full trial and complete interrogation of the evidence. Besides, the Defendants had by then not filed even the statement of defence or any other documents in support of the defence to the claim. Certainly, the court was entitled to make a prima facie finding but certainly a prima facie finding does not equate a final finding: see **Mrao Ltd –v- First American Bank of Kenya Ltd & 2 others [2003] KLR 1215**.
30. Secondly, the manner of proving the existence of sale agreements for the disposition of interest in land is contained under **Section 38** of the **Land Act, 2012**. For purposes of this suit, the relevant statute would be the **Law of Contract Act (Cap 23) Laws of Kenya** and in particular **Section 3** thereof. The Section is clear that such a contract must be in writing, signed by all the parties thereto and their signatures duly attested. It is that written document (or contract or agreement) that is expected to be produced and admitted in proof of evidence under **Section 97** of the **Evidence Act (Cap 80)**. Oral evidence of such transactions are indeed barred under **Section 98** of the **Evidence Act**. Indeed **Section 3** of the **Law of Contract Act** bars any suit and divests the court of jurisdiction unless the disposition is in writing or unless a resulting, constructive or implied trust is pleaded as against the Respondent: see Proviso to Section 3(3) of the Law of Contract Act and, now, **Section 38(2)** of the **Land Act, 2012** also.
31. Based on the Plaintiff's own admission that she had no evidence of a Sale Agreement between herself and the 1st Defendant as well as on the statutory requirements of both the Law of Contract Act (Cap 23) and the Evidence Act (Cap 80), I find and hold that there was no Sale Agreement for the purchase of land Reference No. 13136 Nairobi or part thereof between the Plaintiff and 1st Defendant.

32. The evidence of both DW1 and DW2 seem to place the transaction in better perspective. The 1st Defendant was not selling any property to the Plaintiff or any other person for that matter. The 1st Defendant's role was to facilitate the organizational and financial requirements to enable the 1st Defendant's employees including the Plaintiff acquire property. It is clear from the minutes of a meeting held by the employees and the plaintiff was present thereat, that the 1st Defendant actually paid for a property and the same was to be transferred to the members. At no time did the 1st Defendant own any property. It simply provided the finances for acquisition of the property which the employees were obligated to refund. I accept the evidence by the two defence witnesses in these respects. The evidence was not challenged in any way and remains uncontroverted.
33. With the finding that there was no sale agreement for purchase of a plot in LR No. 13136 Nairobi and by dint of the provisions of Section 3(3) of the Law of Contract Act, the court ought to be divested of jurisdiction but for the various occurrences and incidents which took place subsequent to the payment by the Plaintiff alongside other employees of the 1st Defendant to the 1st Defendant of the purchase price. Because of the proviso to Section 3(3) of the Law of Contract Act as well as Section 38(2) of the Land Act, where it is proven that there was no contract in writing signed by both parties and duly attested yet the purchase price or part thereof has been paid, the court must always in my view consider carefully if there may be created a resulting, implied or constructive trust. It is not sufficient to facially simply hold one to account in equity and perhaps order a refund. A trust if established may lead to the disposed interest actually being transferred even by order of the court: see the Trustee Act (Cap 167) Laws of Kenya, generally.

Chronology of events

34. A brief chronology of events and incidents all undisputed will help shed further light in this dispute.
35. The Plaintiff paid a total of Kshs. 316,250/= towards the purchase of a plot. The Plaintiff was in a group of 102 persons. All were employees of the 1st Defendant. The 1st Defendant paid the full purchase price. The property which was later to turn out to be Land Reference No. 13136/36 was transferred to the 2nd Defendant on 21st December, 2005 at a consideration of Kshs. 21,000,000/=. Each employee had been expected to pay Kshs. 205,833/=, if the employee was successful in his or her application for a plot. The 102 successful employees had from inception of their land project been operating individually and jointly but coordinated through a technical committee. They had meetings, several meetings. They agreed to incorporate the 2nd defendant. By 7th August, 2002 they had paid for the registration of the 2nd Defendant. The property was transferred the 2nd Defendant and the 1st Defendant was off the radar, save for an issue of settling the lawyers' fees. The 2nd Defendant was to ensure the transfer of the property to the employees who were members of the 2nd Defendant. The 2nd Defendant apparently demanded payment of an additional Kshs. 215,000/= for services before transferring plots to its members. The plots are yet to be transferred but most if not all members have been allocated their respective plots. The 2nd Defendant was registered on 25th March, 2003.
36. How was the membership of the 2nd Defendant constituted and was the Plaintiff a member of the 2nd Defendant? That would be an immediate question. The Plaintiff has contended both in evidence and submission that she was never a member of the 2nd Defendant. The Defendants contend otherwise. The effect of membership of the 2nd Defendant is simple. The members are bound by resolutions passed at properly convened meetings which are quorate. Members are also entitled to benefits by the entity.
37. I have reviewed the evidence as well as the submissions and make the following findings. The membership of the 2nd defendant was restricted to and limited to the 102 employees of the 1st Defendant who had purchased plots through and not from the 1st Defendant. The membership was

also open to other employees of the 1st Defendant who held the employment grade of A and above. One became a member upon payment of the entrance fees of at Kshs. 1,000/=. The evidence by the 2nd Defendant is that the 102 employees all became members of the 2nd Defendant. The Defendants state that the Plaintiff paid the entrance fees of Kshs. 1,100/= in October, 2003 which included membership fees. The Plaintiff then constantly paid Kshs. 200/= monthly subscription from November, 2003 upto May, 2007. This evidence was not contested in any way and I have no reason to doubt or reject the same. It all pointed to the fact that the Plaintiff from inception or registration of the 2nd Defendant was a member of the 2nd Defendant.

38. This is further corroborated by the various minutes of the meetings which not only promoted the registration of the 2nd Defendant but also the subsequent general meetings of the 2nd Defendant. In all the minutes availed in evidence, the quorum reflected include and record the Plaintiff's attendance and presence. The Plaintiff herself produced the minutes in evidence and did not object to any one of them. The Plaintiff was present in the meeting of 7th August 2002 as those present discussed the promotion and registration of the 2nd Defendant. The Plaintiff was also present in meetings of the 2nd Defendant held on 19th August, 2005 and 31st March, 2006 when the subject plots were extensively discussed. Why the Plaintiff would be attending these meetings if she had nothing to do with the 2nd Defendant, as she told the court, is not comprehensible. I find as a fact that the Plaintiff was a member of the 2nd Defendant at all material times.

39. There is no evidence that such membership was terminated as prescribed in the 2nd Defendant's constitution. There is no evidence too that the Plaintiff's membership was suspended at any given time as prescribed in the 2nd Defendant's constitution. There is also no evidence that the Plaintiff voluntarily resigned as a member of the 2nd Defendant. What is clear however is that at the time the Plaintiff moved the court in 2009, she was a member but not a member in good standing.

40. Is the suit property identifiable? This is yet another peripheral issue which was raised by the Defendants. It is peripheral as the substantive prayers sought by the Plaintiff should not be affected by it. The suit property has to be in the hands of either Defendant for the Plaintiff to succeed. Indeed it is.

41. Foremost what property is concerned in this dispute. The Defendants have submitted that the Plaintiff has not adequately identified the property as required by the law in any suit for recovery of immovable property. Certainly, **Order 4 Rule 3** of the Civil Procedure Rules is clear that where the subject matter of the suit is immovable property, the plaint should contain a description of the property sufficient to identify it. In the instant case the Plaintiff has under paragraph 4 of the Plaint referred to a plot within LR No. 13136. The Defendants have submitted that describing the property as a plot does not meet the threshold outlined under Order 4 Rule 3 and for that reason the Defendants state the Plaintiff's suit should fail as it is not clear which plot the Plaintiff is claiming. The Defendants have however committed themselves to the fact that the suit property is Land Reference No. 13136/36 which has been subdivided and balloted amongst the members.

42. It would be important to briefly state that the function of all pleadings is to bring the parties to an issue. Pleadings meaning the statement of case (plaint) and statement of response (Defence) simply assist the parties "*to define the issues and give the other party fair notice of the case which he has to meet*": see **Lord Hoffman in Barclays Bank –v- Boulter [1990] 1 WLR 1919, 1923**. Consequently, in considering the adequacy of pleadings, rules of procedure like Order 4 Rule 3 should not be read and interpreted in isolation. Rather the overriding objective of the Civil Procedure Rules and the question as to whether the pleadings have clearly made out the parameters of the case being advanced should be taken into account and answered.

43. The pleadings by the Plaintiff could have been sketchy, perhaps out of an unnecessary attempt at brevity, but certainly they have made out the parameters of the case advanced by the Plaintiff. Both parties certainly are able to identify the issue. It is all about a plot of land now part of the

larger property registered in favour of the 2nd Defendant on 21st December, 2005. It would be wrong to decline the Plaintiff's case at this stage of the proceedings on the basis that the subject matter has not been properly and adequately identified yet pleadings and counter-pleadings have been filed and exchanged between the parties. Evidence has also been led and documents exchanged on the basis that at stake is a plot in the title paramount property held by the 2nd Defendant being L.R. No. 13136/36.

44. It is this latter property that the Plaintiff has submitted was fraudulently transferred to the 2nd Defendant: see paragraph 16 of the Plaintiff's submissions.

45. Evidently, this aspect of the claim as to fraud can only be deemed an afterthought. The Plaintiff did not plead any fraud or deceit. Neither did the Plaintiff lead any evidence on the same. It is a very specific requirement of the common law courts that particulars of fraud be specifically pleaded and proved: see **Nizar Virani –v- Phoenix of East Africa Assurance Co. [2004] eKLR** as well as **Day –v- Garrett [1878] 7 ChD 473**. It is consequently not open to the court to infer fraud from facts not pleaded or facts which have been pleaded but are consistent with honesty. The evidence by the Plaintiff as well as the Defendants cannot even tilt an inference of dishonesty on the part of the Defendants. It would be inappropriate to hold that the property was fraudulently or deceitfully transferred to the 2nd Defendant.

Is the Plaintiff entitled to the prayers sought?

46. I have already found as a fact that the Plaintiff was a member of the 2nd Defendant. Further, at the time of filing the suit the Plaintiff was not a member of good standing. The Plaintiff had not remitted her dues for nearly two years. The Plaintiff had also not effected payment of other monies resolved as payable by the members.

47. There is documentary evidence before the court in the form of a registration certificate, by-laws minutes of various meetings (Annual & special General meetings as well as supervisory committee meetings) and copies of Audited accounts which illustrate that the 2nd Defendant was a registered cooperative society managed pursuant to the provision of the Cooperative Societies Act. It convened meetings. Held the same, once quorate. Passed resolutions. It constituted the necessary committees. It appointed auditors. It caused to be prepared and had its membership adopt audited accounts annually; it conducted elections, presided over by the regulator's representative (in the Provincial Cooperatives officer). It prepared and had its membership approve annual budgets. It lay limits to its borrowing capacity. All these point to a cooperative society that was adequately managed under the Cooperative Societies Act. The effect was that its 102 members had not only benefits but also responsibilities.

48. The first benefit the members had was that a member's share entitled the member to a plot within the paramount suit property and also equal shares in the common plots within the paramount suit property. There were 102 members and the Plaintiff was one of them. They were all entitled to a plot.

49. The same members though also had responsibilities. They were all bound by and with the resolutions and decisions of the 2nd Defendant especially those made and passed at the General meetings. One resolution passed was that the members resolved to develop proper infrastructure on the paramount title. The infrastructure involved roads, perimeter wall, borehole, water reservoir, electricity and storage tanks. The members resolved to pay for this infrastructure. All members were aware of or were notified and reminded of the resolution. Both the Plaintiff as well as DW1 and DW2 testified to like effect. The Plaintiff's testimony was that she was not willing to pay the amount of Kshs. 215,000/= towards the infrastructure as she was not a member of the 2nd Defendant. The Plaintiff does not however challenge the legality of the resolution to develop infrastructure and also the resolution of all members to pay the Kshs. 215,000/=

50. Having found that the Plaintiff was a member of 2nd Defendant, she was duly bound to pay this amount in full. She did not she only paid Kshs. 100,000/= out of the Kshs. 215,000/=. The Plaintiff testified during cross-examination that this amount was paid by her son in the year 2008. The 2nd Defendant contended otherwise. No evidence was however availed by the Plaintiff to show that the amount of Kshs. 100,000/= was paid by her son. She never protested when the payment was made, if at all.
51. I would accept the defence testimony. This money was paid by and to the account of the Plaintiff with the 2nd Defendant. There was a balance of Kshs. 102,366.75. The Plaintiff was in default, yet she was very aware of the consequences of such default. The consequence of full payment was that a member of the 2nd Defendant was then entitled to ballot (or pick his plot of choice) his or her plot. This had been resolved in a meeting attended by the Plaintiff alongside other members on 7th August, 2002. The minutes were produced in evidence by both parties.
52. Conversely, the consequence of nonpayment was that the defendant's plot would be forfeited and repossessed. Once again this binding resolution was passed in a meeting held on 19th August, 2005 of the members of the 2nd Defendant which meeting was also attended by the Plaintiff. The Plaintiff was bound by such resolutions passed at the general meetings. Despite another extension of the time limited for payment by a General meeting convened on 31st March, 2006 the Plaintiff did not effect payment. The resolve, once again of the meeting on 31st March, 2006 was that the plot would be repossessed.
53. It is certainly simple to understand why this resolve for repossession. The membership simply did not want a situation where some expended and developed infrastructure whilst others did not but would then insist on the services.
54. The Plaintiff appears to have been in this latter category. All the Plaintiff wanted was a plot but would hear nothing about the agreed payments. In my view, the Plaintiff was bound by all the resolutions of the 2nd Defendant procedurally and lawfully made and passed. Not once is there any indication that the Plaintiff challenged any of the resolutions or objected to the same. I hold the view that the Plaintiff occasioned her own misfortune. Her plot was lawfully repossessed by the 2nd Defendant. She cannot claim the same whilst insisting that she is neither a member of the 2nd Defendant nor willing to comply with the resolutions made towards acquisition of the plots titles. It would be appropriate to dismiss the Plaintiff's case.
55. I should however be judicious enough to consider and appreciate the fact that the 2nd Defendant has offered to refund the Plaintiff her entire paid up share in form of Kshs. 316,250/-. This amount ought to be refunded to the Plaintiff with interest at court rates from 1st January, 2008 until full payment.
56. I enter judgment in favour of the Plaintiff for the said amount Kshs. 316,250/= together with interest at the rate of 12% p.a. for 1st January, 2008 until payment in full.
57. The rest of the Plaintiff case is otherwise dismissed. The Defendants will have the costs of the suit.

Dated, signed and delivered at Nairobi this 17th day of February, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... **for the Plaintiff/Applicant**

..... **for the Defendants/Respondent**