REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 174 OF 2018

FORMERLY NAIROBI ELC NO.236 2009)

JOSVIR TRADERS & AGENCIES LIMITED.....PLAINTIFF

-VERSUS-

GEFFREY CHEGE KIRUNDI.....1ST DEFENDANT

LUCY WAMAITHA CHEGE.....2ND DEFENDANT

EVERTON COAL ENTERPRISES.....3RD DEFENDANT

JUDGEMENT

Introduction

1. The 1st and 2nd Defendants, who are husband and wife, owned a beneficial interest in *L.R NO. 10090/23* Juja Thika Municipality measuring 50 acres or thereabouts (hereinafter "*the suit property*") which they had bought but had not yet obtained a transfer in their favour due to the existence of litigation in the High Court at Nairobi, namely *Succession Cause No. 3608 of 203 consolidated with Nairobi HCCC No. 1401 of 2004 and Misc. No. 1277 of 2004 (O.S.)* wherein their purchase was being questioned by the beneficiaries of the estate of the initial vendor.

2. In the Plaint, the Plaintiff averred that in September 2004, the 1st Defendant, acting for himself and on behalf of the 2nd Defendant, approached the Plaintiff and offered to sell their beneficial interest in the suit property to the Plaintiff. The Plaintiff averred that the initial purchase price offered was Kshs.50, 500per acre, translating to a total purchase price of Kshs. 22,250,000, wherein a commitment fee of 10% of the purchase price being Kshs. 2,500,000 was duly paid by the Plaintiff.

3. The Plaintiff averred in the Plaint that on 30th December, 2008, the 1st Defendant acting for himself and for the 2nd Defendant, informed the Plaintiff's Director that the aforesaid litigation was about to be concluded, and a favourable Ruling was expected on 31st March, 2009.

4. According to the Plaintiff, the 1st Defendant enhanced the purchase price to Kshs.100,000 per acre translating to a total of Kshs.50,000,000; that the Plaintiff accepted the offer and a formal sale agreement was duly executed by the Plaintiff and the Defendants wherein the terms of payment was that the Plaintiff would pay Kshs.12,500,000 on or before signing the Sale agreement and the balance of Kshs.37,500,000 was payable on or before the expiry of 210 days from the date of the Ruling in the *HCCC No.3398 of 1988* (consolidated).

5. It is the Plaintiff's case that on or about 31st March 2009, the 1st and 2nd Defendants notified the Plaintiff about the Ruling in the succession cause in their favour and requested the Plaintiff to make a further payment pursuant to the agreement; that the Plaintiff duly paid the 1st and 2nd Defendants Kshs.10, 000,000 after which the Defendants put the Plaintiff into possession of the suit premises and that on 14th May 2009, the 1st and 2nd Defendants wrongfully and unlawfully breached the sale agreement by secretly transferring the suit property to the 3rd Defendant, a Limited Liability Company associated with the 1st Defendant.

6. The sale of the suit property to the 3rd Defendant triggered the Plaintiff to file this suit. In the Plaint dated 20th May 2009, the Plaintiff sought the following reliefs: -

> **a. A mandatory injunction to restrain the Defendants from interring with the Plaintiffs quiet possession of all that parcel of Land known as L R No. 10090/23.**

b. An order that the title given in the 3rd Defendants name be cancelled and the 1st and 2nd Defendants do specifically perform the sale agreement by transferring the said LR NO. 10090/23 to the Plaintiff or its nominees.

c. In the alternative, the Defendants do pay the Plaintiff damages for deceit and fraud of Kshs.109, 500, 000/- together with interest as will be outstanding at the time of trial calculated at the rate stipulated in paragraph 13 herein above.

d. Punitive and aggravated general damages for deceit

e. Interest at the same rate until payment in full

f. Costs of the suit.

g. Any other or alternative relief this Honourable Court would deem fit in the circumstance at this case.

7. The Defendants denied the Plaintiff's claim. In their joint Defence, the 1st and 2nd Defendants pleaded that it was the Plaintiff who approached them with an offer to purchase the suit property; that a meeting was held in the 1st Defendant's Chambers on 30th December 2009 between the Plaintiff and the 1st Defendant to conclude the negotiations for the sale and purchase of the suit property and that all the terms of the transaction were reduced into writing in which the Plaintiff was to pay Kshs 12,500,000 on or before the execution of the Agreement and the balance of Kshs 37,500,000 as stipulated in the Agreement.

8. The 1st and 2nd Defendants pleaded in their Defence that the additional Kshs.10, 000,000 that was paid by the Plaintiff was part performance of an agreed oral variation of the completion date as the circumstances on the part of the Defendants had changed, which oral variation had been accepted by the Plaintiff hence the payment of the said sum on 31st March 2009.

9. The 1st and 2nd Defendants denied to have breached the sale agreement by contending that it was the Plaintiff who was unable to raise the balance of the purchase price; that the Plaintiff acted in flagrant violation of the law by subdividing the suit premises without the consent of the Defendants as owners so as to raise the balance of the purchase price and that the Plaintiff sold the sub plots before taking conveyance documents from them, a term that had not been agreed in the contract.

10. According to the 1st and 2nd Defendants, the possession given by them to the Plaintiff could not have been an authority to violate the law by sub-dividing the suit property against the provisions of the **Physical Planning Act, Act No. 6 of 1996, Land Control Act, Survey Act** and other laws and to sell sub-plots and receive sale proceeds before it had taken conveyance from them.

11. It was pleaded by the 1st and 2nd Defendants that the said violations by the Plaintiff caused them to rescind the sale lawfully as the Plaintiff's actions of subdivision, survey, advertising, offering the sub-plots for sale and receiving deposits to raise the purchase price of the suit property gave the impression to potential buyers that the Plaintiff was the Defendants' agent, which was not the case and a fundamental breach of the contract.

12. The 1st and 2nd Defendants pleaded that the subject sale agreement was rendered null and void and unenforceable in law as the period for applying for the consent of the Land Control Board did expire on 30th June 2009 and that since the Plaintiff's claim is premised on the sale agreement which has been rendered invalid, the Plaintiff's claim is an abuse of the court process and ought to be struck out with costs to the Defendants.

13. The 1st and 2nd Defendants denied that the Plaintiff has any cause of action on injunctive relief or any damages under common law or at all against them; that the Plaintiff cannot qualify for any interest on the paid sum of Kshs. 22,500,000 or any such sum of money having been offered a refund and having rejected the same through its advocates and that the Plaintiff cannot be allowed to benefit from its obstinacy and unreasonable stand that was not lawful.

14. The 3rd Defendant averred in its Defence that it is the registered owner of the suit property by virtue of a transfer to it by the 1st and 2nd Defendants; that it purchased the suit property without notice of the Plaintiff's right over the suit property and that the Plaintiff's claim lay against the 1st and 2nd Defendants to refund the purchase price paid under the sale agreement.

The evidence of the Plaintiff

15. PW1, John Kariuki, adopted the contents of his witness statement dated 3rd October 2012 and filed on 4th October 2012 as his evidence in chief. PW1 stated that he used to work as a court clerk in the firm of Kirundi & Co. Advocates; that he knew the 1st Defendant since he used to run errands for him; that he was the one who gave the investigators a copy of the Declaration of Trust and that the original copy of the Declaration of Trust was with Kinuthia & Company Advocates.

16. In cross-examination, PW1 stated that he worked at Kirundi & Co. Advocates in the email department; that he was not supposed to have delivered a copy of the Declaration of Trust to the investigators as it was not among the mails he was to deliver; that a copy of the Trust was in the file and that it was the investigators who requested for a copy of the Trust for their investigations.

17. PW1 stated that he did not know the Plaintiff; that the investigator told him that Bishop Njuguna's land was being grabbed; that he had worked at the1st Defendant's law firm for more than 12 years; that the Trust had been signed by Patrick Kanye and Mzee Hamisi, but not signed by Mr. Kirundi and that his services had been terminated because of handing to the investigators a copy of the Trust Deed.

18. PW2, Joseph Kiheri Macharia, adopted the contents of his witness statement dated 3rd October 2012 filed on 4th October 2012 and relied on the same as his evidence in chief. In cross-examination, PW2 stated that he is an estate agent; that he introduced the Plaintiff to the 1st Defendant and that thereafter a sale agreement for the purchase of LR.No.10090/23 was executed between the 1st and 2nd Defendants and the Plaintiff herein.

19. PW2 stated that the agreed purchase price was Kshs. 50,000,000; that the 1st Defendant gave him an entry letter allowing the buyer to sub-divide the land, which he gave to the buyer; that the buyer was allowed to get into the land after paying the 10% deposit and that the Plaintiff had the authority of Mr. Kirundi, the 1st Defendant, to subdivide and sell the land.

20. PW3, Joseph Ng'ang'a Njuguna**,** stated that he was one of the Plaintiff's directors and had the authority of the company to testify. PW3 adopted the contents of his witness statement dated 3rd October 2012 and filed on 3rd October 2012 as his evidence in chief. PW3 stated that the transaction for the purchase of the suit land started in 2004; that the Plaintiff and the 1st and 2nd Defendants entered into the sale agreement dated 30th December 2008 and that the 1st and 2nd Defendants knew his intention was to purchase the suit property, sub-divide and sell it.

21. According to PW3, the Plaintiff was not restrained from selling the land; that it was the former owner of the land who restrained their entry to the land because of the then ongoing case in respect of the suit land and that the case delayed the signing of the agreement. It was the evidence of PW3 that the agreement made reference to case No.3508 of 2003 which, according to a letter from Kirundi & Co. Advocates, stated that the ruling had not been delivered.

22. PW3 stated that the 1st Defendant later on informed their lawyer that the Ruling in the succession case had been made in their favour; that the Plaintiff's lawyer informed the 1st Defendant that the balance was to be paid once the Plaintiff took possession of the land; that the letter made reference to Clause 7 of the agreement which stated that the risk was to pass to him after the ruling and that it was the 1st Defendant who put the Plaintiff in possession of the land and gave his agent (PW2) a note allowing him (the Plaintiff) to enter into the land.

23. According to PW3, the balance of the purchase price was to be paid within 210 days as per Clause 2 of the agreement; that the 1st Defendant never transferred the land to the Plaintiff and that he was ready to perform the agreement. According to PW3, they paid Kshs.22, 500,000 to the 1st Defendant and that the interest on the said sum in case of default by either party was 18% per annum as per the sale agreement. PW3 stated that the Plaintiff is entitled to a sum of Kshs 730, 722,144 as the total loss.

24. In cross-examination, PW3 stated that he signed the agreement; that he did not know that the land was agricultural and that his aim was to subdivide and sell the land although the issue was not captured in the sale agreement which was executed on 30th December 2008. According to PW3, the initial deposit of Kshs.12, 500,000 in respect of the land was paid in the year 2004 and that the balance was to be paid after 210 days from the date of the Ruling.

25. It was the testimony of PW3 that he did not know that the Defendants were selling the land to repay a loan; that after the deposit of Kshs. 12, 500,000, he paid a further sum of Kshs.10, 000,000 after the 1st Defendant insisted that he pays before he could take possession of the land and that he was not aware of the pressure that the 1st Defendant had from the bank.

26. According to PW3, he marketed the land for sale, did roads on the land and told third parties about the title which was in the name of the 1st Defendant; that third parties made commitments but could not recall how much he received from them and that later on, he received a notice of intention to cancel the agreement.

27. According to PW3, the consent of the Land Control Board was to be applied later by the 1st Defendant; that he did not apply for the consent to sub-divide the land which, according to him, was to be done late; that a search at Ardhi House established that the 3rd Defendant was a proxy of the 1st and 2nd Defendant and that the land was unlawfully transferred to the 3rd Defendant.

28. PW3 stated that the Trust Deed shows that Patrick Ngugi and Mzee Hamisi were the directors of Everton Coal Enterprises Ltd, the 3rd Defendant. He pleaded with the court to cancel the 3rd Defendant's title and in the alternative, a sum of Kshs. 700 million to be paid to the Plaintiff by the 1st and 2nd Defendants.

29. PW4, Ducarieh Ochieng Kamidigo**,** stated that he deals with accounts and finance; that he has a Masters in Business Administration (Finance Option); that in 2012, PW3 approached him through a mutual friend and requested him to conduct a finance analysis of a transaction which fell through and that he was to undertake the financial analysis of the actual and opportunity cost of the transaction between the Plaintiff and the Defendants up to 2012.

30. PW4 stated the actual costs incurred by the Plaintiff in respect to the suit property as at 2009 was Kshs. 646,425,000 while the opportunity/projected cost was Kshs. 730,722,144 as per his financial analysis report dated 19th September 2012 which he produced in evidence.

31. In cross-examination, PW4 stated that the purchase price of the suit property was as a result of the agreement between the two parties which was the only document that he used to come up with his report. According to PW3, after sub-division of the suit land, one could generate 530 plots and that the purchase price of every plot was Kshs. 320,000.

The Defence case

32. DW1, Geoffrey Chege Kirundi, introduced himself as a practitioner and was admitted to the bar on 27th September 1977; that he was a director of various companies; that in 1991, he purchased the suit property from a Mr. Karanja; that the suit land is agricultural land in Juja, Kiambu measuring 50 acres; that the previous purchaser of the suit land sued the seller and that the dispute was concluded in 2004.

33. DW1 stated that in 2004, a Mr. Macharia went to his office and introduced him to Bishop Njuguna (PW3) who was willing to buy the suit land; that he told PW3 that he could not sell him the land because there was a pending case in court and that later on, he (DW1) informed PW3 that the case had been concluded. According to DW1, Bishop Njuguna agreed to purchase the land at a price of Kshs.50 million.

34. According to DW1, as at the time of the sale of the suit property, he was trying to offset a bank loan; that he disclosed to Bishop Njuguna that the purpose of selling the land was to offset the bank loan; that the bank had given him timelines to pay off the debt and that Bishop Njuguna (PW3) only managed to pay him Kshs.10, 000,000/ in addition to Kshs.2.5 million which he had been paid him earlier on.

35. According to DW1, the Plaintiff took possession of the land, sub-divided it into plots and sold the plots to third parties; that the Plaintiff exposed him to third parties by selling the sub-divided plots and receiving deposits to raise the purchase price and that he had not conveyed the land yet the Plaintiff was giving false information to third parties that he was the owner of the land.

36. DW1 confirmed that he gave to the Plaintiff possession of the land to ensure that there were no trespassers. According to DW1, people did farming on the lower part of the land while others wanted to occupy the land as squatters; that he had previously evicted some squatters from the land and that the physical possession given to the Plaintiff was to ensure that squatters were kept away and not for the Plaintiff to bring surveyors and physical planners on the land to create roads and sub-divide the land into plots.

37. DW1 stated that Bishop Njuguna brought tractors on the land, opened up internal roads, brought in containers and sold the land to third parties. According to DW1, the actions of the Plaintiff after taking possession of the land is what led him to rescind the agreement by sending a notice dated 5th May 2009 to Bishop Njuguna.

38. According to DW1, Bishop Njuguna violated all the laws including the need to obtain the consents of the Land Control Board to sub divide the land and that he was ready to refund the deposit paid by the Plaintiff of Kshs. 22,500,000.

39. DW1 stated that he offered to refund the money paid as per his advocate's letter dated 18th May 2009 but Bishop Njuguna declined to accept the refund; that the Trust Deed produced by PW1 was a forged document; that PW1 was a cleaner in his office who had no access to any documents and could not deal with any documents and that the alleged Trust Deed was not prepared in his office and was not signed by him on each page as was the norm.

40. According to DW1, it was a lie that the 3rd Defendant purchased the land on his behalf; that he sold the land to the 3rd Defendant for Kshs.100, 000,000; that they appeared before the Land Control Board whereby the consent was granted and a conveyance was registered to transfer the land to the 3rd Defendant and that the 3rd Defendant is the owner of the land.

41. According to DW1, the 3rd Defendant is 10% owned by Dr. Patrick Karanja Ngugi while Kewango Electrical Ventures Ltd was owned by Dr. Patrick Karanja and his wife and that the Novation Agreement dated 18th May 2009 was entered into because he (DW1) could not manage to pay Kewango Electricals Ventures for items supplied to him and therefore offered the land to Kewango Electricals Ventures in full settlement of the debt owed by Usafi Services Ltd, a company owned by him and his wife. According to DW1, the arrangement was a debt swap.

42. It was the evidence of DW1, that liquidated damages as claimed by the Plaintiff can only arise if there was a valid agreement, which is not the case; that it was the Plaintiff who breached the agreement when he subdivided the land and failed to pay the balance of the purchase price and that in any event, the Walter's family appealed against the decision of the High court whereby his title over the land was nullified.

43. In cross examination, DW1 stated that the agreement between him and the Plaintiff was subject to LSK Conditions of sale, 1989 wherein a Rescission Notice of 21 days must be issued. According to DW1, the risk was to pass to the Plaintiff after paying consideration and that the Plaintiff was to exercise the right of possession and not ownership.

44. DW1, informed the court that as at 4th May 2007, the 210 days had not lapsed for the payment of the purchase price but the Plaintiff had fundamentally breached the implied terms of the agreement; that the reason why he applied for the consent of the board on 29th April 2009 is because they knew that Bishop Njuguna would not comply with the terms of the agreement and was cheating them and that the transfer of the suit land to the 3rd Defendant was done on 11th May 2009 while the consent of the board was given on 5th May 2009, which was the same day he terminated the sale agreement with the Plaintiff.

45. According to DW1, the reasons for termination of the agreement was because of the abuse of possession of land by the Plaintiff, surveying, advertising, offering for sale of plots and receiving deposits of the purchase price for and on behalf of the vendor without express authority from him.

46. DW2, Patrick Karanja Ngugi, introduced himself as a director of the 3rd Defendant's Company. DW2 adopted the contents of his witness statement dated and filed on 15th August 2013. DW3 stated that he signed the Novation Agreement and that he has never seen the agreement between the Plaintiff and the 1st and 2nd Defendants.

47. DW2 stated that they have had a long business relationship with Mr. Kirundi, DW1; that he does electrical installations and was contracted by the 1st Defendant to do electrical installation in the 1st Defendant Suraya's House in Nairobi at a cost of Kshs. 57 Million, amongst other costs and that the total cost was Kshs.77 million for the services he rendered.

48. According to DW2, the 1st Defendant owed his company, Kewango Electrical Ventures Ltd, a lot of money thus the Novation Agreement and that he did not enter into the agreement to cover up for anything as it was a business transaction. DW2 stated that they started discussing about the land with DW1 in early May 2009; that he visited the land with DW1 and that there was nothing specific on the land.

49. DW2 stated that the application for the consent of the board was done on 28th April 2009. According to DW1, the visit to the suit land could have been prior to the lodging of the application for consent and that the application for the consent of the board came first before the agreement. According to DW2, as at 28th April 2009, he was not aware of any other agreement in respect of the suit land; that he was not privy to the Declaration of Trust witnessed by Ivy D. Wasike advocate, who also witnessed the sale agreement and that the Trust Deed he signed was for a different business transaction where the objective was not realized.

50. It was the evidence of DW2 that the Trust Deed he was referring to is different from the Trust Deed filed in court; that he is in possession of the suit land and no order has been served upon him prohibiting him from trespassing on the land and that he was not aware of any roads constructed by the Plaintiff on the suit property.

Plaintiff's Submissions

51. The Plaintiff submitted that it is an undisputed fact that the Agreement executed on 30th December 2008 was the culmination of intents and discussions that had started way back in September 2004; that the terms of payment as per Clause 2 (i) and (ii) of the agreement were that the Plaintiff was to pay Kshs. 12,500,000 on or before the signing of the sale agreement and that the balance of Kshs. 37,500,000 was payable on or before the expiry of 210 days from the date of the Ruling in the HCCC No.3398 of 19888.

52. The Plaintiff submitted that on 23rd April 2009, he paid Kshs.10, 000,000 through his advocate and that upon receipt of the cheque, the 1st Defendant wrote a letter on the same day to the Plaintiff demanding payment of the entire balance of the purchase price by 30th April 2009 and take possession of the suit property. According to the Plaintiff, on 4th May 2008, his advocate wrote back indicating that the sale agreement had not been varied.

53. It was submitted by the Plaintiff that the correspondences do not support the 1st Defendant's testimony that there had been an oral variation of the sale agreement or that the Plaintiff had agree to pay the entire purchase price by end of April 2009 and that as a matter of law, a written sale agreement cannot be varied orally as alleged by the Defendants pursuant to **Section 97** and **98** of the **Evidence Act**. The Plaintiff relied on the case of ***Peter Munjunga Gaturu vs Harun Osoro Nyambuki & Another [2015] eKLR***.

54. According to the Plaintiff, a copy of the letter of consent of the Ruiru Land Control Board found in the Defendants' Supplementary List of Documents shows that the Defendants applied for the consent to transfer the suit property to the 3rd Defendant on 28th April 2009 and that the said date is significant in that it was the date on which the Defendants' advocates delivered the letter dated 24th April 2009 to the Plaintiff's advocates asking for the payment of the entire purchase price.

55. It was submitted by the Plaintiff that the transfer of the suit property to the 3rd Defendant was deceitful and intended to defraud the Plaintiff and that the Defendants vide their letter dated 4th May 2009 complained about the subdivision of the suit property by the Plaintiff when they had already applied for the consent at the Ruiru Land Control Board to transfer the land to the 3rd Defendant, which consent was issued on 5th May 2009.

56. The Plaintiff made reference to the Defendants' letter dated 5th May 20o9 informing the Plaintiff that since the agreement had been terminated, the Plaintiff was to give vacant possession of the suit property; that the letter was not delivered to his advocate until 15th May 2009 and that the transfer of the suit property to the 3rd Defendant was effected on 11th May 2009.

57. It was submitted that the suit property had been alienated to the 3rd Defendant before the 1st and 2nd Defendants informed the Plaintiff that they had terminated the sale to the Plaintiff; that the termination went against Clause 4 of the Sale Agreement where the Law Society of Kenya Conditions of Sale (1989) Edition required a party to give the other a Completion Notice of 21 days and that the sale agreement did not entitle a party to rescind the agreement.

58. The Plaintiff made reference to Clause 12 of the agreement to submit that the Plaintiff was not precluded from offering the subdivided portions of land for sale; that the Declaration of Trust dated 13th May 2009 established that the 1st Defendant owned the suit property by proxy and that according to the 1st Defendant's witness statements dated 12th August 2013 and 27th November 2018, he did not deny executing the Trust but in *viva voce* evidence, he alleged that the Trust was a forgery and not prepared in his office.

59. The Plaintiff submitted that the 3rd Defendant is not a bona fide purchaser for value without notice since it created an express trust vide the Declaration of Trust for the 3rd Defendant to hold the suit property at the pleasure of the 1st and 2nd Defendants and that the letter to the Land Control Board produced by the Defendants established that the consent was applied for on 28th April 2009 before a sale agreement had been done.

60. According to the Plaintiff, no value or consideration was given for the transfer of the suit property to the 3rd Defendant; that the Novation Agreement introduced in court by the Defendants is a false document since it was brought in court at the last minute to cover up for the lack of consideration and that the sale agreement between the 1st and 2nd Defendants and the 3rd Defendant is void for want of consideration.

61. The Plaintiff submitted that he had up to 30th June 2009 from 30th December 2008 when the sale agreement was executed to apply for the consent of the board before the lapse of 6 months stipulated under the Act; that the contract was breached on 11th May 2009 while this suit

was filed on 20th May 2009 and that according to Section 8 (i) of the Land Control Act, this court can extend the stipulated period of six months since the suit had been filed before the lapse of 6 months.

The Defendant's Submissions

62. The 1st and 2nd Defendants filed their joint written submissions on 14th June 2021. The 2nd Defendant submitted that despite being sued as the 2nd Defendant, no evidence was tendered by the Plaintiff or any of its witnesses against her to warrant any orders being made against her. As regards the oral variation of the sale agreement executed on 30th December 2008, the 1st and 2nd Defendants submitted that vide their letter dated 24th April 2008, the Plaintiff was made aware that the part payment of Kshs.10, 000,000 was for purposes of offsetting the bank loan but the Plaintiff defaulted on the variation and tactfully cited Section 97 and 98 of the Evidence Act. Reliance was placed on the case of ***Building Contractors & Another vs Elizabeth Kuher-Heier & Another [2010] eKLR***.

63. According to the 1st and 2nd Defendants, the lack of the consent from the relevant Land Control Board, despite the land being agricultural land, rendered the transaction between the Plaintiff and Defendants void and unenforceable for all purposes and that the Plaintiff frustrated the transfer of the title of the suit property by failing to pay timely the purchase price.

64. According to the 1st and 2nd Defendants, the Plaintiff violated the **Physical Planning Act No.6 of 1996**, the **Survey Act** and the **Land Control Act;** that the rescission of the contract of sale was premised upon the breach occasioned by the Plaintiff hence the suit property became commercially viable for transaction with other parties and that the sale agreement between themselves and the 3rd Defendant conformed to **Section 3(3)** of the law of **Contract Act** and was a valid agreement.

65. As regards the Declaration of Trust Deed dated 13th May 2009, it was submitted by the 1st and 2nd Defendants that the same was void for not being drawn by an advocate or indicating the name and address of the drawer. Reference was made to Section 35(1) of the Advocates Act and the cases of ***National Bank of Kenya Limited vs Anaj Warehousing Limited [2015] eKLR*** *and* ***Mutua & Another vs Kanua [2004] eKLR***.

66. It was submitted that the Trust Deed has not been registered against the suit property title as required under **Section 66(1)** and **(2)** of the **Land Registration Act**; that the Trust Deed has not been lodged at the Company Registry as required under the Companies Act and that the authenticity of the Trust Deed is contested as its source is not capable of being ascertained.

67. The 1st and 2nd Defendant's submitted that this court is bound by the Judgement of the Court Appeal in CA No.172 of 2010 where the transfer of the suit property from the Estate of Walter Karanja Muigai to the 1st and 2nd Defendants was nullified and that as of now, the validity of the title held by the 3rd Defendant stands impeached by the Court of Appeal. Reliance was placed on the case of ***Okiya Omtatah Okoiti & Another vs AG & 2 Others [2015]eKLR***.

68. According to the Defendants, the only available remedy to the Plaintiff is a refund of the purchase price in the sum of Kshs.22, 500,000 as a debt and not damages as provided for under Section 7 of the Land Control Act; that under the sale agreement between the Plaintiff and Defendants, there is no provision imposing an obligation on the part of the Defendant to refund the purchase price with any interest and that any interest should be computed from the date of the Judgement at courts rate.

The 3rd Defendant's submissions

69. On the 3rd Defendant's part, it was submitted that the pleadings do not show any prayers sought against the 3rd Defendant; that the Trust Deed relied upon by the Plaintiff is not valid and is of no evidential value because: it was not signed by the 2nd Defendant; the witness of the 1st Defendant was not summoned to give evidence and it was not stamped.

70. It was submitted that **Section 7** of the **Land Control Act** is clear that no interest can be claimed for deposit of the purchase price under **Section 6** of the Act; that the 3rd Defendant was not privy to the transaction between the Plaintiff and Defendants, neither did it receive any deposit from the Plaintiff and that no permanent injunction can issue against it since there was no privity of contract between it and the Plaintiff.

71. The 3rd Defendant submitted that it is a bonafide purchaser for value. Reliance was placed on the case of **Katende vs Haridah & Comoany Advocates(2008) 2EA**. As regards the Plaintiff's assertion that consideration was inadequate, the 3rd Defendant submitted that it is trite that consideration need not be adequate. Reliance was placed on the case of ***Dwijendra Kumar T/A Rafkins College vs The Registered Trustees of National Union of Kenya Muslims Coast Province Trust Fund (2015) eKLR*** where the court held that consideration only needs to be something of value that moves from the promise.

72. According to the 3rd Defendant, no evidence of fraud or misrepresentation was adduced in court to impugn the validity of the title that was issued to the 3rd Defendant and that the court should dismiss the suit with costs.

Analysis and Determination

73. Having considered the pleadings, the documents in support and in opposition of the suit, the oral evidence and written submissions by the parties, the issues that arise for determination are as follows:

a. Whether there was a variation of the sale agreement dated 30th December, 2008 between the Plaintiff and the 1st and 2nd

Defendants;

b. Who between the Plaintiff and the 1st and 2nd Defendants breached the sale agreement of 30th December, 2008.

c. Whether the suit property was transferred to the 3rd Defendant fraudulently.

d. Which appropriate orders should ensure.

74. The evidence produced in this court shows that Walter Karanja was registered as the proprietor of land known as LR No.10090/23 measuring 20.85 hectares (approximately 50 acres), hereinafter "*the suit property.*" According to a copy of the Certificate of Title, the suit property was registered in favour of the 1st and 2nd Defendants on 24th April, 2009 upon the finalization of a succession cause in respect of the estate of the late Walter Karanja.

75. Before the suit property was formally transferred to the 1st and 2nd Defendants in April, 2009, it was the evidence of all the parties herein that the 1st and 2nd Defendants, who are husband and wife, owned a beneficial interest in the land having purchased the same but could not have the land transferred in their names because of the existence of litigation in the High Court at Nairobi, namely *Succession Cause No. 3608 of 2003 consolidated with Nairobi HCCC No. 1401 of 2004 and Misc. No. 1277 of 2004 (O.S.)* wherein their purchase was being questioned by the beneficiaries of the estate of Walter Karanja.

76. It is not in dispute (as between the Plaintiff and the 1st and 2nd Defendants) that in September 2004, the 1st Defendant approached the Plaintiff and offered to sell their beneficial interest in the suit property to the Plaintiff. The initial purchase price offered was Kshs.50, 500 per acre, translating to a total purchase price of Kshs. 22,250,000, wherein a commitment fee of 10% of the purchase price being Kshs. 2,500,000 was duly paid by the Plaintiff. A formal agreement was to await the conclusion of the then ongoing case.

77. Indeed, the transaction between the Plaintiff and the 1st and 2nd Defendants is aptly captured in the letter dated 10th September, 2004 by the Plaintiff's advocate. In the said letter, the Plaintiff's advocate informed the 1st Defendant, who is also an advocate of this court, as follows:

1. Our client hereby offers to buy the whole of the aforesaid LR No. 10090/23 measuring 50 acres or thereabouts.

2. The purchase price is Kshs 505,000 per acre making a total of Kshs 25,250,000 subject to deduction of the proportionate value of such acreage as may be shown in the already existing survey plan as road reserve.

3. Our client will pay Kshs.1 million towards the purchase price to show commitment in the intent to buy the said land.

4. You will hold the said part of the purchase price pending the transfer of the title to you by the estate of Walter Karanja after which a formal agreement setting other terms except the purchase price will be executed."

78. The two parties did not wait for the finalization of the succession case in respect to the estate of Walter Karanja as agreed above. The evidence produced in this court shows that on 30th December, 2008, the Plaintiff entered into a formal agreement with the 1st and 2nd Defendants in respect of the suit property. The said agreement was drawn by the 1st Defendant.

79. According to the sale agreement dated 30th December, 2008, which was executed by the Plaintiff's directors and the 1st and 2nd Defendants, the purchase price was enhanced to Kshs. 100,000 per acre, translating to a total of Kshs. 50,000,000. The Plaintiff informed the court that he accepted the increase in the purchase price by signing the sale agreement.

80. Under clause 2 of the agreement of 30th December, 2008, the Plaintiff was to pay Kshs.12, 500,000 on or before signing the sale agreement and the balance of Kshs.37, 500,000 was payable on or before the expiry of 210 days from the date of the Ruling in the *HCCC No.3398 of 1988* as consolidated with HCCC No. 1401 of 2004 (OS).

81. The evidence adduced in this court shows that in addition to the deposit of 12,500,000 which was paid to the 1st and 2nd Defendants as at the time of signing the agreement, a further payment of Kshs. 10 million was paid to the Defendants vide a bankers dated 22nd April, 2009. According to the letter forwarding the cheque, the payment of Kshs. 10,000,000 by the Plaintiff was "*a further instalment in payment of the purchase price as per the sale agreement.*"

82. Indeed, by the time the Plaintiff was making the further payment of Kshs 10,000,000 to the 1st and 2nd Defendants on 22nd April, 2009, the 1st Defendant's advocates had by way of a letter dated 1st April, 2009 informed the Plaintiff about the outcome of the Ruling in the succession matter as follows:

"...our client obtained the Ruling yesterday (31st March, 2009) and is ready and willing to Transfer the property immediately on full payment."

83. The Plaintiff's advocates promptly responded to the letter dated 1st April, 2009. In the letter dated 2nd April, 2009, the Plaintiff's advocates informed the 1st and 2nd Defendants' advocates as follows:

"We thank you for your letter of 1st April, 2009.

Our client will get in touch with yours for the purposes of taking possession as agreed under clause 7 of the agreement. Once in possession our client will pay the balance of the purchase price as per the agreement. (emphasis).

84. It would appear that the 1st and 2nd Defendants were under immense pressure from their bank, KCB, to clear an outstanding loan with the bank. In the letter dated 24th April, 2009, the 1st and 2nd Defendants' advocates informed the Plaintiff's advocate of the need of the Plaintiff paying the "full outstanding amount of Kshs. 38,500,000 on or before 30th April, 2009 failure to which our client shall have no option but terminate this agreement and possession be withdrawn forthwith."

85. The letter by the 1st and 2nd Defendants' advocates must have taken the Plaintiff and its advocates by surprise. In the letter dated 4th May, 2009, the Plaintiff's advocates informed the Defendants' advocates that the balance of the purchase price was Kshs. 27,500,000 and not 38, 500,000; that the payment of the purchase price was to be within the stipulated terms of the agreement and that the Plaintiff does not take kindly the threats to rescind the sale agreement.

86. On the same day that the 1st and 2nd Defendants' advocates received the Plaintiff's advocates' letter dated 4th May, 2009, (which was on 4th May, 2009) they responded vide their latter dated 4th May, 2009. In the said letter, the 1st and 2nd Defendants' advocates informed the Plaintiff's advocates that their clients had learnt that the Plaintiff had not only surveyed the land and sub divided it subject to the sale agreement but had also advertised and offered for sale the sub plots to potential buyers.

87. In the same letter, the Defendants' advocates stated that their clients had learnt that the Plaintiff was busy putting up roads within the land, which was a fundamental breach of the sale agreement. On the following day, that is on 5th May, 2009, and before the Plaintiff's advocates could respondent to the letter dated 4th May, 2009, the 1st and 2nd Defendants' advocates issued a "TERMINATION NOTICE." In the said letter, the advocates accused the Plaintiff for breaching the agreement by sub dividing the land, advertising the land for sale and receiving deposits from third parties.

88. In the penultimate paragraph of the "TERMINATION NOTICE" the Defendant's advocate stated as follows:

….since it (the Plaintiff) has failed to desist from these acts despite notice not to do so, we do hereby terminate the sale agreement and this letter do constitute notice under the sale agreement. Your client (the Plaintiff) is requested to move out of the land immediately…By a separate cover, our client will refund your client's deposit with the interest as stipulated in the sale agreement."

89. The 1st and 2nd Defendants pleaded in their Defence and while giving evidence that the additional Kshs.10, 000,000 that was paid by the Plaintiff after signing the agreement of 30th December, 2008, was part performance of an agreed oral variation of the completion date as the circumstances on the part of the Defendants had changed, which oral variation, according to the 1st and 2nd Defendants, had been accepted by the Plaintiff, hence the payment of the said sum on the 31st March 2009.

90. As already stated above, the Plaintiff was clear in its advocates' letter of 23rd April, 2009 that the payment of Kshs. 10,000,000 was "*a further instalment in payment of the purchase price as per the sale agreement."*

91. There was no indication, either in the Plaintiff's advocates letter forwarding the cheque for Kshs. 10,000,000 to the 1st and 2nd Defendants' advocates, or the Defendants' advocates subsequent letters, to show that the payment of Kshs. 10,000,000 was pursuant to the variation of the terms of the agreement of 30th December, 2008.

92. Clause 2 of the agreement of 30th December, 2008 was clear that the Plaintiff was to pay Kshs.12, 500,000 on or before signing the sale agreement and the balance of Kshs.37, 500,000 was payable on or before the expiry of 210 days from the date of the Ruling in the *HCCC No.3398 of 1988* as consolidated with HCCC No. 1401 of 2004 (OS).

93. Indeed, the payment of an additional sum of 10,000,000 by the 1st and 2nd Defendants was pursuant to the agreement of 30th December, 2008 and not an oral agreement as submitted by the 1st and 2nd Defendants. Even if there was an oral agreement varying the completion period contemplated in the written agreement, the same would be a nullity. That is the position that was taken by the Court of Appeal in the case of ***Peter Mujunga Gathuru vs Harun Osoro Nyambuki & another [2015] eKLR*** where it was held as follows:

"As stated earlier on in this judgment, that clause was never modified or varied subsequently in writing. The claim that there was an oral agreement varying this amount later flies in the face of Sections 97 and 98 of the Evidence Act which for ease of reference provide as hereunder:-

Section 97(1) of the Evidence Act Cap 80 Laws of Kenya

"when the terms of a contact, or a grant, or o any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under provisions of this Act."

Further;

Section 98 of the Act provides;

"When the terms of any contract or grants or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to Section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms."

The alleged oral agreement does not fall within the provisos under Section 98 and is outrightly disallowed under Proviso (iv) of the said provision which provides: -

"The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or deposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force……..."

In this case, the oral agreement was never proved. Secondly, pursuant to Section 3(3) of the Law of Contract Act, the agreement for sale of land is required to be in writing.

94. Just as was held by the Court of Appeal in the above decision, the alleged oral agreement varying the completion period provided for in the sale agreement of 30th December, 2008 does not fall within the provisos of **Section 98 of the Evidence Act,** and is out rightly disallowed under **Proviso (iv)** of the said provision which provides that the *existence of any distinct subsequent oral agreement to rescind or modify any contract, grant or deposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing.*

95. In this case, the oral agreement to vary the completion period was never proved. Secondly, even if the same had been proved, pursuant to **Section 3(3)** of the **Law of Contract Act** which requires the agreement for sale of land to be in writing, the oral agreement would have been null and void, and therefore un enforceable.

96. The Agreement executed on 30th December 2008 between the Plaintiff and the 1st and 2nd Defendants was the culmination of intents and discussions that had started way back in September 2004. The terms of payment as per Clause 2 (i) and (ii) of the agreement were that the Plaintiff was to pay Kshs. 12,500,000 on or before the signing of the sale agreement, which it did, the balance of Kshs. 37,500,000 was payable on or before the expiry of 210 days from the date of the Ruling in the HCCC No.3398 of 1988. That term of the sale agreement was never varied.

97. According to Clause 7 of the sale agreement of 30th December, 2008, the Plaintiff was required to pay the balance of the purchase price within 210 days from the date of the Ruling in HCCC No. 3398 of 1988. The said Ruling was made on 31st March, 2009. Indeed, the 1st and 2nd Defendants' advocates informed the Plaintiff's advocates about the Ruling on 1st April, 2009.

98. Even before the expiry of the said 210 days, on 23rd April 2009, the Plaintiff paid the Defendants Kshs.10, 000,000 through his advocate. However, and upon receipt of the cheque, the 1st Defendant wrote a letter on the same day to the Plaintiff demanding payment of the entire balance of the purchase price by 30th April 2009 and take possession of the suit property.

99. The Plaintiff was right when, through its advocates, wrote back indicating that the sale agreement had not been varied, and therefore the balance of the purchase price could not be paid by 30th April, 2009. The letter dated 24th April, 2009 by the 1st and 2nd Defendants' advocates demanding full payment was categorical that the sale agreement was to be terminated if the said payment is not made by 30 th April, 2009.

100. Indeed, the 1st and 2nd Defendants were keen to terminate the contract as threatened in the said letter, a threat they implemented vide their letter dated 4th May, 2009 titled "termination notice." Although the Defendants had earlier on informed the Plaintiff that they will terminate the agreement for nonpayment of the balance of the purchase price, they gave difference reasons in the termination notice, dated 4th May, 2009

101. In the letter terminating the agreement, the 1st and 2nd Defendants advocates accused the Plaintiff for breaching the agreement by sub-dividing the land, advertising the land for sale and receiving deposits from third parties. This in my view was a red herring considering the contents of the letter of 24th April, 2009 in which the 1st and 2nd Defendants had demanded for full payment of the purchase price on or before 30th April, 2009 notwithstanding the clauses in the sale agreement on the payment of the same.

102. In any event, a copy of the letter of consent of the Ruiru Land Control Board shows that the three Defendants applied for the consent to transfer the suit property to the 3rd Defendant on 28th April 2009 which is the same date the 1st and 2nd Defendants' advocates delivered the letter dated 24th April 2009 to the Plaintiff's advocates asking for the payment of the entire purchase price, and in default the sale agreement to be terminated.

103. Indeed, even as the 1st and 2nd Defendants' advocates were authoring the "termination notice" dated 5th May, 2009, which was served on the Plaintiff's advocates on 15th May, 2009, the Defendants had already entered into a sale agreement on 5th May, 2009, obtained the consent of the board to transfer the suit property to the 3rd Defendant on 5th May, 2009 (the same day of the agreement) and transferred the

suit property to the 3rd Defendant on 11th May, 2009.

104. Going by the date of the application of the consent of the land control board and the date that the 'termination notice' was served on the Plaintiff's advocates, it is safe to conclude that the suit property had already been alienated to the 3rd Defendant before the 1st and 2nd Defendants informed the Plaintiff that they had terminated the sale. In fact, the purported termination of the sale agreement went against Clause 4 of the Sale Agreement which incorporated the **Law Society Conditions of Sale (1989) Edition**. The 1st and 2nd Defendants did not only give a Completion Notice of 21 days, they did not bother to give the Plaintiff time to remedy any breach of the fundamental terms of the agreement, if at all.

105. That being the case, it is the finding of this court that the transfer of the suit property to the 3rd Defendant on 11th May, 2009 was deceitful and intended to defraud the Plaintiff. I say so because the 1st and 2nd Defendants vide their letter dated 4th May 2009 complained about the subdivision of the suit property by the Plaintiff when they had already applied for the consent at the Ruiru Land Control Board to transfer the land, which consent was issued on 5th May 2009, which is the same day the Defendants entered into the sale agreement in respect of the suit property with the 3rd Defendant.

106. The 1st and 2nd Defendants breached the sale agreement of 30th December, 2009 by issuing an illegal, null and void 'termination notice' dated 5th May, 2009 and transferring the suit property to the 3rd Defendant on 11th May, 2009. The sale of the suit property to the 3rd Defendant was not only fraudulent but also illegal, null and void.

107. Having found that it is the 1st and 2nd Defendants who breached the sale agreement of 30th December, 2008, and that the transfer of the suit property to the 3rd Defendant was illegal, null and void, the last issue is the appropriate orders that should issue.

108. In the Plaint, the Plaintiff has prayed for an order that the title registered in the 3rd Defendant's name be cancelled and the 1st and 2nd Defendants do specifically perform the sale agreement by transferring the said LR NO. 10090/23 to the Plaintiff or its nominees. In the alternative, the Defendants do pay the Plaintiff damages for deceit and fraud of Kshs.109, 500, 000 together with interest as will be outstanding at the time of trial calculated at the rate stipulated in paragraph 13 herein above.

109. The Plaintiff has also prayed for punitive and aggravated general damages for deceit. The Plaintiff produced in evidence a financial analysis report on the loss that it had suffered due to the breach of the agreement by the 1st and 2nd Defendants. According to the said report, and the evidence of PW4, the actual costs incurred by the Plaintiff as at 2009 was Kshs. 646,425,000 while the projected cost was Kshs. 730,722,144.

110. Considering that this court has found the sale agreement that was entered into between the 1st and 2nd Defendants and the 3rd Defendant a nullity, I would not have hesitated to cancel the said transaction and the title that was issued to the 3rd Defendant. Indeed, this court has always been of the firm view that where the sale of land to a third party is a nullity, the ensuing title should be cancelled, and the title to revert to the party who is entitled to the land, whether the said third party was an innocent purchaser for value or not.

111. However, the evidence that was adduced in this court shows that the title to the 1st and 2nd Defendants was nullified by the Court of Appeal in Nairobi Civil Appeal number 172 of 2010 on 29th July, 2016. Going by the decision of the Court of Appeal, the transfer of the suit property to the 1st and 2nd Defendants on 24th April, 2004 pursuant to an order of the High Court in succession case number 3608 of 2003 was a nullity. The title to the suit property has since reverted to the Estate of the late Walter Karanja.

112. That being the case, the nullification of the transfer of the suit property to the 3rd Defendant by this court has since been overtaken by the order of the Court Appeal. The property having reverted to the Estate of Walter Karanja, the 1st and 2nd Defendants do not have a title to pass to the Plaintiff. The Plaintiff is only entitled to damages as against the 1st and 2nd Defendants for breach of the sale agreement.

113. Although the Plaintiff has quantified damages to include loss of business, this court will assess the payable damages strictly in accordance with the terms of the sale agreement between the Plaintiff and the 1st and 2nd Defendants.

114. Clause 11 of the sale agreement of 30th December, 2008 provides that in the event the vendors shall be unable to successfully transfer the property to the purchaser as a result of circumstances beyond their control, the vendors shall in lieu of the property herein refund the purchase price paid and interest calculated as per clauses hereinabove together with reasonable expenses incurred.

115. The agreement provided the payable interest by the purchaser in case of default on its part at clause 8 as follows:

> **" All monies payable by the Purchaser hereunder whether o account of the purchase price or otherwise shall, without prejudice to all other rights and remedies of the vendor hereunder, carry interest at the rate at the rate of <u>Eighteen (18%) per centum per annum compounded on monthly rates or such rate that may solely determined by the vendors from the date of expiry of 210 days from the date of Ruling of the High Court Succession Cause Number 3608 as consolidated until the date of actual payment</u> (emphasis mine).**

116. The reading of clause 11 of the agreement shows that the interest payable by the Plaintiff in the event it breaches the agreement was to apply mutatis mutandis to the 1st and 2nd Defendants, that is eighteen (18%) per centum per annum compounded on monthly rates.

117. It is not in dispute that as at the time of signing the agreement, the Plaintiff had paid to the 1st and 2nd Defendants Kshs. 12,500,000. It

is also not in dispute that on 24th April, 2009, the Plaintiff paid the 1st and 2nd Defendants Kshs. 10,000,000, making a total of Kshs. 22,500,000. This is the amount that is payable to the Plaintiff, together with interest at the rate of eighteen (18%) per centum per annum compounded on monthly basis from the date when this suit was filed until payment in full.

118. The reason for an order that the interest to be paid by the 1st and 2nd Defendants from the date of filing this suit is because as at the time the suit was filed, the 1st and 2nd Defendants had already received the said money from the Plaintiff, which money they used to offset a loan that was due to them. The Plaintiff would have invested the money in other ventures, and earned interest, but chose to buy the suit property.

119. Indeed, from the evidence of PW3 and PW4, the sole intention of the Plaintiff buying the suit property was to sub divide it, sell the plots and make profits. Having paid to the 1st and 2nd Defendants the said amount a few months before filing this suit, the Plaintiff is entitled to interest on the principal amount as from the time it initiated this suit.

120. For avoidance of doubt, the payable monthly compounded interest is what is otherwise known as "*interest on interest*." The compound interest for the first period is similar to the simple interest but the difference occurs in and from the second period of time. From the second period, the interest is also calculated on the interest thus earned on the previous period of time, thus the term "*interest on interest*." The interest is added back to the principle each month. The total compound interest is the final amount excluding the principal amount.

121. For the reasons given hereinabove, the Plaintiff's Plaint is allowed as follows:

a. The 1st and 2nd Defendants to jointly and severally pay the Plaintiff Kshs. 22, 550,000.

b. The 1st and 2nd Defendants to jointly and severally pay the Plaintiff interest on the above amount at the rate of eighteen (18%) per centum per annum compounded on a monthly basis from the date when this suit was filed until payment in full.

c. The 1st and 2nd Defendants to jointly and severally pay the costs of the suit.

DATED SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 18TH DAY OF FEBRUARY, 2022

O. A. ANGOTE

JUDGE

In the presence of:

Ms Kamau for Mr. Mbigi for the Plaintiff

Mr. Gathamia for the 1st and 2nd Defendants

Mr. Gathamia for Mr. Kirundi for the 3rd Defendant