



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT

ELC NO. 382 OF 2008

NJOWAMU CONSTRUCTION COMPANY LTD.....1ST PLAINTIFF

STEPHEN NJOROGI MUHINJA.....2ND PLAINTIFF

= VERSUS=

SAMUEL NGIGE KIARIE.....DEFENDANT

JUDGEMENT

By a Plaint dated 11th August 2008, the Plaintiffs herein brought this suit against the Defendant. The Plaintiffs prayed for various orders in their Plaint. Among the Orders prayed for are:-

- a. *Specific performance of the agreement for sale dated the 8th June, 2007.*
- b. *In the alternative and without prejudice to (a) above, the sum for Kshs.4.5 million paid to the Defendant under the said agreement for sale together with interest thereon at Court rates from the said 8th June, 2007 until payment in full.*
- c. *General damages for breach of contract of sale dated the 8th June, 2007.*
- d. *Kshs.2,015,904/= being the value of motor vehicle Registration No. KAZ 745 B together with interest thereon from the 11th June, 2008 until payment in full.*
- e. *General damages for loss of use of motor vehicle KAZ 745 B .*
- f. *General damages for coercion.*
- g. *Exemplary and or aggravated damages.*
- h. *Costs of this suit and interest thereon.*

The Plaintiffs had alleged in their Plaint that by an agreement in writing dated the 8th June 2007 and made between the Plaintiffs and the Defendant, the Defendant agreed to sell and 1st Plaintiff agreed to buy all that piece or parcel of Land belonging to the Defendant together with all developments thereon and known as **LR No. 76/784, Thindigua Kiambu , District** at the price of **Kshs. 9. Million only**. That by the said agreement, it was provided inter alia that the Plaintiffs should pay on the signing of the said

agreement an initial sum of **Kshs 4 Million** as well as take possession of the said land and premises as tenant at the monthly rent of **Kshs.20,000/=** pending completion of the sale on or before the 30th August 2007. Further, that pursuant to the said agreement, the Plaintiffs have paid a total of **Kshs. 4.5 Million** towards the purchase price whilst continuing to pay separately monthly rent as provided for in the said agreement. Plaintiffs further alleged that by a letter dated the 7th April, 2008, the Defendant wrote to the Plaintiffs requiring them to vacate the premises the subject of the agreement for sale on the grounds that the Defendant has purportedly terminated the agreement for sale.

It was the Plaintiffs contention that they have at all times been ready, able and willing to complete the sale and have severally offered the balance of purchase price to the Defendant who however has failed, refused and/or neglected to facilitate the completion by way of proffering the requisite statutory completion documents to the Plaintiffs to allow completion.

Further that on 3rd April, 2008, the Defendant wrongfully and unlawfully instructed **M/s Recovery Concept**, to levy distress against the Plaintiffs motor vehicle registration **No. KAZ 745B**, a Mitsubishi pickup which was valued at **Kshs.1,550,650/=** together with the other household goods in the suit premises. The distress was for purported rent arrears of **Kshs.180, 000/=**. The Defendant continued with the said distress and on 11th June 2008, **M/s Keysian Auctioneers** attached and took away the Plaintiffs motor vehicle registration **No. KAZ 745 B** purportedly for a value of **Kshs. 150,000/=** which vehicle, the Plaintiffs have never seen it again to-date. Therefore, the plaintiffs claim damages for conversion of the motor vehicle **KAZ 745 B**, and also aggravated damages.

The Defendant herein **Samuel Ngige Kiarie**, filed his amended Defence and Counter Claim on 10th October 2012, the Defendant denied existence of privity of contract or at all between the 2nd plaintiff and the Defendant. He further alleged that the initial agreement between the 1st Plaintiff and the Defendant was entered on the 1st September 2006 and the 1st Plaintiff breached it by failing to complete payments of the purchase price.

The parties further re-entered into another agreement on 8th June 2007, which the 1st Plaintiff also breached by failing to pay the purchase price. It was the Defendant's contention that the tenancy agreement was part and parcel of the sale agreement and was hinged on condition that the 1st Plaintiff would perform its part of the sale agreement. Further, that the 1st Plaintiff refused, failed and or neglected to pay the balance of the purchase price as stipulated in the agreement and after the said breach, the rent was enhanced to **Kshs.45, 000/=** per month and which both parties assented to and which the 1st Plaintiff has been paying. The Defendant further alleged that long after the completion period, the plaintiff made no effort at all to perform its part of the sale agreement. Again on the 4th March, 2008, the Defendant through his Advocate wrote to the 1st Plaintiff and issued it with 21 days **notice**, within which to complete its part of the sale agreement and further gave notice that the sale agreement would stand terminated if the 1st Plaintiffs failed to perform by expiry of the said 21 days **Notice period**. However, the 1st Plaintiff ignored, failed, and or refused to respond or honour the Notice and the agreement duly terminated upon expiry thereof.

The Defendant also alleged that the Plaintiffs failed, neglected and /or refused to pay to the Defendant **Kshs.225, 000/=** rent arrears despite demand. The Defendant had no option but to instruct auctioneers to levy distress for rent which distress was legally carried out by the auctioneers after 1st Plaintiff was issued with the due Notice.

In his Counter Claim, the Defendant claimed that the 1st Plaintiff breached the Sale Agreement and despite Notice, has failed to complete its part and the Defendant therefore legally terminated the sale agreement. Further, that the Plaintiffs have lodged an illegal caveat against the Defendant's parcel of land and he is now seeking for its removal through the laid down provisions of law.

The Defendant further alleged that he is willing to refund monies paid to him by the 1st Plaintiff

less **10%** of the purchase price as stipulated in the sale agreement. Further, that the Defendant has deposited all money paid to him by the 1st Plaintiff into an interest earning account held by the respective advocates to the parties herein. It was the Defendants contention that as a result of the breach by the 1st Plaintiffs, the Defendant has lost opportunity to invest the sale proceeds and has suffered damage. The Defendant has also lost market rate of his investment.

The Defendant has therefore prayed for;

- a. *Vacant possession of all that property known as **LR NO. 76/784 Thindigua Kiambu District** failure to which eviction will issue.*
- b. *General damages for breach of contract*
- c. *General damages for lodging of illegal caveat thus encumbering the Defendant's property.*
- d. *Mesne profits at the market rate from 1st September, 2006 upto the date of the Plaintiffs shall accord the Defendant the vacant possession or for such other period as the court may decide.*
- e. *Caveat registered against the suit property be removed.*
- f. *Costs of this suit*

The Plaintiffs herein called two witnesses to support their case. The Defendant also gave evidence and called no witness in support of his case. PW1, **Stephen Njoroge Muhinja**, the Managing Director, of **Njowamu Construction Company Limited**, and the 2nd Plaintiff herein gave evidence and told the Court that he lives in the suit premises and that on 1st September, 2006, the Plaintiffs and the Defendant entered into a sale the agreement for sale of **LR No.76/784 Thindingua Kiambu District**, to the Plaintiffs. The purchase price was **Kshs.9,000,000/=**. The terms of agreement was that the 1st Plaintiff was to pay the last instalment of **Kshs.4000,000/=** on 28th February, 2007.

However, the 1st Plaintiff and Defendant re-entered into another sale agreement on 8th June, 2007, which agreement superseded the previous agreement. The Plaintiffs had by then paid a deposit of **Kshs. 4 Million** and the balance was to be paid in two instalments of **2.5 Million each**. The Plaintiffs were to pay **Kshs. 2.5 Million** on or before 30th June, 2007 and another **2.5 Million** on or before 30th August 2007. Further clause No.3 of the sale agreement stated that late payments of the purchase price would attract a penalty of **Kshs.25,000/-** per month until full payment.

PW1 further testified that he had financial difficulties and he explained the same to the Defendant. He was therefore unable to pay the balance of the purchase price by 30th August, 2008. However, he started paying a penalty of **Kshs. 45,000/=** per month as provided by special condition No3 of the sale agreement. It was his evidence that he further paid **Kshs.500, 000/=**, to the Defendant on 18th August, 2007. He produced a copy of the said banker's cheque as exhibit No.2. He further testifies that when he entered into the premises in the year 2006, at the price of **9000,000/=** the same was dilapidated as the house had been left for several years without anyone staying in it. That the roof was leaking, the walls were peeling off and the floor was completely destroyed. It was his evidence that he repaired the said house and improved it by putting up a perimeter fence and a gate and the value has now gone up as evidenced by the valuation reports produced in Court.

PW1 further testified that though he delayed paying the purchase price as per the sale agreement dated 8th June, 2007, he continued to pay the penalty as stipulated by the special condition No.3.

He further testified that the Defendant however, send auctioneers to attach his motor vehicle **KAZ 745B**, for recovery of **Kshs.225, 000/=**, though the motor vehicle was valued at **Kshs.1.5 Million**. It was his testimony that the Defendant finally instructed the auctioneers to sell the motor vehicle at a throw

away price of **Kshs.430, 000/=** though the Motor Vehicle was valued more than that.

PW1 also testified that the Defendant started to send people to the premises to view it and PW1 learnt these were interested buyers. It was his contention that if he was in breach of contract, then the Defendant would have invoked special conditions No.5 of the Sale Agreement and refunded him back the deposit of the purchase price- **Kshs.4.5 Million** less the 10%. However, the Defendant continued to receive **Kshs.45,000/=** penalty every month and he could now not turn around and allege that the Plaintiffs had defaulted. It was further adduced that PW1 feared that Defendant could secretly sell the Land and for that reason, he registered a caveat over the suit Land to protect his interest as a purchaser. He later filed this suit and sought for specific performance of the sale agreement.

PW1 further told the Court that on 26th February, 2009, the Court allowed his **interlocutory application** for **interim injunction** which restrained the Defendant from selling the land to any other person. Further, the Plaintiffs were ordered to deposit the remaining balance of the purchase price – **Ksh.4.5 Million**, into an interest earning joint Account of the advocates for both parties. The Plaintiffs were also ordered to continue paying the monthly rent of **Ksh.20,000/=** and the penalty of **Kshs.25,000/=** was done away with. The said Court Order was produced as exhibit 12.

The PW1 testified that he was always ready to complete the payment of the purchase price, but he had been frustrated by factors beyond his control as he works as a contractor with government agencies but the government at this particular time delayed his payments. He also testified that he had tremendously improved the premises from a dilapidated house to the current premises. PW1 evidence was supported by PW2, **Tabitha Wairimu Njoroge**, who is also one of the Directors of Njowamu Construction Co. Ltd and wife to PW1.

She confirmed that they had lived on the suit premises since 2006, as intended purchasers. Further that they entered into the 1st sale agreement on 1st September 2006 and later the second one on 8th June 2007. It was her evidence that though they defaulted in paying the purchase price by 30th June, 2007, there was a **saving clause** which provided for a penalty of **Kshs.25,000/-** per month until payment in full. She further testified that they continued to pay **Kshs. 45,000/=** to the Defendant who would receipt the money. However, the Defendant also sent auctioneers to distress them for rent.

The auctioneers attached their pick-up motor vehicle **KAZ 745 B** for recovery of rent arrears of **Kshs.225, 000/=** . That though they offered a cheque of **Kshs.225, 000/=** the Defendant and his advocate refused to receipt or accept the same and eventually, the motor vehicle was sold. It was also her evidence that when they bought the suit premises, it was dilapidated as the wooden floor was coming out. She also testified that they repaired the walls, roofs, floors and the gate and their improvement of the house and the land has raised its value as per the valuation reports produced in Court. PW2 further testified that they are still paying rent as per the Court Order but the Defendant has always threatened to evict them.

On his part, the Defendant, **Samuel Ngige Kiarie** , testified that he entered into two sale agreements with the Plaintiffs. That the sale agreement was over the sale of his property at **Thindigua**, which he was selling at **Kshs.9, 000,000/=** to the Plaintiffs. The first sale agreement was entered on 1st September, 2006 and the completion date was on 28th February, 2007. He testified that the Plaintiffs never paid the amount as stated in the sale agreement of 1st September, 2006. Consequently, the Defendant and the Plaintiffs entered into another sale agreement dated 8th June, 2007 and the Plaintiff were to be his tenants until the payment was completed. The Plaintiffs were to pay **Kshs.20,000/=** per month for the period of the agreement. He further testified that the second agreement was not honored and plaintiffs never paid up as agreed. The Defendant therefore demanded payment for the balance of the purchase price and protested against the delayed payment.

On the second sale agreement, the 1st Plaintiff was supposed to pay the final instalment of **Kshs. 2.5 Million** by 30th August 2007. However, the 1st Plaintiff did not honour that agreement too. He testified that instead, the 1st Plaintiffs paid him **Kshs.500,000/=** on 18th August 2007 and there was no any other payment though Defendant demanded for it.

Further the Defendant tried to introduce the 2nd Plaintiff to his Bank, **Savings and Loan Ltd**, so that he could get a loan to service the payment but PW1 declined that offer. Due to that breach, the Defendant renewed the tenancy where the Plaintiffs were now to pay **Kshs. 45,000/=** per month.

The plaintiffs still failed to honour the agreement and Defendant sent them a Notice and the PW1 instead of paying up, registered a caveat on the title. The Defendant further testified that he sent a Completion Notice to the Plaintiffs but they did not respond. He also sent another letter dated 7th April, 2008, asking them to vacate the premises. The letter was also never responded to and the contract was therefore revoked. It was his testimony that the Plaintiffs were in rent arrears of **Kshs.225, 000/=**. The auctioneers levied distress and proclaimed the Plaintiffs goods. The goods were later attached including motor vehicle **KAZ 745 B**, and sold through public auction.

Further that the Plaintiffs filed this suit and they were ordered to deposit the balance of purchase by the Court. They did so and they also continue to pay him rent of **Kshs.20,000/=** per month as per the Court Order. It was his testimony that he also deposited **Kshs. 4.5 Million** that had been paid to him as part payment of the purchase price in the Account opened by their Advocates. Defendant testified that the account now has **Ksh.9 Million** as per the Bank statement Defendant's Exhibit No.2. It was his testimony that the value of the property has now gone up as per the valuation reports produced in Court. That he was selling the land to invest the money in better property that would have given him better returns but he did not get the money as expected. He therefore urged the court to find that he was ready to complete the sale agreement but the Plaintiffs were not. He also urged the Court to give him vacant possession and also awards him damages for breach of contract and Mesne profits. He further urged the court to enter Judgment in his favour as prayed in his Counter-Claim.

The parties herein filed their written submissions and attached several authorities. I have now carefully considered the pleadings generally, the evidence on record and the submissions by both counsels and I make the following findings. I have noted that the parties herein filed their separate list of issues. However, I find that the issues for determination are as follows;

- a. ***Was there a valid sale agreement between the parties herein over the sale of LR No. 76/784, Thindigua Kiambu District?***
- b. ***Was there a breach of the said sale agreement by either of the parties herein.***
- c. ***Was the sale agreement legally terminated and is the Defendant entitled to vacant possession.***
- d. ***Is any of the party herein entitled to damages for breach of the sale agreement?***
- e. ***Are the Plaintiffs entitled to specific performance?.***

Having now considered the evidence on record, the exhibits produced by the parties and the written submissions, there is no doubt that the 1st Plaintiff and the Defendant entered into two sale agreements for the sell of **LR NO. 76/784. Thindigua, Kiambu District**, by the Defendant to the 1st Plaintiff. The purchase price of this parcel of Land was **Kshs. 9000, 000/=**. The first sale agreement was entered on 1st September, 2006. This was later cancelled by a second sale agreement for the same parcel of land dated 8th June, 2007. It is evident that the second sale agreement superseded all the previous agreements. This was provided for in the first part of the sale agreement dated **8th June 2007**, which started in Clause A.

“This agreement supersedes all previous agreements and comprises the new terms of understanding between the vendor and purchaser”.

The above provision meant that the agreement that was now binding to the parties was this second agreement. This second agreement was signed by both 2nd Plaintiff as a Director of 1st Plaintiff and the Defendant. The parties therefore were operating under the new sale agreement. The parties were bound by

the terms and conditions set out in the said sale agreement .All the parties herein have been referring to the said sale agreement in their evidence in Court. There was therefore a valid sale agreement between the parties for the sale of **LR NO.76/784 Thindugua Kiambu**. In the case of **Nelson Kivuvani Vs Yuda Komora & Another, Nairobi High Court , Civil case No. 956 of 1991**, the Court held that;

“ The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations express or implied of each of the parties and witnessed by two witnesses who signed against the name amounts to a valid contract”.

Having found that there was a valid sale agreement between the parties herein, the next question for determination is whether there was a breach of the agreement by either of the parties herein.

I have considered the sale agreement dated 8th June, 2007. From the above agreement, the purchase price was given as **Kshs.9 Million** and the Defendant acknowledged having received **Kshs. 4 Million** from the Plaintiffs. The balance of **Kshs.5 Million** was to be paid in two instalments. The Plaintiffs or purchaser was also acknowledged to have taken possession of the property as a tenant at a monthly rent of **Ksh. 20,000/=** (clause No.1). Further, the two installments were to be paid as follows:-

- i. **Kshs. 2.5 Million on or before 30th June, 2007.**
- ii. **Kshs. 2.5 Million on or before 30th August 2007 (clause 2).**

Interesting in a **clause No.3**, the parties agreed that should the purchaser be late in paying the balance of the purchase price as set out in clause No.2, the same was to attract a penalty equivalent of **Kshs.25,000/=** per month until full payment, but Clause No.3, did not state when the full payment was to be achieved . As I had stated earlier, parties are bound by the terms of their contract or agreement. This was the findings in the case of **National Bank of Kenya Ltd Vs Pipe- Plastic Samkoht(k) Ltd and another, Civil Appeal No. 95 of 1999 (2002) 2 EA 503**, where it was held that:-

“ A court of Law cannot re-write a contract between the parties . The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

As a court, it is my duty to interpret the contract executed herein by both parties to establish the parties respective rights and obligations . However, I should be cautious not to re-write or renegotiate the contract or the sale agreement by the parties herein.

From a first reading of the sale agreement, the impression one gets is that the purchaser was supposed to have cleared payment of the purchase price by 30th August 2007. However, clause No.3 brought another meaning that if there was failure to pay up the balance of the purchase price, then the purchaser would pay a penalty of **Kshs. 25,000/=** per month until payment in full. There was no indication of when the payment in full would be achieved. Therefore the said clause was open ended. There was evidence that even after signing the sale agreement dated 8th September 2007, the purchaser did not pay the two instalments as per the sale agreement. The Defendant alleged that failure to pay the two instalments as per the sale agreement amounted to breach of the agreement. However, PW1 submitted that there was a saving clause No.3 which allowed him to pay a penalty of **Kshs.25, 000/=** per month until payment in full. It is indeed evident that the purchaser did not pay the two installments of **Kshs. 2.5 Million** but only paid **Kshs. 500,000/-** on 18th August 2007 and then continued to pay the penalty.

It is also evident that even after the Plaintiffs failed to pay the balance of the purchase price, the Defendant continued to receive the penalty of **Kshs. 25,000/=**per month until when the Court varied that arrangement. The Defendant also did not evict the purchasers as provided by Clause 9, of the sale agreement. The sale agreement did not stipulate that **time was of essence** and it was also not subject to the **Law Society of Kenya Conditions of sale**.

Section 4 (2), (a) of the Law Society of Kenya Conditions of Sale, states as follows;

2. **Completion shall take place in manner set out hereunder, namely:**
 - a. **Upon completion, the purchaser shall pay the purchase money to the vendor's advocate who shall hold the same as stakeholder until registration of the conveyance. If registration of the conveyance shall not be effected within thirty (30) days of completion, the vendor may, without prejudice and in addition to any other right or remedy, give notice to the purchaser requiring him to effect the registration of the conveyance within such period (not being less than thirty (30) days from the date of notice) as may be specified in the notice. If the conveyance within such period not less than thirty (30) days from the date of notice) as may be specified in the notice. If the conveyance shall not have been registered on or before the expiry of the notice , the purchaser shall, within seven (7) days after such expiry:**
 - i. **Pay and release to the vendor unconditionally the whole of the purchaser price and all other sums payable under the contract.**
 - ii. **Treat the contract as rescinded whereupon the purchaser shall return all documents delivered to him by the vendor against repayment of any sums paid by way of deposits or otherwise and the purchaser shall, at his own expense, procure the cancellation of any entry relating to the contract in any register.**

The Defendant had allowed the purchaser to take over possession of the suit property and the Plaintiffs are therefore not trespassers. The purchaser defaulted in payment of the purchase price. However, I have considered clause No. 3 of the Sale Agreement and I interpret it to mean that in the event of default, the purchaser was bound to pay the penalty of **Kshs. 25,000/=** for every month to the Defendant. All the parties herein admit that the PW1 paid the said penalty and when he defaulted, there was distress for rent authorized by the Defendant's advocate. The 2nd Plaintiffs motor vehicle **KAZ 745 B** was also attached and sold for recovery of **Kshs. 225,000/=** as rent arrears.

Having considered the sale agreement dated 8th June 2007, and the provisions of the clauses 2 therein, I find that though the purchaser did not pay the purchase price on time and defaulted on his obligation, there was a saving clause that allowed him to pay the penalty per month. The Defendant accepted that penalty and the Defendant cannot turn around and allege that the sale agreement has been breached.

The next issue to determine is whether the sale agreement was legally terminated and whether the Defendant is entitled to vacant possession. As had been observed earlier, the parties are bound by their agreement and the Court cannot re-write their contract. (See the case of **Juma Mochemi Vs Agricultural Finance Corporation, Nairobi (Milimani) High Court Civil Case No.1265 of 2001** where it was also held:-

“ A Court cannot write a contract for the parties as a court is duty bound to declare law....”

The sale agreement herein has terms and conditions and it also did not stipulate that time was of essence. In the sale agreement, there are three clauses that touch on default- clause 3, clause 5 and clause 9. The Defendant alleged that the purchaser defaulted in payment of the balance of the purchase price. He further said that after the default persistent, a completion Notice was sent to the Purchaser. Further, that after the completion Notice was not responded to, the Defendant terminated the contract as per the letter dated 7th April, 2008. He further stated that he was ready and willing to refund the purchase price. It was his evidence that he had already deposited the already paid part of the purchase price into the interest earning Account that the Court had ordered the purchaser to deposit the balance of the purchase price. He produced Bank statement exhibits No. 2 to confirm such deposits. From the Bank statements such deposits of **Kshs. 4.5 Million** was done in the year 2011. However, the 1st Plaintiff had paid the Defendant the money in the year 2006 and 2007. By the time the Defendant allegedly terminated the

contract by the letter dated 7th April 2008, he did not adhere to clause No.5 of the sale agreement which provided that;

“ should there be frustration of the sale agreement by either partyshould the purchaser fails to conclude the transaction , he shall be refunded his money less 10%.....”

(Clause 9 further provided that the vendor may enforce **eviction** after 30th August 2007, without notice to the purchaser. However, the Defendant did not invoke any of the clauses in the sale agreement. He went ahead and terminated the sale agreement whereas the 1st Plaintiff was still paying the penalty as provided by clause No.3. The Court finds that the Defendant did not terminate the sale agreement as legally provided in the sale agreement.

It is further evident that the Defendant had intimated that he wished to sell the parcel of land to other interested buyers. The Plaintiffs were intended purchasers in possession who had entered into a sale agreement with the Defendant. There is no doubt that the Plaintiffs felt that their interests were threatened and lodged a caveat on the suit property. The evidence of such caveat is provided by Plaintiffs' exhibit 5 (a) and 5 (b).

The Plaintiffs claimed they had an interest as purchaser and tenant in possession. The Plaintiffs were therefore entitled to lodge such a caveat taking into account their **Kshs. 4.5 Million** was already with the Defendant and there were potential buyers viewing the land with the intention of purchasing it. The Court finds and holds that the sale agreement was not legally terminated and the purchaser was entitled to lodge a caveat as it had an interest as a purchaser and tenant in possession.

The other issue is whether the Defendant is entitled to vacant possession. There is no doubt herein that the PW1's possession of the parcel of land. He entered into the said parcel of land with consent of the Defendant. There is also no doubt that the sale agreement did not provide that time was of the essence and that the provisions of the Law Society of Kenya did not apply. The sale agreement only provided that if the purchaser was in breach then, the purchaser would pay a monthly penalty of **Ksh. 25,000/=** . There was evidence that the PW1 had paid that penalty until when the court on 1st March 2009 varied the said payment. The Plaintiffs testified that they have now improved the parcel of Land and the value has gone up. The Defendant did not evict the purchaser as provided by Clause 9 after 30th August 2007. Defendant continued to engage the Plaintiffs and allowed them to remain on the said parcel of Land. I will rely on the English case quoted by the Plaintiffs' Advocate of **Steadman Vs Steadman (1976) AC 540** , where the Court held :-

“ If one party to an agreement stands by and lets the other party incur expenses or prejudice his position on the faith of the agreement being valued he will not then be allowed to turn around and assert that the agreement is unenforceable”.

The Defendant herein having allowed the purchaser to remain on the parcel for Land after 30th August 2007 and having continued to receive the monthly penalty and the monthly rent of **Ksh. 20,000/=** cannot turn around and seek for vacant possession. The Court finds that the Defendant herein is not entitled to vacant possession.

Each of the party herein has asked for damages for breach of contract. The court has already noted that the sale agreement provided what would happen in the event of breach of the sale agreement. The purchaser was to pay a penalty of **Kshs. 25,000/=** per month until payment in full. The purchaser continued to pay that amount until the High Court varied the terms of monthly payment. The purchaser has also deposited **Kshs. 4.5 Million** into an interest earning Account as ordered by the Court. The Defendant allegedly terminated the sale agreement but contrary to the sale agreement. The purchaser also did not fulfil the conditions of Clause No.2, to pay the balance of the purchaser price by 30th August 2007. However, the Plaintiffs continued to pay the penalty as per the sale agreement. I find that none of the parties herein adhered to the full terms of the sale agreement. None of the party herein is entitled to damage for breach of the sale agreement.

Finally, the Court has to determine whether the Plaintiffs are entitled to an order of specific performance. The remedy of specific performance is an equitable remedy which compels one party to carry out its contractual obligation. In the instant case, the Plaintiff/purchaser is seeking an Order of specific performance so that the court can compel the Defendant to complete the transfer of the Land to them. The above award is a discretionary award and the Plaintiffs have to convince the Court that damages would not be adequate in the circumstances.

The Plaintiffs have adduced evidence that they intended to purchase the suit property in the year 2006. They have already paid **Kshs. 4.5 Million** to the Defendant. That they are now in possession of this suit land since year 2006. They have improved the land and the premises which they acquired in a dilapidated condition. They further testified that the value of the land has gone up and it would be unjust for the Defendant to fail to transfer the Land to them as he has kept the deposit of the purchase price since 2006.

The Defendant on his part testified that the Plaintiffs do not deserve an Order of specific performance as they breached the sale agreement. That they have not come to Court with clean hands and the Defendant is ready and willing to refund the part of the purchase price already paid to him. That to show that he was willing to refund the part of the purchase price, he has already deposited **Kshs.4.5 Million** that he had received from the Plaintiffs in the interest earning Account in the joint names of the two advocates. He produced evidence to show that the said Account now has **Kshs.9 Million** which was the intended purchase price.

However, the Defendant was not ordered by the court to refund the said amount and deposit it in the said interest earning Account. Defendant testified that he did so on advice from his advocate after he terminated the sale agreement. Court have had occasion to decide on the issue of specific performance. The Plaintiffs have to convince the Court that it is the object or subject matter that the desire rather than the value of the object.

Having looked at the sale agreement and the conduct of the parties, it is evident that it was the desire of the purchaser to retain the suit land. He had already taken possession of the same. It is evident that the Defendant had been receiving payments as penalty for non-payment of purchase price by the purchaser. The purchaser has now deposited the balance of the purchase price in the interest earning account as ordered by the Court. The Plaintiffs entered into the suit land with consent of the Defendant. I will be bound by the decision of the Court of Appeal in **Nyeri – Macharia Mwangi Maina and 87 others Vs Davidson Mwangi Kagiri, Civil Appeal No. 26 & 27 of 2011** where the Court held that:-

“the Respondent having put the appellants in possession of the suit property created an overriding interest in favor of the appellants in relation to LR No. 6324/2010.

In the instant case, the Defendant put the Plaintiffs/purchasers into possession and the fact that he had been receiving rent and penalty from the purchaser meant that a **constructive trust** was created in favor of the purchasers /Plaintiffs herein over the property in issue.

There is no doubt that the Plaintiffs have deposited the balance of the purchase price into an interest earning account in the joint names of both Advocates herein. The Court in the case of **Thomas Joseph Openda Vs Peter Martin Ahli (1983) KLR held that:-**

“ The normal remedy in a contract for sale of an immovable property is an action for specific performance because damages are frequently inadequate and unjust remedy for refusal to convey the property concerned “ . See Sudbrook Trading estates Vs Eggleton (1983) Ac 444

Having now found that the purchaser has already deposited the balance of the purchase price into an interest earning Account and having found that the Defendant is not entitled to vacant possession and that the purchaser was right in lodging the caveat over the parcel of land to protect its interest as a purchaser and tenant, the court finds that the plaintiffs have fully convinced this court that an Order of specific performance is the best remedy for them.

For the above reasons, the Court orders the Defendant to finalize the process of transferring this parcel of land to the Plaintiffs. The purchase price already in the interest earning account should be released to the Defendant plus the interest that it has already earned.

Having now considered the available evidence, the Court finds that the Plaintiffs have on a balance of probability proved their case against the Defendant. However, the Court finds that the Defendant's Counter Claim cannot stand and the same is hereby dismissed with no orders as to costs.

The money deposited in the interest earning Account by the Order of the Court should be released to the Defendant forthwith and the Defendant should forthwith transfer the suit Land to the Plaintiffs upon receipt of the balance of purchase price and interest earned thereon. The Court makes no findings on prayers **No. b, d, e f, and g** of the Plaintiffs though plaintiffs had submitted that they had abandoned those prayers. This Court already found that none of the party herein is entitled to damages for breach of contract. Prayer 'C' by the Plaintiffs is dismissed.

Consequently, the Court enters Judgment for the Plaintiffs against the Defendant in terms of prayer no. (a) of the Plaintiffs dated 11th August 2008.

The Court further dismisses the Defendant's Counter-Claim and further Orders that each of the party to bear its own costs.

It is so ordered.

28 days Right of Appeal.

Dated, signed and delivered this 30th day of **September** 2014

L. GACHERU

JUDGE

30/9/2014

Before Gacheru Judge

Court Clerk : Kamau

Mr Kimamo for the Defendant.

Mr Nyagaiyo holdings brief for Mr. Njanja for Plaintiffs.

Court.

Judgment read in open Court in the presence of Mr. Kimamo for Defendant and

Mr Nyagaiyo holding brief for Mr. Njanja for Plaintiffs.

28 days Right of Appeal.

L. GACHERU

JUDGE

30/9/2014

Mr Kimamo : I seek for stay of execution of the Judgment pending Appeal . We also seek for typed proceedings and the Judgment.

L. GACHERU

JUDGE

30/9/2014

Mr Nyagaiyo:

I have instructions to oppose the stay of execution. The Defendant can file a formal application for stay of execution.

L.GACHERU

30/9/2014

Court.

The typed copies of the proceedings and Judgment to be supplied to the Defendant upon payment of requisite fees. Stay of execution is granted for 14 days as the Defendant prepares to file a formal application for stay of execution.

L.GACHERU

30/9/2014