



**Osiemo & another v Onchangu & 2 others (Environment & Land Case  
58 of 2013) [2022] KEELC 111 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 111 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 58 OF 2013**

**JM ONYANGO, J**

**MAY 26, 2022**

**BETWEEN**

**ALEX NYAMWEYA OSIEMO ..... 1<sup>ST</sup> PLAINTIFF**

**OSIKWA INVESTMENT COMMUNICATIONS LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**GLADYS KWAMBOKA ONCHANGU ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KISII ..... 2<sup>ND</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LTD ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 12<sup>th</sup> February, 2013 and amended on 3<sup>rd</sup> July, 2013, the Plaintiffs filed suit against the Defendants seeking the following orders:
  - a. A declaration that the 1<sup>st</sup> Plaintiff is the only lawful proprietor of a parcel of land known as NYARIBARI CHACHE B/B BOBURIA 6309 (hereinafter referred to as ('the suit property')
  - b. A declaration that the purported transfer of the suit property made in favor of the 1<sup>st</sup> Defendant did not create any legal interest or estate in the suit property and is of no legal effect;
  - c. An order directing the 2<sup>nd</sup> Defendant to refuse to accept registration or register any document or instrument made or executed by or on behalf of the 1<sup>st</sup> Defendant purporting to deal with or any connection with the suit property;
  - d. A permanent injunction restraining the 1<sup>st</sup> Defendant whether by herself, servants or agents from entering or trespassing on the suit property or in any manner interfering with the 1<sup>st</sup> Plaintiff's legal rights as the proprietor of the suit property;



- e. An order directing the 2<sup>nd</sup> Defendant to rectify the register by cancelling the entry in respect of the 1<sup>st</sup> Defendant as the proprietor of the suit property and restore the name of the 1<sup>st</sup> Plaintiff's legal rights as the proprietor of the suit property;
  - f. The sum of Kshs. 1,250,000/= in favor of the 1<sup>st</sup> Plaintiff against the 1<sup>st</sup> Defendant as claimed in Paragraph 8(b) and 8 (d) of the Amended Plaint;
  - g. The sum of Kshs. 1,400,000/= together with interest at the bank rates in favor of the 2<sup>nd</sup> Plaintiff against the 3<sup>rd</sup> Defendant with effect from 1<sup>st</sup> August, 2013;
  - h. General damages;
  - i. Any other or further order that may be necessary in the circumstances
  - j. Costs of suit.
2. The 1<sup>st</sup> Plaintiff pleaded that at all material times, the 2<sup>nd</sup> Plaintiff was a customer of the 2<sup>nd</sup> Defendant operating a bank account No. 01136017689100. On diverse dates between June and July 2010 without the authority of the 1<sup>st</sup> Plaintiff or lawful excuse the 3<sup>rd</sup> Defendant debited the 2<sup>nd</sup> Plaintiff's said bank account with a sum of Kshs. 1,400,000/= and subsequently released to the 2<sup>nd</sup> Defendant the 1<sup>st</sup> Plaintiff's title document's to the suit property that were within its (3<sup>rd</sup> Defendant's) custody.
  3. By transfer documents made up by the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant on 26<sup>th</sup> August, 2010 fraudulently and without the authority of the 1<sup>st</sup> Plaintiff caused the suit property to be transferred to the 1<sup>st</sup> Defendant.
  4. The 1<sup>st</sup> Plaintiff further pleaded that the 1<sup>st</sup> Defendant had taken possession of the suit property alleging that the same belonged to her. He complained that after taking possession of the suit property, the Defendant had illegally utilized his building materials, demolished a building structure and erected a perimeter fence curving out an extra 0.03 Ha belonging to the Plaintiff. As result of the Defendant's actions, the 1<sup>st</sup> Plaintiff averred that he had suffered a loss of Kshs. 450,000.
  5. It was the 1<sup>st</sup> Plaintiff's case that the 1<sup>st</sup> Defendant had breached the sale agreement entered between them dated 14<sup>th</sup> July, 2010 by;
    - a. Illegally transferring the suit property to herself without the 1<sup>st</sup> Plaintiff executing the Transfer Documents.
    - b. Illegally curving out 0.03 Ha of the Plaintiff's land without his authority or consent.
    - c. Illegally obtaining the Plaintiff's title documents from the 3<sup>rd</sup> Defendant without his consent or authority.
  6. As a result of the alleged breach, the 1<sup>st</sup> Plaintiff claimed against the 1<sup>st</sup> Defendant a sum of Kshs. 800,000 being 40% of the purchase price being Kshs. 2,000,000 pursuant to their Sale Agreement dated 14<sup>th</sup> July, 2010.
  7. Upon being served with the Plaint and Summons to enter appearance, the 1<sup>st</sup> Defendant filed a Statement of Defence dated 25<sup>th</sup> March, 2013 in which she denied the Plaintiffs' claim and stated that vide a written sale agreement dated 14<sup>th</sup> July, 2010 the 1<sup>st</sup> Plaintiff sold to him the suit property measuring 0.06 Ha at an agreed purchase price of Kshs. 2,000,000. She averred that after the payment of the purchase price in full, the Plaintiff promptly executed all transfer documents in favor of the 1<sup>st</sup>



- Defendant and that the 2<sup>nd</sup> Defendant only executed the transfer documents as per the request of the 1<sup>st</sup> Plaintiff.
8. She added that the transfer of the suit property was executed after the necessary Land Control Board consent was obtained and thus the transfer was legal. She stated that the 1<sup>st</sup> Plaintiff participated in the transfer process and thus her title was valid and proper.
  9. The 1<sup>st</sup> Defendant further averred that there had been previous proceedings before this court between the 1<sup>st</sup> Plaintiff and her over the same subject matter being Kisii High Court Petition No 62 Of 2011 hence the suit is res-judicata.
  10. The 3<sup>rd</sup> Defendant on its part filed a Statement of Defence dated 27<sup>th</sup> November, 2013 denying all the allegations raised by the 1<sup>st</sup> Plaintiff against it and stated that all it did was with the express communication and instructions of both the Defendants and was pursuant to the covenants of the agreement dated 14<sup>th</sup> July, 2010 between the Plaintiff and the 1<sup>st</sup> Defendant in respect to the suit property.
  11. The 3<sup>rd</sup> Defendant further stated that under its banker-customer relationship, Loan Agreement and Guarantee contracts with the Plaintiff respectively and covenants contained in securities provided by the 1<sup>st</sup> Plaintiff for the advances, the 3<sup>rd</sup> Defendant enjoyed a right of recovery and set off of monies owed to it against any account of the Plaintiffs as guarantor and borrower respectively, and was entitled to, and did, recover amounts owed to it from the subject account without notice. She denied that the Plaintiff had suffered any loss or liability to the 2<sup>nd</sup> Plaintiff in a sum of Kshs.1, 400, 000 together with interest.
  12. The matter proceeded for hearing on diverse dates between 25<sup>th</sup> and 1<sup>st</sup> November, 2021 when the parties testified and called their witnesses.

### **Plaintiff's Evidence**

13. The 1<sup>st</sup> Plaintiff testified on 25<sup>th</sup> February, 2016 as PW1 in support of her case. During examination in chief, he relied on his witness statement dated 12<sup>th</sup> February, 2013. He also relied on all the documents enlisted in his List of Documents dated 13<sup>th</sup> October, 2015 and 14<sup>th</sup> October, 2015 listed from number 1 to 26 which he produced as exhibits. While acknowledging that there existed an agreement between him and the 1<sup>st</sup> Defendant, he stated that he did not process the Land Control Board consent even though he was required by the sale agreement to do so since his title deed was being held by the 3<sup>rd</sup> Defendant.
14. He testified that the 2<sup>nd</sup> Plaintiff applied for a loan of Kshs. 1,000,000 with the 3<sup>rd</sup> Defendant using the suit property which was registered in his name as security in the year 2009. He went on to testify that the said loan was never disbursed to the 2<sup>nd</sup> Plaintiff.
15. His testimony that the loan was never disbursed to the 2<sup>nd</sup> Plaintiff was objected to by learned counsel for the 3<sup>rd</sup> Defendant on grounds that the same had not been pleaded in the Plaint and he requested the court to have the witness stood down to enable the 3<sup>rd</sup> Defendant to file documents to illustrate how the loan was disbursed.
16. The court allowed the prayer made by counsel for the 3<sup>rd</sup> Defendant, stood down the witness and granted the 3<sup>rd</sup> Defendant leave to file and serve the said documents within 21 days.



17. The court subsequently allowed the 1<sup>st</sup> Plaintiff further time to file a response to the documents that had been filed and served by the 3<sup>rd</sup> Defendant by filing and serving a Supplementary List of Documents.
18. The hearing resumed on 22<sup>nd</sup> February, 2021 when the 1<sup>st</sup> Plaintiff continued with his testimony. He produced documents in his Supplementary List of Documents except the statement of Account dated 2<sup>nd</sup> August, 2021 for Kshs. 2,000,000 which counsel for the 3<sup>rd</sup> Defendant objected to and the same was marked for identification.
19. The 1<sup>st</sup> Plaintiff further testified that he was not paid the purchase price of 2,000,000 by the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant knew that the property was charged to the 3<sup>rd</sup> Defendant by the time the two entered into the sale agreement. He denied having authorized the 3<sup>rd</sup> Defendant to release the title to the 1<sup>st</sup> Defendant. While referring to a copy of a cheque in the sum of Kshs. 2,000,000 addressed to the 2<sup>nd</sup> Plaintiff Company in which he acknowledged to have been serving as a Co-Director bearing the stamp of the 3<sup>rd</sup> Defendant, he stated that the said cheque was never banked into his account. He stated that the Kshs. 2,000,000 cheque was meant to be purchase price for the suit property.
20. He told the court that there were writings at the back of the cheque that indicated that the title deed was supposed to be released to the 1<sup>st</sup> Defendant which he disowned and stated that he never gave any authority to the 1<sup>st</sup> Defendant to collect the title deed on his behalf. He lamented that the 3<sup>rd</sup> Defendant released the title deed to the 1<sup>st</sup> Defendant on the strength of the note at the back of the cheque leaf and that this happened in October, 2010.
21. While referring to a copy of the application for Land Control Board consent and the transfer documents, the 1<sup>st</sup> Plaintiff testified that he did not append his signature on the same and that the signature thereon was not his. He further stated that he believed that his land was fraudulently transferred to the 1<sup>st</sup> Defendant. He also pointed out that there was no Power of Attorney in favor of the 1<sup>st</sup> Defendant during the transactions and that the only Power of Attorney that existed was one that was being held by the 1<sup>st</sup> Defendant's father that was registered on 26<sup>th</sup> November, 2011 long after the transactions had taken place.
22. During cross examination by counsel for the 1<sup>st</sup> Defendant, he conceded that there was a clause in the sale agreement to the effect that part of the purchase price was supposed to be used to settle the loan with the 3<sup>rd</sup> Defendant who was in turn supposed to release the title deed to the 1<sup>st</sup> Defendant. He also conceded that the cheque was to be drawn in the name of the 2<sup>nd</sup> Plaintiff by the 1<sup>st</sup> Defendant.
23. When referred to the sale agreement, he confirmed that there existed an agreement between the parties though the same was signed between him and one Samwel Ndubi acting on behalf of the 1<sup>st</sup> Defendant.
24. When taken to task to confirm whether he had given vacant possession to the 1<sup>st</sup> Defendant, he answered in the affirmative and confirmed that according to clause 7 of the agreement between him and the 1<sup>st</sup> Defendant he was to give him immediate vacant possession.
25. On the issue of signatures being fraudulent, he admitted that even though the same was not his signature he did not make any report to the DCI that his signature had been forged and that according to him the fraud occurred at the 2<sup>nd</sup> Respondent's premises.
26. During cross examination by counsel for the 1<sup>st</sup> Defendant, he claimed that he wanted the suit property to be transferred to the person who paid him Kshs. 2,000,000 but not the 1<sup>st</sup> Defendant because the 1<sup>st</sup> Defendant did not pay him.



27. When put to task by counsel to confirm whether he had previously filed a suit against the 1<sup>st</sup> Defendant, he stated that it was true that he had filed a Petition (No. 62 of 2011) which was heard and determined in his absence.
28. The 1<sup>st</sup> Plaintiff also stated during cross examination by learned counsel for the 1<sup>st</sup> Defendant that the 3<sup>rd</sup> Defendant was not privy to the agreement between him and the 3<sup>rd</sup> Defendant and thus any subsequent dealings between the 3<sup>rd</sup> and the 1<sup>st</sup> Defendants was null and void. The 1<sup>st</sup> Plaintiff accepted having signed the agreement on the strength of a photocopy of a bankers cheque No. 037782 for Kshs. 2,000,000.
29. When cross examined by counsel for the 2<sup>nd</sup> Defendant, the Plaintiff alleged that he applied for a loan from the 3<sup>rd</sup> Defendant in 2009 and that by June 2010 the loan had not been disbursed to him forcing him to sell the suit property to the 1<sup>st</sup> Defendant. When asked about the application for the Consent of the Land Control Board he denied ever attending the Land Control Board meeting nor receiving an invitation to attend a meeting for the same that was said to have taken place on 12<sup>th</sup> August, 2010.
30. When taken to task to confirm whether the 1<sup>st</sup> Defendant had made payment in the manner prescribed in the sale agreement given that there was a cheque bearing the name of the 2<sup>nd</sup> Plaintiff, he confirmed that same could be true. He added that the payment was made in his absence in order to discharge the title deed to the 1<sup>st</sup> Defendant. Although he admitted that the cheque drawn in the name of Osikwa Investment Communications Ltd was banked at Co-operative Bank, Kisii branch. He denied that it was banked in the 2<sup>nd</sup> Plaintiff's account.
31. During cross-examination by learned counsel for the 3<sup>rd</sup> Defendant, he confirmed that the he had applied for a loan from the 3<sup>rd</sup> Defendant. He also confirmed that he entered into a sale agreement with the 1<sup>st</sup> Defendant which had a clause 3 that stated that the suit property that was being sold to the 1<sup>st</sup> Defendant was charged and that the purpose of the sale of the same was to offset the loan that the 2<sup>nd</sup> Plaintiff had taken from the 3<sup>rd</sup> Defendant.
32. He however claimed that at the time the agreement was being executed he had deposited Kshs. 2,000,000 on 14<sup>th</sup> July, 2010 to offset the loan. He referred to a document which was marked MF1-22. The 1<sup>st</sup> Plaintiff however admitted that prior to entering into a sale agreement with the 1<sup>st</sup> Defendant, he had not deposited any money in bid to settle the balance.
33. Upon further cross examination by counsel for the 3<sup>rd</sup> Defendant on the mode of payment of the purchase price, he referred to clause 4 of the Agreement which states that payment was supposed to be made into the 2<sup>nd</sup> Plaintiff's account was with the 3<sup>rd</sup> Defendant bank.
34. When he was asked to confirm whether he had any written authority or resolution to testify on behalf of the Plaintiff, he answered in the negative.
35. During re-examination by his counsel he stated that he was never invited for a meeting with the Land Control Board nor did he personally receive an invitation for the meeting. He pointed out that the address in the invitation letter (P.O. BOX 2605-40200 KISII) differed from the address indicated in the agreement between the parties (P.O. BOX 35-40200 KISII).
36. He also stated that the cheque that was drawn by the 1<sup>st</sup> Defendant in the name of the 2<sup>nd</sup> Plaintiff was not banked in the account of the 2<sup>nd</sup> Plaintiff as it was supposed to be and that he did not know where it was banked.



## The 1<sup>st</sup> Defendants Case

37. The 1<sup>st</sup> Defendant did not appear in person to testify in support of her case but one David Onchangu Macharia testified on her behalf as DW1. DW1 urged the court to adopt his statement dated 25<sup>th</sup> March, 2013 as his evidence in this case.
38. DW1 testified that the 1<sup>st</sup> Defendant was her daughter who resides in America and who had signed a Power Attorney registered on 21<sup>st</sup> November, 2011 authorizing him to testify on her behalf. He testified that he knew the 1<sup>st</sup> Plaintiff and was fully aware of the land sale agreement that was entered between the Plaintiff and the 1<sup>st</sup> Defendant on 14<sup>th</sup> July, 2010 at a consideration of Kshs. 2,000,000. He confirmed that he was a witness in the said agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant and that his name appears as number 2 in the list of witnesses in the said agreement.
39. He confirmed that the 1<sup>st</sup> Defendant paid the 1<sup>st</sup> Plaintiff vide a Co-operative Bank cheque that was drawn in the name of the 2<sup>nd</sup> Defendant, since this was one of the conditions in the sale agreement. He stated that at the time of signing the agreement the land was vacant and that there were no building materials thereon as alleged by the 1<sup>st</sup> Plaintiff. DW1 told the court that prior to the transaction taking place he visited the suit property together with the 1<sup>st</sup> Defendant who was in the country at the time. He explained that during the transfer, he relied on the authority derived from the Power of Attorney together with the documents signed by 1<sup>st</sup> Plaintiff that effected the transfer. He stated that he together with the 1<sup>st</sup> Defendant visited the Land Registry and signed the necessary documents after the Land Registrar was satisfied that all requirements for transfer had been met.
40. He denied participating in any fraud and insisted that it was the 1<sup>st</sup> Plaintiff who effected the transfer. He also stated that the 1<sup>st</sup> Plaintiff had instituted a petition against the 1<sup>st</sup> Defendant in respect of the suit property and the same was dismissed. He stated that the 1<sup>st</sup> Defendant did not have any outstanding balance owed to the 1<sup>st</sup> Plaintiff and that the 1<sup>st</sup> Plaintiff did not have any building materials on the suit property at the time of sale.
41. During cross-examination by counsel for the 2<sup>nd</sup> Defendant, DW1 confirmed that he visited the Land Registry in the company of the 1<sup>st</sup> Plaintiff and witnessed him sign the transfer documents. He confirmed that the 1<sup>st</sup> Plaintiff attended the Land Control Board meeting and executed the consent as the transferor of the suit property. He also confirmed that the 1<sup>st</sup> Plaintiff had told him that he had charged the property to the 3<sup>rd</sup> Defendant to secure a loan taken by the 2<sup>nd</sup> Plaintiff and that was the reason the 1<sup>st</sup> Defendant paid the 3<sup>rd</sup> Defendant.
42. During the cross-examination by counsel for the 3<sup>rd</sup> Defendant, DW1 confirmed that there existed a valid land sale agreement dated 14<sup>th</sup> July, 2013 between the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Plaintiff for the sale of the suit property at a consideration of Kshs. 2,000,000. He further confirmed that clause 3 of the said agreement indicated that the suit property was charged to the 3<sup>rd</sup> Defendant while clause 4 of the agreement stated that the payment was to be made to the 2<sup>nd</sup> Plaintiff's account with the 3<sup>rd</sup> Defendant.
43. During cross-examination by counsel for the Defendant, he insisted that the 1<sup>st</sup> Plaintiff was paid the purchase price vide a bankers cheque and that he did not know why he was still complaining. He stated that he did not remember when the transfer process was done and all he remembers is that he went to the Land Office and that it was the 1<sup>st</sup> Plaintiff who paid the transfer fee. He also stated that even though the transfer form did not have his passport photo affixed to it, the same had the 1<sup>st</sup> Plaintiff's passport photo. He also insisted that when he visited the suit property he did not find anything thereon and that he has since developed it.



44. When he was re-examined by counsel for the Plaintiff he confirmed that the 1<sup>st</sup> Defendant paid the purchase price in full and in the manner that was prescribed in the sale agreement. He stated that the payment was used to settle part of debt that the 2<sup>nd</sup> Plaintiff had with 3<sup>rd</sup> Defendant. He further stated that the 1<sup>st</sup> Plaintiff was paid in full by the 1<sup>st</sup> Defendant and that he had never demanded for any more money from the 1<sup>st</sup> Defendant.

### **The 2<sup>nd</sup> Defendant's Case**

45. Steve Mokaya, the Land Registrar, Kisii County testified as DW2. He told the court that the suit property was a subdivision of Nyaribari Chache B/b Boburia/ 5363 which prior to the subdivision that happened on 13<sup>th</sup> April, 1999 was registered in the name of Samuel Ndubi. He stated that Samwel Ndubi transferred the suit property to the 1<sup>st</sup> Plaintiff on 11<sup>th</sup> May, 1999 and he was issued with a title deed on the same day. On 22<sup>nd</sup> November, 2001, the 1<sup>st</sup> Plaintiff charged the property to the 3<sup>rd</sup> Defendant for a sum of Kshs. 1,000,000 and the charge was discharged on 12<sup>th</sup> August, 2010. It was his testimony that the suit property was eventually transferred to the 1<sup>st</sup> Defendant on 26<sup>th</sup> August, 2010 and a title deed issued to her the same day.
46. He asserted that the suit property was properly transferred to the 1<sup>st</sup> Defendant given that there was a consent of the Land Control Board, a duly executed land transfer form and a receipt number xxxxx dated 14<sup>th</sup> April, 2011 showing payment of stamp duty. He however noted that date of payment of stamp duty indicated that the transfer was done before the payment of stamp duty. He confirmed that all the documents that the 1<sup>st</sup> Defendant had presented before court to prove the transfer of the suit property from the 1<sup>st</sup> Plaintiff to the 1<sup>st</sup> Defendant originated from his office.
47. During cross examination by counsel for the the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant confirmed that the suit property was registered in the name of the 1<sup>st</sup> Defendant. He confirmed that the transfer of the suit property was carried out procedurally by the 1<sup>st</sup> Plaintiff given that he had his passport photo and consent to transfer from the District Commissioner dated 5<sup>th</sup> August, 2010. He however stated that the only documents that were missing were copies of the Plaintiff's Identity Card and his KRA Pin Certificate.
48. During cross examination by counsel for the 3<sup>rd</sup> Defendant, the 2<sup>nd</sup> Defendant re-affirmed that the discharge of charge was done properly and that it was formally registered as legally required. When queried about the possibility of stamp duty being paid after the transfer, he answered in affirmative and went on to explain that this happens if the Land Registrar notes that stamp duty has been understated.
49. He stated that even though there was letter from the District Commissioner requesting for minutes of the Land Control Board meeting held on 5<sup>th</sup> August, 2010 when the consent was granted, he did not come across any complaint filed by the 1<sup>st</sup> Plaintiff regarding the transfer of the suit property to the 1<sup>st</sup> Defendant.
50. During cross examination by counsel for the Plaintiffs, the 2<sup>nd</sup> Defendant stated that he did not have copies of the 1<sup>st</sup> Plaintiff's National ID and KRA Pin Certificate and could not tell whether the same had been misplaced. He also stated that even though there was a charge document, he did not have the consent to charge. He also admitted that he did not have a receipt to prove of payment of stamp duty with respect to the charge. When taken to task about the different signatures of the Plaintiff on the charge, the sale agreement and the transfer documents he stated that at face value the signatures on the agreement and on the transfer documents looked different while the signatures on the charge document and that one on the sale agreement looked similar.



51. When questioned about the letter dated 17<sup>th</sup> January, 2013 that had been listed in the Plaintiff's Supplementary List of Documents dated 14<sup>th</sup> January, 2014, he stated that letter was not addressed to the Land Registrar. He stated that the letter was addressed the Municipal Council of Kisii which did not deal with freehold land like the suit property.
52. He stated that the Power of Attorney dated 26<sup>th</sup> July, 2010 donating powers to James Onchongu Macharia was registered on 21<sup>st</sup> November, 2011. He further stated the same was not used during the transfer of the suit property to the 1<sup>st</sup> Defendant.
53. When questioned further on the issue of the stamp duty being paid on 14<sup>th</sup> April 2011, 7 months after the transfer of the suit property had been carried out, the 2<sup>nd</sup> Defendant testified that he had a receipt of payment showing that stamp duty of Kshs. 2000 had been paid but this was understated and thus the 1<sup>st</sup> Defendant was compelled to pay the right value for stamp duty amounting to Kshs. 140,100 10 days later after the transaction.
54. It was his testimony that according to him, 90% of the documents in his records which had been produced in court proved that the transfer was proper.
55. During re-examination by his counsel, the 2<sup>nd</sup> Defendant reaffirmed his position that the transfer of the suit property was proper. He confirmed that the right value for the stamp duty was paid. He denied that his office acted out of malice. He stated that there was no way the transfer could have been carried out without copies of the 1<sup>st</sup> Plaintiff's and the 1<sup>st</sup> Defendants Identity Cards and stated that the same might have been misplaced.

### **The 3<sup>rd</sup> Defendant's Case**

56. Joel Odhiambo, a business banker with the 3<sup>rd</sup> Defendant Kisii Branch testified on behalf of the 3<sup>rd</sup> Defendant as DW3. He adopted his witness statement dated 12<sup>th</sup> October, 2021 together with the List of Documents dated 24<sup>th</sup> November, 2013 and the Supplementary List of Documents dated 17<sup>th</sup> May, 2016 in support of the 3<sup>rd</sup> Defendant's case. He testified that he had worked for the 3<sup>rd</sup> Defendant for 9 years. He said he knew the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs as clients who had borrowed Kshs. 1,000,000 from the bank in 2009 and the amount was secured by a legal charge over the suit property.
57. The said charge was prepared by the firm of Moronge and Co. Advocates and was registered on 23<sup>rd</sup> November, 2009. He stated that the loan was disbursed on 8<sup>th</sup> December, 2009 to the 2<sup>nd</sup> Plaintiff, a company where the 1<sup>st</sup> Plaintiff was one of the directors. He stated that the final repayment was made at the request of the 1<sup>st</sup> Plaintiff who promised to settle the amount before the due date on 13<sup>th</sup> July, 2010.
58. It was his testimony that soon after receiving the letter dated 13/7/2010, the 3<sup>rd</sup> Defendant received a sale agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. The sale agreement indicated that the 1<sup>st</sup> Plaintiff had resolved to sell the suit property which was charged to the bank as security for the loan at a purchase price of 2,000,000 so as to settle the outstanding debt he owed to the 3<sup>rd</sup> Defendant. He revealed that the Kshs. 2,000,000 was paid vide a bankers cheque into the 2<sup>nd</sup> Plaintiff's account held with the 3<sup>rd</sup> Defendant.
59. He also revealed that the 3<sup>rd</sup> Defendant received instructions from the 1<sup>st</sup> Defendant to the effect the title to the suit property should not be released to the 1<sup>st</sup> Plaintiff, since she had cleared the loan on the Plaintiff's behalf. He stated that it was on the strength of the sale agreement, payment of the outstanding loan by the 1<sup>st</sup> Defendant and the note from the 1<sup>st</sup> Defendant that the title deed was released to the 1<sup>st</sup> Defendant.



60. DW3 produced a current statement of the 2<sup>nd</sup> Plaintiff's account as proof that its account had been credited with a deposit of Kshs. 2,000,000 by the 1<sup>st</sup> Defendant on 14<sup>th</sup> July, 2010.
61. During cross examination by counsel for the 1<sup>st</sup> Defendant, DW3 confirmed that the Plaintiffs were the 3<sup>rd</sup> Defendant's clients and that they approached the 3<sup>rd</sup> Defendant for a loan Kshs. 1,000,000 which was secured by the suit property.
62. He also revealed that it was the 1<sup>st</sup> Plaintiff who approached the 3<sup>rd</sup> Defendant with sale agreement indicating that he had sold the suit property that had been charged as security for the loan to the 1<sup>st</sup> Defendant at an agreed price of Kshs. 2,000,000. He went on to confirm that the 1<sup>st</sup> Defendant deposited the sum of Kshs. 2,000,000 into the account of the 2<sup>nd</sup> Plaintiff. It was his testimony that by the time the deposit was made by the 1<sup>st</sup> Defendant, the loan balance was less than Kshs, 1,000,000. He further stated that the balance that remained in the account was later withdrawn by the 1<sup>st</sup> Plaintiff.
63. DW3 testified that the Plaintiffs had never made any complaint to the 3<sup>rd</sup> Defendant that the deposit by the 1<sup>st</sup> Defendant was erroneously made to the 2<sup>nd</sup> Plaintiff's account nor had they ever complained that money had erroneously been withdrawn from the 2<sup>nd</sup> Plaintiff's account.
64. While referring to the sale agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant, DW3 confirmed that the main purpose of the said agreement was to settle the loan that existed between the 2<sup>nd</sup> Plaintiff and the 3<sup>rd</sup> Defendant. He confirmed that true to the terms of the sale agreement, the 1<sup>st</sup> Defendant cleared the balance of the loan by depositing a cheque of Kshs. 2,000,000 into the account of the 2<sup>nd</sup> Plaintiff and thus there was no loan balance owed to the 3<sup>rd</sup> Defendant. He confirmed that the title to the suit property was duly discharged and released to the 1<sup>st</sup> Defendant.
65. During cross-examination by counsel for the Plaintiffs, DW3 admitted that he has never dealt with the 2<sup>nd</sup> Plaintiff's account and that some of the people who dealt with the account had left employment with the 3<sup>rd</sup> Defendant. He also stated that he did not know the document that was used to surrender the title deed to the 2<sup>nd</sup> Defendant. He stated that all he knew was that the loan had been cleared and that the title deed had been discharged after the settlement of the loan.
66. He stated that he did not have a requisition form to confirm who the payee of the loan was save for the statement that showed that the amount of money of Kshs. 2,000,000 was deposited into the account on 14<sup>th</sup> July, 2010. He also confirmed that there were several withdrawals by the Plaintiffs from the account after the deposit of Kshs. 2,000,000 on 14<sup>th</sup> July, 2010. He however denied that the withdrawals were being done by the 3<sup>rd</sup> Defendant.
67. During re-examination by counsel for the 3<sup>rd</sup> Defendant, DW3 confirmed that a copy of the cheque produced as evidence to prove payment was dated 14<sup>th</sup> July, 2010 and that a sum of 2,000,000 was deposited into the account of the 2<sup>nd</sup> Plaintiff. He also confirmed that the Kshs. 2,000,000 was the purchase price stated in the sale agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. According to the said agreement the said amount was supposed to be deposited in the 2<sup>nd</sup> Plaintiff's account to clear the outstanding loan that the 2<sup>nd</sup> Plaintiff had with the 3<sup>rd</sup> Defendant.
68. When questioned by the court about the person who presented the sale agreement to the bank, he stated he did not know who brought the sale agreement to the bank. He stated that the agreement was brought to the bank together with a letter from the 1<sup>st</sup> Plaintiff and a bankers cheque of Kshs. 2,000,000 from the 1<sup>st</sup> Defendant together with instructions from her instructing the bank to release the title deed since clause 2 of the sale agreement had been fulfilled by her paying the outstanding loan with the 3<sup>rd</sup> Defendant.



69. He confirmed that the said instructions were not part of the agreement and there was no communication between the 3<sup>rd</sup> Defendant and the 1<sup>st</sup> Plaintiff before and after the release of title to the 1<sup>st</sup> Defendant. He also confirmed to the court that even after the discharge of the title to the 1<sup>st</sup> Defendant on 12<sup>th</sup> August, the Defendant did not write any letter demanding for his title before filing the case.
70. After all the parties closed their cases, the court directed them to file their submissions. At the time of writing this judgment, the Plaintiff had filed their submissions and List of authorities dated 18/11/2021 while the 1<sup>st</sup> Defendant had filed her submissions dated 8/2/2022. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's did not file any submissions.

### **Plaintiff's Submissions**

71. In his submissions learned counsel for the Plaintiffs framed 7 issues for determination namely:-
- i. Whether the 3<sup>rd</sup> Defendant made illegal and unauthorized debits from the 2<sup>nd</sup> Plaintiff's bank account number xxxxxxxxxxxx;
  - ii. Whether the release of the 1<sup>st</sup> Plaintiff's Certificate of the title to the 1<sup>st</sup> Defendant was in breach of the bank-customer relationship;
  - iii. Whether the 1<sup>st</sup> Defendant was in breach of the agreement dated 14<sup>th</sup> July, 2010;
  - iv. Whether the transfer of the suit land was illegal, fraudulent and unlawful;
  - v. Whether the entries made in the register of L.R No. NYARIBARI CHACHE/B/B/BOBURIA/6309 should be cancelled and/or reversed;
  - vi. Whether the possession and occupation of the suit property by the 1<sup>st</sup> Defendant is lawful or trespass;
  - vii. Whether the Plaintiffs are entitled to prayers sought;
  - viii. Who should bear the costs of the suit.
72. On the first issue counsel submitted that the 3<sup>rd</sup> Defendant had breached its contractual obligations as a banker by making fraudulent debits on the 2<sup>nd</sup> Plaintiff's account. He referred to the case of *Equity Bank Ltd & another v Robert Cberang* 2016 eKLR. He further submitted that the 3<sup>rd</sup> Defendant released the 1<sup>st</sup> Plaintiff's title to LR. NO. Nyaribari Chache B/B/Boburia/6309 to the 1<sup>st</sup> Defendant without the Plaintiff's consent and in breach of the trust between the bank and its customer.
73. With regard to the sale agreement dated 14/7/2010, it was counsel's submission that the 1<sup>st</sup> Defendant had breached the said agreement by failing to deposit the purchase price in the 2<sup>nd</sup> Defendant's account.
74. On the question of fraud counsel raised a number of irregularities including the fact that the 1<sup>st</sup> Plaintiff's National Identification Card and KRA Pin Certificate were missing from the parcel file. He submitted that the signature on the transfer form did not belong to the 1<sup>st</sup> Plaintiff and that the 1<sup>st</sup> Plaintiff did not appear before the Land Control Board. He also raised an issue with the date of payment of stamp duty which was after the date of transfer.
75. He concluded that the transfer was hurriedly done with the intention of defrauding the 1<sup>st</sup> Plaintiff and was therefore fraudulent and illegal. He submitted that the title issued to the 1<sup>st</sup> Defendant be impeached in accordance with section 26 of the *Land Registration Act*. He relied on the case of *Jacob Odhock v Tom Ondiek & 2 others* (2021) eKLR.



76. With regard to trespass, counsel submitted that the 1<sup>st</sup> Defendant has been unlawfully occupying the suit property without justifiable cause as she had not acquired a good title.
77. Finally counsel also submitted that the Plaintiffs had proved that they were entitled to the reliefs sought and urged the court to award special damages of Kshs. 1,850,000/= and general damages of Kshs. 6,000,000/=.

### **1<sup>st</sup> Defendant's Submissions**

78. On his part, learned counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiffs had failed to prove fraud against the Defendants. He contended that the transfer of the suit property to the 1<sup>st</sup> Defendant was made procedurally after the 1<sup>st</sup> Defendant paid the full purchase price into the 2<sup>nd</sup> Plaintiff's account.
79. Counsel submitted that the Plaintiff's claim of trespass was unfounded as the 1<sup>st</sup> Defendant had demonstrated that she had lawfully purchased the suit property.
80. Counsel also raised the fact that the suit against the 1<sup>st</sup> Defendant was res judicata as the Plaintiffs had sued the 1<sup>st</sup> Defendant over the same subject matter in a previous suit which had been dismissed.

### **Issues For Determination**

81. The main issues for determination are:
- i. Whether the 1<sup>st</sup> Defendant paid the purchase price in the mode described in the sale agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant.
  - ii. Whether the 3<sup>rd</sup> Defendant breached the bank client fiduciary duty by releasing the suit property to the 1<sup>st</sup> Defendant
  - iii. Whether there is sufficient evidence to prove that the 3<sup>rd</sup> Defendant withdrew money from the account of the 2<sup>nd</sup> Plaintiff.
  - iv. Whether the transfer process was fraudulent.
  - v. Whether the 1<sup>st</sup> Defendant is entitled to special damages and general damages for trespass.

### **Analysis And Determination**

#### **Whether the 1<sup>st</sup> Defendant paid the purchase price in the mode described in the sale agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant.**

82. From the facts of this case, the testimonies of all witnesses and the submissions of the parties, it is not contested that there was a sale agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. It is also not contested that the purpose of the sale of the suit property to the 1<sup>st</sup> Defendant was to clear a debt that the 2<sup>nd</sup> Plaintiff had with the 3<sup>rd</sup> Defendant. It is not contested that the 1<sup>st</sup> Plaintiff was to pay the purchase price amounting Kshs. 2,000,000 by depositing the same in the 2<sup>nd</sup> Plaintiff's account being held by the 3<sup>rd</sup> Defendant.
83. However according to the 1<sup>st</sup> Plaintiff, the purchase price was never deposited into the 2<sup>nd</sup> Plaintiff's account while according to the 3<sup>rd</sup> and 1<sup>st</sup> Defendants the amount of money was deposited in the 2<sup>nd</sup> Plaintiff's account vide a cheque drawn in the name of the 2<sup>nd</sup> Plaintiff dated 14<sup>th</sup> July, 2010. In his attempt to prove that the said amount was never deposited, the 1<sup>st</sup> Plaintiff tried to present a statement



to show that he had repaid the loan prior to the date of the sale agreement entered into between him and the 1<sup>st</sup> Defendant.

84. However, the said statement was not certified and it was merely marked for identification but it was never produced as an exhibit, the same cannot therefore be relied upon as admissible evidence. The 3<sup>rd</sup> Defendant while defending the 1<sup>st</sup> Defendant's position produced a certified statement of account which clearly showed that 1<sup>st</sup> Defendant had deposited a cheque of Kshs. 2,000,000 into the 2<sup>nd</sup> Plaintiff's account. The 3<sup>rd</sup> Defendant also produced a letter from the 1<sup>st</sup> Plaintiff dated 13<sup>th</sup> July, 2010 which acknowledged that the 2<sup>nd</sup> Plaintiff was still indebted to 3<sup>rd</sup> Defendant and that the said debt was going to be cleared.
85. According to the 3<sup>rd</sup> Defendant, when the cheque of Kshs. 2,000,000 was deposited together with an agreement for sale of the suit property bearing a condition that the said cheque was meant to clear the outstanding loan amount, the 3<sup>rd</sup> Defendant deposited the same into the account of the 2<sup>nd</sup> Plaintiff and deducted its outstanding loan as indicated in the sale agreement.
86. The account of the 3<sup>rd</sup> Defendant notwithstanding, a clear reading of the said agreement dated 14<sup>th</sup> July, 2010 states at clause 2 that the vendor acknowledges receipt of the payment and therefore it is quite strange that he would turn up 3 years later to claim that the said amount of money was never paid. For clarity the clause provides as follows;
- ‘That the vendor shall sell and the purchaser shall purchase the whole of the parcel of land aforesaid at a consideration of Kenya Shilling Two Million (Kshs. 2,000,000) only to be paid upon execution of this agreement (RECEIPT OF WHICH THE VENDOR HEREBY ACKNOWLEDGES)’
87. From the foregoing therefore there is no other evidence to controvert the fact that the purchase price was fully paid in accordance with the sale agreement.

**Whether the 3<sup>rd</sup> Defendant breached the bank client fiduciary duty by releasing the suit property to the 1<sup>st</sup> Defendant.**

88. It is the 1<sup>st</sup> Plaintiff's case that the bank breached the fiduciary duty that existed between it and the 2<sup>nd</sup> Plaintiff by releasing the suit property to the 1<sup>st</sup> Defendant. In its defence, the 3<sup>rd</sup> Defendant stated that it did not breach any fiduciary duty between it and the 2<sup>nd</sup> Plaintiff as it received a sale agreement between the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Plaintiff. The said agreement stated that the 1<sup>st</sup> Defendant was purchasing the suit property that had been charged to the 3<sup>rd</sup> Defendant as security in order to clear the loan with the 3<sup>rd</sup> Defendant. Further, the 3<sup>rd</sup> Defendant produced a letter dated 13<sup>th</sup> July, 2010 from the 1<sup>st</sup> Plaintiff communicating the intention by the 2<sup>nd</sup> Plaintiff to clear the loan together with a cheque with a note from the 1<sup>st</sup> Defendant instructing the 3<sup>rd</sup> Defendant to release the title to her.
89. Against this background, it is difficult to conclude that the bank breached its fiduciary duty to the 2<sup>nd</sup> Defendant. In the case of *Standard Chartered Bank K Ltd v Intercom Services Ltd & 4 others* (2004) eKLR the Court of Appeal stated that:-

“The law on the duty of confidentiality by banks regarding information on customers' accounts is comprehensively enunciated in *Tournier National Provincial Union Bank of England* (1923) All ER 550.

It is an implied legal duty arising from the contract. The bank has a qualified obligation with its customer to abstain from disclosing information as to the customer's affairs without his



consent but there is no privilege from disclosure where the disclosure is made by the express or implied consent of the customer”.

90. The actions of the 1<sup>st</sup> Plaintiff before and after the payment of the loan speak volumes. The 1<sup>st</sup> Plaintiff who seems to be speaking on behalf of the 2<sup>nd</sup> Plaintiff without a resolution to do so is trying to run away from his own agreement clearly communicating the intention of selling the suit property to the 1<sup>st</sup> Defendant with the main aim of clearing the loan with the 3<sup>rd</sup> Defendant which was secured by the suit property. It is outrageous for the 1<sup>st</sup> Plaintiff to claim that he cleared the loan before 14<sup>th</sup> July, 2010 yet he never made any effort to have the suit property discharged to him. At any rate the Plaintiffs did not prove that they had paid the loan before 14/7/2010. It is inconceivable that the 1<sup>st</sup> Plaintiff did not write a demand letter seeking to have the title released to him until the year 2013 when he filed this case.
91. His intention to dispose of the suit property to the 1<sup>st</sup> Defendant in accordance with the terms of the agreement dated 14<sup>th</sup> July, 2010, his letter dated 13<sup>th</sup> July, 2021 and the subsequent 3-year silence after the loan was cleared clearly demonstrates that the Plaintiffs did not have any intention of challenging the release of the title deed to the 1<sup>st</sup> Defendant. I therefore find that the Plaintiffs have not established that the 3<sup>rd</sup> Defendant breached the fiduciary relationship that existed between it and the 2<sup>nd</sup> Plaintiff.

**Whether there is sufficient evidence to prove that the 3<sup>rd</sup> Defendant unlawfully withdrew money from the 2<sup>nd</sup> Plaintiff’s account.**

92. It is common ground that the 2<sup>nd</sup> Plaintiff was still indebted to the 3<sup>rd</sup> Defendant prior to 14<sup>th</sup> July, 2010. This is supported by the 1<sup>st</sup> Plaintiff’s own letter dated 13<sup>th</sup> July, 2010. From the statement of account produced as evidence in this court by the 3<sup>rd</sup> Defendant, the 3<sup>rd</sup> Defendant had without any complaint been debiting the 2<sup>nd</sup> Plaintiff’s account in order to recover the loan amount owed to it. It is also evident that before 14<sup>th</sup> July, 2010, the 2<sup>nd</sup> Plaintiff’s account did not have any money and that the bank was still owed by the 2<sup>nd</sup> Plaintiff. It is also clear that the bank recovered its outstanding loan amount immediately after the sum of Kshs. 2,000,000 was deposited in the account.
93. From the evidence on record, the Plaintiffs have not established that the bank withdrew more money than was owed to it by the 2<sup>nd</sup> Plaintiff. Therefore, the claim for a refund of Kshs. 1,400,000 withdrawn from the account of the 2<sup>nd</sup> Plaintiff by 3<sup>rd</sup> Defendant fails.

**Whether the transfer process was fraudulent.**

94. It is trite law that allegations of fraud must not only be concisely pleaded but must also be strictly proved and the standard of proof is higher than on a balance of probabilities.
95. The 1<sup>st</sup> Plaintiff claimed that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants fraudulently and without the authority of the 1<sup>st</sup> Plaintiff caused the suit property to be transferred to the 1<sup>st</sup> Defendant. Unlike in his submissions where new particulars of fraud have been introduced, the Plaintiffs raised the following particulars in their Amended Plaint.
- a. The 1<sup>st</sup> Plaintiff and 1<sup>st</sup> defendant did not appear before the Land Control Board prior to the purported transfer.
  - b. The suit property changed ownership to the 1<sup>st</sup> Defendant without consent and knowledge of the 1<sup>st</sup> Plaintiff.
  - c. The names of the 1<sup>st</sup> Plaintiff as the proprietor was cancelled by the 2<sup>nd</sup> Respondent and title issued to the 1<sup>st</sup> Defendant.



- d. The transfer of the suit property was not duly executed as per the law.
- e. The 1<sup>st</sup> Defendant obtained the transfer by misrepresentation and falsification of the documents.
96. Suffice is to say that parties are bound by their pleadings. The 1<sup>st</sup> Plaintiff testified that he did not sign both the transfer form and application for the consent of the Land Control Board and that the signatures thereon did not belong to him. He concluded that the same were fraudulently procured by the 1<sup>st</sup> Defendant in order to facilitate the illegal transfer of the suit property. However the Plaintiffs did not adduce sufficient evidence to prove the alleged fraud. It is trite law that he who alleges must prove.
97. It was incumbent upon the Plaintiffs to prove that the 1<sup>st</sup> Plaintiff's signature was forged. There was need for an expert witness to establish the alleged forgery. Despite making such serious allegations, I note that during cross-examination by counsel for the 1<sup>st</sup> Defendant, the Plaintiff admitted that he did not bother to report the issue of the fraudulent signatures to the DCI for investigation. It is therefore clear that the allegations of fraud were not proved to the required standard. I draw guidance from the case of *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 where the court held that;
- “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
98. From the evidence on record, it cannot be said with certainty that the 1<sup>st</sup> Plaintiff did not append his signature to both the transfer form and the application for the consent of the Land Control Board.
99. There is also an issue of stamp duty that arose during the hearing of the 2<sup>nd</sup> Defendant's case which was never pleaded specifically by the Plaintiff's. It came to light during cross examination of DW2 that stamp duty was paid 8 months after the transfer process was carried out. In as much as the said issue was not pleaded specifically it is important to address it. The Land Registrar explained that stamp duty can be paid after the transfer if what was paid during transfer is found to have been understated. In such cases, a proper valuation is conducted and the purchaser is asked to top up. The 1<sup>st</sup> Defendant having paid the stamp duty albeit late, this court cannot find that he acted fraudulently.
100. The 1<sup>st</sup> Plaintiff has not adduced sufficient evidence to prove that he never participated in the transfer process right from the signing of the land transfer documents to the seeking of the Land Control Board consent. The Land Registrar who testified as DW2 testified that 90% of the required documents were presented and the only missing documents were copies of his Identity Card, KRA PIN and pass port photos. He however stated that these documents must have been produced before commencing the transfer process and he could not rule out the fact that they may have been misplaced.
101. From the foregoing therefore, I do not find sufficient grounds to impeach the transfer of the suit property to the 1<sup>st</sup> Defendant on account of fraud. The transfer of the suit property to the 1<sup>st</sup> Defendant is valid and thus there is no reasonable ground for impeaching the title issued to the 1<sup>st</sup> Defendant on an account of fraud.



**Whether the 1<sup>st</sup> Plaintiff is entitled to Special and General Damages for trespass.**

102. In his Amended Pleint the 1<sup>st</sup> Plaintiff pleaded that the 1<sup>st</sup> Defendant had taken possession of the suit property and alleged that the same belonged to him. He alleged that after taking possession of the suit property, the Defendant utilized his building materials without his consent, demolished a building structure and erected a perimeter fence curving out an extra 0.03 ha belonging to the Plaintiff. As result the 1<sup>st</sup> Plaintiff averred that he had suffered a loss of Kshs. 450,000.
103. From the evidence before me, it is not in dispute that the Plaintiff entered into an agreement dated 14<sup>th</sup> July, 2010 for the sale of the suit property to the 1<sup>st</sup> Defendant. According to clause 7 of the said agreement the 1<sup>st</sup> Plaintiff was to give the 1<sup>st</sup> Defendant immediate vacant possession of the suit property upon execution of the agreement. It is clear that according to clause 2 which I have already highlighted, he acknowledged payment of the purchase price. It is therefore surprising that a person who surrendered vacant possession upon the execution of the sale agreement and upon acknowledgement of the purchase price would turn up in court claiming that the purchaser had trespassed onto his land.
104. The 1<sup>st</sup> Plaintiff’s claim for special damages is also not tenable as nowhere in the sale agreement is it indicated that the suit property had building materials on it at the time of sale. In any case the Plaintiff handed over vacant possession of the suit property upon execution of the agreement. And he ought to have removed any building materials that may have been on the suit property.
105. The 1<sup>st</sup> Plaintiff is bound by the terms of the valid sale agreement between him and the 1<sup>st</sup> Defendant and this court cannot act outside the clear provisions of their agreement and hold the 1<sup>st</sup> Defendant who was voluntarily given vacant possession to be a trespasser.

**Conclusion**

106. In light of the foregoing, it is my finding that the Plaintiffs have failed to prove their case on a balance of probabilities. I therefore dismiss the suit with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT KISII THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

.....

**J.M ONYANGO**

**JUDGE**

