



**Kamula & 2 others v Mwololo & another (Environment & Land Case 24 of 2018) [2022] KEELC 2951 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2951 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 24 OF 2018**

**CG MBOGO, J**

**MAY 12, 2022**

**BETWEEN**

**STEPHEN KIVANDI KAMULA ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPHINE MUTINDI KILUVA ..... 2<sup>ND</sup> PLAINTIFF**

**BELLA ROSE LAVI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**BONIFACE KIOKO MWOLOLO ..... 1<sup>ST</sup> DEFENDANT**

**SIDIAN BANK ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide the amended plaint dated May 13, 2019 and filed in court on June 21, 2019, the Plaintiffs have sought the following orders against the Defendants: -
  - a) An Order directing the 1<sup>st</sup> Defendant to transfer Makueni/Emali Town/234 to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.
  - b) An Order authorizing the eviction of the 1<sup>st</sup> Defendant from the premises he occupies in Makueni/Emali Town/234.
  - c) A permanent Order of injunction be and is hereby issued barring the 1<sup>st</sup> Defendant from entering into, transferring, alienating, disposing, collecting rent from the tenants or in any manner whatsoever interfering with the Plaintiffs' occupation and use of the suit property Makueni/Emali Town/234.
  - d) An Order that the caution registered by the 2<sup>nd</sup> Defendant on 7<sup>th</sup> March, 2018 be lifted.



- e) An Order of injunction be and is hereby issued prohibiting the 2<sup>nd</sup> Defendant whether by itself, agents, servants or employees from selling, transferring, charging or in any manner alienating all that parcel of land described as Makueni/Emali Town/234.
  - f) An Order for refund of the amount unlawfully collected by the 1<sup>st</sup> Defendant as monthly rental income from the suit premises for the period starting 1<sup>st</sup> March, 2018.
  - g) An Order be issued directing the Director of Survey to re-survey all that parcel of land described as Makueni/Emali Town/234.
  - h) Any other relief that this Honourable Court may deem fit and just to grant.
  - i) Costs and interest of the suit.
2. The Plaintiffs' claim is opposed by both the 1<sup>st</sup> Defendant vide the Statement of Defence dated July 22, 2019 and the 2<sup>nd</sup> Defendant vide the 2<sup>nd</sup> Defendant's Statement of Defence also dated July 22, 2019 and both filed in court on the July 24, 2019.
  3. The 1<sup>st</sup> Plaintiff, Stephen Kivandi Kamula, adopted his statement dated July 19, 2019 as his sworn evidence. He also produced the bundle of documents dated March 21, 2018 with the same being marked PEX Nos. 1 – 7. Again, he produced the further bundle of documents dated 19<sup>th</sup> July, 2019 which was marked as PEX Nos. 8 – 18. He then produced one more bundle containing one document that was marked as PEX No. 19. He stated that he had been appointed to deal with all cases concerning the suit property (Makueni/Emali Town/234) by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs who had donated powers of attorney to him and which were registered on March 14, 2018.
  4. The 1<sup>st</sup> Plaintiff added that the purchase price for the suit property was Kshs. 10,000,000/= . That Kshs. 3,000,000/= was paid as deposit to the firm of Makundi & Co. Advocates, the Advocates for the seller. The seller was Boniface Kioko Mwololo, the 1<sup>st</sup> Defendant. That an official search was conducted and it was confirmed that the property had no encumbrances and that the 1<sup>st</sup> Defendant's had a clean title. That the balance of the purchase price was directly credited to the seller's account and he acknowledged receipt.
  5. The 1<sup>st</sup> Plaintiff stated that a balance of Kshs. 300,000/= would be paid as per the terms of the agreement dated January 18, 2018 which was signed by the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Plaintiff. That the 1<sup>st</sup> Plaintiff was to take possession of the suit property from March 1, 2018 and collect rents therefrom. That the 1<sup>st</sup> Defendant still resides in the suit property and continues to collect rent. That monthly rent at the suit property is Kshs. 62,000/= on the lower rate as expressed in the final agreement. That the relevant consents for the transfer of the suit property were obtained including the spousal consent from Emmaculate Nduku Kioko (DW1).
  6. The 1<sup>st</sup> Plaintiff stated that a transfer of the suit property was not accomplished because on March 2, 2018 when he went to take over the suit property, he was confronted by the Manager of Sidian Bank who said that the property was charged to the Bank. The 1<sup>st</sup> Plaintiff added that the said information was not confirmed in the green card or the certificate of the first official search. Thereafter, the Plaintiffs lodged a caveat. The 1<sup>st</sup> Plaintiff finally stated that the suit property did not have a deed plan at the Survey of Kenya.
  7. In cross-examination by counsel for the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Plaintiff stated that clause 7 of the sale agreement provided for completion to be within 90 days. That transfer of the suit property was to be effected upon payment of the full purchase price. He added that the balance of Kshs. 7,000,000/= was not paid within 90 days. That the completion date was not extended through an addendum agreement.



- That the consent to transfer from the Commissioner of Lands was not accompanied by a transfer. That the transfer form shown was an incomplete document and that it could not be registered as it was.
8. The 1<sup>st</sup> Plaintiff further testified that there was no payment of Kshs. 300,000/=. That the further agreement of January, 2018 was done by the 3<sup>rd</sup> Plaintiff in her handwriting. That the said agreement talked of a Plot No. 224 Emali Town. That there was no signature by the second buyer in the agreement and her identification number was not indicated. That the signature appearing in the said agreement was not the same as the signature of the seller in the first sale agreement. That the second agreement was executed eleven (11) months after the initial sale agreement. That the sum that was paid directly to the 1<sup>st</sup> Defendant's account was Kshs. 6,698,896/=. Finally, the 1<sup>st</sup> Plaintiff stated that the purchase price was fully paid.
  9. Under the cross-examination of counsel for the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Plaintiff stated that he only became aware that the 1<sup>st</sup> Defendant had used the suit property as security for a loan from the Bank after the full purchase price had been paid. That the 1<sup>st</sup> Defendant had the capacity to sell the suit property.
  10. In re-examination, the 1<sup>st</sup> Plaintiff stated that his power of attorney started as soon as this suit was filed. That the 1<sup>st</sup> Defendant signed the transfer forms which were then certified by his Advocate. That the 2<sup>nd</sup> Defendant's caveat was registered on May 29, 2018. That the balance of the purchase price in the sum of Kshs. 300,000/= remained unpaid. With that, the Plaintiffs' case was closed.
  11. The 1<sup>st</sup> Defendant, Boniface Kioko Mwololo, adopted his two statements dated July 22, 2019 and September 26, 2019 as his sworn evidence. He also produced his bundle of documents dated July 22, 2019 which was marked as DExb Nos. 1 – 3 and a further list of documents dated September 20, 2019 which was marked as DExb Nos. 4 – 6. He stated that he entered into a sale agreement with the Plaintiffs in respect of the suit property, parcel number Makueni/Emali Town/234. That the purchase price for the suit property was Kshs. 10,000,000/=. That he was yet to be paid the full purchase price. That he was paid Kshs. 3,000,000/= through his lawyer Andrew Makundi. That the 1<sup>st</sup> Plaintiff later paid him Kshs. 967,000/= through his personal account. That his account was domiciled with the Co-operative Bank. That the transaction ought to have been concluded within 90 days.
  12. The 1<sup>st</sup> Defendant added that he had been paid a total of Kshs. 9,298,895/= by the Plaintiffs. That a balance of Kshs. 701,105/= was outstanding. That he had never entered into a second agreement with the Plaintiffs over how the balance was to be paid. That the signature appearing in the second agreement was not his. That he had not informed his wife about the sale of the suit property before he made the decision to sell. Therefore, he did not obtain his wife's consent. That the suit property is a family asset where he resides to date. That it was his prayer that the suit be dismissed and that the money paid go as per the sale agreement.
  13. In cross-examination by counsel for the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant stated that he obtained a loan from the 2<sup>nd</sup> Defendant bank in 2013 and 2014. That the total loan amount given was Kshs. 10,000,000/=. He denied being in default of payments. He added that he informed the Branch Manager of the 2<sup>nd</sup> Defendant bank that he was about to sell the suit property. That he also informed the Bank that the suit property had changed from Plot No. 651 Emali to parcel number Makueni/Emali Town/234 after he obtained a lease. That he however did not do a letter to that effect.
  14. In cross-examination by counsel for the Plaintiffs, the 1<sup>st</sup> Defendant confirmed that the Kshs. 3,000,000/= paid as deposit by the Plaintiffs was not payment for legal fees. That in a letter dated May 14, 2017, he confirmed having received a total of Kshs. 6,698,896/=. He denied signing a transfer form. He stated that before signing the sale agreement, the suit property had no encumbrances. He also denied ever signing the second agreement dated January 18, 2018. He stated that no rent had ever



been deposited in a joint account opened in the names of the lawyers on the record in compliance with the Court order dated January 17, 2019.

15. In re-examination, the 1<sup>st</sup> Defendant stated that after the Order of January 17, 2019 was issued, he had never received any rent from tenants at the suit property.
16. The 1<sup>st</sup> Defendant called one witness, Emmaculate Nduku Kioko (DW1), his wife. She adopted her statement dated September 26, 2019 as her sworn evidence in chief. She stated that she resides in the suit property. That she only learnt about the sale of the suit property to the Plaintiffs after this suit was filed. That her husband did not inform her about the sale. That her husband told her that he sold the suit property because he owed some people money. That she neither consented to the sale of the suit property nor did she sign a spousal consent.
17. In cross-examination by counsel for the 2<sup>nd</sup> Defendant, she stated that her husband had a loan with Sidian Bank for Kshs. 8,000,000/=. That she did not know whether the loan had been repaid.
18. In cross-examination by counsel for the Plaintiffs, she further stated that that the suit property was matrimonial property. That she started residing in the suit property in 2013 with her husband. That there are 12 shops in the suit property through which they collect rental income. That the spousal consent does not bear her signature.
19. The 2<sup>nd</sup> Defendant called Johnstone Kiilu (DW2), the Branch Manager Sidian Bank, Emali Town. He adopted his statement dated March 19, 2021 as his evidence in chief. Next, he produced a list of documents dated October 8, 2019 which were marked as DExb Nos. 7 – 17. In summary, the 2<sup>nd</sup> Defendant asked the Court to recognize the 2<sup>nd</sup> Defendant's proprietary interest in the suit property.
20. In cross-examination the witness stated that sufficient due diligence was done before the Bank advanced a loan to the 1<sup>st</sup> Defendant. He added that he was aware that the Plaintiff carried out a search at the Lands Office and that no encumbrance was on the suit property. That the Bank placed a caution against the suit property after the Plaintiffs had purchased it. Again, the witness added that the Bank had no claims against the Plaintiffs. That apart from this suit, there is a separate civil suit by the 2<sup>nd</sup> Defendant against the 1<sup>st</sup> Defendant wherein reliefs have been sought with regard to the loan advanced to the 1<sup>st</sup> Defendant.
21. After further cross-examination by Counsel for the 1<sup>st</sup> Defendant, the witness stated that the 2<sup>nd</sup> Defendant Bank was not a party to the sale transaction between the Plaintiffs and the 1<sup>st</sup> Defendant and thus, it was not bound by their agreement.
22. In re-examination, the witness stated that the sale transaction between the Plaintiffs and the 1<sup>st</sup> Defendant concerns the Bank. That the 2<sup>nd</sup> Defendant could not detect the new title that was changed into the name of the 1<sup>st</sup> Defendant when it was carrying out its due diligence. That the other civil case against the 1<sup>st</sup> Defendant was for a refund of the loan advanced.
23. The parties duly filed their respective submissions. In their submissions dated June 4, 2021, the Plaintiffs submitted that an order directing the 1<sup>st</sup> Defendant to transfer the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs constitutes an order for specific performance which this Court has jurisdiction to grant. That the order for specific performance should issue because there exists a valid and enforceable sale agreement without any defect, illegality or mistake. It was further submitted that under clause 2.2 of the sale agreement, the full purchase price was to be paid within 90 days from the date of the agreement or 14 days from the successful registration of transfer in favour of the Plaintiffs.



24. Over and above that, the Plaintiffs submitted that the collapse of the transfer in their favour was due to the 2<sup>nd</sup> Defendant's registration of a caution against the title of the suit property arising from the failure by the 1<sup>st</sup> Defendant to repay a loan borrowed from the 2<sup>nd</sup> Defendant. Nonetheless, it was submitted that the suit premises were sold to them without encumbrances and thus the 1<sup>st</sup> Defendant was in breach thereof. That the 1<sup>st</sup> Defendant never rescinded the sale agreement and thus specific performance would be the most appropriate order to issue. That it was the 1<sup>st</sup> Defendant's intention to transfer the suit property because he signed the transfer forms and only the 2<sup>nd</sup> Defendant's caution prevented completion of the transfer.
25. Additionally, the Plaintiffs submitted that damages or a refund of the purchase price would be inadequate remedies in the circumstances because the suit property had already appreciated in value since execution of the sale agreement. That the 1<sup>st</sup> Defendant's allegations of forgery of his signature on the agreement dated January 18, 2018 ought to be dismissed for want of any evidentiary basis.
26. It was also submitted that the 2<sup>nd</sup> Defendant registered a caution against the title to the suit property in 2018 after the same was sold to the Plaintiffs in 2017 without any encumbrances. Therefore, the 2<sup>nd</sup> Defendant's remedy against the 1<sup>st</sup> Defendant lies in damages and no prejudice will be suffered if the land is transferred to the Plaintiffs.
27. The Plaintiffs further argued that since the 1<sup>st</sup> Defendant and his witness conceded to residing in the suit property, which was sold to the Plaintiffs with vacant possession, it was necessary that an eviction order be issued against the 1<sup>st</sup> Defendant. That after transfer of the suit property to the Plaintiffs, a permanent injunction ought to be granted barring the Defendants from trespassing and interfering with the plaintiffs' quiet possession of the suit property. Again, it was submitted that after full payment of the purchase price, the 1<sup>st</sup> Defendant became a trespasser on the suit premises and thus all the rent he collected thereon amounted to unjust enrichment and the same ought to be recovered by the Plaintiffs.
28. In the 1<sup>st</sup> Defendant's submissions dated June 28, 2021 it was argued that it was the Plaintiffs who breached clause 7 of the sale agreement dated February 8, 2017 when they failed to pay the entire purchase price within 90 days. The 1<sup>st</sup> Defendant rebutted the prayer to grant an order for specific performance to the Plaintiffs based on their failure to pay the full purchase price. It was also submitted that the prayer for a permanent injunction is null and void because the 1<sup>st</sup> Defendant is the registered owner of the suit property and due to the Plaintiffs' breach, the agreement is unenforceable. Lastly, it was submitted that the Plaintiffs came to Court seeking equitable reliefs with unclean hands because, not only had they not paid the full purchase price, they also presented a forged agreement dated January 18, 2018 and a forged spousal consent.
29. Supporting his case for dismissal of the Plaintiffs' case, the 1<sup>st</sup> Defendant relied on the following authorities: -
- i) *Sisto Wambugu v Kamau Njuguna* [1983] eKLR;
  - ii) *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] eKLR; and
  - iii) *Josephine Ndanu v Joshua Nzive Mulwa* [2008] eKLR
30. In its submissions dated July 6, 2021, the 2<sup>nd</sup> Defendant submitted that it lodged a caution on the suit property to protect its interest in a contractual claim being a loan facility advanced to the 1<sup>st</sup> Defendant. That the said interest in the suit property continues to exist until the 1<sup>st</sup> Defendant settles the outstanding loan amount. That from the letter of undertaking from the Makueni County Government dated June 17, 2013, an executed consent from the 2<sup>nd</sup> Defendant was mandatory before



any disposition of the suit property could be registered. That no consent was obtained by the 1<sup>st</sup> Defendant before the sale agreement was executed.

31. The 2<sup>nd</sup> Defendant relied on the following authorities: -
- i) [\*Kiptuya Ngerech Too v Peris Wangui Macharia & another\*](#) [2018] eKLR;
  - ii) [\*John Mbuu Muthoni & another v Ruth Muthoni Kariuki\*](#) [2017] eKLR; and
  - iii) [\*Kenya Anti-Corruption Commission v Paul Moses Ngetha; Sam N. Gachago \(Chairman\) & 2 others \(Interested Parties\)\*](#) [2020] eKLR
32. After consideration of the pleadings and the evidence adduced by the litigants, the apparent issues for determination are as follows: -
- i) whether the sale agreement dated February 8, 2017 is valid and enforceable?
  - ii) whether the agreement dated January 18, 2018 is valid and enforceable?
  - iii) whether the 2<sup>nd</sup> Defendant has a legally enforceable claim on the suit property?
33. From the disposition of the evidence in these proceedings, the undisputed facts are that the Plaintiffs executed the sale agreement dated February 8, 2017. That the purchase price was Kshs. 10,000,000/= . That pursuant to the sale agreement, Kshs. 3,000,000/= was paid as the initial deposit followed by Kshs. 6,698,896/=. That on February 12, 2018, the Plaintiffs registered a caution over the suit property due to the 1<sup>st</sup> Defendant's failure to give vacant possession to them. That on March 7, 2018, the 2<sup>nd</sup> Defendant registered a caution over the suit property to protect its interests on a loan facility that was advanced to the 1<sup>st</sup> Defendant.
34. Beginning with the third issue, the 2<sup>nd</sup> Defendant's evidence is that the 1<sup>st</sup> Defendant deposited a letter of allotment dated January 24, 2011 with the Bank as security for a lending. That in addition, the 2<sup>nd</sup> Defendant obtained a letter of undertaking from the County Government of Makueni dated June 17, 2013 through which the County Government agreed to the suit property being used as security and undertaking to prevent any dealings on the suit property without the prior written consent of the 2<sup>nd</sup> Defendant.
35. The thrust of the 2<sup>nd</sup> Defendant's case therefore, is that it had a cognizable interest which prevented the 1<sup>st</sup> Defendant from disposing the suit property without consent from the Bank. The question is, was the said interest legally cognizable. A lender's interest in the suit property is an encumbrance affecting the land. A reading of Section 2 of the Land Registration Act, 2012 shows the meaning assigned to an encumbrance viz: -
- “encumbrance” means any charge, lease, or other interest noted or required to be noted in the encumbrance Section of the Land Register
36. Sections 43 (1) and (2) of the [\*Land Registration Act\*](#), 2012 provide as follows: -
- (1) Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.
  - (2) No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.



37. Additionally, under Sections 56 (1) and (3) of the [Land Registration Act](#), 2012 the law is as follows: -
- (1) A proprietor may by an instrument, in the prescribed form, charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money's worth, or the fulfilment of a condition and, unless the chargee's remedies have been by instrument, expressly excluded, the instrument shall, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, the persons attesting the affixation of the common seal.
  - (3) The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.
38. The clear intention from the foregoing provisions is that an entry of a lender's legal interest in a property that has been used as security must be registered. I find no validity in the letter of undertaking dated June 17, 2013 drawn by the County Secretary and produced as DExb No. 13 for want of registration in the land register. It is not borne out from the evidence presented by the 2<sup>nd</sup> Defendant whether clause (c) of paragraph 4 of the said letter was ever performed. Perhaps as a result of the 2<sup>nd</sup> Defendant's indolence in ensuring compliance with the said undertaking, a title deed was finally issued on April 12, 2016 exhibiting no encumbrances whatsoever.
39. I have not come across a charge instrument that was executed by the Defendants and registered to support the 1<sup>st</sup> Defendant's borrowing. To support my view that the 2<sup>nd</sup> Defendant has not established a lender's interest, I have taken consideration of the findings of G.V. Odunga J. in [Kenya Bankers Association v Kenya Revenue Authority](#) [2018] eKLR wherein the learned Judge stated as follows: -
- “76. Therefore a chargee's interest in a charged property is only to the extent of the sum due under a charge and not in the property. He does not acquire any proprietary right in the property as such. My view is fortified by the definition of “proprietor” in section 2 of the Land Registration Act and in section 2 of the Land Act, 2012 as meaning:
- (a) in relation to land or a lease, the person named in the register as the proprietor;  
and
  - (b) in relation to a charge of land or a lease, the person named in the register of the land or lease as the person in whose favour the charge is made.”
40. On to the first issue, the sale agreement dated February 8, 2017 was executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs plus the 1<sup>st</sup> Plaintiff. It was duly witnessed too. The 1<sup>st</sup> Defendant insists it is unenforceable because the Plaintiffs did not pay the full purchase price within 90 days. Also, it is claimed that no spousal consent was obtained prior to execution.
41. Section 93 of the [Land Registration Act](#), 2012 provides as follows: -
93. Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the [Matrimonial Property Act](#).
42. Under the [Matrimonial Property Act](#), 2013, matrimonial property is defined under Section 6 as follows: -
- (1) For the purposes of this Act, matrimonial property means—



- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

43. By extension, Section 7 of the said Act provides for the ownership of matrimonial property in the following terms: -

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

44. In my comprehension, not every claim that a property acquired during the subsistence of a marriage qualifies to be matrimonial property. Even though the 1<sup>st</sup> Defendant's witness attached the said claim to the suit property, the law enjoined her to strict proof of her contribution towards acquisition of the same. Other than the bald claim, no hard evidence was presented to substantiate that indeed the suit property was matrimonial property. To buttress this fact, Section 11 of the Land Laws (Amendment) Act, 2016 amended Section 28(a) of the [Land Registration Act](#) which had classified spousal rights over matrimonial property as overriding interests.

45. Consequently, it was not automatic for the 1<sup>st</sup> Defendant's wife to cry wolf over failure to obtain spousal consent when in actual sense, the suit property, which is solely registered in the name of the 1<sup>st</sup> Defendant, was voluntarily offered for sale to the Plaintiffs.

46. Accordingly, the 1<sup>st</sup> Defendant is estopped from resiling from his bargain with the Plaintiffs that the suit property is now matrimonial property requiring spousal consent to dispose of. The Plaintiffs acted upon the 1<sup>st</sup> Defendant's representations and paid substantial amounts to purchase the suit property. The dictum of *Lord Diplock in Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 1 All ER 1130 at 1134 is applicable wherein he held as follows:-

“In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well-known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely on his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely on an event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as 'A man cannot be permitted to take advantage of his own wrong'.”

47. A reading of clause 2.2 of the sale agreement indicates that the balance of the purchase price could be paid either within 90 days of the date of the agreement or 14 days from the date of successful transfer of the suit property in favour of the Plaintiffs. I have not seen a rescission notice in the evidence produced herein. Clause 9.2 of the agreement also provides the purchaser with the option of specific performance in the event of a failure by the Vendor to transfer the suit property.



48. It is, therefore, my finding that the Plaintiffs acquired the suit property in good faith and without knowledge of the fact that the 1<sup>st</sup> Defendant had offered the same for security over a borrowing. They are, therefore, entitled to the enforcement of the sale agreement which is a legally binding contract.
49. Without belabouring the third issue with an extensive discussion, the critical point is whether the agreement was valid so as to be legally binding. Section 3(3) of the Law of Contract Act states as follows: -
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party
50. The 2<sup>nd</sup> Plaintiff did not execute the subject agreement as was done in the sale agreement dated February 8, 2017. There is no need to speculate whether the final balance of Kshs. 300,000/= was paid per the terms contained therein. My finding is that the agreement dated January 18, 2018 is not legally enforceable. Hence, in line with the representations made by the 1<sup>st</sup> Defendant in his letter dated July 5, 2017 (PExb No. 2), the balance of the purchase price payable by the Plaintiffs is Kshs. 300,000/=.
51. Supporting the above finding is the fact that there was bona fides from the Plaintiffs since execution of the sale agreement and completion of the same was frustrated by the 1<sup>st</sup> Defendant's non-disclosure of material facts to wit, the 2<sup>nd</sup> Defendant's interest in the suit property.
52. Inevitably, the Plaintiffs' claim partly succeeds on a balance of probabilities. The Orders which commend themselves are outlined as follows: -
- a) An Order is hereby issued directing the Land Registrar to remove the caution registered by the 2<sup>nd</sup> Defendant on March 7, 2018.
- b) An Order is hereby issued directing the 1<sup>st</sup> Defendant to transfer Makueni/Emali Town/234 to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.
- c) Within 14 days of registration of the transfer in (a) above, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs shall pay the balance of the purchase price being Kshs. 300,000/= to the 1<sup>st</sup> Defendant or his appointed Advocates.
- d) Upon compliance with (b) above, the 1<sup>st</sup> Defendant shall give vacant possession of Makueni/Emali Town/234 within a further 14 days period in default of which the Plaintiffs shall be at liberty to evict the 1<sup>st</sup> Defendant from the suit premises.
- e) Costs of the suit to the Plaintiffs against the 1<sup>st</sup> Defendant.
53. It is so ordered.

**SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

**MBOGO C.G.**

**JUDGE**

**12/5/2022**



Court Assistant: Mr. Timothy Chuma

