REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 2982 OF 1995

AMINA ABDUL KADIR HAWA::PLAINTIFF

VERSUS

RABINDER NATH ANAND::1ST DEFENDANT

KANTA ANAND::2ND DEFENDANT

JUDGMENT

The plaintiff Amina Abdul Kadir Hawa moved to the seat of justice by way of a plaint dated the 27th day of September, 1995 and filed on the 29th day of September, 1995. The salient features of the same are that;-

(i) The defendants are the registered owners of land reference No. LR.209/7755/7 Kabarnet road, Nairobi, together with all the buildings and improvements thereon being a lease hold property held for a term of 99 years from 1st November, 1971.

(ii) By an agreement in writing dated the 28th March, 1995 the defendants agreed to sell and the plaintiff agreed to purchase the said property at the agreed price and or consideration of Kenya shillings. Four (4) million free of encumbrances and with vacant possession.

(iii) In pursuance to the said agreement, the plaintiff at the joint request of the defendants paid the second defendant the sum of Kshs.1,150,000.00 as part payment of the agreed consideration made of Kshs.400,000.00 paid on 28th day of March 1995, Kshs.750,000.00 having been paid on the 27th day of June,1995.

(iv) The agreement had a completion date having been 31st July, 1995.

(v) It is the contention of the plaintiff that the plaintiff had been at all material times and was all along ready and willing to complete the transaction but the defendants wrongfully failed and or refused to continue to neglect and to refuse to complete the said sale or take any steps towards such completion.

In consequence thereof the plaintiff sought the following reliefs from the court:-

(a) Specific performance of the said agreement, dated 28th day of March, 1995.

(b) An order that the defendants do hand over all Title deeds pertaining to LR. NO.209/7755/7 Kabarnet road, Nairobi.

(c) An order that the defendants do execute the transfer pertaining to the said property in her favour free of encumbrances.

(d) An order that the defendants do give vacant possession of the said property.

(e) Damages for breach of contract in lieu of or in addition to specific performance.

(f) All necessary consequential accounts, direction and injuries.

(g) Costs of the suit.

(h) Interest at Bank rate on (e) (f) and (g) above and

(i) Such other or further reliefs as this Honourable court may deem fit and proper.

The defendants were served, entered appearance and filed a defence dated 22nd day of November, 1995 and filed on the 22nd day of November, 1995. The salient features of the same are as follows:-

(1) They admit the existence of the sale agreement pleaded in paragraph 4 of the plaint but state that the said sale agreement was qualified by an oral agreement which was contemporaneous to the said written agreement which made the operation of the written agreement conditional to:-

(i) The plaintiff paying the sum of Kshs.1 million to the defendants in addition to the sale price shown in the said agreement before the completion in cash or its equivalent in pounds sterling.

(ii) Pay the sum of Kshs.750, 000.00 to the defendants on account of the purchase price on or before 30th April, 1995.

(ii) That the plaintiff herein neglected to fulfill the afore stated oral conditions.

(iii) They have knowledge that the afore said sale agreement was handed over to the plaintiffs advocate in escrow pending the fulfillment of the conditions referred to in paragraph 2 of the defence.

(iv) Admit receiving payment of Kshs.400, 000.00 only from the plaintiff towards the afore said transaction.

(v) Concede the completion date was 31st July, 1995.

(vi) Save for what has been stated in number (i)-(v) above the defendants denied each and every allegation in the plaint and put the plaintiff to strict proof on all of them.

(vii) In the alternative that although the plaintiffs advocates had been supplied with photo copies of Title deeds, the plaintiff in breach of the condition of the contract failed to prepare and deliver a conveyance to the defendants advocates for perusal and approval 14 days before the completion date and had not done so as at the time of the date of the filing of the defence.

Parties were heard. The plaintiff called two witnesses. PW1 Rastam Hira an advocate of the high court of Kenya gave evidence to the effect that the sale agreement exhibit 1 was signed in his presence; both parties signed and the defendants' advocate took the defendant copy; the purchase price was given to him PW1 of Kshs.3.6. million of which the defendants were paid Khss.740, 000.00 leaving a balance of Kshs.2.850, 000.00. It is PW1s contention that there was no requirement that part of the purchase price be paid in the UK additional to the purchase price as alleged by the defendant. To PW1, there was no fault

on the part of the plaintiff as it's the defendants who recoiled from the agreement because they had nowhere else to go otherwise the plaintiff has always been ready and willing to complete the transaction. There was no default on the part of the plaintiff. The fault lay with the defendants who did not ot instruct savings and loan to release the title documents to PW1. Efforts were made vide exhibits 17, 18,19,20,21,22,23,24 and 25 to get the said title documents to enable PW1 prepare a transfer to no avail .

When cross-examined the witness maintained that the agreement had no specific condition where the balance of the purchase price was to be paid or when vacant possession was to be paid but agrees that the time was of the essence and there was no provision for the extension of time. He denied receipt of copies of title documents and added that he prepared a caveat from the search certificate. He denied the suggestion that he was acting for both parties and instead explained that mention of the defendant as a client is a misnomer. Confirmed that indeed payment of Kshs.400, 000.00 was made a deposit and 750,000.00 was paid by a personal cheque on the 26/6/95. Denied knowledge of an oral agreement to pay additional amount agreed of 1 million. He concedes Kshs.750, 000.00 was refunded to him by the 1st defendant. But he was not aware of the payment of Kshs.400, 000.00 into court. Maintained that his client had the entire purchase price and it is the defendant who was to blame for the failure to complete the transaction.

The plaintiffS' husband gave evidence as PW2. The sum total of his evidence is that he learned of the defendant's intention to sale the suit property in early March, 1995 and he made efforts to meet with the first defendant and they discussed the issue and agreed on the purchase price as being Kshs.4 million. Upon reaching an agreement of sale on the purchase price is when him PW2 proceeded to his lawyer PW1, gave him the relevant information and an agreement was drawn and signed between the parties on the 28/3/95. As per the requirement of the sale agreement 10% of the purchase price of Kshs.400, 000.00 was paid to his lawyer before the agreement was signed.

In June, 1995 his lawyer PW1 informed him that the defendants had financial problems and that him PW2 should release Kshs.750, 000.00 to the defendants in good faith in order to facilitate the finalization of the transaction which he did. PW2 went on further to state that the purchase price had been raised by his family in Britain, sent to him and he deposited it into an account with Barclays Bank long before the completion date and it is the defendants who failed to complete the sale. The agreement was procedurally signed by PW2s wife and according to him the property was sold and for this reason it should be transferred to them.

When cross-examined PW2 responded that all the terms of the sale were contained in the sale agreement; the purchaser is his wife but him PW2 financed the purchase; the wife was currently resident in Britain, maintained that him PW2 is properly before the seat of justice because he is the one who negotiated the sale and his brother forwarded the money of Kshs.3, 880,000.00 although the remitting document does not show that the money was for the purchase of the suit property.

It is PW2s stand that the correct procedure was followed. Upon conclusion of the condition of the agreement of sale parties agreed on their own before handing over the matter to their lawyers with instruction to his lawyer PW1 to act as a counsel or adviser and conclude the transaction. It is PW2s stand that all the terms of the contract were reduced into writing, that payment of Kshs.750, 000.00 was on the request of his lawyer PW1 and he paid as requested. As at the time of trial PW2 was residing a rented flat while his wife was resident in Britain.

When re-examined he reiterated that he had the balance of the purchase price which was to be paid upon completion of the transaction. All the payments were made by PW2 and not PW2s wife the plaintiff.

The second defendant gave evidence on behalf of the defendants. The sum total of her evidence in chief is that she and the first defendant who was her husband but who had since died on 3/12/2007 were the owners of the suit property; concedes the plaintiff wanted to purchase the suit property. The purchase price was five million and 400,000.00 was given as a down payment Kshs.750, 000.00 was to be paid by 30/4/1995 leaving a balance of Kshs.2, 850,000.00 to be paid by end of July, 1995. She concedes she and her late husband signed the sell agreement. Vacant possession was to be given after the full purchase

price had been paid. Maintains PW2 was not a purchaser and PW1 was their common advocate. She concedes time was of the essence and by 31/7/1995 the completion date Kshs.750, 000.00 had not been paid on 30/4/95, the 1 million had not been paid, Kshs. 2,850,000.00 had also not been paid.

Concerning the cheque for Kshs.740, 000.00, DW1 concedes that indeed she has knowledge of it because it was sneaked under the door to her late husbands' office which had been closed. It had been sneaked under the door without a covering letter. She took issue with the said cheque because it was not in the agreed amount of Kshs.750, 000.00 as the amount indicated was Kshs.740, 000.00; it had not been paid on the 30.4/95 as agreed as it was paid on 26/6/95.

Regarding the release of the title deeds, it is DW1s' evidence that PW1 knew that the title had been mortgaged to savings and loan and that is why he addressed correspondence both to the bank and to the defendant concerning the release of the said document. She denied the plaintiff's assertion that the defendant had financial difficulties and asked to be paid Kshs.750, 000.00 in order to facilitate the release of the Title documents. DW1 denied refusal to give vacant possession which they could only do upon receipt of the entire purchase price. She denied knowledge of any move by the plaintiff to prepare a transfer document and forward it to the defendant. It is her stand that failure to conclude the transaction is attributable to the plaintiff because they never made payment in time as stipulated in the agreement; they never met the time line set despite time being of the essence; they never applied for an extention of time within which to comply and lastly they never tendered the transfer documents to her for signature; she herself never asked for an extention of the time within which to comply neither did she receive the 30 days notice within which to comply. Concedes that that caveat had been registered against the title on the 20/4/95 but by which time the purchase price had not been paid. Lastly that the husband left a will bequeathing the entire property to her whose current value was currently over Kshs.18, 000,000.00. It is her contention that the only person who can take up the issue of sale is the plaintiff herself and not her husband PW2.

When cross-examined DW1 responded that PW1 was their family lawyer and in relation to the transaction leading to these proceedings he was also acting for them but concedes that the agreement indicates that Mr. Anand was acting for the vendor. She concedes the agreement reads deposit of Kshs.400, 000.00 which was paid to her, Kshs.750, 000.00 was to be paid by 30/4/95 although it is not in the agreement. Concedes her late husband closed his offices on 15/3/95 but denied that it was due to inability to pay VAT. Conceded that she never got transfer documents although she is aware that the title documents were with savings and loan at the material time. DW1 confirmed that they never wrote to savings and loan requesting them to release the documents because they never received, payments of Kshs.750,000.00 from the plaintiff as at April, 1995. That it was their intention to complete the contract but it is the plaintiff who failed to comply with the conditions of the qualifying oral agreement.

At the close of the trial parties filed written skeleton submission. Those of the plaintiff are dated 25th day of August, 2008 and filed on the 26th day of August 2008. In a summary the following have been stressed:-

(a) The first defendant is deceased as at the time of trial.

(b) The plaintiffs claim is simply that she contracted to buy the suit property as per the content of sale agreement where upon she paid Kshs.400, 000.00 as 10% down payment and later on request paid Kshs. 750,000.00 but then the defendant failed to complete the transaction by 31/7/1995 which was the completion date.

(c) The defendants have raised the issue of existence of an oral agreement to qualify the written agreement.

(d) That the issue of failure to serve the requisite notice under section 136(2) of the governments lands Act should not be entertained because it was not pleaded in their defence and has just been introduced through submissions.

(ii) In the alternative, the notice meant to issue under section 136(2) of the governments lands Act refers to suits between individuals and the government and not between private individuals.

(iii) In the further alternative if lack of service of notice under the said section had been pleaded or raised in evidence it would have been responded to by production of proof of issuance of the said notice.

(e) By reason of the content of the provisions of section 3(3) of the law of contract Act cap 23 laws of Kenya which requires contracts for the sale of land to be in writing it is not proper for the defendants to claim that there were other oral agreements of additional terms contemporaneous to the written agreement.

(ii) No explanation was given as to why these additional terms were not reflected in the written agreement or in an amendment and for this reason the court is invited to hold that the only binding contract between the disputants herein is the agreement of sale reduced into writing and produced herein.

(f) The plaintiff's failure to testify is not fatal to the case as the evidence can be adduced on her behalf through her witnesses.

(g) It is the contention of the plaintiff that through the testimony of PW1 and PW2 as well as documentary exhibits produced here, the plaintiff has proved her case on a balance of probability.

(h) The plaintiff cannot be penalized for not drawing the transfer instrument and tender them to the defendants for execution because PW1s explanation that he was not given the title documents to prepare the transfer instrument is reasonable as DW1 admitted that they never wrote to savings and loan to release the title documents to PW1.

(i) The court is invited to discount the defendant's assertion that condition 3 of the law society's condition of sale applies to the contract of sale subject of these proceedings; in order to oust the plaintiffs plea for a specific performance because these were not pleaded.

(ii) Even if this condition were to apply, the same do not hold for the defendants because it cannot Oust the requirement in the executed contract which required that the balance of the purchase price be paid upon completion of the transaction which completion could only have arisen upon the defendants tendering the title documents to enable PW1 prepare the transfer documents.

(i) The court is invited to note that the failure to order a refund of Kshs.400, 000.00 deposits to the plaintiff would amount to an unjust enrichment firstly. Secondly it was not pleaded.

(j) Contend that the suit against the first defendant has not abated because the cause of action survived against the co defendant. More so when the suit property was registered in the joint names of both defendants and upon the death of the first defendant the suit property devolved upon the 2nd defendant wholly.

On the basis of the arguments set out in number (i)-(j) above the court was urged to find for the plaintiff.

The second defendants submissions are dated 8th day of August,2008 and filed on the 11th day of August,2008. In a summary, the following have been stressed:-

(i) The plaintiff stands none suited because she did not issue the one months notice under section 136(2) of the governments lands Act.

(ii) The court is urged to believe the 2nd defendant's evidence that the contemporary oral agreement forming these escrow was made between the plaintiff and the defendants which evidence was not challenged in cross-examination.

(iii) The advocate for the plaintiffs never produced the forwarding letter he used to forward the cheque for

Kshs.740, 000.00 not withstanding that it was not the Kshs.750, 000.00, the plaintiff was required to pay.

(iv) The court is invited to note that the plaintiff did not testify and no explanation was given as to why she did not testify and yet no power of Attorney was produced by PW2 to authorize him testify on behalf of the plaintiff.

(v) It is admitted by the plaintiffs witnesses that no request was made by them to extend the completion time.

(vi) The defendants were entitled not to respond to the plaintiffs demands through the plaintiff's lawyer because the plaintiffs had not complied with the terms and conditions under the written contract as well as the escrow agreement before the completion date.

(vii) Although PW1 denied that he was not an advocate for both parties he failed to explain why he drew and kept the original agreement.

(viii) The forwarding of the cheque for Kshs.740, 000.00 outside the written agreement of sale is proof of the existence of the escrow contemporaneous oral agreement varying the terms of the written agreement.

(ix) The court is invited to hold that the sale agreement was repudiated on the 31st day of July, 1995 on the default of the plaintiff.

(x) The court is invited to hold that the clause 3 of the law society conditions of sale was applicable to the transaction subject of this judgment.

(xi) On the basis of the facts presented herein, the court should rule that the Kshs.400, 000.00 paid as deposit should be forfeited to the defendant because it is the plaintiff who failed to perform her part of the contract.

(xii) That since the agreement was signed by both defendants and since the defendant who died was not substituted, the plaintiff cannot get an order for specific performance against the surviving vendor.

By reason of what has been stated in number (i)-(xii) above, the court is invited to hold that on the basis of the pleadings, evidence and the law, the 2nd defendant has ousted the plaintiffs claim and the same should be dismissed with costs to the 2nd defendant.

In response to the plaintiffs submissions, the second defendant reiterated their main submission and then added that the issue of failure to issue one months notice under section 136(2) of the governments Act cap 280 laws of Kenya is an issue of jurisdiction which arose from the evidence and not challenged and being an issue of jurisdiction it can be taken up at any stage of the proceedings even during the submissions; the defendants authority to raise this issue stems from the provision of order XIV rule 1(old) which mandates the court to frame own issues where the parties have not agreed on issues for determination; which is proof that a court can frame and determine an issue outside the pleadings so long as it s disclosed by the evidence on record. On this account, the court is invited to distinguish the case law relied upon by the plaintiffs to state that a party is bound by its pleadings from the facts of this case, and allow the defendant to rely on the issue raised of the notice. That it is not true that the plaintiff had issued the notice and would have tendered it in evidence had it been raised earlier as nothing prevented the plaintiff form recalling their witnesses in rebuttal to tender it in evidence. On the issue of an escrow contemporaneous oral agreement, the court is invited to hold that the said principle is applicable to Kenya as no authority was produced by the plaintiff to show that the said principle is not applicable in Kenya. Still reiterates that the reliefs sought are is not available to the plaintiff by reason of her failure to substitute the deceased first defendant.

Lastly that in the alternative specific performance should not be offered if an award of damages would be adequate compensation. Herein there are factors which dictate against an order for specific performance namely the delay in concluding the matter namely 13 years from initiation to that trial, death of the first

defendant and the conduct of the plaintiff on reneging on the escrow agreement because if this court were to allow it then this would cause a lot of hardship to the 2nd defendant.

Parties also relied on case law. The plaintiff referred the court to the case of **NAIROBI CITY COUNCIL OF NAIORBI VERSUS THABITI ENTERPRISES LIMITED (1995-98) 2EA 231** where in the court of appeal held inter alia that:-"a **Judge had no jurisdiction to decide an issue which had not been pleaded unless pleadings were amended;** the case of **GOVERNEMENT OF THE UNITED STATES OF AMERICA VERSUS JOSEPH MULRIRI GITHONGO NAIROBI CA NO.27 OF 1999** decided by the court of appeal on the 14th day of July, 2000. In this case issue arose as to whether a new verbally conveyed condition also raises a legal issues as to whether a written agreement can be dependant on verbal conditions. In this decision, the CA drew inspiration from its own decision in the case of **MBURURI MATIRI & SONS VERSUS NITHI TIMBER CO-OPERATIVE SOCIETY LIMITED CA NO.125 OF 1987 (UR**) wherein the CA had held unanimously that "**a written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficiency to the contract**". Lastly the case of **STAMN VERSUS TIWI BEACH HOTEL LTD (1995-98) 2EA 378** where in observation was made to the effect that:-

"There is no reference in this rule (order XVII rule 2(1)) to a plaintiff himself giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issue which he has bound to prove and which evidence can be given by any competent witnesses not necessarily himself. A plaintiff does not have to be personally present when he is represented by a duly instructed counsel as was the case here; it is for a plaintiffs' counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. Similarly if a plaintiff can prove his case by means of legal arguments only he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short according to order XVII rule 2(1) a plaintiff can prove his case by the evidence of a witnesses or witnesses other than himself or by arguments of his counsel…"

On the basis of that observation the court of appeal held inter alia that:-

"**According to order XVII rule 2(1) of the civil procedure rules a plaintiff can prove his case by the evidence of a witnesses or witnesses other than himself, or by the arguments of his counsel…"**

The defence on the other hand referred the court to the case of **COMMISSIONER OF LANDS VERSUS HOTEL KUNSTE LIMITED NAKURU CA 234 OF 1995.** There is observation made therein that one of the arguments raised therein was that:-

"**The appellant's case in the superior court and also that of the interested party was firstly that the notice of motion is an action and that the commissioner of lands being a government servant notice under section 136(2) of the governments lands Act and section 13A of the government proceedings Act cap 40 laws of Kenya, should have been given but was not given consequently the notice being mandatory the action, was in competent…"**

The law Lords therein discounted the application of the requirement of the service of the notice under section 136(2) of the G.L.A. (Supra) because the proceedings had been initiated by way of judicial review. The case of **NYANGOTE GITU ALLAS MATSON MOGERE MOGOKO VERSUS MAXWEL OKAMWA MOGERE AND NATIONAL BANK OF KENYA LTD NAIROBI ELC NO.921/2007** where in Rawal J as she then was upheld objection on none compliance with the issuance of the notice under section 136(2) of the G.L.A However the information on the nature of the land and how the G.L.A provisions applied to the subject matter were not brought out in the ruling.The case of **THOMSON VERSUS MCCULLOUGH (1947) IKB 447** where in it was held inter alia that

"in the absence of direct evidence as to the delivery of the deed of conveyance the fact that on April 10 only part of the purchase price had been paid justified the inference that the deed if delivered on that date was delivered as an escrow pending payment of the balance, that the deed on being made effective on June, 21 by payment of the balance could not operate retrospectively to validate the

plaintiffs notice to quit to the defendant…" The case of **WAGICHIENGO VERSUS GERALD (1988) KLR 406** in which the court of appeal held inter alia that:-

"On the evidence, there was a condition precedent to the contract between the parties that the appellant would deposit some £20,000 in the respondents foreign bank account and this condition was not fulfilled by the appellant"

The case of **IN THE ESTATE OF SHAMJI VISRAM AND KURJI KARSAN VERSUS SHANKER PRASAD MAGANLAL BHATT AND OTHERS (1965) EA 189** where in the court held inter alia that:

"(i) Where an issue which should have been raised in the pleadings and canvased before the trial judge is raised for the first time on appeal, the court will not give leave to argue it unless it is satisfied that the evidence established beyond doubt that the facts if fully investigated would have supported the plea of the party seeking to raise the new issue."

The case of **UNION EAGLE LTD VERSUS GOLDEN ACHIEVMENT LTD (1997) A.C. 514** a privy council decision wherein it was held inter alia that:-

"failure to complete on time was a repudiatary breach of contract rendering performance by the purchaser impossible and entitling the vendor to reject the late tender of the purchase price and to rescind the contract; that equity would not normally intervene when an ordinary contract for the sale of land was rescinded for no compliance with an essential condition as to time and fact that the purchaser was only slightly late in completing and not justify departure from that general principle even though the result of the rescission was that the purchaser had forfeited the equitable interest in the land arising under the contract and that accordingly relief by way of an order for specific performance had properly been refused"

The case of **NABRO PROPERTIES LTD VERSUS SKY STRUCTURES LTD & 2 OTHERS (2002) KLR 299** wherein issues of validity of the contract entitling one to an order for specific performance was under interrogation. The court of appeal held inter alia that:-

"the appellant had not paid the full purchase price and had not applied for extention to complete the transaction; At the time the caveat was registered, the defendant had no registarable interest in the land and therefore the acceptance of such caveat did not in law create any such interests in favour of the purchaser. The sale agreement was impossible to perform therefore it could not form a cause of action for specific performance. A party seeking specific performance must show and satisfy the court that it can comply and be ready and able. A mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast on the appellant"

The case of **SAGOO VERSUS DOORADO (1983) KLR 365** wherein time was considered to be of the essence in a contract wherein the CA held inter alia that:-

"While the law society condition of sale provided that it was only on payment of the purchase money that the vendor could be required to execute a conveyance and deliver to the purchaser a clearance certificate; the appellants never became entitled to ask the respondents to execute the conveyance because they never proferred to the respondents the balance of the purchase money; of which the mortgage debt which the appellants never completed was a part. The appellants had not performed all their obligation and the respondents had been freed from their obligation to obtain a clearance certificate"

The case of **COLLINS VERSUS STIMSON (1883) VOL.XI.142** wherein deposit was forfeited on account of non performance (or performance default) The case of **HOWE VERSUS SMITH (1884) VOL.XXVII.A.C.89** wherein it was held inter alia that:-

"**the deposit although to be taken as part payment if the contract was completed was also a guarantee for the performance of the contract and that the plaintiff having failed to perform his**

contract within a reasonable time, had no right to a return of the deposit"

Lastly the case of **BENARD GATHOGO KANGORO VERSUS DAVID M. MUCHEMI & ANOTHER NAIROBI HCCC NO.2059 OF 1993** decided by Ojwang J as he then was on the 10th day of February, 2006 wherein the defendant sought to fault the plaintiffs plea for specific performance on account of the plaintiffs non performance of his obligations under the contract. The court made the following findings:-

(i) **Even if 28th August, 1992 were to be taken as the actual completion date, the plaintiff had not taken two steps which are essential to completion of a land sale agreement namely preparing the transfer document and tendering to the vendor the balance of the purchase price and more than three months passed but still the plaintiff had not taken those vital steps.**

(ii) If it is taken that the completion date was 21st August, 1992, then the failure of the special condition as to the clearing out of squatters could not possibly have arisen before that date, the lawful cause therefore would have been for the plaintiff to turn up with the transfer document and the balance of the purchase price on the stroke of the completion date, and then raise the objection that the squatters were still on the suit land for the first defendant had all along undertaken to have any one being on the suit and removed as at the completion date.

(iii) **The 1st defendants repudiation of the contract due to breach by the plaintiff was in my view entirely justified and was lawful.**

This court has given due consideration to the competing interests of the parties to these proceedings in the pleadings, evidence, submissions as well as principles of case law cited by either side to court for guidance and the court proceeds to make the following findings both on facts and the law in the final disposal of these proceedings:-

(1) That there are no agreed issues to guide this court in the disposal of this matter and for this reason the court will be guided by issues raised by each side in their submission as well as own issues when determining the issues in controversy herein.

(2) It is common ground that the subject matter of the proceedings is property falling into the category of land namely land parcel number LR.No.209/7755/7 situate on Kabarnet road, Nairobi.

(ii) It is also common ground that it had been registered in the joint names of the defendants as proprietors as evidenced by the production of a certificate of title exhibit D1.

(iii) A perusal of the said title document reveals that the certificate of title was issued under the Registration of Titles Act cap 281 laws of Kenya. It is lease hold property granted to the guarantees as joint tenants under LR. NO.I.R.26100/2, for a period of 99 years from the 15th day of November one thousand nine hundred and seventy one duly registered on the nineth day of October one thousand nine hundred and eighty one.

(iv) A further perusal of the title document reveals that the property had been charged to savings and loan Kenya limited for Kshs.400, 000.00 on 9/10/1981.

(v)A caveat had been registered against the title by one Amina Abdul Kadir. She was claiming a purchasers interest pursuant to an agreement for sale dated 28/3/95 whose copy was attached registered on 20/4/95.

(vi) The discharge of charge to savings and loan Kenya limited was discharged on the 3/7/96.

(3) It is common ground that the plaintiff herein desired to purchase the suit property and the registered owners desired to sell the suit property. In order to fruitify the desires of both parties they had to comply

with the mandatory requirements of the law. The relevant applicable law is none other than the law of contract Act cap 23 laws of Kenya. The relevant provision is section 3 thereof. It provides:-

"(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 found is

(i) 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 a party…."

(4) In pursuance to compliance with the legal requirements in number 3 above the parties executed an agreement of sale made on the 28th day of March, 1995. For purposes of assessment only the same is reproduced herein as here under:-

"Agreement for sale. Agreement made on the 28th day of March, 1995. Between Rabinder Nath Anand & (Mrs) Kenta Anand of P.O. BOX 40853 Nairobi (vendor) and Mrs. Amina Abdul Kadir Hawa of P.O. BOX 11034 Nairobi (Purchaser)

1. The property sold is L.R. NO.209/7755/7 Kabarnet road Nairobi (Deed plan No.109920)

2. The interest sold (where an under lease is involved this should be stated) lease hold for 99 years from 1/11/71.

3. The purchase price is Kshs.4, 000,000.00 of which the sum of Kshs.400, 000.00 has been paid to the vendors.

4. The sale is subject to the law society conditions of sale in so far as they are not inconsistent with the conditions contained in this agreement.

5. The contractual completion date is the 31st day of July, 1995.

6. The vendor advocate is Anand BOX 40853, Nairobi and the purchasers advocate is Rustam Hira BOX 47848, Nairobi.

7. The sale include the following things which shall be paid for by the purchaser at a price of Kshs. (state whether the sale is with vacant possession or subject to tenancies (giving particulars of them) The property is sold with vacant possession and free from all encumbrance.

9. (set out the rights privileges' liability etc subject to which the property is sold in particular include any provisional liability or assessment for road and sewerage charge) the property is sold subject to terms and conditions as set out in the grant registered as I.R.36175.

SPECIAL CONDITIONS

1. If the vendors agree to transfer their telephone number 567598 the purchaser will reimburse the total cost thereof.

2. Time is the essence of this contract.

3. Balance of purchase price to be paid against all completion documents

4. Vendors responsible for payment of all outgoings for the year 1995.

5. Each party will bear their own costs.

In witness whereof the parties have to here set their respective hands the day and year first herein before written signed by

Vendors
In the presence of
Rustan Hura
Advocate P.O. Box 47848
NAIROBI
Signed by
Purchaser

In the presence of Rustan M. Hira

Advocate P.O. BOX 47848
NAIROBI"

5. It is undisputed that the proceedings subject of this judgment arose because of none completion of the said agreement and issue of which of the contracting parties breached the said agreement giving rise to a plea for vindication by way of a grant of reliefs pleaded and in the event of establishment of breach against either party determination as to which is the appropriate remedy or remedies for vindication which is to be awarded by the court.

(ii) Each side blames the other for breach. The plaintiff has blamed the defendants for breach on account of the defendants introduction of escrow terms allegedly contained in an oral agreement besides the terms and conditions contained in the written agreement of sale and secondly failure of the defendants to hand over the title documents to the plaintiffs counsel to enable him draw up a transfer instrument. Whereas the defendants have blamed the plaintiffs for breach on account of the plaintiffs failure to Honour the oral terms of the agreement varying the written agreement leading to their failure to comply with their obligation under the terms and condition of the agreement of sale.

6. By reason of the competing interests high lighted above, issue arises as to whether the alleged oral terms of sale which went to vary the written terms of the agreement exist and were indeed made. 2ndly whether these have primacy over the terms and conditions of sale set out in the written contract of sale. The plaintiffs have maintained both in their evidence as well as the pleadings that these were never made, do not exist and secondly even if they did exist which is denied, the principle called into play to cushion them **"escrow-principle**" is not applicable in this jurisdiction. Secondly they do not have primacy over the written terms of contract whereas the defence on the other hand have contended that the principle of **"escrow"** is very much alive and applicable in this jurisdiction and the proceedings herein are proper candidate for its application and secondly the oral agreement has primacy over the written agreement and none compliance with its terms and condition is fatal to the defendants performance of their obligations under the written agreement. The plaintiffs have relied on the case law constiving sections 97 and 98 of the evidence Act cap 80 laws of Kenya. These provide:-

"**Section 97(1) when the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of document, and in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms of such contract grant of other disposition of property or of such matter except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.**

(a) …….
(b) ……..

(3) Subsection (1) applies to cases in which contracts, grants and or disposition of property referred to are contained in one document and to cases in which they are contained in more documents than one.

(4) Where there are more originals than one original only needs to be proved.

(5) The statement in any document whatever of a fact other than the facts referred to in subsection (1) shall not preclude the admission of oral evidence as to the same contract.

Section 98 when the terms of any contract or grant or other disposition of property or any matter required by law to be reduced to the form of a document have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties or any such instrument or their representatives in interest for the purpose of contracting, verifying, adding to or subtracting from its terms; provided that:-

(i**) Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution; want of capacity in any contracting party , want or failure of consideration or mistake of fact or law.**

(ii) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its term, may be provod and in considering whether or not this paragraph of his provision applies the court shall have regard to the degree of formality of the document.

(iii) The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract; grant or disposition of property may be proved.

(iv) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved except in cases in which such contract grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of such documents.

(v) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of such incident would not be repugnant to, or consistent with the express terms of the contract;

(vi) Any fact may be proved which shows what manner the language of a document is related to existing facts"

7. The applicability of the provision of section 3 of the law of contract act (supra) on the requirements that contracts of sale of immovable property be in writing and the applicability of sections 97 and 98 of the evidence Act to oral contracts in relation to how far these oral contracts can be permitted to alter the terms of written contracts, were revisited by the court of appeal in the case of the government of the **united states of America versus Joseph Muiruri Githongo (Supra)** wherein the court ruled that "**a contract entered into in writing speaks for the same and an oral contract to vary its terms can only be permitted to give efficacy to the terms of the written contract on the one hand and on the other hand, and land if the same is within the parameters permitted by the provisions of sections 97 and 98 of the evidence Act (Supra).**

8. To counter the arguments in number 6 and 7 above, the defendants have relied on the definition of Escrow from Blacks law Dictionary page 545 defined as:-

"**Alegal document (such as a deed) money stock or other property delivered by the grantor, promisor or obliger into the hands of a third person to be held by the latter until the happening of a**

contingency or performance of a condition and then by him delivered to the guarantee, promisor or obligor. A system of document transfer in which a deed ,bond, stock Funds or other property is delivered to a third person to hold until all conditions in a contract are fulfilled e.g. delivery of deeds to escrow agent under installment land sale contract until full payment for land is made".

A further definition was sourced from Hallisburrys laws of England Fourth Edition volume 12 page 525 paragraph 1332 defined as:-

"An intended deed may after sealing and any signature required for execution as a deed, be delivered as an escrow (or scroll) that is as a simple writing which is not to become the deed of the party expressed to be bound by it until some condition has been performed. Thus a convey once on sale or a mortgage or a surrender discharging a mortgage may be delivered in escrow so as to be binding on the grantor only if the grantee pays the consideration money or only if the grantee executes a counter part or some other deeds or document as agreed with the grantor like delivery as a deed, delivery as an escrow, may be made in words or by conduct although it needs not be made in any special form or accompanied with any particular words, the essential thing in the case of delivery as an escrow being that the party should expressly or impliedly declare his intention to be bound by the provisions inscribed; not immediately but only in the case of and upon performance of some condition then stated or ascertained. In the absence of direct evidence whether or not a deed of conveyance was delivered as an escrow, the fact that only part of the purchase price has been paid at the time of delivery justifies the inference that the deed was delivered as an escrow pending payment of the balance"

Further extracts from paragraph 1333, and 1334 at page 526-527 go to show that it may be delivered as an escrow to an Attorney acting for all parties or a solicitor acting for the party to benefit under the deed provided it is handed to him as the agent of all parties for the purpose of such delivery. It may be delivered conditionally that it may fruitify only upon the fulfillment of the particular condition and where the condition is not fulfilled the same is not enforceable.

9. This court has given due consideration to the rival arguments as set out under item 7 and 8 above and in this courts opinion the following is the correct position with regard to the said argument.

(i) Existence of an escrow denotes existence of a deed or bond or scroll in other words something in writing which consists of a promise to be fulfilled by the party delivering it for the benefit of the beneficiary named, to be held by the 3rd party appointed to hold the same and cause it to be fruitified in accordance with the conditions set therein. When applied herein, the court is in agreement with the plaintiffs counsels submission that it has no application because what was in issue was an alleged oral agreement varying the terms of the written agreement. There is no 3rd party involved to whom it was delivered and or made. All we have are the participating parties with the defendants asserting in their defence and the evidence of the 2nd defendant DW1 that it was made and the denial of its existence in the plaint and the evidence of PW1 and PW2.

(ii) When compared against the principles of law assessed namely section 3 of the law of contract Act cap 23 laws of Kenya and section 97 and 98 of the evidence Act cap 80 laws of Kenya, the court finds that the content of the extracts assessed above firstly do not support the defences' assertion herein and secondly even if they had existed they would not have ousted the clear provisions of the law a fore said.

(iii) The net result of this assessment is that the court makes a finding that there was no oral agreement to vary the written agreement as pleaded by the defence. No evidence has been adduced to that effect as found herein. The terms and conditions of the sale transaction which are to be considered when determining which party is to blame for the non completion of the sale transaction are those contained in the sale agreement exhibit 1.

10.The finding in number 9 above not withstanding, the defendants has asserted that the plaintiffs still stands non suited by reason of failure to issue the requisite notice under section 136(2) of the G.L.A. (Supra) on the one hand and on the other hand for failure to substitute the first defendant upon his demise

Reliance was placed on the case law assessed.

(ii) The plaintiff countered that argument by arguing that firstly it was not pleaded. 2ndly no notice is required as the government is not involved 3rdly in these proceedings and had it been raised in the plaint or evidence the plaintiff would have been able to tender the notice in evidence.

(ii) This court has considered the rival arguments above and revisited the case law cited namely the case of **IN THE ESTATE OF SHAMJI VISRAM AND KURJI KARSAN VERSUS SHANKER PASAD MAGANLAI BHATT AND OTHERS (SUPRA) NAIOROBI CITY COUNCIL VERSUS THABITI ENTRPRISES LIMITED (SUPRA) THE COMMISSIONER OF LANDS VERSUS HOTEL KUNSTE (SUPRA**) already assessed. Others not assessed are the case of **ODD JOBS VERSUS MUBIA (1970)EA 476** where in the court held (high court) that (i) "**A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision"; the case of "span Freight shipping company Limited versus Kenya ports Authority Nairobi Milimani commercial court civil case number 1063 of 2002"** decided by Waweru J on the 12th day of January, 2005 wherein the learned Judge faulted a suit filed by the plaintiff against the defendant due to lack of issuance of a statutory notice mandatorily required to be issued within a stipulated time frame under the parent Corporations Act. The case of **MWANJERA GICHUKA VERSUS ALICE MWANGI GICHEHA NAIROBI CA No. 183 of 1997** wherein the court approved the decision in "**Odd versus Mubia**" (supra) and ruled that "although trust was was not properly pleaded the facts showing such a position were fully canvased before the learned judge without any objection from the appellants the case of **VYAS INDUSTRIES VERSUS DIOCESE OF MERU NAIROBI CA NUMBER 23 OF 1976** wherein the court approved the principle in **ODD JOBS VERSUS MUBIA (SUPRA)** and then ruled that "the evidence on the record went to demonstrate that the party's left the issue of vicarious liability to the court for determination.

(iii) When the principles of the above case law are applied to the rival arguments on this issue herein the court firstly makes a findings that:-

(a) It is correctly submitted by the plaintiffs' counsel that the issue of failure to issue notice under section 136(2) was not pleaded.

(b) Case law assessed above decided by both the high court and the court of appeal are in agreement that the general position in law is that a party is bound by his/her pleadings but where an issue has not been pleaded but evidence is adduced on it or it is argued fully and there is every indication that parties have invited the court to rule on the issue, its non pleading not withstanding the court is entitled to rule or make a determination on the unpleaded issue. Herein the issue of failure to issue notice under section 136(2) of the G.L.A.was not pleaded; evidence was not adduced on the issue as this issue was raised in the learned counsel's submissions and for this reason this court is not obligated to make a ruling on it.

(c) Further to the assessment above, it is clear that where the statutory notice is required to be issued, the same is provided for under the parent Act and that is why it was a requirement in the case of the commissioner of lands versus Hotel Kunste (Supra) because the issue touched on government land. Whereas in the case of "**spanfreight shipping company limited versus Kenya ports Authority"** (Supra) the issuance of a notice was a requirement under the Kenya ports Authority Act.

(d) Herein the issue of notice was raised by the defence counsel because the title held by the defendants was subject to government conditions. This court has revisited the said copy of the title herein and there is a clear indication that the title is registered under the Registration of Titles Act cap 281 laws of Kenya. This court has perused the entire legislation and has not found in any of its provisions where in there is a requirement that before any action is instituted with regard to a Title registered under the said Act a statutory notice has to be issued. In the premises the court makes a finding that issuance of notice under section 136 (2) G.L.A. is not applicable firstly because the Title subject of these proceedings is not registered under the G.L.A. and secondly the law under which the Title subject of these proceedings is registered under the R.T.A. (Supra) does not make provision to the effect that any action relating to land Registered under it has to be preceded by issuance of a statutory notice.

11.With regard to substitution, it is evidently clear that indeed the first deceased died and was not substituted. The assertion of the defendant is that failure to substitute the first defendant is fatal to the plaintiff's claim. While the plaintiffs submission is that substitution would not have served any useful purposes as the Title was joint.

(ii) Considering the afore set out rival arguments in (i) above, the court agrees with the submissions of the plaintiff because it is trite law that where title is jointly held, upon the death of one of the joint owners, the dead joint owner rights become extinct and nothing is left which can exit distinctly for the benefit of his/her estate in order to warrant a substitution. This being the case failure to substitute the first defendant upon death is not fatal to the plaintiff's case.

12.The defence also took issue with the issue of the plaintiff's failure to give evidence personally. It is common ground that the evidence for the plaintiff was adduced through her advocate PW1 and her husband PW2. Indeed no reason was given as to why she did not attend court to give evidence save that she was resident in Britain at the time of trial. There was no indication that bringing her to testify would have been expensive. The stand of the defence is that failure to do so is fatal to the plaintiff's case because it is contrary to the requirements of the relevant civil procedure rules. The stand of the plaintiffs is that it is not mandatory for the plaintiff to attend court and give evidence personally as such evidence can be adduced on her behalf as her husband did in the circumstances of this case. The civil procedure rule which is now the current order 18 rule 2(1) CPR. Like its earlier counter part has been construed by case law namely the case of **STAMN VERSUS TIWI BEACH HOTEL (SUPRA)** where in the court of Appeal has stated clearly that it is not mandatory for the plaintiff to testify himself. Evidence can be adduced on his/her behalf to the satisfaction of the court. Herein PW1 and PW2 who were familier with the circumstances surrounding the transaction subject of these proceedings gave evidence on behalf of the plaintiff. No body disputed her signature on the sale agreement. There was no allegation that the evidence PW1 and PW2 gave did not state the correct position of the facts herein. The court is therefore satisfied that on the basis of the law and case law assessed failure of the plaintiff to attend court personally and give evidence is not fatal to her case. The evidence adduced through PW1 and 2 is sufficient to prove her claim on a balance of probability.

13.By reason of what has been stated in number 1,2,3,4,5,6,7,8,9,10,11 and 12 above all the technical issues raised by the defence against the competence of the plaintiffs claim stand ousted and the court will now proceed to make determination of the reliefs sought on the their merits.

(a) The first relief to be considered is the plea for specific performance. Extracts from Halisburry laws of England 3rd edition Vol36 paragraph 444 have the following observation:-

"A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed or been ready and willing to perform all the terms which ought to have been performed or been ready and willing to perform all the terms which ought to have been performed by him; and also that he is ready and willing to perform all future obligations and or the contract…"

(At paragraph 450)…"**The plaintiff must all show performance by him of all terms of the contract which he has under taken to perform whether expressly or by implication and which he ought to have performed at the date of the commencement of the action…"**

Reference was also made to extracts from chitty on contracts the 28th Edition Volume 1 London sweet & Maxwel 1999. In chapter 28 Pr.027 There is observation that:-

"**Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within the group f contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary… discretion but one to be governed as far as possible by fixed rules and principles…" (paragraph 028)…specific performance may be refused on the**

ground that the order will cause severe hardship to the defendant where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the defendant can put himself into a position to perform by taking legal proceedings against a third party…. Severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which affect the person of the defendant rather than the subject matter of the contract and for which the claimant is in no way responsible… But it will not be refused merely because the vonder finds it difficult on a rising market to acquire alternative accommodation with the proceeds of the sale, nor because compliance with the order expose the defendant to risk (of whatever nature)…"(paragraph 032) the conduct of the party applying for relief is always an important element for consideration. Thus specific performance may be refused if the claimant fails to perform a promise which he made in order to induce the defendant to enter into the contract but which is neither binding, contractual, nor because it relates to the future operative as a misrepresentation"

(ii) The afore set out principles have been construed and applied by case law assessed herein namely "**union Eagle limited versus Golden Achievement Limited"** (Supra) and "**Nabro Property Limited Versus Sky Structures Limited and 2 others (upra).** There is agreement that in order for the relief of specific performance to be availed to the claimant the following guiding principles or parameters should be met or demonstrated to exist:-

(a) The remedy is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it (the court) it is equitable in the interests of both parties to grant the reliefs.

(b) It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relief of specific performance the court can with hold it and award damage instead.

(c) It is a discretionary relief which discretion should not be exercised arbitrarily but on the basis of applicable principles. The guiding principles applicable to the courts exercise of its discretion which is trite and which this court has judicial notice of is that the discretion has to be exercised judiciously with a reason.

(d) Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may none the less be with held in circumstances where it is likely to course hardship to the defendant even if circumstance giving rise to the hardship to be suffered by the defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract.

(e) The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfill the same.

(iii) The afore set out ingredients have been applied to the rival arguments herein for and against the plea to the court for the grant or with holding of the relief of specific performance and the court proceeds to make the following findings on the same:-

(a) The written contract of sale exhibited by the plaintiff and admitted by the defendant is the governing binding instrument between the disputants. It clearly sets out the duties and obligations of each party. This court has already ruled that no oral agreement was made thereafter to modify its terms. The plaintiff met the first prerequisite by paying 10% down payment of the purchase price.

(b) Upon making the down payment of the pre requisite 10% of the purchase price the plaintiff took steps to protect her interest by lodging a caveat on the title.

(c) The plaintiff went further to assemble funds in readiness to fulfill her part of the contract. There is evidence that funds were pooled into an account. There is nothing to make this court doubt the testimony

of PW2 that although the documentary proof tendered by him as supportive proof of the availability of the balance of the purchase price do not indicate that the indicated funds were meant to pay off the balance of the purchase price there is nothing to show that they were not meant for this purpose as stated by PW2.

(d) It is common ground that the property was mortgaged to savings and loan Limited and the Title documents were with saving and loan limited. It is common ground that no efforts were made by the defendant to off set that loan in order to have M/S savings and loan limited release the title documents to them for on word transmission to the plaintiff.

(e) The defendant has not tendered evidence to show that they complied with their part of the bargain by showing proof of payment of all out goings on the property on the one hand and on the other hand that they tendered the completion documents to the plaintiff one of which is the Title document which would have enabled the plaintiffs advocate to prepare the transfer instrument in readiness for registration upon being signed by the defendant.

(f) The extract of Title tendered in evidence shows clearly that the indebtedness to savings and loan limited were met in June, 1996 meaning that there is no way the parties herein could have met the time line within which to complete the transaction as at 31st July,1995 as the Title document was not yet free and available in order for it to be used to facilitate the completion of the transaction and subsequent transfer to the plaintiff.

(g) On the facts as presented, and more particularly correspondences from PW1 who was the advocate for the plaintiff dated 14th June,1995, 20th June,1995 3rd July,1995,31st July,1995 and 25th August,1995, there is proof that the plaintiff made efforts to comply with the contract terms. She even offered to pay off the mortgage loan if the Title document had been released to her advocate to facilitate the transfer. Nothing has been exhibited by the defendant to show that she made similar efforts to facilitate the completion of the contract. The court therefore makes a finding that the plaintiffs are not in any way responsible for the non completion of the contract of sale of the suit property from the defendant to the plaintiff.

(iii) The failure of the court not to attribute any blame for failure to complete the transaction on the part of the plaintiff not withstanding, the court is of the opinion that on the facts presented herein this is not a proper case for the granting of the relief of specific performance because:-

(a) The plaintiff had only made a down payment of Kshs.400, 000.00 as 10% down payment towards the purchase price which can be ordered to be refunded.

(b) Indeed as per the evidence of PW2, the plaintiff and her husband PW2 intended to reside in this property but there is nothing on record to make the court to believe that the property was or had become of sentimental value to them and could not be swited with any other.

(c) The bulk of the balance of the purchase price remained under the control of the plaintiff through PW2 thereby giving them a lea way to look for alternative property either within the same vicinity or else where.

(d) It is common ground that as at the trial which was over 13 years since the initiation of the proceedings the market value of the suit property had gone up a factor the court cannot fail to take note of as it is duty bound to ensure that neither party unfairly enriches himself/herself to the disadvantage of the other over circumstance neither had control over. The duly in the disposal of the matter arose from systemic problems attributable to the institution on which the seat of justice is anchored. In the premises the court makes a finding that this is a proper case in which an award of damages for breach of contract would be an adequate remedy as opposed to an order for specific performance.

(iv) It is common ground that the 10% deposit paid by the plaintiff has never been refunded. DW1 stated that it was with their lawyer who was then on record meaning that it has all along been under the control

of the defendants. It is noted that the plaintiff did not pray for its refund may be because she had sought specific performance. Failure to so pray even in the alternative is not a bar to the court ordering its refund under the popular relief of "**such other or further relief that the court may deem fit to grant"** as a claim for a refund would have been consequential and or an alternative to the main relief of specific performance. The defendant was alive to the issue of refund and that is why the advocate raised the issue of forfeiture on account of the plaintiff having been the party at fault for none completion of the contract because of the alleged failure to comply with the terms of the oral agreement made to alter the terms of the written contract which assertion has been ousted by the court for the reason given in the assessment. In the premises, the court has no alternative but to order a refund of the 10% deposit paid.

(v) The plaintiff asked for interests to be paid at commercial rates but no evidence was adduced as to why interest should be paid at commercial rates. The court is therefore satisfied that in the circumstances of this case interest will be ordered at court rates.

(vi) On general damages for breach, which this court has found payable as opposed to an order for specific performance, the principles guiding its award which the court has to bear in mind when making the assessment are:-

(i) These are discretionary, meaning the court has to ensure that it exercise its discretion judiciously and with a reason.

(ii) They are not meant to enrich a party but to compensate him/her for the injury suffered.

(iii(These should not be in ordinately too low or too high. Bearing these mind on the one hand, and on the other hand the fact that the bulk of the purchase price had not passed on to the defendant and therefore remained with the plaintiff and also considering that there is nothing sentimental about the defendants property to the plaintiff, and considering that there was an option to settle for another property considering that the transaction had lasted only a few months an award of Kshs.300,000.00 as general damages for breach of contract would be adequate compensation.

For the reasons given in the assessment, the court proceeds to make the following final orders in the disposal of this matter:-

1. The plaintiffs suit is not in competent and the same is ordered to be ruled upon on its merits because:-

(a) The property subject of the dispute herein is registered under the registration of Titles Act cap 281 laws of Kenya. Nowhere does it specify that a notice is required to be issued to the opposite party before comencement of any litigation in respect of property registered under the said Act.

(b) The notice required to be served to the opposite party under section 136(2) of the G.L.A. cap 280 laws of Kenya relates to transactions relating to government land. Herein the Title subject of these proceedings is not government land.

(c) Reference in the said Title that parties were subject to government regulations did not make the title to be government land. Compliance with government regulations were to be governed by the parent registration Act namely the RTA cap 281 laws of Kenya.

2. The failure to substitute the first defendant upon his demise is not fatal to the plaintiffs claim because it is trite and this court has judicial notice of the fact that where property is joint, upon the death of a joint holder the interest of the deceased joint holder becomes extinct. Substitution would not have assisted the plaintiff's case in any way.

3. The failure of the plaintiff to tender evidence in person is not fatal because the rules of procedure and case law assessed do not make it mandatory for the plaintiff to testify in person in order to succeed. All what is required is that evidence is tendered to establish the claim lodged. Herein the evidence of PW1 and PW2 as supported by documentary proof exhibited have all gone to support the plaintiffs claim

satisfactorily on a balance of probability.

4. The defendants assertion both in the defence and the evidence that there was an oral agreement whose terms went to alter the terms and conditions of the written agreement stands ousted because:-

(a) There is no evidence to prove its existence as all that the court has is the assertion of the defence as against the denial of the plaintiff.

(b) The plaintiff has exhibited correspondence emanating from her advocate to the defendants expressing concern over inability to progress the contract of sale to completion. Nowhere has the defendant exhibited replies to those correspondences indicating that failure to progress the transaction to completion was as a result of the plaintiff's failure to comply with the terms of the oral agreement of sale varying the terms of the written agreement of sale.

(c) The unproven assertion on the part of the defendants and the proven denial of the plaintiffs do not bring the defendants allegations within the exception provided for in section 97 and 98 of the evidence Act cap 80 laws of Kenya. For this reason the court finds that the alleged oral agreement though not found to be proved stands ousted by the afore said provision the court therefore finds that the only operative agreement governing the transaction herein is the written contract of sale.

5. On the basis of the evidence assessed herein, the plaintiff is not responsible for breach and or non completion of the sale transaction because:

(a) She paid the 10% deposit of the purchase price of Kshs.400, 000.00.

(b) She lodged a caveat against the title to protect her interest.

(c) There is proven efforts through the evidence and documents tendered in evidence by PW2 that funds were assembled to meet the balance of the purchase price.

(d) The defendants were obligated to pay all out goings on the title and tender the Title documents to the plaintiff to process the transfer which the defendant never did.

(e) It is common ground that the property was charged to savings and loan limited. No efforts were made by the defendants to pay off the indebtedness to savings and loan in order to secure the release of the Title documents to facilitate the preparation of the transfer instrument as no documentary proof to that effect has been exhibited by the defendant.

(f) The plaintiff has exhibited proof by way of correspondence between her advocate and the defendants on the one hand and savings and loan on the other hand asking for the release of the Title documents to facilitate the preparation of the transfer instrument but to which there was no response either from the defendants or M/S savings and loan.

(g) It is evident from the entries made in the copy of the Title document exhibited that the indebtedness to M/S savings and loan (k) limited was met in June, 1996 long after the expiry of the completion date of 31/7/95.

(h) Both parties knew that time was of the essence and were obligated to work towards the time line set.

(i) Since the evidence assessed goes to demonstrate that the defendant was the defaulting party she was obligated (DW1) to apply for extention of completion time which thy never did.

(j) The very fact that the indebtedness to M/S savings and loan was met in June, 1996, is clear proof that there is no way the defendant could have met her obligations under the contract to the plaintiff with regard to the transfer of the subject property to the plaintiff was not available for transfer as the Title was held by savings and Loan who had a lien over the said Title on account of the loan advanced by savings

and loan to the defendants.

6. In view of what has been stated above in number, the court finds the defendant to be the defaulting party and the one required to make good that default to the plaintiff.

(ii) The plaintiff's main relief is specific performance.

For the reasons given in the assessment although ground has been made out for the granting of the relief of specific performance, the court is none the less not inclined to exercise its discretion to grant the same because:-

(a) The transaction took a short time.

(b) The plaintiff had parted with only 10% of the purchase price which had been paid as a deposit of Kshs.400, 000.00.

(c) The bulk of the balance of the purchase price remained with the plaintiff giving her greater lee way and opportunity to look for an alternative property to buy either within the same locality or else where.

(d) There is nothing of sentimental value to the plaintiff in this property which could prevent her from looking for another alternative property to buy either within the same locality or elsewhere.

7. By reason of what has been stated in number 6 above, the court declines to award the relief sought of specific performance together with the attendant reliefs sought for, An order that the defendant do hand over all Title deeds pertaining to LR. NO.209/7755/7 Kabarnet Road Nairobi an order that the defendant do execute Transfer pertaining to the said property in her favour free from them of encumbrances; An order that the defendant do give vacant possession of the said property namely prayers (b) (c) and (d) which are also declined.

8. Upon declining to grant an order for specific performance for the reasons given, the court makes a finding that for the reasons given in the assessment this is a proper case where an award of general damages for breach of contract in liew of specific performance is appropriate and bearing all the afore assessed guiding principles on the assessment of general damages the court makes an assessment of Kshs.300, 000.00 three hundred thousand Kenya shillings only as adequate damages for breach of contract.

9. With regard to the 10% deposit paid and acknowledged by DW1, it is common ground that this has not been refunded. DW1 said that it s is lying with her advocate. The court appreciates that the plaintiff did not seek its refund as an alternative. Failure to do so seek not withstanding the court has jurisdiction, power and the authority to grant the same under the general relief of "**such other and further relief that the court may deem fit to grant"** as an order of refund is consequential to the main relief of specific performance and could have been claimed as an alternative relief.

(ii) An order for its forfeiture to the defendant is declined because the only reason why the defendant sought its forfeiture was on account of the plaintiffs' default on account of alleged breach of the terms of an alleged existence of an oral agreement of sale varying the terms of the written agreement of sale which assertion the court has ousted for the reasons given in the assessment. The court therefore orders a refund of Kshs.400, 000.00 to the plaintiff which had been paid to the defendant as 10% deposit towards the purchase price of the sale transaction which has been faulted.

(a) The plea for an order of interests to be awarded at commercial rates is declined because no reasons were given as to why the court should award interest at commercial rates. For this reason the court will allow interest at court rates on the amount to be refunded of the 10% deposit of Kshs.400, 000.00 from the date of filing till payment in full.

(b) Interest on the general damages awarded under number 7 above will be at court rates from the date of

judgment till payment in full.

10.The plaintiff will have costs of the suit.

11.The delay in the drafting and delivery of the judgment was caused by systemic heavy work load and the same is highly regretted.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA.

DATED, READ AND DELIVERED BY HON. JUSTICE MAJANJA ON THIS 21ST DAY OF SEPTEMBER, 2012.

JUDGE