



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 2484 of 1994

FRANCIS WAHIU THEURIPLAINTIFF

-VERSUS-

MONICAH NJERI

ESTHER WANGUI

CATHERINE MUTHONI

FRANCIS NJURU NGUGI T/A

WAWAGE INVESTMENT COMPANY).....DEFENDANTS

JUDGMENT OF THE COURT

The Plaintiff claims that he is the owner of plot number 125 measuring approximately 26 acres situated along the Ruiru-Kiambu Road (hereinafter referred to as the “suit property”). He entered into an agreement dated 9th February 1991 to sell 20 acres of the suit property to the Defendants at the price of Kshs 4,000,000/=. The Plaintiff claims that the Defendants in breach of the agreement failed to pay Kshs 2,700,000/= of the purchase price, and that further, they entered into the suit property and committed acts of waste thereon without his consent.

The Plaintiff thereby brought a suit against the Defendant by way of a Plaint dated 12th July 1994 and filed in Court on the same date, seeking the following orders:

1. A declaration that the sale agreement entered into between the Plaintiff and Defendants on 9th February 1991 has been legally rescinded, and that the Defendants, their agents and/or servants are trespassers on the suit property.
2. An eviction order against the Defendants their agents, servants and others claiming through them.
3. An injunction restraining the Defendants their agents, servants and others claiming through them from entering, building, dividing or in any other manner interfering with the suit property.
4. General damages for breach of agreement.
5. Costs of the suit together with interest on costs and damage.

6. Any other relief which this Honourable Court may deem fit to grant.

The Defendants filed a Defence on 15th August 1995 of the same date, which was later amended on 22nd May 2002 to include a Counterclaim. A Further Amended Defence and Counterclaim dated 28th September 2010 was filed in court on the same date. The Defendants denied the Plaintiff's claim and attributed the breach of the agreement to the Plaintiff, who they alleged had failed and or refused to obtain title deed for the suit premises to enable them complete the sale. The Defendants pleaded that as a result of the Plaintiff's failure to obtain title deed for the suit premises, the performance of the contract had been frustrated. It was denied by the Defendants that they received the notice to terminate dated 07.09.93 issued by the Plaintiff, and that if it was so issued it was premature and unlawful for reasons that the Plaintiff had not, at the time of the notice, furnished the Defendants with title documents.

The Defendants in their Counterclaim claim that the Plaintiff was on 28th January 1999 issued with the Certificate of Lease for the suit premises Ruiru/Ruiru Block/Witeithie/126. Further that they have paid the full purchase price as provided in the Agreement for sale by depositing Kshs. 1,500,000/= subsequent to execution of the Agreement for sale and the balance of Kshs. 2,500,000/= as ordered by the court on 29th September 1998. It is averred that the Plaintiff has in breach of the agreement for sale refused and/or neglected to transfer the suit premises as sold to the Defendants, and the Defendants claim twenty (20) acres of the suit premises being Ruiru/Ruiru Block/Witeithie/126, and pray for an order of specific performance. They specifically sought the following orders:

1. Retrospective rectification of all the erroneous reference to suit premises Ruiru/Ruiru block/Witeithie/125 to read Ruiru/Ruiru Block/Witeithie/126.
2. A declaration that on the deposit of Kshs.2.5 million the total purchase price of the suit premises was fully paid.
3. A further declaration that the Defendants were entitled to immediate transfer of the suit premises in their names on deposit of the said monies.
4. That the sum of Kshs.2.5 million now standing at Kshs.3,500,129.54 as at 14th April 2008 together with accrued interest be transferred into the Plaintiff's name upon execution of transfer and registration of Title No. Ruiru/Ruiru Block/Witeithie/126 in the Defendants names.
5. In the alternative an order for the Deputy Registrar of the High Court of Kenya to execute transfer of the suit premises in the names of the Defendants.

The hearing of the case proceeded on 15th February 2012 in the absence of the Defendants, after the court confirmed that the hearing notice had been served on the Defendant's Advocate as stated in the Affidavit of Service sworn on 8th February 2012 by Boniface Murage, and filed in Court on the same date. The Plaintiff presented his evidence and closed his case on the said date of hearing, whereupon directions were given that he files his submissions. The Defendants thereupon filed an application dated 6th March 2012 seeking orders that the case to be reopened and they be allowed to cross-examine the Plaintiff and to present their case, which orders were granted by this Court on 21st March 2012. The further hearing of the case proceeded on 18th July 2012 and 15th October 2012, whereupon upon the close of the Defendant's case the parties were directed to file written submissions which they wholly adopted at a hearing on 19th November 2012, and requested for a judgment date.

THE PLAINTIFF'S CASE

The Plaintiff testified in court, and stated that he owned land in Ruiru municipality whose survey number is 125, and that on 9th February 1991 he entered into an agreement with the Defendants for the sale of 20 acres out of 26 acres for Kshs 4,000,000/=, which agreement he produced as the Plaintiff's Exhibit 1. It was the Plaintiff's evidence that the defendants paid Kshs 1,221,000/= as deposit. The Plaintiff stated that

on 7th September 1992 his advocate wrote to the Defendants asking them to pay the balance, which letter he produced as the Plaintiff's Exhibit 2. It was the Plaintiff's testimony that a certificate of lease with respect to the suit property was issued to him on 28th January, 1999, which he produced as the Plaintiff's Exhibit 4, and that he moved to court because the Defendant refused to pay the balance of the purchase price. The Plaintiff informed the court that the Defendants deposited the balance in a bank account without his consent. The Plaintiff informed the court that the 1st and 2nd Defendants have since passed on, and that the 3rd Defendant went to the United Kingdom. The Plaintiff denied knowledge of Francis Ngugi who according to him was not party to the agreement.

According to Plaintiff, plot number 125 measuring 26 acres was initially part of a larger parcel namely 10901/23/Ruiru measuring 103.5 acres which had been subdivided into 4 parcels. The Plaintiff testified that since parcel number 10901/23/Ruiru was agricultural land, consent from Thika Land Board which was produced as the Plaintiff's Exhibit 3 was obtained. The Plaintiff contended that the suit parcel is still agricultural land and that Land Board Consent must be obtained before selling it. Further, the Plaintiff testified that the Defendants brought strangers on the land who did not have title. The Plaintiff maintained that the Defendants had only paid Kshs 1,021,000/= while stating that there was no consent from the Land Board to transfer or subdivide the suit property. The Plaintiff sought to be allowed to refund the Defendants the money they had paid.

During cross examination, the Plaintiff stated that when he entered into the agreement on 9th February 1991, he informed the purchasers that he did not have title but that they agreed to proceed with the transaction. The Plaintiff admitted that it was his duty to obtain the title which he stated that he obtained in 1999 and that under the agreement, the purchasers were responsible for obtaining the Land Control Board Consent which could not have been obtained without the title.

According to the Plaintiff, clause 3 of the agreement stated that the balance of the purchase price being Kshs 3,600,000/= was payable before 01.09.91. The Plaintiff stated that he accepted payment of Kshs 200,000/= and Kshs 86,000/= on 11.09.91 and 01.11.91 respectively because he pardoned the Defendants and extended the time of repayment. The Plaintiff denied that he had received Kshs 1,560,000/= by 1st November 2011, and insisted that he had received Kshs 1,265,000/= as at that date. The Plaintiff denied having known that the Defendants intended to subdivide and sell the suit parcel to other people.

The Plaintiff informed the court that although the sale agreement was silent on the issue, the Defendants were to take possession after the payment. The Plaintiff could not tell whether the Defendants received the notice dated 07.09.92. Further, the Plaintiff admitted knowledge of the fact that Kshs 2,500,000/= was deposited as per the court orders of 21.10.98. The Plaintiff claimed he performed his part of the agreement, although he admitted that by the time he issued the notice on 07.09.92, he did not have a title and there was no consent obtained from the Land Control Board. The Plaintiff's testimony was that after obtaining the title, the Defendants refused to go to the Land Control Board. The Plaintiff stated that he had not filed application for consent or appeared before the board since the contract was already repudiated. Further, the Plaintiff testified that the agreement did not provide who was to obtain the consent.

The Plaintiff stated that he had not signed a transfer as he was to refund the money paid to him by the Defendants who were unable to complete the agreement. While insisting that he had performed his part of the agreement, the Plaintiff stated that the agreement did not provide that he was to give the Defendants the title deed.

In re-examination, the Plaintiff stated that the Defendants never requested him to take them to the Land Control Board and that at the time of entering into the sale agreement, he was ready to transfer the suit property if the purchase price had been paid, but that he was not ready to transfer the said land now. Further, the Plaintiff informed the court that even after issuing the notice on 07.02.92, the Defendants never made an effort to pay the balance owing, and that he too never made an effort to transfer the suit property to them after obtaining title as the agreement had expired.

Counsel for the Plaintiff filed submissions dated 25.10.12 and filed on the same date. While relying on the case of **Openda -vs- Ahn (1984) KLR 208** counsel for the Plaintiff submitted that the Defendant was not entitled to specific performance having failed to pay the balance of the purchase price before the institution of the suit. Counsel for the Plaintiff also relied on the case of **Wambugu -vs- Njuguna (1983) KLR 172** where it was held that an order for specific performance cannot be granted to purchaser who has not performed his part of the bargain, or who has failed to show that he at all times ready to do so.

It was also submitted on behalf of the Plaintiff that failure to obtain consent to subdivide and transfer from the Thika Land Control Board rendered the sale agreement entered into null and void. For this proposition, counsel relied on the cases of **Wasike -vs- Swala (1985) KLR 425** and **Onyango & Another -vs- Luwayi (1986) KLR 513**. The Plaintiff's counsel also argued that the alleged sub-division of the suit property by the Defendants, and sale of the sub-divisions to third parties was illegal for want of Land Control Board and the necessary procedures as to change of user and approvals of architectural plans by the Ruiru Municipal Council were not followed.

THE DEFENDANTS' CASE

The Defendant's witness was Francis Njuru Ngugi (DW1), the who also filed a witness statement dated 30th May 2012 and stated that he is the only available proprietor of the Defendant company. He testified that the Plaintiff was known to him having first met him in 1990 in the company of the other proprietors of the Defendant Company to discuss the purchase of the suit property. According to DW1, the Defendants agreed to buy the land without a title deed because Monica Njeri, one of the Defendants, was a member of the company from which the Plaintiff had acquired the land and had assured the Defendants that the Plaintiff was the owner of the land.

DW1 testified that they entered into a hand written agreement on 11.12.90 and later entered into the sale agreement on 09.02.91 at which time they had paid the Plaintiff Kshs 400,000/=. Further, that by 20.05.91, the Plaintiff had been paid Kshs 1,560,000/=:, and DW1 produced the schedule of payments and receipts evidencing the same in the pages 6 to 11 of the Defendant's List and Bundle of Documents filed with the Court on 8th May 2012. Although DW1 admitted that paragraph 3 of the sale agreement provided that the balance would be paid before 01.09.91, DW1 stated that the Plaintiff received money after that date. DW1's evidence was that the Plaintiff rescinded the agreement after the payment, and that the Defendants proceeded to subdivide the land to smaller portion of 40 by 60 feet plots which they allotted.

DW1 stated that they were ordered by the court to pay to the Plaintiff the balance of the purchase price being Kshs 2,500,000/= million, which they deposited in a fixed deposit account on 01.08.08. DW1 maintained that he was sued as a member of Wawage Investment Company and testified that developments and constructions have been carried out on the suit property. According to DW1, it could not have been procedural to obtain consent from the Land Control Board without a title. DW1 denied having seen any letter from the Plaintiff cancelling the transaction, and further stated that the Defendants had not been refunded the money paid, and that they had filed a counterclaim where they were seeking to have the title to the suit property transferred to Wawage Investment Company. DW1 produced the Defendants Original and Supplementary List and Bundles of Documents filed on 08.05.12 and 17.07.12 respectively as the Defendants' Exhibits 1 and 2.

During cross-examination, DW1 stated that he was present when the sale agreement was signed on February 1991 although he was not one of the signatories. DW1 informed the court that all the Defendants were alive when the suit was being filed, and that the Defendants signed the sale agreement on behalf of Wawage Company. Further, that although the receipts were issued in the name of one of the members of Wawage Company, the payments were made on behalf of Wawage Company. DW1 sought to clarify that Jua Kali Women Investment Company was shown as payee in some of the receipts because Esther Wangui, one of the Defendants, doubled up as the Chairlady of both Wawage Investment Company and Jua Kali Women Investment Company.

According to DW1, several payments were made on the basis of the hand written agreement the parties entered into before the typed agreement was signed, and that the amount shown to have been paid on the

typed sale agreement was wrong. DW1 maintained that at the time of the typed agreement, Kshs 135,000/= and Kshs 160,000/= had been paid under the handwritten contract.

DW1 averred that they agreed to the time frame for completion of the sale agreement to be between 1st February - 1st September 1991. It was DW1's testimony that the Plaintiff accepted money after 1st September 1991, and he maintained that it was the duty of the Plaintiff to prepare the transfer document, and that the Land Control Board consent could not have been obtained without the title which was issued after the suit had been filed. The evidence of DW1 is that they were given the go ahead to subdivide the land by the court when they paid the balance. DW1 also alleged that when they signed the sale agreement, the Plaintiff acceded to the subdivision. DW1 insisted that the exercise by the surveyor of sub-dividing the suit property and issuing beacon certificates was not futile as there are people on the suit property who have been issued with share certificates by the Defendants.

DW1 explained that although there was no change of user sought, the constructions on the suit property were approved, and denied that the buildings thereon were constructed illegally. During re-examination, DW1 stated that in total, the Plaintiff was paid Kshs 1,560,000/= in addition to Kshs 2,500,000/= paid later. Further, DW1 stated that according to the valuation report, the land was not agricultural land but that it was situated in an agricultural area.

The Defendants' submissions dated 16th November 2012 were filed on the same date. It was submitted on behalf of the Defendants that by the Plaintiff accepting payment of the purchase price after the lapse of the contractual date, the Plaintiff acquiesced and by conduct extended the payment period. Further, it was submitted that through a court order, the balance of Kshs 2,500,000/= was deposited in a joint interest earning account and therefore, that the entire balance of the purchase price has been available to the Plaintiff.

In submitting that the Defendants were and are still ready to perform their part of the agreement, counsel for the Defendants relied on the cases of **J. P. Builders V. A. Ramadas Raos (2011)1SCC 429** and **P. D'Souza -vs- Shondrilo Naiduz (SCC P 654)** The Defendants' submissions are that at all times, it was the Plaintiff's responsibility to obtain title, land board consent and transfer the suit premises to the Defendants which the plaintiff failed to do.

Counsel for the Defendants submitted that the Plaintiff failed to prove that he issued or delivered a notice terminating the sale agreement to the Defendants, and that the suit is therefore premature since the sale agreement is still valid to date. He also submitted that the cases of **Wasike -vs- Swala(1985)KLR 425** and **Onyango & anor -vs- Luwayi (1986) KLR 513** cited by the Plaintiff were distinguishable in that the lands in question had title making it possible to apply for and obtain the Land Board Consent.

On the issue of third parties said to be in occupation of the suit premises, counsel for the Defendants submitted that third parties have put up permanent structures on the property, and any orders granting the Plaintiff the property would cause untold hardship to the Defendants and the said third parties. Finally, counsel for the Defendants relied on the maxim "he who comes to equity must come with clean hands" and submitted that the Plaintiff is guilty for failure to keep his part of the bargain. Counsel relied on the case of **Meyers -vs- Casey (1913)17CLR 90** where it was held that no court of equity will aid a man to derive advantage from his own wrong.

ISSUES FOR DETERMINATION AND THE FINDINGS OF THE COURT:

After consideration of the pleadings, evidence and submission made by the parties herein, it is my opinion that the issues for determination in this suit are three:

1. Whether the sale agreement entered into by the Plaintiff and Defendants was legally rescinded, and if so the effect thereof.
2. Whether the Defendants are entitled to specific performance of the sale agreement entered into with the Plaintiff.

3. Whether the remedies sought herein are available to the parties.

Was their Legal Rescission of the Contract for Sale of the Suit Property?

Rescission of a contract is a remedy available to a party to a contract if the other party breaks a term of the contract which is a condition precedent. Specifically with respect to rescission of an agreement for the sale of land it is stated as follows in **Halsbury's Laws of England 4th Edition, Volume 42** at paragraph 242:

“If the contract contains a condition entitling the vendor to rescind on the happening of certain events and those events happen, the vendor may rescind. In the absence of such a condition the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract and the parties can be restored to their former position....”

Upon perusal of the agreement entered into between the Plaintiff and Defendants on 9th February 1991 produced in evidence as the Plaintiff's Exhibit 1, I note that there is no clause of the agreement giving the Plaintiff any right to rescind. What then needs to be determined is whether as claimed by the Plaintiff, the Defendants by not paying the balance of the purchase price of Kshs 3,000,000/= within 21 days as demanded by the letter from the Plaintiff's Advocate dated 7th September 1992, which was produced as Plaintiff's Exhibit 2, thereby repudiated the sale agreement for the suit property.

The Defendants have argued that they never received the said letter, and that they were ready and willing to complete the contract and did deposit the sum of Kshs 2,500,000/= being the balance of the purchase price in court upon court orders granted on 21st October 1998 by Honourable Justice Oguk, and which they produced in evidence.

It is my opinion that the delay and failure by the Defendants to pay the balance of the purchase price was conduct that indicated their intention not to perform their obligations under the contract. I am in this respect guided by the decision in **Wambugu vs Njuguna (1983) K.L.R. 172 at 174**, where the Court of Appeal held as follows:

“When an agreement does not state that time is of the essence (as was the case her) and neither does the vendor give notice for making time of essence, such a vendor having failed to take the necessary steps to make time of the essence could not repudiate the contract on the grounds of unreasonable delay by the purchaser to perform. In such a case the making of time of the essence had been waived, and time can only be made of the essence by fixing a reasonable time for performance.

The vendor is entitled to repudiate the contract of sale of the suit land for failure of performance. The purchaser had failed to pay the balance of the purchase price and could not demand performance by the appellant. In this case there was originally a contract of sale of the suit land and the contract was lawfully repudiated by the appellant for non-payment of the balance, and no specific performance thereof in favour of the respondent can be ordered. ”

In the present case it is not disputed that the balance of the purchase price had not been paid at the time of filing of suit in 12th July 1994, which was almost three years after 1st September 1991, the date when the balance of the purchase price was due under the sale agreement entered into by the parties herein. It may be the case that this date was waived by the Plaintiff by accepting payments thereafter, but he produced evidence of a letter dated 7th September 1992 requesting completion within 21 days which is evidence of his intention to make time of the essence. In any event a delay of over two years by the Defendants in completing payment is in my opinion unreasonable.

It is my finding that failure by the Defendants to pay the balance within the said 21 days, and in any event before the filing of this suit entitled the Plaintiff to rescind the sale agreement. I have also perused the terms of the orders granted by this Court on 21st October 1998, and it was clear that the amount of Kshs 2,500,000/= was being paid as security pending the determination of the suit herein, upon the Plaintiff's

application for an injunction against the Defendants dated 8th May 1998. It was therefore an interlocutory order, and did not determine the issues in this suit with finality in any way.

The legal effect of rescission is to put the parties back to their pre-contractual position. In this particular case the pre-contractual position is that the Plaintiff was the owner and in possession of the suit property, and that the Defendants are to be put back to the financial position they were at the time of entering into the agreement, and thereby refunded the money that they paid under the sale agreement.

On the issue of refund, the Plaintiff claims that he received an amount of Kshs 1,021,000/= from the Defendants as part payment of the purchase price, but did not produce any evidence of such payment. The Defendants on the other hand produced evidence of receipts of money paid to the Plaintiff with respect to the suit property by various members of its to the amount of Kshs 1,560,000/= in their Exhibit No. 1. The Defendants also produced evidence of a fixed deposit confirmation dated 14th April 2008 in a joint account held by the Plaintiff's and Defendant's Advocates with the amount of Kshs 3,477,587.15 as on that date, which is found at page 32 of their Exhibit No. 1. It is therefore my finding that the Defendants are entitled to a refund of Kshs 1,560,000/= and of the amount in the fixed deposit account in which the deposit of Kshs 2,500,000/= was made.

Can the Sale Agreement be Specifically Performed?

The Defendants have argued that they are entitled to specific performance of the contract for reasons that it was the Plaintiff's responsibility to obtain title, the Land Control Board consent and to transfer the suit premises to the Defendants and which he failed to do. They contended that they were always ready and willing on their part to complete the contract. The Plaintiff on his part argued that the Defendant was not entitled to specific performance having failed to pay the balance of the purchase price before the institution of the suit.

The agreement between the parties entered into on 9th February 1991 had no specific terms as to the provision of title, the obtaining of Land Control Board Consent or transfer. On the other hand there were specific terms therein as to the payment of the purchase price. An order of specific performance is made on the basis of clear terms of a contract, as what is being requested to be performed are contractual obligations. It is also the case that specific performance, being an equitable remedy is discretionary and is not available to a party if there has been conduct on his part disentitling him to that relief.

It was held in **Wambugu vs Njuguna (1983) K.L.R. 172** that one of such circumstances is where a purchaser had not performed his or her part of the bargain, and particularly by failing to pay the balance of the purchase price, and he or she cannot then demand specific performance. This was also the decision by the Court of Appeal in **Openda vs Ahn (1984) KLR 208 at 210** wherein it was held as follows:

“ A condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such person as he directs at the time and place of completing the sale...”

It is my finding that by not having completed the payment of the purchase price at the time of filing of suit the Defendants had not performed their part of the bargain, and cannot therefore benefit from an order of specific performance.

The Plaintiff also argued that the Defendants cannot get specific performance as the sale agreement was in any event void for failure to get the consent of the Thika Land Control Board. From the evidence adduced before court by the Plaintiff, the suit property was hived off from agricultural land and the Land Control Board's consent to the sale transaction between the parties was therefore required under section 6(1)(a) of the Land Control Act, (Cap 302 of the Laws of Kenya) which provides as follows:

"6(1) Each of the following transactions that is to say:-

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any

agricultural land which is situated within a land control area; is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

Under section 8 of the Land Control Act, an application for consent should have been made within six months of the making of the agreement. Since no such consent was sought, the sale agreement entered into became void under the Land Control Act. The cases of **Wasike -vs- Swala (1985) KLR 425** and **Onyango & Another -vs- Luwayi (1986) KLR 513** cited by the Plaintiff are applicable since the application of section 6(1) of the Land Control Act is not limited to land with titles but applies to "dealings with any agricultural land situated within a land control area". In any event, if indeed the practice is that a title is required, then from the testimony of DW1 this is a risk that the Defendants were willing to take, as they were aware at the time of entering the sale agreement that the suit property had no title.

The Act is also not specific as to which party is responsible for getting the Land Control Board consent and section 8 provides that an application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction "by any party thereto". Where a sale agreement contract is silent as to which party shall make the application, it behoves the party who will be most prejudiced by the lack of consent, and in this case the Defendants, to ensure that such an application is made. It is therefore the finding of this court that the sale agreement, being void for lack of the Land Control Board consent is incapable of being specifically performed.

Are the Remedies Sought Available to the Parties?

This Court has already made findings on the remedies of rescission and specific performance that were sought by the Plaintiff and Defendants respectively. The other specific reliefs sought by the Defendants in their counterclaim were consequential to there being a finding that they were entitled to specific performance, and therefore also fail. With regards to the Defendants the only remedy that is available to them in the circumstances of this case is the refund of the purchase price paid, arising from the rescissions of the contract, and also under the provisions of section 7 of the Land Control Act which provides as follows:-

"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."

The Court of Appeal in the case of **Wasike -vs- Swala (1985) KLR 425**, having found the transaction therein void for reasons that the consent of the Land Control Board was not sought, stated that the appellant was entitled to refund of the money paid in the course of the dealing.

There are other remedies sought on the part of the Plaintiff, in terms of eviction and permanent injunction orders against the Defendant and their agents. This remedy raises the question of whether the Plaintiff can be put back to possession of the suit property. The Plaintiff argued that the alleged developments on the suit property are illegal as the land was not legally subdivided. It was the Plaintiff's contention that for the sub-division to be lawful, the consent of the Land Control Board and approvals for change of user from the Ruiru Municipal Council have to be obtained. The Plaintiff also submitted that the lifting of restrictions on developments on the suit property by the court order granted on 21st October 1998 could not cure the illegality of ownership of the suit premises, as the Plaintiff could not be divested of the same in the absence of the lack of the consent by the Land Control Board.

The Defendants on the other hand argued that that the Plaintiff was aware that the land was being bought by the Defendants for subdivision and sale to third parties who have developed their portions with permanent structures. They produced evidence of a valuation report of the suit property and photographs of developments thereon, and a list of the purchaser's sub-divided plots and beacon certificates in their

Exhibit No. 2. The Defendants submitted that the property cannot therefore be available to the Plaintiff in any way, and any order granting him the property will cause untold hardship to the Defendants and the said third parties.

The Plaintiff on the other hand has brought evidence of a certificate of lease issued to him with respect to the suit property now known as Ruiru/Ruiru Block 1 (Witeithie/125) issued to him on 28th January 1999. In **Moya Drift Farm Ltd vs Theuri (1973) EA 114**, it was held by the Court of Appeal that an absolute and indefeasible owner of land is entitled to possession of the said land, and to take proceedings in trespass.

It is not disputed that there are third parties that are occupying the suit property, and who have built structures thereon. The Defendants have not brought any evidence of title or authority granted to them to sub-divide and/or sell the suit property. It is therefore my finding that by sub-dividing the suit property and selling the said sub-divisions to third parties without title and the consent of the Land Control Board, the Defendants accepted the risk of any negative consequences and claims that may arise therefrom. Further, having found that the sale transaction between the Plaintiff and Defendants void, it is also my finding that the Defendants also did not have any interest in the suit property that they could pass on to third parties.

The final remedy sought by the Plaintiff is that of general damages for breach of contract. The Plaintiff's evidence was that the Defendants were in breach of the sale agreement for failing to deliver the balance of the purchase price on the completion date. The Plaintiff's claim for damages for breach of contract however fails in light of the Court of Appeal's finding in the case of **Leonard Njonjo Kariuki -vs- Njoroge Kariuki alias Benson Njonjo, Nairobi Civil Appeal No. 26 of 1979**, where it was held that no general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent by the Land Control Board. Similarly it was held in the case of **Omullo -vs- Small Enterprises Finance Co Ltd & Another, (2005)1 KLR 668**, that if an act is void, it is void *ab initio*, and no party can get any benefit from a transaction based on that act. It is therefore my finding that the Plaintiff cannot be granted any damages arising from the void sale agreement entered into with the Defendants.

In conclusion, this Court finds that the Plaintiff has proved his case on a balance of probabilities, and that the Defendants' Counterclaim fails. I accordingly enter judgment for the Plaintiff as against the Defendant as follows:

- a) The sale agreement entered into between the Plaintiff and Defendants on 9th February 1991 is hereby declared to have been legally rescinded and that the Defendants, their agents and/or servants are trespassers on the parcel of land known as Ruiru/Ruiru Block 1 (Witeithie/125)
- b) The Defendants, their agents, servants and any persons claiming through them are hereby ordered to vacate and remove their structures from the parcel of land known as Ruiru/Ruiru Block 1 (Witeithie/125) within 90 days of service of this judgment by the Plaintiff. In default, an order for eviction to issue.
- c) The Defendants, their agents, servants and any persons claiming through them are hereby restrained from entering on, continuing to construct on, sub-dividing or in any other manner interfering with the ownership of the Plaintiff's suit property being Ruiru/Ruiru Block 1 (Witeithie/125)
- d) The Plaintiff shall refund to the Defendants the sum of Kshs 1,560,000/= being the sum of money he was paid pursuant to the sale agreement entered into on 9th February 1991 with interest at the court rates of 12% from the date of this judgment.
- e) The Defendants shall be refunded the sum of Kshs 2,500,000/= and accrued interest and held in fixed deposit account in the joint names of the Plaintiff's and Defendant's Advocates in the Standard Chartered Bank Kenya Limited, and deposited pursuant to this Court's orders granted by the Honourable Mr. Justice Oguk on 21st October 1998,

f) Each party shall bear their own costs.

Dated, signed and delivered in open court at Nairobi this ____14th____ day of__December____, 2012.

P. NYAMWEYA

JUDGE