



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO.130 OF 2008**

**JANE WANJIKU KABIRA .....1<sup>ST</sup> PLAINTIFF**  
**ISAAC KAMAU KABIRA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK OF KENYA..... 1<sup>ST</sup> DEFENDANT**  
**JOHN KIMANI GACHATHI.....2<sup>ND</sup> DEFENDANT**  
**SAMUEL MIRIA GACHATHI.....3<sup>RD</sup> DEFENDANT**  
**ROSEMARY WAMBUI GACHATHI.....4<sup>TH</sup> DEFENDANT**  
**WINFRED NYAMBURA KARUGU .....5<sup>TH</sup> DEFENDANT**  
**RACHAEL WAIHERA NGARI.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

Jane Wanjiru Kabira and Isaac Kamau Kabira in their capacities as the legal representatives of the estate of Kabira Muita, deceased together with Isaac Kamau Kabira being the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively sued Standard Chartered Bank (k) Ltd, John Kimani Gachathi, Samuel Miria Gachathi, Rosemary Wambui Gachathi, Winfred Nyambura Karugu and Rachael Waithera Ngari being the 1<sup>st</sup> – 6<sup>th</sup> Defendants respectively vide the amended plaint dated 23<sup>rd</sup> July 2009 in which they sought for judgment in the following terms:

**a. *Specific performance in terms that the defendants be ordered to transfer Nyandarua/Sabugo/3266 to the plaintiffs.***

**aa. *IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO (a) above the defendants jointly and severally be ordered to refund the plaintiffs Kenya Shillings Six Million Six Hundred Thousand (Kshs. 6,600,000/=) being the amount of consideration already paid as well as penalties as provided for in the sale of agreement and the Law Society conditions of sale.***

**b. *costs of the suit.***

**bb. *Costs of the suit and interest on (aa) above at court rate***

The 1<sup>st</sup> Defendant filed a defence to deny the Plaintiffs claim, while the 2<sup>nd</sup> – 6<sup>th</sup> Defendants filed a joint statement of defence being the beneficiaries of the estate of P.J. Gachathi, deceased, to also deny the Plaintiffs' claim.

When the suit came up for hearing, the plaintiffs tendered the evidence of two witnesses in support of their case. Isaac Kamau Kabira (P.W.1) told this court that he had a discussion with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants over the sale of 71 acres to be excised from the parcel of land known as L.R. NO. NYANDARUA/SABUGO/49. P.W.1 stated that they executed an agreement dated 29<sup>th</sup> October 2004 in which the Plaintiffs agreed to purchase the land at Kshs. 10,000,000/=. The aforesaid agreement was produced as an exhibit in evidence. P.W.1 further stated that on 5<sup>th</sup> July 2005, they executed another agreement in which the 2<sup>nd</sup> - 6<sup>th</sup> Defendants agreed to sell to the Plaintiffs another 4 acres at a consideration of Kshs. 600,000/=. P.W.1 averred that they paid a deposit of Kshs. 6,000,000/= in respect of the first agreement. The first agreement states that the balance would be paid within three (3) months from the date of the agreement. In the second agreement, P.W.1 stated that he paid the entire sum of Kshs. 600,000/- at the date of execution of the agreement. P.W.1 confirmed that all the subdivision work was done and the relevant land consents were obtained. P.W.1 further alluded in his evidence that the Plaintiffs failed to complete the transaction because their father (Kabira Muita, deceased) died while the transaction was ongoing. Mbichi Mboroki (P.W.2) being the Plaintiffs' advocate in the sale transaction told this court that all along he had with him the balance of the purchase price. P.W.2 averred that after the death of Kabira Muita some issues arose that needed to be sorted out first hence he was forced to hold the transaction for a little longer. P.W.2 denied ever receiving the notice of 21 days rescinding the agreement from the 2<sup>nd</sup> to 6<sup>th</sup> Defendants. P.W.2 further stated that he was instructed by the Defendants to draw two cheques i.e one for Kshs. 3,900,000/= in favour of Astra Developers Ltd while the second cheque for Ksh. 100,000/= in favour of Messes Gakuru & co. Advocates. According to P.W.2, these later instructions militated against the entire transaction.

The 1<sup>st</sup> Defendant opted not to summon any witnesses in support of their case. The 2<sup>nd</sup> - 6<sup>th</sup> Defendants summoned the evidence of two witnesses i.e. Samuel Mirie Gachathi (D.W.1) and Sam Gakuru (D.W.2). The evidence of Samuel Mirie Gachathi (D.W.1) confirmed to this court that indeed there was a transaction between the Plaintiffs and the 2<sup>nd</sup> to 6<sup>th</sup> Defendants. D.W.1 further stated that the agreement obliged the 2<sup>nd</sup> Plaintiff and his late father to settle the balance of the consideration upon the production of the completion documents. D.W.1 also stated that all the completion documents were presented to the Plaintiffs' lawyers by their lawyers. D.W.1 further stated that the plaintiffs' advocate, Messrs Mbichi Mboroki (P.W.2) were then instructed to write two cheques i.e. one for Ksh. 3,900,000/= in favour of Astra Developers Ltd and the other for Kshs. 100,000/= in the name of Messrs Gakuru & co. Advocates. D.W.1 alleged that the Defendants instructed the firm of Messrs Gakuru & Co. Advocates to issue a notice rescinding the agreement when it became apparent that funds from the Plaintiffs was not forthcoming. Sam Gakuru (D.W.2) corroborated the evidence of D.W.1. He told this court that he obtained all the relevant completion documents and delivered copies thereof to the firm of Messrs Mbichi Mboroki & Co. Advocates upon which he requested that firm to forward payment of the balance of the purchase price. D.W.2 stated that the firm of Messrs Mbichi Mboroki & Co. refused to pay the aforesaid sum on the basis that the mode of payment proposed by the Defendant's advocate was against the letter and spirit of the said transaction. D.W.2 stated that he was therefore compelled to write to the firm of Messrs Mbichi Mboroki & Co. giving them 21 days notice to settle the balance of the consideration or the transaction shall stand as rescinded. D.W.2 said he personally delivered the notice to the offices of P.W.2. The Defendants have stated that they are not willing to complete the transaction.

At the close of the evidence, parties were permitted to file written submissions. I have considered the evidence tendered plus the rival submissions. The parties to this suit did not file the agreed issues. In my estimation and from the evidence and the submissions presented to this court, I think the following issues arose for my determination.

- (1) Who is to blame for breach of the agreement?**
- (2) Whether an order of Specific performance should issue!**
- (3) What are the available remedies in the circumstances**

Let me start with the first issue as to who is to blame for the failure to complete the transaction? It is not in dispute that the parties executed two agreements in respect of the sale of 75 acres to be excised from **L.R. no. Nyandarua/Sabugo/49**. The consideration for the aforesaid transaction was fixed for Kshs.

10,600,000/=. It is also not in dispute that the Plaintiffs have so far paid to the Defendants Ksh. 6,600,000/= leaving a balance of Ksh.4,000,000/= unpaid. It is also not in dispute that as of 29<sup>th</sup> December 2005, the aforesaid sum had not been paid. The other fact which is not disputed also is that the transaction(s) was (were) to be completed within three months from the date of the agreement. It is also not in dispute that as of 25<sup>th</sup> November 2005, all the relevant completion documents were ready. The question is whether or not the Plaintiffs were justified to delay in releasing the balance of the consideration to the Defendants. The other issue related to this is whether in the circumstances of this case the Defendants were entitled to rescind the contract! The Plaintiffs have given one main reason as to why they failed to pay the balance of the purchase price to the Defendants. It is alleged that the Defendants had proposed a different mode of payment of the purchase sum which was contrary to that stated in the sale agreement. I have looked at clause 4 of the sale agreement and it is plain that the purchasers were required to pay the initial deposit to the vendor's advocate i.e. Messrs Gakuru & Co. Advocates. The balance was to be paid on or before the completion date. The agreement does not specifically state who was to be paid the balance but it can be inferred that the same should be paid through the vendors' advocate. I find the reason given by the Plaintiffs to be puzzling. It is true that the purchasers' advocate was instructed to prepare two cheques. One for Ksh.3,900,000/= in favour of Astra Developments Ltd. and the other for Ksh.100,000 in favour of Messrs Gakuru & Co. Advocates. If the Plaintiffs advocate felt that the proposed mode of payment was not in conformity with the agreement, then the prudent thing he should have done was to forward one cheque for Ksh.4,000,000/= in the name of Messrs Gakuru & Co. Advocates. In the circumstances, I am convinced the Plaintiffs are to blame for breaching the agreement. They simply failed to settle the balance of the purchase price upon completion of the agreement. By that time the Defendants had fulfilled their part of the bargain. They had secured all the necessary documents ready to complete the transaction. In my view the Defendants were thereafter entitled to rescind the contract. The Plaintiffs' advocate has stated that he did receive notice rescinding the contract since he had closed his offices for the Christmas holidays. The sale agreement expressly states that it is subject to the Law Society Conditions of Sale (1989 Edition). I am convinced service of such notice is captured under Section 28 of the Law Society Conditions of Sale. It is stated that service of notice upon any person is considered as effective if it is:

- (i) Served personally or
- (ii) Delivered upon his advocates or
- (iii) Sent by registered post, telex, facsimile to the advocate or to his last known address.

The vendors' advocate, in this case, personally delivered the notice rescinding the agreement on the offices of the Plaintiffs advocate. I am convinced that the notice of rescission was properly served. It may have reached the purchasers' advocates office late but nevertheless the same was sufficient to cancel the contract. With respect, I am convinced that the sale transaction was frustrated by the Plaintiffs' procrastination in the matter hence the 2<sup>nd</sup> – 6<sup>th</sup> Defendants were entitled to rescind the contract. My conclusion in the first issue leads me to the second issue as to whether or not an order for specific performance should issue. My answer to this is that the order for specific performance is not available to the Plaintiffs because they are to blame for the frustration of the contract.

The last issue is what are the available remedies for the Plaintiffs? It is obvious that in the circumstances the Plaintiffs are only entitled to a refund of the Deposit less 10%. It is obvious that the Plaintiffs have no cause of action against the 1<sup>st</sup> Defendant who was merely the custodian of the title in dispute hence a trustee and executor of the deceased's Estate. The action against the 1<sup>st</sup> Defendant is for dismissal which I hereby order with costs.

In the end I dismiss the Plaintiffs prayer for specific performance. I however, give them judgment in terms of the alternative prayer (aa) of the amended Plaint save that the refund shall be less by 10%. The Plaintiffs are given costs of the suit to be paid by the 2<sup>nd</sup> to 6<sup>th</sup> Defendants.

***Dated and delivered at Nyeri this 3<sup>rd</sup> day of June 2011.***

**J. K. SERGON**

**JUDGE**

In open court in the presence of the Plaintiff. No appearance for the Defendants.