



**Mountain Mall Limited v Motha (Environment & Land Case
520 of 2018) [2022] KEELC 2980 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 520 OF 2018**

LC KOMINGOI, J

JULY 14, 2022

BETWEEN

MOUNTAIN MALL LIMITED PLAINTIFF

AND

MOHAMMED ALI MOTHA DEFENDANT

JUDGMENT

1. By the plaint dated October 11, 2017, the Plaintiff prays for judgement against the Defendant for:-
 - a) A permanent injunction order restraining the Defendant whether acting by himself or through his proxies, Powers of Attorney, agents, servants or workmen from doing any of the following that is to say, entering into 3rd Party sale agreements, disposing off by private treaty or otherwise, transferring, engaging potential buyers and /or in any other manner dealing or interfering with all that parcel of land known as Land Reference No 463/III/MN(CR 13065) inconsistent with the Plaintiff's rights and interest therein.
 - b) Damages for breach of contract.
 - c) Return of the deposit of Kshs 103, 830,000/= together with interest.
 - d) A declaration that the deposit of Kshs 46, 170,000/= paid by the Plaintiff to Barclays bank of Kenya is recoverable from the Defendant and an order of payment of the same together with interest since May 2014.
 - e) In the alternative to prayer (c) and (d) above, a declaration and an order that the Defendant is liable to carve out for transfer to the Plaintiff a portion of the said property known as LR No463/III/MN(CR 13065) valued for the



sum of Kshs 150,000,000/= as at November 2016 when the deposit became acknowledged for recovery.

- f) Costs and interest of the suit.
- g) Any other relief that the Honourable court may deem fit to grant.

2. The Plaintiff averred that the Defendant was and is the duly registered proprietor of all that parcel of land known as Land Reference Number MN/III/463(CR 13065), measuring approximately 51.3 acres and situated in Mtwapa, Mombasa County. It further averred that the said property was charged to Barclays Bank of Kenya who held a first charge over it and who had by their letter of May 27, 2014 consented to the sale of the property by way of private treaty in order for the bank to discharge the property.
3. It averred that it entered into a sale agreement with the Defendant for purchase of the suit property at a consideration of Kshs 46,170,000/=. It further averred that it was a term of the said contract that Kshs 46,170,000/= being 10% of the purchase price would be deposited by the purchaser directly into the account provided by Barclays Bank of Kenya. The balance of the purchase price of Kshs 415, 530,000/= was payable within ninety (90) days of the agreement. Out of the balance of the purchase price, Kshs 283, 830,000/= would be deposited by the purchaser directly to the account provided by Barclays bank while Kshs 131,700,000/= was to be deposited directly in the vendor's advocates client account.
4. The Plaintiff contended that it paid the 10% deposit and that the Defendant in need of further finances due to pressing needs sought for more advances from the Plaintiff on account of what was payable to him and by a Deed of Variation of agreement made on May 27, 2017, it agreed to advance the Defendant a further sum of Kshs 30 million.
5. It also averred that at all material times, it remained able and willing to complete the transaction until it learnt that a Third Party by the name Delta Connections Limited was also claiming a purchaser's interest in the property and had on June 19, 2014 placed a caveat over the property making the Defendant unable to complete the contract.
6. The Plaintiff contended that parties resolved to engage the Third Party with a view of arriving at an amicable solution and on August 25, 2014, the caveat was removed paving way for renegotiated completion period between the Plaintiff and the Defendant. It added that two further Deeds of Variation extending the completion period were entered into subsequent to the withdrawal of the caveat and the Plaintiff proceeded to make further advances towards the purchase price to the Defendant as well as their lawyers and has so far paid Kshs,150,000,000/=.
7. The Plaintiff contended that after the caveat was removed, further details emerged that that the suit property had already been subdivided fraudulently into smaller plots leading to the Plaintiff's financier who was to partially finance the purchase opted to pull out of the transaction and thereby crippling completion of the said contract.
8. The Plaintiff also averred that notwithstanding the fact that the Defendant was the party in breach, by his letter of November 10, 2014, he wrongfully sought to terminate the agreement and forfeit the amounts paid on the false assumption that the Plaintiff was in breach. It added that on November 11, 2016 a Memorandum of Understanding to refund the money paid by Plaintiff was effected pursuant to a resolution reached between them the Defendant was the party in breach. It contended that in breach of the Memorandum of Understanding, it learnt that the Defendant was in the process of disposing off the property to another buyer without informing the Plaintiff prompting it to register a caveat on the property on July 3, 2017. The said caveat was removed without the Plaintiff's consent.



The Defendant's Case

9. The Defendant filed the statement of defence dated June 29, 2019. He denied all the allegations made against him in the plaint. He averred that the suit property is charged to Barclays Bank Limited and admitted that Kshs 46, 170,000/= was paid to the said bank by the Plaintiff. He admitted entering the sale agreement dated May 27, 2014 but contended that under the agreement, the Plaintiff was required to pay all monies to the Defendant's Advocates' client account and in default of completion, the Defendant would be entitled to rescind the sale agreement and retain all monies paid to the Defendant by the Plaintiff as agreed liquidated damages.
10. The Defendant contended that the Deeds of Variation dated September 11, 2014 and another dated March 2015 are forgeries. He also averred that he issued a specific joint Power of Attorney to his son Juma Mohammed Motha and his nephew Ramadhani Juma Ali to specifically engage the chargee, Barclays bank of Kenya Limited and ensure that the sale agreement was conducted satisfactorily but he did not authorize them to receive any monies on his behalf.
11. The Defendant averred that due to the Plaintiff's breach, his Advocates issued the Plaintiff's Advocates with a Notice of Termination on November 10, 2014 and in view of the Notice, he was entitled to dispose off the suit property to Third Parties and the alleged caution that was placed on the property by the Plaintiff had no legal basis as the Plaintiff's interest in the suit property had been extinguished by operation of the law. He disputed the memorandum of understanding dated November 11, 2016 and termed it a forgery as he has never instructed any persons to admit the alleged debt of Kshs 150million.

Evidence of the Plaintiff

12. PW1, James Kiriya Gachiri, the Plaintiff's director, testified on June 22, 2021. He produced the sale agreement dated May 27, 2014 and told the court that he was buying the parcel of land known as Land Reference No MN/III/463(CR 13065) measuring approximately 51.3 acres for Kshs 461,700,000/=. He stated that he searched the title and realised that the land was charged to Barclays Bank of Kenya Limited and the bank had no objection to him buying the land as long as he paid it a deposit of Kshs 46,170,000/=. He produced a funds transfer of Kshs 46,170,000/= in favour of the said bank.
13. It was his testimony that the Defendant is about 85-90 years old and that he had donated to his sons Ramadhani Juma Ali and Juma Mohammed Motha a power of Attorney dated July 2, 2014. He further stated that he paid the Defendant Kshs 103, 830,000/= in total but the Defendant did not give him vacant possession. He testified that when they tried to subdivide the land, a Third Party, Delta connections Limited placed a caveat on the suit property. He produced the search dated August 14, 2014 showing a caveat placed on June 16, 2014 by Delta connections Limited. He added that he informed the Defendant who sent Ramadhani Ali Juma and Juma Mohammed Motha who were his sons to discuss the issue and the caveat was removed.
14. It was also his testimony that after removing the caveat, they were not given possession as they realized that Delta connections Limited had subdivided the land and had been given a deed plan. He stated that the search dated September 3, 2014 showed that there is no caveat.
15. He stated that he called the Defendant's two sons and they agreed that they should refund the money he had paid. He produced the Memorandum of understanding dated November 11, 2016. He stated that the money to be refunded was Kshs 103, 830,000/= paid to the Defendant and Kshs 46,170,000/= paid to the bank, by December 31, 2017 but they have not refunded which prompted him to file this suit.



16. He also told the court that before filing this suit, he placed a caveat on the suit property. He stated that he has never removed it and the Registrar of lands never called him but he later learnt that the caveat had been removed. He stated that the Defendant breached their agreement and that he paid him Kshs150 million and he had no intention of breaching the agreement. He stated that he has not been refunded with the deposit and that the Defendant has sold the land to someone else.
17. When he was cross-examined, he stated that he has met the Defendant and that they entered into the sale agreement dated May 27, 2014. He further stated that the suit land was charged to Barclays bank Limited. When referred to the no objection letter dated May 27, 2014 from Barclays Bank Limited, he stated that clause 2 reads, “strictly upon the terms of the agreement.”
18. He stated that completion date was in ninety (90) days and that he paid 10% of the purchase price and the balance was to be paid as agreed because of the issues that arose. When referred to clause 5.3 of the agreement, he stated that it states that the purchaser would forfeit the deposit. He also stated that someone else had claimed to have purchased the land therefore the time within which to pay the balance was extended by two separate deeds of variation being the one dated 11th September 2014 and the one dated in March 2015. He stated that when the time was extended, he went to carry out a subdivision but he found that Delta Connections Limited had subdivided the land and it had deed plans. He further stated that he had nothing in court to confirm the subdivision by Delta Connections Limited in court but the deed plans exist.
19. He stated that he paid Kshs 46,170,000/= to Barclays Bank Limited and a further Kshs 103,830,000/= to Ramadhani Juma Ali and Juma Mohammed Motha and through their Advocates. He stated that he paid them Kshs 30,000,000/= on May 27, 2014 being part of the deposit as per Clause 2.3a (iv) of the deed of variation dated May 27, 2015 and that it was not part of the cash to be paid to the bank. He further stated that as for the Kshs 73,830,000, he would deposit money to the Defendants account and his sons would get the cash and acknowledge receipt. He also pointed out that he paid Ksh 6.7 million, Kshs 6.8 million, Kshs 20 million and Kshs 3.2 million separately to M/S Kithure Kindiki Advocates. He produced the deposit slip in favour of Barclays Bank Limited for Ksh 46,170,000/=.
20. He stated that the memorandum of understanding dated November 11, 2016 between the Plaintiff and the Defendant’s donees is genuine. He further stated that they agreed to refund the monies. When referred to the Power of Attorney dated July 2, 2014, he stated that the two donees were receiving money on behalf of the Defendant and the monies were to be deposited in the Advocate’s client account. He stated that the Defendant got sick and went to India for treatment and the two donees of the Power of Attorney would collect money urgently and sign to acknowledge receipt.
21. When he was re-examined, he reiterated that the memorandum of understanding dated November 11, 2016 is genuine and not a forgery. He also stated that he paid Barclays Bank Kshs 46,170,000/= and paid the Defendant Kshs 103,830,000/= in installments. When referred to the Power of Attorney, he confirmed that it is dated July 2, 2014, entered into after the sale transaction herein when the Defendant got sick.
22. He stated that he did not breach the agreement, and that there are correspondences between the two Advocates confirming subdivision had been done by Delta Connections Limited. He also stated that the letter dated February 24, 2015 from the Ministry of Lands indicates that a subdivision was made fraudulently and that is what frustrated the agreement. He further stated that he dealt with the donees as per the power of Attorney.



Evidence of the Defendant

23. DW1, Mohammed Ali Motha, the Defendant testified on November 29, 2021. He told the court that he agreed to sell the Plaintiff a parcel of land situated in Mombasa vide the sale agreement dated May 27, 2014 for Kshs 461 million. He stated that the purchase price was to be paid through his bank account to himself. He stated that as per clause 2:4(ii) of the agreement, consideration was to be paid through the vendor's lawyer's client account. He added that the purchasers were not to pay through cash at all.
24. He testified that the money paid through the bank was 10% of Kshs 461 million which is Kshs 46,170,000/= that was paid to Barclays while monies paid through his lawyers M/S Kithure Kindiki Advocates was Kshs 20million on May 29, 2014, Kshs 3,200,000/= paid on May 29, 2014, Kshs 6,800,000/= paid on 28th May 2014 and a further Kshs 6,700,000/= and Kshs 29,900,000/= and all was paid to his Advocates as the agreement did not mention payment in cash.
25. He stated that the acknowledgement of payment of Kshs 1.5 million by Ramadhani Juma Ali and Juma Mohammed Motha dated May 22, 2015 is not witnessed by any Advocate. When referred to the deed of variation dated September 11, 2014, he stated that he does not recognize it as the signature is not his and it is a forgery and he does not know Boniface Mutwiri the advocate who witnessed it. When he was referred to the Deed of Variation dated May 2015, he stated that it is a forgery and he did not take part in it. When he was referred to the memorandum of understanding dated November 11, 2016, he stated that he did not give authority to his donees to give an undertaking to acknowledge a debt on his behalf. He further stated that the Plaintiff did not fulfill its obligations in the sale agreement. He also stated that Ksh 46,170,000/= was forfeited as the Plaintiff failed to fulfill the conditions in the agreement. He further stated that the Plaintiff did not pay Kshs 103, million therefore he could not agree to refund the same. He added that in the said Memorandum of Understanding, the same is prepared by Stephen Gachie Mwanza who also witnessed his donees signature. He added that he revoked the Power of Attorney as the donees were not trustworthy. He stated that he never gave them instructions to enter into the Memorandum of Understanding and that he learnt of the Memorandum of Understanding after he revoked the power of Attorney. He stated that the land was intact as he had not done any subdivision. When referred to the letter dated February 24, 2015 from the Ministry of lands, he stated that no subdivision had been registered and prayed that the Plaintiff's suit be dismissed with costs.
26. When he was cross-examined, he stated that entered into a sale agreement with the Plaintiff and that he is between 90-95 yeas but he did not introduce his sons to the Plaintiff to follow up on the transaction. When referred to the power of Attorney dated July 2, 2014, he stated that the signature therein is his and that he gave the donees the power to deal with the transaction. When referred to the Deed of Variation dated May 27, 2014, he stated that the signature is his. He stated that the Power of Attorney is dated July 2, 2014 and that after July 2, 2014, he does not recall signing anything relating to the transaction.
27. When he was referred to the letter dated September 24, 2014 Addressed to M/S Gachie Mwanza Advocates from M/S Kithure Kindiki Associates, acknowledging receipt of Kshs 7million, he stated that he does not recall the amounts. When referred to the Deed of Variation dated September 11, 2014, he stated that the vendor's signature is witnessed by Duncan Okatch Advocate and the Deed of Variation dated May 24, 2014 is also witnessed by Duncan Okatch Advocate as well as the sale agreement. He stated that the Power of Attorney dated July 2, 2014 was prepared by his Advocates' M/s Kithure Kindiki and that his signature is witnessed by Hannah Mtekele Advocate.



28. He stated that he does not know why the sale was not completed and he is not aware that other people claimed to have bought the same land. He stated that he knows Omondi Waweru Advocates and he knows their client had interest on the land but they did not agree on the purchase price and he does not recall whether his offer was before the Plaintiffs'. He added that he is not aware that the said M/S Omondi Waweru Advocates had placed a caveat on the title to the suit property.
29. When he was referred to the letter dated September 8, 2014 addressed to M/S Kithure Kindiki & Associates by M/S Gachie Omwanza & Company Advocates, he stated that he is not aware of the Deed Plans or that subdivision had been done. He stated that the Plaintiff paid Kshs 46,170,000/= to offset the loan owed to Barclays Bank and Kshs 42 million to his lawyers. He admitted that he did not sell to the Plaintiff because of the caveat placed by M/S Omondi Waweru Advocates. When referred to the certificate postal search over the suit land as on July 3, 2017, showing a caveat dated June 29, 2017 by James Kinyi Gachiri (Director of the Plaintiff), he stated that he is not aware of it. He stated that the land is in the hands of his sons, Juma Mohammed Motha and Ramadhan Juma Ali and he does not know who is on the land. When referred to his witness statement, he stated that he asked his lawyers to remove the caution. He also stated that he does not have a document to show he revoked the Power of Attorney to his sons. When referred to the acknowledgement receipts signed by the donees, he stated that he does not know his sons' signatures. He further stated that Ramadhan Juma Ali is now deceased while Juma Mohammed Motha is alive but he did not know where he was. He stated that he did not ask them if the signatures are theirs and he did not make a report to the police concerning their forged signatures.
30. He stated that it is not fair for him to retain monies paid by the Plaintiff as it does not have the land. He added that the Plaintiff ought to be refunded its monies. When he was referred to the Deed of Variation dated March 2015, he stated that the signature therein is not his but it was witnessed by his Advocates.
31. When he was re-examined and referred to the Power of Attorney dated July 2, 2014 and the Memorandum of understanding dated November 11, 2016, he stated that the amount in the Memorandum of understanding does not relate to his loan accounts at Barclays Bank. He stated that the acknowledgement receipts and valuations were presented by the Plaintiff but he contests that those are his signatures therefore the Plaintiff ought to show that the signatures were genuine. When referred to the letter dated September 10, 2014 from M/S Kithure Kindiki Associates acknowledging that the vendor had paid Kshs 35million, he stated that Kshs 46,170 ,000/= was paid to Barclay Bank Limited and it is not refundable as the Plaintiff was in breach and that there is no document to show Kshs 150,000,000/= was paid.
32. At the close of the oral testimonies, parties tendered final submissions.

The Plaintiff's Submissions

33. They are dated 30th February 2022. Counsel for the Plaintiff submitted that the following issues arose for determination:-
 - a) Whether the Defendant is in breach of the contracts entered into with the Plaintiff in regards to the suit property?
 - b) Whether the Plaintiff has proved its case on a balance of probabilities to warrant the orders sought in the plaint?
34. It was counsel's submission that the Plaintiff was ready and willing to perform its obligations but it was frustrated by the Defendant who is in breach for entering into another sale transaction with a different



purchaser behind the Plaintiff's back. He relied on the case of *Thomas Smith Aikman, Allan Malloy & others v Muchoki & others* [1982]e KLR.

35. It was also his submission that the sale agreement, the Deeds of Variation and the Memorandum of understanding have met the requirement of Section 3(3) of the *Law of Contract Act*. He relied on the case of *Wallace Kamau Mbugua v Aziza Fatuma Athumani & 5 others*[2020]e KLR. He further submitted that the Plaintiff has provided evidence to prove its case. He put forward the case of *Michael JCK Kapsot v Koptut Arap Too* [2020]e KLR.

The Defendant's Submissions

36. They are dated April 25, 2022. The Defendant submitted on the following issues;
- a) Whether the Defendant was in breach of the contract entered with the Plaintiff.
 - b) Can the orders sought by the Plaintiff issue?
 - c) Who should pay costs of the suit?
37. It was counsel for the Defendant's submission that it was the Plaintiff who was in breach of the sale agreement herein. He pointed out that the Plaintiff labored to demonstrate if indeed it was in a position to complete the agreement and failed to show how the Defendant had breached it. He further submitted that the Plaintiff's allegation that it was unable to complete the agreement since the Defendant has subdivided the land prior to the sale to the Plaintiff was unfounded. He pointed out that the letter dated February 24, 2015 from the Director of surveys confirms that no subdivision had been registered on the property and if at all there was any, the same was fraudulent and subject of investigation.
38. It was also counsel's submission that the Defendant denied executing Deed Variations herein save for the Deed of Variation dated May 17, 2014 therefore Plaintiff was bound under Section 107 of the *Evidence Act* to prove the variations existed but he failed to. He put forward the case of *Sinohydro Corporation v George Kisivo* [2018] e KLR.
39. He submitted that the memorandum of understanding dated November 11, 2016 between the Plaintiff and the Attorneys of the Defendant is not enforceable as against the Defendant since the Power of Attorney did not permit the donees thereof to acknowledge any debt on behalf of the Defendant.
40. I have considered the pleadings and the evidence on record. I have also considered the written Submissions, the authorities cited. The issues for determination are:-
- (i) Who between the Plaintiff and the Defendant is in breach of the contract?
 - (ii) Is the Plaintiff entitled to the reliefs sought?
 - (iii) Who should bear costs of this suit?
41. The Plaintiff and the Defendant entered into the sale agreement dated May 27, 2014 for sale of Land Reference No MN/III/463 (CR 13065) at a consideration of Kshs 461,700,000/=. The completion date for that transaction was ninety (90) days from the date thereof. The cause of action is that the Defendant is in breach of the sale agreement dated May 27, 2014, its Deeds of Variation thereof of even date, the Deed of Variation dated September 11, 2014, the Deed of Variation dated March 2015 and the memorandum of understanding dated November 11, 2016. The Defendant denied as much.



42. The Plaintiff led evidence that while the sale transaction herein was on going, a caveat was entered on the suit land by Delta Connections Limited on June 19, 2014 as evidenced by the certificate of postal search over the suit land as of August 14, 2014. In their letter dated September 5, 2014, Advocates for the vendor acknowledged that the purchaser had fallen behind in payments of the balance of the purchase price by the completion date and stated that they understood the purchaser's hesitation was caused by the registration of the caveat. They informed the purchaser through its Advocates that the said caveat had been lifted.
43. The Plaintiff argued that owing to the fact that the completion date had passed, the parties entered into the variation agreement dated September 11, 2014 extending the execution date to 150 days from the date of completion of the principal agreement. The said agreement was drawn by the vendor's Advocates. Its existence is also acknowledged by the vendor's Advocates in their letter dated November 10, 2014 addressed to the purchaser's Advocates. It is not signed by the purchaser but PW1 acknowledged it in evidence. Although DW1 disputed having signed it, the fact that it is drawn by his Advocates and they have acknowledged it in their correspondences tells that it was validly entered into between the parties. In *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* [2017] eKLR, the court stated, "... generally as well, attestation is necessary in some but not all agreements. It is not a pre-condition, in my view, to the existence of contractual obligations or relations. It operates as an assertion that one signed an agreement and is not necessary (unless the statute dictates otherwise) where the execution or signing is not denied."
44. The Plaintiff also contended that by a second Deed of Variation signed in March 2015 completion date was extended from November 7, 2014 to May 2, 2015. The second Deed of Variation agreement signed in March 2015 is not dated. It does not indicate the drawer either and none of the parties make reference to it in their correspondences. However, there is a Deed of Variation dated September 11, 2014. Where clause 1 provides that:-

“ Clause 4:1 of the Principal Agreement is hereby varied to provide the completion date shall be one hundred and fifty (150) days from the date of execution of the Principal Agreement. That is the original ninety (90) days plus an additional sixty (60) days”

The Defendant admitted that his signature is witnessed by Duncan Okach Advocate. He is the one who witnessed his signature in the Principal Agreement.

45. Having found that parties did vary terms of the completion date a second time, the completion date of the sale agreement dated May 27, 2014 was on or before May 2, 2015. By that date, both parties had not complied with the terms of the said contract. The purchaser had not paid the balance as stipulated. *Vide* the letter dated November 10, 2014, the vendor's Advocates notified the purchaser's Advocates that the sale agreement stood terminated on the basis that the Plaintiff was in breach.
46. In paragraph 11 of the Plaintiff the Plaintiff has given the particulars of breach of contract by the Defendant as follows:-
- (a) Material non-disclosure of facts relevant for the transaction.
 - (b) Entering into Third Party sale without regard to the earlier obligations the Defendant had.



- (c) Misrepresentation of the Contract of Sale by warranting that no Third Party claims existed in respect of the property.
- (d) Obtaining monies from the Plaintiff with full knowledge of their inability to complete.

47. The sale agreement dated May 27, 2014 between the Plaintiff and the Defendant is in respect of Land Parcel No CR 13065 Plot No MN/III/463 measuring approximately 51.3 acres for Kshs 461,000,000/-. The same is drawn by M/S Kithure Kindiki Advocates. The Defendant's signature is witnessed by Duncan Okatch Advocates while the Plaintiff's director's signatures are witnessed by Stephen Mwanza Gachie Advocate. There is also a Deed of Variation dated May 27, 2014. Similarly, the Defendant's signature is witnessed by Duncan Okatch Advocate.
48. The Power of Attorney from the Defendant to Ramadhan Juma Ali and Juma Mohammed Motha who are his sons, is dated July 2, 2014. Under clause 3 and 7 the Defendant donated power to them to deal with this transaction and complete it.

Clause 6 provides that:-

“ To finalise the sale transaction of my property known as CR 13065 Plot No MN/III/463 situated in Mtwapa”

49. When he was cross examined by Plaintiff's counsel he admitted that he gave the Donees power to deal with the transaction. He also denied the subsequent agreements but all signatures were witnessed by Duncan Okatch Advocate who was acting for the Defendant in the transaction. He also admitted that he had not revoked the Power of Attorney to his said sons by November 11, 2016. He also admitted that the signatures on the acknowledgement receipts were those of his two sons.
50. PW1 produced a search dated August 14, 2004. The same shows there was a caveat registered in favour of Delta Communications Limited. There is a letter dated February 24, 2015 to the Defendant's advocates by the Director of Surveys assuring the vendor's advocates that the deeds arising out of the fraudulent subdivisions had been cancelled. This confirms the Plaintiffs assertions that Delta Communications Limited had undertaken subdivisions and had the Deed Plans. This confirms that there was a third party by the name Delta Communications Limited which were claiming purchaser's interest on the suit property. This fact was not disclosed to the Plaintiff at the time of the transaction.
51. The Plaintiff has outlined the steps it took to ensure that the transaction was completed despite the Defendant's failure to disclose the issue of a third party but all its efforts were frustrated. I find that the Defendant was in breach of terms of the contract. He and his Donees continued to receive monies from the Plaintiff despite the issue of the Third Party. In the case of *Wallace Kamau Mbugua v Aziza Fatuma Athumani & 5 Others* [2020] e KLR the court while citing the decision in *Kenya Breweries Ltd vs Natex Distributors Ltd* Nbi HCCC No 704 of 2000 held as follows:-

“ Having found that the parties herein are bound by the sale agreement that they entered, then the 1st Defendant could not introduce other conditions that were not expressly or impliedly provided for in the said sale agreement. See the case of *Kenya Breweries Ltd v Natex Distributors Ltd*, Nairobi HCCC no 704 of 2000, where the court held that:-

‘Parties to a written contract are bound by its terms and the invocation of nonexistent clause to terminate a contract is not legitimate even though there is a termination clause. However,



much a party resents the behavior of another party to the contract, it cannot terminate it without following the laid down procedure”.

52. It is also the evidence of the Plaintiff that the caveat it placed to secure its interest on July 3, 2017 was removed without its knowledge and notice and the property sold to a Third Party. From the foregoing, I find that the Defendant was in breach of the contract and the Plaintiff is entitled to damages which I assess at Kshs 500,000/-.
53. The Memorandum of Understanding entered into between the Plaintiff and the signatures of Donees of the Power of Attorney are witnessed by Stephen Mwanza Gachie. The said Donees did not have an advocate of their own.
54. In my view, the Power of Attorney dated July 2, 2014 was very specific on what the donees were to do in the transaction relating to sale of the suit land. They were only to complete the transaction. They had no capacity to enter the memorandum of understanding dated November 11, 2016 thus it is not enforceable.
55. I find that the Plaintiff cannot rely on this Memorandum of Understanding dated November 11, 2016 as the Defendant was categorical that he did not give authority to the said Donees to acknowledge debt on his behalf. It is not in dispute that by the time the caveat by M/S Delta Communications Limited was removed, the land had been subdivided and deed plans issued. This claim by a Third Party was not communicated to the Plaintiff at the time of entering into the sale agreement. The Defendant is clearly in breach of the said contract.
56. The Plaintiff is also entitled to a refund of the monies paid to M/S Kithure Kindiki the Defendant’s advocates by a voucher prepared on April 15, 2015 shows that the Plaintiff had paid a total of Kshs 101,170,000/-. The Plaintiff is entitled to a refund of Kshs 101,170,000/- paid to the said advocates inclusive the amount paid to offset the loan at Barclays Bank (K) Ltd. The Donees also acknowledged receipt of Kshs 2.5 million.
57. In conclusion, I find that the Plaintiff has proved his case on a balance of probabilities as against the Defendant.
58. Accordingly, judgment is entered in favour of the Plaintiff as against the Defendant as follows:_
 - (a) Damages for breach of contract; Kshs 500,000/-.
 - (b) Refund of the deposit of Kshs 103, 670,000/= together with interest.
 - (c) A declaration that the deposit of Kshs 46, 170,000/= paid by the Plaintiff to Barclays bank of Kenya is recoverable from the Defendant and an order of payment of the same together with interest since May 2014.
 - (d) In the alternative to prayer (b) and (c) above, a declaration and an order that the Defendant is liable to curve out for transfer to the Plaintiff a portion of the said property known as LR No463/III/MN(C.R. 13065) valued in the sum of Kshs 103,670,000/= as at November 2016 when the deposit became acknowledged for recovery.
 - (e) Costs of this suit plus interest.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 14TH DAY OF JULY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Gachie Mwanza advocate for the Plaintiff

Mr. Wangila advocate for the Defendant

Steve - Court Assistant

