



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 514 of 2003

STEPHEN KANYAGIA MWANGI

PATRICK GATHONDU GICHUKIPLAINTIFFS

VERSUS

MACKENZIE MUTISO SILA

ANICENT GABRIEL KIMATUDEFENDANTS

J U D G M E N T

1. The dispute herein revolves around the property known as Nairobi/Block 32/813 (the suit premises) which was, up to the end of the year, 2002, registered in the name of **Anicent Gabriel Kimatu**, the 2nd Defendant herein. The property was charged to Housing Finance Company of Kenya Ltd. (HFCK).
2. By their amended plaint dated 28/10/2004 and filed in court on the 5/11/2004, the two Plaintiffs allege that by an agreement in writing dated 18/10/2002 between the 1st Plaintiff and Anicent Gabriel Kimatu (the Vendor), the 1st Plaintiff agreed to purchase and the Vendor agreed to sell to the Plaintiff or to the 1st Plaintiffs' nominee, the suit premises at the consideration of Kshs.2.3 million which consideration the 1st Plaintiff paid to the Vendor as follows:-
 - (i) *A deposit of Kshs.750,000/= upon the execution of the Agreement, which deposit was to be utilized by the Vendor to discharge a mortgage by HFCK over the suit premises; and*
 - (ii) *The balance of Kshs.1,550,000/= upon the execution of the transfer in favour of the 1st Plaintiff and/or his nominee.*
3. The 1st Plaintiff avers that he nominated Patrick Gathondu Gichuki, the 2nd Plaintiff herein as his (1st Plaintiff's) nominee and that subsequently on the 25/03/2003, the suit premises were lawfully transferred to the said 2nd Plaintiff and a Certificate of Lease duly issued on the same day. The 2nd Plaintiff avers that the 1st Defendant has since refused, failed and/or neglected to give vacant possession to the 2nd Plaintiff. The Plaintiffs contend that as at the time of purchasing the suit premises, the Vendor did not disclose to the Plaintiffs that the 1st Defendant was in occupation of the suit premises. Accordingly, the Plaintiffs pray for judgment against the Defendants in the following terms:-

(A) Against the 1st Defendant

- (i) *A declaration that the 2nd Plaintiff is entitled to vacant possession of the suit premises, and an order that the 1st Defendant do deliver up and/or surrender the suit premises to the 2nd Plaintiff.*
- (ii) *That the 1st Defendant do pay to the 2nd Plaintiff mesne profits at such rate as may be determined by the court, from 15th March 2003, until the 1st Defendant complies with the order being sought in (i) hereinabove.*

(B) Against the 2nd Defendant in the alternative to (A) hereinabove

- (i) *Refund of the purchase price herein, with interest thereon at court rates, or at such rates as the court may deem to be expedient.*
- (ii) *Refund of all expenses incurred by the Plaintiffs in the transaction by way of stamp-duties and legal expenses.*

(C) Against both Defendant

- (i) *Costs of this suit*
- (ii) *Any other relief or remedy that this Honourable Court may deem to be just in the circumstances of the case.*

The 1st Defendant's Defence:

4. The 1st Defendant filed his defence on 9/07/2003. While admitting that the suit premises were registered in the names of the 2nd Defendant Anicent Gabriel Kimatu the 1st Defendant averred that the said title had never been transferred to any other party as alleged by the Plaintiffs or at all. The 1st Defendant also averred that no transfer of title of the suit premises could have been effected when there was a caveat on the property, which caveat was registered on 7/11/2002. The 1st Defendant also contends that this suit is res judicata as the ownership dispute concerning the suit premises was adjudicated upon on the 3/12/1999 in HCCC 1595 of 1992. The 1st Defendant did not admit the jurisdiction of this Honourable Court on grounds that this suit is res judicata. The 1st Defendant asked the court to dismiss the Plaintiffs' suit against himself with costs.
5. By an amended Notice of Motion application dated 4/07/2005, the Plaintiffs sought to have the 1st Defendant's defence struck out on grounds that it was (a) scandalous, frivolous or vexatious; (b) calculated to prejudice or delay the fair trial of the suit or (c) otherwise an abuse of the process of the court.
6. That application was heard by Osiemo J and by his ruling dated 2/10/2006, the learned Judge found that the 1st Defendant's defence raised triable issues that needed to go to full trial. The learned Judge dismissed the Plaintiffs' application for summary judgment and granted the 1st Defendant unconditional leave to defend.

The 2nd Defendant's Defence

7. The 2nd Defendant filed his defence dated 18/11/2004 on the 19/11/2004. The 2nd Defendant admits entering into an agreement for the sale of the suit premises with the 1st Plaintiff as stated in paragraph 4 of the plaint and says that he executed a transfer in favour of the 1st Plaintiff's nominee as provided under the agreement for sale, and

that thereafter, the suit premises were lawfully transferred to the 2nd Plaintiff.

8. The 2nd Defendant states further that when 1st Defendant failed to honour his mortgage obligations to the HFCK, the 2nd Defendant took steps and offered the suit premises for sale to the Plaintiffs in order to avert the threatened sale of the suit premises by public auction. Further and without prejudice to the foregoing, the 2nd Defendant avers that the 1st Defendant has failed to honour the decree in HCCC No. 1595 of 1992, thereby frustrating the agreement between the 2nd Defendant and the 1st Defendant. The 2nd Defendant prays that the Plaintiff's suit against him be dismissed with costs.

Other Suits

9. Before I move to highlight the evidence given by the parties in this case, it is important to note that there have been other suits touching on the suit premises. In Nairobi HCCC No. 1595 of 1992 – **Anicent Gabriel Kimatu –vs- Mackenzie Mutiso Sila** – the Plaintiff sued the Defendant for:-

- (a) *Special damages calculated by court as pleaded in paragraph 11 or 13 of the plaint*
- (b) *General damages*
- (c) *Interest on (a) and (b) above at court rates or such other rates as the court shall deem fit*
- (d) *Costs of the suit*

10. Aganyanya J (as he then was) who heard the suit dismissed the Plaintiff's suit but ordered as follows:-

- (i) **THAT** the Defendant do refund to the Plaintiff the sum of Kshs.1,565,550/80 as more particularly set forth hereunder:-

(a) Debt of	Kshs.	486,586.00
(b) Balance of the amount the Defendant agreed to pay	Kshs.	128,000.00
(c) Interest on (a) and (b) at 12% p.a from 5/11/91 to 3/12/99	Kshs.	<u>950,915.00</u>
		<u>Kshs.1,565,550.00</u>

The learned Judge ordered each party to bear its own costs.

The Plaintiff's Evidence

11. The 1st Plaintiff Stephen Kanyagia Mwangi testified as PW1 and told the court that in or about September, 2002, he came upon an advertisement for the sale of the suit premises and after making necessary enquiries from Valley Auctioneers who had put the advertisement in the paper, he was informed that the suit premises were up for sale by HFCK. He further testified that he later on met with the 2nd Defendant herein. The 2nd Defendant apparently told PW1 that HFCK was selling the suit premises over an outstanding mortgage sum of Kshs.750,000/=. The two quickly agreed on the purchase price of Kshs.2,300,000.00 (Two Million Three Hundred Thousand Only) out of which Kshs.750,000/= was to be paid by the 1st Plaintiff directly to HFCK to clear the loan balance. The 1st Plaintiff says that when they went to view the suit premises they could only do so from the outside the compound since the occupant of the house, whom the 2nd Defendant said was a tenant, was

not at home.

12. Eventually, the agreement between the 1st Plaintiff and the 2nd Defendant was reduced into writing on the 18/10/2002 – see PExhibit 1. The 1st Plaintiff paid the sum of Kshs.750,000/= and evidence of receipt of such payment by HFCK was produced in evidence as PExhibit 2. The suit premises were eventually discharged by HFCK as per the Discharge of Charge dated 17/03/2003 by HFCK and produced in evidence as PExhibit 3.
13. PW1 stated further that the suit premises were eventually transferred into the name of the 2nd Plaintiff as nominee of the 1st Plaintiff and a certificate of lease was subsequently issued on 25/03/2003 as per PExhibit 6. PW1 stated that though he later paid the balance of the purchase price to his (1st Plaintiff) advocate on behalf of the 2nd Defendant, he (1st Plaintiff) was unable to obtain vacant possession of the suit premises from the 1st Defendant.
14. PW1 admitted that he was not the registered owner of the suit premises. PW1 also conceded that throughout the transaction with the 2nd Defendant, he never spoke to the 1st Defendant; that he never paid any money to the 1st Defendant and that he never conducted any search on the suit premises before he committed himself to the purchase. PW1 also stated that he has since asked the 2nd Defendant to refund the amount of the purchase price that was paid to the said 2nd Defendant. Finally, PW1 admitted that he later learnt of the existence of Nairobi HCCC No. 1595 of 1992 between the 1st Defendant and the 2nd Defendant and the court's judgment dated 3/12/1999 which judgment PW1 admitted does not order the 2nd Defendant to transfer the suit premises to the 1st Defendant.
15. On re-examination by counsel for the Plaintiffs, PW1 stated that he was interested in the refund of the monies paid towards the purchase of the suit premises.
16. PW2 was the 2nd Plaintiff, Patrick Gathonu Gichuki. His evidence corroborated the testimony given by PW1 and confirmed that the suit premises is registered in his name. PW2 stated that according to the Sale Agreement between PW1 and the 2nd Defendant, it was the 2nd Defendant who was required to give vacant possession of the suit premises to PW1. Special Condition No. 4 of the Sale Agreement dated 18/10/2002 reads:-

“(4). The Purchaser having had an opportunity of inspecting the property, has notice of the identity of the property and of its actual state and condition and takes it as it is. It is however agreed by the parties that the Vendor will, prior to receiving the balances of the purchase-price in terms of clause 3 hereinabove, give vacant possession to the Purchaser, and for that purpose, the Vendor will at his expense take all steps, including filing a suit for eviction, in order to obtain vacant possession of the property.”

17. The Plaintiffs therefore say that as purchasers for value, and without notice, they are entitled to an order of this Honourable Court requiring the 1st Defendant to vacate the suit premises and pay damages for the unlawful possession thereof since the registration of the transfer in favour of the 2nd Plaintiff.

The 1st Defendant's Evidence

18. The 1st Defendant Mackenzie Mutiso Sila testified as DW1. He stated that he lives in the suit premises known as Plot No. 32/813 situate at Ngumo Estate. He said he bought the suit premises from the 2nd Defendant in or about 1987 for Kshs.650,000/= which amount included Kshs.139,000/= paid directly to HFCK to cover arrears on

mortgage. DW1 stated that by the time he bought the suit premises from the 2nd Defendant, the 2nd Defendant had already been evicted by HFCK and that as soon as he paid Kshs.139,000/= to HFCK, he was given vacant possession of the suit premises. DW1 stated further that though he had agreed with the 2nd Defendant that he (DW1) would continue to service the loan with HFCK, the 2nd Defendant refused to take the balance of the purchase price and instead filed HCCC No. 1595 of 1992 seeking both special and general damages and interest plus costs. I have already referred to the judgment of Aganyanya, J (as he then was) in the said HCCC No. 1595 of 1992. DW1 produced judgment in the said case as DExhibit 1.

19. DW1 stated further that after the judgment in HCCC No. 1595 of 1992, he offered to pay the 2nd Defendant the balance of the purchase price, but that the offer was turned down by the 2nd Defendant. That thereafter DW1 placed a caution on the suit premises on a date he could not remember. DW1 denied any knowledge of the Plaintiffs herein before commencement of this suit. The Plaintiff also admitted that they had neither met nor spoken to DW1 before commencement of this suit.
20. On cross examination DW1 stated that the suit premises have never been transferred into his name. He also stated that when he went to HFCK, to confirm the balance on the loan, he found out that the same had been paid off by some unknown people and that on the 25/03/2003, the title to the suit premises was issued in favour of the 2nd Plaintiff, adding that there was a grave mistake in issuing the title to the 2nd Plaintiff. Admittedly, the Registrar of Lands is not a party in these proceedings. DW1 finally stated that the 2nd Defendant never informed him of the transfer of the suit premises to the 2nd Plaintiff.
21. The 2nd Defendant also testified as DW2. DW2 admitted entering into an agreement in or about 1987 to sell the suit premises to the 1st Defendant but stated that the sale did not proceed to completion for reasons that DW1 did not pay the full purchase price to him (DW2) comprising of Kshs.229,800/= to DW2 and Kshs.421,000/= direct to HFCK, hence the filing of HCCC No. 1595 of 1992 in which DW1 was ordered to pay the outstanding balances to DW2 within 10 days of the date of judgment on 3/12/1999.
22. DW2 went on to state that when DW1 failed to pay off the balance of the purchase price and the arrears to HFCK, HFCK went ahead and advertised the suit premises for sale by public auction, and because he had no money, he entered into private arrangement with the 1st Plaintiff herein who agreed to buy the suit premises at Kshs.2,300,000.00 in addition to paying Kshs.669,000/= to HFCK in arrears. DW2 stated the deal went through though DW1 was still in occupation of the suit premises and that he (DW2) had agreed to remove DW1 from the suit premises before 1st Plaintiff could pay the balance of the purchase price pursuant to special condition No. 4 of the Agreement for Sale between DW2 and the 1st Plaintiff. It is DW2's case that he had to sell the suit premises to the 1st Plaintiff because DW1 had defaulted on loan repayments to HFCK. DW2 wants an eviction order issued against DW1 and also prays that the 1st Plaintiff pays up the balance of the purchase price under the unwritten agreement.
23. On cross examination DW2 stated that the agreement between himself and DW1 was not reduced into writing. He stated that out of the total indebtedness to HFCK amounting to Kshs.421,000/=. DW1 paid only Kshs.139,000/=. and a mere 90,000/= out of Kshs.229,000/= which DW1 was supposed to pay to DW2 under the Agreement for Sale. DW2 also confirmed that he never appealed against the judgment in HCCC No. 1595 of 1992 which rules that DW2 was only entitled to payment of the balance of the purchase price from DW1 though

there was no order requiring DW2 to transfer the suit premises to DW1. DW2 also stated that the 1st Plaintiff has never paid any amount to him (DW2) apart from the amount that was paid directly to HFCK. DW2 denied an allegation by DW1 that he (DW2) refused to take moneys from DW1 towards the purchase price. DW2 however agreed that he was under an obligation to remove DW1 from the suit premises before taking the balance of the purchase price from the 1st Plaintiff. DW2 also stated that for all these years, he has never demanded any rent from DW1. DW2 however confirmed that the balance of the purchase price from 1st Plaintiff is in the hands of the Plaintiffs' lawyers, M/s P.M. Kimani, advocates, and that the said amount can only be released to him (DW2) once DW1 is evicted from the suit premises.

Issues For Determination

24. The parties herein agreed on the issues dated 17/10/2007 but filed in court on 14/01/2004. The Plaintiffs and 2nd Defendant signed the issues but counsel for the 1st Defendant, M/s Mutua Mboya & Nzissi did not do so. The court has not seen separate issues filed by the 1st Defendant. For this judgment therefore, the court will take the issues as agreed by all parties as follows:-

- (1) *Whether there is a valid and binding Agreement for Sale of the suit premises (Plot L.R. No. NAIROBI/BLOCK 32/813) between the 2nd Defendant as Vendor and the Plaintiffs as purchasers?*
- (2) *Whether the Plaintiffs were lawful and innocent purchasers for valuable consideration without notice of the 1st Defendants alleged interest?*
- (3) *Whether the suit premises has lawfully been transferred to the 2nd Plaintiff?*
- (4) *Whether consideration has changed hands?*
- (5) *Whether the 2nd Plaintiff is entitled to vacant possession of the suit premises?*
- (6) *Whether the issue of ownership of the suit premises has already been determined in HCCC No. 1595 of 1992?*
- (8) *Are the Plaintiffs entitled to Judgment against the 1st Defendant and/or the 2nd Defendant as pleaded in their Amended Plaintiff?*
- (9) *Which party should bear the costs of this suit?*

The Plaintiffs' Submissions

25. These were filed in court on 21/10/2010. Counsel for the Plaintiffs submitted that the 1st Defendant's defence as filed does not allege any fraud on the part of the Plaintiffs, nor does it allege that the Plaintiffs were privy to HCCC No. 1595 of 1992. The Plaintiffs' counsel faulted the defence of the 1st Defendant after the Plaintiffs amended their defence; and submitted that it was absolutely necessary for the 1st Defendant to amend his defence and to seek to bring the Chief Land Registrar on board because of 1st Defendant's allegation that the caution he had placed on the suit premises was improperly removed by the lands registry staff.
26. As regards the 2nd Defendant's defence, counsel for the Plaintiffs submitted that the 2nd Defendant does not expressly admit as stated in the plaint that the suit premises had already been transferred to the 2nd Plaintiff and that in light of the 2nd Defendant's defence, the 1st Defendant ought to have been aware that

- *his (1st Defendant's) contention in his defence that no transfer had taken place was not sustainable; and*
- *his further contention that his alleged caution was a bar to any registration was also misplaced because the transfer had already taken place; and*
- *if it was his contention that the transfer to the 2nd Plaintiff was illegal and/or fraudulent, then there was need to amend his defence in order to plead the illegality.*

27. Counsel for the Plaintiffs further submitted that the 1st Defendant admitted to the following facts upon cross-examination, namely that

- (i) *the caution that was placed on the suit premises does not appear as an encumbrance against the title issued to the 2nd Plaintiff on the 25/03/2003;*
- (ii) *since the issuance of the title he had not gone back to the lands office to find out the status of the caution earlier registered by him;*
- (iii) *he has not bothered to sue the Registrar of lands, inspite of what he called a "grave mistake" and that it was upon the court to find out who made the mistake;*
- (iv) *after obtaining the judgment in HCCC No. 1595 of 1992 he did not consider it necessary:-*
 - *To register it [judgment] against the title*
 - *To make known to the public at large that dealings on the suit premises are, as he alleged, barred by the said judgment*

28. It is not in dispute in this case that the balance of the purchase price, from the Plaintiffs together with the sum of Kshs.90,000/= or thereabouts left from the deposit of Kshs.750,000/= is held by the Plaintiff's advocates pending giving of vacant possession of the suit premises to the Plaintiffs.

29. With regard to the law, counsel for the Plaintiffs' submitted that the 2nd Defendant's title to the suit premises is indefeasible in the absence of:-

- (i) *proof that the transfer to him is tainted by fraud or illegality to which they [Plaintiffs] are parties; and*
- (ii) *proof that the judgment in HCCC No. 1595 of 1992 can be construed to be a legal bar to the disposal of the suit premises by the 2nd Defendant; and*
- (iii) *proof that if (i) hereinabove is indeed the case, proof that the Plaintiffs are not legal purchasers for value and without notice of the said legal bar.*

30. As regards fraud and illegality, and the question of notice, counsel for the Plaintiffs submitted that the 2nd Defendant did not even bother to plead the same in his (2nd Defendant's) defence.

31. To buttress the argument that the Plaintiffs' title to the suit premises is indefeasible counsel for the Plaintiffs relied on Section 28 of the Registered Land Act (Cap 300) and argued that the 2nd Plaintiff's title is not liable to be defeated save as is provided in the Act. Counsel further submitted that by virtue of S. 27 of the RLA, the 2nd Plaintiffs registration as proprietor of the suit premises is sufficient proof that the 2nd Plaintiff is vested with the absolute ownership of the suit premises together with all rights and privileges belonging to or appurtenant thereto. Sections 27 and 28 of the RLA read:-

"27. Subject to this Act –

- (a) *the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;*
- (b) *the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.*

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- (a) *to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*
- (b) *unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register;*

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

32. Counsel for the Plaintiffs also argued that under section 3 of the RLA, the definition of the term “proprietor” squarely covers the 2nd Plaintiff herein namely, “*in relation to land or a lease*”, as “*the person named in the register as the proprietor thereof –*”⁴. Referring further to section 128(1) of the RLA, counsel for the Plaintiffs contended and quite rightly I think that the various provisions of the RLA dealing with the effect of registration under the RLA show that:-

- (i) *once a transfer is registered for valuable consideration the title of the proprietor becomes indefeasible, except as provided by the Act.*
- (ii) *The proprietor then acquires absolute ownership with all rights and privileges*
- (iii) *If any party wishes to restrict dealings on any property registered under the RLA, they can seek and obtain a court order to that effect.*
- (iv) *No court orders having been obtained by any party prior to the transfer of the suit premises to the 2nd Plaintiff, there was no bar to the said transfer.*
- (v) *In any event no restriction orders are being sought by the 1st Defendant against the 2nd Plaintiff's title.*

33. Counsel for the Plaintiff also submitted that under the provisions of section 133 of the RLA, which section reads:-

“133.(1) If a title deed or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and if the title or the certificate shows all subsisting entries in the register, a note of the registration shall be made on the title deed or certificate.

(2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in that case a new certificate may be issued to the new proprietor.

(3) If the disposition is a charge, the certificate shall be delivered to the charge.”

The 1st Defendant has not availed or produced any title deed or certificate of lease for the suit property which is now registered in the name of the 2nd Plaintiff.

Counsel for the Plaintiff submitted that the 1st Defendant has completely failed to provide any credible evidence

to demonstrate to this Honourable Court that –

- (a) *he was not given due notice of the intended removal of the caveat;*
- (b) *he was not otherwise involved in the process of the removal of the caveat as provided by the RLA and*
- (c) *he has taken any action since March 2003 to re-establish his interests in the suit premises*

34. Regarding the 1st Defendant’s prayer for rectification of the register, counsel for the Plaintiffs submitted that in the absence of express averments on fraud or mistake by the 1st Defendant against the 2nd Plaintiff, the 1st Defendant cannot be heard to urge this Honourable Court to “*order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake*”. It is the Plaintiffs’ case, and I agree with counsel for the Plaintiff on this point of law, that Order VI Rule 8 of the Civil Procedure Rules requires a party alleging fraud or mistake, not only to specifically plead the same, but also give particulars of such fraud or mistake. Counsel for the Plaintiffs has thus faulted the 1st Defendant whom he says neither pleaded nor particularized such fraud or mistake in his pleadings.
35. One final point on which counsel for the Plaintiffs submitted at length is the one on res judicata. The 1st Defendant has alleged in his defence that the Plaintiff’s instant suit is res judicata on account of the existence of the judgment in HCCC No. 1595 of 1992. For clarity on this issue, Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya states:-

*“7. No court shall try any suit or issue in which the matter directly and subsequently in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and **has been heard and finally decided by such court**”. [Emphasis is supplied].*

36. Counsel for the Plaintiffs submitted that the Plaintiffs herein were not parties to the previous litigation and further that the matters in issue in the two suits are not similar at all. The question that the court asks on this particular point is whether the issues raised in HCCC No. 1595 of 1992 were heard and finally decided by the court; and whether any of the parties to this suit are litigating under any of the parties in HCCC 1595 of 1992.
37. Explanations 3, 4 and 5 under section 7 of the Civil Procedure Act shed some light on what this whole section means. I set these specific explanations out for that purpose:-

Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

The 1st Defendants Submissions

38. The first point of contention raised by the 1st Defendant against the Plaintiff’s claim is that the purchasers are not bona fide purchasers for value without notice. The 1st Defendant contended that all along, the Plaintiffs were fully aware of the existence of a court case which case the 1st Defendant said must have induced the 1st Plaintiff

to have the suit premises registered in the name of the 2nd Plaintiff. The 1st Defendant therefore argued that in view of those circumstances, the 2nd Defendant did not have a good title to pass to the Plaintiffs. The 1st Defendant cited 3 (three) reasons why he thought the alleged transaction between the 2nd Defendant and the Plaintiffs is unsustainable namely that –

- (i) *The judgment in HCCC No. 1595 of 1992 is clear that the property belongs to the 1st Defendant who purchased it from the 2nd Defendant in 1987 and took possession of the property and for all intents and purposes the 2nd Defendant had no real proprietary interest in the property capable of being sold to the Plaintiffs herein.*
- (ii) *Even if the court were to ignore the judgment in HCCC No. 1595 of 1992, the 2nd Defendant himself in his sworn evidence on cross-examination and re-examination confirmed to the court that he had sold the suit property to the 1st Defendant in 1987 and handed to him vacant possession. The 2nd Defendant needed to repossess the property before he could sell it. The Plaintiff has not been able to show this court any successful repossession of the property and therefore the 2nd Defendant could not sell what he did not have.*
- (iii) *The alleged sale to the Plaintiffs herein was based on calculated misrepresentation and non-disclosure of material facts. That makes the sale null and void.*

39. The 1st Defendant also contended that if the Plaintiffs were bona fide purchasers for value, they would not have had to view the suit premises from a distance; they would have inspected the suit premises from within and confirmed whether the occupant thereof was a tenant as alleged by the 2nd Defendant or not; they would have been eager to confirm the status of the court case that they had been informed about by the 2nd Defendant and would also have carried out a search at the lands registry from where they would have established that the suit premises had a caution on it.
40. It is worth observing at this point that the court in HCCC No. 1595 of 1992 found that the 1st Defendant herein had paid a total of Kshs.479,000/= plus Kshs.139,000/= to HFCK in respect of loan repayments for the suit premises. The court also found that the sum of Kshs.486,586/50 paid by the 2nd Defendant to HFCK towards the same cause was money paid by an intruder since the 2nd Defendant had not consulted the 1st Defendant as to whether the 1st Defendant needed assistance towards the loan repayment to HFCK. Regarding the alleged breach of agreement by the 1st Defendant, the court stated that the 2nd Defendant was all the time ready to run away from the problem of loan repayments to HFCK and give over the house to the 1st Defendant at a token payment.
41. The second point raised by the 1st Defendant against the Plaintiffs' claim is that the 2nd Defendant has not placed evidence before this court to show that there was any threat of any auction when he decided to sell the suit premises to the Plaintiffs namely that the 2nd Defendant has not produced demand letters from HFCK or the statutory notice under ss 65 and 74 of the RLA or the 45 day notice under Rule 15(d) of the Auctioneers Rules. The 1st Defendant submitted that there was mischief in the newspaper advertisement.
42. In his evidence in chief, the 2nd Defendant testified that the only notice that he came across about the sale of the suit premises in the year 2002 was the newspaper advertisement. The 2nd Defendant also stated that he had to sell the suit premises to the Plaintiffs to save it from the auctioneers' hammer. The question that begs for an answer in this regard is whether the 2nd Defendant was under any obligation to protect the suit premises from

the auctioneer's hammer in the year 2002.

43. Counsel for the 1st Defendant also contended that it seems strange that the 2nd Defendant was ready and willing to transfer the suit premises to the Plaintiffs (a) without being paid any money towards the purchase price for the same and (b) at less than half the current market value of the suit premises.
44. The 1st Defendant also contended that the Plaintiffs have no platform on which to stand in making their claims against the 1st Defendant because it was expressly agreed between the Plaintiffs and the 2nd Defendant that the balance of the purchase price would only be paid to the 2nd Defendant once the 2nd Defendant gave vacant possession to the Plaintiffs after the 2nd Defendant obtained orders of eviction against the 1st Defendant herein. The 1st Defendant argued that the Plaintiffs are therefore not properly before this court.
45. On registration of the 2nd Plaintiffs' as the owner of the suit premises, counsel for the 1st Defendant submitted that the Plaintiffs' title is not indefeasible because it is not the first registration under Section 143(1) of the RLA and secondly that the 2nd Defendant had no good title to pass on to the Plaintiffs.
46. The 1st Defendant thus wants the Plaintiffs' suit dismissed on grounds that failure to dismiss the suit would be to assist the 2nd Defendant benefit twice from the same cause.

The 2nd Defendant's Submission.

47. In his brief submissions dated 29/10/2009 and filed in court on 30/10/2009, the 2nd Defendant admitted having entered into an agreement with the 1st Plaintiff for the sale of the suit premises, and says in his evidence that he did so to salvage the property which was under threat of being sold by the HFCK due to default on loan repayments. The 2nd Defendant also readily admits that he had earlier entered into an agreement for sale of the suit premises with the 1st Defendant way back in 1987, but that the 1st Defendant was in breach of the said Sale Agreement, hence the subsequent agreement with the 1st Plaintiff and the earlier filing of HCCC No. 1595 of 1992.
48. The 2nd Defendant submitted further that the judgment in HCCC 1595 of 1992 did not order the 2nd Defendant to transfer the suit property to the 1st Defendant, but ordered the 1st Defendant, as Defendant therein to pay to the 2nd Defendant the sum of Kshs.486,586/50 and a further Kshs.128,000/= plus interest at court rates. The 2nd Defendant said he understood the judgment in HCCC No. 1595 of 1992 to mean that he was bound to transfer the suit property to the 1st Defendant upon payment of the amount ordered by the court, which amount was to be paid within ten (10) days of the date of judgment. That failure by the 1st Defendant to meet the terms of the judgment in HCCC 1595 of 1992 meant that the 2nd Defendant could deal with the suit property as he deemed fit. In summary the 2nd Defendant contended that:-

- (a) *The 1st Defendant did not comply with the judgment in HCCC 1595 of 1992.*
- (b) *The said judgment did not confer title upon the 1st Defendant.*
- (c) *Title remained in the 2nd Defendant with a charge to HFCK.*
- (d) *HFCK advertised the property for sale to recover amount owing.*

- (e) *The 2nd Defendant in an attempt to save the property entered into an agreement of sale with the Plaintiffs who paid the amount owing.*
- (f) *The 1st Defendant owed the 2nd Defendant a substantial amount of money pursuant to HCC No. 1595 of 1992*
- (g) *Title has already passed to the Plaintiffs.*

49. Regarding the issue of res judicata, the 2nd Defendant submitted that this suit is not res judicata because the parties in this suit and in HCCC 1595 of 1992 are different. The 2nd Defendant urged the court to dismiss the Plaintiff's suit against himself and to find that the Plaintiffs' suit succeeds only against the 1st Defendant.

Findings and Conclusions

50. The court has now considered the pleadings, the evidence, the submissions and the law. I will now look at the eight (8) issues raised by the parties in light of the consideration above. In discussing these issues, I am satisfied that the success or failure of this suit depends on whether or not the issue of ownership of the suit premises has already been determined in HCCC 1595 of 1992, thus rendering this suit res judicata. That takes me straight to issue 6 of the agreed issues.
51. The question that the parties want this court to determine is whether the issue of ownership of the suit premises was determined in HCCC 1595 of 1992. I have already set out in earlier paragraphs of this judgment the reliefs sought by the 2nd Defendant against the 1st Defendant in HCCC 1595 of 1992. The 2nd Defendant sought special and general damages, costs and interest on the amounts awarded. My own considered reading of those prayers by the 2nd Defendant as vendor against the 1st Defendant as purchaser were made on the assumption that the 2nd Defendants' proprietary interest in the suit premises had passed to the 1st Defendant as purchaser. As the learned judge observed in the said suit the parties in that suit had agreed that the suit premises would remain in the name of the 2nd Defendant until the 1st Defendant completed repaying the loan. It is not denied that the 1st Defendant did not repay the loan but there is no evidence either by the 2nd Defendant herein or from the agreement between the two that time was of the essence in the agreement. That meant that the 1st Defendant could take whatever length of time he wished to pay the amounts due and owing to the 2nd Defendant. In the judgment of Aganyanya J (as he then was but is now a Judge of Appeal), the learned Judge ordered refund of a total of Kshs.486,586.00 plus 128,000/= together with interest thereon at 12% p.a from 5/11/1991 to 3/12/1999. It is clear from the said judgment that there was no doubt as at 3/12/1999 who owned the suit property. It is thus clear to me that the issue of ownership of the suit premises was determined in favour of the 1st Defendant herein.
52. In light of the above, I would conclude my findings on issue 6 by saying that this suit is res judicata, that is to say that this suit is for the reason that the issues in this case were directly and substantially in issue in HCCC 1595 of 1992. The issue in this case is one of ownership; it is one of moneys owed to HFCK. I agree with the learned judge in HCCC 1595 of 1992 that the only interest the 2nd Defendant had in the suit premises was the money due to him from the 1st Defendant, and that is why the 2nd Defendant moved with speed to put the 1st Defendant in possession of the suit premises even before the 1st Defendant paid him anything towards the purchase price. The 2nd Defendant repeated the same thing when he encountered the 1st Plaintiff in this case. The 2nd

Defendant wanted money, money for himself and money for HFCK. In any event, it is also clear that the Plaintiffs in this case are claiming under the 2nd Defendant who was the Plaintiff in HCCC 1595 of 1992 and in which the suit property was the same as in the present suit.

53. This takes me to the next question and that is whether there is a valid and binding agreement for sale of the suit premises (Plot LR No. NAIROBI/BLOCK 32/813) between the 2nd Defendant as Vendor and the Plaintiffs as purchasers. I have taken time to peruse the pleading in HCCC 1595 of 1992 and also the pleadings in this suit. From all this material I do not think that there is a valid and binding agreement for sale between the 2nd Defendant as Vendor and the Plaintiffs as purchaser. The 2nd Defendant knew as a fact that as at the time of the said agreement for sale, he had nothing to sell. He had no house to sell. He had long given possession of the suit premises to the 1st Defendant and had received partial payments from 1st Defendant. He had already been to court and obtained judgment against the 1st Defendant for refund of monies expended by the 2nd Defendant towards the loan repayment and other monies which the parties had agreed was to be paid to the 2nd Defendant by the 1st Defendant. The issue of ownership had thus already been determined and section 7 of the Civil Procedure Act would thus come into play.
54. The next question for determination is whether the Plaintiffs herein were lawful and innocent purchasers for value. The Plaintiffs have both testified that none of them was able to access the suit premises for viewing before they sealed the deal with the 2nd Defendant. The Plaintiffs were also fully aware that the suit premises had been the subject of a court case between the 1st Defendant and the 2nd Defendant and that is why it was agreed between the Plaintiffs and the 2nd Defendant that unless and until the 2nd Defendant repossessed the suit premises from the 1st Defendant, the 2nd Defendant had nothing to sell to the Plaintiffs. It therefore follows that the Plaintiffs herein are not bona fide purchasers for value without notice. The Plaintiffs were fully in the picture of the inhibition on the suit premises. It is surprising to the court that the Plaintiffs were in such a great hurry to pay moneys both to HFCK and the 2nd Defendant (though 2nd Defendants amount is still lying with the Plaintiff's advocates). There is no doubt in my mind therefore that the purported sale of the suit premises to the Plaintiffs was based on misrepresentation that the 2nd Defendant was capable of dislodging the 1st Defendant from the suit premises. Though the 1st Plaintiff stated on oath that he has been buying and selling immovable properties, he was unable to discern the guile of the 2nd Defendant in this case.
55. The other issue for determination by the court is whether the suit premises have lawfully been transferred to the 2nd Plaintiff. The 1st Plaintiff explained that he nominated the 2nd Plaintiff for registration of this suit premises first, because the two are cousins and secondly because the two do many other things (read business) together. The 1st Defendants' case is that the transfer to the 2nd Plaintiff could not have been lawful because there was a caveat on the suit premises. The 1st Defendant says that he does not know under what circumstances the caveat was removed. In light of all these contentions, the court finds that the transfer of the suit premises to the 2nd Plaintiff was not lawfully done, although there is no doubt that money has changed hands between the Plaintiffs and the 2nd Defendant. In any event, the completion of the sale between the Plaintiffs and the 2nd Defendant was subject to the 2nd Defendant dislodging the 1st Defendant from the suit premises. The 2nd Defendant failed to do so and therefore frustrated the contract of sale. No valid transfer could thus be made to the 2nd Plaintiff by the 2nd Defendant.

55. Regarding the issue as to whether the 2nd Plaintiff is entitled to vacant possession of the suit premises, my view of the matter is that the 2nd Plaintiff is not entitled to vacant possession from the 1st Defendant. I have already stated that the 2nd Defendant had nothing to sell to the 1st Plaintiff, and consequently, the 1st Plaintiff had nothing to pass on to the 2nd Plaintiff for registration. From as long ago as 1987, the 1st Defendant has been in possession of the suit premises. The 2nd Defendant has a judgment against the 1st Defendant and if the 2nd Defendant wanted, he should have proceeded to execute the same. Instead of executing for the amounts awarded, the 2nd Defendant sought another buyer for the same suit premises. In the premises, if the 2nd Defendant has a claim against the 1st Defendant such a claim is not for vacant possession. It is in refund of moneys as already ordered in HCCC 1595 of 1992.
56. In the premises, the Plaintiff's claim against the 1st Defendant which claim is based on possession of the suit premises fails on both limbs (i) and (ii). As against the 2nd Defendant, the Plaintiffs suit succeeds and accordingly I enter judgment for the Plaintiffs as against the said 2nd Defendant as follows:-
- (a) *The 2nd Defendant shall refund to the Plaintiffs the entire purchase price herein with interest thereon at court rates from the date of this judgment until payment in full.*
 - (b) *The 2nd Defendant shall refund all the expenses incurred by the Plaintiffs in the transaction by way of stamp-duties and legal expenses.*
 - (c) *Each party shall bear its own costs.*

Orders accordingly.

Dated and delivered at Nairobi this 19th day of April, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. P.M. Kimani for the Plaintiffs

Mr. Mutua Mboya (present).for the 1st Defendant

Mr. Ndumu Kimani (present) for the 2nd Defendant

Weche - court clerk