Ngolepus v Lonapa & another (Environment & Land Case 176 of 2017) [2022] KEELC 12687 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12687 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 176 OF 2017

FO NYAGAKA, J

SEPTEMBER 27, 2022

BETWEEN

JOSEPH PKERPKER NGOLEPUS ..... PLAINTIFF

AND

WILSON LONAPA ..... 1ST DEFENDANT

REUBEN LEMERENG ..... 2ND DEFENDANT

JUDGMENT

1. This judgment followed long and protracted proceedings which were as a result of a suit commenced by the institution of a Plaint on November 9, 2017. The issues, actions and evidence of the parties were intriguing. Some of the facts and issues became compounded overtime in the life of the suit. But what was deplorable was that the suit pitted two persons who once colloquially termed each other as "brothers", yet not so in the biological sense of the word, who, however, threw each other into a legal boxing ring as bitter rivals. The best case scenario advice would have been to put the two parties into a negotiated settlement but it was not to be. Such a move would have been so ideal that it would have contingently sustained their rocky relationship with the ultimate hope of extending an olive branch and turning it to the original state it was. Since that was not the case, however, this Court had to determine the dispute in a manner that would potentially soar their relationship to none, because in the adversarial system the winner takes it all unless a compromise is reached. The Court had no choice than to apply the facts to the law and make a determination of the matter.

2. Turning back to the suit, the said Plaint was verified by an Affidavit as by law required. The 1st Defendant subsequently filed his Memorandum of Appearance on November 22, 2017. He filed a Statement of Defence and Counterclaim on January 12, 2018January 12, 2018. Thereafter, the Plaintiff sought, and was granted leave, to amend his Plaint. The Amended Plaint on January 15, 2019 (sic) was filed on January 16, 2020. On July 30, 2020, leave was granted by the Plaintiff to further

amend his Amended Plaint. The further amendment had the effect of enjoining the 2nd Defendant in the proceedings herein. It was filed on August 24, 2020. It sought the following reliefs:

a. A declaration that the 1st Defendant is in breach of the Agreement dated 20/4/2017 and should pay the Plaintiff damages for breach of contract as agreed in the agreement.

b. An order rescinding/cancelling the contract agreement entered on 20/4/2017 between the Plaintiff and the 1st Defendant.

c. An order for eviction evicting the Defendants their assignees, agents, servants or anyone whosoever claiming through him from the land parcel known as Plot No. D/3 at Makutano Town;

d. An order that the Plaintiff do possess Plot No. D/3 at Makutano Town together with all developments;

e. A permanent injunction restraining the 1st Defendant whether by himself, his servants and/or agents from interfering with the Plaintiff's quiet possession of Plot No. D/3 Makutano Town.

f. An order cancelling any change of ownership of Plot No. D/3 Makutano from the Plaintiff to the 1st Defendant or at all.

g. Costs and interest;

h. Any other relief that the Honorable Court shall deem fit and just to grant.

3. Organically, the 1st Defendant amended his pleadings. However, I note that he only amended his Defence and Counterclaim in response to the first amendment granted upon the Plaintiff. Thus, to note, on February 5, 2020 he filed an amended Statement of Defence and Counterclaim in which he sought the following reliefs:

a. The Plaintiff's (now the Defendant) suit be dismissed with costs to the Defendant (now the Plaintiff).

b. The Defendant (now Plaintiff in the counterclaim) in the counterclaim prays for.

i. A declaration order that the Defendant (now Plaintiff in the counterclaim) is the legal owner of Plot D/3.

ii. An order of permanent injunction against the Plaintiff (now the Defendant) by himself, his servants, agents and/or any other person restraining, dealing, claiming and/or interfering in any way with the suit Plot D/3.

iii. Costs.

iv. Interest.

v. Any other relief this Honorable Court may deem fit and just to grant.

4. The 2nd Defendant entered appearance on October 22, 2020 and filed its Statement of Defence on November 4, 2020. He denied any form of liability save to add that he was willing to advance the sum of Kshs. 2,000.000.00 to the Plaintiff. He urged this Court to dismiss the Plaintiff's claim with costs. The Plaintiff filed a Reply to the 2nd Defendant's Defence on 12/11/2020. It must have been served, and pleadings closed.

5. After close of pleadings, parties proceeded for the viva voce taking of evidence. The hearing commenced on December 17, 2020.

The plaintiff's case

6. The Plaintiff testified that in 2003, he purchased Plot No. D/3 measuring 50 by 100 feet with developments thereon which included four (4) front shops and rental houses. The property was situate at Makutano town within West Pokot County. In support of this he produced as P. Exhibit 7 a letter from the Town Administrator. It was dated April 15, 2016.

7. He testified that he had known the 1st Defendant since childhood and met the 2nd Defendant five (5) years prior to the time of his testimony. The Plaintiff testified that in 2016, the maize business he used to run collapsed. He thus approached the 1st Defendant who, trading as a shylock, advanced several loan facilities to him with a view to rebirthing the business.

8. Under the terms of engagement, interest was capped at Kshs. 100/- but eventually rose to Kshs. 120/- after one month. It was further agreed that the Plaintiff would receive several sums in installments as advance payments as a result of which the 1st Defendant would ultimately become owner of the Plaintiff's property, namely, Plot No. 3/D. Under the terms, its documents were deposited as security. The Agreements were captured in his list of documents marked as P. Exhibit 1 - 6 & 8 as follows:

> Exhibit 4 revealed that the Plaintiff had received Kshs. 300,000.00 from the 1st Defendant. Further agreement indicated that the parties would conclude their terms of engagement of their agreement within two (2) months from April 7, 2016. P. Exhibit 6 indicated that the Plaintiff had received Kshs. 1,000,000.00 from the 1st Defendant being part payment of the plot. This was described as a sale agreement. P. Exhibit 9 revealed that the Plaintiff had entered into a sale agreement on June 17, 2016 with the 1st Defendant for the sale of his plot. It was agreed that the purchase price stood at Kshs. 11,000,000.00. The Plaintiff further confirmed to be in receipt of the sum of Kshs. 2,602,500.00 on July 18, 2016July 18, 2016. P. Exhibit 8 disclosed that the Plaintiff had received a total of Kshs. 3,250,000.00 from the 1st Defendant as at August 1, 2016. P. Exhibit 5 disclosed that the 1st Defendant had paid a total of Kshs. 4,700,000.00 to the Plaintiff as at 30/08/2016. Since the plot had been registered in both names, it was agreed that the 1st Defendant would continue to pay the Plaintiff in full in order to transfer ownership of the plot to his favor. P. Exhibit 1 revealed that as at September 18, 2016, the Plaintiff had received a total of Kshs. 5,500,000.00, having received Kshs. 800,000.00 on September 8, 2016. The balance of the agreed sum stood at Kshs. 5,500,000.00. P. Exhibit 2 disclosed that the Plaintiff had received Kshs. 6,270,000.00 from the 1st Defendant as at September 28, 2016. As at that time the balance stood at Kshs. 4,730,000.00. P. Exhibit 3 showed that the 1st Defendant had paid a sum of Kshs. 730,000.00. As a result, the Plaintiff confirmed that he was in receipt of a total of Kshs. 7,000,000.00 from the 1st Defendant as at October 25, 2016. Further agreement indicated that the balance of Kshs. 4,000,000.00 would be settled on November 24, 2016. The Plaintiff testified that ultimately, he received of a total sum of Kshs. 9,000,000.00 which sum was inclusive of interest payable.

9. Subsequently, on April 20, 2017, the Plaintiff and 1st Defendant entered into another Sale Agreement produced and marked as P. Exhibit 10. The gist of it was that the Plaintiff did relinquish his proprietary rights over Plot No. D/3 to the favor of the 1st Defendant as the purchaser with a view to settling the sums due and owing to the 1st Defendant. The consideration sum was agreed at Kshs. 11,000,000.00.

It was acknowledged that Kshs. 9,000,000.00 had been received by the Plaintiff; the balance of Kshs. 2,000,000.00 was agreed to be paid on or before June 24, 2017.

10. In addition, according to the terms of the second agreement, the 1st Defendant would take possession upon completion of the consideration amount. It was also agreed that the consents from the relevant authorities would be obtained within six (6) months from the date of completion of the consideration. Furthermore, any breach of the terms of agreement by any party would have attracted a penalty sum of 20% of the consideration amount in damages.

11. The Plaintiff testified that after execution of the agreement, the 1st Defendant remitted the sum of Kshs. 700,000.00 on April 27, 2017 leaving a balance of Kshs. 1,300,000.00. He produced as P. Exhibit 11 an Acknowledgement Note which was executed by both parties. In total, the Plaintiff was in receipt of the sum of Kshs. 9,700,000.00. It was further reiterated in the note that the balance of Kshs. 1,300,000.00 would be paid to the Plaintiff on or before June 24, 2017.

12. It would appear, from the evidence adduced that the payment of the balance was not made on the stated date. On August 4, 2017, the 1st Defendant's learned counsel wrote a letter, to all tenants in occupation that his client, the 1st Defendant and not the Plaintiff, was the landlord. PW1 produced the letter in evidence and it was marked as P. Exhibit 18. In terms of the letter, learned counsel's instructions were that, subsequent to the issuance of P. Exhibit 18, rent would be paid to the 1st Defendant with effect from August, 2017. In the letter, tenants were advised to renew their leases to the incoming landlord failure of which they stood terminated.

13. In this regard, the Plaintiff testified that 1st Defendant breached the terms of the contract by not only refuting to pay the balance due and owing but also by issuing a notice of change of ownership to the tenants to pay rent to the 1st Defendant. Following the aforesaid breaches, the Plaintiff wrote a letter dated August 7, 2017, produced in evidence as P. Exhibit 19, demanding the 1st Defendant to clear the sum due and owing. He made reference to the terms of the sale agreement dated April 20, 2017. He notified the 1st Defendant to remedy the breach by paying the entire consideration and a further 20% of the consideration as damages as provided in the contract. The Plaintiff further indicated that he was aware that the 1st Defendant had fraudulently and secretly changed the records at the County Government Offices Department of Land in that the 1st Defendant was the proprietor, yet he could only take possession upon settling the consideration sum. The Plaintiff further notified the 1st Defendant that if after sixty (60) days, the breach had not been remedied, the contract stood rescinded.

14. The Plaintiff testified that on November 6, 2017, the Defendant's son harassed the tenants in occupation by compelling them to pay rent to the 1st Defendant as per his terms or vacate. The Plaintiff also testified that on November 7, 2017, he visited West Pokot County Lands Office to collect his receipt for tax payment. To his surprise, he discovered that the 1st Defendant had changed the records to reflect that the 1st Defendant, and not the Plaintiff, was the proprietor of the suit land. He produced Receipts No. 59953 and 59952 both dated July 14, 2017 evincing that the 1st Defendant had remitted the sum of Kshs. 3,000.00 and 12,000.00 respectively to the County Government of West Pokot for transfer fees and rent respectively. They were marked as P. Exhibit 16 and P. Exhibit 17 respectively.

15. The Plaintiff's further evidence was that the 1st Defendant later demolished the back building, prompting him to file this suit. His further testimony was that in January, 2018, the 1st Defendant had the Plaintiff criminally charged in Kapenguria Senior Principal Magistrate's Court with the offence of obtaining money by false pretenses in Criminal Case No. 52 of 2018. He produced the charge sheet, his statement, and the statements of Christopher Poghon and Dominic Pyatich Siangole as P. Exhibit

20, P. Exhibit 21, P. Exhibit 22, P. Exhibit 23 and P. Exhibit 24 respectively. The outcome of the trial was that he was acquitted of the charges.

16. The tussle between the Plaintiff and the 1st Defendant escalated so much that one (1) of the Plaintiff's tenants elected to terminate the tenancy agreement with the Plaintiff. Vide its letter dated April 1, 2018, produced as P. Exhibit 25, the said tenant cited daily harassment of their staff.

17. During the pendency of the suit herein, it came to the attention of the Plaintiff, and with incredulity, that two agreements dated (the same date) the April 5, 2019 drawn by Ms. Barongo Ombasa & Company Advocates and Ms. Lowasikou & Company Advocates, which were produced as P. Exhibit 26 and 27 respectively, were entered into as between the Defendants herein. By them, the 1st Defendant purported to sell the suit land to the 2nd Defendant.

18. The Plaintiff's evidence was that P. Exhibit 27 was silent as to the existence of the present suit. It stated that the said property would be transferred upon settlement of the full purchase price which was agreed at Kshs. 13,000,000.00. However, P. Exhibit 27 revealed that the purchase price, agreed at Kshs. 18,000,000.00 would be paid to the favor of the 1st Defendant in three (3) installments as follows:

    a. Kshs. 5,000,000.00 on execution.

    b. Kshs, 11,000,000.00 on or before November 8, 2019 and

    c. The balance of Kshs. 2,000,000.00 upon finalization of this suit.

19. It was further agreed that the 2nd Defendant would take possession upon payment of the 2nd installment. There was, however, no disclosure as to how the money would be advanced. The Plaintiff highlighted that in the agreements, the Defendants acknowledged that there was a pending suit between the Plaintiff and the 1st Defendant at that time.

20. Subsequently, on June 6, 2019, Ms. Douglas Ombati & Company Advocates, at the behest of the 1st Defendant, wrote letters to Simon alias Simo T/A Paraywa Electronics, John Limakamar Karamunya and Micah Bowen, which were produced and marked as P. Exhibit 28, P. Exhibit 29 and P. Exhibit 30 respectively. He copied the letters to the Plaintiff. The 1st Defendant maintained that he was the landlord of the premises and demanded rent from the three (3) tenants.

21. The said letters prompted a response from the Plaintiff through his Counsel vide a letter dated June 18, 2019, produced as P. Exhibit 31. The response requested, *inter alia*, to establish whether the legal ownership of the subject parcel of land was ascertained.

22. He testified that he was still surprised as to how the 1st Defendant sold the property to the 2nd Defendant who was in possession of the said plot at the time of his testimony. He added that the tenants on the premises currently owed allegiance to the 2nd Defendant.

23. On the money deposited by Christopher Chepchanga to his account, the Plaintiff refuted that the said Chepchanga used to sell his cows. His evidence was that any proceeds from such sales were sent to the Plaintiff via Mpesa if the transactional amounts were less than Kshs. 100,000.00. Otherwise, any proceeds above Kshs. 100,000.00 were directly deposited into his account. For this evidence, he produced as P. Exhibit 12, P. Exhibit 13, P. Exhibit 14 and P. Exhibit 15 as evidence of transactional receipts in May, 2017 totaling Kshs. 500,000.00. He also relied on his bundle of documents evincing the particulars of Mpesa and bank statements that was filed on November 23, 2020.

24. He denied ever accompanying the 1st Defendant or his assigns, including Christopher and Robert Sehemu, to the County Lands offices for purposes of transfer of the suit land. He asserted that he never executed any transfer forms. He maintained that the 1st Defendant had never remedied the breach as

per the terms of their agreement. Since then, the Plaintiff had been unable to take possession of the suit land. He urged this Court to grant the prayers sought in his Plaint.

25. Again, the Plaintiff challenged the 2nd Defendant's assertions that he utilized a sum of Kshs. 14,000,000.00 in development of the suit land. This was because his statement of accounts, D. Exhibit 9 indicated that the balance in the account was Kshs. 13,561,234.00 as at May 20, 2020.

The defendants' case

26. The two Defendants gave evidence in support of their side of the cases. Their evidence is analyzed as follows:

The 1st Defendant

27. The 1st Defendant's testimony was recorded as DW1's. His oral testimony was that there were several handwritten agreements which were produced as P. Exhibit 1-6, 8 & 9. He testified that he entered into the agreements with the Plaintiff prior to the sale agreement of the suit land. To him, they were witnessed by one Robert Sehemu, an officer at County lands office, who confirmed at the time that the suit property belonged to the Plaintiff.

28. DW1 also stated that indeed, the Plaintiff and 1st Defendant, entered into a sale agreement of the suit property and that the consideration amount agreed upon was Kshs. 11,000,000.00. The Agreement was produced and marked as D. Exhibit 1. It was also conceded that the sum of Kshs. 9,000,000.00 was received by the Plaintiff. He further testified the Plaintiff received a sum of Kshs. 700,000.00 and that that balance of Kshs. 1,300,000.00 would, in his interpretation, be paid on June 24, 2017. He testified that at this juncture, the Plaintiff did not possess a title deed.

29. He testified further that the Plaintiff was charged in 2018 with the offence of obtaining money by false pretenses. That was following a complaint that he lodged. He added that he did so because the Plaintiff denied receiving Kshs. 500,000.00 from him. To this end, he stated that the charge sheet was in error for capturing that the Plaintiff obtained Kshs. 11,000,000.00. He blamed the police officers for drafting erroneous charges deliberately since one of the officers was a relative to the Plaintiff.

30. The 1st Defendant opined that the Plaintiff was in breach of the agreement between them hence the Counterclaim he made. He raised several grounds in support of the Counterclaim. Firstly, he testified that the Plaintiff requested the 1st Defendant to send him Kshs. 700,000.00 in advance yet it was agreed that the whole balance of Kshs. 2,000,000.00 would be paid as a whole in line with the terms encapsulated in the Acknowledgement Note that was marked D. Exhibit 2. Secondly, that the Plaintiff failed to avail himself at the 1st Defendant's Advocates' chambers in order to finalize their agreement on June 24, 2017. His testimony was that on that day he was accompanied to the advocate's offices by his manager. To him the inaction put the Plaintiff in breach of the contract. Thirdly, the 1st Defendant advanced a total sum of Kshs. 500,000.00 on May 8, 2017 and May 11, 2017 to the Plaintiff on his request. He testified that the money was obtained from his business and cash at hand. He thus stated that the Plaintiff was again in breach of the contractual agreement. His further evidence was that the sums were deposited by Christopher Chepchanga alias Christopher Limakwong (DW2) and Dominic Changole (DW3) at the 1st Defendant's behest. The receipts were produced and marked as D. Exhibit 3 (a), (b) and (c). Fourthly, according to the 1st Defendant, the Plaintiff fraudulently and unlawfully collected rent between 2017 and 2018 to the tune of Kshs. 2,000,000.00. This sum was over and above the Kshs. 800,000.00 that the 1st Defendant owed the Plaintiff.

31. In justification that the suit land was duly transferred in his name, the 1st Defendant testified that two transfers took effect to his benefit. In the 1st transfer, the property was transferred in the joint names of the Plaintiff and the 1st Defendant. He was present in this instance. In the 2nd transfer, where he was absent, the property was transferred in his name. He produced Receipt No. 53953 dated July 14, 2017 as evidence of payment of Kshs. 3,000.00 described transfer fees from the Plaintiff to the 1st Defendant and was marked DMFI-4. He relied on the document for the presupposition that the property was duly transferred from the Plaintiff to the 1st Defendant. He testified that he settled the arrears of the rent owed to the County Government that the Plaintiff had failed to honor. He emphasized that the Plaintiff was present when the transfer took place. DW1 testified that upon transfer of the suit property to his favor, he made several repairs to the structures therein.

32. DW1 testified he did not pay the balance of Kshs. 800,000.00 as a dispute arose between himself and the Plaintiff. This was because the Plaintiff illegally and fraudulently collected rent over and above the Kshs. 800,000.00, to the tune of Kshs. 2,000.000.00. Furthermore, to him, the Plaintiff had breached the terms of their contract. He intimated that these issues were escalated to elders who advised them to forgive each other and any monies owed as between themselves be written off as bad debts.

33. On February 11, 2019, this suit was dismissed. Soon afterwards he sold the property. He testified that since nothing barred him from selling the property at that time, he elected to sell it to the 2nd Defendant on 05/04/2019. He testified that two (2) agreements were executed in this regard. His further testimony was that since the 1st agreement did not capture the costs of renovations amounting to Kshs. 5,000,000.00 that he had incurred, a 2nd agreement was drawn fixing the consideration amount at Kshs. 18,000.000.00. He testified that he received Kshs. 5,000,000.00 on the date of execution of the sale agreement and that the balance of Kshs. 11,000,000.00 to be paid at a later date.

34. When asked about the clause in the contract stipulated as "the balance of Kshs. 2,000,000.00 to be deposited after the finalization of the suit", the 1st Defendant stated that he reserved the funds to pay the Plaintiff who would potentially trouble the 2nd Defendant in future. His evidence was that the alternative reason was, depending on the outcome of this suit, that he would utilize the funds to settle any claim in favor of the Plaintiff since he had conceded that he had never settled the balance of Kshs. 800,000.00.

35. His evidence was that following execution of the agreement between the Defendants, the suit land was transferred from the 1st Defendant to the 2nd Defendant. He urged this Court to allow his Counterclaim as prayed and dismiss the suit against the Plaintiff.

36. The 1st Defendant called Christopher Chepchanga alias Christopher Limakwong as his second witness DW2. The witness testified he was employed by the 1st Defendant's as his manager. He testified that he deposited Kshs. 500,000.00 to the Plaintiff on behalf of the 1st Defendant in respect to Plot No. D/3. Referring to P. Exhibit 12-14, he stated that he personally deposited money for those transactions following instructions from the 1st Defendant. He denied ever having any business relationship with the Plaintiff.

37. He added that he was a witness to the 2nd transfer that took place in the presence of the Plaintiff. He witnessed the Plaintiff executing documents in the presence of Mr. Robert Sehemu. In the said transaction, a sum of Kshs. 15,000.00 was advanced in settlement of rates and transfer fees. He also stated that Dominic Siangole was present albeit that information was not captured in his witness statement. He also testified that he accompanied the 1st Defendant to his Advocates' chambers on June 26, 2017 where the Plaintiff did not show up. He added that the 1st Defendant carried Kshs. 800,000.00 in settlement of the balance of the purchase price. DW2 further testified that the property had since

been sold to the 2nd Defendant, and that the 2nd Defendant had since erected additional structures upon takeover of the property.

38. DW3, Dominic Siangole testified on behalf of the 1st Defendant. He stated that he witnessed the 1st Defendant disbursing the sum of Kshs. 700,000.00 and Kshs. 500,000.00 to the Plaintiff. This was in settlement of the consideration amount of the sale agreement between the Plaintiff and the 1st Defendant. He testified that he accompanied the 1st Defendant to his Advocates' chambers on June 26, 2017 but the Plaintiff did not show up. He added that on the material date the 1st Defendant carried Kshs. 800,000.00 in readiness for the settlement of the balance of the purchase price. He testified that he was also present at the County Lands office where the transfer documents were executed. He testified that DW2 and the Plaintiff executed the documents.

39. DW4, one Robert Sehemu, an Administrative Officer at the County Government of West Pokot, testified that he was the custodian of a property register known as Kalamazoo. The register listed all plots at the trading centre. He testified that Plot No. D/3 it was initially allotted to Mama Asha Ibrahim. It was then allotted to the Plaintiff in the 1980s.

40. DW4 testified that in on April 15, 2016, the Plaintiff and the 1st Defendant approached him to have their names registered as joint owners of the suit land and he did as instructed. On August 1, 2016, parties again appeared before him (DW4) who witnessed the 1st Defendant hand over the sum of Kshs. 3,250,000.00 to the Plaintiff. He executed as a witness the agreement which document was produced and marked as P. Exhibit 8. He also witnessed the agreements marked as P. Exhibit 1, P. Exhibit 2 and P. Exhibit 3.

41. He later learned that the Plaintiff and the 1st Defendant executed a sale agreement dated April 20, 2017. DW4's evidence was that subsequently, he was approached by the Plaintiff, the 1st Defendant, DW2 and another person with instructions to transfer the suit land to the 1st Defendant as the purchase price had been fully paid. They informed him that the sum of Kshs. 800,000.00 remaining balance, was offset from rent that the Plaintiff had collected from the tenants in the suit land. In the presence of the Plaintiff, DW2 and another, DW4 testified that he transferred the suit land to the favor of the 1st Defendant who had stepped out. He testified that the 1st Defendant paid Kshs. 3,000.00 in settlement of the transfer fees in this regard. The transfer was effected in 2017.

42. DW4 stated further that he followed this same procedure of ascertainment when suit land was transferred to the favor of the 2nd Defendant. During the subsequent transaction, both Defendants were present. He produced D. Exhibit 6 and D. Exhibit 7 receipts for Kshs. 3,000.00 and Kshs. 12,000.00 which were issued for settlement of Transfer Fees and Rates Fees respectively. They were paid by the 2nd Defendant on April 8, 2019 and March 20, 2020 respectively.

43. DW4 further testified that consent from the Land Control Board was not a requirement. Parties were to only submit and authenticated sale agreement for transfer to take place. Although he did not produce them in evidence, DW4 further submitted that copies were retained by the County Lands offices. He also relied on D. Exhibit 4 an excerpt from the Kalamazoo, when he testified.

44. DW4 denied that he informed the 1st Defendant that he was required to pay Kshs. 15,000.00. He testified instead that he informed the 1st Defendant that the title would take time to be processed as they do not issue titles. After the evidence of DW4 was taken, the 1st Defendant closed his case.

The 2nd Defendant

45. The 2nd Defendant, Reuben Lemureng, testified that he purchased the suit land from the 1st Defendant on April 5, 2019 for a sum of Kshs. 18,000,000.00. He confirmed that two (2) separate agreements were drawn. Under the terms of agreement, the 2nd Defendant paid the 1st Defendant Kshs. 5,000,000.00 which the 1st Defendant acknowledged receipt. However, when cross examined, he stated that he disbursed Kshs. 3,000,000.00. Before purchasing the property, the 2nd Defendant testified that he consulted the Plaintiff who informed him that he had filed the present suit against the 1st Defendant seeking to recover the outstanding amount due and owing to him. It also sought a declaration that the Plaintiff is the owner of the suit land. He claimed that when the suit was dismissed, the Plaintiff intimated to him that he intended to reinstate the same. This is the reason the 2nd Defendant retained the sum of Kshs. 2,000,000.00 for the benefit of the Plaintiff. This, according to the 2nd Defendant is the balance out of the Kshs. 18,000,000.00 of the purchase price that he is yet to part with.

46. According to the 2nd Defendant, a cursory perusal of the agreement the Plaintiff and the 1st Defendant entered into, made no provisions for revocation since there was no clause to that effect. He was thus estopped from doing that.

47. The 2nd Defendant stated that the Plaintiff was aware that he (the 2nd Defendant) was the registered proprietor of the suit property. He relied on the Kalamazoo, D. Exhibit 4 for this assertion. He stated that the Plaintiff actually acquiesced to the transaction. He produced D. Exhibit 6 and D. Exhibit 7 being receipts for Transfer Fees and Revenue Fees paid on April 8, 2019 and March 20, 2020 respectively. As a show of goodwill, the 2nd Defendant disbursed the sum of Kshs. 50,000.00 and Kshs. 10,000.00 to the Plaintiff and his brother respectively. He relied on D. Exhibit 10 Mpesa Statement as evidence of the three (3) transactions.

48. He stated that he had substantially laid investment on the suit property. Additionally, he took out a loan from the bank in the sum of Kshs. 11,000,000.00. He produced his Statement of Accounts for the period December 19, 2019 to October 19, 2020 as D. Exhibit 9.

49. The 2nd Defendant made an application for funds transfer on August 7, 2019 for the sum of Kshs. 2,000,000.00 to the 1st Defendant. The Application was produced and marked D. Exhibit 11. He further produced eleven (11) Banking slips in a bundle marked as D. Exhibit 12 (a) - (l). They were paid in furtherance of the purchase of the suit land as captured in the narratives in the banking slips. He testified that they totaled Kshs. 11,666,000.00. The 2nd Defendant added the payments were disbursed as follows:

SLIP NO	DATE	TRANSACTION AMOUNT (Kshs)	OTHER REMARKS (added by hand)
12(a)	03/10/2019	990,000.00	He testified to have additionally paid Kshs. 10,000.00 via MPESA
12(b)	16/10/2019	600,000.00	He testified that he additionally paid Kshs. 400,000.00 in cash
12(c)	22/10/2019	700,000.00	He testified that he additionally paid Kshs. 300,000.00 in cash
12(d)	04/11/2019	990,000.00	He testified that he additionally paid Kshs. 10,000 via MPESA
12(e)	11/11/2019 but stamped 09/11/2019	700,000.00	He paid an additional Kshs. 300,000.00 in cash
12(f)	13/12/2019	990,000.00	An additional Kshs. 10,000.00 was paid via MPESA
12(g)	27/12/2019	990,000.00	An additional Kshs. 10,000.00 was paid via MPESA
12(h)	13/01/2020	900,000.00	An additional Kshs. 100,000.00 was paid from proceeds of rent
12(i)	06/02/2020	500,000.00	No comments added
12(k)	17/04/2020	500,000.00	No comments added
12(j)	06/03/2020	394,000.00	No comments added
12(l)	08/06/2020 but stamped 06/06/2020	272,000.00	No comments added

50. In view of the above, the 2nd Defendant computed that he had disbursed a total of Kshs. 16,666,000.00 to the 1st Defendant in settlement of the consideration for the transaction. However, one thing that

was curiosity arousing was that for D. Exhibit 12 (a) - (h), the additions indicated in the tabulation above as "other remarks (added by hand)" were inserted by hand while the other figures evidencing payments made were machine-generated.

51. His evidence was that following the substantial investments made to the suit land, it was valued now at Kshs. 27,000,000.00. He relied on D. Exhibit 8 Valuation Report dated 22/10/2020 for this presupposition. He mentioned that he had so far disbursed the sum of Kshs. 10,200,000.00 to the 1st Defendant. He testified that he would thus be highly prejudiced if the agreement was revoked. He expressed willingness to settle any outstanding amount should the Court find due and owing to the Plaintiff to the tune of Kshs. 2,000,000.00.

52. The 2nd Defendant further testified and admitted in evidence that it was not true as shown in P. Exhibit 27 that he had paid the sum of Kshs. 13,000,000.00 in full as at the time of execution. He further could not ascertain how the Kshs. 14,000,000.00 disbursed to him was utilized. On being referred to P. Exhibit 28 at cross-examination, he stated that he was the true landlord and not the 1st Defendant. However, he admitted in evidence that had only paid Kshs. 5,000,000.00 at this juncture. He was thus not in possession. He urged this Court to dismiss the suit as against him. He closed his case without further evidence.

SUBMISSIONS

53. Following the close of parties' respective cases, they filed closing written submissions. The Plaintiff, 1st Defendant and 2nd Defendant filed their submissions on 21/04/2022, 06/05/2022 and 10/05/2022 respectively.

54. According to the Plaintiff, there existed a valid contract between him and the 1st Defendant. The Plaintiff contended that the 1st Defendant occasioned its breach by failing to settle the outstanding consideration balance. He added that the 1st Defendant had failed to establish that he had paid him Kshs. 500,000.00. According to the Plaintiff, he was in an agreement with DW2 who would sell livestock on his behalf. Any proceeds therefrom would then be deposited to the Plaintiff through his Mpesa or bank account. The Plaintiff contended that the said Kshs. 500,000.00 formed part of this arrangement and was in no way part of the purchase price as alleged by the 1st Defendant. When questioned on the Mpesa transitional documents, the Plaintiff submitted that DW2 could not give any explanation. He urged this court to find that the Plaintiff was owed the sum of Kshs. 1,300,000.00. He maintained that the 1st Defendant illegally transferred ownership as possession had not been handed over by the Plaintiff.

55. Since the 1st Defendant had committed a breach of the contract, the Plaintiff submitted that the natural consequence was payment of damages for non-performance. Relying, however, on the decisions in Photo Production -vs- Securicor Limited (1980) AC 827 at page 848 and Woodar Investment Development Limited -vs- Wimpey Construction UK Limited (1980) 1 All ER 571, the Plaintiff submitted that the 1st Defendant's non-performance constituted a repudiation of future undertakings upon which the Plaintiff could end the contract as regards future performance.

56. Following then, the Plaintiff issued a notice of remedy of breach dated 07/08/2017 in countermanding the 1st Defendant's notice of change of ownership addressed to the Plaintiff's tenants on 04/08/2017. A mathematical computation of the sixty (60) days notified in the Plaintiff's letter meant that the contract stood rescinded on 06/10/2017. He urged this court to award damages for breach of contract and rescission accordingly.

57. On whether the counterclaim was merited, he urged this court to dismiss the same as the 1st Defendant cannot be held to benefit from his own wrongdoing. On whether the 2nd Defendant was a bona fide purchaser for value without notice, the Plaintiff invoked the application of the doctrine of lis pendens and the nemo dat quod non habet principle for the holding that the 1st Defendant unlawfully and fraudulently procured the registration of the suit land in his name. He had no better title and any sale or transfer was thus of no legal effect. He pointed out that the agreement in P. Exhibit 26 captured that there was a pending suit arising out of the parcel of land. The 2nd Defendant was thus aware of the suit herein and cannot be held to be a bona fide purchase for value without notice.

58. On costs, the Plaintiff urged this court to condemn the 1st Defendant to meet the costs of the suit since he breached the initial agreement. He prayed that the counterclaim be dismissed as well with costs.

59. The 1st Defendant maintained that he did not breach the agreement dated 20/04/2017. Interestingly, he relied on the submissions filed by the 2nd Defendant on this issue. I find that this beats logic since the 2nd Defendant was not a party to the agreement entered into between the Plaintiff and the 1st Defendant, the substratum of the present dispute. Needless to say that submissions being only marketing tools for parties while urging the determination of their cases in their favour, they will not alter the evidence on record and thus the finding of the Court.

60. Even then, what was more baffling was that the 1st Defendant relied on the 2nd Defendant's submissions that were filed four (4) days after he filed his. I would not want to hypothesize but it is quite peculiar that he was aware of the contents of his submissions before being formally served or exchanged. What would make of such an observation? As stated above, submissions contain only persuasive marketing language by a party to convince the Court to lean to his side and perhaps see the issue from a better or other light than the perspective it holds. But it behooved the 1st Defendant to submit before this Court in depth on this issue instead of indolently relying on the submissions of a stranger to the contract.

61. Nonetheless, the 1st Defendant maintained that Kshs. 9,000,000.00 had been paid as at the time of execution of the agreement with the Plaintiff, Kshs. 700,000.00 was paid on 27/04/2017, Kshs. 500,000.00 was deposited on diverse dates on 08/05/2017 and 11/05/2017 by DW2 and that the sum of Kshs. 800,000.00 was paid up from the rent collected by the Plaintiff. He was thus not indebted to the Plaintiff as the agreed purchase price had been fully paid. The 1st Defendant submitted further that the Plaintiff failed to give the 1st Defendant vacant possession and continued to illegally collect rent. He added that the Plaintiff had approached this court with unclean hands and was thus undeserving of the orders sought.

62. On whether the notice to rescind contract was served upon him, the 1st Defendant denied ever being served with the same. Relying on Ann Mumbi Hinga -vs- William Mwangi Gathuma & Janet Wanjiku Mwangi eKLR, the 1st Defendant submitted that he was not in default and rescission could thus not arise.

63. On whether he was within his rights to sell the suit property, the 1st Defendant submitted that the property rightfully passed in his hands. He thus had good title to pass to another. He relied on the testimony of DW4 who testified that title passed chronologically from the Plaintiff to the 1st Defendant and finally to the 2nd Defendant upon fulfillment of the conditions imposed by DW4. Be that as it may, the 2nd Defendant made several improvements to the suit land that would cause irreparable harm if the court found otherwise. He urged this court to dismiss the Plaintiff's suit with costs and allow the counterclaim with costs.

64. The 2nd Defendant submitted that there was no breach of contractual terms by the 1st Defendant in the agreement dated 20/04/2017. He reiterated the 1st Defendant's submissions in that the consideration sum was fully paid. The 2nd Defendant submitted further that in the event the court found breach of the terms encapsulated in the agreement existed, then both parties were guilty of breach. On the part of the Plaintiff, he accused him of failing to give vacant possession and further continued to collect rent from the premises illegally. He fortified his submission by relying on Joseph Muinde & Another -vs- Geoffrey Kithuka Mwangangi & Another [2020] eKLR. In fact, the Plaintiff, he added, was charged with obtaining money by false pretences. This was direct evidence of breach on the Plaintiff's part.

65. The 2nd Defendant continued that should a breach of the terms be found, then parties were bound by the terms of their contract. Consequently, the aggrieved party was only entitled to 20% of the consideration amount as damages. In that regard, repudiation of the contract is not an adequate remedy. He urged this court to instead order specific performance that the 2nd Defendant was willing to take over the settlement of the same and pay Kshs. 2,000,000.00 to the favor of the Plaintiff.

66. The 2nd Defendant acknowledged the nemo dat principle insofar as passing a good title is concerned. He however cited that there are exceptions to the general rule on a bona fide and/or innocent purchaser for value without notice. He relied on DW4's evidence. He testified that he was not part of the fraud or illegality, if any. Whilst he was aware that a suit concerning the subject matter subsisted, he remained a bona fide purchaser for value. Citing Njenga & 3 Others -vs- Ndua & Another (Civil Appeal 187 of 2017 [2021] KECA 253 (KLR), the 2nd Defendant urged this court to find that he had developed the suit property and it would be difficult for him to recover the suit as opposed to the Plaintiff who could easily be compensated by an award of damages. On costs, he urged this court to follow the event.

67. I have carefully analyzed the pleadings and the documents relied on by parties. I have also considered the submissions filed by the Plaintiff and the 1st Defendant. In analyzing the issues in dispute, I formulate that the following issues fall for determination:

    a. Whether the Agreement dated 20/04/2017 was breached and by whom;

    b. What remedy, if any, lay to the aggrieved party?

    c. Whether the 1st Defendant could pass title to the 2nd Defendant;

    d. Whether the 2nd Defendant was a bona fide purchaser for value without notice ;

    e. Whether the counterclaim was competent and merited;

    f. Who to bear the costs of the suit?

68. ANALYSIS AND DISPOSITION

(a) Whether the Agreement dated 20/04/2017 was breached and by whom?

69. It is not gainsaid that the Plaintiff and the 1st Defendant were engaged in a contractual relationship. The validity of the said agreement dated 20/04/2017 is also not disputed. I also add that the said agreement fulfilled the requirements set out in Section 3 of the *Law of Contract Act* Cap 23 Laws of Kenya.

70. The Plaintiff and the 1st Defendant, however, accused each other of breaching the terms of their agreement. On the one part, the Plaintiff stated that the 1st Defendant breached the contract by failing to honor his financial obligation. The 1st Defendant denied that. Instead, he accused the Plaintiff of breaching the contract by illegally refused to deliver possession of the suit land. He also accused the Plaintiff of fraudulently collecting rent from the tenants.

71. What then is the definition of a breach? According to the 11th Edition of the Black's Law Dictionary, breach is defined as:

> " A violation or infraction of a law, obligation, or agreement especially of an official duty or a legal obligation, whether by neglect, refusal, resistance, or inaction."

72. In this regard, it must be demonstrated that either the Plaintiff or the 1st Defendant violated a legal obligation in the contract whether by neglect, refusal, resistance or inaction.

73. From the facts established before me, the Plaintiff and 1st Defendant, long term friends, entered into a sale agreement on 20/04/2017. This was a culmination of several loan facilities advanced by the 1st Defendant to the Plaintiff. This was occasioned severally between 2016 and 2017. It was part of their agreement that the Plaintiff's title was deposited as security. In fact, in one of those transactions, that were put into writing, DW4 attested to their execution. On the strength of DW4's assurances, as Administrative Officer at the County Government of West Pokot, coupled with the P. Exhibit 7, the 1st Defendant cast no doubt that indeed the Plaintiff was the legal proprietor of Plot No. D/3.

74. Back to the sale agreement, P. Exhibit 10, the Plaintiff yielded that he would sell his parcel of land namely Plot No. D/3 situated in Makutano trading area within Kapenguaria in West Pokot County. Under the terms of engagement, parties agreed, inter alia, as follows:

    i. Agreed consideration at Kshs. 11,000,000.00 to wit Kshs. 9,000,000.00 already paid in cash and receipt whereof the vendor acknowledges and the balance of Kshs. 2,000,000.00 shall be paid on or before 24/06/2017.

    ii. vacant possession upon completion of the consideration hereof.

    iii. the vendor to sign the necessary documents to facilitate transfer in favor of the purchaser.

    iv. any party that breaches this agreement shall pay 20% of the consideration as damages to the aggrieved party.

75. The facts, as summarized above, were not been disputed. So much so that, as at 20/04/2017, the Plaintiff and the 1st Defendant were bound by the terms of their contract as entered into on that date, which was the second and final time they reduced the transaction into writing. The law on contracts is that once the parties to a contract negotiate the terms thereof and reduce it into writing, the oral evidence is seldom given (with legally accepted exceptions) to contradict or add to it. Section 97(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya provides that:

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

76. Further, and given the evidence of the parties, namely the Plaintiff and 1st Defendant, that the contract of sale entered into regarding the suit land was reduced into writing in the end on 24/04/2017, the

relevant provisions of the *Evidence Act* are worth citing here and applying the facts to them. Thus, Section 98 provides that:

> "When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:
>
> Provided that-
>
> (ii) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph of this proviso applies, the court shall have regard to the degree of formality of the document;
>
> (iii) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved."

77. Both the Plaintiff and 1st Defendant agree that besides providing for a 20% penalty in terms of damages for breach, the contract was silent on what the effect of the breach would be. There was no evidence adduced by the parties to show any oral agreement on the aspect the contract was silent on so as to invite the application of the above-cited provision. All that the 1st Defendant did was to rely on the silence to imply that payment of damages would entitle the Court and the parties to infer the subsistence of the contract despite breach. I will address this issue much later.

78. Suffice it to say that the Court will not re-write or vary the terms of a contract duly entered into by parties unless it falls under the exceptions that the law provides when the Court can intervene. Broadly speaking, for a court to step in there must be shown that there was coercion, fraud or undue influence. None of these was pleaded herein or evidence led thereon. Thus, the Court is only enjoined to give effect to the intention of the parties as evinced by the terms of the contract. On this I am guided by the holding in National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another Civil Appeal No. 95 of 1999 [2001] KLR where the Court restated the need to uphold the consensus theory of contract as follows:

> "A Court of Law cannot rewrite a contract between the parties once ascertained that the intention was to enter into a valid contract. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

79. As Lord Denning M.R. put it in the case of Case of Storer v Manchester City Council [1974] 1 W.L.R. 1403 so I reiterate herein. He stated that:-

> "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: "I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough."

80. I thus proceed to analyze the terms of the contract in issue. On 27/04/2017, the 1st Defendant disbursed the sum of Kshs. 700,000.00 in settlement of the contractual terms. This was acknowledged

as demonstrated in P. Exhibit 11. It was at this juncture that the Plaintiff and the 1st Defendant accuse each other of breach of the contract, produced as P. Exhibit 10.

81. According to the 1st Defendant, the disbursement of Kshs. 700,000.00 to the Plaintiff was in breach of P. Exhibit 10. He testified that the Plaintiff approached him to disburse the said amount prior to 24/06/2017. He testified that parties agreed to disburse the total balance of the purchase price on 24/06/2017. To me, apart from the oral testimony of the 1st Defendant that the Plaintiff approached him to disburse the sum earlier than the agreed date, there was no other evidence to support it. I thus, only rely on the terms document itself for interpretation.

82. I have carefully analyzed P. Exhibit 10, the agreement made on 20/04/2017. I will extract the wordings of the relevant clause. Clause 2, under the subsection headed "CONSIDERATION" reads as follows, "The balance of Kshs 2,000,000/= shall be paid on or before 24/06/2017." I find no ambiguity in the words imported therein. My understanding of the phrase is that it was not a must that the said sum of Kshs 2,000,000/= was to await the 26/06/2017. It could be paid earlier or on the stated date as long as the deadline did not pass. Nothing in the phrase prevented the 1st Defendant from paying the sum in instalments as long as the entire sum was received by then. Thus, contrary to the assertions by the 1st Defendant on breach of the condition, there was no breach of the contract by the Plaintiff when he received the sum of Kshs. 700,000/= from the first Defendant earlier than the deadline.

83. Upon receipt of Kshs. 700,000.00, parties executed an Acknowledgement Note, P. Exhibit 11. Under it, the Plaintiff acknowledged to have been in receipt of the said sum in "respect of the sale agreement dated 20/04/2017 as part of the balance as earlier agreed upon..." it was further noted that the remaining balance of Kshs. 1,300,000.00 shall be paid on or before 24/06/2017. This was in consonance with their sale agreement. Moreover, it was executed freely by the parties.

84. Sometime in May, 2017, particularly 08/05/2017 and 22/05/2017, the Plaintiff received a total sum of Kshs. 500,000.00 from DW2. When asked about the purpose of the said funds transfer, DW2 indicated that, on the instructions of the 1st Defendant, he deposited the sum in part payment of the consideration amount that remained due and owing. The 1st Defendant corroborated DW2's evidence. The Plaintiff, whilst acknowledging receipt of the funds, rebutted that it was intended as payment of the sale of livestock. The Plaintiff furthered that he was in an agreement with the DW2 who sold his livestock. All proceeds would then be credited to the Plaintiff either thought his bank account or Mpesa account depending on the funds received. DW2 denied this.

85. This Court was been called upon to determine whether the sum of Kshs. 500,000.00 was in further settlement of the consideration. On the other hand, the Plaintiff alleged that the same was in furtherance of a local arrangement he had created with DW2. Looking at these contrasting testimonies of rival parties, I cast doubt on the 1st Defendant's assertions. Looking at the historical engagements the parties had every time cash transaction took place, the 1st Defendant endeavored to ensure that parties executed a document as some acknowledgment. That could have been in the form of a document such as that shown as P. Exhibit 11. In this instance, this did not take place. One wonders why the 1st Defendant elected to not do so. Nothing would have prevented him from making the Plaintiff execute some sort of acknowledgement or any other document as their modus operandi was in each and every transaction. I am therefore inclined to believe that the Plaintiff was in receipt of the funds from DW2 for other reasons not related to the issues herein. Consequently, I find that the sum of Kshs. 500,000.00 did not set off the remaining consideration balance that fell due and owing.

86. Having rejected the 1st Defendant's evidence as to the purpose of the Kshs. 500,000/= it is upon him to recover it, if he so wishes and if the law as to limitation permits, by proving it in a separate suit than the instant one as it is not related to it. It is noteworthy here that the 1st Defendant tendered evidence that

he caused the Plaintiff to be charged over the said sum in Kapenguria subordinate Court. If indeed the payment for the agreement in issue, it beats logic as to how the Plaintiff would have "obtained money by false pretenses" yet it was in performance of the contract alleged by the 1st Defendant to have not been breached by him. Needless to say, that the charge was neither proved nor was the amount stated in the charge Kshs. 500,000/=. My finding is that the sum was for other purposes than the instant contract and that is why the 1st Defendant panicked and moved the security agencies for charges thereon, so as to protect those interests.

87. The 1st Defendant testified that come the 26/06/2017 he agreed with the Plaintiff to meet at the offices of Mr. Chebii Advocate to finalize the said agreement. As stated earlier, this was the date the total amount was to be paid in full. Thereafter, the Plaintiff would hand over the property to the 1st Defendant. His testimony was that he was with DW2 at the said offices but the Plaintiff failed to show up. Again, I cast incertitude with the 1st Defendant's allegations. He alleged that the parties agreed orally. While the DW2 testified that indeed he was with the 1st Defendant at Chebii Advocate's chambers, the question that begs an answer is, why did the 1st Defendant fail to call the said Advocate to testimony to establish the veracity of his claims? Secondly, he did not lay credence as to the fact that he made concerted efforts to trace the Plaintiff on that day or that indeed there was an earlier arrangement that they meet at the Advocate's offices. For instance, the 1st Defendant would have furnished call log records to establish that indeed he made every effort possible to trace the Plaintiff. I thus find that these allegations did not meet the threshold set out in Sections 107, 108 and 109 of the *Evidence Act*.

88. This court finds that as at 24/06/2017, the 1st Defendant had not met his obligations. Be that as it may, the 1st Defendant notified the tenants of the premises, through his Counsel, on 04/08/2017 that he was the "new sheriff" in town. Consequently, he demanded that the tenants do forthwith pay rent to him. Thereafter, on 07/08/2017, the Plaintiff wrote to the 1st Defendant demanding that he remedies his breach. He further demanded 20% consideration as damages. He further put the 1st Defendant to notice that should he fail to remedy his breach within sixty (60) days from the date thereof, the contract stood rescinded.

89. A multiplicity of issues come into play in view of the foregoing. Firstly, the 1st Defendant disputed that he was never served with the notice for remedy. The Plaintiff testified that he served the 1st Defendant. However, the mode of service was not demystified. The 1st Defendant simply denied receipt of the letter. In my view, as to whether he received notice of breach or not, it does not change the fact of breach of the contract. I hold so because, first, the date of fulfilment of the condition of payment and hand over of the premises was specified in the contract entered into on 20/04/2017, and second, there was no clause in the said agreement that breach had to be notified to the party on breach. Again, the 1st Defendant assumed proprietorship of the said parcel of land yet it was not agreed upon that way. The evidence of the 1st Defendant was that he has to date not paid the sum of Kshs. 8000,000.00 to the Plaintiff. That the same continues to remain due and owing. Knowing very well that possession was to be given upon settlement of the purchase price, it is suspect why the 1st Defendant declared that he was the new landlord notwithstanding the fact that he had not met his obligations.

90. The agreement entered between the Plaintiff and the 1st Defendant remained unequivocal. Naturally then, the 1st Defendant fell in breach of the contract when the sums fell due on 24/06/2017. The 1st Defendant admitted that he has never settled the sum of Kshs. 800,000.00 to date. He did, however, contradict in his evidence that no monies were due and owing. He maintained that the Plaintiff continued to illegally collect rent to the tune of Kshs. 2,000,000.00 from the suit land. However, his assertions were not backed by evidence. To the extent that in terms of P. Exhibit 10 or D. Exhibit 1,

possession of the suit land was not to pass until payment was made, I find the 1st Defendant's evidence about illegal collection of rent unmerited.

91. In view of the foregoing evaluation, I find that in fact, he had not settled the sum of Kshs. 1,300,000.00. Consequently, I find that the 1st Defendant was in breach of the contractual agreement for failing to settle the sums due. Since possession would only be given once the consideration amount was settled, I emphasize in my finding that the Plaintiff was not effectuating any illegality by remaining as the landlord and/or proprietor of the suit premises.

(a). What remedy, if any, lay to the aggrieved party?

92. As found hereinabove, the 1st Defendant was in breach of the contract dated 20/04/2017. What were the consequences for breach? Put differently, did any remedy lie to the Plaintiff consequently? The Plaintiff submitted that he was entitled to an order of rescission/cancellation of the agreement. In this regard, the Plaintiff submitted that the 1st Defendant fraudulently transferred the property in his name and further notified tenants that he was the lawful landlord. He further sought 20% of consideration amount as agreed in the contract as damages. This was pegged on the fact that the 1st Defendant was in breach for having not fulfilled his financial obligations. The 1st Defendant maintained that no grounds had been furnished by the Plaintiff to sustain that a rescission was an adequate remedy. Since he had fulfilled his obligations, then rescission could not issue. The 2nd Defendant submitted that the Plaintiff was only entitled to the sums embedded in the contract. He was thus of the view that the Plaintiff was only entitled to payment of damages for breach.

93. In regard to this issue, I have looked at the evidence on record and paid particular scrutiny to the contract dated 20/04/2017. In it, an aggrieved party was entitled to 20% of the consideration as compensation for damages. As stated hereinabove, the 1st Defendant admitted that he had not fully satisfied his obligations in the contract. For these reasons alone, I find that the Plaintiff is indeed entitled to the said sum. I am guided by the tenet that parties are bound by the terms of the contract agreed upon between them.

94. It is also hallowed, and is stated above, that a court of law cannot rewrite a contract between parties. Against this dogma, the Plaintiff seeks rescission/cancellation of the agreement dated 20/04/2017. It is not disputed by any parties that such remedy was not available in the contract. Can this court, in that regard, make an order for rescission/cancellation? It is important to note that the agreement was silent on the effect of the breach. Thus, as to whether rescission or damages were an appropriate remedy, it would depend on the weight or importance the parties placed on the term breached. In other words, how fundamental to the contract was the breached term? The term must be material to the contract.

95. Going by its definition under the 11th edn of Black's Law Dictionary, rescission means:

> "1. A party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach, or a judgment rescinding the contract; voidance. Rescission is generally available as a remedy or defence for a non-defaulting party and it's accompanied by restitution of any partial performance, thus restoring the parties to the pre-contractual positions. 2. An agreement by contracting parties to discharge all remaining duties of performance and terminate the contract."

96. Halsbury's Laws of England (4th Ed) Vol. 9 at para 561 states:

> "Where a contract is executory on both sides (i.e. where neither party has completely performed his obligation under the contract), the parties may terminate it by mutual

consent, and this will be so whether the obligation is indefinite or limited in point of time, or provides that it shall be determinable by notice or otherwise. Such rescission may take the form of an express agreement or may be inferred from conduct as where neither party has insisted on performance of the contract for a long period of time, or where the parties have acted in a manner inconsistent with the continuance of the contract…" (emphasis added).

97. My understanding of the above is that, rescission is available where one party is acting against any of its obligations or the spirit or tenor of the contract. In other words, where a party is unfulfilling their legal obligations, the aggrieved party is entitled to cancel the contract owing to the fact that the contract has frustrated.

98. In this case, it has been confirmed that the 1st Defendant has never fulfilled his legal obligations in the contract to date. To my mind it is clear that the parties were well aware of the fact that payment of the full sum of the purchase price was material to the contract and they intended it to be fundamental. That is why there was a specific date to it and the date was not only given but repeated in both P. Exhibit 10 and P. Exhibit 11 and also a condition made and written down that possession of the premises or suit land would only pass upon payment of the balance. In any event, the subject matter herein, that is to say land, is of rare 'quality' in Kenya and owners do not casually part with its proprietorship that easily.

99. Consequently, I find that the Plaintiff is well within his rights to seek a cancellation order of not only the contract but the activities that followed the breach thereof since it appears that the 1st Defendant was no longer interested in fulfilling his obligations. Having said that, I also observed that the 1st Defendant purportedly sold the suit land. To me, the 1st Defendant seemed not interested in complying with his obligations. The order of rescission in the circumstances does apply herein.

(b) Whether the 1st Defendant acted fraudulently when passing title to the 2nd Defendant

100. As stated, the 1st Defendant had failed to fulfil his obligations as required. He however purported to acquire ownership against the terms of the contract. Thus, from the onset and as shall be demonstrated, the 1st Defendant acted fraudulently when purporting to pass title to the 2nd Defendant. The 1st Defendant testified that subsequently, he went to the offices of DW4 together with DW2, DW3 and the Plaintiff to execute the necessary forms to effect transfer in his name. According to the 1st Defendant, the balance of Kshs. 800,000.00 was offset by the Plaintiff's action of collecting rent for the period 2017-2018. The 1st Defendant, however, failed to establish the veracity of those allegations. For instance, the 1st Defendant did not produce transactions, leases or any other proof evidencing that the Plaintiff had collected Kshs. 2,000,000.00. In fact, if this was factually true, one would imagine that he would have sought for a refund of the same in his Counterclaim: he did not. Interestingly, the 1st Defendant elected not to claim for this amount in toto or the surplus of Kshs. 800,000.00, the balance of the consideration that he claimed remained due, was deducted.

101. It was testified by DW1 that on that day he stepped out of the room and left to attend to some engagements. He left DW2 and DW3 together with the Plaintiff and DW4. The agreement dated 20/04/2017 stipulated that parties would execute the necessary transfer forms upon completion. According to DW3, DW2 and the Plaintiff executed transfer documents. DW2 was not only not a party to the transaction but also had no legal authority to execute land documents on behalf of the 1st Defendant. It is thus not clear as to how he obtained that authority. What was more strange to this evidence, however, is that DW4 stated that no transfer forms were required and that no parties executed any transfer forms on this day. The parties were only required to present the sale agreement with a copy left in the custody of DW4. Again, the 1st Defendant and DW2 testified that they were requested by DW4 to deposit the sum of Kshs. 15,000.00 for transfer fees and rates fees. However, DW4 testified

that he asked them to remit the sum of Kshs. 3,000.00. Again, strangely, the 1st Defendant testified, and it was submitted (as noted in paragraph 63 above), that title between him and the 2nd defendant passed upon fulfilment of conditions imposed by DW4. DW4 was not a party to the transactions and had no business imposing other conditions on parties to fulfil. One wonders whether such a meeting ever took place. Such discrepancies move to the truthfulness of the facts as laid out.

102. The 1st Defendant's machinations did not stop there. On 11/02/2019, his Counsel in the absence of the Plaintiff or his Counsel, applied to the court to have the suit dismissed with costs as "the Plaintiff is not interested in the suit." The court dismissed the suit for non-attendance with costs. Notably, the 1st Defendant had on record a Counterclaim that had neither been prosecuted nor dismissed. One would wonder why, after the dismissal, the 1st Defendant did not prosecute the Counterclaim forthwith. At the same time, it is baffling that whilst the Counterclaim was pending the 1st Defendant went on to "sell" the suit property to the 2nd Defendant.

103. A counterclaim is a cross suit that can survive distinctively and separately from a main suit. It is for these reasons that if a suit is dismissed, the counterclaim survives. My views are guided by the provisions espoused in Section 35 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, and Order 7 Rule 13 of the Civil Procedure Rules, 2010. Order 7 Rule 13 provides that, "If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with." Section 35 of the *Limitation of Actions Act* provides that,

> " For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded."

104. The two provisions are explicit that a counter-claim, though filed in a suit, wherein a claim has been brought, continues to exist despite the fact that, and irrespective of what happens to and causes, the main suit is not able to exist further in the proceedings. The autonomous nature of a counterclaim, separate and distinct from a main suit, albeit decided simultaneously with a suit, was held as so in the Supreme Court of India's decision of Sh. Jag Mohan Chawla & another -vs- Dera Radha Swami Satsang & Ors [1996] Insc 667 (7 May 1996). So that the question as to the rightful owner of the suit property had not been ascertained as at 11/02/2019. The 1st Defendant's whimsical reliance on the dismissal of the suit to sell the suit land remained an illegality as the status as to ownership had not been ascertained. The counterclaim had not been allowed as prayed on the said date. Consequently, the suit remained alive.

105. The 1st Defendant indicated that he was not tied by any law not to sell the suit premises. At the risk of repeating myself, in reiterating my earlier sentiments, the 1st Defendant had no authority or capacity to sell the suit land. Since ownership of title was yet to be ascertained following the subsistence of the counterclaim, there was need to preserve the subject matter of the suit in accordance with the doctrine of lis pendens. In Mawji vs US International University & another [1976] KLR 185, Madan, J.A. stated thus:-

> " The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA

and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other..."

106. In P. Exhibit 26, it was admitted that there was a pending dispute in this matter. The said agreement read in part; "... shall be paid after the Kitale Environment Land case No. 176 of 2017 between Joseph Pkerker Ngolepus -vs- Wilson Lonapa is finalized." Looking at the totality of the foregoing, it is apparent that the 1st Defendant had every intention of defeating the course of justice and committing fraud. While noting that a suit remained alive, he still elected to proceed with a purported sale. Contrary to his assertions, he was estopped by the doctrine of lis pendens from passing title pending the outcome of the present suit.

107. Thus, the 1st Defendant was engaged in a fraudulent scheme to defeat the purpose of the suit. The scheme was further observed by the drafter of the contract between the two Defendants. The law firm acting for the 2nd Defendant drew the agreement discussed in the foregoing paragraphs. He engaged the very counsel who acted for both to act for him. How then would an advocate, having acted for both parties to the transaction purport to represent only one of the parties herein?

108. The 1st Defendant's glaring fraudulent activities cannot be protected by the law. By the time he sold the property to the 2nd Defendant, he knew well that he was not the owner. He had no title to it. He could not pass a better title than he had, as enshrined in the nemo dat quod non habet rule. A court cannot uphold an illegality. The actions of the 1st Defendant were gapingly abhorrent and must be condemned. They were designed to defeat the substratum of this suit and they go into showing the lack of good faith that he had all along in the transections that led to the instant suit.

(c) Whether the 2nd Defendant was a bona fide purchaser for value without notice

109. Apart from the 1st Defendant being prevented by law by the doctrine of lis pendens from transferring the ownership of the property, if indeed he had any, he was further not permitted by law to do so. Indeed the 1st Defendant could not pass a better title than he had because he had none. He did not in essence hold any proprietary rights over the suit land.

110. Having established that, the question this Court must answer is whether the 2nd Defendant was part of his crafty scheme or an innocent and/or bona fide purchaser for value without notice. As stated, one cannot give a better title than one has. However, by that doctrine, there are indeed exceptions to that general rule. The court, in Diamond Trust Bank Kenya Ltd -vs- Said Hamad Shamisi & 2 Others [2015] eKLR had this to say:

> Firstly, Section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in BISHOPSGATE MOTOR FINANCE CORPORATION LTD V TRANSPOERT BRAKES LTD (1949) 1 KB 322, AT PP. 336 when he stated:
>
> > "In the development of our law, two principles have striven for masterly, the first is for the protecting of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title.

> The first principle has held sway for a long time, but it has been modified by the common law itself and by statue so as to meet the needs of our own times."

The 3rd and 4th defendants argue that the import and tenor of the Doctrine of Nemo dat quod non habet, was further amplified and/or otherwise deliberated upon in the decision in the case of KATANA KALUME & ANOTHER V MUNICIPAL COUNCIL FO MOMBASA & ANOTHER [2019] eKLKR.

> "Nemo Dat quod Non Habet" (No one can give that which one does not have) equally applies to the purported allocation of the suit property herein to the 2nd defendant. A person cannot give a better title than what he has, except in rare cases such as, a sale under an order of court, transfer of negotiable instrument to a holder in due course. None of these exceptions apply in this case, No person can ever pass a better title than the one he has. They relied on the decision of the court of Appeal in diamond Trust Bank Kenya Ltd vs. Said Hamad Shamisi & 2 others [2015] eKLR.

111. Similarly, the cases in Haul Mart Kenya limited -vs- Tata Africa Kenya limited (2017) eKLR and Katana Kalume -vs- Municipal Council of Mombasa (2019) eKLR, held that the law provided some exceptions to the nemo dat quod non habet rule in the following certain circumstances:

> " For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract."

112. Turning to the instant suit, the 2nd Defendant alleged that he was an innocent purchaser for value without notice. I do not agree with this evidence and assertion. It is hard to hold as such. This is because, first, from the sale agreement dated 05/04/2019, the 2nd Defendant whose Counsel drew the agreement, stated that he was aware that the suit property was the subject of the present proceedings. Moreover, the two Defendants agreed in the document that they agreed to reserve the sum of Kshs. 2,000,000.00 pending the determination of the present suit. He even went ahead and confirmed this state of affairs from the Plaintiff. The instant proceedings, of which the 2nd Defendant was therefore aware, were on ownership of the suit land. How innocent can the buyer be when he is aware that the seller is engaged in a legal tussle over the property? A person who ventures into fire knowing that it is likely to burn him shall blame himself fully if he is so burnt.

113. Again, the 2nd Defendant cannot feign innocence in the transactions. This is because, by the time be bought the property, there were tenants in it and it was clear that they had rent payment issues between the Plaintiff and the Defendant. He ought to have done due inquiry as to who owned the properties first before venturing into buying it. Additionally, when he and the 1st Defendant went to DW4's offices to effect the transfer of the suit land to him and he found that it was in the joint name of the first Defendant and the Plaintiff, that would have raised a red flag to an innocent buyer that he was jumping into a frying pan. He cannot wriggle himself out of the frying pan without having been scalded. He cannot inverse the course of events of justice and have the plaintiff thrown into the said frying pan that he caused to be hotter by using funds to try and alter the status of the property.

114. Even when he knew that the proprietary records in the County (DW4's) office were not in favour of the seller, that did not stop the 2nd Defendant's ravenous appetite from the intention to acquire the

parcel of land. For instance, he paid for the transfer fees a whooping three (3) days after executing the agreement. That is not in any way or form a definition of a bona fide purchaser. Additionally and bearing repeat, why would he retain commitment to pay the Plaintiff Kshs. 2,000,000.00 as compensation for the Plaintiff? Secondly, as rightly pointed out by the Plaintiff, the 2nd Defendant did not in any event settle the sums due from the consideration. While maintaining that he paid the sum of Kshs. 16,666,000.00, the 2nd Defendant has only proved to the satisfaction of this court, that he parted with a sum of Kshs. 10,526,000.00.

115. It is clear and beyond any form of peradventure that the 2nd Defendant was well aware of his actions and the potential ripple effects it would have had. His actions, coupled with those of his Advocates were directly intended to defeat the Plaintiff's legitimate ownership. Unfortunately, the 2nd Defendant cannot be protected on his actions or lack thereof. I thus find that he was not a bona fide purchaser for value without notice. He cannot thus fall within the exception of the nemo dat quod non habet rule.

(d) Who bears costs of the suit?

116. Section 27 of the *Civil Procedure Act* provides that costs follow the event unless for some other reason, the Court directs otherwise. It is thus discretionary. I find that the Plaintiff has succeeded in his claim as prayed. Being the successful party, and he having been made to bring this suit to claim his right, which he should have had in the first instance without the suit, he ought to be awarded costs of the suit.

ORDERS AND DISPOSITION

117. Having found that the Plaintiff has discharged his burden of proof on a preponderance of the evidence adduced, I enter judgment for him against the Defendants as follows:

a. A declaration be and is hereby made that the 1st Defendant is in breach of the agreement dated 20/04/2017.

b. The 1st Defendant shall pay the Plaintiff the sum of Kshs. 2,200,000.00 being 20% of the consideration amount as captured in their agreement dated 20/04/2017.

c. An order be and is hereby issued rescinding the agreement dated 20/04/2017 between the Plaintiff and the 1st Defendant.

d. A declaration be and is hereby made that the Plaintiff is the proprietor of that parcel of land known as Plot No. D/3 Makutano Town and should be registered so.

e. An order be and is hereby issued cancelling forthwith any changes of ownership, in the relevant office, of all that parcel of land known as Plot. No. D/3 Makutano Town contrary to (d) above.

f. The 1st Defendant's Counterclaim dated 04/02/2020 is unmerited and is hereby dismissed with costs to the Plaintiff.

g. In the interest of justice, and to avoid unjust enrichment, the Plaintiff to refund the 1st Defendant the sums of money paid to him by the said Defendant, pursuant to the rescinded agreement.

h. In the alternative to the Orders above, and should the Plaintiff not rescinding the contract entered into on 20/04/2017, the Plaintiff and 1st Defendant to negotiate afresh the sale of the suit land and factor in the sums already paid in it, the balance due, the damages payable and the consideration to be reached.

i. The 1st Defendant shall meet the Plaintiff's costs of the suit.

j. Interest.

118. It is so ordered.

Judgment, dated, signed and delivered at Kitale via Electronic Mail on this 27th day of September, 2022**

DR. IUR FREDNYAGAKA

JUDGE, ELC, KITALE

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