



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

**Civil Suit 5934 of 1992**

**JOSEPH BWOGA ONDIJO.....PLAINTIFF**

**VERSUS**

**PATRICK ODHIAMBO OSODO.....1<sup>ST</sup> DEFENDANT**

**KIMUTAI LABAN ARAP ROTICH.....2<sup>ND</sup> DEFENDANT**

**NATIONAL HOUSING CORPORATION.....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

**The Pleadings**

1.The Plaintiff's case is premised on the ground that there was a contract of sale of the suit property known as House No. J3 (the suit premises) within the Kibera Mixed Housing Development Scheme that was developed and funded by the Third Defendant herein, M/s National Housing Corporation in the late 1980's. The original plaint was filed on 6/11/1992. The plaint was later amended on 22/03/1993 and by the amended plaint, the Plaintiff prays for judgment against the Defendant's for:-

***(a) An order of this Honourable Court quashing and or annulling the transfer of the suit premises by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant.***

***(b) A declaration that the Plaintiff is the rightful owner of the suit premises***

***(c) An order of this Honourable Court to the effect that the suit premises be transferred to the Plaintiff***

***(d) In the alternative an order that the Defendants do refund the purchase money paid to the 1<sup>st</sup> Defendant and the loan repayment money paid to the 3<sup>rd</sup> Defendant with interest***

***(e)Costs of this suit and interest***

***(f) Such further order or relief which this Honourable Court may deem fit and just to grant.***

2.The Plaintiff alleges that the 1<sup>st</sup> Defendant, from whom she bought the suit premises on or about 20/08/1982 was in breach of the sale agreement when he purported to sell the same premises to the 2<sup>nd</sup>

Defendant herein to the utter detriment and prejudice of the Plaintiff. The Plaintiff alleges further that the purported sale between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was fraudulent, and in particular she alleges that the 1<sup>st</sup> Defendant was fraudulent by:-

***(a) Proprietary (sic) to sell the suit premises to the 2<sup>nd</sup> Defendant while he had already sold the same to the Plaintiff.***

***(b) Receiving interest for the suit premises while he has already received some other interest in respect of the suit premises from the Plaintiff.***

***(c) Instructing the 3<sup>rd</sup> Defendant knowing and fully well that the Plaintiff was entitled to the same (sic).***

***(d) Purporting to deprive of the Plaintiff the suit premises which rightfully belonged to the Plaintiff (sic).***

***(e) Transferring the suit premises to the 2<sup>nd</sup> Defendant while the Plaintiff had purchaser's interest on the same.***

3. The 1<sup>st</sup> Defendant filed defence on 3/08/1993 and in it he denies that he entered into any sale agreement with the Plaintiff as pleaded by the Plaintiff and instead avers that all that passed between himself and the husband of the Plaintiff, one Joseph Bwoga was that he (2<sup>nd</sup> Defendant) borrowed some Kshs.30,000/= to enable him pay the additional deposit required by the 3<sup>rd</sup> Defendant towards the purchase price of the suit premises. The 1<sup>st</sup> Defendant also avers that in or about August 1982, he leased the suit premises to one Joseph Bwoga who testified as PW2 at monthly rent of Kshs.900/= which sum he said was to be applied as follows:-

***(a) Kshs.678/= out of the 900/= was to be paid directly by the said Joseph Bwoga to the 3<sup>rd</sup> Defendant being instalment payment of monies due to the said 3<sup>rd</sup> Defendant***

***(b) Kshs.222/= to be recovered by Mr. Bwoga towards loan repayment of Kshs.30,000/= advanced to him by Mr. Bwoga.***

The net effect of the 1<sup>st</sup> Defendant's averments is that the alleged contract between himself and the Plaintiff was non-existent despite the fact that the Plaintiff produced the Sale Agreement as Exhibit 1. Instead the 1<sup>st</sup> Defendant alleges that if there was any such agreement of sale which he denied then the same was entered into fraudulently. The 1<sup>st</sup> Defendant accused the Plaintiff of being fraudulent for:-

***(a) Converting and/or using the 1<sup>st</sup> Defendant's signature on the instrument acknowledging receipt of Kshs.30,000/= as aforesaid into and/or to appear as the 1<sup>st</sup> Defendant's execution of a sale agreement.***

***(b) The 1<sup>st</sup> Defendant signed on one leafed acknowledgement of debt only to be subsequently manipulated into or to appear as a two paged sale agreement.***

***(c) The 1<sup>st</sup> Defendant signed a blank form only to be turned later into a sale agreement.***

***(d) Purporting that there was a sale agreement well aware that there was none.***

4. Finally the 1<sup>st</sup> Defendant avers that because of the terms of the tenant-purchase agreement between himself and the 3<sup>rd</sup> Defendant, he could not have gone ahead to enter into any sale agreement with the Plaintiff without the prior consent of the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant wants the Plaintiff's suit against himself dismissed with costs.

5. In his statement of defence filed in court on 21/10/1993, the 2<sup>nd</sup> Defendant avers that he was a bona fide purchaser for value and without notice of any alleged prior interest in the suit premises by a third party. He further avers that as the first registered owner of the suit premises his title is indefeasible and that he has since charged the property to Kenya Commercial Bank for a loan. The 2<sup>nd</sup> Defendant further avers that the Plaintiff's suit against him has no legal basis and ought to be struck out with costs to himself. The suit premises, now known as Nairobi/Block 62/467 was charged on 28/08/1992 to secure a loan of Kshs.530,000/=.

6. In its defence, the 3<sup>rd</sup> Defendant avers that it is the registered owner of the plot on which the suit premises stand. It alleges that it was never informed of the agreement of sale between the Plaintiff and the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant also avers that all the payments that were made to it in respect of the tenant-purchase loan were made in the name of the 1<sup>st</sup> Defendant and that at no time were the Plaintiff's alleged rights ever made known to it.

### **The Plaintiff's Evidence**

7. The Plaintiff **Akinyi Bwoga**, told the court that on 20/08/1983, she bought the suit premises from the 1<sup>st</sup> Defendant as per the Sale Agreement she exhibited as Exhibit 1. She also said that the purchase price was Kshs.30,000/= which was paid to the 1<sup>st</sup> Defendant and that upon purchase, she took possession of the suit premises and leased the same to a third party. She said that her tenant was removed in circumstances she did not understand.

8. As regards the purchase price, the Plaintiff stated that she paid the sum of Kshs.21,800/= directly to the 1<sup>st</sup> Defendant while Kshs.8,700/= was paid directly to the third Defendant. The Plaintiff explained that the payment to the third Defendant was to offset outstanding loan repayments due from the 1<sup>st</sup> Defendant to the said 3<sup>rd</sup> Defendant. The Plaintiff also stated that she did not seek the consent of the 3<sup>rd</sup> Defendant before concluding the purchase from the 1<sup>st</sup> Defendant. The Plaintiff also told the court that all the payments made in connection with the Sale Agreement were made by her husband, Mr. Joseph Bwoga Ondicho, PW2. The Plaintiff stated that she believed that the suit premises belonged to the 1<sup>st</sup> Defendant at the time of the purchase.

9. PW2 was Joseph Bwoga Ondicho, a retired employee of the Ministry of Works. He stated how he met the 1<sup>st</sup> Defendant sometime in early August 1982 and how eventually it was agreed between the two, who were in the company of one Patrick Achieng Agwang' (now deceased) that the Plaintiff should buy the 1<sup>st</sup> Defendant's house at the agreed purchase price of Kshs.30,000/= out of which Kshs.21,800 was paid directly to the 1<sup>st</sup> Defendant while Kshs.8,200/= was paid directly to the 3<sup>rd</sup> Defendant. PW2 also stated that on 20/08/1982, he and the 1<sup>st</sup> Defendant met a Mr. Joseph Njuguna of the 3<sup>rd</sup> Defendant at the latter's offices and that the said Mr. Njuguna wrote a letter on behalf of the 3<sup>rd</sup> Defendant authorizing the Plaintiff to continue making loan repayments. PW2 did not however avail a copy of the said authority to the court.

10. PW2 went on to state that after those preliminaries, the Plaintiff and the 1<sup>st</sup> Defendant executed the Sale Agreement upon which execution the 1<sup>st</sup> Defendant was paid Kshs.21,800/=. The 3<sup>rd</sup> Defendant was also paid Kshs.8,200/= as per the payment receipt dated 20/08/1982. PW2 stated further that upon execution of the Sale Agreement and the payments, the 1<sup>st</sup> Defendant wrote a letter changing the contact address from his own to that of the Plaintiff – see Exhibit 3. PW2 also informed the court that on taking possession of the suit premises, the Plaintiff leased the same to a Mr. Kent Lundaki at Kshs.400 p.m.

11. In his further testimony, PW2 stated that in or about November 1992, the 1<sup>st</sup> Defendant sold the house to a 3<sup>rd</sup> party despite the fact that PW2 had paid a total of Kshs.161,940/= to the 3<sup>rd</sup> Defendant including a sum of Kshs.58,400/= paid on 26/03/1992. PW2 stated that all the payments to the 3<sup>rd</sup> Defendant in respect of the suit premises were made in the name of the 1<sup>st</sup> Defendant. The payment

receipts dated between 20/08/1982 to 26/11/1992 were produced as Exhibit 4. The receipt for 26/11/1992 was for Kshs.58,400/=. PW2 stated further that by a letter dated 22/05/1992, the 3<sup>rd</sup> Defendant informed the Plaintiff's lawyers, M/s Njoroge & Musyoka Advocates, that the amount then outstanding on the suit premises was Kshs.61,590/= as at 31/03/1992; that there was also an amount of Kshs.3,294/= outstanding in arrears on monthly instalments of loan repayments. The amount was said to have been outstanding from January 1987. PW2 said that he paid all these amounts.

12. PW2 denied that he lent Kshs.30,000/= or any other amount to the 1<sup>st</sup> Defendant. PW2 stated that the suit premises were fraudulently sold to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant with the full knowledge of the 3<sup>rd</sup> Defendant. PW2 also denied the 1<sup>st</sup> Defendant's allegations that he (PW2) misled the 1<sup>st</sup> Defendant into signing a blank form instead of the Agreement for Sale produced as PExhibit 1. It was PW2's case that the Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant was availed to the 3<sup>rd</sup> Defendant on 24/10/1987, so that by November 1992 when the 1<sup>st</sup> Defendant was assigning the same to the 2<sup>nd</sup> Defendant, both the 1<sup>st</sup> and 3<sup>rd</sup> Defendants knew or ought to have known that the suit premises had been bought by the Plaintiff.

### **The Defence Case**

13. While admitting that he was a tenant-purchaser of the suit premises from the 3<sup>rd</sup> Defendant, the 1<sup>st</sup> Defendant, **Patrick Laban Odhiambo Osodo**, denied ever selling the suit premises to the Plaintiff. He said that in or about August 1982, he was required to pay about Kshs.9,000/= to the 3<sup>rd</sup> Defendant and that after discussions and negotiations, PW2 agreed to lease the suit premises from the 1<sup>st</sup> Defendant though the monthly rent was not agreed. He also said that PW2 agreed to lend him Kshs.30,000/= on the understanding that PW2 would make monthly instalments to the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant said that out of the loan of Kshs.30,000/=, he was paid Kshs.21,800/= in cash while the balance of Kshs.8,200/= was paid directly by PW2 to the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant denied executing the Agreement of Sale – Pexhibit 1 – and instead stated that PW2 misled him into signing a blank document at PW2's advocates' offices. He said that the signature on PExhibit 1 was slightly different from his own signature. The 1<sup>st</sup> Defendant did not however call expert evidence to confirm whether or not the signature on PExhibit 1 was indeed his. The 1<sup>st</sup> Defendant also stated that on completion of the suit premises, he went and collected keys from the 3<sup>rd</sup> Defendant and handed them over to PW2 on behalf of the Plaintiff. In further testimony, the 1<sup>st</sup> Defendant stated that PW2 leased the premises to a 3<sup>rd</sup> party without his (1<sup>st</sup> Defendant's knowledge), though he admits that PW2 paid all the outstanding loan balances to the 3<sup>rd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant stated further that at some point PW2 refused to divulge to him how much money was still outstanding to the 3<sup>rd</sup> Defendant on the suit premises, as a result of which he (1<sup>st</sup> Defendant) decided to sell the suit premises to the 2<sup>nd</sup> Defendant.

14. During cross examination, 1<sup>st</sup> Defendant admitted that he knew where PW2 worked and could have seen him at any time he wished. He also admitted that he voluntarily wrote PExhibit 3. He also said that the receipt for the instalment payment by PW2 on 20/08/1982 was handed over to safe custody to PW2 by the 1<sup>st</sup> Defendant himself. The 1<sup>st</sup> Defendant also stated that when he entered into a Sale Agreement with the 2<sup>nd</sup> Defendant, PW2 was still making payments to the 3<sup>rd</sup> Defendant. As to what Kshs.30,000/= from PW2 to himself was for, the 1<sup>st</sup> Defendant stated that it was rent deposit by PW2 and that the 2<sup>nd</sup> Defendant had agreed to refund the money to PW2.

15. DW2 was Shiguli Newton, an accountant with the 3<sup>rd</sup> Defendant. He testified that the 3<sup>rd</sup> Defendant had no knowledge of the Plaintiff and that it was also not aware of the Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant. DW2 also stated that he was not involved in the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He urged the court to dismiss the Plaintiff's case against the 3<sup>rd</sup> Defendant.

16. During cross examination, DW2 admitted that the 3<sup>rd</sup> Defendant wrote the letter of 24/04/1992 asking for balance of the outstanding account; that the account was overpaid by Kshs.6,324/= as at 31/05/2002 due to continued payments even after the loan had been liquidated. DW2 stated further that the agreement of Sale dated 3/12/1991 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was not brought to the attention of the 3<sup>rd</sup> Defendant which was required by law to give consent for the assignment. DW2 also confirmed that the loan balances amounting to Kshs.62,400/= was all cleared. From the record, the 2<sup>nd</sup> Defendant did not adduce any oral evidence.

#### Submissions

17. Learned counsel Mr. Oyugi for the Plaintiff submitted that the 1<sup>st</sup> Defendant was a pathological liar and that his evidence should be disregarded. He also submitted that the 3<sup>rd</sup> Defendant, through its officers represented to the Plaintiff that Plaintiff could enter into agreements for sale and that in any event, the Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant was submitted to a Mr. Alloo of the 3<sup>rd</sup> Defendant. In his view, learned counsel for the Plaintiff said that after the Agreement of Sale between the Plaintiff and the 1<sup>st</sup> Defendant was executed, the 1<sup>st</sup> Defendant held the suit premises in trust for the Plaintiff; that the 1<sup>st</sup> Defendant was under a duty to account to the Plaintiff when he (1<sup>st</sup> Defendant) later sold the suit premises to the 2<sup>nd</sup> Defendant. Mr. Oyugi finally submitted that the knowledge of the 3<sup>rd</sup> Defendant of the existence of the agreement between the Plaintiff and the 1<sup>st</sup> Defendant was sufficient to support the Plaintiff's cause of action against all the Defendants.

18. **Miss Mbaka**, learned counsel appeared for the 1<sup>st</sup> Defendant and submitted that the Plaintiff had not proved her case to the required standard. She submitted that the Sale Agreement between the Plaintiff and the 1<sup>st</sup> Defendant did not involve the 3<sup>rd</sup> Defendant and as such the agreement was null and void. She urged the court to dismiss the Plaintiff's suit against each of the 1<sup>st</sup> Defendant with costs.

19. Mr. Osoro, learned counsel for the 3<sup>rd</sup> Defendant concurred with submissions made by Miss Mbaka and submitted further that the Plaintiff's case must fall flat on its face because no particulars of fraud against the Defendants were made. It is to be noted that the Plaintiff amended her plaint on 22/03/1993 and gave particulars of alleged fraud against each of the Defendants. Regarding PExhibit 1 – the Sale Agreement with the 1<sup>st</sup> Defendant – Mr. Osoro submitted that the same does not involve the 3<sup>rd</sup> Defendant and that the same is therefore null and void. Learned counsel also submitted that the 3<sup>rd</sup> Defendant was ready to refund the overpayment. Counsel urged the court to dismiss the Plaintiff's suit against the 3<sup>rd</sup> Defendant.

#### **Authorities cited**

20. Learned counsel for the Plaintiff referred the court to three cases. In the **Levrie & Dennis (1893) 491**, mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees and there was no contractual relation between him and them. The surveyor acted negligently resulting in the certificates containing untrue statements as to the progress of the buildings, but there was no fraud on his part. It was held that the surveyor owed no duty to the mortgages to exercise care in giving his certificates and they could not maintain an action against him by reason of the alleged negligence.

21. The second authority was **Doyle –vs- Olby (Ironmongers) Ltd and Others [1969]2 AII ER 119**. Without going into the details of the facts of the case, the court held that the object of damages in fraud, unlike contract, is that damages should compensate the Plaintiff for all the loss that he has suffered, i.e. for all the actual damage directly flowing from the fraudulent inducement. In the case, Lord Denning MR quoting from the judgment of Sir Richard Henn Collins MR in **McConnel –vs- Wright [1903]1 Ch. 546** said

**“It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect come in, but it is an action of tort – it is an action for a wrong done whereby the Plaintiff was tricked out of certain money in his pocket, and therefore prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company.”**  
(Emphasis is mine).

22. Lord Denning MR went ahead to distinguish between damages payable on breach of contract and damages payable in an action for deceit when he said at p. 122 of the judgment:-

***“On principle the distinction is this: in contract the Defendant has made a promise and broken it. The object of the damages is to put the Plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the Defendant has been guilty of a deliberate wrong, by inducing the Plaintiff to act to his detriment. The object of the damages is to compensate the Plaintiff for all the loss he suffered, so far as, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The Defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say “I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid to you, but what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages”. All such damages can be recovered, and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen.”***

23. The third authority is **Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd. (No. 2) [1970] EA 469**. The Appellant was a company manufacturing biscuits. It entered into a contract with Respondent whereby it was to be the sole distributor for the Appellant’s biscuits for a period of three years. The Respondent was to be responsible for sales promotion and was to receive a commission. The agreement was terminated by the Appellant. The Respondent sued for damages and an account. The trial court found there was a contract and awarded damages with interest from the date the contract would have expired. The Appellant appealed, saying that the contract was too vague to be enforceable; that the Respondent had not proved that it had suffered damage and had not mitigated any loss suffered and that the Judge erred in awarding interest for a period prior to the judgment. The court held:-

**(i) in general the terms of a contract must be clear and certain;**

**(ii) a contract is likely to be found void, for uncertainty if executed or partly executed (British Bank for Foreign Trade Ltd. –vs- Novina Ltd. [1949] 1 KB 623 and F & G Sykes (Wessex) Ltd. –vs- Fine Fare Ltd. [1967] 1 Llyods Rep 53 followed)**

**(iii) as reasonable terms will be implied in respect of remuneration and termination and for the carrying out of the intention of the parties, the test of reasonableness will be invoked to cure uncertainty in other respects where the parties intended to enter into an agreement legally binding on them**

**(iv) -----**

**(v) ----- where damages have to be assessed by the court, interest should only be given from the date of judgment (Prem Lata v Mbiyu [1965] EA 592**

### **The Issues**

24. I have perused the court file but find that the parties did not agree on the issues. That notwithstanding I think that the following are the issues to be determined by this court **(a) whether there**

***was a valid and binding agreement of sale between the Plaintiff and the 1<sup>st</sup> Defendant; (b) whether the said agreement was breached by the 1<sup>st</sup> Defendant; (c) whether the 1<sup>st</sup> Defendant was fraudulent in breaching the agreement of sale (d) whether such a breach resulted in loss and damage to the Plaintiff; (e) whether the Plaintiff paid off the loan owed by the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant; (f) whether the Defendants jointly and severally defrauded the Plaintiff and deprived her of the suit premises; (g) what is the measure of damages and (h) who should bear the cost of this suit?***

### **The Findings**

25. I have now carefully considered the evidence before court. I have also considered the pleadings and the law. I have considered the submissions made by all counsel appearing. From the above consideration, there is no doubt in my mind that the Plaintiff entered into an agreement for the sale of the suit premises by the 1<sup>st</sup> Defendant to herself. Though the 1<sup>st</sup> Defendant denies that there was such an agreement, I do not think that the 1<sup>st</sup> Defendant told the court the truth when he denied the existence of the agreement and alleged that the Kshs.30,000/= paid to him was a loan from PW2. I find that the 1<sup>st</sup> Defendant's explanation of how PW2 came to give him the Kshs.30,000/= was so disjointed that it made no sense. I reject that piece of evidence by the 1<sup>st</sup> Defendant.

26. The 1<sup>st</sup> Defendant also tried to say that PW2 took him to an advocate's office and made him to sign a blank document. I find it difficult to believe the 1<sup>st</sup> Defendant's testimony particularly in view of his allegations that the signature appearing on PExhibit 1 was somehow different from his own signature a pack of lies. I am also satisfied that before the Plaintiff and the 1<sup>st</sup> Defendant entered into the agreement of sale, the parties visited the officers of the 3<sup>rd</sup> Defendant, and in particular a Mr. Joseph Njuguna and later a Mr. Alloo during which visit the Plaintiff and PW2 were assured that the Plaintiff could buy the house and continue paying off the loan. This was why immediately after consultations with the 3<sup>rd</sup> Defendant, the Plaintiff and the 1<sup>st</sup> Defendant concluded the agreement for the sale of the suit premises. As a result of that agreement, the 1<sup>st</sup> Defendant changed his address at the 3<sup>rd</sup> Defendants offices so as to facilitate easy communication between the Plaintiff and the 3<sup>rd</sup> Defendant. It was also for this reason that the 1<sup>st</sup> Defendant handed over the first payment receipt for Kshs.8,200/= to PW2. It was also for this reason that when the arrears of loan repayment began to accumulate, the 3<sup>rd</sup> Defendant wrote directly to the advocates for the Plaintiff and on 22/05/1992 demanded payment of arrears. By the 22/05/1992, it was clear that the 3<sup>rd</sup> Defendant had compromised the requirement that the 3<sup>rd</sup> Defendant ought to have given a formal consent for the sale of the suit premises by the 1<sup>st</sup> Defendant to the Plaintiff. It is my view that the 3<sup>rd</sup> Defendant was already aware of the existence of that sale agreement which had been validly executed between the Plaintiff and the 1<sup>st</sup> Defendant. On the basis of the above, I reject the 1<sup>st</sup> Defendant's defence that he did not execute the Sale Agreement dated 20/08/1982.

27. Having established that there was a valid Agreement of Sale between the Plaintiff and the 1<sup>st</sup> Defendant, I also find that the 1<sup>st</sup> Defendant was in breach of the said agreement when he purported to sell the suit premises to the 2<sup>nd</sup> Defendant by entering into a separate Agreement of Sale ten years after the sale to the Plaintiff. Both the Plaintiff and the 1<sup>st</sup> Defendant are in agreement that after the Plaintiff paid Kshs.30,000/= to the 1<sup>st</sup> Defendant on 20/08/1982, the Plaintiff took possession of the suit premises and put a tenant therein. Without any notice to the Plaintiff, the 1<sup>st</sup> Defendant ejected the said tenant and sold the suit premises to the 2<sup>nd</sup> Defendant. During his evidence in cross examination, the 1<sup>st</sup> Defendant stated that he went ahead to make the second sale because PW2 failed to show up and speak to him. The 1<sup>st</sup> Defendant however admitted that he knew the location of PW2's office and he therefore did not have to wait for PW2 to come to him. It is my view that the 1<sup>st</sup> Defendant acted fraudulently in selling the suit premises to the 2<sup>nd</sup> Defendant and in the process the Plaintiff lost the sum of Kshs.30,000/= paid to the 1<sup>st</sup> Defendant and also lost the money she paid to the 3<sup>rd</sup> Defendant in respect of the suit premises and also lost the suit premises plus the rent that she would have received from the same. The evidence is on record to show that the Plaintiff paid off the entire loan taken by the 1<sup>st</sup> Defendant from the 3<sup>rd</sup> Defendant, and

that this was done on the advice and with the concurrence of the 3<sup>rd</sup> Defendant.

28. What then is the measure of damages to the Plaintiff in this case? In this case, as was the position in **Dyle v Olby (mongers) Ltd. & Others (supra)**, the Plaintiff not only lost the money she paid to the 3<sup>rd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant, but she has lost the house and possible revenue from rent. It was held in the case above by both Lord Denning MR and Winn LT that there is a dearth of authority on what is the proper measure of damages for deceit. Winn LJ says in the above cited case that a Plaintiff must demonstrate that the damage he seeks to recover must have flowed directly from the fraud perpetrated on him. Applying that principle to this case, I do think that if the Plaintiff herself had sold the house when the 1<sup>st</sup> Defendant fraudulently sold the house to the 2<sup>nd</sup> Defendant, she would have sold it at the same purchase price of Kshs.300,000/= as at 1/08/1992. In my view that amount plus the amount paid by the Plaintiff to the 3<sup>rd</sup> Defendant to offset the loan taken by the 1<sup>st</sup> Defendant amounting to Kshs.78,000/= was the loss suffered by the Plaintiff. The Sale Agreement dated 20/08/1982 entered into between the Plaintiff and the 1<sup>st</sup> Defendant provided that if the agreement were to be rendered of no effect, then the 1<sup>st</sup> Defendant was to refund all money paid to him or on his behalf by the Plaintiff as purchaser. In total I would round off the amount to Kshs.400,000/= in damages. I accordingly enter judgment for the Plaintiff as against all the three Defendants jointly and severally for the said sum of Kshs.400,000/= together with costs of this suit and interest. The Plaintiff shall have interest at court rates on the sum of Kshs.78,000/= from date of filing suit, while the balance thereof in the sum of Kshs.322,000/= shall draw interest from the date of judgment until payment in full.

30. The Plaintiff shall also have the costs of this suit.

Orders accordingly.

Dated and delivered at Nairobi this 31<sup>st</sup> day of July 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

..... for the Plaintiff

..... For the Defendants

.....- court clerk