



**Karuga & another v Ndegwa & another (Environment & Land Case
20 of 2008) [2022] KEELC 15179 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15179 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 20 OF 2008**

**MD MWANGI, J
NOVEMBER 24, 2022**

BETWEEN

ROSE WAMBUI KARUGA 1ST PLAINTIFF

KENNETH GICHINGA KARUGA 2ND PLAINTIFF

AND

TITUS GETHI NDEGWA 1ST DEFENDANT

AJAA OLUBAYI T/A AJAA OLUBAYI & CO. ADVOCATES 2ND DEFENDANT

JUDGMENT

1. This case was filed by Dedan Karuga Gichinga, now deceased, way back on January 30, 2008. Upon his death, he was substituted by the Administrators of his estate, the current Plaintiffs.
2. The basis of the Plaintiffs' claim is that the deceased Dedan Karuga Gichinga (herein after referred to as 'the deceased') entered into an agreement with the 1st Defendant for sale of the parcel of land known as LR No 195/195 Karen (hereinafter referred to as 'the suit property'). The sale agreement was dated January 27, 2006. The 2nd Defendant was the Advocate for both parties in the agreement.
3. The Plaintiffs aver that the deceased, upon request by the 2nd Defendant delivered to the 2nd Defendant title documents to facilitate the transfer of the suit property to the 1st Defendant. The deceased delivered the documents upon representation by the 2nd Defendant that:
 - a. The payments for the property was to be made to the 2nd Defendant before the transfer/indenture was to be registered in favour of the 1st Defendant. The payments were to be released to the Plaintiff (the deceased) upon successful registration of the transfer/indenture in favour of the 1st Defendant.



- b. The 2nd Defendant would hold the documents in trust and to the deceased's order returnable on demand pending the 1st Defendant's payment to the deceased through the 2nd Defendant, the entire purchase price of Kshs 15,000,000/-. If the 1st Defendant failed to pay the consideration, the 2nd Defendant was to return all the title documents in the same conditions in which they were so deposited and should registration have taken place, the 2nd Defendant was to procure the simultaneous cancellation of the registration of all the documents to reinstate the deceased's title to the suit property.
 - c. The Defendants jointly and severally represented to the Plaintiff that the 1st Defendant had the money ready for the purchase of the suit property.
4. The Plaintiffs aver that the deceased acted on the representations by the Defendants and on May 2, 2006, the deceased delivered to the 2nd Defendant title documents to facilitate the transfer of title to the 1st Defendant; including the original title of the property LR No 195/90 and a duly executed and 'registrable' transfer/indenture.
5. The deceased stated in the plaint that he later discovered that the representations by the Defendants were either false or fraudulent in all material aspects. He arrived at that conclusion when he realized that the 1st Defendant did not have the funds to purchase the property. If he had the money, then he did not have the intention of completing the contract for sale. Secondly, the deceased stated that the 2nd Defendant proceeded to register the transfer/indenture of the suit property without his explicit approval or concurrence.
6. The deceased relied on the representations of the Defendants to his detriment. He therefore averred that the transfer/indenture of his property to the 1st Defendant through the supervision of the 2nd Defendant was illegal, fraudulent and therefore null and void. He particularized the alleged fraud at paragraph 11 of the plaint.
7. As soon as the deceased discovered that the representations by the Defendants were false/fraudulent, he repudiated the said contract by way of letters dated May 6, 2007, November 21, 2007 and December 21, 2007 through his advocate. He therefore pleaded that the sale was canceled and he was entitled to the re-transfer (re-conveyance) of the title to the suit property to his name.
8. The Plaintiffs alternatively and without prejudice to the foregoing accused the 2nd Defendant of professional negligence as the advocate for the deceased for failing to exercise reasonable care and skill which he owed the deceased as his advocate in the transaction.
9. As a consequence of the negligence of the 2nd Defendant, the Plaintiff suffered loss of losing ownership and use of the suit property as particularized in paragraph 14 of the plaint.
10. The Plaintiffs therefore pray for judgment against the Defendants jointly and severally for: -
 - a) Rescission of the said contract of sale alternatively a declaration that the agreements for sale between the parties herein in respect to LR No 195/195 Karen, Nairobi are illegal, fraudulent, null and void.
 - b) Cancellation of the Transfer/Indenture in respect of the suit property and registered in the name of the 1st Defendant. The 1st Defendant be directed to execute necessary transfer documents back to the Plaintiff and failure to which the Deputy Registrar to sign on his behalf.



- c) An order of forfeiture of the sum of Kshs 1,500,000/- being 10% of the purchase price paid by the 1st Defendant to the Plaintiff.
- d) Mesne profits as particularized at paragraph 14 of the plaint.
- e) Legal fees and stamp duty on re-transfer of the property.
- f) In the alternative, the 1st Defendant be ordered to pay the entire purchase price of the suit property with interest at commercial rates 15% from 30th May 2006 until payment in full. (both days inclusive)
- g) Damages against the 1st Defendant for breach of contract.
- h) Damages against the 2nd Defendant for fraudulent misrepresentation and or in the alternative damages for professional negligence.
- i) A permanent injunction restraining the 1st Defendant, and his agents from alienating, encumbering, disposing off or trespassing on the suit property.
- j) Costs of the suit.
- k) Interest on (d), (e), (f), (g), (h), &, (j) at court rates from the date of filing this suit until payment in full.
- l) Any other relief that the Hon. Court may deem fit to grant.

Responses by the Defendants

11. Both Defendants filed their respective statements of Defence. The 1st Defendant's was dated March 18, 2008 which he later amended to include a counter-claim on March 12, 2015. The 2nd Defendant's statement of Defence is dated March 9, 2008.

The 1st Defendant Amended Defence, Counter-claim and Set off.

12. The Amended Defence and counterclaim was filed pursuant to leave of court granted on the March 9, 2015.
13. The 1st Defendant in his defence denies the allegations leveled against him by the Plaintiffs. He merely admitted that the 2nd Defendant acted on his behalf in the transaction for the purchase of the property but denied all other allegations contained in the plaint.
14. Further, and on a without prejudice basis, the 1st Defendant states that the deceased was at liberty to get an independent counsel to act for him in the transaction but he opted to use the 2nd Defendant as his advocate. The 1st Defendant averred that the deceased unilaterally and deliberately decided that the 2nd Defendant should act for both of them and that he at all times approved the appointment of the 2nd Defendant to handle the transaction.
15. The 1st Defendant further states on a without prejudice basis that pursuant to the mutual variation of the sale agreement herein, he paid the entire agreed purchase price of Kshs 5,000,000/- to the deceased who acknowledged receipt in the indenture executed by the two parties.
16. The 1st Defendant states that he always had the money to complete the outstanding payments (if any) but discovered later that the property was not in the state in which it had been represented to him. He claims to have incurred costs of refurbishing the house.



17. The 1st Defendant denies the allegations of fraud leveled against him by the Plaintiffs. He contends that the purported failure to complete the transaction in time was due to the misrepresentations by the deceased. He however, claims that he eventually completed the purchase price as mutually agreed.
18. The 1st Defendant argues that there was absolutely no fraud in the transfer of the title to the suit property to him as there was due adherence to the terms and conditions of the sale agreements, the Advocates Act and the LSK Conditions of Sale. He denied any misrepresentation on his part and averred that the purchase price was paid to the deceased who duly acknowledged receipt. He argued that he was the one who in fact suffered loss and damage on account of breach of the terms of sale by the deceased.
19. The 1st Defendant further asserted that there was no provision for repudiation of the transaction in the sale agreement hence the said remedy was not available to the deceased. He alleged that he completed the construction and/or refurbished the house on the suit property at his own costs of Kshs 3.6 million and therefore repudiation of the contract would deprive him value of the development and unjustly enrich the Plaintiffs. The suit property is in any event registered in his name after having paid the agreed purchase price. The Plaintiffs can only therefore claim any outstanding amounts less the amounts claimed in the 1st Defendant's counterclaim.
20. The 1st Defendant further denied that any loss was suffered by the Plaintiffs. He stated that despite the property having been registered in his name and having expended on its refurbishment, the deceased had wrongfully rented out the property and the Plaintiffs have been collecting rent. The Plaintiffs cannot therefore claim mesne profits from the 1st Defendant being the ones in actual physical possession of the suit property and enjoying rent.
21. In his counterclaim, the 1st Defendant avers that he paid the deceased a sum of Kshs 5,000,000/- which sum he acknowledged receipt of in full and final settlement of the purchase price. The deceased allegedly confirmed and acknowledged in writing as shown in the indenture dated May 30, 2006.
22. The 1st Defendant further averred that, the sum of Kshs 5.0 million was the correct purchase price as the collector of stamp duty valued the property at Kshs 7,000,000/- for purposes of assessing the stamp duty payable. He stated that it was after payment of the said purchase price, that he was consequently registered as the owner of the suit property and possession handed over to him.
23. The 1st Defendant alleged that it was only after taking possession of the suit property that he realized that the property required extensive construction and refurbishment. He therefore allegedly spent Ksh 3,500,000/- to this end. However, and upon completion of the refurbishment, the deceased denied him access to the suit property and proceeded to rent it out to a third party.
24. The 1st Defendant claims that he has suffered loss and damage being Kshs 120,000/- per month from August 2007 to date, and Kshs 3,500,000/- spent for refurbishing the suit property; which amounts he claims from the Plaintiffs.
25. The 1st Defendant asserts that in the event that the court finds that he is indebted to the Plaintiffs, he pleads a set off.
26. He further avers that the 2nd Defendant is yet to release the title documents to him and therefore seeks an order directing the 2nd Defendant to release the title documents in respect of the suit property to him. He also seeks an order of vacant possession of the suit property.
27. The 1st Defendant prays for judgment as follows;
 - a) Dismissal of the Plaintiff's suit with costs



- b) The 2nd Defendant be directed to release to the 1st Defendant the title documents of the suit property.
- c) The Plaintiff be compelled to grant vacant possession to the 1st Defendant of the suit property.
- d) A sum of Kshs 3,500,000/- for the refurbishment costs of the suit property by the 1st Defendant from the Plaintiff.
- e) A sum of Kshs 120,000/- per month from August 2007 until the date of judgment.
- f) A set off of the amounts claimed by the 1st Defendant against the Plaintiff as against any amounts, the court may deem payable by the 1st Defendant to the Plaintiff.
- g) Interest on the above prayers at court rates.

The 2nd Defendant's Statement of Defence.

- 28. The 2nd Defendant on his part filed a statement of Defence dated March 9, 2008.
- 29. The 2nd Defendant avers that on or about January 27, 2006, the deceased and the 1st Defendant together walked into his office and instructed him to draw an agreement for sale of the suit property for them. He allegedly advised the deceased to retain a different advocate to act for him but the deceased declined and insisted on him being his advocate.
- 30. He stated that at the time of instructing the 2nd Defendant, the deceased and the 1st Defendant had already agreed on the amount of deposit of the sale price payable and the further installments payable by the 1st Defendant directly to the deceased. They had also agreed that the 2nd Defendant would not handle any monies for the sale of the suit property. Further, that the balance of the purchase price would be paid only after the title to the suit property was registered in the name of the 1st Defendant.
- 31. The 2nd Defendant further states that the deceased and the 1st Defendant clearly decided that he was not to hold the deposit or any other part of the purchase price as a stakeholder. The deposit was therefore paid directly to the deceased.
- 32. The 2nd Defendant further states that although he advised the deceased not to transfer the title to the suit property to the 1st Defendant before payment of the entire balance of the purchase price, the deceased declined the advice insisting that he was sure that the 1st Defendant, who was his friend would honour his obligation. The deceased also rejected the alternative proposal to allow the 2nd Defendant hold the balance of the purchase price on his behalf before executing the transfer of the title to the suit property.
- 33. The deceased allegedly assured the 2nd Defendant that the 1st Defendant would definitely pay him the balance of the sale price after registration of the title. As an Advocate, the 2nd Defendant could not act contrary to the instructions of the clients. The 2nd Defendant therefore drafted the agreement and engrossed it for execution by the parties therein as duly and expressly instructed.
- 34. It was upon execution of the agreement that the title to the suit property was successfully registered in the name of the 1st Defendant.



35. The 2nd Defendant denied the allegations of fraudulently misrepresenting to the deceased and giving any warranty. The 2nd Defendant therefore averred that although the deceased had suffered loss and damage, the same was not attributable to him.
36. The 2nd Defendant asserted that due to the failure by the 1st Defendant to pay to the deceased Plaintiff the balance of the purchase price, he severally advised the 1st Defendant to re-convey the title to the suit property to the deceased but the 1st Defendant declined. On his part he affirmed that he was willing to handover the title to the suit property to the Plaintiffs if and when instructed to do so by either the 1st Defendant or the court.
37. The 2nd Defendant therefore prays that the Plaintiffs' suit against him be dismissed with costs.
38. The deceased filed an Amended Reply to the 1st Defendant's Amended Defence and counterclaim dated March 20, 2015 whereby he denied all the allegations in the amended defence and counterclaim. In refuting the 1st Defendant's claim for the cost of refurbishing the house, the deceased particularly pointed out that the suit property was to be sold, if at all on 'as is, where is basis' as stated in clause 2 of the agreement for sale.
39. The deceased too particularly denied that the sale price was varied as alleged and or that the 1st Defendant paid him Kshs 5,000,000/- as alleged.

Defence to counterclaim and set off.

40. The Plaintiffs denied all the allegations contained in the counterclaim and set off. The Plaintiffs in particular denied the alleged breach of contract. Their position was that the registration of the 1st Defendant as the proprietor of the suit property was obtained through misrepresentation, collusion and fraud and as such the 1st Defendant was not entitled to possession.
41. The Plaintiffs insisted that the 1st Defendant was not ready to perform his obligations under the contract, leaving the deceased with no option but to repudiate the contract. The Plaintiffs denied that the 1st Defendant was entitled to vacant possession, release of title documents and or Kshs 3,500,000/- as the claims were not only unjustifiable but were also time barred. The 1st Defendant had been indolent and guilty of laches in bringing his counter-claim. Further that the 1st Defendant Amended Defence and counterclaim was a sham and did not raise any cause of action against the Plaintiffs.
42. Consequently, the Plaintiffs prayed that the 1st Defendant's Amended Defence and counterclaim be struck out and judgment be entered for the Plaintiffs as prayed for in the amended plaint.

Evidence adduced on behalf of the Plaintiffs.

43. I must state that the original plaintiff, Dedan Karuga Gichinga died before the hearing of this case, on February 24, 2016. He was substituted by the current Plaintiffs who are the administrators of his estate on November 2, 2017.
44. The Plaintiffs called 3 witnesses.
45. PW1 was Kenneth Gichinga Karuga, the 2nd Plaintiff herein and a son of the deceased. The witness adopted his witness statement dated November 1, 2018 as his evidence in chief.
46. PW1 affirmed that his late father entered into an agreement for sale of a portion measuring 0.3733 hectares dated January 27, 2006 with the 1st Defendant. The 2nd Defendant was acting as the advocate for both parties. The agreed purchase price was Kshs 15,000,000/=.



47. The witness averred that the 1st Defendant only paid a deposit of Kshs 1,500,000/- equivalent to 10% of the purchase price.
48. The balance of the purchase price, Kshs 13,500,000/- was to be paid upon issuance of the title. In accordance with the terms of the agreement, the deceased executed the transfer of the title in favour of the 1st Defendant and the transfer was effected on July 19, 2006.
49. The 1st Defendant however, was unable to pay the balance of Kshs 13,500,000/-. DW1 asserted that the transfer of the title to the 1st Defendant was therefore illegal, fraudulent, null and void since 1st Defendant did not honour his part of the bargain. When they went for the money from the 2nd Defendant, they were shocked to learn that the 1st Defendant had not deposited the money with the 2nd Defendant. They learnt that the 1st Defendant did not even have the money to pay for the balance of the purchase price as he on March 27, 2007 wrote to the deceased requesting to be allowed to charge the property in order to raise the balance of the purchase price.
50. PW1 stated that the Defendants had misrepresented to the deceased that the 1st Defendant was capable of performing his obligations which was not true as it subsequently turned out that he did not even have the money to pay the balance of the purchase price.
51. The deceased's advocates Kerandi Manduku & Ondabu Advocates took up the issue and by way of a letter dated December 21, 2007 issued a notice to the 2nd Defendant canceling the transaction.
52. It was PW1's evidence that the suit property has definitely appreciated in value to approximately Kshs 50,200,000/- as confirmed by the valuer (PW 3) who had valued the suit property and prepared a report which PW1 made reference to in his testimony.
53. In cross-examination by the advocate for the 1st Defendant, PW1 confirmed that the deposit paid was actually Kshs 1.5 million. That would then make the balance of the purchase price Kshs 13.5 million. Under clause 1 of the agreement (original), the balance of Kshs 13.5 million was payable upon issuance of the title and in the mode that was to be provided for in the further agreement that was to be executed within 14 days from the date of the original agreement.
54. Under clause 1 of the 2nd (subsequent) agreement dated March 13, 2006, the deceased who was the vendor acknowledged receipt of a further Kshs 1.0 million and committed to give the purchaser the documents listed under clause 4 to enable completion of the agreement. PW1 confirmed that there was no clause in the 2nd agreement varying the time for payment of the balance of the purchase price.
55. There was a 2nd supplementary agreement dated May 30, 2006. Clause 2 thereof provided that the balance would be paid after the indenture was registered in favour of the purchaser (the 1st Defendant). The clause did not however set the specific timelines within which the payment was to be done.
56. PW1 confirmed that clause 2 of the 1st supplementary agreement of March 13, 2006 had provided that the vendor was to give possession of the property to the purchaser who would then complete the construction of the partially completed residential house at his own cost. PW1 was categorical that the 1st Defendant did not take physical possession of the suit property; neither did he renovate the house as alleged.
57. It was PW1's testimony that the house on the suit property has been vacant all through. They had not rented it to a third party at any time. The house is adjacent to their main family house.
58. On the aspect of repudiation, PW1 confirmed that the agreement between the deceased and the 1st Defendant did not have an explicit repudiation term.



59. On cross-examination by the advocate for the 2nd Defendant, PW1 stated that he was not aware whether the deceased knew the 2nd defendant before the agreement of January 27, 2006 was made. He further was not aware of the kind of advice given by the 2nd Defendant to the deceased. He was however alive to the fact that the terms of the agreement between the deceased and the 1st Defendant were mutually agreed upon by the two.
60. PW1 insisted that the 1st Defendant swindled the deceased on the advice or counsel of the 2nd Defendant; - on the promise that the balance of the purchase price would be available upon registration of the title (indenture) in favour of the 1st Defendant. PW1 was not aware if the deceased lodged a complaint of professional misconduct against the 2nd Defendant with the Law Society of Kenya or the Advocates Complaints Commission for that matter.
61. As far as PW1 knew, all the monies were paid by the 1st Defendant directly to the deceased and not through the 2nd Defendant. He knew that the title of the suit property, though registered in the name of the 1st Defendant was still being held by the 2nd Defendant.
62. PW1's opinion on the responsibility of the 2nd Defendant to the deceased was that he had a moral obligation to ensure that before the transfer of the title to the purchaser, the money to pay the balance of the purchase price was available, in order to complete the transaction.
63. In re-examination, PW1 reiterated that he had not seen the acknowledgment of Kshs 500,000/- by the deceased before the date of the hearing. Further that clause 1 of the agreement of May 30, 2006 confirmed the balance of the purchase price to be Kshs 13,500,000/-. The letter dated November 7, 2006 by the 1st Defendant also acknowledged the balance to be Kshs 13,500,000/-; though was the letter of July 7, 2008 by JK Mwangi & Co Advocates. This is a letter written after this case had been filed.
64. PW1 insisted that the balance of the purchase price was payable immediately after the registration of the indenture in favour of the 1st Defendant.
65. PW2 was an advocate who had previously acted on behalf of the deceased. PW2 stated that his initial instructions were that the 2nd Defendant had received the balance of the purchase price from the 1st Defendant and failed to remit it to the deceased. That was why he wrote a demand letter to the 2nd Defendant on behalf of the deceased dated April 10, 2007. He however, came to learn that the 2nd Defendant had not received any payments from the 1st Defendant. He therefore engaged the 2nd Defendant giving him the option to re-convey the title to the deceased if the 1st Defendant was unable to pay the balance of the purchase price. On further engagement, PW2 stated that they agreed with the 2nd Defendant that the transaction stood canceled in view of the failure of the 1st Defendant to honour his part of the bargain.
66. The 1st Defendant apparently instructed another Advocate, JK Mwangi whom PW2 also corresponded with but the stalemate was not resolved. PW2 therefore proceeded to file suit to protect his client's interests. He however still made attempts to resolve the matter amicably without success. His client's position was that the title to the suit property be re-conveyed to him since the 1st Defendant had demonstrated that he was either unwilling or unable to pay the balance of the purchase price. The balance of the purchase price was Kshs 13.5 million according to PW2.
67. On cross-examination by the Advocate for the 1st Defendant, PW2 confirmed that according to clause 3 of the agreement of January 27, 2006, the balance of the purchase price was payable upon transfer of the title to the suit property to the purchaser.



68. The subsequent supplementary agreements did not change that provision under clause 3. The agreements too did not specify the definite period within which the balance of the purchase price was payable after the registration of the transfer in favour of the 1st Defendant. Further there was no repudiation clause.
69. PW2 stated that he did not receive any direct communication from the 1st Defendant expressing his inability to pay the purchase price.
70. PW2 expressed an opinion that the 2nd Defendant did not handle the transaction between the 1st Defendant and the deceased professionally.
71. PW2 was of the view that the LSK conditions of sale were applicable in the transaction herein. The payments therefore should have been made immediately upon transfer of the title to the 1st Defendant.
72. PW3 was the valuer who valued the suit property. He produced in evidence his report dated May 24, 2018. He had used the cost approach method in arriving at the value of the suit property.

Evidence adduced on behalf of the 1st Defendant.

73. The 1st Defendant testified as the only witness in his case. He adopted his witness statement dated September 16, 2019 as his evidence in chief.
74. The 1st Defendant stated that they were friends with the deceased, the late Dedan Karuga. The agreement they had was for the sale of 1 acre of land at Karen in Nairobi. The purchase price was Kshs 15.0 million out of which he had paid a deposit of Kshs 1,500,000/- equivalent to 10% of the purchase upon signing the agreement. The balance was to be paid upon transfer of the title documents to him.
75. The 1st Defendant's testimony was that upon them signing the 1st supplementary agreement, he paid a further Kshs 1,000,000/- to the deceased which he acknowledged in the said agreement. Clause 2 of the agreement allowed him to take possession of the suit property to develop and make use of the house. He actually proceeded to take possession. It is at that time that he allegedly spent Kshs 3.5 million refurbishing the house since the property was unkempt and seemingly abandoned for many years.
76. The deceased thereafter denied him access to the premises in the same year after he had finished renovating the house around the year 2008.
77. The 1st Defendant averred that the agreement with the deceased was willingly entered into without any coercion and or compulsion. The agreement had no repudiation clause; neither the 1st nor the 2nd supplementary agreement.
78. The 1st defendant expressed his wish was to finish the payment of the balance of the purchase price and conclude the transaction as originally intended. He recanted the allegations in his statement of Defence and Counter-claim to the effect that he had paid the purchase price in full and instead stated that he was ready and willing to pay the balance of the purchase price to the Plaintiffs.
79. The 1st Defendant stated that he had paid the deceased a total sum of Kshs 7.5 million. The sum of Kshs 5.0 million was acknowledged in the indenture which was executed by the deceased and himself. The balance due that he was therefore willing to pay was Kshs 7.5 million.
80. The 1st Defendant averred that he had unsuccessfully made attempts to reach out the Plaintiffs to settle the dispute amicably. He urged the court to allow him pay the balance of the purchase price and settle the matter.



81. On cross-examination by the advocate for the Plaintiffs, the 1st Defendant confirmed that he was renouncing what he had stated in his witness statement and in his amended statement of defence and counterclaim. Instead, he acknowledged owing the balance of the purchase price and expressed his wish to pay the said balance of the purchase price to the Plaintiffs and settle the matter. He further confirmed that the purchase price was Kshs 15.0 million and not Kshs 5.0 million as he had earlier stated. As far as he was concerned he owed the Plaintiffs a sum of Kshs 7.5 million.
82. The 1st Defendant again agreed that his letter dated November 7, 2006 acknowledged the balance of kshs 13.5 million which he had undertaken to clear.
83. The 1st Defendant affirmed that he was supposed to pay the balance of the purchase price upon successful transfer of the title to his name. He had been willing to pay the said balance but he was kicked out of the suit property by the deceased. That was the reason why he declined to pay him the balance then.
84. In regard to the deed of indenture, the 1st Defendant agreed that it bore the same date with the 3rd agreement (2nd supplementary agreement). He agreed with Counsel for the Plaintiffs that the agreements for sale contained the terms between him and the deceased, not the indenture.
85. The 1st Defendant had visited the suit property before signing the agreement with the deceased and therefore knew its condition.

Evidence adduced on behalf of the 2nd Defendant.

86. The 2nd Defendant too testified as the only witness in his case. He adopted his witness statement dated July 25, 2018 as his evidence in chief.
87. He testified that the 1st Defendant and the deceased instructed him to draw an agreement for sale of the suit property at the price of Kshs 15 million. The agreement was signed on January 27, 2006. The 1st Defendant paid a deposit of Kshs 1.5 million leaving a balance of Kshs 13.5 million which was to be paid within 14 days of registration of the suit property in the name of the 1st Defendant.
88. The 2nd Defendant confirmed that the 1st Defendant paid the deposit of kshs 1.5 million and subsequently a further Kshs 1.0 million only on March 13, 2006.
89. In the month of May 2006, the 2nd defendant made the indenture/transfer of the suit property to the 1st Defendant. He confirmed that though the sum of Kshs 5 million was indicated as having been paid by the 1st Defendant to the deceased, it had not actually been paid. It was indicated that way for purposes of assessment of the stamp duty. That was why the 2nd Defendant advised the parties to do a further agreement (2nd supplementary agreement). He agreed with the Counsel for the Plaintiffs that the agreements for sale rather than the indenture contained the terms and conditions of their agreement with the deceased.
90. The 1st Defendant further confirmed that he had visited the suit property before signing the agreement with the deceased and therefore knew its status even as he signed the agreement.

Evidence adduced on behalf of the 2nd Defendant

91. The 2nd Defendant too testified as a witness in his own case. He adopted his witness statement dated July 25, 2018 as his evidence in chief. He explained that the deceased and the 1st Defendant instructed him to draw an agreement for sale of the suit property at the price of Kshs 15.0 million. The agreement was signed on January 27, 2006.



92. The 1st Defendant paid a sum of Ksh 1.5million as a deposit leaving a balance of Kshs 13.5 million which was to be paid within 14 days of registration of the suit property in the name of the 1st Defendant.
93. The 2nd Defendant confirmed that the 1st Defendant subsequently paid a further sum of Ksh 1.0 million on March 13, 2006 leaving the outstanding balance as Kshs 12.5 million.
94. In the month of May 2006, the 2nd Defendant made the indenture/transfer of the suit property to the 1st Defendant. He confirmed that although the sum of Kshs 5.0 million was indicated as having been paid by the 1st Defendant and acknowledged by the deceased, it was not actually paid. It was only indicated that way for purposes of assessment of stamp duty to facilitate the transfer of the title to the 1st Defendant. That was the reason why the 2nd Defendant advised the parties to do the 2nd supplementary affidavit bearing the same date as the indenture/transfer expressly stating the true position. That explains the agreement of May 30, 2006. The agreement explicitly stated that the balance of the purchase price due from the 1st Defendant to the deceased was Kshs 12.5 million. The Kshs 5.0 million was not actually paid to the deceased.
95. The indenture transferring the title to the name of the 1st Defendant was registered on July 19, 2006. Upon collecting it from the lands office, the 2nd defendant confirmed that he requested the 1st Defendant to honour his obligation and pay to the deceased the balance of the purchase price in full as he was bound to. The 2nd Defendant did not comply and according to the 2nd defendant, the 1st Defendant has not paid up the said balance todate.
96. The 2nd Defendant confirmed that all the agreements and the indenture were signed in his presence. He attested them as a witness.
97. The 2nd Defendant stated that he had advised the deceased not to transfer the title to the name of the 1st Defendant before receiving the entire amount but he did not heed insisting that they were friends with the 1st Defendant, and he had no doubt that the 1st Defendant would honour his obligations.
98. On cross-examination by the Advocate for the Plaintiffs, the 2nd Defendant affirmed that the 1st Defendant and the deceased always went to his office together. They had jointly instructed him. That is why he was acting for both of them.
99. Despite him advising the deceased to get another advocate, the deceased insisted on using him as his advocate. The deceased too declined the proposal by 2nd Defendant that he holds the money as a stakeholder before effecting the transfer to the 1st Defendant. The 2nd Defendant therefore had no choice but to act as instructed by his clients. He reduced the parties' agreement into writing as expressly instructed by them. He did not receive any monies on behalf of the deceased. The deposit and the subsequent sum of Kshs 1.0 million was directly paid to the deceased by the 1st Defendant.
100. Payments for the balance of the purchase price was to be done by way of bankers cheque as stated in the 2nd Supplementary agreement of May 2006. The agreement according to the 2nd Defendant was explicit that the transfer was to be done first then payments of the balance of the purchase price to follow in 14 days.
101. The 2nd Defendant confirmed that he was the one who prepared the indenture and the 2nd Supplementary agreement whose sole purpose was to clarify that the sum of Kshs 5.0 million (indicated in the indenture as paid) had not actually been paid. That is the agreement dated May 30, 2006. It stated that the balance of the purchase price was Kshs 13.5 million. The total paid though taking into account the Kshs 1.0 million paid subsequently was Kshs 2.5 million hence the balance should have been Kshs 12.5 million.



Court's directions.

102. Upon the conclusion of the hearing, the court directed parties to file written submissions. All the parties complied. I thank the advocates for the parties for the great effort: Mr Kosgei for the Plaintiffs, Ms Mutinda for the 1st Defendant and Ms Muriithi for the 2nd Defendant.
103. The court has had an opportunity to read through their submissions and the authorities cited in support of their respective positions.

Issues for determination.

104. This is a convoluted case by all standards. Having considered the pleadings filed, the evidence adduced and the respective submissions filed by the parties, the court is of the view that the issues for determination in this case are: -
- a) Whether the 1st Defendant breached the terms of the agreement of sale between him and the deceased by failing to pay the balance of the purchase price immediately after the transfer of the title to the suit property into his name.
 - b) Subject to (a) above, whether the vendor could lawfully repudiate the agreement for sale.
 - c) Subject to (b) above, whether in case of repudiation of the agreement the vendor is entitled to retain the sum of Kshs 1,500,000/- being the equivalent of the 10% of the purchase price.
 - d) Subject to (b) above, whether the vendor is entitled to damages for breach of contract, and mesne profits.
 - e) Subject to (b) above, whether the title in favour of the 1st Defendant should be canceled.
 - f) Whether the Plaintiffs are entitled to an order of permanent injunction against the 1st Defendant.
 - g) Whether the Plaintiffs have made a case of professional misconduct against the 2nd Defendant.
 - h) Whether the 1st Defendant has proved the expenditure of Kshs 3.5 million for the refurbishment of the suit property.
 - i) Subject to (b) above, whether the 1st defendant is entitled to the sum of Kshs 120,000/- per month from August 2007 until the date of judgment.
 - j) Who should bear the costs of the suit and the counter-claim.



Analysis and Determination.

A. Whether the 1st Defendant breached the terms of the agreement for sale by failing to pay the balance of the purchase price immediately after the transfer of the title to the suit property to his name.

105. Clause 3 of the agreement dated January 27, 2006 stated that;

' The balance of the Purchase Price being the sum of Kshs 13, 500,000/= shall be paid after the issuance of title and in the mode that shall be stated in the agreement that shall be executed within 14 days from the date hereof which agreement shall supersede this one.'

106. The subsequent Agreement dated March 13, 2006 was silent on the mode of payment of the balance of the Purchase Price. There was a third Agreement however, dated May 30, 2006 which in clauses 1, 2 and 3 thereof stated that;

- a) The Vendor is yet to be paid the balance of Kshs 13,500,000/-
- b) The balance shall be paid after the indenture is registered in favour of the Purchaser.
- c) The payment shall be by banker's cheque only.

107. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale v Umon Manufacturing Co (Ramsboltom) [1918] LR 1KB 592*, Scrutton LJ held as follows:

' The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.'

108. In the case of *General Properties Limited v Saika Two Estate Developers Limited [2021] eKLR*, the court made reference to the *Black's Law Dictionary, 9th Edition*, Page 213, which defines a breach of contract as;

' A violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be by non-performance or by repudiation or by both.'

109. The 1st Defendant who was the purchaser obviously did not honour the obligations spelled out above. He in his own testimony under oath admitted that he did not pay in full the balance of the purchase price as stipulated above. The 1st Defendant renounced his witness statement and his amended statement of defence and counterclaim and acknowledged owing the balance of the purchase price. He expressed his wish to pay the said balance of the purchase price to the Plaintiffs and settle the matter. He pleaded with the court to allow him pay the balance of the purchase price to the Plaintiffs.

110. PW2, an advocate who represented the deceased testified that the transaction between the deceased and the 1st Defendant was subject to the Law Society conditions of sale, 1989 edition. The balance of the purchase price was therefore payable immediately after the transfer of the title to the suit property to the name of the 1st Defendant.



111. The 2nd Defendant who was the advocate for both parties too confirmed that the 1st Defendant was bound to pay the balance of the purchase price immediately upon confirmation that the title to the suit property had been successfully registered in his name. He affirmed that, he immediately informed the 1st Defendant as soon as he registered the title and requested him to pay the said balance but he did not comply.
112. I find that the 1st Defendant breached the terms of the agreement for sale by failing to pay the balance of the purchase price immediately after the transfer of the title to the suit property to his name. He was bound by the terms of the agreement to pay the balance of the purchase price immediately upon confirmation by the 2nd Defendant that the title to the suit property had been successfully registered in his name.

B. Whether the Vendor could lawfully repudiate the agreement for sale between him and the 1st Defendant for failure to pay the balance of the purchase price immediately after the transfer of the title of the suit property to his name.

113. The agreement between the parties herein was subject to the Law Society Conditions of Sale (1989 edition). The 1st Defendant was therefore bound to pay the balance of the purchase price immediately upon confirmation of the transfer of the title to the suit property into his name. His advocate then, the 2nd Defendant in this case, in his testimony confirmed that position.
114. The 1st Defendant had in his statement of Defence and counter-claim averred that he had paid the entire purchase price to the deceased. He however, in his testimony recanted that position and expressly admitted default. He pleaded with the court to allow him pay the balance due and owing and complete the transaction.
115. I must also point out that from the record of the court, the 1st Defendant had previously made an application dated April 4, 2012 expressly acknowledging indebtedness and seeking to deposit the balance of the purchase price in court with a view to satisfying the Plaintiff's claim in full.
116. The 1st Defendant's failure to honour the fundamental obligation of paying in full the agreed consideration despite the vendor transferring the title to the suit property into his name, entitled the vendor to cancel/rescind the contract as he did through his Advocate then, Kerandi Manduku and Company Advocates.
117. Rescission has been defined in the Black Law Dictionary, 9th Edition as follows:

' A party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach. Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their pre- contractual position.'

118. The contract between the parties therefore is already rescinded. The court need not make any declaration in that respect. The rescission of the contract by the vendor has not been challenged by the 1st Defendant.

C. Whether the vendor was entitled to forfeit the 10% of the purchase price upon repudiation of the agreement.

119. I have carefully read the agreement between the parties including the two supplementary agreements. I see no provision therein allowing the vendor to retain 10% of the purchase price upon repudiation



of the agreement. This prayer is therefore not based on the provisions of the agreement and cannot therefore be allowed.

D. Whether the title in the name of the 1st Defendant should be canceled

120. The court in the case of *Esther Kabugi Njuguna v Martha Chebet & 3 others [2020] eKLR*, while considering a matter under almost similar circumstances as in the instant case held that the burden to prove payment of the purchase price rested on the purchaser. The transfer could only be valid if the purchaser could have demonstrated payment of the purchase price. If the purchase price was not paid, the transfer would be ineffectual as it would have been effected without any consideration.
121. In the instant case, there is no dispute that the transfer of the suit property to the 1st defendant was effected before the purchase price was fully paid to the vendor. The balance of the purchase price was payable immediately after confirmation of the transfer in the name of the purchaser. Undoubtedly, this was not done.
122. The net result is that the transfer in favour of the 1st defendant was irregularly procured and cannot therefore be effectual. The failure to honour the explicit terms of the agreement by the purchaser certainly vitiated the contract of sale.
123. The court therefore orders that the transfer effected in favour of the 1st Defendant in respect of the title to the suit property be canceled and a re-transfer effected forthwith in favour of the Plaintiffs at the cost of the 1st Defendant.

E. Whether the Plaintiffs have made a case of professional negligence against the 2nd Defendant

124. The Plaintiffs accused the 2nd Defendant of professional negligence as the advocate for the deceased in that he failed to exercise reasonable care and skill which he owed the deceased as his advocate in the transaction.
125. The Plaintiffs alleged that as a consequence of the negligence of the 2nd Defendant, they suffered loss of losing ownership and use of the suit property as particularized in paragraph 14 of the plaint.
126. The 2nd Defendant denied the allegations against him by the Plaintiffs and averred that he acted on the express instructions given to him by the deceased. He stated that on or about January 27, 2006, the deceased and the 1st Defendant together walked into his office and instructed him to draw an agreement for sale of the suit property by the deceased to the 1st Defendant. He allegedly advised the deceased Plaintiff to retain a different advocate to act for him but the deceased declined.
127. It was the 2nd Defendant's testimony that the deceased and the 1st Defendant had already agreed on the terms of their intended agreement including the deposit of the sale price payable by the 1st Defendant directly to the deceased. They had also agreed that the 2nd Defendant would not handle any monies for the sale of the suit property. Further, that the balance of the purchase price would be paid only after the property was registered in the name of the 1st Defendant.
128. The 2nd Defendant further testified that the deceased and the 1st Defendant decided that he was not to hold the deposit or any other part of the purchase price as a stakeholder. The deposit was therefore paid directly to the deceased. The 2nd Defendant asserted that though he advised the deceased Plaintiff not to transfer the property to the 1st Defendant before payment of the entire balance of the purchase price, the deceased declined the advice insisting that he was sure that the 1st Defendant would honour his obligations. The deceased also rejected the alternative to allow the 2nd Defendant hold the balance of the purchase price before executing the transfer of the title to the suit property.



129. The 2nd Defendant affirmed that the deceased assured him that the 1st Defendant would definitely pay him the balance of the sale price after registration of the title. As an Advocate, the 2nd Defendant could not act contrary to the instructions of the 1st Defendant and the deceased. The 2nd Defendant therefore drafted the agreement and engrossed it for execution by the parties therein as duly and expressly instructed by both parties.
130. As the old adage goes, 'dead men tell no tales'. None of the Plaintiffs dealt with the 2nd Defendant at any one time. None of them could therefore confirm or otherwise tell whatever the arrangement was between the 2nd Defendant and the deceased. It is now impossible to establish the truthfulness or otherwise of the testimony of the 2nd Defendant. PW1 confirmed that he was not aware of the kind of advice given by the 2nd Defendant to the deceased. We can only leave it to the conscience of the 2nd Defendant. At least he held onto the title of the suit property even after transferring it into the name of the 1st Defendant.
131. Accordingly, the court's finding is that the Plaintiffs have not established the claim of professional negligence against the 2nd Defendant.

F. Whether the Plaintiffs are entitled to mesne profits and Damages against the 1st Defendant for breach of contract.

132. From the evidence adduced before the court on behalf of the Plaintiffs and the 1st Defendant, it is clear that the Plaintiffs retained possession of the suit property. They nevertheless pray for mesne profits and damages for breach of contract.
133. Mesne profits must not only be pleaded but also specifically proved. In the case *Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR*, the Court of Appeal held as follows:
- ' As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded.'
134. The Plaintiffs did not provide any evidence to justify the sum of Kshs 45,000/- per month per month.
135. The same applies to the claim for damages for breach of contract. The justification for award of such damages is restoring the parties to their pre-contractual position. The Plaintiffs have had possession of the suit premises despite the fact that the title had been transferred to the name of the 1st Defendant. The Plaintiffs did not provide any evidence of the loss they may have suffered to justify an award for damages.
136. The Plaintiffs claim for mesne profits and damages for breach of contract therefore fails.

G. Whether the 1st Defendant proved his counter-claim.

137. The 1st Defendant's counter-claim was premised on the basis that he had paid the entire purchase price to the vendor as was pleaded in his amended statement of Defence and counterclaim. As stated earlier, the 1st Defendant in his evidence recanted the allegations in his witness statement and the amended statement of Defence and counter-claim and admitted that he had not paid the purchase price in full.
138. In cross-examination by the advocate for the Plaintiffs, the 1st defendant confirmed that he was renouncing what he had put in his witness statement. Instead, he wished to pay the balance of the purchase price to the Plaintiffs and settle the matter. He confirmed that he had not fully paid the



purchase price which was Kshs 15.0 million. As far as he was concerned however, he owed the Plaintiffs a sum of Kshs 7.5 million which he was ready to pay and settle the dispute with the Plaintiffs.

139. The 1st Defendant further confirmed that his letter dated November 7, 2006 acknowledged the balance of Kshs 13.5 million which he had undertaken to clear.
140. The 1st Defendant affirmed that he was supposed to pay the balance of the purchase price upon successful transfer of the title to his name. He had been willing to pay the said balance but he was kicked out of the suit premises by the deceased and that was the reason why he did not pay him the balance then.
141. On the alleged expenditure of Kshs 3.5 million, the 1st Defendant did not adduce any material evidence to prove the claim which was a special damages claim anyway.
142. Accordingly, the 1st Defendant's counter-claim fails in its entirety.

H. Whether the Plaintiffs are entitled to an order of permanent injunction against the 1st Defendant

143. A permanent injunction is granted upon the merits of the case after evidence has been tendered (*KPLC Ltd v Sheriff Molana Habib [2018] eKLR.*)
144. The court having found in favour of the Plaintiffs will not hesitate to grant them an order of permanent injunction against the 1st Defendant restraining the 1st Defendant, and his agents from alienating, encumbering, disposing off, interfering or trespassing on the suit property.

I. Who should bear the costs of the suit and the counter-claim

145. Costs follow the event, the 1st Defendant being the defaulting party should foot the costs of both the suit and counterclaim.

Disposition

146. The upshot is that the Plaintiffs' case succeeds in the following terms: -
 - i. An order be and is hereby issued canceling the transfer effected in favour of the 1st Defendant in respect of the title to the suit property.
 - ii. The 2nd Defendant be and is hereby ordered to unconditionally hand over all the original documents in his possession in respect of the suit property to the Plaintiffs' Advocates forthwith.
 - iii. An order be and is hereby issued that a re-transfer of the title to the suit property be effected forthwith in favour of the Plaintiffs at the cost of the 1st Defendant. The 1st Defendant be and is hereby directed to execute all necessary transfer documents in favour of the Plaintiffs and failure to which the Deputy Registrar of the court is authorized to sign on his behalf without any further reference to the court.
 - iv. For avoidance of any doubts, the costs in (iii) above includes the stamp duty payable, the registration charges and the advocates' fees for effecting the re-transfer as per the Advocates' Remuneration Order.
 - v. An order of permanent injunction be and is hereby issued restraining the 1st Defendant, and his agents from alienating, encumbering, disposing off, interfering or trespassing on the suit property.



- vi. The Plaintiffs' case as against the 2nd Defendant is disallowed with no orders as to costs.
- vii. The 1st Defendant's counter-claim against the Plaintiffs is dismissed with costs.
- viii. The costs of the suit and the counter-claim are awarded to the Plaintiffs as against the 1st Defendant.
- ix. The sum of Kshs 2.5 million paid by the 1st Defendant to the deceased shall be applied towards the cost of the re-transfer of the title to the suit property (as ordered under (iii) above); the balance thereof towards the assessed costs of the suit. If there be any balance, the same to be refunded to the 1st Defendant and vice versa.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kosgei for the Plaintiff.

Ms. Koludhe for the 1st Defendant.

Ms. Murithi for the 2nd Defendant.

Court Assistant – Hilda/Yvette.

M.D. MWANGI

JUDGE

