REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 2059 OF 1993

BERNAD GATHOGO KANGORO…….PLAINTIFF

VERSUS

LT. COL. (RTD) DAVID M. MUCHEMI ……1ST DEFENDANT

STEPHEN KIMANI GAKENIA ……2ND DEFENDANT

JUDGMENT

I. DECLINING FIRST PURCHASER AND SELLING SAME LAND TO SOMEONE ELSE? – PLAINTIFF'S PLEADINGS

The original plaint in this suit, dated and filed on 29th April, 1993 was amended on 7th April, 1996 and the amended version filed on 8th August, 1996.

The plaintiff pleads that by an agreement in writing dated 22nd July, 1992 and made between him and the 1st defendant, the 1st defendant agreed to sell to him and he agreed to purchase a property known as No. 8 OLJORO OROK SCHEME/NYANDARUA, at the price of Kshs.2,102,500/=. It was provided in the said agreement that the sale was to be completed on 21st August, 1992 and that the 1st defendant should thereupon give vacant possession of the said property to the plaintiff. It was also provided in the said agreement that the 1st defendant should evict all the squatters who were occupying and exploiting the said land.

Pursuant to the said agreement, the plaintiff duly paid to the 1st defendant Kshs.600,000/= as deposit, as required by clause 3 of the sale agreement. At the time of the said payment of deposit, it is pleaded, the plaintiff was, as he still is to-date, ready and willing to fulfil and perform all his obligations under the agreement.

The plaintiff pleads that, in pursuance of the said agreement of 22nd July, 1992 the 1st defendant applied to the Oljoro Orok Land Control Board, sometime is August, 1992 for consent to transfer the land to the plaintiff for a consideration of Kshs 2,102,500/=. The plaintiff and the defendant thereafter appeared before the Oljoro Orok Land Control Board which, on 28th August, 1992 gave the requisite consent to transfer.

The plaintiff pleads that he was surprised when, one year later, in August 1993 he learned that the suit land was now under the occupation of the 2nd defendant. Upon inquiry the plaintiff came to learn that there had been a purported sale of the suit land between the 1st and the 2nd defendant; the 1st defendant had sold that same land to the 2nd defendant, for a consideration of Kshs.300,000/=.

The plaintiff contends in his pleadings that the 2nd defendant was not and could not have been a bona fide purchaser, for the following reasons:

(i) the 2nd defendant's consideration was far below the plaintiff's;

(ii) both the Oljoro Orok Land Control Board and the Settlement Fund Trustees were aware of the earlier sale-and-purchase transaction between the plaintiff and the 1st defendant;

(iii) the 2nd defendant's taking of possession of the suit land during the pendency of purchase of the same by plaintiff, and the 2nd defendant's conduct and demeanour after he took possession, would suggest that he had conspired with the 1st defendant to defeat the process of transfer to the plaintiff.

The plaintiff pleads that his requests to the 1st defendant have gone unheeded, and he has failed and refused to complete the land-sale transaction in favour of the plaintiff. The plaintiff pleads that notwithstanding his protestations, the 2nd defendant continues to occupy the

suit land and has neglected or refused to vacate the same, to enable the 1st defendant and the plaintiff to conclude the sale transaction.

The plaintiff seeks judgement against the defendants jointly and severally, in the following terms:

(a) permanent injunction restraining the defendants, their servants and/or agents from selling, sub-dividing, disposing of and/or in any way interfering with L. R. No.8 OLJORO OROK;

(b) declaration that if there had at all been a sale between the 1st and 2nd defendants, then the same was null and void ab initio;

(c) a declaration that the 1st defendant was in breach of every aspect of the agreement dated 22nd July, 1982;

(d) specific performance of the sale agreement dated 22nd July, 1992;

(e) damages for breach of contract, in lieu of or in addition to specific performance;

(f) eviction of the 2nd defendant, his family, servants and/or agents from the suit land;

(g) special damages;

(h) costs of this suit.

II. FAILURE TO PREPARE TRANSFER DOCUMENTS LED TO REPUDIATION BY VENDOR WHO HAS NOW PASSED TITLE TO THIRD PARTY: PLEADINGS OF THE VENDOR

The 1st defendant's original statement of defence, dated and filed on 18th October, 1993 was amended on 23rd September, 1996, the amended version being filed on 7th October, 1996.

In his pleadings, the 1st defendant denied that the eviction of squatters had been a condition in the transfer of the suit land to the plaintiff, under the terms of the sale agreement of *22nd July, 1992.* The 1st defendant admits receiving Kshs.600,000/= from the plaintiff as deposit, but "denies that the plaintiff has been at all material times ready and willing to fulfil and perform all his obligations under the sale agreements." The 1st defendant pleads that he had fulfilled all the conditions in the said sale agreement of 22nd July, 1992 and it is the plaintiff who failed to complete his part of the contact – by refusing and/or neglecting to prepare the transfer documents for the 1st defendant's execution, following the grant of Land Control Board consent. It is this failure to prepare transfer documents, the 1st defendant states, which led him to repudiate the agreement of 22nd July,1992; and after repudiation he, the 1st defendant, proceeded to sell the suit land to a third party, namely the 2nd defendant.

The 1st defendant pleaded that the orders now sought by the plaintiff cannot be granted, because the title for the suit premises has already passed to the 2nd defendant and was no longer available to be claimed by the plaintiff.

III. IS THIRD PARTY A BONA FIDE PURCHASER FOR VALUE? IS PLAINTIFF LIMITED TO SEEKING DAMAGES AGAINST VENDOR? – 2ND DEFENDANT'S PLEADINGS

The 2nd defendant's original statement of defence was dated and filed on 13th October, 1994 but it was amended on 14th August, 1996 – the amended version being filed on 14th November, 1996.

The 2nd defendant denies that the plaintiff and the 1st defendant had gone through the process of obtaining Land Control Board consent, for a transfer of the suit land to the plaintiff. On the operations of the Oljoro Orok Land Control Board, and in relation to the matters in dispute herein, the 2nd defendant pleads that he, himself was the beneficiary of the required consent to transfer land, and that the 1st defendant had transferred the suit land to him, for consideration, by a document of transfer dated 31st March 1993. In the pleadings, the 2nd defendant does not state when the Land Control Board consent was given, nor does he state the consideration which he paid before the suit land was transferred to him.

The 2nd defendant pleads in effect that the transfer of the suit land to him was proper in every respect, as a certificate of outright purchase was issued to him on 23rd April, 1993 by the Settlement Fund Trustees. The 2nd defendant had taken possession, and came into occupation of the suit land in February, 1993. He pleads that after taking possession of the suit land, he has "carried out substantial developments on the property [bearing a value] in excess of Kshs.5,300,000".

The 2nd defendant denies that the only consideration he had paid for the suit land was Kshs.300,000. He denies that he was not a bona fide purchaser; and he denies that he has acted in any manner while being in possession of the suit land, such as to suggest that he was anything but a bona fide purchaser for value.

The 2nd defendant contends that the remedy of specific performance, as claimed by the plaintiff, cannot lie, and that the plaintiff can only seek damages against the 1st defendant. The 2nd defendant asserts that as a bona fide purchaser, he was entitled to possession of the suit land.

IV. ISSUES FOR RESOLUTION

On file is a statement of issues dated 23rd December 1994 and filed on 4th January 1995. I will set out these issues, as they represent, in my view, the main questions which if answered, would facilitate a determination of the outcome of this case.

The issues are set out as follows:

(i) whether the plaintiff entered into a sale agreement dated 24th [22nd?] July, 1992 with the 1st defendant in respect of the property No. 8 OLJORO OROK SCHEME/NYANDARUA; if so, what were the terms and conditions?

(ii) whether the plaintiff entered into a fresh sale agreement dated 2nd July 1992 [22nd ?] with the 1st defendant and if so, what were the terms and conditions?

(iii) whether the 1st defendant was/is in breach of the said agreement and if so, in what respect; or whether the plaintiff was in breach of the agreement and if so, in what respect?

(iv) whether the plaintiff was at all material times ready, able and willing to perform his obligations under the agreement?

(v) whether the 1st defendant was entitled to repudiate the agreement with the plaintiff? (vi) whether the 2nd defendant is entitled to ownership/possession of the suit premises?

(vii) whether the amended plaint discloses a cause of action against the 2nd defendant?

(viii) what orders should be made as to costs?

V. TESTIMONIES

1. Evidence for the Plaintiff

Hearing of this case began before Hayanga, J on 17th June, 2003 when PW1, Bernard Gathogo Kangoro was sworn and led through the evidence-in-chief by learned counsel Ms. Nduiga

The plaintiff testified that he was a small-scale farmer in Kinoo, Kikuyu Division. He averred that he had entered into a sale agreement with the 1st defendant on 24th July, 1990 for the purchase of the 1st defendant's land title No. NYANDARUA/OLJORO www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 7 OROK/8. The agreed price was Ksh.1,750,000/=. The suit properly had on it two houses and six out-houses. At the time of the agreement there were some eight squatter - families on the suit land. The plaintiff averred that the 1st defendant's failure to remove the squatters from the suit land was the reason why the purchase agreement was not completed. He testified that the 1st defendant had undertaken in the sale-and-purchase agreement to remove the squatter. It became necessary, the plaintiff testified, to execute a second agreement between him and the 1st defendant on 22nd July 1992.Under the new agreement, the plaintiff was to purchase the same parcel of land, though for an enhanced price of Kshs.2,102,000. Under the second agreement the 1st defendant remained under duty to clear the suit land of the squatters. The plaintiff made a part – payment in the sum of Kshs.430,000, the balance to be paid later. In the meantime, the plaintiff applied for Land Control Board Consent (20th August, 1992), and he obtained this consent on 28th August, 1992.

The plaintiff testified that he had been ready and willing to complete the second agreement, but the 1st defendant failed to remove the squatters. This caused concern to the plaintiff who requested his advocate to make reference to the provisions of the original contract, and to obtain injunctive orders against the 1st defendant. On 7th June, 1993 a consent order was made by Aluoch, J : the 1st defendant, his agents or servants were restrained from selling, sub-dividing, disposing of, or in any other way interfering with L. R. 8 OLJORO OROK SCHEME/NYANDARUA. Subsequently the plaintiff sought to restrain the 2nd defendant by himself, his family members, servants and/or agents from entering, trespassing and/or interfering in any manner with the said property until further order of the Court. The plaintiff also sought to restrain the 2nd defendant from tilling, grazing on or www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 8 developing the suit land. This second application was made when the plaintiff noticed that there was some activity going on, on the suit land – removal of the squatters; renovation of the home. Shah, J (as he then was) granted the prayers for an injunction against the 2nd defendant. The plaintiff testified that he later learned that the 1st defendant had sold the suit land to the 2nd defendant for a consideration of Kshs.300,000/=. The plaintiff did not perceive the 2nd defendant as an innocent purchaser – because the land was sold to him for a lower price than that which the plaintiff had committed himself to pay. In the plaintiff's view, the consent for the sale of the suit land to the 2nd defendant could not have been properly obtained. He testified that he had now paid a total of Kshs.600,000/= in respect of the sale transaction, as a deposit which had been duly acknowledged by the 1st defendant, and he was ready and willing to complete the transaction. The plaintiff testified that he had sold two of his properties, so as to raise the money to pay to the 1st defendant as purchase price. The date of completion of the purchase transaction in respect of the suit land was set as 30th August 1992, but by that date the 1st defendant had not removed the squatters. The plaintiff's prayer was that the 1st defendant be held to have been in breach of the sale-and-purchase agreement. He testified that as a consequence of the alleged breach of contract by the 1st defendant, he, the plaintiff, had suffered substantial losses, which could not be quantified. On cross-examination, the plaintiff testified that he had entered into two separate agreements with the 1st defendant; the first one was dated 24th July 1990 and was for the purchase of 50 acres, for the consideration of Kshs.1.5 million. The second agreement was dated 22nd July, 1992 in respect of the same parcel of land but with an additional parcel www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 9 of 11.7 acres – and on this account an additional Kshs.405,000 was to be paid by the plaintiff. The plaintiff testified that in the 1st sale agreement he had paid Kshs.600,000/= as a deposit, in 1991. (Hayanga, J made the note that Shs.800,000/= was recorded as having been paid at the time of execution and not Kshs.600,000/=). When the plaintiff was asked why he paid Kshs.600,000 and not Kshs.800,000/= he answered that this was because there was a misunderstanding; he "did not like the way [the 1st defendant] was behaving". The plaintiff testified that he did not himself attend before the Oljoro Orok Land control Board; the consent document was forwarded to him by his lawyers; and the plaintiff is aware that the said lawyers were asked by the vendor's lawyers to prepare a transfer document. However, the plaintiff lawyers did not prepare a transfer – because the removal of squatters from the suit was a special condition in the contract, but it had not yet been performed. The vendor had not signed the transfer; and on this point the plaintiff testified: "I did not sign because [the] vendor had not signed'. This matter was listed before me, following the retirement of Hayaga, J, on 17th March, 2004 and on that occasion learned counsel for the 1st defendant, Mr. Etole, continued with cross-examination. The plaintiff testified that from July, 1990 the Vender (1st defendant) had made no efforts to satisfy the terms of the special conditions in the sale agreement. What were those special conditions? The purchaser was to pay Kshs.800,000/= before 31st July, 1990. But the plaintiff did not pay that amount. He testified that the had previously paid shs.200,000/= to the 1st defendant – and therefore he would have been due to pay shs.600,000 and not Kshs.800,000/=. He said he later paid Kshs.400,000/= – and therefore he had now paid a www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 10 total of Kshs.600,000/=. He did not pay Kshs.800,000/= and he acknowledged that this was a failure to satisfy a condition of the sale agreement. The plaintiff testified that

the 1st defendant also did not fulfil the special condition to clear out all the squatters from the suit land. He averred also that the vendor was required under the sale agreement to execute all the necessary papers to facilitate transfer, but he did not do it. It become necessary, on 22nd July, 1992 to enter another agreement. It is the vendor who approached the plaintiff, and indicated that over and above the 50 acres which the parties had agreed on, there were 11.75 additional acres which the plaintiff could also purchase. The plaintiff agreed to pay Kshs.2,102,500/=; and the parties agreed to write a new agreement, with a completion date set at 21st August, 1992. The land had about 10 squatters, and the 1st defendant acknowledged that they were, indeed, squatters. The plaintiff testified that he was not aware that it was his duty to prepare a transfer document, for the vendor to sign. He was aware that the vendor's lawyers had written to his own lawyers, requesting the preparation of the transfer documents. But the plaintiff's lawyers "refused to prepare the transfer – because the vendor had not removed the squatters." On 8th December, 1992 the vendor's lawyers had given the plaintiff seven days' notice to prepare the transfer for signature, indicating that the agreement would be rescinded if action was not taken as requested. The plaintiff did not consider himself to have been unco-operative; rather, it was the 1st defendant who failed to comply with the special conditions, and so the cause of failure was, in the plaintiff's view, the vendor. The plaintiff averred that the vendor has never been willing to complete the sale transaction, and that the mere fact that the vendor had appeared before the Land Control Board, to secure consent for the transfer to the plaintiff, was by no means a sign that he had been willing to transfer the land to the plaintiff. The plaintiff considered as the true signal of willingness on the part of the 1st defendant to transfer the suit land to the plaintiff, compliance with the special condition relating to the removal of squatters. So long as the squatters were still on the suit land, the plaintiff "refused" to take any action on transfer documents. The witness testified that he was aware in 1993, that the vendor intended to sell the suit land to the 2nd defendant; but he was not aware that the land had now been transferred to the 2nd defendant. He said he believes that the suit land had been sold to the 2nd defendant for Kshs.300,000 and he prayed that such sale to the 2nd defendant be declared null and void. He believed after conducting a search in the Lands Office, that the formal ownership of the suit land was still in the name of the Settlement Fund Trustees. He prayed for specific performance of the 1992 agreement. On re-examination by learned counsel Mr. Kahonge, the plaintiff further testified as follows. The first agreement between the plaintiff and the 1st defendant, dated 24th July, 1990 was not performed; and then there was the second agreement of 22nd July, 1992 which led to the instant suit. The plaintiff re-stated that it was a primary term of the second sale agreement that the suit land was being sold with vacant possession; the vendor was to clear out all the squatters and give vacant possession. The plaintiff failed to fulfil that condition, and so in the plaintiff's words, "I did not part with the purchase price". He further said:"[That was also] the reason why I did not give instructions for the [transfer] documents [to be prepared]." He averred that, by clause 5, the completion date was to be 21st August, 1992; and that by that date, the vendor should have executed all the necessary documents to effect transfer. He testified that it was the vendor's responsibility to obtain the consent of the Land Control Board; and that this consent was obtained belatedly, on 28th August, 1992 after the agreed completion date. In the plaintiff's perception, the vendor had not complied with the terms of the sale agreement. The plaintiff testified that a search conducted in the Lands Office, on 5th May, 1997 when this case had been filed in Court, showed the registered owner of the suit as not the 2nd defendant, but the Settlement Fund Trustees. To the plaintiff's knowledge, the land had not yet been transferred from the original owner. PW2, Maina Kibuchi, was sworn and gave his testimony. He averred that he is 74 years old, lives at Oljoro Orok, and does odd jobs. He knew all the parties to the suit. The witness was already living at Oljoro Orok when the 1st defendant was allocated the suit land by the Settlement Fund Trustees. The witness had become a squatter in 1959, and he remains a squatter to-date. He was living on the suit land with others – and together there were more than ten people squatting on that land. In 1993 the witness and the other squatters were evicted from the suit land, after being given a three-day notice by the 2nd defendant. The eviction process took the form of burning down the squatters' houses while they were away at work. None of them was able to resettle on the suit land; they sought rented accommodation at the local shopping centre. The witness remembered the names of some of the other evicted squatters: Moru, Rebecca, Stephen Ndungu Mbugua. The suit land, since the squatter evictions, is occupied by Kimani wa Gakenia (2nd defendant), and he is the one who had effected the evictions. Cross-examined by learned counsel Mr. Etole, the witness testified that the 1st defendant had acquired the suit land in 1982, and that this land had at first belonged to the Settlement Fund Trustees. He further testified that the small community of squatters who had been evicted by the 2nd defendant included whole families. He testified that the 1st www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 13 defendant's presence at the suit land had mainly been symbolised by his employees living in, and caring for his cattle which grazed on the land. PW3 was Stephen Mbugua Ndung'u. He was sworn and testified that he was born at Nyakarianga in Oljoro Orok; he lived by doing odd jobs; he knew the parties. The witness knew that the 1st defendant, who had been a military officer, was allocated the suit land sometime between 1980 and 1983. The witness was a member of one of the several families who had been squatting on the suit land, until their houses were pulled down, and one house burnt, following a three-day notice which the 2nd defendant had given them. Before the arrival of the 2nd defendant, the 1st defendant had had on the suit land herdsmen who took care of his animals. At one time, sometime in early 1990, the plaintiff had visited the suit land; and he went up to the squatters' dwellings and spoke to them. The witness and his fellow-squatters had, on that occasion, intimated to the plaintiff that they were entertaining the hope that the Government would give them land. The plaintiff informed them that he had purchased the suit land; but later, sometime in 1993, it was the 2nd defendant who claimed ownership of the land, and who evicted the squatters. On cross-examination by learned counsel Mr. Etole, the witness named as fellow squatters one Samuel Ndung'u; one Maina Kibuchi; one Laban Fedha; one Moru Mate. He testified that the 1st defendant had had three workers, and he, the witness, was not one of them; these three workers were not taken on by the 2nd defendant, and they no longer live on the suit land. On 9th June, 2004 counsel in these proceedings agreed on re-call of the witnesses, due to a mix-up in the cause-lists which had rendered it impossible for learned counsel Mr. www.kenyalaw.org Kairu to be present in Court, during the earlier hearing. I on that occasion made a ruling as follows: "That pursuant to section 146(4) of the Evidence Act (Cap.80), the plaintiff Bernard Gathogo Kangoro and the plaintiff's witnesses Maina Kibuchi and Stephen Mbugua Ndungu be recalled for further cross-examination on 9th June, 2004 or on such other date as may be ordered" On that date learned counsel Mr. Kairu cross-examined the plaintiff on his evidence as PW1. The plaintiff stated that he was seeking specific performance, as he was ready and willing to continue with the sale as agreed in 1992. He testified that it was not the true position that the suit land was now occupied by the 2nd defendant; in the plaintiff's words: "It is not the man himself who is on the land; it is his mother who is there. He is using his mother as [cover]". In the plaintiff's perception, the 2nd defendant was not genuinely in possession of the suit land. The plaintiff testified that when he first filed suit, on 29th April,1993 he was suing only the 1st defendant herein. But when he learned that the 1st defendant was selling his suit land to somebody else, he sought and obtained an injunction; but later he realised there was a second purchaser (2nd defendant) who had lodged his mother or the suit land; and he sought leave by application of 20th August, 1993 to join the 2nd defendant as a party. The plaintiff testified that the 2nd defendant had adopted a well known traditional notion in claiming possession of the suit land; he had lodged his own mother on the land, as an indicia of possession. The plaintiff averred that the first agreement, of 24th July, 1990 had been abandoned when the second one of 22nd July, 1992 was adopted. He testified that under the first agreement, the purchase deposit payable was Kshs.800,000/=; but under the second agreement that amount was reduced to Kshs.600,000/=. The 1st defendant had been his www.kenyalaw.org

friend, and had expressed the desire to sell the suit land to him through the plaintiff's wife. The plaintiff said he had paid a deposit of Kshs.200,000/= even before the first agreement was entered into, and the sum of Kshs.400,000. was paid before the 2nd agreement. The plaintiff testified that under Conditions 4 of the Law Society's Conditions of Sale, completion was to take place at the offices of the vendor's advocates, where the balance of the purchase price would be paid, and in exchange all the title documents would be given to the purchaser, to

present for registration; and simultaneously with registration, the purchaser would be given possession of the property sold. The plaintiff testified that he did not, on the agreed completion date, tender the balance of the purchase price, and up to now he had not done so. He said he has not, todate, submitted a transfer for execution. His reason was: “it is two-way traffic; I could not tender my part before the vendor performed his part.” He testified that he had been ready and willing to complete, and he remains ready and wiling. The plaintiff testified that he had sold his two properties in Dagoretti, to enable him to pay the purchase price for the suit property; and he had already made arrangements with the Settlement Fund Trustees to take over the existing loan which the vendor had owed, in respect of the property – but the 1st defendant failed to fulfil his obligations under the agreement. The failure to perform his obligation by the 1st defendant, the plaintiff testified, was failure to remove the squatters. In his word. “He never attempted to remove [the squatters]” On the initiative in the execution of the transfer document, the plaintiff said: “It was for the vendor to forward transfer to me, and I would sign, once the squatters [had been] cleared.” www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 16 The plaintiff testified that the 1st defendant and the 2nd defendant had acted in collusion in defeating the sale agreement between the plaintiff and the 1st defendant. He testified that it was in May, 1993 that the 1st defendant’s nephew, David Muchemi Wagara (now deceased) who was a care-taker on the suit land had reported to the plaintiff that the 1st defendant was apparently selling the land to the 2nd defendant. The plaintiff had received information that the 2nd defendant was buying the suit land for a consideration of only Ksh.300,000/=, but he did not know if there was any additional consideration given to the 1st defendant. The plaintiff testified that the Land Control Board had given consent for his purchase of the suit land on 28th August, 1992; and therefore the consent given for purchase by the 2nd defendant only five months later, must have been fraudulently obtained. Although the first consent had not been cancelled, the suit property was transferred to the 2nd defendant, and in April 1993 the 2nd defendant was given a certificate of outright purchase by the Settlement Fund Trustees. In the plaintiff’s belief such certificate of outright purchase could not allow the processing of title in favour of the 2nd defendant, because there must first be a discharge. The plaintiff himself had not been given a certificate of outright purchase for the suit land. The fact that the 2nd defendant had buried his grandmother on the suit land, the plaintiff averred, was itself an act of contempt. The plaintiff disputed the claims of the 2nd defendant, that he had made certain developments on the suit land: the houses said to have been constructed, had been burnt down in 1997; it is doubtful that the 2nd defendant did install irrigation systems; it is equally in doubt, whether any cow-shed have been built on the suit land. The squatters have been removed, and this was done by the 2nd defendant, in March or April, 1993. www.kenyalaw.org

The plaintiff testified that the first agreement between himself and the 1st defendant had been abandoned because the suit land had been surveyed and found to be larger than had been assumed. The plaintiff’s intention was to build a school on the suit land, and also to conduct dairy farming thereon. The plaintiff testified that if the 1st defendant had cleared out the squatters by the completion date, 21st August, 1992 he would have made all payments and duly signed the transfer document. Just before the completion date the plaintiffs’ lawyers had written to the vendor’s lawyers regarding the squatters. By the time of the completion date, the consent of the Land Control Board had not yet been obtained. On 22nd November, 2004 PW4, Dr. Laban Ireri Munene was sworn and gave his evidence. He testified that he was a practising dentist, employed by the City Council of Nairobi, and living along Ngong Road in the city. He had known the plaintiff since 1991, when in March of that year, the plaintiff had sold him property in Nairobi, L. R. No.Dagoretti/Kinoo/1816. The sale price was Kshs.900,000. This transaction was in accordance with a sale agreement dated 1st March, 1991. The property was duly transferred to the witness on 9th April, 1991. PW5 was sworn and gave his evidence on 22nd November, 2004. This was Barnabas Kariuki of Voice of God Recording, living at Kinoo. He testified that he had known the plaintiff since 1986. On 10th July, 1990 the witness had made a sale agreement with the plaintiff, for the purchase of the plaintiff’s land, L.R. No. Dagoretti/Kinoo/1815, and the sum of Kshs.800,000/= had been paid as consideration for that property. The said property was duly transferred to the name of the witness. The plaintiff had intimated that he was www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 18 selling the property to enable him to buy a 50-acre farm in the Nyahururu area. The cheque paid out by the witness was in the name of the 1st defendant – dated 16th July, 1990. 2. Evidence for the 1st Defendant DW1, Col. David Muchemi (1st Defendant) was sworn and gave his evidence on 20th April 2005. He testified that he was a retired army officer, now a farmer in Kiambu District. In July 1990 he had agreement with the plaintiff, to sell to the plaintiff land at Oljoro Orok, in Nyandarua District. For this transaction an agreement was signed, and the consideration payable was Kshs.2,100,000/=. A deposit of 10% of the purchase price was paid; but the agreement was not concluded. The purchaser did not meet the deadline for completion; he could not fulfil his obligations; his advocate never submitted to the vendor the transfer documents; the plaintiff was objecting to the advocate who was representing the 1st defendant – Mr. Agina. There was an earlier agreement of 1990 – under which the purchase price was Kshs.1.75 million. At this stage an assumption was being made that the suit land comprised 50 acres. The sum of Kshs.800,000/= was to be paid as initial deposit. The 1st defendant believes only Kshs.600,000/= was paid, however. This first agreement was not completed, as the plaintiff did not fulfil his obligations. It is averred that the plaintiff kept on delaying completion, even as he also demanded possession. The parties went on to a 2nd agreement – brokered by the plaintiff’s own emissaries. Before the new agreement was made it was necessary to survey the land, which was found to comprise 61.75 acres; and for this size of land the price of Kshs.2,102,500/= was agreed. Already the plaintiff had paid Kshs.600,000/= as deposit. According to the 1st defendant, www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 19 the agreed figures for the deposit were not quite clear, as they were not fully documented. He testified that he had not demanded any additional deposit. The 1st defendant testified that under the terms of the second agreement, the suit land was to be sold with vacant possession; and special condition No.3 stated that squatters were to be removed from the land. But he went on to aver: “There were never squatters on the land. Only my workers were on the land. They were tending my animals” The 1st defendant testified that he had obtained Land Control Board consent on 28th August, 1992 for transfer to the plaintiff; but the plaintiff failed to submit to him the transfer document to enable him to complete the sale. The purchaser also made no further payment of purchase price. The 1st defendant’s advocates had on 8th December, 1992 written to the plaintiff as follows. “We refer to your letter of 23rd November, 1992 and advise that our client maintains that there are no squatters, only workers who he intends to evict upon transfer. “Our instructions are to give you 7 days to complete this transaction failing which our client will take alternative option open to him. “Our client had done everything possible within his powers to finalise this transaction.” To that letter, the 1st defendant testified, there was no reply. The 1st defendant had the impression at the time, that although the plaintiff badly wanted possession, he was not prepared to complete the purchase; and the 1st defendant considered this to be dangerous, and he started looking for another buyer – and found the 2nd defendant. On 31st March, 1993 the 1st defendant sold the land to the 2nd defendant. The 1st defendant testified that the sale agreement had provided for refund of any moneys paid, if the deal failed to materialise. But he said he was not responsible for the failure of the transaction. He said the plaintiff bore responsibility for the failure – and www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 20 consequently the deposit paid was to be forfeited. The 1st defendant said he had done his best to accommodate the plaintiff, but the plaintiff failed to meet his purchase obligations. He prayed that the suit be dismissed with costs. On cross-examination, 1st defendant said he retired from Army service in 1987; and in 1990 when the plaintiff came to see him he was keeping cattle, and engaging in smallscale business. He was keeping cattle on the suit land, and the plaintiff had wanted to buy beef cattle from him. In the course of such transactions, the plaintiff took an interest in the suit land, and desired it for the development of a school. This was the background to the agreement signed between the parties, on 24th July, 1990, being witnessed by an advocate Mr. Ojwang Agina. The 1st defendant testified that even though special condition No. 4 of the agreement had mentioned squatters, this could only have meant that vacant possession was to be given to the plaintiff, upon completion, as there had been no squatters on the land. The 1st defendant thought that the stakeholder sum of Kshs.800,000/= had been paid by the plaintiff, out of the original agreed

price of Kshs.1.75 million. But the plaintiff failed to complete the transaction. The 1st defendant testified that the suit land was part of a new settlement scheme; the Government had checked all the parcels before final demarcation; any squatters found had been shifted and given their own lands; and consequently there were no squatters on the suit land. The 1st defendant testified that there had been no Land Control Board consent in respect of the first agreement, of 1990; and there was no transfer in relation to that agreement. There had been an understanding between the plaintiff and the 1st defendant that, if he discharged a certain portion of the purchase-payment obligation, then the plaintiff www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 21 could be given possession. Why was Land Control Board consent not sought at this stage? 1st defendant: "We did not get Land Control Board consent, because I thought he was a straightforward man. We did not apply for the consent. We had a mutual discussion. This was Settlement Fund Trustees Land, and it had no title …….The purchaser was clear, there was no title. I think this is why the first agreement was invalidated". According to the 1st defendant, there was no sale condition he had failed to fulfil, and which would have brought the 1st agreement to an end. The 1st defendant testified that the second agreement, of 22nd July 1992 was duly signed by the parties, and witnessed by Mr. Etole and Ms. Abida Ali, both advocates. Under this agreement, Kshs.600.000/= was paid as deposit by the purchaser. It was agreed that the purchaser would take up the outstanding loan on the suit property, and provide for it in an adjusted purchase price. The 1st defendant testified that the completion date for the second sale agreement was 21st August, 1992; and by that date he had already applied for the consent of the Land Control Board. It is true, he conceded, that the consent could have come a day or two late – but the application itself had been made in good time. The Land Control Board consent was dated 20th August, 1992 but it was issued on 28th August 1992. The Land Control Board gave the approval at its regular meeting, when it approved all consent applications then lying before it. Under special condition No.1 in the agreement, the plaintiff was required to deposit Ksh.600,000/= out of the purchase price; but the stakeholder payment was 10% of the purchase price – which is only Ksh.210,000/=. The 1st defendant testified that the plaintiff has never asked for the balance of the deposit which would be his, once the 10% deposit is www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 22 forfeited for the plaintiff's failure to complete. DW1 averred that he has made no refund because the plaintiff has been in no mood to seek or receive the same, as he had wanted nothing but the suit land. DW1 averred that he would be able to pay up the said balance if the plaintiff asked for it. DW1 said he had sold the suit land to the 2nd defendant on 31st March, 1993 - "a long time after the expiry of the deadline [specified in the second agreement with the plaintiff]". The 1st defendant testified that the sale by him of the suit land to the 2nd defendant had been on the basis of fresh agreements which were duly signed, and he had already put the 2nd defendant in possession. Learned counsel Mr Kahonge continued with cross-examination on 14th June, 2005 when DW1 testified that the transaction with the 2nd defendant had gone before the Land Control Board on 15th March, 1993. DW1 did not know whether the earlier consent, in respect of the same suit land, for sale to the plaintiff had been withdrawn; but he believed that earlier consent had been overtaken by events. The 2nd defendant later received a Certificate of Outright Purchase, for the suit land, dated 23rd April, 1993 and issued by the Ministry of Lands. DW1 testified that the suit land had now been registered in the name of the 2nd defendant. On cross-examination by learned counsel Mr. Kairu DW1 agreed on the consideration monies shown on the transfer – as Kshs.300,000/=; but he went on to state that the suit land had been transferred to the 2nd defendant, in much the same way as "the Kilimanjaro [had been transferred from Kenya] to Tanzania". The purchase price had been in cash and in kind; part – exchange of a vehicle was an element in the consideration. www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 23 On re-examination by learned counsel Mr. Etole DW1 testified that in 1992 he had all the intention of selling the suit land to Mr. Kangoro (plaintiff); but he received no transfer document from Mr. Kangoro, and he received no further payment from the plaintiff; the 1st defendant, consequently, gave notice to the plaintiff that the contract would be repudiated. 3. Evidence for the 2nd Defendant DW2, Stephen Kimani Gakenia (2nd defendant) was sworn and gave his evidence on 14th June, 2005. He testified that he is a farmer in Nakuru and Nyahururu, and also conducts some business in Nairobi. He averred that he did know the 1st defendant, who had sold to him land at Rongai, and in 1993 sold to him, the 2nd defendant, the suit land at Oljoro Orok. DW2 already had a parcel of land at Oljoro Orok, but it was not located by the road like the suit land. He purchased the suit land from the 1st defendant, and settled his mother there. Since then, the 2nd defendant has had full possession of the suit land, and he had interred there the remains of deceased members of his family. DW2 averred that he had paid consideration for the transfer to him of the suit land, though to-date he still owes the 1st defendant some Kshs.400,000/= which is part of a varied set of considerations he had to pay for the land. DW2 testified that the suit land had a large colonial – type house which was rundown and which burned down in 1997. He has now put up a model house on the suit land, and in the compound he has also availed space for the building of a Church. He said that todate, he has paid to the vendor some Kshs.2 million. When he took over possession of the land, the 2nd defendant found no squatters there, but he found staff who had been in the employ of the vendor. www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 24 DW2 averred that he had purchased the suit property in good faith, and has all the relevant legal documents. However, at the moment, in the settlement area at Oljoro Orok, there are no registered titles yet, and what one gets is the letter of allotment – which he already has. He averred that he had no known there was anyone else who was interested in purchasing the suit property. He had not been a party to the suit when it was instituted in1993, and he was enjoined only later. He testified that he had invested a lot in the suit property; he has built on it a modern house; he has brought in a Church institution; he has interred three deceased relatives on the land. He prayed that the suit be dismissed with costs. On cross-examination by learned counsel Mr. Kahonge, DW2 testified that he had come to know of the 1st defendant's intention to sell the suit land through one Juma Muchemi, a brother of the vendor. Although the formal registered title is still in the name of the Settlement Fund Trustees, DW2 testified, the right to it and the possession of it had already passed to him, after purchase on the willing-buyer-willing-seller principle, and with the consent of the Land Control Board given on 31st March, 1993. DW2 testified that the value of the land, as declared before the Land Control Board, was Kshs.300,000/=, but many of the payments of purchase price had been in kind. He testified that he had settled on the suit land in August, 1993 but had taken possession in March, 1993. Prior to his taking of possession, none but the vendor's workers had been on the land; and DW2 was not responsible for any houses on the suit land being burnt as alleged by some of the plaintiff's witness. When Mr. Kahonge reminded the witness of a Court order of 6th April 1994 which restrained the 2nd defendant or his agents from entering the suit land, Mr. Kairu www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 25 for the 2nd defendant raised the point that the said order had later been vacated by the Court; and Mr. Etole for the 1st defendant confirmed the same. DW2 averred that he would have been aware of the same order; but he had received counsel that the order had been set aside. VI. WHO WAS IN BREACH OF AGREEMENT? BUT, WHOEVER IS IN BREACH, IS VENDOR DEBARRED FROM PASSING VALID TITLE TO THIRD PARTY? – SUBMISSIONS FOR THE PLAINTIFF (i) Evidence Learned counsel Mr. Kahonge contended that the 1st defendant, Lt. Col. (Rtd) David M. Muchemi was in breach of the contract/agreement dated 22nd July, 1992 in respect of the sale of L. R. No. 8 Oljoro Orok Scheme/Nyandarua; and that, consequently, the plaintiff merited the grant of orders of specific performance, to compel the 1st defendant to complete the land sale transaction. As against the 2nd defendant, Stephen Kimani Gakenia, the plaintiff sought eviction orders, covering him, his family, servants and agents. In his analysis of evidence Mr. Kahonge underlined the averment made by the plaintiff in his testimony, "that the land was to be sold with vacant possession and that the 1st defendant would evict all the squatters who were occupying the property and tilling it". Counsel also emphasised the testimony that, in preparation for completion of the purchase transaction, the plaintiff had already sold his own properties at Kinoo, and he was now ready and willing to complete. Counsel maintained that there had indeed been squatters on the suit land, and that both PW2 and PW3 fell in that category. Counsel submitted that the evidence of both PW2 and PW3 led to the conclusion that there had been a secret sale agreement between the 1st and 2nd defendants, and that their purpose was to defeat the agreement which had earlier been made between the plaintiff and www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi &

another [2006] eKLR 26 the 1st defendant. He further submitted that the 1st defendant was in breach of the 22nd July, 1992 agreement to sell the suit premises to the plaintiff with vacant possession. Mr. Kahonge submitted that the evidence tendered for the defence was generally inconsistent with the pleadings filed. Mr. Kahonge submitted that the 2nd defendant's denial of any knowledge of the sale agreement between the plaintiff and the 1st defendant would have been in bad faith: because he had retained Kshs.400,000/= of the purchase price, in apprehension that his land – purchase transaction might not succeed. Counsel submitted that the provision for vacant possession and clearing of squatters had been made both in the 1990 and the 1992 agreements – and so the relevant clauses could not have been merely to please a particular party; there must have been squatters on the suit land. Counsel wondered why the 1st defendant had not called his former "workers" to testify to the fact that they had been workers and not squatters on the suit land. Failure by the 1st defendant to call such witnesses, learned counsel submitted, would lead, on the basis of the provisions of section 119 of the Evidence Act (Cap.80), to the inference that such "workers" would have testified adversely against the 1st defendant. Learned counsel submitted that the 1st defendant had not conducted himself with honesty and had not given true evidence: he had no good reasons for not refunding the plaintiff's Kshs.600,000/=; he alone appeared before the Land Control Board on two separate occasions, securing consent to transfer the suit land to different persons; he had deliberately understated the purchase price for the suit property. (ii) Does a Cause of Action Lie against the Defendants? Mr. Kahonge submitted that the 1st defendant was in breach of contract – the agreement of 22nd July, 1992. The specific breach alleged is failure to complete the 1st defendant's part of www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 27 the sale transaction – by failing to remove squatters from the suit premises, and thereafter giving vacant possession before the completion date. Hence the claim for specific performance; and in this regard counsel relies on Halsbury's Laws of England. 3rd (Vol.36) at Pa. 309 et seq. The relevant passage thus reads (para 444): "Failure to be ready and willing to contract. A plaintiff seeking to enforce a contract must show that all conditions precedent have been fulfilled and that he has performed, or been ready and willing to perform, all the terms which ought to have been performed by him, and also that he is ready and wiling to perform all future obligations under the contract……." The following passage appears at para. 450 of Halsbury's Law of England (id.): "…….the plaintiff must also show performance by him of all terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. This rule, however, only applies as to terms which are essential and considerable. The Court does not bar a claim on the ground that the plaintiff has failed in literal performance, on is in default in some non-essential or unimportant terms, though in such cases it may grant compensation. "Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the Court does not accept his undertaking to perform in lieu of performance, but dismisses the claim." Learned counsel next made reference to R. Hodgin in his work, The Law of Contract in East Africa (Nairobi: 1985 repr.), where specific performance is considered (p.218). and it is stated that this remedy was introduced to alleviate the harshness of certain rules of the common law. Specific performance is invoked when a monetary award may not be a suitable remedy for the plaintiff; it compels the wrongdoer to carry out his contractual obligations; it is a discretionary remedy, and so it will be granted only when the plaintiff convinces the Court that damages are not an adequate remedy in the circumstances. Hodgin states that a plaintiff seeking such remedy must come to Court without undue delay, and www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 28 with clean hands; and Courts will not issue specific performance if it causes undue hardship to the defendant, or if it would prove impossible to enforce the orders. The foregoing principles are also considered in elaborate detail in Chitty on Contracts (London: Sweet & Maxwell, 1994), 27th ed. (Vol.I); a passage on p. 1284 (para.27-004) may be set out here: "Land. The law takes the view that the purchaser of a particular piece of land or a particular house (however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him. It seems that this is so even though the purchaser has bought for resale These principles have been incorporated into Kenyan law, as witness a decision such as Njuguna v. Kivundi [1982] KLR 233 where Hancox, J (as he then as) held that the remedy of specific performance was available to a party who is affected by the other party's acts in breach of an agreement. It was in that case held (p.233): " In a contract for the sale of land, after time has been made or has become of the essence, if the purchaser fails to complete the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation and proceed to claim damages for breach of contract, both parties being discharged from further performance of the contract, or he may seek from the Court an order for specific performance with damages for any loss arising from delay in performance. " If the vendor treats the contract as having been repudiated and accepts the repudiation, he cannot thereafter seek specific performance. The correct remedy in this case would have been specific performance but in the circumstances of the case, it would be unfair to grant this remedy. The appropriate remedy would be refund for money paid plus damages". On the basis of the foregoing principles, Mr. Kahonge submitted that the plaintiff had done all that was required, as a condition for seeking the equitable remedy of rescission: he was ready and willing to complete the transaction; he had come in time before there was any registered transfer of the suit premises to the 2nd defendant. Learned counsel submitted www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 29 that the plaintiff was coming to Court with clean hands, and so was properly within the Court's equitable jurisdiction. Mr. Kahonge submitted that there should be no undue significance attached to the fact that the registered owners of the suit land, the Settlement Fund Trustees, had already issued to the 2nd defendant a Certificate of outright purchase; because no legal transfer of title had taken place yet; and so "the relief of specific performance is still within reach". In learned counsel's words: "proprietary rights in the suit premises being [Registered Land Act] lands can only be conferred and protected in law if the same are registered. No such registration has taken place and there would no valid ……. reason whey the Court cannot order the 1st defendant to complete the transaction ……and have the plaintiff registered as owner of the suit premises." Learned counsel contested the claim by the 2nd defendant that he had already made developments on the suit land; because such developments "were carried out despite the existence of Court orders dated 6th April, 1994 which orders specifically barred him [2nd defendant] from developing the suit premises." So, counsel urged, "the 2nd defendant ought to suffer for his misadventure, as he is the author of his misfortune if indeed he has developed the land as he alleges". Counsel submitted that there would be no undue hardship caused to either defendant if an order for specific performance [were] made as prayed, "as any hardship that may be suffered is in the circumstances self-created". Mr. Kahonge submitted that the plaintiff had attached much significance to the sale transaction, and had disposed of "his lifetime investments and only source of income so that he could purchase the suit premises". In these circumstances, counsel urged, "damages only www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 30 would not appropriately compensate [the plaintiff]…" counsel prayed for damages in addition to specific performance. VII. WHO IS IN BREACH OF CONTRACT? INNOCENT PARTY MAY LAWFULLY REPUDIATE SALE AGREEMENT, AND SELL TO THIRD PARTY – SUBMISSIONS FOR 1ST DEFENDANT Learned counsel Mr. Etole entered upon his submissions by considering special condition No.3 in the sale agreement of 22nd July, 1992 – which stipulated that the vendor was to clear out of the suit land all squatters, by the completion date. He restated from the evidence given by the 1st defendant, that there were no squatters on the land, and the people thought to be squatters by the plaintiff, were his workers. He urged that the 1st defendant's evidence was the truth, because "upon sale of the suit property to the 2nd defendant, the socalled squatters were peremptorily removed." Counsel submitted that, in any event, the special condition on squatters "could not have stopped the plaintiff from meeting his obligation under the contract, i.e to transfer the land to himself first." Counsel then considered special condition No.7 of the sale agreement. This stated that, should the 1st defendant be the cause of non-completion of the sale transaction, then he was to refund the purchase price, with interest. He submitted that it was not shown in the evidence that the 1st defendant was in breach of the sale agreement. It was the 1st defendant who secured Land Control Board consent, for the transfer of the suit land to the plaintiff. Thereafter, the 1st defendant's advocates asked the plaintiff's advocates to prepare a transfer document for the vendor's signature; but the plaintiff refused to prepare the transfer, from August 1992 till December, 1992 when the 1st defendant repudiated the contract. The plaintiff also failed, counsel

contended, to pay to the 1st defendant or his advocate the www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 31 balance of the purchase price. So counsel poses: “can the plaintiff be said to have been ready and willing to complete his part of the bargain, in the circumstances? The answer to the question is in the negative” Learned counsel remarked from the evidence, that the plaintiff had not at any time given any documentary evidence that he was in possession of the balance of the purchase price. Although the plaintiff did testify as to the sale of his two properties at Kinoo, Mr. Etole submitted that “selling of his other properties per se is not evidence that he had the balance of the purchase price ready in his possession”. Learned counsel submitted that it was the plaintiff who had been in breach of the sale agreement – by not performing his obligations under the contract. Counsel urged: “Nothing would have been easier than for the plaintiff to transfer the land to himself first, and then demand that the 1st defendant removes the ‘workers’ or ‘squatters’ as the case may be, before the release of the balance of the purchase price. This option was open to him but he failed to take advantage of the same.” In the circumstances, counsel urged, “the plaintiff has no cause for complaint in this matter. He is squarely to blame for the failure of this transaction”. Counsel took up the typification by counsel for the plaintiff, of both the plaintiff and the 1st defendant as “knowledgeable men of commerce” to urge a principle which, I think, is a meritorious one: “if the plaintiff was truly a knowledgeable man of commerce, he ought to have mitigated his loss by first getting the land transferred to himself before going into the issue of eviction of squatters and/or workers”. As already noted at the beginning of this judgment, the plaintiff’s plaint was amended on 7th April, 1996 and the same filed on 8th August, 1996. Mr. Etole took issue with para.11 of the amended plaint which reads: www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 32 “That in breach of the sale agreement and notwithstanding requests made by the plaintiff, the 1st defendant has wrongfully failed and refused and continues to neglect and refuses to complete the sale.” Yet, as learned counsel submits, the plaintiff did know that the suit land had been sold to the 2nd defendant in April, 1993; and so, it is urged, the plaintiff “was still labouring under an honest but mistaken belief that there was still land owned by the 1st defendant to be transferred to him as late as 7th August, 1996 …” Mr. Etole submitted that once the 2nd defendant got the land transferred to himself, the plaintiff’s claim to the suit land was extinguished. Learned counsel urged that since there was no privity of contract between the plaintiff and the 2nd defendant, the 2nd defendant should not have been enjoined in this suit. Learned counsel then considered the individual prayers made by the plaintiff. He urged that the prayer for a permanent injunction restraining the defendants, their servants or agents from selling, sub-dividing, disposing of and/or in any way interfering with the suit land, was not available to the plaintiff, as the 1st defendant has no land in respect of which an injunction could issue. Counsel submitted that the sale of the suit land to the 2nd defendant had been legally done; and therefore there was no room for the plaintiff’s prayer for a declaration that if there was any sale between the 1st and the 2nd defendants, the same be declared void ab initio. Learned counsel submitted that the plaintiff’s prayer for specific performance, equally, had no basis. For the plaintiff is well aware that the suit land has already passed over to a third party who had no notice of any impropriety. And in any event, counsel urged, it was the plaintiff who was in breach of contract; so specific performance would be www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 33 unavailable to him. To support this point, learned counsel relied on the Court of Appeal’s decision in Wambugu v. Njuguna [1983] KLR 172 at p.186 (Chesoni, Ag. J. A.): “In the circumstances, the appellant was, in my view, entitled to repudiate the contract of sale of the suit land for failure of performance and as the respondent had failed to perform his part, he could not demand performance by the appellant. I would therefore hold that although there was originally a contract of sale of the suit land, the contract was lawfully repudiated by the appellant and no specific performance thereof in favour of the respondent could be ordered.” On the plaintiff’s prayer for damages for breach of contract in lieu of, or in addition to specific performance, learned counsel submitted that as the plaintiff rather that the 1st defendant is the one in breach of contract, damages as a remedy is not available to the plaintiff. Learned counsel submitted that as the 2nd defendant is the legal owner of the suit land, it would be inequitable to entertain the plaintiff’s prayer, that he, his family, servants and/or agents be evicted from the suit land. Learned counsel contested the plaintiff’s prayers for special damages, as the same had not been specifically pleaded. He urged that such damages were not available to the plaintiff. VIII. THE DUTY FALLS ON THE PURCHASER TO TENDER TRANSFER DOCUMENTS, AND TO PAY THE PURCHASE PRICE BY A DEFINED DATE – SUBMISSION FOR 2ND DEFENDANT (i) Squatters Learned counsel Mr. Kairu entered upon his submission by adverting to para.11 of the amended plaint which pleads: www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 34 “That in breach of the sale agreement and notwithstanding requests made by the plaintiff, the 1st defendant has wrongfully failed and refused and continues to neglect and refuse to complete the sale” But from the evidence, learned counsel submitted, the plaintiff’s specific complaint was that the 1st defendant allegedly failed to evict squatters from the suit land as required under special condition No.3. The 2nd defendant’s evidence had been to the effect that, by the time he took possession of the said premises in 1993, there were no squatters therein. (ii) Responsibility for Conveyance Document, and for Payment Learned counsel recalled from the evidence that even when the 1st defendant had been ready to remove all persons residing on the suit property once the sale was concluded, the plaintiff did not meet his obligations under the agreement: there was failure to tender balance of the purchase price; and failure to prepare and tender the transfer instrument. Mr. Kairu submitted that there was no evidence that the1st defendant had been in breach of the sale agreement of 22nd July, 1992; and instead, it is the plaintiff who was in breach. Learned counsel referred to two important letters, in the communications between advocates for the 1st defendant, M/s. Cheloti & Etole Advocates and M/s. Mugambi & Ali Advccates respectively, dated 11th November, 1992 and 23rd November, 1992; and from this correspondence it emerges that the plaintiff had not had his transfer documents prepared – so that the suit land could be transferred to himself. The governing law on this transfer procedure is to be found in a decision of the Court of Appeal for Eastern Africa, in Shantilal Lalji Shah v. Gulzer Begum w/o Lall Khan (1948) 15 EACA 25 (see pp. 26-27, Sir John Gray, C. J.): “…a purchaser is in certain circumstances to tender a conveyance for execution by the vendor in order to obtain completion of the purchase. As said by www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 35 Viscount Haldane in the Burmese case of Ma Hnit v. Maung Po Pu (1920), 55 Indian Cases p.591, ‘the duty of the purchaser having regard to the analogy of what is laid down by section 55 of the Indian Transfer of Property Act, 1882,which is treated as defining what ought to be the practice in upper Burma, was to tender a conveyance, and he would then, and not before such tender was either made or waived, have a right to the deeds as the accompaniment of the transfer of title’. “In other words, the law under the Indian Act is the same as the rule of English law. Generally speaking, a purchaser must tender a conveyance to the vendor for execution, but there may be cases in which the vendor either expressly, or by his conduct impliedly, waives the formality of tender of a conveyance for execution” That principle of law is now quite clear, as witnesses the much later Court of Appeal decisions Parminder Singh Sagoo & Another v. Neville Anthony Dourado & Another (1982 – 88) KAR 64 (at p. 69 Madan, J. A): “Condition 22(5) of the conditions of sale also provides that it is only on payment of the purchase money that the vendor can be required to execute a proper conveyance and deliver to the purchaser a clearance certificate in respect of the property. The purchasers never qualified themselves or became entitled to ask the vendors to execute a conveyance because they never proffered it to the vendors together with the balance of the purchase price either in cash or in the form of a receipt or discharge of the mortgage duly executed by the mortgagee. The mortgage debt formed a part of the purchase price which would have been payable to the vendors direct if the encumbrance of the mortgage did not exist.” (iii) Readiness and willingness to Complete the Transaction Learned counsel submitted that the plaintiff had not demonstrated, within the framework of law as stated in Halsbury’s Laws of England, 3rd ed (vol.36) (p.309), loc cit, that he had indeed been ready and willing to complete the sale transaction between himself and the 1st defendant. The agreement had set out the completion date as 21st August, 1992 and the plaintiff was to prepare the transfer instrument. From the evidence, the plaintiff’s Kinoo properties had been sold under completed contracts “a considerable time before the completion date of 21st August, 1992” which is the relevant date in the www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 36 agreement herein. Mr.

Kairu remarked: “The plaintiff did not adduce any evidence, for instance bank statements, to show that he held Kshs. 1.7 milion received from the sale of the [Kinoo] parcels of land as at the completion date of the agreement in question. He also did not tender the balance of the purchase price to the defendant by 21st August, 1992 or thereafter. He has not produced evidence to show he was able to perform this obligation” Learned counsel submitted that the plaintiff was not ready and willing to perform his obligation under the agreement of 22nd July, 1992; and so he would not be entitled to the remedy of specific performance. Counsel sought to support this submission with the Court of Appeal decision in Wambugu v. Njuguna [1983] KLR 172, in which it was held (p. 174, 177) that specific performance could not be granted in favour of the respondent, because he had not fulfilled his obligations under the contract. (iv) Damages versus Specific Performance Proceeding from the principle stated in Hodgin’s Law of Contract in East Africa, that specific performance is not to be granted where damages will provide an adequate remedy, Mr. Kairu submitted that the circumstances of this case would be inappropriate for the grant of specific performance. And the relevant circumstances are: (a) the plaintiff and the 1st defendant had expressly agreed on appropriate remedy, in the event of failure to complete by either party; (b) the 2nd defendant had emerged as a bona fide purchaser for value, without notice of any irregularity, and he was in possession and has so been for more than a decade; he has developed the property at considerable cost; he has interred the remains of his close relatives on the suit land; he had allocated a portion of the suit land to a Church establishment. www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 37 Counsel submitted that by assigning appropriate remedies in the event of termination of the sale agreement, the parties, by the special conditions, had made deliberate choices, and in this manner they had agreed in favour of waiver of the remedy of specific performance. (v) Did the Vendor have a Right to Repudiate the Sale Agreement? Counsel noted that the 1st defendant had a right to repudiate the agreement of 22nd July, 1992 since by his letter to the plaintiff of 8th December, 1992 he had given notice, and allowed the plaintiff enough time to complete the transaction. In the said letter from M/s. Cheloti & Etole Advocates to M/s. Mugambi & Ali Advocates the following paragraphs may be quoted: “We refer to your letter of 23rd November, 1992 and advise that out client maintains that there are no squatters, only workers who we undertake to evict upon transfer. Our instructions are to give you 7 DAYS to complete this transaction failing which our client will take alternative options open to him. “Our client has done everything possible within his powers to finalise this transaction.” Mr. Kairu submitted that the 1st defendant had repudiated the contract only after more than three months had passed, following the issuance of notice; and that the 1st defendant was within his rights in repudiating the contract. Learned counsel invoked the decision in Wambugu v. Njuguna [1983] KLR 172 in which it had been held that the contract was lawfully repudiated by the appellant, after the respondent failed to perform his obligation. (vi) Is the Plaintiff entitled to the Suit Property? Learned counsel noted that the Law Society Conditions of Sale (1989) which applied to the agreement herein, thus states, in condition 5: www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 38 “…the purchaser shall not be entitled to possession of the property until he has paid or (as the case may be) unconditionally authorised the release of the whole of the purchase money to the vendor”. Mr. Kairu submitted that the plaintiff had not at any time paid the whole of the purchase price to the 1st defendant – and that such failure amounted to a breach, going to the root of the contract. Consequently, it was submitted, the plaintiff was not entitled to possession of the suit property. Counsel further submitted that an order for specific performance should not be granted; for the 2nd defendant had testified that he has invested heavily in the suit property, and an order of eviction would occasion hardship. In Ongecha v. City Council of Nairobi [1982] KLR 151 it was held (Chesoni, J) (p.156): (a) “Failure of performance, whether total or partial, may constitute a breach of contract if it goes to the root of the contract…” (b) [at p.158] “The agreement here is not uncertain in any material respect, but an order for specific performance would involve hardship as it would entail the ejectment of tenants in possession for the eight flats originally promised to eight of the plaintiffs.” The position of the Court in that case was, that an order of specific performance was an equitable remedy which would not be granted where it would occasion hardship. (vii) Is the Third Party entitled to remain in Possession? Mr. Kairu stated from the evidence, that the 2nd defendant had entered into a sale agreement with the 1st defendant, and had purchased the suit property on 31st March, 1993. He noted that the date of purchase by the 2nd defendant was after the 1st defendant’s agreement with the plaintiff had been repudiated. By a letter dated 29th March, 1993 the Director of Land Adjudication and Settlement had informed the District Land Settlement Officer of the www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 39 proposed sale. Thereafter, the 1st defendant sought the Land Control Board’s consent – which was issued on 31st March, 1993. A transfer in favour of the 2nd defendant, from the 1st defendant, was issued on 31st March, 1993. The 2nd defendant then obtained a Certificate of Outright Purchase dated 23rd April, 1993; and this confirmed that the 2nd defendant is the allottee of the suit property. Mr. Kairu submitted that in all the circumstances, and as a matter of law, the true owner of the suit land was the 2nd defendant, with the exclusive right of possession. In Wamwea v. Catholic Diocese of Murang’a Registered Trustees [2003] KLR 389 the High Court (Khamoni, J) had clarified the nexus between legal entitlement and rights of possession (p.395): “…the sole absolute owner of the suit parcel of land had already lawfully transferred the land to the respondent who was as a result entitled, not only to possession but also to occupation of the suit parcel of land. Not only did the respondent acquire the legal title but the respondent also acquired the right to occupy and work that land. On the other hand the appellant, on refusal to give vacant possession, became a trespasser notwithstanding that he had refused to take the compensation money he was given as his refusal to take that money did not confer any legal interest in the suit land [upon] the [appellant].” The essential point in that decision is summarised by learned counsel Mr. Kairu: once a party acquires legal title over a parcel of land, such a party is entitled not only to possession but also to occupation of that land. Learned counsel submitted, and I believe correctly, that the 2nd defendant who obtained the certificate of outright purchase, for the suit land, has legal title over that property; and that the 2nd defendant is therefore entitled to possession of the suit property. He urged that the prayer for an eviction order against the 2nd defendant, be refused. (viii) Is there a Cause of Action against the 2nd Defendant? www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 40 Mr. Kairu submitted that the plaintiff had no cause of action against the 2nd defendant; because the agreement which has led to the instant suit was only between the plaintiff and the 1st defendant. Counsel argued that the 2nd defendant was not privy to the said agreement, and was therefore not liable, and could not be called upon to answer to the plaintiff’s claims sounding in contract. Furthermore, it was urged, the 2nd defendant had acquired legal title over the suit property, so that no legal entitlement was lying fallow, and which the plaintiff could now claim. In Nairobi Permanent Markets Society & Others v. Salima Enterprises & Others [1995- 1998] 1 E.A. 232, and in relation to appellants who urged a land claim not resting on legal entitlement, the Court of Appeal had held: “The appellants have not disclosed what right or interest they had in the suit land. In the absence of that they could not expect the Court to interfere with the company’s right of ownership by putting a hold on its activity or development of the suit land. We fully agree with the learned trial Judge that in the circumstances the appellants prima facie did not have locus standi to bring the said action for an injunction against the respondents” In like manner, Mr. Kairu urged that the plaintiff herein has not established or disclosed the legal interest which he has, in the suit property. Counsel submitted that the 2nd defendant was an innocent, bona fide purchaser for valuable consideration, who has been dragged into the instant suit without good cause. He urged that the suit be dismissed with costs. IX. JOINDER OF 2ND DEFENDANT, AND TERMS OF GRANT OF SPECIFIC PERFORMANCE: PLAINTIFF’S REJOINDER (i) Joinder, Misjoinder www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 41 Learned counsel Mr. Kahonge submitted that there had been procedurally valid grounds for joining the 2nd defendant in this suit in 1993. The plaintiff was seeking as reliefs, specific performance and an order of eviction; and so it was a paramount step, that the 2nd defendant be joined to the proceedings, so that he may be heard, especially as adverse orders were being sought against the 2nd defendant. So far as it goes, I think, Mr. Kahonge’s submission on this point is valid. Of course, the outcome must abide the merits of the whole case and, primarily, relate to the manner in which this case evolves in relation to the 1st defendant; and it is on that basis that the question of liability must ultimately be determined, further on. (ii) Specific Performance Learned counsel restated the principle that specific

performance is a relief normally awarded, if in favour of a purchaser of land, where it would not cause undue hardship to the vendor – and the purchaser would have to show that he did not occasion the breach; that he was able and willing to complete the contract. Counsel was constrained concerned to reply on his client's perception of the squatter issue. He urged that it would have been foolhardy for the purchaser to pay the full purchase price if the squatters had not been removed from the suit land. Counsel also underlined issues which had featured in his main submissions, such as readiness and willingness to complete the contractual obligations; possible hardship that may be caused if the Court were to grant the prayer for specific performance; the status of the developments which the 2nd defendant has made on the suit land. www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 42 X. FINAL ANALYSIS, AND DECREE The points of law foreshadowing the dispute herein are by no means novel even though they could have somewhat faded in past judgement texts, and so would not be, in common, acknowledged by the parties as being dispositive of the claims which have arisen here. In summary the questions for resolution in this case are as follows. (i) Was either the plaintiff or the 1st defendant in breach of the sale agreement of 22nd July, 1992? (ii)If the said agreement had ceased to be, did this fact entitle the plaintiff to certain remedies against the 1st defendant? (iii) Assuming the party in breach was the 1st defendant was he in the circumstances, bound to transfer the suit land to the plaintiff, and did he remain so liable even today, more than a dozen years later? (iv) suppose, on the other hand, that it is the plaintiff who was in breach of contract, could he still move this Court seeking specific performance? (v) Is there evidence to show that the plaintiff had at all times been ready and willing to complete the land sale transaction? (vi) If the plaintiff did not pay the balance of the purchase price by the completion date, can he maintain action for breach of contract? (vii) If the plaintiff did not prepare the conveyance document and seek the 1st defendant's execution thereof, could he maintain action for breach of contract? (viii) Was the special condition regarding removal of squatters, as at the completion date, a reason in law for the plaintiff not to take action by preparing the transfer document, and by paying the balance of purchase price? (ix) If the 1st defendant repudiated the sale agreement several months after the completion date passed, would he be in breach of contract; and could he pass good title to the 2nd defendant? (x) If the 2nd defendant has all the operational indicia of entitlement to the suit www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 43 land, is it tenable that the plaintiff can challenge his possession and occupation of the suit land? The agreed completion date under the sale agreement between the plaintiff and the 1st defendant was 21st August, 1992. The plaintiff took the position that the 1st defendant was in breach of the contract, for not complying in certain ways with that time limit. The plaintiff saw it as a breach, that the consent letter of the Oljoro Orok Land control Board was issued after the completion date, on 28thAugust, 1992. There is, however, uncontroverted evidence that the 1st defendant, upon whom fell the task of obtaining Land Control Board consent had indeed obtained consent on 20th August, 1992 – which was ahead of the completion date – except that owing to the workings of public office bureaucracy, of which judicial notice may in this case be taken, that letter was only issued on 28th August, 1992. I think the 1st defendant bears no blame for that slight delay. And as for the rights of the plaintiff under the contract, I would hold that such a delay is so small that it is accommodated under the general principle applied in civil law, de minimis non curat lex – the law does not concern itself with trifles. It is apparent from the evidence that even if 28th August, 1992 were to be taken as the actual completion date, by that date the plaintiff had not taken two steps which are essential to completion of a land sale agreement: preparing the transfer document, and tendering to the vendor the balance of purchase price. And more than three months then passed, but still the plaintiff had not taken those vital steps. This now became a problem to the vendor, www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 44 whose advocates, on 8th December, 1992 gave formal notice to the plaintiff to complete the sale transaction, failing which the 1st defendant would exercise any available options. Up to this point, and on the basic facts here summarised, I have no doubts that the 1st defendant had acted in all propriety, under the terms of the agreement of 22nd July, 1992 and that the plaintiff had, quite clearly, embarked upon a course which entailed breach of contract. Once the completion date had come and gone, and the plaintiff had not yet completed his part of the contract, was the contract still operational? The plaintiff comes to Court on the basis that the land-sale agreement of 22nd July, 1992 remained in force and it is the 1st defendant who acted in breach of it by making a new contract with the 2nd defendant, and selling the suit land to the 2nd defendant on 31st March, 1993 – some four months after the plaintiff had been served with completion notice. The plaintiff pleads as his reason for not completing the land sale, whether on 21st August, 1992 or 28th August, 1992 or within seven days after the 1st defendant's completion notice of 8th December, 1992 the fact (which itself is disputed) that a certain special condition – the eviction of squatters from the suit land – had not been performed by the 1st defendant as at the date of completion. If it is taken that the completion date was 21st August, 1992 then the failure of the special condition as to the clearing out of squatters could not possibly have arisen before that date. The lawful course, therefore, would have been for the plaintiff to turn up with the transfer document and the balance of purchase price, on the stroke of the completion date, and then raise the objection that the "squatters" were still on the suit land; for the 1st defendant had all along undertaken to have anyone being on the suit land removed as at the www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 45 completion date. There is much evidence that the plaintiff was raising objection in advance about the special condition on squatters; but there is no evidence that the plaintiff observed the completion date, by bringing forth the balance of the purchase price, and also the conveyance documents – for execution by the vendor. On those facts, I have no doubts in my mind that the apprehensions in the plaintiff's mind led him to fail to perform his part in the land-sale agreement of 22nd July, 1992. Both counsel for the defendants have illuminated a significant point in the plaintiff's flawed case in this suit: his first duty was to transfer to himself the suit land, which was the crucial element in the whole transaction, and thereafter raise secondary questions as to any shortfalls in the mode of delivery by the 1st defendant. This submission has much merit, in my opinion, and goes into the well – recognised principle of contract, that a party must take reasonable steps to mitigate his losses. If the plaintiff genuinely apprehended loss on the land sale agreement, he was expected to take action to mitigate such possible losses; and if he did, no doubt a legal process of recompense would be available to him. I would hold that the land sale agreement of 22nd July, 1992 ceased to be, one week after the 1st defendant's notice to the plaintiff, of 8th December, 1992. The 1st defendant's repudiation of the contract due to breach by the plaintiff, was in my view entirely justified and was lawful. This means that, thenceforth, the 1st defendant was perfectly free to dispose of the suit land as he saw fit. The 1st defendant, on 31st March, 1993 sold the suit land to the 2nd defendant. I would hold that the 1st defendant had properly passed to the 2nd defendant the indicia of ownership of the suit land and the 2nd defendant, as now the bearer of the certificate of www.kenyalaw.org Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR 46 outright purchase, is the party entitled to the land. I would further adopt the High Court's decision in Wamwea v. Catholic Dioceses of Murang'a Registered Trustees [2003] KLR 389, and hold that the 2nd defendant as the entitled proprietor of the suit land, has full rights of possession and occupation thereof, and the law will protect him in the enjoyment of his property, in accordance with the fundamental right to private property as defined in the Constitution of Kenya (s.75). It is noted that the 2nd defendant has already substantially, over the last decade or so, exercised his rights of ownership and occupation by putting up major physical developments on the suit land. Such legitimate interests also stand to be protected by virtue of the Court's equitable jurisdiction. The fact that the search done by the plaintiff in the Lands Office on 5th May 1997 showed the Settlement Fund Trustees to be still the registered holders of the suit land, is of no materiality to the status of the rights of the parties herein.

In the outcome I hereby – (a) refuse to issue permanent injunction restraining the defendants, their servants and/or agents from selling, sub-dividing, disposing off and/or in any way interfering with L.R. NO.8 OLJORO OROK; (b) refuse the prayer for a declaration of nullity in the sale of the suit land by the 1st defendant to the2nd defendant; (c) refuse the prayer for declaration that the 1st defendant had been in breach of the agreement dated 22nd July, 1992; (d) refuse specific performance of the sale agreement of 22nd July 1992; (e) decline to award damages for breach of contract against the 1st defendant; (f) decline to order eviction of the 2nd defendant, his family, servants and/or agents from the

suit land; (g) refuse the prayer for special damages against the defendants.

The plaintiff's suit is dismissed with costs to the defendants. It is so ordered.

DATED and delivered at Nairobi this 10th day of February, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Mwangi

For the plaintff: Mr. Kahonge, instructed by

M/s. Macharia Kahonge & Co. Advocate

For the 1st defendant: Mr. Etole, instructed by

M/s. Cheloti & Etole Advocates

For the 2nd Defendant: Mr. Kairu, Instructed by

M/s. Kairu & Mc Court Advocates