REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 374 OF 1997

ROSE WATHIRU WARUINGE……....PLAINTIFF

-VERSUS-

JOHN NJENGA KIMANI……..….DEFENDANT

JUDGEMENT

I. FAILURE TO SUB-DIVIDE AND TRANSFER PLOT, BREACH OF CONTRACT: PLAINTIFF'S CLAIM

The plaintiff's claim is based on the plaint dated 14th February, 1997 and filed on 17th February, 1997.

The plaintiff states that she is "suing on her own behalf and as the personal representative and administratrix of the estate of the late ***Samuel Waruinge."*** The basis of the suit is a parcel of land registered in the name of the defendant as L.R. No.2246/4 Langata, Nairobi. It is pleaded that the plaintiff and her deceased husband had offered to purchase out of the said parcel of land, a portion of some three acres for a sum of Kshs.1,000,000/=; that the defendant had accepted the said offer; that the parties had duly executed an agreement for the sale on *18th February, 1991*; that pursuant to the said agreement the plaintiff made in part-payment of the purchase price the sum of Kshs.400,000/=. The said agreement, it is pleaded, placed on the plaintiff the obligation to pay the balance of the purchase price on or before the completion date, namely *28th March, 1992*; placed on the defendant as vendor, the obligation to sub-divide the main parcel of land and thereout, to excise at his own cost the three acres to be transferred; obligated the defendant as vendor to provide access to the said three acres, with necessary approvals by the Commissioner of Lands and the Nairobi City Commission; and obligated the defendant to free the said three acres of all encumbrances and to transfer the same with vacant possession.

The plaintiff pleads that the purchasers, subsequent to the execution of the land-sale agreement, were always ready and willing to perform the obligations resting upon them, but the defendant "unilaterally failed [to perform his part] and [fell] in breach of the …terms of the ….agreement…"

The plaintiff gives as particulars of breach of contract by the defendant, the following:

(i) failing to obtain the necessary approvals and the sub-division of the suit land;

(ii) failing to sell the agree three acres of land to the plaintiff;

(iii) failing to have the encumbrances registered against the property withdrawn or settled;

(iv) failing to sell the property with vacant possession to the plaintiff;

(v) failing to complete the transaction within the agreed completion date or at all;

(vi) withholding title documents and thus voluntarily defeating and/or obstructing the transfer of the property to the plaintiff as agreed;

(vii) evincing an intention to repudiate the land-sale agreement without any lawful cause;

(viii) failing to undertake the necessary survey work, and to provide access road to the portion agreed to be sub-divided and transferred to the plaintiff.

The plaintiff pleads that owing to the defendant's breaches of contract she has suffered loss in the following particulars:

(i) deposit paid as part of the purchase price: Kshs.400,000/=;

(ii) legal fees incurred: Kshs.35,000/=

(iii) further advance given in the form of legal services: Kshs.330,000/=.

Apart from such special damages, the plaintiff prays for *general damages* for breach of contract. She seeks both heads of damages with interest, as from specified dates.

The plaintiff, in the alternative, seeks specific performance of the contract as executed between the parties.

The plaintiff prays for costs, and for "such further or other relief or order as this Honourable Court may deem fit and just to grant."

II. CONTRACT FRUSTRATED BY PLAINTIFF'S SMALLER-PLOT CLAIM, AND BY NON-EXTENSION OF COMPLETION DATE: DEFENDANT'S PLEADING

The defendant's statement of defence dated 4th September, 1997 was filed on 10th September, 1997.

The defendant admits entering into an agreement for the sale of three acres of land to the plaintiff, the same being excised from the larger parcel, L.R. No. 2246/4 Langata. He pleads that under the sale agreement executed by the parties herein, the conveyance had a completion date, *28th March, 1992* and that in this regard, time was of the essence. The defendant admits that pursuant to the said land-sale agreement, he had received from the plaintiff as part-payment the sum of Kshs.400,000/=, leaving still outstanding a balance of Kshs.600,000/=.

The defendant pleads that the land-sale agreement became *frustrated*, because the plaintiff and her deceased husband, at some stage, sought the excision and transfer to them of ***two*** acres of land in place of the agreed ***three.*** He avers that the decision to have only two acres transferred was communicated to him only "belatedly."

It is pleaded that the three-acres component of the sale agreement was a "material part of the agreement" – and so, seeking only two acres amounted to frustration of the contract.

The defendant pleads as further elements in the *frustration* of the land-sale agreement – and by the plaintiff – lapse of time, and failure of mutual agreement for extension of the same. The defendant denies that the plaintiff has suffered any loss and damage as claimed.

III. ISSUES FOR RESOLUTION BY TRIAL

Counsel for both parties agreed the issues for resolution and the same, dated 17th September, 2002 were filed on 3rd October, 2002. These issues are as follows:

> ***(a)*** *does the plaintiff have the capacity to file this claim on her own behalf and on behalf of the estate of her late husband,* ***Gitahi Samuel Waruinge?***
>
> *(b) was the condition, "time of essence," one of the fundamental conditions of the Agreement for Sale entered into between the parties on 18th February, 1991 and if so, who is guilty of breach of the agreement?*
>
> *(c) did the plaintiffs alter the said agreement unilaterally as alleged by the defendant, and, if so, was this capable of causing the agreement to be frustrated?*
>
> *(d) did the defendant unilaterally breach and/or fail to perform terms of the land-sale agreement?*
>
> *(e) is the defendant entitled to keep the money he received from the plaintiff under the agreement, without any consideration on his part?*
>
> *(f) what loss and damage has the plaintiff suffered, if any?*
>
> (g) *is the plaintiff entitled to specific performance of the land-sale agreement and/or the reliefs prayed for in the plaint*?
>
> *(h) who should pay the costs of this suit?*

IV. TESTIMONIES

1. The Plaintiff's Position

On 22nd March, 2004 learned counsel ***Mr. Kihara*** and ***Mr. Ngwiri*** appeared in Court, respectively for the plaintiff and the defendant. ***Mr. Kihara*** made his introductory address, and called the plaintiff, ***Rose Wathiru Waruinge*** as PW1.

PW1 testified that she is a lawyer and the sole proprietor of the firm, Waruinge & Waruinge advocates. Her husband who was a partner in that firm, had died on ***10th July, 1992.***

PW1's firm had acted for the defendant in the 1990/91 period, in several conveyancing matters. In two of those matters the defendant had been the purchaser of two plots in the Kangemi area, Nairobi, and PW1's firm acted for ***both*** sides. In the third of those matters, PW1's firm rendered to the defendant services related to securities held by a financial institution against his land. The said financial institution went into liquidation, and it fell upon PW1's firm to deal with the Official Receiver and to retrieve title documents on behalf of the defendant. In the course of such interventions, the defendant agreed that if PW1 secured the title documents, and had the secured amounts re-assessed at lower value, then he, the defendant, would excise one acre from his parcel of land L.R. No. 2246/4, in favour of PW1 and her husband, in defrayment of legal fees payable. The consensus on this point is thus expressed by PW1: "This offer was accepted by my late husband and me; our fees would have matched the value of that land. He told us he did not have cash to pay us. So we accepted the offer." The parties apparently were in agreement, at that time, that the going price of land in the Langata area was *Kshs.300,000/= to Kshs.400,000/= per acre.* So on that basis an agreement was drawn, dated 18th February, 1991, between ***John Njenga Kimani*** (defendant) for the one part, and ***Gitahi Samuel Waruinge*** and ***Rose Wathiru Waruinge*** (plaintiff) for the other part. This agreement extended the plaintiff's entitlement beyond the one acre of land which PW1 and her late husband were to take in exchange for legal services provided to the defendant; the defendant was to sell a further ***two*** acres to them, the combined total (3 acres) to be excised from the defendant's L.R. No. 2246/4, Langata. The total purchase price was agreed at Kshs.1 million, out of which Kshs.400,000/= was paid to the vendor by the purchasers; out of the said sum of Kshs.400,000/=,

Kshs.200,000/= was already delivered to the defendant, and then another Kshs.200,000/= was paid by the purchasers to the vendor on the date of the agreement. In the execution of the agreement, ***Mr. Maina Kiai*** of the plaintiff's firm was the advocate handling the matter on behalf of the vendor and the purchasers. To the agreement (plaintiff's exhibit No.1) was attached a deed plan, No.125831 dated 29th October, 1991 which related to only some five acres, designated as L.R. No. 12699/2, out of the main title L.R. No. 2246/4; and it is from the said five-acre portion that the three acres for transfer to the purchasers, were to be excised.

By the terms of the sale agreement, the vendor was to provide access to the three-acre portion being transferred; the land was to be sold with vacant possession; and it was to be sold free from encumbrances. The vendor was required to obtain approvals from the Commissioner of Lands and from the Nairobi City Commission, for the access as designed for the portion of land to be transferred; the vendor was to excise the land and to sub-divide it at his own cost; the vendor was to clear all rates, land rent and income tax then standing against the suit land. The outstanding purchase price of Kshs.600,000/= was to be paid by the purchasers on or before completion date, and if the purchaser incurred any costs in respect of the vendor's payments due on the land, then the same would be deducted.

PW1 testified that the completion period was stated to run from the date of execution of the agreement, *18th February, 1991* to *28th March, 1992*, that is, *slightly more than one year*, because "parties appreciated the time that would be spent in getting clearances."

The defendant had given the purchasers the impression that he had embarked upon fulfilment of his obligations immediately; in PW1's words: "After signing the agreement, the vendor informed me that he would instruct his surveyor, ***Mr. Kamwere,*** to cause a further sub-division [to be effected]." The purchasers then visited ***Mr. Kamwere*** and "confirmed that he had been instructed by ***Mr. Kimani*** [defendant] to carry out the excision of the three acres***." Mr. Kamwe***re expressed his pleasure at carrying out the defendant's instructions, save that already, in connection with other matters, the defendant was indebted to him; in PW1's words: "[***Mr. Kamwere***] informed us in a letter of 18th May, 1991 that he would gladly [carry out ***Mr. Kimani's*** instructions] if he would be paid Kshs.9,372/55 which had not been paid by ***John Njenga Kimani*** on an earlier instruction to him." When the purchasers took this message to the defendant, PW1 testified, "He requested us to pay this money to Kamwere & Associates, so that ***[Mr. Kamwere]*** could start the work." Upon that representation, the purchasers made the payment to the surveyor, on the defendants' account, and the surveyor provided them with the original of the plan for the land to be excised. Already paid on the defendant's account was Kshs.200,000/=, which enabled the plaintiff to obtain the defendant's title documents from the Official Receiver, along with the removal of the caveat against the defendant's land which had been lodged by the Official Receiver (plaintiff's exhibit No. 2, No.3A No.3B, and No.5).

PW1 testified that once his several financial commitments had been solved by the purchasers, he felt content and gave no instructions to the surveyor to excise the three acres from the larger portion of land; and the defendant did not even apply to the relevant authorities for consent to sub-divide the land. PW1 testified that she had remained in contact with the defendant and had kept checking on his progress with transactions required by the sale agreement of 18th February, 1991. The outcome, in PW1's words, were as follows:

> "…he did not engage me in any way. When we inquired, he said he was handling the matter directly with Nairobi City Commission. We invited the vendor to give us instructions to prepare a transfer in our favour – to facilitate the sale. Over the whole period, close to 12 months, he declined to do so, but never stated his intention."

Such apparent reluctance led PW1 to conduct a search at the Income Tax Department, in relation to the property in question; and she found that an income tax caveat, which could only be removed by the vendor's personal efforts, was in place. There were, too, rates and land rents due on the suit property – but these the purchasers could not dispose of, as they would be paid when the conveyance documents were stamped and ready for registration.

The plaintiff testified that the defendant was appearing to be unco-operative, and this was injurious to the plaintiffs, as they were anxious to develop the land once it was transferred to them. In PW1's words: "I attempted many times to engage the vendor. He did not appear keen to complete the sale." This state of affairs continued until the completion date expired; but the purchasers remained committed to completion of the transaction. At this stage the purchasers resorted to the good offices of one ***Zechariah Gakunju,*** to intercede with the defendant. The purchasers even made personal visits to the defendant and his family, in quest of his co-operation. The defendant would even give other instructions to the purchasers as advocates, but took no action on the transactions which have occasioned the instant suit. The purchasers also sought the intervention of another advocate, ***Mr. Ezekiel Wanjama***; indeed they formally engaged ***Mr. Wanjama*** to act for them, especially at a later stage when they felt prepared to receive from the defendant only two acres, instead of the originally-agreed three. ***Mr. Wanjama*** arranged for a meeting of the parties, with the defendant stating that he was "happy to proceed and complete" the transaction. A meeting was held thereafter, at the site itself, attended by the defendant, the plaintiff, the surveyor (***Mr. Kamwere***) and ***Mr. Wanjama*** – and agreement was reached on the broad lines of excision to be carried out. The position on the ground was that the defendant's whole land portfolio at Langata (L.R. No. 2246/4) exceeded 20 acres; out of this, the excision of the five acres (L.R. No. 12699/2) had already been approved by the relevant authority; out of the excised parcel, the defendant should now demarcate the reduced area of *two acres*; and the surveyor's role was that of demarcating the two acres. On that occasion, at the site, the defendant himself mentioned the subject of an access route for the plaintiff; and the appropriate location of the same was then agreed on the ground.

The plaintiff testified that during the said visit to the site (*on 14th June, 1996*), the subject of payments to the defendant was raised; it became clear that there was no uncertainty as regards *one acre* which the defendant was to transfer to the plaintiff; and it also became clear that the sum of Kshs.200,000/= was the outstanding balance of purchase-price, and that it was being held to the defendant's prospective claim, by the plaintiff's advocate, ***Mr. Wanjama***. It was also agreed on that occasion that the surveyor would excise only two acres of the defendant's land, for the plaintiff. As ***Mr. Wanjama*** was holding to the defendant's claim Kshs.200,000/= (plaintiff's exhibit No.7), it was agreed that the only *further* amount the plaintiff would pay was Kshs.100,000/=.

The status of the agreement is reflected in ***Mr. Wanjama's*** letter to the defendant Ref. W1601/95 dated 4th September, 1995 and copied to the plaintiff herein (plaintiff's exhibit No.7), which came several months prior to the said meeting. The letter, so far as is relevant, thus reads:

> "We refer to our letter to ***Mrs. Waruinge*** dated 30th August, 1995 and copied to you, and have pleasure confirming to you that our client has agreed to pay the sum of Kshs.200,000/= with a view to finalising this transaction as soon as possible.
>
> "Our client has already caused the removal of the caveat by M/s. Continental Credit Finance Co. Ltd. [and] is in the process of causing the removal of the Prohibitory Order lodged by I.C.D.C. Ltd. [until] the debt to I.C.D.C. is fully paid.
>
> "Kindly instruct M/s. Kamwere & Associates to proceed with the partition of the 2 acres without delay.
>
> "We hereby give you our professional undertaking to pay to you the sum of Kshs.200,000/= upon completion of this transaction."

PW1 testified that even though the agreement between the parties was clear in its details, the defendant took no action by way of compliance; in the words of PW1: "He did not attempt even to excise the two acres, despite the undertaking given by my lawyer, to pay the balance of the purchase price…Up to this day, the vendor has taken no action. His lawyer has even written to my lawyer demanding the release of the title documents that I hold." The plaintiff has kept one security over the defendant's land, in the form of a caveat which she had lodged.

PW1 testified that the defendant did not request for the money held to his claim by M/s. Wanjama & Co.

Advocates; and in the end she called it back, for the purpose of placing it in an interest-earning account. The defendant did not refund the monies he had already been paid as part of the purchase price; did not pay for legal services in respect of which he was to transfer an acre of land to the plaintiff; did not refund moneys already expended on his account, in respect of his liabilities on the suit land; made no promise to pay the same; did not transfer any land at all to the plaintiff.

PW1 made specific reference to para. 7 of the statement of defence (of 4th September, 1997), which reads:

"The defendant admits receiving Kshs.400,000/= as part-payment of Kshs.1,000,000/= under the aforesaid sale agreement and states that by reason of the plaintiff in [conjunction] with ***Gitahi Samuel Waruinge***, her deceased husband unilaterally altering the agreement to excise 2 acres instead of the agreed 3, and only informing the defendant belatedly, the agreement was frustrated."

PW1 testified that whereas the *completion date* was stated in the agreement as *28th March, 1992* her husband died on *10th July, 1992;* and it is this event that changed her status and made her feel she could do with the smaller parcel of 2 acres instead of three; she personally, in the company of one ***Njoroge,*** visited the defendant at his base in Kangemi, Nairobi and made the representation to him – the same being reduced into writing; and the defendant agreed to reduce the land transferred to the plaintiff from ***three*** to ***two*** acres. However, the defendant did not respond or clarify the position in writing after the agreement; and he did not dispute the same. By the completion date, the defendant had taken no action in accordance with the agreement, and he, the defendant, had served no completion notice upon the plaintiff, in PW1's words, "verbal or written." The defendants' reluctance to effect transfer of the portion of land purchased by the plaintiff was incomprehensible to the plaintiff; in her words:

"[The defendant] was not a stranger [to us]. We visited him even at home. He always gave the impression that things were okay; but he 'was not walking the talk.'"

The plaintiff's prayer was that the defendant be ordered to complete his part of the agreement, by transferring the agreed portion of land; and in the alternative, the defendant should be made to refund the monies due to the plaintiff – with interest at 21% "because that was the prevailing interest rate", and from 19th April, 1995 to-date. She also prayed for orders that the defendant do pay legal fees, assessed at Kshs.400,000/= with interest as from 19th April, 1995. She prayed too for general damages for breach of contract; for the plaintiff had taken much trouble in the defendant's cause, including paying his own survey fees.

PW1 gave further evidence on cross-examination by learned counsel ***Mr. O.T. Ngwiri.*** She stated that as at the time of the original agreement in issue herein, the plaintiff's firm had been the advocates for the vendor; she had been in that firm with three other advocates one of whom, ***Mr. Kiai***, is the one who had the conduct of the matter. Mutual trust had been an important consideration, in this relationship in which the plaintiff's firm was acting for both parties; but when the defendant declined to give effect to the terms of the land-sale agreement, the plaintiff came to the realisation that "mutual trust was not [operating] both ways." And the plaintiff thereupon instructed the firm of Wanjama & Co. Advocates to act for her – and each party was now represented by a separate advocate.

Well after the passing of the completion date (28th March, 1992), on *10th July, 1993* the plaintiff had to go abroad for further studies, and she was away until *July, 1994* even though her practice offices in Nairobi remained open throughout. It was in September, 1994 that the plaintiff instructed M/s. Wanjama & Co. Advocates to act for her; and she visited the defendant at his business premises in Kangemi and asked him to instruct his own advocates for the purpose of resolving the dispute relating to the suit land.

PW1 testified: "The defendant is a person very well known to me"; and it was not at first her intention to open litigious action against him. The context is made clearer still by the plaintiff:

"I knew that ***Mr. Wanjama*** very well knew ***John Njenga Kimani*** [defendant]. That is the lawyer I

wanted. ***Mr. Wanjama*** was a great friend of my late husband. So, I saw an opportunity of not only handling the matter legally, but also benefiting from the close acquaintances. I did not want the matter to involve acrimony."

PW1 testified that in the period her firm had acted for the defendant, they had faithfully carried out the defendant's instructions, both written and verbal; and, in relation to the land-sale agreement in dispute, she averred: "I even gave the defendant the time and the opportunity to complete. She averred that when the completion date came, on *28th March, 1992* she "could have terminated the contract and demanded the deposit paid, as well as payment of our legal fees incurred up to that time"; but she did not do so and, indeed, during the intervening period even took at least two unrelated instructions from the defendant – in respect of purchases of land – Dagoretti/Riruta/2865 and Dagoretti/Kangemi/836. In the case of the said two instructions, PW1 averred, her firm acted for *both* the vendors and the purchaser who was the defendant herein; and these transactions were successfully concluded; and the witness added: "We were very happy to complete those transactions."

PW1 testified that the purchasers were always ready and willing to pay to the defendant the outstanding balances of purchase-price, save that the time of payment was contingent on the defendant executing a transfer in favour of the purchasers. Even a draft of the said transfer could not be prepared by the plaintiff's firm, "because details had to come from ***Mr. Kamwere***; but since he had not been paid, he did not do his job. The Kshs.9,000/= or so paid to him by ourselves on behalf of the defendant, related to a previous account" ? in the words of PW1.

Mr. Kamwere had prepared Deed Plan No. 158197 of 28th October, 1991 in respect of a portion of the defendant's land comprising ***O.4654 ha*** and this made provision for the access route into the parcel of land which was to be sold to the plaintiff; but he needed further instructions which, however, the defendant did not give. By the completion date, all outstanding purchase-price payments had been lodged with the advocate, ***Mr. Wanjama*** to hold to the order of the defendant. In the end, this money was refunded to the plaintiff, as the defendant had taken no action in performance of his obligation to transfer the land.

PW1 testified that she had taken no action to rescind the original land-sale agreement of 18th February, 1991 and that there was no mention of the word *rescission* in any single instance of her dealings with the defendant from the time the original agreement was executed. The amendment to the said agreement, which reduced the size of the land being sold from three or two acres, had made no mention of rescission. The letter from M/s. Wanjama & Co. Advocates dated 30th *August, 1995* to the defendant and copied to the plaintiff, and subsequent, related correspondence shows a commitment between the parties for the transfer of two acres of land, and the said letter, in PW1's words, "confirms a continuous agreement…, it is part of a process of completion."

Counsel sought to know why PW1 had undertaken to pay to the defendant the sum of Kshs.100,000/=, quite apart from the Kshs.200,000/= which was outstanding on the original sale agreement; and the answer was: "The first agreement was in writing…to be completed on 28th March, 1992….The additional Kshs.100,000/= is a *punitive payment which the vendor was asking for – due to delay.* In desperation I agreed to pay this extra amount. There was no necessity to draw a new agreement."

By subsequently seeking the transfer to herself of ***two*** acres instead of ***three***, had PW terminated the original contract for two acres? PW1's answer was in the negative; for the lessened delivery-obligation now resting upon the vendor had been mutually agreed upon; and when PW1 had referred to the two acres in her letter of 18th March, 1992 she was ready with the funds to make full payment to the vendor; and she remained ready and willing to pay even after her co-purchaser, ***Gitahi Samuel Waruinge,*** died on 10th July, 1992. PW1 testified that the defendant had well understood that the amount of land to be transferred to the plaintiff was now ***two*** acres; and it is on this basis that he, the defendant, the surveyor (***Mr. Kamwere***) and the plaintiff's advocate, ***Mr. Wanjama*** had visited the suit land on *14th June, 1996* for the purpose of ascertaining relevant matters on the ground.

PW1 testified that the deed plan and the property title in the name of the defendant, had been retrieved by the purchasers from the Official Receiver in 1991, and that these were still in her custody – and that this was to the intent that a transfer would be registered in favour of the purchasers as soon as the sub-division plan had been finalised by the surveyor. What was now required was the deed *plan*, and the *transfer*, and the sale-and-purchase transaction would be complete. It was not possible for the firm of Waruinge & Waruinge Advocates to prepare the transfer document without *instructions* to do so; and the defendant did not give those instructions. In the words of PW1:

> "The transfer [would have described] the land that is being purchased. The documents in my custody are for L.R. 2246/4 – which covers some 20 acres and is not sub-divided. The title of the Official Receiver covered all of it. I could not have purported to have verbal instructions [to prepare a conveyance] if I did not have. We needed the Deed Plan as the basis for preparing a transfer. Therefore, instructions had to be given. For the sub-division of undivided land, sketch plans had to be sent to the Department of Physical Planning of the Nairobi City Commission. This was for the vendor to do; there was the bit to be done by the lawyer, and there was the bit that only the vendor could do."

PW1 as an advocate had made searches on the suit property, at relevant records offices; and she found the land to have, lodged against its title, prohibitory orders in respect of uncleared loans, as well as income tax obligations. It would have been necessary for the vendor himself to act; in the words of PW1: "***John Njenga Kimani*** needed to go to Income Tax, make payment, and bring to me a receipt, which I would attach to my application for a lifting of the prohibitory order in respect of income taxes owing."

Responding to questions in cross-examination, PW1 averred that it was by no means improper for her and her husband to have contracted for the sale-and-purchase of property thus encumbered; for "lots of property is encumbered; and it is normal to have the encumbrances cleared by the time of executing the transfer." Under the sale agreement, provision had been made for options in favour of the vendor, as to whether the purchasers should make purchase-price payments to him directly, or pay on his account to defray the liabilities which had occasioned the lodgement of the several encumbrances.

PW1 testified that the original contract of 18th February, 1991 had not been rescinded, but was amended in February, 1992 by *mutual agreement*, by reducing the size of land to be transferred from three to two acres. The vendor did not move to sub-divide the land for transfer at any point in time, and so there was never a *deed plan* even for the three acres originally agreed upon.

On re-examination by learned counse***l Mr. Kihara,*** PW1 clarified that the vendor has not refunded the sum of Kshs.400,000/= which the purchasers had paid to him; and that the defendant has given no instructions for the preparation of a transfer for the two acres of land in question. The sum of Kshs.100,000/= was due to be paid by the purchasers to the vendor upon transfer – and this money had always been available. PW1 has received no request from the defendant, that she should *remove the caveat* which she had lodged on the suit land, in protection of her purchaser's interest; but she has received a letter from the defendant's advocates demanding the documents of title which the plaintiff had been given by the Official Receiver after she cleared the defendant's outstanding secured debts. PW1 testified: "The vendor has never provided me with any transfer documents to effect the transfer, *whether for two acres or three acres*." She further averred that the date *28th March, 1992* had been stated in the land-sale agreement to be the *completion date* but not the *expiry date*; and that since an expiry date had not been provided for, the dispute between the parties belonged to the subject of *contract,* and entailed two parties – *plaintiff* and *defendant.*

PW2, ***James Kamwere Muriuki*** was sworn on 6th December, 2005 and conducted through the examination-in-chief by learned counsel ***Mr. Kihara.*** He testified that he is a licensed land surveyor, working under M/s. Kamwere & Associates Licensed Surveyors, and living at Kyuna Estate in Nairobi. He has worked in that capacity since 1974, and came to know the defendant as his client (1984 – 1994). In 1984 he had sub-divided the defendant's land in Langata (L.R. No. 2246/4) into four portions; and then in 1991, the defendant again called him to come on a visit to the same land. The purpose was that the *plaintiff,* who was on the said land-visit, should indicate on the ground the portion to be transferred to her

and her husband; and later, in *June, 1996*, yet another such visit was made, with the advocate ***Mr. Wanjama***, the *defendant,* and the *plaintiff* all present. At that time the larger parcel was already sub-divided into four, five-acre portions; and the defendant pointed out one of the four portions, L.R. No. 12699/2 (on Survey Plan No. F/R 166/54) as the one from which a further sub-division was to be done, so that there would be one plot of *two acres;* another of 2 ½ acres; and then a certain portion would be reserved for *access road*. PW2 had instructions to plan accordingly, and in 1994 he did prepare a map reflecting the design above-described, and the defendant duly signed it.

PW2 showed on plaintiff's exhibit No. 9 (marked "proposed sub-division of L.R. No. 12699/2" dated 18th May, 1994 and duly signed by the defendant), a map drawn by himself, the portion of the defendant's land, L.R. No. 12699/2, and also showed how he had marked it for division into portions A (***0.8094 ha)*** and B (***0.9576 ha*****),** with an access road occupying ***0.12 ha***, running on the side of section B and terminating at the entrance to section A. PW2 testified that this map had been drawn on the basis of an agreement that one portion (which comprised two acres) would be transferred to the plaintiff. In ***1996,*** once again, PW2, the plaintiff and her lawyer ***Mr. Wanjama***, and the defendant had made a visit to L.R. 12699/2, for the purpose of indicating to the plaintiff the land which would be transferred to her. It was not possible for the group to physically inspect portion A aforesaid as it was water-logged, but they stood on portion B as they discussed matters relating to the land. The defendant's intention at the time was to transfer portion A to the plaintiff, but as to portion B, he expressed the intention to create four half-acre plots. It was PW2's evidence that on the occasion of the said visit to the site in 1996, portion A had not appeared attractive, and the plaintiff stated her desire as portion B, and indicated so to the defendant, in PW2's presence. The defendant "kept quiet". So this left an uncertainty as to which plot was to be transferred to the plaintiff; and to-date the defendant has given "no clear instructions" on that question. Indeed, subsequent to the said site meeting of 1996, the defendant went to see PW2 but only to give instructions for the sub-division of portion B into half-acre plots.

PW2 testified that it was the *plaintiff* who paid his past fees on the defendant's account, and thereupon two deed plans – Deed Plan No. 125831 and Deed Plan No. 158197 – were released to the plaintiff (plaintiff's exhibits No. 6A and 6B); but the fees in question were unrelated to the portion of the defendant's land to be transferred to the plaintiff. Although the proposed sub-division plan for L.R. No. 12699/2 was signed by the defendant in 1994, it has not yet been submitted to the City Council of Nairobi for approval. The witness averred: "I am still waiting for [the defendant's] instructions to proceed with the sub-division of L.R. No. 12699/2. If he gives the instructions, then we will comply with the Physical Planning Act which came into effect in 1999, and obtain the approval of the City Council and of the Ministry of Lands. Such instructions should come to us by way of submission of current rates-payment receipts, approval plans of the City Council, and a letter of instruction." PW2 testified that the mode of sub-division would not be settled until the defendant gives instructions.

Since, to-date the defendant has kept ***portion A*** of L.R. No. 12699/2 intact, it was PW2's belief that he still intends to transfer it to the plaintiff. At the last meeting at the site, in *1996,* in the words of PW2: "he was *pointing out* portion A to [the plaintiff] while [the plaintiff] was pointing out portion B." So, what is PW2's understanding of the defendant's intent? "My understanding is that ***Mr. Kimani*** has no intention of denying ***Mrs. Waruinge*** the land. I think the *siting of the land* is the issue**. *Mr. Kimani*** has never given me the impression he wants to deny ***Mrs. Waruinge*** her land."

2. The Defendant's Position

Learned counsel ***Mr. Ngwiri*** opened the defence case by introducing the main assertions in the plaint, and then introduced DW1, ***John Njenga Kimani,*** who was sworn on 28th July, 2006 and embarked upon his testimony.

DW1 testified that he is the defendant and lives on a 20-acre parcel of land on Mukoyet Road in Langata. He had obtained a City Council approval for sub-division of the land in 1991; but this process "could not be completed, because I did not have the original title deed; the title deed was with my lawyers – M/s. Waruinge & Waruinge Advocates." He was selling land to the plaintiff and her husband, on the basis of a written agreement (plaintiff's exhibit No.1). The agreed size of land to be sold was *three acres* – at the

price of Kshs.1 million out of which Kshs.400,000/= had already been paid to DW1.

The words of the witness are notable:

> "I received the Kshs.400,000/=. I never received the balance of the purchase price. The 28th of March, 1992 was the completion date. The agreement was not completed."

DW1 testified that he had not refunded to the plaintiff the sum of Kshs.400,000/= which had been paid to him under the agreement. He also said that the moment he received the letter of *18th March, 1992* (defendant's exhibit No.1) from M/s. Waruinge & Waruinge Advocates, addressed *to* ***Mr. Kamwere*** the surveyor and copied to him, he concluded that the purchasers were no longer interested in the land, and he "assumed the agreement had collapsed." What does the said letter of 18th March, 1992 say? It may here be quoted in part:

> "Further to our letter to you of 21st February, 1992 we write to inform you that we have had a further discussion with ***Mr. John Njenga Kimani*** on [L.R. No. 12966/1 and 12966/2 – formerly 2246/4, Langata, Nairobi]… and have agreed that we shall now purchase two acres and not three acres.
>
> "Kindly arrange to excise two acres from L.R. No. 12966/2 immediately. We understand ***Mr. Kimani*** will be contacting you to instruct you on this. Kindly furnish us with sketch plans as soon as they are ready."

DW1 testified that following the purchasers' aforementioned letter of *18th March, 1992* "no agreement in writing was made, like the original agreement of *18th February, 1991";* and that when the completion date came ten days later, on *28th March, 1992* the agreement was not completed in accordance with the terms of the original agreement. The witness, in my assessment, carried little candour in his testimony, especially in relation to his alleged conviction that the completion date had to be complied with. He was skimpy in his delivery of testimony, and on several occasions, testified in a manner inconsistent with natural human reactions. DW1, after remarking that the agreement had not been fulfilled by the completion date, said: "I went to [the purchasers' offices] to inquire about the matter, but I found that in my lawyers' office, there was a problem about the [plaintiff's] husband who had passed away; I could not ask more questions. After *a few days* I returned to the lawyers' offices. I found [that] ***Mrs. Waruinge*** had left the country for further studies. I was so much annoyed; I found everything in chaos. I intended to use the money to expand my business. She had gone with my title deed, and nothing had materialised."

It is a matter of record that the completion date was *28th March, 1992;* and it is the uncontroverted evidence on record that the plaintiff's husband, ***Gitahi Samuel Waruinge*** died on ***10th July, 1992*** – more than 100 days later. It is also the uncontroverted evidence on record that the plaintiff left the country for further studies abroad on *10th July, 1993, twelve months* after the death of ***Gitahi Samuel Waruinge,*** and returned twelve months later, and since then she has consistently been at her practice offices.

Of the plaintiff's absence between July 1993 and July 1994, the defendant's testimony thus ran:

> "She [the plaintiff] was away. I could not trace her. I [continued to bear my financial hardship courageously by my own devices]…and I am still suffering. I can't remember when ***Mrs. Waruinge*** returned….I was at one time told by one of ***Mr. Ngwiri's*** clerks that I had been sued. I don't know when she returned to the country. When I received summons, I went to ***Mr. O.T. Ngwiri*** to represent me. I first came to ***Mr. Ngwiri*** and asked him to write to ***Mrs. Waruinge*** to return my title deeds. I never received the title deeds…I have suffered loss. It is much loss, I can't estimate. I am asking the Court to give me my title deeds."

DW1 averred that the plaintiff's advocates (M/s. Wanjama & Co. Advocates) "did not, so far as I can remember, do anything to enable me to sell the land to ***Mrs. Waruinge.*** I was owing rates that would

prevent me from selling to ***Mrs. Waruinge***; I can't remember how much; I am indebted to the City Council, to Income Tax and to the Commissioner of Lands – and they even have caveats against my title; I can't pay because my sources of money have been blocked. I wanted to sell the land to clear the debts, but now I cannot sell." The defendant went on to say: "Anybody who will come up with a *reasonable agreement,* I will sell the land to; I will sell even to ***Mrs. Waruinge*** if she *renews the agreement on the basis of current land value."* DW1 restated that point during cross-examination, averring that since his land is varied in elevation, it cannot all be assessed at uniform unit-value. He averred that the value of his land is *now* higher than it was in 1992; he did not know his current state of indebtedness on rates and other charges accumulating against the property over the years; he was not aware of the value of money today, as compared to the position in 1992. He testified that *since 28th March, 1992 he has not refunded the deposit money* on the land-sale transaction which the plaintiff had paid him, and neither has he written to the plaintiff since then offering to make the refund. DW1 testified that since the expiration of the completion date, he has "*told [the surveyor] verbally not to excise my land for transfer to* ***Mrs. Waruinge;"*** in DW1's words: "I explained to [the surveyor] that ***Mrs. Waruinge*** has disappeared with my title deeds, so the agreement *seems to have collapsed*; and so he should not excise the land."

DW1, on cross-examination, testified that the letter from M/s. Waruinge & Waruinge Advocates which referred to the agreement that the purchasers would take *two acres*, rather than three, "does not say she no longer wants the land." The defendant admitted that he had led the plaintiff to the suit land and *pointed out to her the portion that was to be transferred,* and that they had later *returned there in the presence of the surveyor.*

DW1 read to the Court the letter which he had received from the plaintiff's lawyers, M/s. Wanjama & Co. Advocates, regarding an agreement that he transfers two acres instead of three, to the plaintiff; and he then averred: "That is my land; and it is out of that very land that I had wanted to sell *three acres* to ***Mrs. Waruinge."*** He disputed the statement in the said letter that an agreement had been reached for the transfer of portion B of the five-acre plot L.R. No. 12699/2; in his words: "By that time the land measured five acres, so how could we have agreed if the land had not been sub-divided?" DW1 said when he received a copy of the said letter he raised objections with ***Mr. Wanjama:*** "He was introduced to me; then I went to him and told him I did not know who he was representing because the agreement had collapsed." The defendant testified that he had not instructed his lawyers to write a letter of protest to M/s. Wanjama & Co. Advocates; in his words: "I did not write a letter to [the surveyor]; I did not write back to ***Mrs. Waruinge***; I think I did not respond; I think I went to [the surveyor] and spoke to him on the matter verbally." He further testified that he had requested the help of ***Mrs***. ***Waruinge*** to clear the charges on his land, before he had expressed the desire to sell the same; and it is ***Mrs. Waruinge*** who secured the release of the larger parcel of land, L.R. No. 2246/4 from the Official Receiver. He testified that the title for the five-acre parcel of land, L.R. No. 12966/2 was always in his custody, but he then gave it to the plaintiff – in connection with the *intended excision* of ***three*** acres for transfer to her.

DW1 testified that the plaintiff's detainer of his title document had made it impossible for him to complete another sale to a certain bank – Continental Bank. He was, however, unable to indicate the particular property which he had undertaken to sell to Continental Bank; and as he spoke on this question I observed his demeanour and recorded as follows: "Witness goes silent on being asked by the Court what title number he was negotiating to sell to Continental Bank. He clearly lacks candour on this point."

There obviously had been a dealing between the defendant and Continental Bank, as DW1 thus testified:

> "…I instructed ***Mrs. Waruinge*** to get my titles released and discharged by Continental Bank. She carried out my instructions. I got the title deed. I was satisfied with ***Mrs. Waruinge's*** services…I remember I paid for her services by agreeing to sell the land. The money which will come out of the sale of L.R. No. 12966/2 will be applied to pay her fees."

This testimony, however, is contradicted when DW1 avers: "I don't remember there was any other purchaser of L.R. No. 12966/2 except ***Mrs. Waruinge***. She was not buying the whole plot. There was to be a set-off in her payment to me for L.R. No. 12966/2, to cater for her fees." DW1 went on to testify:

> "The purchase price in total was Kshs.1 million. [***Mrs. Waruinge***] paid Kshs.400,000/= in cash….She had not completed the legal work, to enable me to know how much she would be paid for it. She had not mentioned how much she wanted to be paid…***Mrs. Waruinge*** would be owing me Kshs.600,000/=. And I would be owing her the delivery of 3 acres of land. I don't remember that 1 acre was to be given to ***Mrs. Waruinge*** as consideration for legal services rendered…I don't remember that ***Mrs. Waruinge's*** services were equal to one acre's value."

When learned counsel put it to the defendant that he was untruthful about the one acre which was to be given to ***Mrs. Waruinge*** for legal services, he now averred: "I think we had agreed that one acre was to be given in kind – for the work she had done for me." But he then went on to aver that the said deal between himself and the plaintiff was "not very serious about one acre and for how much; it was a friendly matter, because of what she had done for me; figures were not put on the value of an acre of land." In the event of a disagreement, DW1 testified, he would stand indebted to ***Mrs. Waruinge*** to the tune of Kshs.400,000/= (which she had already paid to him) plus one acre of land (in return for legal services rendered) plus disbursements (such as the repayment of Kshs.9,372/50 paid on his account to the surveyor, M/s. Kamwere & Associates). DW1 did not remember whether in his defence he had offered to make the said payments to the plaintiff; and he now averred: "I am ready to pay her legal fees…" He averred further: "I have not refunded the disbursements paid on my behalf…" DW1 reckoned that his indebtedness to the plaintiff for one acre of land not transferred as agreed, would be ***Kshs.330,000/=*** ? and he wished to make a refund on that basis. But on the same criteria, DW1 acknowledged, if the transaction was still to be completed, then the only amount she would now have required from the plaintiff would be *Kshs.270,000/=*. He also acknowledged that the plaintiff had notified him that M/s. Wanjama & Co. Advocates had been holding the sum of Kshs.200,000/= to his demand upon completion of the transaction, and that ***Mr. Wanjama*** had given him a professional undertaking in that regard. Of his duty to make a transfer of land to the plaintiff, DW1 averred:

"When we visited the plot, the only outstanding issue was, *where* the *two acres* would come from…"

DW1, in cross-examination, made certain remarkable statements:

> "I have not paid the rates, and it is not correct that I was to clear the rates as a condition of the transfer process;" "I have not decided not to sell the land; when the agreement collapsed I decided that everything was finished; if the sale collapses, then the money is forfeited, and I forfeited the money because the agreement collapsed." To counsel's question whether the plaintiff was notified of forfeiture, DW1 averred: "She was not in the country to be served with forfeiture notice. When she left the country, on the very day she left, I forfeited her money. I did not serve a forfeiture notice."

V. SUBMISSIONS OF COUNSEL

1. Defendant Refused to Take Actions Preparatory to Conveyance of Land to Plaintiff, and Declined Purchase-Price Balance Payment: Plaintiff's Position

Learned counsel ***Mr. Kihara*** stated the essence of the plaintiff's case: for legal services rendered by her and her late husband, it had been agreed with the defendant that he as vendor would transfer 1 acre of land to them, as payment-in-kind, and in addition, they would purchase from him two additional acres of land; on 18th February, 1991 a sale agreement was executed by the parties, incorporating those principles; the agreed price was to be Kshs.1,000,000/= and the purchasers paid thereout the sum of Kshs.400,000/= as part-consideration, at the time of signing of the agreement.

Learned counsel submitted that the defendant had failed to perform his obligations under the agreement, and instead rescinded the same, and clearly evinced the intention not to be bound, and, though himself failing to move the transfer process in favour of the plaintiffs, the defendant now took the position in his defence that it is the purchasers who had not complied with their obligations up to the completion date, which then elapsed. Counsel submitted that while the defendant holds out a subsequent agreement between the parties that only two acres, instead of three, be transferred to the plaintiff, as a cause of

frustration to the contract, the defendant's failure to perform his obligations subsumed even the original position in which *three* acres were to be transferred. ***Mr. Kihara*** disputed the claim by the defendant that in the land-sale agreement, time was of the essence, and he urged that, even if it were so, it was the defendant who was in breach of this condition; for the defendant had not served a 21-day completion notice on the plaintiff in accordance with Clause No. 4(5)(c) of the Law Society of Kenya Conditions of Sale.

Learned counsel submitted that the evidence had shown that the plaintiff had done all things she was required to do as purchaser, including calling on the defendant to physically point out the land to be transferred, in the presence of the defendant's surveyor; and she also paid the defendant's own debts to the surveyor, so that the surveyor may have no objections to doing professional work in relation to the intended excision of land and transfer to the plaintiff.

Mr. Kihara submitted that the expiration of the specified completion date, *28th March, 1992* cannot be pleaded in connection with the defendant's claims of *frustration,* because it was well after that date, on *14th June, 1996* that the defendant led the plaintiff as purchaser, her advocate ***Mr. Wanjama,*** and the surveyor on a visit to the suit land; "yet [the defendant] did not protest then that the sale had been frustrated or that the agreement had lapsed." Such conduct on the part of the parties, counsel urged, showed that "time was not of the essence, and the time was…extended by their own actions."

It was the plaintiff's prayer that the Court do make "an order to compel the defendant to excise the three acres and to specifically perform his part of the contract." For this prayer, learned counsel relied on ***Assanand v. Pettitt*** (No.3) [1989] KLR 252 in which ***Simpson, J*** in the High Court held (p.256):

> ***"The Courts usually take the view in suits for specific performance of a contract for the sale of immovable property that damages is not an adequate remedy and in this case [counsel] has indicated a number of reasons why the plaintiff requires this particular house. I find that damages would not be an adequate remedy."***

How does the principle stated in ***Assanand*** apply in the instant case? ***Mr. Kihara*** submitted that this is a meet case for specific performance because the parcel of land in issue "is certain and indeed has been ascertained by the defendant's surveyor. The acreage is not in dispute. The money paid and the acreage to be given in kind for the services rendered are known, as agreed by both parties."

Learned counsel also relied on the High Court for Zanzibar (***Windham, C.J***.) decision in ***Rashid bin Salim bin Mohamed v. Mohamed bin Said bin Abeid*** [1957] E.A. 211, in which the plaintiff had contracted orally to purchase a plot from the defendant, and for that purpose the plaintiff paid the price; but the defendant then refused to execute a conveyance, whereupon the plaintiff obtained orders compelling the defendant to execute the conveyance; and the defendant now appealed. It was held that such a contract for the sale of land, "wholly performed on the purchaser's side by the payment of the purchase price, entitles the purchaser to sue for specific performance by requiring the vendor to execute a proper conveyance of the property" (p.211).

Counsel also relied on ***S.L. Patel & Another v. Dhana Singh s/o Hakam Singh*** [1962] E.A. 32. In that case, the parties had agreed, by a contract of 7th January, 1954 that the respondent would sell to the appellants a portion of his land "estimated to comprise *one hundred acres* or thereabouts" as shown within red lines on an annexed sketch plan. This sketch plan was of the whole area owned by the respondent, and a clerk of the advocate acting for both parties had delineated a portion thereof with red lines. The contract provided that the respondent should have the survey and survey plan done and approved within two years; that the survey should include an area whereupon the appellants had dug a well; and that if the respondent failed to get the survey done as agreed, the appellants would have the right to employ a surveyor for this purpose. On 18th November, 1955 the appellants reminded the respondent of this obligation to have the survey done, to which the respondent's advocate replied suggesting rescission of the contract on the grounds that there would be *practical difficulty* in surveying and conveying the land to the appellants. The respondents failed to get the survey done; and so the appellants engaged a surveyor who prepared a plan, which they then submitted to the respondent. This

plan comprised about 101 acres; and the respondent rejected it because it did not conform to the area proposed for sale during the negotiations. The appellants now requested the respondent to indicate the boundaries to another surveyor; but the respondent refused to allow this surveyor to enter upon the land. The appellants sued for an order for *specific performance*, or alternatively, damages for breach of contract. This dispute was first heard in H.M. Supreme Court of Kenya (***Farrell, J***), from which an appeal was filed in the Court of Appeal for East Africa sitting at Nairobi. ***Farrell, J*** had upheld the respondent's position, holding that whereas the contract referred to 100 acres or thereabouts, the sketch plan annexed showed a considerably larger area; that the intention was that the description should prevail over the plan; that the precise land to be sold had never been and still had to be determined, and accordingly, there was *no concluded agreement* on which an order for specific performance could be made.

The Court of Appeal decided differently; and it is the principle there adopted that learned counsel ***Mr. Kihara*** has urged, should guide this Court in determining the instant matter, especially on the question of *specific performance*. The relevant passage in the ***S.L. Patel*** case (pp 38 – 41, ***Crawshaw, J.A***.) is as follows:

> ***"…if the estimate of one hundred acres is, as the learned Judge regarded it, too great a discrepancy to be covered by the words 'or thereabouts' then I would say that it would be covered by the maxim 'falsa demonstratio non nocet'….There can be no doubt…that the appellants at some stage at least, understood that there was to be a further plan excising from the area delineated in the first plan a part thereof of one hundred acres….[It] seems that the respondent must either convey the whole area in the first plan or the reduced area in the second plan, the appellants being prepared to accept either. He [the respondent] cannot complain if he is given the choice. If he refuses to exercise it, my view is….that he is bound by the first plan…In my opinion it cannot be said that the parcels in exhibit 1 were insufficiently described so as to create a latent ambiguity. At most there was a misdescription of the measurement… Even if…the right view of the agreement is, as the learned Judge found, that a parcel of one hundred acres was to be carved out of the area delineated red on the first plan, I am inclined to think that on the principles applied in Jenkins v. Green, 54 E.R. 172, and Rumble v. Heygate (1870), 18W.R.749, it would be proper to make an order for specific performance, and to do so whether or not the precise situation of the one hundred acres had been agreed between the parties."***

Of the respondent's failure to have a survey carried out within two years – a situation similar to the defendant's conduct in the instant matter – the Court in the ***S.L. Patel*** case remarked (p.42):

> ***"In the instant case the first act to be done was by the respondent, who under cl.4 of the agreement was required to have the area surveyed and a deed plan thereof prepared and approved by the Survey Department within two years. Had the case been decided on this point he should not, in my opinion, have been allowed to benefit by his failure to carry out this obligation, and the right of selection would pass to the appellants."***

On the foregoing foundations, learned counsel prayed for orders on the basis that there had been a written sale agreement for the excision of *three* acres from the subject land; it was not controverted that the plaintiff had already paid Kshs.400,000/=, in part-performance of her part in the agreement; the sale price was Kshs.1,000,000/=; a further sum of Kshs.400,000/= was to be deemed duly paid by the plaintiff, through professional services which had been rendered to the defendant; M/s. Wanjama & Co. Advocates for the plaintiff had held the sum of Kshs.200,000/= to the defendant's order, in respect of the outstanding balance of purchase-price. In these circumstances, counsel submitted, "It is the defendant who has always refused to perform his part…" Counsel urged that the defendant's reason for failure to finalise his part in the contract, "has no merit and is an afterthought." Therefore, learned counsel urged, the plaintiff was entitled to an order for specific performance, which should take the form of "the defendant being ordered to instruct the surveyor to finalise the sub-division and …to execute the conveyance in favour of the plaintiff, [upon] the plaintiff utilising the balance of Kshs.200,000/= to pay the survey fees and [the] local authority fees [which have fallen] due, if the defendant does not do so of [his] own volition." Counsel prayed for costs of the suit, with interest thereon until payment in full.

2. Plaintiff Unilaterally Modified and Frustrated the Contract, and Suffered Self-Inflicted Injury: Defendant's Position

Learned counsel ***Mr. Ngwiri*** set out, in his submissions, by impugning the plaintiff's conduct in making substantial deposit-payments with the defendant at the beginning, without first having obtained "all the details of outgoings including sub-division." Counsel further urged an excuse for the defendant's action regarding the land-sale agreement, on grounds that the plaintiff as conveyancing lawyer, ought not to have acted at the beginning for ***both*** vendor and purchaser as conflicts of interest might arise.

Learned counsel urged that once the completion date passed, on 28th March, 1992 there was no further basis of obligation on the part of the defendant, as the original agreement "was not extended by any formal writing" ; consequently, in the words of counsel, "there was no subsisting agreement between the plaintiff and the defendant as at the time this suit was filed."

Mr. Ngwiri urged that notwithstanding the long completion period agreed upon by the parties, which was one year and one month, time remained of the essence, for "it is trite law that in every transaction time is of the essence." He contended, on the basis of DW1's evidence, that delay in the performance of the sale transaction had been occasioned by the plaintiff's absence abroad for 12 months, from *10th July, 1993*. This one-year absence, learned counsel urged, occasioned a frustration of the land-sale agreement of 18th February, *1991* in respect of which the completion date was *28th March, 1992.*

Frustration of contract was urged to have afflicted the land-sale agreement from still another direction; in the words of learned counsel ***Mr. Ngwiri:***

> "…it was very clear from the evidence of PW1 during examination-in-chief that the acreage was changed from ***three*** acres as per the Agreement for Sale to ***two*** acres. There was no documentary evidence tendered in Court to show that [a variation to] the Agreement for Sale…was signed by both parties…These changes were therefore unilaterally made by the plaintiff thereby frustrating the original contract further."

Did the defendant ever serve upon the plaintiff a notice of completion, when the agreed completion date came, on 28th March, 1992 but the transaction remained uncompleted? On this point ***Mr. Ngwiri*** submitted: "…during examination-in-chief PW1…admitted that she had at a certain time received a letter from the defendant's advocates demanding the return of the title documents…We submit that this was a sufficient notice to the plaintiff [as regards] non-completion or delay by the plaintiff." The letter referred to, however, was not identified, and its date is unascertained.

From the premise of his foregoing contentions, ***Mr. Ngwiri*** made the submission that "it is clear that the plaintiff is the one who breached the contract."

Learned counsel urged that since the plaintiff's firm had been the advocates for the defendant, the plaintiff "was duty-bound to advise the defendant on the issue of completion notice"; he considered that the plaintiff had been in default, in that regard, and that, consequently, "the plaintiff is not entitled to a refund of the deposit paid to the defendant."

Mr. Ngwiri submitted that if the plaintiff had suffered any damage due to the non-completion of the land-sale agreement, the same was "self-inflicted"; he maintained, however, that "the plaintiff [had] not suffered any loss and she is therefore not entitled to specific performance of the agreement."

Learned counsel contended that the plaintiff, apart from paying Kshs.400,000/= to the defendant, was owed nothing else by the defendant "as there was no agreement with respect to remuneration between her and the defendant."

Mr. Ngwiri cited the High Court case, ***Samuel N. Kamau t/a Woven Fabrics Labels v. Kenya Industrial Estates Ltd***. HCCC No. 284 of 2001 to support the contention that the land sale-agreement had been

unilaterally altered by the plaintiff, and so had ceased to exist. In that decision, however, counsel has not excerpted any part carrying a principle such as would advance the defendant's case; counsel has only marked out a limited, cryptic portion which thus reads: "It is true the applicant knew he was due to meet some payments and his own letters indicate the same, but the basis of the …payments, namely a *written contract, is missing and a Court cannot enforce what is non-existent."*

Learned counsel has also sought to rely on highly abridged Press reports of two High Court cases – ***BOC Kenya Limited v. Chemgas Ltd***, HCCC No. 935 of 1999 (***Onyango Otieno, J*** as he then was) and ***Margaret Wanjiku Kamau v. John Njoroge Gathuru & Another*** [2005] eKLR (***Musinga, J.).*** He relies on these cases for the proposition that since the plaintiff's firm had acted for the defendant, "it was the duty of the plaintiff to ensure that the land-sale transaction [was successful]"; and the proposition that "the plaintiff being an expert in conveyancing law, ought to have been aware of the old maxim *caveat emptor…"*

VI. FURTHER ANALYSIS

(1) Discharging Obligations under the Land-sale Agreement

The crucial question in resolving the dispute represented by this suit is this: ***Who*** must bear responsibility for the non-compliance with the agreed completion date, *28th March, 1992* under the Agreement for Sale between the plaintiff and the defendant dated 18th February, 1991?

Although the defendant in his testimony, and his advocate in his submissions, have endeavoured to exhonerate the defendant and to attribute breach to the plaintiff, they did not, in my view, place before the Court cogent material whether factual or legal, highlighting the plaintiff's breaches of the terms of the agreement. From the evidence it is clear that the plaintiff's obligations under the contract had to do with *payment;* but the main obligations which required *getting up and preparing the ground*, as a pre-condition to the drawing of the conveyance and the delivery of final payments, fell squarely at the doors of the *defendant* herein. And what are these threshold obligations without which the property-transfer stage could not but remain in abeyance? These were set out mainly in the "Special Conditions": (i) "the vendor undertakes to sub-divide the land in order to excise the 3 acres at his own cost"; (ii) "the vendor will clear all the rates on the property, and the land rents, and income tax." Elsewhere in the Agreement for Sale, there were still other obligations resting upon the defendant: (i) Clause 8 stated that the property was sold with vacant possession; and (ii) clause 9 thus stipulated: "The property is sold subject to conditions, restrictions and stipulations in the vendor's title but otherwise free from all encumbrances. The property shall be excised from L.R. No. 2246/4 Langata. The vendor has undertaken to provide access to the land being purchased which should be satisfactory to the requirements of the Commissioner of Lands and the Nairobi City Commission."

(2) Specific Issues Emerging From the Evidence

(i) Which party failed to comply with the completion date?

In spite of contentions by the defendant to the contrary, the more credible evidence on record shows that the plaintiff could not have drawn the conveyance document without instructions; and the defendant, even by his own evidence, never performed the special conditions specified in the contract, and never gave the plaintiff instructions to prepare a transfer.

I find and hold, therefore, that it was the *defendant* rather than the plaintiff who did not complete his part by the agreed completion date, namely *28th March, 1992.*

(ii) Was time of the essence, in the land-sale agreement of 18th February, 1991?

In the very nature of the land the subject of the agreement, with deed plans to be drawn, excision to be done and charges to be cleared, the special conditions adopted *did not state* that time was of the essence.

The applicable norm, in the circumstances, was clause 4(7) (b) of the 1989 edition of the *Law Society Conditions of Sale and Agreement for Sale,* which thus states:

> ***"If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction…"***

It is provided in clause 4(7)(c) of the same rules that:

> ***"Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within 21 days of service and, in respect of such period, time shall be of the essence of the contract***."

Since I have already held that the party who failed to comply with the completion date was the *defendant,* it follows, under the applicable law, that the plaintiff is the party upon whom the duty fell to give the *completion notice*. If the plaintiff gave the completion notice as she was entitled to do, then the path of resolution of the dispute would have been defined by the basic law of contract, by the terms of the agreement of 18th February, 1991 and by the terms of *Law Society Conditions of Sale and Agreement for Sale, 1989*. If the plaintiff failed to give completion notice, then the dispute would stand to be resolved essentially within the *basic principles of contract law.*

From the evidence, the plaintiff did not serve a formal completion notice, but kept on *urging* and *prompting* the defendant to complete his part in the land-sale agreement: the plaintiff paid up the defendant's debts with his surveyor, to enable the surveyor to undertake the required sub-division on behalf of the vendor; the plaintiff deposited outstanding part-payments on price, with M/s. Wanjama & Co. Advocates to hold to the defendants orders; the plaintiff asserted her purchaser's interest in the suit land by lodging a caveat against the defendant's title; the plaintiff agreed to pay a "punitive" extra charge of Kshs.100,000/= imposed by the defendant for "delay in completing"; the plaintiff persistently engaged the defendant on the land-sale transaction, and even employed the good offices of others, to get the defendant to perform his part of the agreement; the plaintiff arranged for visits with the defendant and the defendant's surveyor, and her own advocates to the subject land, for the purpose of clarifying which portion was to be excised and transferred to her.

All the foregoing instances show that the plaintiff *considered herself bound* by the contract executed by the parties on 18th February, 1991. They show that the performance of the contract got stuck on the *defendant's* side, and that the plaintiff had gone beyond the call of duty to ensure implementation of the contract. The taking of such initiatives well beyond the completion date, shows that the *plaintiff by her conduct, had waived the completion date*; and thus, what was left as an obligation of the *defendant* towards her was, excision and transfer to her of the subject land, in accordance with the terms of the original agreement.

Did the defendant also waive the condition that time was of the essence? I think so. PW2, ***James Kamwere Muriuki***, who is the defendant's surveyor, thus testified:

> "My understanding is that [the defendant] has no intention of denying [the plaintiff] the land. I think the siting of the land is the issue. [The defendant] has never given me the impression he wants to deny [the plaintiff] her land."

As late as *three-to-four years* after the expiration of the completion date, the defendant himself *visited* the subject land together with his surveyor, the plaintiff and her advocate, for the purpose of *indicating the specific portion to be excised* and conveyanced to the plaintiff. And, whether candidly or not, the defendant testified that his failure to transfer land to the plaintiff in accordance with the agreement was occasioned by the fact that the transfer process "could not be completed because I did not have the original title deed; the title deed was with my lawyers…" The defendant also testified as follows:

> "Anybody who will come up with a reasonable agreement I will sell the land to; I will sell even to

[the plaintiff] if she renews the agreement on the basis of current land value."

From such evidence, I would hold that, just as for the plaintiff, for the defendant too, time in the performance of the contract of 18th February, 1991 was *not of the essence*. Therefore, the dispute between the parties is to be resolved on the basis of *normal contract law*.

(iii) Was the land-sale contract frustrated?

The defendant sought to rely on the doctrine of frustration, to free himself of any legal consequences flowing from the non-performance of the land-sale agreement. It is not clear, however, how this doctrine could be of any relevance in the instant case. Frustration in contract is thus defined in ***Osborn's Concise Law Dictionary***, 6th ed by John Burke (London: Sweet & Maxwell, 1976);

> ***"The discharge of a contract rendered impossible of performance by external causes beyond the contemplation of the parties. For example, a contract postponed by Government order would be discharged if the interference was so gross that when the time did arrive to resume work the parties would find themselves in completely different circumstances (Metropolitan Water Board v. Dick Kerr [1917] 2 KB1). Money paid under a contract which is later frustrated and discharged may be recoverable in quasi-contract (The Fibrosa Case [1943] A.C. 32)."***

From the evidence, the performance of the contract herein was not at all affected by "external causes beyond the contemplation of the parties"; and hence the contract could not, I would hold, have been discharged.

(iv) ***Did the contract provide for the excision and transfer of three, or two acres of land***?

Learned counsel for the defendant made an issue of the difference between ***three*** and ***two*** acres of land as the portion intended for excision, as a cause of *frustration* in the contract, so that the defendant had no further obligations to deliver. In ***Mr. Ngwiri's*** words:

> "…it was very clear from the evidence of PW1..that the acreage was changed from three acres… There was no documentary evidence tendered in Court to show that [a variation to] the Agreement for Sale..was signed by both parties…These changes were therefore unilaterally made by the plaintiff thereby *frustrating* the original contract.."

If the plaintiff now sought a smaller portion of the defendant's land than that contracted for, then, with respect to learned counsel, it is the conduct of the parties *vis-à-vis* the agreement that would be in issue, and not "external causes beyond the contemplation of the parties", and thus the doctrine of "frustration" would have *no application*.

It is clear from the pleadings, from the evidence, and from the submissions that the legal obligation resting upon the defendant, under the land-sale agreement of *18th February, 1991* was to excise *three acres* out of his larger parcel and to transfer it to the plaintiff on certain terms. Did the defendant perform that obligation? No. So why should the defendant complain about having to transfer to the plaintiff, instead, a smaller portion of land? How would the defendant be *prejudiced?* I would hold such a complaint on the part of the defendant to fall within the principle, *de minimis non curat lex* – trifles are not the preoccupation of the law. For no evidence at all has been led to the effect that since the making of the land-sale agreement, the plaintiff has sought to lessen the burdens of purchase-price payment falling upon her.

Several documents may be said to carry the contractual intent between the parties, and the primary one is clearly the duly-signed agreement of *18th February, 1991*. The letter written on behalf of the plaintiff, by M/s. Wanjama & Co. Advocates, dated 30th August, 1995 indeed refers to *two* acres as the portion of the defendant's land to be transferred to the plaintiff under the sale agreement. That discrepancy is, in my view, a trivial one; and besides, ignoring it would find legal validity in the well known principle, *falsa*

demonstratio non nocet – a false description does not vitiate a document. The written agreement of 18th February, 1991 describes the area of land to be conveyanced to the plaintiff with sufficient certainty, and so the untrue part will be rejected or ignored. The defendant in his evidence had confirmed the foregoing position:

> "That is my land; and it is out of that very land that I had wanted to sell three acres to the plaintiff."

(v) Who is in breach of contract?

The evidence given in this case has been fully set out, and I have considered and evaluated it in the context of the submissions of counsel. It emerges quite clearly that the party in breach of the contract is *the defendant*. It is evident that the defendant had signed the land-sale agreement of 18th February, 1991 without having any intention to perform the obligations falling upon him. The defendant gave no instructions to his surveyor to draw plans for the excision of the land to be transferred to the plaintiff; he did not even apply to the relevant public authorities for consent to sub-divide the land; he received and retained benefits from the plaintiff under the agreement; he persistently declined to respond to the plaintiff's inquires and initiatives; he did not clear the several encumbrances lawfully attached to his land, so he may excise the plaintiff's portion and transfer; he gave instructions to his surveyor to undertake no work on the relevant deed plans; he gave no instructions to the plaintiff to prepare a conveyance of the subject land in her favour; he claimed unjustifiably that the plaintiff had not performed her part in the land-sale agreement timeously; he imposed unilateral conditions, such as demanding punitive amounts as additional purchase-price; he testified in Court that his earlier agreement "that one acre was to be given in kind for work done" by the plaintiff, was only "a friendly matter" and the parties were "not very serious about it."

(vi) Court's finding

My finding, therefore, is in favour of the plaintiff and against the defendant; and on that basis I will make a suitable decree as set out below.

VII. DECREE OF THE COURT

> ***(1) I hereby grant specific performance by the defendant of the obligation to transfer to the plaintiff three acres of land, in accordance with the agreement executed between them on 18th February, 1991, upon payment by the plaintiff of the outstanding purchase-price balance of Kshs.200,000/=: and in this regard the defendant shall instruct a surveyor to finalise the sub-division and shall execute the conveyance in favour of the plaintiff; and if the defendant shall not on his own volition do so, then the plaintiff shall apply the said balance of Kshs.200,000/= towards the defrayment of the survey fees and other charges such as may currently attach to the subject property.***
>
> ***(2) In the alternative, the defendant shall pay special damages to the plaintiff as follows:***
>
> ***(i) Kshs.400,000/= bearing interest at 21% per annum with effect from 19th April, 1995 until payment in full;***
>
> ***(ii) Kshs.9,372/55 bearing interest at 21% per annum as from 30th October, 1991 until payment in full;***
>
> ***(iii) Kshs.330,000/= bearing interest at 21% per annum as from 19th April, 1995 until payment in full.***
>
> ***(3) I award general damages for breach of contract by the defendant, in the sum of Kshs.80,000/=, to bear interest at Court rate with effect from the date hereof until payment in full.***

(4) The defendant shall bear the costs of this suit, payable with interest at Court rate with effect from the date of filing suit until payment in full.

(5) ***If any application or motion shall arise in connection with this judgement, the same shall be heard and determined by a Judge in the Civil Division of the High Court***.

DATED and **DELIVERED** at Nairobi this 10th day of November, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff: Mr. Kihara, instructed by M/s. C.N. Kihara & Co. Advocates

For the Defendant: Mr. Ngwiri, instructed by M/s. O.T. Ngwiri & Co. Advocates