



Both t/a Nemka Commercial Agencies v Board of Trustees National Social Security Fund; Chege & 12 others (Interested Party) (Environment and Land Case Civil Suit 543 of 2013 & 1331 of 2014 (Consolidated)) [2023] KEELC 16139 (KLR) (1 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16139 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT
543 OF 2013 & 1331 OF 2014 (CONSOLIDATED)

JA MOGENI, J

MARCH 1, 2023

BETWEEN

**DAVID MBURU GIBSON NELSON MWANGI BOTH T/A NEMKA
COMMERCIAL AGENCIES PLAINTIFF**

AND

BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND . DEFENDANT

AND

ELIZABETH NJOKI CHEGE & 12 OTHERS INTERESTED PARTY

JUDGMENT

1. This is a consolidation judgment in respect of two suits. David Mburu Gibson and Nelson Mwangi both t/a NEMKA Commercial Agencies filed ELC Civil Suit No. 543 of 2013 and Njoki Chege & 8 others (the interested parties herein) filed ELC Case No. 1331 of 2014. The parties herein entered into a sale agreement dated 17/05/2005 in which the Defendant (vendor) was selling to the Plaintiff (Purchaser) twenty (20) acres of land (“the suit property”) which was to be excised from land known as L.R No. 11895/24 situated along Mombasa Road in Mlolongo/Athi River area in Nairobi initially measuring 114.8 hectares at a consideration of Kshs. 16,400,000.00. The Plaintiffs subdivided the suit property into 166 plots and sold some to third parties by receiving down payments which in turn, led to the interested parties filing their own suit. For ease of reference, the Plaintiffs in ELC Case No. 1331 of 2014 will be referred to as the interested parties in this judgment. On 22/04/2021, the Court gave an order for consolidation of the two suits of which ELC 543 of 2013 became the lead file.



ELC 543 of 2013

2. The first suit was commenced by way of a Plaint dated 3/05/2013 that was filed on 10/05/2013 by David Mburu Gibson and Nelson Mwangi both t/a NEMKA Commercial Agencies against NSSF. In that case, the Plaintiffs sought for Judgment against the Defendant for the following orders: -
 - a. A mandatory order for specific performance requiring the Defendant to excise, transfer and hand over vacant possession to the Plaintiffs the purchased twenty (20) acres to be excised from L.R. No. 11895/24 as per the sale agreement dated 17th May 2005.
 - b. Damages/mesne profits for loss occasioned by the Defendant's delay to transfer the purchased twenty (20) acres to the Plaintiffs from the date the entire purchase price was paid until the date the defendant shall transfer and hand over vacant possession of the suit property to the plaintiffs.
 - c. Costs of this suit and interest thereon.

In the alternative, judgment in favour of the plaintiffs against the defendant for:-

Kshs. 16,400,000/- being the purchase price paid by the Plaintiffs to the Defendant.

- a. A sum of Kshs. 415,000,000/- or such other amount that the court may deem reasonable and just being the current market value of the suit property subdivided into 166 plots at Kshs. 2,500,000/- per general plot and/or the profit that the plaintiffs would have made by sale of the suit property to third parties upon sub-division into sub-plots.
- b. Interest on the amount claimed in (d) hereinabove calculated at current bank rates from 22nd March 2007 when Plaintiffs completed paying the entire purchase price until date of actual refund of the claimed sum.
- c. Costs of this suit and interest thereof.
- d. Any other or further relief this Honourable court may deem fit and just to grant.

Plaintiff's Case

3. It was the Plaintiffs' case that at all material times, the Defendant was the registered owner of the parcel of land then known as L.R. No. 11895/24 situated along Mombasa Road in Mlolongo/Athi River area in Nairobi initially measuring approximately 114.8 hectares vide a formal agreement dated 17/05/2005 executed between the Plaintiffs on the one part and the Defendant on the other part the Defendant sold to the Plaintiffs twenty (20) acres of land (hereinafter referred to us the "suit property" which were to be excised from the Defendant's aforesaid then large parcel of land known as L.R. No. 11895/24 at a total purchase price of Kshs. 16,400,000/-.
4. It was a term of the said agreement that the Defendant would excise and transfer the said twenty (20) acres to the plaintiffs after the Plaintiffs had paid in full the purchase price. The Plaintiffs aver that they duly paid the agreed entire purchase price of Kshs. 16,400,000/-.
5. They allege that it was the plaintiff's business intention and which intention was well known to the defendant to subdivide the 20 acres into subplots and dispose the same to third parties at a profit. The



- plaintiffs further aver that with the defendant's knowledge and consent they had formally subdivided the 20 acres property into 166 plots and sold some to third parties by receiving down payments.
6. In spite of the payment of the purchase price by the Plaintiffs to the Defendant, the Defendant has so far refused, failed and/or neglected to transfer the suit property to the Plaintiffs.
 7. The plaintiffs further aver that as a result of the Defendant's failure to transfer and/or give vacant possession of the suit property to the Plaintiffs, they have been denied the Kshs. 16,400,000/- purchase price already paid but also the income /profit they would have generated from the sale of the sub-plots which were to be partitioned out of the suit property and sold to third parties. The Plaintiffs aver that they are real estate agents and engaged in the business of buying and selling real estate and therefore expected to make some substantial amounts out of the sub-divided plots and the defendant is, therefore, guilty of breach of the terms of the aforesaid agreement.
 8. The Plaintiff listed particulars of breach as follows: Failing to avail the completion documents to the plaintiffs as envisaged in clause 9 of the sale agreement, failing to cause the excision of the 20 acres as contemplated in the sale agreement, failing to grant the plaintiffs vacant possession of the suit property in time or at all, failing to fulfill its obligations as per the sale agreement, and Breaching the sale agreement in its entirety.
 9. The plaintiffs further aver that they have subsequently learned that the Defendant has over time and after the plaintiffs had purchased the twenty (20) acres been selling the suit property to other third parties who have even developed part of the portion of land that the Plaintiffs had agreed with the Defendant that the twenty (20) acres were to be excised from.
 10. In spite of the Plaintiffs protests the said third parties with the consent, connivance and/or knowledge of the Defendant has now developed part of the suit property and other portion fenced with permanent stone wall.
 11. The Plaintiffs therefore contend that the Defendant ought to be compelled by way of an order of specific performance to excise and transfer to the Plaintiffs the purchased twenty (20) acres forthwith. In the alternative the Defendant should be compelled to refund the entire purchase price and accrued interest thereof at prevailing commercial rates from the time the said amount was paid until date of payment in full. Further the Defendant should be ordered to pay punitive damages for breach of contract which damages should be based on the current market value of the property as at the time of judgment herein and/or based on the profit that the plaintiffs would have made for the sale of the plots that were to be sub-divided from the suit property and sold to the third parties based on the current market value.

Defence Case

12. The Defendant entered appearance and filed a statement of defence dated 19/09/2013. The defendant denies each and every allegation of fact contained in the Plaint dated 3/05/2013.
13. They confirm that it was the registered owner of the parcel of land known as L No. 11895/24 situated along Mombasa road in Mlolongo/Athi Area, and as the Vendor of the property, the Defendant denies that the actual area was as represented on the certificate of title as 114.8 Hectares.
14. The Defendant admits that through the sale agreement dated and executed on 17/05/2005 executed between the Plaintiff and itself, it contracted to sell to the Plaintiff 20 acres to be excised from the suit property for a consideration of Kshs.16,400,000/- and further avers that the agreement for sale was to be completed within 90 days, time being of the essence. Further, the Defendant further avers that the following terms, conditions and provisions of law were material to the sale.



15. The conditions were as follows:
- 4.1. Under Clause 3(a) of the agreement, the 10% deposit of the sale price, in the sum of Kshs. 1,640,000/- was to be paid directly to the Defendant on or before execution of the sale agreement.
- 4.2. Under Clause 3(b) of the agreement, balance of the purchase price, in the sum of Kshs. 14,760,000/- was to be paid in accordance with Clause 8 thereof.
- 4.3. Under Clause 4, the sale was to be completed within 90 days from the date of execution of the agreement, and therefore time was expressly provided to be of the essence, such that the completion date was to be on or about 15/08/2005.
- 4.4. Under Clause 8 of the Agreement, the balance of the purchase price was to be paid through the Vendor's advocates and was to be paid lump sum on or before the completion date, as Clause 8 provided that:-
- “On or prior to the completion date, the Purchaser shall pay to the Vendor's advocates the balance of the purchase price (plus the apportionment of rates and such other money as may be payable under this agreement) in exchange of the release of the completion documents stated in Clause 9 by the advocate for the Vendor, upon a suitable undertaking from the Vendor's advocates not to release the said amount to the Vendor until confirmation is received from the Purchaser's advocates that the transfer has been duly registered.”
- 4.5. Under Clause 9 of the Agreement, the release of completion documents was conditional upon receipt of the balance of the purchase price by NSSF's advocates; and
- 4.6. Under the Special Condition C of the agreement, the Purchasers were to meet all the costs of identifying the beacons, together with survey, subdivision fees and all related expenses.
- 4.7. Under Clause 5 of the agreement, the sale of the suit property was subject to the Law Society Conditions of Sale (1989 Edition) in so far as they were not inconsistent with the conditions contained in the agreement, or specifically hereby excluded.
16. The defendant avers that the plaintiff did not comply with the terms of payment of the sale agreement as alleged herein and in blatant breach of the terms and conditions of the agreement dated and executed on 17/05/2005, the defendant avers by way of defence to the plaintiffs claim that the plaintiff breached the agreement for sale as particularized as follows: Failing to pay the balance of the purchase price within the 90 day completion period commencing from 17/05/2005 as required and in accordance with Clauses 4 & 8 of the Agreement, if at all it was ready, able and willing to complete, as a legal basis for alleging breach of contract, issuing a completion notice and/or seeking specific performance, failing to meet the costs for identifying the beacons, the survey, subdivision fees and related expenses, failing to seek extension of the completion period to pay the balance of the purchase price as contemplated under by Clauses 4 & 8 of the Agreement, as time. was of the essence, on the date of completion, they failed to deposit the balance of the purchase money (or part thereof) upon seven (7) days, as a legal basis for issuing a completion notice or seeking specific performance, contrary to Clauses 3(b), 4 & 8 of the Agreement as read together with Condition 26 of the Law Society Conditions, they proceeded to unilaterally and uncontractually vary the terms of payment of the balance of the purchase price, by opting to pay the balance through installments, without any notice to the Defendant or its advocates, into the Plaintiff's general account, through installments between 18/08/2006 – 23/02/2011 as a means of circumventing the terms of automatic default.
17. As a consequence of the Plaintiffs breach as set out above, the Defendant also avers that it duly issued the Plaintiffs with a default/completion notice through its advocate's letter dated 23/11/2005,



requiring payment of the balance price, in the sum of Kshs. 14,760,000/- within 21 days, in default of which the agreement would stand rescinded and the deposit of Kshs. 1,640,000/- would stand forfeited, and the contract therefore stood so automatically terminated through default upon expiry of this notice.

18. Further in the alternative and without prejudice to the above, the Defendant avers, in any event, that the particulars set out above disclose particulars of estoppel, such that the Plaintiffs are estopped from asserting their own acts and conduct in breach of contract as a basis for seeking damages or specific performance, and each and every of the aforesaid particulars are specifically incorporated and reiterated herein by way of defence of estoppel to the assertions in Paragraphs 5, 7 & 8 of the Plaintiff.
19. The Defendant avers that it was not a term of the sale agreement that 20 acres would be excised after the Plaintiff had paid the full purchase price. The Defendant avers that the balance of the purchase price was due on or before the completion date defined as 90 days from 17/05/2005 and that the Plaintiff never paid the balance on or before the completion date.
20. That the intention of the Plaintiffs was unknown to the Defendant, and neither was it brought to the attention of the Defendant in any way. Further the Defendant avers that the sale agreement dated 17/05/2005 was silent as to the intention of the plaintiffs in acquiring the 20 acres and therefore the plaintiff's unilateral business intention cannot be imposed on the defendant.
21. The Defendant avers that payment of the balance of the purchase price was not as per clause 8 of the sale agreement and therefore the sums received cannot be said to have been in furtherance of the sale agreement dated 17/05/2005 and the sums were therefore received under a mistake of fact induced by the false representation of the Plaintiffs that they were purchasing LR No. 11895/24- Mavoko.
22. The Defendant denies that it has failed and/or refused to transfer 20 acres to the Plaintiffs as pleaded or at all and aver that the contract was rescinded upon breach by the Plaintiffs and further that and in the alternative supervening events frustrated the sale agreement.
23. The particulars of breach enumerated in paragraph 8 of the Plaintiff are denied in toto. It was an express term of the sale agreement that the plaintiffs were to meet the subdivision and resurvey costs and having failed to do that there was no way the Defendant could have availed completion documents because payment of the balance of the purchase price was a necessary condition precedent for the subdivision exercise and was an integral and indispensable part of processing the completion documents.
24. That also by reason of all the above, the Defendant denies that the Plaintiffs are entitled to any damages as alleged in, and further deny each and every particular of breach as alleged by the Plaintiff and listed as (a) - (e) in Paragraph 8 thereof.
25. Additionally, the Defendant avers that:-
 - i. The Plaintiff's completion notice dated and/or issued on 23rd February, 2011 is also void for the same reasons.
 - ii. It was an express term of the sale agreement that the plaintiffs were to meet the subdivision and resurvey costs and having failed to do that, in any event, there was no way the Defendant could have availed completion documents because the subdivision exercise was an integral and indispensable part of processing the completion documents.
26. In reply to paragraph 9 of the Plaintiff, the Defendant avers that the contract between the Plaintiffs and the Defendant was rescinded due to the breach by the Plaintiffs and in the alternative, it was frustrated,



and all that the Plaintiff is entitled to is a refund of sums paid to the Defendant and received by the Defendant under mistake of fact.

27. Additionally, and without prejudice to the foregoing, it is the Defendant's alternative defence that on account of the contents of Paragraphs 4 - 114 hereabove, the allegations therein are irrelevant and/or immaterial to the Plaintiff's claim, and the Plaintiff is put to strict proof of any allegation to the contrary.
28. In further response to Paragraph 9 of the Plaintiff, the Defendant avers that, that in addition to the Plaintiff's breach, there were supervening events that changed the character of the suit property which are particularized as follows: Acquisition or compulsory acquisition of a substantial part of the suit property by the Government for purposes of road construction or expansion, Acquisition of a substantial part of the land for wayleaves and power lines and failure by the Plaintiff to meet subdivision costs or in any way facilitate the, resurvey and subdivision.
29. In response to Paragraph 10 of the Plaintiff, the Defendant states by way of defence that the Plaintiff's suit neither discloses a legal basis for seeking specific performance of the contract on account of the contents hereabove. In any event, and without prejudice to the foregoing, even assuming that the Plaintiff's suit indeed discloses a legal basis for seeking specific performance (which is denied), the contract, if still subsisting is incapable of discharge through specific performance of the sale agreement dated 17th May, 2005.
30. The Defendant avers that it is ready, able, and willing to refund to the Plaintiffs the sum of Kshs. 14, 760,000/- being the balance of the purchase price paid and received under a mistake of fact. Additionally, the defendant states by way of defense that:
 - a. The sums were received and retained by the Defendant under a mistake of fact induced by the uncontractual misconduct of the Plaintiffs of which the Defendant had no notice of as earlier stated.
 - b. The mistake of fact was only confirmed by the Defendant on or about 23rd September, 2011 as duly communicated to the Plaintiffs in writing.
 - c. The Plaintiffs elected to treat the contract as in force and could not accept a refund of the same as they were seeking specific performance.
 - d. The Defendant avers that it is ready, able and willing to refund to the Plaintiffs the sum of Kshs. 14,760,000/- paid and received under a mistake of fact but denies that the Plaintiffs are entitled to claim any interest from any date antecedent to filing suit or to any offer of refund made by the Defendant in this regard and/or to the extent not admitted.
31. The Defendant states by way of defence that the Plaintiffs are not entitled to a refund of the deposit paid, as the Plaintiffs breached the contract as they were not ready and/or able to pay the balance of the purchase price on the completion date, resulting in an automatic forfeiture of the deposit of Kshs. 1,640,000/-. In the alternative, and without prejudice to the foregoing, if at all the Plaintiffs are entitled to a refund of the deposit of Kshs. 1,640,000/- (which is denied), the same is only refundable without any interest by reason that:-
 - a. the Plaintiffs were not ready and/or able to pay the balance of the purchase price on the completion date, and therefore in breach.



- b. it would be inequitable on the Defendant to pay interest on this sum which the Plaintiffs deliberately failed to demand for in order to enable them not only to give a void completion notice on 23rd February, 2011 but also seek specific performance.
32. In any event, and without any prejudice to any of the defenses raised herein in, the Defendant pleads the right of setoff against any sums awarded by the Court in favour of the Plaintiff herein, as particularized as follows: under Clause 3 Clauses 3(b), 4 & 8 of the Agreement, the balance of the purchase price, in the sum of Kshs. 14,760,000/- became due to the Defendant on the completion date, that is 90 days from 17 March, 2005, when the agreement was duly signed. The Plaintiffs failed and were unable to pay the balance of the purchase price on the completion date as particularized in the foregoing paragraphs, by virtue of Condition 8(3) of the Law Society Conditions of Sale, interest on the sum of Kshs. 14,760,000/- (date of completion to date) began running on or about 17th August 2005; and the Defendant is entitled to set off the principal and/or interest accrued on this sum between 17th August 2005 to 23rd February, 2011 at the same rate that is applicable or claimed by the Plaintiff and any sum found owing to the Defendant be refunded in the manner prescribed under Order 7 Rule 14 of the Civil Procedure Rules.
33. In further response to Paragraph 10 of the Plaint, the Defendant states by way of Defence that the Plaintiff is not entitled to the sum of Kshs. 415,000,000/- as claimed, for reasons stated in the foregoing paragraphs of this Amended Defence, and the Defendant, shall at the opportune moment, move the Court to strike out and/or dismiss this claim for lost profits with costs, for not having any pleaded or legal basis in law.
34. The Defendant further avers that the land to be purchased by the Plaintiffs had not been excised and it is presumptuous for the Plaintiffs to contend that the land sold by the Defendant was the same land that was to be purchased by the Plaintiffs.
35. In reply to paragraph 10 of the Plaint the Defendant avers that specific performance would be impossible because of supervening events that changed the character of the suit property and further that it would be inequitable to allow the Plaintiffs to benefit from their own wrong.
36. The Defendant admits an obligation to refund the sum of Kshs. 14,760,000/- received under mistake but denies that the Plaintiffs are entitled to claim interest from any date antecedent to filing suit or any offer of refund by the Defendant and avers that it is settled that interest on monetary claims is due from due date of filing suit unless there is a contrary agreement or contrary statute.
37. Paragraph 11 of the Plaint is denied. Further, in light of all the facts stated here above by way of defence, and in the absence of this necessary pre-action demand letter, the Defendant states by way of defence that the Plaintiff is not entitled to be awarded any costs and/or interest on the sum of Kshs. 14,760,000/- paid by the Plaintiffs and received by the Defendants under a mistake of fact, and which the Defendant has always been ready able and/or willing to refund; and the Plaintiff is entitled to have any costs and/or interest the Plaintiff would otherwise have been awarded reduced by the amount of legal costs the Defendant incurs in defending the Plaintiffs claims.
38. Paragraph 12 of the Plaint is admitted save that the Plaintiffs are also Plaintiffs in HCCC No. 616 of 2010 and not interested parties as alleged and the Defendant will move the court to stay or strike out proceedings as appropriate.
39. Lastly, the defendant prays that the plaintiffs' suit be dismissed with costs.



Interested Parties' Case

40. The Interested Parties filed an affidavit in support of their claim. It was sworn by Anthony Maina Muhoro on 15/06/2022.
41. It is their contention that the interested parties have beneficial interest in the subject matter of the suit and have therefore approached the Honourable court to protect their interests when hearing and adjudicating this matter.
42. That the Plaintiff entered into a sale agreement with the Defendant for the purchase of approximately 20 acres excised from the larger property owned by the defendant and described as L.R No. 11895/24 at Kshs. 16,400,000.
43. Consequently, on the strength of the above-mentioned Sale Agreement, the 1st to 13th Interested parties entered into further separate Sale Agreements with the Plaintiff herein for the purchase of the 20 Acres, which the Plaintiff purchased from the Defendant.
44. That the Plaintiff subdivided the said 20 acres into several plots measuring approximately 50 × 100ft which it later sold to the 1st to 13th interested parties at varied prices. Each plot sold for Kshs. 400,000.00 but some purchasers got discounts when they purchased two or more plots.
45. They aver that on the instructions of the Plaintiff herein, some interested parties paid the requisite purchase price for their plots directly to the Defendant but on behalf of the Plaintiff. The plaintiff was thereby fulfilling the terms of its contract with the defendant to pay the purchase price in time.
46. Consequently, the plaintiff was to acquire the suit property from the defendant for onward transfer of respective plots to the 1st - 13th interested parties. Each interested party herein finished paying up the respective purchase prices of their plots covering the whole 20 acres in time and in respect of the terms of their Sale Agreements. The amount paid by the 1st - 13th Interested parties to both the plaintiff and the defendant directly amounted to Kshs. 16,400,000.00.
47. After payment of the requisite purchase price, the Plaintiff issued each interested party with an ownership certificate for their respective plots signifying ownership and interest in land. The Plaintiff had promised to assist the interested to obtain individual titles from the government and registration into their own names.
48. Thereafter, the defendant issued an unequivocal acknowledgment letter to the plaintiff herein, acknowledging receipt of the full purchase price of the suit property being Kshs. 16,400,000.00. Even after the defendant received the full purchase price for the suit property from the plaintiff and further acknowledged receipt, the Defendant repudiated on their contract by refusing to transfer the suit property to the plaintiff to enable it to fulfil its contract with the interested parties herein by transferring the 20 acres excised from LR No. 11895/24 to the 1st to 13th interested parties.
49. The 1st – 13th Interested parties were apprehensive of the impact of the breach of contract between the plaintiff and the defendant since they are the ones who paid the outstanding amount of Kshs. 16,400,000.00 to both the plaintiff and the defendant.
50. None of the 1st – 13th interested parties have received a refund of the said money for a period of over 16 years from the date of payment, nor received any response from either the plaintiff or the defendant. The Plaintiff continues to unlawfully withhold and benefit from the interested parties' money which was a lot of money at the time of executing the contracts and which has gained great value over the years till date.



51. As a result of the breach of contract by the plaintiff, the 1st to 13th interested parties continue to suffer mental anguish from great financial losses suffered, for which they jointly and severally hold the plaintiff liable. The interested parties remain apprehensive that the plaintiff is adamant and not committed to admitting liability and refunding their money or transferring the suit property to them.
52. That the plaintiff denied the interested parties the right to own property under article 40 of *the constitution* of Kenya, 2010 and should be compelled by the honorable court to fulfil his obligations under the contracts.
53. Based on the above stated facts, I have been advised by the interested parties' advocate on record, which advice I verily believe to be true, that the defendant breached its contract with the plaintiff by repudiating a written and executed contract after the plaintiff had fulfilled its obligation. This prevented the subsequent transfer of property to the interested parties.
54. The 1st to 13th interested parties claim against the plaintiff is for Kenya Shillings Sixteen Million Four Hundred Thousand only (Kshs. 16,400,00.00) being the total amount paid to it and to the defendant on behalf of the plaintiff, plus accrued interest from the time of breach of contract to date.

ELC 1331 of 2014

55. The second case, that is ELC 1331 of 2014, was filed on 15/10/2014. The Plaintiffs in this case are Njoki Chege & 8 others. The Defendants are David Mburu Gibson and Nelson Mwangi both t/a NEMKA Commercial Agencies and NSSF. By a Plaint dated 14/10/2014, the Plaintiffs therein sought for Judgment against the Defendants for the following orders: -
 - a. Specific Performance against the Defendants to excise 20 acres from L.R No. 11895/24.
 - b. Costs of this suit.
 - c. In the alternative and without prejudice to the foregoing if the Defendants are not able to revert ownership of the suit property to the Plaintiffs:
 - i. The Defendants offers alternative land of equal, size, value and economic potential as the suit property.
 - OR
 - ii. The Defendants pays the 1 - 9th Plaintiffs the current market value of their respective pieces of land as bought from the 1st Defendant.

Plaintiff's Case

56. It was the Plaintiff's case that the 1st Defendant, on 17/05/2005, entered into a Sale Agreement with the 2nd Defendant for purchase of all that parcel of land known as L.R No. 11895/24 measuring 20 acres along Mombasa Road.
57. It was on the basis of the above-mentioned Sale Agreement that the 1st - 9th Plaintiffs in this suit purchased various plots, measuring 50 x 100 in the proposed subdivision plan of the 20 acres bought from National Social Security Fund (NSSF) by the 1st Defendant out of L.R No. 11895/24, from the 1st Defendant.



58. The Plaintiffs aver that the 1st Plaintiff is the beneficial owner of Plot No. 22 measuring 50 × 100; as marked in the subdivision plan of L.R. No. 11895/24, bought from the 2nd Defendant. On or about the 21/12/2007, the 1st Plaintiff entered into a Sale Agreement with the 1st Defendant for the purchase of the above-mentioned plot and paid a total of Kshs. 400,000/- as purchase price for the abovementioned plot; she was given Certificate of Ownership Number 016 as proof of ownership of the plot.
59. The 2nd Plaintiff in numerous transactions, paid the 1st Defendant a total of Kshs 340,000/= towards the purchase of 2 plots measuring 50 × 100, marked as plot No. 152 in the proposed subdivision plan, of the 20 acres bought from National Social Security Fund (NSSF) by the 1st Defendant out of L.R No. 11895/24.
60. On or about the 13/9/2006, the 3rd Plaintiff entered into a Sale Agreement with the 1st Defendant for purchase of 3 plots measuring 50 x 100, marked as plot Nos. 17, 18 and 21 in the proposed subdivision plan, of the 20 acres bought from National Social Security Fund (NSSF) by the 1st Defendant out of L.R No. 11895/24. The 3rd Plaintiff paid a total of Kshs 1,100,000/= to the 1st Defendant as purchase price for the above-mentioned plots with the remaining balance of the purchase price, being Kshs 100,000/= to be paid on completion the completion date.
61. On or about the 13/9/2006, the 4th Plaintiff entered into a Sale Agreement with the 1st Defendant for purchase of 2 plots measuring 50 x 100, marked as plot Nos. 10 & 13 in the proposed subdivision plan, of the 20 acres bought from National Social Security Fund (NSSF) by the 1st Defendant out of L.R No. 11895/24. The 4th Plaintiff paid a total of Kshs 750,000/= to the 1st Defendant as purchase price for the above-mentioned plots. The 4th Plaintiff additionally bought 2 plots from the above-mentioned parcel of land, measuring 50 x 100 marked as plots Nos. 65 and 66 in the proposed subdivision plan from Anne Mukami Kihuni at Kshs. 600,000/=.
62. The 6th Plaintiff, in numerous transactions, paid the 1st Defendant a total of Kshs. 350,000/= towards the purchase of 2 plots measuring 50 x 100, marked as plots Nos. 151 and 154 in the proposed subdivision plan, of the 20 acres bought from National Social Security Fund (NSSF) by the 1st Defendant out of L.R No. 11895/24.
63. On or about the 21/11/2006, the 7th Plaintiff entered into a Sale Agreement with the 1st Defendant for purchase of 8 plots measuring 50 x 100, marked as plots Nos. 151, 152, 153, 154, 155, 156, 157 & 158 in the proposed subdivision plan, of the 20 acres bought from National Social Security Fund (NSSF) by the 1st Defendant out of L.R No. 11895/24. The 7th Plaintiff paid a total of Kshs 2,850,000/= to the 1st Defendant as purchase price for the above-mentioned plots.
64. The 8th Plaintiff in numerous transactions paid the 1st Defendant a total of Kshs. 2,400,000/ towards the purchase of 6 plots measuring 50 × 100, marked as plots No. 14, 16, 19, 20, 23 & 25 in the proposed subdivision plan, of the 20 acres bought from National Social Security Fund (NSSF) by the 1st Defendant out of L.R No. 11895/24. The 8th Plaintiff was given Certificates of Ownership Nos. 017, 012, 058, 013, 011 & 014 as proof of ownership of the above-mentioned plots.
65. On or about 8/9/2009, the 9th Plaintiff entered into a Sale Agreement with the 1st Plaintiff for purchase of 10 plots measuring 1 acre, marked as plots No. 87, 88, 89, 90, 91, 92, 93, 94, 95 and 96 in the proposed subdivision plan, of the 20 acres bought from National Social Security Fund (NSSF) by the 1st Defendant out of L.R No. 11895/24.
66. The 9th Plaintiff paid the 1st Plaintiff a total of Kshs 2,100,000/= towards the purchase of 10 plots measuring all measuring to 1 acre, marked as plots No. 87, 88, 89, 90, 91, 92, 93, 94, 95 and 96 in the proposed subdivision plan, of the 20 acres bought from National Social Security Fund (NSSF) by the



- Plaintiff out of L.R No. 11895/24. The 9th Plaintiff was given Certificates of Ownership Nos. 100, 102, 103, 104, 105, 105, 106, 107, 108, 109 & 110 as proof of ownership of the above-mentioned plots.
67. The Plaintiffs state that even after adhering to the terms of the respective Sale Agreements, and even after payment of the sums stated in the various transactions mentioned herein above, they have not had their respective plots transferred to them to date.
68. As a result, the Plaintiffs have suffered great loss and damage. They listed the particulars of loss and damage as follows:
- Purchase Price paid to the Plaintiff by the 1 - 9th Plaintiffs apportioned as follows:
1. Njoki Chege, 1st Plaintiff – Kshs. 400,000/=
 2. Danson N. Mukururo, 2nd Plaintiff - Kshs 340,000/=
 3. Ruth Kareithi, 3rd Plaintiff - Kshs 1,100,000/=
 4. Anthony Maina Muhoro, 4th Plaintiff - Kshs 750,000/=, Kshs 600,000/=
 5. Charles Muhia, 5th Plaintiff -
 6. John N. Waitbaka, 6th Plaintiff - Kshs 350,000/=
 7. White sky investment Ltd, 7th Plaintiff - Kshs 2,850,000/=
 8. Magi holdings Ltd, 8th Plaintiff - Kshs. 2,400,000/=
 9. Micro-dot engineering, 9th Plaintiff - Kshs 2,100,000/=
69. The 1st - 9th Plaintiffs have great interest in the aforementioned property, as apportioned to them by the 1st Plaintiff, as they have already committed much of their money into buying the suit property.
70. Moreover, the 1st Defendant used the Plaintiffs' money to enable purchase the suit property from the 2nd Defendant. The Plaintiffs possess a better interest to the land than any other buyer having been first buyers, in good faith.
71. The Plaintiffs state that in certain instances, the 1st Defendant instructed some of the Plaintiffs to pay purchase price for their respective plots as bought from 1st Defendant directly to the 2nd Defendant.

Defence Case

1st Defendant's Case

72. The 1st Defendant entered appearance and filed a statement of defence dated 11/12/2014. The 1st Defendant prays that the Plaintiffs' plaint be dismissed with costs and denies each and every allegation contained in the plaint.
73. Further without prejudice to what is stated hereinabove the 1st Defendant avers that if there is any loss and damage occasioned to the Plaintiffs which is however denied, then the same was occasioned by the 2nd Defendant who breached the sale agreement between it and the 1st Defendant.
74. The 1st defendant listed particulars of breach by the 2nd defendant as follows: Failing to avail the completion documents to the 1st Defendant as envisaged in the sale agreement between them, failing to cause the excision of 20 acres as contemplated in the sale agreement, failing to grant the 1st Defendant



vacant possession of the suit property in time or at all, failing to fulfil its obligations as per the sale agreement and breaching the sale agreement.

75. It is their contention that the 2nd Defendant is thus liable to the Plaintiffs herein for the loss and damage occasioned to them (if any) and the 1st Defendant also reserves the right to claim for indemnity from the 2nd Defendant.
76. Further and without prejudice to the foregoing the 1st Defendant in response to paragraph 23, 24, 25 and 26 avers that there was no need for the Plaintiffs to file the instant suit as the Plaintiffs' claims/ interest can be ventilated in ELC 543 of 2013 already filed by the 1st Defendant as against the 2nd Defendant.

2nd Defendant's Case

77. The 2nd Defendant entered appearance and filed a statement of defence dated 08/12/2014. The 2nd Defendant denies each and every material allegation of fact contained in the Plaint dated 14/10/2014.
78. Save that the 1st Defendant entered into an agreement for sale date of land with the 2nd Defendant as stated in Paragraph 3 of the Plaint, the 2nd Defendant is not aware of and was never privy to how or why the Plaintiffs and the 1st Defendant entered into the subsequent contractual agreements for sale of the property between the Plaintiffs and the 1st Defendant as alleged in Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 of the Plaint, and accordingly, the said allegations do not disclose any known or actionable cause of action against the 2nd Defendant.
79. That the 2nd Defendant is not privy to any contractual arrangements forming the basis of the allegations made the plaintiffs save to admit the pendency of Nairobi ELC No.543 of 2013 NEMKA Commercial Agencies vs. NSSF, the contents of Paragraph 27 of the Plaint are denied to the extent it is alleged that the two suits raise the same causes of action, are between the same parties and/or ought to be consolidated and heard together.
80. The 2nd Defendant avers that there is no legal of contractual foundation for the claim of specific performance, demand for alternative land, liability for the pecuniary damages stated and particularized by the Plaintiffs in Paragraph 22 of the Plaint or indeed the claim for compensation, as it was not aware of or privy to any contractual arrangements forming the basis of the claim against the 1st Defendant.

Evidence Of The Parties

Plaintiff's Evidence

81. PW1 – David Mburu Gibson confirmed that he is the 1st Plaintiff. That there is a 2nd Plaintiff – Nelson Mwangi. He confirmed that he trades under the name NEMKA Commercial Agencies, and he lives in Wangige. He testified that he is familiar with his statement dated 3/05/2013 at page 10 of the bundle. He adopted his witness statement dated 3/05/2013 as his evidence in chief. He also produced a list of documents, 7 documents in total marked as PExh.1 - 7.
82. It was his testimony that he has read the witness statement by NSSF, by one Lilian Kemunto Maugo. He added that the transaction goes way back in 2005. He never met Lilian Kemunto. He was dealing with Said Juma Chitembwe (now Judge). He also dealt with Margaret Osolika. He noted that they are not denying there was a sale, and he paid the entire purchase price. Further, they are saying that there is no 20 acres that they can give him. The sale agreement is at page 15 of the plaintiff's bundle. This 20 acres was a small portion within a big land. Officers from NSSF identified the portion specifically, Said Juma Chitembwe. After he paid, the 10% down payment they alleged that he never paid the balance



within 90 days. At the end of 90 days, they were to give him completion documents as tabulated at clause 9 but they did not. They kept asking them to wait as they complete the documents. He contended that he moved to the land, subdivided, and sold it. This is true because they had a meeting with the company secretary who allowed them to receive deposits from their clients. They took them to the site; they were able to mark roads and install beacons. There is a letter at page 23 (defendant's bundle) dated 1/02/2022.

83. He affirmed that he has never seen that letter at page 23. He added that the letter didn't even say that they were ready with completion documents even up to the time he came to court. They say on page 24 that land was compulsorily acquired vide gazette dated 19/05/2006. Their agreement is dated 17/05/2005. They never alerted him that his land had been acquired. That the Kenya gazette land being acquired is part of his land and not all of it. At page 27 is a map showing land being acquired. It is a strip being acquired. The entire land was over 300 acres. He stated that he did not agree when they say his land was acquired. At page 25, there was minutes of a meeting held on site and he confirms that he was in the meeting and his land was mentioned LR 27199, 20 acres. At page 28-31, the document is a decree from court civil suit 22/2007 and his agreement was still in force. Claim 4 in the court document for 18/01/2005 but NSSF never told PW1 that there was a case against them when he bought the land. The decree being enforced was before his sale agreement, but NSSF never disclosed. The orders show that the decree was by consent. All the activities he undertook going on the ground were through the legal department. He was never required to appear before the board. He was not familiar with internal processes. He never asked Judge Chitembwe. He has sought for an order for specific performances of 20 acres but now he sees from the development that the order may not be possible. At page 42-43, there is value of the land by the time he came to court. The letters from page 77-80, he sees letters that the defendants sought their indulgence as they sought documents. There is no letter given to them saying that the land is unavailable.
84. In cross-examination, he confirmed that he signed the sale agreement for and on behalf of his partner. At the time of signing the sale agreement, he had paid 10% and so there was a balance of 90%. Clause 9 of the sale agreement stated upon payment of the balance price then the completion documents would be issued. Clause 4 of the sale agreement stated that the completion date was 90 days. They however did not provide the funds. He testified that they informed NSSF that they were ready. They wrote to them after the lapse of 90 days. As of August 2005, they were ready with the money. There is no document to show that at the lapse of 90 days, they were ready. The balance was to be paid by lumpsum, but it was paid in installments, and this was in conflict with the agreement. There is no document varying the terms of the agreement. He testified that he did not agree that he was in breach by paying in installments. Clause 6 stated that once he paid the entire purchase price then he would be allowed to take vacant possession. Despite the clause, he confirmed that he took possession and sold to third parties, and he also constructed roads though this was not in writing though they had a meeting, and the minutes were written by them.
85. He testified that by the time they sold the land, he contended that they had possession but there is no document to show they had been given possession. There is no document to show they allowed them to sell the land though their action shows that they allowed them. At page 38 of the plaintiffs' bundle, there is a scheme of sub-division, but it had not been approved by the county government. He testified that he sold the land without approval, but they had a scheme.
86. He further added that all the way from 2005, he entered into an agreement with the interested parties and the dates are in the sale agreement. He confirmed that he entered into these agreements on the strength of the 1st sale agreement with the defendant. The defendant had dealt with them before. PW1 confirmed that the interested parties made payments directly to the defendant on the plaintiff's behalf



and they issued them with receipts. The full purchase price was paid to the defendant, some by the plaintiffs and some by the Interested parties but he cannot tell the fraction. He added that he issued certificates to the Interested parties. That the defendant shared a letter stating that he had paid the full purchase price. To date, they never gave the plaintiffs the completion certificate. He never received the money back from NSSF. They notified the Interested parties of the turn of events. They did not file notification in court.

87. In re-examination, PW1 testified that at page 13 of the plaintiffs' bundle, clause 8 provides for payment of the money in exchange of completion documents. It is not true that he had to pay the money first. What was agreed was changed through mutual agreement i.e. payment by Interested parties of monies to NSSF directly. There is no letter from NSSF that questioned his entry to the land and or saying that the Interested parties should not pay them directly. Letters on page 71-80 of the defendant's bundle. At page 115 there is a letter stating they have received the monies. The letters on page 77-80 there are letters stating they indulge them until they find completion documents. In the meetings with NSSF the company secretary took all minutes and so they have them, a sub-division scheme cannot be approved until you get the title then the sketch will be approved. NSSF held the title. The receipts were issued in favour of NEMKA Agencies. There was an approval from legal office to allow cash office accept payments.
88. PW1 was recalled on 15/11/2022. He informed the court as a COS in Kiambu County and that he undertakes business in the name of NEMKA Commercial Agencies. He remembered he gave evidence in 2005 but he was not working with the county by then. The document at page 42 and 43 is a list of the people they sold to the 20 acres; the plots were 165 plots in total. Column no. 1 relates to the plot numbers, column 3 are the names of the customers, column 5 is the negotiated consideration to be paid. Column 6 shows amount of monies received, this is the deposit, and the last column is the outstanding balance. The sale of the plots was happening with approval of the defendant. The sales were not completed because they found that the defendant had sold the land to another person. If they had sold all the plots, they would have mad Kshs. 324,377,500 and this information is on page 43 of the bundle. This was an actual figure in 2013. If they were selling the plots now the price would be different. In the plaint, he is seeking Kshs. 415,000,000.00 considering inflation and time lapse.
89. He stated that the third parties listed are not all. There are others not here. It is not enough for the defendant to refund Kshs. 16 million. This will put him in trouble.
90. In cross-examination, it was PW1's testimony evidence that the defendant knew about the sale. the office of the legal officer knew about it. The board communication through the CEO. He has no document to show approval but some of the third parties paid directly to NSSF. The defendant took the plaintiffs to the ground and showed them the beacons. After payment of 10%, the sale was ongoing, and they had authority because NSSF was collecting cheques from 3rd parties. Subdivision had not been approved but they were moving towards thar direction. The buyers were aware of this situation. He was selling because he had possession. The document at page 42-43 is a schedule and not a valuation. He gave receipt to all Interested parties. Not all Interested parties are on the listed suit. The entire purchase price was paid in total. The full purchase price was paid to the defendants, Kshs. 16,400,000.00.
91. In re-examination, PW1 contended that when he was buying this property, he was not told the board was to give approval. Further, he never dealt with the board. Among the documents produced by the defendants there is no board approval produced. He was granted approval. They were taken to the land by officers of NSSF. The buyers went to the ground to see the land. NSSF was aware of this. He never received any letter of protest from NSSF to state that he was a trespasser. There was no sub-division approval, it required submission of the mother title. The land he is talking about was a portion of 300 acres and so NSSF was to give them a sub-title for the portion. There is no valuation because one has



to get a search for that area so that they commission a valuation. The Kshs. 16,400,000.00 is in an escrow account waiting the conclusion of this matter to be paid on a without prejudice basis. Even if the monies were released to him, the money is not enough. He did not agree to the refund, he would prefer the land. The land is not available though. See consent on page 5 of the supplementary bundle. The Kshs. 16,400,000.00 was the purchase price which was based on a bid made by the plaintiffs.

92. With that evidence, the Plaintiff closed their case.

Defendant's Evidence

93. DW1- Lilian Kemunto Maugo testified that she is a legal officer at NSSF. She confirmed that she recorded a witness statement dated 31/08/2022. She adopted it as her evidence in chief together with her bundle of documents marked and running from page 24-140 dated 1/02/2022 and documents on page 5-7 as supplementary bundle dated 7/02/2022 as her exhibits.

94. She testified that she is currently there, and her evidence is based on what is on record. There was a sale agreement between NEMKA and the board which is NSSF Board of Trustees for the sale of 20 acres and the purchase price was Kshs. 16,400,000.00 and the down payment was to be paid before execution and balance within 90 days, but this was not paid but the balance deposit only. The record indicates that the balance was received, and instalment payments done way beyond the 90 days from 2006-2011 way after the agreed completion date. Based on terms of the agreement payment was to be done within 90 days. There was also no variation to the agreement, so the payments were in breach. They also did not receive a completion notice. The Kshs. 16,400,000.00 was refunded by NSSF when they recorded the consent. They decided to refund because the property was compulsorily acquired (see gazette notice on page 47). It was compulsorily acquired for purposes of construction of a road. She added that they currently have no land to give to the plaintiff since it was acquired. The principal amount was refunded by consent.

95. In cross-examination, she stated that she joined NSSF in 2015 after this matter was filed in Court. She never participated in the meeting, but she has confirmed through records. NSSF is not disputing selling the 20 acres. Further, the amount agreed upon was paid in full to NEMKA but in an escrow account in different installments. The law firm of Kipkenda, Lilan & Co. Advocates was representing NSSF in this transaction. She did not have a conversation with the firm or with Judge Chitembwe. There are no board minutes on record and also as per the record, there is no meeting that took place between the plaintiff and the NSSF board. When it comes to sale of land, the board decision is communicated through various officers. Board approval at NSSF is an inhouse process. The witness statement at paragraph 12 states that completion date was 15/08/2005 but there is no correspondence from NSSF lawyers drawing the plaintiffs' attention to this date. NSSF confirmed to receive monies from NEMKA. Between 2006-2011 there is no correspondence from NSSF to NEMKA stating that the contract was cancelled nor telling them to stop depositing the monies in NSSF accounts. There was no completion notice either issued by NSSF. The receipts that were paying the balance of the purchase price on page 16-26 shows that the plaintiff paid the cash to the NSSF cash office after passing through the legal office though she is aware that this was the procedure. Money was being paid by NEMKA and there is no letter that was telling NEMKA not to pay.

96. Between 2006 – 2011, there was no letter written to NEMKA from NSSF alerting them not to pay the monies since the land had been compulsorily acquired. There was only the gazette notice but no letter to NEMKA. The letters at page 27-34 (Plaintiff's bundle) show that NEMKA was asking for completion documents up to the time the plaintiff came to court. NSSF through their advocate were still promising the plaintiff that they would send completion documents.



97. The letter at page 34 is from NSSF confirming receiving full purchase price and this is dated 23/09/2011. By that date, the land had been taken away, but NSSF never informed the plaintiffs. The averments that the land had been taken has come through her statement dated 31/03/2022. There was no formal communication to NEMKA about this before then. The agreement was made on 17/05/2005, the gazette notice is dated 19/05/2006. Gazette notice no. 3577 LR No. 11895/24 if you look at the gazette, it is not the entire 287 acres being acquired. At page 36, there is a map on what was being acquired. The acquisition of the land did not wipe on the entire 20 acres that were being bought by NEMKA. The report at page 48 document the site meeting where NEMKA is identified as another party and their surveyor, but NSSF never confirmed no advise that they had sold the land to NEMKA. NEMKA were not advised that part of the land was being acquired and even after the gazette NSSF continued to receive the purchase price. Actually they received the entire purchase price. At paragraph 24.2 of the witness statement means that a portion of land of NEMKA became smaller after the acquisition because the entire land was also affected as per the report on pages 48-50 of the plaintiff's bundle. From the report, it is not true that there was no land for NEMKA since it is considered in the valuation report as the 2nd item on the land reserved. The document at page 51 there is a decree dated 16/06/2010 where NSSF was a party sued but NSSF never wrote to NEMKA to inform them of the case. The LR No. 11895/19 is different from the mother title.
98. This shows that the big chunk of the land has been subdivided and /19 is one of the subdivisions. At paragraph 3, whatever was concluded was by consent. There is a consent that was then entered into. NSSF never advised NEMKA about the suit nor the consent recorded which would affect NEMKA. There is no letter from NSSF telling NEMKA that the agreement has been revoked or cancelled. The documents in the bundle of documents from page 55-136, there are sale agreements between NEMKA and 3rd parties, but she is not aware about agreement with NSSF and 3rd parties.
99. The document on page 5 of the supplementary bundle of documents from defendant, at paragraph 3 shows a without prejudice agreement/consent. She does not know the current status is unknown. She has not gone to mlolongo. As per the records, she cannot confirm whether the land is there or not.
100. As per NSSF records, they have no confirmation of the sale to other parties. The monies paid, there are no receipts of 3rd parties, they show paid by NEMKA. At page 80 of the interested parties' documents, there is a letter stating that there was receipt of full purchase price. Upon the 1st breach by the plaintiffs, NSSF did not rescind the contract. From the contract of sale, there was no clause for rescission. The deposit was paid as per the agreement. At the breach, the deposit was not refunded immediately. Money was paid from 2006 to 2011. They are not disputing the depositing of the monies from NEMKA from 2006 to 2011. They never communicated to NEMKA that the property had been compulsorily acquired. It is not true that NSSF acquired monies from NEMKA yet sold the property to another vendor. They forwarded the monies of Kshs. 16,400,000.00 to the plaintiffs' account. He cannot confirm that NSSF sold the portion of the land that remained.
101. In re-examination, she testified that Mr. Chitembwe is not with the defendant anymore and Madama Sulika is still at the Fund. They never informed the plaintiff about the compulsory acquisition because the gazette notice is a public document. The report at page 48 shows those who were present at site meeting in the defendant's bundle. The plaintiffs were present at that meeting. Based on the receipts, the money was all paid into the fund by NEMKA there were no other parties. The documents at page 55, do not testify that NEMKA had sold and subdivided the properties.
102. With that evidence, the Defendant closed their case.



Written submissions

103. At the close of hearing on 15/11/2022, the Court gave directions on filing of written submissions. Parties submitted and I have duly considered them and will refer to them in the resolution of the issues raised. The Plaintiffs' filed their submissions dated 30/01/2023 on 22/02/2023 and the Defendant filed their submissions dated 30/01/2023 on the even date.

Issues for Determination

104. I have considered all the material presented before this court including the consent order dated 12/11/2014. It emerges that there are some issues which are uncontroverted; that the two litigants had entered into an agreement for sale of land dated 17/05/2005 in which the Plaintiff paid the entire purchase price in the amount Kshs. 16,400,000.00. It is also not in dispute that the land was not transferred to the Plaintiff and that the Defendant, following a consent order refunded the Plaintiff Kshs. 16,400,000.00. Further, that the Plaintiff sold the subplots arising from a subdivision of the suit property to third parties before the consent order. Seeing that the initial transaction between the plaintiff and the defendant did not go through, it follows that somehow somewhat, there was a breach of the agreement. In that regard, the Defendant also issued the Plaintiff a refund of Kshs, 16,400,000.00 and this is being held in an escrow account pending the determination of this suit.

105. From the above, the following arise as the issues for determination before this Court:-

- i. Who between the Plaintiff and the Defendant breached the sale agreement dated 17/05/2005.
- ii. Whether the Plaintiffs are entitled to the orders sought in the plaint.
- iii. What reliefs are available for the Interested Parties?

Analysis and Determination

Who between the Plaintiff and the Defendant breached the sale agreement dated 17/05/2005.

106. Each side has blamed the other for the failure to complete the transaction. Even before I proceed to determine who was in breach, let me start by saying that it is trite law that agreements for sale of land are supposed to be reduced into writing and indeed can only be enforced if they are in writing. This is spelt out in Section 3 (3) of the *Law of Contract Act*,

107. The parties in the suit ELC No. 543/2013, that is NEMKA Commercial Agencies and NSSF, did indeed have a contract that was reduced in writing, and it is not in dispute that on 17/05/2005, the Plaintiffs entered into an agreement with the Defendant to purchase the suit property at the agreed consideration of Kshs. 16,400,000.00 and that the Plaintiffs paid the deposit of Kshs. 1,640,000.00 in accordance with the terms of the agreement as seen on page 16 of the Plaintiffs' bundle.

108. This being an agreement which the law requires to be in writing, the provisions of Section 97 and 98 of the *Evidence Act*, Cap 80, Laws of Kenya, apply. The said provisions of the law are drawn as follows:-

“ 97. Written contracts and grants

1. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any



matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

2. Notwithstanding the provisions of subsection (1) of this section—
 - a. wills admitted to probate in Kenya may be proved by the probate;
 - b. when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
3. Subsection (1) of this section applies equally to cases in which contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.
4. Where there are more originals than one, one original only need be proved.
5. The statement, in any document whatever, of a fact other than the facts referred to in subsection (1) of this section, shall not preclude the admission of oral evidence as to the same fact.

98. Evidence of oral agreement

When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:

Provided that—

- i. any fact may be proved which would invalidate any document, or which would



- entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;
- ii. the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph of this proviso applies, the court shall have regard to the degree of formality of the document;
 - iii. the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved;
 - iv. the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents;
 - v. any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract;
 - vi. any fact may be proved which shows in what manner the language of a document is related to existing facts.”

109. It will be seen that under Section 97 and 98 above, where the contract is required to be in writing and it is indeed reduced into writing, the terms of the contract are supposed to be deduced from the document itself and not from oral averments. The terms of the contract are those which are indicated in the document, and it is this document which will reveal the subject matter of the contract, the purchase price, and other terms thereof.



110. In this case, it is prudent to note that Clause 4 of the sale agreement did provide that time would be of essence. Further, Condition 4 (7) of the Law Society Conditions of Sale (1989) provided as follows: “7. This sub-condition applies unless a Special Condition provides that time is of the essence in respect of the completion date.”
111. It emerged in evidence that the Plaintiffs were to pay Kshs. 14,760,000.00 on or prior to the completion date which was within 90 days from the date of execution of the said agreement. The sale agreement provided that upon receipt of the balance of purchase price by the defendant shall promptly release the completion documents as listed on clause 9 of the agreement. The completion date was 15/05/2005.
112. It also emerged in evidence that the Plaintiffs paid the balance of the purchase price in installments from 18/08/2006 to 22/07/2011. The Plaintiff testified that the balance was to be paid in a lumpsum, but it was paid in installments and that this was in conflict with the agreement. There is no document varying the terms of the agreement.
113. From the forgoing, I am not in doubt that it was actually the plaintiffs who breached the contract by failing to provide the balance of the purchase price within the completion period of 90 days.
114. The unique circumstance of this case is that the Plaintiff however proceeded to pay for the balance of the purchase price and that the defendant did not communicate with them to stop making payments. The defendant continued to collect the payments and even issued the Plaintiffs with receipts confirming receipt of the same. Evidence adduced demonstrate that the Plaintiffs did pay the entire purchase price of Kshs. 16,400,000.00 and the same was acknowledged by the Defendant through their letter ref. SF/A/10/200/VOL.IV dated 23/09/2011.
115. Additionally, it was a term of the contract that vacant possession shall only be given to the Plaintiffs upon payment of the entire purchase price together with the apportioned outgoing and that the Plaintiffs shall meet all the costs for identifying the beacons together with survey, subdivision fees and related expenses.
116. Condition 5 of the LSK Conditions (1989) also provided that:
- “save as provided in Condition 6, the purchaser shall not be entitled to possession of the property until he has paid or (as the case may be) unconditionally authorized the release of the whole of the purchase money to the vendor.”
117. In continued breach of the agreement, PW1 confirmed that he took possession and sold to third parties and further that he also constructed roads, although this information was not in writing.
118. Further, it appears the parties did not anticipate an event of default as the sale agreement dated 17/05/2005 did not provide for rescission of the contract. The agreement however stated that the sale is subject to the law society conditions of sale (1989 Edition) in so far as they are not inconsistent with the conditions contained in this Agreement or specifically hereby excluded.
119. Condition 11 of the LSK Conditions of sale 1989 Edition provide for rescission as follows:
- “ 11. Rescission
1. Where a purchaser makes an objection or a requisition under Condition 10 with which the vendor is unable to comply or with which he is unwilling to comply on reasonable grounds of difficulty, delay or unreasonable expense, the vendor may give to the purchaser written notice referring to this



Condition, specifying his grounds and requesting withdrawal of the objection or requisition within a specified period being not less than seven (7) days.

2. If the purchaser fails to withdraw the objection or requisition within the period specified by the notice, the vendor may by notice in writing to the purchaser rescind the contract.
3. On rescission the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.
4. The purchaser has no claim against the vendor for costs, compensation or otherwise.
5. Where the contract becomes void under any law the provisions of sub conditions (3) and (4) apply.”

120. The Defendant alleges that they issued the Plaintiffs with a completion notice dated 23/11/2005 as seen at page 23 of the Defendant’s bundle. That since the Plaintiff failed to pay the balance of the purchase price within 21 days thereof, the agreement was rescinded.
121. It is a condition under condition 4 of the LSK Conditions of sale 1989 edition that “Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service, and, in respect of such period, time shall be of the essence of the contract.”
122. No evidence was given of how the rescission notice dated 23/11/2005 which the Defendant contends was given to the Plaintiffs was served upon the Plaintiff. The court is not satisfied that the Defendant rescinded the sale in the manner prescribed in the agreement. Evidence was not given of how the notice was served on the Plaintiff. The alleged notice dated 23/11/2005 is therefore null and void.
123. On the other hand, it is not in dispute that the completion documents were never forwarded to the Plaintiffs but the Court notes that the Plaintiffs did not issue the Defendant’s with a completion notice either after they finished paying the balance of the purchase price. The Plaintiffs and the Defendant both did not issue each other with a completion notice. This transaction was just full of irregularities.
124. The Plaintiffs alleged that they were ready and able to complete the sale transaction but that the Defendant refused to complete. PW1 testified that as of August 2005, they were ready with the money, but he also confirmed that there is no document to show that at the lapse of 90 days, they were ready. PW1 alleged that there was a mutual agreement that the Interested parties paid the money directly to NSSF. But there is no written document, or a variation of the sale agreement dated 17/05/2005. This remains allegations. No one has produced cheques drawn in favour of NSSF to prove that the third parties were paying to NSSF directly as has been alleged.
125. In the case of *Sagoo -vs-Dourado* (1983)KLR 365, the court cited with approval Halsbury’s Laws of England, 4th Edition, paragraph 481 as follows:

“The modern law in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of essence unless:



1. The parties expressly stipulate that conditions as to time must be strictly complied with.
2. The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or.
3. A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence”.

126. In *Simpson v. Connolly* (4), [1953] 2 All E.R. 474, Finnemore, J., stated at p. 476 in relation to contracts for the sale of land:

“The purchaser or vendor cannot just say: ‘The time has gone, and the contract is at an end’. Some kind of notice must be given or what has been called in this case an ultimatum to say that: ‘After a certain time if you do not complete this matter, we shall treat the contract as at an end.’”

127. No such ultimatum was given since the completion notice dated 23/11/2005 at page 23 of the Defendant’s bundle was never served upon the Plaintiff.

128. As to whether the Plaintiffs or the defendant breached the agreement for sale, Black’s Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as:

“a violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

129. It is trite law that Courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale Vs Umon Manufacturing Co. (Ramsboltom)* (1918) L.R 1KB 592, Scrutton L.J. held as follows:

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

130. Equally in the case of *Attorney General of Belize et al Vs Belize Telecom Ltd & Another* (2009), 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609, held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”



131. This Court is persuaded by the finding by this Court in *Malindi in Sun Sand Dunes Limited -vs- Raiya Construction Limited* [2018] eKLR:

“The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean.”

132. This is an irregular transaction for the sale of land. Based on the above decisions, the starting point for the Court will be the agreement that the parties signed and the terms therein. According to the agreement, the plaintiffs were to pay the balance of the purchase price on or before the completion date which was ninety (90) days from the date of the agreement dated 17/05/2005. The same is a valid and enforceable contract which has not been rescinded. The completion date was 90 days from the date of signing i.e. 17/05/2005. The Plaintiffs failed to pay the balance within 90 days. Failure to pay the balance of the purchase price on the mutually agreed completion date of 15/08/2005, would constitute a breach going to the root of the contract, and failure to comply would be construed as conduct which would be inferred as the plaintiffs’ repudiation. Time had clearly been made of the essence in respect of the completion date of 15/08/2005.

133. As correctly observed, where a purchaser has dragged his feet and has been guilty of unnecessary delay as was the case here, the vendor is perfectly entitled to serve upon the purchaser a notice limiting time, at the expiry of which the vendor would treat the sale agreement as rescinded. This is also in consonance with this court’s decision in *Njamunyu v Nyaga* [1983] KLR 282 in which it was observed thus:

“... before an agreement such as this can be rescinded, the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given, failure to rectify will result in rescission of the contract.”

134. The Plaintiffs eventually paid the balance by 2011 and they informed the defendant of the same. The Defendant also averred that the plaintiff kept on paying in instalments until payment in full. The defendant’s counsel promised to follow up on the completion documents with their client. The defendant never availed the completion documents. This was in breach of the agreement on their part. The Plaintiffs did not issue a completion notice and the Defendant’s completion notice was void.

135. It has been admitted that the suit property is no longer available as it was compulsorily acquired on 19/05/2006 vide Gazette Notice no. 3577 and that the defendant also sold to other third parties although DW1 testified that she cannot confirm the same. The Defendant testified that they did not inform the plaintiff of the compulsory acquisition because a gazette notice is a public document. It is true that a gazette notice is a public document. However, I opine that people don’t ordinarily go looking at gazette notices.

136. In *Gatobu M’Ibuutu Karatho v Christopher Muriithi Kubai* [2014] eKLR the Ugandan case of *Nakana Trading Co. Ltd V Coffee Marketing Board 1990 – 1994 EA 448*, was cited where the High court in Kampala held that:

“In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts.



No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous....”

137. In light of the above, the fact of the matter is that the Plaintiffs were in breach of the contract. The Plaintiffs failed to pay the balance of the purchase price within the 90 days. The Defendant’s then appeared to ‘waive’ the delay and continued to collect the payment of the balance in installments until payment in full even though they allege that this was done by mistake. The defendant also issued a void completion notice.
138. All in all, it is the plaintiffs who failed to make available the balance of the purchase price within time and they cannot complain. However, it appears they were accommodated by the defendant even though the land was no longer available for sale as was alleged.

Whether the Plaintiff is entitled to prayers sought in the Plaint

139. Looking at the outcome of issues discussed hereinabove, it is clear that the Plaintiffs breached the terms of the Agreement for sale, but the Defendant ‘waived’ the delay and the breach as specified in this judgment with their action of collecting the payment of the balance in installments until payment in full.
140. The Plaintiffs concede that prayer (a) and (b) are spent as evidence before this Court indicates that the 20 acres suit property is not available and that an order of specific performance would be in vain. I agree and I therefore decline to grant Prayers (a) and (b).
141. Prayer (d) has already been partly canvassed. The parties herein entered into a consent which was adopted as an order of the court. The consent order for refund dated 12/11/2014 provided as follows:
 1. “That on grounds stated and reasons admitted by the Defendant in its Amended Statement of Defence (as amended), an order of refund be entered in favor of the Plaintiffs for a sum of Kshs. 16,400,000/-comprising the balance of the purchase price in the sum of Kshs. 14,760,000/- (excluding the 10% deposit), together with interest until 5th June, 2014.
 2. The said refund shall be made through the Plaintiff’s advocate’s office within twenty-one (21) days from the date of the order.
 3. The said order of refund is entered without prejudice to any ancillary issues of costs and/or interest arising therefrom, and also without prejudice to any other or alternative claims, defenses, right of setoff, interest or costs that the Plaintiffs & Defendant may have against each other, and which shall be addressed and determined as part of the substantive judgment.
 4. Costs of and/or incidental to the Defendant’s Notice of Motion dated 19th September 2014 be costs in the cause.
 5. There shall be liberty to apply.
 6. That the suit is confirmed as ready for hearing. Parties to take a date at the Registry.”
142. From the above consent order, the refund of Kshs. 16,400,000.00 only comprised of the balance of the purchase price plus interest. It did not include the 10% deposit that was paid on 7/03/2005.



143. I have found that the Plaintiffs and the Defendant had a contractual relationship. Pursuant to the contract, the Plaintiffs performed part of their bargain being payment of the 10% deposit until the contract was terminated at the behest of the Plaintiffs. In circumstances like in the present case where both parties were unable to complete the agreement, I opine that a refund of the entire deposit is fair. I am persuaded and convinced that the Plaintiffs are entitled to the 10% deposit paid on execution of the sale agreement dated 17/05/2005.
144. I have already stated that in my opinion, it is the plaintiffs who failed to perform their part of the bargain within the 90 days. The plaintiffs were later able to complete the payment of the balance. I am aware that the Defendant has issued a refund in the amount of Kshs. 16,400,000.00 which should be released to the Plaintiffs on the date of delivery of this Judgement.
145. The plaintiffs are similarly not entitled to any award for general damages or specific damages against the defendant because it was them who breached the contract. The sale agreement was self-executing in so far as failure by the purchaser to pay the balance of the purchase price in time was concerned.
146. In the premises while I find and hold that the plaintiff is not entitled to the orders listed above and notwithstanding that there is no prayer for the payment of the deposit of the purchase price, I shall exercise the inherent powers of the court and be guided by the overriding objective the *Civil Procedure Act* Cap 21 Laws of Kenya Section 1A and the duty of the court to render substantive justice as provided under section 1B of the *Civil Procedure Act*. The agreement is to be nullified with the remedy being a refund of the deposit paid. The only remedy that the plaintiffs are entitled to is therefore a refund of the deposit. I will order a refund within the next 90 days. If no refund is forthcoming, the plaintiff will be at liberty to execute for the same. I therefore decline prayers (e) and (f).

What reliefs are available for the Interested Parties?

147. Before I delve into the above, I wish to state that an intending purchaser of a property ordinarily is expected to carry out due diligence to verify the details and particulars of the property, it cannot be expected that the scope of such due diligence would extend beyond what the law provides as being sufficient e.g. official searches and inspection of survey records. Going forward with a sale as a purchaser when there is no title in the name of the vendor and/or an approved subdivision plan is stupid and premature. If the sale fails, as was the case in this suit, the purchaser has no leg to stand on when it comes to requesting for orders of a refund a current market value. I mean they were clearly not purchasing the plots from the defendant herein who is the registered owner of the suit property.
148. To begin with, it should be noted that it was a term of the contract that vacant possession shall only be given to the Plaintiffs upon payment of the entire purchase price together with the apportioned outgoings and that the Plaintiffs shall meet all the costs for identifying the beacons together with survey, subdivision fees and related expenses. Condition 5 of the LSK Condition 1989 Edition also provided that “save as provided in Condition 6, the purchaser shall not be entitled to possession of the property until he has paid or (as the case may be) unconditionally authorized the release of the whole of the purchase money to the vendor.”
149. PW1 confirmed that in breach of the sale agreement dated 17/05/2005, the Plaintiffs took possession of the suit property after paying the 10% deposit and proceeded to SELL the same to third parties. The Plaintiffs admitted that they did not have a sub-division plan that had been approved by the county government. That they sold the land without approval. They also testified that they had not produced a valuation report before this Court. It emerged in evidence that the Plaintiffs entered into 7 sale agreements with various third parties who have been enjoined as Interested Parties in the present suit.



150. In the case of Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others [2018] eKLR the Court held:

“It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court’s role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally, and the learned judge’s ultimate findings cannot by any stretch of imagination be faulted.”

151. The [Land Registration Act](#) is very clear on issues of ownership of land. Section 24 of the [Land Registration Act](#) No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – on the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated on section 26 of the [Land Registration Act](#), 2012.

152. It is not in dispute that the Defendant is the registered proprietor of the suit property. The property being sold is clearly spelt out in the sale agreement dated 17/05/2005. I have found that the Plaintiffs were in breach of contract and are therefore entitled to a refund of the 10% deposit that they had paid. It has also been revealed that the suit property was compulsorily acquired and therefore not available for purposes of specific performance in favor of the Plaintiff herein. The question is whether or not the Plaintiffs held a good title. The sale herein was never completed. The Defendant did not even transfer the title and the same was never registered in favour of the Plaintiffs. I find and hold that the Plaintiffs did not have any title to pass to the Interested parties. The sale to the third parties was a nullity to begin with.

153. The suit property is no longer available, and the Plaintiffs herein conceded the prayer for specific performance. Therefore, the only relief available for consideration is one for refund of monies paid towards the purchase of their respective plots.

154. The Interested parties had prayed for both the Plaintiffs herein and the Defendant to pay the 1st -9th Plaintiffs, in ELC 1331 of 2014, the current market value of their respective pieces of land as bought from the Plaintiffs. I note that the Interested Parties did not provide a valuation report before this court to demonstrate the current market value. I opine that because of that, they are only entitled to the amounts that they had paid for their respective plots, and only if there is evidence of proof of payment.

155. The Interested Parties allege that they have suffered great loss and damage as follows:

Purchase Price paid to the Plaintiff by the 1st - 9th Plaintiffs apportioned as follows:

1. Njoki Chege, 1st Plaintiff – Kshs. 400,000/=
2. Danson N. Mukururo, 2nd Plaintiff - Kshs 340,000/=



3. Ruth Kareithi, 3rd Plaintiff - Kshs 1,100,000/=
4. Anthony Maina Muhoro, 4th Plaintiff - Kshs 750,000/=, Kshs 600,000/=
5. Charles Muhia, 5th Plaintiff /=
6. John N. Waithaka, 6th Plaintiff - Kshs 350,000/=
7. White sky investment Ltd, 7th Plaintiff - Kshs 2,850,000/=
8. Magi holdings Ltd, 8th Plaintiff - Kshs. 2,400,000/=
9. Micro-dot engineering, 9th Plaintiff - Kshs 2,100,000/=

156. A perusal of the records before this Court established as follows: -

- a. 1st Interested Party (Njoki Chege) entered into an agreement dated 21/12/2007 with NEMKA for a consideration of Kshs. 400,000.00 (see page 15 of the Interested Parties' Affidavit in support of claim). Evidence before this Court also show that she was issued with a certificate of ownership dated 18/12/2007 at page 74. I note however, that there is no evidence before me showing that she actually paid Kshs. 400,000.00. Her payment in full has not been disputed. However, the Plaintiffs herein only stated that if there is any loss occasioned, the same was occasioned by the Defendant herein.
- b. The 2nd Interested party, Danson Mukururo, made payments in the amount of Kshs. 240,000.00 and not Kshs. 340,000.00 as alleged in the Plaint in ELC 1331 of 2014. He was subsequently issued with a certificate of ownership as seen at page 73. However, the same was under the name of one Joyce Wangui Ndai. There was also no sale agreement between him and NEMKA adduced before this court.
- c. The 3rd Interested Party, Ruth Kareithi entered into an agreement with NEMKA on 13/09/2006 at page 13 for Kshs. 1,200,000.00. Evidence shows that she paid a total of Kshs. 900,000.00 despite the amount alleged in the Plaint of Kshs. 1,100,000.00. she was also issued with a certificate of ownership as seen on page 75 and 76.
- d. The 4th Interested Party, Anthony Maina Muhoro entered into an agreement with NEMKA on 13/09/2006 as seen on page 8 for Kshs. 750,000.00. The evidence before me indicates that he paid the full amount, Kshs. 750,000.00 and he was subsequently issued with a certificate of ownership as seen on page 54 -56.
- e. There is no evidence before me demonstrating whether the 5th Interested Party, Charles Muhia entered into an agreement with NEMKA and/or made payments towards purchase of any subplot on the suit property. He is therefore no liable for any refund.
- f. There is no evidence before me indicating that the 6th Interested Party, John Waithaka, entered into a sale agreement with NEMKA. He was also not issued with a certificate of ownership. The only available evidence is that he paid Kshs. 350,000.00 as per the receipts no. 354, no. 353, no. 352, no. 288, no. 422, no.



403 dated 25/05/2011, 17/11/2010, 23/10/2010, 22/01/2010, 3/07/2007 and 27/02/2007 respectively for plot Nos. 151 and 154.

- g. The Plaintiffs in ELC 1331 of 2014 allege that the 7th Interested Party, White Sky Investment Ltd, entered into a sale agreement with NEMKA on 21/11/2006 and paid Kshs. 2,850,000.00. No evidence has been adduced to demonstrate this. There is no evidence that they were issued with a certificate of ownership either. However, receipts on record demonstrate that the 7th Interested Parties paid Kshs. 2,750,000.00 towards purchase of various plots on the suit property as seen on page 43.
- h. There is evidence that the 8th Interested Party, Magi Holdings Ltd paid Kshs. 2,400,000.00 as has been alleged. They were however issued with a certificate of ownership as seen on page 57. Evidence before me shows that they have paid Kshs. 300,000.00 and not Kshs. 2,100,000.00 towards purchase of their respective plots as has been indicated in the plaint.
- i. The 9th Interested Party, Micro-Dot Engineering and NEMKA entered into a sale agreement dated 8/09/2009 for Kshs. 3,600,000.00. . They were subsequently issued with a certificate of ownership as seen on page 58-72. Evidence before me demonstrates that they have only paid Kshs. 3,500,000.00 towards payment of their respective plots.
- j. The 10th Interested Party, Felicitus Gathoni Waruru entered into a sale agreement with NEMKA on 30/05/2006 for Kshs. 1,300,000.00. they were not issued with a certificate of ownership. Evidence before me demonstrates that they have only paid Kshs. 500,000.00 towards the purchase of her respective plot.
- k. The 11th Interested Party, Hilda Wang'ithi Murithii entered into a sale agreement with NEMKA on 7/09/2006 for Kshs. 750,000.00. She was issued with a certificate of ownership as well. Evidence indicates that she has also paid the full purchase price in the amount Kshs. 750,000.00.
- l. The 12th Interested Party, Samuel Ng'ang'a Mungai entered into a sale agreement with NEMKA on 8/11/2006 for Kshs. 400,000.00. He was issued with a certificate of ownership as seen on page 77. There is no evidence before me demonstrating that he paid any monies towards the purchase of his respective plot. He is therefore not entitled to any refund.
- m. There is no sale agreement between the 13th Interested Party, Erastus Karimi and NEMKA. He was issued with a certificate of ownership as seen on page 78 and 79. There is no evidence before me demonstrating that he paid any monies towards the purchase of towards the purchase of his respective plot. He is therefore not entitled to any refund.

157. From the above, the Court finds and holds that the Interested Parties are only entitled to a refund of the amounts they paid as demonstrated above.



Costs

158. A careful reading of Section 27 of the *Civil Procedure Act* indicates that it is considered trite law that costs follow the event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. That costs must follow the event unless the court, for some good reasons, orders otherwise. By virtue of Section 27, the issue of costs is a discretionary award. The award of costs is therefore not cast in stone, but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. See *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR. The Court finds that the transaction herein was tainted with irregularities and it is therefore ordered that each party meet their own costs.

Disposal Orders

159. It is against the foregoing that the Court enters Judgment in favour of the Plaintiffs against the Defendant in the following terms: -

- a. The refund of Kshs. 16,400,000.00 awarded to the Plaintiffs to be released to the Plaintiffs forthwith.
- b. The Plaintiffs are awarded a refund of the 10% deposit of the purchase price in the amount Kshs. 1,640,000.00 to be paid within the next 90 days.
- c. Interest at court rates on (b) from the date of this Judgment until payment in full.
- d. The Plaintiffs to refund the Interested Parties as follows:
 - i. Njoki Chege- Kshs. 400,000.00
 - ii. Danson N. Mukururo – Kshs. 240,000.00
 - iii. Ruth Kareithi – Kshs. 900,000.00
 - iv. Anthony Maina Muhoro – Kshs. 750,000.00
 - v. Charles Muhia – No refund.
 - vi. John N. Waithaka – Kshs. 350,000.00
 - vii. White Sky Investment Ltd – Kshs. 2,750,000.00
 - viii. Magi Holdings Ltd – Kshs. 300,000.00
 - ix. Micro-Dot Engineering – Kshs. 3,500,000.00
 - x. Felicitus Gathoni Waruru – Kshs. 500,000.00
 - xi. Hilda Wang’ithi Murithii – Kshs. 750,000.00
 - xii. Samuel Ng’ang’a Mungai – no refund
 - xiii. Erastus Karimi – no refund
- e. Each party to bear to meet their own costs in both ELC 543 of 2013 and ELC 1331 of 2014.



It is so ordered.

DATED, SIGNED AND DELIVERED THIS 1st DAY OF MARCH, 2023

.....

MOGENI J

JUDGE

