



**Soni (Herself and on behalf of the Estate of Dhirajlal Ratilal Soni (Deceased)) v Dukes Investments International Limited & 2 others; Soni (Suing on his own behalf and on behalf of the Estate of the Late Ratilal Bhurabhai Soni) (Interested Party) (Environment & Land Case 370 of 2014) [2023] KEELC 18881 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18881 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 370 OF 2014**

**EK WABWOTO, J**

**JULY 6, 2023**

**BETWEEN**

**MANJULA DHIRAJLAL SONI ..... PLAINTIFF  
HERSELF AND ON BEHALF OF THE ESTATE OF DHIRAJLAL RATILAL SONI  
(DECEASED)**

**AND**

**DUKES INVESTMENTS INTERNATIONAL LIMITED ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH MISATI GESORA ..... 2<sup>ND</sup> DEFENDANT  
MIDDLE EAST BANK KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**CHANDULAL RATILAL BHURABHAI SONI (SUING ON HIS OWN BEHALF  
AND ON BEHALF OF THE ESTATE OF THE LATE RATILAL BHURABHAI  
SONI) ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff filed the subject suit vide an Amended Complaint dated 26<sup>th</sup> of February 2020 and in which the following reliefs are sought:
  - i. A permanent injunction prohibiting the defendants, the registration of land from disposing of, transferring, charging, taking possession of land title LR No. 209/525/4 or offering it for sale to another party and/or offering the same as a security to the bank or any other financial institution in order to obtain a loan or any other financial facility.



- ii. Mandatory decree of injunction putting the defendants to specific performance of the contract by paying for the land as per the agreement of 28<sup>th</sup> September 2013 in default the contract for sale of land LR No. 209/525/4 dated 28<sup>th</sup> September 2013 between the plaintiff and the 1<sup>st</sup> defendant be considered rescinded.
  - iii. A declaration that the contract for sale between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant dated 28<sup>th</sup> September 2013 is rescinded and the plaintiff's documents of title be returned to the plaintiff.
  - iv. General damages.
  - v. Costs of the suit.
  - vi. Interest on (iv) and(v) above.
2. The suit emanates from an agreement for the sale and purchase of LR No 209/525/4 which was executed on 28<sup>th</sup> September 2013 between the Plaintiff and the 1<sup>st</sup> Defendant. The court granted some interim reliefs pending the final determination of the suit.
  3. Upon filing of the subject suit, the 3<sup>rd</sup> defendant herein having been joined to these proceedings filed statement of defence dated 9<sup>th</sup> April 2021 in which the it disputed the claim by the Plaintiff and the jurisdiction of the Court. In a ruling delivered on 17<sup>th</sup> January 2022 this Court determined that it did have jurisdiction to adjudicate the dispute in the suit and directing the suit to proceed for full hearing.
  4. Subsequently, the said matter was fixed for hearing and it proceeded on 17<sup>th</sup> November 2022 and 23<sup>rd</sup> January 2023 after which parties closed their case and filed their respective submissions. During trial, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant never participated. It later emerged that the 2<sup>nd</sup> Defendant who was a Director of the 1<sup>st</sup> Defendant had passed away after the commencement of the suit.

### **Plaintiff's Case**

5. Mr. Ketan Kumar Dhirajlal Soni testified as PW1. He stated that he was aware of the case in which Manjula Dhirajlal Soni, his mother was the Plaintiff. He confirmed that she was currently in the United Kingdom (UK) attending to treatment. He relied on his witness statement dated 28<sup>th</sup> October 2022 and bundle of documents dated 24<sup>th</sup> March 2014 which were adopted by the Court as PEx 1-PEx 5. The list of documents dated 31<sup>st</sup> October 2022 were produced and adopted as PEx6-PEx8.
6. In cross-examination, he confirmed that his mother had authorized him to represent her in the case. The letter of authority was filed on 14<sup>th</sup> November 2022 after being sent from London. He further confirmed that his father's will mentions him and his mother as beneficiaries.
7. He confirmed being present when the sale agreement was negotiated and signed by his mother and the 2<sup>nd</sup> Defendant at the Plaintiff's residence on 28<sup>th</sup> September 2013. He stated that they did not receive any money for the transaction.
8. He further stated that they involved a lawyer to write a letter to the Chief Land register in April 2014. The 2<sup>nd</sup> Defendant made a visit to the Plaintiff where he promised to pay purchase price in respect to the said transaction. He also stated that the Plaintiff signed further documents after which they surrendered all documents to the 2<sup>nd</sup> Defendant. He reiterated that they did not have knowledge that what they signed were transfer documents.
9. When re-examined, he stated that the 2<sup>nd</sup> Defendant approached them with another agent and the sale agreement was witnessed by their Advocate. It was also reiterated that the 10% deposit was never paid



and has not been received to date. He confirmed that only Kshs 1,000,000/- had been received and they sought to have the transaction stopped. He also stated that the Plaintiff's case was against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and not the bank.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants case**

10. During trial it emerged that the 2<sup>nd</sup> Defendant had passed away after the commencement of this suit leaving the suit to proceed as only against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. However, the 1<sup>st</sup> Defendant save for filing Notice of Appointment dated 17<sup>th</sup> May 2014 never filed any pleadings, written submissions nor participated in the proceedings herein.

### **The 3<sup>rd</sup> Defendant's case**

11. The 3<sup>rd</sup> Defendant filed a statement of defence dated 9<sup>th</sup> April 2021, it was averred that no action by the Bank was done fraudulently in the matter of the title of the suit property and security perfection thereon and sought for dismissal of the suit against them with costs. During trial, two witness testified on behalf of the 3<sup>rd</sup> Defendant.
12. Dhirendra Rana testified as DW1. He adopted his witness statement dated 23<sup>rd</sup> January 2023 as his evidence in chief. He also stated that he was the Managing Director of the 3<sup>rd</sup> Defendant between 2013 to 2019 and is currently a non-executive Director of the Bank. He denied ever contacting Ketan Soni on 11<sup>th</sup> March 2014 or any other date neither does he know him.
13. It was also his testimony that he never informed Ketan Soni that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had been granted a loan facility of Ksh 98,000,000 by the Bank. He denied any fraudulent action by the Bank in respect to the transaction herein.
14. On cross examination, he denied ever calling Ketan Soni and further stated that the 3<sup>rd</sup> Defendant acted within the law in the said transaction.
15. On reexamination, he reiterated that he never contacted Ketan and neither is he known to him. he confirmed that at the time the facility was taken there was no other person in in the bank with the name "RANA" and he was present in Court to reply to the allegations that he had contacted the Plaintiff.
16. Mr. Felix Nganga Karanja testified as DW2. His witness statement dated 6<sup>th</sup> April 2021 and bundle of documents dated 10<sup>th</sup> November 2022 were produced and adopted by the Court as his evidence in chief. He testified to being an Advocate of the High Court of over 20 years in practice having been admitted to the bar on 3<sup>rd</sup> July 1996 and currently working with Esmail and Esmail Advocates as an associate. He confirmed visiting the Plaintiff's residence on two occasions in the company of Mr. Gesora (2<sup>nd</sup> Defendant).
17. He also stated that he was instructed by the bank to prepare the transfer documents after which the money was disbursed to the 2<sup>nd</sup> Defendant. He testified that although he was not privy to the transaction and did not know the value of the property, the amount of Kshs 145,000,000/- was disbursed for two properties in Kajiado and Nairobi. He was not aware that the vendor did not receive any consideration or that the bank spoke to the vendor.
18. In his cross-examination and re-examination, he reiterated that the Plaintiff never complained to the bank that she has not received payment. Furthermore, during the visit to the Plaintiff's residence she seemed comfortable and intelligent, never showing signs of doubt in what she was doing.



## The Plaintiff's written submissions

19. The Plaintiff filed written submissions dated 8<sup>th</sup> March 2023 through Ombachi, Moriasi & Company Advocates. The Plaintiff submitted that the purchase price for the suit property was Kshs 350,000,000 which was to be paid by installments of Kshs 35,000,000 being 10% payable within 90 days as follows: Kshs 1,000,000 upon execution, 11,000,000 by 30<sup>th</sup> October 2012, 11,000,000 by 30<sup>th</sup> November 2013 and 12,000,000 by 31<sup>st</sup> December 2013. It was also submitted that the original title documents were handed over to the 2<sup>nd</sup> defendant on the understanding that he would acquire the 350,000,000 via a loan facility.
20. The Plaintiff outlined the following issues as for determination by this Court;
  - i. Has the plaintiff made out a case for the grant of permanent and mandatory injunction directed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant for specific performance of the contract dated 28<sup>th</sup> September 2013?
  - ii. Does the plaintiff deserve the decree for rescission of the contract dated 28<sup>th</sup> September 2013 and the return of the title documents to the Plaintiff?
  - iii. Is there privity of contract between the plaintiff and the 3<sup>rd</sup> Defendant if in the negative does it have any claim against the plaintiff which will affect the release of the title documents upon rescission of the contract as between the plaintiff and the 1<sup>st</sup> defendant?
  - iv. Does the plaintiff deserve the grant of general damages, how much and who pays the same?
21. It was submitted that the Plaintiff has demonstrated that she is the administratrix and sole beneficiary of the estate of Dhirajlal Soni the registered owner of the property LR No. 209/525/4. She had entered into a sale of land transaction with the 1<sup>st</sup> defendant vide an agreement dated 28<sup>th</sup> September 2013. The 1<sup>st</sup> defendant was to pay a total sum of Kshs 350,000,000/- payable by installments the first 10% within 90 days and the balance by installment as clearly stated in the agreement PF EXBT1. The Plaintiff testified that she was only paid a sum of Kshs 1,000,000/- and the balance of the deposit was never paid as agreed despite the promises made. When the 3<sup>rd</sup> defendant's advocates Mr. Karanja visited the Plaintiff's house and caused her to sign the transfer and charge document the promise and legitimate expectation was that the defendant was going to pay at the least the deposit of 10% but this was not done. The 1<sup>st</sup> and by extension the 2<sup>nd</sup> defendant have not filed any defence or counterclaim to deny the fact that no consideration was paid on their part to the Plaintiff in terms of the contract. They are in breach of the contract from the very beginning.
22. The Plaintiff's prayer is that the contract be honoured by paying the purchase price of Kshs 350,000,000/- since the time provided for the payment of the same had expired in 2013 now ten (10) years later there is no sign or offer from the 1<sup>st</sup> defendant to pay the purchase price as agreed.
23. It was also submitted that the Plaintiff had made out a case for the grant of specific performance, however the 1<sup>st</sup> defendant is non-committal as no reason has been given for the nonperformance of the contract. There is no evidence to exhibit its capacity to honour the contract hence the Plaintiff has succeeded in the grant of a permanent injunction restraining the defendants, registrar of lands from disposing of, transferring, charging, taking possession of land title LR No. 209/525/4
24. It was further submitted that Plaintiff has demonstrated above that the 2<sup>nd</sup> defendant has not proffered any evidence to the contrary nor the intention to pay the purchase price or in general honour the contract. Being in breach of contract the only option for the court is to order the 1<sup>st</sup> defendant to



comply with the contract by way of specific performance failure to which the Plaintiff's title documents be released to her upon rescission of the contract.

25. The condition for the validity of the contract includes;

- i. Offer and acceptance.
- ii. Capacity
- iii. Consideration
- iv. Free consent or intention to create legal relations etc.

In respect of which it was submitted that the foregoing elements were provided for in the contract. The only limitation was the payment of consideration which the 1<sup>st</sup> defendant was unable to fulfil hence a recipe for the termination or rescission of the contract. The Plaintiff further submitted that it is now 10 years from the commencement date of September 2013 yet the deposits have not been paid as agreed and that the 1<sup>st</sup> defendant's evidence to show its capacity to settle the purchase price leave alone the 10% deposit is missing.

26. The Plaintiff also argued that in the absence of prove of incapacity and reasons for the delay to honour the contract the only option for the court is to declare the rescission of the contract for the breach of the contract by the 1<sup>st</sup> defendant. It was submitted that the net effect of the rescission of the contract is the return or release of title documents to the Plaintiff from the registrar of lands and bring the process to a close.

27. It was argued that the Plaintiff had entered into a contract with 1<sup>st</sup> defendant Dukes Investments International Ltd at the instance of its director Joseph Misati Gesora the 2<sup>nd</sup> defendant herein. The sale agreement was very clear on the terms of the contract especially the consideration which the 1<sup>st</sup> defendant never honoured to date. The agreement was valid since it provided for consideration however in the absence of prove of payment of the consideration purchase price or 10% thereof the court should hold that there was no consideration and proceed to order the termination/rescission and other documents of the contract for breach thereof and make an order for release of titles to the Plaintiff.

28. The Plaintiff has sued the 1<sup>st</sup> and 2<sup>nd</sup> defendant claiming for permanent injunction and mandatory injunction for specific performance, failure to which the contract be rescinded. The honourable court granted an interim order of injunction holding the processing of transfer and charge in favour of the bank at the lands office. The 3<sup>rd</sup> defendant then applied to the court to be enjoined as an interested party defendant which was granted by the court. Throughout the pleadings and the evidence of the parties in court it is very clear that the Plaintiff and 3<sup>rd</sup> defendant had no privity of contract hence no obligation as emphatically stated by the 3<sup>rd</sup> defendant's witness Mr. Karanja. In the same vein the 3<sup>rd</sup> defendant has no right to hold unto the documents and demand for the compliance of the contract and registration of charge as against the Plaintiff whom the bank acknowledges had no privity of contract. Further in the absence of consideration the contract is invalid and the only option is the termination thereof as prayed for.

29. The 3<sup>rd</sup> defendant has explicitly denied the privity of contract between the bank and the plaintiff, this can be seen clearly throughout the defence dated 6<sup>th</sup> April 2021 and the evidence of Mr. Karanja DW2. The court should then wonder why it applied to be enjoined to the case and why it is holding tightly to the title documents belonging to the Plaintiff. This comes out clearly that it was a conspiracy between the 1<sup>st</sup> defendants and the 3<sup>rd</sup> defendant to defraud the Plaintiff of her title without any consideration to which the bank is culpable. The bank pleadings distancing itself from the transaction is a ploy to



hoodwink the court too late in the day when the damage is already done. The court should grant the Plaintiffs prayers as against the 1<sup>st</sup>, 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant for rescission of the contract return of the title and completion documents and order the parties to pay damages to the Plaintiff.

30. The Plaintiff concluded the submissions by urging the court to grant him the prayers sought.

### **The 3<sup>rd</sup> Defendant's written submissions**

31. The 3<sup>rd</sup> Defendant filed written submission dated 20<sup>th</sup> March 2023 through Esmail and Esmail Advocates. It was submitted that on several occasions the Plaintiff made it clear that the complaint was against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and not the bank. Firstly, the letter to the Chief Land Registrar was only about the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Secondly, Paragraph 9 of the Amended Plaintiff only addresses the alleged fraudsters as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Thirdly, PW1 had equally expressed that he had no issue with the bank.

32. It was also submitted that the performance of prayers sought would be impractical seeing that the 2<sup>nd</sup> Defendant had passed away and no personal representatives of his Estate had been enjoined as prescribed in Order 24 Rule 4(3) of the Civil Procedure Rules. Relying on the case of Athi Highway Developers v West End Butchery(2015) eKLR and Blacks Law Dictionary definition of fraud, it was contented that since PW1 could not recall events accurately, such evidence could not be relied upon to sustain allegations of fraud.

### **Issues for determination**

33. The Court having considered the pleadings of the parties, evidence tendered and submissions, this Court is of the view that the following issues are for determination;

- i. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants actions amounted to breach of the Sale Agreement dated 28<sup>th</sup> September 2013?
- ii. Whether the Defendants acted fraudulently in the transaction?
- iii. What reliefs can be granted by this court.
- iv. Who should bear costs of the suit?

### **Analysis and Determination**

34. I will now proceed to analyze all the issues sequentially.

35. It was not disputed that the Plaintiff and the 1<sup>st</sup> Defendant entered into a sale agreement dated 28<sup>th</sup> September 2013. The agreement was in respect to the sale of L.R No. 209/525/4 situate at River Road in the City of Nairobi for a consideration of Ksh 350,000,000/- which was to be paid as follows;

- a. Ksh 35,000,000/- to be paid within 90 days
- b. Ksh 1,000,000/- upon execution of the agreement which the vendor acknowledged receipt.
- c. Ksh 11,000,000/- on or before 30<sup>th</sup> October 2013.
- d. Ksh 11,000,000/- on or before 30<sup>th</sup> November 2013.
- e. Ksh 12,000,000/- on or before the 31<sup>st</sup> December 2013.
- f. The balance of Ksh 315,000,000/- to be paid in equal monthly instalments of Ksh 4,375,000/- until payment in full commencing the 30<sup>th</sup> day of January 2014.



36. From the evidence that was tendered by the Plaintiff, the 2<sup>nd</sup> Defendant was given the original title of the land for the purposes of presenting them to the bank together with the agreement to solicit a loan to finance payment of the purchase price. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants never paid any purchase price within the agreement timelines and it also emerged that the transfer had been done to the names of the 1<sup>st</sup> Defendant.
37. In order to determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Plaintiff has alleged that he entered into a sale agreement with the 1<sup>st</sup> Defendant for the purchase of the suit property. Further that the same was reduced into writing and signed by all the parties. Section 3(3) of the Contract Act provides that;

“3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless

—

- (a) the contract upon which the suit is founded—
  - (i) is in writing;
  - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

38. The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

39. The Sale agreement having met all the requirements between the Plaintiff and the 1<sup>st</sup> Defendant and therefore the sale agreement between the two is valid and it thus met the requirements of Section 3(3) of Contract Act. It then follows that the Court must further interrogate whether there was breach of the said Contract. Blacks Law Dictionary, 9<sup>th</sup> Edition, page 213 defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one’s own promised, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or 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 unable to show such loss with sufficient certainty he has at least a claim for nominal damages”.



40. As the Court had earlier held that the Plaintiff's testimony remained uncontroverted and having held that the contract was valid, the Court will then interrogate whether there was breach of the Contract.
41. The obligation of the purchaser was to pay the purchase price within the stipulated timelines of the sale agreement. No money had been deposited to the Plaintiff's account by the completion date, nor was any money deposited to the advocate who could hold the same as stakeholder, if only to protect the Plaintiff, pending completion of the transaction. The understanding of the parties was that the purchase price was being financed by the bank. However, no such payment was ever made to the Plaintiff.
42. As to whether the defendant breached the agreement for sale, Black's Law Dictionary, 9<sup>th</sup> 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”.
43. 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.”
44. Equally in the case of *Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009)*, 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973)* I 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.”
45. From the foregoing, I am not in doubt that it was actually the 1<sup>st</sup> and 2<sup>nd</sup> defendants who breached the contract by failing to provide the purchase price within the agreed timelines and as such it's the finding of this court that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was in clear breach of the agreement dated 28<sup>th</sup> September 2013.
46. The second issue for determination by this court is whether defendants herein acted fraudulently in the transaction. The Plaintiff pleaded and particularized fraud against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which were outlined at paragraph 10 of the amended plaint dated 26<sup>th</sup> February 2020. The following particulars of fraud were pleaded.
- i. Misrepresenting to the Plaintiff that there were in a position to obtain a loan from the bank.
  - ii. Misrepresenting through fraud that there were in a position to deposit the 10% of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant purchase price and monthly payments of Ksh 4,375,000/- while knowing that they were not in a position.



- iii. Failure to remit to the Plaintiff the amount of advance from the bank with the title L.R No. 209.525/4 as security.
  - iv. Proceeding fraudulently with the transfer and charge of property without first paying the 10% and the monthly instalments as agreed.
  - v. Failure on the part of the 3<sup>rd</sup> Defendant to confirm the contents of the sale agreement before proceeding to draw and process the transfer and charge documents in favour of the bank.
  - vi. Failure to update the Plaintiff on the processing of the loan and the charge.
  - vii. Using undue influence to make the Plaintiff execute the loan application and transfer documents in favour of the bank while making the Plaintiff believe that the deposit of the purchase price was payable to her as part of the purchase price.
  - viii. Failure to notify the Plaintiff's advocates in the transaction of the preparation of the various documents for their input and attestation.
47. A party alleging fraud must specifically plead the particulars of fraud and lead evidence to prove the allegations of fraud. Fraud is defined under the Black's Law Dictionary 10<sup>th</sup> Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the Defendants. How then can fraud be proved? The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR held;
- "Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities".
- Similarly, the Court of Appeal decision in the case of John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR held that:
- "we find that the law is clear as put by Mr. Karanja that matters of "fraud" must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine."
48. In the instance case, the Plaintiff adduced evidence that pursuant to the sale agreement dated 28<sup>th</sup> September 2013, the 2<sup>nd</sup> Defendant was given the original title of the land for the purposes of presenting them to the bank together with the agreement to solicit a loan to finance payment of the purchase price. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants never paid any purchase price within the agreement timelines and it also emerged that the transfer had been done to the name of the 1<sup>st</sup> Defendant.
49. In respect to the 3<sup>rd</sup> Defendant, during trial and in cross examination of the PWI, he conceded that the Plaintiff had no case against the bank and he could not recall who exactly from the bank had contacted him to inform him about the transaction. There was also no evidence adduced by the Plaintiff that indeed they ever visited the bank to follow up on the allegations that had been made. The 3<sup>rd</sup> Defendant also submitted that they were not a party to any fraud since a genuine title deed was handed over to it with full knowledge of the Plaintiff and that the Plaintiff had willingly signed the transfer.



50. It was the sole duty of the Plaintiff to lead evidence that the transfer of the suit property to the 1<sup>st</sup> Defendant was fraudulent and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants actions were also fraudulent. In the case of Gladys Wanjiru Ngacha V Terresa Chepsaat & 4 Others, [2013] eKLR, the Court held that:
- “... Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga vs. Nyati (1984) KLR 425, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”.
51. Taking the meaning of fraud as espoused above, and in the Plaintiff’s evidence tendered in Court, this Court finds and holds that the Plaintiff has been able to prove to the required standard the particulars of fraud as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. However as relates to the 3<sup>rd</sup> Defendant, the Plaintiff did not on the required standard of proof demonstrate any existence of fraud on the part of the 3<sup>rd</sup> Defendant.
52. The third issue for consideration is what reliefs should be granted by this Court. The Plaintiff sought for various reliefs against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, however none was sought specifically as against the 3<sup>rd</sup> Defendant even after filling the amended Plaint.
53. In respect to the prayer for specific performance that was sought, I wish to state that before this court determines whether it should award the order of specific performance, it must first satisfy itself that the sale agreement that the Plaintiff seeks to rely on meets the requirements of a contract of sale of land. The Court has already held and found that there was a valid sale agreement as per section 3(3) of the contract Act.
54. The Granting of the equitable remedy of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of Reliable Electrical Engineers Ltd....Vs....Mantrac Kenya Limited (2006) eKLR, wherein Justice Maraga (as he then was) stated that:–“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles. The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship”
55. As already found and held by this Court, there was a valid sale agreement by the parties that was duly signed. Further the said agreement has not been vitiated by any factors nor has there been any allegations or form of illegality that has been alluded to. In view of the foregoing, this court finds that the said order for specific performance is for granting as sought by the Plaintiff.
56. On the issue of costs, under Section 27 of the *Civil Procedure Act*, the same is a doctrine of the court and ordinarily costs follow the event, unless otherwise stated. In the instant case, the Plaintiff has succeeded in its claim as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and I will award costs to be paid by the 1<sup>st</sup> Defendants



## **Final orders**

57. From the foregoing analysis, the Plaintiff proved its case on a balance of probabilities against the 1st and 2nd Defendant and in this regard, this Court makes the following final orders;

- i. The Plaintiff's claim against the 3<sup>rd</sup> Defendant is dismissed.
- ii. An order of specific performance is hereby issued directing the 1<sup>st</sup> Defendant to pay for the land as per the agreement of 28<sup>th</sup> September 2013 within 30 days from today.
- iii. Failure to comply with order 1 above, the contract for sale of land LR No. 209/525/4 dated 28<sup>th</sup> September 2013 between the plaintiff and the 1<sup>st</sup> defendant shall be deemed as rescinded and all the plaintiff's documents of title shall be returned to the plaintiff.
- iv. The 1<sup>st</sup> Defendant to pay the Plaintiff's and the 3<sup>rd</sup> Defendants costs of the suit

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY 2023.**

**E. K. WABWOTO**

**JUDGE**

In the Presence of:

Mr. Moriasi for the Plaintiff

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Karanja for the 3<sup>rd</sup> Defendant

Court Assistant: Caroline Nafuna

