



**Maingi & another (Suing as the Administrators of the Estate of Rachael Katula Kaloki) v Strategic Property Management Co. Ltd & 2 others; Maurice Muli Nzavi t/a Amon Nyansera Nyakundi & 11 others (Interested Parties) (Environment & Land Case 231 of 2010) [2023] KEELC 20568 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20568 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 231 OF 2010  
LC KOMINGOI, J  
OCTOBER 5, 2023**

**BETWEEN**

**ANDREW MUNYAO MAINGI ..... 1<sup>ST</sup> PLAINTIFF  
FELIX KITHUKA MAINGI ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE ADMINISTRATORS OF THE ESTATE OF RACHAEL KATULA  
KALOKI**

**AND**

**STRATEGIC PROPERTY MANAGEMENT CO. LTD ..... 1<sup>ST</sup> DEFENDANT  
CHIEF LANDS REGISTRAR ..... 2<sup>ND</sup> DEFENDANT  
THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**MAURICE MULI NZAVI T/A AMON NYANSERA NYAKUNDI .. INTERESTED  
PARTY  
DANIEL ONDIMU MWEBI ..... INTERESTED PARTY  
PHILIP OKUMU KOYUNDI ..... INTERESTED PARTY  
JANE KWAMBOKA MOGERE ..... INTERESTED PARTY  
SOLOMON MUNENE CHEGE ..... INTERESTED PARTY  
IRENE WANJIKU CHEGE ..... INTERESTED PARTY  
REUBEN GITARI MURIUKI ..... INTERESTED PARTY  
DOMISTAND GITONGA WATHIA ..... INTERESTED PARTY  
LEONAD SANG ..... INTERESTED PARTY**



**EDWIN KIPCHUMBA CHEBOI ..... INTERESTED PARTY**  
**ROSE J. CHERUIYOT ..... INTERESTED PARTY**  
**EDWARD J.O KINANGA ..... INTERESTED PARTY**

## **JUDGMENT**

1. Through the Further Further Amended Plaintiff dated 7<sup>th</sup> October 2020, the Plaintiffs claim that their late father Francis Kaloki vide a sale agreement dated 8<sup>th</sup> April 2009 agreed to sell to the 1<sup>st</sup> Defendant his land LR No. 12715/188 (herein after referred to as suit property) for a consideration of Kshs. 9,500,000. However, before the 1<sup>st</sup> Defendant completed payment of the purchase price the 4<sup>th</sup> Defendant who was the advocate for both parties in the transaction, released the completion documents and the suit property was consequently fraudulently and by misrepresentation registered in the 1<sup>st</sup> Defendant's name. And after the transfer, the 1<sup>st</sup> Defendant went on to subdivide the suit property and sold it to the interested parties. The Plaintiffs outlined the following particulars of fraud and/or misrepresentation against the 1<sup>st</sup> Defendant, 2<sup>nd</sup> Defendant and 4<sup>th</sup> Defendant (paraphrased):
2. Particulars of fraud and misrepresentation of the 1<sup>st</sup> Defendant
  - i. Causing a transfer to be registered in his favour knowing that it had not paid the balance of the purchase price, was in breach of the sale agreement, the amount paid of Kshs. 2,200,000 was lower than the consideration price agreed, was evading payment of stamp duty;
  - ii. Misrepresenting to the Plaintiffs father that it was going to honour its obligation by paying the balance of the purchase price in vain.
3. Particulars of fraud of the 2<sup>nd</sup> Defendant
  - i. Proceeding with registration of the transfer in favour of the 1<sup>st</sup> Defendant without involving the Plaintiffs' father;
  - ii. Registering the transfer in favour of the 1<sup>st</sup> Defendant without ensuring that all documentation for the transaction was in order;
  - iii. Colluding with the 1<sup>st</sup> Defendant to register the transfer in favour of the 1<sup>st</sup> Defendant at a reduced consideration in order to evade payment of stamp duty;
  - iv. Failing to enter caveat on the property despite an application in respect thereof being made by the Plaintiff's father.
4. Particulars of fraud and misrepresentation of the 4<sup>th</sup> Defendant
  - i. Colluding with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and enabling the registration of the transfer in favour of the 1<sup>st</sup> Defendant knowing that it was in breach of the sale agreement and releasing title and transfer documents in his custody to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants knowing the balance of the purchase price had not been settled which was in breach of his professional duty for not securing the Plaintiffs' father interests as his client.
5. The Plaintiffs thus claimed for judgement against the Defendants and the interested parties for:
  1. A declaration that the 1<sup>st</sup> Defendant was in breach of the sale agreement dated 8<sup>th</sup> April 2009;



2. Orders that the 1<sup>st</sup> Defendant specifically performs its obligations to the Plaintiff as contained in Paragraph 2(b) of the said sale agreement dated 8<sup>th</sup> April 2009;
  3. A permanent injunction against the 1<sup>st</sup> Defendant and the interested parties by themselves or acting through their agents, servants and/or employees restraining them from subdividing, selling, disposing of, transferring, alienating the whole or any portion of the suit property;
  4. A declaration that in absence of payment in full of the purchase price to the Plaintiff in terms of Paragraph 2(b) of the said sale agreement dated 8<sup>th</sup> April 2009, the registration of a transfer effected on 31<sup>st</sup> July 2009 in favour of the 1<sup>st</sup> Defendant entered as entry Number 3162 of 31<sup>st</sup> July 2009 on the Registrar of Lands at Nairobi District Land Registry on LR No. 12715/888 is and shall for all intents and purposes be deemed to be in Trust for the Plaintiffs Andrew Munyao Maingi and Felix Kithuka Maingi.
  5. General damages as against the 1<sup>st</sup> Defendant for breach of the sale agreement dated 8<sup>th</sup> April 2009;
  6. General damages as against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants for fraud and misrepresentation;
  7. General damages against the 4<sup>th</sup> Defendant for negligence and breach of professional duty;
  8. An order directing the 2<sup>nd</sup> Defendant to cancel the entry in Certificate of Title LR No. 12715/888 being presentation number 3162 of 31<sup>st</sup> July 2009 in favour of Strategic Property Management Co. Ltd and to transfer the said title to Andrew Munyao Maingi and Felix Kithuka Maingi.
  9. A declaration to issue that the division, sale, transfer and disposition of the suit property LR No. 12715/888 to the interested parties during the pendency of the instant suit is vitiated or voidable at the option of the Plaintiffs.
  10. The entry number(s) in the land register purporting to transfer the suit property and or any subdivision thereof be reverted to the Plaintiffs.
  11. In the alternative, the 1<sup>st</sup> and the 4<sup>th</sup> Defendants, and the interested parties do pay to the Plaintiff the balance of the purchase price on the suit property and interest from the due date until payment in full.
  12. A permanent injunction be issued restraining the Defendants and the interested Parties whether by themselves, their agents, their servants and employees from entering, selling, transferring, alienating, disposing of or in any other manner whatsoever interfering with the Plaintiffs quiet possession and enjoyment of the suit property.
  13. Strictly in the alternative, the 4<sup>th</sup> Defendant be compelled to pay the Plaintiffs a sum of Kshs. 6,550,000 plus accrued interest from the date of the sale until payment in full.
  14. Costs of the suit
  15. Interest on prayers 5, 6, 7, and 13 above.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their Defence dated 19<sup>th</sup> October 2020 contested the allegation stating that the suit property was duly registered lawfully and procedurally without notice of any fraud.
  7. The 4<sup>th</sup> Defendant in his Amended Statement of Defence dated 6<sup>th</sup> May 2011, denied the allegations of fraud, misrepresentation and breach of duty fashioned against him and put the Plaintiffs to strict



proof. He claimed that he released the completion documents with written instructions of the late Francis and the 1<sup>st</sup> Defendant's agent was they were thus estopped from claiming otherwise.

8. The 1<sup>st</sup> to the 6<sup>th</sup> Interested Parties in their Statement of Defence dated 12<sup>th</sup> September 2017 contested being parties to the suit stating that they were neither party nor aware of the dealings between the Plaintiffs and the 1<sup>st</sup> Defendant indicating that they purchased the suit property without knowledge of fraud or illegality and the suit ought to be dismissed.

### **Evidence of the Plaintiffs'**

9. PW1 Andrew Munyao Maingi, the 1<sup>st</sup> Plaintiff adopted his witness statement dated 7<sup>th</sup> October 2020 as his evidence in chief and produced the Bundle of Documents dated 8<sup>th</sup> May 2017 as exhibits. He stated that his father the late Francis sold to the 1<sup>st</sup> Defendant the suit property for Kshs. 9,500,000 but was only paid Kshs. 2,950,000 and sought to either have the balance paid with interest, or the property reverted back to them.
10. On Cross examination he stated that the 4<sup>th</sup> Advocate acted for both his father and the 1<sup>st</sup> Defendant. Although he chose not to comment on the letter dated 22<sup>nd</sup> July 2009 by the 1<sup>st</sup> Defendant, he confirmed that his father's signature was on the said letter which released documents to one Mr. Kimanzi. He also confirmed that the transfer documents were signed by his father. He went on to state that after registration of the suit property he was aware that it was subdivided and they had not made fraud allegations against the interested parties. He indicated that his late father could not get a search certificate nor register a caution against it because they were informed at the Lands Registry that file was missing.
11. On re-examination he stated that the suit was instituted by his late father Francis who sold the suit property to the 1<sup>st</sup> Defendant. After his demise, their mother Rachael Kaloki took over the suit but she also passed on and that is when they took over prosecution of the matter. He also stated that his father was not paid the agreed purchase price by the 1<sup>st</sup> Defendant also pointing out that there was a sale agreement between the 1<sup>st</sup> Defendant and the interested parties in 2008 before his late father sold the suit property.

### **Evidence of Defendants'**

12. DW1 Maurice Muli Nzavi an Advocate of the High Court of Kenya adopted his witness statement dated 28<sup>th</sup> February 2012 and adduced his bundle and supplementary of documents as exhibit. He testified that he did not present himself neither did he forward any documents to the Registrar of Titles in respect to the suit property as the transfer documents were not in his custody. He stated that the late Francis vide a letter dated 22<sup>nd</sup> July 2009 asked him to release the completion documents to the 1<sup>st</sup> Defendant for purposes of registration. He stated that he never at any point acted negligently towards his clients because he gave them professional advice including releasing of the completion documents. However, Francis was adamant about the release as such he released the said documents to the 1<sup>st</sup> Defendant in presence of the Late Francis.
13. He went on to state that later the late Francis informed him that the 1<sup>st</sup> Defendant had not completed paying the purchase price and instructed him to issue a demand notice to the 1<sup>st</sup> Defendant which he did. He also stated that the only money given to him by the 1<sup>st</sup> Defendant was a cheque for deposit of Kshs. 950,000 which he passed on to the late Francis. All the other acknowledgments of money paid was between the 1<sup>st</sup> Defendant and Francis which he was not involved in. He went further to indicate that the late Francis even filed a complaint to the Advocates Complaints Commission which



he responded to as evidenced. He asked for the case against him to be dismissed since he was wrongly joined and had nothing to do with the transfer and failure of the 1<sup>st</sup> Defendant to pay.

14. On cross examination he confirmed that he acted for both late Francis and the 1<sup>st</sup> Defendant in the sale transaction and the agreement between them was also prepared by him and that he had the completion documents until 22<sup>nd</sup> July 2009 when the parties asked him to release them. And that is when his relationship with the parties was discharged. He indicated that he was approached by the parties after they had negotiated and agreed on the sale/purchase of the suit property. He pointed out that there was a claim to sell and transfer the suit property to the 1<sup>st</sup> Defendant and as at 22<sup>nd</sup> July 2009 there still was the intention to sell and at no time did the parties ask him to cancel the said insertion.
15. He confirmed that the total purchase price was Kshs. 9,500,000 and only received a cheque of Kshs. 950,000 which was 10% of the purchase price and that the demand for payment dated 22<sup>nd</sup> January 2010 to the 1<sup>st</sup> Defendant went unanswered.
16. He also confirmed that the letter asking him to release the completion documents was received by his office although it was not stamped received and that he did not write a follow up letter that he had released the completion documents. He also acknowledged that the supplementary agreement was prepared with consensus of the parties. He stated that if the claim that the Plaintiff was not paid the purchase was accurate, then the 1<sup>st</sup> Defendant was in breach of the sale agreement.
17. On re-examination he affirmed that he received withdrawal instructions on 22<sup>nd</sup> July 2009 and the Plaintiff handed over the completion documents to the 1<sup>st</sup> Defendant himself.
18. DW2, was the 1<sup>st</sup> Interested Party Amon Nyansera Nyakundi. He adopted his witness statement dated 12<sup>th</sup> September 2007 and adduced his bundle of documents as his evidence. He indicated that he was familiar with the 1<sup>st</sup> Defendant who sold them the suit property in 2009 and his family had been residing thereon since then.
19. On cross examination he stated that he conducted a search of the suit property on 3<sup>rd</sup> November 2009 but the sale agreement was entered on 27<sup>th</sup> July 2009. He confirmed that the suit property was transferred to the 1<sup>st</sup> Defendant on 31<sup>st</sup> July 2009 and thus by 27<sup>th</sup> July 2009 when the sale agreement was entered into the suit property was not in its name. The suit property was then transferred to him on 6<sup>th</sup> November 2012 however approval for subdivision and the mutation form was not adduced in court neither the stamp duty receipt. He concluded by stating that all they wanted was quiet possession of the suit property and if the balance of the purchase price was not paid to the Plaintiffs then the same should be done.
20. The 13<sup>th</sup> Interested Party David Ndolo Mwangangi testified as DW3 and adopted his sworn affidavit dated 21<sup>st</sup> October 2020 he also adduced his sale agreement as evidence. He stated that he was only aware of the 1<sup>st</sup> and 4<sup>th</sup> Defendants but did not know who the Plaintiffs were and wanted the issue resolved so that he could take possession of his portion of the suit property.
21. On cross examination he stated that he carried out a search on 8<sup>th</sup> January 2020 before buying the property and it showed that the registered owner was the 1<sup>st</sup> Defendant. He also visited the site of the property to confirm its status and subsequently a transfer in his favour was effected. He indicated that the transfer document showed that the suit property was transferred for Kshs. 2,200,000 on 31<sup>st</sup> July 2009.
22. This marked the close of the Plaintiffs and Defendants/Interested Parties case.
23. At the close of the oral testimonies, parties tendered final written submissions.



## The Plaintiffs Submissions

24. Counsel for the Plaintiff's in their submissions reiterated the plaintiff's claim and highlighted the following five issues for determination.
25. Whether the Plaintiffs had the requisite locus to institute the suit as contended by the 1<sup>st</sup> to the 6<sup>th</sup> Interested Parties, counsel outlined the history of the suit property which was registered in the name of Francis Kaloki Maingi on 19<sup>th</sup> June 2009. However, the said Francis passed away on 22<sup>nd</sup> February 2015 and was substituted by his wife Rachael Kaloki vide letters of administration dated 10<sup>th</sup> June 2015. The said Rachael subsequently passed away on 31<sup>st</sup> October 2018 and was substituted by the Plaintiffs having obtained letters of administration on 12<sup>th</sup> June 2019. As such they were duly vested with locus to sustain the proceedings.
26. On whether the Plaintiffs had proved their case on a balance of probabilities counsel submitted that they had proved their case and wanted the 1<sup>st</sup> Defendant to be found to be in breach of the sale agreement dated 8<sup>th</sup> April 2009 and to specifically perform his obligations by paying the remaining Kshs. 6,550,000 of the agreed purchase price of Kshs. 9,500,000. Counsel also submitted that the Plaintiffs were entitled to general damages of Kshs. 10,000,000 for breach of the sale agreement citing *Amina Abdul Kadir Hawa vs Rabinder Nath Anand & Another* (2012) eKLR where court held that general damages are meant to compensate a party for the injury suffered and should not be inordinately high or low.
27. On whether the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants were guilty of fraud and misrepresentation counsel submitted that the transfer in favour of the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant was fraudulently done since the whole purchase price had not been paid and he ought to have known the value of land in the said location. He also submitted that the 4<sup>th</sup> Defendant acted fraudulently and misrepresented to the late Francis as elucidated in the Plaintiff. As such they sought an award of Kshs.10, 000,000 as general damages for fraud. Reference was made to *Abiero vs Thabiti Finance Company Ltd & Another* [2001] eKLR. He also went on to submit that they were entitled to general damages against the 4<sup>th</sup> Defendant for negligence and breach of professional duty by surrendering the completion documents before the agreed purchase price was fully paid and as a consequence the Plaintiffs suffered loss which the 4<sup>th</sup> Defendant should be liable for. As such they prayed for an award of Kshs. 5,000,000 as general damages for professional negligence citing *Peter Mule Muthungu (suing as the Administrator and personal representative of the Estate of Jane Mueni Ngui) vs Kenyatta National Hospital* [2020] eKLR.
28. He also submitted that the subdivision of the suit property to the Interested Parties during the pendency of this suit should be vitiated and any subdivision reverted to the Plaintiffs or in the alternative, the 1<sup>st</sup> Defendant, 4<sup>th</sup> Defendant and Interested Parties jointly and severally pay the Plaintiffs the balance of the purchase price from the due date until payment in full. He concluded by submitting that they were entitled to costs with interest.

## The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Submissions

29. Counsel submitted on the following three issues for determination.
30. On whether the 2<sup>nd</sup> Defendant was guilty of fraud and misrepresentation counsel submitted that the 2<sup>nd</sup> Defendant was not privy to the contract between the deceased Francis and the 1<sup>st</sup> Defendant as the transfer was effected on the strength of the documents presented at the registry and the Land Registrar acted as per its functions provided under Section 14 of the *Land Registration Act*. As such the Land Registrar was absolved of any liability as per Section 13A(5) of the *Land Registration Act*. Counsel



went on to submit that it was not the Land Registrar's mandate to find out whether a contractual conflict existed between parties citing *Karanja Guchu vs sabera Wanjiku Guchu & 3 others* [2018] eKLR adding that allegations of fraud must be strictly proved as was held by the Court of Appeal in *Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 others* [2013] eKLR, *Vivo Energy Kenya Ltd vs Maloba Petrol Station Ltd & 3 others* [2015] eKLR, *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR and *Kinyanjui Kamau vs George Kamau* [2015] eKLR. Counsel also submitted that the 2<sup>nd</sup> Defendant's duty was to register documents presented to it which were deemed as regular not unless fraud was detected on the face of it as was held in *Lucy Wanjiku Mwangi (suing as the Legal representative of the estate of Benson Mwangi Macharia) vs Chief Land Registrar & 2 others* [2022] eKLR. As such the allegation of fraud levelled against it had not been proved.

31. Whether the Plaintiff was entitled to the general damages sought counsel submitted that the Plaintiff should not be awarded the relief sought since he was the author of his own misfortune by withdrawing instructions from his Advocate and handing over completion documents to the 1<sup>st</sup> Defendant. Therefore, the 2<sup>nd</sup> Defendant was absolved from any liability and the suit against it be dismissed with costs.
32. On who should bear the costs of the suit, counsel submitted that costs follow event citing *Ex-parte Applicant vs Ibururu Dairy Farmers Cooperative Society Ltd* [2014] eKLR.

#### **The 1<sup>st</sup> to 6<sup>th</sup> Interested Parties' Submissions**

33. Counsel for the interested parties submitted on the following issues for determination as summarised below.
34. Whether the Plaintiffs had established that the 1<sup>st</sup> Defendant failed to pay the balance of the purchase price counsel submitted that the deceased having withdrawn instructions from his advocate the 4<sup>th</sup> Defendant it was hard to tell whether the balance of the purchase price was paid at a later date or not.
35. He went on to submit that the Interested Parties were bonafide purchasers for value who possessed valid certificates of Title and were protected by Section 26(2), 30 (3) and 35(1) and (2) of the *Land Registration Act* and that they had purchased the suit property in good faith without knowledge of fraud and for valuable consideration. Counsel added that the Interested Parties only learnt of existence of the suit in 2017 when they were joined in it noting that in 2013 a search was conducted which showed the suit property belonged to the 1<sup>st</sup> Defendant and did not have any caveat on it. Counsel submitted that it would be a miscarriage of justice to compel the Interested Parties to pay money arising out of a contract they were not privy to.
36. Counsel submitted that the Interested Parties conducted due diligence before purchase of the suit property and they should thus be prevented for any illegalities or irregularities done without their knowledge citing *Shimoni Resort vs Registrar of Titles & 5 others* [2016] eKLR and *Peterson Kiengo & 2 Others vs Kariuki Thuo*.
37. On whether court should order rectification of the register, counsel submitted that a register should not be rectified where Title was obtained without knowledge of fraud or misrepresentation as provided under Section 26, 80(1) of the *Land Registration Act* and Article 40 of *the Constitution* of Kenya. As such the Plaintiffs had not proved they had a case warranting issuance of the sought orders and should thus be dismissed with costs.



## Analysis and determination

38. I have considered the pleadings, evidence on record, the written submissions, and the authorities cited the issues for determination are:
- i. Have the Plaintiffs proved that the 1<sup>st</sup> Defendant breached the sale agreement dated 8<sup>th</sup> April 2009?
  - ii. If the answer to the above is in the affirmative, are they entitled to an order of specific performance and general damages as sought?
  - iii. Have the Plaintiffs made a case of fraud and misrepresentation against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants?
  - iv. What orders should issue.
  - v. Who should bear costs of this suit?
39. This suit emanates from a sale agreement dated 8<sup>th</sup> April 2009 entered between the late Francis Kaloki and the 1<sup>st</sup> Defendant Strategic Property Management Co. Ltd. The Plaintiffs claim that the said agreement was breached by the 1<sup>st</sup> Defendant for failing to meet its obligations to pay the entire purchase price as agreed. The plaintiff claimed that the purchase price was Kshs. 9,500,000 but the 1<sup>st</sup> Defendant only paid Kshs. 2,550,000. The 1<sup>st</sup> Defendant only filed its Statement of Defence but did not make another move in defending the suit.
40. From perusing the sale agreement adduced as evidence this Court notes that the terms of the agreement stipulated that the purchase price was Kshs. 9,500,000; a deposit of Kshs. 950,000 was to be paid upon execution of the agreement and the balance Kshs. 8,550,000 was to be paid upon the registration of the transfer in favour of the purchaser or within 90 days from the date of execution of the agreement. There is a supplementary agreement dated 22<sup>nd</sup> July 2009 between the two parties which provides that Kshs. 1,750,000 had already been paid by the purchaser to the vendor; the sum of Kshs. 5,000,000 was to be paid within 21 days and the balance of Kshs. 2,750,000 was to be paid upon completion of the transfer in favour of the purchaser.
41. Placed before court is a sale agreement and a supplementary agreement whose terms are crystal clear. The courts have stated time without number that their duty is not to re-write contracts, but to interpret them. And that parties are bound by the contractual terms and must perform their outlined obligations. To buttress this, the Court of Appeal in *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR

It is settled law ... 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...

42. Once again, the Court of Appeal *Sun Sand Dunes Limited v Raiya Construction Limited* [2018] eKLR stated:

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.

43. From the foregoing, it is thus not in contention that there was a valid contract between the late Francis and the 1<sup>st</sup> Defendant that ought to have been enforced.
44. Did the 1<sup>st</sup> Defendant adhere to the stipulations of the agreement?
45. Counsel for the Interested Parties submitted that the issue of incomplete payment could not be ascertained because the Plaintiff withdrew instructions from its Advocate and as such it was not clear whether the balance was paid at a later date or not. The Court wishes to respectfully disagree with this and states that the Court can and will make a determination based on evidence before it and shall not speculate on what might have happened or not. This is also echoed in the *Evidence Act* under Section 109 and 112 of the *Evidence Act*:
  109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.  
...
  112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
46. It is noted that the first contract was executed on 8<sup>th</sup> April 2009 and by 22<sup>nd</sup> July 2009 when a supplementary agreement was executed only Kshs. 1,750,000 had been paid to Francis. The supplementary agreement further outlined the amounts of money to be paid and within what timelines. This court has tallied the assortment of confirmation of payment receipts adduced by the Plaintiffs which are between dates 6<sup>th</sup> April 2009 to 2<sup>nd</sup> October 2009 and confirms they amount to Kshs. 2,950,000 of the purchase price. The 4<sup>th</sup> Defendant testifying as DW1 stated that he only received a cheque of Kshs. 950,000 which was 10% of the purchase price and confirmed that he wrote a demand letter to the 1<sup>st</sup> Defendant with instructions from the late Francis demanding for the balance of the purchase price which went unanswered. The Plaintiffs adduced the demand letters dated 22<sup>nd</sup> January 2010 and 13<sup>th</sup> April 2010 demanding for the balance of the purchase price.
47. The court notes that on 31<sup>st</sup> July 2009, the suit property was transferred to the 1<sup>st</sup> Defendant who immediately went ahead to subdivide and dispose it off to third parties in total disregard of the balance it owed the late Francis.
48. On breach of contract for non-payment, the Court of Appeal in *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* (*supra*) stated:

“...The appellant cannot, in good faith, insist that it was not in breach or did not understand the nature of the letter dated 2<sup>nd</sup> August 2007 because the facts themselves clearly demonstrate that despite being put on notice through the letter, that failure to pay the balance of the purchase price on the final mutually agreed completion date of 30<sup>th</sup> September 2007, 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 appellant’s repudiation...” (emphasis own)



49. From the preceding analysis and evidence, this court has detailed that it is not in contention that the Late Francis was not only ready to sell the suit property, he actually went ahead and released the completion documents to the 1<sup>st</sup> Defendant and effected a transfer in its favour. Only for the 1<sup>st</sup> Defendant to halt payment of the purchase price in total breach the terms. As such, are the Plaintiffs entitled to an order of specific performance and damages against the 1<sup>st</sup> Defendant as sought?
50. Having found in this case that the sale agreement was valid and that there was no mistake when parties entered into the sale agreement, the court is of the view that an order for specific performance ought to issue. The relief of specific performance is a discretionary remedy and ordinarily, it will not be granted if there is an alternative adequate remedy that is available. In this suit, it has not been shown that there is an adequate alternative remedy for the plaintiffs noting that the 1<sup>st</sup> Defendant already subdivided the suit property and sold it to third parties. The court makes reference to the Court of Appeal case of *Ngaira v Cheng'oli* [2022] KECA 80 (KLR) (Judgment) which held:
45. ... the threshold for sustaining a plea for specific performance has now been crystallized by case law numerously enunciated both by the predecessor of this Court and this Court. We take it from the decision in the case of *Thrifty Homes Limited vs. Kenya Investments Limited* [2015] eKLR in which it was stated, inter alia, that “the remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy.”
- ...
47. Applying the above to the prerequisites for granting the relief of specific performance, it is our position that there is no evidence on the record pointing towards any defect, mistake or illegality in the sale agreement executed by the rival parties herein.
- ...
51. I am satisfied that there is no evidence on record pointing towards any defect, mistake or illegality in the sale agreement executed by the rival parties herein. The Plaintiffs are thus entitled to an order of specific performance for Kshs. 6,550,000 owed to them by the 1<sup>st</sup> Defendant.
52. The Plaintiffs also sought Kshs. 10,000,000 for general damages against the 1<sup>st</sup> Defendant. It is noteworthy that an award of general damages is an exercise of court’s discretion which should not be punitive but as much as possible restore the injured party to the position they were and indemnify them of the loss and damage. Majanja J. in Odinga *Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “... General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR...” This court having taken into consideration the merits of the case, breach of the contract terms by the 1<sup>st</sup> Defendant from 2009 and its nonchalant manner in its dealings finds that the Plaintiffs are entitled to general damages of Kshs. 5,000,000.
53. The Plaintiffs also sought for orders that purchase of the suit property by the interested parties should be vitiated.
54. The interested parties who testified as DW2 and DW3 stated that they were innocent purchasers for value who did due diligence and found that the suit property belonged to the 1<sup>st</sup> Defendant. Counsel



submitted that the Interested Parties were not privy to the agreement and purchased the suit property without notice of fraud or illegality and were thus protected by law. Counsel added that it would be a miscarriage of justice if they were to be compelled to pay money arising out of a contract they were not privy to.

55. This court has already determined that it is not in contention that the late Francis had all intentions of selling the suit property to the 1<sup>st</sup> Defendant and the dispute arose from the non-payment of the agreed purchase price. Therefore, this court is in agreement with counsel for the Interested Parties that it would be a miscarriage of justice to grant any orders against the Interested Parties who's only role in the dispute is purchasing the property from the 1<sup>st</sup> Defendant.
56. Have the Plaintiffs made a case of fraud and misrepresentation against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants?
57. Counsel for the Plaintiffs argued that the 2<sup>nd</sup> Defendant fraudulently transferred the suit property in favour of the 1<sup>st</sup> Defendant for Kshs. 2,200,000 which was inordinately low and the "2<sup>nd</sup> Defendant ought to have known the value of the land in places where the suit land was situated".
58. Counsel for the 2<sup>nd</sup> Defendant submitted that the Chief Land Registrar as per its statutory mandate transferred the suit property as per the documents presented before it which had no defect on the face of it. Therefore, they neither acted fraudulently nor were they liable to any breach of terms or agreement that they were not party to.
59. It has been said time without number that fraud is a serious allegation which should not only be pleaded but strictly proved. The Court of Appeal in *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR had this to say on the issue of fraud:

The law is clear as buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." (emphasis own)

60. This court agrees with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submissions and finds no case against them since the allegation of fraud was not proved. In this regard, the relief of general damages sought against them falls. The sum effect is the claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is dismissed with no orders as to costs.
61. The Plaintiffs also claimed that the 4<sup>th</sup> Defendant also breach his professional duty by not properly representing the late Francis and releasing the completion documents to the 1<sup>st</sup> Defendant. The 4<sup>th</sup> Defendant testified that he released the said completion documents on instructions of the late Francis as per the letter dated 22<sup>nd</sup> July 2009 which reads: "...We jointly request you to release the completion documents you are holding to Mr. Kimanzi of Strategic Property Management Co. Ltd for purposes of carrying out the registration process..." This letter is signed by Mr. Kimanzi of Strategic Property Management and Francis Kaloki Maingi. Counsel also submitted that the late Francis also filed a disciplinary action against the 4<sup>th</sup> Defendant with the Advocates Disciplinary Tribunal.
62. This court is in agreement with the 4<sup>th</sup> Defendant that the late Francis having withdrawn his instructions, the 4<sup>th</sup> Defendant was no longer bound by actions of the late Francis. His professional duty to the late Francis terminated when the instructions were withdrawn. Further Section 60 of the



*Advocates Act* empowers the Advocates' Disciplinary Tribunal to hear complaints over any professional misconduct by an advocate and its determination shall be deemed as a determination of court. As such, this court has no jurisdiction making a pronouncement on a complaint that was already lodged and determined by the appropriate legally established body.

63. Accordingly, I grant the following orders;

- i. That the 1<sup>st</sup> Defendant is ordered to pay the Plaintiffs Kshs. 6,550,000 as specific performance for breach of contract as well as general damages of Kshs. 5,000,000 with interest at court rate from 31<sup>st</sup> July 2009 until payment in full plus costs of the suit from the date of this judgement until payment in full.
- ii. That the claims against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Defendants by the Plaintiffs are hereby dismissed with no orders as to costs.
- iii. The cost of the suit be borne by the 1<sup>st</sup> defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5<sup>TH</sup> DAY OF OCTOBER 2023.**

**L. KOMINGOI**

**JUDGE.**

IN THE PRESENCE OF:

Mr. Mokuia for the Plaintiffs.

N/A for the 1<sup>st</sup> Defendant.

Ms. Kirina for the 2<sup>nd</sup> Defendant.

Mr. Mbulo for the 4<sup>th</sup> Defendant.

Mr. Mulomi for the 1<sup>st</sup> & 6<sup>th</sup> Interested Parties.

Mrs. Kalinga for the 13<sup>th</sup> Interested Party.

