REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 1023 OF 2014

(CONSOLIDATED WITH ELC. CASE NO. 305 OF 2015)

UKULIMA CO-OPERATIVE SAVINGS & CREDIT LTD.....PLAINTIFF

VERSUS

POPULITE INTERNATIONAL LIMITED.....DEFENDANT

JUDGMENT

1. The parties herein entered into a land sale agreement dated 24.8.2011 in which the Plaintiff (Vendor) was selling to the Defendant (Purchaser) a land parcel L.R. No. 209/5001 (original 209/4991/10 – L.R. No. 12015) in Nairobi area at a consideration price of Kshs 175,000,000. It is not disputed that the Defendant paid a 10% deposit of Kshs 17,500,000. It was a term of the sale agreement that the purchaser was to pay to the Vendor the balance of Kshs 157,500,000 on or before the completion date, of which the said date was put at 90 days.

2. There was no payment of the balance, there was no completion and the dispute spilled into the courts. The Plaintiff filed the suit ELC. No.1023 of 2014(OS) seeking orders that:

> ***1) The caveat be removed.***
>
> ***2) There be a determination that the Defendant defaulted the agreement for sale and has no valid legal claim over the Plaintiff's property***
>
> ***3) Costs***

3. In turn, the Defendant filed his own suit ELC. No. 305 of 2015 vide a plaint dated 15.4.2015 in which they seek the following orders:

> ***1. Order for specific performance compelling the Defendant to perfect the Title and complete the sale to the Plaintiff***
>
> ***2. In the alternative a refund of Kshs 17,500,000 together with interest at contractual rate of 18% p.a from 12th August 2011 until payment in full***
>
> ***3. Special damages of Kshs 200,000,000 with interest at 18% per annum from date of filing hereof until payment in full.***
>
> ***4. Costs of The Suit.***

4. On 10.6.2015, the court gave an order for consolidation of the two suits of which **File No. 1023/2014** became the lead file.

5. The matter proceeded for trial with each side calling one witness. I took over the matter when it was at the tail end of the trial at Re-examination of the last witness.

Plaintiff's Case

6. Plaintiff's case was advanced by Richard Nyaanga who introduced himself as the Chief Executive Officer (CEO)of the Plaintiff. He adopted as his evidence his supporting affidavit to the amended Originating Summons sworn on 1.8.2017 as well as his witness statement dated and filed on 26.9.2016 in **Case No. 305/2015**. He also produced the 12 documents which are annexed to his supporting affidavit to the Originating Summons as P-exhibits 1-12. He further produced the 9 documents filed in case No .305/2015 as P-exhibits 13-21.

7. PW1 stated that Plaintiff is the registered owner of the suit land. That Plaintiff had invited tenders for sale of the property of which Defendant successfully got the offer.

8. The parties had then entered into an agreement on 24.8.2011 for the sale of the suit land where the following conditions were captured.

i. Payment of 10% of the purchase price which the Defendant paid.

ii. Payment of the balance of the purchase price (Ksh. 157,500,000) on or before the completion date which was ninety days from the date of agreement.

iii. Delivery by the plaintiff of the completion documents to the Vendor's Advocates on confirmation of receipt of the payment of the balance of the purchase price.

iv. Sale subject to the Acts, covenants, conditions and stipulations as more particularly set out in the documents title relating to the property otherwise free from all encumbrances.

v. Clause 9 provides for failure to complete.

9. PW1 contends that the Defendants did not pay the balance of the purchase price even though vide a letter of 8.4.2013, they had confirmed they were ready to pay the balance. However, the Defendants started making demands for perfection of the title as seen in the letters dated 9.5.2013 and 5.8.2013.

10. The Defendants advocates also started demanding a sum of Kshs 510,000 from the Plaintiff.

11. Further, Defendant had an absolute caveat registered on the suit land restricting the Plaintiff from dealing with the land. The Plaintiff contends that the caveat is unjustified and ought to be removed.

12. During cross-examination, PW1 stated that the original title was parcel L.R. 12015 of which the suit plot was the last piece of the sub-division in respect of the title mentioned above as the other pieces had been sold. The piece which the Plaintiff was selling was IR.209/4991/10. PW1 states that the issue of defects in the title was raised after the sale agreement had been signed and the deposit had been paid.

13. That on 1.2.2012, the parties had a meeting and it was agreed that a joint visit could be made to lands office. The visit was made and the Commissioner confirmed verbally that the title was valid. They invited Defendants to a meeting on 15.2.2012 which culminated in the withdrawal of the completion notice.

14. PW1 further stated that though a deed of variation was prepared which required the perfection of the title, the Plaintiff did not execute the same as it had departed from what had been agreed in the original agreement.

15. In Re-examination, PW1 stated that the agreement had properly described the suit property, that all along Defendant was represented by an advocate and that completion documents were only to be availed after completion of payments. Further, Plaintiff had made full disclosure at the time of signing the agreement.

Defence Case

16. The defence case was advanced by Stephen Ndungu Kinuthia DW1, who introduced himself as a director of the Defendant in Originating summons **Case No. 1023 of 2014** and the Plaintiff in **ElC Case No. 305 of 2015.** For his evidence he relied on his replying affidavit dated 21.10.2014 as well as a supplementary statement dated 19.1.2018 (*the latter document could not be found in his trial bundles or in any of the two files)*. He also relied on the statement dated 15.4.2015 of his co-director one John Mbuu. DW1 also produced the bundle of his documents as D- Exhibit 1-48 (excluding item No. 24 and 25).

17. DW1 admits that indeed they entered into a sale agreement with the Plaintiff for parcel L.R. 209/5001(original 209/4991/10) of which they paid the 10% deposit of Kshs.17,500,000. However, thereafter, and upon following due diligence on the title held by the Vendor, they noted the following:

i. That though the property being sold was L.R 209/5001 measuring 0.243 acres, the Provisional Grant held by the Vendor I.R. No. 12015/1 was for L.R. 209/4991 measuring 4.61acres.

ii. That though the property being sold was 0.243 acres, the Deed Plan attached to the Grant held by the Vendor No.60614 was for 4.61acres.

18. They raised the issues with the Vendor and they also requested to peruse the original certificate of title as well as the document of transfer with which the Plaintiff had acquired the property. The Vendor indicated that the original title was lost and they only had a provisional title and that they could not trace the original transfer documents.

19. After a series of meetings, the representatives of the parties jointly perused the records at lands office where they found most records missing including the deed plan and that there was no evidence of registration on the deed plan No.61320 for the title No.209/4991/10 and there were no copies of transfer via which the property got into the hands of the Plaintiff. That in order to perfect the title, the Plaintiff was

advised to make an application for issuance of a certificate of Title Parcel 209/49991/10. To this end, the completion date was to be extended to allow the title to be rectified.

20. The parties were to prepare an addendum in order to capture the new issues of which the Defendant executed the same but the Plaintiff declined.

21. In June 2013, they learnt that the Plaintiff wanted to sell the land to the Government. That is when they lodged a caveat to protect their interest. Thereafter, the parties again resulted to communicating on the issue of perfecting the title of which the vendor kept on promising to perfect the said title, but they did not. They went silent only to file the instant suit.

22. DW1 contends that the Plaintiff is still in a position to perfect the title, that they have a legitimate claim but the Plaintiff wants to sell the land to another party.

23. The statement by John Mbuu is more or less similar to that of Stephen.

24. During cross-examination, DW1 stated that they had not done complete due diligence on the property and that the tender notice was too short. They however still went ahead and accepted the award which had the land reference number and they subsequently signed the sale agreement. That the land reference number in the sale agreement is the same one as in the tender award.

25. He further stated that the purchase price was to be paid as per Clause 8 of the agreement where they were to pay the balance of the purchase price and thereafter, they were to get the completion documents. He averred that no other agreement was made by the parties.

26. They did not pay the balance of the purchase price within 90 days or at all. That there is no evidence of any communication relating to their concerns prior to the expiry of the 90 days period which lapsed on or about 24.11.2011.

27. DW1 further stated that they registered a caveat against the title held by the Plaintiff. However, the land registry had not questioned Plaintiff's title. He also stated that he had no document from the Ministry of Lands to suggest that the Title held by the Plaintiff needed perfection.

28. In re-examination, DW1 reiterated the shortcomings of the title held by Plaintiff, emphasizing that the Plaintiff has no transfer with which they acquired the property. He also reiterated the issue of the addendum agreement as there was a problem with the title, and that there are no documents showing that the Plaintiff was the owner of the suit property.

Plaintiff's Submissions

29. The issues framed for determination by the plaintiff are:-

a. *Whether the caveat should be removed by an Order of the court.*

30. It was submitted that this prayer is anchored on the provisions of **Section 73(1)** of the **Land Registration Act 2012** which provide that a Caution may be removed by an order of the court. **Section 2** of the **Act** defines Caution to include a Caveat. Populite in the Replying Affidavit filed on 22.10.2014, paragraph 29 deposed that it registered a caveat on 24.6.2013 to protect it's interests as purchaser. The caveat was registered against the:

> *"suit property, (LR No.209/5001 (Original No.209/4991/10(IR No.12015) and forbids registration of dealing with the said property."*

31. Since Populite are relinquishing/abandoning its claim for specific performance over the property (LR No.209/5001 (Original No.209/4991/10(IR No.12015), then the Caveat should be removed.

b. *Whether Populite defaulted the agreement for sale and has no valid legal claim over the property.*

32. It was submitted that this is no longer an issue as from when the defendant withdrew it's prayer for specific performance during re-examination.

c. *Whether Populite is entitled to Refund of deposit of Kshs.17,500,000.00 together with interest at the rate of 18% p.a from 12.8.2011 until payment in full.*

33. It was submitted that the defendant is the one who defaulted the agreement for sale dated 24.8.2011 where the property is described as **L.R No.209/5001 (Original No.209/4991/10IR No.12015) measuring 0.2487.** That the agreement was preceded by a letter of award dated 11.7.2011 (page 1 and 2 of the bundle) which contains registration details of the property. The defendant unconditionally accepted the offer on 12.8.2011 and proceeded to pay Ksh 17.5 million being 10% deposit on acceptance of the offer. The balance was to be paid on or before 90 days of signing the agreement to enable Ukulima sign the Transfer.

34. Subsequently the agreement for sale dated 24.8.2011 was signed of which the defendant was represented by an Advocate. Clause 8.1 provides for payment of the balance of Kshs.157,500,000.00 unconditionally to plaintiff's designated account. Clause 8.2 provides that:

"on confirmation of receipt of the payment of the balance of the purchase price, the vendor's advocates shall deliver to the purchaser's advocates the following completion documents"

The documents are listed as number 1-9 among them original provisional certificate of lease and executed Transfer.

35. That Clause 6 is clear on the agreed completion date being 90 days from the date of execution of the agreement. It further provides that; *it may be extended for a further period as may be agreed in writing between the parties*. That failure to complete within the period, it shall be assumed that the purchaser is not interested in the deal and the vendor can offer the land to another interested purchaser.

36. The plaintiff has submitted that their obligation to deliver completion documents could only crystalize upon payment of the balance of the purchase price to itself as per the agreement. The defendant did not pay the balance thus defaulted the agreement and did not adduce any evidence to the contrary. That Clause 9(iii) of the agreement provides consequence for default by purchaser (Populite) being to forfeit 20% of the deposit as damages and contractual costs to the vendor and the vendor shall cancel the agreement and be at liberty to sell the property at it's sole discretion as it deems fit.

37. It is further submitted that the parties had mutually extended the period for 45 days which lapsed on 31.1.2012. No other extension of time was agreed between the parties.

38. That in February 2012, the defendant changed advocates who started demanding perfection of title and execution of an Addendum they drew. Their demands were extraneous of which the agreement and the addendum were not signed. Their attempt to purport to have agreed with the plaintiff's advocates was met with protest as per the letter dated 10.2.2012 in response to the letter dated 8.2.2021 (page 30 of the bundle).

39. To this end, reference was made to the case of **Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others [2018] eKLR** in which the trial court held;

" 'when time is of the essence there is no leeway for delay'. Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission."

"I consider that it is good law that where a purchaser has dragged his feet and has been guilty of unnecessary delay, the vendor is perfectly entitled to serve upon the purchaser a notice limiting time, at the expiration of which the vendor will treat the contract as having come to an end. ..."

40. The plaintiff contends that since the defendant did not pay the balance of the purchase price, and also went ahead to register a caveat, the plaintiff could not deal with the property in any way. Further, the Defendant filed suit to assert it's rights of specific performance to compel Ukulima to transfer the land, only to drop it's quest during re-examination on 28.9.2021. In the circumstances, the Defendant is not entitled to whole refund and interest of the deposit. Instead, defendant is only entitled to Kshs.14Million being 80 % of the deposit upon removal of the caveat.

41. The Plaintiff relied on the case of **Nabro Properties Ltd Vs Sky Structures LTD (2002) Eklr** where **Gicheru JA**, as he then was, stated;

*"According to Brooms Legal Maxims at page 191: "**It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity…"***

42. The plaintiff also relied on the case of **Housing finance and NSSF case (supra)** in which the Court of appeal affirmed that;

"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."

42. It was submitted that no document from the Ministry of Lands was availed to the effect that the provisional certificate of title had defects requiring perfection. If the title had any defects then the caveat could not have been registered.

43. It was also submitted that in the supplementary witness statement dated 19.1.2018, defendant attached valuation report by Crystal Valuers Ltd, which report describes the property as 209/5001 (Original number 209/4991/10) same as the description in the agreement for sale and that the land is registered in the name of Ukulima (plaintiff). They have attached the same provisional certificate of title to their report. Thus the defendant cannot run away or contradict its content in evidence by purporting to say the property is not in the name of Ukulima.

d. *Whether populite is entitled to special damages of* *Kshs.200 million with interest at 18% from the date of filing*

until payment in full.

44. The claim for damages has no basis and should be dismissed with cost, that since defendant was in default, they cannot claim damages. That it is trite that a claim for special damages must not only be specifically pleaded but also proved with certainty and particularity. No particulars of special damages are pleaded, no evidence was tendered to support the claim of Kshs.200 million with interest at 18% from 12.8.2011 as pleaded.

45. To this end, reference was made to the case of **John Richard Okuku Oloo v South Nyanza Sugar Co Ltd [20 13] eKLR ,** where it was stated that;

> ***"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity, but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained…."***

The plaintiff also relied on the case of **Gatere Njamunyu vs. Joseck Njue Nyaga (1983) eKLR.**

Defendants Submissions

46. The issues framed for determination by the defendant are;

> ***a Did Ukulima have an authentic Title to the property which is the subject of the sale?***
>
> ***b Does Populite have any claim against Ukulima in respect of the sale agreement dated 24th August 2011?***
>
> ***c Should Ukulima refund the deposit of Ksh. 17,500,000 paid by Populite?***
>
> ***d Should Ukulima pay interest on the said deposit at 18% p.a as claimed by Populite and as per the sale agreement?***
>
> ***e Should Ukulima pay damages to Populite as claimed in the Plaint?***
>
> ***f What are the appropriate orders in the circumstances?***

Issue No. 1 – Did Ukulima produce Title to Land Reference 209/5001 being the property subject of the sale?

47. The defendant has posed the question; What was the property being sold? –That the property being sold is clearly spelt out in the sale agreement dated 24th August, 2011. Paragraph 2 of the agreement defines the property sold as

> ***"… All that piece of Land known as Land Reference No. 209/5001 (Original No. 209/4991/10 (I.R No. 12015) in Nairobi Area containing by measurement naught decimal two four eight seven (0.2487) acres and more particularly described in Vol D1. Folio 103/1614 file MMVII…"***

48. However, the plaintiff produced a Provisional certificate of Title – (*Document No.3 of the plaintiff documents*) claiming that the original Title of Certificate had been lost. A perusal of this Provisional certificate of Title shows reveals the following;

> *a. It's a provisional certificate of Title I.R 12015 issued by reason of the fact that the Grant No. I.R 12015/1 has been lost. It is supposed to replace Grant No. I.R 12015/1.*
>
> *b. Grant I.R 12015 copy attached to the provisional Certificate of Title shows that it is in respect of Land Reference 209/4991 measuring 4.61 Acres or thereabouts.*
>
> *c. The Deed Plan attached to the Title refers to L.R 209/4991 measuring 4.61 Acres*
>
> *d. The entries in the Title shows that the property was transferred to City Properties*
>
> *Ltd on 17th February, 1956.*
>
> *e. Entry 3 shows the land was subsequently sub divided into 15 subdivisions being*
>
> *L.R 209/4991/1 to L.R No. 209/4991/15.*
>
> *f. Entry No.5 shows that L.R 209/4991/13, 14, 15 were surrendered to the Crown on 11th August, 1956 in exchange for new Grant No. I.R 12693.*

g. Entry No. 6 shows that L.R 209/4991/3, 8,11 and 12 were surrendered to the Crown in exchange to Grants I.R 12609, I.R 12662 and I.R12780.

h. Entry No.9 shows L.R 209/4991/2 and L.R No. 209/499/6 were surrendered to the

Crown in exchange with Grant No. I.R 13194.

i. ***Entry No. 10 shows that L.R 209/4991/4, 5, 7, 9 and 10 were transferred to City Council of Nairobi for Ksh. 2,162,000 on 20th May 1960.***

j. Entry No.12 shows that L.R No. 209/4991/5 was transferred to Continental Credit Finance Ltd on 28th August 1979.

k. Entry No.13 shows that L.R No. 209/4991/9 was transferred to Mbagu Investments Limited on 24th October, 1979.

l . Entry No.14 shows that L.R 209/4991/4 and 7 were acquired by the Government of Kenya.

49. There is no reference at all in the provisional certificate of Title to Land Reference 209/5001 the subject matter of the sale. In fact, the entries show that the last dealing with Land Reference 209/4991/10 was transfer to City Council of Nairobi with other lands as shown in entry No.10.

50. That the Plaintiff did not even have the Deed Plan for L.R No. 209/5001. The copy of Deed Plan attached to the Provisional Certificate of Title is in respect to the Land L.R 209/4990 prior to the subdivision reflecting 4.61 Acres while the land being sold was 0.2487 Acres. That as per letter dated 23rd August, 2012 by Ministry of Lands *produced by Ukulima as document 5*, the Ministry of lands declined to issue a certified true copy of Deed Plan for L.R 209/5001 as the status of the original could not be verified.

51. It was also submitted that the plaintiff did not have any document to show how they procured the property and that plaintiff agreed that the Title they held at best was defective and it needed to be perfected.

52. Defendant hence avers that the plaintiff failed to produce title for the property being sold being L.R 409/5001 and that the provisional certificate of Title held by Ukulima and produced in court is not the Title for the property being sold.

Issue No. 2 - Does Populite have any claim against Ukulima in respect of the sale agreement dated 24th August 2011

53. It is submitted that even after Ukulima declined to perfect the Title, it did not refund the monies paid to date amounting to Ksh. 17,500,000. That even if plaintiff believed that defendant had breached the contract, under Clause 9.1(iii) of the sale agreement they were required to cancel the agreement and refund the deposit less 20% thereof. Thus defendant has a legitimate claim against the plaintiff.

Issue No 3- Should Ukulima refund the Deposit of Ksh. 17,500,000 paid by Populite?

54. It is submitted that upon the Defendant rejecting the Title held by the plaintiff, the later had two options; either to Perfect the Title and complete transaction; or rescind the Sale Agreement and refund the deposit. That the plaintiff did not undertake any of the said options. Thus the plaintiff cannot keep the property and the deposit as well.

ISSUE NO. 4- Should Ukulima pay interest on the deposit?

55. It is submitted that the Plaintiff has been using the deposited funds from 24th August, 2011, even after filing suit in 2014, hence they should pay interest. Reference was made to the case of **Luke Mathew Wasonga v Kartar Singh Bhachu [2018] eKLR,** where the High Court in finding in favor of the Plaintiff, ordered refund of the deposit paid together with interest at contractual rates of 18% from the date of sale agreement.

56. It was submitted that under Clause 1.1.5 of the Sale Agreement dated 24th August,2011 the contractual interest rate was set at eighteen percent (18%) per annum. Populite paid the money in August 2011 and receipt was acknowledged by the Sale agreement dated 24th August, 2011. Thus Plaintiff should pay interest at the agreed contractual rate of 18% p.a from 24th August, 2011 until payment in full.

57. Reference was also made to the Court of Appeal case of **Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others [2018] eKLR** where the court upheld the findings of the trial court that interests is awarded on refund from date the money was paid. The agreed interest rate should therefore be paid from the date of acknowledgment of the deposit on 24th August,2011.

Issue No. 5- Should Ukulima pay Special Damages?

58. The Defendant has made reference to the case of **Millicent Perpetua Atieno Wandiga & Another V John Chege [2013] eKLR,** where the Court of Appeal quoted with approval **Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183** on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

"where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the

purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain...."

59. Further, the Court of Appeal in **Civil Appeal No. 460 Of 2018 Gami Properties Limited v National Social Security Fund Board of Trustees & Chief Land Registrar [2021] eKLR** affirmed the trial court's position that damages payable is the difference between the contract price and the value of the suit property at the time the sale fell through.

60. It was submitted that where an aggrieved purchaser proves breach of contract and such party claims specific performance but abandons it for good reason, such a party is entitled to damages in substitution for specific performance. This is more so where an order for specific performance even if granted would not be achieved. That this was the position held by Justice F. Tuiyott in **Gami Properties Limited v National Social Security Fund Board of Trustees & 2 others [2018] eKLR,** where the judge observed thus:-

"[47]. This Court does agree with Counsel for Gami that having proved Breach of Contract, it would be entitled to Damages in lien of Specific Performance….

[50.] If the objective of an Award of Damages for breach of Contract is to put the offended Party in much the same place if breach had not happened then a person who losses particular land on account of breach should be awarded such Damages as would place him/her in a position of acquiring property of equivalent value... It may be suitable, for instance, where an aggrieved party presents a case for Damages as an alternative for Specific performance which has good prospects of success in the claim for Specific Perfomance and pursues it diligently but for reasons out of his control is unable to obtain that relief and the Court makes an award of Damages in leiu. If the litigation has drawn on for a long time and property prices increased sharply then there could be justification* in *assessing the Damages on the value of the lost property at the time of Judgment."

61. The situation obtaining in the instant case is that as per evidence produced, Ukulima declined to perfect the Title despite insistence by Populite thereby making the transaction to collapse. Populite in the circumstance is justified to claim damages for loss of bargain of Kshs. 85,000,000 being the difference between the purchase price and market value at time of trial.

62. As per valuation report produced as Document No. 49 the property subject to appropriate Title Document being produced was valued at Ksh. 260,000,000. Populite would have gained at least Ksh. 85,000,000 from the said sale, hence Populite claims the difference of Ksh. 85,000,000.

Issue no 6- What are the appropriate orders in the circumstances?

63. In light of objection by Ukulima to perfect Title, Populite has abandoned its claim for specific performance and now prays for judgment in its favour as follows: -

a) Ukulima Suit in ELC 1023 of 2014 (O.S) be dismissed with costs.

b) Judgment be entered for Populite in ELC 305 of 2015 for: -

i. Ksh. 17,500,000 plus interest at 18% p.a from 24th August, 2011 until payment in full.

ii. Special Damages for loss of bargain of Ksh. 85,000,000 with interest at 18% p.a from date of filing suit until payment in full.

iii. Costs of the suit.

Determination

64. I have considered all the material presented before this court. At this juncture, I do commend the advocates of the rival parties for their very robust and resourceful articulation of the issues appertaining to the dispute.

65. It emerges that there are some issues which are un- controverted; that the the two litigants had entered into an agreement for sale of land dated 24.8.2011 in which the Defendant paid a 10% of deposit of Kshs 17,500,000 as the purchase price was Kshs 175,000,000. It is also not in dispute that the land was not transferred to Defendant and the latter did not pay the balance of the purchase price of Kshs 157,500,000. Further, the sum of Ksh.17 500 000 paid out as deposit of the purchase price was not refunded.

66. It is also not disputed that the Defendant did lodge the caveat on the suit land before the filing of the case No.1023/2014.

67. I note that when the said suit was filed, the Defendant did file a replying affidavit on 21.10.2014 without a counter-claim. The Defendant however went ahead and filed the suit No. 305 of 2015. No reasonable explanation has been advanced as to why the Defendant did not file complete pleadings in the initial suit instead of filing a case of his own when the other matter was active. Nevertheless, considering that the two matters are consolidated, the court will treat the claim in ELC No. 305 of 2015 as a counter-claim.

68. Seeing that the transaction between the two parties did not go through, it follows that somehow some what, there was a breach of the

agreement. In that regard, and noting that there is a caveat on the land, I find that the key issues arising for determination are:

1. Who breached the agreement?

2. Should the caveat placed on the suit land be removed.

3. What are the reliefs available including costs

Breach of the Agreement

69. Each side has blamed the other for the failure to complete the transaction. However, it does emerge that an issue relating to the "perfection of the title" did arise after the execution of the agreement, thereby creating a conundrum which prevented any further transactions.

70. The defence claims that they found the title wanting for various reasons, including no original title, no transfer document, that the property being sold L.R 209/5001 was measuring 0.243 acres while provisional grant was for L.R.12015 for L.R. 209/4991 measuring 4.61 acres and that even the deed plan was different. The question is at what point during the engagement of the parties were these issues raised. To what extent should the court step in to determine who caused the breach of the contract.

71. The ***Blacks Law Dictionary, 9th Edition , page 213*** defines a breach of Contract as follows;

"***a violation of a contractual obligation by failing to perform one's own promise, 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".

72. 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…."

73. In the Court of Appeal case of **National Bank of Kenya vs. Pipeplastic Samkolit (k) Ltd & Another (2001)eKLR,** it was held that;

" A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fruad or undue influence are pleaded and proved."

74. Likewise in the instant matter, this court will not in anyway strive to re-write the contract for the parties. Rather, the court will analyse the nature and extent of the breach in order to give appropriate orders. In doing so, I have perused the entire agreement of 24.8.2011, where clause 8.2 gives details of the documents which were to be availed by Vendor (Plaintiff). These included **the original provisional certificate of lease**. Nowhere in that agreement did the Plaintiff undertake to avail any other document of title other than the provisional certificate of title. The Defendant signed the document in that format and was therefore aware that what was available in terms of ownership documents in the hands of the Plaintiff was the provisional certificate of title.

75. It has also emerged that despite the various communication between the parties post the execution of the agreement, the alleged addendum agreement to capture issues of perfecting the title was never executed. Neither the verbal or written communication, nor the visits to lands office or various meetings amounted to a variation of the initial agreement.

76. In the letter on page 52 of the defence bundle dated 18.4.2013, the Plaintiff states as follows:

"The property that is subject of the agreement is well defined in the agreement for sale and has not changed. The documents to be delivered by the vendor are also specified.

There is no need to an addendum to the agreement executed by the parties. Your client has copy of the provisional certificate of title and Deed Plan No. 61330.

Our client does not have another certificate of title and deed plan. …"

77. After this letter, the defence started making offers to assist in the process of perfecting the title (see defence letter of 9.5.2013) which proposal was flatly declined by the Plaintiffs vide their letter of 13.5.2013.

78. During cross-examination, DW1 stated that:

"There is no evidence of any communication relating to our concerns prior to the expiry of the 90 days period. The 90 days period lapsed on or about 24.11.2011."

79. This is a confirmation from Defendant that their issue regarding the perfection of title was introduced after the 90 days from the date of execution the agreement.

80. As rightly submitted by the plaintiff and articulated in the case of **Housing Company of East Africa Limited (supra);**

"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".

81. I find that the party who set in motion the acrimonious relationship which led to failure of the performance of the contract was the Defendant as it is this entity which raised the issue of "perfection of the title". Having received an ultimatum from the Plaintiff by the letters of 18.4.2013 which was quite unequivocal, the Defendant ought to have taken a clear stand instead of going on and on about an issue (perfection of title) which the Plaintiff had declined to adhere to and which had not been factored in the main agreement. It is noted that at some point, the defence advocate had even offered to procure the perfect title for the Plaintiff at a fee.

82. In light of the foregoing analysis, I am inclined to find that Defendant is the one who breached the contract.

Caveat

83. What was the nature and extent of the interest that the Defendant held in the suit land to warrant the lodging of the caveat on 26.6.2013?.

84. I find that the only payment made by Defendant was the 10% deposit. Going by the events succeeding the execution of the agreement and taking into account the letter of 18.4.2013 from the Plaintiff that they would not perfect the title, then the Defendant cannot be said to have acquired any interest in the suit land. After all, by the time of lodging the caveat the Defendants appear to have been doubtful as to whether the Plaintiff owned a perfect title. And in any event the Defendant has abandoned his claim for specific performance.

85. In that regard, I find that there is no reasonable basis for the caveat to remain in force.

Relief

The Defendant claims that the Plaintiff cannot retain the land and the money deposited at the same time. However, it is noted that the caveat was lodged upon the suit land way back in June 2013 preventing the Plaintiff from dealing with that land. The Defendant had also filed a suit for specific performances despite the fact that they were in breach of the agreement.

86. In **ALGHUSSEIN ESTABLISHMENT v ETON COLLEGE (1991) 1 All ER pp 267,** quoted in **Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014] eKLR**, it was held that;

"The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach…..'

87. True, the plaintiff cannot retain the land and the deposit at the same time. However, taking into account that the defendant is the one who initiated and perpetuated the process of breach of the agreement, I find that they are only entitled to the 80 % of the said deposit of Kshs 17,500,000 which is Kshs 14,000,000 without interest, in terms of Clause 9(1) iii of the agreement dated 24.8.2011.

88. In the final analysis, the suit ELC. 305/2015 is dismissed while Plaintiff's Case ELC. 1023/2014 is allowed in the following terms:

1) The caveat in the suit land is to be removed forthwith.

2) It is declared that Defendant (Populate International Ltd) has no right over the suit land.

3) The Plaintiff is to refund to Defendant a sum of Kshs 14,000,000 without interest within a period of 45 days, failure to which interest thereof shall start accruing at court's rates.

4) The Defendant is condemned to pay costs of the suit No. 1023 of 2014 with interest at court's rates.

5) No orders as to costs in ELC 305/2015.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mrs. Mbaabu for the Plaintiff (Ukulima)

Githiri holding brief for Njuguna for the Defendant

Court Assistant: Eddel Barasa