



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO 115 OF 2018

MARGARET MAKAI.....PLAINTIFF

VERSUS

JULIUS KILONZO MAWEU.....DEFENDANT

AND

FELIZ MAITHYA NDUOTA.....INTERESTED PARTY

JUDGMENT

1. By a Plaint dated 27th of November 2018 the Plaintiff is seeking for the following orders: -

- a) **An order restraining the Defendant from sub-dividing, and or transferring land number Konza North/Konza North Block 2 (Malili) 1934 to any other person.**
- b) **An order cancelling the Defendant's title and directing the Machakos County Land Registrar to rectify the register to reflect the name Margaret Makai as the registered owner Konza North/Konza North Block 2 (Malili) 1934.**
- c) **Costs of the suit with interest.**

2. The Defendant denied the Plaintiff's claim vide a Statement of Defence which he later amended to include a Counter Claim dated 24th of January 2019. In the Counter Claim the Defendant is seeking for the following orders:-

- a) **A declaration that the Plaintiff being the Legal Administrator of the late Makai Kiluti Ndunda is bound by the agreement dated 14th November 2011 and she be compelled to comply with the same.**
- b) **A declaration that the deceased and now the Plaintiff who is the Administrator of the Estate of the deceased breached the agreement dated 14th November 2011 and in particular clause (b) and (c) thereof.**
- c) **An order that the Plaintiff do comply with the agreement dated 14th November 2011 and in particular clause (b) and (c) and pay the Defendant the sum of Kshs 9,312,000 being the balance of the purchase price plus accrued interest.**
- d) **In the alternative a declaration do issue that the Defendant is the legal owner of agricultural Plot number 17 in Malili Ranch Company Limited which is now registered as Konza North/Konza North Block 2 (MALILI) 1934.**
- e) **Costs of the suit and the Counter Claim.**

3. The Interested Party sought leave to be enjoined in the suit and vide a ruling dated 14th of November the same was granted. The Interested Party filed a statement of Defence and Counter Claim dated 12th February 2020.

PLAINTIFF'S CASE

4. The Plaintiff testified that she obtained letters of administration in respect to the Estate of her late father Makai Kaluti Ndunda. It is her evidence that her late father sold the suit land to the Defendant on 8th of November 2011. That three days thereafter, the Defendant went to their home and demanded for a refund of the purchase price on the grounds that he had discovered that the land was not vacant. She testified that on the 13th of November 2011, they met with the Defendant at Equity Bank Machakos branch and her parents refunded to the Defendant

Kshs 1,399,950/- vide a bank transfer. She testified that thereafter, they executed an agreement for the refund of the purchase price in the offices of M/s B.M Mung'ata and Company Advocates.

5. It is her evidence that after she obtained the certificate of confirmation of grant in respect to the Estate of her late father, she presented it to the offices of Malili Ranch Company Limited, and discovered that the suit land was registered in the names of the Defendant. She stated that she reported the matter to the DCI who summoned the Defendant to their office but he refused to honour the summons. The Plaintiff produced the documents in her list of documents dated 27th of November 2018 as exhibit 1 to 5 respectively.

6. On cross examination, she stated that her late father sold the suit land to the Defendant for a consideration of Kshs 2,300,000/- which was paid in full upon the execution of the sale agreement. She stated that according to clause c and clause d of the sale agreement, her late father was to transfer the land immediately to the Defendant who was to take possession immediately upon execution of the agreement for sale.

7. She further testified that upon execution of the agreement dated 14th of November 2011, they refunded to the Defendant Kshs 1,399,950/- leaving a balance of Kshs 970,000/- which they were to pay on or before 23rd of November 2011. It is her evidence that the balance of Kshs 970,000/- had not been paid to date.

8. She further testified that clause c of the agreement dated 14th November 2011 provided that the balance would accrue an interest of 10% while clause d provided that the original allotment letter was to be held by the firm of B M Mungata until the transaction was concluded.

9. She further testified that as the Administrator of the Estate of her late father, she did not at the time of filing the Petition inform the Judge that her father owed the Defendant any money.

10. On re-examination the Plaintiff stated that the Defendant in clause d stated that he wanted to cancel the sale agreement and by 14th of November 2011 the sale agreement was cancelled.

11. Pw2 Rose Mutani adopted her statement as her evidence in chief. It is her evidence that her late father Makai Kaluti Ndunda sold Plot No 17 Malili to the Defendant. She testified that the Defendant was a director of Malili Ranch Company Limited. She stated that on 13th of November 2011, the Defendant went to their home and demanded for a refund of the purchase price. She further testified that on 14th November 2011, they met with the Defendant at Equity Bank Machakos branch and the purchase price was refunded.

12. On cross examination, she stated that she knew the Defendant as her late father had sold land to him. It is her evidence that she was aware that her father refunded the purchase price and that there was an outstanding balance which was unpaid to date. She stated that she did not know if her father was to refund the money with interest.

13. Pw3 Alfonse Kisoi adopted his statement as his evidence in chief. It is his evidence that on 8th of November 2011, the Defendant purchased Plot No. 17 Malili from his late father Makai Kaluti Ndunda. It is his evidence that three days thereafter, the Defendant demanded for the refund of the purchase price which was done at Equity Bank Machakos Branch. It is his evidence that the Defendant fraudulently transferred the suit land in his name. He urged the court to cancel the Defendant's title and have the same registered in the name of the Plaintiff.

14. On cross examination he stated that he witnessed the sale agreement and confirmed that the Defendant paid the full purchase price of Kshs 2,300,000/-. He further stated that his late father executed an agreement to refund the purchase price. He stated that although there was an outstanding balance that was to be refunded back to the Defendant with interest, they were ready to refund the principal balance without interest. It is his further evidence that his father had earlier on sold the suit land to Felix Mathya Nduota on 28th of January 2009 before he sold the same to the Defendant.

15. Pw4 Francis Maundu Makai testified that the Plaintiff was his sister. It is his evidence that on 8th of November 2011 his late father Makai Kaluti Ndunda sold Plot No. 17 to the Defendant. That three days thereafter the Defendant demanded for a refund of the purchase price and the same was refunded on the 14th of November 2011. He stated that the suit land should revert back the family.

16. On cross examination he testified that he witnessed and signed the sale agreement dated 8th November 2011. It is his evidence that although he was aware that there was an outstanding balance owed to the Defendant, he was not aware that the refund was to be paid back with interest.

17. It is his evidence that they were ready to refund the balance of the purchase price with interest so long as the Defendant gives them back their land. It is his evidence that he was aware that his late father had earlier on sold the suit land to Felix Maithya Nduota.

DEFENDANT'S CASE

18. The Defendant Julius Kilonzo Maweu adopted his statement as his evidence in chief and produced his bundle of documents as exhibits 1 to 23 respectively. He testified that he entered into a sale agreement with the late Makai Kaluti Ndunda for the sale of Plot No. 17 Malili. It is his evidence that it was a term of the agreement upon the execution of the sale agreement, the transfer was to be effected immediately. That in compliance with the said term, he immediately paid the transfer fees.

19. He further testified that three days after executing the sale agreement, he took building materials to the suit land and met some people who informed him that the suit land had been sold to Felix Maithya Nduota and gave him a document. He further testified that upon relaying this information to the seller, the seller agreed to refund back the purchase price and on 14/11/2011, the seller refunded Kshs 1,399,950/=.

20. He further testified that they executed an agreement of refund of the purchase price dated 14/11/2011 and agreed that the outstanding balance would be refunded on or before 23/11/2011. It is his evidence that they further agreed that, if the seller did not refund the outstanding balance of Kshs 970,000/- by 23rd of November 2011, it would attract an interest of 10% every month.

21. It is his evidence that he did not transfer the suit land fraudulently to himself as the agreement for sale provided that the transfer was to be effected immediately. It is his further evidence that the Plaintiff and her witnesses were present when they executed the agreement for sale and the agreement to refund the money. It is his evidence that he did not force the seller to sign the agreement.

22. On cross examination he stated that he used to be a Director of Malili Ranch Company Limited. He stated that he was ready to surrender the suit land title to the Plaintiff once the balance of the purchase price was paid back with interest. It is his evidence that he was the one who paid the transfer fees and that once the transfer fees were paid the documents were taken to survey.

23. On re- examination he stated that after the transfer was done, the process of transfer was not reversed as it was before the survey of Kenya. It is his evidence that the Plaintiff's father breached the sale agreement after he discovered that the suit land was not vacant.

SUBMISSIONS

24. The Plaintiff through her written submissions filed on 30th November 2021 submitted that the Defendant who was a Director of Malili Ranch Company Limited used his position to unlawfully execute the transfer document and secretly transferred the property in his name. She further submitted that the Plaintiff and the other beneficiaries were entitled to the land which belongs to the Estate of her late father. The Plaintiff relied on the following cases in support of her submissions.

1) Alice Chemutai Too Vs Nickson Kipkirui Korir and 2 Others (2015) eKLR;

2) Zachariah Wambugu Gathimu & Another Vs John Ndungu Maina (2019) eKLR.

25. The Defendant through his written submissions filed on 10th of January 2022 identified the issues for determinations as follows;

i. Whether the refund agreement dated 14/11/2011 is binding on the plaintiff as the legal administrator.

ii. Whether the plaintiff's suit has merit.

iii. Whether the counter claim has merit.

26. Counsel for the Defendant submitted that the Plaintiff has legal capacity to represent the Estate of her late father as evidenced by the grant of letters of Administration *Ad Litem* issued to her on 16th of September 2015. Counsel placed reliance in the case of **Kalonde Kyambo (Suing in her capacity as the Legal Representative of the Estate of Kyambo Ngata (Deceased) Vs Peter Wanjohi Kamau (Sued as the Liquidator of Drumville Farmers' Co-operative Society Limited & Another, Bernard Mutinda Matheka (Applicant); Albert Athans Makau Kyambo (interested party) (2021) eKLR.**

27. Counsel further submitted that the Plaintiff as the Legal Administrator of the Estate of Makai Kaluti Ndunda – deceased was bound by the agreement dated 14th of November 2011. Counsel submitted that the Plaintiff was under a duty to pay the Defendant the outstanding balance of the purchase price. He relied on the case of **Esther Wanjiku Machatha Vs Timothy Njenga Gitura & 4 Others (2015) eKLR** to support his submissions.

28. Counsel argued that the Plaintiff suit lacks merit as the Plaintiff was aware of the terms of the sale agreement dated 8/11/2011 and of the fact that the deceased had not fully refunded the balance of the purchase price. Counsel argued that the Plaintiff was aware of the fact that the transfer was to be effected immediately and that the Defendant paid Kshs 20,000/- towards the same.

29. On the issue whether the Defendant's Counter Claim is merited, Counsel submitted that the Plaintiff as the Legal Administrator of the Estate of her later father was bound by the agreement of refund dated 14/11/2011. Counsel submitted that the Plaintiff admitted that the parties executed the agreement. Counsel contends that the Plaintiff could therefore, not ask the court to re-write the agreement for the parties. To buttress his submissions, Counsel relied on the following cases:-

1) Feba Radio (Kenya) Limited t/a Feba Radio Vs Ikiyu Enterprises Limited (2017) eKLR.

2) Five Forty Aviation Limited Vs Erwin Lanoe (2019) eKLR.

3) Pius Kimaiyo Langat Vs Co-operative Bank of Kenya Ltd (2017) eKLR.

30. It is not in dispute that: -

a) The late Makai Kaluti Ndunda executed a sale agreement on the 8th of November 2011 with the Defendant for the sale of Land Parcel number Konza North/Konza North Block 2 (Malili) 1934 formerly Malili Agricultural Plot No 17 as evidenced in Defence exhibit 2.

b) That the purchase price was Kshs 2,300,000/- and that it was paid in full.

- c) That on 14/11/2011 the late Makai Kaluti Ndunda executed an agreement for the refund of Kshs 2,300,000/- with the Defendant herein.
- d) That Kshs 1,399,950/- was refunded on 14/11/2011 leaving a balance of Kshs 970,000/-.
- e) That the balance of Kshs 970,000/- was to be repaid by 23/11/2011 in default of which an interest of 10% would accrue every month.
- f) That the plaintiff duly witnessed and signed both agreements.

31. I have carefully considered the evidence on record, the rival submissions by the parties and I find that the issues for determination are;

- a) Whether the agreement dated 14/11/2011 is binding upon the Plaintiff.**
- b) Whether the Plaintiff is entitled to the orders sought.**
- c) Whether the Defendant is entitled to the orders sought in the Counter Claim.**

32. In answer to the first issue for determination, it is not in dispute that the Defendant executed a sale agreement on 08/11/2011 (Defence exhibit 2) with the late Makai Kaluti Ndunda for the sale of Plot No. 17 Malili for a consideration of Kshs 2,300,000/-. The sale agreement was witnessed by the Plaintiff, Pw2, Pw3, and Pw4. It is the Plaintiff's evidence that three days after the parties executed the sale agreement, the Defendant went to their home and demanded for a refund of the purchase price on the grounds that he had established that the land was not vacant. The parties mutually rescinded the agreement for sale and executed an agreement for refund on 14/11/2011. I have looked at the agreement of refund dated 14/11/2011 (Defence exhibit 4) and I find that the sale agreement dated 08/11/2011 was rescinded by the parties on the grounds that the land which was the subject of the agreement was non-existent.

33. The Defendant in his evidence stated that he discovered that the land was not vacant when he took building materials to the suit property when he was informed by the people he met on the suit land, that the land belonged to Felix Maithya Nduota. Pw3 and Pw4 on cross examination confirmed that their late father had sold the land to Felix Maithya Nduota on 28th of January 2009. On the basis of the evidence and the documents produced, it is clear that the parties agreed to rescind the agreement for sale.

34. It is evident from the agreement of refund (Defence exhibit 4) that upon the execution of the agreement, the seller (the late Makai Kaluti Ndunda) refunded to the defendant Kshs 1,399,950/- via a funds transfer.

35. Clause b of the agreement for refund dated 14th of November 2011 provides as follows:- **the balance of Kshs 950,000/- plus costs towards transfer in the sum of Kshs 20000/- amounting to Kshs 970,000/- (Nine hundred and seventy thousand only) shall become payable on or before 23rd of November 2011.**

36. Clause c provides as follows:- **that the sum shall be paid on the aforesaid date in full and in default the same shall accrue a 10% monthly interest thereon.**

37. The agreement was executed by the late Makai Kaluti Ndunda and the Defendant. It was witnessed by the Plaintiff, Pw2, Pw3, Pw4 and Rebecca Maundu.

38. It is not in dispute that the Plaintiff petitioned the court for a grant of letters of administration for the Estate of her late father as evidenced in Defence exhibit 7. It is also not in dispute that the Plaintiff is the Legal Administrator of the Estate of Makai Kaluti Ndunda. The grant was confirmed on 27th of April 2017. I have looked at the certificate of confirmation of grant (Plaintiff exhibit 1) and I find that the suit land forms part of the Estate of the late Makai Kaluti Ndunda.

39. The Law of Succession defines an Administrator as a person to whom a grant of letters of administration has been made under this Act.

40. As rightly submitted by the Defendant, parties are bound by the terms of the contract and it is not the duty of the court to rewrite a contract for the parties. It is trite law that courts cannot rewrite contracts for parties.

41. The duties of an Administrator are clearly spelt out in Section 83 of the Law of succession. Section 83(d) provides that **the personal representative shall have the following duties:-**

- d) to ascertain and pay out of the estate of the deceased all the debts.**

42. It is not in dispute that the outstanding balance of Kshs 970,000/= was to be paid on or before the 23rd of November 2021. The Plaintiff and her witnesses admitted that there was an outstanding balance of the purchase price, though PW3 stated that they were not ready to pay the interest accrued thereon. That the balance of the purchase price was to be paid on or before 23rd of November 2011. The outstanding balance of the purchase price owed to the Defendant is a debt to the Estate of Makai Kaluti. As the Administrator of the Estate of her late father, the Plaintiff is duty bound to pay out of the Estate of her late father all the debts. The Plaintiff therefore cannot run away from her duties and obligations as the Legal Administrator of the Estate of late father.

43. I therefore find that the Plaintiff who is the Administrator of the Estate of her late father is bound by the agreement dated 14th of

November 2011. The agreement is therefore binding and enforceable between the Plaintiff and the Defendant.

44. On the issue as to whether the Plaintiff is entitled to the orders sought, it is not in dispute that the late Makai Kaluti Ndunda executed the sale agreement dated 8th of November 2011 and the agreement of refund dated 14th of November 2011. It is the Plaintiff's evidence that the Defendant fraudulently registered the suit land in his name. In her plaint, the Plaintiff stated the particulars of fraud as follows: -

- a) The Defendant using his position to unlawfully execute transfer documents and transfer the deceased's land to his name.
- b) Presenting false information to the lands registry to transfer the deceased land to the Defendant's name.
- c) Secretly transferring land to his name with full knowledge that the Plaintiff and other beneficiaries are unaware of the transfer.

45. The Black's law dictionary defines fraud thus;

"Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud as applied to contracts is the cause of an error bearing on a material part of the contract created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and which an undue and unconscientious advantage is taken of another".

46. In the case of **R.G Patel vs Lalji Makanji (1957) EA 314**, the former Court of Appeal for East Africa 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."

47. Similarly, in the case of **Urmilla w/o Mahendra Shah Vs Barclays Bank International Limited & Another (1979) KLR 78** the court held that;

"allegations of fraud must be strictly proven and that 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. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned."

48. It is the Plaintiff's case that the Defendant used his position as the Director of Malili Ranch Company Limited to execute transfer documents and to transfer the deceased property to himself. The Defendant testified that according to the terms of the sale agreement which he heavily relied on, the transfer was to be effected immediately upon execution of the sale agreement. He stated that after he paid the transfer fees, the process was undertaken by the Survey of Kenya and that it could not be reversed. I have looked at clause 5 of the agreement for sale dated 8th November 2011 and I find that it provides that;

"the seller has obligation to ensure the immediate transfer is effected and shall thus sign all the relevant documentation and/or sheets and/or the requisite consents in furtherance of the transfer process."

49. The parties to the sale agreement rescinded the agreement and executed an agreement of refund of the purchase price. The agreement of refund dated 14/11/2011 rescinded the agreement for sale dated 8th of November 2011. The sale agreement therefore ceased to exist as confirmed by clause e of the agreement of refund which provides as follows: -

"This agreement supersedes all other agreements and shall thus take precedence."

50. It is evident that the letter of allotment was one of the documents that were required to effect the transfer of the suit property. Clause d of the agreement for refund dated 14th of November 2011 provides as follows: -

"The letter of allotment shall remain in the custody of the firm of M/s B.M. Mungáta & Company Associates until the completion of this transaction."

51. I have looked at the letter of allotment dated 5th of August 2006 from Malili Ranch Company Limited (Defence exhibit 1) and I find that the late Makai Kaluti Ndunda, ID No. 3361280, was a member No 841. It is evident from the letter that he balloted for Agricultural Plot No. 17 and for Commercial Plot No. 502. It is also evident from the copy of the Certificate of Title for land parcel number Konza North/Konza/ North Block 2 (Malili) 1934 (Defence exhibit 5) that the Defendant was registered as the owner on 24/5/2017 and a certificate of title was issued on 29/8/2017. Section 26 of the Land Registration Act provides that;

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except;

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

52. As may be observed, the law is extremely protective of title and provides for two instances when the protection can be removed.

53. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

54. In the case of **Alice Chemutai Too vs Nickson Kipkirui Korir & 3 Others (2015) e KLR** the court held that

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26(1) (b) is to remove the protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders”

55. There is no evidence on record as to who presented the transfer documents for registration at the lands office. There is equally no evidence as to what documents were presented to facilitate the transfer and the subsequent registration of the suit land in the Defendant's name. It is however clear that the letter of allotment was the root of the title to the suit land. It is evident from the certificate of title (Plaintiff exhibit 2 and defence exhibit 5) that the suit property is registered in the name of the Defendant. According to the certificate of title (defence exhibit 5), the Defendant was registered as the proprietor of the suit land on 24th of May 2017. The registration was done long after the parties rescinded the sale agreement.

56. The Defendant in his evidence relied on the sale agreement. It is his evidence that the transfer was to take effect immediately. The transfer process could not have been effected as the parties had rescinded the sale agreement. Furthermore, the letter of allotment was to be held by the firm of M/s. B M Mungáta until the refund of the balance of the purchase was concluded. The subject matter in the agreement of refund, was the refund of the purchase price and not the sale of the suit property.

57. I find that the Defendant's title was obtained illegally, unprocedurally or through a corrupt scheme. The Defendant's title is therefore impeached by dint of Section 26(1) (b) of the Land Registration Act. Section 80(1) subject to sub Section 2 of the Land Registration Act empowers the court to order for rectification of a register if it is satisfied that any registration was obtained, made or omitted by fraud or mistake that the certificate of title can be impeached. Having found that the Defendant's registration of the suit property was obtained illegally, unprocedurally or through a corrupt scheme, the same should not be allowed to stand.

58. On the issue as to whether the Defendant is entitled to the orders sought in the Counter Claim, it is not in dispute the parties rescinded the sale agreement by executing an agreement for the refund of the purchase price. The rescission was a result of the breach of the sale agreement. The agreement for refund was clear in its terms. What I can derive from it is that, the agreement set time lines within which the outstanding balance of Kshs 970,000/- was to be paid.

59. Clause b of the agreement dated 14th November 2011 provides that: -

The balance of Kshs 950,000/- plus costs towards the transfer in the sum of Kshs 20,000/- amounting to Kshs 970,000/- (Nine Hundred and Seventy Thousand Shillings Only) shall become payable on or before the 23rd day of November 2011; while clause c provides that: -

The said sum shall be paid on the aforesaid date in full and in default the same shall accrue a 10% monthly interest thereon.

60. The Plaintiff, Pw2, Pw3, and Pw4 admitted that their late father executed the agreement of refund. It is the evidence of the Plaintiff, Pw2, Pw3 and Pw4 that they witnessed the agreement of refund. Pw3 testified that they were ready to refund the principal balance of the purchase price without interest. Having confirmed that the agreement was duly executed by the parties, the court cannot be called upon to rewrite a contract for the parties.

61. The Court of Appeal in the case of **National Bank of Kenya Limited Vs Pipe Plastic Sankolit (K) Lt Civil Appeal No 95 of 1999 held as follows;**

“A court of law cannot rewrite a contract with regard to interest as parties are bound by the terms of their contract. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to procedural abuse.....”

62. Similarly, in the case of **Pius Kimaiyo Langat Vs Co-operative Bank of Kenya Ltd (2017)** the Court of Appeal further stated that;

“We are alive to the hallowed legal maxim that it is not the business of the court to rewrite contracts between the parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

63. In the present case, there was no evidence that the deceased signed the agreement as a result of fraud, coercion or undue influence nor

was it pleaded. In light of the above principles, it is my finding that the contract executed by the parties was lawful and binding upon them.

64. On the issue as to whether the Plaintiff breached the agreement of refund, Black's Law Dictionary 9th Edition defines a breach of contract as;

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

65. It is not in dispute that the outstanding balance of the purchase price was to be paid on or before 23rd of November 2011. The Plaintiff admitted that the outstanding balance was not paid. Her witnesses confirmed her evidence. Pw3 testified that they were not ready to pay the interest on the outstanding balance. The terms of the agreement of refund were very clear. Having failed to pay the outstanding balance on the agreed date, I find that the Plaintiff breached the agreement of refund.

66. Having found that the agreement of refund is binding upon the Plaintiff who is the Administrator of the Estate of the late Makai Kaluti Ndunda, I find that the Defendant is entitled to a refund of the outstanding balance of the purchase price with interest of 10% per month as agreed by the parties. For the avoidance of doubt, the interest on the outstanding balance of the purchase price began to run from 24th of November 2011 until 24th of May 2017 which makes it a total of 67 months. This works out as follows :-

Kshs 970,000 * 67 months x 10% = 6,499,000/-

67. In the end, I find that the Plaintiff has proved her case on a balance of probabilities as required. I therefore enter judgment for the Plaintiff against the Defendant in the following terms: -

a) An order be and is hereby issued for the cancelation of the Defendant's title in Land Parcel No. Konza North/Konza North Block 2 (Malili) 1944.

b) An order be and is hereby issued directing the Machakos County Land Registrar to rectify the Register to reflect the name of Margaret Makai as the registered owner of Konza North/Konza North Block 2 (Malili) 1934.

68. I also find that the Defendant's Counter Claim partially succeeds and I enter judgment for the Defendant against the Plaintiff in the following terms:-

a) A declaration is hereby issued that the Plaintiff being the Legal Administrator of the Estate of the late Makai Kaluti Ndunda is bound by the agreement dated 14/11/2011.

b) A declaration is issued that the deceased and now the Plaintiff breached the clause b and c of the agreement dated 14/11/2011.

c) An order be and is hereby issued that the Plaintiff to pay the Defendant Kshs 6,499,000/- being the balance of the purchase price.

69. Each party to bear its own costs.

.....

HON T. MURIGI

JUDGE

JUDGEMENT SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF MARCH 2022.

IN THE PRESENCE OF: -

Munyao for the Defendant

Plaintiff in person

Court assistant – Mr. Kwemboi