



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 70 OF 2009

CHRISTOPHER MUSYOKA MUSAU.....PLAINTIFF

VERSUS

KATHARINE BROWN.....DEFENDANT

JUDGMENT

Introduction:

1. In the Plaintiff dated 20th March, 2009, the Plaintiff averred that on or about 4th July, 1994 or thereabout, he offered to sell and the Defendant agreed to purchase five (5) acres out of his land registered as L.R. No. 19270, Machakos, at an agreed price of Kshs. 500,000 out of which the Defendant paid Kshs. 350,000 being part payment of the purchase price.
2. The Plaintiff averred that it was a term of the said contract that the said parcel of land would be sub-divided and a deed plan obtained for the said portion, and a separate title issued, but the said process delayed and the Defendant opted to cancel the said transaction citing delay in securing a deed plan for the suit property.
3. According to the Plaintiff, after canceling the Agreement as aforesaid, the Defendant executed a Disclaimer dated 4th July, 2007, the express terms of which were *inter alia* that in consideration of the Defendant waiving all her rights, powers, privileges, benefits or remedies over the suit property, or claims, actions, suits, procedures, costs, expenses, damages and liabilities whatsoever, cause or nature however arising against the said property, the Plaintiff would in consideration of the foregoing pay to the Defendant a total sum of Kshs. 700,000 being the deposit paid as stated above and the agreed "compensation".
4. The Plaintiff averred in the Plaintiff that upon payment as aforesaid, the Defendant was to release and indemnify the Plaintiff from all actions, proceedings, claims, demands, costs and expenses whatsoever which the Defendant may have against him in relation to or arising out of the suit property and that pursuant to the said Disclaimer and or indemnity and, in reliance on the same, he wholly paid to the Defendant, through her advocates, a total sum of Kshs.700, 000.
5. It was averred that subsequently, the Plaintiff learnt that the entire parcel measuring approximately 7.5 acres was transferred to the Defendant under unclear circumstances, notwithstanding that the Agreement was for the sale of 5 acres and that the above transfer was erroneous, fraudulent, illegal and effected with the sole purpose or intention of defrauding the Plaintiff.
6. The particulars of fraud and illegality enumerated in the Plaintiff as against the Defendant are as follows: illegally and secretly transferring 7.5 acres to herself yet the contract was for 5 acres; presenting a forged transfer instrument for registration; falsifying detail of a transfer to read 7.5 acres instead of 5 acres thereby transferring the entire parcel of land to herself; failing to disclose this fact to the Plaintiff and receiving Kshs. 700,000 as a refund knowing that she had transferred the entire parcel of land to herself.
7. The Plaintiff finally averred that the Defendant has without any justifiable cause or legal basis unreasonably failed, refused and or neglected to retransfer the said parcel of land back to him and that the Defendant may not retransfer the suit property to him unless compelled by this court to do so. The Plaintiff has prayed for the following prayers:

a) An order compelling the Defendant to re-transfer L.R. No. 19270 (L.R.No.95867) back to the Plaintiff and or execute the relevant transfer instructions in favour of the Plaintiff.

b) Further and or in the alternative and without prejudice to (a) above, an order authorizing the Deputy Registrar of this Honourable Court to execute transfer instruments transferring L.R. No. 19270 (I.R. No. 95867) to the Plaintiff Christopher Musyoka Musau.

c) Further and or without prejudice to prayers (a) and (b)above, an order directing the Registrar of Titles, Nairobi to delete the

name of Katharine Brown from the L.R. No. 19270(I.R.No.95867) and substitute it with the name of Christopher Musyoka Musau as the Grantee of the said Grant.

d) Costs of the suit.

8. In her Defence and Counter-claim, the Defendant averred that she complied with the terms of the Agreement between the parties which required that 70% of the purchase price be paid before the issue of the title and that 30% would be paid upon receipt of a certificate from an Engineer confirming that the advertised services were in place. These services included the connection of water to the estate which has never taken place to date.

9. The Defendant averred in her Defence that there was an extremely inordinate delay in the issuing of the title for the suit land; that the Plaintiff offered to refund the purchase price paid; that she reluctantly agreed to accept the Plaintiff's offer out of frustration on the issue of obtaining the title to the suit land and give up her rights to the suit land and that although the Title Deed was in fact issued on 16th July, 2003 in her name, she did not know about this, despite her efforts, until after the Plaintiff had induced her to give up on her claim.

10. It is the Defendant's case that her signing of the Disclaimer was informed by the willful and fraudulent non-disclosure of material facts by the Plaintiff; that the Disclaimer was voidable at her option, which option she exercised immediately upon discovery of the fact that she was the legitimate and registered owner of the suit land and that the registration of the land in her favour was well within the Plaintiff's knowledge which fact was deliberately concealed from her until after she signed the Disclaimer.

11. The Defendant averred that the Disclaimer is not a registered conveyance and therefore did not convey the Defendant's interest in the suit land to the Plaintiff; that she received the cheque on a without prejudice basis and that she has been ready and willing to make the refund on the basis that she would not have given up her rights to the land had she known that she in fact has a Title Deed.

12. According to the Defendant, the understanding was that she would re-transfer the extra 2.26 acres to the Plaintiff as the land could not be sub-divided without a Grant being issued first and that she has always been ready to enter into this arrangement but the Plaintiff took it upon himself to try to exhort the whole title for himself, to her detriment.

13. In her Counter-claim, the Defendant averred that the Plaintiff knowingly and fraudulently concealed the fact that a Grant to the suit land had already been issued and got the Defendant to sign the Disclaimer out of frustration with the intention of defrauding the Defendant. The Defendant has prayed for the following reliefs:

a) A declaration that the Defendant is the rightful and legitimate owner of the five (5) acres of the suit land that she purchased from the Plaintiff in the years 1994;

b) Specific performance on the part of the Plaintiff's obligations of the contract of the purchase of the five (5) acres of land registered as LR No. 19270;

c) An order of vacant possession; and

d) Costs of and incidental to the whole suit.

The Plaintiff's case:

14. The Plaintiff, PW1, informed the court that in 1994 or thereabouts, the Defendant, Katherine Brown, expressed interest to purchase a piece of land from him at Maanzoni measuring 5 acres; that the 5 acres were to be excised from his land L.R No. 11066 and that in the sub-division plan, the said portion was marked as plot number 545.

15. PW1 informed the court that he agreed to her request with the agreed purchase price being Kshs. 500,000; that the Defendant paid him a total sum of Kshs. 350,000; that even though the firm of Waki & Co advocates drafted a Sale Agreement, the same was never signed and that the formal sub-division process and securing of individual titles for the various plots, including the plot the subject of this case, took long. According to PW1, it was an express term of the contract that the Agreement was subject to the said sub-division and issuance of a separate deed plan/title.

16. PW1 informed the court that the Defendant, Katherine Brown, changed her mind and demanded her money back; that in fact, even though she had paid him Kshs. 350,000, she demanded for Kshs. 700,000 which he paid by two cheques dated 6th November, 2007 and 27th February, 2008 and that the payment was preceded by her signing a Disclaimer dated 4th July, 2007 drawn by her advocates Kaplan & Stratton advocates.

17. According to PW1, in the Disclaimer drawn by the Defendant's advocates and signed by her, she *inter alia* stated that she had paid Kshs. 350,000 to him for the said land and that no deed plans or title were exchanged, transferred or otherwise dealt with and that in consideration of himself paying her Kshs. 700,000, she would disclaim any right to the said property.

18. It was the evidence of PW1 that in the Disclaimer, the Defendant waived any rights, powers, privileges, benefits or remedies, claims, actions, suits, costs, expenses, damages and liabilities over the property and further that she agreed to release him against any proceedings, claims or demands over the suit property.

19. PW1 stated that the effect of the said document was that she renounced all her rights and interests to the said land; that she signed the

Disclaimer voluntarily and that on the strength of the said Disclaimer, he paid her Kshs. 700,000 and the transaction was cancelled.

20. It was the evidence of PW1 that subsequently, his advocates discovered that a Grant was issued in the Defendant's name; that they had never presented a transfer to that effect for registration; that instead of the 5 acres Katherine Brown was buying, a Grant had been issued in her name for a total of 7.5 acres (2.941 Ha) being L.R. No. 19270 and that the land transferred to her was 2.5 acres more than what she had purchased.

21. PW1 stated that although the Grant is still registered in the name of Katherine Brown, she has refused to transfer the land back to him; that the Defendant cancelled the Agreement of Sale and cannot claim any interest in the land and that this court should cancel the title on grounds of fraud and or order that the Defendant to transfer it back to him.

22. In cross-examination, PW1 stated that he only sent to the Defendant's advocate a certified copy of the title for L.R. No. 19270 which was issued in favour of the Defendant on 16th July, 2003; that the total number of the plots he was selling were 826 and that they only discovered the title document had been registered in favour of the Defendant while making a follow up on the rest of the title documents.

23. According to PW1, he never picked the title document from lands; that he only obtained a certified copy from the lands offices; that he surrendered the deed plan for the suit property to his lawyers and that they agreed that the Defendant was to retransfer to him 2.5 acres which was to be used to put up a water tank.

24. According to PW1, he surrendered the deed plan in respect of the portion of land he was selling to the Plaintiff to her advocates; that the title was supposed to come out in his name before he could transfer the land to the Defendant and that he never signed the transfer document in favour of the Defendant.

The Defendant's case:

25. On her part, the Defendant, DW1, informed the court that she entered into a Sale Agreement with the Plaintiff in January, 1994 for the purchase of 5 acres at an agreed purchase price of Kshs. 500,000 for the suit land registered as L.R. No. 19270; that she complied with the terms of the Agreement which required that 70% of the purchase price be paid before the issue of the title and that 30% of the purchase price was to be paid upon receipt of a Certificate from an Engineer confirming that the advertised services, which included the connection of water to the estate, were in place.

26. DW1 stated that there was an extremely inordinate delay in the issuing of the title for the suit land; that after diligently following up on the issue of the title for the suit land from 1994 to 2007 without success, the Plaintiff offered to purchase the land from her and that she executed a Disclaimer in July, 2007 on the basis that there was no title.

27. It was the evidence of DW1 that she would never have signed the Disclaimer if she had known that she was already the registered and rightful owner of the suit property; that her signing of the Disclaimer was informed by the willful and fraudulent non-disclosure of material facts by the Plaintiff, which Disclaimer was voidable at her option and that notwithstanding that the Grant was in fact issued before the Disclaimer was signed, she did not know this and neither did her advocates at the time.

28. DW1 stated that she exercised the option of avoiding the Disclaimer upon discovery that she was the legitimate and registered owner of the suit land; that she communicated her intention to refund the money paid pursuant to the Disclaimer together with interest and that the money was received on a without prejudice basis and is still held in a client account held by the Advocates who were handling the transaction.

29. The evidence of DW1 was that the Plaintiff knew about the issuance of the Grant in her name way before she signed the Disclaimer but concealed this fact; that to this date, she has never sighted the original Grant; that the Grant was rightfully issued to her as the legitimate owner of the suit land and that she lays no claim whatsoever over the 2.4 acres over and above the 5 acres that she purchased.

30. DW1 stated that the Plaintiff knowingly and fraudulently concealed the fact that a Grant to the suit land had already been issued and got her to sign the Disclaimer out of frustration with the intention of defrauding her; that she was unable to get the full market price of the suit land as no prospective purchaser was willing to purchase the property without the title document and that she was forced to sell the property back to the Plaintiff who had failed to perform his part of the agreement for the sale of the suit land under the erroneous believe that there was no title to the property.

31. In cross-examination, DW1 denied having received the letter dated 2nd December, 2004. According to DW1, by 2nd December, 2004, she was already in England and that the letter dated 2nd December, 2004 was never brought to her notice. DW1 stated that she never entered into a formal agreement with the Plaintiff and that no title documents were ever exchanged.

32. The Defendant's conveyance advocate, DW2, informed the court that the continuous attempts to obtain a title document were fruitless; that in the year 2007, the terms of waiver were agreed upon between the Plaintiff and the Defendant and that the Defendant agreed to give up her rights in respect to the suit property in exchange of Kshs. 700,000

33. According to DW2, a few days after the Disclaimer agreement was signed, he received from the Plaintiff a copy of the Grant in favour of the Defendant together with a letter requesting the Defendant to transfer the title to the Defendant; that all along, the Plaintiff knew that the title had been issued in favour of the Defendant and that the Disclaimer was unenforceable on account of mistake and misrepresentation.

34. According to DW2, they wrote to the Plaintiff's advocate repudiating the Disclaimer Agreement; that the Defendant agreed to refund the money paid to her by the Plaintiff and retransfer to the Plaintiff 2.5 acres that were over and above the 5 acres that she had purchased and that

they applied for a provisional Grant for the suit property which they are holding.

The Plaintiff's submissions:

35. The Plaintiff's advocate submitted that in 1994, there was an oral agreement between the parties; that the agreement was that the Plaintiff would obtain a Title Deed for L.R. No. 19270 from the Commissioner of Lands, sub-divide it and transfer 5 acres to the Defendant and that the purchase price for the 5 acres was Kshs. 500,000.

36. The Plaintiff's advocate submitted that even though PW1 applied his best efforts to obtain the Title Deed in his name, he failed; that the parties herein freely accepted to bind themselves to the above terms; that there was consensus *ad idem* that the Title Deed would be issued in the Plaintiff's name and that there was neither a variation of the terms of the oral agreement nor was there a revocation of the said terms. Counsel relied on the case of **Kenya Breweries Ltd vs. Kiambu General Transport Agency Ltd [2000] 2 EA 398**.

37. The Plaintiff's counsel submitted that nonetheless, M/S K.H. Osmond Advocate would aid and abet breach of the agreement in a very irregular and fraudulent fashion so as to cause the Title Deed to be issued in the Defendant's name; that none of this information was shared with the Plaintiff and that the Plaintiff never signed any transfer forms for the suit property as required. Counsel relied on the case of **Sukhdev Singh Laly vs. Philip Ojwang Kamau & 3 others [2018] eKLR**, where the Court of Appeal held as follows:

"Since Ojwang's title was unknown to the Registrar of Titles, because no valid documents existed to support the transfers or the endorsements to Akuka, his title was discredited, as were the ensuing transfers to Sukhdev or Ojwang. This lends credence to the assertion that since no root of their title was established, they were rendered invalid. Akuka's title was empty and devoid of substance or foundation. It was defective, invalid and incapable of conveying any rights to a third party. And it mattered not that it mysteriously found its way into the registry. Without such rights attached to it, it was nothing but a worthless piece of paper. So that the Jethwas, not having executed a transfer in favour of Charles Oduol Akuka or any other persons, it could not be said that they passed on their proprietorship or the interests that had vested in them in the suit property to Sukhdev, or to Ojwang, who in turn, did not acquire any rights or interest in the suit property."

38. Counsel submitted that this court should find the Defendant's Title Deed fraudulent; that the Defendant willingly proposed to waive all her rights in the suit property; that in fact, the 2007 Disclaimer was the Defendant's idea and that at all times, the Defendant, through her advocates, were in constant communication with the Commissioner of Lands with a motive to defeat the Plaintiff's title and have the same issued in her name.

39. It was submitted by the Plaintiff's counsel that no sufficient evidence has been adduced by the Defendant in order to prove the alleged misrepresentation, deception and or concealment of material facts by the Plaintiff at the signing of the Disclaimer and that the Defendant having already been guilty of breach of the original oral agreement is estopped from enforcing any part thereof as a consequence of her own fraud.

40. It was submitted that the Disclaimer dated 4th July, 2007 conclusively defined the intention of the parties; that the Disclaimer was negotiated and executed willingly; that the Plaintiff paid the full consideration of Kshs. 700,000 and that during negotiations and at the time of signing the Disclaimer, the option to renew the original agreement or to make the Disclaimer in any manner voidable was not open.

41. The Plaintiff's advocate submitted that the Defendant cannot proceed to enforce the original agreement for disposition of land when there is no contract in writing. Counsel relied on the provision of Section 3(3) of the Law of Contract Act which provides as follows:

"No suit shall be brought upon a contract for the disposition of an interest in land unless—

a) the contract upon which the suit is founded—

i) is in writing;

ii) is signed by all the parties thereto; and

b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

42. The Plaintiff's advocate finally submitted that this court cannot rewrite the Disclaimer herein and cannot allow the prayers sought in the Plaintiff's Complaint and that the Plaintiff's claim is justified. In contrast, it was submitted, the Defendant does not have a cause of action at law and or equity.

The Defendant's Submissions:

43. The Defendant's advocate submitted that it was the Plaintiff who was in control of the process of the development and sub-division of the Maanzoni property and hence in charge of the process of transfer of the land to the Defendant and that the Plaintiff did not lead evidence to prove the allegations of illegality, secret transfer of property, forgery or falsification as alleged in the Complaint.

44. It was submitted by the Defendant's advocate that the Plaintiff did not adduce before the Court evidence of any fraud on the part of the Defendant and, therefore, the claim for fraud against the Defendant fails.

45. On the contrary, it was submitted, the evidence adduced before the Court by both parties is clear that the Plaintiff not only had control of the development, but also of the sub-division and was the one who collected the original Title Deed from the Lands Registry in Nairobi. Counsel relied on the cases of ***Gichinga Kibutha vs. Caroline Nduku [2018] eKLR*** and ***Kuria Kiarie & 2 Others vs. Sammy Magera [2018] eKLR***.

46. It was submitted that the Plaintiff knowingly and fraudulently concealed the fact that a Grant to the suit land had already been issued and induced the Defendant to sign the Disclaimer to defraud her; that the Disclaimer is therefore voidable at the option of the Defendant; that a voidable contract is defined as a formal agreement between two parties that may be rendered unenforceable and that the Defendant signed the Disclaimer Agreement out of frustration and upon material non-disclosure by the Plaintiff that the Title Deed for the suit property had already been issued in her name.

47. Counsel relied on the case of ***Mamta Peeush Mahajan (Suing on behalf of the Estate of the late Peeush Premal Mahajan) vs. Yashwant Kumari Mahajan (Sued personally and as Executrix of the Estate and beneficiary of the Estate of the late Krishan Lal Mahajan) [2017] eKLR***, where Onguto J. stated as follows:

“...the correspondence after 2012 was not about acceptance but evidence that the parties believed that there was a binding contract in place and they now wanted to vary the same with respect to payment details and days, value of consideration, nature of consideration and sooner completion. The attempted variation collapsed and left intact was again the original contract. It leads me to the vitiating factors raised by the Defendant; fraud, misrepresentation, illegality, duress, et al. It is trite that once the defendant’s signature is proved or admitted, the plaintiff has discharged his or her burden and the burden is then on the defendant to prove fraud, misrepresentation, illegality, duress or whatever defence he or she might have. The burden likewise shifts once it is shown that an agreement, oral or otherwise, exists.”

48. The Defendant’s advocate submitted that the Disclaimer Agreement was a confirmation that both the Plaintiff and Defendant knew that there was a valid agreement for sale that existed between them; that the Disclaimer Agreement sought to vary the terms of the agreement for sale and that the Disclaimer Agreement was marred by material non-disclosure and fraudulent intent on the part of the Plaintiff, hence the Defendant signed it by mistake and on a misrepresentation of the facts, making it voidable. Counsel relied on the case of ***Monarch Insurance Company Limited vs. Swaleh Moi Juma [2020] eKLR*** and ***Nebart Njeru Munyi vs. Nicholas Muriithi Zakaria [2015] eKLR***.

49. Counsel finally submitted that this court should find that the Disclaimer was avoided by the Defendant and hence its contents could not be imported into the transaction for the sale of the suit property and enforce the Defendant’s proprietary rights over the suit property.

Analysis and findings:

50. Arising from the pleadings and the evidence of the parties, the following are the issues for determination:

- a) *Whether the Defendant is the lawful proprietor of the suit property.*
- b) *Whether the Plaintiff misrepresented, deceived and or concealed material facts from the Defendant at the time of signing the Disclaimer.*
- c) *Whether there exists any enforceable agreement (s) between the Plaintiff and Defendant.*
- d) *Whether the Plaintiff and the Defendant are entitled to the prayers sought.*

51. The Plaintiff sued the Defendant by way of a Plaint dated 20th March, 2009 seeking that Judgment be entered against the Defendant for:

- a. *An order compelling the Defendant to re-transfer L.R. No. 19720 (I.R. No. 95867) (“the suit property”) to the Plaintiff and/or execute the relevant transfer instruments in favour of the Plaintiff;*
- b. *Further and/or in the alternative and without prejudice to (a) above, an order authorizing the Deputy Registrar of this Honourable Court to execute transfer instruments transferring the suit property to the Plaintiff;*
- c. *Further and/or without prejudice to (a) and (b) above, an order directing the Registrar of Titles, Nairobi to delete the name of the Defendant from the suit property and substitute it with the name of the Plaintiff as the Grantee of the said Grant; and*
- d. *Costs of the suit.*

52. The suit was opposed by the Defendant vide her Defence and Counter-claim. In the Counter-claim, the Defendant prayed for the following reliefs:

- a) *A declaration that the Defendant is the rightful and legitimate owner of five (5) acres of the suit land that she purchased from the Plaintiff in the year 1994;*
- b) *Specific performance on the part of the Plaintiff’s obligations of the contract of the purchase of the five (5) acres of land registered as LR. No. 19270;*
- c) *An order of vacant possession; and*

d) *Costs of and incidental to the whole suit.*

53. In his evidence, the Plaintiff, PW1, informed the court that he orally agreed with Defendant to transfer 5 acres of land known L.R. No. 19720 (*suit property*) to the Defendant upon payment of the full purchase price being Kshs. 500,000. It was his evidence that they agreed that he would obtain the Title Deed of the suit property issued in his name, sub-divide it and transfer the agreed 5 acres to her with no extra costs to her.

54. According to the Plaintiff, with a view of actualizing the oral agreement he had with the Defendant, through Messrs. Wagerika N.N & Co. Advocates, he released the original Deed Plan No. 182447 and a Sub-division Scheme Approval dated 22nd July, 1994 to Messrs. K.H. Osmond Advocates to facilitate issuance of the Title Deed in his name before he could sub-divide the land and transfer to the Defendant the agreed 5 acres.

55. The Plaintiff's case is that he never signed any transfer documents for the suit property in favour of the Defendant, and that when the transaction took long to be completed, the Defendant voluntarily offered to relinquish her interest in the suit property in exchange for valuable consideration being Kshs. 700,000 which he paid her, upon her signing the Disclaimer Agreement.

56. On her part, it is the Defendant's case that there was an extremely inordinate delay in the issuing of the title of the suit land; that after diligently following up on the issue of the title for the suit land from 1994 to 2007 without success, the Plaintiff offered to purchase the land from her and that she executed a Disclaimer in July, 2007 on the basis that there was no title.

57. It was the evidence of the Defendant that she would never have signed the Disclaimer if she had known that she was already the registered and rightful owner of the suit property; that her signing of the Disclaimer was informed by the willful and fraudulent non-disclosure of material facts by the Plaintiff, which Disclaimer was voidable at her option and that notwithstanding that the title was in fact issued before the Disclaimer was signed, she did not know about that fact and neither did her Advocates at the time.

58. The evidence before this court shows that on 8th March, 1995, and after the oral agreement that the Plaintiff and the Defendant had entered into for the sale of 5 acres of L.R. No. 19270, the Plaintiff's advocate forwarded to the Defendant's advocate a Deed Plan for the land that the Defendant was interested in purchasing in the following terms:

"We did advise earlier that the plot your client is interested in buying is 7.4 acres...We also enclose the Deep Plan. We are not in a position to further sub divide the plot for the water tank. All we wanted your client to confirm is whether she is agreeable to later releasing that extra piece of land to our client who will be managing the water. Kindly revert with your client's final word in this matter."

59. In response to the Plaintiff's advocate letter, in his letter dated 29th March, 1995, the Defendant's advocate agreed to the proposals by the Plaintiff, which included *"taking the title for the whole of the abovementioned property measuring 7.4 acres on the basis that she release to your client 2.4 acres at a later date."*

60. In her letter dated 19th November, 1998, the Plaintiff's advocate informed the Defendant that she had been advised that L.R. No. 19270 measuring 7.4 acres could not be sub-divided until a Grant (*title*) is issued. In that letter, the Plaintiff's advocate informed the Defendant as follows:

"Our client's (the Plaintiff) firm instructions are that the Grant be issued directly to him to hasten the process at the Lands Office and thereafter we shall sub-divide the parcel of land...We shall therefore proceed to obtain the Grant and keep you informed."

61. In her letter dated 5th August, 1999, the Plaintiff's advocate informed the Defendant that they have already forwarded the documents to the Lands Office for purposes of obtaining the Grant *"in our client's (the Plaintiff) name."* The penultimate paragraph of the letter stated as follows:

"We shall therefore proceed to obtain the Grant and keep you informed."

62. Although the Plaintiff's advocate did not state the documents that she had forwarded to Lands Office for the purpose of having the Grant issued, it follows that one of the documents must have been the Deed for L.R. No. 19270 measuring 7.4 acres.

63. Vide her letter dated 9th January, 2000, the Defendant made a follow up with the Plaintiff's advocate on why it had taken long for the Grant to be issued. The Plaintiff produced in evidence a letter dated 30th May, 2002 by the Commissioner for Lands addressed to the law firm of K.H. Osmond in which they approved the transfer of L.R. No. 19270, on condition that stamp duty is paid and *"informal transfer form duly signed by the two parties before an advocate."*

64. The evidence before me shows that by way of a letter dated 23rd April, 2001, K.H. Osmond advocates informed the Plaintiff's advocates that they were acting for the Defendant and requested for the original allotment letter and the Deed Plan to enable them complete the transaction. On 25th April, 2001, the Plaintiff's advocate forwarded to the said firm Deed Plan number 182447 and the approved sub-division scheme. The receipt of the said documents was duly acknowledged by the clerk of K.H. Osmond Advocate.

65. The Plaintiff's advocates made a follow up by way of numerous letters on whether the land had been registered in favour of the Plaintiff as agreed. After the Plaintiff's advocates informed the Defendant's advocate vide their letter dated 2nd December, 2004 that they were aware that the land had been unlawfully registered in the name of the Defendant, the Defendant's advocates informed the Plaintiff's advocate that

the Defendant “wishes to sell back her property” to the Plaintiff for Kshs. 1.5 Million.

66. What is clear to this court is that all along, the parties had agreed that the grant for L.R. No. 19270 measuring 7.4 acres was to be issued in favour of the Plaintiff who would then sub-divide the land and transfer to the Defendant 5 acres. That being so, it is unlikely that the Plaintiff signed any transfer documents transferring L.R. No. 19270 measuring 7.4 acres to the Defendant.

67. The documents produced by the Defendant shows that on 28th October, 2003, the Defendant made a payment of Kshs. 16,157 to the Lands office for L.R. No. 19270. The Defendant did not inform this court what this payment was for. The letters dated 4th June, 2004, 4th October, 2004 and 6th July, 2004 by the Defendant’s advocate shows that it is the said advocates who were making a follow up for the issuance of the title for L.R. No. 19270. In the letter dated 4th June, 2004, the firm of Kaplan & Stratton informed the Commissioner of Lands as follows:

“We understand that the title had already been prepared, stamped and taken to the land rent section for confirmation of payment of land rent..We understand that K.H. Osmond Advocate has been attempting to extract the Title Deed for over 4 years and in the circumstances we would be grateful.”

68. It is instructive to note that all the letters by the firm of Kaplan and Stratton to the Commissioner of Lands inquiring into the issuance of the title were never copied to the Plaintiff’s advocates. In fact, by June, 2004, the Defendant’s advocates were aware that the title for L.R. No. 192270 had already been prepared. This notwithstanding, in their letter dated 24th May, 2006, the firm of Kaplan & Stratton informed the Plaintiff’s advocate that they did not hold the Deed Plan, and were not aware of its whereabouts.

69. While awaiting the issuance of the title in favour of the Defendant, on their own volition, the Defendant’s advocates informed the Plaintiff’s advocates vide the letter dated 24th May, 2006 that their client “is prepared to relinquish her interest in the property against payment of the sum of Kshs. 360,000 together with all interest thereon calculated from September, 1994...” In the letter dated 19th June, 2006, the Defendant’s advocates informed the Plaintiff’s advocates that the Defendant had agreed to relinquish her claim to the plot for the sum of Kshs. 700,000.

70. It is the agreement between the parties, as proposed by the Defendant herself, that informed the Disclaimer Agreement dated 4th July, 2007 in which the Defendant agreed to “waive any rights, powers, benefits or remedies whatsoever over the property.”

71. The evaluation of the evidence before me shows that although the Plaintiff applied his best efforts to obtain the Grant in his name, he failed. The evidence before me also shows that the parties herein freely accepted to bind themselves, firstly to the oral agreement, and secondly to the Disclaimer Agreement of 4th July, 2007.

72. The evidence before me further shows that at all times, the parties herein cooperated towards mutual fulfillment of the said terms in order to bring the transaction to fruition, including agreeing that the Grant for 7.4 acres should be issued to the Plaintiff. However, the Grant was issued and registered in the name of the Defendant on 15th September, 2004, a fact that the Plaintiff was not aware of until after the Disclaimer Agreement had been signed on 4th June, 2007.

73. Having evaluated the evidence before me, it is my finding that K.H. Osmond aided and abetted a breach of the oral agreement between the parties so as to cause the Grant to be issued in the Defendant’s name, which was not in the original arrangement as agreed by the parties. Further, none of this information was shared with the Plaintiff.

74. Most importantly, the Plaintiff never signed any transfer forms for the suit property as required. Indeed, even the Defendant herself did not produce any evidence to show that she signed the transfer document in respect of the suit property as requested by the Commissioner of Lands. Furthermore, no advocate was called to testify that he/she witnessed the Plaintiff and the Defendant sign the transfer document for L.R. No. 19270.

75. That being the case, the Defendant cannot claim any legal right from an invalidly and fraudulently obtained Grant. The actions of the Defendant, or her advocates, to have the entire land registered in her favour invalidates the oral agreement that she had with the Plaintiff in respect of the 5 acres that she purchased.

76. The Defendant willingly proposed to waive all her rights in the suit property. In fact, the 2007 Disclaimer was her idea. More significantly, M/S Kaplan & Stratton Advocates who prepared the Disclaimer in the year 2007 knew of the existence of a Grant in the Defendant’s name as far back as the year 2004.

77. Evidently, the Plaintiff never concealed the fact of the Grant being in existence to the Defendant before the signing of the Disclaimer in 2007 as alleged. To the contrary, it is the Defendant who all along knew that the Grant was only to be issued in favour of the Plaintiff. The particulars of misrepresentation and fraud pleaded in the Counter-claim must therefore fail.

78. Indeed, no sufficient evidence was adduced by the Defendant to prove the alleged misrepresentation, deception and or concealment of material facts by the Plaintiff at the signing of the Disclaimer. As I have already stated, the Defendant having already been guilty of breach of the original oral agreement by having the Grant registered in her name is estopped from enforcing any part thereof as a consequence of her own fraud.

79. Further, the Disclaimer dated 4th July, 2007 conclusively defined the intention of the parties. It was negotiated and executed willingly. The Plaintiff paid the full consideration of Kshs. 700,000 which the Defendant accepted. In the case of **Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited (2014) eKLR**, the Court of Appeal held as follows:

*“It is not for the court to rewrite a contract for the parties. As this court held in **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd**. Civil Appeal No. 95 of 1999 “a court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”*

80. The Disclaimer Agreement between the Plaintiff and the Defendant is in clear and express terms. It is neither vague nor capable of misconstruction. During negotiations and at the time of signing the Disclaimer, the option to renew the original agreement or to make the Disclaimer in any manner voidable was not open. As a matter of fact, the Defendant lost any option to revive the original agreement by her own conduct.

81. Having been paid Kshs. 700,000 by the Plaintiff, and having stated in her letters that she was willing to resell the land she bought from the Plaintiff to the Plaintiff, the Defendant cannot claim to be the rightful owner of 5 acres of the suit property. Indeed, the Defendant has not shown why she should be granted an order of specific performance of the 1994 oral agreement. Specific performance being an equitable remedy, the Defendant soiled her hands when she had the suit property registered in her favour contrary to what she had agreed with the Plaintiff.

82. Even if this court was to find that the Disclaimer Agreement was voidable on the ground of fraud, misrepresentation or mistake, the Defendant would still not be able to enforce the oral agreement of 1994 in respect to the suit land. Section 3(3) of the Law of Contract Act (as amended by Act No. 2 of 2002) provides as follows:

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

a) the contract upon which the suit is founded—

i) is in writing;

ii) is signed by all the parties thereto; and

b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

83. Having not reduced the oral contract in writing, the Defendant’s only recourse would have been to seek for a refund of the purchase price.

84. Considering that the Defendant is asking this court to revoke the Disclaimer and to reinstate an oral agreement that she never complied with, the Defendant is asking this court to rewrite the contract that she entered into with the Plaintiff voluntarily. In **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, the Court of Appeal held as follows:

*“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of **Fina Bank Limited vs. Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported)**:*

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

85. Having found that the Plaintiff did not act fraudulently or by misrepresentation, this court cannot rewrite the Disclaimer Agreement dated 4th July, 2007, nether can it find the Agreement to be void or voidable. Having been paid Kshs. 700,000, it is my finding that the Defendant, who had the land fraudulently registered in her name, should transfer the suit property to the Plaintiff.

86. Based on the evidence before this court, it is my finding that the Plaintiff has proved his claim on a balance of probabilities. On the other hand, the Defendant has not proved her Counter-claim on a balance of probabilities.

87. For those reasons, the Defendant’s Counter-claim dated 12th February, 2013 is dismissed with costs while the Plaintiff’s Plaint dated 20th March, 2009 is allowed as follows:

a) An order be and is hereby issued compelling the Defendant to re-transfer L.R. No. 19270, IR 95867 back to the Plaintiff and or execute the relevant transfer instructions in favour of the Plaintiff.

b) In the event the Defendant does not transfer L.R. No. 19270 to the Plaintiff, the Deputy Registrar of this court to execute transfer documents transferring L.R. No. 19270 (IR 95867) to the Plaintiff.

c) The Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 7TH DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE