



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 171 OF 2015

KIHUBA HOLDINGS LIMITED.....PLAINTIFF

VERSUS

CHARO KARISA NGULU.....DEFENDANT

JUDGMENT

(Plaintiff filing suit seeking specific performance of a sale agreement; in the alternative general damages and refund of the purchase price; defendant filing a counterclaim for vacant possession, mesne profits and general damages; plaintiff and defendant having entered into a sale agreement where the plaintiff was purchaser and the defendant vendor of land; plaintiff having been a tenant before the sale agreement; sale agreement providing for a deposit to be paid and the parties to complete within 90 days; plaintiff claiming that the defendant failed to present the completion documents particularly the original title deed before the completion date; defendant on the other hand asserting that it was the plaintiff who breached the contract by failing to present the balance of the purchase price within the completion period; there being letters written by their mutual advocate that he is holding the original title deed; apparent therefore that the defendant had deposited the title with the advocate and had completed his part of the bargain; balance of the purchase price being declared as available after the completion date; it was therefore the plaintiff who was in breach of the agreement and not the defendant; agreement providing that in case of breach, the agreement would be declared null and void and vendor to be refunded; only remedy of the plaintiff is refund of the deposit; plaintiff has no right to be on the premises and ordered to vacate and pay mesne profits equivalent to the rent payable; defendant entitled to costs)

A. Introduction and Pleadings

1. This suit was commenced through a plaint that was filed on 28 July 2015 and subsequently amended. It is the case of the plaintiff that she was tenant of the defendant in the land parcel Mombasa/Mwembelegeza/940 which was said to have since changed to the land parcel Mombasa/Mwembelegeza/1670. It is pleaded that on 29 January 2014, the plaintiff entered into an agreement with the defendant for the purchase of the land for the sum of Kshs. 9,500,000/=. The completion date was 90 days. The plaintiff avers to have paid a deposit of Kshs. 1,000,000/= pending delivery of the completion documents by the defendant. It is pleaded that on the completion date, the defendant failed to deliver the completion documents despite the fact that the plaintiff was able and willing to pay the balance of the purchase price. The plaintiff has pleaded that she is still interested in purchasing the suit premises where it has heavily invested, but that the defendant, without any colour of right has served her with intention to sell to a third party thus requiring the plaintiff to give vacant possession. In the suit, the plaintiff has asked for the following orders :-

- a. An order of injunction restraining the defendant either by himself, his agents or servants or otherwise howsoever from selling, and or evicting the plaintiff or otherwise howsoever entering upon or dealing with the suit premises now known as Mombasa/Mwembelegeza/1670.*
- b. A declaration that the plaintiff is entitled to specific performance of the sale agreement dated 29 January 2014 in respect of Plot No. Mombasa/Mwembelegeza/1670.*
- c. In the alternative, an award of general damages and a refund of the deposit paid to the defendant.*
- d. Costs of the suit.*
- e. Any other remedy this honourable court may deem just in the circumstances.*

2. The defendant filed a defence and counterclaim. He denied failing to deliver the completion documents to the plaintiff. He averred that he indeed delivered the same to their joint advocate but the plaintiff failed to secure the balance of the purchase price from her financier and neither the advocate nor the financier was ready to give the plaintiff a professional undertaking. He admitted serving the plaintiff with a

notice of termination and averred that this was consistent with clauses in the agreement for sale. He pleaded that it was the plaintiff in breach of the agreement and has no right to enjoy the property. In his counterclaim, he pleaded that the plaintiff is in possession of the suit premises despite her lease having expired. He asked for the following orders :-

- a. A declaration that the plaintiff is in breach of the agreement dated 29 January 2014, between the plaintiff and the defendant hence, the same is null and void;*
- b. An order that the plaintiff do give the defendant vacant possession of the suit property;*
- c. An order that the plaintiff do pay the defendant mesne profit of Kshs. 25,000/= per month from November 2015 till vacant possession is given to the defendant;*
- d. General damages for deprivation of the use and enjoyment of the suit premises;*
- e. Interest and cost of the suit.*

3. The plaintiff filed a reply to defence and defence to counterclaim. She pleaded that she was a bona fide purchaser for value and was entitled to quiet possession of the property. She pleaded that the plot number of the property was changed from Mwembelegeza/940 to Mwembelegeza/1670 without any lawful explanation, and it was a subject of investigation by the County Commissioner, and the County Government of Mombasa as it is suspected to be public land. She asked that the counterclaim be dismissed with costs.

B. Evidence of the Parties

4. PW-1 was Genoveva Wangare Mugo. She stated that she is a director of the plaintiff company. She testified that they entered into the sale agreement with the defendant on 29 January 2014. The plot was identified as Mombasa/Mwemberlegez/940 (hereinafter described as Plot No. 940). The purchase price was Kshs. 9,500,000/= and the plaintiff was to pay 10% thereof. A sum of Kshs. 1,000,000/= was paid. They had a mutual advocate, a Mr. Wachira, and he is the one who prepared the sale agreement. She stated that on receipt of the deposit of the purchase price, the defendant was to deposit the completion documents with the advocate, with the completion period being 90 days. She testified that the balance was to be financed by a bank and that the defendant was aware of this. She stated that she processed the loan (for the balance) and was given a letter of offer for Kshs. 6,500,000/=. She stated that she had Kshs. 2,000,000/= in her account and that she communicated this to the advocate. She testified that their advocate requested the defendant to deposit with him the title documents but the defendant responded that he could not release the original title deed. When he refused to do so, she became suspicious and engaged a valuer. She was informed that there are two titles and that the Plot No. 940 was located somewhere else and not where she had been shown. She later got a copy of the title for Mombasa/Mwembelegeza/1670 (hereinafter referred to as Plot No. 670) and the mutation form. She wondered why the plot had changed numbers from 940 to 1670 and no explanation about the change of number came from the defendant despite being written to. She nevertheless registered a caveat. Subsequently she was issued with a notice terminating the agreement with the defendant saying that he had found another buyer as he had waited for the purchase price for 2 years. She stated that she has heavily invested in the property where she runs a bar and restaurant business. She said that the bank is still willing to finance her. She denied that her advocate refused to give an undertaking and stated that it was the defendant who had not deposited the title. She claimed that it was the defendant in breach. She stated that she had been the defendant's tenant for close to 10 years and was paying rent of Kshs. 25,000/=.

5. Cross-examined, she testified inter alia that the plaintiff company had two directors, herself and her husband. Her husband however died before the transaction could be completed. She asserted that completion was not met because the defendant did not hand over the title documents. She was however referred to a letter dated 28 April 2014, written by Mr. Wachira Advocate stating that the title deed is deposited with him. She said that this letter was addressed to the bank so that the bank may release the funds. She insisted that the defendant never deposited the title. She acknowledged that the letter of offer from the bank (Equity Bank) was dated 12 May 2014. She denied that she started looking for funds after the title had been deposited. She testified that this title was to be used as security for the loan. She acknowledged that in various letters the defendant requested for a professional undertaking. She conceded that no professional undertaking was ever given. She testified that there was a mutation of the original plot and what is there is now smaller. She agreed that she is still in the premises and she contended to be fully paid up in rent.

6. Re-examined, she affirmed that the defendant has requested for a professional undertaking which she said she was willing to give. She stated that the bank delayed in issuing its letter because the bank realised that there were fishy deals. She wished that the defendant had told her that he had proper documents. She did not know whether her deposit would be transferred to the Plot No. 1670. She did not know why Mr. Wachira wrote the letter dated 28 April 2014 to the bank (stating that he has the original title deed).

7. PW-2 was David Kamau Wachira. He is an advocate practising in the law firm of M/s Muraya & Wachira Advocates. He testified that the parties came to his office to do a sale agreement and the agreement dated 29 January 2014 was prepared. The purchase price was Kshs. 9,500,000/= and a deposit of Kshs. 1 million had been paid prior to drawing the agreement. The completion date was 90 days and the vendor was to bring the completion documents to his office to process the transfer. He stated that the vendor did not comply despite writing several letters to him. He testified that the bank was financing the transaction. He testified that his firm wrote a letter asking the bank to transfer funds to the vendor's account. He testified that the vendor started bringing other terms that were not in the original agreement. On the change of the numbering of the title, he stated that he was not informed as there was already bad blood.

8. Cross-examined, he testified inter alia that he was the one who drafted the sale agreement and he acted as the joint advocate for the parties. He knew the directors of the plaintiff before as they were his clients. The defendant was brought to him by the directors of the plaintiff after they had agreed to the transaction. He confirmed that a letter dated 25 April 2014 (asking the defendant to inter alia deposit the original title with him) and a letter dated 28 April 2014 (informing the bank that the original title document is with his law firm) emanated from his office. He could however not remember if the defendant visited his office on 28 April 2014. He denied that the defendant brought the documents in his office on 28 April 2014 because he would have completed the transaction. He denied that the defendant made several visits to his office but was being dodged. He acknowledged that the defendant requested for a professional undertaking. He stated that he could not give the

undertaking because it was the bank financing the transaction. He did not write any letter addressing the issue. Re-examined, he stated that the letter requesting for a professional undertaking came after the completion period. He said he would not have written a letter acknowledging receipt of the documents as he was their joint advocate. He stated that he would have completed the transaction if he was given the documents but the defendant did not provide the same. He testified that the defendant in his letters did not mention that he was holding the documents. He could not give an undertaking because he was their joint advocate and the money was not in his account.

9. With the above evidence, the plaintiff closed her case.

10. The defendant testified that he works as an accountant in Nairobi. He stated that Paul Mugo (husband to PW-1), was his tenant holding a lease of five years from 2008 – 2013 over the property Plot No. 940/I/MN. When the lease was about to expire he informed him that he was interested in purchasing the property and they agreed that he could buy it at Kshs. 10 million. He paid a deposit of Kshs. 1 million on 29 January 2014. Mr. Mugo then took him to Mr. Wachira advocate who was his friend. He himself did not know the advocate before. He testified that it was agreed that from the balance of Kshs. 9,000,000/=, Kshs. 500,000/= would pay the advocate fees, so that what he was to be paid was a sum of Kshs. 8,500,000/= to complete the purchase. An agreement was then drawn but backdated to the date that the deposit was made. They learnt later that there was a problem with the size of the land and he complained to the Lands Office. They agreed to rectify it. He stated that the rectification was done in the year 2016 and the parcel number changed from Plot No. 940 to Plot No. 1670. He stated that he gave Mr. Mugo the original title when he paid the deposit, and also handed over a copy of his ID, passport size photographs, and transfer. The advocate was to do the rest. Mr. Mugo started ailing and when they visited him in hospital, he stated that his wife would go on with the transaction. When he asked his wife (PW-1), she stated that the advocate was handling everything. When he went to the advocate, the advocate would say that PW-1 has not given him any money. He testified that on 25 April 2014, the advocate wrote to him an email that the money was ready. He told PW-1 that he was coming for his money or title. PW-1 gave him the title and he handed it over to the advocate on 28 April 2014. The advocate wrote a letter acknowledging the same. He was not given any money. He came back on 29 April 2014 and stayed there the whole day but no money was given to him. Mrs. Mugo then asked for forgiveness and she paid for his air ticket and he returned to Nairobi. He stated that he took back the title after expiry of the agreement as he did not wish to engage in tug and pull. He stated that he was not aware of the bank letter dated 12 May 2014 and in his view it came after the agreement had lapsed. Mr. Wachira advised him to get another advocate. He stated that he was ready to give his title if he was given an undertaking which Mr. Wachira was not ready to give. He stated that PW-1 continued being in the premises but stopped paying rent after the death of her husband. He testified that it was the land that was sold and not the premises. He is ready to refund the deposit.

11. Cross-examined, he testified inter alia that the plot sold was Plot No. 940 but it had a problem with the acreage which was sorted out in 2014 when a mutation of the plot was done. The new title to Plot No. 1670 is dated 24 October 2014. There was a letter dated 17 February 2015 that proposed that the agreement be redrafted. He reiterated that he had given Mr. Mugo the title but he handed it back to him in the presence of his wife. He stated that it was on 28 April 2014 that he took the title to the advocate. He pointed out that the letter of offer from the bank was for Kshs. 6.5 million and not the whole balance. He denied that he refused to hand over the title documents. He stated that rent had been paid up to December 2017. Re-examined, he testified that he surrendered the old title to get the new one.

12. With the above evidence, the defendant closed his case.

C. Submissions of Counsel

13. Counsel filed written submissions to address the respective positions of their clients. In her submissions, Ms. Okumu, learned counsel for the plaintiff, inter alia referred me to Clause 4.3 of the sale agreement, which provided that the balance was to be financed by a bank and the money paid to the vendor's account, and to clause 5.1 which provided that completion was to take place in the office of the joint advocate. She also referred to clause 5.3 which provided for the documents that the vendor was to deliver; clause 15.1 which provided that time was of essence; and clause 15.2 which provided that if the money was not paid on its due date then the agreement would be deemed null and void. She submitted that the balance was to be financed by the bank but the financing would have only been possible if the completion documents were presented to the bank. She submitted that the evidence showed that it was the defendant who failed to deliver the completion documents on the completion date and that is why the balance of the purchase price was not paid to the defendant. She submitted that the cart cannot be put before the horse and that payment of the balance of the purchase price could not be made before delivery of the completion documents or the same can only be concurrent. She relied on the case of *National Bank of Kenya Limited vs Samkolite Pipe Plastic, Civil Appeal No. 95 of 1999*, that parties are bound by the terms of the contract and also on the case of *Openda v Ahn, Civil Appeal No. 42 of 1981*. She submitted that the Law Society Conditions of Sale were operational and that under Clause 4(7) thereof, one is to give a notice of 21 days which was not done. She submitted that the defendant is the one who was in breach by failing to deliver the completion documents. She wondered what made it difficult to submit the documents if they were available and concluded that it was because they never existed. She submitted that the new title was issued on 24 October 2014 long after the completion date. She submitted that the plaintiff is entitled to the order of specific performance, but if not, then she be paid damages. She submitted that the defendant has failed to prove his counterclaim that the plaintiff was in breach of the contract. On the tenancy, she stated that this can only be determined at the Business Premises Rent Tribunal.

14. On the part of the defendant, Mr. Mwadzogo, learned counsel, inter alia submitted that the suit is fatally defective for lack of a company resolution or ratification. He relied on the case of *Kenya Commercial Bank Limited vs Stage Coach Management Limited and Assia Pharmaceuticals vs Nairobi Veterinary Centre Limited HCCC No. 391 of 2000*. He submitted that no company resolution was produced and no evidence that PW-1 was a director of the plaintiff. He added that the suit is also defective for not being accompanied by a competent verifying affidavit. He submitted that under Order 4 Rule 14, the verifying affidavit is to be sworn by an officer of the company duly authorized under the company seal. He submitted that there was nothing on record to show that PW-1 was an officer of the company. He pointed out that the affidavit states that Genoveva Wangare Mugo is the plaintiff and that the advocate has filed the case on her behalf. He submitted that this defect is of substance and not form and cannot be cured under Article 159 (2) (d) of the Constitution. On who was in breach of contract, he submitted that the agreement was entered into on 29 January 2014 and completion was to be within 90 days. He referred me to clause 15.2 on requirement to pay the balance in time. He also referred to the letter dated 25 April 2014 from Mr. Wachira Advocate requesting the defendant to deposit the title with him, and the subsequent letter dated 28 April 2014, which Mr. Wachira wrote to the bank stating that the original title has been deposited with him. He submitted that from these two letters, it is clear beyond reasonable doubt, that the defendant did comply with all the terms of the agreement. On the commitment by the bank, he submitted that the letter of offer was dated 12 May 2014, and referred to an application made on 2 May 2014 for financing. He submitted that the application for the facility was thus made after the completion date. He wondered that if it was alleged that the defendant failed to hand over the completion

documents, then what did the plaintiff use to apply for the facility ? He submitted that the defendant acted in good faith and simply resorted to asking for a professional undertaking. On costs, he submitted that the same should be borne personally by Ms. Genova Wangare Mugo.

D. Determination

15. I have considered all the above. Before I delve deeper into the issue surrounding the sale agreement, let me address some procedural issues raised by counsel for the defendant in his submissions. His submission was that the suit is incompetent for want of a company resolution. On this I am not persuaded. There is actually annexed a Board Resolution dated 28 July 2015 which was filed alongside the plaint and which authorises Genoveva Wangare Mugo to swear all affidavits and sign all documents in relation to the suit for and on behalf of the company. I am at a loss why it is now being said that there is no Board resolution. On the verifying affidavit, I can see that it was sworn by Genoveva Wangare Mugo. In it she has said that she is the plaintiff but I am prepared to hold this was erroneous. She was clearly swearing the affidavit on behalf of the plaintiff company. It was argued that no evidence was presented that she is director but I do not think much of this argument. Ms. Mugo in her statement stated that she is a director of the plaintiff company. She also signed the sale agreement as a director of the company. If the defendant was of the view that she is not a director I wonder why he did not complain when the sale agreement was being executed by her. The Board resolution also states that she is a director. If the defendant is of the view that all these are false, then it was his burden to provide the CR 12 of the company, or other evidence to demonstrate that Ms. Mugo is not a director and is not duly authorised by the company. In absence of such evidence, I have nothing to doubt the capacity of Ms. Mugo. Nothing arises from these preliminary points and I will thus delve into the substance of the case.

16. The issue revolves around the sale agreement dated 29 January 2014 where the plaintiff was purchaser and the defendant the vendor. The plot specified in the sale agreement is the Plot No. 940. The terms of sale are within the agreement. The agreement also states that the Law Society Conditions of Sale will be applicable unless varied. The agreement states that the purchase price is Kshs. 9,500,000/= and that receipt of the deposit of Kshs. 1,000,000/= is acknowledged as paid. Clause 4.3 of the sale agreement states that the balance of Kshs. 8,500,000/= shall be financed by the bank and paid to the vendor's account by the bank. The completion period is 90 days from 29 January 2014 and that completion shall take place at the office of the joint advocate. Clause 5.3 provides for the vendor to deposit with the advocate, before the completion date, various documents including the original certificate of title. Clause 15 provided for special conditions and clause 15.1 and 15.2 thereof are important for our purposes. They provide as follows :-

15. Special Conditions

15.1 Time shall be of the essence in respect of all the obligations of the purchasers hereunder.

15.2 in the event that any sum payable by the purchaser hereunder is not paid on its due date then this agreement will be deemed to be null and void.

The vendor shall exercise his or her right to sell the property to any other prospective buyer And refund the deposit amount.

17. Even before I proceed to determine who was in breach, there was submissions by Ms. Okumu that Condition 4 (7) of the Law Society Conditions of Sale (1989) applied. That cannot be the position. The said condition 4 (7) provided as follows :-

7. This sub-condition applies unless a Special Condition provides that time is of the essence in respect of the completion date.

In our case, the special condition 15 did provide that time would be of essence. It also provided what would happen if the balance of the purchase price was not paid in time. Condition 4(7) of the Law Society Conditions of Sale (1989) which inter alia provided for service of a 21 day completion notice cannot therefore be imported into this agreement. The defendant cannot therefore allege that she should first have been served with a 21 day completion notice by the defendant.

18. Getting back to the agreement, it is of course the contention of the plaintiff, as the purchaser, that the vendor breached the agreement by not presenting the completion documents in time. I do not agree. The plaintiff herself referred to a letter dated 28 April 2014 from her advocates M/s Muraya & Wachira which letter is addressed to the Branch Manager, Equity Bank, Moi Avenue, Mombasa. It is drawn as follows :-

RE: TRANSACTION IN RESPECT OF PLOT NUMBER

MOMBASA/MWEMBELEGEZA/940

We refer to the above transaction and our earlier letter dated 24th April, 2014.

We have confirmed from the lands office Mombasa that the plots at Mwembelegeza Settlement Scheme had no charge from the settlement fund trustee as erroneously indicated by the vendor.

The original title document has been deposited with us. The land officer has also confirmed to us that the charge is registable (sic). We write to confirm that you can proceed to transfer funds to the vendors. We enclose a copy of the search.

Yours Faithfully,

Muraya & Wachira Advocates

19. It will be noted in the above letter, that Mr. Wachira acknowledges that the original title has been deposited with his law firm. He in fact continues to tell the bank that it can proceed to transfer the funds to the account of the vendor. There is reference to a previous letter (that dated 24 April 2014) which mentioned that the property had a charge of the Settlement Fund Trustees (SFT) which needed to be discharged, but in this letter, it is clarified that there is actually no such SFT charge and therefore the property can be charged to the bank. A copy of the search is enclosed. This letter is in black and white and speaks for itself. I do not see how it could have been written if indeed the title documents were not with the advocate. I do not buy the denial by Mr. Wachira when he testified that he did not receive the title document. If he had no title document then he would simply have said so in his letter. The mention, in his letter, that the bank can proceed to transfer funds to the vendor, also means that he was comfortable that the vendor had discharged his part of the transaction, including the deposit of all other completion documents, and that he could now be paid. If there was anything untoward in that letter, I believe that Mr. Wachira would have written another letter to clarify, just as he did to his previous letter of 24 April 2014. It is apparent to me that Mr. Wachira was trying his level best, hopelessly albeit, to assist his client and friend. I therefore have no doubt in my mind that the vendor had discharged his part of the bargain as at the date of completion of the agreement.

20. The obligation of the purchaser was to pay the purchase price within 90 days of the sale agreement. No money had been deposited to the defendant's account by the completion date, nor was any money deposited to the joint advocate, who could hold the same as stakeholder, if only to protect the purchaser, pending completion of the transaction. The understanding of the parties was that the balance was being financed but the letter from the bank confirming the availability of the money came after the completion period. Mr. Wachira in his letter dated 25 April 2014 did write to the defendant that the money was available. In that letter he never stated that the money was in his account only that "it was available". He probably received this instruction that the money "was available" from the plaintiff. But was the money really available? The fact of the matter is that it was not available as at 25 April 2014 when that letter was written. That money became available earliest on 12 May 2014 when Equity Bank wrote to the plaintiff to inform her that following the plaintiff's application dated 2 May 2014, she has been offered a credit facility of Kshs. 6,500,000/= .

21. There are three things that arise out of this letter. First, it is apparent that despite the sale agreement indicating that the balance of the purchase price was to be financed, and despite there being a 90 day completion period, the plaintiff made an application for financial facilities on 2 May 2014, but this was after the completion period. Secondly, the approval of the facility was done on 12 May 2014 and this again was after the completion period. Even assuming that the original title had not been supplied by the defendant, nothing stopped the plaintiff from seeking financing before expiry of the completion period. The plaintiff did not need to have to be in possession of the original title deed in order to apply for financing. Thirdly, what the bank was making available was not the whole of the balance of the purchase price but the sum of Kshs. 6,500,000/=. This means that the plaintiff was to top up a further sum of Kshs. 2,000,000/= from its own coffers. Although PW-1 orally mentioned that she had this Kshs. 2,000,000/= in her account, no documentary evidence of it was provided, to actually show that indeed she had this money and that the same was readily available to top up what the bank was providing.

22. From the foregoing, I am not in doubt that it was actually the plaintiff and not the defendant who breached the contract by failing to provide the balance of the purchase price within the completion period of 90 days. The defendant stated that he proceeded to repossess his title deed when the money was not available and I cannot blame him for doing so, for the sale agreement did provide that if the balance was not paid within the completion period, then the agreement would be declared null and void.

23. It appears to me, from the evidence provided, that the defendant was nevertheless willing to waive this delay subject to being issued with a professional undertaking that he would be paid his money if he released the title document. This was not an unusual request for transactions of this nature, for it is nothing more than asking for commitment that the balance of the purchase price will be paid. It is as good as saying "show me the money." The plaintiff had already delayed in making the money available for she did not do so within the completion period, and I see nothing wrong with the defendant asking for proof that the money was indeed available for him to complete the transfer. All the defendant was doing was trying to accommodate the plaintiff after she had already breached the sale agreement. Did the plaintiff actually expect that the defendant will sign off the transfer and the property to her without there being proof of the money being available now that none was deposited within the completion period? That would have been expecting too much from the defendant.

24. I do not see why the plaintiff is alleging that the defendant breached the contract. It is the plaintiff who failed to make available the balance of the purchase price within time and she cannot complain. She was accommodated by the defendant in order to salvage the sale transaction, albeit out of time, but the plaintiff refused to tender a professional undertaking. I in fact wonder why the plaintiff came to court. If she was willing to proceed with the sale then all she needed to do was make the money available to the defendant and/or issue the professional undertaking. The defendant to me did not appear to have any problem with completion so long as he was guaranteed payment of the balance.

25. I am aware that the plaintiff tried to raise issues about the change of title from Plot No. 940 to Plot No. 1670 and making allegations of "fishy deals" on the title. That to me is a red herring being raised to try and cover the fact that the plaintiff did not make the balance available on time or indeed at all. If the plaintiff was not happy with the change of the plot number, and if she thought that the change in identity of the plot number was prejudicial to her, and outside the ambit of the sale agreement that she had, then she would simply have walked out of the transaction on that ground and demanded a refund of her deposit. But the curious scenario I have is the plaintiff saying that the title is "fishy" and using the same breadth to say that the defendant has refused to transfer the title to her despite being willing to complete the sale. Where is the stand of the plaintiff? How can she be asking for specific performance in this suit while at the same time complaining that the title is suspicious? Either she is willing to complete the sale with the new title as it is or she opts out of the sale because the title number has changed and she is suspicious of it. She cannot be heard to say that she is opting in, and at the same time complaining about the change of title number, and also claiming that the title is suspicious.

26. I am afraid that the plaintiff has failed to demonstrate to me that the defendant failed to complete his part of the bargain. I have already stated that in my opinion, it is the plaintiff who failed to perform her part of the bargain. The plaintiff is therefore not entitled to the remedy of specific performance. The plaintiff is similarly not entitled to any award for general damages against the defendant because it was her who breached the contract. The sale agreement was self-executing in so far as failure by the purchaser to pay the balance of the purchase price in time was concerned. The agreement was to be nullified with the remedy being a refund of the deposit paid. The defendant has stated that all

along he has been willing to refund the purchase price. The only remedy that the plaintiff is entitled to is therefore a refund of the deposit. I will order a refund within the next 90 days. If no refund is forthcoming, the plaintiff will be at liberty to execute for the same.

27. The defendant had a counterclaim for a declaration that the plaintiff breached the sale agreement; vacant possession; mesne profits from November 2015 till vacant possession is given; general damages for the deprivation and use of the premises; cost and interest. I have already found that it is the plaintiff who breached the contract by failing to pay the balance of the purchase price within time. I will thus issue an order of declaration to that effect as prayed by the defendant. On mesne profits, there is consensus that the rent payable was Kshs. 25,000/= per month. The defendant when giving evidence testified that he was last paid in December 2017. This evidence has not been controverted by the plaintiff. The defendant is thus entitled to mesne profits of Kshs. 25,000/= per month from January 2018 to the date of this judgment and thereafter until vacant possession is given. I see no basis for making an additional award as general damages “for deprivation of the use of the premises” for the award for mesne profits does sufficiently compensate the defendant for not being able to use the premises. On the prayer for vacant possession, I am persuaded that there is no basis upon which the plaintiff can continue being in the suit premises. She was converting her tenancy into ownership but this has since collapsed. I have no evidence that her tenancy has been renewed. She is a trespasser for all intents and purposes. I do not see how she can try and escape her position by claiming that the issue of her tenancy should be determined by the Business Premises Rent Tribunal. The true position is that she is now a trespasser, and unless the defendant is willing to negotiate another tenancy with her, then she needs to vacate the suit premises. I give her 3 months to do so. She will also pay rent of Kshs. 25,000/= for these 3 months and/or until she gives vacant possession. The only issue left is costs. I award costs to the defendant. The defendant is also awarded interest of any sums of money not paid which interest shall accrue from the date that such money fell due at court rates till settlement in full.

28. Judgment accordingly.

DATED AND DELIVERED THIS 16TH DAY OF JUNE 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA