



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1323 OF 2013**

**ABDELHAFID TCHOKETCH.....1<sup>ST</sup> PLAINTIFF**

**VERONICA MARIE KEMUNTO OGETO.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**MERCY NYAMBURA KANYARA..... DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 28<sup>th</sup> October 2013 and amended on 9<sup>th</sup> August 2018 the plaintiffs seek judgment against the defendant for:-.

*(a) A permanent injunction restraining the defendant, either by herself, her servants and/or agents from occupying, constructing any structure, putting to any use, interfering, selling and/or in any other way dealing or interfering with Land Reference Nos, 7380, 23, 7380/24 and 7380/25 (Original Land Reference Number 7380/16) otherwise other than as provided in the agreement of sale dated 2<sup>nd</sup> April 2013 between the plaintiffs and the defendant towards effecting transfer of the said suit properties to the plaintiffs.*

*(b) A declaration that the defendant is in breach of her obligations under the contract dated 2<sup>nd</sup> April 2013 between the plaintiffs and the defendant for sale of suit properties known as Land Reference Nos 7380/23, 7380/24 and 7380/25 (original Land Reference Number 7380/16).*

*(c) That the plaintiffs be declared the true/bonafide owners of the Land Reference Nos 7380/23, 7380/24 and 7380/25 (original Land Reference Number 7380/16).*

*(d) That the court does find it mete and just for the plaintiff herein to pay the balance of the purchase price into court in full discharge of their obligation in the sale contract/agreement of sale dated 2<sup>nd</sup> April 2013 between the plaintiffs and the defendant and therefore the Registrar of Title Karen Area, Nairobi be ordered to register Parcels 7380/23, 7380/24 and 7380/25 in favour of the plaintiffs upon proof of payment of the balance purchase price thereof in court.*

*(e) That the plaintiffs be granted an order of specific performance in accordance with terms of the Agreement of sale dated 2<sup>nd</sup> April 2013 signed by the parties herein particularly compelling the defendant whether by herself, her agents, servants, assignees and or anybody claiming thereunder to receive the balance of the purchase price under or as per the agreement of sale hereto from the plaintiff, execute and deliver up to the plaintiff or their advocate all completion documents necessary for registration of a transfer of the suit properties known as Land Reference Nos. 7380/23, 7380/24 and 7380/25 (original Land Reference Number 7380/16) in the plaintiffs name and/or the plaintiff's nominees within 30 days of the order hereof, and in default thereof, the Deputy Registrar of this Court to execute the transfer and all the documents necessary for registration of a Transfer of the interest in the suit properties hereof in the name of the plaintiffs or its nominees upon receipt of payment of the balance purchase price in court by the plaintiffs.*

*(f) That the defendant pays the plaintiffs special damages in the sum:-*

*(i) Kshs.11,275,000,00.*

*(ii) Kshs.320,000,000 per month from August 2018 until 1<sup>st</sup> February 2019 and thereafter Kshs.336,000 per month until the date of delivery of vacant possession of the suit properties to the plaintiff or compliance with obligations under the Agreement of sale dated 2<sup>nd</sup> April 2013 between parties herein.*

*(g) That the defendant be condemned to pay default interest on (f) above to the plaintiffs for breach of contract in addition to transferring the suit premises to the purchasers.*

*(h) Costs of the suit and any other relief that this honourable court may deem fit and just to grant.*

2. Upon being served with copies of plaint and summons to enter appearance the defendant filed a statement of defence dated 24<sup>th</sup> July 2019.

3. The plaintiffs then filed a reply to the statement of defence dated 7<sup>th</sup> December 2020.

#### **The Plaintiffs' Case**

4. The defendant is the registered proprietor of the property known as LR Nos 7380/23, 7380/24, 7380/25 (original LR No 7380/16). That on or about 2<sup>nd</sup> April 2013, the plaintiffs entered into a written agreement for sale with the defendant for sale of LR NO s 7380/23, 7380/24 and 7380/24 (**hereinafter referred to as :the suit properties**”). The agreed consideration was Kshs.87,000,000/-.

5. The parties further agreed that a deposit of Kshs.8,700,000/- being 10% of the purchase price was to be paid upon the execution of the agreement for sale. The deposit was done on 15<sup>th</sup> April 2013 and the balance of Kshs.78,300,000/- was to be paid on completion. The defendant surrendered copies of Deeds to the said parcels of land which documents were used by the plaintiffs' advocates to draw the Transfer documents. The completion date of the sale agreement was 17<sup>th</sup> May 2013; when the defendant undertook to deliver completion documents to the plaintiffs' Advocates to facilitate registration of a transfer of the suit properties in favour of the plaintiffs.

6. The plaintiffs served the defendant with a completion notice dated 8<sup>th</sup> July 2013 when there was manifest, breach of completion terms by the defendant and which notice the defendant neglected, ignored and/or failed to remedy the default.

7. The plaintiffs have always been ready and willing to complete the transaction by issuance of the contractual professional undertaking or payment of the balance of the purchase price as per the agreement of sale but the defendant has to date refused, failed and/or neglected to complete her obligations under the contract and threatens to continue with the default and breach hereof unless compelled by this court.

8. Parties to the agreement of sale extended time for completion on various occasions beyond the contractual date expressly and by conduct to enable the defendant obtain completion documents as per the agreement of sale beyond the completion date in the agreement but the defendant has failed to complete the transaction hereof and intends to indefinitely extend the completion date without any lawful excuse. The defendant's inordinate and indefinite extension or failure to complete the agreement despite a notice to complete is inexcusable, unreasonable, and a breach of the contract.

9. In paragraph 14A of the Amended Plaint, the particulars of breach on the part of the defendant are given as:-

*(a) Failure to complete the contract within the stipulated time.*

*(b) Failure to respond to letters as ethically required and especially failure to reply to completion notice and communicate at all of the progress in the transaction thereof in providing the completion documents.*

*(c) Shutting of the plaintiffs from progress of the proposed transaction and ultimately unjustifiably threatening to terminate the contract.*

*(d) Daring the plaintiffs to sue her since she was certain that the court will stop the transaction.*

*(e) Acting dishonestly in performance of her obligation in the contract by purporting to have suffered frustration in performance of her obligation.*

*(f) Failure to issue the necessary notices of readiness to complete in order to facilitate plaintiffs payment of the balance purchase price or procuring the necessary undertaking under the agreement.*

*(g) Failure to provide/deliver completion documents as per the agreement of sale.*

*(h) Failure to issue notice of readiness to complete as per the vendors obligations in the agreement of sale and letter of offer dated 26<sup>th</sup> March 2013.*

*(i) Failure to deliver or avail statutory approvals, change of user, consents and duly registered surrender of the access road set out in the agreement of sale.*

*(j) Failure to pursue and facilitate registration of transfer of suit properties to the plaintiffs.*

*(k) Failure to illustrate compliance and or readiness and willingness to complete vendors obligations under the agreement of sale to the plaintiffs.*

*(l) Delayed delivery of completion documents.*

*(m) Failure to mark or illustrate marking of the boundary or place beacons on the suit properties and clearly mark the boundaries for suit property number 7380/25.*

*(n) Failure to deliver an account of the land rates and rent for apportionment between the plaintiffs and defendant.*

*(o) Failure to remedy the default or breach of the agreement of sale within the stipulated/notice to complete period.*

10. As a result of the above the plaintiffs have suffered loss and damage and they claim the same.

#### **The Defendant's case**

11. As per clause 4.2 of the sale agreement, the completion date was 45 days from the date of execution of the agreement. That the defendant's advocate was to first confirm to the plaintiffs' advocates that they were ready with completion documents stated in clause 4.4 and 4.5 of the sale agreement.

12. The completion of the transaction was frustrated because the defendant could not secure the completion documents prior to the completion date. This made it impossible to comply with clause 4.2 of the agreement for sale. The defendant always had the will to carry out her obligations as stipulated in the agreement of sale. However, this has been frustrated by numerous challenges encountered at the department of lands and the Nairobi County Government. This fact has been communicated to the plaintiffs on numerous occasions. This also formed the subject matter of the letter dated 9<sup>th</sup> July 2013 addressed to M/S Muigai, Kemei & Associates, the advocates acting for the plaintiffs in the conveyance.

13. A meeting was held on the 4<sup>th</sup> September 2013 amongst the plaintiffs, their advocate and the defendant wherein it was agreed that it was necessary to have an addendum to the agreement for sale. The addendum was to be drafted by the plaintiffs. The defendant avers that she never received the addendum for approval or execution despite asking for it.

14. There is no enforceable contract as between the plaintiffs and the defendant as the same was terminated on the completion date. The lapse of the twenty-one (21) days notice marked the end of the contract. Specific performance cannot be granted as a relief. She prays that the plaintiffs' suit be dismissed with costs.

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

15. The plaintiffs called one witness PW1, Abdel Hafid Tchoketch, the 1<sup>st</sup> plaintiff herein told the court that he was also giving evidence on behalf of the 2<sup>nd</sup> plaintiff, who is his wife. That she had given him that authority. The authority to plead and act is dated 6<sup>th</sup> August 2018.

16. PW1 adopted his witness statement filed on 4<sup>th</sup> November 2013. He also stated that he was relying on the bundle of documents filed on 20<sup>th</sup> November 2017, it was produced and marked Exhibit P1. The documents run from No 1 to P61 respectively. The sale agreement dated 2<sup>nd</sup> April 2013 refers to LR Nos 7380/23, 7380/24 and 7380/25 (original LR NO 7380/16). Clause 3.1 (b) provides that:-

*“the balance of Kshs.78,300,000/- being the balance of the purchase price shall be paid by the purchaser to the vendors Advocates by way of RTGS into the vendor's Advocates Bank account in accordance with clause 4.3 below”*

Clause 4.3 provides that:-

*“The purchasers' advocates shall upon receipt of the copies of the completion documents in accordance with clause 4:2 above advise the purchasers to pay the balance of the purchase price into the purchasers advocates bank account. The purchasers' advocates shall forward a copy of the RGTS transfer slip to the vendors Advocates”.*

17. PW1 further stated that under clause 4:4 and 4:5 the vendor's advocates were to forward to the purchasers' advocates the completion documents listed therein. **Clause 7.1** provides that:-

*“If the purchasers shall fail to comply with any of the conditions hereof or of the conditions subject to which this sale is made including the conditions relating to the completion of the sale the vendors may give to the purchasers twenty one (21) days notice in writing confirming the vendors readiness to complete the sale in all respects and specifying the defaults and requiring the purchasers to remedy the same before the expiration of such notice AND.....”*

18. In page 16 of the plaintiffs' bundle there is an RGTS for Kshs.8,700,500 in favour of M. N. Kanyara & Co. Advocates dated 15<sup>th</sup> April 2013.

19. PW1 prays that the sale agreement dated 2<sup>nd</sup> April 2013 be enforced. It is in respect of the three plots namely LR Nos 7380/23, 7380/24 and 7380/25 (original title 7380/16). He prays that the prayers in the Amended Complaint be granted.

#### **Evidence of the Defendant**

20. The Defence called one witness. DW1 Mercy Nyambura Kanyara the defendant and adopted her witness statement dated 24<sup>th</sup> July 2019 as part of her evidence. She also relied on the list and bundle of documents dated 24<sup>th</sup> July 2019. It was produced and marked exhibit D1(a) with documents listed as No1 to 35 respectively. She also relied on the supplementary list of documents dated 6<sup>th</sup> October 2020. It was produced and marked as exhibit D1(b).

21. She told the court that she entered into an agreement of sale with the plaintiffs for three (3) plots out of LR No 7380/16. The completion date was forty five (45) days. That as per clause 4:4 of the sale Agreement, she did not have the original certificates of title. She further stated that to date she has not obtained these documents.

22. She further stated that there were challenges in the processing of new grants owing to the transition challenges between the Lands Registry and the National Land Commission on who should issue titles. She stated that she was willing to complete the transaction if the plaintiffs were willing to wait. She informed the plaintiffs' advocates as much in her letter dated 9<sup>th</sup> July 2013. In the same letter she informed them that she was ready to refund the 10% deposit together with interest. She stated that this letter never elicited a response hence her letter dated 22<sup>nd</sup> August 2013 rescinding the agreement with respect to LR 7380/25 due to a boundary dispute with her neighbor.

23. She stated that she held several meetings with the plaintiffs and their Advocates, where she informed them of her frustration in processing the titles. They agreed that they would do an addendum to the sale agreement to address the completion period, the beacon issue in LR NO 7380/25 and possession by the plaintiffs. The plaintiffs' advocates were to prepare the said addendum but they did not. She said she was later surprised when she was served with summons to attend court.

24. She further told the court that there was no clause in the agreement stating that the vendor would pay the plaintiffs' rent. Further that there are ongoing investigations by the Directorate of Criminal Investigations, as someone was trying to sell the suit property. Later the original surrender/indenture was misplaced at the Lands Registry hence she is unable to process the new leases.

25. She prays that the court finds that the prayers sought in the plaint cannot be granted as sought. That she is willing to refund the deposit with interest. She prays that the plaintiffs' case be dismissed with costs.

26. At the close of the oral testimonies, parties tended final submissions.

#### **The Plaintiffs' Submissions**

27. They are dated 24<sup>th</sup> December 2020 and the reply to the defendant's submissions are dated 8<sup>th</sup> December 2021.

28. The plaintiffs' main prayer is for specific performance of the sale agreement dated 2<sup>nd</sup> April 2013 for the sale of the suit properties against the defendant. The basis of the plaintiffs' claim is that parties are bound by the terms of contract and the defendant cannot, upon having voluntarily executed the contract and received a deposit of the purchase price unilaterally without justifiable reason decide not to fulfil her bargain. They have put forward the cases of **Jeremiah Mucheru Ndibui vs David Gichure Ngugi [2019] eKLR**; **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**.

29. The contract between the parties herein is not impugned by any special circumstances, defects or illegalities to excuse the defendant from performing her obligations thereto. The defendant is thus bound by the terms therein and cannot in abuse of court process seek to escape from obligations therein. The plaintiffs have satisfied the legal and evidential threshold for orders of specific performance to compel the defendant to complete the contract or in lieu thereof this court executes the requisite documents to enable the plaintiffs obtain registration of the titles to the suit properties in their names.

30. The law on grant of equitable relief of specific performance is settled. The Court of Appeal in the case of **Benard Ng'ang'a Ndirangu vs Samuel Wainaina Tiras [2019] eKLR** stated as follows at paragraph 31 of its judgment as regards specific performance as an equitable remedy:-

***“On the issue whether the trial court erred in issuing an order for specific performance, we reiterate that specific performance is an equitable remedy. In Thrift Homes Limited vs Kenya Investments Limited [2015] eKLR it was stated that specific performance like any other equitable remedy is discretionary. The jurisdiction to grant specific performance is based on the existence of a valid enforceable contract; specific performance will not be ordered if the contract suffers from some defect, mistake or illegality. Specific performance will also not be granted if there is an alternative effective remedy.”***

31. The sale agreement dated 2<sup>nd</sup> April 2013 between the parties for the sale of the suit properties is not in dispute. The contract is valid and enforceable. The plaintiffs moved to court since it was clear that the defendant was not keen to complete the contract but indefinitely deferred the same. Parties extended completion date by conduct. The defendant admitted as such at paragraph 17 of her witness statement and confirmed during the hearing that she stands by her statement without any amendments.

32. The correspondences by parties subsequent to 17<sup>th</sup> May 2013 which as per the agreement was the completion date, clearly it was stated that parties extended the completion date. The letter dated 9<sup>th</sup> July 2013 which as per the agreement was the completion date, clearly it illustrated that parties extended the completion date. The letter is dated 9<sup>th</sup> July 2013, 22<sup>nd</sup> August 2013 and 30<sup>th</sup> September 2013 by the defendant's advocates to the plaintiffs' advocates clearly illustrate that parties communicated and acted towards or in respect of their respective obligations in the sale agreement. By a replying affidavit dated 25<sup>th</sup> November 2013 (page 3-7) of the plaintiffs' supplementary list/bundle of documents, the defendant admitted at paragraph 17 thereof that she is still willing to transfer the suit properties as soon as titles are issued. The allegation that the contract lapsed by effluxion of time is thus an afterthought, inconsistent with pleadings an approbation and reprobation.

33. As late as 30<sup>th</sup> September 2013, subsequent to the alleged rescission on 22<sup>nd</sup> August 2013 parties discussed matters relating to completion of the contract which comprised of sale and transfer of Plot 7380/25 as illustrated by the letter dated 30<sup>th</sup> September 2013. The defendant is estopped from alleging rescission when she was negotiating on completion in respect of Plot No 7380/25. The defendant cannot approbate and reprobate. They have relied on the Court of Appeal case of **Bernard Nganga Ndirangu (Supra)** where the Court rejected approbation and reprobation and held as follows:-

*“The appellant cannot approbate and reprobate. As was stated by Lord Reid in Steadman–vs Steadman (1976) AC 536, 540,*

*“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.*

34. There is no defect in the contract. The defendant stated that the contract was frustrated by reasons beyond her control namely alleged delay by the relevant Lands Registry and or the National Land Commission hence the contract is unenforceable or would cause her hardship in performance. The defendant also alleged for the first time that the title to the property is lost. This is not pleaded and is inconsistent with the pleadings, incredible, baseless and an afterthought. The statement of defence and all pleadings by the defendant were filed on 24<sup>th</sup> July 2019 and later on 6<sup>th</sup> October 2020. During cross examination the defendant without proof alleged that the original documents were lost at the Land Registry in 2018. This is false, an afterthought and baseless.

35. The contract was never and or is not frustrated as alleged by the defendant or at all. The defendant is merely and deliberately refusing to procure completion documents and/or complete the contract. The alleged frustration is an afterthought and self induced. The alleged dispute between the National Land Commission and the Ministry of Lands & Housing on issuance of Titles and consents for disposition of leases was resolved by the Supreme Court of Kenya on 2<sup>nd</sup> December 2015 by advisory opinion of the court **in the matter of National Land Commission [2015] eKLR**. The defendant failed to take or demonstrate steps to procure the requisite documents or completion documents from the National Land Commission or the Land Registry for over six (6) years.

36. The Defendant did not show any single communication by herself to the Lands Registry or the National Land Commission applying, forwarding relevant applications or following up on the requisite consents or title documents. There was no letter from the said National Land Commission or Land Registry to the defendant in relation to the alleged defendant's efforts to get consents or title documents or even stating that the required documents were delaying or cannot be issued.

37. The defendant never took any reasonable steps to procure completion documents. The inaction was deliberate and the purported blame or alleged challenges caused by the Land Registry or National Land Commission are false and an afterthought. Frustration cannot be taken to have occurred if the event pleaded is self induced like in the case of the defendant herein.

38. The defendant alleged a boundary dispute relating to LR No 7380/25. When cross examined, the defendant stated that the dispute in the said plot was existing even before the date of the contract but failed to take steps to resolve it. The defendant's never lodged a suit in court in respect of the alleged trespass. The plaintiff testified that he approached the neighbor who stated was willing to vacate the defendants land which fact corroborate the plaintiff's case that there was no boundary dispute as alleged by the defendant. They have put forward the case of **Lucy Njeri Njoroge vs Kaiyahe Njoroge [2015] eKLR; John Kung'u Kiarie vs Dyer & Blair Investment Bank Ltd & Another [2016] eKLR**.

39. There is no illegality or defect to the contract. There is no hardship that will be occasioned if the orders are granted. The allegation of the missing title documents in the Land Registry, is not an issue as the defendant or the court will still execute documents to facilitate reconstruction and or procurement of a duplicate title. Under clause 4.2 and 4.3 of the contract, parties agreed on conditions precedent before the balance is paid and how the same was to be paid. The defendant was first to notify the plaintiffs advocates that the completion documents were ready and the plaintiffs would then deposit the balance with their advocates who would issue an undertaking. Clause 8 of the agreement only allows importation of Law Society of Kenya Conditions where the same are not inconsistent with the terms of the agreement. They have relied on the case of **National Bank of Kenya Ltd (Supra)**. Court cannot rewrite the contract but only enforce it as per agreement of parties.

40. The plaintiffs have demonstrated willingness and readiness to complete the contract as per the letter dated 8<sup>th</sup> July 2013 by the plaintiffs' advocates to the defendant. Failure by the defendant to provide completion documents and or illustrate reasonable steps to procure the same in the circumstances of this case is in breach of contract. The said breach has denied the plaintiffs land for over 7 years. It is a matter of local notoriety that the land must and has in fact appreciated in value and the loss occasioned by the said breach cannot be compensated by damages. They have put forward the case of **Jacob Muriungi Murea vs Salome Njoki Njuguna [2018] eKLR; Bernard Nganga Ndirangu (Supra)**.

41. A party should not be allowed to benefit from her own wrong as sought by the defendant herein. It is for this reason that an order of specific performance should issue. They have put forward the case of **P. N. Gichoho Ngugi vs County Government of Laikipia & Another [2017] eKLR**.

42. The defendant failure to procure completion documents for over 7 years without any justifiable clause has not only deprived the plaintiff the land but also occasioned more losses in terms of loss of user on the land. The plaintiff claim special damages. The defendant knew that the suit properties would be used for residential and commercial purposes. She confirmed that she authored letter dated 27<sup>th</sup> March 2013 giving the terms of offer for purchase of the properties by the plaintiffs. The defendant confirmed she had obtained some approvals for development of 28 units. The defendant knew the plaintiffs acquisition was to be followed by immediate use and developments. The defendant cannot deny the claim for loss of user resulting from her breach as pleaded by the plaintiffs. They pray that the prayers on the Amended Plaint be granted.

43. In answer to the defendant's submissions dated 21<sup>st</sup> January 2021, the plaintiffs further submitted that the plaintiffs issued several notices to the defendant to complete but the defendant deliberately failed. The notices are dated 5<sup>th</sup> July 2013, 5<sup>th</sup> August 2013 and 16<sup>th</sup> August 2013. That the decision in **Henry Mwangi Gatai & Another vs Margaret Godwin & 3 Others [2018] eKLR** relied on by the defendants is distinguishable. That in the said case the vendor had already refunded the deposit of the purchase price to the purchaser which was the consideration under the demised contract. The vendor had already sold the same property to a third party. Lack of completion documents was due to the fault of no one unlike in the instant case where the vendor is at fault.

44. In this case the vendor requested the purchaser to wait for her to procure completion documents or rescind the contract. The plaintiffs herein chose to wait and not rescind the contract. No purchase price has been refunded in this case. The plaintiffs are entitled to an order of specific performance. They pray that the prayer on the Amended Plaint be allowed together with costs of the suit.

#### **The Defendant's Submissions**

45. They are dated 21<sup>st</sup> January 2021. To date the plaintiffs do not have the certificate of lease for LR Nos 7380/23, 7380/24 and 7380/25 the subject of the sale agreement. The completion date lapsed on 17<sup>th</sup> May 2013 and the same has not been extended. Time is of essence as per clause 13.7 of the agreement of sale.

46. They raise three issues for determination:-

*(a) Whether the contract between the parties terminated upon expiry of the completion date.*

*(b) Whether the plaintiffs are entitled to an order of specific performance.*

*(c) Whether the plaintiffs are entitled to other reliefs sought.*

47. The defendant could not secure the completion documents within 45 days after execution of the agreement on 2<sup>nd</sup> April 2013 as the process of obtaining individual certificate of title for the subdivision plots had not been completed on completion date. The defendant made visits to the Land Registry to inquire on the process and was informed that the same were pending approval. Without the certificate of title for the subsequent plots, the defendant would not secure the other completion documents including clearance certificates.

48. The contract was hence frustrated by the non availability of certificate of leases for the various sub plots/completion documents as the same were not processed by the Land Registry within or before the completion date. The frustrating event did not arise from the fault of the defendant. The defendant took all steps to secure the completion documents within the completion period. Under clause 13.7 time was of essence of the contract for all purposes of the agreement. She has put forward the case of **J. T. M Construction & Equipment Ltd vs B Farms Ltd** which was cited with approval in the case of **Housing Company of East Africa Ltd vs Board of Trustees National Social Society Fund & 2 Others [2018] eKLR** to wit the court held:

*“It is settled that “when time is of the essence there is no lee way for delay”. Completion must be on the date specified”*

49. The parties agreed to extend the agreement following the lapse of completion date to revive the agreement but the same never materialized as the plaintiffs failed or neglected to do an addendum to the agreement dated 2<sup>nd</sup> April 2013. The defendant communicated the need to negotiate on new terms vide extension of the agreement through the letter dated 22<sup>nd</sup> August 2013 and also requested for the addendum vide letter dated 30<sup>th</sup> September 2013. The allegation by the plaintiffs' that the completion date was extended by conduct of parties is unfounded and baseless. The conduct of parties, if any, cannot supersede or vary the agreement for sale between the parties.

50. An agreement for sale can only be varied by an addendum and not by alleged conduct of parties. She has relied on **Section 3(3)** of the Laws of Contract Act, Cap 23 Laws of Kenya and in the case of **Emo Investment Ltd vs Stephanus Petrus Krugen [2010] eKLR**. The agreement for sale lapsed on 17<sup>th</sup> May 2013 upon expiry of the completion date as the same was never extended by the parties. Under condition 4(7) of the Law Society of Kenya conditions of sale 1989 the agreement of sale dated 2<sup>nd</sup> April 2013 stands terminated after 21 days of the completion notice. She has put forward the case of **Henry Mwangi Gatai vs Margaret Wanjiku Godwin & 2 Others [2018] eKLR**.

51. Under clause 13.5 of the sale agreement, parties were allowed to negotiate in good faith and amend those terms that are unenforceable so as to make the same valid and enforceable. That by a letter dated 22<sup>nd</sup> August 2013, the defendant explained to the plaintiffs' advocates that she is unable to complete the transaction on the agreed time owing to the frustration of the contract caused by factors beyond her control and informed them that if they were willing, the parties could have a meeting and negotiate on new terms and extension of the sale agreement. In the meeting of 4<sup>th</sup> September 2013 it was agreed an addendum be prepared, the same was not prepared by the plaintiffs' advocates. She has relied on the case of **Emo Investments Limited (Supra)**.

52. The plaintiffs are not entitled to an order of specific performance and the same cannot be granted in the circumstances of this case. She has put forward the case of **Anne Murambi vs John Munyao Nyamu & Another [2018] eKLR**.

There is no enforceable contract for which to decree an order for specific performance. There are no certificates of lease for the land reference for which the plaintiffs seek an order of specific performance since the defendant has been unable to procure the same from the Ministry of Lands owing to the numerous factors captured in the letter dated 22<sup>nd</sup> August 2013. The parent title is missing and there are pending investigations by the police on the fraudsters trying to sell the property. She has also put forward the case of **Gardev Singh Birdi &**

**Another vs Singh Ghatora & Another Civ Appeal No 165 of 1996** where the court relied on the case of **Thrift Homes Ltd vs Kays Investment Ltd [2015] eKLR**.

53. The defendant was willing to transfer the suit properties to the plaintiffs after termination of the contract as soon as the titles were issued, only if the plaintiffs deposited forthwith the balance of the purchase price in an interest earning account in the names of the advocates of the parties. An order of specific performance would cause hardship to the defendant considering the parent title is missing, the disputes surrounding the property, the ongoing investigation by Directorate of Criminal Investigations concerning the fraudsters who purported to sell the property, all of which makes it impossible to secure completion documents.

54. The plaintiffs have no proprietary right or interest to the suit property as they have not paid the balance of the purchase price to be entitled to any of the reliefs sought. The order of permanent injunction is untenable. There is no contract for which the same can be founded. The defendant is the registered proprietor of the suit property. The rental expenses incurred by the plaintiffs, if any are their sole responsibility and the same not based on the agreement for sale between them and the defendant.

55. The plaintiffs are not entitled to possession of the suit property having not paid or deposited the balance of the purchase price as provided for in conditions of the Law Society of Kenya conditions of sale 1989. The plaintiffs are not entitled to any claim of special damages. She prays that the plaintiffs' suit be dismissed with costs.

56. I have considered the pleadings, the evidence tendered by the parties, the written submissions filed on behalf of parties and the authorities cited. The issues for determination are:-

- i. Whether there is an enforceable contract between the parties.*
- ii. Has the contract been frustrated?*
- iii. Whether the plaintiffs are entitled to an order of specific performance.*
- iv. Are the plaintiffs entitled to reliefs sought?*
- v. Who should bear costs of the suit?*

57. The sale agreement between the plaintiffs' and the defendant is dated 2<sup>nd</sup> April 2013. Under clause 4:3 of the said agreement the vendor's advocates were to forward the completion documents to the purchase is advocates before the balance of the purchase price could be deposited under clauses 4.2, 4.3 and 4.5 the vendor was under an obligation to obtain the said completion documents to be forwarded to the purchasers' advocates. He plaintiffs issued several notices to the defendant to complete but the defendant deliberately failed. The notices are dated 8<sup>th</sup> July 2013, 5<sup>th</sup> August 2013 and 16<sup>th</sup> August 2013. The defendant responded to these notices by intimating that she needed more time to obtain the said documents. Though the completion period was 45 days. The contract was extended by the parties as shown in the correspondences between them.

58. In paragraph 17 of her witness statement the defendant states:-

***“On several occasions all parties mutually agreed to extend the completion period and the extension period owing to the challenges that were prevailing at the Land Registry in Nairobi”.***

In a letter dated 9<sup>th</sup> July 2013 by M. N. Kanyara Advocates to M/S Muigai, Kemei & Associates, the defendant in the last two paragraphs stated:-

***“...For your information the under signed spoke with your client on 7 instant and he was informed that as from this week starting on Monday it had been resolved that the former Commissioner of Lands will continue signing on behalf of the Land Commission during the transition period. The undersigned went to the lands office of 7<sup>th</sup> instant and was informed of the steps to be undertaken to process the new grants and the process was commenced.***

***In the event your clients are not willing to wait for completion of the pending process at the lands office our client is ready and willing to refund back the 10% deposit .....***”

Similarly in a letter dated 22<sup>nd</sup> August 2013 by the defendant to the plaintiffs' advocates paragraph 4 (ii) states:-

***“If your clients are not ready to wait for the process to complete, the purchasers are at liberty to rescind.....”.***

59. In a letter dated 30<sup>th</sup> September 2013:-

***“30<sup>th</sup> September 2013***

***Muigai, Kemei & Associates***

*Jabavu House, 3<sup>rd</sup> Floor*

*P. O. Box 10060-0010*

**NAIROBI**

*Dear Madam,*

**RE: SALE OF LR Nos 7380/23, 7380/24 & 7380-/25**

**VENDOR: MERCY NYAMBURA KANYARA**

**PURCHASERS: ABDELHAFID TCHOKETCH & VERONICA TCHOKETCH**

*“We refer to your letter dated 23<sup>rd</sup> instant relating to the above mentioned.*

*During the meeting held between yourself, your client and the undersigned on 4<sup>th</sup> instant, we agreed that there is need to have an addendum to the sale agreement due to the fact that the vendor will not be able to fulfil clause 5.4 of the sale agreement. During the meeting you client did agree to pursue the shifting of the beacon thus the need to have an addendum.*

*In the meantime as notified during our telephone conversation, we are in the process of obtaining copies of the subdivision certificate and the final approval. We are hoping to get the same before end of this week.*

*Kindly let us have a draft if the addendum for our approval.*

*Attached are the allotment letters for the aforesaid parcel.*

*Yours faithfully,*

**M. N. KANYARA & CO. ADVOCATES**

**MERCY KANYARA(Ms)**

It is clear from the above letters that the parties continued to engage even after the completion period. I agree with the plaintiffs’ counsel submissions that parties extended the completion by conduct.

60. The defendant cannot rely on the letter dated 22<sup>nd</sup> August 2013 allegedly communicating rescission of the contract, when the letter dated 30<sup>th</sup> September 2013 speaks otherwise.

I find that as at 30<sup>th</sup> September 2013 parties were willing to go ahead with the completion of the contract.

61. I find that the sale agreement of 2<sup>nd</sup> April 2013 is valid and enforceable. The defendant is estopped from alleging rescission when she was negotiating on completion in respect of LR No 7380/25.

I rely on the case of Bernard Ng’ang’a Ndirangu vs Samuel Wainaina Tiras [2019] eKLR.

In the correspondences outlined above the defendant requested the plaintiff to wait for her to procure completion documents. The plaintiff chose to wait.

62. The defendant’s case is that the contract was frustrated because she was not able to obtain the completion documents from the Land Registry and the National Land Commission.

63. According to Blacks Law Dictionary 10<sup>th</sup> Edition “Frustration” is defined as:-

***“The prevention or hindering of the attainment of a goal, such as contractual performance”.***

*Commercial frustration is defined case:-*

***“An excuse for a party’s non performance because of some unforeseeable and uncontrollable circumstances”.***

*While self induced frustration is defined as:-*

***“A breach of contract caused by one party’s action that prevents the performance”.***

The defendant was not able to demonstrate by way of letters that she tried to procure the documents from the said bodies.

64. There is no communication between the defendant and the said various bodies to show that she applied, forwarded relevant applications or to follow up on the requisite consent or title documents. The defendant did not avail any letter from the Land Registry or the National Land Commission in regard to the said documents. I agree with the plaintiffs' counsel submission that the defendant failed to take any action against the said bodies for not acting on the applications if any. The defendant did nothing to compel the said bodies to perform their duties. She needed an explanation from the said bodies as to why they had not acted on her application for consents and or issuance of titles.

65. In my view, the defendant ought to have demonstrated that she took steps to procure the completion documents. I find that the defendant has failed to discharge that burden. In the case of **Lucy Njeri Njoroge vs Kaiyahe Njoroge [2015] eKLR** the Court of Appeal held as follows:-

***“This leads us into the issue of whether the contract was indeed frustrated. The case of Davis Contractors Ltd vs Farehum U.D.C [1956] AC 696 sought to provide guidance on when a contract can be held to have been frustrated. In that case Lord Radcliff stated thus:-***

***“.....frustration occurs when the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. “Non haec in faederi veni”It was not what I promised to do... There must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for”.***

The defendant failed to demonstrate that she took all reasonable steps that a diligent conveyancing lawyer was expected to have taken to ensure that completion documents are obtained.

66. When cross examined by the plaintiffs' counsel the defendant stated she did not write any letters to the Ministry of lands and the National Land Commission regarding the completion documents. Perhaps this explains why none were produced. She also admitted that she did not file any suit against the neighbour she alleged had encroached on LR NO 7380/25. There is nothing to confirm there is a boundary dispute in respect of the said plot. I agree with the plaintiffs' counsel's submission that the frustration cited by the defendant is self-induced.

67. The defendant also stated that the title documents at the Lands Registry. This was not pleaded in the statement of defence. In fact the defendant has not demonstrated that the said Title is missing from the Land Registry. Even if it was true the defendant did not state what steps she has taken to have the file reconstructed.

68. The plaintiffs were to deposit the balance of the purchase price with their Advocates upon the vendor availing the completion documents. The letter dated 22<sup>nd</sup> August 2013 by the defendant to the plaintiffs' Advocates cannot be construed to communicate termination of the sale agreement. The plaintiffs have committed no breach. It is their case that they are ready and willing to pay the balance of purchase price as per the agreement.

69. The vendor was obligated to avail the completion documents before the balance of the purchase price could be deposited by the plaintiffs' with their advocates.

70. All in all, I find that the plaintiffs have proved that the sale agreement ought to be enforced. I find that they are entitled to an order of specific performance. In the case of **Orion East Africa Ltd vs Ite Farmers Corporation Society Ltd** S. Okong'o J quoted with approval the supreme court case of Uganda in the case of **Manzour vs Baram [2003] 2EA 580** that was cited in **Thrift Homes Ltd vs Kays Investments Ltd [2015] eKLR** the court stated thus:-

***“Specific performance is an equitable remedy grounded in the equitable maxim that “equity regards as done; that which ought to be done. As an equitable remedy; it is decreed at the discretion of the court. The basic rule is that specific performance will be decreed where a common law remedy such as damages, would not be adequate to put the plaintiff in the position he would have been but for the breach. In that regard the courts have long considered damages an inadequate remedy for breach of a contract of sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance,***

***.....in the result I would allow the appeal, and set aside the judgments and decrees of the Court of Appeal and the High Court and subsequent judgement and decree of specific performance of the said agreement, ordering the respondent to transfer the suit property to the appellant. I would order the respondent to pay to the appellant costs of this appeal as well as costs in both courts below”.***

71. Similarly, in the case of **Bernard Ng'ang'a Ndirangu vs Samuel Wainaina Tiras [2019] eKLR** the Court of Appeal held that an order of specific performance will issue to compel a registered owner who has received the money for a property and has retained the money with the property.

72. The defendant failed to procure completion documents for over seven (7) years without any justifiable cause. The plaintiffs have suffered loss and they are entitled to damages for breach of contract. I award Kshs.300,000/- which I think is reasonable.

73. The plaintiffs are however not entitled to special damages of Kshs.11,275,000 as sought in paragraph (f) of the Amended Plaint as the issue of rent was not captured on the sale agreement. It was not stated what the plaintiffs would do with the suit properties once they acquired the same. They did not produce any building plans to show that they intended to put up a residential house.

74. All in all, I find that the plaintiffs have proved their case on a balance of probabilities as against the defendant.

75. Accordingly, judgment is entered for the plaintiffs as against the defendant as follow:-

*(a) That a permanent injunction is hereby issued restraining the defendant, either by herself, her servants and/or agents from occupying, constructing any structure, putting to any use, interfering, selling and/or in any other way dealing or interfering with Land Reference Nos, 7380, 23, 7380/24 and 7380/25 (Original Land Reference Number 7380/16) otherwise other than as provided in the agreement of sale dated 2<sup>nd</sup> April 2013 between the plaintiffs and the defendant towards effecting transfer of the said suit properties to the plaintiffs.*

*(b) That a declaration is hereby issued that the defendant is in breach of her obligations under the contract dated 2<sup>nd</sup> April 2013 between the plaintiffs and the defendant for sale of suit properties known as Land Reference Nos 7380/23, 7380/24 and 7380/25 (original Land Reference Number 7380/16).*

*(c) That the plaintiffs are hereby declared the true/bonafide owners of the Land Reference Nos 7380/23, 7380/24 and 7380/25 (original Land Reference Number 7380/16).*

*(d) That the plaintiffs herein are directed to pay the balance of the purchase price into court in full discharge of their obligation in the sale contract/agreement of sale dated 2<sup>nd</sup> April 2013 between the plaintiffs and the defendant and therefore the Registrar of Title Karen Area, Nairobi is hereby ordered to register Parcels 7380/23, 7380/24 and 7380/25 in favour of the plaintiffs upon proof of payment of the balance purchase price thereof in court.*

*(e) That an order of specific performance is hereby issued in accordance with terms of the Agreement of sale dated 2<sup>nd</sup> April 2013 signed by the parties herein particularly compelling the defendant whether by herself, her agents, servants, assignees and or anybody claiming thereunder to receive the balance of the purchase price under or as per the agreement of sale hereto from the plaintiff, execute and deliver up to the plaintiff or their advocate all completion documents necessary for registration of a transfer of the suit properties known as Land Reference Nos. 7380/23, 7380/24 and 7380/25 (original Land Reference Number 7380/16) in the plaintiffs name and/or the plaintiff's nominees within 30 days of the order hereof, and in default thereof, the Deputy Registrar of this Court to execute the transfer and all the documents necessary for registration of a Transfer of the interest in the suit properties hereof in the name of the plaintiffs or its nominees upon receipt of payment of the balance purchase price in court by the plaintiffs.*

*(f) General damages for breach of contract for Kshs.300,000/-*

*(g) That costs of the suit are awarded to the Plaintiffs.*

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 1ST DAY OF JULY 2021.

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Litoro for the Plaintiffs

Mr. Leon Calisto for Mr. Lutta for the Defendant

Phyllis – Court Assistant