**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELC NO. 25 OF 2019**

**ANTHONY MBUGUA NJIHIA ..... 1ST PLAINTIFF**

**BERNARD MWANGI WAWERU.....2ND PLAINTIFF**

**PURITY K. KABUBA .....3RD PLAINTIFF**

**ONESMUS KAMAU KAGWANJA.....4TH PLAINTIFF**

**MERCY WAITHERA KIMURA..... 5TH PLAINTIFF**

**& 32 OTHERS..... PLAINTIFFS**

**VERSUS**

**URITHI HOUSING CO-OPERATIVE SOCIETY LTD.....1ST DEFENDANT**

**FAMILY BANK LIMITED.....2ND DEFENDANT**

**JUDGEMENT**

The background

1. The background of the case is that the 1st Defendant acquired the Property L R No L.R. No 11486/6 measuring 104 acres from an undisclosed third party at the cost of Kshs 728 Million. It contributed Kshs. 228 Million to the venture.

2. Vide a letter of offer dated the 20/8/2015, to meet the balance of the purchase price, it approached the 2nd Defendant for a loan facility of Kshs 500 million for purposes of acquiring the said property.

3. Subsequently the 1st Defendant charged the property to the 2nd Defendant creating a first legal charge in favour of the 2nd Defendant as security for the sum of Kshs 500 Million. In addition, the Directors of the 1st Defendant offered personal guarantees as security to cover the loan facility.

4. The charge was executed by the 1st Defendant and the 2nd Defendant on the 15/12/2015. It was not disclosed when the same was registered.

5. Thereafter the 1st Defendant embarked on carrying out a provisional subdivision of the suit land as shown on page 13 of the Plaintiff's bundle. It created the Panaroma Estate Master Plan with the suit land subdivided into various categories of plots with measurements ranging from 1/8, ¼, ½ to over an acre. The project was dubbed Panaroma Gardens. Some of the additional shared facility offerings included residential, commercial spaces, police post, nursery school, waste management system, drainage channels, aquapark and riparian reserve to name a few (herein after called "the common utilities").

6. It would appear that the 1st Defendant thereafter went into a major campaign to sell the plots dubbed the Panaroma gardens to members of the public through the media and its website. According to the Plaintiffs they learned of the project through Hope FM and others through the mainstream media. The buyers would, in addition to buying the plots did subscribe into membership of the 1st Defendant.

7. It was a term of the loan that all the sale proceeds would be channeled through the escrow account in the 2nd Defendant's bank.

8. Then came the default of the 1st Defendant in servicing the loan and what followed were the issuance of notices by the 2nd Defendant in the exercise of its statutory power of sale. See notification of sale dated the 25/4/2019. It is this notice that triggered the filing of the Plaintiffs suit on the 17/7/2019.

The Pleadings

9. The Plaintiffs instituted a suit against the Defendants vide a plaint dated 16th July, 2019 and amended on the 17/2/2020 for orders that;

a. A declaration that the Plaintiffs are entitled to the assorted plots No. 22, 128,129,203,373 and 91 to be hived off all that parcel of land known as L.R. No **11486/6 PANORAMA ESTATE** bought from the 1st Defendant.

b. An order of specific performance of the various sale agreements entered between the Plaintiffs and the 1st Defendant compelling the 1st Defendant to transfer the plots No.22, 128, 129,203, 373, 191, 150, 51, 354, 361, 200, 58, 59, 422, 423, 372, 384, 317, 318, 144, 163, 70, 1, 59, 245, 256, 337, 264, 53, 54, 55, 71, 207, 334, 234, 368, 369, 370, 474, 436, 39, 2, 360, 192, 96, 11, 8, 119, 82, 13, 481 & 482 to be hived off all that parcel of land known as L.R. No **11486/6 PANORAMA ESTATE** to the Plaintiffs and issue them with title deeds and/ or registered lease.

c. An injunction restraining the 2nd Defendant whether by itself, its servants and or agents or whoever acting on its behalf from alienating, sub-dividing, transferring, offering for sale, selling and or dealing with the land parcel L.R. No **11486/6 PANORAMA ESTATE** in any manner adverse to the Plaintiffs' interest in the land.

d. General damages for breach of contract in lieu of or in addition to the order for specific performance.

e. Cost of this suit and any other relief that this Court may deem fit and just to grant

10. It is the Plaintiffs' case that they purchased various sub plots from the 1st Defendant on parcel No 11486/6 – Panaroma gardens (suit land). The 1st Defendant is the registered owner of the suit land. That despite this, the 1st Defendant took a loan with the 2nd Defendant with the mother title as the security behind their backs and after being put in vacant possession. That upon default, the 2nd Defendant now intends to auction the property to recover the loan. That this will cause loss of property and land to the Plaintiffs.

11. The 1st Defendant admitted that it is the registered owner of the suit property and that it sold some portions to the Plaintiffs. It is its averments that the Plaintiffs were aware of its operational model which entailed purchasing a big chunk of land, inviting members to purchase the plots by installments. After full payment of the purchase price together with conveyancing costs, the land would be subdivided into plots and eventually transferred to the buyers.

12. In addition, that the 1st Defendant obtained a loan facility from the 2nd Defendant to purchase the property which facility was serviced through the sale proceeds of the plots. That the Plaintiffs have not paid the purchase price in full together with conveyancing fees. That unless the loan is paid in full the 1st Defendant cannot transfer the plots to the Plaintiffs as the title is held as security by the 2nd Defendant. That the suit is premature.

13. The 2nd Defendant denied knowledge of the agreement between the Plaintiffs and the 1st Defendants save that, the 1st Defendant was the registered proprietor of the suit property. It was its defence that the 1st Defendant took a loan of Kshs. 500,000,000 which was secured by a charge over **L.R. No. 11486/6, PANORAMA ESTATE.** That prior to taking out the loan the 2nd Defendant confirmed that the title was free of any encumbrance. That it has not issued any statutory notice and the suit is an anticipation of a default. It is the 2nd Defendant's defence that the suit against it is misconceived and the orders if granted is likely to suffer harm. That the suit is a collusion between the Plaintiffs and the 1st Defendant to defeat the 2nd Defendant's statutory power of sale should it arise.

The evidence

14. PW1- ANTHONY MBUGUA NJIHIA; stated that he purchased plot No 90 measuring 50*100 feet vide an agreement of sale dated the 9/11/15 at the price of Kshs 1.25 Million which he paid in full and was issued with a receipt dated the 9/11/2015 together with a certificate of ownership No 8701. Later the plot No was changed to No 22 necessitating the execution of another agreement on the 30/9/16. It was his testimony that he executed two sale agreements without the knowledge that the suit land was charged to the 2nd Defendant. That on inquiry he was informed that the loan was for the development of infrastructure and the common utilities. He conceded that he did not carry out any search on the property before executing the agreement of sale.

15. That he was given vacant possession on the 9/11/2015 and he has developed the plot by fencing, planted bananas and dug trenches.

16. That his claim against the 2nd Defendant is a discharge of charge on his plot on account of the full payment made to the 1st Defendant. He admitted in evidence that at no time did he deal with the 2nd Defendant nor made inquiries about the charge.

17. PW2- VINCENT KURIA KIBABU; stated that he purchased plot No 354 (formerly 443) measuring 1/4 of an acre vide an agreement of sale dated the 14/7/2016 at the cost of Kshs. 3,526,523/-. That he paid the full purchase price into account No 005********* at Family bank

on the 5/5/16 as directed by the 1st Defendant. Subsequently he was given vacant possession and issued with an ownership certificate No 4461 dated the 13/9/2016.

18. In cross-examination, he stated that he was not aware of the charge at the point of purchase as he did not carry out any due diligence or search on the property. That he later noticed the clause on the charge and upon inquiry was informed that the loan was for common infrastructural development. According to him the agreement is not complete since he has not been issued with the completion documents. That although the 1st Defendant has failed to issue him with a title for the plots he acquired, he admitted that he too has not issued the 1st Defendant with any completion notice. On re-examination, he testified that he did not know that the property was charged at the point of paying the purchase price.

19. PW3- BENARD MWANGI WAWERU; it was his testimony that he bought two plots (128 and 129 ) from the 1st Defendant and upon payment of full consideration in the sum of Kshs 3.9 million was issued with a certificate of ownership No . That he was not aware of the charge and has sued the 2nd Defendant because it intends to sell the property through a public auction. He produced a bundle of documents to buttress his claim.

20. On cross-examination, he informed the Court that he did not carry out due diligence nor search on the property before he acquired the same. He confirmed that according to Clause 3.1 of the agreement of sale the plots were sold subject to terms and conditions of the title including a charge. That he entered into an agreement with the 1st Defendant and did not deal with the 2nd Defendant at all. On re-exam he informed the Court that he was represented by the 1st Defendant's counsel but could not give clear testimony why the agreement was not dated.

21. PW4- WANGECHI CAROLINE; testified that she bought two plots (150 and 151) from the 1st Defendant and paid the entire sum of Kshs 3.9 million and was issued with a certificate of ownership. That she was not aware of any charge and got to know about it after seeing a notice issued to the 1st Defendant issued by the 2nd Defendant.

22. On cross-examination she told Court that she did not undertake any search and that had she done so she would have found out about the charge. She confirmed that her agreement was undated and had no sufficient reason for this. She confirmed that the charge clause was in the agreement and also that she has not signed any transfer for completion. It was her confirmation that the charge was registered in 2015. That she has not issued any notice of completion to the 1st Defendant though she has demanded for the title a number of times to no avail. On re-exam she told Court that she was not informed of the nature of charge referred in the agreement.

23. PW5, ERICK KIHORO GITERE, it was his testimony that upon hearing about the land being advertised vide Hope FM radio, he visited the land and purchased plot no 361 and paid the purchase price of Kshs 1.95 million in full. That he entered into a sale agreement dated the 26/4/2016 after which he was issued with a certificate of ownership. That at the signing of the agreement, he was not aware of any charge and only got to know about it when he read an auction notice. That notwithstanding full payment, the 1st Defendant has not transferred the plot to him.

24. On Cross-examination, he informed the Court that he never conducted a search as it was the duty of Simon Mwaura, Advocate to do so. It was his testimony that the firm that drew the agreement was RM Murugi Advocates and he did not follow up with them to know if a search had been done. That he has not paid any stamp duty towards transfer. That he acted on the 1st Defendant's assurance that the land was sold free of encumbrances. On re-exam stated that the reason he did not conduct a search was because the 1st Defendant was represented by counsel.

25. PW6, SARAH WAIGANJO GATHECHA, she relied on her witness statement dated 12/2/2020. That she purchased plot No 360 vide an undated agreement of sale in 2016 and paid the full purchase price of Kshs 1.950 Million, receipt of which was duly acknowledged by the 1st Defendant. That she paid a membership fee of Kshs 1000/- to gain membership in the 1st Defendant Company and an additional 13000/- for shares. That he was given possession and has commenced developments thereon.

26. When showed para 2 of the agreement of sale she conceded that the property was charged and the sale proceeds would be used to service the loan to the 2nd Defendant. That despite several enquiries the 1st Defendant has failed to honour its part of the agreement that is to transfer the plot to her. She admitted that no demand was issued to the 1st Defendant before filing the current suit. That the 2nd Defendants notice to auction the property alarmed her otherwise no claim has been laid against the plot she purchased.

27. That she has not paid any other amount on the property in the form of stamp duty but confirms she fenced the property. She told Court that she has not made any demand to the 1st Defendant in respect to issuance of title. On re-exam it was her testimony that she never conducted any search.

28. PW7-FAITH WAMBURA MUGO, she relied on the contents of her witness statement dated the 8/2/2020 and stated that vide the agreements of sale dated the 20/11/2017 and 28/6/2019 she bought two plots (422 and 423) from the 1st Defendant at the total purchase price of Kshs 3.65 million who issued receipts in acknowledgement. Consequently, she was given two certificates of ownership Nos 22560 and 22773. That she was put in vacant possession of the two plots. That the 1st Defendant has failed to transfer the plots to her despite several demands to do so.

29. In addition, that she acquired membership of the 1st Defendant society vide membership No 21789. That she is now aware that the business model of the 1st Defendant relies on member's contribution to purchase the land.

30. She stated that the 1st Defendant represented to her that the suit land was free from encumbrances and only realized later that the land

was charged to the 2nd Defendant. That according to para 3 of the agreement of sale, the land was sold subject to restrictions, policies and charges and conditions stated in the title. She conceded that she has not paid stamp duty, and registration charges as it has not been demanded by the 1st Defendant. She admitted that no one has claimed her plot from her. That although completion was to take place within 90 days, she has not issued a notice of completion as provided for under Clause 11 of the agreement of sale.

31. That she has sued the 1st Defendant for title and the 2nd Defendant because it threatened to auction the land.

32. On further cross-examination, she stated that she was not aware that the suit land had been charged to the 2nd Defendant. That she purchased the property based on trust and had no reason to question the payments she made into the 1st Defendants account at Equity bank. That she is yet to pay for the stamp duty and registration fees as it has not been demanded.

33. DW1- SAMUEL NGUNDO MAINA, adopted his statement dated 15/6/2020 and relied on the bundle of documents in their defence. He introduced himself as the Chairman of the management committee of the 1st Defendant. That the 1st Defendant is the registered owner of 104 acres of land dubbed the Panaroma Estate (LR No 11486/6).

34. That the 1st Defendants model is to purchase land and invite members and non-members to purchase the subplots which are transferred to the buyers upon completion of the purchase price and other transfer charges. That the Plaintiffs are its members and are bound by its rules regulations and policies of its modus operandi.

35. That the 1st Defendant was advanced a loan facility in the sum of Kshs 500 Million from the 2nd Defendant to purchase the Property. This was in addition to its own contribution of Kshs 200 Million. That the sale proceeds were to be used to defray the loan payments through its accounts held with the 2nd Defendant.

36. He stated that the members, Plaintiffs included were aware that the suit land was charged to the 2nd Defendant as it was disclosed in the agreements of sale. That the loan is still outstanding due to slow payments by the purchasers of the plots. That the default by the 1st Defendant was occasioned by the non payment leading to the 2nd Defendant issuing notices for the exercise of its statutory power of sale.

37. That a loan restructuring was reached on the 21/6/19 where the 1st Defendant agreed to interalia market the plots and remit the sale proceeds to clear the loan. That this has not been done as a result of the injunction in force. In addition, that the 1st Defendant waived its right to issuance of notices to exercise statutory power of sale in future and all proceeds were to be channeled to the loan account at the 2nd Defendant's bank. That by the time of loan restructuring some of the Plaintiffs had paid into the loan account as advised by the 1st Defendant. That the 1st Defendant has fully complied with this requirement.

38. With regard to the exercise of statutory power of sale he stated that the 1st Defendant had approached the bank to grant partial discharges for the plots that are fully paid but it stopped when the suit was filed. That the 1st Defendant is in default of the payment of the loan.

39. He confirmed that the Plaintiffs have paid the purchase price, received membership certificates and vacant possession of the plots and what remains is the transfer and titles to be issued.

40. He admitted that provisional subdivision has been done and that all the plots sold are numbered and identifiable. That on the ground the plots have been beaconed and the plots are firmly in the control of the Plaintiffs.

41. He stated that unless the loan is repaid in full, the suit land is not available for transfer to the buyers. In addition, he stated that the Plaintiffs have not paid in full the purchase price as well as stamp duty and other outgoings.

42. It was his testimony that the suit land is now valued over Kshs. 2 billion while the loan is only about 200 million and in his opinion, the bank should grant partial discharges to the Plaintiffs and continue to sell the rest of the unsold land.

43. With that the 1st Defendant closed its case.

44. DW2, ALEX MURIITHI, introduced himself as the relationship Manager of the 2nd Defendant at its head office in Nairobi. He relied on his witness statement dated the 28/2/2020 together with the bundle of documents attached thereto.

45. It was his testimony that the 1st Defendant was advanced a loan of Kshs 500 million vide a letter of offer dated the 20/8/2015 for purposes of acquiring the property. The facility was secured by a first legal charge of Kshs 500 Million over the suit land together with personal guarantees of the Directors of the 1st Defendant. The loan was repayable over a period of 60 months.

46. That the bank was aware of the composition of the 1st Defendant as a membership driven society which relies on its membership as a source of funding. That the bank was aware that the 1st Defendant was buying the land for purposes of subdividing and selling amongst its members. That the proceeds were to be deposited in an escrow account and so far the account has received around Kshs 800,000 from some of the land buyers.

47. That due to the default of the 1st Defendant in repaying the loan, 1st and 2nd Defendant executed a loan restructuring agreement dated the 21/6/2019. That even then the 1st Defendant has failed to comply with the terms of the loan restructuring agreement with the loan outstanding being Kshs 286 million. That as at now the 2nd Defendant is at liberty to exercise the remedies available under the charge

without any recourse to the Plaintiffs as long as the loan account remains in arrears. That the banks right to exercise the statutory power of sale has accrued and that the Court should lift the injunction to pave way for the sale of the entire property by way of auction.

48. That the 2nd Defendant is not privy to the agreements of sale between the Plaintiffs and the 1st Defendant and as such is not binding on the 2nd Defendant. That the consent of the bank was not sought and obtained. However, he admitted that the bank was aware that the plots were being sold to third parties. That the Plaintiffs cannot be in vacant possession because the land is encumbered with a charge in favour of the bank.

49. He admitted that according to the letter of offer dated the 20/8/15 the sale proceeds mentioned referred to the sale of the plots.

50. The witness informed the Court that the bank has not asked for a status report from the 1st Defendant so as to assess who among the Plaintiffs have paid for the plots. Further the witness stated that the charge prohibited the 1st Defendant from selling the land while the letter of offer required it to service the loan through the land sale proceeds.

51. Lastly, that the bank has been accommodative towards the 1st Defendant who has failed to comply with the bank's condition this far. That the only remedy is for the bank to exercise their statutory power of sale.

52. With that the 2nd Defendant closed its case.

The written submissions

53. As to whether the Plaintiffs have proved that they are purchasers of the plots, the Plaintiffs submitted that the evidence by way of agreements of sale, receipts and ownership certificates were not controverted by the Defendants.

54. As to whether the Plaintiffs were given vacant possession, the Plaintiffs submitted that they led unchallenged evidence which evidence was confirmed by the 1st Defendant. That an irrevocable constructive trust was created in favour of the Plaintiffs. That their contribution to the property by way of payment of purchase price created a constructive trust between the Plaintiffs and the Defendants. As to the beneficial interest created on the constructive trust, it is their submission that the same should be shared fairly.

55. That the certificate of ownership issued to the Plaintiffs was an intention to give beneficial interest. They submitted that the nature of transaction culminated to a resulting trust with the meaning espoused in the case of **Twalib Hatayan & Another v Said Saggar Ahmed Al-Heidy & 5 others [2015] eKLR.** It was their submission in relying on the case in **Nairobi Civil Application No. 385 of 2011** that financial institutions should not take advantage of their customers.

56. On whether the Plaintiff knew about the charge, they argue that there was a misrepresentation on the purpose of the charge and that some agreements had the clause while some did not. Further that the 2nd Defendant was aware that the security was being sold to third parties and cannot circumvent this at this point. As to whether they are entitled to the prayers sought, it is the Plaintiffs' submissions that the legal charge is defeated by the constructive trust created by the Defendants in their favor. That they paid up the entire consideration and were given vacant possession of the land.

57. That the 2nd Defendant never did due diligence and can recover any amount owing from the 1st Defendant and the plots that remain unsold, or lift the corporate veil and claim from the directors of the 1st Defendants, the guarantors. That they hold overriding interests over the property that the Court should consider and in the end submit that they are entitled to cost.

58. The 1st Defendant submitted on the model of doing business it being a corporative society. That the Plaintiffs were aware of their model which is geared towards membership economic empowerment. It analyzed the case and evidence adduced and submitted on four issues. They submitted that the Plaintiffs are not entitled to specific performance as it is an equitable remedy. That the Plaintiffs are in breach of the terms of the agreement as they did not pay up their respective balances. In submitting on this they relied on the case of **Gurdev Singh Birdi & Narinder Singh Ghatora Case.** Also that the Plaintiff's testimony on the absence of knowledge of the charge does not entitle them to an order of specific performance. It relied in the case of **Reliable Electrical Engineers Ltd Case** to opine that the order for specific performance will occasion it financial hardship.

59. On whether the Plaintiffs are entitled to permanent injunction, the 1st Defendant submits that the same would result in a stalemate. That they restructured the loan and were allowed to advertise and market the property to mobilize funds. That the standard of proof for grant of permanent injunction is high than that of temporary injunction and which the Plaintiffs have not discharged. Reliance was on **Kenya Power and Lighting Co. Ltd vs. Sheriff Molana Habib [2018] eKLR.** On general damages, the Defendant submits that the Plaintiffs failed to specifically plead damages and are thus no entitled.

60. It is the 1st Defendant's submission that the Plaintiffs are not entitled to costs. That at the time of instituting the suit, there was no notice of sale since the Defendants had restructured the loan. That had the Plaintiffs issued the 1st Defendant with a notice of intention to sue, they would have been made aware of this fact and the suit would have been avoided. It was its contention that the Plaintiffs' were aware of the charge.

61. The 2nd Defendant submitted on the analysis of pleadings and evidence and opined five issues for consideration. That the charge as drawn is valid and none of the parties challenged it and is thus binding on all parties. That the charge is a contract as was held in **First Choice Mega Store Limited v Ecobank Kenya Limited [2017] eKLR.** That being the case, the intention of the parties ought to be protected as was laid down in **Ibrahim Seikei T/A Masco Enterprises v Delphis Bank [2004] eKLR.** On the issue of permanent injunction,

it is its' submission that the Plaintiffs have not discharged the standard of proof required in grant of Permanent injunction. That the standard of proof is higher as was established in **Kenya Power case (supra).**

62. The 2nd Defendant submitted that the 1st Defendant took a loan of 500M and having defaulted to pay, it exercised its statutory power of sale as required by law. That issuing the injunction will result in non-payment by the 1st Defendant which loan continues to attract interest as it is non-performing. That the Plaintiffs were aware of the charge and the 1st Defendant having sold a considerable number of the plots continues to enjoy financial benefits at the behest of the loan. That despite restructuring the loan, the 1st Defendant has not repaid the loan and as at 29/04/2021 the loan stood at Kshs. 295,090,493.16. That they owe legitimate expectation to their customers in whose money they use to grant such loans.

63. Further, it submitted that the partial discharge of charge as suggested is unfair to them. That it would be difficult to do so due to the glaring discrepancies in the nature that whereas agreements depict certain plot numbers, the certificate indicates another. Also there was no evidence to demonstrate developments on the plots. It submitted that since sub-division has not been completed, it would complicate the discharge. On who should bear the cost of the suit, it submits that the suit revolves around performance of agreement which is between the 1st Defendant and the Plaintiffs.

64. It further submitted on the various prayers and sought to distance itself from the issue of specific performance and damages.

Analysis and Determination

65. Before delving into the determination of the suit, I need to address the issue of the Plaintiffs case. The suit was filed by 37 Plaintiffs each claiming a specific plot or plots. At the hearing only 7 Plaintiffs being 1st, 2nd, 6th, 7th, 8th, 11th and 36th testified on their own behalf. The balance of 30 Plaintiffs did not offer any evidence in support of their cases.

66. According to the record the counsel for the Plaintiffs informed the Court and the Defendants that he had instructions to close his client's case ostensibly since the case was similar in all respects and to save on judicial time. I have anxiously perused the pleadings and I find no evidence that the 7 Plaintiffs testified with the authority of the 30. It is also not in dispute that the suit was not a representative suit as per the provisions of Order 1 Rule 8 and 13 of the Civil Procedure Rules in which event there has to be authority in writing by the persons being represented.

67. In the circumstances I shall proceed to strike out the suits of the 30 Plaintiffs for want of prosecution.

68. For purposes of clarity, all reference to the Plaintiffs therefore in the suit shall be made to the 1st, 2nd, 6th, 7th, 8th , 11th and 36th Plaintiffs.

69. Having considered the Pleadings, the evidence of the witnesses, the written submissions and the applicable law, the overall issue is whether the Plaintiffs are entitled to the Prayers sought; who meets the costs of the suit.

70. The Plaintiffs led evidence that they purchased plots from the 1st Defendant, executed agreements of sale, paid the full purchase price and were issued with receipts acknowledging the consideration together with the ownership certificates in respect to the plots acquired. This evidence was supported by the agreements of sale, payment receipts, certificates of ownership and the panaroma estate master plan produced by the Plaintiffs.

71. The Plaintiffs contend that the land was unencumbered and the 1st Defendant did charge the property behind their backs. According to the charge on record, the charge between the 1st and 2nd Defendant was entered in 2015. It is common between the 1st and 2nd Defendant that the property was charged in 2015. It is also a common ground between the Plaintiffs and the 1st Defendant that the sale of the plots took place in 2016 onwards. That being the case it follows that the charge took priority over the sale of the Plots.

72. This can be seen in the agreement dated the 30 /9/2016 between the 1st Plaintiff and the 1st Defendant. Clause 2 of the said agreement states as follows;

> "The property is currently charged to Family Bank of Kenya Limited and the Vendor shall use the sale proceeds herein to procure a discharge of charge from the said bank in order to facilitate completion of this transaction."

73. The second example of the agreement of sale undated between the 2nd Plaintiff and the 1st Defendant with respect to Plot No. 128 contained a proviso under Clause 3.1 to the effect that the purchaser acknowledged that the property is sold subject to the covenants terms conditions stipulations and rights as provided and reserved in the title.

74. The Plaintiffs led similar evidence at the trial that they did not carry out any due diligence to wit a search at the lands office on the suit property. Their claim that the 1st Defendant charged the property behind their backs is to say the least untrue going by the evidence adduced. It is vital that a purchaser carries out due diligence on the property that they wish to buy. A search is a preliminary step that a buyer is expected to take. Had the Plaintiffs done that it would have been obvious that the land was not free from encumbrances.

75. It is the view of the Court that the Plaintiffs purchased land that was encumbered by a charge in favour of the 2nd Defendant. This was disclosed in the agreement of sale and they cannot turn around and feign ignorance of the same. The 1st Defendant made the disclosure in the agreement of sale and the Court finds no evidence of misrepresentation on the part of the 1st Defendant.

76. It is not disputed that the 1st Defendant created a first legal charge over the suit property in 2015. Under Clause 6 of the charge the 1st Defendant reserved the right to early redemption of the property under Section 85(3) of the Land Act subject to payment of the loan, the secured obligations and performance of all the obligations under the charge. Clause 40 of the charge states that the discharge of the charge shall be upon the final payment of the money secured and due to the 2nd Defendant.

77. The 1st Defendant pursuant to Clause 7 of the charge read together with Section 88 (1) of the Land Act, specifically subsection g) covenanted not to transfer or assign the land, lease or part of it without the consent of the 2nd Defendant, which consent shall not be unreasonably withheld.

78. Para 7(g) of the charge states that if (and upon receipt of the banks written consent) the property is subdivided or partitioned, the 1st Defendant must comply with the terms given by the bank for such subdivision or partition (as the case may be).

79. Section 87 of the Land Act and Section 59 of the Land Registration Act are both pertinent pieces of legislation in such situations. Section 87 of the Land Act provides:-

> "If a charge contains a condition, express or implied that charge prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar."

Section 59 of the Land Registration Act provides-

> "If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar."

80. The above provisions made it mandatory for parties to seek and obtain the consent of the 2nd Defendant before an Agreement for sale of a charged property is entered into and concluded. As earlier stated the charge having been disclosed in the agreement of sale, the Plaintiffs could have ensured that the said agreement of sale was endorsed by way of consent by the 2nd Defendant. This was not done and the conclusion is that the sale of the suit land is subject to the charge in favour of the 2nd Defendant.

81. Equally the 2nd Defendants right to exercise its statutory power of sale was reserved under Clause 10 of the charge read together with Section 90 and 96 of the Land Act. The actions of the 2nd Defendant with respect to the remedies of default on the part of the 1st Defendant are in accordance with the charge and the law. I find no ground to fault the 2nd Defendant. Nothing has been brought to the attention of the Court that the charge in favour of the 2nd Defendant suffers from any defect. The charge therefore remains valid and binding between the 1st and 2nd Defendant.

82. Are the Plaintiffs entitled to specific performance against the 1st Defendant? Specific performance, like any other equitable remedy, is discretionary and the Court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant. See the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR.**

83. According to the evidence tendered by the 1st Defendant the title of the suit land is yet to be subdivided. It is not in doubt that there exists a subdivision scheme through which the plots are identifiable. It is also common ground that the title of the suit land is with the 2nd Defendant having secured the loan facilities in favour of the 1st Defendant. It is therefore impractical to order specific performance against the 1st Defendant for the simple reason that it has not possess the title. In addition, the title being charged is not available to the 1st Defendant to convey to the Plaintiffs until the loan is repaid in full.

84. I am persuaded with the reasoning of the Court in the case of **Oscar Ochieng & another v Prilcscot Company Limited [2018] eKLR** when the Court held that:

> "As a common law rule, the Court will not decree specific performance where, if at trial, evidence is tendered to the effect that the vendor is unable to convey the land. This rule is informed by the philosophy that it is the essence of the remedy of specific performance that the purchaser should obtain the land".

85. For that reason I hold the view that the Plaintiffs are not entitled to specific performance as against the 1st Defendant.

86. With respect to the prayer for injunction against the 2nd Defendant, it is common ground that there is no privity of contract between the Plaintiffs and the 2nd Defendant. The only person that can raise an issue about the charge is the 1st Defendant and not the Plaintiffs. If the Plaintiffs are allowed to injunct the 2nd Defendant it will mean that the 1st Defendant being bound by the contractual terms of the charge will escape its obligations to repay the loan as per the charge. As stated earlier the Plaintiffs entered into the agreements of sale with full knowledge of the existence of the charge meaning they took the risk including the event of default on the part of the 1st Defendant and the sale of the property in exercise of the 2nd Defendant's power of sale. The Plaintiffs were aware or ought to have known the risk they were

assuming. Any rights that may have accrued to the Plaintiffs are insubordinated to the rights of the 2nd Defendant. They can claim against the 1st Defendant but not the 2nd Defendant.

87. They instituted the suit on the presumption that there was an auction that threatened to dispose of the property. During trial no material evidence was placed before Court to demonstrate that indeed there was any threat of auction. The Defendants did lead evidence that the loan period was extended by a period of sixty months upto 2024. The Defendants further informed the Court that there is no eminent danger since the auction was arrested by the loan restructuring agreement entered into between the 1st and 2nd Defendant. Had the Plaintiffs issued a demand letter as required perhaps they would be aware of this. Thus, the Plaintiffs' proprietary right is not in any danger and if there is, they have not discharged their burden to demonstrate so.

88. On the question whether they will suffer substantial loss, the Plaintiffs led evidence through the agreements of sale which disclosed the consideration for the purchase of the plots. It is the view of the Court that if any injury will be suffered then the same can be assessed and compensated by way of damages. Further, that the 1st Defendant charged the suit property as security for loan, it is right to make an inference that the land became a commodity for sale in case of default and the value can be ascertained at market rates. (**See Nairobi HCC No. 203 of 2005 Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR).** Also even if the Plaintiffs acquired beneficial interest on the property, the same is insubordinated the 2nd Defendant's interest on the charge. (**See Nairobi HCC No. E035 of 2020 Monica Waruguru Kamau & another v Innercity Properties Limited & 2 others [2020] eKLR).**

89. In any event the Plaintiffs can still proceed against the 1st Defendant for the appropriate remedies under the agreement of sale and therefore do not stand to suffer prejudice. It is borne by Clause F of the agreement of sale that the Plaintiffs are members of the 1st Defendant and therefore it follows that it is in their interest that the 1st Defendant complies with the terms of the charge so as not to jeopardize their acquisitions. See Clause F which states as follows;

> "The Purchaser being a member of the Vendor understands and agrees to be bound by the model policies rules and regulations formulated and approved for use by the vendor for the benefit of its members."

90. In the circumstances of this case the 1st Defendant, for which the Plaintiffs are members, committed itself in the charge to repay the full loan facility advanced and comply with all the terms of the charge before the suit land could be discharged. Indeed under para 2 of the agreement of sale, it disclosed to its members, the Plaintiffs that the property is charged to the 2nd Defendant and that the purchase price was to be used to procure the discharge of charge from the bank in order to facilitate completion of the transaction. These are the terms the Plaintiffs bound themselves to in the agreement of sale. It is common ground that the 1st Defendant is yet to comply with the terms of the said charge.

91. I find that the balance of convenience does not tilt in favor of the Plaintiffs. The prayer injuncting the 2nd Defendant is therefore dismissed.

92. The Plaintiffs prayer for general damages has not been proved. Though pleaded, it would appear that the Plaintiffs abandoned it mid-way. In any event it is the law that general damages are not awarded in a claim emanating from contract. This Court is guided by the reasoning in Court of Appeal Case of **Nairobi Civil Appeal No. 120 of 2017 Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** that:-

> "as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason"

93. The prayer for general damages is not proved and is hereby dismissed.

94. The Plaintiff submitted that constructive trust has accrued in its favour and urged the Court to hold as such. The Plaintiffs failed to plead particularize and proof constructive trust on the part of the Defendants. I do not need to say more on this.

95. In the end I find the Plaintiffs case is unmerited. It is hereby dismissed.

96. I order that each party to meet their costs.

97. The interim orders issued on the 19/12/2019 be and are hereby discharged.

98. It is so ordered.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 12TH DAY OF OCTOBER 2021**

**J. G. KEMEI**

**JUDGE**

In the presence of:-

Mr. Gacoya for the Plaintiffs

Ms Gitau for the 1st Defendant

Ms Wangu for the 2nd Defendant

Ms Phylis Mwangi – Court Assistant