



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 138 OF 2015

CLEOPHAS NGEYWA.....PLAINTIFF

VERSUS

DINAH NAFULA SEME.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff commenced the instant suit by way of a plaint dated **26/10/2015** which was filed on the same date. The plaintiff seeks for orders against the defendant as follows:-

(a) **Declaration that the defendant is a trespasser on LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3925 and 3926.**

(b) **Eviction orders to remove the defendant, construction materials and demolish all the structures constructed by the defendant on LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3925 and 3926.**

(c) **General damages for breach of the agreement dated 5/1/2014, damaged fence, banana stems, fruit trees, maize plantations and indigenous trees.**

(d) **Costs of the suit be provided for.**

PLEADINGS

The Plaintiff

2. It is the plaintiff's case that he and the defendant entered into a sale of land agreement on **5/12/2014** for the sale of **LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/2111** by the plaintiff to the defendant for a consideration of **Ksh 1,200,000/=**; that at the execution of the agreement the defendant paid **Ksh 900,000/=** to the plaintiff; that the balance of **Ksh 300,000/=** has not been paid to date; that subsequent to the agreement the plaintiff subdivided the **LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/2111** into **LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3925** and **LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3926**; that the defendant forcibly entered the two plots in **September 2015** and destroyed the fence as well as various crops on the land and deposited construction materials on the land; that no land control board consent was obtained for the transaction and that she ought to be evicted therefrom.

The Defendant's Defence and Counterclaim

3. The defendant filed her defence and counterclaim on **16/12/2015** which she later amended on **16/3/2017**. In that amended defence and counterclaim she admitted that she paid **Ksh 900,000/=** and that there were conditions precedent to the payment of the balance; however she also adds that she subsequently paid the full balance in instalments on various dates. She stated that she took possession of the land after viewing it in **2015** and has retained possession ever since of a portion of land measuring **50** by **160** feet which she has already developed. After she had developed the plot she came to learn that the plaintiff had subdivided the land into **4** titles. According to her, some of the monies were deposited with Karani & Co Advocates for transmission to the plaintiff. The plaintiff failed to pick the money and the defendant fearing the cheque would become stale retrieved it and deposited **Ksh 28,000/=** in the plaintiff's wife's account whose number he had been given by the plaintiff. She terms the subdivision of the land as calculated to defraud her of her money. In her counterclaim she states that she has paid the entire purchase price and seeks a declaration that she is in lawful use and possession of the two portions and an order of specific performance. She also seeks costs.

Reply to the Amended Defence and Counterclaim and Defence to The Counterclaim.

4. On 3/4/2017 the plaintiff filed an amended reply to the amended defence and defence to counterclaim. In that pleading the plaintiff avers that the balance of the purchase price remains unpaid to date; that there was no fraud; that the defendant has been refunded the sum of **Ksh 193,000/=** by one **Janet Nekesa Wanyama** and that the orders sought by the defendant cannot issue in her favour as she is in breach. He avers that the counterclaim should be dismissed for the additional reason that there was no consent of the land control board for the sale transaction between the parties.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Case

5. **PW1, Cleophas Ngeywa**, the plaintiff testified on 23/10/2017. His evidence closely follows the matters set out in the plaint. He admits that the defendant purchased his land on 5/12/2014; that the balance was to be paid on or before 5/3/2015 but it has never been paid; that he subdivided the land into 4 subplots which are still registered in his name; that the defendant invaded two of the plots and destroyed crops and developed the same without his consent; that the parties have never attended the land control board to obtain its consent; that the reason for the failure to attend the board is that the defendant breached the consent; that the defendant never heeded the demands from the plaintiff through his advocate to vacate the land. He denied having ever received the funds that the defendant claims to have paid to his wife.

6. On cross-examination however he admitted that his witness in the agreement was *Janet Nekesa Wanyama* who is his wife; that *Paul Wasike* named in the agreement was the defendant's father; that he sold land to secure school fees for his children; that he showed the defendant the portion that she was buying; that he entered into the transaction with the defendant after his employer interdicted him; that he has sold the remaining two plots to two other persons; that the special condition in the agreement stated that the purchaser was to take possession immediately on execution; that his wife went with the defendant and they deposited the deposit in his wife's account with the bank; that as at the time of sale the land was charged to the agricultural finance corporation and could not be subdivided as he owed the **AFC Ksh 200,000/=**. Her denied knowledge of the sums allegedly paid to his wife by the defendant. He also admitted that he sent the demand notice to the defendant after he had subdivided the land; he admitted that the defendant collects rent from the tenants in the dwellings on the land; that the land that he occupies is **20 by 100** feet; that he did not intend to defraud the defendant. on re-examination by Mr Nyamu he offered to refund the sum of **Ksh 900,000/=** to the defendant and at that juncture the plaintiff closed his case.

The Defendant's Defence & Counterclaim

7. **DW1, Dinah Nafula Seme**, the defendant testified on 6/5/2019 and on 23/9/2019. Her evidence is that in November 2014 she was introduced to the plaintiff who in turn introduced her to his wife; that the plaintiff had a half acre of land; that the parties viewed the land in the company of three other persons; that they met the plaintiff's wife and children on the land; that they agreed on the sale of a portion measuring **80 by 100** feet; that the agreement was executed at an advocate's office; that the plaintiff his wife and the defendant and her father signed the agreement; that one condition was that the plaintiff would clear the AFC loan he had borrowed on the security of the land before the balance was paid; that the plaintiff was required to remove his trees and fruits from the land before 30/1/2015 and also obtain consent of the land control board and execute a transfer in the defendant's favour; that the agreement was that anyone who failed to meet the conditions would pay **30%** of the consideration as the penalty; that on 16/2/2015 the plaintiff called the defendant as his children had been sent away from school for lack of fees; that the plaintiff asked the defendant to lend the family money and after securing the approval of Mr Karani the advocate she deposited **Ksh 35,000/=** in his wife's account on 16/2/2015; that regarding the payment of the deposit of **Ksh 900,000/=** the plaintiff and his wife temporarily disagreed on which account the money was supposed to go to but finally settled on the wife's account and the defendant and the plaintiff's wife were entrusted with visiting the bank to deposit the money. She produced the deposit slips as **DExh 2** and **DExh 3**. That on 4/3/2015, **DW1** visited the AFC office and upon inquiry was informed that there was a balance of **Ksh 160,000/=** unpaid on the loan advanced to the plaintiff on the security of the land and the bank had readied documents for auction of the suit land; that she then informed the AFC of her interest in the land and requested priority; that by then the plaintiff was in Nairobi; that she then called the wife; that they agreed to meet at Mr Karani's office on 5/3/2015 but the plaintiff skipped the meeting; that the police then traced him to Nairobi; that on 10/3/2015 the advocate approved payment of funds into the plaintiff's wife's account; that the defendant was to pay **Ksh 165,000/-** on 17/3/2015; that she paid and an acknowledgement of receipt by the plaintiff and his wife was made out and signed at Mr Karani's office; that that was part of the purchase price; that the balance was **Ksh 100,000/=** as stated in the acknowledgement; that after receiving **Ksh 165,000** The plaintiff's wife only paid **Ksh 20,000/=** towards the loan and a balance of **Ksh 140,000/=** remained leading the AFC to call the defendant threatening to auction the property; that when the defendant inquired of the plaintiff's wife as to why she never paid in full she simply stated that they had issues with the AFC and that the defendant should advance them more money; that the defendant also asked the plaintiff why the loan was not cleared; that the defendant then gave the plaintiff's wife **Ksh 47,000/=** in cash which the plaintiff's wife never signed for; that the plaintiff's wife again failed to repay the loan in full and paid only **Ksh 13,000/=** leaving a balance of **Ksh 34,000/=** that the AFC manager informed the defendant that she could repay the loan directly and the defendant's counsel approved of the plan; that the defendant then paid to AFC **Ksh 25,000/=** on 20/4/2015 vide receipt produced as **DExh 5**; that later she sent a bankers cheque to the plaintiff through Mr Karani the advocate; that the plaintiff refused to collect the bankers cheque and that he has also never refunded the money already received; that as the **Ksh 28,000/=** bankers cheque was getting stale the defendant took it from Mr Karani's office and replaced it with cash of equal amount which she deposited in Janet's bank account; that the defendant has paid the full purchase price of **Ksh 1,200,000/=**. The defendant denied being in breach of the contract and averred that the contract contained a **30%** penalty for breach. She maintained that the contract has not been rescinded yet. She stated that she was not given any agricultural assessment and that the plaintiff was to remove the crop on the land by 31/1/2015. She also maintained that Janet received the purchase price on behalf of the couple as she was the plaintiff's wife and it was trusted that the money would offset the school fees once paid through her hand. She stated that the entire loan to AFC was fully repaid and that she was the initial source of the money that repaid it and that the subdivision of the land of which she had not been notified was fraudulent.

8. Under cross-examination by Mr Nyamu, she admitted that no clause in the agreement provided that the consideration be paid to the plaintiff's wife. She also stated that she recalled the plaintiff writing to state that he was not interested in proceeding to the conclusion of their transaction thus leading to her lodging of a caution over the land, and that she does not recall Mr. Karani writing to state that she was still intent on proceeding with the same.

9. In re-examination by the defendant's counsel the defendant stated that the plaintiff was supposed to have provided her with consent of the land control board before payment of the **Ksh 100,000/=** but he failed to; that part of the consideration was paid after the stipulated period had expired and accepted and that all through the transaction the plaintiff never wrote to her to state that she had paid the consideration to the wrong person.

10. **DW2, Aggrey Karani**, testified on **9/10/2019**. He stated that he is an advocate of the high court; that the parties herein are known to him; that Janet is the plaintiff's wife; that he prepared a sale agreement for the parties on **5/12/14**; that the agreement was for a plot of **80 by 100** feet; that the plot was to be carved out of **Kitale Municipality Block 15/Koitogos /2111**; that the plaintiff was the seller; that the consideration which was **Ksh 1,200,000/=** was to be paid in two instalments; that **Ksh 900,000/=** was paid on the day of execution thereof; that on **10/3/15** the defendant and Janet visited his office and instructed him to prepare an acknowledgement for **Ksh 165,000/=** paid to Janet by Dinah at the plaintiff's instruction; that he called the plaintiff who stated that he was in Nairobi; that however the plaintiff confirmed that he was aware that his wife had been paid; that **DW3** then prepared the acknowledgment naming the plaintiff but indicating that the money had been received by Janet on his behalf. Janet, Dinah and her father were present at the time of the making of the acknowledgment; that as the plaintiff was away he could not sign the acknowledgment; that **DW3** retained all the three sets of acknowledgment as the plaintiff had not signed; that he instructed Janet to ask the plaintiff to attend and sign the acknowledgment but he never did. Later the defendant took away the three forms and indicated that she would seek the plaintiff and get him to sign them; he produced the acknowledgment as **DExh4** which stated that **Ksh 900,000/=** was paid to the plaintiff while he was with his wife Janet. He confirmed that the defendant later availed a bankers cheque for **Ksh 28,000/=** and instructed him to call the plaintiff to collect it and that the plaintiff in response stated that he did not want the money. **DW3** then returned the cheque to the defendant.

11. Upon cross-examination by Mr Nyamu **DW3** stated that none of the parties ever came back to extend the contract payment deadline of **5/3/2015**. According to **DW3**, the plaintiff's refusal to proceed with the transaction came after the acknowledgment had been executed.

12. **DW3, Janet Nekesa Wanyama**, testified on **1/7/2021**. She adopted her witness statement dated **29/7/2021** as her evidence-in-chief. Her evidence is that she received **Ksh 165,000/=** while at **DW3's** office while with the defendant but that **Ksh 28,000/=** was not paid to her; she only received a notification later on **15/5/15** that the latter amount had been paid into her account, and that she refunded the latter amount by paying it into the defendant's account. She produced a marriage certificate as **DExh 7** and the deposit slips

13. Upon cross-examination by Prof Sifuna for the defendant **DW3** stated that she was the plaintiff's wife; that the plaintiff never consulted her while he was filing the case; that she lives on the suit land, having begun residing on the land in **2014** with the plaintiff; that from the start she was not involved in the transaction leading to the suit; that she attended the transaction and executed the agreement only as a witness; that she never objected to the sale; that the defendant paid **Ksh 900,000/=** which her husband received and gave her to deposit in her own account; that she went to the bank with Dinah to deposit the cash; that she is not aware that the defendant deposited **Ksh 35,000/=** in her account; that before the defendant bought the land she was shown the spot being sold to her; that the plaintiff's house was not located on that spot; that no survey was done. She knew that the **Ksh 900,000/=** was for the land; that she knew of the balance and the date of the payment of the balance; that she knew of the AFC loan her husband was required to pay; that he had not paid it by **March 2015**, that she stayed with the money paid by the defendant for about two years; that she received **Ksh 165,000/=** on behalf of herself and not in respect of the transaction and that is why she refunded the money to the defendant; that she never gave the **Ksh 165,000/=** to her husband.

14. **DW4, Raymond Tuitoek**, testified on **28/7/2021**. His evidence is that **DExh 8** and **DExh 9** originated from the bank he works for. He stated that the sums of **Ksh 165,000/=** and **Ksh 28,000/=** respectively were credited into the defendant's account vide those banking slips.

15. That marked the close of defence case.

SUBMISSIONS OF THE PARTIES

16. The plaintiff written submissions was filed on **4/11/2019** and a supplementary submissions filed on **13/8/2021**. The defendant filed his submissions on **25/11/2021** and supplementary submissions on **19/8/2021**.

DETERMINATION

Issues for determination

17. I have considered the pleadings, the evidence and the submissions of the parties. The broad issues for determination in this suit are as follows:

(a) Whether it was the plaintiff or the defendant who breached of the agreement dated 15/12/2014 and whether there was fraud on the part of the plaintiff in respect of his transaction with the defendant;

(b) Whether the defendant is in lawful use and possession of Kitale Municipality Block 15/Koitogos /2111 into LR Nos Kitale Municipality Block 15/Koitogos /3925, 3926;

(c) Whether an order of specific performance should issue against the plaintiff to complete the agreement and if so, whether the subdivision of Kitale Municipality Block 15/Koitogos /2111 into LR Nos Kitale Municipality Block 15/Koitogos /3925, 3926, 3927 and 3928 should be nullified;

(d) What Orders should issue as to costs?

18. The issues are addressed as hereunder:-

(a) Whether it was the plaintiff or the defendant who breached of the agreement dated 15/12/2014?

19. In determining this issue the conduct of both parties must be construed against the contractual terms. For the plaintiff the spotlight must turn to whether he performed his non-pecuniary obligations under the contract. The question will also be addressed as to how crucial the performance by the plaintiff of his obligations was to create an enabling environment to the defendant for the performance of her duties under the agreement. In consequence, it will be possible to determine if any action or inaction on the part of one party debilitated the other party and frustrated their attempts to honour their part.

20. Both parties agree that they entered into an agreement for sale of a parcel of land by measurement **80 by 100 feet** to be carved out of land reference no **Kitale Municipality Block 15/Koitogos /2111**; that **Kshs 900,000/=** was paid by the defendant through the plaintiff's wife's account at the execution of the agreement and that the balance that remained was **Ksh 300,000/=**; that the land has now been subdivided by the plaintiff and that the defendant is in possession of a portion of **Kitale Municipality Block 15/Koitogos /2111 into LR Nos Kitale Municipality Block 15/Koitogos /3925, 3926; Kitale Municipality Block 15/Koitogos /2111**.

21. What are the allegations of the plaintiff with regard to breach by the defendant? They are that the defendant neglected or failed to pay the balance of the purchase price and continues with such neglect or failure, failed to pay the penalty provided for in the agreement and subsequently forcibly took possession of the land and developed it.

22. On her part the defendant alleges that the particulars of breach by the plaintiff are that he subdivided the land fraudulently without the defendant's consent, that he failed to inform the defendant that he intended to reduce the acreage of land sold to her, that he secured titles to the new subdivisions and withheld the defendant's money paid as consideration, refused to transfer the land to the defendant.

23. Only a proper interpretation of the relevant provisions of the agreement dated **5/12/2014, PExh 1**, can aid in the determination of who was in breach.

24. I will first examine the plaintiff's allegations. Did the defendant neglect or fail to pay the balance of the purchase price and continue with such neglect or failure? Did she fail to pay the penalty provided for in the agreement and subsequently forcibly take possession of the land and develop it?

25. While the plaintiff avers that the defendant never paid a cent of the balance the defendant responds that she paid the whole amount. **Kshs 35,000/=** was allegedly paid into the plaintiff's wife's account on **16/2/2015** and **Ksh 165,000/=** on **10/3/2015**. A further **Ksh 28,000/=** was allegedly paid into the same account on **31/8/2015**. **Ksh 25,000/=** was paid to Agricultural Finance Corporation in regard to a loan that the plaintiff owed AFC and **Ksh 47,000/=** was paid directly to the plaintiff's wife in cash. As the deadline for the payment of the balance stipulated in the agreement was on or before **5/3/2015**, it is clear to see why the plaintiff alleges there was breach for late payment. But was there?

26. The defendant's position is that the plaintiff was also required to perform some parts of the agreement including clearing the AFC loan he had borrowed on the security of the land before the balance was paid, which the plaintiff failed to do even after being paid the consideration; removing his trees and fruits from the land before **30/1/2015** and also obtaining consent of the Land Control Board and executing a transfer in the defendant's favour and these were not done.

27. It is noteworthy that only the payment of the balance of the purchase price and the removal of crops and trees were subject to express timeframes under the agreement.

28. In respect of discharge of the land from encumbrance of the loan by the AFC, **clause no 4** and **clause no 6** of the agreement conflict since while one acknowledges that the land was still charged the other states that the vendor covenants that the land is sold free of all encumbrances. In this Court's view the proper perspective to take is that the land could not be deemed as effectively sold while the AFC legal charge still encumbered it.

29. The conflict between **clause no 4** and **clause no 6** will be resolved by simply ascertaining whether the plaintiff had repaid the loan by the date the defendant was supposed to pay the balance of the purchased price.

30. The defendant has an AFC receipt dated **20/4/2015** showing that **Ksh 25,000/=** was paid in respect of the plaintiff's loan account with that institution. The payment by the defendant to the AFC was done after the deadline for the payment of the balance of the purchase price that is **5/3/2015**.

31. It is the defendant's case that she paid off the loan to avert an auction of the suit land for the plaintiff's default, which would have prejudiced her purchase.

32. As the deadline for the payment of the balance stipulated in the agreement was on or before **5/3/2015** and the plaintiff had not taken measures to disencumber the land purchased by the defendant by **20/4/2015** this court views him to have been in breach of the agreement even as at **5/3/2015**.

33. I am also content that by paying off the loan owed to the AFC by the plaintiff the defendant was attempting to salvage the agreement between her and the plaintiff and that this is sufficient proof that she still had interest in carrying out her part of the bargain.

34. It is therefore observable that the plaintiff is not entitled to be the first one to cry wolf. I think the ideal situation would have been where the utilized the consideration already paid by the defendant in settling the AFC loan before **5/3/2015** and then inviting the defendant to complete her part of the bargain by that date. As things stand it is impossible for this court to countenance the argument that the plaintiff is

excepted from complying with the vital clause regarding disencumbrance of the sold property while holding that the defendant is held fact to the date of payment of the balance of the purchase price as an effective sale envisaged a disencumbered property.

35. Regarding whether the plaintiff was in breach for late payment of the balance the role of the plaintiff's wife played in the transaction is crucial. The relevant question arising is whether she was the plaintiff's agent in the transaction.

36. The court in the case of **Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited & another [2015] eKLR** cited with approval **Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001**, which defines the agent principal relationship to be:-

“... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”

37. The court in **Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited & another [2015] eKLR** also cited the case of **Branwhite versus Worcester Works Finance Ltd. [1969] 1 A.C. 552 at 587** as follows:

“While an agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from the agency.”

38. In the case of **Garnac Grain Co. Inc. versus H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967) 2 All E.R. 353** it was stated as follows:

“The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct “.

39. First, the plaintiff's wife admitted that she witnessed the agreement. Then she took the money paid as deposit and put it into her bank account. The couple was thus acting in unison at the time of the payment of the deposit. This is the same account that was used for subsequent payments which the defendant intended to be the balance of consideration. Save for **Kshs 25,000/=** paid to AFC and **Ksh 47,000/=** said to have been paid to the plaintiff's wife in cash, the rest of the balance of the purchase price appears to have been paid into her bank account.

40. Were the monies deposited into her account meant for the transaction between the plaintiff and the defendant? the plaintiff's evidence is as follows:

“That sometime in 2015, our relationship deteriorated and we stopped talking to each other wherefore he moved to Nairobi and stayed there leaving me and our five children.

That consequently he chose to dispose of the suit land to the defendant where I witnessed the agreement and the balance owing was to be paid within a given period.

That I am aware that the defendant failed to pay the remainder of the balance as agreed in the contract.

That taking advantage of our strained relationship with the plaintiff she called me through Karani Advocate sometime in October 2016 and told me that the plaintiff had indicated to her that I should go and pick the balance of the purchase price on the plaintiff's behalf.

That since we were not on talking terms with the plaintiff I proceeded to the said firm and was given cash of Ksh 165, 000/= and later was added Ksh 28,000/=through a direct deposit without my knowledge.

That when it became apparent I was duped by the defendant in to accepting Ksh 165,000/= after expiry of the date agreed for payment of the balance of the purchase price I refunded the defendant's money through her account with KCB.

That I am aware that the defendant testified in court alleging that she gave me money as part of consideration for the purchase price which statement is partly true, though the same was given to me after breach of contract, which amount I deposited back to the defendant's account on 28/1/2017, which fact she concealed from the court.”

41. The defendant's allusion of the possibility that the plaintiff may not have paid school fees for his children had he received the consideration is given some credence by what the plaintiff's wife states in her evidence. However, the disagreement between the plaintiff and his wife, if any existed at all, must have preceded the execution of the contract because even the initial deposit of the consideration was placed into the wife's account. The agreement having been executed in **December 2014** with the plaintiff's wife being a witness and she having banked the proceeds into her bank account, the plaintiff's wife's allegation that the family fallout occurred in **2015** sounds untrue. Consequently, it is the finding of this court that she was part and parcel of the agreement, that she knew in advance of and consented to the sale and that the receipt of the monies she got from the defendant was in furtherance of the subject matter agreement. Since she is silent on the matter this court must agree with the defendant that even the sum of **Ksh 47,000/=** was paid to her in **April 2015**. The court notes that the refund of the monies to the defendant by the plaintiff's wife took place on **18/1/2017** that is after about **2 years**. The plaintiff's wife does not

state the exact date that she discovered that she had been misled into receiving money from the defendant. That is not the conduct of someone who has received money erroneously. Besides DW2 stated that in his role and an advocate for both parties in the transaction he telephoned the plaintiff who was away and that the plaintiff gave authority for the payment of the money in his office, and that though the plaintiff was not present to sign the acknowledgement of receipt he would sign it after he returned from his sojourns.

42. It appears that later the plaintiff changed his mind and subdivided the land in the manner the agreement had not envisaged and sold some portions to third parties leaving the defendant high and dry. The copies of certificate of official search in respect of the subdivisions created from the suit land show that the subdivision was effected at least by 1/9/2015. The defendant who by the act seems to have been on the alert regarding any double-crossing by the plaintiff lodged a caution two days later on 3/9/2015. Soon thereafter the plaintiff ran to this court for succour, the defendant having allegedly entered into possession of the suit land in September, for a declaration that she was trespassing.

43. In any event, the acceptance and retention for two years of the monies by the plaintiff's wife who had earlier accepted the agreement's deposit must in the circumstances described herein before, as a waiver of the deadline for payment of the balance of the purchase price.

44. It is quite evident that the plaintiff therefore subdivided the land long after the purchase price had been paid and this was in breach of the agreement.

45. The conclusion from the foregoing is that the plaintiff without good ground breached the agreement dated 5/12/2014, which breach resulted in late payments by the defendant and the defendant may not be blamed for late payments.

46. Lastly on the issue I must address whether there was fraud on the part of the plaintiff.

47. In the case of **Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2014] eKLR Civil Appeal No. 1 Of 2008 (WAKI, G.B.M. KARIUKI, & M'INOTI, J.J.A.)** the Court Of Appeal stated as follows:

"As was stated in R. G. Patel Vs Lalji Makanji (Supra), while allegations of fraud must be strictly proved, the standard of proof may not be so heavy as to require proof beyond reasonable doubt; what is required is something more than a mere balance of probabilities."

48. In the case of **Abiero -vs- Thabiti Finance Company Ltd & Another [2001] eKLR** the court observed regarding fraud as follows:

"Fraud can clearly be inferred from the defendant' acts. (In) Black's Law Dictionary, fraud is defined as:

"A generic term, embracing all multifarious means which human urgently and devise, and which are resorted to by one individual to get advantage over another by false suggestions, or by suppression of truth, and includes all surprise, trick, winning, dissembling and any unfair way by which another is cleared."

49. The court in **Ndolo -versus- Ndolo (2008) 1 KLR (G&F) 742** held that:

"...We start by saying that it was the respondent who was alleging that the Will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

50. The plaintiff rushed to this court as soon as he had subdivided the land and sold portions thereof to persons not named as parties in this suit, claiming that the defendant had not paid the consideration in full and that the transaction lacked the consent of the land control board. I have found that the plaintiff's conduct regarding the encumbrance on the title to the property sold stymied the progress of payments of the balance price; the agreement clearly obligated the plaintiff to execute the transfer instruments and obtain the land control board consents which he has not established that he acquired.

51. The acknowledgment of receipt dated 10/3/2015 signed by his wife bound the plaintiff as though he had signed it personally. It would be unjust to the defendant to hold that she could not pay further consideration through the same person through whom she had paid the initial instalment especially in view of the fact that the recipient was the plaintiff's wife. Besides no letter rescinding the agreement between the parties appears to have been sent to the defendant by then.

52. Finally, having determined that he was not willing to sell land to the defendant any longer, the plaintiff failed to refund the purchase price already received and even when his wife whom I deem his agent in the transaction as far as receipt of consideration is concerned did refund any money, it was with the success of the instant suit in mind that she did so, and she only refunded a paltry amount, less than one third of it.

53. Does the foregoing amount to evidence of a party who was willing to go to great length to take advantage of the defendant, to the extent that the plaintiff should be found guilty of fraud in the transaction?

54. In my view, the answer is in the negative.

55. It must be recalled that all through the proceedings there was a palpable wave of familial conflict sweeping the plaintiff's marriage to the extent that his spouse could not be certain whether school fees for the children would be paid if the consideration was paid directly to the

plaintiff. The fog surrounding that soured marital relationship defies all attempts at a clear identification of fraud in the conduct of the plaintiff. Furthermore, the plaintiff does not deny the agreement. It is perfectly within the law to defend oneself against an action by a party to the agreement which one considers improper and the plaintiff can not be blamed for coming to court. The justice system is there for the purpose of resolving whatever grievances one holds. He did the right thing. I do not therefore find that the plaintiff was fraudulent in his conduct.

(b) Whether the defendant is in lawful use and possession of Kitale Municipality Block 15/Koitoagos /2111 into LR Nos Kitale Municipality Block 15/Koitoagos /3925, 3926;

56. The defendant's defence is that she never unlawfully invaded the plaintiff's land. I find this to be the proper position and I uphold her claim because the contract between the two stated that the defendant was to take possession immediately upon the execution of the agreement.

(c) Whether an order of specific performance should issue against the plaintiff to complete the agreement and if so, whether the subdivision of Kitale Municipality Block 15/Koitoagos /2111 into LR Nos Kitale Municipality Block 15/Koitoagos /3925, 3926, 3927 and 3928 should be nullified;

57. Specific performance is an equitable remedy. The person who applies for it must come to court with clean hands. I have found the defendant to be of clean hands. In this particular case should this court order specific performance?

58. I find the plaintiff's wife to be untruthful when she attempts to create the impression that she resides on the portion that the defendant claims. By the time it was sold to the defendant the family of the plaintiff was living elsewhere on the main parcel **LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/2111** from which it was to be carved and I do not think that they would be prejudiced by orders of specific performance if they issue. Besides, were it not for the refunds which the defendant did not demand to be effected, the defendant must be deemed to have paid the full purchase price and taken possession of the land which possession if conceded by the plaintiff and his wife. In this court's view specific performance is the proper remedy for the defendant in the instant case.

Conclusion.

59. I find that the plaintiff has failed to establish his claim against the defendant on a balance of probabilities while the defendant has established her counterclaim against the plaintiff on a balance of probabilities. I hereby enter judgment for the defendant on her counterclaim and I issue the following final orders:

a. A declaration is hereby issued declaring that the defendant in the main suit is in lawful use and possession of a portion of land measuring 80 feet wide and 100 feet long being part of both LR Numbers LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3925 and LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3926;

b. The subdivision of land reference LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/2111 into LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3925 LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3926, LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3927 and LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/3928 is hereby nullified;

c. The plaintiff shall within 14 days of this judgment inform the defendant the manner in which he desires to be paid and the defendant shall within 30 days of such advice pay to the plaintiff in full in the manner so advised the sum of Ksh 253,000/= being the balance of the purchase price as at date;

d. The plaintiff shall execute all documents requisite for the subdivision of the land in a manner that will accommodate the parcel measuring 80 by 100 feet and the same shall be carved out of LR. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/2111 at the physical location initially agreed by both parties at the execution of the agreement and such subdivision shall as far as shall be practicable accommodate the defendant's developments on the ground;

e. The plaintiff shall execute all documents requisite for transfer to the defendant's name of the parcel of land so carved out in accordance with order (d) above;

f. In default of the plaintiff's compliance with the orders (d) and (e) herein above the Deputy Registrar of Environment and Land Court Kitale shall execute all documents requisite for such subdivision and transfer of the portion of land measuring 80 by 100 feet into the defendant's name;

g. The costs of this litigation shall be borne by the plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 25TH DAY OF NOVEMBER 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.