



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. 276 OF 2011

ELIZABETH WANJIRU KAMAU.....1ST PLAINTIFF

EUNICE NJAMBI GITAU.....2ND PLAINTIFF

-VERSUS-

JAMES MUBIA GITUMBI.....1ST DEFENDANT

NANCY WAIRIGA & COMPANY ADVOCATES.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide Complaint dated 10th June 2011, the Plaintiffs herein have sought for the following Reliefs;

- i. Declaration that there was a breach of contract.*
- ii. Damages for breach of contract.*
- iii. Release of the Original Certificate of Title for the Parcel of land known as Land Reference Number 9363/7 by the 2nd Defendant.*
- iv. Costs of the suit.*
- v. Interests on (iv) above at court rates.*
- vi. That the Defendant's counterclaim be dismissed with costs to the Plaintiffs.*

2. Following the filing and service of the Complaint and the summons to enter appearance, the 1st Defendant herein responded by entering appearance and filing a statement of defence and counterclaim, which was filed on the 3rd August 2011, whereby the 1st Defendant essentially denied the claim by the Plaintiffs and averred that it is the Plaintiffs who violated the terms of the agreement entered into on the 27th March 2009.

3. On the other hand, the 1st Defendant herein sought for the following reliefs vide the counter claim;

- a. The Plaintiff's suit be dismissed with costs.
- b. A mandatory injunction to compel the Defendants in the counterclaim to deliver all the completion documents to the Plaintiff in the counterclaim and execute all the documents and do such things and/or acts as is necessary for the effective and effectual transfer of *Land Reference Number 9363/7* to the Plaintiff in the counterclaim.
- c. Costs of the suit.
- d. Interest on b and c above at court rates.

e. Any other or further relief that this honourable court may deem fit to grant.

4. On her part, the 2nd Defendant also entered appearance and filed a statement of Defence on the 21st September 2011, whereby same denied the claim by and/or on behalf of the Plaintiffs. For the avoidance of doubt, the 2nd Defendant sought that the Plaintiffs suit be dismissed.

Evidence by the parties

Plaintiff's evidence

5. After a protracted delay, the Hearing of the case was commenced and the 1st Plaintiff herein, namely Elizabeth Wanjiru Kamau, testified as PW1.

6. According to PW1, the 2nd Plaintiff and herself, who had been appointed as the legal administratrix of the Estate of one Gitau Gikiono, deceased, who was the Plaintiffs' father, entered into a land sale agreement with the 1st Defendant herein, for purposes of selling all that property known as *Land Reference Number 9363/7*, which at the material point in time was registered in the name of the deceased.

7. PW1 further testified that the sale agreement, dated the 27th March 2009, was prepared and/or drafted by the 2nd Defendant, who acted as an advocate for both the vendors as well as the purchasers, respectively.

8. It was the witness further testimony, that upon the execution of the sale agreement, same were supposed to be paid the sum of Kes.2,000,000/= only, being the stakeholder sum/deposit, but upon the execution of the sale agreement, the 1st defendant herein only deposited the sum of kes.1,000,000/= only into her account and promised to pay the balance of kes.1,000,000/= only, after one week.

9. The witness further testified that despite the promise by the 1st Defendant to pay the balance of the balance deposit within one week from the date of the execution of the sale agreement, the 1st Defendant failed to do so and the failure then made her to follow up with the 2nd Defendant on the issue of the payment of not only the balance of the deposit, but also the remainder of the purchase price.

10. Nevertheless, the witness further testified that on the 2nd March 2010, the 1st defendant deposited the sum of kes.1,000,000/= into her account, ostensibly towards completing the payment of the deposit in respect of the sale agreement.

11. The witness further testified that on the 5th May 2010, the 1st defendant also deposited another sum of kes.1,000,000/= in her account making a total of kes.3,000,000/= Only, inclusive of the deposit.

12. It was PW1 further testimony that the 1st Defendant herein, failed to comply with and/or adhere to the terms of the sale agreement and as a result of the failure by the 1st defendant, she was constrained to and visited the offices of the 2nd Defendant and advised same to cancel the transaction. In fact, the witness testified that she visited the offices of the 2nd Defendant more that twenty times, but to no avail.

13. It was the witness further testimony, that having not been able to receive any substantive response from the 2nd Defendant, she consulted the 2nd Plaintiff and they both agreed to instruct another advocate and in this regard same proceeded to and instructed one Samuel Muhia Advocate, the latter testified as PW2.

14. The witness herein further testified that according to the terms of the sale agreement, the 1st Defendant was to pay the entire deposit of kes.2,000,000/= Only, at the execution of the sale agreement and thereafter pay the balance of the purchase price (less rates and rents which were payable to the city county of Nairobi) **within 90 days of the sale agreement or not latter than 7 days after transfer and registration in favor of the purchaser, whichever was earlier.**

15. Be that as it may, the witness further testified that the 1st Defendant herein neither paid the rates and rents which were due and payable to the city county of Nairobi and which rates remained unpaid up to and including 13th June 2011, when the city county of Nairobi issued a demand note for rates in the sum of kes.5,461,518/= only.

16. Other than the failure to pay the rates and rents, which were payable within 90 days of the sale agreement, the witness also testified that the 1st Defendant similarly failed to settle the balance of the purchase price in accordance with the terms of the sale agreement or at all.

17. Owing to the foregoing, the witness further testified that she was constrained to instruct her new advocates, namely PW2, to issue and serve a notice of completion of the agreement which was thereafter issued vide letter dated the 16th June 2010, addressed to both Defendants and which letter was received by the 2nd Defendant on the 17th June 2010.

18. It was the witness further testimony that despite the issuance and service of the completion notice, the 1st Defendant did not complete the transaction, either by clearing the rates and rents as well as paying the balance of the purchase price. In this regard, the witness thus testified that the sale agreement therefore stood rescinded upon lapse of 21 days from the date of the issuance and service of the completion notice, which lapsed on the 8th July 2010.

19. Nevertheless, the witness further testified that after the passage of the 21 days at the foot of the completion notice, the 2nd Defendant herein wrote a letter dated 12th July 2010, which was produced as exhibit P8, which enclosed cheque number 000361 for the sum of kes.364,910/= only, alleged to be the balance of the purchase price.

20. However, the witness further testified that by the time the 2nd Defendant forwarded the letter dated 12th July 2010, which was received by PW2 on the 13th July 2010, the sale agreement, stood rescinded and was therefore not available to be acted upon.
21. In any event, the witness further testified that as at the 12th July 2010, when the 2nd Defendant purported to send the cheque for kes.364,910/= only, on account of being the balance of the purchase price, the rates and rents which were due, owing and payable, had not been paid by the 1st Defendant or at all.
22. On cross examination, the witness herein reiterated her testimony as herein before and re-affirmed that the 1st defendant did not pay the monies as agreed in accordance with the terms of the sale agreement dated 27th March 2009.
23. Besides, the witness also contended that the 1st Defendant herein failed to pay the rates and rents to the city county government of Nairobi either within the time agreed upon or at all. In fact, the witness further averred that finally the rates and rents which amounted to kshs..5,302,445/= only, was paid by the Plaintiffs with the assistance of their cousins and after a fund raising, to avert the sale of the suit property by the city county of Nairobi.
24. On account of the total monies that had been paid to and/or in favor of the Plaintiffs, the witness confirmed that other than the Kshs. 3,000,000 Only, which was variously deposited in her account, there was another sum of kes.200,000/= only, which was paid to her sister, namely Milka Nyaruguna Gitau. In this regard, the witness conceded that the total monies that were paid at the foot of the sale agreement prior to the rescission amounted to kes.3,200,000/= only.
25. In response to the 1st Defendant cross examination, the witness testified that it is the 1st Defendant who breached or violated the terms of the sale agreement, right from the onset and thereby frustrated the contract.
26. On cross examination by the 2nd Defendant, the witness herein testified that the 2nd Defendant had not exercised impartiality and/or professional competence whilst handling the subject transaction.
27. According to the witness, the 2nd Defendant had favored the 1st Defendant in the transaction, including secretly, albeit illegally handing over the title of the suit property to the 1st Defendant, without the authority of the plaintiff and even before the payment of the balance of the purchase price.
28. The other witness called by the Plaintiffs was one Samuel Muhia, who is himself an advocate of Kenya and same testified as PW2.
29. According to the said witness, he was instructed by the Plaintiffs to take over representation from the 2nd Defendant and in this regard, same testified that he wrote a letter to the 2nd defendant dated the 16th June 2010, informing and/or advising the 2nd Defendant of his retention by the plaintiffs herein, to pursue the issue of the sale of the suit property, which was previously was being handled by the 2nd Defendant.
30. It was PW2 further testimony, that other than communicating with the 2nd Defendant and expressing his engagement by the Plaintiff, he also proceeded to and issued a completion notice vide letter dated 16th June 2010, which was duly received by the 2nd Defendant on the 17th June 2010, and whereby the Plaintiff's signaled their reediness to complete the transaction within 21 days and in default, the agreement stands canceled and/or rescinded.
31. The witness further testified, that after the issuance of completion notice, no substantive response, towards completion came from the Defendants and in this regard the agreement stood cancelled upon lapse of the 21days, *w.e.f* 17th July 2010.
32. Be that as it may, PW2 further testified that on the 13th July 2010, same received a letter dated 12th July 2010, whereby the 2nd Defendant was forwarding cheque number 000361 for a sum of kes.364,910/= only, towards completion of the balance of the purchase price.
33. However, the witness testified that upon consultation with the Plaintiff's, same was advised that the sale agreement had collapsed. Consequently, PW2 returned the cheque to the 2nd Defendant vide letter dated 15th July 2010, which was produced as exhibit P9.
34. Other than returning the cheque vide the letter dated 15th July 2010, PW2 also forwarded a 4 bankers' cheques to the 2nd Defendant, totaling kes.2,208,000/= only, being refund of the purchase price that had been paid, less 10% forfeiture. For clarity, the cheques herein were forwarded vide letter dated 29th July 2010, which was produced as exhibit P10.
35. Finally, PW2, testified that despite the rescission of the sale agreement, following the lapse of the completion notice, the 2nd Defendant herein failed and/or refused to hand over the original title in respect of the suit property, which had been surrendered to her, to hold onto pending completion of the transaction.
36. On cross examination, PW2 maintained that the issuance and service of the completion notice made time to be of essence. Consequently, the Defendants ought to have completed the transaction by clearing the rates and remitting the balance of the purchase price, which was not the case.
37. On the issue as to whether the 2nd Defendant had authority to release the original title of the suit property to the 1st Defendant, PW2 stated that there was no such authority and that the 2nd Defendant was obliged to comply with the terms of the sale agreement, which

enjoined her to hold the title document pending receipt of the balance of the purchase price.

38. With foregoing testimony, the Plaintiff's case was closed.

Defendants case

The 1st Defendant

39. The 1st Defendant herein testified as DW1 and produced a total of 4 documents in support of his defense, as well as the counter claim.

40. According to DW1, same indeed entered into a sale agreement with the Plaintiffs herein, pertaining to and/or concerning the sale of the suit property.

41. It was DW1 further testimony that the sale agreement between himself and the plaintiffs, was duly reduced into writing by the 2nd Defendant and thereafter, same was signed by the all the parties concerned.

42. On the other hand, DW1 also acknowledged that as at the time of the execution of the sale agreement, same only paid to and in favor of the Plaintiff the sum of kes.1,000,000/= only, which was deposited into the 1st Plaintiff bank account in terms of exhibit D1.

43. On the other hand, the witness further testified that he further paid to and/or in favor of the Plaintiffs a further sum of kes.1,000,000/= only, which was deposited into the 1st Plaintiff account on the 5th March 2010 and in this regard the witness produced as D2, being an RTGS in favor of the 1st Plaintiff.

44. It was DW1's further testimony, that other than the aforesaid payments he also paid a further sum of kes.1,000,000/= only, to the Plaintiffs vide an RTGS on the 4th May 2010. In this regard, DW1 tendered in evidence exhibit D3.

45. It was DW1's further testimony that other than kes.3,000,000/= aforesaid he paid to and/or in favor of the Plaintiffs sister namely, Milka Nyaruguna Gitau, the sum of kes.200,000/=Only, which payment was made with the authority of the Plaintiffs.

46. It was DW1's further testimony that he was ready and willing to conclude the transaction, but it was the Plaintiffs who had refused to sign and execute the transfer instrument and therefore it was the Plaintiff who violated and/or breached the sale agreement dated 27th March 2009.

47. Besides, DW1 also stated that the sale agreement has not been lawfully rescinded and therefore the same remains available and it is on this account that DW1 seeks an order for specific performance.

48. On cross examination, DW1 conceded that he had not paid the entire deposit of kes.2,000,000/=Only, as at the time of execution of the sale agreement.

49. It was DW1 further concession that he had not also paid the rates and rents which same was obligated to pay

50. With that the 1st Defendant's case was closed.

2nd Defendant's case

51. The 2nd Defendant herein testified as DW2 and same informed the court that she is an advocate of the high court of Kenya and thus authorized to handle various legal issues, including conveyance.

52. On the other hand, DW2 further testified that she was duly instructed by the Plaintiffs as well as the 1st Defendant, to draft a sale agreement pertaining to and/or concerning the sale of the suit property and in this regard, same crafted and caused to be executed the sale agreement dated the 27th March 2009.

53. It was DW2's further testimony that after the execution of the sale agreement, same received and/or was handed over custody of the original title document in respect of the suit property.

54. It was her further testimony that latter the Plaintiffs herein instructed her to hand over the title document to and/or in favor of the 1st Defendant. In this regard, the Witness stated that the instructions to release the Title Document was verbalized by the first Plaintiff.

55. DW2 further testified that latter she received a letter from the plaintiff's new advocates, which informed her that the Plaintiffs has since withdrawn instructions from her and that she had also received a completion notice dated the 16th June 2010, from the said PW2.

56. DW2 further testified that after receipt of the notice of completion from PW2, she wrote to PW2 a letter dated the 28th June 2010, whereby same indicated that the balance of the purchase price that was due and outstanding on the basis of the sale agreement in respect of the suit property was kes.364,910/= only. See exhibit P6.

57. DW2 further testified that vide letter dated 12th July 2010, she also forwarded cheque number 000361 for the sum of kes.364,910/= Only, to PW2, but the said cheque was returned to her on the 16th July 2010, by PW2, on the basis that the sale agreement stood rescinded, upon the lapse of the completion notice.

58. On cross examination DW2 insisted that the 1st Plaintiff herein had verbally instructed her to release the original title document to the 1st defendant.

59. With the foregoing testimony, the 2nd Defendant's case was closed.

Submissions

60. Following the close of the Defendant's case, the subject matter took a bizarre turn whereby the court file, containing the original exhibits which were produced by the parties, disappeared and thereafter a skeleton file was constructed, to facilitate further proceedings.

61. One would have imagined that would have been the end of the twist, but somehow upon the reconstruction of the file ,a consent was entered into, whereby it was contended that the parties herein had agreed to compromise the suit. The consent was endorsed and adopted on the 29th March 2017.

62. Nevertheless, it turned out that the said consent was fraudulent and thus attracted an application for review dated the 26th July 2019, which was ultimately heard and determined vide ruling rendered on the 5th May 2020. Consequently, the subject suit was restored for purposes of determination, upon filing of submissions.

63. On the foregoing basis, the parties thereafter agreed and took directions on the 13th July 2020, to have the matter finalized on the basis of the Submissions which had hitherto been filed by the Parties.

64. On my own, I have confirmed that submissions were duly filed by the parties as hereunder;

i. Plaintiff's submissions were filed on 20th May 2014.

ii. The 1st Defendant submissions were filed on the 23rd June 2014

iii. The 2nd Defendant submissions were filed on the 4th June 2014.

65. I have perused and/or examined the foregoing submissions as well as the authorities relied upon by the respective parties and having done so, I have distilled the following issues for purposes of determination;

a. Whether the terms of the sale agreement dated the 27th March 2009 were un equivocal and if so, whether the 1st Defendant duly complied with the same or otherwise.

b. Whether the 2nd Defendant exercised impartiality in the discharge and/or execution of her professional duties to the parties to the sale agreement and in particular to the Plaintiffs.

c. Whether the 1st Defendant is entitled to specific performance of the sale agreement dated 27th March 2009.

d. What reliefs are appropriate in the circumstances.

Analysis and determination

Issue number 1

66. The sale agreement dated the 27th March 2009, was duly reduced into writing and same contained and/or embodied all the requisite terms and/or conditions, which were ascribed to by both parties, namely the vendors and the purchasers, respectively.

67. It is imperative to note that the sale agreement under reference duly complied with and/or conformed to the provision **of section 3(3) of the law of contract Act, Chapter 23 Laws of Kenya, which provides as hereunder;**

Certain contracts to be in writing

(1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or

given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.

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

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

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

68. Having been reduced into writing and the terms thereof stipulated therein, the parties to the said agreements were therefore obliged to comply with and/or observe the conditions and/or covenants thereto.

69. In any event, being a contract entered into between the parties herein, it was taken that the parties to the said agreement had read and understood the contents thereto and same are therefore bound by the terms of the conditions of the sale agreement.

70. On the other hand, being a document that was reduced into writing, same is self-contained and thus can only be construed and interpreted on the basis on the contents thereof and not by taking into account any extraneous allegations and/or oral testimonies, by either of the parties. For clarity, if there was need to vary the terms of the said agreement, same can only be varied and/or reviewed by an addendum, duly signed by all the parties.

71. Be that as it may, the manner in which a written document, be it an agreement, contract and/or deed is to be interpreted, has attracted the decisions from the various courts, including the honourable court of appeal. In this regard, I am obliged to and do hereby invoke the decision in the case of the **Speaker of the County Assembly of Kisii & 2 Other v James Omariba Nyaoga (2015) eKLR, where the honourable court held as hereunder:**

“The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the Evidence Act, Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of **John Onyanicha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003] (UR)**, we cited, with approval, Halisbury's Laws of England 4th Edition vol. 12, on interpretation of deeds and non Testamentary Instruments paragrah,1478 as follows:-

“ **Extrinsic evidence generally excluded:**

Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.

Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.”

72. On the other hand, where the parties have contracted at arm's length and thereby agreed on mutual agreed terms, it is the duty of the court to construe the agreement in accordance with the terms thereof and not to Re-write the agreement and/or otherwise derogate from the terms thereof.

73. In support of the forgoing preposition, I rely in the decision in the case **of Samuel Kamau Macharia v Daima Bank Ltd (2008) eKLR, where the honourable court observed as hereunder:**

On this issue of interest all we can say is that the appellant cannot be allowed to escape from the bargain he voluntarily entered into. In **NATIONAL BANK OF KENYA LTD. V. PIPEPLASTIC SAMKOLIT (K) LTD. AND ANOTHER [2001] KLR 112 at p. 118** this Court said:-

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

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

74. Premised and/or based on the foregoing legal foundation, I am now disposed to analyze the terms of the sale agreement dated the 27th March 2009, and to see whether the 1st Defendant duly complied with the explicit terms thereof from the onset.

75. According to the sale agreement, clause Number 1, thereof was to the effect that the total purchase price was agreed upon to be kes.7,920,000/= only, and the sum of kes.2,000,000/= only, being the stakeholder sum, was to be paid to the vendors at the execution of the sale agreement herein and it was further posited that the said payment was hereby acknowledged.

76. A reading of the said clause, would make one to believe that by the time the Plaintiffs were signing and/or executing the said agreement, which duly attested by the 2nd Defendant, the entire sum of kes.2,000,000/= Only, had been paid out to and acknowledged by the Plaintiffs.

77. Unfortunately, the only amount that was paid to and which was acknowledged by the Plaintiffs was the sum of kes.1,000,000/= only, vide RTGS into the 1st Plaintiff account and which is confirmed by exhibit DW1.

78. In my humble view, the 2nd Defendant who was the advocate for both the vendors and the purchasers, did not execute her professional duty appropriately, when same attested the signatures of the parties to the said agreement and thereby creating an impression that she had witnessed the payment of the entire of the stakeholder sum being paid to the Plaintiffs.

79. Be that as it may, I wish to point out that right from the onset, the 1st defendant herein breached and/or violated the terms of the sale agreement. In this regard, the plaintiffs' herein, were within their mandate to repudiate the sale agreement.

80. Other than the failure to pay the entire stakeholder sum at the execution of the sale agreement, it is also worthy to note that the parties herein also agreed that the balance of the purchase price amounting to kes.5,920,000/=Only, less sums expended by the purchaser for rates, land rents and any other expenses incurred by the purchasers, shall be paid by the purchasers to the Plaintiffs herein within 90 days of the execution of the sale agreement or on or before the expiry of 7 days of successful registration of the title documents in favor of the purchaser, whichever shall be earlier.

81. My understanding of the said clause, is that the purchaser was obliged to pay the balance of the purchase price net of the expenses incurred and/or expended and that the timeline of such payment, was well stipulated in the sale agreement.

82. The sale agreement having been entered into and/or executed on the 27th March 2009, the 90 days within which the 1st Defendant was obliged to pay the balance ended and/or lapsed on the 28th June 2009. For clarity, by the time the 90 days ended the 1st Defendant herein, had not even completed the payment as pertains to and/or in respect of the stake holder sum.

83. It is worthy to note and/or recall that the balance of the stakeholder sum, amounting to kes.1,000,000/= only was paid on the 5th March 2010, by which time the duration and/or life span of the sale agreement had terminated. See exhibit DW2.

84. Other than the failure to pay the purchase price in accordance with the stipulations of the sale agreement, it is also common ground that the 1st Defendant did not pay and/or clear the rates, land rents and such other outgoings, which were payable to the city county of Nairobi either within the 90 days or at all. In this regard, it is sufficient to note that the 1st Defendant skirted the issue both in his evidence and the submissions that were tendered.

85. Nevertheless, it cannot be gainsaid that the rates, land rents and such other outgoings which the 1st Defendant had undertook to pay and/or settle with the balance of the purchase price and which were similarly payable within the 90 days period, were actually paid by the Plaintiffs herein when the suit property was under threat by the city county of Nairobi, who was threatening to repossess and dispose of the suit property. Suffice it to note, the rates were paid on the 18th July 2011.

86. From the foregoing, it is evident that the 1st Defendant herein, did not comply with and/or adhere to the terms of the sale agreement. In fact, the 1st Defendant breached the said terms with gross impunity and has not exhibited any remorse, for the unwarranted breach of the contract.

87. In a nutshell, I find and hold that it is the 1st Defendant who breached the terms of the sale agreement and not otherwise.

Issue number 2

88. The 2nd Defendant, accepted to act for both the vendor and the purchasers, respectively as pertains to the subject conveyance.

89. Having agreed to act for both parties, it was therefore incumbent upon the 2nd Defendant, not only to show professional competence, but also to exercise impartiality to protect the interests of both parties equally, without showing any favor and/or inclination to the other.

90. However, right from the word go, the 2nd Defendant herein, was prepared to sacrifice her professional competence and the duty to protect the vendors, by agreeing to attest to the signatures on the sale agreement, even though she was aware that the vendors had not been paid, nor received nor acknowledged the entire stakeholder sum amounting to kes.2,000,000/= only.

91. The impression created by the attestation of the signatures of the parties to the sale agreement is that the 2nd Defendant explained the terms of the sale agreement to the parties as well as witnessed the payment of the stakeholder sum, but that impression is incorrect when juxtaposed against exhibit DW1 & DW2, being the RTGS payments released to the Plaintiffs.

92. On the second bit, the 1st Plaintiff herein testified and the testimony has not been controverted that same visited the offices of the 2nd

Defendant more than 20 times to plead with the 2nd Defendant to cancel the sale agreement.

93. However, despite the protest by and/or on behalf of the Plaintiffs who are the vendors, the 2nd Defendant herein does not appear to have written any letter to the 1st Defendant, to signal the position conveyed to her by the Plaintiffs and neither did same acknowledged any protest by any correspondence.

94. Notwithstanding the foregoing, the 2nd Defendant herein, who was the advocate for both parties, was also aware about the delayed release of the payments or otherwise utter refusal to make the payments, but again same did not intervene and thereby showing a slanted approach in handling the business of the parties.

95. As if the foregoing is not enough, the 2nd Defendant had the brevity to release the original title of the suit property to and/or in favor of the 1st Defendant, yet she knew that the 1st Defendant had not paid the balance of the purchase price to and/or in favor of the Plaintiffs, by the time of the release of the title document or at all.

96. Worse still, the 2nd Defendant testified that the release of the title to the 1st Defendant, was on the basis of verbal instructions by the 1st Plaintiff herein, yet the 2nd Defendant as an advocate is pretty aware that where there is a written contract, the terms thereof can only be altered by another written contract duly signed by the parties and/or by an addendum. Clearly, no advocate worth her salt would release the original title document to the purchaser, prior to the payment of the purchase price and without asking for written instructions.

97. In support of the foregoing position, I rely in the decision in the case of KINLUC HOLDINGS LTD vs MINT HOLDINGS LTD & ANOTHER[1998]eKLR, where the court observed as here under;

"A law-agent is bound to obey the instructions given to him by his employer, and if he exceed or fall short of these instructions, he may be justly made liable for the damages which result from his disregard of them." Having held that the vendor has a cause of action against the advocate we come to the issue as to whether or not the advocate and the purchaser have been properly joined as co defendants in the suit. Order 1 rule 3 of the Civil Procedure Rules says:

"3.All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise"

98. In my humble view, the 2nd Defendant herein failed to protect the interests of the Plaintiffs as the vendors in respect to the suit transaction and thus the 2nd Defendant failed to exercise impartiality, Due diligence and Professional Competence, in the execution of her duties and/or responsibilities.

Issue number 3

99. The 1st Defendant herein filed a counter claim, in respect of which same has sought for an order of specific performance, ostensibly to compel the Plaintiffs to specifically perform their part of the contract.

100. Before delving into and considering the applicable laws, it worthy to recall that the 1st Defendant herein had himself covenanted to pay and/or settle the rates, land rents and such other outgoings attached to the suit property and which were payable to the city county government of Nairobi. **See clause 2 (b) of the sale agreement.**

101. It is also worthy to note that despite that promise to pay, which payment ought to have been paid within the 90 days, same did not do so and thereby left the Plaintiffs herein exposed to the risk of having the suit property alienated by the city county of Nairobi, on account of unpaid plot rates and land rents, owing at the foot of the suit property.

102. Lest it be lost, it is also imperative to take cognizance that when the Plaintiffs were confronted with the advertisement to dispose of the suit property by the city county of Nairobi, same were forced to raise the sum of kes.5,400,000/= only, which was then paid on the 18th July 2011, to settle the rates and land rents, which by the said time had escalated.

103. The question then is, can a person who has breached and/or violated the explicit terms of the sale agreement/contract approach a court of law and/or equity for a discretionary order of specific order of performance.

104. In my humble view, to reward the 1st Defendant herein with a equitable order of specific performance, would be tantamount to sanctioning and/or whitewashing an illegality and thereby meting out injustice to the Plaintiffs.

105. I am afraid that the provision of Article 10 (2)[b] of the Constitution 2010, does not allow my clear conscience to cloth the 1st Defendant with such an order, which is ipso facto **Inequitable and contrary to social justice.**

106. Notwithstanding the foregoing, the law pertaining to the circumstances under which a court of law can decree and/or grant an order for specific performance is now well settled and/or crystalized.

107. **In support of the foregoing position, I rely in the decision in the case Sisto Wambugu v Kamau Njuguna [1983] eKLR**, where the honourable court of appeal held as hereunder;

Accordingly, as it is my view that the respondent made no attempt to perform his obligations and to pay the remainder of the purchase price for several years after the balance was due, he cannot at this late stage obtain an order for transfer of the land pursuant to the contract, and registration of it in his name.

108. Other than the foregoing position, I also feel obliged to refer to the case in **Sighn Birdi & Narinder Sighn Ghatore as trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti (1997) eKLR**, where the honorable court of appeal held as hereunder;

It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

"must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.

Issue number 4

109. The Plaintiff herein have sought for various reliefs including payment of damages for Breach of contract. However, in the body of the Plaint, the Plaintiffs has not specifically alluded to the nature of the damages and the quantum thereof.

110. Suffice it to say, that Damages that arise from breach of contract are ascertainable and/or quantifiable from the onset and therefore such damages are special in nature. Consequently, it behooves a party seeking Damages for breach of contract to specifically plead and thereafter particularly prove such Damages.

111. However, in respect of the instant matter, no such specific pleadings have been tendered and/or supplied and in this regard, no Damages are due and/or awardable to the Plaintiffs.

112. In support of the foregoing position, I rely in the decision in the case of **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR** as follows:

"The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".

113. Other than the issue of Damages for breach of contract, which I am not prepared to grant, it is my finding that the Plaintiff herein, is entitled to the declaration that the suit contract was breached and violated by the 1st Defendant.

114. Same are also entitled to immediate and forthwith surrender of the original title in respect of L.R No. 9363/7 by the 2nd Defendant and/or such other persons, who currently holds the said title document.

115. On the other hand, the 1st Defendant is not entitled to the order for specific performance or such other order claimed against the Plaintiffs.

Final disposition

114. Having reviewed all the issues enumerated for determination, I am minded to grant the following orders;

a. declaration be and is hereby issued that the sale agreement dated 27th March 2009, was breached by the 1st Defendant.

b. An order be and is hereby made directing the Defendants, jointly and/or severally, to surrender and/or hand over the original title document in respect L.R No. 9363/7 to the Plaintiffs, forthwith and in any event with a duration not exceeding 14 days henceforth.

c. The Defendant's counterclaim 1st August 2011, be and is hereby Dismissed.

d. The Plaintiffs be and are hereby awarded the costs of the suit and the counterclaim.

e. The Plaintiffs are at liberty to pursue the issue of professional misconduct, if so advised, with the advocate disciplinary tribunal, in accordance with the advocates Act, Chapter 16 Laws of Kenya.

115. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIRONMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

..... **for the Plaintiffs**

.....**for the 1ST Defendant**

.....**for the 2ND Defendant**