



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 8 OF 2018**

**BENJAMIN IMALINGAT.....1<sup>ST</sup> PLAINTIFF**

**ANNE WAIRIMU IMALINGAT.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOLLY OLOIT BUDDS.....1<sup>ST</sup> DEFENDANT**

**KYUNA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

This suit was commenced by way of a plaint dated 22<sup>nd</sup> December 2017 in which the Plaintiffs sought the following reliefs;

- a) A permanent injunction restraining the Defendants either by themselves and/or their agents/employees/servants from constructing or interfering in any way with the parcel of land known as L.R. No. 7158/616 (hereinafter referred to as “the first suit property”).
- b) A permanent injunction restraining the Defendants either by themselves and/or their agents/employees/servants from constructing, erecting, selling or interfering in any way with the one acre to be hived off L.R No. 7158/617 (hereinafter referred to as “the second suit property”) that the 1<sup>st</sup> Defendant had agreed and contracted to sell to the Plaintiffs and the Plaintiffs had paid a deposit for.
- c) A declaration that the Plaintiffs are the rightful owners of the first suit property and that it measures 0.4117ha. and not 0.3840ha as indicated in the title of the resurveyed land.
- d) An order compelling the 1<sup>st</sup> Defendant to transfer the first suit property upon resurveying, titling and correction of the acreage to reflect what was agreed in the sale agreement dated 16<sup>th</sup> August, 2004.
- e) An order compelling the 1<sup>st</sup> Defendant to transfer a further one acre to be hived off the mother parcel of land for which a deposit had been paid, upon completion of payment of the purchase price by the Plaintiffs and contemporaneously an order of specific performance.
- f) In the alternative, the 1<sup>st</sup> Defendant be ordered to pay the contemporary value of the breached sale to the Plaintiffs in respect of the one-acre parcel of land to be hived off the second suit property and which the 1<sup>st</sup> Defendant has refused, failed or ignored to complete sale and to which the 2<sup>nd</sup> Defendant purported to occupy, invade, take over and/or develop.
- g) Costs and interests of the suit.

**The Plaintiffs’ case:**

The Plaintiffs averred that they entered into a sale agreement dated 16<sup>th</sup> August, 2004 with the 1<sup>st</sup> Defendant and one, John Edwards Budds, deceased (hereinafter referred to as “the deceased”). The agreement was for the sale of a portion measuring 0.4117ha. of all that parcel of land known as L.R No. 7158/48 Spring Valley Nairobi. The said portion of land comprised of a parcel of land referred to as Plot A measuring 0.1800ha. and another parcel of land referred to as Plot B measuring 0.2317 ha. which were to be hived from L.R No. 7158/48 (“the mother plot”). Due to the friendly relationship that the parties enjoyed at the material time, the Plaintiffs began paying for the said portion of land in instalments even before the said sale agreement was executed. The said agreement for sale provided in part that the purchase price for the said portion of land was Kshs. 15,500,000/- and that the same was to be sold with vacant possession on the completion

date. It was a term of the agreement that the 1<sup>st</sup> defendant and the deceased (“the vendors”) would subdivide the mother plot and transfer the Plaintiffs’ portion to them.

That never happened. The Plaintiffs found out that the deceased died around 2015 after which the 1<sup>st</sup> Defendant resurveyed the mother plot and produced two parcels of land. The first parcel of land was measuring 0.3840ha. that was registered as L.R No. 7158/616 (the first suit property) which comprised of Plot A and B mentioned above. The second parcel of land was registered as L.R No. 7158/617(the second suit property). The Plaintiffs have contended that following the subdivision that was carried out by the 1<sup>st</sup> Defendant, the suit property was smaller than the land that was initially sold to them by the 1<sup>st</sup> Defendant and the deceased and that the subdivision did not take into consideration the agreed shape and orientation of the land. The suit property measured 0.3840 ha. compared to the land initially sold to them that measured 0.4117ha.

The Plaintiffs have averred that on 5<sup>th</sup> October, 2013 after they had already finished paying for the first suit property and were waiting for the title documents, the deceased approached them to buy a further portion of land measuring 1 acre to be carved out of the second suit property. The deceased asked them for a sum of Kshs. 430,000/- as a deposit for this second portion of land which they paid. The 1<sup>st</sup> Defendant also received a further sum of Kshs. 450,000/- as deposit for the second portion of land. This further sum of Kshs. 450,000/- was received by the 1<sup>st</sup> Defendant from the Plaintiffs’ tenant who was living on the first suit property. The Plaintiffs have averred that the terms of the agreement for sale dated 16<sup>th</sup> August, 2004 for the first suit property were to apply to this second portion of land.

The Plaintiffs have averred that in 2016, the 1<sup>st</sup> Defendant entered into an agreement with one, Mr. Viju Patel and formed a company known as Kyuna Limited, the 2<sup>nd</sup> Defendant herein which company commenced construction on the second suit property. The Plaintiffs have averred that by a letter dated 10<sup>th</sup> October, 2017, the 1<sup>st</sup> Defendant purported to rescind and terminate the agreement for sale dated 16<sup>th</sup> August, 2004 in respect of the first suit property as well as the scheduled transfer of the property to the Plaintiffs. The Plaintiffs have averred that the commencement of construction on the second suit property and purported termination of the agreement for sale dated 16<sup>th</sup> August, 2004 amounted to a breach of contract the particulars of which were pleaded as follows;

- a. The illegal/unprocedural resurvey by the 1<sup>st</sup> Defendant of the piece of land sold to the Plaintiffs pursuant to the sale agreement dated 16<sup>th</sup> August, 2004 and the reduction of its size from 0.4117ha. to 0.3840ha.
- b. The failure/refusal to transfer the parcel of land pursuant to the sale agreement dated 16<sup>th</sup> August, 2004.
- c. The purported rescinding of the sale agreement dated 16<sup>th</sup> August, 2004 by a letter dated 10<sup>th</sup> October, 2017.
- d. The failure to honour the subsequent agreement for the sale of one acre to be hived off L.R No. 7158/617 having collected money from the Plaintiffs.
- e. Occupying, developing and hiving off the Plaintiffs’ properties herein detailed.

#### The Defendants’ case:

The Defendants filed a joint statement of defence and counter-claim on 28<sup>th</sup> May 2019. The Defendants denied the Plaintiffs’ averments and averred further as follows: The deceased, John Edward Budds and the 1<sup>st</sup> Defendant were joint owners of the parcel of land known as L.R No. 7158/48 Spring Valley Nairobi measuring approximately 3.2 acres (the mother plot). On 16<sup>th</sup> August 2004, the deceased and the 1<sup>st</sup> defendant (the vendors) entered into an agreement for the sale of part of the mother plot measuring 0.4117 ha. (the first suit property) to the Plaintiffs. It is not correct as claimed by the Plaintiffs that they started paying the purchase price for the suit property before a formal agreement for sale was executed. The deceased and the 1<sup>st</sup> defendant did not surrender or transfer the first suit property to the Plaintiffs because the Plaintiffs did not pay the full purchase price. The Plaintiffs cannot claim to be the owners of the suit while they have not paid the full purchase price for the same.

Before his death on 2<sup>nd</sup> April 2016, the deceased had commenced the process of subdividing the mother plot. In the process, the City Council of Nairobi directed that the mother plot be resurveyed. Upon the resurvey, subdivision and registration of the subdivision, the mother plot gave rise to the first suit property and the second suit property. The first suit property measures 0.3840ha. as a wayleave for a road reserve was carved out of it. The second suit property is registered in the name of the 2<sup>nd</sup> Defendant after the same was transferred to the 2<sup>nd</sup> Defendant by the deceased and the 1<sup>st</sup> Defendant. A portion of the second suit property was hived off to form part of the riparian reserve as directed by the City Council of Nairobi since the land parcel is next to a river. The Defendants had no control over the directions by the City Council of Nairobi regarding the aforesaid reserves.

With regard to the monies paid by the Plaintiffs allegedly for the second portion of land, the Defendants have averred that the agreement pursuant to which the Plaintiffs advanced to the deceased a sum of Kshs. 430,000/- lapsed in accordance with the terms of the letter dated 5<sup>th</sup> October 2003 which had a clear condition that the said payment was refundable if no agreement was reached between the parties. The Defendants have contended that the Plaintiffs did not enter into an agreement for sale with the deceased with regard to the said second portion of land. The Defendants have contended that if the Plaintiffs prove that they paid to the deceased the said sum of Kshs. 430,000/- they would only be entitled to a refund of the said amount. With regard to a further sum of Kshs. 450,000/- that was allegedly received by the 1<sup>st</sup> Defendant as part of the deposit for the second portion of land, the Defendants have averred that the Plaintiffs had been collecting rent from the house erected on the first suit property from 2010 and that the 1<sup>st</sup> Defendant had not received the alleged sum of Kshs. 450,000/- or any other payment as rent from the said house.

With regard to the transfer of the second suit property to the 2<sup>nd</sup> Defendant, the Defendants have averred that the said property was transferred to the 2<sup>nd</sup> Defendant during the lifetime of the deceased. The Defendants have averred that if indeed the Plaintiffs had purchased a portion of the second suit property, the property could not have been transferred to the 2<sup>nd</sup> Defendant.

In their counter-claim, the Defendants reiterated the contents of their defence and averred further as follows: The Plaintiffs leased the first suit property to one, Kevin Douglas Brown in 2010 and formalized the same by a tenancy agreement dated 12<sup>th</sup> August 2014. In the agreement, the Plaintiffs presented themselves as the owners of the first suit property despite not having made full payment for the same or acquiring a good title in respect thereof. The Plaintiffs had collected rent totalling Kshs. 16,080,00/- from the said tenant since 2010. The Defendants have sought judgment against the Plaintiffs for;

1. Kshs. 16,080,000/-.
2. Costs of the suit and counter-claim.
3. Interest on the rental income at court rates.

Reply to defence and defence to counter-claim:

The Plaintiffs filed a reply to defence and defence to counter-claim on 3<sup>rd</sup> December, 2019. The Plaintiffs have averred that they have been collecting rent from the first suit property as of right since they are the owners thereof. The Plaintiffs have averred that they have paid the full purchase price for the first suit property which was the basis of the deceased and the 1<sup>st</sup> Defendant granting them possession thereof. The Plaintiffs have averred that the Defendants' counter-claim is an afterthought the same having been brought 9 years after the alleged cause of action accrued in 2010.

The Plaintiffs' evidence:

At the hearing of the suit, the 1<sup>st</sup> Plaintiff Benjamin Imalingat testified as PW1. He adopted his witness statement as part of his evidence in chief, produced the Plaintiffs' bundle of documents dated 18<sup>th</sup> February, 2019 as exhibits and stated further as follows:

In 2004, the deceased and the 1<sup>st</sup> Defendant approached him and offered to sell to him the first suit property which measured 0.4117ha. The purchase price was agreed at Kshs. 15,500,000/- which the Plaintiffs paid in cash and cheques. Kshs. 8,020,000/- of the said amount was paid to the deceased while Kshs. 7,400,000/- was paid to the 1<sup>st</sup> Defendant. They paid Kshs. 80,000/- less due to foreign exchange rate fluctuation. Towards the end of the transaction (sometime in May 2008) he had a meeting with the deceased and the 1<sup>st</sup> Defendant (the vendors) at which they settled the accounts and agreed that the outstanding balance of the purchase price was Kshs. 2,400,000/-. From that amount, he was to pay to the deceased Kshs. 1,400,000/- and the 1<sup>st</sup> Defendant Kshs. 1,000,000/-. He may the payments as agreed and receipt of the same was acknowledged.

With reference to Clause 3 of the sale agreement which stated that Kshs. 4,500,000/- was to be paid within 14 days, he acknowledged that the same was not done but stated that time was not of the essence. He stated that he started paying for the suit property even before they entered into a formal agreement and that even after they entered into the said agreement, they did not insist on the timelines set out therein due to their friendship. He stated that they were to pay Kshs. 2,000,000/- once approvals were obtained from the City Council of Nairobi. He stated that since he was dealing with friends, he paid the said amount even though the said approvals had not been obtained. He stated that a sum of Kshs. 8,000,000/- was to be paid once the transfer was effected. He stated that he paid the amount but the transfer was not effected in their favour.

He testified further that after they made the last payment in October 2009 he was given possession of the first suit property and he was still in possession. He stated that he rented out the premises and the 1<sup>st</sup> Defendant was a witness to the tenancy agreement which was an indication that the 1<sup>st</sup> Defendant acknowledged his ownership of the first suit property. On 5<sup>th</sup> October, 2013, the deceased approached him and offered to sell to him an additional one acre out of the second suit property. He paid to the deceased Kshs. 430,000/- and to the 1<sup>st</sup> Defendant Kshs. 450,000/- for the second portion of land. The latter payment was the money that was kept by the 1<sup>st</sup> Defendant from the rent that he had collected from the Plaintiffs' tenant on the first suit property. He stated that there was no formal agreement for this second sale. He stated that he was not refunded the said sum of Kshs. 850,000/- that he paid for the second portion of land although the same was refundable if the parties did not agree on the purchase price.

He testified further that, in 2016, the 1<sup>st</sup> Defendant gave him a title bearing the names of the deceased and the 1<sup>st</sup> Defendant. The size of the land therein was 0.3840ha. The 1<sup>st</sup> Defendant also showed him construction plans prepared for the whole land measuring 3.2 acres comprised in the mother plot. The 1<sup>st</sup> Defendant also showed him a Memorandum of Understanding (MOU) that the 1<sup>st</sup> Defendant had entered into with a company that was to construct houses on the whole of the mother plot including the portion that had been sold to them. Under the MOU, he (the 1<sup>st</sup> Plaintiff) was to receive three houses that were to be constructed. He declined this arrangement because he was being offered less land measuring 0.3840ha. which was less than the land that he had purchased that measured 0.4117ha. The 1<sup>st</sup> Defendant did not take his refusal of the arrangement kindly. The 1<sup>st</sup> Defendant wrote a letter dated 10<sup>th</sup> October, 2017 rescinding the sale agreement dated 16<sup>th</sup> August, 2004 on the allegation that they (the Plaintiffs) had not paid the full purchase price.

On cross-examination by the Defendants' advocate, the 1<sup>st</sup> Plaintiff stated that both parties did not comply with the terms of the agreement in relation to the completion date. He stated that he paid Kshs. 1,000,000/- on the date of signing the agreement for sale but when showed his exhibits, he stated that he could have paid more. He averred that he was not aware of any dishonoured cheques. He acknowledged that he took possession of the first suit property after the last payment was made in October 2009. He stated that the first suit property is comprised

of one bungalow which has two, two bedroom units. He stated that he was occupying the entire bungalow. He stated that initially, his tenant was occupying one of the units while the other unit was occupied by the deceased with his permission while he was alive. He stated that there were also some wooden servant quarters which he allowed the 1<sup>st</sup> Defendant to use as a store.

He stated further that he did not push for the completion documents after 16<sup>th</sup> October, 2009 because he was dealing with friends and furthermore, he had possession and had been offered more land. He stated that he was willing to wait and get the ownership documents for all the land that had been sold to him together. He admitted that the City Council of Nairobi had to approve the subdivision. He stated however that he was not given evidence that such approval was given subject to a road reserve being created.

With reference to the letter dated 5<sup>th</sup> October, 2013 regarding the second suit property, the 1<sup>st</sup> Plaintiff stated that the size of the second suit property was not stated because an agreement on price and size was yet to be reached. He admitted that no formal agreement was reached and the said letter was not signed by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Plaintiff stated that he was receiving rent of Kshs. 240,000/- per month from the first suit property. He could however not remember what the rent was in 2009.

During re-examination, the 1<sup>st</sup> Plaintiff he stated that the 1<sup>st</sup> Defendant was aware that he had rented out the first suit property and the 1<sup>st</sup> Defendant had even referred to the tenant on the property as the 1<sup>st</sup> Plaintiff's tenant. He also stated that Clause 7 of the agreement for sale allowed him to rent out the first suit property after taking possession and he had rightfully taken possession after paying the full price. On the second suit property, he stated that the particulars were not indicated because the subject land had not been subdivided.

The Plaintiffs' second witness was a land surveyor and physical planner, Charles Ameso Okoth(PW2). He identified his report that was produced by PW1 as PExh.9. He stated that he was instructed by the Plaintiffs to confirm if the subdivision that had been undertaken on the mother title in 2016 was carried out in accordance with the approved subdivision scheme of 1997 on which the sale agreement of 16<sup>th</sup> August, 2004 was based. He stated that he looked at the said approved subdivision scheme and the Survey Plan No. 576/61 that was authenticated on 1<sup>st</sup> July, 2016. He stated that there was a provision for a 3 metre road reserve in the approved subdivision scheme of 1997. He stated that the survey plan of 2016 that gave rise to the first suit property and the second suit property followed the 1997 subdivision scheme only as far as the provision for the road reserve was concerned. He stated that whereas the Plaintiffs were supposed to get land measuring 0.4117ha. in accordance with the 1997 subdivision scheme, the land sold to the Plaintiffs was reduced in size in the 2016 survey plan to 0.3840ha. He stated further that whereas the second suit property measured 0.7301ha. in the 1997 subdivision scheme, its size was increased to 0.9ha. in the 2016 survey plan. He stated that there was an increase in acreage for the 2<sup>nd</sup> Defendant who owned the second suit property and a decrease in acreage for the Plaintiffs in respect of the first suit property. He stated that the said decrease in the acreage of the first suit property that was sold to the Plaintiffs had nothing to do with the road reserve.

On cross-examination, PW2 stated that the portion of the mother plot that was purchased by the Plaintiffs did not include the road reserve which would measure about 0.0175ha. He admitted that the 2016 survey was authenticated by the Director of Surveys. He stated further that a subdivision scheme can be amended for various reasons by the owner of the subject property. PW2 maintained that the second suit property had encroached on the first suit property as it did not obey the 1997 subdivision scheme. He stated that to ensure that the acreage of the first suit property was maintained, the boundary between the first suit property and the second suit property should be moved by 4 metres towards the second suit property an exercise that would need a fresh survey. He stated that a survey plan must be in tandem with a subdivision scheme as the subdivision scheme was not the final authority on survey. He stated that the 2016 subdivision should be cancelled to rectify the anomalies that he pointed out.

On re-examination, he clarified that in the 1997 subdivision scheme, the road reserve was not part of the first suit property. He stated further that when an owner of land requests for a survey, the survey must be conducted in accordance with the appropriate scheme. He stated that surveyors are duty bound to follow the subdivision scheme and if they fail to do so, the survey should be cancelled and a new one ordered.

#### The Defendant's evidence:

The 1<sup>st</sup> Defendant gave evidence as DW1. He adopted his witness statement filed in court on 28<sup>th</sup> May, 2019 as part of his evidence in chief and produced the Defendants' bundle of documents dated 23<sup>rd</sup> May, 2019. He stated further as follows: He is a retired hotelier as well as a shareholder in the 2<sup>nd</sup> Defendant. The Plaintiffs were his good friends. He sold to them a portion of land measuring one acre. A sale agreement was executed with the purchase price being Kshs. 15,500,000/-. He was to be paid Kshs. 6,000,000/- while his deceased father, John Edward Budds was to receive the balance. The Plaintiffs did not pay the full purchase price since the deceased and he received a total of Kshs. 9,600,000/- only.

He stated further that there are four structures on the first suit property; one main house and four servant quarters. All are occupied by the Plaintiffs. The deceased and he had possession when the agreement for sale was executed with the Plaintiffs. The Plaintiffs took possession of one unit in 2010, while the second unit was occupied by the deceased and the other structures by his mother and staff. He stated that the events leading to the Plaintiffs taking possession of the first suit property were as follows: In 2010, the deceased had difficulty in paying staff salaries as he only had a rental income of Kshs. 50,000/-. The deceased then entered into an understanding with the Plaintiffs whereby the Plaintiffs would receive rent from one of the units in consideration for paying the salaries of the deceased's servants. He witnessed the signing of a tenancy agreement between the tenant who entered the said unit and the 1<sup>st</sup> Plaintiff. The Plaintiffs had not completed paying for the first suit property at that point. There was an outstanding balance of Kshs. 3,000,000/- due from the Plaintiffs. The Plaintiffs did not give back the unit. In 2016, after the death of the deceased, the unit he had previously occupied was derelict and the Plaintiffs' tenant in the other unit was also complaining. The Plaintiffs offered to renovate the premises. Following the renovation, the Plaintiffs put a tenant in the unit that was occupied by the deceased and started receiving rent from that unit also.

He stated further that on 18<sup>th</sup> March, 2020 after the court session, the Plaintiffs came with thugs and demolished the servant quarters and the third unit that was occupied by his (the 1<sup>st</sup> Defendant) mother. He stated that that was how the Plaintiffs took possession of the first suit property.

He stated further that he started processing the titles for the suit properties in 2013 when the deceased was still alive. He stated that the Plaintiffs had not asked for the titles. As for the payment of land rates, he stated that he had been paying the same for the first suit property. He stated that the Plaintiffs asked to start paying the land rates after the filing of this suit.

He stated that there was no agreement for the sale of the second suit property and that he was not aware of any payment made for same. It was his assertion that the deceased could not have sold the second suit property as he owned it jointly with him and that the same was transferred to the 2<sup>nd</sup> defendant in 2014 while the deceased was still alive. He urged the court to enter judgment in his favour as prayed in the counter-claim.

On cross-examination he stated that: The deceased and he sold to the Plaintiffs land measuring 0.117ha. He contended however that there was no such land on the ground. He admitted that the second suit property measures 0.9ha. He also admitted that the agreement between the parties provided for full and not partial possession and that the same has not been amended. He conceded further that he did not have a breakdown of how the purchase price was received or shared between him and the deceased. He admitted that at times he would receive payment in cash or through cheques in the absence of the deceased and would sign for the same.

He stated that if the Plaintiffs proved that he was paid Kshs 7,400,000/- and that the full purchase price was paid he would not dispute the same. When he was shown a letter dated 19<sup>th</sup> May, 2008 which referred to the final instalment of the purchase price, he confirmed that he and his father signed the letter. When shown another letter dated 16<sup>th</sup> October, 2009 which also referred to the final instalment payment, he admitted that the letter bore the deceased's signature.

With respect to rent collection he stated that there were four units on the first suit property but the Plaintiffs were only collecting rent from one unit. When he was shown the tenancy agreements dated 12<sup>th</sup> August, 2014 and 30<sup>th</sup> March, 2016, he stated that the same were for the same house but for different tenants. As regards the 2<sup>nd</sup> Defendant, he stated he was a shareholder and not director thereof. He denied ever inviting the 1<sup>st</sup> Plaintiff to be a shareholder of the 2<sup>nd</sup> Defendant.

With regard to Clause 3 of the agreement, he admitted that Kshs. 8,000,000/- was to be paid on transfer and that the transfer had not been effected in favour of the Plaintiffs. He conceded further that one of the special conditions in the agreement provided that possession would be given upon full payment and as such the fact that the Plaintiffs were in possession created the assumption that payment of the purchase price was made in full. He stated further that time was not of the essence in respect of the parties' obligations under the agreement for sale and that the Plaintiffs had not given notice that they were ready to complete the agreement.

On re-examination, the 1<sup>st</sup> Defendant stated that he was both a shareholder and a director of the 2<sup>nd</sup> Defendant. He stated that all the letters dated 19<sup>th</sup> May, 2008, 18<sup>th</sup> March, 2005 and 16<sup>th</sup> October, 2009 referred to final instalment of the purchase price. He denied that he had approached the Plaintiffs for a joint venture arrangement or that he gave the Plaintiffs plans for construction that was to be undertaken on the suit properties. He stated that he had entered into a joint venture agreement with a partner in 2013 and that the Plaintiffs only asked him how the joint venture agreement would work. He stated that under Clause 3 of the agreement Kshs. 4,500,000/- was to be paid within 14 days but the same was not done. In conclusion he stated that the Plaintiffs did not respond to the letter of rescission.

#### The Plaintiffs' submissions:

The Plaintiffs filed their submissions on 5<sup>th</sup> March, 2021 in which they framed the following issues for determination by the court which they submitted on;

1. Whether the Plaintiffs paid the 1<sup>st</sup> Defendant and his deceased father the full consideration as agreed in the agreement for sale dated 16<sup>th</sup> August, 2004.
2. The consequences of the parties' failure to comply with the timelines provided for in the agreement.
3. The acreage that the Plaintiffs are entitled to.
4. The fate of the Defendants' counter-claim.

On the first issue, the Plaintiffs submitted that while they had produced evidence in support of their contention that they made full payment of the purchase price (in the form of, the schedule of payments, copies of cheques and letters of acknowledgement), the 1<sup>st</sup> Defendant had not given any evidence in proof of his allegation that the purchase price was not paid in full. The Plaintiffs submitted further that the 1<sup>st</sup> Defendant came up with different figures as concerns what he claimed to have been paid and what was outstanding. The Plaintiffs submitted that initially, the 1<sup>st</sup> Defendant stated that only a sum of Kshs. 1,500,000/- had been paid. When the 1<sup>st</sup> Defendant filed his witness statement, he claimed that he had been paid Kshs. 9,600,000/-. During trial, the 1<sup>st</sup> Defendant claimed that he was owed Kshs. 3,000,000/-.

The Plaintiffs submitted that although they could not prove payment of a sum of Kshs. 1,000,000/- through documentary evidence, they had proved that they paid Kshs. 15,480,000/-. The Plaintiffs reiterated that the difference of Kshs. 20,000/- was occasioned by fluctuation in foreign currency exchange rates. The Plaintiffs submitted that on 16<sup>th</sup> October, 2009, the deceased acknowledged receipt of Kshs. 700,000/- as final payment for the suit property. The deceased also sought to enter into an agreement for the sale of the second suit property. The Plaintiffs submitted that this could not have happened if the deceased was still owed money from the sale of the first suit property. The Plaintiffs submitted further that 1<sup>st</sup> Defendant also acknowledged receipt of Kshs. 1,000,000/- as final payment by a letter dated 19<sup>th</sup> May 2008 and that the 1<sup>st</sup> Defendant did not deny signing this letter at the trial.

Concerning the letter dated 18<sup>th</sup> March, 2005 in which the 1<sup>st</sup> Defendant testified that the words “final instalment” was also used, the Plaintiffs submitted that the letter was a response to a letter written by the 1<sup>st</sup> Defendant’s advocates asking the Plaintiffs to comply with Clause 3 of the agreement by making a further payment of Kshs. 1,500,000/-. The Plaintiffs submitted that in the letter, they were informing the 1<sup>st</sup> Defendant’s advocates that that was the final payment in compliance with clause 3. The Plaintiffs submitted that this was different from the letters dated 19<sup>th</sup> May, 2008 and 16<sup>th</sup> October, 2009.

The Plaintiffs submitted that the sequence of events supported a finding that they had paid the full purchase price. They submitted that they were put in possession in 2010 which was after the 16<sup>th</sup> October 2009 letter acknowledging receipt of the final payment. The Plaintiffs submitted further that the 1<sup>st</sup> Defendant would not have witnessed an agreement that allowed the Plaintiffs to collect rent to the tune of Kshs. 250,000/- per month from the first suit property if the Plaintiffs had not paid the full purchase price.

On the second issue, the Plaintiffs submitted that the parties were friends and were operating on mutual trust and that time was not of the essence in respect of the parties’ obligations under the agreement for sale. Relying on the cases of Hassan Zubeidi v Patrick Mwangangi Kibaiya & another, Civil Case No. 79 of 2014, Aida Nunes v J.M.N Njonjo & C. Kigwe [1962] EA page 89 and Sagoo v Dourado [1983] KLR 365 the Plaintiffs submitted that if the contract did not provide for it and the vendor did not give notice making time of the essence, then time was not an overriding factor. The Plaintiffs submitted that the 16<sup>th</sup> August, 2004 agreement for sale did not make time of the essence and the vendors did not issue any notice making time of essence.

Relying on the cases of Serah Mwobi v John Kimani Njoroge Civil Appeal No. 314 of 2009 and Paradise Properties Limited v Steve Wambua Musyimi & Mercy Mbula Ndambuki ELC Suit No. 345 of 2013, the Plaintiffs submitted that the 1<sup>st</sup> Defendant had waived his right to rescind the contract for non-completion by acquiescing and accepting payment after the completion date. They submitted further that the 1<sup>st</sup> Defendant was guilty of laches for seeking to rescind the agreement 13 years after the completion date and 9 years after the final payment was made. This they submitted was also beyond the statutory period set for bringing such claim. The Plaintiffs also submitted that the 1<sup>st</sup> Defendant was seeking an equitable remedy of rescission but had himself not performed equity by failing to comply with Clause 3 of the agreement.

On the third issue, the Plaintiffs submitted that they paid the full purchase price for 0.4117ha. of land but are in possession of land measuring 0.3840ha. They submitted that as was confirmed by the evidence of PW2, the discrepancy in the acreage was not because of the creation of a road reserve as claimed by the 1<sup>st</sup> Defendant. The Plaintiffs’ submitted that the reduction on the acreage of the first suit property was as a result of an increase in acreage of the second suit property. The road reserve, they submitted had been in place even when they entered into the agreement for sale. They submitted that they are entitled to the exact acreage of land that they contracted over and paid for. The Plaintiffs submitted further that they are also entitled to a refund of the sum of Kshs. 430,000/- that they paid as a deposit for the second suit property.

On the fourth issue, the Plaintiffs submitted that the Defendants’ counter-claim should be dismissed with costs for several reasons. First, they submitted that the 1<sup>st</sup> Defendant’s testimony that the Plaintiffs were collecting rent as the deceased and 1<sup>st</sup> Defendant’s agents did not hold as there was no evidence that the Plaintiffs were in a principal - agent relationship with the 1<sup>st</sup> Defendant and his deceased father. Secondly, the Plaintiffs submitted that they are busy medical consultants with no expertise on property management and as such it did not make sense that the 1<sup>st</sup> Defendant, a retiree living on the suit property would hire them as property agents. Thirdly, the Plaintiffs submitted that the 1<sup>st</sup> Defendant did not explain why he waited until the Plaintiffs sued him to realize that the rent the Plaintiffs were collecting was due to him.

#### The Defendants’ submissions:

The Defendants filed submissions on 26<sup>th</sup> April, 2021 in which they framed the following issues for determination by the court;

1. Whether the full purchase price was paid for the first suit property and the consequences of failure to make the payment.
2. Whether the Agreement for sale dated 16<sup>th</sup> August 2004 was breached and if so by which party.
3. Whether there was an agreement between the Plaintiffs and the 1<sup>st</sup> Defendant and his deceased father for the sale of a further 1-acre piece of land.
4. What was the measurement of the land that was the subject matter of the agreement dated 16<sup>th</sup> August, 2004?
5. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in the counter-claim.

On the first issue, the Defendants maintained that the Plaintiffs did not complete the payment of the full purchase price. The Defendants submitted that a sum of Kshs. 4,020,000/- was owed to the 1<sup>st</sup> Defendant on account of the purchase price. The Defendants submitted that the Plaintiffs who had failed to pay the full purchase price could not benefit from an order of specific performance. The cases of Sisto Wambugu v Kamau Njuguna [1983] eKLR and Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR were relied on by the Defendants in this regard. The Defendants also submitted that the Plaintiffs were not in possession of the whole of the first suit property. The Defendants submitted that the Plaintiffs occupied only part of the first suit property in respect of which they were put in possession despite not having paid the full purchase price.

On the second issue, the Defendants relied on the case of Purple Rose Trading Company Limited v Bhanoo Shashikant Jai [2014] eKLR and argued that the Plaintiffs should not be granted an order of specific performance because they had not paid the balance of the purchase price by the completion date. This, it was submitted entitled the 1<sup>st</sup> Defendant to rescind the agreement.

On the third issue, the Defendants submitted that there was no written agreement for sale between the parties for the second suit property. This they submitted was contrary to section 3(3) of the Law of Contracts Act, Chapter 16 Laws of Kenya which requires that suits concerning interests in land be based on a written agreement.

On the fourth issue, the Defendants submitted that the deceased started pursuing the subdivision of the suit property in 2015. The Defendants submitted that the subdivision resulted in a road reserve being carved out of the first suit property. The Defendants submitted that this was in line with Clause 8 of the agreement for sale which provided that:

**“The property is sold subject to:**

**All subsisting easements, quasi easements and rights of way.”**

On the fifth issue, the Defendants submitted that it had been proved that the Plaintiffs were in possession of the first suit property despite having not paid the purchase price in full. The Defendants submitted that the rental income the Plaintiffs had been getting from the first suit property should be awarded to the 1<sup>st</sup> Defendant as prayed in the counter-claim.

Issues for determination:

From the pleadings the following in my view are the issues arising for determination in this suit;

1. Whether the agreement for sale dated 16<sup>th</sup> August, 2004 between the Plaintiffs on the one hand, and the 1<sup>st</sup> defendant and the deceased on the other hand was breached and if so, by whom?
2. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
3. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in the counter-claim.
4. Who is liable for the costs of the suit and the counter-claim?

Whether the agreement for sale dated 16<sup>th</sup> August, 2004 between the Plaintiffs on the one hand, and the 1<sup>st</sup> defendant and the deceased on the other hand was breached and if so, by whom?

In their plaint, the Plaintiffs averred that the 1<sup>st</sup> Defendant and his deceased father breached the agreement for sale between the parties. The particulars of breach were set out in the plaint as follows;

- a. The illegal/unprocedural resurvey by the 1<sup>st</sup> Defendant of the piece of land sold to the Plaintiffs pursuant to the sale agreement dated 16<sup>th</sup> August, 2004 and the reduction of its size from 0.4117ha. to 0.3840ha.
- b. The failure/refusal to transfer the parcel of land pursuant to the sale agreement dated 16<sup>th</sup> August, 2004.
- c. The purported rescinding of the sale agreement dated 16<sup>th</sup> August, 2004 by a letter dated 10<sup>th</sup> October, 2017.
- d. The failure to honour the subsequent agreement for the sale of one acre to be hived off L.R No. 7158/617 having collected money from the Plaintiffs.
- e. Occupying, developing and hiving off the Plaintiffs' properties herein detailed.

To be able to determine whether, the 1<sup>st</sup> Defendant and the deceased breached the agreement for sale dated 16<sup>th</sup> August, 2004, it is necessary for the court to interrogate these particulars of breach one after the other. The first act of breach concerns the alleged reduction of the size of the first suit property from from 0.4117ha. to 0.3840ha. I have perused the agreement dated 16<sup>th</sup> August, 2004. It is clear that as at the time the parties entered into the agreement, the mother plot from which the portion of land that was sold to the Plaintiffs (the first suit property) was to be carved from had not been surveyed. The first suit property was therefore sold to the Plaintiffs as unsurveyed land. The agreement was based on a subdivision scheme. As was correctly pointed out by PW2, a subdivision scheme is not a survey. In the subdivision scheme, it was stated expressly that **“All measurements are in metres. All distances and areas are approximate and subject to final survey.”** The portion of the mother plot that was sold to the Plaintiffs was indicated as measuring approximately 0.4117 ha. In my view, after survey, this measurement could be more or less. In this case it turned out to be less by 0.0277ha. The 1<sup>st</sup> Defendant attributed the reduction in size of the first suit property to a road reserve which he claimed had taken part of the property. On the other hand, the Plaintiffs claimed that the size of the first suit property reduced due to encroachment by the second suit property. The 1<sup>st</sup> Defendant did not convince me that the size of the first suit property as it was in the 1997 subdivision scheme reduced after final survey as a result of a provision that was made for a road reserve. I was also not convinced by the Plaintiffs that the reduction was caused by extending the boundaries of the second suit property towards the first suit property. In the subdivision scheme of 1997, the 1<sup>st</sup> Defendant and the deceased had proposed to subdivide the mother plot into four portions; A, B, C and D. The Plaintiffs did not demonstrate that the size of the second suit property as it was in the subdivision scheme of 1997 increased by 0.0277ha. in the 2016 survey that gave rise to the first and second suit properties.

Due to the foregoing, I am not persuaded that the 1<sup>st</sup> Defendant and the deceased breached the agreement of 16<sup>th</sup> August, 2014 by reducing the measurement of the portion of the mother plot that was sold to the Plaintiffs. The agreement for sale was based on a subdivision scheme

that had approximate areas that could change after final survey and which ultimately changed.

On whether the 1<sup>st</sup> Defendant and the deceased breached the said agreement by failing to transfer the suit property to the Plaintiffs, the agreement provided that the completion date was 31<sup>st</sup> July, 2005. It is not disputed that the agreement was not completed by the completion date. From the material on record, the subdivision of the mother title was not completed and a title for the portion thereof that was sold to the Plaintiffs issued until 27<sup>th</sup> June, 2016. This was several years past the completion date. On their part, the Plaintiffs also paid the purchase price over a period of four years past the completion date. It is clear therefore that the parties did not comply strictly with the timelines that were set in the agreement for sale. The parties kept the agreement alive even after the expiry of the completion period. It is common ground that the agreement did not provide that time was of essence in respect of any of the parties' obligations under the agreement. The agreement was however subject to the Law Society Conditions of Sale (1989) Edition.

The Law Society Conditions of Sale provides as follows in Condition 4(7);

#### **“4. Completion**

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

**(a) In this condition “completion notice” means a notice served in accordance with this sub-condition;**

**(b) If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete:**

**(i) If he could be so but for some default or omission of the other party;**

**(ii) Notwithstanding that any mortgage on the property is unredeemed when the completion notice is served, if the aggregate of all sums necessary to redeem all such mortgages (to the extent that they relate to the property) does not exceed the sum payable on completion.**

**(c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within (21) days of service and, in respect of such period, time shall be of the essence of the contract.**

**(d) If the purchaser does not comply with a completion notice:**

**(i) The purchaser shall forthwith return all documents delivered to him by the vendor and at his own expense procure the cancellation of any entry relating to the contract in any register;**

**(ii) Without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty.**

**(e) If on any such re-sale contracted within Six (6) months after the completion date the vendor incurs a loss, the purchaser shall pay to the vendor liquidated damages. The amount payable shall be the aggregate of such loss, all costs and expenses reasonably incurred in any such re-sale and any attempted re-sale and interest at the contract rate on such part of the purchase money as is from time to time outstanding (giving credit for the amount of the forfeited deposit (if any) and for all sums received under any re-sale contract on account of the re-sale price) after the completion date;**

**(f) If the vendor does not comply with a completion notice, the purchaser, without prejudice to any other rights or remedies available to him, may give notice to the vendor forthwith to pay to the purchaser any sums paid by way of deposit or otherwise under the contract and interest on such sums at the contract rate from Four (4) working days after service of the notice until payment. On compliance with such notice, the purchaser shall not be entitled to specific performance of the contract but shall forthwith return all documents delivered to him by the vendor and, at the expense of the vendor, procure the cancellation, of any entry relating to the contract in any register;**

**(g) Where, after service of a completion notice, the time for completion shall have been extended by agreement or implication, either party may again invoke the provisions of this condition which shall then take effect with the substitution of “ten (10) days” for “twenty-one (21) days” in paragraph (c) of this sub-condition.”**

Since time was not made of the essence in respect of the completion date, the Plaintiffs who have claimed to have paid the full purchase price were obliged to serve the 1<sup>st</sup> Defendant with a completion notice under Condition 4(7) of the Law Society Conditions of Sale. It was upon the 1<sup>st</sup> Defendant's failure to comply with such notice that he could be said to have breached the agreement for sale with the Plaintiffs. In fact, such notice was a condition precedent to the filing of this suit. There is no evidence that the Plaintiffs served the 1<sup>st</sup> Defendant with a completion notice or any other notice for that matter before filing this suit. It is my finding therefore that the 1<sup>st</sup> Defendant and the deceased did not breach the agreement for sale by refusing to transfer the first suit property to the Plaintiffs.

With regard, to the letter of rescission dated 10<sup>th</sup> October, 2017, that was served upon the Plaintiffs by the 1<sup>st</sup> Defendant, my view is that the letter was premature for the same reasons that I have given above. Like the Plaintiffs, the 1<sup>st</sup> Defendant was also required to serve the

Plaintiffs with a completion notice under Condition 4(7) of the Law Society Conditions of Sale before he could terminate the agreement for sale between them and the Plaintiffs on account of the Plaintiffs' alleged breach by failing to pay the balance of the purchase price. By his failure to serve the Plaintiffs with a completion notice before purporting to rescind the agreement for sale, the 1<sup>st</sup> Defendant breached the terms of the said agreement. In Surdev Singh Birdi & another v Abubakar Madhubuti [1997] eKLR it was stated as follows:

**“It cannot be denied that where a contract for sale of land does not make time the essence of the contract, equity requires that time be made of such essence before the contract can be rescinded. This requirement is also subject to the ability of the purchaser to complete the contract in good time. Equity requires that the vendor calls upon the purchaser to complete the contract within a reasonable time when time is not the essence of the contract. It is for this reason that I agree with the holding in the case of Graham v. Pitkin [1992] 2 All E. R. 235 which I quote:**

**“Unreasonable delay by a purchaser in completing a contract for the sale of land does not entitle the vendor to rescind the contract without first serving a notice to complete, although delay may be an ingredient in deciding whether a party in default does not intend to proceed and has repudiated the contract.”**

In Bir Singh v Parmar [1972] E.A 209 the court stated as follows at page 212:

**“...The agreement did not specify that the time was of the essence in connection with the payment of the deposit, and the judge refused to imply a stipulation making time of the essence. He preferred to apply the general rule as stated in 8 Halsbury's laws, 3rd Edn. Pp.164-165, and held that in the absence of an express stipulation or clear implication that time in relation to the payment of the deposit was of the essence of the contract, failure to pay the deposit did not entitle the vendor unilaterally to avoid the contract. The position would of course have been different if the vendor had given notice making time for payment of the deposit of the essence of the contract and specifying a reasonable period for payment, but this he did not do. He preferred to treat the contract as not binding on him but I agree with the judge that in these circumstances the contract continued in force.”**

On the alleged breach of the agreement to transfer to the Plaintiffs the second the suit property, it was common ground that no formal agreement was entered into by the parties in respect of the said property and that the 1<sup>st</sup> Defendant who was a co-owner of the property was not a party to any discussions that were held regarding the sale of the property. Section 3(3) of the Law of Contract Act provides that:

**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.**

Pursuant foregoing provisions of the Law of Contract Act, the Plaintiffs claim in respect of the second suit property is not maintainable. It is my finding therefore that the 1<sup>st</sup> Defendant and the deceased did not breach any agreement in respect of the second suit property.

The Plaintiffs have also contended that the 1<sup>st</sup> Defendant breached the agreement for sale dated 16<sup>th</sup> August, 2004 by hiving off and occupying a portion of the first suit property. As I have stated earlier, there is no evidence that the 1<sup>st</sup> Defendant had hived off and occupied a portion of the first suit property. The alleged breach of the agreement of sale based on the alleged hiving off and occupation of the first suit property by the 1<sup>st</sup> Defendant is therefore without any basis.

On his part, the 1<sup>st</sup> Defendant contended that the Plaintiffs breached the agreement of sale dated 16<sup>th</sup> August, 2004 by their failure to pay the balance of the purchase price. The burden was on the Plaintiffs to prove that they paid the purchase price in full. Section 107 (1) of the Evidence Act, Chapter 80 Laws of Kenya provides that:

**Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

The Plaintiffs have asserted that they paid the full purchase price of Kshs. 15,500,000/- for the first suit property. The burden was therefore upon them to prove that payment. A schedule of payment was prepared and tendered in evidence. Acknowledgements of payment signed by the 1<sup>st</sup> Defendant and his deceased father, John Edward Budds as well as copies of cheques were also presented in evidence in proof of the said payment.

The 1<sup>st</sup> Defendant did not contest any of the acknowledgements of payment that were tendered in evidence by the Plaintiffs. The 1<sup>st</sup> Defendant did not also contest any of the cheques said to have been paid to him and the deceased copies of which were also tendered in evidence. The Plaintiffs also produced in evidence a letter dated 16<sup>th</sup> October, 2009 in which the deceased received a sum of Kshs. 700,000/- as the final instalment of the purchase price. Although the 1<sup>st</sup> Defendant denied that that payment was the final payment of the purchase price for the first suit property, he did not deny that the letter or acknowledgment was signed by the deceased.

In his witness statement, the 1<sup>st</sup> Defendant stated that as at 10<sup>th</sup> October, 2017, the deceased and he had been paid a total of Kshs. 9,600,000/- meaning that they are owed Kshs. 5,900,000/-. He took the same position early in his evidence in chief. He however later on told the court that the balance of the purchase price payable to them was Kshs. 3,000,000/-. In cross-examination he repeated that the balance of the purchase price payable to them was Kshs. 3,000,000/-. He tendered no evidence in proof of these figures.

From copies of acknowledgements of payment, letters forwarding payments and cheques on record, the Plaintiffs have proved that they have paid a total of Kshs. 13,670,000/- for the first suit property. I have not taken into account the payments which were allegedly made but receipt thereof was not acknowledged by the deceased or the 1<sup>st</sup> Defendant. Since such payments were contested by the 1<sup>st</sup> Defendant, the same had to be strictly proved by the Plaintiffs who claimed to have made the same.

I am also not satisfied that the letter dated 16<sup>th</sup> October, 2009 in which the deceased acknowledged receipt of Kshs. 700,000/- as final payment is conclusive evidence that the Plaintiffs had paid the full purchase price. The letter was not signed by the 1<sup>st</sup> Defendant who was one of the vendors. It was only signed by the Plaintiffs and the deceased. The evidence of payment tendered by the Plaintiffs does not also support their claim that as at 16<sup>th</sup> October, 2009, they had paid Kshs. 15,500,000/- to the deceased and the 1<sup>st</sup> Defendant. In the absence of acknowledgment of receipt of payment or any other acceptable evidence that the Plaintiffs paid a total sum of Kshs. 15,500,000/- to the 1<sup>st</sup> Defendant and the deceased, I find the payment of the said amount not proved.

As mentioned earlier, the Plaintiffs have only proved payment of a sum of Kshs. 13,670,000/- to the deceased and the 1<sup>st</sup> Defendant on account of the purchase price for the suit property. There is therefore a balance of Kshs. 1,830,000/- which is due to the 1<sup>st</sup> Defendant. According to the agreement of sale, the balance of the purchase price in the sum of Kshs. 8,000,000/- was payable to the 1<sup>st</sup> Defendant and the deceased 14 days from the date of the transfer and registration of the first suit property in the name of the Plaintiffs. It is common ground that the first suit property has not been transferred to the Plaintiffs. The said balance of Kshs. 1,830,000/- is therefore not payable to the 1<sup>st</sup> Defendant. The Plaintiffs cannot therefore be said to have breached the agreement of sale between the parties by failing to pay the said sum of Kshs. 1,830,000/-. In any event, the 1<sup>st</sup> Defendant did not serve the Plaintiffs with the completion notice under Condition 4(7) of the Law Society Conditions of sale. There is therefore no default that can constitute a breach of the agreement.

#### Whether the Plaintiffs are entitled to the reliefs sought in the plaint.

The Plaintiffs have sought a number of reliefs that I have set out at the beginning of this judgment. I have held that the Plaintiffs entered into an agreement for sale with the 1<sup>st</sup> Defendant and his deceased father in respect of the first suit property which is still valid and enforceable. The Plaintiffs from the evidence on record are in possession of the first suit property. The 1<sup>st</sup> Defendant who has not transferred the suit property to the plaintiffs has purported to rescind the said agreement. I am satisfied that the Plaintiffs are entitled to an order of injunction restraining the Defendants from interfering with the first suit property. The Plaintiffs are however not entitled to an injunction in respect of the second suit property. The Plaintiffs are also not entitled to specific performance of the alleged agreement relating to the said parcel of land. As I have held above, there is no enforceable agreement between the Plaintiffs and the 1<sup>st</sup> Defendant in relation to that property on which an order of injunction or specific performance can be anchored. The Plaintiffs have sought as an alternative relief compensation for the loss of the second suit property equivalent to the current value of the portion thereof measuring 1 acre that he allegedly purchased. This alternative prayer is also not available as it has no basis.

With regard to the declaration sought, I am satisfied that the Plaintiffs are beneficial owners of the first suit property. The property however measures 0.3840ha. and not 0.4117ha. The first suit property has already been surveyed and a title issued. For the reasons that I have given earlier, I can see no justification for ordering a resurvey and titling of the first suit property. The same will have to be transferred to the Plaintiffs as it is if they are still interested in the completion of the agreement.

#### Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in the counter-claim.

In his counter-claim, the 1<sup>st</sup> Defendant sought judgment for a sum of Kshs. 16,080,000/- being rent allegedly collected by the Plaintiffs from the first suit property from 2010 to 2019. From the evidence on record, the 1<sup>st</sup> Defendant and the deceased gave the Plaintiffs possession of the first suit property. This can be inferred from the fact that the 1<sup>st</sup> Defendant and the deceased knew from 2010 that the Plaintiffs were in possession of the suit property and that they were receiving rent. There is no evidence that the 1<sup>st</sup> Defendant had at any time protested against the Plaintiffs' possession of the first suit property prior to the filing of this suit. Since the Plaintiffs have a valid agreement for sale with the 1<sup>st</sup> Defendant which they have performed in part and pursuant to which they were given possession of the first suit property, I find no basis for the rent claimed from the Plaintiffs by the 1<sup>st</sup> Defendant. I wish to add that the claim is in the nature of special damages. The same had to be pleaded and strictly proved. The 1<sup>st</sup> Defendant tendered no evidence showing that the Plaintiffs collected rent to the tune of Kshs. 16,080,000/- from the first suit property from 2010 to 2019. Due to the foregoing, I find no merit in the 1<sup>st</sup> Defendants counter-claim.

#### Who is liable for the costs of the suit and the counter-claim?

In the circumstances of this case, each party shall bear its own costs.

#### Conclusion:

In conclusion, I hereby make the following orders;

- 1) I enter judgment for the Plaintiffs against the Defendants on the following terms;

a) A permanent injunction is issued restraining the Defendants either by themselves and/or their agents/employees/servants from constructing on or interfering in any way with the parcel of land known as L.R. No. 7158/616 (“the first suit property”).

b) I declare that the Plaintiffs are the beneficial owners of the first suit property.

c) The 1<sup>st</sup> Defendant shall transfer the first suit property to the Plaintiffs within thirty (30) days from the date hereof.

d) Since the Plaintiffs have been in possession of the first suit property and have been benefitting from it since 2010, the Plaintiffs shall clear any outstanding land rent and land rates for the property.

e) The Plaintiffs shall pay to the 1<sup>st</sup> Defendant a sum of Kshs. 1,830,000/- within 14 days of registration of the first suit property in the names of the Plaintiffs being the balance of the purchase price.

2) The 1<sup>st</sup> Defendant’s counter-claim is dismissed.

3) Each party shall bear its own costs of the suit and the counter-claim.

**Delivered and Dated at Nairobi this 16<sup>th</sup> day of December 2021**

**S. OKONG’O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Gichini h/b for Mr. Abdirazak for the Plaintiffs

Ms. Nyabenge for the Defendants

Ms. Betsy Chelangat-Court Assistant