

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 143 OF 2017

ERIC MWENDA KANYUURU.....PLAINTIFF

VERSUS

CHARLES MWITI MUGAMBI.....1ST DEFENDANT

ZAKAYO KIMATHI MUNGANIA.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

JUDGEMENT

1. ELC Case No. 137 of 2017 was consolidated with this suit and the court directed that this file would be used for the trial of both suits. This dispute revolves around land reference number (L.R. No.) 12672/51 situated in Runda (“the Suit Property”) which the Plaintiff claimed that he purchased through an agreement dated 29/8/2012 between him on one part and the 1st Defendant and David Mwenda Maingi on the second part. The Suit Property was registered in the 1st Defendant’s name. The Plaintiff agreed to purchase the land from the 1st Defendant at Kshs. 16,000,000/=. David Mwenda Maingi had put up an incomplete building on the Suit Property, for which the Plaintiff undertook to pay him Kshs. 8,000,000. The Plaintiff claimed that he paid a total sum of Kshs. 7,500,000/= to the 1st Defendant after which he took possession of the Suit Property, fenced it and continued the construction of the house on the land. The Plaintiff claimed that he spent in excess of Kshs. 10,575,686/= on the house on the Suit Property and that he paid David Mwenda Maingi the agreed sum of Kshs. 8,000,000/=.

2. About a month after the Plaintiff had paid part of the purchase price to the 1st Defendant, the 1st Defendant took a loan of Kshs. 10,000,000/= from Kenya Commercial Bank (“KCB”) using the Suit Property as security for the loan. A charge was registered against the Suit Property in favour of Kenya Commercial Bank. The 1st Defendant terminated the sale agreement and withheld the purchase price paid by the Plaintiff. The Plaintiff learnt in October 2016 that the 1st Defendant had transferred the Suit Property to the 2nd Defendant.

3. The Plaintiff filed this suit on 2/3/2017 seeking to be declared the beneficial owner of the Suit Property and to have the Land Registrar cancel the transfer of the Suit Property to the 2nd Defendant. He also sought an injunction to restrain the 1st and 2nd Defendants from interfering with his quiet possession of the Suit Property and general damages for breach of contract. Alternatively, the Plaintiff sought an order directing the 1st Defendant to pay him Kshs. 26,000,000/= being the cost of construction of the house on the Suit property and the purchase price he had paid together with interest of 25% compounded per month from 29/8/2012 until payment in full. In the Amended Plaintiff dated 27/4/2017, the Plaintiff sought specific performance of the agreement dated 29/8/2012.

4. In his defence filed in court on 3/4/2017 the 1st Defendant averred that the Plaintiff took possession of the Suit Property but that he breached the terms of the sale agreement when he failed to pay the three instalments of Kshs. 3,000,000/= as agreed. He gave the Plaintiff 21 days’ notice to remedy the default which he failed to do which therefore meant he lost the right to possession when the agreement was terminated on or about 29/3/2018. He admitted that he registered a charge against the Suit Property on 27/9/2012. He added that prior to execution of the sale agreement there was a subsisting charge against the Suit Property registered on 22/7/2009 and that the agreement contemplated that there would be a charge or charges against the Suit Property. The 1st Defendant contended that the subsequent charge merely amounted to a change of chargee and did not alter the terms of the sale agreement. He averred that he sold the Suit Property to the 2nd Defendant after terminating the contract with the Plaintiff. He maintained that the Plaintiff failed to complete the transaction owing to lack of funds and contended that the remedy of specific performance was not available to the Plaintiff

5. The 2nd Defendant filed **ELC Case No. 137 of 2017** seeking an injunction to restrain the Plaintiff from dealing with the Suit Property. He claimed that he purchased the Suit Property from the 1st Defendant together with the incomplete development vide the sale agreement dated 19/7/2016 and that the land was transferred to his name on 31/8/2016. He gave dates between 20th January and 25th February 2017 when he claimed that the Plaintiff trespassed on the Suit Property.

6. The Plaintiff testified and called two witnesses to testify on his behalf. Sometime in April 2012 he sold a motor vehicle to the 1st Defendant for Kshs. 2,750,000/=. The two cheques issued by the 1st Defendant were dishonored when he presented them for payment. He entered into an agreement with the 1st Defendant on 29/8/2012 for the purchase of the Suit Property. He agreed with the 1st Defendant that due to the late payment the value of the motor vehicle would be increased to Kshs. 3,000,000 and would be factored into the purchase price of the land. He sold the second motor vehicle to the 1st Defendant for Kshs. 1,200,000/=.

7. On 29/8/2012 he entered into a tripartite agreement with the 1st Defendant for the purchase of the Suit Property at Kshs. 16,000,000/= and with David Mwenda Maingi for the purchase of the incomplete residential house on the Suit Property at Kshs. 8,000,000/=. He paid Kshs. 8,000,000/= in full to Mr. Maingi. He paid Kshs. 7,000,000 to the 1st Defendant leaving a balance of Kshs. 9,000,000/= which he was to pay in three instalments of Kshs. 3,000,000/= each on 13/11/2012, 28/2/2013 and 31/5/2013. He was given possession and continued construction of the building at the cost of Kshs. 10,575,686/=. He claimed that he took over the workers of Mr. Maingi.

8. He stated that the 1st Defendant refused to accept payment through instalments and insisted on a lump sum and pressurized him for money in January 2013 to assist him in his political campaigns. He paid Kshs. 500,000 to the 1st Defendant in January 2013. Unknown to the Plaintiff the 1st Defendant had charged the Suit Property to Kenya Commercial Bank Limited on 27/9/2012 to secure a loan of Kshs. 10,000,000 which the Plaintiff averred was in breach of the agreement. The Plaintiff withheld further payments and attempted to have the dispute with the 1st Defendant resolved through their mutual friends and their parents.

9. The Plaintiff stated that the 1st Defendant purported to terminate the agreement in January 2014 claiming that he had breached the terms of the agreement and instructed his advocates to refund the Plaintiff the sum of Kshs. 5,900,000/= being the deposit he had paid less the forfeited sum of Kshs. 1,600,000/=.

10. The Plaintiff stated that he had arranged to obtain a loan from the Co-operative Bank of Kenya limited to pay the balance of the purchase price and the bank required a written agreement between him and the 1st Defendant to support his application for the loan. A draft agreement was prepared for this purpose which the 1st Defendant declined to sign. The Plaintiff discovered in October 2016 that the 1st Defendant had transferred the Suit Property to the 2nd Defendant on 31/8/2016. He claimed that on 23/2/2017 individuals hired by the 1st Defendant invaded the Suit Property with the intention of evicting him from the land. He stated that he had spent more than 26,000,000/= on the Suit Property and stood to suffer irreparable loss and damage if the transfer to the 2nd Defendant was allowed to stand.

11. He produced a copy of the agreement dated 29/8/2012 titled Cessation of Business, Dissolution of Partnership and Sale Agreement; a copy of the certificate of title over the Suit Property, copies of the cheques dated 5/3/2012. He also produced copies of messages exchanged with the 1st Defendant. He conceded that he did not pay the instalments that fell due on 30/11/2012, 28/2/2013 and 21/5/2013 and that the 1st Defendant gave him 21 days' notice. He did not collect the refund of the deposit that he had paid to the 1st Defendant from the advocate.

12. Paragraph 7 of the agreement provided that on termination he was to remove the development from the land. He was aware that the Suit Property was charged to Cooperative Bank at the time he entered into the sale agreement with the 1st Defendant but emphasised that he was made to understand that that loan had been repaid. He maintained that the sale agreement was not properly terminated by the 1st Defendant. He did not pay any other money to the 1st Defendant after he discovered that a month after entering into the agreement the 1st Defendant charged the Suit Property to Kenya Commercial Bank Limited. According to the sale agreement he was to be refunded the deposit within three months. A year later he got a letter dated 30/1/2014 asking him to collect the refund from the 1st Defendant's lawyers. He reiterated that he was in a position to pay the balance of purchase price on 30/11/2012 and was to take a loan to pay the balance of Kshs. 8,500,000/=. He called the 1st Defendant to seek directions on how the balance was to be paid.

13. David Mwenda Maingi gave evidence. He incorporated a company with the 1st Defendant as a special purpose vehicle for the development and sale of property. The 1st Defendant owned L.R. Numbers 12672/51 and 12672/52 in Nairobi and had developed L.R. No. 12672/52. They agreed to develop L.R. No. 12672/51 as a joint venture using the company with the intention of transferring the land to the company and later sell it for a profit. He agreed with the 1st Defendant that he would carry out construction to the tune of Kshs. 12,000,000/= which was the market price for the plot at that time. Unfortunately he could not make the full contribution of Kshs. 12,000,000/= and only managed a development worth 6,800,000/=.

14. Due to financial constraints he entered into an agreement with the Plaintiff on 29/8/2012 through which the Plaintiff was to pay him Kshs. 8,000,000 being the value of the construction of the development on the Suit Property. He had been friends with the Plaintiff for many years and he confirmed that the Plaintiff paid this sum. It was also agreed that the Plaintiff would pay to the 1st Defendant Kshs. 16,000,000/= being the value of the land without the developments which belonged to Mr. Maingi. He stated that the Plaintiff took possession and paid Kshs. 7,500,000/= to the 1st Defendant. He stated that he took over the caretakers who used to work for Mr. Maingi.

15. Sometime in December 2012 while he was having lunch with the Plaintiff and 1st Defendant, the 1st Defendant demanded payment of the balance of the purchase price of Kshs. 9,000,000/= and stated that he was not going to accept instalments in line with the agreement. He tried to reconcile the Plaintiff and the 1st Defendant to no avail. The Plaintiff informed him that since the 1st Defendant kept changing the terms of the agreement, he had decided to enter into a fresh agreement with him so that he could take a loan and pay him the balance of the purchase price. Mr. Maingi was present at the meeting where the draft agreement was prepared but the 1st Defendant refused to sign it and demanded payment of an extra Kshs. 5,000,000/= before he could proceed with the sale. The Plaintiff had paid Kshs. 7,500,000/= to the 1st Defendant.

16. Michael Otieno Anjelo who worked as a caretaker for the Plaintiff also gave evidence. He had lived on the Suit Property since June 2016 but had never seen the 2nd Defendant before.

17. The 1st Defendant gave evidence. He was the registered proprietor of the Suit Property. He entered into a partnership agreement dated 15/9/2010 with David Mwenda Maingi for a joint venture business in which he contributed the land and David was to finance its development. Due to financial constraints the development on the Suit Property could not be completed and they agreed to sell the property to recoup their investment in the venture. They entered into an agreement with the Plaintiff on 29/8/2012 vide which he sold him the land for 16,000,000/= and David Mwenda Maingi sold the development for Kshs. 8,000,000/=. The Plaintiff was to pay him Kshs. 3,000,000 and Kshs. 1,200,000/= in the form of a Mercedes Benz and Volkswagen Golf respectively which the Plaintiff had sold to him prior to the execution of the agreement. The Plaintiff was to pay Kshs. 2,100,000/= on the signing of the agreement and the balance of Kshs. 9,000,000/=

in three installments of Kshs. 3,000,000/= each on or before 30/11/2012, 28/2/2013 and 31/5/2013. The Plaintiff was to pay David Mwenda Maingi Kshs. 8,000,000 for the development through four instalments the last of which was to be made before 31/10/2012. Completion documents including an executed discharge of charge were to be availed on or before 31/5/2013.

18. He stated that the Plaintiff trespassed on the Suit Property and demolished part of the perimeter wall on 25/2/2017. He stated that he introduced the Plaintiff to his caretakers when he gave him possession. He claimed the Plaintiff defaulted on the payment of the purchase price, stopped construction and vacated the premises before the Christmas of 2012. He added that the Plaintiff lost the right to possession pursuant to Clause 6 of the sale agreement upon termination of the agreement on 29/3/2013 pursuant to clause 3c. He denied that the Plaintiff had developed the property at the cost of Kshs. 10,575,686/= as he claimed.

19. He stated that prior to the signing of sale agreement there was a charge registered against the Suit Property on 22/7/2009 and that clause 9 of the agreement contemplated that there would be charges against the title over the Suit Property. He added that at the time of negotiations and entering into the sale agreement the title over the Suit Property was in the custody of the bank. The charge registered on 22/7/2009 was discharged on 27/9/2012. He contended that the second charge registered against the Suit property on 27/9/2012 merely changed the financier from the Cooperative Bank to the Kenya Commercial Bank. He was emphatic that the second charge did not alter the terms of the agreement or the obligations envisaged by clause 9 (b) of the agreement.

20. He believed the Plaintiff failed to remit the three instalments due to lack of funds because the Plaintiff informed him that he was unable to raise the instalments due on 30/11/2012 since he had started construction on the land. At the time he was campaigning for political office in Meru. The Plaintiff only paid Kshs. 500,000/= on diverse dates between 31/1/2013 and February 2013 leaving a balance of Kshs. 2,500,000/=. When the Plaintiff failed to pay the second instalment, he issued a 21 days' notice to the Plaintiff on 8/3/2013 demanding payment failing which he would terminate the agreement. The Plaintiff did not remedy the default and he therefore terminated the agreement on 29/3/2013 and the Plaintiff thereby lost the right to possession of the Suit Property seven days after the termination of the contract.

21. The Plaintiff attempted to enter into a new agreement and forwarded a draft sale agreement to his advocate on 14/5/2013. He wrote to the Plaintiff on 30/1/2014 notifying him that as a consequence of the termination he had retained Kshs. 1,600,000/= of the purchase price paid and would deposit the difference of Kshs. 5,900,000 with Mugambi Mungania Advocates who represented both parties in the transaction. The letter requested the Plaintiff to provide his bank details which he failed to give and the 1st Defendant wrote to the advocate on 10/3/2014 requesting him to return the sum of Kshs. 5,900,000 that he had deposited with them. He stated that the funds were still with the advocates and that he communicated this through an email dated 16/12/2016.

22. The 1st Defendant stated that he offered the Suit Property for sale. He sold the Suit Property to the 2nd Defendant at Kshs. 30,000,000 and transferred it to him. The Plaintiff attempted to construct a permanent wall to partition the two plots in February 2017. The Plaintiff's advocate wrote a demand letter to him on 27/2/2017 demanding specific performance within a day. He responded by reiterating that the sale had been rescinded as a result of the Plaintiff's breach and that the sum of Kshs. 5,900,000 was held by their common advocate. He stated that he had been arrested by the police in connection with the sale of the Suit Property on 6/3/2017 and claimed that the Plaintiff was abusing the criminal justice system to harass him. He added that even if he had breached the agreement with the Plaintiff, the Plaintiff's recourse was to seek damages. He denied refusing to receive payment from the Plaintiff or that the Plaintiff was ready and willing to complete payment of the purchase price.

23. He confirmed that the cheques in respect of the monies he owed to the Plaintiff for the sale of two motor vehicles were returned unpaid. He did not refund the purchase price within the three months stipulated in the agreement. He stated that at the time of the agreement the roof of the house was partly done. He confirmed that he charged the Suit Property to Kenya Commercial Bank to secure a loan of Kshs. 10,000,000/= a month after entering into the agreement with the Plaintiff. He stated that he had informed the Plaintiff that he would charge the property to Kenya Commercial Bank. He could not remember about the loan to Cooperative Bank. He stated that he owed Kenya Commercial Bank Kshs. 7,500,000/= which he claimed the 2nd Defendant paid to the bank after he sold the Suit Property to him for Kshs. 30,000,000/=. He claimed the Plaintiff was not in possession of the Suit Property at the time he sold it to the 2nd Defendant.

24. He put up the property for sale and it took two months for him to enter into an agreement with the 2nd Defendant whom he did not make aware of the earlier agreement he had entered into with the Plaintiff. He maintained that he did not extend the time for the Plaintiff to complete the sale. He entered into agreement with the 2nd Defendant on 19/7/2016 and maintained that there was nothing to prevent him from selling the Suit Property to the 2nd Defendant. The transfer of the Suit Property to the 2nd Defendant was registered on 31/8/2016.

25. The 2nd Defendant gave evidence and confirmed that he entered into an agreement with the 1st Defendant for the purchase of the Suit Property on 19/7/2016. He did a search on the land before entering the sale agreement. He maintained that he was a purchaser for value of the Suit Property and claimed that the Plaintiff had been trying to dislodge him from the Suit Property with impunity and in disregard of the law. He maintained that being the lawful owner of the Suit Property he was entitled to possession of the suit land. He learnt on 21/2/2017 that some people were digging a trench on the boundary of the two plots and reported the matter to the City Council of Nairobi and put guards on the suit land. He also reported the matter to the police.

26. He produced copies of the transfer over the Suit Property, photographs showing the trench dug up, charge sheet in respect of Michael Otieno, demand letter dated 23/2/2017 addressed to the Plaintiff and a schedule of the payments made of the purchase price. He also produced a copy of the indenture of conveyance dated 10/3/2017 from him to Lawrence Warui and Rose Macharia over a different piece of land.

27. He stated that the 1st Defendant warranted to him that there was no other interest over the suit land. He paid the purchase price through Lawrence Mugambi Advocates who in turn paid the 1st Defendant. He claimed that he deposited the purchase price in the lawyers' account. He stated that he was given the land reference number by his advocate who gave him the contact of the seller who is the 1st Defendant in the case. He claimed that he paid Kshs. 10,000,000/= as the first instalment towards the purchase price through his lawyer in accordance with clause 4 (a) of the agreement. He claimed that he was not aware of any dispute regarding the Suit Property at the time he bought the suit land

but was aware of the charge to KCB. He later changed his evidence and stated that he was to pay Kshs. 10,000,000/= to KCB which he claimed he paid.

28. Parties filed submissions which the court has considered. The issues for determination are:-

- a. Is the Plaintiff entitled to the remedy of specific performance?
- b. Was the contract between the Plaintiff and the 1st Defendant lawfully terminated?
- c. Should the court grant the orders sought by the 2nd Defendant in **ELC Case No. 137 of 2017**?

29. The Plaintiff submitted that the 1st Defendant breached clause 3 (c) of the sale agreement which required a refund of the monies paid by the purchaser to be made within three months of the expiry of the notice to comply. The 1st Defendant gave a completion notice to the Plaintiff on 8/3/2013 which expired on 29/3/2013 and should therefore have refunded the purchase price paid to the Plaintiff by 29/6/2013. Despite the 1st Defendant claiming that he deposited the refund with his lawyer on 30/1/2014, the funds have never been paid to the Plaintiff. The Plaintiff contended that even though the contract did not provide for the manner in which the refund of the deposit was to be made, there were several options open to the 1st Defendant to make the refund since the parties to the agreement knew each other very well. The Plaintiff submitted that the 1st Defendant could have procured bankers cheques or deposited the money in the Plaintiff's bank account.

30. The Plaintiff submitted that the 2nd Defendant did not pay any purchase price to the 1st Defendant and urged that the schedule of payments produced by the 1st Defendant was fictitious and that it listed cheque amounts ranging from Kshs. 2,000,000/= to Kshs. 9,000,000/= yet the Central Bank of Kenya set the ceiling for cheque payments at amounts less than Kshs. 1,000,000/= per cheque. The Plaintiff relied on the earlier cheques dated 30/4/2012 for Kshs. 900,000/= and Kshs. 950,000/= which the 1st Defendant gave to the Plaintiff for payment of the debt he owed him. The Plaintiff pointed out the contradictions in the 2nd Defendant's evidence on the dates he made payment and the mode through which he paid the purchase price.

31. The 2nd Defendant did not produce any bank statements, copies of cheques, RTGs or any other receipts or transaction slips to show how the purchase price was paid. The Plaintiff contended that the 2nd Defendant was not a *bona fide* purchaser without notice and that he was actually aware of the scheme to defeat the Plaintiff's claim to the Suit Property. The Plaintiff submitted that the 2nd Defendant's conduct was unconvincing as that of a genuine purchaser based on the fact that he did not go to inspect the house before the purchase and only frequented the Suit Property after February 2017. This was in addition to the 2nd Defendant's claim that he purchased the Suit Property and left it in the care and control of the 1st Defendant whom he claimed he did not know before he entered into the sale transaction.

32. The Plaintiff argued that the 1st Defendant acted fraudulently when he charged the Suit Property to KCB a month after entering into an agreement for the sale of the same land to the Plaintiff without the Plaintiff's knowledge, consent or involvement thereby jeopardising the Plaintiff's interest in the Suit Property. The Plaintiff submitted that although the earlier encumbrance had not been discharged at the time he entered into the sale agreement with the 1st Defendant, he was given assurances by the 1st Defendant that the debt had already been paid in full.

33. The Plaintiff faulted the 1st Defendant for requesting additional payments from him to use in his campaign for election in January 2013 yet by that time he had already charged the Suit Property to KCB. The Plaintiff concluded that even if he had paid the balance of the purchase price to the 1st Defendant, the 1st Defendant would not have been in a position to deliver the title and discharge of charge over the Suit Property since the loan amount the 1st Defendant owed to KCB was higher than the outstanding purchase price from him.

34. The Plaintiff contended that the certificate of title over the Suit Property produced by the 1st Defendant were altered and did not show all the entries and the consideration for those entries on the title. The Plaintiff submitted that from the outset the 1st Defendant's conduct showed that he did not intend to be bound by the terms of the sale agreement or to complete the sale to the Plaintiff.

35. The Plaintiff submitted that he was not guilty of laches and added that he attempted to have this dispute resolved amicably through family and friends after he discovered that the 1st Defendant had charged the Suit Property to KCB and only filed this suit when he realised that the 1st Defendant had transferred the Suit Property to the 2nd Defendant. The Plaintiff submitted that he had made arrangements to obtain a loan from the Co-operative Bank to complete the purchase but the 1st Defendant refused to sign the draft sale agreement required by the Bank and instead demanded payment of an extra Kshs. 5,000,000/=. The Plaintiff faulted the 1st Defendant for his erratic behavior of changing goal posts. He submitted that the agreement between the 1st and 2nd Defendant was a sham for the reason that no consideration was paid making it unenforceable and illegal.

36. The 1st Defendant submitted that the sale agreement did not bar the registration of a new charge against the Suit Property and that reference in clause 9(b) of the agreement to duly executed discharges of all charges meant that at the time of completion the 1st Defendant needed to provide duly executed discharges of charges. The 1st Defendant submitted that the Plaintiff made piecemeal payments between January and February 2013 amounting to Kshs. 500,000/= which showed that he did not have the financial capability to pay the balance of the purchase price.

37. The 1st Defendant relied on the case of **Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed) v George Boniface Mbogua alias George Boniface Nyanja, Civil Appeal No. 242 of 2018** in which the court stated that the Respondent had been granted many opportunities by time extension to pay the balance of the purchase price but he was in breach of his

obligations under the agreement.

38. The 1st Defendant relied on clause 7 of the agreement that in the event of termination the Plaintiff was to forfeit the development on the Suit Property to the 1st Defendant. He submitted that the Plaintiff did not remedy the situation by either paying the sum of Kshs. 5,500,000/= or seeking an extension of time when he received the 21 days' notice. He submitted that on termination of the contract the whole Suit Property reverted to him if the Plaintiff failed to remove the development from the suit land. He submitted that the Plaintiff did not have the funds to complete the sale which is why he tried to get him enter into a second agreement claiming the bank required the agreement so as to finance him which did not work out. The 1st Defendant contended that the Plaintiff was trying to revive and amend the terms of the sale agreement dated 29/8/2012.

39. He submitted that the Plaintiff had failed to prove fraud on his part and contended that the Plaintiff was guilty of laches having failed to complete the sale in 2013. He added that the Plaintiff was not entitled to the remedy of specific performance because at no time was he ready, able and willing to pay the balance of the purchase price stipulated in clause 3 of the agreement for sale. The 1st Defendant urged the court not to re-write the contract while reacting to the Plaintiff's prayer for judgement for the purchase price paid and the cost of construction he incurred together with interest at 25% per month.

40. The court will first deal with the Plaintiff's claim before that of the 2nd Defendant. The sale agreement which the Plaintiff entered into with the 1st Defendant is what dissolved the partnership between the 1st Defendant and David Mwenda Maingi. David Mwenda Maingi had expended resources in the construction of the house on the Suit Property which the Plaintiff agreed to purchase at Kshs. 8,000,000/= and paid this sum. The three were good friends and the Plaintiff contended that he attempted to resolve the dispute over the Suit Property through friends and their parents. At the time of entering into the contract, the Plaintiff had already paid the 1st Defendant the sum of Kshs. 4,900,000/= which included the cost of two motor vehicles the Plaintiff sold to the 1st Defendant for which he issued cheques that were dishonoured.

41. Clause 3 (c) of the agreement enjoined the 1st Defendant to refund to the Plaintiff the purchase price less the sum he was to forfeit within three months of the expiry of the 21 days' notice given on 8/3/2013. It was not until 30/1/2014 that the 1st Defendant wrote to the Plaintiff indicating that he had deposited the refund of Kshs. 5,900,000/= with Mugambi Mungania Advocates and requested the Plaintiff to furnish his bank details for the remittance. The next letter the 1st Defendant wrote was on 10/3/2014 to Mugambi Mungania Advocates directing the advocates to return the funds to him. Mr. Mugambi Advocate sent an email to the Plaintiff on 16/12/2016 claiming that the 1st Defendant had re-deposited the sum of Kshs. 5,900,000/= with the advocates who sought to know the account to they were to deposit the funds into.

42. The 1st Defendant claimed that the Plaintiff breached the sale agreement by failing to pay the two instalments of Kshs. 3,000,000/= each which fell due on 30/11/2012 and 28/2/2012 under clause 3(c) of the sale agreement dated 29/8/2012 as a consequence of which he issued a 21 days' notice to the Plaintiff on 8/3/2013.

43. At the time the Plaintiff and 1st Defendant entered into the sale agreement the Suit Property was charged to Co-operative Bank Limited to secure a figure that is written over. The charge was registered on 22/7/2009. The Plaintiff stated that the 1st Defendant had given him assurances that the loan to Cooperative Bank had been paid off. The 1st Defendant discharged the charge in favour of Co-operative Bank on 27/9/2012 and charged the Suit Property to KCB on the same date to secure payment of the sum of Kshs. 10,000,000/=.

44. According to the copy of title over the Suit Property produced by the 2nd Defendant, the discharge of the KCB charge was registered on 31/8/2016, which is the same day the Suit Property was transferred to the 2nd Defendant for Kshs. 30,000,000/=. Even if the Plaintiff had paid the balance of the purchase price to the 1st Defendant on the dates stated in the sale agreement dated 29/8/2012, the 1st Defendant was not in a position to transfer the Suit Property to the Plaintiff until the charge to KCB was discharged.

45. The court is unable to agree with the 1st Defendant's contention that the subsequent charge to KCB did not in way alter the contract between him and the Plaintiff. The legal effect of registering a charge over land is that the rights of the chargee rank in priority over any other subsequent interests registered over the same land. The land cannot be sold and successfully transferred until any subsisting charge against the title is discharged. Consequently the 1st Defendant could only have transferred the Suit Property to the Plaintiff after the discharge of the KCB charge was registered on 31/8/2016. The 21 days' notice the 1st Defendant issued to the Plaintiff on 8/3/2013 was therefore ineffectual in light of the fact that the 1st Defendant had not performed his obligations under the sale agreement.

46. Clause 10 (b) of the sale agreement between the Plaintiff and the 1st Defendant stipulated as follows:

“The property sold is subject to the Acts, Reservations, Stipulations and conditions subject to which the property is currently held by the common vendors but otherwise free from all encumbrances or any adverse claims whatsoever.

47. Clause 10(c) of the sale agreement enjoined the 1st Defendant to maintain the Suit Property in the state it was in at the time of execution of the sale agreement on 29/8/2012 free of all other encumbrances. The 1st Defendant therefore breached clause 10(c) of the sale agreement when he charged the Suit Property to KCB on 27/9/2012. Besides paying the 1st Defendant Kshs. 7,500,000/= towards the purchase price, the Plaintiff also paid David Mwenda Maingi Kshs. 8,000,000/= for the development on the Suit Property. He paid a further sum of Kshs. 500,000/= to the 1st Defendant in early 2013 when he needed funds for his election bid.

48. The Plaintiff claimed that the 1st Defendant demanded an additional sum of Kshs. 5,000,000/= to complete the sale to him. The court is inclined to believe that the Plaintiff was ready, able and willing to perform his obligation to pay the balance of the Suit Property based on the draft agreement he forwarded for the 1st Defendant's execution to enable him obtain a bank loan. He is therefore entitled to the specific

performance of the contract dated 29/8/2012.

49. It is necessary to reproduce the schedule of the payments the 2nd Defendant claimed that he made to the 1st Defendant.

ITEM	DATE	DESCRIPTION	CHEQUE NO.	AMOUNT (Kshs)	CUMULATIVE BALANCE
1		Purchase Price			30,000,000/=
2.	27/7/16	KCB – Loan	003171	7,910,674/=	22,089,326/=
3.	27/7/16	Land rates penalties	302404	93,888/=	21,995,438/=
4.	27/7/16	Charles Mugambi Mwiti	RTGS	1,600,000/=	20,395,438/=
5.	28/7/16	KCB – Loan		143,303/=	20,252,135/=
6.	22/8/16	Charles Mugambi Mwiti	003184	2,000,000/=	18,252,135/=
7.	7/10/16	Charles Mugambi Mwiti	003211	1,000,000/=	17,252,135/=
8	7/10/16	Commissioner		1,000,000/=	16,252,135/=
9.	29/11/16	Charles Mugambi Mwiti	003237	500,000/=	15,752,135/=
10.		Due to Eric Kanyuuru		5,900,000/=	9,852,135/=
11.		Legal fees		630,000/=	9,222,135/=
12.	16/12/16	Charles Mugambi Mwiti	003249	9,222,135/=	0.00

50. Looking at the schedule of payments the 1st Defendant claimed the 2nd Defendant made, the sum of Kshs. 5,900,000/= is indicated as item number 10 dated 29/11/2016. This raises doubt as to the 1st Defendant's ability to have refunded the deposit to the Plaintiff before November 2016. The first and fifth items on the schedule of payments made by the 2nd Defendant are in relation to the KCB loan dated 27th and 28th July 2016.

51. There is something to be said about the advocates who represented the 1st Defendant in the sale transaction and drafting of the provisions in that agreement safeguarding the Plaintiff's interest in the Suit Property. Mugambi Mungania and Company Advocates drew the cessation of Business, Dissolution of Partnership and sale agreement dated 29/8/2012 between the Plaintiff, 1st Defendant and David Mwenda Maingi which is the subject matter of this suit. The same firm of advocates drew the sale agreement dated 19/7/2016 between the 1st and 2nd Defendants for the same Suit Property.

52. Under clause 13 of this agreement the 1st Defendant warranted to the 2nd Defendant that he had capacity to sell the land and that there were no other interested parties laying claim to the suit land yet at the time the dispute between the Plaintiff and the 1st Defendant had not been resolved and these advocates were aware of this. They were also aware that the 1st Defendant had not remitted the refund of the deposit to the Plaintiff in accordance with the earlier agreement which the 1st Defendant had purported to terminate in March 2013.

53. Mugambi Mungania and Company Advocates is said to have handled the payments of the consideration for the suit land paid by the 2nd Defendant. These advocates also drew the transfer dated 16/8/2016 and handled the issue regarding the refund of the deposit by the 1st Defendant to the Plaintiff which is indicated as item number 10 on the schedule of payment reproduced above.

54. Having found that the Plaintiff is entitled to specific performance of the sale agreement dated 29/8/2012 over the Suit Property, the sale between the 1st and 2nd Defendants cannot stand.

55. The 2nd Defendant's claim in **ELC Case No. 137 of 2017** is dismissed with costs to the Plaintiff who was the Defendant in ELC Case No. 137 of 2017.

56. The court grants prayers (a), (b), (c) and (d) of the Amended Plaint dated 27/4/2017 together with the costs of this suit.

Dated and delivered at Nairobi this 27th day of February 2020

K.BOR

JUDGE

In the presence of:-

Mr. Otieno Muga for the 1st Defendant

Ms. Gathoni Mbugua for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff, 3rd and 4th Defendants