



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1384 OF 2014**

**PATRICK GATHITU KARIUKI.....PLAINTIFF**

**=VERSUS=**

**HOTTENSIAH WAMBUI HINGA.....1<sup>ST</sup> DEFENDANT**

**NANCY NJOKI OGINDE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The 1<sup>st</sup> defendant is a widow and an administrator of the estate of Godfrey Hinga deceased who died on 1<sup>st</sup> August, 2010. The 1<sup>st</sup> defendant was issued with Grant of Letters of Administration in respect of the estate of her deceased husband on 20<sup>th</sup> September, 2011. The said Grant of Letters of Administration was confirmed on 19<sup>th</sup> April, 2012. The estate of the 1<sup>st</sup> defendant's deceased husband comprised of among others all that parcel of land known as L.R No. 2951/501 measuring 2.897 hectares (hereinafter referred to only as "the suit property"). All the assets of the deceased devolved upon the plaintiff absolutely. In November, 2010 shortly after the death of her husband, the 1<sup>st</sup> defendant suffered a stroke that left her physically incapacitated for some time. Due to her illness, the 1<sup>st</sup> defendant donated to her younger sister one, Catherine Nungari Nduku Mwangi a general power of attorney on 21<sup>st</sup> March, 2012 so that she could assist the 1<sup>st</sup> defendant in managing her affairs.

The plaintiff brought this suit against the 1<sup>st</sup> defendant on 29<sup>th</sup> October, 2014 through a plaint dated 28<sup>th</sup> October, 2014. The plaint was amended on 14<sup>th</sup> May, 2018 to add the 2<sup>nd</sup> defendant to the suit. In his amended plaint that was filed on 29<sup>th</sup> July, 2018, the plaintiff averred that on or about 28<sup>th</sup> May, 2013, he entered into a written joint venture agreement with the 1<sup>st</sup> defendant for the development of L.R. No. 2951/501(the suit property). The plaintiff averred that under the said joint venture agreement, the plaintiff and the 1<sup>st</sup> defendant agreed to construct approximately 22 luxurious 4 and 5 bedroomed houses on the suit property. The plaintiff averred that pursuant to the said agreement, he paid to the 1<sup>st</sup> defendant a sum of Kshs. 1,000,000/= as a deposit receipt of which the 1<sup>st</sup> defendant acknowledged. The plaintiff averred further that with express and/or implied consent of the 1<sup>st</sup> defendant, the plaintiff spent a further sum of Kshs. 25,085,232.64 on project design.

The plaintiff averred that the 1<sup>st</sup> defendant was dilly-dallying on committing to complete the agreement although the 1<sup>st</sup> defendant had not terminated the agreement formally. The plaintiff averred that the 1<sup>st</sup> defendant's failure, delay and/or refusal to complete the joint venture agreement was exposing the plaintiff to loss, harm and risk of a suit. The plaintiff averred that he was ready and willing to complete his part of the agreement. The plaintiff averred that it was an implied term of the joint venture agreement that time was of essence in respect of the parties' obligations under the agreement. The plaintiff averred that the 1<sup>st</sup> defendant had wrongfully and without justifiable cause failed to proceed with the project under the joint venture agreement and had also refused and/or neglected to refund the money that was paid by the plaintiff to her and to the contractors pursuant to the said agreement.

The plaintiff averred that the 2<sup>nd</sup> defendant purported to purchase a portion of the suit property measuring half (½) acre from the 1<sup>st</sup> defendant on 18<sup>th</sup> March, 2015. The plaintiff averred that the sale of the said portion of the suit property to the 2<sup>nd</sup> defendant was carried out by the 1<sup>st</sup> defendant in contravention of an order that had been issued by the court herein restraining the 1<sup>st</sup> defendant from undertaking any transaction relating to the suit property. The plaintiff averred that while carrying out the transaction, the defendants were aware of the said court order but chose to disregard the same. The plaintiff averred further that the alleged sale of the said portion of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was false, illegal and an attempt to defeat the due process of law. The plaintiff sought judgment against the defendants for; specific performance of the joint venture agreement dated 28<sup>th</sup> May, 2013 and in the alternative, payment of Kshs. 26,085,232.64, a declaration that the agreement for sale between the 1<sup>st</sup> and 2<sup>nd</sup> defendants in relation to a portion of the suit property measuring half (½) acre was illegal and should be set aside, damages for breach of contract, interest and costs of the suit.

The 1<sup>st</sup> defendant filed amended statement of defence on 17<sup>th</sup> September, 2013. The 1<sup>st</sup> defendant denied that she entered into a joint venture agreement with the plaintiff. The 1<sup>st</sup> defendant averred that she was held at ransom and shown a document the contents of which she was not aware of which she was asked to sign. The 1<sup>st</sup> defendant averred that when the said agreement was allegedly entered into, she had retained the services of a firm of advocates M/s Ndambiri & Co. Advocates which could have represented her in the transaction. The 1<sup>st</sup> defendant averred that she had instructed the same firm of advocates to terminate the power of attorney that she had given to her younger sister, Catherine Ndungari Mwangi in 2012.

The 1<sup>st</sup> defendant averred that the suit property was a prime parcel of land situated at Kitusuru, Nairobi whose market value was over KShs. 350,000,000/=. The 1<sup>st</sup> defendant averred that the alleged joint venture agreement was unconscionable if not void. The 1<sup>st</sup> defendant denied that the plaintiff had paid to her a deposit in the sum of KShs. 1,000,000/= and had also incurred expenses to the tune of KShs. 25,085,232.64 on project design and architectural work. The 1<sup>st</sup> defendant averred that she was in possession of the suit property and that no developments or improvements had been undertaken on the property to justify the expenditure claimed by the plaintiff. The 1<sup>st</sup> defendant denied that she had given the plaintiff instruction to incur any expenditure on the suit property.

The 1<sup>st</sup> defendant admitted that she sold a portion of the suit property measuring half (½) acre to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant denied however that the sale was carried out in breach of a court order. The 1<sup>st</sup> defendant averred that when she sold the said parcel of land to the 2<sup>nd</sup> defendant there was no court order in place restraining the transaction. The 1<sup>st</sup> defendant averred that she was wrongly sued and urged the court to dismiss the suit with costs.

The 2<sup>nd</sup> defendant filed a statement of defence on 17<sup>th</sup> September, 2018. The 2<sup>nd</sup> defendant admitted that she purchased a portion of the suit property measuring half (½) acre from the 1<sup>st</sup> defendant on 18<sup>th</sup> March, 2015 at a consideration of KShs. 15,000,000/=. The 2<sup>nd</sup> defendant averred that she entered into an agreement for sale with the 1<sup>st</sup> defendant after conducting due diligence and that she had no notice of the joint venture agreement between the plaintiff and the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that the court order that had been issued herein restraining dealings with the suit property was brought to her attention on 22<sup>nd</sup> March, 2016 by which time she had paid to the 1<sup>st</sup> defendant KShs. 12,810,000/= on account of the purchase price of the said portion of the suit property and a transfer had already been executed in her favour by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that what was remaining at that time for the transfer of the said portion of the suit property to be registered in her favour was consent of the Land Control Board. The 2<sup>nd</sup> defendant denied that the said court order was in place on 18<sup>th</sup> March, 2015 when she entered into the said agreement for sale with the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> defendant averred that she was an innocent purchaser of the said portion of the suit property without notice of the plaintiff's interest in the property and that the agreement for sale between her and the 1<sup>st</sup> defendant was valid and enforceable. The 2<sup>nd</sup> defendant averred that a caveat that had been registered against the title of the suit property by the plaintiff on 25<sup>th</sup> July, 2013 claiming purchaser's interest was removed on 22<sup>nd</sup> July, 2014 before she entered into an agreement for sale with the 1<sup>st</sup> defendant to purchase a portion of the suit property on 18<sup>th</sup> March, 2015. The 2<sup>nd</sup> defendant averred that she took possession of the said portion of the suit property on 18<sup>th</sup> March, 2015 and had remained in possession since then. The 2<sup>nd</sup> defendant urged the court to uphold her agreement with the 1<sup>st</sup> defendant dated 18<sup>th</sup> March, 2015 and to dismiss the plaintiff's suit.

Together with the defence, the 2<sup>nd</sup> defendant filed a Notice of Claim against the 1<sup>st</sup> defendant under order 1 Rule 24 (1) of the Civil Procedure Rules. In the notice, the 2<sup>nd</sup> defendant averred that pursuant to clause 14 of the agreement for sale dated 18<sup>th</sup> March, 2015 between her and the 1<sup>st</sup> defendant, she was entitled to an indemnity from the 1<sup>st</sup> defendant against any order that may be made by the court depriving her of the portion of the suit property that she purchased from 1<sup>st</sup> defendant and any order on costs of the suit. The plaintiff filed a reply to the 2<sup>nd</sup> defendant's defence on 19<sup>th</sup> September, 2018 in which the plaintiff denied that the 2<sup>nd</sup> defendant was an innocent purchaser of a portion of the suit property.

At the trial, the plaintiff adopted his witness statement dated 28<sup>th</sup> October, 2014 as his evidence in chief and produced the documents at pages 34 to 61 of his bundle of documents as exhibits. The plaintiff told the court that in May, 2013, his lawyer John Mburu introduced him to one, Catherine Nungari. He stated that John Mburu had informed him prior to that date that Catherine Nungari was his client and that she was interested in entering into a joint venture. The plaintiff told the court that he met Catherine Nungari in the presence of John Mburu. At the meeting, Catherine Nungari told him that she had land measuring 7 acres which she wanted to develop through a joint venture arrangement. Catherine Nungari told him that the land belonged to the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant had given her a power of attorney to deal with the land on her behalf because she had suffered a stroke in 2010. Catherine Nungari also told him that although the 1<sup>st</sup> defendant had recovered; she was still unwell. The plaintiff stated that Catherine Nungari gave him a copy of a letter from the 1<sup>st</sup> defendant's doctor on her improved health status. The plaintiff stated that after perusing the said letter from the 1<sup>st</sup> defendant's doctor, he insisted that the joint venture agreement be signed by the 1<sup>st</sup> defendant in person and that Catherine Nungari be a witness to the agreement.

The plaintiff stated further that following the said meeting with Catherine Nungari, John Mburu prepared a joint venture agreement and on 28<sup>th</sup> May, 2013, the 1<sup>st</sup> defendant came to his office and after going through the agreement signed the same. He stated that the 1<sup>st</sup> defendant was accompanied by Catherine Nungari, an in-law by the name George Kimani and a niece, Roselyn Wanjiru. He stated that the 1<sup>st</sup> defendant's signature in the agreement was witnessed by Catherine Nungari. He stated that after the execution of the agreement, he paid to the 1<sup>st</sup> defendant KShs. 1,000,000/= which was the consideration provided for in the joint venture agreement after which they parted ways to begin the project.

The plaintiff stated after the execution of the joint venture agreement engaged the services of an architect and a surveyor. He stated that around 16<sup>th</sup> July, 2013, he was informed by his lawyer John Mburu that he had received a letter from the 1<sup>st</sup> defendant's advocates claiming that the 1<sup>st</sup> defendant had been kidnapped and forced to sign the joint venture agreement. The plaintiff stated that in view of this turn of events, he registered a caveat against the title of the suit property to protect his interest. The plaintiff stated that the 1<sup>st</sup> defendant was neither

kidnapped nor forced to sign the joint venture agreement. The plaintiff stated that in 2014, he discovered that the caveat that he had registered against the title of the suit property had been removed, the suit property subdivided and a portion sold to the 2<sup>nd</sup> defendant. The plaintiff urged the court to grant the reliefs sought in the amended plaint.

In her evidence, the 1<sup>st</sup> defendant adopted her witness statement dated 16<sup>th</sup> November, 2017 as her evidence in chief. The 1<sup>st</sup> defendant told the court that she met the plaintiff once in his office at 5:30p.m. She stated that her sister Catherine Nungari came to her place and informed her that she had found people who could give her financial help and that she took her to the plaintiff's office. The 1<sup>st</sup> defendant stated that she was taken to the plaintiff's office by her niece and when she arrived she found when her sister had already arrived. She stated that she was welcomed with a cup of tea. She stated that after she was through with the tea, documents were brought to her in an envelope and she asked her to read the same. She stated that since the documents were bulky, she requested to be allowed to take them home for reading but the request turned down. She stated that after her request was rejected, she folded the documents, signed the same and handed them back to those who had brought them. The plaintiff stated that she did not know what she was signing since she did not read the documents that were presented to her. The 1<sup>st</sup> defendant admitted that the signature in the joint venture agreement was hers. The plaintiff stated that when the agreement was given to her the same was folded and she signed a blank paper. She stated that she did not know what was in the agreement.

The 1<sup>st</sup> defendant stated that after she had signed the document, her sister Catherine Nungari gave her an envelope outside the plaintiff's office which she was told contained money. The 1<sup>st</sup> defendant stated that her said sister followed her and took all the money that was in the envelope leaving her with Kshs.500/= only which she took to Gigiri Police Station the following day. The 1<sup>st</sup> defendant stated that she was not given an opportunity to read the document that she signed. She stated that she thereafter subdivided the suit property so that she could sell portions thereof when she realised that a caveat had been registered against the title of the property. She stated that her advocates applied for the removal of the said caveat and the same was lifted accordingly after which she sold portions of the suit property. The 1<sup>st</sup> defendant told the court that she did not enter into an agreement with the plaintiff. She produced the documents attached to her bundle of documents filed in court on 17<sup>th</sup> September, 2018 as exhibits.

The 1<sup>st</sup> defendant's witness was Roselyn Wanjiru Kairu (DW 2). DW 2 stated that the 1<sup>st</sup> defendant was her aunt. She adopted her witness statement dated 17<sup>th</sup> September, 2018 as her evidence in chief. DW 2 told the court that she accompanied the 1<sup>st</sup> defendant to the plaintiff's office where she was given Kshs. 500,000/=. DW 2 stated that the 1<sup>st</sup> defendant did not sign the joint venture agreement. She stated that the 1<sup>st</sup> defendant only signed an acknowledgment receipt for Kshs. 500,000/= that she was paid. She stated that out of the said sum of Kshs. 500,000/= a sum of Kshs. 445,000/= was taken by the 1<sup>st</sup> defendant to Gigiri Police Station. She stated that a sum of Kshs. 55,000/= was taken by Catherine Nungari who followed them after they had been given the money. DW 2 told the court that when they arrived at the plaintiff's office, the plaintiff's advocate, John Mburu was present. She stated that the others who were present were the plaintiff, the 1<sup>st</sup> defendant's sister Catherine Nungari and one, James Kimani. DW 2 stated that when the 1<sup>st</sup> defendant was given the joint venture agreement, DW 2 requested that she be allowed to read the document for her but the request was turned down. DW 2 stated that Catherine Nungari told her that the deal was done and as such it was not necessary for her to read the document for the 1<sup>st</sup> defendant.

The last to give evidence was the 2<sup>nd</sup> defendant, Nancy Njoki Oginde (DW 3). The 2<sup>nd</sup> defendant adopted her witness statement dated 13<sup>th</sup> September, 2018 as her evidence in chief and produced as exhibits the documents attached to her bundle of documents dated 14<sup>th</sup> September, 2018. The 2<sup>nd</sup> defendant narrated to the court; how she got to know that the 1<sup>st</sup> defendant was subdividing the suit property and selling portions thereof, how she entered into an agreement for sale with the 1<sup>st</sup> defendant in respect of a portion of the suit property, the payments she made to the 1<sup>st</sup> defendant and how she came to learn of this suit and the court order that had been issued by the court restraining any transaction involving the suit property. The 2<sup>nd</sup> defendant told the court that she purchased the portion of the suit property innocently without notice of the plaintiff's interest in the same. She urged the court to allow her to continue with the transaction involving the portion of the suit property that she purchased from the 1<sup>st</sup> defendant.

After the end of the evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 20<sup>th</sup> November, 2019. The 2<sup>nd</sup> defendant filed her submissions on 18<sup>th</sup> September, 2019 while the 1<sup>st</sup> defendant did not file submissions. I have considered the evidence tendered by the parties and the submissions by the advocates for the plaintiff and the 2<sup>nd</sup> defendant. Before the 2<sup>nd</sup> defendant was added to the suit, the plaintiff and the 1<sup>st</sup> defendant had agreed on a total of 12 issues to be determined by the court. The said issues were not reviewed or amended after the plaint was amended to add the 2<sup>nd</sup> defendant to the suit. From the pleadings and the issues that were agreed upon by plaintiff and the 1<sup>st</sup> defendant, the issues arising for determination by the court in this suit can be summarised as follows;

1. Whether there was a valid joint venture agreement between the plaintiff and the 1<sup>st</sup> defendant relating to L.R No. 2951/501 (the suit property).
2. If the answer to issue number 1 is in the affirmative, whether the 1<sup>st</sup> defendant breached the said agreement.
3. Whether the plaintiff made any payment to the 1<sup>st</sup> defendant under the joint venture agreement and if so how much?
4. Whether the plaintiff incurred any expense pursuant to the said joint venture agreement and if so, whether the 1<sup>st</sup> defendant is liable to reimburse the plaintiff of such expense.
5. Whether the sale of a portion of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was lawful.
6. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.

7. Whether the 2<sup>nd</sup> defendant is entitled to the indemnity sought in its Notice of Claim against the 1<sup>st</sup> defendant.

8. Who is liable for the costs of the suit?

Whether there was a valid joint venture agreement between the plaintiff and the 1<sup>st</sup> defendant relating to L.R No. 2951/501 (the suit property).

From the evidence on record, I am satisfied that the joint venture agreement dated 28<sup>th</sup> May, 2013 (hereinafter referred to only as “JVA”) was signed by the plaintiff and the 1<sup>st</sup> defendant. In National Bank of Kenya Ltd. v Pipeplastic Samkolit (K) Ltd. and another [2002] E. A. 503, the court stated that:

**“This in our view is a serious misdirection on the part of the learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.”**

In Mwinyi Hamisi Ali v The Attorney General & Another [1997]eKLR the court stated that:

**“It can be seen straight away that Mr. Hamisi Ali was not in adverse possession of the plots in question. He was in possession by virtue of Captain Townsend’s consent and somewhat nebulous implied consent of the other three co-owners of plot No. 334.....In a court of law, sympathy takes a second stand. We are governed by statutes.” (Emphasis added).**

In her amended defence, the 1<sup>st</sup> defendant averred at paragraph 4 that there was no contract between her and the plaintiff. The 1<sup>st</sup> defendant averred that “*she was held to ransom and shown a document whose contents she was not aware of, and told that she had signed (sic) when she was not aware of the contents thereof.*” The 1<sup>st</sup> defendant averred that when she was forced to sign the said document she did not have the benefit of independent legal advice.

From those averments, it is clear that the 1<sup>st</sup> defendant attempted to raise a defence of coercion. The 1<sup>st</sup> defendant claimed to have been held to ransom and given a document to sign the contents of which she did not understand. This is very clear from the letter dated 16<sup>th</sup> July, 2013 which the 1<sup>st</sup> defendant’s advocates, Wairagu & Wairagu Advocates wrote to the plaintiff’s former advocates John Mburu & Company Advocates (See page 60 of P Exh. 1). In the letter the 1<sup>st</sup> defendant’s said advocates claimed as follows in relation to the 1<sup>st</sup> defendant:

**“Our instructions are that our client was actually coerced if not abducted from her office to another place where she was made to sign the same agreement (if any) after 6:30p.m.”**

The burden of proof was on the 1<sup>st</sup> defendant to establish that she was coerced to sign the JVA. The fact that the 1<sup>st</sup> defendant signed the JVA agreement is in my view beyond doubt. In her affidavit sworn on 23<sup>rd</sup> March, 2016 and filed in court on 24<sup>th</sup> March, 2016 in opposition to the plaintiff’s application for interlocutory injunction, the 1<sup>st</sup> defendant stated as follows at paragraphs 8, 10, 11 and 12;

**“8. THAT I recall my said sister taking me to a building in Westlands where I found the plaintiff and a lawyer who asked me to sign a document which I was told that it is a “Joint Venture Agreement.”**

**10. However I was told that after I sign the document I would be paid some money.**

**11. So I signed the document although I did not understand its implication as I was denied a chance to appoint my lawyer neither did I appoint the lawyer who made the agreement to act for me....**

**12. THAT at the time of signing Exhibit “PKG2” (the Joint Venture Agreement), the land in question was still registered in the name of my late husband.” (explanation added).**

In her witness statement dated 16<sup>th</sup> November, 2017 filed in court on 22<sup>nd</sup> November, 2017 the 1<sup>st</sup> defendant stated as follows at paragraph 6, 7, 8 and 9;

**“6. On 28<sup>th</sup> May, 2013, I recall my sister Catherine Nungari Mwangi took me to a building in Westlands where I found the plaintiff and his lawyer. I was asked to sign a document which I had no benefit of seeing before nor had I sought any legal advice on. The said document then turned out to be a Joint Venture Agreement.**

**7. As I was on my way to recovery, I was heavily burdened financially, this is when my sister came with a solution of people who wanted to help me, she really persuaded me. I recall being told that after I sign the agreement I would be paid some money.**

**8. I signed the document though I did not understand its contents and or its implications. I was denied the chance to appoint a lawyer who would have assisted me to go through the document and advise me as appropriate. I did not further know the person and or the lawyer who had drawn the document.**

**9. At the time of signing the agreement the title of the parcel of land in question was still registered in the name of my late husband Mr. Godfrey Hinga and same had not been transferred to me though I had obtained the letters of administration of the estate of my late husband as the sole administrator of the estate.”**

In her evidence before the court, the 1<sup>st</sup> defendant also admitted having signed the JVA. In my assessment of the evidence on record in totality, the evidence of the document examiner (DW 3) did not establish that the 1<sup>st</sup> defendant did not sign the JVA. DW 3 was given three (3) sets of signatures of the 1<sup>st</sup> defendant to analyse. He had the 1<sup>st</sup> defendant's specimen signatures that she had given to the police, the 1<sup>st</sup> defendant's known signatures which were contained in the letters that she had signed previously and the signatures in the JVA and the acknowledgment receipt for Kshs. 500,000/- which were said to be that of the 1<sup>st</sup> defendant. In his evidence, DW 3 stated that the signatures in the JVA and the acknowledgment receipt aforesaid were made by the same person. DW 3 stated further that the said signatures in the JVA and the acknowledgment receipt, and the 1<sup>st</sup> defendant's known signatures and specimen signatures were not of the same person. In my view, If DW 3 had looked at and compared the specimen signatures that were given by the 1<sup>st</sup> defendant and her known signatures, DW 3 would have noted that they were not by the same person. This casts doubt on the authenticity of what the 1<sup>st</sup> defendant had given to the police as her specimen signature. I therefore find DW 3's evidence inconclusive on the issue as to whether or not the 1<sup>st</sup> defendant signed the JVA. As I have shown above, the 1<sup>st</sup> defendant admitted signing the JVA on several instances. It is this court's finding that she signed the document.

With the issue as to whether or not the 1<sup>st</sup> defendant signed the JVA now laid to rest, I will go back to the issue as to whether the 1<sup>st</sup> defendant has established that she was coerced or forced to sign the agreement. Coercion that would vitiate the JVA at the instance of the 1<sup>st</sup> defendant must be one that originated from the plaintiff with whom they entered into the said agreement. The 1<sup>st</sup> defendant did not place any evidence before the court showing that either the plaintiff or his advocates coerced her to sign the JVA. The fact that she did not have legal advice or that she did not read the JVA before signing the same in my view is not evidence of coercion. Evidence before the court shows that on the day when she signed the JVA, the 1<sup>st</sup> defendant left her house in the company of DW 2 willingly. The evidence also shows that the 1<sup>st</sup> defendant knew that she was going to the plaintiff's office and the purpose of her visit to the office. The evidence before the court further shows that the 1<sup>st</sup> defendant was told that what she was signing was a JVA. There is no evidence that the 1<sup>st</sup> defendant refused to sign the agreement and was forced by the plaintiff to sign the same under threat of harm being inflicted on her.

I am not satisfied that the 1<sup>st</sup> defendant has established any cause that would vitiate the JVA that she entered into with the plaintiff. The fact that when the plaintiff and the 1<sup>st</sup> defendant entered into the JVA, the suit property was not in the name of 1<sup>st</sup> defendant does not in my view make the JVA invalid. It only affects its enforceability which is another issue altogether. It is therefore my finding that the plaintiff and the 1<sup>st</sup> defendant entered into a valid JVA on 28<sup>th</sup> May, 2013 relating to L.R No. 2951/501 (the suit property).

If the answer to issue number 1 is in the affirmative, whether the 1<sup>st</sup> defendant breached the said agreement.

There is no doubt from the evidence adduced by both parties that the 1<sup>st</sup> defendant had a change of mind after signing the JVA and requested that it be terminated. The 1<sup>st</sup> defendant's conduct after the execution of the JVA agreement showed that she did not wish to be bound by the same. The 1<sup>st</sup> defendant subdivided the suit property that was her contribution to the project under the JVA and sold portions thereof to third parties. This is explicit evidence of breach of the JVA. It is my finding arising from the foregoing that the 1<sup>st</sup> defendant breached the JVA.

Whether the plaintiff made any payment to the 1<sup>st</sup> defendant under the joint venture agreement and if so how much?

The evidence before the court shows that the 1<sup>st</sup> defendant received a sum of Kshs. 500,000/= from the plaintiff. She was to receive a total of Kshs. 1,000,000/= on the date of the signing of the JVA. However, there is no evidence that the balance of Kshs. 500,000/= was paid to her either in cash or to her bank account. It was alleged that out of the said sum of Kshs. 500,000/= that was received by the 1<sup>st</sup> defendant, a sum of Kshs. 445,000/= was taken to Gigiri Police Station by the 1<sup>st</sup> defendant and deposited there for the plaintiff to collect. No evidence was placed before the court from the Kenya Police Service, Gigiri acknowledging receipt of Kshs. 445,000/= from the 1<sup>st</sup> defendant on behalf of the plaintiff. It is therefore my finding that the plaintiff paid to the 1<sup>st</sup> defendant a sum of Kshs. 500,000/= only under the JVA.

Whether the plaintiff incurred any expense pursuant to the said joint venture agreement and if so, whether the 1<sup>st</sup> defendant is liable to reimburse the plaintiff of such expense.

In his amended plaint the plaintiff averred that pursuant to the JVA he spent a sum of Kshs. 25,085,232.64 on project design and architectural work. In evidence, the plaintiff produced two (2) invoices for a total sum of Kshs. 12,646,962.24. The first invoice was dated 12<sup>th</sup> June, 2013 in the sum of Kshs. 9,406,962.24. The invoice was issued by Panache Management Ltd. It is not clear from the invoice as to the services in respect of which fees was being charged. I am unable to determine whether the invoice was for project management or architectural works. The breakdown of the services said to have been rendered however appears as if the invoice was for architectural services. The invoice is not signed. There are also no details of the V.A.T that was payable on the fees claimed. No evidence was placed before the court of any architectural or project management services that had been rendered by Panache Management Ltd. to the plaintiff as at 12<sup>th</sup> June, 2013 when the invoice was raised. There was also no evidence that the plaintiff paid the invoice. No evidence of payment was placed before the court neither was a receipt in acknowledgment of any such payment produced. I am not satisfied on the evidence before me that the plaintiff incurred expense to the tune of Kshs. 9,406,962.24 on architectural works.

The other invoice is dated 4<sup>th</sup> August, 2013 for Kshs. 3,240,000/=. This invoice is from Geosurve Systems Ltd. The invoice is in respect of planning, survey work and deed plans. Again no evidence was placed before the court showing that the company that raised this invoice had carried out any survey work to be entitled to this payment. The plaintiff did not also place before the court evidence showing that he settled this invoice. Due to the foregoing, I am not satisfied that the plaintiff spent Kshs. 25,085,232.64 or any other amount pursuant to the JVA. If the plaintiff had established such expense, I would have held that he is entitled to reimbursement of the same as special damages by the 1<sup>st</sup>

defendant whom the court has found to have breached the JVA. As the 2<sup>nd</sup> defendant has submitted at length, special damages must not only be pleaded specifically but must also be strictly proved. The plaintiff did not plead the sum of Kshs. 25,085,232.64 claimed in the plaint with the necessary particulars. The same was also not strictly proved. It is therefore my finding that the plaintiff is not entitled to reimbursement of the said sum of Kshs. 25,085,232.64 or any other amount as non has been proved to be due.

Whether the sale of a portion of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was lawful.

From the evidence on record, I am satisfied that the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant entered into a valid sale agreement in respect of a portion of the suit property. It is not correct as claimed by the plaintiff that the sale transaction between the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant was carried out in breach of a court order issued herein. From the record, the order restraining the 1<sup>st</sup> defendant from among others selling the suit property was made on 15<sup>th</sup> March, 2016 while the agreement for sale between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant was made on 18<sup>th</sup> March, 2015. I am however in agreement with the plaintiff that the transaction was carried out in breach of the *lis pendens* rule. Breach of the *lis pendens* rule *per se* in my view does not nullify a sale transaction. What is does is to make the transaction subject to the outcome of the court proceedings which were pending when the transaction involving the land in question was carried out. It follows therefore that, whereas the sale transaction between the 1<sup>st</sup> and 2<sup>nd</sup> defendants was valid and enforceable as between them, the same is subject to the outcome of this suit. It is irrelevant that the 2<sup>nd</sup> defendant was not aware of the existence of this suit when she entered into the said agreement for sale with the 1<sup>st</sup> defendant.

In *Mawji v US International University & Another* [1976] KLR 185, the Court stated that:

**“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other.....Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”**

Whether the plaintiff is entitled to the reliefs sought in the amended plaint.

I have set out at the beginning of this judgment the reliefs sought by the plaintiff in the amended plaint. The first relief is specific performance. The law on specific performance is settled. Specific performance is a discretionary remedy. In the circumstances of this case, I am not satisfied that the plaintiff is entitled to the order. The plaintiff has demonstrated that the 1<sup>st</sup> defendant breached the JVA. He has however failed to establish that on his part he had fulfilled all his obligations under the JVA. The JVA provided that the plaintiff was to pay to the 1<sup>st</sup> defendant a sum of Kshs. 1,000,000/= on or before the execution of the JVA and the balance in the sum of Kshs. 8,800,000/= within 90 days of the execution of the agreement. As I have stated earlier, the plaintiff paid to the 1<sup>st</sup> defendant a sum of Kshs. 500,000/= only on the signing of the JVA.

The plaintiff did not place before the court evidence showing that he paid the balance of the deposit in the sum of Kshs. 500,000/= to the 1<sup>st</sup> defendant so as to make the total amount paid as a deposit Kshs. 1,000,000/=. On the last page of the JVA, the 1<sup>st</sup> defendant had provided her account details and had authorised the plaintiff not only to pay the initial deposit of Kshs. 1,000,000/= to that account but all the payments that were due to her under the JVA. The plaintiff cannot therefore claim as he has done that he was waiting for the 1<sup>st</sup> defendant to provide her account details to enable him pay what remained of Kshs. 9,800,000/= that was payable to the 1<sup>st</sup> defendant under the JVA. The plaintiff failed not only to pay the deposit of Kshs. 1,000,000/= but also the balance in the sum of Kshs. 8,800,000/= that was payable within 90 days. There is no evidence that the plaintiff deposited the said amount to the bank account that was provided by the 1<sup>st</sup> defendant or that he tendered the same in court upon filing of this suit.

The plaintiff having failed to fulfill his part of the JVA he is not entitled to the remedy of specific performance. The other factor that militates against the grant of the order of specific performance is the fact that the suit property that was the subject of the JVA is no longer in existence. The property has been subdivided by the 1<sup>st</sup> defendant into various portions and titles for the subdivisions have been issued. It is not possible therefore to put the parties to the same position in which they were when they entered the JVA. It should be noted that the court has not been called upon to cancel the subdivision that has been carried out by the 1<sup>st</sup> defendant. For the foregoing reasons, the plaintiff is not entitled to an order of specific performance.

The plaintiff had sought an alternative prayer for Kshs. 26,085,232.64. As I have held above, save for the sum of Kshs. 500,000/= the plaintiff has not proved this claim and as such the same cannot be granted by the court. The plaintiff had also sought a declaration that the agreement for sale that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had entered into over a portion of the suit property is illegal. I have already dealt with this issue. The sale was not illegal but subject to the outcome of this suit. In view of the finding that I have made above that the plaintiff is not entitled to specific performance, there is no basis for setting aside the sale.

The final relief that was sought by the plaintiff is damages for breach of contract. I am in agreement with the submissions by the 2<sup>nd</sup> defendant that damages for breach of contract are in the nature of special damages which must be specifically pleaded and strictly proved. In my view, the only special damages that was proved by the plaintiff was the sum of Kshs. 500,000/= that he paid to the 1<sup>st</sup> defendant as part of the deposit that was payable under the JVA. I would therefore award the plaintiff the said sum of Kshs. 500,000/= as special damages for breach of contract by the 1<sup>st</sup> defendant.

Whether the 2<sup>nd</sup> defendant is entitled to the indemnity sought in its Notice of Claim against the 1<sup>st</sup> defendant.

In view of the findings I have made above, the 2<sup>nd</sup> defendant is not entitled to be indemnified in any way by the 1<sup>st</sup> defendant.

Who is liable for the costs of the suit?

As a general rule, costs follow the event. In the circumstances of this case, I am of the view that justice would be better served if each party bears its own costs.

Conclusion:

In the final analysis and for the foregoing reasons, I hereby enter judgment for the plaintiff against the defendants on the following terms;

1. Kshs. 500,000/= as special damages against the 1<sup>st</sup> defendant.
2. The claim against the 2<sup>nd</sup> defendant is dismissed.
3. Each party to bear its own costs of the suit.

**Delivered and Dated at Nairobi this 18<sup>th</sup> Day of May 2020**

**S. OKONG'O**

**JUDGE**

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

Mr. Makori for the Plaintiff

Mr. Wairagu for the 1<sup>st</sup> Defendant

Mr. Kimani for 2<sup>nd</sup> Defendant

Ms. C. Nyokabi-Court Assistant