



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 104 OF 2017

ELIJAH SADALA MSAGHA.....PLAINTIFF

VERSUS

BENEDICT MWAKIO MCHOMBO..... 1ST DEFENDANT

SAFARICOM (K) LIMITED2ND DEFENDANT

JUDGMENT

(Plaintiff having entered into a sale agreement with the 1st defendant for sale of a portion of the 1st defendant's land; sale agreement entered into in the year 1998; sale agreement not attested; the 2nd defendant later showing interest to lease the land; agreement entered that the 2nd defendant would lease the land with plaintiff signing as a beneficiary; formal lease agreement later executed with 1st defendant as lessor and lease registered; 1st defendant commissioning a surveyor to carve out the portion sold to the plaintiff; 1st defendant executing a rent payment form directing the 2nd defendant to pay rent to the plaintiff; 1st defendant later demanding that rent be paid to him and 2nd defendant complying; plaintiff now filing suit for specific performance of the sale agreement and for an order that he be paid rent; 1st defendant raising issue that the sale agreement was not attested and that the suit is time barred; attestation having been introduced through a 2002 amendment to the Law of Contract Act, and not a requirement to contracts there before; suit time barred for having been filed outside 12 years; however, court making an order of specific performance on the doctrine of constructive trust; further order that it is the plaintiff who is entitled to the rent and any rent paid to the 1st defendant is held in trust for the plaintiff)

1. This suit was commenced through a plaint which was filed on 23 March 2017. The plaintiff avers that on 11 April 1998, he purchased a portion of land from the 1st defendant out of the land parcel MN/V/729. He contends to have paid the purchase price and that he was to get his title upon the land being subdivided. It is pleaded that the 2nd defendant approached the plaintiff and requested to erect a communication mast and pay annual rent. An agreement was entered and it is pleaded that the 1st defendant assured the plaintiff that a title would be processed in his name. The plaintiff avers that he received from the 2nd defendant Kshs. 240,000/- on 13 February 2014 for 2014 rent. On 14 November 2014, he received rent for the year 2015 and on 17 November 2015, he received rent for the year 2016. However, the 2nd defendant did not pay the 2017 rent which was due in November 2016. He has pleaded that he is thus entitled to terminate the agreement with the 2nd defendant and claim the outstanding rent and damages. In the suit, he has asked for the following orders :-

- (i) An order of specific performance compelling the 1st defendant to comply with the terms of the agreement dated 11.04.1998 and procure the subdivision of MN/V/729 to carve (sic) out the portion purchased by the plaintiff for value and execute a transfer and all necessary documentation in favour of the plaintiff for the portion purchased for value.
- (ii) An order be issued compelling the 2nd defendant to pay rent arrears for the year 2017 and or in default an order of eviction against the 2nd defendants (sic) its agents, servants, as well as any other parties whom the defendant, have (sic) permitted to occupy any part of the property do (sic) forthwith vacate and deliver vacant possession of the premises to the plaintiff as the time of letting.
- (iii) Mesne profits at commercial rates from November 2016 until vacant possession is obtained by the plaintiff.
- (iv) Costs of this suit together with interest thereon at commercial rate and such period of time as this Honourable Court may deem fit to grant.
- (v) Interest on (ii)-(iv) above at commercial rates until payment in full.

2. The 1st defendant filed defence vide which he denied selling a portion of the suit land to the plaintiff which he described as Subdivision

Number 729 (Original No. 381/1) Section V Mainland North. He also denied that the 2nd defendant entered into any agreement with the plaintiff to erect a telecommunication mast on the suit land. He pleaded that it was him (1st defendant) who entered into a lease with the 2nd defendant on 8 August 2014, and that the lease was registered on 15 October 2014, and further that the plaintiff is not privy to that lease, and thus not entitled to receive rent on it. He has pleaded that the monies paid to the plaintiff were paid to him through fraud and or false and illegal misrepresentation. He filed a cross-claim against the 2nd defendant claiming rent for the years 2014 (Kshs. 240,000/-) , 2015 (Kshs. 252,000/-) and 2016 (Kshs. 264,600/-), in total, Kshs. 756,600/-.

3. The 2nd defendant filed defence through which it pleaded that it made a written offer to the 1st defendant, dated 11 October 2013, to erect a base station on a portion of the suit land and the 1st defendant accepted this offer. The 1st defendant supplied a copy of the title and notified the 2nd defendant of the plaintiff's beneficial interest, and the plaintiff consented to the lease agreement between the 1st defendant and the 2nd defendant. The 2nd defendant admitted paying rent to the plaintiff for the years 2014, 2015 and 2016, but averred that it did so after the 1st defendant signed a Rental Payment Form directing the 2nd defendant to pay the rent into the plaintiff's account. On 5 March 2015, it received a demand notice demanding that rent payments be made to the 1st defendant and not to the plaintiff, and the 1st defendant signed a new Rental Payment Form to change the payment details. The 2nd defendant pleaded that it inadvertently paid the 2016 rent to the plaintiff's account but rectified this in the year 2017, and has since been paying rent as directed by the 1st defendant, which it avers is in compliance with the terms of the lease agreement. It has pleaded that the plaintiff has no right to terminate a lease that it is not privy to. It has pleaded readiness to pay rent as directed by the court.

4. In his evidence, the plaintiff testified inter alia that he has known the 1st defendant since the year 1968 and stated that on 11 April 1998, they entered into a sale agreement for a portion of the suit land. He produced the sale agreement as an exhibit. However, title was not forthcoming as the 1st defendant gave him excuses including that the title is charged. He stated that in the year 2013, the 1st defendant brought a surveyor to carve out his portion, and a survey plan was drawn. He testified that after the survey was completed, the 1st defendant called him and informed him that the 2nd defendant wanted to put up a mast on the plot. An agreement was later entered. He stated that he also signed on the agreement, and that the 1st defendant gave the 2nd defendant his (plaintiff's) account details and money was paid into his account being rent for the years 2014 to 2016. When further rent was not forthcoming, he approached an advocate who drew a demand letter which was replied to. It is then that he filed this case. Cross-examined on his sale agreement with the 1st defendant, he admitted that the same is not witnessed. He stated that he paid the purchase price although he did not have proof of it. He averred that he gave consent, as beneficial owner, so that the 2nd defendant may put up its mast on the suit land. He acknowledged that he is yet to receive title to the portion that he claims to have purchased. Re-examined, he stated that they entered into the agreement as brothers and that he was receiving rent as landlord.

5. PW- 2 was Gilbert Nderitu a surveyor working with the County Government of Mombasa. He testified that he was approached by the owner of the suit land (the 1st defendant) to demarcate a plot of 40 X 80 feet. He went to the ground and did the beaconing on 21 November 2013. He never went beyond that, as the owner was to proceed to give consent so that he may get new title numbers, which apparently was not done. When he did the partition of the land both the plaintiff and the 1st defendant were present and he was separating the portion sold to the plaintiff. Cross-examined by counsel for the 1st defendant, he stated that as a civil servant, he is not allowed to carry out private work although he was paid Kshs. 15,000/= for the survey work that he did. He never issued a receipt and never paid tax on the payment. He admitted that the subdivision process is not complete and that there is no deed plan. What he prepared was a proposal.

6. The 1st defendant donated a power of attorney to Elpina Mwakio who testified on his behalf. She stated that she is the daughter to the 1st defendant. She relied on the witness statement that was drawn by her father. She testified that the suit land measures 2 ½ acres and is situated in Jomvu. Her father got title to it in the year 1990. She stated that on the land, there are 11 tenants who built houses and pay rent depending on the size that they have leased. She denied that her father had sold a portion of the land to the plaintiff and stated that he only leased the same to him in the year 1998 to allow the plaintiff conduct his business. The rent payable was Kshs. 500/= per month and the sum of Kshs. 200,000/= was paid to allow him rent the space since it was next to the road. She stated that she is the one who collects rent and that the plaintiff has never paid the Kshs. 500/= rent. The land remained vacant until the 2nd defendant requested to erect a mast on it and his father leased out the land to the 2nd defendant. She stated that her father inquired why the 2nd defendant was making payment to the plaintiff, and after he protested, the 2nd defendant started paying him directly. She stated that the sale agreement produced by the plaintiff was typed by the plaintiff himself and that his father refused to sign it. She was cross-examined on the agreement to lease, which she acknowledged was signed by both her father and the plaintiff, with the latter signing as "beneficial owner". She asserted that her father did not have a sale agreement with the plaintiff but only had a lease agreement which was never put into writing. She was aware that a surveyor went to the ground but stated that it was for the lease to the 2nd defendant.

7. The 2nd defendant did not bring a witness on the day that the matter was scheduled for defence hearing and I declined to adjourn the matter. No evidence was thus tendered on behalf of the 2nd defendant.

8. I invited counsel to file their submissions which they all did. I have taken note of the same. Among the salient arguments raised by counsel for the 1st defendant, is that the sale agreement produced by the plaintiff is not valid and is not enforceable, principally because it was not attested. He referred me to Section 3 (3) of the Law of Contract Act, Cap 23, Laws of Kenya. He submitted that the remedy of specific performance would need to be premised upon a valid enforceable contract. He further submitted that the plaintiff's claim is time barred by dint of Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, which provides for a limitation period of 12 years for the recovery of land. He submitted that his client deserves to be paid the sum of Kshs. 756,000/- as claimed. He relied on various authorities to buttress his submissions. For the 2nd defendant, it was inter alia submitted that it is the 1st defendant who instructed the 2nd defendant to make payments into the plaintiff's account and that the claim of the 1st defendant against the 2nd defendant should thus be dismissed. For the plaintiff it was argued inter alia that the current Section 3 (3) of the Law of Contract Act, came into effect on 1 June 2003, and that the previous Section 3 (3) only required a memorandum or note in writing. It was thus submitted that the sale agreement is enforceable. She submitted that the relationship between the plaintiff and 1st defendant could not have been one of tenancy and submitted that it defied logic that no rent was ever demanded from the plaintiff by the 1st defendant. She submitted that forwarding of the plaintiff's bank details was an acquiescence by the 1st defendant that he had sold the land to the plaintiff.

9. The following issues in my view are up for determination :-

- (a) Whether the suit land was sold to the plaintiff;
- (b) Whether the sale agreement is enforceable;
- (c) Whether the suit is time barred;
- (d) Whether the plaintiff deserves the order of specific performance;
- (e) Whether the 1st defendant's claim for payment as against the 2nd defendant may be sustained and who is entitled to payment of rent.

Whether the suit land was sold to the plaintiff

10. The plaintiff's case is of course premised on the claim that the land in dispute was sold to him on 11 April 1998. He produced the sale agreement as an exhibit. The 1st defendant has denied ever entering into the said sale agreement and has denied ever signing it. It is thus a contested agreement. Apart from this, there is the submission that the agreement is not attested as required by Section 3 (3) of the Law of Contract Act.

11. Whether or not the sale agreement produced by the plaintiff was actually entered into by the 1st defendant is a question of fact that I will need to determine based on the evidence on record. My finding is that this agreement was actually entered into between the plaintiff and 1st defendant. Although the 1st defendant denied signing that agreement, I am persuaded that he did so, based on his conduct thereafter. It is not disputed that he engaged a surveyor to demarcate the land. PW-2 testified that during the survey, the plaintiff was present as well. I do not see why the 1st defendant would invite the plaintiff to be present during the survey if he was merely a tenant. I in fact do not buy the theory of tenancy between the plaintiff and 1st defendant at all. First, there was never produced a tenancy agreement. If at all the agreement was oral, as claimed by DW-1, I do not see how the 1st defendant would have continued to refer to the plaintiff as his tenant while no rent was forthcoming. The land also remained vacant all that time before the 2nd defendant came into the picture. In those circumstances, it would be unusual for the 1st defendant to invite the plaintiff to be present during the survey exercise. Significantly, the 1st defendant does not dispute the agreement to lease that he had with the 2nd defendant. That agreement is also signed by the plaintiff as beneficial owner, and I wonder why the 1st defendant would invite the plaintiff to sign that agreement as beneficial owner, if he was not acknowledging that this portion had been purchased by the plaintiff. Further, it will be noted that in the "Rental Payment Form" signed by the 1st defendant, he did direct the 2nd defendant to make rental payment to the plaintiff. The only explanation for all these is that the 1st defendant acknowledged the plaintiff to be a beneficial owner of the suit property and this could only be because he was aware that he had sold the suit land to the plaintiff. I am persuaded that the plaintiff and 1st defendant did sign the sale agreement of 11 April 1998.

Is the Sale Agreement of 11 April 1998 enforceable despite lack of attestation ?

12. This is now a question of law. It was submitted by counsel for the 1st defendant that the sale agreement is not enforceable because it was never attested. Reliance was placed upon the provisions of Section 3 (3) of the Law of Contract Act. That provision of the law prescribes as follows :-

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

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

(i) is in writing;

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

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

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

13. It will thus be seen that the law requires contracts for the disposition of land to be in writing and that such contracts be attested. Section 3 (3) which I have copied above, was introduced into the Law of Contract Act through The Statute Law (Miscellaneous Amendments) Act, No. 2 of 2002. Section 3 (3) before this amendment read as follows :-

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee

who has performed or is willing to perform his part of a contract –

(i) Has in part performance of the contract taken possession of the property or any part thereof;

(ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

14. It is the above provision of Section 3(3) of the Law of Contract Act, which was operative when the agreement between the plaintiff and the 1st defendant was entered and not the current Section 3(3) which requires attestation. The agreement between the plaintiff and 1st defendant is in writing and I have already determined that it was signed by the 1st defendant. It is thus an agreement that in the circumstances of this case is capable of being enforced despite there not being any attestation. A similar scenario unfolded in the case of *Peter Mbir Michuki vs Samuel Mugo Michuki (2014)eKLR* referred to me by counsel for the plaintiff. The subject was an agreement in 1964 which was not in writing and the Court of Appeal held that writing was not necessary, since possession had been taken by the respondent, and thus the agreement did not violate Section 3 (3) of the Law of Contract Act, which was then in operation. It is therefore my holding that the sale agreement between the plaintiff and 1st defendant was in line with the then Law of Contract Act and is a valid agreement that is capable of being enforced unless other factors exist. One such factor is limitation and I will now delve into it.

Whether the Plaintiff's Suit is time barred

15. The argument of the 1st defendant is that the plaintiff's suit is time barred by dint of Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, which is drawn as follows :-

7. *Actions to recover land*

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

16. The date of the sale agreement between the plaintiff and 1st defendant is 11 April 1998. This suit was filed on 29 March 2017. A period in excess of 18 years had lapsed and I think the 1st defendant has a point in urging that the contract cannot be enforced because it is now time barred. I have gone through the submissions of counsel for the plaintiff and I have not actually seen any serious response on this point. Counsel only referred me to the case of *Korir vs Soin United Women Group (2018) eKLR* where an order for specific performance was issued. The issue of limitation did not arise in that case since the contract was one of the year 2009 and the suit was filed in the year 2017 which was within a period of 12 years. The decision in that case does not therefore help the plaintiff and counsel for the plaintiff has completely avoided addressing me on this point. I do not see how the plaintiff can be helped on the issue of limitation. Clearly his cause of action, in so far as it seeks specific performance on the basis of the agreement dated 11 April 1998 is out of time. Maybe, the plaintiff could have contemplated filing suit for adverse possession but that is not the nature of the case before me and I opt not to say any more on that point. I am afraid therefore that the plaintiff cannot obtain the order of specific performance based on the contract.

Is the prayer of specific performance still available on other basis ?

17. I think there are unique circumstances in this case which to me would make the prayer for specific performance available to the plaintiff, not based on the contract, which as I have demonstrated above cannot be enforced, because it is way out of time, but based on a constructive trust. It is apparent to me that the 1st defendant acknowledged the plaintiff to have purchased a portion of the suit land and acknowledged that he has ceded his rights over this portion sold to the plaintiff. Thus, in as much as the 1st defendant held the legal title, he was aware that he does not own this portion of land, but that this portion is owned by the plaintiff. This acknowledgment comes out clearly because the plaintiff signed in the agreement to lease as a beneficial owner. It again manifests itself in the fact that the 1st defendant directed the 2nd defendant to make payments for rent into the plaintiff's account and not his (1st defendant's) account. It is these actions which drive me to the conclusion that the 1st defendant was aware that this portion of land actually belonged to the plaintiff despite the plaintiff not holding the legal title to it.

18. The 1st defendant has of course pressed the case that he is the legal owner, and as legal owner, it was him who entered into the lease, and that following the terms of lease, he had the right to change the payment account for the rent. That may be so, but since the plaintiff did not hold the legal title, it is only the 1st defendant who could legally have entered into a lease agreement. As owner of the legal title, it was him, and him alone who had capacity to execute a lease, or enter into dispositions which require registration, and that includes the lease at hand. The plaintiff had no legal title and thus had no capacity to enter into, or register any dispositions, since these could only be done by the one with the legal title, who in this instance was the 1st defendant. There was however a tacit acknowledgment on the part of the 1st defendant that he was entering into these dispositions, not on his own behalf, but on behalf of the plaintiff, who had no capacity to execute any lease with the 2nd defendant. That is why I am prepared to imply a trust in the case at hand. It would indeed be grossly unjust to the plaintiff, for the 1st defendant to allow him to be acknowledged by the 2nd defendant as a beneficial owner, then later, renege on that promise. It is apparent to me that the 1st defendant has now seen that this portion of land that he sold to the plaintiff is valuable and wants to turn back on his promise that he would hold it for the benefit of the plaintiff. It is an act of malice, greed and bad faith, on the part of the 1st defendant, which calls for the intervention of equitable principles including the construction of a trust.

19. Perhaps it would have been difficult to construe a trust if the 1st defendant, had not, in the days leading up to the lease, and prior to its execution, acknowledged the plaintiff as beneficial owner. But as I have said above, we cannot pretend that this acknowledgement does not exist, for it is there in black and white for all to see. The 1st defendant also invited the plaintiff to be present in a survey exercise that was conducted at just about the same time that the lease to the 2nd defendant was being contemplated. He also directed that rental payments be made to the plaintiff. That is why I say that there are special circumstances that exist in this case that make me rely on the doctrine of a constructive trust.

20. I see some similarities between this case and that of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri (2014)eKLR*. In this case, the respondent had land which he subdivided into one acre plots and sold to the appellants. The land in issue was agricultural land which required the consent of the Land Control Board, which was never sought. However the appellants paid the full purchase price and were given vacant possession of the land. Some difference on the survey of the land arose and the appellant sued for vacant possession which he was granted by the High Court for the reason that the contract was not enforceable for want of consent of the Land Control Board. On appeal, the Court of Appeal held inter alia that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price.

21. It is therefore my holding that the 1st defendant holds the portion of the suit land sold to the plaintiff in trust, mainly based on the fact of his own acknowledgment and conduct, and he cannot be allowed to escape from his obligation. Now that it is clear that the 1st defendant cannot be trusted to allow the plaintiff receive rents in respect of the land, he must be made to transfer the legal interest to the plaintiff and that can only be done if an order of specific performance is made in favour of the plaintiff. I need to be clear, that I am not issuing this order of specific performance, based upon the contract which in any event is unenforceable for being outside the limitation period, but is based on a constructive trust. I will therefore make orders for specific performance of the portion noted in the agreement and which is delineated in the survey plan prepared by the PW-2 in favour of the plaintiff. I am aware that a lot of issues were raised with regard to whether the surveyor could undertake the survey him being a civil servant. To me, that is neither here nor there. What matters in our case is that he did a plan which identifies the land that was sold to the plaintiff. I am thus prepared to issue an order of specific performance to direct the 1st defendant to transfer this portion identified in the survey plan prepared by PW-2.

Whether the 1st defendant's claim for payment as against the 2nd defendant may be sustained and who is entitled to payment of rent.

22. The second of the plaintiff's prayers is to be paid rent arrears for the year 2017 and in default for an order of eviction. The 2nd defendant did make payment for the years 2014, 2015 and 2016 to the plaintiff, but from the year 2017, payment was made to the 1st defendant. This was because the 1st defendant unilaterally changed the account details. The 1st defendant on his part, and in his cross-claim, has sought to be paid by the 2nd defendant for the years 2014, 2015 and 2016. I can address these two claims together.

23. The 1st defendant has claimed that the rent payments of 2014, 2015 and 2016 were made to the plaintiff through fraud. I am unable to believe that. My view is that the 1st defendant, being aware that he was trustee of the plaintiff, voluntarily directed the 2nd defendant to make payment into the account of the plaintiff. It is hard to believe that the 1st defendant watched the 2nd defendant put up its base station, and keep quiet yet he had not been paid, and still continue not to make any complaint until three years later. The only conclusion one can reach is that he directed payment to be made to the beneficiary of the land. I am thus unable to make any order in favour of the 1st defendant, directing the 2nd defendant, or even the plaintiff, to pay the 1st defendant the rent of the years 2014, 2014 and 2015. Those monies were properly paid into the account of the plaintiff. In other words, I see no merit in the cross-claim of the 1st defendant and the same is hereby dismissed with costs.

24. Turning to the claim of the plaintiff, for payment of rent for the year 2017, I can appreciate the position of the 2nd defendant, who mentions that all it did was pay rent as instructed by the legal lessor, who was the 1st defendant. My honest view of the case is that the genesis of the problem was the manner in which the lease agreement was drawn. The 2nd defendant was aware that there was another person who had an interest in the land but the drafter of the lease agreement, did not make provision for his interest. When you read the lease agreement, you get the impression that this was a standard cut and paste document, and the drafter did not think much about making a special lease that took into account the special circumstances of this case. That is partly the reason why you have a squabble between the plaintiff and the defendants on the payment of rent. It is important when agreements are drawn, and that applies to lease agreements, that they be tailor made taking into account the unique positions of the parties. This will reduce the chances of having litigation on agreements.

25. I think it would be inequitable to demand that the 2nd defendant makes a second payment to the plaintiff when payment had been made to the 1st defendant. I however believe that the 1st defendant unfairly demanded and unfairly received this money. This rent was supposed to be paid to the plaintiff as beneficial owner of the property that was leased. My holding therefore is that the 1st defendant is holding this money, that is the rent paid from the year 2017 to date, in trust for the plaintiff. He will need to hand over this money to the plaintiff, and if he does not, the plaintiff can execute for it against the 1st defendant. Going forward, I order the 2nd defendant to be making rental payments directly to the plaintiff for I have already held that the plaintiff is entitled to this land and I have issued an order of specific performance in his favour.

Final Orders

26. I believe that I have dealt with all issues save for costs. It is the 1st defendant who is the genesis of the problem. If he had acted in good faith, this litigation would probably not have been necessary. The 1st defendant will therefore bear the costs of the plaintiff's suit. I have dismissed the cross-claim of the 1st defendant and the 2nd defendant will have the costs of this cross-claim.

27. For the avoidance of doubt, these are the final orders of this court :-

(i) That it is hereby declared that the 1st defendant holds in trust for the plaintiff a portion of land measuring 0.0293 Ha out of the land parcel MN/V/729 which portion is delineated and identified in the survey plan dated 21 November 2013.

(ii) That it is hereby declared that the 1st defendant entered into the subject lease with the 2nd defendant as trustee of the plaintiff who held no legal title to the demised land.

(iii) That it is hereby declared that all payments made by the 2nd defendant to the 1st defendant in respect of the lease over the land parcel MN/V/729 are held by the 1st defendant in trust for the plaintiff.

(iv) That the 1st defendant is hereby ordered to forthwith pay to the plaintiff all monies received in respect of the lease over the land parcel MN/V/729 and such monies will attract interest at court rates from the time they were paid until settlement in full.

(v) That the 2nd defendant is directed and ordered to henceforth pay all monies in respect of the subject lease directly to the plaintiff as he may direct.

(vi) That an order of specific performance is hereby issued directing the 1st defendant to register the proposed sub-division contained in the survey plan dated 21 November 2013, and proceed to formally subdivide the land parcel MN/V/729, in order to carve out a portion of 0.0293 Ha, and convey this portion to the plaintiff at his own cost.

(vii) That in default, of complying with order (vi) above, the Deputy Registrar of this court to proceed to effect the said order and any costs be shouldered by the 1st defendant.

(viii) That the 1st defendant will pay the plaintiff's costs of the suit and will pay the costs of the dismissed cross-claim to the 2nd defendant.

Judgment accordingly.

DATED this 7th day of May 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA