



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 821 OF 2014**

**HARJINDER SINGH BHOGAL.....1<sup>ST</sup> PLAINTIFF**

**KULWINDER SINGH SANDHU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EDWARD MUKUNDI KARANJA.....1<sup>ST</sup> DEFENDANT**

**VERONICA WANJIKU KARANJA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiffs brought this suit by way of a plaint dated 25<sup>th</sup> June, 2014 filed in court on the same date. The plaintiffs averred that through a sale agreement dated 10<sup>th</sup> January, 2011 between the plaintiffs and the defendants, the defendants agreed to sell and transfer to the plaintiffs all that property known as subplot No. 1 which was a subdivision of L.R No. 2259/44 (hereinafter referred to as “the suit property”) at a consideration of Ksh. 31,000,000/-. The plaintiffs averred that clause 4 of the said agreement of sale provided that a sum of Ksh. 3,100,000/- would be paid to the defendants upon execution of the agreement to hold as stakeholders. The plaintiffs averred that special condition B of the agreement provided that the completion date was to be the 14<sup>th</sup> day after the defendants or their advocates had given a written notice to the plaintiffs or their advocates that the defendants had the completion documents.

The plaintiffs averred that special condition D of the agreement provided that on or before the completion date but after receipt of the notice for completion, the plaintiffs would procure the payment to the defendants’ advocates in cleared funds the balance of the purchase price in the sum of Ksh. 27,900,000/- plus apportionment monies without deduction, set off or counterclaim. The plaintiffs averred that special condition E of the agreement provided that provided the balance of the purchase price had been received by the defendants’ advocates, the completion documents would be made available to the plaintiffs’ advocates on the completion date. The plaintiffs averred that they paid a deposit of Ksh. 3,100,000/- being 10% of the purchase price to the defendants’ advocates to hold as stakeholders pending completion of the sale. The plaintiffs averred that on 27<sup>th</sup> March, 2012, the defendants’ advocates informed the plaintiffs’ advocates that the defendants were in a position to complete the sale and on 14<sup>th</sup> May, 2012, the said advocates issued the plaintiffs’ advocates with a completion notice requiring the plaintiffs to complete the sale.

The plaintiffs averred that pursuant to the said completion notice, the plaintiffs’ advocates informed the defendants’ advocates on 24<sup>th</sup> May, 2012 that the plaintiffs were ready to complete the sale and to tender the balance of the purchase price together with the registration and stamp duty fees to the defendants’ advocates. The plaintiffs averred that in the said letter, the plaintiffs’ advocates also requested the defendants’ advocates to make available all the completion documents for inspection.

The plaintiffs averred that on 25<sup>th</sup> May, 2012, the defendants’ advocates declined the plaintiffs’ advocates’ request to inspect the completion documents and threatened to rescind the agreement if the plaintiffs did not complete the sale. The plaintiffs averred that the completion date was 25<sup>th</sup> May, 2012 and on that day, the plaintiffs tendered the balance of the purchase price together with stamp duty and bank charges payable on transfer of the suit property and registration fees all amounting to a total of Ksh. 29,142,000/-.

The plaintiffs averred that on 4<sup>th</sup> June, 2012, the defendants’ advocates acknowledged receipt of the balance of the purchase price but indicated that they still did not have; a copy of the title for the parent property, the land rent clearance certificate and the rates clearance certificate. The plaintiffs averred that on 10<sup>th</sup> July, 2012, the plaintiffs’ advocates demanded a return of the balance of the purchase price on the basis that the defendants had proceeded to issue a completion notice when they did not have all the completion documents. The plaintiffs averred that on 13<sup>th</sup> July, 2012, the defendants’ advocates refunded the sum of Ksh 29,142,000/- that had been paid to them on account of the balance of the purchase price, registration fees and stamp duty. The plaintiffs averred that despite promises by the defendants made through their advocates that they would obtain all the completion documents in order to complete the sale, the defendants had not availed all the completion documents in breach of the agreement between parties. The plaintiffs averred that the defendants were in breach of the sale agreement by reason of their failure to complete the sale either on or before the completion date or on or before the expiry of the 21 days’ notice that was given to the defendants in the demand letter dated 20<sup>th</sup> March, 2014. The plaintiffs averred that by reason of the defendants’

breach of the agreement, the plaintiffs had suffered loss and damage. The plaintiffs sought judgment against the defendants for:

- a) An order of specific performance and in the alternative;
- b) A refund of Ksh 3,100,000/- paid by the defendants as deposit;
- c) Damages for loss of bargain; and
- d) Interest on (b) and (c) above at court rate;
- e) Costs of the suit.

The defendants filed a joint statement of defence on 23<sup>rd</sup> September, 2014. The defendants admitted entering into a sale agreement with the plaintiffs and the terms thereof. The defendants admitted further that the plaintiffs paid the 10% deposit in the sum of Kshs. 3,100,000/- and that the plaintiffs were ready to complete the agreement of sale by making payment of the balance of the purchase price together with the registration fees and stamp duty. The defendants admitted further that their advocates had served the plaintiffs' advocates with a completion notice and that the plaintiffs' advocates had requested their advocates to make available the completion documents for inspection.

The defendants denied that they failed to make available the completion documents for inspection by the plaintiffs' advocates and that they threatened to rescind the agreement if the plaintiffs did not complete the sale. The defendants averred that on 25<sup>th</sup> May, 2014, all the completion documents were ready for inspection save for the land rent clearance certificate, consent to transfer and rates clearance certificate which were still being processed as communicated through their advocates' letter dated 27<sup>th</sup> March, 2012. The defendants averred further that with a view to complete the sale, the 1<sup>st</sup> defendant wrote to Kenya Commercial Bank (KCB) on 28<sup>th</sup> May, 2012 requesting for the release of the original title No. I.R 5751 for L.R No 2259/44 that was held by the said bank in safe custody. The defendants averred that by a letter dated 4<sup>th</sup> June, 2014, the defendants' advocates forwarded to the plaintiffs' advocates copies of the completion documents together with a copy of the said letter to KCB requesting for the release of the original title for the said parcel of land which was one of the completion documents.

The defendants averred that by an email dated 28<sup>th</sup> June, 2012, the defendants' advocates informed the plaintiffs' advocates that the original title No. I.R 5751 for L.R No 2259/44 a portion of which was being sold to the plaintiffs was missing from KCB where it had been deposited for safe keeping. The defendants averred further that by a letter dated 10<sup>th</sup> July, 2012, the plaintiffs' advocates informed the defendants' advocates that the plaintiffs would wait for the processing of a duplicate title and in the meantime demanded the return of the balance of the purchase price which they undertook to hold and only release to the defendants' advocates upon production of the duplicate title. The defendants averred that by letter dated 12<sup>th</sup> July, 2012, the defendants' advocates instructed their bank to transfer a sum of Ksh. 29,142,000/- to the plaintiffs' advocates clients' account. The defendants averred that on 19<sup>th</sup> July, 2012, they applied to the registrar of titles for a provisional certificate of title for L.R No 2259/44 and by a letter dated 20<sup>th</sup> September, 2012 their advocates informed the plaintiffs' advocates that they had re-submitted the application for a provisional title after incorporating additional information that was required by the lands registry.

The defendants averred that on 20<sup>th</sup> March, 2013 they received a letter dated 17<sup>th</sup> August, 2012 from the registrar of titles to the effect that a caveat had been lodged by the plaintiffs on 17<sup>th</sup> August, 2012 prohibiting any dealings with L.R No 2259/44 (I.R 5751) a portion of which was sold to the plaintiffs. The defendants averred that their advocates wrote to the registrar of titles explaining that the said caveat was invalid as it was lodged in breach of the express terms of the sale agreement and requested for its removal to facilitate the issuance of the provisional title. The defendants averred that through an email dated 22<sup>nd</sup> March, 2013, the defendants' advocates informed the plaintiffs' advocates of the said letter from the registrar of titles and that the application for a provisional title had been declined on account of the caveat by the plaintiffs. The defendants averred further that special condition O of the sale agreement obliged the plaintiffs not to place a caveat on the title of the said parcel of land. The defendants averred that the delay in processing the provisional title had been occasioned by the plaintiffs' act of placing a caveat on the parent title in breach of the terms of the sale agreement.

The defendants averred further that they requested the plaintiffs' advocates to remove the said caveat to enable them process the provisional title and that instead of removing the caveat, the plaintiffs purported to rescind the agreement of sale through their advocates' letter dated 5<sup>th</sup> April, 2013 by which the plaintiffs requested for a return of the deposit that they had paid. The defendants averred that through an email dated 11<sup>th</sup> June, 2013 their advocates asked the plaintiffs' advocates for a response to their request for the removal of the said caveat. The defendants averred that in continuous breach of an express term of the sale agreement, the plaintiffs failed to remove the said caveat. The defendants averred that the plaintiffs had acknowledged in the sale agreement that L.R No 2259/44 (I.R 5751) was being subdivided and that the title for the parent property had to be surrendered to the registrar of titles. The defendants averred that the said caveat by the plaintiffs had jeopardised the whole process of replacement of the missing title and the subdivision of the said parcel of land. The defendants averred that they were not to blame for the missing title and that their attempt to obtain a provisional title was frustrated by the plaintiffs through placing of a caveat against the parent title without the consent of the defendants in breach of special condition O of the sale agreement. The defendants averred that with regard to the rates and land rent clearance certificates, they paid for the same and as such the delay on the part of the relevant authorities in issuing the same could not constitute a breach of the sale agreement on their part since the sale agreement was subject to the said consents being obtained.

The defendants denied that they breached the sale agreement with the plaintiffs. The defendants averred that it was the plaintiffs who breached the said agreement by; placing a caveat on the parent title contrary to the express terms of the agreement, refusing to remove the said caveat despite requests by the defendants, purporting to terminate the agreement by demanding a refund of the deposit and frustrating efforts to obtain a provisional title. The defendants averred that the plaintiffs' claim for specific performance was not tenable given the circumstances of the case. The defendants averred that the plaintiffs were not entitled to any of the reliefs sought. The defendants urged the court to dismiss the plaintiffs' suit against them with cost. The plaintiffs filed a reply to defence on 2<sup>nd</sup> October, 2014 in which they joined

issue with the defendants in their defence save where the same consisted of admissions.

At the trial, Kulwinder Singh Bhoghal Sandhu (PW1) adopted his witness statement dated 19<sup>th</sup> June, 2014 as his evidence in chief and relied on the documents in the plaintiffs' bundle of documents in support of the plaintiffs' case. He told the court that he was giving evidence on his own behalf and on behalf of the 1<sup>st</sup> plaintiff. He stated that among the reliefs they were seeking was damages for loss of bargain since the value of the suit property had gone up. He stated that if the sale transaction was completed successfully they would have developed their residential home on the suit property and would have been staying thereon. He told the court that as at the time of his evidence, the value of the suit property which is situated in Karen was in the region of between Ksh. 45,000,000/- to 50,000,000/-.

In cross examination, PW1 admitted that they registered a caveat against the title of L.R No 2259/44 (I.R 5751/1) and that they had not removed the caveat that had encumbered the entire parcel of land. He stated that they were only entitled to one (1) acre of the said L.R No 2259/44 (I.R 5751/1). PW1 stated further that he was not aware that the title for L.R No 2259/44 got lost at the bank where it was kept and that he received the information from their advocates. He stated further that their advocate told them later that the title was missing. PW1 stated that he was not aware if the defendants were informed that they were proceeding to register a caveat against the title of L.R No 2259/44. PW1 stated that they placed the said caveat against the title of L.R No 2259/44 to protect their interest in the suit property. PW1 admitted that he was aware that the original title for L.R No 2259/44 was one of the completion documents. He stated that the said title together with many other documents were missing and were not available on the completion date. PW1 told the court that they placed the caveat on the title of L.R No 2259/44 after the completion period had lapsed. He stated that the completion date was 25<sup>th</sup> May, 2012 and that they placed a caveat against the title of the said property 3 months after the said date. He stated that the person on whose behalf the suit property was being sold to them was joined in the agreement of sale solely for the purpose of giving consent to the agreement. He stated that the said person who was the beneficiary of the agreement authorised the transaction. He admitted that the defendants had offered to refund the deposit that had been paid to them and that clause 4 of the agreement provided that the deposit would not earn interest. He stated that they were not claiming interest but the change in the value on the suit property in the event they did not get the property.

Edward Mukundi Karanja (DW1) gave evidence on his own behalf and on behalf of the 2<sup>nd</sup> defendant. He told the court that the 2<sup>nd</sup> defendant and he were the administrators of the estate of their late father John Joseph Karanja. DW1 adopted his witness statement dated 7<sup>th</sup> April, 2017 as his evidence in chief and relied on the bundle of documents that was filed in court on 4<sup>th</sup> April 2017 in their defence. In cross-examination by the plaintiffs' advocates, DW1 stated that they sold to the plaintiffs a subdivision of L.R No. 2259/44. He stated that they entered into a sale agreement with the plaintiffs as administrators of the estate of John Joseph Karanja and that the beneficiary of the said estate on whose behalf the property was being sold one, William Mukundi Karanja consented to the agreement. He admitted that they had already obtained a deed plan for the portion of L.R No. 2259/44 (the suit property) that they sold to the plaintiffs. He also admitted that the plaintiffs paid a deposit of Kshs. 3,100,000/- in accordance with the terms of the sale agreement. DW1 admitted further that their advocates gave to the plaintiffs a completion notice on 14<sup>th</sup> May, 2012 and demanded the payment of the balance of the purchase price. He stated that the completion date was 14 days from 14<sup>th</sup> May, 2012. DW1 admitted that as at 25<sup>th</sup> May, 2012 they should have had all the completion documents ready for inspection and that the plaintiffs' advocates requested to be allowed to inspect the said documents. DW1 admitted that the plaintiffs paid the balance of the purchase price thereby fulfilling their part of the sale agreement. He admitted that as at 25<sup>th</sup> May, 2012 they did not have all the completion documents as some of the documents had not been received. He stated that their advocates gave a completion notice when they did not have all the completion documents. He admitted that their advocates should not have issued a completion notice and demanded the payment of the balance of the purchase price when they did not have all the completion documents. He stated that they refunded to the plaintiffs Ksh 29,142, 000/- being the balance of the purchase price and stamp duty that was paid to their advocates following the said completion notice. He told the court the refund was made when they discovered that the bank with which they had kept the title for L.R No. 2259/44 did not have it and as such they could not complete the agreement. He stated that they needed time to obtain another title. DW1 stated that he made an application for a provisional certificate of title on 12<sup>th</sup> July, 2012. He stated that on or about the 20<sup>th</sup> of March, 2013, their advocates learnt that the plaintiffs had registered a caveat against the title of L.R No. 2259/44 on 17<sup>th</sup> August, 2012. He stated that their application for a new title was rejected because of the caveat. He stated that the process of obtaining the new title could not go on with the said caveat on the title.

After the close of the defendants' case, the parties were directed to make closing submissions in writing. The plaintiffs filed submissions and supplementary submissions on 12<sup>th</sup> April, 2019 and 3<sup>rd</sup> February, 2020 respectively while the defendants filed their submissions on 23<sup>rd</sup> January, 2020. The plaintiffs submitted that the sale agreement dated 10<sup>th</sup> January, 2011 between the plaintiffs and the defendants was valid and enforceable. The plaintiffs reiterated that it was the defendants who breached the said agreement of sale. The plaintiffs reiterated that the defendants issued a completion notice to the plaintiffs while they did not have all the completion documents and as such were unable to complete the agreement. On the defendants' argument that the sale was conditional on them obtaining the requisite consents and approvals which they were unable to obtain and as such the agreement was frustrated, the plaintiffs cited Neon & Norlo Signs (Kenya) Ltd. v Alarkhia and others[1970] E.A 82 and submitted that if performance of a contract is conditional upon the occurrence of a certain event, a party responsible for that event is required to take steps to ensure that the events materialise and cannot be allowed to renege from a contract on basis that the event or events have not materialised. The plaintiffs submitted that a party who does not take diligent steps to fulfil his obligations under a contract cannot rely on the doctrine of frustration. In support of this submission, the plaintiffs relied on Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR, Openda v Ahn [1984] KLR 208, Karia & Co. Ltd. v Dhanani[1969]E.A 392, Karachi Gas Co. Ltd. v H. Isaaq [1965] E.A 42, and Davis Contractors v Fareham UDC [1956]2All ER 145. The plaintiffs cited Akash Himatlal Dodhia v Dorothy Margret Wanjiku Kung'u & Another [2017] eKLR and Wagiciengo v Gerrard [1982] KLR 336 and submitted that they were entitled to register a caveat against the parent title to protect their interest in the suit property after the defendants failed to complete the sale agreement between them.

On whether the plaintiffs were entitled to the order of specific performance, the plaintiffs submitted that specific performance is a discretionary remedy and the same is granted on the basis that damages recoverable will not in a particular case afford a complete remedy. In support of this submission, plaintiffs cited Snell's Equity 31<sup>st</sup> Edition (Thomson Sweet and Maxwell )2005 at page 352. The plaintiffs also relied on Akash Himatlal Dodhia v Dorothy Margret Wanjiku Kung'u & Another(supra) where court issued an order of specific performance on the basis that the plaintiff had been willing to complete the sale but the sale was not completed due to the defendants' breach. The plaintiffs submitted that they would suffer loss if the order of specific performance was not granted because it would be difficult for them to obtain similar property in the same area where the suit property is located at the same price. The plaintiffs submitted that due to passage of

time the value of the suit property had increased to about Kshs. 45,000,000/- and as such it would be difficult to get a similar property in the neighbourhood at a price of Kshs. 31,000,000/- for which they contracted to purchase the suit property. The plaintiffs submitted that the 2<sup>nd</sup> plaintiff had intended to build a home on the suit property which is situated in a serene location away from the overcrowded part of the city of Nairobi where he resides.

With regard to the alternative prayers, the plaintiffs submitted that they were seeking the alternative prayers to ensure that they were not left without a remedy in the event that the court does not grant specific performance. On the refund of the deposit, the plaintiffs submitted that the payment and receipt of the deposit by the defendants was not disputed. The plaintiff submitted that although the agreement for sale provided that the deposit was not to attract any interest, the court had a discretion to award interest on the said deposit from the date the same was paid to the defendants. On the claim for damages for loss of bargain, the plaintiffs submitted that damages was intended to put them in the position they would have been if the defendants had completed the sale. In support of this submission, the plaintiffs cited Johnson v Agnew [1980] AC 367. The plaintiffs submitted that the measure of damages payable would be the difference between the value of the suit property as at the date of the sale agreement which was Kshs. 31,000,000/- and the market value of the suit property as at the date of judgment which they estimated to be about Kshs. 45,000,000/-. The plaintiffs submitted that the difference between the two was Kshs. 14,000,000/- which would be the plaintiffs' loss of bargain. On the issue of interest on damages, the plaintiffs cited section 26 of the Civil Procedure Act and submitted that the court has power to award interest on the principal sum at such rates as the court may deem fit. The plaintiffs submitted that they had proved their case against the defendants on a balance of probabilities.

In their submissions in reply dated 23<sup>rd</sup> January, 2020 the defendants submitted that the plaintiffs were not entitled to the remedy of specific performance. The defendants submitted that in a ruling dated 8<sup>th</sup> May, 2015 made on the plaintiffs' application for interlocutory injunction, the court had rejected the plaintiffs' request for the suit property to be preserved. The defendants submitted that an order of specific performance would cause hardship to the defendants. The defendants submitted that they executed the agreement of sale with the plaintiffs as administrators of an estate of a deceased. The defendants submitted that they were no longer in control of the suit property which they had conveyed to the beneficiary of the said estate on whose behalf the property was being sold. The defendants submitted further that there was nothing unique in the suit property and that in the ruling of the court mentioned above, the court had made a finding that the value of the suit property could be ascertained through valuation. The defendants submitted that the plaintiffs' prayer for damages as an alternative remedy to specific performance was an admission that damages would be an adequate remedy to the plaintiffs for the alleged breach of contract.

On whether the plaintiffs were entitled to the alternative remedies of a refund of the deposit and damages, the defendants submitted that they were all along willing to refund the deposit to the plaintiffs. The defendants submitted that they were still willing to refund the deposit but without any interest. The defendants submitted that clause 4 of the agreement of sale provided that the deposit would not earn any interest. On damages for loss of bargain, the defendants submitted that the plaintiffs were not entitled to the same. The defendants submitted that the parent title went missing as a result of not fault on their part and that they made genuine attempts to obtain a provisional title which attempts were frustrated by the plaintiffs by placing a caveat on the register of the property in breach of the special conditions of the agreement. The defendants submitted further that their failure to obtain land rates and rent clearance certificates which was as a result of the delay on the part of the relevant authorities to process the same could not amount to a breach of the sale agreement since the sale was conditional upon the plaintiffs obtaining the said certificates.

On the plaintiffs' assessment of their loss, the defendants submitted that the plaintiffs did not place any evidence before the court in proof of their claim that the value of the suit property was Kshs. 45,000,000/-. The defendants submitted that even if the plaintiffs were entitled to damages a fact which they did not admit, the measure of damages payable would be the loss incurred by the plaintiffs if any as a natural and direct result of the repudiation of the contract which includes; a return of any deposit paid with interest together with the expenses incurred in investigating the title and other expenses within the contemplation of the parties and where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain. In support of this submission the defendants cited Halsbury's Laws of England, Volume 12, 4<sup>th</sup> Edition at paragraph 1183 that was quoted by the court in Millicent Perpetua Atieno v Louis Onyango Otieno [2013] eKLR.

The parties agreed on the following issues for determination by the court;

1. Whether the defendants breached the sale agreement dated 10<sup>th</sup> January, 2011.
2. If so, whether the plaintiffs suffered any loss as a result of the defendants' breach.
3. Whether the plaintiffs breached the sale agreement dated 10<sup>th</sup> January, 2011.
4. If so, whether the defendants' failure to complete the sale was due to the plaintiffs' breach of the sale agreement.
5. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
6. Who should bear the costs of the suit?

Whether the defendants breached the sale agreement dated 10<sup>th</sup> January, 2011 and if so, whether the plaintiffs suffered any loss as a result of the defendants' breach.

The fact that the plaintiffs and the defendants entered into the agreement of sale dated 10<sup>th</sup> January, 2011 is not disputed. The terms of the said agreement are also not disputed. It is also not disputed that the said agreement was breached. What is in dispute is who as between the plaintiffs and the defendants breached the said agreement. The plaintiffs have contended that the said agreement was breached by the defendants by their failure to tender the completion documents on the completion date. The particulars of the completion documents that were to be made available by the defendants to the plaintiffs are set out in Special Condition E of the agreement. The plaintiffs contended

that even after they paid to the defendants the balance of the purchase price, the defendants were unable to make available all the completion documents. The plaintiffs contended that despite promises by the defendants that they would obtain all the completion documents in order to complete the sale of the suit property, they had failed to do so as a result of which the sale remained uncompleted. The plaintiffs contended that they were ready, able and willing to complete the sale. The defendants contended on their part that all the completion documents were ready for inspection on 25<sup>th</sup> May, 2014 which was the completion date save for the land rates and land rent clearance certificates, consent to transfer from the Commissioner of Lands which were still being processed and the original title No. I.R 5751 for L.R No. 2259/44 that was with Kenya Commercial Bank for safe keeping. The defendants contended that the completion documents save as aforesaid were forwarded to the plaintiffs' advocates under cover of the defendants' advocates letter dated 4<sup>th</sup> June, 2012. The defendants contended that they notified the plaintiffs that the original title for L.R No. 2259/44 a copy of which was one of the completion documents had gone missing at Kenya Commercial Bank where it was kept. The defendants contended further that the plaintiffs intimated through their advocates' letter dated 10<sup>th</sup> July, 2012 that they would wait for the processing of a new title for the property but demanded the refund of the balance of the purchase price that they had already paid to the defendants. The defendants contended that they duly paid back to the plaintiffs the said balance of the purchase price on 12<sup>th</sup> July, 2012 and applied for a provisional certificate of title for L.R No. 2259/44 on 19<sup>th</sup> July, 2012. The defendants contended that they kept the plaintiffs informed of the progress of their application for a provisional title. The defendants averred that while pursuing the said provisional title, they were notified by the registrar of titles that the plaintiffs had placed a caveat against the title of L.R No. 2259/44 on 17<sup>th</sup> August, 2012 which prohibited any dealings with the land.

The defendants contended that they informed the plaintiffs advocates of the caveat and of the fact that it was illegal having been placed in breach of the terms of the agreement and requested for its removal so that the provisional title could be processed and issued. The defendants averred that instead of removing the said caveat, the plaintiffs purported to rescind the agreement through their advocates' letter dated 5<sup>th</sup> April, 2013 in which they also demanded for a refund of the deposit. The defendants contended that in breach of the terms of the agreement of sale, the plaintiffs refused to remove the said caveat. The defendants contended that the processing of a provisional title for L.R No. 2259/44 was frustrated by the said caveat and in the absence of the said title the sale could not be completed.

The defendants contended further that the sale was conditional upon the defendants obtaining all the requisite consents and approvals from the relevant local authorities and government agencies. The defendants contended that they made the necessary payments for the land rent and rates clearance certificates and as such the delay on the part of the relevant authorities to process the same could not amount to a breach of the sale agreement on their part. Due to the foregoing, the defendants denied having breached the agreement of sale between them and the plaintiffs.

I have considered the parties' conflicting positions on the issue as to who was responsible for the breach of the sale agreement dated 10<sup>th</sup> January, 2011. The following is my view on the matter. Special Condition B of the agreement between the parties provided that the completion date was 14<sup>th</sup> day after the defendants had given notice to the plaintiffs that they had in their possession the completion documents set out in Special Condition E of the agreement. Special Condition B provided further that if the defendants failed to issue a notice of completion as aforesaid by the 120<sup>th</sup> day from the date of the agreement, the plaintiffs were entitled to terminate the agreement in which case the deposit paid by them to the defendants was to be refunded within 21 days of such termination. Special Condition D of the agreement provided that on or before the completion date, the plaintiffs were to pay to the defendants the balance of the purchase price in the sum of Kshs. 27,900,000/- plus what was referred to as apportionment monies. Special Condition E of the agreement provided that upon payment of the said balance of the purchase price together with the apportionment monies, the completion documents the particulars of which were set out thereunder were to be made available to the plaintiffs for inspection. Among the completion documents were, the original grant for the parent property, L.R No. 2259/44, rates clearance certificate, land rent clearance certificate and commissioner of lands consent to transfer the suit property.

It is not in dispute that the plaintiffs paid to defendants a sum of Kshs. 3,100,000/- as a deposit after the execution of the sale agreement. It is also not in dispute that on 14<sup>th</sup> May, 2012, the defendants purported to give the plaintiffs a completion notice pursuant to Special Condition B of the sale agreement. It is also not in dispute that the plaintiffs upon receipt of the said notice paid to the defendants the balance of the purchase price in the sum of Kshs. 27,900,000/- together with Kshs. 1,242,000/- being stamp duty and registration fees payable on transfer. It is also not in dispute that as at the time when the defendants purported to give the said completion notice, the defendants did not have all the completion documents. Upon receipt of the balance of the purchase price and the said additional amount for stamp duty and registration fees, the defendants forwarded to the plaintiffs' advocates the completion documents under cover of their advocates' letter dated 4<sup>th</sup> June, 2012. The documents were however incomplete in that the original grant for L.R No. 2259/44, the land rent clearance certificate, rates clearance certificate and the commissioner of lands' consent to transfer were missing. In their forwarding letter, the defendants' advocates informed the plaintiffs' advocates that they would forward the missing documents to the plaintiffs' advocates when the same became available.

At that point, there is no doubt that the defendants were in breach of the sale agreement having given a notice of completion and not being in a position to complete. The plaintiffs were entitled to rescind the agreement and to demand not only the deposit paid but also the balance of the purchase price and the additional amount that was paid for stamp duty and registration fees. Instead of rescinding the agreement, the plaintiffs through their advocates' letter dated 10<sup>th</sup> July, 2012 decided to give the defendants time to obtain the missing completion documents particularly, the original title for L.R No. 2259/44. The plaintiffs however demanded the return of the balance of the purchase price and the stamp duty and registration fees that they had paid to the defendants pursuant to the completion notice aforesaid. The plaintiffs undertook to keep the said balance of the purchase price and the stamp duty and registration fees in an interest earning account until the defendants had obtained a provisional title for L.R No. 2259/44. The plaintiffs had been informed that the original title for L.R No. 2259/44 was missing. Following that demand by the plaintiffs, the defendants refunded to the plaintiffs the balance of the purchase price and the stamp duty and registration fees aforesaid after which they started the process of obtaining a provisional title for the parent property, L.R No. 2259/44. I am of the view that by their advocates' letter dated 10<sup>th</sup> July, 2012 through which they demanded the return of balance of the purchase price and, the stamp duty and registration fees, the plaintiffs left the completion date open. According to the letter, the completion was to take place once the defendants had obtained a provisional title in respect of L.R No. 2259/44 or had obtained a written confirmation from the registrar of titles that he will dispense with the production of the said title during the registration of the transfer in favour of the plaintiffs.

The evidence before the court shows that the defendants made an application for a provisional title for L.R No. 2259/44 and kept the

plaintiffs informed of the progress of the application. Unknown to the defendants and contrary to Special Condition O of the sale agreement, the plaintiffs registered a caveat on L.R No. 2259/44 prohibiting any dealings with the said parcel of land. The evidence before the court shows that the defendants informed the plaintiffs that the said caveat was hindering the processing of the provisional title and requested that the same be removed. The defendants also wrote to the registrar of titles pointing out the illegality of the said caveat and asking for its removal. Neither the plaintiffs nor the registrar of titles acted on the defendants' request for the removal of the said caveat. From the evidence on record, the plaintiffs' advocates on record kept telling the defendants' advocates that they were waiting for instructions from the plaintiffs on the issue. The last of such communication from the plaintiffs' advocates was through their letter dated 5<sup>th</sup> April, 2013.

On 20<sup>th</sup> March, 2014, the plaintiffs served the defendants with a notice demanding completion of the sale agreement within 21 days from the date of the notice in default of which the plaintiffs would institute a suit for specific performance and/or damages. It is not disputed that as at the date of that notice, the plaintiffs had not removed the caveat that they had registered on the title of the parent property that prohibited any dealings with the said property a portion of which was sold to the plaintiffs. The plaintiffs proceeded thereafter to file this suit on 25<sup>th</sup> June, 2014. The evidence that was given at the trial was to the effect that the plaintiffs had not removed the said caveat even after filing this suit. It is not disputed that the registration of the said caveat was a violation of the express provisions of the agreement of sale. The plaintiffs argued that they placed the said caveat against the parent property to protect their interest. I believe that there were other avenues available to the plaintiffs through which they could protect their interest in the suit property apart from that which was prohibited by the agreement of sale which they now seek to enforce. There is no doubt that with the plaintiffs' caveat in place, the defendants could not be issued with a provisional title for the parent property a portion of which was being sold to the plaintiffs. Without the said provisional title, the sale of the suit property which was a subdivision of the parent property could not proceed. I am in agreement with the defendants that through the said caveat, the plaintiffs frustrated the completion of the sale agreement by preventing the defendants from obtaining a provisional title for the parent property that was not only a completion document but also a necessary document for the completion of the whole transaction. In my view, even if the defendants had obtained the other completion documents such as the rates and land rent clearance certificates and the consent to transfer, the transaction could still not have been completed without the title for parent property. Due to the foregoing, it is my finding that the completion of the sale agreement between the plaintiffs and the defendants was frustrated by the plaintiffs and as such the said agreement was not breached by the defendants. Since I have held that the defendants did not breach the sale agreement between them and the plaintiffs, the issue of loss arising from such breach does not arise.

Whether the plaintiffs breached the sale agreement dated 10<sup>th</sup> January, 2011 and if so, whether the failure by the defendants to complete the sale was due to the plaintiffs' breach of the sale agreement.

I have answered this issue while dealing with the first issue above. From my findings above, I am in agreement with the defendants that it is the plaintiffs who breached the agreement of sale between the plaintiffs and the defendants dated 10<sup>th</sup> January, 2011. The plaintiffs as I have stated above extended the completion date until the defendants had obtained a provisional title for the parent property which was one of the completion documents. After the defendants made an application for the said provisional title, the plaintiffs registered a caveat on the title of the said parent property thereby forbidding any dealings with the same including issuance of a provisional title in respect thereof. The said caveat was placed by the plaintiffs against the said property in breach of Special Condition O of the agreement of sale that required the plaintiffs to obtain consent of the defendants before registering such caveat against the title of the property. I am not in agreement with the plaintiffs that the requirement for such consent was permissive. As a result of the plaintiffs' breach of the said Special Condition O of the agreement of sale, the defendants were unable to complete the sale agreement as they could not obtain a provisional title for the parent property. It is therefore my finding that the plaintiffs breached Special Condition O of the agreement of sale which resulted in the frustration of the agreement. In my view, the defendants' failure to perform their part of the agreement of sale was as a result of the plaintiffs' breach of the said agreement. The evidence before the court shows that the defendants were willing to perform their part of the agreement and that they took necessary steps to accomplish that desire. There is no convincing evidence on record to support the plaintiffs' claim that the defendants wanted to be paid more money before they could complete the agreement. The evidence before the court shows that the defendants pleaded with the plaintiffs to remove the caveat so that they could obtain a provisional title in order to complete the agreement which pleas were all ignored by the plaintiffs.

Whether the plaintiffs are entitled to the reliefs sought in the plaint.

The plaintiffs have not proved their case against the defendants on a balance of probabilities. The plaintiffs are therefore not entitled to the reliefs sought in the plaint save for a refund of the deposit of Kshs. 3,100,000/-. Even if the plaintiffs had proved that the defendants had breached the agreement of sale between the parties, I would not have granted the plaintiffs an order of specific performance. The law is settled that a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. In Surdev Singh Birdi and Marinder Singh Ghatora v Abubakar Madhubuti CA No.165 of 1996 it was held that:

**“...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”**

As I have found above, the plaintiffs breached the agreement of sale between them and the defendants by placing a caveat against the title of the parent property a portion of which was being sold to them, without the consent of the defendants thereby preventing the defendants from obtaining a provisional title which was a completion document. Such conduct disentitles the plaintiff to an equitable remedy of specific performance. I would however have awarded the plaintiffs damages for loss of bargain. The evidence that was adduced by the plaintiffs that the value of the suit property had appreciated since the date of the agreement of sale between the parties was not rebutted. The plaintiffs had put the current market value of the suit property at Kshs. 45,000,000/-. I agree with the defendants that the plaintiffs did not tender any evidence on how they arrived at that value. The defendants did not also tender any evidence on the current value of the suit property although they agreed with the plaintiffs that damages payable for loss of bargain in case the value of the property had increased since the date of the sale agreement was the difference between the agreed sale price and the increased value. The difference between the agreed purchase price and Kshs. 45,000,000/- that the plaintiff claimed to be the estimated current value of the suit property is Kshs. 14,000,000/-. Doing the best I

can for the plaintiffs, I would have awarded the plaintiffs Kshs. 10,000,000/- for loss of bargain in addition to Kshs. 3,100,000/- which they paid as a deposit. The defendants had offered to refund the deposit to the plaintiffs. The plaintiffs however demanded interest on the same from the date when it was paid to the defendants. The agreement between the parties provided that the deposit would not earn interest. Having held that it was the plaintiffs who breached the agreement of sale, there would be no basis for awarding them interest on the said deposit from the date it was paid to the defendants which in any event is not provided for under the agreement of sale.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiffs against the defendants in the sum of Kshs. 3,100,000/- being the refund of their deposit together with interest at court rates from the date of this judgment until payment in full. Each party shall bear its own costs of the suit.

**Delivered and Dated at Nairobi this 23<sup>rd</sup> Day of July 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read through Microsoft Teams video conferencing platform in the presence of;**

Ms. Songok h/b for Mr. Ochieng for the Plaintiffs

Mr. Wambu h/b for Mr. Kimani for the Defendants

Ms. C. Nyokabi - Court Assistant