



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

ELC NO. 288 OF 2011

FORMERLY HCCC NO.319 OF 2008 &

CONSOLIDATED WITH HCCC NO.605 OF 2009

KENT LIBISO.....1ST PLAINTIFF

ITRONIX LIMITED.....2ND PLAINTIFF

VERSUS

CIRKON TRUST CO. LIMITED.....1ST DEFENDANT

BEAUFORT INVESTMENT LIMITED.....2ND DEFENDANT

JAMES N MWANGI

T/A ELAN TRADERS.....3RD DEFENDANT

SAMUEL NJUGUNA KIMANI.....4TH DEFENDANT

J U D G M E N T

Background and the Pleadings

1. The plaintiffs commenced this suit vide a plaint dated 19th August 2009 which was subsequently amended on 12th May 2010 and further amended on 24th May 2012. The 1st plaintiff was the principal shareholder and director of the 2nd plaintiff. The 2nd plaintiff was a tenant of the 1st defendant for a term of 5 years from 1st July 2006 over the property known as L.R No. 1/811 Nairobi (“ the suit property”). The 1st plaintiff on 14th August 2007 in his personal capacity entered into a sale agreement with the 1st defendant to purchase the suit property for the consideration of Kshs.25,000,000/=. The transaction for diverse reasons was not completed and the 1st defendant without notice or reference to the 1st plaintiff sold and transferred the suit property to the 2nd defendant who subsequently sold and transferred the property to the 4th defendant.

2. The 1st plaintiff paid a deposit of Kshs11,000,000 towards the purchase price in the installments on diverse dates. The plaintiff averred the completion period of the contract was varied but contended that the 1st defendant in breach of the agreement fraudulently sold the suit property to the 2nd defendant notwithstanding that the sale transaction between the 1st plaintiff and the 1st defendant was pending. The plaintiffs by the plaint inter alia prayed for:-

1. A declaration that the purported sale and/or transfer of the suit property to the 2nd defendant in July 2009 was fraudulent, illegal, a blatant breach, disregard and contempt of a valid court order issued on Hccc No.319 of 2008 and therefore null and void.

2. A declaration that the sale of the suit property from the 2nd defendant to the 4th defendant was fraudulent, illegal and/or untenable in law and that the 2nd defendant did not have a good title to pass to the 4th Defendant on the basis that the transfer from the 1st Defendant to the 2nd Defendant was itself null and void on account of the injunctive order issued on 27th November 2008 in HCCC No. 319 of 2008.

3. An order directing the Commissioner of Lands/Registrar of Titles to cancel any entry of transfer of the suit premises LR No.1/811- Kilimani from 1st defendant to the 2nd defendant and from the 2nd defendant to the 4th Defendant.

4. An order for specific performance requiring the transfer and handover of vacant possession of the suit property (LR No.1/811 Nairobi) from 1st defendant to the 1st plaintiff in terms of the sale agreement dated 14th August,2007 with the 1st defendant and/or the 1st, 2nd and 4th defendants availing the necessary completion documents in exchange of the balance of the agreed purchase price amounting to Kshs.14 million.

5. A mandatory order directed at the Registrar of Titles requiring the discharge of any encumbrances registered against the suit property LR. No.1/811 Nairobi.

3. The plaintiffs had earlier instituted a suit against the 1st defendant, Cirkon Trust Limited and one Samuel Mugo Wangai T/A Sannex Enterprises Auctioners vide Nairobi HCCC No.319 of 2008 following a levy of distress for rent arrears which distress the plaintiffs contended was illegal unlawful. In the suit the 2nd plaintiff averred that it had entered into a lease agreement with the 1st Defendant for a term of 5 years from 1st July 2006 over the premises known as LR No.1/811 Nairobi. In the same suit the 1st plaintiff who was the principal director and shareholder of the 2nd plaintiff pleaded that he on 14th August 2007 had entered into a sale agreement with the 1st defendant to purchase the said premises for the consideration of Kshs.25 million payable in installments with the last installment being payable on or before 30th November 2007.

4. The 1st plaintiff averred that the completion date of the sale transaction was over the period valid to 30th May 2008 and that the 1st plaintiff had by 23rd February 2008 paid to the 1st defendant a deposit of Kshs.11 Million towards the purchase and was ready to pay the balance of the purchase price but the 1st defendant failed to avail the necessary completion documents which were a prerequisite for the payment of the balance. The plaintiffs in the suit averred that the 1st defendant on 13th June 2008 during the pendency of the sale agreement unlawfully instructed and authorized the 2nd defendant to levy distress on the plaintiffs goods on the suit premises precipitating the institution of the suit.

5. In the plaint in Nairobi HCC No.319 of 2008 the plaintiffs interalia prayed for:-

(a) A Declaration that the attachment of the plaintiffs goods on 13th June 2008 was illegal and unjustified.

(b) An order for specific performance against the 1st defendant requiring that it avails and executes all the documents necessary to facilitate the conclusion and eventual transfer of suit premises to the 1st plaintiff.

(c) In the alternative the 1st defendant to be ordered to refund the entire deposit of the purchase price paid by the plaintiffs together with the costs of all renovation effected by the plaintiffs on the suit premises.

(d) Damages occasioned to the plaintiffs attached goods together with damages for the unlawful distress.

6. The defendants in Nairobi HCCC No. 319 of 2008 on 20th August 2008 filed a joint statement of defence and counterclaim . By the defence, the defendants stated that the contracts of 19th June 2006 and 14th August 2007 mentioned by the plaintiffs in the plaint were separate and distinct and could not be construed as one. The defendants contended that the sale agreement dated 14th August 2008 had lapsed and/or had been extinguished by breach of a fundamental term and/or by effluxion of time. The defendants further stated the 2nd plaintiff was in arrears of rent and that the 1st defendant was entitled to authorize the 2nd defendant to levy distress for the recovery of the rent arrears. The 1st defendant contended that it was entitled to rescind the agreement entered into with the 1st plaintiff on 14th August 2007 for breach of the conditions thereof.

7. By the counterclaim the defendants prayed for a declaration that the lease dated 19th June 2006 between the 1st defendant and the 1st plaintiff was determined and an order for delivery of vacant possession of the premises to the 1st defendant to be made. Additionally, the 1st defendant also prayed for an order that the sale agreement made on 14th August 2007 between the 1st defendant and the 1st plaintiff had been determined and no longer binding on the 1st defendant. The 1st defendant further sought an order for vacant possession of LR No.1/811 George Padmore Road, Nairobi and the costs of the suit.

8. HCCC No. 319 of 2008 was transferred from the Commercial Division of the High Court to the Environment and Land Division of the High Court by Njagi, J on the 13th June 2011 and in the Land Division was re numbered as Nairobi HC ELC No.288 of 2011.

9. The Court record shows an order to consolidated HCCC No.605 of 2009 with HCCC No.319 of 2008 was made by Hon Martha Koome, J (as she then was) on 15th June 2010 and the two files were to be heard together. Regrettably the record is in a state of confusion as the pleadings are all mixed up, and that a part from a short spell after the order of consolidation was made, when there was a notation on the pleadings filed to denote there was a consolidation, from the year 2012 the notation was dropped and henceforth the reference was only to ELC No.288 of 2011. The confusion was compounded by the fact that there were no specific directions given by the court for the conduct of the suit once consolidation was ordered.

10. Be it as it may be, the record does not show the 1st defendant in Nairobi HCCC No.605 of 2009 filed any defence in the suit though it defended the various applications made in the matter . The 1st defendant however filed a witness statement through its director in October 2018 and further filed its bundle of documents and had filed a statement of defence and counterclaim in Nairobi HCCC No. 319

of 2008 as indicated herein above.

11. The 2nd, 3rd and 4th defendants filed their respective defences to the further amended plaint in Nairobi HCCC No. 605 of 2009. The 2nd and 4th defendants pleaded that they regularly purchased and had the suit property transferred to themselves. They contended they were bonfide purchasers for value without any notice of any defect in the title. The 3rd defendant averred that he acted lawfully in levying distress against the 2nd plaintiff on the instructions of the lawful landlord of the suit premises.

12. I have done an extensive review of the background to this matter to contextualize the evidence and the pertinent issues under contention in the two consolidated suits. The suit was listed before me for hearing on 1st November 2018 when I was doing service week at the ELC Milimani. I heard the matter on 1st November 2018, 30th November 2018, 22nd Mach 2019 and 16th May 2019 when the trial closed. After close of the trial the parties were directed to file their written submissions by 31st July 2019 when the matter was to be mentioned before the Deputy Registrar for directions. On the 31st July 2019 when the matter was mentioned before the Deputy Registrar none of the parties had filed their submissions. The Deputy Registrar transmitted the file to me at Nakuru ELC for directions and/or preparation of judgment. As none of the parties sought any directions respecting the filing of submissions out of time the court opted to proceed to prepare the judgment on the basis of pleadings and the evidence on record.

Evidence by the parties.

13. Mr Kent Libiso the 1st plaintiff testified as PW1 on behalf of himself and the 2nd plaintiff company where he was a shareholder and a director. He testified that the 2nd plaintiff was a tenant of the 1st defendant on LR No. 1/811 Nairobi Kilimani under a lease for 5 years commencing from 1st July 2006 as per the lease dated 19th June 2006 exhibited as documents 1 in the plaintiffs bundle of documents. The 1st plaintiff further stated that he entered into an agreement to purchase LR No.1/811 from the 1st defendant as per the sale agreement dated 14th August 2007 exhibited as Document No.2 in the plaintiffs bundle of documents. Under clause 3 of the agreement the mode of payment of the purchase price was provided as follows:-

3. The purchase price is Kenya shillings Twenty five million only (Kshs.25,000,000/=) payable in five equal monthly installments as follows:-

(a) Kshs.2,500,000(Kenya Shillings Tow Million Five Hundred Thousand only) on signing the sale agreement.

(b) Kshs.2,500,000 (Kenya Shillings Two million Five Hundred thousand Only) on or before 31st August 2007).

(c) Ksh.5,000,000(Kenya shillings five Million Only) on or before 30th September 2007.

(d) Kshs.5,000,000(Kenya shillings Five Million only) on or before 31st October 2007.

(e) Kshs.10,000,000(Kenya Shillings Ten Million only) on or before 30th November 2007.

15. Clause (5) of the agreement provided as follows:-

5. The completion date shall be after payment of the last instalment as per paragraph 3 above where the vendor shall release all the completion documents to the purchaser.

16. The 1st plaintiff in his evidence stated the parties were not ready to complete the transaction by 30th November 2007 when the last installment of Kshs10 million was payable . He stated that he and the vendor mutually agreed to change and vary the completion date to 30th May 2008. The 1st plaintiff stated that he continued to make payments which the 1st defendant acknowledged and as at 23rd February 2008 he had in aggregate paid Kshs.11 million towards the purchase price.

17. The 1st plaintiff stated that before the completion date the plaintiffs changed their lawyers from Khamati & Minishi Advocates to J M Njenga & Company Advocates and that their new advocates on 14th May 2008 wrote to the 1st defendant to confirm the 1st plaintiff would pay the balance by 30th May 2008 and in the meantime requested that the completion documents be made ready. The contents of the said letter exhibited at page 20 of the plaintiff's bundle was as follows:-

Dear Sir,

RE: SALE OF LR.1/811 KILIMANI

PURCHASE/OUR CLIENT: ITRONIX LTD

Kindly note we have been instructed by the Purchaser herein to handle the remaining part of the subject transactions.

As you have already been advised the balance of the purchase price will be paid on or about 30th May, 2008.

In the meantime please ensure that all the completion documents as per special conditions 1 of the sale agreement are ready for

completion purposes

We shall however revert shortly and as soon as the balance of the purchase price is released to us.

Yours faithfully

For: J M NJENGA & CO. ADVOCATES

Jeremy Njenga

CC: Mr Muchiri, Munga & Kibanga Advocates

Attn: Mr. C K Mungai

B.c.c Intronix Ltd- Attn Mr. Kent Libiso

Jn/pm

18. The 1st plaintiff stated that the sellers advocates responded to the letter vide their letter dated 20th May 2008 exhibited at page 26 whose contents were as hereunder.

Dear sir,

RE: Completion Notice Purchase of LR. No.1/811 Nairobi: Cirkon Ltd to Kent Liboso.

The above refers.

Kindly note that we expect the entire balance of the purchase price to wit; Kshs 14,000,000.00 (Kenya shillings fourteen million only) on or before 30th May 2008. We refer to the letter dated 14th May 2008 to Cirkon Trust Co Ltd by your Advocates J M Njenga & Company Advocates.

TAKE FURTHER NOTICE

That unless the said balance to wit, Kshs.14,000,000.00 (Kenya shillings fourteen million only) is received by us on or before 30th May 2008 the agreement for sale shall stand automatically terminated and 10% deposit forfeited. Kindly take this as a final notice in view of your habitual default in making timely payments.

Kindly deal.

Thanking you in advance.

Yours faithfully

MUCHIRI MUNGA & KIBANGA ADVOCATES

C K Munga

Advocate

CC: Cirkon Trust Company Ltd

J M Njenga & Company Advocates

19. The 1st plaintiff stated that his advocates responded to the vendor's advocates letter vide their letter of 24th May 2008 where they sought confirmation from the vendors advocates as to their readiness to complete the transaction and requested to be furnished with copies of the completion documents. He stated the vendor's advocates had not by 30th May 2008 confirmed that they were ready to complete and neither had they furnished the copies of the completion documents.

20. The witness stated that on 13th June 2008 persons who claimed to be Auctioneers descended on the premises and claimed they were levying distress on account of arrears of rent. The Auctioneers had allegedly been sent by the 1st defendant though it was one Dr. Gichuhi Wanyoike who had signed the papers for distress. He claimed that both his personal goods and goods belonging to the 2nd plaintiff were taken away and that prompted the plaintiffs to file HCCC No. 319 of 2008. The witness stated they had not been served with any court order authorizing the levy of distress.

21. The witness further stated that the court issued a conditional order of injunction where the plaintiffs were required to make a deposit of Kshs.1,171,824/= and the defendants were restrained from evicting the plaintiffs from the suit premises. The witness stated that notwithstanding that the court had given an order of injunction the vendors advocates on 2nd December 2008 gave the plaintiffs what they referred to as a completion notice. The letter exhibited at Page 52 of the plaintiff's documents bundle was in the following terms:

Dear Madam,

RE: SALE OF L.R NO.1/811 KILIMANI TO KENT LIBISO

COMPLETION NOTICE

Under special conditions 1 & 11 of the sale agreement dated 14th August 2007 and condition 4 of the Law Society Conditions of sale (1989 Edition)

We Messrs MUCIRI MINGA & KIBANGA ADVOCATES as advocates for and on behalf of CIRKON TRUST COMPANY LIMITED of post office Box Number 333-00200 Nairobi(hereinafter "the vendor")HEREBY GIVE YOU NOTICE pursuant to the provisions of clause 5 of the sale agreement dated 14th August 2007 and conditions 4 of the Law Society Conditions of sales (1989 Edition)as follows:

1. The vendor has been ready, able and willing to complete the transaction of LR. 1/811 Kilimani ("the property") agreed to be sold to you by an Agreement for Sale in writing dated the 14th of August 2007 between the vender on one part and yourself on the other part("the agreement"), which was expressed to be subject to the Law Society Conditions of sale (1989 Edition);

2. Under the Provisions of clauses 2 of the agreement, the completion date was on 30th November 2007;

3. However, you unilaterally changed the date and assigned the 30th of May 2008 as the completion date; but since then; you have not made any effort to complete the contract in tandem with its clause;

4. That you have made default in complying with your obligation under the Agreement by failing to pay the balance of the purchase price and interest as per special condition 7 of the agreement;

5.That you are HEREBY REQUIRED to make good such default by praying the balance of the purchase price and interest in accordance with the term of the said agreement before the expiry of TWENTY ONE(21) DAYS from the date of the service of this Notice.

Please note that if you fail to comply with this Notice within the time aforesaid the vendor will without prejudice to any other right or remedies available to him

a. Terminate the agreement and forfeit 10% of the purchase price from the monies paid to him,

b. Sue for breach of contract and damages arising therefrom.

Yours faithfully,

MUCHIRI MUNGA & KIBANGA ADVOCATES

C.KMUNGA

22. The plaintiffs advocates responded to the letter under reference vide a letter dated 4th December 2008 whose contents are reproduced hereunder:-

Dear Sir,

RE: SALE OF L.R NO.1/811- KILIMANI TO KENT LIBISO(now the subject of Nairobi Hccc No.319/08)

ITRONIX LTD 7 ANOTHER VS. CIRKON TRUST LTD & ANOTHER

Your unsigned letter dated 2nd instant addressed to our client through us refers.

Your client in instructing you to issue the belated completion notice has for sure woken up from the slumber obviously prompted by the injunctive ruling delivered on 27/11/08 in our client's favour.

All in all note that the purported completion notice and which you ought have issued around 31/5/08 and certainly before we went to court is of no legal consequence in light of the injunction now in place in favour of our client. Needless to emphasize the non issuance of a completion notice was one of the issues canvassed in the injunction application and was also addressed by the court in its ruling and you cannot now seek to issue the belated notice to circumvent the findings of the court in its aforesaid

ruling.

We reiterate that there is an injunction in our client's favour and the issue of the sale has to be guided by terms as issued by the court and your completion notice is for now of no legal consequence.

Needless to emphasize, our client inspite of the injunction in place is still not averse to a negotiated conclusion of the matter but our client will not entertain any attempts to harass and/or intimidate him through unorthodox means as happened in June 2008.

Yours faithfully,

For: J M Njenga & Co. Advocates

Jeremy Njenga

Jn/an

CC: Deputy Registrarr

High Court of Kenya

NAIROBI

Bcc: Kent Libiso

Enclosed is copy of the letter under reply. The writer will discuss the contents thereof with you.

23. The 1st plaintiff stated that on 5th January 2009 the 1st defendant's advocates wrote to their lawyers confirming they had terminated the sale agreement forfeited 10% deposit and forwarded a cheque for Kshs.8,500,000/= being on account of the balance of the deposit paid towards the purchase price.

24. The advocates did not accept receipt of the cheque and returned the same to the 1st defendant's advocates. The plaintiffs insisted that the 1st defendant had acted in breach of the injunctive orders in serving the notice of completion and in further proceedings to deal with the suit property by way of sale.

25. The plaintiffs maintained they were not the ones who breached the sale agreement insisting it was the 1st defendant who breached the agreement by failing to avail the necessary completion documents. The 1st plaintiff stated that he registered a caveat to protect the plaintiffs interest in the suit property but the caveat was unlawfully and irregularly removed.

26. The witness stated that on 17th August 2009 their premises were attacked by persons whose intent was to evict them but the police intervened.

27. The 1st plaintiff further stated that they opted to file suit and that it was at this point following their investigations that they learnt the 2nd defendant had allegedly purchased the suit property. The witness stated that they obtained an interim order of injunction in HCCC No. 605 of 2009 in terms of the order exhibited at pages 71 and 72 of the plaintiffs bundle. The witness stated further that on 8th February 2010 there was another unlawful levy of distress and finally on 29th April 2011 they were forcefully evicted from the premises by the 1st and 2nd defendants who were accompanied by police officers. He stated their goods were damaged and were carried away when the police were standing on guard. He stated that from that date they never got back into the premises.

28. The witness further stated that in 2012 they learnt the 4th defendant had purchased the suit property and that necessitated them to make an application for joinder of the 4th defendant to the suit. The 1st plaintiff stated that the 1st defendant had no right to sell the property to the 2nd defendant when he had already sold the property to him. He maintained the 2nd defendant could not have been a bonafide purchaser as he must have been aware of the sale of the property to the 1st plaintiff. Mr. Munga Kibanga Advocate represented the 1st defendant and was involved in the two suits in court and he also participated in the incorporation of the 2nd defendant. He also drew the conveyance from the 1st defendant to the 2nd defendant. The witness equally maintained the 4th defendant could not have been an innocent purchaser for value without notice as in his view he must have been aware of the goings on relating to the suit property.

29. The 1st plaintiff stated the 1st defendant still holds the deposit of Kshs.11.0 million he had paid as deposit and reiterated he was still ready and willing to pay the balance of the purchase price in completion of the transition.

30. The 1st plaintiff in cross examination by Mr. Kiunga advocate for the 1st defendant stated the 2nd plaintiff held a lease over the suit property for a term of 5 years from 19th June 2006 and was paying a rent of Kshs100,000/=. He could not recollect when the 2nd plaintiff last paid rent. The 1st plaintiff stated he had deposited the balance of the purchase price with his advocates though he furnished no evidence. He stated his advocates did not give any letter offering a professional undertaking to pay the balance of the purchase price. He stated he had not paid the balance of the purchase price by 30th February 2008 since he had not received the completion documents. He admitted he made the last installment payment on 23rd February 2008.

31. The 1st plaintiff further stated under cross examination that after he entered into the sale agreement, the lease held by the 2nd plaintiff over the suit property became inoperative though he agreed the agreement never made any reference to the lease. The witness affirmed the conveyance in favour of the 2nd defendant was registered on 28th July 2009 while the injunctive orders barring any dealings with the suit property exhibited at page 72 of the plaintiffs bundle were issued on 8th September 2009 after the conveyance had already been registered. The 1st plaintiff stated he did not comply with the completion Notice carried in the letter of 2nd December 2008 because there was an injunction still in force issued by Lady Justice Khaminwa.

32. The witness cross examined by Mr. Kibanga for the 2nd defendant agreed that he had no privity of contract with the 2nd defendant. The witness stated that his understanding of the court order of 27th November 2008 was that it barred the 1st defendant from dealing with the suit property by way of sale and/or transfer until the suit was heard and determined. Cross examined by Mr. Kairu advocate for the 4th defendant the witness affirmed he had no claims against the 4th defendant who was but an interested party as he purchased a property that was subject of a dispute.

33. Dr. Wanyoike Gichuhi testified as DW1 as a director of the 1st defendant. It was his evidence that the 1st defendant as the owner of LR NO. 1/811 Kilimani in Nairobi leased the premises to the 2nd plaintiff for a term of 5 years from 1st July, 2006. The lease period was to lapse on 30th June 2011. DW1 adopted his witness statement dated 24th October 2018 as part of his evidence. In his oral testimony the witness testified that the 1st defendant entered into a sale agreement for the suit property dated 14th August 2007 for the consideration of Kshs.25 million which was to be paid in installments as stipulated in the agreement. The final installment of Kshs.10 million was to be paid on or before 30th November 2007. He stated the plaintiff only paid a sum of Kshs.11.0 million and defaulted in paying the balance. He stated that even though the 1st plaintiff had indicated he would pay the balance of the purchase price on or before 30th May 2008 he failed to do so.

34. DW1 stated the 1st plaintiff's advocates never gave any professional undertaking for the payment of the balance. He stated as the 1st plaintiff did not honour the terms of the agreement the agreement was rescinded as communicated vide the letter of 5th January 2009. The witness stated that as the 1st plaintiff defaulted on the terms of the agreement he was liable to pay damages as provided under clause 11 of the sale agreement.

35. The 1st defendant denied the plaintiffs made any improvements to the premises and denied any knowledge of any such improvements. The 1st defendant stated at the time it sold the property to the 2nd defendant it had no valid subsisting agreement with the 1st plaintiff as the agreement had been rescinded. The witness stated further that the sale of the property to the 2nd defendant was subject to the existing tenancy. He denied there was in force at the time of the sale to the 2nd defendant a court order barring the 1st defendant from selling the suit property. He stated the court ruling by Hon Lady Justice Khaminwa of 27th November 2008 exhibited at pages 63 to 68 of the plaintiffs bundle only allowed the application in terms of prayer (3) of the application which related to the release of the plaintiffs attached goods and did not touch on the sale transaction and did not bar the 1st plaintiff from paying the balance of the purchase price. As relates to the court order made on 4th July 2008 exhibited at pages 61 and 62 of the plaintiffs bundle the witness stated that the order related to the release of the attached goods and the deposit of rent in arrears and did not relate to the sale of the property. DW1 stated that the plaintiffs refused to pay any rent since the 1st plaintiff entered into the sale agreement. He stated that by the time Koome, J made the order respecting payment of rent on 7th May 2010, the 1st defendant had already transferred the property to the 2nd defendant, the transfer having been effected on 13th July 2009.

36. Under cross examination by Mr. Njenga advocate for the plaintiff's, DW1 stated he did not formally notify the plaintiffs that he was selling the property to the 2nd defendant and that he was under no obligation to do so. Regarding the sale agreement between the 1st defendant and the 1st plaintiff, he stated the completion documents were to be furnished by the 1st defendant after the last installment of the purchase price was paid. The witness maintained the documents for completion were ready but the 1st plaintiff failed to pay the balance by 30th May 2008 as he had promised he would do.

37. The witness affirmed that on 13th June 2008 when the levy of distress was carried out the 1st defendant was still the registered owner of the suit property. He further admitted that the court granted an order of injunction on 27th November 2008 exhibited at page 69 and 70 of the plaintiffs bundle. He admitted the sale to the 2nd defendant was after this order of injunction had been issued. He stated the property was transferred to the 2nd defendant in July 2009 after a caveat that had been registered on the instance of the 1st plaintiff in January 2009 was removed by the Registrar. The witness explained that the sale to the 2nd defendant was subject to the 2nd plaintiff's lease. He maintained there was no court order that barred the sale of the property. He denied colluding with the 2nd defendant to transfer the suit property to them to frustrate the sale to the 1st plaintiff. The witness stated he had no knowledge of the circumstances that led to the eviction of the plaintiffs from the suit premises. The witness further denied the plaintiffs had made any improvements to the suit property. The witness denied receiving the letter dated 8th May 2007 exhibited at page 17 of the plaintiffs bundle setting out the improvements that had been made on the property. The witness stated that at the time he sold the property to the 2nd defendant it was in the same condition as when he land entered into the sale agreement with the 1st plaintiff.

38. DW2 Josephine Kariuki testified on behalf of the 2nd defendant and adopted her witness statement dated 28th February 2019 filed in court on 1st March 2019. It was her evidence that the 2nd defendant purchased the suit premises from the 1st defendant on 13th July 2009. She stated the purchase was subject to the existing lease between the 2nd plaintiff and the 1st defendant. It was her evidence that as the registered owner of the suit premises, the 2nd defendant was entitled to receive rent from the 2nd plaintiff. The 2nd plaintiff never paid any rent to the 2nd defendant and therefore the 2nd defendant was entitled to levy distress on the 2nd plaintiff's goods. The witness affirmed that the 2nd defendant lawfully sold and transferred the suit property to the 4th defendant.

39. In cross examination by Mr Njenga advocate for the plaintiffs the witness affirmed that their company shared offices with the 1st defendant. She affirmed they got to know about the sale of the property through Munga Kibanga advocates in 2008/2009. She stated they incorporated the company with her other director for purposes of purchasing the property. She stated a sale agreement was made in July 2008 and that they paid the consideration of Kshs25 million through the lawyer (who the parties were sharing). The sale agreement was not exhibited and although the witness stated the consideration was made in installments the witness could not remember the dates when the payments were made.

40. The witness stated they purchased the property subject to the existing tenancy she stated the lawyer was the one who was to liaise with the tenant and notify them of the change of ownership. She did not have any evidence to show the lawyer notified the tenants of the change in ownership. She stated at the time of purchase the lawyer informed them the property had no encumbrances.

41. The witness stated she was not aware of the pendency of any suit relating to the property at the time of purchase. She further affirmed that after the 2nd defendant was registered as the owner of the property the tenant did not pay rent and they instructed the lawyer to demand the rent. She stated at the time they sold the property to the 4th defendant they were not aware of any court order barring the sale of the property. She affirmed Mr. Munga Kibanga advocate acted for them in the sale to the 4th defendant and he handled the entire transaction.

42. The 4th Defendant, Samuel Njuguna Kimani testified as DW3 . He testified that he bought the suit property in May 2011 for the consideration of Kshs47, 500,000/=. He stated that he paid a deposit of 10 % and was financed the balance by standard Chartered Bank Ltd who took a charge over the property as security .The 4th defendant stated that he carried out the necessary due diligence before purchasing the property and that the bank equally did their due diligence before they agreed to advance him money against the title as security . The witness relied on his recorded witness statement dated 4th October 2017 . He asserted that he bought the property in good faith and that he was a bonafide purchaser for value without any notice of any defect in the title.

43. The witness cross examined by Mr. Njenga Advocate for the plaintiffs stated he was a Banker by professional and had worked for Kenya Commercial Bank Ltd, the Central Bank of Kenya and at the time of testifying was the Non- Executive Chairman, NSE. He stated in May 2011 he was working for Kenya Commercial Bank Ltd when he identified the suit property for purchase. He stated due diligence was carried out on the property by his lawyers, He stated a lawyer friend of his informed him the subject property was on sale. He stated his lawyer in the sale transaction was John Mburu advocate. He stated he did not know whether the said advocate had any relationship with the 2nd defendant. He stated he had no knowledge of any litigation involving the suit property. He stated the seller did not inform him of any litigation involving the property.

44. The witness disclosed that he sold the suit property in 2018 to offset the bank loan and the property was at the time he was testifying not in his name. He affirmed that he did not demolish the structures on the property upon purchase and that he only put a gate and did minor internal renovations but otherwise the structures remained the same.

Analysis, evaluation and determination.

45. The foregoing is the summary of the evidence adduced by the parties in support of their respective cases. As indicated earlier in this judgment though the parties were afforded the opportunity to file their final written closing submission, by the time the file was forwarded to me to prepare the judgment none of the parties has filed any submissions . Having carefully reviewed the pleadings and the evidence tendered by the parties both orally and by way of documents, the following issues emerge for determination:-

(i) Whether the 1st plaintiff by signing the sale agreement with the 1st defendant on 14th August 2007 the obligations of the 2nd plaintiff under the lease agreement dated 19th June 2006 to pay rent to the 1st defendant was discharged.

(ii) Whether there was default on the part of the 1st plaintiff in fulfilling the terms of the agreement dated 14th August 2007 as at the time the plaintiff filed HCCC 319 of 2008 on 16th June 2008?

(iii) Whether the order of injunction issued by the Court on 27th November 2008 restrained the parties to the sale agreement dated 14th August 2007 and the lease dated 19th June 2006 from performing their obligations under the instruments?

(iv) Whether the 1st defendant lawfully rescinded the agreement of sale, and whether the sale of the suit property to the 2nd defendant was valid or fraudulent?

(v) Whether the sale of the suit property to the 4th defendant was fraudulent or he was a bonafide purchaser for value without notice of any defect in the title?

(vi) What reliefs and/or remedies should the court grant?

46. It was not disputed that the 2nd plaintiff, Itronix Limited entered into a lease Agreement dated 19th June 2008 with the 1st defendant over land parcel LR No.1/811 Kilimani Nairobi for a term of 5 years from 1st July 2008. The 1st plaintiff was the principal shareholder and director of the 2nd plaintiff . It was also not disputed that the 1st plaintiff in his own personal capacity entered into a Sale Agreement with the 1st defendant on 14th August 2007 whereby the 1st plaintiff agreed to purchase the suit property from the 1st defendant for the consideration of Kshs.25 million. The consideration was to be paid in instalments with the last instalment scheduled to be paid on or before 30th November 2007 when completion was to take place. The 1st plaintiff did not honour the repayment

arrangements and though there was no formal written variation of the agreement the 1st plaintiff testified that he approached the 1st defendant and the completion date was mutually varied to 30th May 2008. The 1st defendant denied the variation was mutual stating that the 1st plaintiff unilaterally varied the date to 30th May 2008. The 1st defendant however appears to have ratified the variation as they continued to receive payment deposits from the 1st plaintiff. The last deposit of Kshs1,000,000/= was paid to the 1st defendant on 23rd February 2008 and was acknowledged.

47. The sale agreement dated 14th August 2007 was personal to the 1st plaintiff and though the property the subject of the sale was the same property in respect of which the 2nd plaintiff held a lease, the sale agreement could not override the lease. The lease dated 19th June 2006 entered into between the 1st defendant and the 2nd plaintiff constituted a separate contract and was in no way related to the sale agreement the 1st plaintiff entered into. The 1st plaintiff in his evidence stated that after he entered the sale agreement with the defendant, the 2nd plaintiff's obligation to pay rent to the 1st defendant ceased. That position with respect cannot be correct. The 1st plaintiff and the 2nd plaintiff were two separate legal entities and the obligations of either could not be taken over and/or ceased by the other unless there was an express agreement to such effect. The agreement the 1st plaintiff entered into with the 1st defendant had no mention of the lease agreement the 2nd plaintiff had entered into with the 1st defendant and it cannot be presumed the lease was discarded once the 1st plaintiff signed the agreement for sale. The obligations of the 1st plaintiff under the sale agreement did not and could not discharge the 2nd plaintiff's obligation under the lease to pay rent of the suit premises to the 1st defendant until the sale transaction to the 1st plaintiff had been successfully completed. If there was any intention for the 2nd plaintiff to cease paying rent to the 1st defendant upon the 1st plaintiff entering into the sale agreement for the purchase of the property that was not expressed and/or made a term of the agreement.

48. On the second issue whether or not the 1st plaintiff had defaulted in fulfilling the terms of the sale agreement as at the time the plaintiffs filed suit HCCC No.319 of 2008, it is necessary to consider the contrasting positions taken by the 1st plaintiff and the 1st defendant. Under clause 3 of the Agreement of sale the 1st plaintiff was to pay the agreed purchase price by installments as set out therein. The last installment of Kshs.10,000,000/= was payable on or before 30th November 2007. Clause 5 and 6 of the sale agreement provided as follows:-

5. The completion date shall be after payment of the last installment as per paragraph 3 above where the vendor shall release all the completion documents to the purchaser.

6. Payment shall be made to the vendor as and when payment of the purchase money is made to the vendor's advocate by the purchaser.

49. It is common ground that the 1st plaintiff did not pay the purchase price as stipulated under clause 3 of the sale agreement. The last installment had not been paid by 30th November 2007 as provided. The 1st plaintiff contended that they mutually agreed to have the completion date extended to 30th May 2008. The 1st defendant denied there was any such mutual agreement and said the 1st plaintiff unilaterally decided to extend the completion date but even then stated the 1st plaintiff failed to abide by the date of completion he set for himself. The 1st defendant's assertion was that if the variation of the completion date had been mutual a deed of variation would have been done in terms of special condition (10) of the agreement which provided as follows:-

10. No amendment or variation to this Agreement shall be effectual or binding on this parties hereto unless it is in writing and duly executed by or on behalf the parties hereto.

50. The 1st defendant's position was that even though they accommodated the 1st plaintiff he failed to honour his pledge to pay the balance of the purchase price of Kshs.14 million and that prompted the 1st defendant to give notification of termination of the agreement vide the letter dated 3rd June 2008. The 1st plaintiff's response was that he was ready to pay the balance but the 1st defendant did not avail the completion documents. The 1st plaintiff however did not furnish any evidence that he had the balance of Kshs.14 million ready and available to be transmitted to the 1st defendant. The 1st plaintiff could either have demonstrated he had paid the money to his advocates for their onward transmission to the 1st defendant's advocates which would have enabled the advocates to give an appropriate professional undertaking (as is usual in conveyancing transactions) to pay the balance of the purchase price or he could have availed a bank statement certifying the money was held in such account and he had authority to transact the account. A plain reading and interpretation of the sale agreement in my view invited the 1st plaintiff on the date of completion to either have remitted the full purchase price and/or to demonstrate that the cash was available to be remitted to the vendor or their advocates once it was demonstrated to him the completion documents were ready. It was noteworthy that even after the 1st defendant's threat vide letter dated 20th May 2008 to have the sale agreement terminated if the balance was not paid on or before 30th May 2008, the 1st plaintiff did not demonstrate that he was ready with the cash for the balance. His advocates vide their response letter of 24th May 2008 merely stated the 1st plaintiff would be ready to complete. The advocates did not give a professional undertaking.

51. Under special condition 3 of the sale agreement time was made of the essence. It provided as follows:-

3. Time shall be deemed of the essence of the contract for all the purposes of this Agreement anything to the contrary in these conditions of sale notwithstanding.

52. The sale agreement provided for payment of the full purchase price by the 1st plaintiff on or before 30th November 2007. The 1st defendant without any formal amendment and/or variation to the agreement indulged the 1st plaintiff upto 30th May 2008 to pay the balance but the 1st plaintiff never tendered the balance. In the premises I am persuaded that by the time the 1st plaintiff and the 2nd

plaintiff filed HCCC No. 319 of 2008 on 16th June 2008 the 1st plaintiff was in default of the sale agreement he had entered into with the 1st defendant on 14th August 2007.

Effect of the Order of injunction of 27th November 2008

53. The 1st plaintiff strenuously argued and contended that the Court order of injunction issued on 27th November 2008 restrained the parties from in any manner dealing with the suit property. This injunction was issued in HCCC No.319 of 2008 which was precipitated by the 1st defendant's levy of distress on the premises for nonpayment of the rent reserved under the lease dated 19th June 2006 by the 2nd plaintiff. Lady Justice Joyce Khaminwa in her concluding remarks in her ruling of 27th November 2008 stated as follows:-

“ It is my considered view that the Respondents were acting illegally in trying to gain entry into the premises subject to the sale agreement. The sale agreement not having been lawfully rescinded and in view of there being no rent arrears and also in view of clause 6 (4) Law Society conditions of sale. I allow this application in accordance with terms of prayer 3 of the applications”.

54. These sentiments of the judge in my view did not mean the parties to the sale agreement could not proceed to complete the sale transaction if the appropriate procedure was adhered to. The extracted court order arising from the Judge's ruling exhibited at pages 69 and 70 of the plaintiffs bundle was in the following terms:-

“ That the 1st Respondent by itself, its agents the 2nd defendant and/or its any other agents and/or servants be restrained by way of injunction from evicting and/or interfering with the applicants quiet possession of the suit premises LR No.1/811- Kilimani Nairobi in whatsoever manner pending the hearing and final determination if the instant suit”

55. It is clear the plaintiffs application dated 16th June 2008 was composite in the sense that it related to both issues relating to the occupancy of the suit premises pursuant to the lease held by the 2nd plaintiff and issues touching on the sale agreement entered into by the 1st plaintiff with the 1st defendant on 14th August 2007. Possession of the suit premises by the 1st and 2nd plaintiff stemmed from the lease held by the 2nd plaintiff and was not pursuant to the sale agreement. The application was provoked by the 1st defendant's attempt to levy distress for rent and the applicants sought orders barring disposal of the distrained goods; an order of injunction restraining any eviction; and an order for the release of the attached and/or distrained goods. An interim order was issued on 4th July 2008 for the release of the distrained goods against the deposit of Kshs.1,171,824/=. On the 29th July 2008 the order restraining eviction and for non interference with the plaintiffs possession was granted. I have carefully reviewed the ruling by Lady Justice Khaminwa of 27th November 2008 and the ensuing order and my view is that the order of 27th November 2008 did not preclude the parties to the agreement of 14th August 2007 from proceeding with the sale transaction in accordance with the terms thereof.

56. All the Honourable Judge observed in her concluding observations was that the 1st defendant had not complied with the terms of the agreement in seeking to have the same rescinded. That in my view did not mean the 1st defendant could not remedy the default and seek compliance from the 1st plaintiff in terms of the agreement. The 1st plaintiff in such circumstance would not have been exposed to any prejudice if there was compliance on his part since the agreement would have been completed on the terms thereof. In the premises it is my determination that the injunction of 27th November 2008 did not take away the obligation of the lessee of the suit premises, the 2nd plaintiff to pay rent and neither did it absolve the 1st plaintiff from honouring the terms of the sale agreement.

Whether order of specific performance would be available

57. The 1st plaintiff has sought an order for specific performance of the sale agreement dated 14th August 2007. The 1st defendant contends that the remedy of specific performance was not at any time available to the 1st plaintiff as he failed to perform his part of the contract. The 1st defendant further averred that the agreement of 14th August 2007 was lawfully rescinded by the 1st defendant following default on the part of the 1st plaintiff to satisfy an essential part of the agreement. The 1st plaintiff insists that it was the 1st defendant who failed to furnish the completion documents to enable the 1st plaintiff to pay the balance of the purchase price. The parties admit the agreement was not completed on or before 30th November 2007 when the last instalment of the purchase price ought to have been paid under Clause 3(e) of the agreement. I have earlier in this judgment made a finding to the effect that the 1st plaintiff had by the time HCCC No.319 of 2008 was filed defaulted on the sale agreement dated 14th August 2007 as he had failed to pay the balance of the purchase price as provided under the agreement. The 1st plaintiff therefore as at 16th June 2008 could not be entitled to an order of specific performance as he could not demonstrate he had complied with the terms of the sale agreement.

58. In the Halsburys Laws of England (4th Edition) at paragraph 487 Vol.44 it is stated as follows regarding specific performance.

“A plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications and which ought to have been performed at the date of the writ in the action. However this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance or is in default in some non-essential or unimportant term although in such cases it may grant compensation.

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performances, but dismisses the claim”.

59. In the Court of Appeal case of *Gurder Singh Birdi & Narinder Singh Gatora as Trustees of Ramgharia Institute of Mombasa -vs- Abubakar Madhbuti (1997) eKLR* Gicheru, JA while considering the application of the doctrine of specific performance invoked the above paragraph in the Halsbury's Laws of England and held:-

“When the appellants came to Court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable of grant the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”.

60. In the present matter the 1st plaintiff had not paid the balance of the purchase price of Kshs.14 million at the time he approached the court seeking specific performance. He did not tender the balance of the purchase price even after the 1st defendant issued the letter “headlined” completion Notice dated 2nd December 2008. There was no evidence that he had placed this balance with his advocates. If he had, the advocates would have had no difficulty in issuing an appropriate professional undertaking to the 1st defendant's advocates to pay the balance. It was not enough for the 1st plaintiff to merely state he was ready to complete when the agreement required him to actually pay the full purchase price on or before the date of completion. It is in the premises my view that there was an essential term and/or condition of the agreement the 1st plaintiff had not fulfilled as at the time he commenced the action. He had the opportunity to make amends when the 1st defendant gave him the completion notice signifying the intention to rescind the agreement. The 1st plaintiff did not have clean hands at the time of the institution of the suit and therefore cannot appeal to equity. Specific performance being an equitable remedy would not in the circumstances of this matter be available to the 1st plaintiff.

61. On the evidence tendered I am therefore persuaded that the 1st defendant validly rescinded the agreement entered into with the 1st plaintiff for want of performance of a fundamental term of the agreement. The 1st plaintiff failed to pay the balance of the purchase despite the indulgence extended by the 1st defendant. By the letter of 20th May 2008 the 1st defendant clearly indicated that time was of the essence. The fact that the letter did not qualify as a completion notice was of no consequence as it only meant that the letter could not be treated as terminating the agreement. The 1st defendant could only rescind the agreement if an appropriate completion notice that was compliant with the LSK general conditions of sale was served. It is against that context that the 1st defendant issued the completion Notice vide the letter of 2nd December 2008. The Notice vide this letter was compliant but the 1st plaintiff failed to make amends by tendering the balance of the purchase price. If he had, most probably the outcome of this litigation would have been different. There was no demonstration by the 1st plaintiff that indeed he had the balance available. It cannot be ruled out that he resulted to the court process to frustrate the 1st defendant otherwise it is not explainable why he did not tender the balance if the money was available as he claimed. I do not believe that he in fact had the balance ready.

62. As I have held the 1st defendant did in fact validly rescind the agreement, it follows that the 1st defendant after the rescission of the agreement could deal with the suit property and could offer the same for sale to any other person. The 1st defendant upon the rescission of the agreement following the failure by the 1st plaintiff to comply with the notice of completion of 2nd December 2008 tendered to the 1st plaintiff a refund of the deposit in the sum of Kshs.8,500,000/= after forfeiture of Kshs.2,500,000/= being 10% of the purchase price as per the sale agreement. The 1st plaintiff declined to accept the refund and returned the cheque. Clause 11 of the agreement of sale provided for forfeiture of 10% deposit of the purchase price in the event of default.

63. On the whole evaluation of the evidence, I am not satisfied the plaintiffs have on a balance of probabilities discharged their burden of proof to be entitled to the reliefs sought in the amended plaint. Though there was scanty evidence as relates to the 2nd plaintiff's compliance with the terms of the lease dated 19th June 2006 the 1st plaintiff in his evidence was insistent that as he was a purchaser in occupation /possession he was not supposed to pay rent. I have in the course of this judgment disabused the 1st plaintiff of that notion. There was no variation of the lease and the agreement of sale never made any provision in that regard. The two contracts were distinct and were separate and carried different obligations and different legal entities were involved. Given that scenario I am not able to hold or find that the levy of distress for rent carried out on the suit premises by the 1st defendant was unlawful. The 1st defendant was entitled to receive rent for the premises from the lawful tenant, the 2nd plaintiff.

64. The sale of the suit property to the 2nd defendant by the 1st defendant after the sale to the 1st plaintiff was terminated was valid and consequently the 2nd defendant could properly sell the property to the 4th defendant. The 4th defendant at any rate was a bonafide purchaser for value without any notice of any defect in the title. He purchased the property from the 2nd defendant who was the registered owner and took a substantial loan facility to finance the sale. There was no evidence that the transfer to the 2nd defendant was fraudulent or that the 4th defendant was complicit in any fraudulent and/or illegal dealing respecting the suit property. The sale of the property to the 2nd defendant could only be subject to the 2nd plaintiff's unregistered lease as the 2nd plaintiff was in possession and the lease had not been determined.

65. I believe I have in my analysis and evaluation of the evidence dealt with the various issues that I flagged for determination and I have in the body of the judgment indicated how I have resolved each of the issues. In a nutshell, the plaintiffs have failed to prove their case on a balance of probabilities and they cannot therefore be entitled to judgment in the manner sought.

Reliefs.

66. The 1st plaintiff paid a deposit of Kshs11 million towards the purchase of the suit property. I have held that he defaulted on the agreement. The 1st defendant was entitled to rescind the agreement and forfeit Kshs.2,500,000/= as provided under special condition 11 of the sale agreement. Having opted to rescind the sale agreement the 1st defendant could not be entitled to the other penalties provided for

default under special condition 11 as those were predicated on the defaulting party proceeding to have the transaction completed.

67. The 1st defendant tendered Kshs.8,500,000/= which the 1st plaintiff declined to accept. In the premises I order that the 1st defendant refunds to the 1st plaintiff Kshs.8,500,000 together with interest at Court rates as from 7th January 2009 when the refund was declined until payment is made in full. In awarding interest I have taken into account the 1st defendant has had the use of the money since it was deposited with them. The 1st defendant could either have tendered the refund of the deposit to the Court or could have placed the same into a deposit earning account as he had appreciated the deposit was liable to be paid to the 1st plaintiff.

68. The sum of Kshs.1,171,842/= deposited in the joint names of the parties advocates was on account of rent which ought to have been paid to the 1st defendant. The plaintiffs did not demonstrate that rent had been paid to the 1st defendant. I order that the deposit be released to the 1st defendant's advocates together with all accrued interest thereon.

69. Subject to the above specific orders I have made, the plaintiffs suit is ordered dismissed. Although the usual thing is for the costs to follow the event I am not considering all the circumstances of this case persuaded I should order costs to be borne by any party. I order that all parties will bear their own costs of the suit.

Judgment dated signed and delivered electronically (virtually) at Nakuru this 7th day of July 2020.

J M MUTUNGI

JUDGE