



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 387 OF 2019**

**CONSOLIDATED WITH ELC MISCELLANEOUS APPLICATION NO.191 OF 2019**

**UZIMAPRESS LIMITED.....PLAINTIFF**

**VERSUS**

**ASHRAF SAVANI.....1<sup>ST</sup> DEFENDANT**

**MADATALI SUBURALI CHATUR.....2<sup>ND</sup> DEFENDANT**

**RIGHT END PROPERTIES LIMITED.....3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. Following the judgment that this court delivered on 4/7/2018 in **Nairobi ELC Case No. 2315 of 2007 Salim Hussein Dungarwalla v Uzima Press Limited, Rights End Properties Limited and the Registrar of Titles**, Uzima Press Limited filed **ELC No. 387 of 2019** against Ashraf Savani, Madatali Chatur, Right End Properties Limited and the Chief Land Registrar while Right End Properties Limited sued Uzima Press Limited in **ELC Misc. Application No. 191 of 2019**. Both suits were indicated to flow from this court's judgement in **Nairobi ELC Case No. 2315 of 2007** and the parties averred that they were intended to give effect to that judgement.

2. The background to this case is that Salim Hussein Dungarwalla (Mr. Dungarwalla) filed **ELC Case No. 2315 of 2007** challenging the termination of the contract of sale over land reference number 1870/X/24 ("the Suit Property") which he had entered into with Uzima Press Limited on 23/6/2005 at the agreed consideration of Kshs 27,000,000/= and paid a deposit of Kshs. 2,700,000/=. Uzima Press Limited rescinded that contract on the grounds that Mr. Dungarwalla had fraudulently altered the consideration in the sale agreement to read Kshs. 37,000,000/= when he approached Right End Properties Limited for purposes of assigning the sale of the Suit Property to it. Uzima Press Limited then entered into another agreement dated 15/6/2007 with Right End Properties Limited for the sale of the same piece of land at Kshs. 40,000,000/= and was paid a deposit of Kshs. 4,000,000/=. Mr. Dungarwalla filed suit on 27/11/2007 seeking a declaration that the agreement he had executed with Uzima Press Limited over the Suit Property was valid and legally binding and an injunction to restrain Uzima Press Limited from dealing with the suit land.

3. Uzima Press Limited filed a defence in which it maintained that it was entitled to rescind the sale agreement dated 23/6/2005 when it became apparent that Mr. Dungarwalla had altered the purchase price to read Kshs. 37,000,000/= instead of 27,000,000/=. Uzima Press Limited counterclaimed a declaration that the agreement dated 23/6/2005 was voided by reason of Mr. Dungarwalla's fraud, misrepresentation or deceit. It further sought a declaration that the transfer lodged in favour of Right End Properties Limited was valid and not subject to Mr. Dungarwalla's rights and interest over the suit land. The court delivered its judgement on 4/7/2018 and found that the agreement between Mr. Dungarwalla and Uzima Press Limited was validly rescinded and dismissed Mr. Dungarwalla's suit. The court allowed Uzima Press Limited's counterclaim whose import was that the transfer lodged in favour of Right End Properties Limited was declared to be valid.

4. After delivery of that judgement, a series of events took place as can be discerned from the documents filed in support of the two suits. Right End Properties Limited filed **Misc. Application No. 191 of 2019** on 25/10/2019 seeking to enforce that judgement and sought to compel Uzima Press Limited through the firm of R.M. Mugo and Company Advocates to receive or give its bank details for remission of Kshs. 36,000,000/= from Kipkenda and Company Advocates being the balance of the purchase price pursuant to the sale agreement dated 15/6/2007 so as to bring to an end the conveyance in the matter. In the alternative, Right End Properties Limited sought to deposit the balance of the purchase price of Kshs. 36,000,000/= in court within 7 days if Uzima Press Limited declined to accept payment of that sum. In addition, Right End Properties Limited sought vacant possession of the Suit Property upon payment of the purchase price and in the event that this was not given it sought a mandatory injunction to evict Uzima Press Limited from the Suit Property with the assistance of the

Officer Commanding Kileleshwa Police Station.

5. The application was made on the grounds that the parties entered into a sale agreement on 15/6/2007 and that upon receipt of 10% of the purchase price and a professional undertaking from Kipkenda Lilan and Company Advocates, Uzima Press Limited signed and transferred the Suit Property to Right End Properties Limited. The transaction was halted by a temporary injunction issued in **ELC Case No. 2315 of 2007**. After litigation spanning more than 10 years, this court delivered a judgement on 4/7/2018 in which it found that the transfer lodged in favour of Right End Properties Limited was valid and not subject to any right of Mr. Dungarwalla. Right End Properties averred that the transfer lodged in its favour which had been halted by the injunction was reinstated on 6/2/2019 following this court's judgement and that the land was now registered in its favour. Right End Properties added that it had written to Uzima Press Limited to provide its bank details for purposes of payment of the balance of the purchase price but that Uzima Press Limited had refused to provide its bank details or receive the balance of the purchase price.

6. The application by the Right End Properties Limited was supported by the affidavit of Madatali Suburali Chatur, a director of Right End Properties Limited. He produced copies of the agreement dated 15/6/2007, transfer dated 17/10/2007 together with the pleadings and judgement in ELC No. 2315 of 2007. He averred that following the reinstatement of the transfer dated 17/10/2007 pursuant to this court's judgement delivered on 4/7/2018, Right End Properties was the registered proprietor of the Suit Property. He attached a copy of his advocates' letter dated 9/8/2019 addressed to R.M. Mugo and Company advocates and Triple OK Law Advocates which made reference to clause 3(b) of the sale agreement dated 15/6/2007 and indicated that Right End Properties Limited was ready to pay the balance of the purchase price of Kshs. 36,000,000/=. The letter sought advice on which of the two law firms would receive the balance of the purchase price and sought the bank account into which the funds were to be deposited. He also attached a copy of the letter dated 26/9/2019 addressed to Triple OK Law Advocates which pointed out that the balance of the purchase price was to be paid within 60 days of the successful registration of the transfer in favour of the purchaser pursuant to clause 3(a) of the sale agreement.

7. The advocates stated in the letter that the transfer in favor of the Right End Properties Limited was consummated upon lodging the transfer and payment of stamp duty and registration fees. The letter pointed out salient parts of the defence and counterclaim filed by Uzima Press Limited in **ELC No. 2315 of 2007**. Kipkenda and Company Advocates contended in the letter that their professional undertaking to hold the documents of title over the Suit Property to the order of R.M. Mugo Advocates became *functus officio* and the remaining undertaking was for them to remit the balance of the purchase price. The advocates maintained that the transaction was already completed by the time Mr. Dungarwalla obtained the injunction in **ELC No. 2315 of 2007**. Kipkenda Advocates stated in the letter that they had previously confirmed that their client, Right End Properties Limited, was always ready and willing to complete the transaction were it not for the unfortunate court order which had been lifted on conclusion of the trial. The lawyers denied that they had breached their professional undertaking.

8. Clement Ouko, the General Manager of Uzima Press Limited swore the replying affidavit in opposition to that application which was filed in court on 5/2/2020. He conceded that Uzima Press Limited entered into an agreement with Right End Properties Limited after terminating the agreement with Mr. Dungarwalla. He attached a copy of the professional undertaking given by Kipkenda Lilan and Company Advocates on 12/9/2007 vide which this law firm undertook to hold the completion documents to the order of R.M. Mugo and Company Advocates without releasing them to any advocate. Further, they undertook not to utilise the documents for any other purpose other than the registration of the transfer in favour of the purchaser and to forward a banker's cheque for Kshs. 36,000,000/= within 14 days of the successful registration of the transfer. In addition, they undertook that if the registration of the transfer was not effected within 45 days of the date the documents were forwarded then the law firm would upon demand return the documents in the same condition they were in when they were delivered.

9. Mr. Ouko deposed that Uzima Press Limited signed the transfer in favour of Right End Properties Limited and furnished all the completion documents including the original certificate of title with the intention to have the transfer registered and the sale completed in line with the terms of the sale agreement. He produced a copy of the letter dated 28/9/2007 which forwarded the completion documents to Kipkenda Lilan and Company Advocates together with copies of the land clearance certificate and the consent. He stated that even though Uzima Press Limited was willing to proceed with the transaction, due to a number of factors including delay and failure by Right End Properties Limited to pay the balance of the purchase price in time, Uzima Press Limited exercised its rights under clauses 7 and 8 of the sale agreement and rescinded the sale agreement through a notice dated 27/11/2014 which was served on Right End Properties Limited. He produced a copy of the notice of termination together with the response from Kipkenda and Company Advocates dated 1/12/2014 which rejected the notice to terminate the agreement terming it as misplaced. The advocate indicated that the purchaser, Right End Properties Limited, had always been ready and willing to complete were it not for the unfortunate court order.

10. Mr. Ouko maintained that the implication of this court's judgement in **ELC No. 2315 of 2007** was that it validated the rights of Uzima Press Limited to enter into a binding agreement with Right End Properties Limited under the terms and conditions set out in the agreement. He contended that the court's judgment neither compelled Uzima Press Limited to transfer the Suit Property to Right End Properties Limited nor did it compel Uzima Press Limited to register the transfer and did not set time lines for the registration of the transfer since these were not issues the court had been asked to adjudicate upon. Mr. Ouko maintained that the judgment did not reinstate the transfer or stop the rescission of the sale agreement between Uzima Press Limited and Right End Properties Limited which in any event had been effected through the notice dated 27/11/2014. Mr. Ouko stated that he was aware that an appeal was pending before the Court of Appeal against this court's judgement.

11. Mr. Ouko averred that Right End Properties Limited sought a vesting order through the notice of motion dated 17/4/2019 which it filed in **ELC No. 2315 of 2007** through the firm of Ombati Otieno and Opondo Advocates, who also sought to come on record for Right End Properties Limited after judgement. Mr. Ouko faulted Right End Properties Limited for making the application without serving it on Uzima Press Limited yet it knew that Uzima Press Limited should have been served. The court disallowed the application on the basis that it became *functus officio* after delivering judgement on 4/7/2018.

12. Mr. Ouko averred that Uzima Press Limited was shocked to learn that Right End Properties Limited had reinstated the transfer in respect of the Suit Property and got it registered. It learnt this from the letter dated 9/8/2019 from the lawyers for Right End Properties Limited. Upon receipt of that letter, Uzima Press Limited carried out a search which revealed that the Suit Property had been transferred without its knowledge and was registered in the name of Right End Properties Limited on 6/2/2019. He added that the application dated 17/4/2019

which sought a vesting order was a mere attempt to sanitise the registration of the transfer of the Suit Property that had unprocedurally taken place on 6/2/2019.

13. He averred that Right End Properties Limited indicated in the letter of 9/8/2019 that it was ready to pay the balance of the purchase price under clause 3 (b) of the sale agreement dated 15/6/2007. Uzima Press Limited declined to accept the balance of the purchase price because it believed it had already rescinded the sale agreement through the notice dated 27/11/2014 and was aware that the original certificate of title was being held by police investigators to be used as an exhibit in **Chief Magistrate's Criminal Case Number 338 of 2014 – Republic v Stephen Oyugi**. He maintained that the title could not have been issued without the registered owner of the land being notified. Further, that Right End Properties Limited was in breach of clause 3(b) of the sale agreement which stipulated that the balance of Kshs. 36,000,000/= was to be paid to the vendor's advocate within 60 days of the date of the execution of the agreement or upon successful registration of the transfer in favour of the purchaser, whichever came later.

14. Mr. Ouko contended that the search showed that the decree dated 4/7/2018 issued in **ELC No. 2315 of 2007** had been registered against the Suit Property on 19/10/2018 as entry number 9 yet the decree never vested ownership of the Suit Property in Right End Properties Limited. Entry number 10 indicated that a court order dated 9/10/2018 issued in Criminal Case No. 338 of 2014 had been registered against the Suit Property. On the strength of entries number 9 and 10 a transfer was registered in favour of Right End Properties on 6/2/2019 as entry number 11.

15. Uzima Press Limited obtained copies of the order dated 9/10/2018 in **Chief Magistrates Court Criminal Case Number 338 of 2014 – Republic v Stephen Oyugi Okello** from which it noted that Right End Properties Limited obtained the court order by making a false representation that this court had directed the reinstatement of the transfer documents in **ELC No. 2315 of 2007** when in fact such no orders had been made and the court did not give timelines for the registration of this transfer as intimated by Right End Properties Limited. Mr. Ouko averred that Right End Properties deliberately misled the court regarding the position of the transfer by presenting a misleading and falsified affidavit to the court. Uzima Press Limited unsuccessfully attempted to have the illegal transfer reversed which prompted it to file ELC No. 387 of 2019 – Uzima Press Limited v. Ashraf Savani and 3 others to have its title restored.

16. In the supporting affidavit filed in **CMMisc. Criminal Case Number 338 of 2014**, Madatali Chatur stated that the court had given strict timelines within which to effect the transfer which is why they required the original title. He stated that the title was to be released with the purpose of effecting the transfer in accordance with the orders of this court. The order issued on 9/10/2018 by the Chief Magistrate indicated that the Director of Criminal Investigations was to release the transfer documents dated 17/10/2007 for purposes of completing the reinstatement of the transfer over the Suit Property. The charge sheet in respect of the criminal case related to making a document without authority contrary to Section 357 (a) of the Penal Code and related to a notice of withdrawal of the caveat over the Suit Property.

17. Uzima Press Limited filed **ELC No. 387 of 2019** seeking a declaration that the agreement for sale dated 15/6/2007 between it and Right End Properties Limited was properly rescinded by the notice issued dated 27/11/2014. It also sought declarations that Right End Properties Limited breached its obligations under the sale agreement and the agreement was terminated pursuant to clause 8. It further sought a declaration that the transfer of the Suit Property registered on 6/2/2019 in favour of Right End Properties Limited was obtained through fraud, mistake, misrepresentation and material non-disclosure. It sought cancellation of the transfer and to have the Suit Property vest in Uzima Press Limited. In addition, it also sought a permanent injunction to restrain Right End Properties Limited, Ashraf Savani and Madatali Chatur from dealing with the Suit Property.

18. Madatali Chatur swore the replying affidavit in **ELC No. 387 of 2019** in opposition to the application for injunction filed by Uzima Press Limited. He adverted to the defence and counterclaim filed by Uzima Press Limited in **ELC No. 2315 of 2007**. He averred that completion of the sale agreement between Right End Properties Limited and Uzima Press Limited could not be done within 60 days due to the temporary orders of injunction issued by the court in **ELC No. 2315 of 2007** which stopped any further transactions over the Suit Property until the case filed by a third party was heard and determined. He added that Uzima Press Limited was well aware of the orders of injunction and that Right End Properties Limited could not have paid the balance of purchase price until that suit was heard and determined. He maintained that the notice issued by Uzima Press Limited to rescind the sale agreement dated 27/11/2014 was void and that they would have acted in contempt of the court orders if they had proceeded with the transaction. He attached a copy of the order of injunction issued on 28/11/2007. The order which was extended on 6/12/2007 stated that a temporary injunction had been granted against the Defendants or their agents from transferring, disposing of, alienating or in any other way dealing with the Suit Property on condition that the Plaintiff was to file an undertaking as to damages within two days failing which the order would lapse.

19. He averred that following the entry of judgement, Right End Properties Limited applied to have the transfer entered in its favour on 16/2/2011 reinstated as it had been lodged properly accompanied by the completion documents and the stamp duty and registration fees duly paid. He stated that the Suit Property was transferred to Right End Properties Limited on 6/2/2019 after which he and Mr. Savani sought to pay the balance of the purchase price which Uzima Press Limited refused to accept.

20. He faulted Uzima Press Limited for filing the new suit and contended that it should have responded in **Misc. Application Number 19 of 2019** which Right End Properties Limited filed to enforce its rights. He urged that it was untrue for Uzima Press to allege that Right End Properties Limited had failed to complete the sale transaction in accordance with the agreement. He maintained that the sale transaction was handled properly and urged that the orders sought by Uzima Press Limited cannot be granted because the court confirmed the transfer of the Suit Property to Right End Properties Limited. He added that these issues were *resjudicata* and that this court cannot overturn its judgement and the decree in **ELC No. 2315 of 2007** as this will be tantamount to the court sitting on appeal of its own decision. He added that Uzima Press Limited had approached them to renegotiate the terms of sale by proposing a higher purchase price which offer they had turned down.

21. Parties filed submissions which the court has considered. Right End Properties Limited submitted that the order the court made on 4/7/2018 in **ELC No. 2315 of 2007** was to the effect that the transfer lodged in relation to Right End Properties Limited was valid and was not subject to the interests of Mr. Dungarwalla who was challenging the transfer. According to Right End Properties Limited, the transfer which had been lodged in its favour over the Suit Property was reinstated on 5/2/2019. Right End Properties viewed the main issue for determination as whether the sale agreement was terminated by the notice issued by Uzima Press Limited on 27/11/2014. It maintained that the sale agreement was never rescinded and that the rescission was void due to the orders of injunction which restrained dealings over the

Suit Property. It also made reference to the attempt by Uzima Press Limited to amend its defence and counterclaim in **ELC No. 2315 of 2007** which the court rejected. It urged that parties are bound by their pleadings while contending that the orders the court gave were based on the prayers sought by Uzima Press Limited in its counterclaim. It argued that it was only after successfully defending the suit in **ELC No. 2315 of 2007** which validated the transfer in its favour that it could pay the balance of the purchase price after registration of the transfer and added that the Court of Appeal had not issued any stay barring the completion of the transaction.

22. Right End Properties Limited together with Ashraf Savani and Madatali Chatur also filed submissions in **ELC No. 387 of 2019**. They maintained that the new suit filed by Uzima Press Limited was *resjudicata* which advocates for finality in litigation. They contended that Section 7 of the Civil Procedure Act which sets out the conditions that would bar a subsequent suit were met since the issue of the agreement dated 15/6/2007 had been litigated upon in **ELC No. 2315 of 2007** and the court gave its final judgement. They cited the case of **Gurbachan Singh Kalsi v Yowani Ekorai Civil Appeal No. 62 of 1958** in which the court stated that parties to a litigation should bring forward all their case and only in special circumstances would they be permitted to reopen the same subject of litigation in respect of a matter which they would have brought forth. They maintained that the court ought not to grant an order of injunction since the matter was already *resjudicata*.

23. Uzima Press Limited filed one set of submissions in respect of the two suits and set out four issues for determination being whether the agreement between Uzima Press Limited and Right End Properties Limited was lawfully terminated by Uzima Press Limited; whether the judgement delivered by this court on 4/7/2018 directed that a transfer of the Suit Property was to be effected in favour of Right End Properties Limited; thirdly, whether the transfer of the Suit Property registered on 6/2/2019 was valid and whether the court should grant the orders sought by Right End Properties Limited.

24. Uzima press Limited submitted that Right End Properties Limited together with Ashraf Savani and Madatali Chatur breached a fundamental term of the sale agreement dated 15/6/2007 when they failed to pay the balance of the purchase price of Kshs. 36,000,000/= within 60 days of the date of execution of the agreement and further, that despite successfully registering the transfer on 16/2/2011 the purchasers did not pay the balance of the purchase price within 60 days of the date of registration of the transfer. It submitted that it issued the notice of termination on 17/11/2014 in exercise of its rights under special clause 8 of the agreement which provided that if the purchaser failed to comply with its obligations under the agreement including the obligation to complete the sale and pay the balance of the purchase price, and time being of essence for purposes of that obligation, the vendor was at liberty to rescind the agreement by giving 21 days' written notice to the purchaser.

25. Uzima Press Limited relied on paragraph 106 of volume 42 Halsbury's Laws of England on when the right of rescission can be exercised. It relied on the case of **Karanja Mbugua and another v. Marybin Holding Company Limited [2014] eKLR** in which Nyamweya J stated that the law on rescission of a contract for the sale of land was to the effect that if the contract contained a condition entitling the vendor to rescind on the happening of certain events and those events happened, then the vendor could rescind. In the absence of such condition the vendor may only rescind if the purchaser's conduct amounts to repudiation of the contract and the parties could be restored to their former position. On the issue of completion it relied on **Njamuyu v. Nyaga [1993] KLR 282** on the point that apart from express agreement or notice making time of essence, the court would require precise compliance with stipulations as to time whenever the circumstances of the case indicate that this would fulfil the intention of the parties.

26. Uzima Press Limited submitted that despite receiving the notice of termination, Right End Properties Limited together with Ashraf Savani and Madatali Chatur did not pay the balance of the purchase price within the 21 days given in the notice but merely stated that they were ready to complete and gave the court order as the reason for their non-completion yet that court order did not suspend their contractual obligation under the sale agreement.

27. Uzima Press Limited relied on special clauses 7 and 8 of the agreement which gave parties the liberty to terminate the sale agreement where it could not be completed at the completion date by providing that if the transaction failed to go through for any reason other than default on the purchaser's part on or before the completion date, the vendor was to refund the monies paid by the purchaser plus costs and expenses together with interest at the prevailing bank rates. The vendor was to pay 10% of the purchase price as liquidated damages for non-completion of the sale. Uzima Press Limited maintained that it had rightly exercised its right when it terminated the sale agreement and added that by the time the judgment was delivered the sale agreement stood terminated.

28. Uzima Press Limited submitted that the court decree neither directed the Land Registrar to register the transfer in favour of the Right End Properties Limited nor did it reinstate the transfer. It argued that the court only recognised the validity of the sale agreement between Uzima Press Limited and Right End Properties Limited following the termination of the sale agreement between Mr. Dungarwalla and Uzima Press Limited. It maintained that the transfer was subject to the rights of Uzima Press Limited under the sale agreement including the obligation to pay the balance of the purchase price within 60 days of the registration of the transfer. It urged that a party who is in breach of its obligation under an agreement cannot seek to benefit from its own breach. It further contended that even if the court were to find that the transfer was successfully registered on 6/2/2019, Right End Properties Limited together with Ashraf Savani and Madatali Chatur failed to pay the balance of purchase price of Kshs. 36,000,000/= within 60 days of the registration of the transfer on 6/2/2019. Uzima Press argued that by recognising the validity of the transfer lodged by Right End Properties Limited together with Madatali Chatur and Ashraf Savani, the court order did not excuse them from honouring the terms of the sale agreement and paying the balance of purchase price within 60 days. Uzima Press Limited contended that the purchasers had not made any attempt to complete the transaction by paying the purchase price.

29. Uzima Press Limited contended that the transfer of the Suit Property effected on 6/2/2019 was not valid because it was lodged after the agreement for sale had been terminated by the notice dated 17/11/2014 following breach by the purchasers. Secondly, that the registration of the transfer was as a result of misrepresentation in the application dated 21/9/2018 filed in **Misc. Criminal Case No. 338 of 2014** in which the certificate of title had been retained as an exhibit in the criminal case which neither the purchasers nor the vendor were party to. It submitted that a fraudulent representation was made to the Magistrate's Court to release the transfer documents for purposes of completing the reinstatement of the transfer. It argued that through the misrepresentations, Right End Properties Limited together with Ashraf Savani and Madatali Chatur lodged the transfer for registration without the knowledge of Uzima Press Limited and deprived it of the opportunity to bring to the attention of the Chief Land Registrar the fact of the termination of the sale agreement. It added that the registration of the transfer on 6/2/2019 was in breach of the terms of the professional undertaking given by Kipkenda Lilan and Company Advocates in their letter dated 12/9/2007 vide which they undertook to give Uzima Press Limited a banker's cheques for Kshs. 36,000,000/= being the balance of the

purchase price for the Suit Property within 14 days of the successful registration of the transfer.

30. Uzima Press limited further argued that if the transfer registered on 16/2/2011 was valid then the banker's cheques ought to have been forwarded within 14 days of that date. Clause (c) of the undertaking stipulated that the completion documents would be returned to Uzima Press Limited if the transfer was not effected within 45 days of the date when the documents were forwarded to the advocates if they failed to comply with the terms of the undertaking. The completion documents were forwarded on 2/10/2007 but unfortunately they were neither returned to Uzima Press Limited in line with the professional undertaking nor was the balance of the purchase price paid within the period given in the professional undertaking.

31. Uzima Press Limited submitted that it was curious that Right End Properties Limited together with Ashraf Savani and Madatali Chatur registered the transfer without removing the caveat registered against the Suit Property as entry number 6. Ordinarily a transfer cannot be registered against title where there are existing caveats against that land. Uzima Press Limited submitted that the documents relied on by Right End Properties Limited showed that they had committed fraud in the registration of the transfer and relied on Section 26 of the Land Registration Act vide which a certificate of title can be challenged on grounds of fraud or misrepresentation to which the person registered is proved to have been a party or where the title was acquired illegally, unprocedurally or through a corrupt scheme.

32. On the orders sought by Right End Properties in the miscellaneous application, Uzima Press Limited submitted that they were in the nature of the equitable remedy of specific performance and relied on **Gurdev Singh Birdi and Marinder Singh Gatora as Trustees of Ramgaria Institute of Mombasa v Abubakar Madhubuti Civil Appeal No. 165 of 1996** in which the court stated that a party seeking specific performance of a contract must show that he had performed all the terms of the contract which he undertook to perform and which he ought to have performed at the date of the writ in the action. Uzima Press Limited contended that Right End Properties Limited had failed to show that it was ready, willing and able to perform its part of the bargain and not merely make a statement that it was ready to pay the balance of the purchase price.

33. It also relied on **Nabro Properties Limited v Sky Structures Limited and 2 others [2002] eKLR**. Uzima Press Limited submitted that the purchasers had not come to court with clean hands having breached the terms of the sale agreement and having misrepresented the true position in the criminal court in order to obtain the original certificate of title for purposes of registering the transfer. It concluded that granting the orders sought by Right End Properties Limited would be tantamount to allowing a party to benefit from its breach of its contractual obligations and allowing it to benefit from an illegality committed on the court.

34. The court gave directions on 10/2/2020 that the two cases would be heard together and directed that parties were to file their submissions within 30 days. Parties filed their submissions as elucidated above. Highlighting of the submissions could not proceed on 26/3/2020 as scheduled owing to the outbreak of the Covid-19 pandemic in the country. The case was mentioned on 2/7/2020 when parties confirmed that they had filed their written submissions and the court gave a judgement date.

35. In deciding whether to grant the orders sought in **ELC No. 387 of 2019** or those sought in **Misc. Application No. 191 of 2019**, this court has to determine whether the former suit is *res judicata* and whether Uzima Press Limited lawfully terminated the sale agreement. It will be necessary to look at the legal effect of this court's judgement in **ELC No. 2315 of 2007** in so far as the rights of the parties under the sale agreement dated 15/6/2007 were. What transpired after this court delivered the judgement on 4/7/2018 will also be a relevant consideration to be taken into account in determining issues in the two suits.

36. This court is in full agreement with the decision in **Gurbachan Singh Kalsi v Yowani Ekorai Civil Appeal No. 62 of 1958** that parties to a suit should bring forward all their case and only in special circumstances would they be permitted to reopen the same subject of litigation in respect of a matter which they would have brought forth in the earlier suit. The parties in these two suits should ideally have litigated over the validity of the sale agreement between them in **ELC No. 2315 of 2007** but they did not.

37. Section 7 of the Civil Procedure Act contemplates that a matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; and the suit must have been between the same parties who litigated in the same title in the former suit. To satisfy the conditions, the matter in issue must have been heard and finally decided in the former suit. Looking at the facts of this case can it be said that the issue of breach of the sale agreement between Right End Properties Limited and Uzima Press Limited was heard and finally decided in **ELC No. 2315 of 2007**?

38. It is easy to discern from the facts and judgement what issue was directly and substantially in dispute, which was whether the sale agreement between Mr. Dungarwalla and Uzima Press Limited was lawfully terminated. At that point Uzima Press Limited and Right End Properties Limited were only too happy to fight on the same side as Defendants because they had entered into another agreement over the Suit Property to the exclusion of Mr. Dungarwalla, the initial purchaser who was said to have altered the purchase price in sale agreement. The court found that Mr. Dungarwalla had failed to prove that he was ready, able and willing to pay the balance of the purchase price pursuant to the agreement he had entered into with Uzima Press Limited for the court to grant the order of specific performance that he sought in the suit. This court neither granted a vesting order to Right End Properties Limited nor did it specifically direct the Land Registrar to lift the caveat which Mr. Dungarwalla had caused to be registered against the suit land.

39. In **ELC No. 2315 of 2007**, the court did not determine any issue relating to the validity of the notice of termination of the sale agreement dated 27/11/2014 issued by Uzima Press Limited to Right End Properties Limited nor did the judgement address the issue of the rights and obligations of Uzima Press Limited and Right End Properties Limited pursuant to the sale agreement dated 15/6/2007. The issue of failure to pay the balance of the purchase price in accordance with the sale agreement by Right End Properties Limited or the validity of the notice of termination issued by Uzima Press Limited are not *res judicata*. Had these matters been dealt with by this court then Right End Properties would not have needed to file the application dated 17/4/2019 which sought a vesting order through the firm of Ombati Otieno and Opondo Advocates nor would it have been necessary for Uzima Press Limited and Right End Properties Limited to file **ELC Misc. Application No. 191 of 2019** and **ELC No. 387 of 2019**. Further, it would not have been necessary for Right End Properties Limited and Madatali Chatur to seek the orders it sought from the Chief Magistrates Court in **Misc. Criminal Case No. 338 of 2014** which ostensibly were to give effect to that judgement.

40. At the time this court delivered its judgement on 4/7/2018 in **ELC No. 2315 of 2007** and upheld the transfer registered in February 2011, an order of injunction had been issued in December 2007. This fact was not brought to the attention of the court. It is not clear how Right End Properties Limited managed to lodge the transfer in respect of the Suit Property on 16/2/2011 yet there was a court order given on 13/12/2007 prohibiting registration of any dealings including a transfer against the Suit Property. That transfer was later cancelled by the Land Registrar just like the two entries preceding that transfer.

41. Parties are bound by the terms of the agreement they enter into. It is not the place of the court to rewrite contracts for parties. The judgement delivered on 4/7/2018 did not discharge parties from their obligations under the sale agreement. Uzima Publishing House agreed to sell the Suit Property to Ashraf Savani and Madatali Chatur under the sale agreement dated 15/6/2007, which set the completion date at clause 6 as 60 days of the date of execution of the agreement or the date stipulated in clause 3(b) or such later date as agreed between the parties in writing. Clause 3(b) provided that the balance of Kshs. 36,000,000/= would be paid to the vendor's advocate within 60 days of the date of execution of the agreement or upon the successful registration of the transfer in favour of the purchasers, whichever was later.

42. Special condition 3 of the sale agreement provided that the vendor's advocates' were to provide the completion documents on or before the completion date. These were forwarded vide the letter dated 28/9/2007. Special condition 7 provided that if the transaction failed to go through for any reason other than default on the purchasers' part on or before the completion date then the vendor would refund all monies paid to it. Special condition 8 provided that if the purchasers failed to comply with their obligations under the agreement including payment of the balance of the purchase price with time being made of essence, the vendor was at liberty to rescind the agreement by giving 21 days' written notice to the purchasers. If the purchasers did not comply the vendor was to forfeit 10% of the purchase price and no interest was payable on the sum already paid.

43. It is not in dispute that Right End Properties Limited together with Ashraf Savani and Madatali Chatur did not pay the balance of the purchase price of Kshs. 36,000,000/= within the timelines set out in the agreement. The purchasers never made any attempt to pay the balance of the purchase price or deposit it in an interest earning account while the suit brought by Mr. Dungarwalla was pending in court. In the court's view, the purchasers had the option of seeking an extension of the time for completing the contract under clause 6 of the agreement which would have led to a later completion date being agreed on by the parties as the suit was heard.

44. The court finds that Uzima Press Limited lawfully terminated the sale agreement 21 days after it issued the notice of termination dated 27/11/2014 and the purchasers failed to pay the balance of the purchase price within that notice period.

45. Uzima Press Limited unsuccessfully attempted to amend its defence and counterclaim in **ELC No. 2315 of 2007** to plead the issue of the notice of termination but Gitumbi J. declined to allow the amendment in her ruling of 1/4/2016 on the grounds that the suit was part heard and Mr. Dungarwalla had died after testifying. That should have alerted the purchasers to the fact that Uzima Press Limited was still intent on its termination of the contract so that they could take steps regarding payment of the balance of the purchase price.

46. After this court delivered its judgement on 4/7/2018, Right End Properties Limited made an unsuccessful attempt to obtain a vesting order on 17/4/2019. By then the impugned transfer had already been registered on 6/2/2019. The court notes that Madatali Chatur informed the court in his affidavit sworn on 21/9/2018 in support of the application for the release of the original title over the Suit Property that this court had given strict timelines within which the transfer was to be effected, which was not the case. The Magistrates Court directed the Director of Criminal Investigations to release the title and transfer over the Suit Property to Right End Properties Limited for purposes of completing the reinstatement of the transfer. The court order issued on 9/10/2018 in **Chief Magistrates Court Criminal Case No. 338 of 2014** which was registered against the Suit Property as entry number 10 must have cleared the way for the transfer to be registered on 6/2/2019. All these took place without the knowledge or involvement of Uzima Press Limited yet it would be affected by these actions. The Chief Magistrate who was to prosecute Stephen Oyugi Okello for the offence of making a document without authority contrary to Section 357 (a) of the Penal Code did not have the jurisdiction to deal with the reinstatement of the transfer over the Suit Property in the manner it did in the criminal proceedings.

47. As Tunoi JA observed in **Gurdev Singh Birdi and Narinder Singh Ghatora v Abubakar Madhubuti**, it would be oppressive, unjust and financially injurious to require Uzima Press Limited to accept the sum of Kshs. 36,000,000/= for the suit land whose value has significantly appreciated twelve years after the date the sale should have been completed. Right End Properties Limited together with Ashraf Savani and Madatali Chatur were well aware of the fast rate at which the value of the Suit Property appreciated for the land was to be sold to Mr. Dungarwalla for Kshs. 27,000,000/= in 2005 yet they were to purchase it for Kshs. 40,000,000/= in 2007.

48. The court declines to grant the orders sought in the application dated 23/10/2019 filed in **ELC Miscellaneous Application No. 191 of 2019**. Each party will bear its costs for that application.

49. The court grants prayers (a), (b), (c), (d), (e), (f), (g) and (h) of the plaint dated 27/11/2019. Each party will bear its costs of the suit.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of August 2020**

**K.BOR**

**JUDGE**

**In the presence of:-**

Ms. Chemutai Koskei holding brief for Mr. E. Masika for the Plaintiff

Mr. Geoffrey Mulanya for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Mr.V.Owuor- Court Assistant

No appearance for the 4<sup>th</sup> Defendant.