



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 156 OF 2010

MARGARET NDUTA KAMITHI.....1ST PLAINTIFF

GEORGE NJENGA KAMITHI.....2ND PLAINTIFF

(As Administrators of the Estate of the late Stephen Kamithi Mira (Deceased))

=VERSUS=

ANNUNCIATA WAITHERA KIBUE.....1ST DEFENDANT

PAUL KIMARI NJAU.....2ND DEFENANT

SUSAN NJERI KIBUE.....3RD DEFENDANT

(As Administrators of the Estate of the late James Aram Njau Kibue (Deceased))

JUDGEMENT

1. The plaintiffs are the administrators of the Estate of the late Stephen Kamithi Mira (deceased) and the defendants are the administrators of the Estate of the late James Aram Njau Kibue (deceased). The suit arises out of an alleged breach of sale agreement dated 8th November 1994 between James Aram Njau Kibue and Stephen Kamithi Mira in respect of three plots (plots 1, 2 and 19) that were to be hived out of LR No. 5989/14.

2. By a plaint dated 29th March 2010, amended on 23rd August 2011 and further amended on 25th May 2016, the plaintiff seeks judgment against the defendants jointly and severally for:-

(a) An order of specific performance be issued compelling the defendant to complete the transaction in terms of clause 4 of the sale agreement dated 8th November 1994 and transfer plot numbers 1, 2 and 19 situate within LR No. 5989/14 to the plaintiffs within ninety (90) days of the order hereto, whereafter the plaintiffs shall release the balance of the purchase price to the defendants within thirty (30) days.

(b) In the alternative the defendants damages for loss of bargain calculated as the difference between the purchase price of Kshs.2.28 million and the market price of the suit property plot nos 1, 2 and 19 situate within LR NO. 5989/14, which as at September 2015 had a cumulative market value of Kshs. One hundred eighty six million Kshs.186,000,000/-.

(c) Costs of the suit with interest.

(d) Any other relief that the court may deem fit to grant in the circumstances of this case.

3. Upon being served with summons to enter appearance and copies of plaint, the defendants entered appearance on 23rd September 2011 and through the firm of M/S Wanyoike & Macharia advocates and filed a statement of defence dated 4th October 2011 and amended on 10th June 2016. The defendants deny each and every allegation in the plaint and pray that the plaintiffs' suit be dismissed with costs.

4. PW1, Kiragu Kimani, a senior advocate practicing in the firm of M/S Hamilton, Harrison and Mathews adopted his witness statement dated 23rd May 2017 as part of his evidence in chief. He told the court that he acted for Kenya Planters Co-operative Union Limited in the

1990s in respect of a debt collection matter. He told the court that he instructed M/S Richard Muchai Auctioneers to sell by public auction, a property known as LR No.5989/17 situate along Kiambu road. The said auctioneers issued a notification of sale.

5. He further told the court that on 8th November 1994, he received communication from the firm of M/S J. A Guserwa & Co. Advocates requesting him to call off the scheduled sale by public auction as the debtor James Aram Njau Kibue was in the process of selling a portion of a separate parcel of land to clear off the debt owing. That he subsequently received a copy of a signed sale agreement in respect of LR No. 5989/14 dated 8th November 1994 and a cheque of Kshs.500,000. He later received Kshs.334,744.30 on 15th November 1994 and Kshs.413,652.50 from the firm of M/S J A Guserwa. He confirmed that following receipt of these amounts the sale of the property known as LR NO. 5989/17 was avoided.

6. PW2 Margaret Nduta Kamithi, the 1st plaintiff, told the court that the late Stephen Kamithi Mira was her husband. She adopted her witness statement dated 23rd May 2017 as part of her evidence in chief. She stated that her husband passed away on 11th April 1999. She further stated that her husband's friend and fellow businessman, the late James Aram Njau Kibue fell into financial problems in the year 1994 which led to land parcel number LR 5989/17 to be put up for sale by public auction. She was informed by her late husband that Mr. James Kibue pleaded with him to purchase a portion of a different property to utilize some of the purchase price to pay Kenya Planters Co-operative Union Limited. Her husband agreed and they made the agreement dated 8th November 1994.

7. As per the agreement, her late husband made two payments directly to messrs Hamilton Harrison & Mathews Advocates who were acting on behalf of Kenya Planters Co-operative Union Limited. The 20.7 acre land was therefore saved from sale by public auction. Mr. James Kibue did not transfer the land.

8. After both parties to the agreement died, PW1 had a meeting with the 1st and 3rd defendants where they ratified the sale of three (3) plots sub divided from LR 5989/14. There were various correspondences between them through their advocates concerning the completion of the transaction. However, after sometime she received a letter informing her that the defendants had decided not to proceed with the sale. There was also an enclosed cheque of Kshs.950,000 which PW1's advocate sent back. She then instituted this suit.

9. PW3, Peter Wakahora Kanyogo a registered valuer and Estate agent practicing in the firm of Circuit Valuers and Management Consultants Limited stated that he was instructed by the 1st plaintiff (PW2) to carryout an open market valuation of the three suit plots. The said plots are situate along Kiambu road in the Ridgeways area in Nairobi. The entire parcel measures 22.72 acres. That the title is freehold registered in the name of James Arum Njau Kibue. He prepared three valuation reports for the three plots which were produced as exhibits in this case.

10. PW4 Eliaph Maina Gikinya, a licensed land surveyor told the court that he was instructed by M/S Walker Kontos Advocates to show where the suit land is located. The land is located near Karura forest. He further told the court that initially the land was agricultural but has been converted to residential.

11. PW5 Judith Abrahamas Guserwa, an advocate of the high court confirmed that she acted for the plaintiffs in the matter in 1994. She told the court that she was instructed by the late Stephen Kamithi Mira to act for him in the transaction. She drafted the sale agreement between Stephen Kamithi Mira and James Aram Njau Kibue. The said agreement is dated 8th November 1994. She also confirmed that several cheques were forwarded and acknowledged. She first forwarded kshs.500,000 to M/S Hamilton Harrison & Mathews, the balance of Kshs.334,774.30 plus Kshs.29,500 legal fees. Subsequently she sent a cheque of Kshs.31,881.85 to Kenya Planters Co-operative Union Limited. She sought title documents and the discharge of charge. In the years after, the original parties to the agreement passed away. She continued to correspond with M/S Kamau Kuria & Kiraitu Advocates for the defendants, regarding the delay in completion of the transaction. The reason for the delay as explained by the defendants was the issue of grant of letters of administration to the Estate of the late James Aram Njau Kibue. By a letter dated 28th March 2002 the defendant's advocate wrote confirming that the defendants had agreed to transfer to the purchaser the three plots to be carved out of LR NO. 5989/14.

12. Later the defendant's advocates requested her to release the title documents on their professional undertaking that they would be returned on time. Further correspondences between the advocates took place back and forth until the defendant's confirmed they were ready to complete the transactions but requested for the balance of the purchase price contrary to clause 4 of the agreement. There were further back and forth correspondences between the advocates until 2006 when in a joint meeting it was agreed that the matter be finalized. However on 28th June 2006, she received a letter indicating that the defendants did not wish to complete the transaction. Enclosed was a cheque of Kshs.950,000 being a refund of the purchase price. Following this there were several letters between the advocates in relation to the title documents, indentures and professional undertaking.

13. DW1, Annunciata Waithira Kibue, widow and co- administrator of the Estate of James Aram Njau Kibue adopted her witness statement dated 9th March 2012. She stated that during the course of a legal battle over distribution of the Estate, it was brought to their attention that the deceased had entered into a sale agreement over three plots in LR No. 5989/14 with one Stephen Kamithi Mira. She stated that their advocate advised that it was impossible to proceed with the agreement because the purchaser had not paid the purchase price by 28th February 1995, the subject land was agricultural requiring consent and the rescinding clause in the agreement.

14. They were then advised to refund the plaintiffs, the money paid by the late Kamithi to the late Kabue amounting to Kshs.950,000. She thereafter considered the matter settled until the plaintiff instituted this suit. She also stated that LR NO. 5989/14 was distributed on 16th December 2005 to the beneficiaries of the Estate vide High Court Succession Cause NO. 2356 of 1996.

15. DW2, Paul Kimari Njau the 2nd defendant adopted his witness statement dated 31st May 2017. He told the court he is the son and co-administrator of the Estate of the late James Aram Njau Kibue. He told the court the suit property was never under any threat of sale by public auction. Further that none of the plaintiffs' claims that the land was to be sold by public auction were captured in the sale agreement between the late James Aram Njau Kibue and Stephen Kamithi Mira. He told the court that his father was not in the process of subdividing the suit property. No consent were sought and he had no intention of disposing the sub plots to Stephen Kamithi Mira. Further that the

advocates refunded the Kshs.950,000/- because the land control board consent had not been obtained making the transaction null and void and incapable of being enforced. He further stated that the plaintiff's firm of advocates on record M/S J. A. Guserwa & Co. Advocates had at some point acted for their late father and had in possession the title documents which they refused to handover thus necessitating the defendants to apply for replacement of the title documents.

16. He further stated that the distribution of the Estate of their late further was dealt with in Nairobi High Court Succession Cause No. 2358 of 1996 in which the plaintiffs were aware of but did not participate in. That the suit properties are not available to them.

17. The 3rd defendant, Susan Njeri Kibue did not testify but she recorded a witness statement dated 31st May 2017. The contents are the same as the 1st defendant's (DW2).

18. At the close of the respective testimonies, the parties stated that they would tender final submissions.

The plaintiffs' submissions

19. They are dated 19th May 2020. They raise several issues:-

(1) Whether the letter by M/S Kamau Kuria & Kiraitu to M/S J. A Guserwa & Co. Advocates dated 28th June 2006 in which he indicated he had been instructed by his client (the defendants) "that they have decided not to proceed with the sale of the above plots" had the effect of rescinding/terminating the sale agreement. The plaintiffs' submissions to this issue is that the sale agreement was not terminated as a clause in the agreement required the presence of a dispute before the vendor could rescind. There was no such dispute referred to in the letter or in any other correspondence prior to the letter. That the alleged dispute is appearing in the defendants' documents were introduced as an afterthought.

(2) Whether the sale agreement was void for not obtaining the land control board. To this issue, the plaintiffs submit that the sale agreement is not void. The suit properties are in Ridgeways area within the boarders of Nairobi City County. They rely on the definition of Agricultural land in Section 2(b) of the Land Control Act. They have also put forward the case of Munyaka Kura Company Limited vs Bernado Vicezo De Masi (the Administrator of the Estate of Domenico De Masi (Deceased) [2018] Eklr.

(3) Whether the purported completion notice dated 28th June 2005 was in breach of the sale agreement and in effective to terminate the agreement. It is the plaintiff's submission that clause 4 of the sale agreement obligated the vendor to transfer the property to the purchaser first, before the purchaser became obliged to release the balance of the purchase price and that there would be no liability to the purchaser if the completion date of 28th February 1995 was delayed. They also referred to clause 5 of the agreement arguing that it emphasizes that all the necessary consents and documents to procure the registration in favour of the purchaser was to be delivered just before the purchase price was paid. They have put forward the case of Orion East Africa Limited vs Ite Farmers Cooperative Society Limited ELC Suit No. 283 of 2011 where the court held that a completion notice was in breach of the agreement for sale and thus could not terminate the agreement. Further that under a clause in the agreement notice could only be issued to a party in default and that party had not defaulted.

(4) Whether the defendants had already agreed to transfer the suit properties to the plaintiffs. The answer was in the affirmative and counsel referred to the various correspondences over the years between the advocates.

(5) Whether the act of forum shopping should be construed against the defendants. Counsel relied on Republic & 3 Others vs CS Transport & Infrastructure & 5 Others Experte Kenya Country Bus Owners Association & 8 Others [2014] eKLR. The plaintiff's submitted that the defendants herein did not follow the process set out for recusal and ended up maligning the character and integrity of the Hon. Judge Bor when they applied for her recusal from handling this matter. This act should be construed against the defendants.

(6) The effect of the 1st defendant conceding to the plaintiffs' claim under oath during trial. It was submitted that the threshold set for a judgment on admission was set in Choirtram vs Nazare [1984] Eklr. The plaintiffs submit that the admission were clear, spontaneous and in equivocal. They have also put forward the case of Stephen Kibet Malakwen vs Benson Gateca Mbugua [2014] eKLR.

(7) Whether the plaintiffs are entitled to specific performance. To this the plaintiff's submitted that they have proved that the sale agreement remains intact and that they have carried out their part of the bargain thereunder. Stephen Mira Kamithi had saved Mr. James Aram Njau Kibue's land LR NO. 5989/17 from sale by public auction by paying the debt owed to Kenya Planters Coffee Union Limited. It is clear that the plaintiffs are entitled to an order of specific performance. They have put forward the case of Orion East Africa Limited vs Ite Farmers Cooperative Society Limited. It was further submitted that the physical location of the three plots is known. It is shown in the correspondence between the 1st defendant and her advocates on 28th February 2003, 13th May 2003 and with her surveyor as well as the valuation report filed by an expert witness Peter Kanyogo. The 1st defendant while under oath confirmed to the court that she was ready to sign the transfers of the suit plots to the plaintiffs hence the plaintiffs have succeeded in their claim for specific performance.

(8) As regards to the alternative prayer for damages and loss of bargain. It was submitted this prayer is not the plaintiff's preferred relief but in the unlikely event that the court decides to grant the alternative prayer for damages for loss of bargain, then the applicable principles were emphasized in Gami Properties Limited vs NSSF Board of Trustees & 2 Others [2018] ekLR. It was submitted that the firm of Circuit Valuers has in three report exhibited, confirmed the total value of the three plots as kshs.186 million as at 14th September 2015. That the plots have undoubtedly increased in value since then and that the figure of Kshs.186

million would be sufficient for damages for loss of bargain, the value of the property saved by Mr. Mira all those years ago for Mr. Kibue is worth far more than it was at the time the defendants have derived exponential benefits from it including putting up a shopping mall.

It is further the plaintiffs submissions that should the defendants fail to cause the said plots to be transferred to the plaintiffs within ninety (90) days from the date of the order the court do order the deputy registrar of the environment and land court to execute any documents required to vest the suit plots in the names of the plaintiffs. They also prayed for costs of the suit and interest.

The Defendant's submissions

20. They are dated 23rd June 2020. It is their contention that the suit is irredeemably time barred as it was filed over three years after the cause of action had lapsed. They have set out the following issues for determination:-

- (a) Whether the suit is statutorily time barred.*
- (b) Whether the suit property is subject to the provisions of the Land Control Act.*
- (c) Whether the lack of the consent from the Land Control Board rendered the sale agreement null and void.*
- (d) Whether the plaintiffs are entitled to the reliefs sought.*
- (e) Whether special or general damages are payable for alleged breach of a void contract.*

21. The defendants contend that the suit was filed without leave of court on 31st March 2010 more than fifteen (15) years after execution of the agreement whose completion date was 28th February 1995; thus the suit was filed over three (3) years after the cause of action had lapsed in the year 2007. They relied on section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya) and put forward the case of **Nelson Machoka Keraro vs Land Registrar Kisii & 3 Others [2019] eKLR** and **Margaret Wairimu Magugu vs Karura Investment Limited & 4 Others [2019] eKLR**. The late Stephen Kamithi Mari died on 11th April 1999, five years after the agreement was signed. After his death the administrators of the Estate had all the time upto 2007 but they did not seek specific performance. This suit having been filed more than 15 years after the cause of action means that this court has no jurisdiction to entertain it. They relied on the case of **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited [1989] eKLR**. Prayer (b) of the plaint is also statutorily time barred as it seeks damages based on the sale agreement dated 8th November 1994.

22. On the second issue, it was submitted that the transaction required the consent of the Land Control Board. They relied on a letter dated 10th June 2010 by J. M Amisi for the Commissioner of Lands confirmed that LR NO. 5989/14 falls within an area marked for agricultural use and is therefore controlled under the provisions of the Land Control Act, Cap 302 Laws of Kenya. They have put forward the case of **Gitonga Mwaniki & Another vs Annunciata Waithira Kibue [2010] eKLR**.

23. On the third issue counsel submitted that the vendor and purchaser both deceased, did not obtain consent from the Land Control Board thus rendering their agreement void for all intents and purposes. Reliance was placed on section 6(1) of the Land Control Act and on the decided case of **Gabriel Makokha Wamukota vs Sylvester Nyongesa Donati [1987] Eklr, David Sironga Ole Tukai vs Frances Arap Muge & 2 Others [2014] eKLR. Karuiki VS Kariuki [1982] Eklr Simiyu vs Watambamala [1985] Eklr.**

24. On the fourth issue it was submitted that the plaintiffs are not entitled to the reliefs sought. Further that there is no provision allowing this court to import the doctrines of equity due to the mandatory provisions of the Land Control Act. They have put forward the cases of **David Sironga (Supra) Karuri vs Gitura [1981] KLR 247; Onyango & Another vs Luwayi [1986] KLR 513; Gabriel Makokha (Supra); Hirani Ngaithe Githire vs Wanjiku Munge [1979] eKLR.**

25. On the fifth issue, counsel contended that general damages cannot be granted in this case as the agreement is void and relied on the case of **Kariuki vs Kariuki (Supra)**. Further that the court cannot award special or general damages because they were not agreed upon. They have put forward the case of **Danson Muriuki Kiharu vs Johnson Kabungo [2017] eKLR**. They further contend that general damages are not recoverable in case of alleged breach of contract and relied on the case of **Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] eKLR**. It is the late Stephen Kamithi Mira who breached the contract by failing to pay the full purchase price and not the vendor and as such he is not protected by the loss of bargain rule that damages paid to an aggrieved party in a breach of contract case should be sufficient to put that party in a position it would have been had the breach not occurred. The only option for the plaintiff is to call for the Kshs.950,000 from M/S Kamau Kuria & Co. Advocates who still holds it.

26. I have considered the pleadings and the evidence on record. I have also considered the written submissions made on behalf of the parties and the authorities cited. The issue for determination are:-

- (i) Whether this suit is statutorily time barred.*
- (ii) Whether the sale agreement was void for not obtaining land control board consent.*
- (iii) Whether the purported completion notice dated 28th June 2005 was in breach of the sale agreement and had no effect of terminating the agreement.*

(iv) *Whether the plaintiffs are entitled to the reliefs sought.*

(v) *Who should bear costs?*

27. It is the defendants' contention that the suit herein is time barred. The sale agreement between Stephen Kamithi Mira and James Aram Njau Kibue was executed on 8th November 1994. The plaintiffs on the other hand contend that time starts to run from 28th June 2006 when the defendants through their advocates wrote to the plaintiffs stating that they have decided not to sell the plots.

28. **Section 4(1)** of the Limitation of Actions Act provides that:-

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

29. I agree with the plaintiffs' submissions that time started to run from 28th June 2006 hence the suit is not time barred.

30. It is not in doubt that Mr. James Aram Njau Kibue was faced with imminent loss of his property namely LR NO. 5989/17 through sale by public auction by Kenya Planters Co-operative Union Limited. He pleaded with his friend and businessman Stephen Kamithi Mira to pay off his debt and receive in exchange three plot from LR NO. 5989/14. The said Stephen Kamithi Mira obliged. As a result of this arrangement the land parcel no 5989/17 was saved from public auction. The plaintiffs have exhibited receipt of acknowledgement of payments to Kenya Planters Co-operative Union Limited.

31. The second issue is whether the sale was void for not obtaining land control board consent. **Section 2** of the Land Control Act provides that:-

In this Act, unless the context otherwise requires— "agricultural land" means—

(a) land that is not within—

(i) a municipality or a township; or

(ii) an area which was, on or at any time after the 1st July 1952, a township under the Townships Act (Cap. 133, 1948 now repealed); or

(iii) an area which was, on or at any time after the 1st July 1952, a trading centre under the Trading Centres Act (Cap. 278, 1948 now repealed); or

(iv) a market;

(b) land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a nonagricultural purpose;

It is the plaintiff's contention that the 1st defendant admitted in her testimony that the suit property is rented out to tenants who are carrying out commercial activities. She also stated that the neighbouring property owned by herself has a large shopping mall built on it known as Ciata mall. This confirms the nature of the suit property and the surrounding properties. The plaintiffs have relied on a letter by E. M. Gikinya & Associates, who are licensed land surveyors and consultants. The same is dated 16th May 2006 forwarding the letter from the Director of Surveys. The said letter is dated 13th May 2016. It confirms that the location of LR NO. 5989/14 is within Ridgeways area, along Kiambu Road in Nairobi County. This confirms that the suit property is within Nairobi City County hence it is not agricultural land. It was therefore not subject to the Land Control Act. I have seen a letter in the defendants list of documents. The same is authored by one J. M. Amisi for commissioner of lands in which he states that the suit property is within an area marked for agricultural use. This contradicts the 1st defendant's (DW2's) testimony that the same is leased to tenants who are carrying out commercial activities. I am inclined to go by the letter from the Director of Surveys dated 13th May 2016 as the true position that the suit property is located within Nairobi County.

32. In the case of **Kiplagat Kotul vs Rose Jeber Kipngok [2019] Eklr**, the Court of Appeal held thus, in part:-

“We have deliberated on the reasoning by the trial court on the validity of the consent of the land control board. Certain pertinent facts are evident and proven from the record. It is indisputable that the sale agreement was entered into between the appellant and the respondent; pursuant to the agreement, the respondent received the purchase price of Kshs.700,000 from the appellant. The trial judge correctly held that the respondent is estopped from relying on the sale agreement. We agree with the judge and add that the doctrine of proprietary estoppel and contractive trust are applicable in the instant case and the respondent cannot renege from her contractual obligations as well as fiduciary duty imposed by law and equity. As Lord Bridge observed in Lloyds Bank PLC vs Rosset [1991] 1ac 107 132, A constructive trust is based on a common intention which is on the agreement arrangement or in understanding actually reached between the parties and relied on and acted on by a claimant.....”

I am guided by the above authority.

Similarly, in the case of **Willy Kimutai Kitilit vs Michael Kibet [2018] Eklr**, the Court of Appeal stated thus:-

“The Land Control Act does not, unlike section 3(3) of the Land Control Act, save the operation of the doctrines of constructive trust and proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different they both limit the freedom of contract by making the contract void and enforceable since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, are by analogy the equally apply to contracts which are void and enforceable for lack of consent of the Land Control Act especially where the parties in breach of the Land Control Board have unreasonably delayed in performing its contract. However, whether the court will apply the doctrine of constructive trust to a contract rendered void by lack of consent of Land Control Board will largely depend on the circumstances of each particular case”.

The court went further to state:-

“Thus, since the constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the court in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrine of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board”

The sale agreement dated 8th November 1994 would still be enforceable even though there was lack of consent from the Land Control Board. I have stated so even assuming that the suit property was agricultural land. I have however in the foregoing paragraphs found that the suit property is not agricultural land.

33. The conduct of the parties even after the demise of the parties to the agreement was such that they intended to complete the transaction. This is evident from the meetings held between the parties herein and the correspondences between their advocates. In a letter to the plaintiffs advocates dated 25th March 2002, M/S Kamau Kuria & Kiraitu Advocates for the defendants affirmed that:-

“Our instructions are that our client and your client have discussed that...the plots to come to your client will be carved out from LR 5989/14. Our instructions are therefore to request, which we hereby do, that you kindly let us have as soon as possible the original title documents in respect of LR 5989/16 and 17. She will register any discharges that require registration on these two. That in respect of LR NO. 5989/14 will be registered together with the transfers in favour of your client”

34. From the contents of this letter it is clear that the defendants were desirous of completing the transaction. It is therefore not true the assertions by DW2 that the M/S J. A. Guserwa Advocates were in possession of the documents because she had acted for his late father in other matters. It is clear from the correspondences between the parties that the defendants have all along been willing to complete the transaction. On 8th March 2002, the 1st plaintiff and the 1st defendant (both widows of the original parties) met in the presence of the 3rd defendant. They ratified the sale of three plots subdivided from LR NO. 5989/14 as had been agreed by their deceased husbands. It was resolved;

“Minute 2.1: Mrs. Kabue noted that she was not aware of the subdivisions of plot LR NO. 5989/14 but noted that Mrs. Kamithi can still have the plots she wants. These can be subdivided separately on the same parcel of land.

Minute 2.2: She can retain title for Plot LR NO. 5989/14 until the transaction is complete.

Minute 2.3: Mrs. Kamithi will get her plots surveyed and beacons placed”

35. This was a while after their husbands had passed on. The defendants cannot now claim they are not willing to transfer the plots to the plaintiffs. DW1 Annunciata Waithira Kibue (the 1st defendant) confirmed that LR NO. 5989/14 is now registered in her name and that of the 2nd defendant and 3rd defendants, her son and daughter respectively. The three are co-administrators of the Estate of the late James Aram Njau Kibue. When cross examined by Mr. Karungo for the plaintiffs DW1 admitted that they pay rates to Nairobi City County for the suit parcel LR 5989/14 and other parcels. She also confirmed that she was willing to sign the transfer forms for the said plots in favour of the plaintiffs. On 1st October 2019, when DW1 was reexamined by her advocate she changed the story and stated that she was not ready to sign any transfers in favour of the plaintiffs.

36. M/S J. A. Guserwa advocate who acted for both parties was clear that the suit property was situated in Nairobi hence the consent from Land Control Board was not required. It was therefore not provided for in the sale agreement.

37. Clause 4 of the sale agreement provides that:-

“The vendor will on or before the 28th February 1995 (but without any liability whatsoever to the purchaser should that date not be met) cause the property to be transferred to the purchaser upon receipt of the title for the sub plots upon registration of the transfer the purchaser’s advocates will release the sum of Kshs.1.38 million being the balance of the purchase’s price to the vendor forthwith whereupon the transaction will be treated as complete.”

38. It is clear that the balance of the purchase price was payable after the plots had been transferred to the plaintiffs. The letter dated 28th June 2006 by the defendants advocates is of no consequences and will not be construed to communicate termination of the said sale agreement. I find that the letter dated 28th June 2006 did not terminate the said agreement. No reasons are given for the said decision to rescind the agreement. The plaintiffs have committed no breach. It is their case that they are ready and willing to pay the balance of the purchase price as per the agreement.

39. The vendor was obliged to transfer the suit property to the purchaser before the purchaser would release the balance of the purchase price. The letter dated 28th June 2005 was therefore contrary to the terms of the agreement.

40. All in all I find that the plaintiffs have proved that the sale agreement ought to be enforced. I find that they are entitled to the reliefs sought. In the case of **Orion East Africa Limited vs Ite Farmers Cooperative Society Limited, ELC 283 of 2011** S. Okong’o J, quoted with approval, the supreme court case of Uganda in the case of **Manzoor vs Baram [2003] 2 EA 580** that was cited in **Thrift Homes Limited vs Kays Investment Limited [2015] eKLR**, the court stated as thus:-

“Specific performance is an equitable remedy grounded in the equitable maxim that “equity regards as done, that which ought to be done”. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the court have long considered damages an inadequate remedy for breach as a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance.

.....in the result, I would allow the appeal, and set aside the judgments and decrees of the Court of Appeal and the High Court and substitute judgment and decree of specific performance of the suit agreement, ordering the respondent to transfer the suit property to the appellant. I would order the respondent to pay to the appellant costs of this appeal as well as costs in both courts below”

41. In conclusion, I find that the plaintiffs have proved their case as against the defendants on a balance of probabilities. I enter judgment in their favour as against the defendants as follows:-

(a) That an order of specific performance is hereby issued compelling the defendants to complete the transaction in terms of clause 4 of the sale agreement dated 8th November 1994 and transfer plot nos 1, 2 and 19 situate within LR NO. 5989/14 to the plaintiffs within ninety (90) days from the date of this judgment, thereafter the plaintiffs shall release the balance of the purchase price to the defendants within thirty (30) days. In default the deputy registry Environment and Land Court is hereby ordered to execute all the necessary documents to effect transfers in favor of the plaintiffs.

(b) That the plaintiffs shall have costs of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 30th day of September 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Wambu for Mr. Karungo for the Plaintiffs

Ms Waweru for Mr. Nga’ng’a for the Defendants

Kajuju - Court Assistant