



**REPUBLIC OF KENYA**

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

**ELC NO. 136 OF 2006**

**VICTORIA MASINDE (Suing through her Attorney**

**BETTY TINDI MASINDE.....PLAINTIFF**

**VERSUS**

**LOIS CHESIRIKEN PSENJEN (Legal personal representative of**

**ENOCK MOKOIT PSENJEN (deceased).....1<sup>ST</sup> DEFENDANT**

**STEPHEN KIPLANGAT PSENJEN (Legal personal representative**

**of ENOCK MOKOIT PSENJEN (deceased).....2<sup>ND</sup> DEFENDANT**

**AMY CHELAGAT KIPTUL.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff filed a further amended plaint dated 20/11/2019 in court on 22/11/2019 in the present suit seeking for judgment for the following orders against the defendants:-

(a) An order of specific performance of the agreements dated 10/6/2003 and 30/9/2003 and letter dated 13/8/2003, and transfer of land measuring 0.40 Ha marked as mutation form as parcels E and D to be excised from LR No. 2116/571 Section V11, also known as KITALE MUNICIPALITY BLOCK 10/3 to be plaintiff, or

(b) In the alternative, a refund of Kshs.1,100,000/=, interest thereon at 21% per annum from the date of filing this suit and damages for breach of contract being 50% of the purchase price as provided for in the said agreements and the difference on the current market price to enable the plaintiff to purchase land of the same size (1 acre) in the same locality of Milimani Estate.

(c) Costs of this suit.

(d) Interest on the aggregate at court rates.

**PLEADINGS**

**The Plaint**

2. In the amended plaint, the plaintiff stated that vide two (2) agreements dated 10/6/2003 and 30/9/2003 and a letter dated 13/8/2003 she purchased the suit land from one **Enock Mokoit Psenjen** (*hereinafter also "Enoch"*) now deceased and whose estate is now represented in this suit by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The suit land comprised a part of all that parcel known as **LR No. 2116/571 Section VII Kitale** also known as **Kitale Municipality Block 10/3**. The plaintiff states that she purchase the land at a cost of **Kshs. 275,000/=** per quarter acre, the aggregate for one (1) acre being **Kshs. 1,100,000/=**. **Kshs. 825,000/=** was paid by way of remittance of local government land rates to the then Kitale Municipal Council while **Kshs. 275,000/=** was to be retained by the 3<sup>rd</sup> defendant in consideration for handling payment of land rates on behalf of the deceased in lieu of a quarter acre of land. The plaintiff paid **Kshs. 825,000/=** as rates and **Kshs. 275,000/=** directly to the 3<sup>rd</sup> defendant in lieu of the quarter acre which quarter acre therefore immediately became the plaintiff's. The entire land the plaintiff took

possession of was **0.40 Ha** and she began to erect developments thereon. She alleges that despite having fulfilled her obligations under the agreements the defendants have wrongfully failed and neglected to take any steps towards the completion of the said agreements and have repeatedly ignored requests to do so from her advocates, hence this suit.

### The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Further Amended Defence and Counterclaim

3. In their joint statement of further amended defence and counterclaim dated **20/11/2019** and filed in court on **22/11/2019**, the 1<sup>st</sup> and 2<sup>nd</sup> defendants deny that **Rose Masinde** is the plaintiff's lawful attorney. They deny that **Timothy Naibei Pello** (*hereinafter also "Timothy"*) was the deceased **Enoch Mokoit Psenjen's** attorney. Referring the main parcel in which the suit land is comprised as **LR No. 2116/571 Section VII Kitale**, they further deny having entered into the agreements pleaded by the plaintiff with the plaintiff or that the 3<sup>rd</sup> defendant entered into any agreements with the plaintiff and aver that they do not know the plaintiff. They also raise an alternative defence that the 3<sup>rd</sup> defendant had no legal or other authority to enter into the said contracts with the plaintiff and that the plaintiff is a trespasser who, having no legitimate claim to the suit land, should be evicted from the suit land and seek an order to that effect.

4. The 3<sup>rd</sup> defendant filed her defence on **30/8/2006**. It was not subsequently amended like the other parties' pleadings. She avers in that defence that she performed her part of the contractual obligations by paying the land rates on **9/6/2003**, and that it is the 1<sup>st</sup> defendant (**Enoch Mokoit Psenjen**, represented by one **Timothy Naibei Pello** by then) who had capacity to transfer the suit land and who should be held liable in the event there arose a breach of contract.

### Plaintiff's Evidence

5. **PW1, Rose Naswa Masinde**, the attorney of **Victoria Masinde** the plaintiff, testified on **28/11/2019**. Her evidence is that she is the attorney of **Victoria Masinde**, the plaintiff; that the plaintiff, her daughter, works abroad; that in **2003** the plaintiff returned to Kenya for her leave and sought to purchase the suit land which she intended to make her home. The plaintiff showed **PW1** the land which was in **Milimani Estate in Kitale**. By then the 3<sup>rd</sup> defendant was working for **Enoch**. **PW1** testified that she knew the 1<sup>st</sup> defendant, having schooled with her at **Kaimosi Girls High school**. The plaintiff had sent **PW1** some money to pay **Enoch**. She was aware that an agreement was entered into between the plaintiff and the 3<sup>rd</sup> defendant. Her further testimony was that the 3<sup>rd</sup> defendant came to **PW1's** home to report that they needed money urgently to pay for municipal council land rates. The plaintiff purchased one acre for **Kshs. 1,100,000/=**; the land was in 4 quarters and each was being sold for **Kshs. 275,000/=**.

6. **PW2, Nelson Odhiambo**, the County Land Registrar testified on **27/11/2019**. He produced several documents as exhibits. These included a Power of Attorney dated **6/3/2003** executed between **Enoch Mokoit Psenjen** and **Timothy Pello Naibei**, apparently authorizing the latter to subdivide and transfer land comprised in "**Kitale Municipality Block 10/3 (Originally 571)**" to several persons named therein. He testified that that Power of Attorney was duly registered. He also produced another Power of Attorney dated **6/6/2003** between **Enock Mokoit Psenjen** and **Timothy Naibei Pello** authorizing the latter to prepare a part development plan and subdivide the land and to transfer it to the several transferees named therein. He was also authorized to execute transfer forms to transfer land where **Enoch** had not done so. He also produced a third Power of Attorney executed between **Rose Naswa Masinde** and **Victoria Masinde**. He produced a certified copy of the register as evidence of the registration of the Powers of Attorney he had produced. The plaintiff then closed her case.

### The Defendants' Evidence

7. **DW1, Amy Chelagat Kiptui**, the 3<sup>rd</sup> defendant (*hereinafter also "Amy"*), testified on **28/11/2010**. She adopted her statement dated **21/11/2019** filed in this case. Her evidence is that she worked with **Enoch** for a long time in **Nakuru** at **KFA**; that after he retired they again met in **Kitale** in or about the year **2003** and he informed her that he was interested in selling land; that she introduced **Enoch** to **Timothy** who was a surveyor and whom she thought would have known potential buyers; that when **Enoch** and **Timothy** met she realised that they had known one another even before the introduction by **Amy**; that **DW1** was given one acre out of the whole land by **Enoch**; that **Enoch** pointed the plot out to her while in the company of **Timothy**; that they agreed that she pays for rates and survey fees for the land from the proceeds of sale of that land; that some subdivisions were to be transferred to **Enoch's** sons; while part of the land was to be transferred to her; that she sold the land allocated to her to the plaintiff who bought it in parts and the agreements between them were executed before an advocate who acted for **Enoch**; the plaintiff took possession of the land and has been in possession to date; **DW1** stated that she had accounted for all the money that she had gotten from the plaintiff and **Enoch** had no complaint at all and the parcels the plaintiff bought should be transferred to her or in the alternative she be refunded the consideration; however, she had no capacity to transfer the parcels to the plaintiff and only **Timothy** could do that; that **Timothy** is now deceased. According to her the plaintiff's claim is genuine. She stated that she had no role in the preparation of the Powers of Attorney and that **Enoch** instructed an advocate to prepare them. The 3<sup>rd</sup> defendant then closed her case.

8. **DW2, Stephen Kiplangat Psenjen** testified on **4/12/2019** on his own behalf and on behalf of the 2<sup>nd</sup> defendant. His evidence is that he is a co-administrator of **Enoch's** estate; that **Enoch** was his father; that he administers the estate jointly with his mother who is the 1<sup>st</sup> defendant herein; that his late father met his demise on **10/9/2012**; that he came to know of the defendants only from these court proceedings; that the deceased was not involved in the sale of land by the 3<sup>rd</sup> defendant; that **Kshs. 637,972/=** was paid as rates although the Council had not made any demand; holding a notice of assessment of land rates from the Municipal Council which is dated **11/6/2003**, he laughed off the allegations that rates could have been paid earlier on **6/6/2003**; he alleged that the 3<sup>rd</sup> defendant and **Timothy** were married to each other; he disputed the allegation that **Enoch** had donated any Power of Attorney to **Timothy**, and argued that there was no endorsement of registration of any Power of Attorney on the Grant to the land which he described as **LR 2116/571**. He maintained that the land register in respect of the **LR 2116/571** was in the **Nairobi Lands Office** and not in **Kitale**; he stated that a proper Power of Attorney would have been registered in **Nairobi** and not at **Kitale**. He stated that the land has never been surveyed or subdivided. He averred that the title to the land has never been converted from **RTA** to the **RLA** regime. He maintained that the 3<sup>rd</sup> defendant fraudulently sold the plaintiff non-existent land. He also stated that **Enoch** was a high ranking Government official of the level then the equivalent of a County Commissioner and could have refunded the amount that was paid by the 3<sup>rd</sup> defendant as land rates. He denied that **Elizabeth Tanui** ever was his father's advocate, and stated that his father used the firm of **Lel and Bungei Advocates**. He maintained that his father's character, as he knew him, did not allow him

to turn around and deny agreements he had entered into. He denied that his father had financial difficulties in or around the year **2003** and averred that he was a man of means. He stated that the plaintiff's mother visited his mother in Kapsokwony in **2004** and told her that she had bought part of the land. Then his mother travelled and went to his father and demanded why he was doing things in secret. Then his father came to Kitale and ploughed the land with a tractor to drive out the persons then on the land. The plaintiff's family then called the police and the driver of the tractor was arrested. However the police stated that the dispute amounted to a civil case. Thereafter while his father was readying himself to file an eviction case in court, the plaintiff filed this suit. The dispute then went before the District Commissioner and his father informed the District Commissioner that Timothy and the 3<sup>rd</sup> defendant were his friends. The matter was delegated to the DO 1 who visited the site and asked the parties to refrain from any other action pending the determination of the instant suit. However the plaintiff continued to build a house on the land and an injunction was sought in this suit; she however defied the injunction and went on with the construction. According to him the agreement dated **10/6/2003** was signed by the 3<sup>rd</sup> defendant and there is nothing to show that Timothy received the proceeds. He also denied that the deceased received any money from the plaintiff or from the 3<sup>rd</sup> defendant.

**9. DW3, Nelson Otieno Odhiambo, County Land Registrar**, testified on **9/12/2019**. His evidence is that he is the County Land Registrar, Trans Nzoia; that there is no file record in respect of parcel number **Kitale Municipality Block 10/3** in his land registry at Kitale; that **P.Exh 1(b)** the power of attorney purportedly between Enoch and Timothy was registered on **6/6/2003**. However upon cross-examination he averred that the Power of Attorney had never been revoked.

**10.** The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' case was then closed. Subsequently it was reported to court that the plaintiff's representative, Rose Masinde had met her demise soon after the completion of the hearing and one Betty Tindi Masinde was substituted in her stead and a further amended plaint dated **10/9/2020** bearing the particulars of such substitution was filed on **11/9/2020**.

### **SUBMISSIONS**

**11.** The plaintiff filed her submissions on **14/9/2020**. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their submissions on **16/9/2020**. The 3<sup>rd</sup> defendant did not file submissions. I have considered the pleadings, the evidence and the filed submissions.

### **DETERMINATION**

#### **The Issues and Determination**

**12.** The issues which arise for determination in this suit are as follows:

*(a) Do the numbers LR 2116/571 and Kitale Municipality/ Block 10/3 refer to the same parcel of land?*

*(b) Did Enock Mokoit Psenjen execute Powers of Attorney to Timothy Naibei Pello and if so did those powers of attorney entitle the 3<sup>rd</sup> defendant to receive any land?*

*(c) Did the 3<sup>rd</sup> defendant have power to dispose of the suit land to the plaintiff?*

*(d) Are the 1<sup>st</sup> and 2<sup>nd</sup> defendants bound by the terms of the powers of attorney donated to Timothy and the actions of Timothy and the 3<sup>rd</sup> defendant with regard to the suit land?*

*(e) What orders should issue regarding the suit and counterclaim?*

**13.** The above issues are discussed as hereunder.

#### **(a) Do the Numbers LR 2116/571 and Kitale Municipality/Block 10/3 refer to the same parcel of land?**

**14.** In his final testimony before this court the County Land Registrar stated that there is no file record for parcel number **Kitale Municipality Block 10/3** in the Kitale Land Registry. He insinuated that such land does not exist.

**15.** However it is clear from documents in the record that a Power of Attorney dated **6/6/2003** was registered between Enoch and Timothy against land that appears to have been then known by that number. Two Powers of Attorney were produced as **P. Exh 1 (a)** and **P. Exh 1(b)**. **P. Exh 1(a)** is a long and detailed computer generated document and refers to the land subject matter therein as "*Kitale municipality Block 10/3 (originally 571.)*" **P. Exh 1(b)** is a brief standard form for registration purposes with dotted slots for indication of the date received for registration, presentation book number and registration fees receipt and it refers to the land simply as "*Kitale Municipality Block 10/3.*" However the two documents name the same **5 persons** as beneficiaries of the intended subdivision of the main land parcel and transfer. These include the 3<sup>rd</sup> defendant. In this court's view the two Powers of Attorney are of the same effect.

**16.** The limited Power of Attorney between the plaintiff and her mother was also registered approximately one year later on **21/6/2004** in respect of the "*purchase and transfer of a plot*" and the land subject matter is cited in the particulars of registration of the Power of Attorney as "*Block 10/3.*" However the Site Value receipt dated **9/6/2003** reads "*LR no 2116/571 Section VI*" and the land rates clearance certificate dated the same date refers to the land as "*Plot No 2116/571 section VII.*" The certificate of compliance issued under the **Physical Planning Act Cap 286** and dated **21/7/2003** refers to the land as "*Kitale Municipality Block 10/3.*" The subdivision plan approval dated **8/7/2003** refers to the land as "*Kitale Block 10/3.*" Official receipts apparently issued by the Land Registry Kitale on **10/6/2003 (P. Exh 13)** refer to the land as "*Kitale Municipality Block 10/3.*"

17. **P. Exh. 1(a)** gives an insight into the affair at **paragraph (e)** where it states as follows:

**“(e). to apply for conversion or any other permission for the sale deeds being registered.”**

18. **P. Exh. 1(a)** is the first detailed document which shows that the parties were intent on dealing with land that was undergoing or had already undergone a transition from the **Registration of Titles Act (RTA)** regime to the **Registered Land Act (RLA)** regime and that pursuant to such transition or intended transition it had been assigned on RLA land reference. The plaintiff and the original defence of the 1<sup>st</sup> and 2<sup>nd</sup> defendants refer to the land as “*Kitale Municipality Block 10/3*,” with the original defence dated **18/9/2008** seeking a declaration that the plaintiff is a trespasser on that parcel who should be evicted. In the supporting affidavit to the application dated **27/2/2008** in the court record, Enoch avers that he is the registered and lawful owner of all that parcel of land known as “*Kitale Municipality Block 10/3*.” This reference must also be deemed a further admission of the transition. Though it was later amended at the instance of the administrators after the demise of Enoch that reference in the defence and affidavit, while taken in conjunction with other similar references in documentary evidence in this suit, must be taken to be an admission of the transition and evidence of the probable allocation of an RLA Reference Number to the land. The 1<sup>st</sup> and 2<sup>nd</sup> defendants can not therefore feign ignorance of the fact that the number **Kitale Municipality Block 10/3** refers to the real land subject matter of the suit. Further, it is inconceivable that the Land Registrar registered a Power of Attorney over land that was non-existent or a registration number that was non-existent or that the physical planning authorities who referred to the land by such reference in their documents were mistaken.

19. From the foregoing, this court is therefore convinced that the two numbers refer to one and the same parcel.

**(b) Did Enoch Mokoit Psenjen execute a Power of Attorney to Timothy Naibei Pello and if so did that Power of Attorney entitle the 3<sup>rd</sup> Defendant to receive any land?**

20. **Section 107** of the **Evidence Act** provides as follows:

**“107. Burden of proof**

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

21. The backbone of the plaintiff’s claim is the validity or genuineness of the Powers of Attorney dated **6/6/2003**. The burden of proof lay on the plaintiff in this case to establish that Enoch executed the Powers of Attorney and that they entitled the 3<sup>rd</sup> defendant to dispose of the land that she sold to the plaintiff.

22. **DW2’s** evidence vacillates between an admission that Timothy was assigned the task of surveying the land and the denial that the Powers of Attorney produced by the plaintiff are genuine. He did not however produce any document of his own to demonstrate the terms of Timothy’s engagement by Enoch and these two positions are irreconcilable.

23. The Powers of Attorney produced as **P. Exh. 1(a)** and **P. Exh. 1(b)** appear to have been executed in the presence of an Advocate. The 1<sup>st</sup> and 2<sup>nd</sup> defendants’ defence filed in the matter denies that Timothy was Enoch’s duly appointed Attorney. However the certified copy of the register referred to as “*Register of Powers of Attorney and Revocations*” produced by the County Land Registrar shows that a Power of Attorney executed between Enoch and Timothy was registered on **6/6/2003** and that it was not subsequently revoked. That was not the only power of attorney demonstrated to have been registered at the Kitale Land Registry: another power of attorney executed between the plaintiff and her mother appears to have been registered on **21/6/2004**. **DW3**, the County Land Registrar confirmed these facts. The Land Registry’s register of powers of attorney is therefore genuine in the opinion of this court and this court finds nothing to suggest that there was any irregularity about the registration of the powers of attorney produced as **P. Exh 1(a)** and **P. Exh 1(b)**.

24. In this court’s view, if the said Power of Attorney had not been properly donated by Enoch, one of the most obvious or natural options on the part of the deceased (and subsequently any administrator to his estate) was to report Timothy, the 3<sup>rd</sup> defendant and the plaintiff to the police so that they could be investigated and possibly charged with the offence of forgery or fraud. There is no evidence that such a report was ever made or that the documents were ever otherwise subjected to a criminal investigation. It would be quite strange that Enoch who had formerly held such a high level administrative office in government, and who from his high position this court presumes should have been quite enlightened on such affairs, did not find any need to report an offence of forgery affecting his valuable property so as to secure criminal justice.

25. **Section 109** of the **Evidence Act** provides as follows:

**“109. Proof of particular fact.**

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

26. This provision must be applied to test the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s allegation that Enoch never executed the Powers of Attorney in favour of Timothy.

27. This court finds it curious that numerous documents dealing in very prime land and alleged to have been witnessed by the same advocate within a span of one year, and which bear a visibly similar stamp mark could be dismissed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants as forgeries while, despite having had so much time and opportunity available to them, the defendants failed to have the advocate mentioned in the same documents summoned to denounce the same in sworn evidence in court; they also failed to prove that she is non-existent. They also failed to present any expert evidence in respect of the powers of attorney to establish that the signatures thereon were not genuine. These documents are: the Powers of Attorney between the Enoch and Timothy, the 2 agreements between Amy and the plaintiff, the acknowledgment by Amy of receipt of Kshs. 275,000/= from the plaintiff and the 3<sup>rd</sup> defendant's undertaking to pay rates. Calling the advocate mentioned in the documents as a witness in court to denounce them was the natural thing to do but the 1<sup>st</sup> and 2<sup>nd</sup> defendants failed to call her.

28. In **Serraco Limited v Attorney General [2016] eKLR** the Court of Appeal observed that “...proof is by evidence because averments are merely matters, the truth of which is submitted for investigation.” In the same decision, the Court of Appeal had this to say:

**“In Charterhouse Bank Ltd v. Frank N. Kamau, CA. No. 87 of 2014, this Court stated that it is not in every case where the defendant elects not to call evidence that the plaintiff is ipso facto entitled to judgment. The plaintiff must first make out a case, which if not rebutted by the defendant, would succeed on a balance of probabilities. It is also apt to point out that as stated by this Court in Kirugi & Another v Kabiya & 3 Others (supra), the effect of failure by the respondent to call evidence to controvert that adduced by the appellant makes it easier for the appellant to prove its case on a balance of probabilities.”**

29. In this court's view the plaintiff has on a balance of probabilities established that the power of attorney donated to Timothy by Enoch is genuine. Save for the 1<sup>st</sup> defendant's oral averments, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have failed to gather and present sufficient evidence before court to rebut that assertion. This court is therefore inclined to believe that the said documents were prepared and attested to by the said Advocate and that they bore a genuine intention of the parties at the time. Consequently, this court hence finds that a Power of Attorney was executed by Enoch and registered in favour of Timothy and it has not been revoked to date.

30. The question that arises next is whether the Powers of Attorney entitled the 3<sup>rd</sup> defendant to any portion of land from parcel number **Kitale Municipality Block 10/3**. The 3<sup>rd</sup> defendant is named as beneficiary in the Powers of Attorney. The evidence of **DW2** dispels any doubt regarding the fact that Enoch had assigned Timothy the task of subdividing the land and transferring the resultant portions to Enoch's sons and the 3<sup>rd</sup> defendant. However further to his challenge raised against the Powers of Attorney donated to Timothy, **DW2** maintains that the 3<sup>rd</sup> defendant sold the plaintiff non-existent land.

31. Nothing demonstrates the likelihood that the 3<sup>rd</sup> defendant was entitled to get some land from Enoch than an examination of the land rates payment issue. The plaintiff's counsel submits that the 3<sup>rd</sup> defendant was compelled to give a written undertaking to pay land rates on 31/3/2003 before Enoch could include her in the Powers of Attorney dated 6/6/2003 and I find this submission to be correct. The 3<sup>rd</sup> defendant avers that she paid the land rates out of her own funds and later recovered the amount from the sale proceeds.

32. **DW2** maintains that his father Enoch was not a signatory to **P. Exh. 7**, the undertaking by the 3<sup>rd</sup> defendant to pay rates on his behalf. However this court thinks that only the 3<sup>rd</sup> defendant needed commit herself to Enoch in that undertaking to apply the proceeds of a sale of part of the land, once she received them from the purchaser, to payment of rates accrued in respect of the same land.

33. Under **Section 109** of the **Evidence Act**, **DW2** and his mother were tasked with the burden of proof of the allegation that **DW1** never paid the land rates for parcel number **Kitale Municipality Block 10/3**. However, when asked for an account by counsel for the plaintiff, **DW2** could not show how the land rates were paid by his father. In this court's opinion, the mere issuance of a land rates payment receipt in the name of “Enoch Mokoit Psenjen” is not sufficient evidence that Enoch paid the land rates. The local authority would ordinarily not be expected to issue a rates payment receipt in the name of any other person save to one reflected as the proprietor of the land in their records. Given those facts and the lengthy period available to parties for preparation for the hearing, it is surprising that **DW2** and his mother did not present in court any evidence of a bank account cash or cheque withdrawal of the rates payment period, or, as the plaintiff's counsel submits, any other statement of account showing that Enoch had the means to and did indeed pay the land rates directly from resources other than the proceeds of the land sale; this is despite the fact that they have been in control of the affairs of Enoch's estate for quite some time now since his demise. **DW2** was also not able to demonstrate how Timothy's professional fees for the survey exercise were paid.

34. It is the understanding of this court that the surveyor and the 3<sup>rd</sup> defendant were intended by Enoch to run his errands regarding the land subdivision and sale and this could not have been for free as they have not been demonstrated to have been his permanent employees.

35. The only version that therefore appeals to this court to be true is that the two obtained their recompense for their trouble from by way of entitlement to a portion of land (in respect of Amy, a quarter acre which she subsequently sold to the plaintiff) and part of the proceeds of the sale of part of Enoch's land measuring  $\frac{3}{4}$  acres, (in respect of Timothy) respectively. The foregoing demonstrates that the answer to the question as to whether the 3<sup>rd</sup> defendant was entitled to any land from Enoch is in the positive.

36. This court is therefore persuaded that the evidence adduced by the plaintiff, **DW1** and **DW2** shows on the whole, and on a balance of probabilities, that Enoch donated a power of attorney to Timothy and that it entitled the 3<sup>rd</sup> defendant to a portion of Enoch's land.

***(c) Did the 3<sup>rd</sup> Defendant have power to dispose of the suit land to the Plaintiff?***

37. It is the 1<sup>st</sup> and 2<sup>nd</sup> defendants' submission that since the Power of Attorney was issued to Timothy and not the 3<sup>rd</sup> defendant, and that no land had been allocated or transferred to the 3<sup>rd</sup> defendant by the time the agreements between the 3<sup>rd</sup> defendant and the plaintiff were executed, and that the Power of Attorney did not stipulate the size of land the 3<sup>rd</sup> defendant was to be allocated, the 3<sup>rd</sup> defendant had no capacity to dispose of land to the plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> defendants also fault the plaintiff's agreements with the 3<sup>rd</sup> defendant for the

misrepresentation that the 3<sup>rd</sup> defendant owned the land, and that one of the agreements cites the wrong number that is “Kitale Municipality Block 3/10”, which they also acknowledge could be a typographical error.

38. However, this court finds that the land to be allocated to the 3<sup>rd</sup> defendant was said to have been pointed out by Enoch and demarcated, and the same was subsequently pointed out to the plaintiff and **PW1**. Both contracting parties therefore knew the real identity of the subject land on the ground, and the 3<sup>rd</sup> defendant’s equitable entitlement to a share of the land flowed from both the terms of the Power of Attorney donated to Timothy and from direct representation made to her by Enoch.

39. DW1’s capacity to dispose of the land was a prerequisite for obtaining monies by which land rates could be paid. Subdivision and conversion of the RTA title to the RLA regime were dependent on the payment of rates. Having found that the DW1 had in exchange for services acquired an interest in the land was entitled to land from the parcel owned by Enoch, it then follows that she had capacity dispose of her interest in the land to the plaintiff before a formal transfer to her was effected and her sale agreements with the plaintiff are valid and well founded. The issue of privity of contract between the plaintiff and Enoch does not therefore arise in this suit since DW1 was Enoch’s agent in this matter.

**(d) Are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants bound by the terms of the Powers of Attorney donated to Timothy and the actions of Timothy and the 3<sup>rd</sup> Defendant with regard to the suit land?**

40. The powers of attorney dated 6/6/2003 having been found genuine and valid, they granted Timothy the power of an agent representing Enoch for the purposes of subdivision of the land, applying for all planning permissions and transferring the land to the persons named therein. Express power to deal with the land was therefore given to Timothy.

41. However the power granted to the 3<sup>rd</sup> defendant lies in a greyer area as far as disposal of part of the suit land is concerned. Nonetheless, bearing in mind that it has been established that the 3<sup>rd</sup> defendant was assigned, and undertook the responsibility of paying for land rates, which payment would enable the re-planning process, it is an implied conclusion that she was authorized to dispose of a portion of the suit land for the purpose of raising the funds. Such disposal would in this court’s view not be unilaterally revocable at the instance of Enoch, or, as it has come to pass, the administrators of his estate after his demise.

42. The plaintiff’s counsel submits that Enoch impliedly ratified the actions of Timothy and the 3<sup>rd</sup> defendant when he failed to file a notice of revocation of the powers of attorney, failed to object to the sale of the suit land in his lifetime by seeking rescission and injunction orders and also by his failure to lodge a complaint with the police regarding the two persons. As it has been proved by the plaintiff that the powers of attorney are genuine this court agrees with that submission. The inevitable conclusion is that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are bound by the actions of Timothy and the 3<sup>rd</sup> defendant.

**(e) What Orders should issue regarding the suit and Counterclaim?**

43. Specific performance is an equitable remedy. Equity regards as done that which ought to have been done. In real property transactions, this court has discretion to order either specific performance or a refund where all substantial terms of the contract, including full consideration, has been paid and an applicant has taken possession of the suit property, and the position of the purchaser has been considerably altered on the basis of reliance on the express or implied representations by the vendor.

44. In the Court of Appeal decision in **George Njenga Kagai v Samuel Kabi Njoroge & another [2019] eKLR** it was observed as follows:

**“In Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti, Civil Appeal No. 165 of 1996 this Court stated thus:**

**“Gicheru, JA (as he then was): When the appellants sought the relief of specific performance of sale of the respondent’s property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement... It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. 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 performance, but dismisses the claim...The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the court of equity would refuse to grant specific performance and would leave the parties to their other rights...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 these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”.**

45. The plaintiff’s counsel has also cited the decision in **Reliable Electrical Engineering Ltd Vs Mantrac Kenya Ltd (2006) eKLR** where Maraga J (as he then was) stated as follows:

**“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.**

**The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”**

46. This court concurs with the above holding. In the instant case the 3<sup>rd</sup> defendant was a mere agent of the true vendor, Enoch. In this court’s view the plaintiff has established that the 3<sup>rd</sup> defendant was entitled to land from Enoch by virtue of the Powers of Attorney. The plaintiff has established on a balance of probabilities that she entered into land purchase agreements with the 3<sup>rd</sup> defendant in respect of the land which the 3<sup>rd</sup> defendant had been given by Enoch, part of it for sale and part of it as a gift, and that she paid the consideration in full, that is **Kshs. 1,100,000/=** to the 3<sup>rd</sup> defendant. The plaintiff is also in possession and this court finds that orders of specific performance would not occasion the 1<sup>st</sup> and 2<sup>nd</sup> defendants any severe hardship.

47. It therefore is the final conclusion of this court that there exists a valid contract binding Enoch’s estate, through the 3<sup>rd</sup> defendant as Enoch’s agent, to the plaintiff which is capable of being enforced by an order of specific performance.

48. The final issue arising and salient to the grant of an order of specific performance is that this court takes judicial notice that the land is located in the upmarket estate of Milimani in Kitale town and it would be difficult if not impossible for the plaintiff to obtain land of equivalent value elsewhere even if a refund and damages were awarded as a remedy in this case.

49. Consequently, 14 long years after this litigation commenced, this court finds that the plaintiff is not a trespasser on the land and that she should not therefore be evicted. Instead, the plaintiff’s suit must succeed and the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s counterclaim should fail. I therefore enter judgment for the plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally in this suit and I issue the following final orders:

**(a) The plaintiff’s suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants succeeds and the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ counterclaim is hereby dismissed;**

**(b) An order of specific performance is hereby issued to compel the 1<sup>st</sup> and 2<sup>nd</sup> defendants to complete the agreements dated 10/6/2003 and 30/9/2003 and the letter dated 13/8/2003, and to transfer a portion of land measuring 0.40 Ha out of all that land parcel known as Kitale Municipality Block 10/3, also known as LR 2116/571 - Kitale which portion is occupied by the plaintiff to the plaintiff and in default the Deputy Registrar of this court shall execute all documents necessary to finally effect such transfer.**

**(c) Only the 1<sup>st</sup> and 2<sup>nd</sup> defendants shall bear the costs of this suit.**

It is so ordered.

**Dated signed and delivered at Kitale via electronic mail on this 30<sup>th</sup> day of September, 2020.**

**MWANGI NJOROGE,**

**JUDGE, ELC KITALE.**