REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 40 OF 2019

(*FORMERLY MILIMANI HIGH COURT CIVIL CASE NUMBER 1587 OF 1999)*

NAKURU CANNERS LIMITED ..... PLAINTIFF

VERSUS

PATRICK OMANI NYAMWEYA ..... 1ST DEFENDANT

GEOFFREY MAKANA ASANYO ..... 2ND DEFENDANT

(Both trading as PAGE INVESTMENT COMPANY)

KURKAN COMPANY LIMITED ..... 3RD DEFENDANT

COMMISSIONER OF LANDS ..... THIRD PARTY

CONSOLIDATED WITH MILIMANI HIGH COURT CIVIL CASE NO. 1588 OF 1999

INTERNATIONAL TRADE AGENCIES LIMITED ..... PLAINTIFF

VERSUS

PATRICK OMANI NYAMWEYA ..... 1ST DEFENDANT

GEOFFREY MAKANA ASANYO ..... 2ND DEFENDANT

(Both trading as PAGE INVESTMENT COMPANY)

KURKAN COMPANY LIMITED ..... 3RD DEFENDANT

COMMISSIONER OF LANDS ..... THIRD PARTY

JUDGMENT

Introduction

Case Number 1587 of 1999

1. This Judgment concerns two suits, namely Milimani High Court Civil Case Number 1587 of 1999 and Milimani High Court Civil Case No. 1588 of 1999. In Milimani High Court Case No. 1587 of 1999, the Plaintiff, Nakuru Canners Limited sought judgement against the Defendants jointly and severally for:

a) The sum of Kshs. 22,655,000/= being the amount due and owing from the Defendants to the Plaintiff under the sale agreement plus interest thereon at the rate of 2% per month from 8th June 1996 till payment in full.

b) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

2. The Plaintiff's case is that the 3rd Defendant was the owner of the suit property, L.R. Number 209/12984, Nairobi measuring 5 hectares pursuant to a letter of allotment dated

23rd February 1996. It was averred that by a sale agreement dated 8th March 1996, the 1st and 2nd Defendants, acting for themselves and as alleged authorised agents of the 3rd Defendant, agreed to sell the property to the Plaintiff for Kshs. 9,000,000.

3. According to the Plaintiff, it was agreed that Kshs. 4,500,000 would be paid by the Plaintiff to the Defendants on or before the signing of the agreement and that the Defendant would in turn pay the Commissioner of Lands the sum of Kshs. 2,110,060.00 and that the balance of the purchase price would be paid in two equal instalments.

4. The Plaintiff contended that upon further verbal requests by the Defendants to increase the purchase price, it paid a total sum of Kshs. 22,655,000; that the payments were made on the understanding that the Defendants were pursuing issuance of title documents for the said property and that in breach of the agreement and its verbal variations, the Defendants failed to deliver the title, thereby frustrating completion of the agreement.

5. The alleged breaches were particularized as follows: failure to obtain title to the property; failure to secure the requisite consent to transfer, rates clearance and land rent certificates; failure to meet the costs of procuring such consents; failure to refund monies received; and refusal, despite repeated demands, to complete the agreement or refund advances made.

6. In their Defence, the 1st and 2nd Defendants denied that the 3rd Defendant owned L.R. Number 209/12984, asserting instead that it belonged to Page Investment Company, a partnership of the 1st and 2nd Defendants.

7. The Defendants contended that the 3rd Defendant had been invited to join in the allotment of 23rd February 1996 but declined; that the agreement with the Plaintiff was entered into solely in their personal capacity, not as agents of the 3rd defendant as claimed. While denying receipt of Kshs. 22,655,000, they admitted receiving Kshs. 4,500,000, allegedly to process title documents from the Commissioner of Lands.

8. The Defendants denied that they were in breach of the contract and that they were issued a notice of repudiation. They maintained that they took all reasonable steps to obtain the title documents, but that the Commissioner of Lands declined, without explanation to release them.

Case No. 1588 of 1999

9. In Milimani High Court Case No. 1588 of 1999, the Plaintiff, International Trade Agencies Limited (ITAL), by way of an Amended Plaint, prayed for:

> ***a) The sum of Kshs. 8,870,000/= being the amount due and owing from the Defendants to the Plaintiff under the sale agreement plus interest***

thereon at the rate of 2% per month from 8th June 1996 till payment in full.

b) Costs of this together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

10. The Plaintiff's case was that the 3rd Defendant was the owner of L.R. No. 209/12983, Nairobi, pursuant to an allotment letter of 23rd February 1996. By an agreement dated 8th March 1996, the 1st and 2nd Defendants, allegedly acting both for themselves and as authorised agents of the 3rd Defendant, agreed to sell the said property to the Plaintiff at Kshs. 3,500,000.

11. The Plaintiff averred that pursuant to verbal variations requested by the Defendants, it paid a total of Kshs. 8,870,000, on the understanding that the Defendants were pursuing issuance of title documents. However, the Defendants allegedly failed to deliver the title, frustrating completion of the agreement.

12. Particulars of breach included: failure to obtain title; failure to procure the requisite consent to transfer, rates and land rent certification; failure to pay for and levy for the procurement of the consent to transfer the property in the name of the purchaser and failure to refund monies received notwithstanding the aborted transfer.

13. The Plaintiff further pleaded that it issued a notice of repudiation of the agreement and elected to sue for a refund rather than pursue specific performance.

14. In their Defence, the 1st and 2nd Defendants denied that the 3rd Defendant owned L.R. No. 209/12983, averring instead that it belonged to Page Investment Company, a partnership of the 1st and 2nd Defendants. They stated that although the 3rd Defendant had been invited to join the allotment, it declined.

15. The Defendants admitted entering into the agreement with the Plaintiff but stated that it was in their personal capacity and not as agents of the 3rd Defendant. They denied receipt of Kshs. 8,810,000 as claimed, but admitted receipt of Kshs. 1,750,000 to facilitate the processing of title documents from the Commissioner of Lands.

16. They denied breach and repudiation, insisting that they had taken steps to secure the title but that the Commissioner of Lands declined to release the same without explanation. They stated that they would join the Commissioner of Lands and Attorney General as parties to this suit.

17. Upon being granted leave, the 1st and 2nd Defendants issued a Third Party Notice against the Commissioner of Lands in Civil Suit No 1587 of 1999 and 1588 of 1999. They sought indemnity on the basis that despite several requests, the Commissioner of Lands had failed and/or refused to issue or

release the title documents for the subject properties to enable them complete the sale transactions.

18. In its Statement of Defence, the Third Party, the Commissioner of Lands, denied the claim for indemnity. It averred that according to its records, LR No. 209/12983 had been allocated to Kurkan Company Limited and Page Investment Limited vide a Letter of Allotment Ref. 46549 dated 23rd February 1996.

19. It was the Commissioner's case that by an undated letter, the allottees accepted the offer and made the requisite payments amounting to Kshs. 862,633; that an official receipt No. D441191 dated 20th March 1996 was duly issued; that Page Investment Ltd, on behalf of the allottees, applied for a refund of the legal fees on the ground that the allocated plot was not available for the intended use and that acting on this request, the Commissioner of Lands processed payment vouchers No. 0187 and 0188 dated 18th June 1996 for the said amount in favour of Page investment Limited.

20. Thereafter, it was averred, the letter of allotment Ref. 46549/XIV dated 23rd February 1996 was formerly cancelled vide letter Ref. 179594/8 dated 29th May 2000.

21. The Third Party contended that a letter of allotment is merely an offer, subject to conditions including payment of the requisite dues. It was averred that once an allottee seeks and obtains a refund of payments made, that offer automatically lapses.

22. Consequently, the Commissioner maintained that there existed no contractual obligation between the government and the allottees in respect of LR 209/12983 as the offer had lapsed.

23. The Third Party further contended that there were no outstanding obligations between its office and the Defendants over the suit properties. It asserted that the request for consent to transfer LR Nos 209/12983 and 209/12984, and the consent to transfer that was issued vide the letter dated 11th March 1996 lapsed as the Defendants did not meet the conditions stipulated therein.

24. It was also the Commissioner of Lands position that he was not a party to any of the alleged sale transactions undertaken between the parties. He maintained that any information he provided was in good faith and pursuant to his statutory duties and that the allocation of the suit property, its withdrawal and subsequent cancellation were all procedurally done and no fraud or negligence could be imputed against his office.

25. In their Reply to Third Party's Defence, the Defendants denied any knowledge of the alleged letter requesting a refund. They also denied having received any refund or being notified of the cancellation of the letter of allotment dated 23rd February 1996, contrary to what the law required.

26. The Defendants further contended that the said undated refund request, the payment vouchers No. 0187 and 0188 dated 18th June 1996 and the cancellation letter dated 29th May 2000 were forgeries and fraudulent documents. They maintained that the same were irregularly and illegally procured with the aim of perpetrating fraud and defeating their lawful interest in the suit property.

Hearing and Evidence

27. PW1, Shantilal V. Shah, a Director of Nakuru Canners Limited, testified on the basis of his statement dated 18th July 2017. He also relied on the documents at pages 172-228 of the Plaintiff's Bundle, which he produced as PEXB1.

28. In his statement, PW1 stated that he was directly involved in the agreements that resulted in these suits. He confirmed that the Directors of Nakuru Canners Limited are Messrs K.S. Bedi, T.K. Patel and himself. He also indicated that the directors of International Traders Agencies Limited are Messrs Jaswinder S. Bedi, H.M. Patel and G.V. Shah.

29. PW1 testified that he first met the 2nd Defendant, Geoffrey Asanyo, in the mid 1970s when the latter worked with Marshalls Limited as a salesman, before later establishing his own firm, Kwanza Motors. He further stated that the 2nd Defendant introduced him to the 1st Defendant.

30. According to PW1, the 1st and 2nd Defendants, trading under the name Page Investments Company, entered into a sale

agreement with Nakuru Canners Limited in March 1996 in respect of L.R. No. 209/12984. The agreement indicated that the Defendants were acting as agents of the 3rd Defendant.

31. PW1 averred that the Defendants represented themselves as owners and vendors of the suit properties; that the Defendants agreed to sell the suit properties at a consideration of Kshs. 9,000,000; that the Plaintiff was to pay Kshs. 4,500,000 on or before execution of the agreement and that out of this, the Defendant would pay the Commissioner of Lands the sum of Kshs. 2,110,060.

32. According to PW1, the balance was to be paid in two equal instalments: the first upon obtaining the requisite consent to transfer, a deed plan and the duly executed transfer; and the second upon registration of the transfer in the plaintiff's favour.

33. It was further his testimony that the agreement provided for interest at the rate of 2% per month on any delayed payments by the Plaintiff; that under the contract, the Defendants were obligated to procure the title documents, the consent to transfer, valid rates and land rent clearance certificate and to meet any levies for procurement of the consent to transfer and that the Plaintiffs were to take possession of the land upon execution of the agreement.

34. It was his testimony that another term was that should the Defendants fail to transfer the suit property, they would

refund all monies received together with interest at 2% per month; that it was also agreed that the Defendants would obtain title within two months, failing which the purchaser was entitled to register a caveat at its discretion and that both agreements were drawn by Messrs Bowry Maraga & Company Advocates, who acted for both parties.

35. PW1 noted that the 1st and 2nd Defendants admitted entering into the agreement with Nakuru Canners Limited. He added that International Trade Agencies Limited (ITAL) similarly entered into an agreement with the 1st and 2nd defendants dated 8th March 1996 in respect of L.R. No. 209/12983, on terms similar to those in the Nakuru Canners contract, for the consideration of Kshs. 3,500,000.

36. PW1 testified that at the time of signing the agreement, L.R. Number 209/12984 did not have a title. To demonstrate beneficial ownership, it was stated, the Defendants produced the original Letter of Allotment dated 23rd February 1996, addressed to Kurkan Company Limited and Page Investment Company; deed plans for the property and a letter dated 11th March 1996 from the Ministry of Lands & Settlement addressed to Page Investment & others granting consent to transfer L.R. Nos 209/12983 and 209/12984.

37. PW1 informed the court that the Defendants also handed to them receipts of Kshs. 35,077 and Kshs. 2,046,542.50/= allegedly paid pursuant to the allotment; a letter dated 17th June 1996 from the Ministry of Lands to the Director of

Metereology seeking clarification on its interest in the land; and the Director's reply dated 4th July 1996.

38. PW1 stated that Nakuru Canners Limited relied on these representations and paid substantial sums to the Defendants. He testified that the Plaintiffs paid an aggregate of Kshs. 31,525,000 for both suit properties, particularised as follows:

1. ***Two Petty Cash Voucher dated 28th February 1996 each for Kshs. 500,000/= received by Geoffrey Asanyo as deposit towards LR 209/12983 and LR 209/12984.***
2. ***Petty Cash Voucher dated 6th March 1996 for Kshs. 100,000/= received by Geoffrey Asanyo as part payment towards purchase of LR 209/12984.***
3. ***Petty Cash Voucher dated 9th March 1996 for Kshs. 6,000,000/= received by Patrick Onami Nyamweya as part payment towards purchase of LR 209/12983 and LR 209/12984.***
4. ***Petty Cash Voucher dated 10th April 1996 for Kshs. 400,000/= received by Geoffrey Asanyo as part payment towards purchase of LR 209/12983***
5. ***Bankers Cheque No. 5139 dated 8th March 1996 for Kshs. 5,000,000/= paid to Patrick Onami Nyamweya.***
6. ***Bankers Cheque No. 5273 dated 19th March 1996 for Kshs. 3,500,000/= paid to Patrick Onami Nyamweya.***

7. ***Bankers Cheque No. 5291 dated 20th March 1996 for Kshs. 6,150,000/= paid to Patrick Onami Nyamweya***
8. ***Bankers Cheque No. 61660 dated 18th March 1996 for Kshs. 7,500,000/= payable to Page Investments Co.***
9. ***Bankers Cheque No. 4210 dated 18th March 1996 for Kshs. 1,875,000/= payable to Page Investments Co.***

39. PW1 highlighted that the Defendants admitted receipt of Kshs. 1,750,000 and Kshs. 4,500,000 from each of the Plaintiffs but had not refunded the same.

40. PW1 testified that the Defendants failed to transfer LR No. 209/12984 to Nakuru Canners Limited within two months, contrary to the Agreement. They also failed to procure the title, the consent to transfer, Rates Clearance Certificate and Land Rent Clearance Certificate.

41. PW1 further testified that on 20th December 1996, he wrote to the Defendants demanding that they transfer the title within ten days or refund the monies already paid; that on 28th January 1998, Messrs Bowry Maraga Advocates similarly wrote to the Defendants asking them to perform their part of the agreement and that by a letter dated 27th May 1999, the Plaintiff's Advocates, Messrs Salim Dhanji and Company Advocates wrote to the Defendants repudiating the Agreements and demanding a refund of the monies together

with the agreed interest of 2% per month. The Defendants, however, neither refunded the monies nor paid the interest.

42. In cross-examination, PW1 stated that the Company had relied on the trust it had with Mr. Asanyo and did not investigate the directorship of Page Investment Limited. He reiterated that the initial purchase price was Kshs. 9,000,000 out of which Kshs. 2,110,060 was to be remitted to the Commissioner of Lands by Mr. Asanyo. He testified that the deposit of Kshs. 4,500,000 was paid at the signing of the agreement, while the second deposit of Kshs. 2,250,000 was to be paid upon the consent to transfer being obtained and the final deposit of Kshs. 2,250,000/= was to be paid after the transfer.

43. PW1 stated that he never saw the said consent and did not inquire about it, as he trusted Mr. Asanyo. Despite the absence of the consent and transfer, the Plaintiffs paid the balance, although L.R. No. 209/12984 was never transferred to them and no title was ever issued in their favour.

44. PW1 also testified that they had inspected the land with the agent, but never took possession. Although the agreement entitled Nakuru Canners to register a caveat in default of transfer, they did not do so. He stated that it was Geoffrey Asanyo, with whom he had had business dealings with since 1975, who showed him the land. He confirmed that he visited the land in 1996.

45. PW1 admitted that the Plaintiff did not conduct due diligence. He testified that he never confirmed the authenticity of the Letter of Allotment with the Commissioner of Lands and that the Letter of Allotment indicated that the allottees were the 3rd Defendant and Page Investment Company.

46. He stated that the Plaintiff did not verify how the two entities were issued with the allotment. Whereas the allotment letter indicated that the payable amount was Kshs. 862,633, PW1 maintained that under the agreement, the amount payable to the Commissioner of Lands was Kshs. 2,110,060 for LR No. 209/12984. He referred to a receipt at page 218 of the Plaintiff's Bundle, which he said, had been given to him by Mr. Asanyo.

47. PW1 further stated that he was later informed that the Letter of Allotment for LR No. 209/12984 was cancelled but no refund was ever made. He testified that he had never seen a title for the said property, nor was there ever an instrument of transfer of the allotment in favour of Nakuru Canners. He reiterated that the Plaintiff never took possession because they had no title.

48. It was also his testimony that in 2005, there were telecommunication masts erected on the land. He stated that even in 1996, when they visited the land, the masts were already in place. He confirmed that they did not inquire from

Mr. Asanyo whether the Defendants had put up the masts, but were assured that the title was being pursued.

49. PW1 denied ever seeing the document at page 6 of the Defendant's bundle. He also denied having paid any monies directly to the Government. In re-examination, PW1 clarified that the Plaintiff issued two cheques in the name of Page Investments Limited and that Page Investments Limited never furnished them with bank statements showing receipt of the monies paid.

50. PW2, Jaswinder Bedi, a Director of International Trade Agencies Limited (ITAL), relied on his Witness Statement dated 31st July 2017. He also relied on the documents which were produced as PEXB1.

51. PW2 confirmed that the Directors of ITAL were himself, H.M. Patel, and G.V. Shah. He further confirmed that the Directors of Nakuru Canners Limited were Messrs K.S. Bedi, T.K. Patel, and Shantilal V. Shah.

52. PW2 testified that he first met the 2nd Defendant, Geoffrey Asanyo, in the mid-1970s when the latter was working with Marshalls Limited as a salesman, before later establishing Kwanza Motors; that the 1st Defendant, Patrick Nyamweya, was introduced to him by Mr. Asanyo and that the Defendants entered into a sale agreement with ITAL in March 1996 for the sale of L.R. No. 209/12983, Nairobi.

53. PW2 averred that in the said agreement, the 1st and 2nd Defendants acted both in their personal capacities and as agents and representatives of the 3rd Defendant; that the Defendants held themselves out as vendors; that it was agreed that the Defendants would sell ITAL (the 2nd Plaintiff) LR No. 209/12983 at the agreed price of Kshs. 3,500,000 and that a deposit of Kshs. 1,750,000 was to be paid to the Defendants, who would in turn remit Kshs. 862,633/= to the Commissioner of Lands. The balance was to be paid in two instalments: the first upon obtaining consent to transfer, a deed plan and a registrable transfer; and the second upon registration of the transfer in favour of ITAL.

54. It was further his testimony that the agreement provided that the Defendants would be entitled to interest at the rate of 2% per month if the Plaintiff delayed in paying the purchase price on their respective due dates; that ITAL was to take possession upon signing of the agreement and that the property was sold subject to the conditions in the Letter of Allotment, but otherwise free of all encumbrances.

55. According to PW2, it was further agreed that in the event that the transfer was not completed, the Defendant would refund all monies received together with interest at 2% per month and that the purchaser was also entitled to register a caveat should the Defendants fail to obtain the title within two months.

56. PW2 confirmed that both agreements, between the Defendants and ITAL and between the Defendants and Nakuru Canners, were drawn by Messrs Bowry Maraga & Company Advocates, who acted for both parties. He also stated that the Defendants admitted having entered into both agreements.

57. PW2 further testified that at the time of signing the agreement with ITAL, the Defendants had no title; that they nevertheless represented to ITAL that they were the beneficial owners of LR No. 209/12983 and produced various documents in support, including the Letter of Allotment dated 23rd February 1996 addressed to Kurkan Company Limited and Page Investment Company; deed plans for the property; a letter dated 11th March 1996 from Ministry of Lands and Settlement granting consent to transfer Plot Nos LR 209/12983 and 209/12984.

58. It was his evidence that the Defendants were also in possession of receipts for Kshs. 35,077 and Kshs. 2,046,542.50 purportedly paid pursuant to the allotment; a letter dated 17th June 1996 from the Ministry of Lands to the Director of Meteorology regarding interest in the land and the Director's response dated 4th July 1996.

59. PW2 stated that ITAL and Nakuru Canners relied on these representations and paid substantial amounts of money to the Defendants, as particularised in PW1's testimony, totalling Kshs. 31,525,000. He added that although the

Defendants admitted receipt of Kshs. 6,250,000/= from the Plaintiffs, they have not refunded the said sums.

60. PW2 stated that the Defendants breached their obligations by failing to transfer the property to the Plaintiff within two months and by failing to procure title and completion documents. He testified that on 20th December 1996, Mr. Shantilal Shah wrote to the Defendants demanding transfer within ten days or a refund and that Plaintiff's Advocates thereafter wrote to the Defendants on 27th May 1999 repudiating the Agreements and demanding the refund together with the agreed interest of 2% per month.

61. In cross examination, PW2 clarified that ITAL's claim relates to LR No. 209/12983. He stated that he retained the original letter of allotment, which named Kurkan Co. Ltd and Page Investment as allottees, although Kurkan was not a party to the agreement. He confirmed the purchase price was Kshs. 3,500,000, of which he paid a deposit of Kshs. 1,750,000, and that Kshs. 862,633 was paid to the Commissioner of Lands while the balance of Kshs. 875,000 was never paid as the transfer was not completed.

62. PW2 testified that he inspected the land and found it vacant except for some masts; that the property was adjacent to the other parcel; that he was uncertain of the exact location of the masts and that ITAL's claim is for a refund together with interest.

63. PW2 confirmed having paid Kshs. 3,500,000 pursuant to the agreement. He admitted that ITAL did not register a caveat. He was referred to a petty cash voucher of Kshs. 500,000 payable to Geoffrey Asanyo at page 191 and confirmed the payment. He testified that the 1st and 2nd Defendants were Directors in Page Investment and Kurkan Company. He claimed Kshs. 8,800,000 in total, being payments made pursuant to verbal variations of the purchase price.

64. PW2 further testified that the land had been surveyed, though they did not ascertain by whom. He stated that ITAL was to pay Kshs. 875,000/= upon obtaining a deed plan, which he received from Mr. Asanyo. He confirmed visiting the land in 1996 before the purchase. He denied knowledge of any interest by the Meteorological Department, although he later learnt that the land was reserved as an antennae site.

65. DW1, Patrick Nyamweya, the 1st Defendant, testified on his own behalf and on behalf of Page Investment. He relied on his witness statements dated 20th November 2o12 and 21st November 2018.

66. In his statement dated 20th November 2012, DW1 stated that he and Geoffrey Asanyo were partners in Page Investment. He averred that neither LR No. 209/12984 nor LR No. 209/12983 were ever owned by Kurkan Limited, and that neither him nor Mr. Asanyo were directors or shareholders in Kurkan Limited.

67. According to DW1, the suit properties were at all times the property of Page Investment, by virtue of a Letter of Allotment dated 23rd February 1996. He admitted receiving Kshs. 4,500,000 out of which Kshs. 2,110,060 was paid to the Commissioner of Lands to facilitate issuance of title documents in favour of the Plaintiffs.

68. DW1 maintained that on 11th March 1996, the Commissioner of Lands issued consents to transfer the suit properties; that on 2nd April 1996, Page paid the sum of Kshs. 2,046,542 for each property to the Commissioner of Lands to enable him to issue titles to the Plaintiff, while the rent had been paid earlier on 20th March 1996 and that it was on this basis that the Defendants filed Third Party proceedings against the Commissioner of Lands seeking indemnity.

69. In his statement dated 22nd November 2018, DW1 testified on behalf of Page Investment Limited and Kurkan Company Limited, whose authority he stated he had. He confirmed that LR No. 209/12983 was allocated to Kurkan Company Limited and Page Investment, which was a partnership and not a registered Limited Company. He denied knowledge of the undated letter at page 5 of the Third Party's Bundle of documents seeking a refund of Kshs. 862,633 for L. R No. 209/12983. He insisted that neither him nor Mr. Asanyo authored that letter.

70. DW1 contended that the undated letter and the documents in support of the alleged refund were contradictory and

deliberately procured to defeat their lawful interest in the property. He gave the following reasons:

a) *That the undated letter sought a refund of Kshs. 862,633/= allegedly paid for LR No. 209/12984 whereas receipt No.*
D441191 dated 20th March 1996 related to LR No. 209/12983.

b) *That the total allotment premium for LR No. 209/12984 was Kshs. 2,110,060 and not Kshs. 862,633.*

c) *That the Letter of Allotment was issued jointly to Kurkan Company Limited and Page Investment Limited who jointly paid Kshs.862,633. The request for refund by Page Investment alone was, therefore, irregular and illegal.*

d) *That under Government procedure, a refund of allotment monies required surrender of the original receipt and allotment letter. He asserted that Page Investment Company was never asked to submit those originals, which remained in the possession of the Plaintiff since execution of the sale agreement.*

71. DW1 denied that Page Investment Company ever sought a refund on the ground that the land was unavailable. He noted that the Director of Kenya Meteorology had already confirmed to the Commissioner of Lands that the department no longer had interest in the property. He further testified that neither him nor Mr. Asanyo had ever received formal

communication of any cancellation of the allotment. He contended that the letter of cancellation addressed only to Kurkan Company Limited to the exclusion of Page Investment was invalid.

72. DW1 argued that the Third Party cannot disassociate itself from the transaction yet it had issued the Letters of allotment, received the premium, receipted the payments and issued consents to transfer.

73. In cross-examination, DW1 stated that Kurkan Co Ltd had been invited by Page Investment to be a co-allottee but failed to meet the conditions. He did not, however, produce a list of directors of the 3rd Defendant.

74. DW1 confirmed that the Defendants received a total of Kshs. 6,250,000 being Kshs. 4,500,000 for one parcel of land and Kshs. 1,750,000 for the second parcel of land. He stated that he could not recall the exact modes of payment as the transactions had occurred nearly thirty years earlier. He testified that the monies were paid to Page Investment Limited and collected either by himself or Mr. Asanyo.

75. When referred to the specific payments alleged by the Plaintiffs, DW1 responded that around the same time, the parties had many other financial dealings, and the payments presented by the Plaintiffs could have related to other transactions.

76. DW1 asserted that under the agreement, the Defendants were to procure the title, consent to transfer, and the rates and rent clearances. He contended that the responsibility of the vendor was to make payments, which they did and that it was ultimately the Ministry of Lands and the Commissioner of Lands who bore responsibility for procuring titles.

77. DW1 stated that the Defendants took out Third Party proceedings precisely because they sought indemnity. He admitted receipt of Kshs. 6,500,000/= for the land, which he had not refunded to the Plaintiffs.

78. Regarding the Letters of Allotment, DW1 contended that any complications in processing titles ought to attract indemnity from the Government. He confirmed that the stand premium was Kshs. 862,633. He denied authorship of the letter at page 6 of the Third Party's Bundle, allegedly written by Page Investment.

79. DW1 testified that the Defendants had also been allocated LR No. 209/12984, for which they paid the premium of Kshs. 2,100,000. However, he stated, the Commissioner of Lands never issued them with a title. He reiterated that the refund amount of Kshs. 862,633 related to LR No. 209/12983 as per receipt no. D441191, yet the letter of refund referred to LR No. 209/12984, with respect to which the receipt the Defendants received was D441193. He denied knowledge of whether any monies were processed.

80. When referred to vouchers in favour of Page Investment for Kshs. 3,500 and Kshs. 819,133, DW1 argued that the total premium of Kshs. 862,633 was jointly paid by Page Investment and Kurkan Company Limited, and that any refund should have been processed in favour of both parties and not Page Investment alone.

81. DW1 denied ever receiving the cancellation letter for the allotment. He testified that they had submitted an informal transfer, thereby bringing the Commissioner of Lands into the transaction.

82. DW2, Gordon Odeke Ochieng stated that he was the Director of Land Administration at the Ministry of Lands, a position he had held after serving in the Ministry for thirty-five (35) years. He adopted his Witness Statement as his evidence-in-chief and relied on documents dated 30th October 2018, which were produced as Third Party's Exhibit No. 1.

83. DW2 explained the normal procedure for registration of new grants. He stated that it is a lengthy process which ordinarily entails: an application for allocation; confirmation of the availability of the plot; issuance of a Letter of Allotment; payment of the requisite fees; survey of the plot; issuance of a deed plan by the Director of Surveys; processing and execution of the new grant by the Commissioner of Lands; and, ultimately, registration by the Registrar of Titles.

84. DW2 reiterated the facts pleaded in the Third Party's Defence. He stated that LR 209/12983 was allocated to Kurkan Company Limited and Page Investment Limited; that the allottees accepted the offer and paid Kshs. 862,633 for which receipt Ref. No. D441191 dated 20th March 1996 was issued; that Page Investment Co. Ltd later applied for a refund; and that the Commissioner of Lands processed the refund through two payment vouchers dated 18th June 1996.

85. DW2 further stated that the offer to Kurkan Company Ltd and Page Investment contained in the letter of allotment Ref. 46549/XIV dated 23rd February 1996 was formally cancelled vide letter ref. 179594/8 dated 29th May 2000. According to him, the request for consent to transfer LR 209/12983 and LR 209/12984 and the subsequent consent to transfer granted by the Commissioner of Lands on 11th March 1996 lapsed because the Defendants did not comply with the stipulated conditions.

86. In cross-examination, DW2 maintained that the Government refunded the monies to the allottees. He stated that whereas the cancellation letter by the Commissioner of Lands referred to LR 209/12983, the application for refund by the Defendants referred to LR 209/12984. He further noted that while LR No. 209/12983 was jointly allocated to Kurkan Co. Ltd and Page Investment, the letter for refund was issued in the name of Page Investment alone.

87. According to DW2, the refund processed was for Kshs. 862,633 supported by receipt Number D441191, which bore the names of the allottees and the reference to LR No. 209/12983. He acknowledged, however, that there was an inconsistency regarding the L.R. Numbers. He stated that his testimony concerned LR No. 209/12983 and that he had not encountered any documentation relating to LR 209/12984.

88. DW2 further stated that he had no evidence showing that the monies were actually received nor did he have a formal cancellation letter of the allotment. He explained that the practice was that the original receipt issued to the allottee had to be surrendered before the refund could be effected. He could not confirm whether a refund could have been processed without the return of the original receipt.

Submissions

89. Counsel for the Plaintiffs submitted that although the Defendants had represented themselves as beneficial owners of the suit properties, they were unable to procure titles as promised. Counsel pointed out that there appeared to be a “blame game” between the Defendants and the Third Party.

90. It was submitted that whereas the Third Party asserted that the Defendants sought and obtained cancellation of the allotments, with the result that the properties reverted to the Government, the Defendants in turn contended that it was the Third Party which failed to complete the allocation and issue titles.

91. It was submitted that the 1st and 2nd Defendants entered into the agreements both personally and as authorised agents of the 3rd Defendant. Counsel argued that the agreements were subsequently varied to increase the purchase price. Reliance was placed on the handwritten agreements at pages 226 and 227 of the Plaintiffs' Bundle, which reflected the escalation of price.

92. Counsel stated that the handwritten documents were duly signed by the 2nd Defendant, whose signatures were not denied in Court, and that they specifically identified the properties, the acreage, and the price per acre. It was submitted that under the revised terms, L.R. No. 209/12983, measuring 4.94 acres at Kshs. 1,750,000/= per acre, was valued at Kshs. 8,645,000/=; and L.R. No. 209/12984, measuring 12.36 acres at Kshs. 1,750,000/= per acre, was valued at Kshs. 21,630,000 and that the total amount of Kshs. 30,275,000/=, was the amounts actually paid.

93. Counsel submitted that the Plaintiffs proved payment of Kshs. 31,525,000, a fact not dislodged in cross-examination nor by counter-evidence. Reference was made to the documentary evidence at pages 191–203 of the Plaintiffs' Bundle, showing that the Defendants received both bankers' cheques and cash payments.

94. Counsel submitted that the 1st Defendant admitted in evidence that he used to receive monies from the Plaintiffs

and specifically confirmed receipt of Kshs. 6,250,000. It was further submitted that the bankers' cheques alone amounted to Kshs. 24,024,000/=, all of which could be traced through the banking system. Counsel noted that bank statements were produced to show that the cheques were cleared and funds left the Plaintiffs' accounts.

95. Counsel emphasised that the Defendants did not adduce evidence of the exact payments they received from the Plaintiffs. It was argued that none of the instalments pleaded by the Defendants corresponded with the actual payments made. Counsel contended that, had the purchase price not been increased, the Plaintiffs would not have paid the additional sums, nor would the Defendants have accepted them. It was further argued that no evidence was produced to justify the Defendants' acceptance of larger sums for any other reason. In addition, no allegation was made, nor proof offered, that the signatures on the payment vouchers were forged.

96. To buttress the argument that the agreements were validly varied, Counsel relied on the Court of Appeal decision in ***748 Air Services Limited vs Theuri Munyi [2017] KECA 419 (KLR),*** where the Court upheld a variation of purchase price, initially made verbally but subsequently confirmed through handwritten notes and reinforced by conduct. Counsel submitted that similarly, in the present case, the variation was evidenced by signed handwritten agreements and by

actual payments, which the Defendants received and retained.

97. Counsel further submitted that the Plaintiffs had proved breach of contract. He argued that the Defendants failed to complete the sale and to transfer the suit properties despite having received the full purchase price. Counsel stressed that the Defendants neither alleged nor proved that the Plaintiffs were at fault. Instead, the Defendants attempted to shift responsibility to the Third Party.

98. Counsel argued that even if the Third Party failed to perform its duties, that did not excuse the Defendants from their own contractual obligations. On the contrary, they expressly provided a remedy in favour of the Plaintiffs in the event of non-performance by the Defendants. Counsel pointed out that no evidence was tendered to show that the Defendants actively pursued the Commissioner of Lands for issuance of titles or that they were obstructed by the Third Party.

99. Counsel noted that the Plaintiffs issued a repudiation notice through their Advocates vide a letter dated 27th May 1999, which was dispatched by registered post.

100. Counsel relied on several authorities on breach of contract and remedies.

101. These included ***Hydro Water Well (K) Limited vs Nelson Mukara Sechere & 2 others [2015] eKLR***, where the Court explained the nature of breach and the rationale for

awarding relief; ***Raghbir Singh Chatte vs National Bank of Kenya Limited [1996] eKLR***; ***Abdul Gayur Yusuf Hasham vs National Hospital Insurance Fund [2010] eKLR***; and ***Stephen Karanja Kibuku vs Safaricom Limited [2018] eKLR***.

102. Counsel submitted that the Plaintiffs had proved entitlement to compensation, having paid substantial sums for land which was never transferred. It was argued that to allow the Defendants to retain the monies would amount to unjust enrichment.

103. On interest, Counsel submitted that the claim for 2% per month was grounded on Clause 7 of the Sale Agreements. It was pointed out that the agreements were executed in March 1996, with initial payments made in the same month, and that the Defendants had undertaken to complete the transfers within two months. Counsel submitted that computation of interest from 8th June 1996 was therefore reasonable, and that interest ought to accrue until the principal sum is fully paid.

104. Counsel concluded by noting that the Plaintiffs have been deprived of their money for nearly twenty-nine (29) years. They argued that fairness demanded that they be awarded contractual interest to compensate for the prolonged deprivation. Counsel estimated that the interest due for the period 8th June 1996 to 12th June 2025 stood at Kshs. 219,600,558.90/=. Reliance was placed on the case of ***Paul***

***Ng'ang'a Mbuthia vs Anastacia Wariara Wagiciengo [2020] KEELC 1416 (KLR)*.**

105. Counsel for the 1st and 2nd Defendants submitted that there was no dispute that the Plaintiffs and the Defendants entered into two Sale Agreements, both dated 8th March 1996, with respect to L.R. Nos. 209/12983 and 209/12984.

106. With respect to LR No. 209/12983, Counsel submitted that the Defendants received Kshs. 1,750,000 out of the agreed purchase price of Kshs. 3,500,000. It was submitted that, in accordance with the contract, the Defendants adduced evidence showing that they paid the Commissioner of Lands Kshs. 862,633, as evidenced by the official receipt at page 7 of the Third Party's Bundle and confirmed by the testimony of DW1.

107. Counsel further pointed out that PW1, Mr. Shantilal Shah, acknowledged in his witness statement and under cross-examination that such a payment was made. Counsel submitted that the balance left after remittance to the Commissioner was Kshs. 887,367.

108. Counsel argued that the Plaintiff's only produced two documents in relation to LR No. 209/12983, namely the petty cash voucher for Kshs. 500,000 at page 192 and the voucher for Kshs. 400,000 at page 195. It was submitted that this sum of Kshs. 900,000 was part of the Kshs. 1,750,000 admitted by the Defendants, and that in the absence of any mutual

written variation of the Sale Agreement, the maximum recoverable amount under that contract was Kshs. 3,500,000.

109. Turning to LR No. 209/12984, Counsel submitted that the Defendants admitted receipt of Kshs. 4,500,000 out of the total purchase price of Kshs. 9,000,000. Counsel stated that the Defendants produced evidence that they remitted Kshs. 2,110,060 to the Commissioner of Lands as required by the Agreement. This, it was submitted, was evidenced by the receipt dated 2nd April 1996 at pages 51 and 218 of the Plaintiffs' Bundle, which was also confirmed by PW1 both in his statement and in cross-examination. Counsel submitted that the balance left after the remittance was Kshs. 2,389,940.

110. Counsel stated that the only documents produced in relation to LR No. 209/12984 were the vouchers of Kshs. 500,000 at page 192, the voucher for Kshs. 100,000 at page 193 and the voucher of Kshs. 6,000,000 said to relate to both properties, although the apportionment of the latter sum was unclear. Counsel argued that these payments adds up to Kshs. 6,600,000 and that, in any event, the maximum recoverable amount under the Agreement was Kshs. 9,000,000.

111. Counsel submitted that both PW1 and PW2 admitted that there was no written or oral variation of the two sale agreements. It was argued that the handwritten agreements relied on by the Plaintiffs were dated 28th February 1996,

before the Sale Agreements were signed on 8th March 1996 and that the purchaser named therein was Flamingo Bottlers limited, a stranger to the present contracts. Counsel argued that those notes were irrelevant to the proceedings.

112. Counsel further submitted that entries 6 to 10 in the Plaintiff's schedule of payments bore no relevance to the two Sale Agreements. It was urged that it was inconceivable and unjustifiable for the purchase price to escalate from Kshs. 9 million to Kshs. 22,655,000 and from Kshs. 3,500,000 to Kshs. 8,870,000 without any formal documentation.

113. Counsel contended that if the Plaintiffs indeed made payments over and above the contractually agreed sums, then they voluntarily assumed a foreseeable risk or entered into an unenforceable bargain, for which they should not seek the sympathy of the Court.

114. Counsel submitted that courts have consistently held that they are not in the business of writing contracts for parties. Reliance was placed on ***Pius Kimaiyo Lagat vs Co-operative Bank of Kenya Limited (2017) KECA 152 (KLR***, ***National Bank of Kenya Limited vs Pipeplastic Samkolit(K) Ltd & Another (2001) KECA 362 (KLR)*** and ***John Mburu vs Consolidated Bank of Kenya (2018) KECA 796 (KLR)*.**

115. It was submitted that the agreements were signed in 1996, long before the coming into force of **Section 3(3)** of the **Law**

of Contract as amended, which required that all contracts for disposition of land be in writing.

116. Counsel argued that prior to that amendment, agreements for the sale of land could be inferred by acts of part performance where the purchaser had taken possession, continues in possession and done other acts in furtherance of the contract. It was, however, submitted that the Plaintiffs never took possession, and thus the protection under the old **Section 3** was not available to them. Counsel relied on the case of ***Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) KECA 342 (KLR)*.**

117. Counsel also distinguished the case of **748 Air Services Limited vs Theuri (2017) KECA** arguing that unlike in that case, the parties herein did not mutually agree to vary the contracts. Counsel further argued that **Hydro Water Well (K) Limited v Nelson Mukara Sechere & 2 others** related to general damages for breach of contract, whereas in the present case, the Plaintiffs' claim was for special damages.

118. Counsel also submitted that unlike in ***Raghbir Singh Chatte vs National Bank of Kenya Limited [1996] eKLR*,** the Defendants had not made mere denials but had substantially answered the Plaintiffs' claim and even taken out Third Party proceedings for indemnity. It was further submitted that the authorities of ***Abdul Gayur Yusuf Hasham vs National Hospital Insurance Fund [2010] eKLR*** and ***Stephen Karanja Kibuku vs Safaricom***

Limited [2018] eKLR concerned unjust enrichment, which had not been pleaded by the Plaintiffs.

119. Counsel argued that the contractual obligations of the Defendants were limited to making the requisite payments under the allotment letters. The actual processing, registration, and issuance of titles, it was submitted, was a statutory duty reserved for the Commissioner of Lands, a fact known to the Plaintiffs. Counsel argued that failure by the Commissioner to issue titles could not amount to breach by the Defendants.

120. On indemnity, Counsel argued that the Third Party only responded to the Defendants' claim in relation to L.R. No. 209/12983, but did not answer or defend the claim in relation to L.R. No. 209/12984. It was submitted that the claim for indemnity regarding L.R. No. 209/12984 was therefore undefended and ought to be allowed.

121. Counsel further submitted that the Third Party's own witness admitted to irregularities and inconsistencies in the documents produced regarding the alleged refund for L.R. No. 209/12983. It was argued that the Third Party had not demonstrated any breach by the allottees, and had failed to explain the delay of four years before purporting to cancel the allotment.

122. Counsel submitted that the law obligated the Commissioner of Lands to issue titles upon compliance with the terms of the allotment. It was therefore untenable for the Commissioner

to deny responsibility. Reliance was placed on Section 9 of the Government Lands Act, which governed the matter at the material time.

123. Counsel placed further reliance on ***Ali Mohamed Dagane vs Hakar Abshir & Others ELC 65 of 2017*** and ***Mbau Saw Mills Limited vs The Commissioner of Lands ELC No. 59 of 2008***, where the Courts held that once an allottee complied with the conditions in the letter of allotment, the Commissioner of Lands assumed responsibility for issuance of title.

124. Counsel therefore submitted that the Defendants' claim for indemnity against the Third Party was merited and had been proved on a balance of probabilities, the reasons advanced for non-issuance of titles having no basis in fact or law.

Analysis and Determination

125. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the following arise as the issues for determination:

a) *Whether the contracts between the Plaintiffs and the Defendants were varied to increase the purchase price.*
b) *Whether the Defendants breached their contractual obligations.*
c) *Whether the Commissioner of Lands is liable to indemnify the Defendants for failing to issue titles*

d) *Whether the Plaintiffs proved payment of the full sums claimed*

e) *Whether the Plaintiffs are entitled to contractual amount and interest.*

126. It is not in dispute that these proceedings arise from sale agreements entered into on 8th March 1996 between the Plaintiffs and the 1st and 2nd Defendants, partners in Page Investments Company Limited. The said Defendants executed two sale agreements: the first, to sell to Nakuru Canners Limited Land Reference Number 209/12984 measuring five (5) hectares at a consideration of Kenya Shillings Nine Million (Kshs. 9,000,000/=); and the second, to sell to International Trade Agencies Limited (ITAL) Land Reference Number 209/12983 measuring two (2) hectares at a consideration of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/=).

127. The said contracts expressly described the suit properties as being owned by Page Investment Limited and Kurkan Limited. Although the 1st and 2nd Defendants initially denied the 3rd Defendant's ownership in their pleadings and in the witness statement of DW1 sworn on 20th November 2012, they later conceded to such ownership through a subsequent witness statement sworn on 21st November 2018, and in cross-examination.

128. The Defendants' beneficial interest in the properties arose from Letters of Allotment issued on 23rd February 1996. The Plaintiffs concede that the Defendants duly paid the sums

stipulated therein. In respect of LR No. 209/12983, payment is evidenced by Receipt No. D441191 dated 20th March 1996 for Kshs. 862,633. For LR No. 209/12984, payments are evidenced by Receipt No. D441193 of 20th March 1996 for Kshs. 35,077 and Receipt No. D442727 of 2nd April 1996 for Kshs. 2,046,542.50, amounting to Kshs. 2,081,619.50.

129. The Plaintiffs' claim is for a refund of Kshs. 31,525,000, being Kshs. 22,655,000 for Nakuru Canners and Kshs. 8,870,000 for ITAL. Their contention is that these sums were paid in excess of the purchase price stipulated in the sale agreements, pursuant to alleged oral variations thereto.

130. The Plaintiffs further aver that they repudiated the contracts and served notices of rescission dated 27th May 1999 in respect of each property.

131. In response, the Defendants admit receipt of only Kshs. 6,250,000 from the Plaintiffs: Kshs. 4,500,000 from Nakuru Canners and Kshs. 1,750,000 from ITAL. They deny the existence of any oral variation of the purchase price and reject the allegation of additional payments.

132. It is not in contest that to date, no titles have been issued in respect of the suit properties. The Defendants attribute this to the alleged failure of the 3rd Defendant, the Commissioner of Lands, from whom they seek indemnity.

133. The 3rd Defendant, on its part, contends that the Letter of Allotment for LR No. 209/12983 was cancelled at the request

of Page Investment Ltd, while the offer under the Letter of Allotment for LR No. 209/12984 lapsed due to non-compliance with its conditions.

Whether the contracts were varied to increase the purchase price

134. It is a settled principle that a court cannot rewrite a contract for parties. This was articulated by the Court of Appeal in ***National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR*** where the Court stated:

> ***"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved…"***

135. Similarly, in ***Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd [2017] eKLR***, the Court reiterated:

> ***"We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."***

136. Written contracts, being self-contained, can only be construed and interpreted on the basis of the contents therein. As the Court of Appeal in ***Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited [2017] eKLR*** explained:

"This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it…."

137. In the present case, the validity of the written contracts has not been challenged and there are no allegations of coercion, fraud or undue influence. The question is whether the Plaintiffs discharged the burden of proving that the parties orally amended their written contracts.

138. The Plaintiffs produced handwritten notes allegedly evidencing such oral agreements. However, these notes were dated 28th February 1996, before the execution of the subject sale agreements, and were between Page Investment Limited and Flamingo Bottlers Limited. No nexus was shown between Flamingo Bottlers Limited and the Plaintiffs. These documents therefore have no probative value in the present dispute.

139. The sale agreements between the Plaintiffs and the Defendants were executed on 8th March 1996. The Plaintiffs contend that these contracts were subsequently amended vide verbal/oral agreements between the parties. Notably,

neither of the contracts stipulates that variations to the contractual terms must be in writing.

140. While the particular dates of these oral agreements have not been stated, all the payments were made by the Plaintiffs between 28th February 1996 and 20th March 1996, as evident from the Plaintiffs' documentary evidence. This was before the amendment to **Section 3(3)** of the **Law of Contract Act** of 2003.

141. **Section 3(7)** of the **Law of Contract Act** excludes the application of **Section 3(3)** to contracts made before the commencement of the subsection. Prior to the amendment of 2003, **Section 3** of the **Law of Contract Act** in 2003 read as follows:

> ***"(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;***
>
> ***Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-***
>
> ***(1) Has in part performance of the contract taken possession of the property or any part thereof; or***

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

142. The law pertaining to agreements in respect to land before the amendments of 2003 was considered by the Court of Appeal in the case of ***Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR*** as follows:

"25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in1991. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part

performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act."

143. **Section 98 (iv)** of the **Evidence Act** permits a party to prove the existence of any distinct subsequent oral agreement to rescind or modify a contract, except where it is required by law to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents.

144. Similarly, in the English Court of Appeal case ***Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others***, which was quoted with approval by the Court of Appeal in ***National Bank of Kenya Limited vs Hamida Bana & 103 others [2017] KECA 151 (KLR),*** Lord Justice Beatson stated as follows:

"Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever

terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct."

145. This court is duly guided. The Plaintiffs bore the burden of proving that the alleged oral variation was accompanied by acts of part performance. They did not discharge this burden, as no evidence was led to show possession, development, or any other act unequivocally referable to the alleged variation. Mere payment, particularly where disputed, is insufficient.

146. Unlike in ***748 Air Services Limited vs Theuri [2017] eKLR***, upon which the Plaintiffs place reliance, no evidence has been placed before this Court to demonstrate conduct by the parties from which an agreement to vary the written terms may be inferred. Equally, no documentary material has been tendered acknowledging or recording such variation.

147. This court therefore finds that the Plaintiffs have failed to prove that the contracts they entered into with the Defendants were varied by oral agreement to increase the purchase price.

Whether the Defendants breached their contractual obligations

148. As already observed, the duty of this Court is to examine the rights and obligations of the parties as expressed in the agreements they voluntarily executed.

149. Clause 2 of the two sale agreements is in identical terms. It provides:

> ***"It shall be the sole responsibility of the Vendor to procure and obtain the Title Documents of the said land, the requisite consent to transfer and valid Rates and Land Rent Clearance Certificates and to pay for the procurement of the consent to transfer the property in the name of the Purchaser."***

150. The Plaintiffs concede that the 1st and 2nd Defendants procured the consent to transfer in respect of LR Nos. 209/12984 and 209/12983 from the Ministry of Lands through a letter dated 11th March 1996. That consent was, however, expressly conditional upon settlement of all outstanding ground rent and rates, payment of consent fees at two percent (2%) of the consideration, and submission of an informal transfer duly executed before an advocate.

151. The Defendants have asserted that they paid the sums required under the respective Letters of Allotment. For LR No. 209/12983, the payment of Kshs. 862,633 is evidenced by receipt number. D441191 issued within the stipulated timelines. In respect of LR No. 209/12984, receipts tendered confirm payment of Kshs. 2,081,619.50 against a total demand of Kshs. 2,110,060, leaving a balance of Kshs. 28,440.50. No evidence was placed before this Court to demonstrate that this balance was ever cleared.

152. The Court of Appeal in ***Waterfront Holdings Limited vs Kandie & 2 Others (Civil Appeal No. 88 of 2019) [2023] KECA 1223 (KLR),*** addressed the effect of non-payment of the stand premium within the thirty (30) days stipulated in a letter of allotment. The Court pronounced itself as follows:

> ***"From the foregoing, the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment... The question however is whether the failure to comply with the requirement for payment of stand premium automatically cancels the offer or something more is required to be done by the allotting authority to denote that cancellation. To answer this question, we need to interrogate the legal status of the letter of allotment... Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed."***

153. Guided by the above holding, and applying it to the facts herein, it is evident that the Defendants did not meet the mandatory conditions set out in the letter of allotment relating to LR No. 209/12984. Their failure to make the requisite payments within the acceptable period meant that the allotment was never perfected into a binding interest in land. Consequently, the letter of allotment lapsed by operation of law and conferred no enforceable rights upon the Defendants.

154. The Defendants similarly failed to place before the Court proof of payment of consent fees, which, based on the agreed consideration, ought to have been Kshs. 180,000 for LR No. 209/12984 and Kshs. 70,000 for LR No. 209/12983. Equally, no evidence was adduced that the two agreements were ever forwarded to the Ministry of Lands, or that the Defendants made any follow-up to ensure compliance with the conditions attendant to the consent.

155. The Defendants also claimed to have obtained Land Rent and Land Rates Clearance Certificates. However, no copies of such certificates were produced in evidence for the Court's consideration.

156. In the circumstances, while the Defendants contend that they discharged their obligations under Clause 2 of the agreements, the evidence tendered falls short of establishing full compliance. The admitted shortfall in the stand premium,

the absence of proof of payment of consent fees, and the failure to produce clearance certificates or evidence of follow-up with the Ministry of Lands demonstrate that the Defendants did not perform their contractual duty to procure and obtain the necessary title documents and statutory clearances.

Whether the Commissioner of Lands is liable to indemnify the Defendants for failing to issue titles

157. The law on indemnity is settled. It arises either by express contractual provision or by statute. In the Court of Appeal case of ***Sango Bay Estates Ltd & Others v. Dresdner Bank Ag (No.2) [1971]E.A. 307***, the following passage (Brett, M.R. at p. 101) in ***Speller vs Bristol Steam Navigation Co. (1884), 13 Q.B.D. 96*** was quoted with approval:

> ***"When by law may a person be entitled to indemnity? It is only when there is a contract express or implied that he shall be indemnified ...and that it can only apply to the case where a third person has contracted to indemnify the defendant".***
>
> ***...***
>
> ***"In a third party proceeding, it is for the defendant to satisfy the Court that there is a 'proper question to be tried as to liability of the third party'. In other words, the defendants in***

the instant case, must satisfy the Court that they have a right of indemnity against GHH, and that that right arises out of the contract between Sango Bay and GHH. In the absence of such a contract they must fail."

158. The principle was expounded in ***Eastern shipping Co vs Quah Beng Kee (1), [1924] AC 177 at p 182***, later cited in ***Kapenguria Teachers Sacco Ltd vs Patel t/a Shaven Enterprises & another [2022] KEHC 17129 (KLR)***, where the Court held that:

> ***"A right to indemnity generally arise from contract express or implied, but it's not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the***

party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's word in Waring vs Ward; a case of vendor and purchaser), in cases in which the court will 'independent of a contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation of the vendor. These considerations were all dealt with by the Lords Justices in Birmingham and District Land CO vs London and North Western Ry Co."

159. In the present case, no contractual undertaking of indemnity by the Commissioner of Lands has been demonstrated, nor has any breach of a statutory duty been established. The Government Lands Act, Cap. 280 (Repealed), which governed the disposition of Government land, contained no provision imposing liability or granting a right of indemnity against the Government or the Commissioner of Lands in the event of failure to issue a title.

160. The Act principally vested in the President and the Commissioner of Lands the power to make grants, leases, and dispositions of Government land, but it did not create reciprocal obligations sounding in damages or indemnity to allottees who failed to perfect their interests.

161. This is to be contrasted with the **Registration of Titles Act, Cap. 281 (Repealed)**, which, in **Section 24,** expressly

established a statutory indemnity scheme for loss occasioned by errors or omissions in the register. Likewise, the more recent **Land Registration Act, 2012** carries forward this indemnity principle in **Sections 81–84**.

162. The absence of any such framework under the Government Land Act Cap. 280 underscores the position that, in the absence of a contractual commitment, the Defendants cannot anchor their claim for indemnity upon the Commissioner of Lands.

163. All the same, this court has already found that the Defendants did not fulfill their primary obligations under the two sale agreements. In particular, with respect to LR No. 209/12984, the Defendants failed to remit the entire stand premium and additional fees within the stipulated timeline of 30 days from 23rd February 1996 as required by the letter of allotment.

164. The law is settled that a letter of allotment does not of itself confer proprietary rights. It is only upon compliance with the terms and conditions therein that an allottee acquires an enforceable interest capable of being converted into a registrable title. In ***Bubaki Investment Co Ltd vs National Land Commission & 2 Others [2015] eKLR*** the court held that;

> ***"Having held that the petitioner did not comply with the terms and conditions of the letter of***

allotment, it follows that the petitioner could not and did not acquire any proprietary interest in the suit property notwithstanding the payment it made."

165. Regarding LR No. 209/12983, the Commissioner of Lands contends that the allotment was cancelled and payments refunded following a request by Page Investments. The letter relied upon in support of that cancellation, however, was undated, internally inconsistent, and referred to LR No. 209/12984 while purporting to authorize refund of Kshs. 862,633 under LR No. 209/12983.

166. Indeed, the refund was processed through two vouchers of Kshs. 859,133 and Kshs. 3,500. The Commissioner's own witness conceded that the records could not explain these discrepancies and that, procedurally, original receipts ought to have been surrendered prior to effecting a refund. The step of surrender of the original receipts was, however, not demonstrated in this case.

167. The Defendants allege that the cancellation letter and the documents presented by the Third party were a forgery. Fraud, however, is not an inference to be drawn from suspicion or inconsistency. The law requires that fraud be specifically pleaded and strictly proved. In the often-cited decision of the Court, ***Vijay Morjaria vs Nansingh Madhusingh Dabar & Another [2000] eKLR***, Tunoi, JA. stated that:

> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."***

168. In the present case, although the Defendants raised questions as to the authenticity of the cancellation letter and the payment vouchers through which the refund was made, no cogent evidence was led to demonstrate that the document was indeed a forgery. The burden of proof, which is higher than on a balance of probabilities, but less than beyond reasonable doubt, was not discharged.

169. Having considered the totality of the evidence, this Court finds no basis for attaching liability to the Commissioner of Lands for failure to issue titles in respect of the suit properties. With respect to LR No. 209/12984, the letter of allotment lapsed upon the Defendants' failure to comply fully with the conditions therein within the thirty (30) days prescribed.

170. In the case of LR No. 209/12983, the allotment was cancelled and monies refunded, albeit irregularly, but in any event the Defendants took no steps to pursue the process of obtaining a grant. They neither paid the requisite consent fees nor lodged the transfer documents and produced no correspondence to demonstrate a follow-up with the Commissioner of Lands. The Defendants cannot shift the responsibility for their own inaction to the Commissioner of Lands. Accordingly, their claim for indemnity must fail.

Whether the Plaintiffs proved payment of the sums claimed

171. The Plaintiffs presented evidence of multiple petty cash vouchers and bank cheques issued between 28th February 1996 and 20th March 1996 to Page Investments, Geoffrey Asanyo, and Patrick Nyamweya. The aggregate of these payments was Kshs. 31,525,000. Most vouchers expressly described the payments as “part payment towards purchase of LR No. 209/12983 and 209/12984.” Only one voucher of Kshs. 100,000 referred specifically to LR No. 209/12984.

172. The 1st and 2nd Defendants informed the court that the allotees were in a partnership, and the three of them were partners in the said entities. In law, a partnership has no separate legal personality; the partners act collectively, and a payment to one partner is ordinarily deemed a payment to the partnership as a whole. Thus, where payments were

made to a partner of the partnership, they would, in principle, bind the partnership.

173. On the purchaser's side, the contracting parties were Nakuru Canners Ltd and ITAL, each a separate legal person distinct from its directors. As stated in ***Salomon vs Salomon & Co Ltd [1897] AC 22***, the acts of directors in their personal capacity cannot automatically be equated with acts of the company. For a company to be bound, it must be shown either that the directors acted as its agents when making the payments, or that the company subsequently ratified those payments.

174. The Court of Appeal in ***Ajay Shah vs Deposit Protection Fund Board as Liquidator of Trust Bank Ltd (in liquidation) [2016] eKLR*** affirmed that directors are agents of the company, standing in a fiduciary relationship to it. As such, their acts may bind the company where they fall within authority or are later ratified. It stated;

> ***"….to describe directors as trustees seems today to be neither strictly correct nor invariably helpful. (See City Equitable Fire Insurance Co. (1925) Ch 407 per Romer J. at p.426. in truth, directors are agents of the company rather than trustee of it or its property. But as agents, they stand in fiduciary relationship to their principal, the company. The duty of good faith which this fiduciary relationship imposes is virtually***

identical with those imposed on trustees and to this extent the description "trustee" still has validity. The duties of directors can conveniently be discussed under two heads: (a) fiduciary duties of loyalty and good faith (analogous to the duties of trustee's stricto sensu) and (b) duties of care and skills." (See "Fiduciary Relationships" (1962) C.L.J. 69 and 91963) C.L.J. 119 and "The Director as Trustee" (1967) C.L.J. 83)." (emphasis added)

175. In the present case, ratification may be inferred from the conduct of the Plaintiffs' companies in accepting and relying upon the benefits of the impugned transactions. This ratification is further evidenced by the correspondence of their advocates, M/s Salim Shanji & Co., dated 27th May 1999, wherein they expressly confirmed that Nakuru Canners Ltd had remitted Kshs. 22,655,000 and ITAL had remitted Kshs. 8,810,000/= to Page Investments. Such acknowledgment, made on the Plaintiffs' instructions, amounts to corporate adoption of payments initially advanced through individual directors.

176. The Defendants admitted to receiving Kshs. 6,250,000 but offered no clarity as to which specific payments they conceded and which they rejected. Notably, there is no combination of the Plaintiffs' payments that amounts to Kshs.

6,250,000. Their admission, unsupported by records, does not displace the Plaintiffs' documentary evidence.

177. On the totality of the evidence, this Court is satisfied that the Plaintiffs paid Kshs. 31,525,000. Nonetheless, the written agreements fixed the purchase price at Kshs. 12,500,000 (Kshs. 9,000,000 to Nakuru Canners Ltd and Kshs. 3,500,000 to ITAL). The oral amendment alleged by the Plaintiffs to increase this consideration is unenforceable under **Section 3 (3)** of the **Law of Contract Act** which was then in force, as the Plaintiffs never taken possession of the suit properties.

178. However, while the contractual obligation was limited to Kshs. 12,500,000, the Defendants nonetheless received and retained Kshs. 31,525,000. To allow them to retain sums over and above the contractual price would amount to unjust enrichment. Equity demands restitution of all monies paid and proved, to restore the parties to the position they ought to have been in.

179. The doctrine of unjust enrichment is intended to prevent a person from retaining money or a benefit that should justifiably be returned to the Plaintiff. This doctrine was expounded in the case of ***Joel Mwangangi Kithure vs Priscah Mukorimburi [2022] eKLR*** as follows:

> *"**And on the authorities approved by Madan and Wambuzi, JJA (as they then were) in the case of Chase International Investment Corporation***

(supra), the basic elements presupposed by the doctrine of unjust enrichment are (1) that the Defendant has been enriched by the receipt of a benefit, (2) that he has been so enriched at the expense of the plaintiff to allow the Defendant to retain the benefit in the circumstances of the case. These subordinate principles of the general principle of unjust enrichment are interrelated. They clearly show the nature of restitutionary claims, and how people incur restitutionary obligations.

In other words, the idea of unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the Plaintiff. The gist is that a Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to make restitution."

180. Guided by the foregoing principles, this Court finds that the Plaintiffs proved, on a balance of probabilities, that they paid Kshs. 31,525,000 to the Defendants and that they are entitled to restitution of the entire Kshs. 31,525,000 proved to have been paid.

Whether the Plaintiffs are entitled to contractual interest

181. The question that remains is the quantum of interest that the Plaintiffs are entitled to. Clause 7 of the Sale agreements states that:

> ***"If for any reason whatsoever, the property is not transferred to the Purchaser, the Vendors shall refund all the monies had and received pursuant to this agreement together with interest at the rate of 2% calculated at monthly intervals."***

182. This Court has found that the payments exceeding the purchase price were not anchored in any valid oral variation under Section 3 of the Law of Contract Act and are recoverable only in equity. The contractual obligation was confined to Kshs. 9,000,000 under the Nakuru Canners contract and Kshs. 3,500,000 under the ITAL contract, a total of Kshs. 12,500,000.

183. The agreements expressly provided that, if the transfer failed, the vendors would refund all monies received pursuant thereto with interest at 2% per month. That stipulation is applicable only to the contractual sum of Kshs. 12,500,000.

184. The Plaintiffs contend that computation of interest ought to be calculated from 8th June 1996. This is since Clause 11 of the Contract states that if the title documents are not obtained within a period of two moths, the purchasers shall be entitled to register a caveat at their sole discretion.

185. The Plaintiffs, however, never registered caveats against the properties and the parties continued engaging in the contract. It was not until 27th May 1999 that the Plaintiffs' counsel issued notices of repudiation of the contracts. By their conduct, the Plaintiffs extended the time of completion. It was therefore on 27th May 1999 that the vendors' obligation to refund the consideration and to pay contractual interest thereon crystallized.

186. **Section 26(1)** of the **Civil Procedure Act** vests in the Court discretion to award interest from such date as the Court considers just. It provides that:

> ***"Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."***

187. In the circumstances, this Court finds that the Plaintiffs should be awarded the contractual interest at the rate of 2% per month from 27th May 1999 until payment in full.

Computed up to the date of judgment, 9th October 2025, the period amounts to 316 months. The contractual interest owing is therefore Kshs. 56,880,000/= to Nakuru Canners Ltd on the principal sum of Kshs. 9,000,000/=, and Kshs. 22,120,000/= to ITAL on the principal sum of Kshs. 3,500,000/=.

188. In conclusion, this court finds the Plaintiffs' claims in HCCC No. 1587 of 1999 and HCCC No. 1588 of 1999 are merited. Accordingly, judgment is entered in favour of the Plaintiffs and against the 1st and 2nd Defendants in the following terms:

a) **The 1st and 2nd Defendants shall pay to Nakuru Canners Limited the sum of Kshs. 22,655,000 being the amount found due and owing.**

b) **The 1st and 2nd Defendants shall further pay to Nakuru Canners Limited contractual interest on the sum of Kshs. 9,000,000 at the rate of 2% per month from 27th May 1999 until payment in full. As at the date of judgment, 9th October 2025, the accrued interest amounts to Kshs. 56,880,000.**

c) **The 1st and 2nd Defendants shall pay to International Trade Agency Limited (ITAL) the sum of Kshs. Kshs. 8,870,000 being the amount found due and owing.**

d) The 1st and 2nd Defendants shall further pay to International Trade Agency Limited (ITAL) interest on the sum of Kshs. 3,500,000 at the rate of 2% per month from 27th May 1999 until payment in full. As at the date of judgment, 9th October 2025, the accrued interest amounts to Kshs. 22,120,000.

e) The 1st and 2nd Defendants shall pay to Nakuru Canners Limited interest at court rates on the sum of Kshs. 13,655,000, being the difference between the money paid and the contractual sum (22,655,000 – 9000,000) from the date of filing this suit until payment in full.

f) The 1st and 2nd Defendants shall pay to International Trade Agency Limited (ITAL) interest at court rates on the sum of Kshs. 5,370,000, being the difference between the money paid and the contractual sum (8,870,000 – 3,500,000) from the date of filing this suit until payment in full.

g) The Third Party proceedings are hereby dismissed with costs.

h) The 1st and 2nd Defendants shall bear the costs of the two suits.

Dated, signed and delivered virtually in Nairobi this 9th day of October, 2025.

O. A. Angote

Judge

In the presence of;

Mr. Thuo for Plaintiffs

Mr. Allan Kamau for 3rd Party

Mr. Thengei for 1st and 2nd Defendants

Court Assistant: Tracy