



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 12 OF 2014

BLUERIDGE CAPITAL LIMITED.....PLAINTIFF

VERSUS

1. JAMES MWAURA NJOROGI

2. ESTHER W. NJOROGI

3. HIGH TIME TRADING LIMITED.....DEFENDANTS

JUDGMENT

Plaintiff's case

1. The plaintiff commenced this suit against the defendants by way of plaint dated 22nd January 2014 which was later amended on 19th February, 2015. The Plaintiff prays for judgment to be entered against the defendants for:

a) Damages for breach of contract of Kshs.55,740,500.

b) Assessment of the unaccounted interest.

c) Costs of the suit.

d) Interest on (a) and (b) above at court rates.

2. The plaintiff avers that at all material times, the defendants were the registered proprietors of an estate in fee simple of all that land known as plot sub-division 8124(Original Number 864/1) Section 1 Mainland North measuring approximately 0.0569 hectares situate within Mombasa County (hereinafter referred to as "the suit property"). It is the plaintiff's case that on 12th July 2013, the plaintiff and the defendants entered into an agreement of sale (hereinafter referred to as "the sale agreement") for the purchase of the suit property. The plaintiff outlines the following as the salient terms of the sale agreement:

- **The purchase price was Kshs.127,000,000.**
- **A deposit of Kshs.12,700,000 was deposited with the defendants' advocates.**
- **The balance of the purchase price of Kshs.105,000,000 was to be paid at completion.**
- **The completion date would be 90 days from the date of the agreement.**

3. The Plaintiff avers that at the time of signing the sale agreement, the land registry file could not be traced. That the Land Registry file was traced and the defendants' advocates notified the plaintiff's advocates by a letter dated 14th October 2013 and the Plaintiff avers that both sides mutually agreed to have time start running after 15th October 2013 and therefore according to the plaintiff, completion was supposed to take place on or before 16th January 2014.

4. It is the plaintiff's averment that after obtaining the official search, it noted that there was an encumbrance in the form of a lease by the 3rd

defendant herein. The plaintiff stated that on 26th October, 2013, the plaintiff's advocates wrote to the advocates of the vendors informing them that there was a crucial material non-disclosure about the lease and pointed out that the plaintiff doubted whether the 1st and 2nd defendants were able to give vacant possession of the suit property at completion. Further, that during that time, the plaintiff's advocates contacted the 3rd defendant's advocates M/s Kiarie Kariuki & Co. Advocates who confirmed that the 3rd defendant was not agreeable to have the lease terminated earlier, adding that due to the heavy investments the 3rd defendant had allegedly incurred, the 3rd defendant was to exercise the option to renew the lease for a similar term, which would see them in the property until 2019.

5. The plaintiff further averred that it engaged the 1st and 2nd defendants and their advocates with a view to resolving the matter amicably and that arising from the said discussion, an agreement was reached in which the purchase price was reduced to Kshs.98,000,000 which was payable by increasing the existing deposit held by the vendors advocates, M/s Godfrey Mutubia & Company Advocates as stakeholders to Kshs.45,000,000 and the balance of Kshs.53,000,000 was to be paid on or by 1st August, 2014. That the issue of vacant possession was abandoned.

6. It is the plaintiff's averment that a formal offer was drawn by the 1st and 2nd defendants on 12th December 2013 and forwarded to the plaintiff's advocates via email. The plaintiff contends that on 18th December 2013, the plaintiff through its advocates through an email to the 1st and 2nd defendants advocate accepted the offer with some changes on the wording of the proposed supplementary agreement of sale. The plaintiff further contends that on 18th January, 2014, the 1st and 2nd defendants advocates wrote a letter proposing the purchase price to be revised to Kshs.125,000,000 and asked the plaintiff to accept the new price and in default, the sale agreement to stand rescinded. The plaintiff was not agreeable to the changes.

7. The plaintiff further averred that during the subsistence of the agreement, it had identified a potential buyer for the suit property who was ready, willing and able to pay Kshs.180,000,000 and a new agreement had been signed and a deposit of Kshs.13,500,000 had been paid as stakeholders pending completion. The plaintiff contends that they were waiting for the completion of the agreement so as to proceed with the completion of the new transaction from which the plaintiff stated that he expected to make a profit of Kshs.53,000,000/=.

8. It is the plaintiff's averment that it has established that the 1st and 2nd defendants have commenced negotiations with other parties with the aim of ultimately selling the suit property to them. The plaintiff further averred that it was ready, willing and able to complete the transaction between it and the 1st and 2nd defendants on the terms agreed between the parties on condition that the 1st and 2nd defendants were able to give a good and marketable title to the property free and clear of all encumbrances. The plaintiff contends that the 1st and 2nd defendants had not rescinded the agreement at this point.

9. The plaintiff further averred that the 1st and 2nd defendants' advocates M/s Godfrey Mutubia & Co. Advocates did not disclose any information regarding the deposit they held as stakeholders despite repeated attempts to contact them by the plaintiff's advocates. The plaintiff further averred that it became apparently clear that the 1st and 2nd defendants were incapable of giving vacant possession of the suit property and as a consequence the plaintiff's prospective purchaser pulled out of the envisioned sale.

10. The plaintiff stated that the 1st and 2nd defendants through their advocates in a letter dated 1/8/14 purported to raise the purchase price to Kshs.140,000,000/= despite a sale agreement having already been executed. The plaintiff stated further that this was a fundamental breach of contract as between the parties and it instructed its advocates to abandon the transaction and the consent dated 21/11/14 was filed in court terminating the same. The plaintiff further stated that in accordance with the consent on 17th July 2014, the 1st and 2nd defendants' advocates transferred a sum of Kshs.13,186,952/= held as the deposit claiming Kshs.486,952/= as interest allegedly earned and stated that the full interest earned was not accounted for.

11. The plaintiff contends that as a result of the 1st and 2nd defendants' breach of contract, it suffered loss and damage which includes loss of profits from the proposed sale by the plaintiff to the potential buyer of Kshs.53,000,000/=, legal fees incurred in the aborted conveyancing transaction with the proposed 3rd party buyer and 1st and 2nd defendants of Kshs.2,740,500/; costs of institution and prosecution of the instant suit and unaccounted interest earned on the deposit.

12. The Plaintiff called one Yehuda Sulami (PW1) who signed a witness statement on 22/1/2014 which he adopted as his evidence during his testimony at the hearing of the suit. He also produced a list of documents dated 22nd January 2014 as plaintiff's exhibits 1 to 22 and the supplementary list of documents filed on 28th January 2016 as Plaintiff's exhibits 23 to 28. PW1 stated that he was a director, chairman and shareholder of the plaintiff company. He referred to plaintiff's exhibit 3 which is a resolution of the company to file this suit and plaintiff's exhibit 4 which is a Certificate of Incorporation of the plaintiff company. PW1 referred to the sale agreement between the 1st and 2nd defendant and the plaintiff (Plaintiff's Exhibit 5) and in particular clause 7 (iv) thereof which stated that the vendors have a good and marketable title to the property, free and clear of all encumbrances. He also referred to the letter from the plaintiff's advocates to the 1st and 2nd defendants advocates, P. exhibit 13 and Exhibit 14 which is a letter from the 1st and 2nd defendants advocates confirming receipt of the money. PW1 also produced the application for postal search (P.exhibit 16) and the certificate of postal search (P.Exhibit17), which at the encumbrance section showed that there was a lease dated 29th April 2009 to the 3rd defendant for 5 years from 1/8/2009. Plaintiff's Exhibit 22 is a letter from the 3rd defendant's advocates stating that their client was not agreeable to an earlier termination of the lease. P.exhibit 46 is the transfer of the sum of Kshs.12,700,000/= to the 1st and 2nd defendants advocates account while Exhibit 47-52 is an agreement dated 5th July 2013 between the plaintiff and Neno Evangelism Centre, Mombasa for Kshs.180,000,000/= out of which the buyer paid 10% deposit.

13. It was the testimony of PW1 that the plaintiff bought the suit property for Kshs.127,000,000/= (P/exhibit 6) and sold it for Kshs.180,000,000/=. He stated that the plaintiff received the sum of Kshs.13,186,952/= from the 1st and 2nd defendants and that out of this, the sum of Kshs.486,952/= was interest. PW1 testified that from the time of payment, the period that had elapsed was 2 years 4 months and the interest payable is Kshs.3,500,000/= out of which the sum of Kshs.486,952/= had been received. The plaintiff is therefore claiming the outstanding balance.

14. When cross examined by Mr. Mutubia, learned Counsel for the 1st and 2nd defendants, PW1 confirmed that the agreement (p.Exhibit.3) did not provide that the plaintiff would be entitled to any interest and therefore the claim for interest is not anchored in the sale agreement. He further confirmed that the agreement provided that the 10% deposit was to be paid within 3 days, that is by 15th July 2013, but the same was paid by the plaintiff on 17th July 2013, which was outside the agreed period. PW1 also confirmed that the balance of the purchase price being Kshs.114,300,000/= was not paid within 90 days as provided for in the agreement. According to him, the payment of the outstanding balance was dependent upon vacant possession. When shown the agreement, he admitted that this was his own interpretation as the agreement had no requirement that the vendor gives vacant possession before completion. He clarified that P.exhibit 9 was a letter from the plaintiff's advocates to the 1st and 2nd defendants' advocates in which the plaintiff was complaining about the existence of a tenant. According to PW1, it was his understanding that the vendor was incapable of giving then vacant possession. He further confirmed that paragraph 'D' is a disclaimer which showed that the plaintiff had inspected the property before signing the agreement.

15. PW1 further confirmed that in the agreement between the plaintiff and Neno Evangelism Church (P.exhibit 22), the plaintiff described itself as the beneficial owner and admitted receiving Kshs.18,000,000/= as deposit paid to them by the church. He however denied that they were getting the payment from the church to pay the 1st and 2nd defendants, adding that the plaintiff had the capacity and source to pay from its own monies. He also clarified that the church required vacant possession.

16. PW1 admitted that the plaintiff tried to enter another agreement (P.exhibit 16) with the 1st and 2nd defendants to reduce the purchase price from Kshs.127, 000,000/= to Kshs.98,000,000/= but the vendor refused. That agreement was not signed. He further admitted that they did not disclose that they had made an agreement with the church though by the time the agreement was signed on 12th July 2013, they had already entered into another agreement with the church. He added that they approached the tenant (3rd defendant) directly and did not inform the 1st and 2nd defendants yet they did not know the arrangements between the 1st and 2nd defendants and the 3rd defendant as at 12th July 2013. He admitted that he did not have evidence of the 11% claimed.

17. When cross-examined by Ms. Obura, counsel for the 3rd defendant, PW1 confirmed that he personally inspected the property before signing the agreement. He stated that he saw that there were people in occupation. He further stated that before they signed the agreement, they applied for an official search at the Lands Office adding that they did not find the title. He confirmed that the plaintiff did not have any claim against the 3rd defendant.

18. When re-examined by Mr. Munyithya counsel for the plaintiff, PW1 stated that the completion documents were never sent. He agreed that he inspected the physical condition of the property.

1ST AND 2ND DEFENDANTS' CASE

19. The 1st and 2nd defendants in an amended defence dated 31st December, 2014 admitted that the parties entered into an agreement for sale of the suit property for Kshs.127,000,000/= and a 10% deposit was paid. The 1st and 2nd defendants averred that the plaintiff had inspected the property prior to the sale and was purchasing it with full notice of the identity and its actual condition and state. They denied that there was any agreement reached to reduce the purchase price to Kshs.98,000,000/= and maintain that the only valid agreement for sale of the suit property between the parties was the one dated 12th July 2013 and deny the existence of any other valid agreement between the parties over the suit property. The 1st and 2nd defendants have denied the averments in the amended plaint in particular that the plaintiff had identified a potential buyer for the suit property who was ready, willing and able to pay Kshs.180,00,000/= and averred that the existence of such alleged facts was never disclosed neither were they material to the signing of the sale agreement. The 1st and 2nd defendants further averred that the firm of M/s Godfrey Mutubia & Co. Advocates was under no obligation to disclose any information regarding the deposit they held as stakeholders. It is their contention that the plaintiff was under obligation to carry out due diligence and verify the state and condition of the property before entering into any transaction, adding that the plaintiff was aware that the property was not vacant at the time of entering into the sale agreement.

20. The 1st and 2nd defendants further contend that if there was a proposal to raise the purchase price, then the same was part of new negotiations for sale of the property after the previous agreement had been breached by the plaintiff and rescinded by the parties. The 1st and 2nd defendant have denied breaching the agreement and further deny that the plaintiff had suffered any loss or damage. The 1st and 2nd defendants contend that the plaintiff is not entitled to the prayers sought, adding that the plaintiff's claims is an attempt to obtain illegal and/or unjust enrichment by having acted like a broker and attempting to sell the suit property by passing off as the owner, stating that the plaintiff's claim is a gross abuse of the court process and that the same does not disclose any or any reasonable cause of action against them.

21. The 2nd defendant, Esther Wangui Njoroge (DW1) filed a witness statement and gave oral evidence. She stated that the 1st defendant is her brother. It was her testimony that they entered into a sale agreement with the plaintiff company who was represented by its director, Mr. Yehuda Sulami PW1. DW1 testified that they terminated the sale agreement because the plaintiff breached the same by failing to pay the balance of the purchase price as agreed. It was the testimony of DW1 that while they were waiting for the payment of the balance of the purchase price, she received a call from one Pastor Wafula of Neno Evangelism Church who requested to view the suit property. That she referred him to her advocate who held a meeting with him and discovered that the purchaser together with PW1 were trying to sell the suit property to Neno Evangelism Church behind their back. It was the evidence of DW1 that after the meeting with Pastor Wafula, it emerged that the plaintiff did not have the funds to purchase the property and wanted to use the funds from Neno Evangelism Church to purchase the property, which fact is corroborated by the agreement for sale dated 5th July 2013 executed between the plaintiff and Neno Evangelism Centre. That there was no provision for payment of any interest on the deposit paid.

22. DW1 stated that on 23rd January 2014, the plaintiff moved to court and obtained an injunction against the 1st and 2nd defendants thereby effectively frustrating the sale. That on 27th November 2014, the parties filed the consent dated 21st November 2014 whereby the 1st and 2nd defendants' advocates released back to the plaintiff's advocates the entire deposit paid together with the interest thereby bringing the matter to a full closure. It is the 1st and 2nd defendants' contention that the breach of the contract, if any, was occasioned by the plaintiff who failed

to pay the full purchase price as agreed. It is the evidence of DW1 that the plaintiff and its director, PW1, conducted due diligence, visited the property and enquired from DW1 and the 1st and 2nd defendants advocates and were fully aware of the existence of the tenant on the property at the time of executing the agreement. DW1 averred that she had her own arrangement with the tenant and she would have easily convinced the tenant to vacate upon payment of the full purchase price by the plaintiff. She added that they rescinded the contract after it became clear that the plaintiff and its director were incapable of raising the purchase price and were acting as brokers to profit from their property through unjust enrichment and dubious means. She contends that the discussions subsequent to the signing of the agreement for sale were carried out on “without prejudice” basis and that the same are not binding, adding that in any event, no further agreement or variation agreement was signed between the parties and as such the agreement for sale dated 12th July 2013 stands rescinded and there is no other existing and/or enforceable contract or agreement between the parties to warrant the orders sought by the plaintiff. DW1 further contends that the plaintiff has no or no valid claim against them and the suit herein ought to be dismissed with costs.

3RD DEFENDANT'S CASE

23. Pursuant to consent entered into on 21st November, 2017 between the plaintiff and the 3rd defendant, the suit against the 3rd defendant was withdrawn with costs to be agreed upon or taxed.

PLAINTIFFS' SUBMISSIONS

24. The plaintiff in their submissions dated 10th July 2018 highlighted the various issues for determination before this Honourable Court. Some of the highlighted issues are: the existence of a valid sale agreement between the plaintiff (as the purchaser) and the 1st and 2nd defendants (as the vendor); whether the consideration was paid; what were the terms of the sale agreement in terms of completion and whether there were amendments to those terms; whether there was material non-disclosure by the 1st and 2nd defendants; whether the 1st and 2nd defendants are guilty of frustrating the agreement for sale; whether the plaintiff is entitled to damages and to what extent.

25. The plaintiff submitted that there was a valid sale agreement dated 11th July 2013 which was binding on both parties. They relied on the Court of Appeal decision of **National Bank of Kenya Ltd –v- Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR** where the court stated:

“...A court of law cannot rewrite 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge....”

26. The plaintiff submitted that the point of departure is on the issue of breach and further submitted that the 1st and 2nd defendants were in breach of the contract by failing to disclose existence of an encumbrance in the form of a lease. They relied on the case of **Gatobu M'Ibuutu Karatho –v- Christopher Muriithi Kubai (2014) eKLR** and submitted that the court is duty bound to look at the documents and make a determination based on the facts presented before it. It was further submitted that the plaintiff was led to believe that the property was being sold free from any encumbrance and that the 1st and 2nd defendant are estopped from denying the same. In this regard they relied on the doctrine of estoppel as provided in Section 120 of the Evidence Act.

27. The plaintiff further submitted that the 1st and 2nd defendants were in breach of the contract by unilaterally revising the purchase price to Kshs.125,000,000 and Kshs.140,000,000, and relying on the case of **Beatrice Muthio Nzoka –v- Charles Akelo Ongwen (2014)eKLR** submitted that rescission could have only taken place at the time of the breach if the parties were mutually agreeable to the unmaking of the contract. The plaintiff further submitted that it suffered severe financial loss due to the 1st and 2nd defendants breach of contract and that an award of damages for the lost transaction of Kshs.53,000,000/= is readily available to the plaintiff. the plaintiff relied on the case of **Equity Bank Ltd and Another – v- Robert Chesang (2016)eKLR** and the case of **Hadley –v-Baxendale (154)9. Exch.241** cited in **Karanja Mbugua & Another –v- Marybin Holding Co. Ltd (2014) eKLR** and submitted that the subsequent contract between the plaintiff and Neno Evangelism Center was known to the 1st and 2nd defendants. The plaintiff further submitted that it is lawfully entitled to the unaccounted interests of the deposit of the purchase price and while relying on the case of **Central London Property Trust Ltd –v- High Trees Ltd (1947)k.B 130**, cited in **Republic of Kenya – v – Kenya Railways & Another** ex-parte **Inviolatte Wacike Siboe (2014)eKLR**, submitted that the 1st and 2nd defendants are estopped by their own conduct from denying the plaintiff's claim to accrued interests. The plaintiff urged the court to enter judgment against the 1st and 2nd defendants as prayed in the amended plaint dated 19th February 2015.

1ST AND 2ND DEFENDANTS' SUBMISSIONS

28. The 1st and 2nd defendants field their submissions on 20th September, 2018. They submitted that the plaintiff has failed to prove its case or establish its claim to the required standard and that the suit herein ought to be dismissed with costs. They further submitted that upon signing of the agreement the plaintiff failed to pay the balance of the purchase price and attempted to renegotiate the price of the property but the 1st and 2nd defendants declined to renegotiate the price. It is their submission that at the time of the repudiation of the sale agreement, the plaintiff had only paid 10% deposit and not the full purchase price adding that the plaintiff had not acquired any proprietary interest on the land to warrant award of damages. They further submitted that the purchaser was shielded from any loss or damage by dint of clause 3.4 of the agreement which required the vendors' advocates to hold the purchase price as stakeholders pending completion, and that whereas there was no provision or requirement under the agreement for the vendors or their advocates to place the deposit of the purchase price in an interest earning account, the vendors' advocate proceeded to do so as a clear show of good faith and commitment to the agreement. The 1st and 2nd defendants submitted that under the agreement the purchaser's advocate was required to provide an irrevocable professional undertaking to release the purchase price to the vendors' advocates upon successful transfer in favour of the purchaser or the purchaser's nominee but they failed to provide such professional undertaking thereby effectively breaching the agreement and leaving the 1st and 2nd defendants with no option but to walk out of the agreement.

29. The 1st and 2nd defendants submitted that the purchaser had inspected the property and was aware of its state and having signed the agreement is estopped from pleading otherwise or alleging that they were not aware of the status of the property. They further submitted that the presence of a tenant on the property was not an issue prior to completion, adding that all that the purchaser was required to do was to provide the professional undertaking and allow the vendor to deliver the property to the purchaser within 90 days as per the agreement. It is their submission that the purchaser had no right to demand vacant possession prior to payment of the balance of the purchase price or delivery of an acceptable professional undertaking, adding that the existence of a tenant on the property, if any, was a matter to be dealt with by the vendor within the ninety (90) days period subject to the professional undertaking. The 1st and 2nd defendants submitted that the agreement was clear as to the purchaser's obligation and that the purchaser failed to honour its part of the bargain thereby frustrating/breaching the same. Consequently, it was submitted, the plaintiff's claim for damages is unfounded both in contract and under the law. The defendants submitted that they were not aware of the existence of the contract between the plaintiff and Neno Evangelism at the time of negotiating or executing the agreement for sale on 12th July 2013 and that the plaintiff deliberately kept the issue of the second agreement away from the knowledge of the vendors fearing that the same would jeopardize the negotiations for the price. It was submitted that the plaintiff cannot rely on the alleged agreement to plead loss or damages against the defendants and that the reasons for the termination of the alleged contract between the plaintiff and Neno Evangelism were not pleaded or proved to warrant the award of damages. They submitted that the plaintiff has failed to strictly prove the claim in it is entirely and that the evidence and documents relied on by the plaintiff cannot sustain the claim. The 1st and 2nd defendants relied on the following cases; **Victoria Laundry –v- Newman (1949) 2KB 528; Karani Mbugua & Another –v- Maybin Holding Co. Ltd (2014)eKLR; and Eric Omolo Ounga –vs- Kenay Commercial Bank Ltd (2017)eKLR.**

30. The 1st and 2nd defendants concluded by submitting that the plaintiff did not adduce any evidence to show that the 1st and 2nd defendants had knowledge as to why the plaintiff wanted to purchase the property, adding that the loss claimed by the plaintiff was not reasonably forceable as a consequence of any breach. That the plaintiff was returned to its pre-contractual position and has no or no further claim against the defendants. They further submitted that the alleged anticipated profits could not be foreseen by the defendants and in any event the alleged profits cannot be deduced from the alleged agreement between the plaintiff and Neno Evangelism which agreement, they submitted, was premised on misrepresentation and falsehoods. The 1st and 2nd defendants therefore prayed that the plaintiff's suit against them be dismissed with costs.

THE ISSUES AND DETERMINATION

31. This court has now carefully considered the available evidence, the exhibits thereto, the relevant provisions of the law, the written submissions and the cited authorities and the court make the following findings. There is no doubt that the 1st and 2nd defendants were the registered proprietors of the property known AS PLOT SUB-DIVISION 8124 (ORIGINAL NUMBER 864/1) SECTION 1 MAINLAND NORTH MEASURING 0.5659 HECTARES or thereabouts. There is no doubt that the 1st and 2nd defendants and the plaintiff entered into an agreement for sale of the suit property. The sale agreement is dated 12th July 2013 and the purchase price was Kshs.127,000,000/= and the said agreement had express terms.

32. The plaintiff paid a deposit of Kshs.12,700,000/= which was deposited with the 1st and 2nd defendants advocates M/s Godfrey Mutubia & Co Advocates. The said deposit was to be paid within three (3) working days after the signing of the said agreement and the said advocates were to hold the same as stakeholders pending completion. The balance of the purchase price of Kshs.114,300,000/= was to be paid not later than three (3) days prior to the completion to the vendors' advocates designated bank account to hold as stakeholders pending registration of transfer of the property to the plaintiff or the plaintiff's nominee. The completion date was 90 days after the date of signing of the agreement.

33. It is also evident that prior to the release of the completion documents, the plaintiffs' advocates were to provide the defendants advocate with an acceptance professional undertaking on terms approved by both advocates to release the purchase price to the defendants' advocates upon successful transfer and registration of the property in favour of the plaintiff or the plaintiff's nominee. It was upon issuing the defendants advocates with the professional undertaking that the 1st and 2nd defendants were to hand over to the plaintiff's advocates the completion documents.

34. There is also no doubt that under the said agreement each party was responsible for payment of their respective advisors and legal fees. It is also evident that in the said agreement the plaintiff had agreed and admitted that it had inspected the property and purchased it with full notice of the identity thereof and of its actual state and condition and entered into the said agreement solely as a result of its own inspection and on the basis of the terms of the said agreement and not in reliance upon any representation either written or oral or implied made by or on behalf of the 1st and 2nd defendants of anything whatsoever subject to the said agreement.

35. From the available evidence, it is evident that the plaintiff paid the 10% deposit. However, the balance of the purchase price was not paid within the agreed time or at all. There is also no doubt that the completion documents were not handed over to the plaintiff's advocates as contemplated in the sale agreement. In a nutshell, the transaction was frustrated and later rescinded by an agreement of the parties through a consent recorded in court on 15th December 2014.

36. It is the plaintiff's case that the agreement of sale entered into by the parties on 12th July 2013 was frustrated by the 1st and 2nd defendants who failed to disclose the existence of a lease with the 3rd defendant. The plaintiff stated that it had negotiated to sell the property to Neno Evangelism Center for the sum of Kshs.180,000,000/=. The plaintiff claims that it is entitled to the sum of Kshs.53,000,000/= being the amount it could have earned had the transaction between it and Neno Evangelism Center materialized. The plaintiff further claims interest of Kshs.486,952/= as well as legal fees of Kshs.2,740,500/=.

37. From the undisputed facts, the court finds that the issues for determination are as follows:

i. Did the parties herein enter into a valid sale agreement?

ii. If so did any of the parties herein breach the terms of the said sale agreement?

iii. Are the 1st and 2nd defendants guilty of frustrating the said sale agreement?

iv. Is the plaintiff entitled to the prayers sought?

38. The court will now embark on the issues for determination as follows:

i. Did the parties herein enter into a valid sale agreement?

As the court had earlier stated, the 1st and 2nd defendants and the plaintiff entered into a sale agreement dated 12th July 2013. The sale agreement related to sale of PLOT SUB-DIVISION 8124 (ORIGINAL NO.864/1) SECTION 1 MAINLAND NORTH and was signed by the parties herein. The sale agreement constituted the entire agreement between the parties and superseded and extinguished any prior agreements. Clause 4 of the said agreement stipulated that “no amendment change or addition to this agreement shall be effectual or binding on the parties hereto unless it is in writing and duly executed by or on behalf of the parties hereto.”

39. As the said agreement was in writing and was signed by the parties, it met the requirements of Section 3(3) of the Contract Act which states as follows: -

3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –

a) The contract upon which the suit is founded –

i. Is in writing;

ii. Is signed by all the parties thereto: and

b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 5 26), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

40. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said agreement confirms that the same is a valid agreement which is enforceable by the parties.

41. The plaintiff alleged that they subsequently entered into a supplementary sale agreement wherein the terms of the original agreement were amended. I note however that there was no such agreement that was executed by the parties herein. It is evident however that there were negotiations which did not result into the execution of another sale agreement. There was no valid agreement produced in court between the parties herein except the agreement dated 12th July 2013. This court cannot hold and find that indeed the 1st and 2nd defendants and the plaintiff entered into another valid sale agreement for the sale of the suit property except the sale agreement dated 12th July 2013.

ii). **Did any of the parties herein breach the terms of the sale agreement dated 12th July 2013?**

42. As the court has found and held earlier, the basis of the transaction in issue herein is the agreement dated 12th July 2013 wherein the plaintiff paid a deposit of Kshs.12,700,000/= towards the purchase price of the suit property and the balance was to be paid not later than three (3) days prior to the completion to the vendors’ advocates. The completion period was stated to be ninety (90) days after the signing of the said agreement. Prior to the release of the completion documents shown in clause (B) the plaintiff’s advocates were required to provide the 1st and 2nd defendants’ advocates with an acceptable irrevocable professional undertaking. Upon issuing the 1st and 2nd defendants’ advocate with the said professional undertaking the 1st and 2nd defendant was required to hand over to the plaintiff’s advocates the completion documents.

43. There was no evidence that the plaintiff paid the balance of the purchase price as provided in the agreement. Further, there was no evidence to show that the plaintiff’s advocates issued the professional undertaking to the 1st and 2nd defendants’ advocates to facilitate the release of the completion documents.

44. The court finds and holds that the plaintiff failed to pay the balance of the purchase price of Kshs.114,300,000/= as agreed or at all. Though the plaintiff alleged that the 1st and 2nd defendants were in breach, it is clear that the plaintiff did not fulfil its obligations under the sale agreement. The plaintiff was obligated to pay the balance of the purchase price of Kshs.114,300,000/= three (3) days prior to the completion date.

45. The plaintiff further alleged that the 1st and 2nd defendnats are guilty of material non-disclosure for failing to disclose the existence of a lease to the 3rd defendant. However, as the court had stated earlier, the agreement is clear that the plaintiff agreed and admitted that it had inspected the property prior to purchasing it. The court finds and holds that the plaintiff had prior notice of the said lease. The 1st and 2nd defendants cannot be accused of material non-disclosure when the plaintiff has clearly indicated in the agreement that it inspected and

purchased the property with full notice of the identity thereof and of its actual state and condition. The 1st and 2nd defendants therefore were not in breach. This court cannot imply any term in the said contract unless it was intended.

46. Are the 1st and 2nd defendants' guilty of frustrating the said sale agreement? The court has held that the parties herein entered into a valid sale agreement with express terms. Each of the parties therefore had a duty to observe the terms of the said agreement and fulfil their respective obligations. The plaintiff had an obligation to pay the purchase price as stipulated and on time and the 1st and 2nd defendants had a duty to ensure that the suit property was transferred to the plaintiff herein. It was only upon receipt of the balance of the purchase price or professional undertaking that the 1st and 2nd defendants were expected to release the completion documents. However, it is evident that the plaintiff never made payment of the outstanding balance or at all, neither did its advocates give the required professional undertaking. It is worth noting that the evidence that has emerged shows that the plaintiff instead of fulfilling its obligation under the sale agreement, purported to enter into another sale agreement with a third party, Neno Evangelism Centre, where the plaintiff purported to sell the same property even before obtaining any proprietary interest in it. In my view, it was the plaintiff, and not the 1st and 2nd defendants, who frustrated the said sale agreement. I find and hold that the 1st and 2nd defendants did not frustrate the agreement for sale dated 12th July 2013.

47. Is the plaintiff entitled to the prayers sought?

The plaintiff had pleaded that it had already identified a potential buyer who was willing to purchase the suit property at Kshs.180,000,000/= thus it stood to make a profit of Kshs.53,000,000/=. In support of this claim, the plaintiff produced a copy of a sale agreement between itself and Neno Evangelism Centre.

48. I have found and held that the 1st and 2nd defendants were not in breach of the agreement dated 12th July 2013. It is the plaintiff who was in breach, having failed to meet its obligations under the said agreement. The agreement for sale between the plaintiff and Neno Evangelism Centre was not subject of the sale agreement dated 12th July 2013. There was no evidence adduced by the plaintiff to show that the 1st and 2nd defendants knew or were made aware of the agreement between the plaintiff and Neno Evangelism Centre prior to the execution of the agreement for sale dated 12th July 2013. In order that the Plaintiff should recover the profits expected on the latter contract, the 1st and 2nd defendants would have been made aware at the time they entered the agreement dated 12th July 2013. The plaintiff did not adduce any evidence to show that the 1st and 2nd defendants had knowledge as to why the plaintiff wanted to purchase the property on 12th July 2013. The loss flowing from loss of business opportunities and deals with third parties including loss of anticipated profits were too speculative and failure of the said deals would not be attributed to the 1st and 2nd defendants action or inaction. The plaintiff failed to honour the terms of the agreement dated 12th July 2013 by failing to pay the balance of the purchase price or failing to provide professional undertaking as required. As a result the plaintiff cannot seek to benefit from its own breach.

49. The plaintiff has been paid the deposit paid plus interest. In my view, the plaintiff has been returned to its pre-contractual position and had no or no further claim against the 1st and 2nd defendants. I agree with the 1st and 2nd defendants' submission that the plaintiff cannot seek to benefit from interest yet it is the same plaintiff who moved to court to stop the transactions using a court order. Moreover the rate of interest relied on by the plaintiff is not supported by any evidence.

50. As regards the claim for legal fees of Kshs.2,740,000/=-, it is my finding that the same is not payable as the agreement for sale dated 12th July 2013 was clear that each party shall be responsible for payment of their respective advisors and legal fees. I cannot rewrite a contract between parties and parties are bound by the terms of their contract.

51. Having carefully considered the available evidence, the relevant provisions of the law, the written submissions and the cited authorities, the court finds that the plaintiff has not proved its case on a balance of probability. In the result the plaintiff's suit is dismissed with costs to the 1st and 2nd defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 4th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Omondi holding brief for Munyithya for plaintiff

Nyongesa holding brief for Mutubia for 1st defendants

Yumna Court Assistant

C.K. YANO

JUDGE

