REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 617 OF 2008

ANDREW MURUGU MAINA.....1ST PLAINTIFF

CAROLINE WANGARI MURIUKI.....2ND PLAINTIFF

VERSUS

JOHNSON NGARARI MWAURA.....DEFENDANT

JUDGMENT

The plaintiff commenced this suit by way of a plaint dated 22nd December, 2008 seeking the following reliefs:

i. An order of injunction restraining the defendant from breaching or committing further breach of the agreement for sale to the plaintiffs of L.R No. 7785/897, Runda (hereinafter referred to as "the suit property") or in any way cancelling, purporting to cancel, terminating, retracting, or in any way withdrawing from sale of the said property to the plaintiffs.

ii. An order directing the defendant to specifically perform and complete the sale of the suit property to the plaintiffs forthwith.

iii. General damages for breach of contract.

iv. Special damages of Kshs. 220,010/-.

v. Costs of the suit and interest.

vi. Any other order that the court may deem just and fit to grant.

In their plaint, the plaintiffs averred as follows. On 12th June, 2008, they entered into an agreement for sale of the suit property with the defendant at Kshs. 5,500,000/-. On 9th June 2008, they deposited the entire purchase price with the advocates who were acting for them in the transaction who subsequently issued a professional undertaking to the advocates who were acting for the defendant for the payment of the entire purchase price. Despite having met all their obligations under the agreement for sale, the defendant neglected or refused to provide them with the completion documents. On 15th December 2008, the defendant's advocates wrote to their advocates indicating that the defendant was no longer interested in the transaction and was cancelling the same. On 18th December, 2008, their advocates wrote to the defendant's advocates rejecting the purported rescission of the agreement for sale and demanding specific performance.

The plaintiffs averred that the defendant breached and/or threatened to breach the said contract for sale by failing to provide the completion documents and to complete the transaction. The plaintiffs averred that they had suffered and will continue to suffer loss as a result of the defendant's said breach of contract.

The defendant filed a statement of defence on 2nd February, 2009 which was amended on 12th November, 2012 to include a counter-claim. The defendant admitted having entered into an agreement for sale of the suit property with the plaintiffs but contended that the said agreement was null and void for lack of consideration. The defendant denied being in breach of the said agreement and contended that the agreement ceased to exist upon the lapse of the contractual completion period. The defendant averred that he released all the completion documents to the plaintiffs on the strength of a professional undertaking that was issued by the plaintiffs' advocates save for the rates clearance certificate which could not be issued owing to outstanding rates of Kshs. 550,000/- that was due to the City Council of Nairobi. The defendant averred that he authorised the plaintiffs to utilise Kshs. 550,000/- out of the sale proceeds to pay the outstanding rates and to remit the balance of the purchase price of Kshs. 4,950,000/- to him upon registration of the transfer of the property in favour of the plaintiffs.

In his counterclaim, the defendant averred that he agreed to sell the suit property to the plaintiffs to enable him raise funds that he needed urgently within 60 days of the agreement for sale. The defendant averred that the plaintiffs had assured him that he would receive the

purchase price within 60 days from 12th June, 2008, that is on or before 12th August, 2008. The defendant averred that it was a fundamental term of the contract between the parties that time was of the essence and that non observance of the same would lead to the collapse of the agreement for sale. The defendant reiterated that prior to the expiry of the completion period, he requested and authorised the plaintiffs to utilise a portion of the sale proceeds to pay off the outstanding rates to pave way for the eventual transfer of the suit property to the plaintiffs. The defendant averred that the plaintiffs failed, refused and/ or neglected to pay the outstanding rates thereby frustrating the agreement for sale and rendering it incapable of performance. The defendant sought the following reliefs against the plaintiffs by way of a counter-claim:

a) A declaration that the agreement for sale dated 12th June, 2008 lapsed on 11th August, 2008.

b) A declaration that the agreement for sale dated 12th June, 2008 is incapable of specific performance.

c) A declaration that the plaintiffs are not entitled to recover the sum of Kshs 220,010/- from the defendant.

The suit was heard on 10th May, 2016 when the 1st plaintiff and the defendant testified and closed their respective cases. The 1st plaintiff (PW1) adopted his statement dated 2nd March, 2012 as his evidence in chief. He stated as follows. He was a banker by profession. In the year 2008, he approached the defendant to discuss a possibility of purchasing the suit property which was near his residence. The suit property measured half an acre. A purchase price of Kshs 5,500,000/- was agreed upon. They deposited the purchase price with Mboya & Wangongu Advocates who were representing them in the transaction. Thereafter, they executed an agreement for sale with the defendant. The said firm of Mboya & Wangongu Advocates issued a professional undertaking to the defendant's advocates to pay to them the full purchase price upon receipt of the completion documents.

The 1st plaintiff stated further that their advocates aforesaid forwarded to the defendant's advocates a sum of Kshs. 220,010/- on account of stamp duty. He stated that the defendant furnished them with all the completion documents save for the rates clearance certificate from the City Council of Nairobi. He stated that the defendant informed him that he had rates arrears in respect of which he was expecting a waiver. He stated that despite giving the defendant time to procure the rates clearance certificate, the defendant never complied. He stated that upon the lapse of the completion period of 60 days, the defendant informed them that he was no longer interested in selling the suit property and a letter to that effect dated 15th December, 2008 was written to their advocates. He stated that their advocates wrote to the defendant's advocates on 15th December, 2008 and 7th November 2008 rejecting the unilateral cancellation of the agreement.

The 1st plaintiff stated further that he held discussions with the defendant on the possibility of having the rates cleared by the plaintiffs and the plaintiffs deducting the same from the purchase price. He stated that the defendant ultimately obtained a rates waiver and upon inquiry as to when the defendant intended to clear the rates, the defendant informed him that he was no longer interested in the sale transaction. The 1st plaintiff stated that the entire purchase price was still with their advocates and that they were ready and willing to complete the transaction. He produced the documents in their bundle of documents dated 2nd March, 2012 as plaintiffs exhibits 1-21 respectively.

In cross-examination, the 1st plaintiff admitted that as at 12th June, 2008, their advocates had received all the completion documents save for the rates clearance certificate. He admitted also that time was of absolute essence in respect of the parties' obligations under the agreement for sale. He admitted that the purchase price paid to his advocates had not been released to the defendant. He admitted further that clause 4 of the special conditions of sale provided for rescission of the agreement in the event of non-payment while clause 10 provided that time was of the essence in respect of the parties' obligations under the agreement.

The 1st plaintiff stated that it was the defendant's duty to provide the rates clearance certificate while payment of stamp duty was his obligation. He stated that the suit property was situated in old Runda where half an acre of land was now going for Kshs. 40 million. He contended that their advocates needed consent from the defendant to pay the outstanding rates. He stated that after the expiry of the 6o days completion period, the defendant issued a cheque to their advocates for refund of the amount they had paid for stamp duty.

In his defence, the defendant (DW1) also adopted his statement dated 29th October, 2014 as part of his evidence in chief. He stated as follows. He was an architect and a property developer. At the material time, he was undertaking a project in Langata and needed funds urgently. He was required to build the structures that he was working on to a certain level in order to meet the conditions of the loan from Shelter Afrique which was the financier of the project. The plaintiffs who were his neighbours approached him with an offer to buy the suit property. He agreed with the plaintiffs that the agreement for sale would be rescinded if the purchase price was not paid within 60 days of the agreement. Between 12th June, 2008 and 11th August, 2008, he and his advocates did not receive communication of any difficulties the plaintiffs may have had in completing the agreement. He produced documents attached to his bundle of documents dated 29th October, 2014 as defendant's exhibits 1-15 respectively.

The defendant stated further that clause 6 of the special conditions of sale had in mind his special financial circumstances. He stated that the said clause was tied to clause 10 of the special conditions of sale and that apportionment of the outgoings was to be done on completion. He averred that the plaintiffs' advocates were to apply the monies deposited with them towards the outgoings and that he was to get the balance. He stated that he finished the Langata Project with alternative funding which was more expensive.

In cross-examination, the defendant admitted that it was his responsibility to provide the rates clearance certificate and that he did not provide the same. He admitted further that he had received an undertaking from the plaintiffs with regard to the purchase price. He reiterated that he was in urgent need of funds and that the plaintiffs were aware of the same. The defendant stated that it was his understanding that once he procured the rates demand note, the plaintiffs would clear the rates and accounts would be settled accordingly. He stated that both parties understood the urgency of the transaction and that he supplied all the completion documents to the plaintiffs save for the rates clearance certificate three days before execution of the agreement.

In re-examination, the defendant stated that he paid stamp duty and returned to the plaintiffs' advocates a duly stamped instrument of

transfer. He stated further that he was never paid even the 10% deposit of the purchase price which he could have used to sort out the outgoings. He stated that the plaintiffs did nothing until after the lapse of the completion period. He stated that there was no agreement to change the completion date and that the plaintiffs never requested for an extension.

Submissions:

After the close of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 17th October, 2018 in which they argued that at the time the defendant purported to cancel the agreement, the same was valid and enforceable. They submitted that by executing the instrument of transfer, the defendant had confirmed that the contract was alive. The plaintiffs averred that the purchase price was secured by a professional undertaking issued to the defendant's advocates by their advocates and that the purchase price for the suit property was still held by their advocates.

The plaintiffs submitted that they discharged their obligations as required under the agreement for sale having issued an unconditional, unequivocal and irrevocable professional undertaking for the payment of the purchase price. They averred that the defendant breached the said agreement by failing to avail all the completion documents. The plaintiffs submitted that this was a proper and a fit case for the court to order specific performance since there exists a valid and subsisting agreement. In support of this submission, the plaintiffs relied on the case of Anne Murambi *v* John Munyao & another [2018] eKLR where the court stated that the essence of an order for specific performance is that the contract remains in force and parties discharge their obligations under the contract.

The plaintiffs argued further that the defendant's conduct of executing the instrument of transfer and having the same stamped gave rise to a proprietary estoppel and that the defendant could not be heard to say that the transaction was cancelled or failed for want of extension of the completion period. The plaintiffs relied on the case of Taylor Fashions Ltd *v* Liverpool Victoria Trustees Co. Ltd [1981] QB 133 cited in Constance Tunda Vuko *v* Kenya Power & Lighting Co. Ltd & another [2018]eKLR in support of this submission.

The plaintiffs submitted that although there was a general principle that courts do not normally award general damages for breach of contract, there were exceptions such as where the conduct of a party is shown to be oppressive, high handed, outrageous, insolent or vindictive and in support of this submission, reliance was placed on the case of Marine Management Association & another *v* National Maritime Authority [2012]18 NWLR 504. The plaintiffs submitted further that the defendant's action of cancelling the transaction when the instrument of transfer had been executed was carried out in bad faith and that this was a peculiar case where general damages for breach of contract should be awarded.

The plaintiff's submitted that they were not to blame for the defendant's failure to complete the agreement. They submitted that the defendant's financial constraints could not exonerate him from non-compliance with the agreement. The plaintiffs cited the case of Akash Himatlal Dodhia *v* Dorothy Margaret Wanjiku Kungu & another [2017] eKLR where the court had ordered specific performance.

The defendant filed his submissions on 21st December, 2018. The defendant submitted that in the absence of any payment made to him, the contract with the plaintiffs was void for lack of consideration. The defendant referred to clauses 2(i)(a), 5, 6 and 10 of the agreement for sale and submitted that it was important for the parties to adhere to the 60 days completion period. The defendant submitted that three days before the execution of the agreement, the defendant supplied all the completion documents including the rates demand note to the plaintiffs and that it was common ground that the rates clearance certificate would only be issued on payment of the outstanding rates.

The defendant submitted that in order to demonstrate that time was of the essence, he obtained the signed instrument of transfer from the plaintiffs' advocates, had it assessed for stamp duty and paid the stamp duty. The defendant argued that the plaintiffs had 59 days to pay the rates, obtain a rates clearance certificate and book the documents for registration. The defendant submitted that the plaintiffs' advocates should have paid the rates, registered the transfer and thereafter apportioned the outgoings as provided under clause 10 of the agreement for sale. The defendant submitted that under clause 10 of the agreement, the plaintiffs' advocates needed no authority or consent to pay the rates and thereafter apportion the outgoings between the parties.

The defendant argued that clause 6 of the agreement provided for rescission on account of non-payment of the purchase price within 60 days and that on 12th August, 2008, the agreement stood rescinded and could only have been revived through extension of time in writing or payment of the purchase price which was not done. The defendant cited the case of Kukal Properties Development Ltd *v* Maloo & 3 others [1993] KLR 52 and submitted that having agreed on the completion date, the plaintiffs acted in breach of the express terms of the agreement and that it would be wrong to reward them for that breach.

The defendant submitted further that no request or demand was made in respect to the rates clearance certificate. He averred that the rates clearance certificate was not one of the documents requested in the plaintiffs' advocates' letter of 9th June, 2008. The defendant argued that as at 12th June, 2008, the defendant had furnished the plaintiffs with all the requisite documents and as such the plaintiffs had everything they needed to effect the transfer of the suit property in their favour. The defendant submitted further that plaintiffs who were aware of the outstanding rates due on the suit property held the monies that would have been applied towards the settlement of the same. The defendant relied on the case of Sagoo *v* Dourado (1982-88)1KAR 64 where the court stated that a vendor had been freed from his obligation to obtain a clearance certificate because the purchasers never performed their part of the contract.

The defendant submitted further that neither he nor his advocates received any payment from the plaintiffs. He averred that Cheque No. 922400 for Kshs. 220,010/- that was forwarded to his advocates for stamp duty was drawn in favour of the Commissioner of Domestic Taxes and not his advocates. The defendant submitted that the amount paid towards stamp duty was refunded to the plaintiffs in good faith.

The defendant cited the case of George Mwangi Wakangu *v* Samuel Mackenzie Kyhalo & 3 others [2014] eKLR in support of his submission that the plaintiffs' suit was fatally defective for seeking both specific performance and damages for breach of contract. The defendant argued that there was no evidence that the plaintiffs would suffer loss if specific performance was not granted. He argued that being an equitable remedy, the plaintiffs were undeserving of the orders of specific performance as they had failed to discharge their

obligations under the contract. The defendant submitted that the value of the suit property had since increased and that granting the reliefs sought by the plaintiffs would amount to unjust enrichment to the plaintiffs. The defendant urged the court to allow his counterclaim and order for the return of all his original documents which were still in the plaintiffs' advocates' custody.

Determination:

I have considered the evidence adduced by the parties in support of their respective cases. The parties did not agree on the issues for determination by the court. Each party framed its own issues. From the pleadings filed by the parties, the following in my view are the issues that arise for determination in this case:

1. Whether the agreement for sale dated 12th June, 2008 between the plaintiffs and the defendant in respect of the suit property was valid and enforceable.

2. Whether the said agreement was lawfully rescinded by the defendant.

3. Whether the plaintiff is entitled to the reliefs sought in the plaint.

4. Whether the defendant is entitled to the reliefs sought in the counter-claim.

5. Who is liable for the costs of the suit?

Whether the agreement for sale dated 12th June, 2008 between the plaintiffs and the defendant in respect of the suit property was valid and enforceable.

The defendant contended that the agreement for sale that he entered into with the plaintiffs was invalid and unenforceable. In Charles Mwirigi Miriti *v* Thananga Tea Growers Sacco Ltd & another [2014] eKLR, the court stated as follows on the issue of consideration:

> "*It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration*. See ***Halsbury's Laws of England, Vol. 22, 5th Edition, paragraph 308.*** *The trial court held that there was no consideration and that the agreement was one of an intention to sell and buy*. ***Chitty on Contracts, Vol. 1, General Principles, 29th Edition*** *at paragraph 3-004 defines consideration as follows:-*
>
> ***"The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as a detriment to the seller or as a benefit to the buyer. It should be emphasized that these statements relate to the consideration for each promise looked at separately. For example the seller suffers a 'detriment' when he delivers the goods and this enables him to enforce the buyer's promise to pay the price."***

See also ***Halsbury's Laws of England (supra), paragraph 309.***

[12] Consideration is further classified as either executed or executory. ***The Common Law Series on the Law of Contract by Robert Bradgate*** *at paragraph 2:49 defines executed and executory consideration as follows:-*

> ***"A distinction is generally drawn between executed and executory consideration. Consideration for a promise is executed where it consists of an actual act or forbearance. Consideration is said to be executory when it consists of a promise of an act or forbearance. A simple example of a situation where consideration is wholly executory is provided by a contract for sale of goods to be delivered at a future date on credit terms. There is a fully binding, bilateral executory contract as soon as promises are exchanged, despite the fact that neither seller nor buyer has actually performed as yet. Each party's promise is consideration for that of the other. This example is typical of commercial contracts which often are bilateral executory contracts. When either party renders performance in accordance with his promise his consideration is executed."***

Halsbury's Laws of England (supra), at paragraph 314 *indicates that:-*

> ***"Consideration is said to be 'executory' when it consists of a promise to do or forbear from doing some act in the future; and it is said to be 'executed' when it consists some act or forbearance completed at the earliest when the promise becomes binding".***

The learned author of ***Cheshire, Fifoot & Furmstone's Law of Contract, 14th Edition*** *at page 83 in distinguishing executory and executed consideration stated,*

> ***"Consideration is called executory when the defendant's promise is made in return for a counter promise from the plaintiff, executed when it is made in return for the performance of an act. … At the time when the agreement is made, nothing has yet been done to fulfil the mutual promises of which the bargain is composed. The whole transaction remains in future".***

It was common ground that the defendant did not receive any payment from the plaintiffs under the agreement for sale dated 12th June, 2008. However, from the authorities cited above, that does not mean that there was no consideration flowing from the plaintiffs to the defendant under the said agreement. Under the agreement, the plaintiffs promised to pay to the defendant the full purchase price of Kshs. 5,500,000/- within 7 days of completion of registration of transfer of the suit property in favour of the plaintiffs. This promise which was to be performed in future was sufficient consideration for the defendant's agreement to sell the suit property to the plaintiffs. In the circumstances, it is my finding that the plaintiffs provided consideration for the agreement for sale dated 12th June, 2008 between the plaintiffs and the defendant. The agreement was therefore valid and enforceable.

Whether the said agreement was lawfully rescinded by the defendant:

The plaintiffs' case was that whereas they performed their obligations under the agreement for sale, the defendant failed to avail all the completion documents to facilitate the transfer of the suit property to them. The defendant contended on the other hand that it was the plaintiffs who breached the agreement for sale by failing to pay the purchase price within 60 days completion period provided in the said agreement. The defendant contended both in his pleadings and submissions that time was of absolute essence in respect of the parties' obligations and that upon the lapse of the completion period, the agreement for sale stood rescinded.

Clause 2 (i)(a) of the agreement provided that the completion date was 60 days from the date of the agreement or such other date as the parties may agree on in writing. Clause 3 of the agreement provided that the purchase price for the suit property of Kshs. 5,500,000/- was payable within 7 days upon completion of registration of the transfer in favor of the plaintiffs. The 1st plaintiff testified that the plaintiffs deposited the entire purchase price with their advocates, Mboya & Wangong'u Advocates even before the agreement for sale was executed. Evidence was placed before the court in proof of this deposit. Clause 4 of the agreement obligated the plaintiffs' advocates to give to the defendant's advocates a professional undertaking that the purchase price would be paid to them within 7 days of completion of registration of the transfer in favour of the plaintiffs. It was not contested that on 9th June, 2008, the plaintiffs' advocates issued an unconditional, unequivocal and irrevocable professional undertaking to pay to the defendant's advocates the entire purchase price within 7 days of registration of the transfer in the plaintiffs' favour. I am in agreement with the plaintiffs that with this undertaking by their advocates, they had fully performed their obligations under the agreement for sale.

I find no basis for the defendant's contention that the plaintiffs were in breach of the sale agreement for failing to pay the purchase price within the 60 days completion period. As I have stated above, the purchase price was payable 7 days after registration of the transfer in the plaintiffs' favour. It was common ground that due to lack of rates clearance certificate the instrument of transfer was not registered. In the circumstances, the defendant was not entitled to receive the purchase price. The defendant blamed the plaintiffs for the lack of rates clearance certificate that made the registration of the transfer impossible.

The defendant admitted in his defence that he had released all the completion documents to the plaintiffs save for the rates clearance certificate. Clause 7 of the agreement provided that on or before the completion date, the defendant would deliver completion documents listed thereunder in respect of the suit property to the plaintiffs' advocates provided that the plaintiffs' advocates had given a professional undertaking. Among the said documents set out in sub-clause (h) which the defendant was to deliver to the plaintiffs' advocates were consents and clearance certificates as well as any other documents which could be required for registration of the transfer in the plaintiffs' favour. Clause 3 of the Special Conditions of Sale provided that the defendant had the obligation to pay land rates due on the suit property.

The defendant contended that rates clearance certificate was not one of the documents that the plaintiffs' advocates' had requested for in their letter of undertaking dated 9th June, 2008 because the plaintiffs were aware that it was their duty to obtain the same following prior discussions on the issue. I find no merit in this contention. First, in the plaintiffs' advocates' letter aforesaid, the said advocates requested for "Rates demand note for the parent Title as well as receipted payment bills." This leaves no doubt that the plaintiffs expected the defendant to pay the land rates and to present evidence of such payment. Secondly, the contents of the said letter could not override the express provisions of the agreement for sale which placed an obligation upon the defendant to pay rates and provide a rates clearance certificate.

The defendant had also contended that clause 10 of the Special Conditions of Sale which provided that "All outgoings will be apportioned among the parties as at the date of completion and time shall remain of essence" meant that the plaintiffs were to pay the land rates and deduct the same from the proceeds of sale. A part from stating that outgoings would be apportioned as at the date of completion, that clause did not state what the outgoings were and who was to meet what part of the same. There is nothing in the said clause from which it can be implied that the plaintiffs were to pay the land rates and have the same deducted from the sale proceeds. The defendant had also contended that prior to the expiry of the completion period, he had requested and authorised the plaintiffs to utilise a portion of the sale proceeds to pay off the outstanding rates. The defendant did not place any written communication between him and the plaintiffs on the issue. The agreement between the parties could only be varied in writing. In any event, even if such request was made and the plaintiffs refused to accede to it, that could not amount to a breach of the agreement by the plaintiffs as they had no obligation to pay the land rates. The case of Sagoo *v* Dourado (supra) cited by the defendant in support of his submission on the issue of payment of land rates is distinguishable. In that case, the obligation to pay land rates was on the purchaser.

It is my finding that the plaintiffs' had fulfilled all their obligations under the agreement for sale dated 12th June, 2008 and that it was the defendant who breached the said agreement for sale by failing to provide the rates clearance certificate. It follows from that finding that the defendant's purported rescission of the said agreement for sale on the ground of alleged breach thereof by the plaintiff was unlawful. The defendant who was in breach of the said agreement had no right to rescind the same.

I wish to add that clause 6 of the agreement for sale incorporated the Law Society Conditions of Sale (1989 Edition) ("LSK Conditions of Sale"). Clause 4(7)(b) of the LSK Conditions of Sale requires a defaulting party to be issued with a 21 days completion notice. There is no evidence that a completion notice was issued to the plaintiffs prior to the purported rescission of the agreement for sale. In the circumstances, even if the defendant had a right to rescind the agreement for sale, the purported rescission was not carried out in accordance with the terms of the agreement for sale and as such was ineffective to terminate the agreement.

Whether the plaintiffs are entitled to the reliefs sought in the plaint:

The plaintiff has sought an injunction, general damages, special damages in the sum of Kshs. 220,010/- and an order for specific performance. The law is settled that a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. In Gurdev Singh Birdi and Marinder Singh Ghatora *v* Abubakar Madhubuti CA No.165 of 1996 it was held that:

> **"…It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."**

As I have held above, the plaintiffs had performed their part of the agreement for sale between them and the defendant. I am satisfied that the plaintiffs have met the conditions for granting an order for specific performance. Specific performance is however a discretionary remedy. Even where a claimant has satisfied all the conditions for granting of the relief, the court can still decline to grant the same for good reason. In the case of Amina Abdulkadir Hawa *v* Rabinder Nath Anand & Another [2012] eKLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

> **"Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles…….specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party…..severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible."**

In the Supreme Court of Uganda's case of Manzoor *v* Baram [2003] 2 E.A 580 that was cited in the case of Thrift Homes Limited *v* Kays Investment Limited [2015] eKLR, the court stated as follows on specific performance:

> "**Specific performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance."**

I am not in agreement with the defendant's contention that the plaintiffs are not entitled to an order for specific performance because they have also claimed damages for breach of contract. Nothing stops the plaintiff from claiming general damages as an alternative to specific performance or damages in addition to specific performance. A part from his contention that the value of the suit property has increased considerably such that it would amount to unjust enrichment of the plaintiffs to order specific performance, the defendant did no adduce any evidence showing that he would have any difficulty in transferring the suit property to the plaintiffs. It is my finding in the circumstances that no valid reason has been put forward to deny the plaintiffs an order for specific performance. I am of the view that after ordering specific performance, the prayers for injunction and general damages for breach of contract have been overtaken by events. The sum of Kshs. 220,010/- claimed as special damages was the amount paid for stamp duty. This claim has also been subsumed in the order for specific performance.

Whether the defendant is entitled to the reliefs sought in the counter-claim.

I have already made a finding herein earlier that it was the defendant who breached the agreement for sale between him and the plaintiffs. Arising from that finding, the defendant is not entitled to any of the reliefs sought in his counter-claim dated 12th November, 2012.

Who is liable for the costs of the suit?

Section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya puts the award of costs at the discretion of the court. It is settled that costs follow the event unless for good reason, the court orders otherwise. In the case before me, no reason exists that warrants a departure from this settled rule on costs. I would therefore award to the plaintiffs the costs of the suit and the counter-claim.

Conclusion:

In conclusion, I hereby make the following orders:

1. Judgment is entered for the plaintiffs against the defendant in terms of prayer

(b) in the plaint dated 22nd December, 2008.

2. The defendant's counter-claim against the plaintiffs is dismissed.

3. The defendant shall pay the plaintiffs' costs of the suit and the counter-claim.

Delivered and Dated at Nairobi this 28th day of March, 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Omulama for the Plaintiffs

Mr. Gichuru for the Defendant

C. Nyokabi-Court Assistant