REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 240 OF 2009

DANIEL KARURU MWAURA & 12 OTHERS.....PLAINTIFFS

VERSUS

EDWARD KANJABI

SAMUEL B. MBUGUA

T/A MEMBLEY HOUSING SCHEME……..……..…..DEFENDANTS

JUDGMENT

The pleadings:

The plaintiffs instituted this suit by a plaint dated 25th May, 2009 claiming that on diverse dates between 11th December, 2002 and 15th April 2003, they applied for and were allocated by the defendants 20 plots each measuring 1/8 of an acre comprised in all that parcel of land known as L.R No. 10901/46 situated behind Kenyatta University namely, Plot Numbers 319, 320, 321, 341, 339, 322, 314, 315, 324, 338, 331, 337, 313, 334, 340, 327, 316, 323, 328 and 325 (hereinafter referred to as "the suit properties"). The plaintiffs averred that each plot was allocated to them at a consideration was Kshs. 100,000/-. The plaintiffs averred that between 11th December, 2002 and 15th April,2003 they paid to the defendants various amounts towards the purchase price of the suit properties. The plaintiffs averred that on 30th July, 2003, they visited the suit properties in the company of the defendants' surveyor and were shown the properties.

The plaintiffs averred that the defendants with intent to defraud them, and without any just cause unilaterally altered the measurements of the suit properties downwards from 1/8 of an acre to 10m by 18m and also increased the purchase price from Kshs. 100,000/- to Kshs. 130,000/- per plot which alterations the plaintiffs rejected and proceeded to take possession of the suit properties. The plaintiffs averred that the defendants informed them that the defendants wanted to refund the payments which they had made towards the purchase price and to take possession of the suit properties. The plaintiffs averred that, that action amounted to a breach of the agreements for sale which they entered into with the defendants. The plaintiffs sought the following reliefs against the defendants:

a) An order of specific performance compelling the defendants to complete the sale agreements which they entered into with the plaintiffs in respect of the suit properties;

b) In the alternative and without prejudice, an order for a refund all the monies received by the defendants with interest at 30% p.a from the time of receipt until payment in full;

c) General damages;

d) Costs of the suit;

e) Interest on (c) and (d) above.

The 1st defendant filed a statement of defence dated 17th March, 2010 in which he denied that he was trading as a partner in the firm of Membley Housing Scheme. The 1st defendant averred that he was a partner in the firm of Membley Housing along with others none of whom was known as Samuel B. Mbugua. The 1st defendant admitted that the plaintiffs applied to be allocated the suit properties. The 1st defendant averred that at all material times, Membley Housing (hereinafter referred to as "Membley") dealt with the 1st plaintiff on behalf of the other plaintiffs and that at no time did it deal with the 2nd to 13th plaintiffs. The 1st plaintiff averred that Membley invited applications for the purchase of residential plots measuring 10m by 18m initially at a price of Kshs. 100,000/- which was later on revised to Kshs. 130,000/- on the terms and conditions that were set out in the application forms. The 1st plaintiff contended that the said application forms that were signed by the plaintiffs did not constitute contracts for the disposition of land.

The 1st defendant averred that during the site visit on 11th December, 2002, the 1st defendant pointed out to the plaintiffs the suit properties each of which had already been demarcated and was measuring 10m by 18m. The 1st defendant denied that Membley had at any time authorised the plaintiffs to take possession of the suit properties. The 1st defendant averred that the payments that were due to Membley for the allocation of the suit properties to the plaintiffs were received subject to the conditions set out in the application forms and that none of the plaintiffs paid the purchase price in full or satisfied the conditions under which the suit properties were allocated to them.

The 1st defendant averred that at all material times, the 1st plaintiff was aware of the sizes of the suit properties which he had inspected on several occasions including when the same were pointed out to him by the 1st defendant on 11th December, 2002. The 1st defendant denied that there was a reduction or variation of the plot sizes. The 1st defendant averred that on 31st March, 2009, Membley notified the plaintiffs that the parties had not reached a consensus on the terms of the agreement for sale of the suit properties and as such it was necessary that the monies which the plaintiffs had paid as deposits be refunded to them. The 1st defendant denied that Membley had breached the agreements for sale it had entered into with plaintiffs and contended that there were no agreements for sale capable of being breached. The 1st defendant averred in the alternative that if there were agreements for sale, the enforcement thereof was time barred. The 1st defendant denied that the plaintiffs were entitled to the reliefs sought in the plaint.

The evidence:

During trial, the 1st plaintiff (PW1) stated that he was an advocate practising in Nairobi and that he was testifying on his own behalf and on behalf of the other 12 plaintiffs. He stated that the 1st defendant who was introduced to him in early 2002 as an Anglican Church lay reader informed him that he was selling some plots along Thika Road at Membley under a scheme known as Membley Housing Scheme. He stated that the 1st defendant introduced the 2nd defendant to him as his partner and that they had discussions in the 1st defendant's office where he was shown a plan for the housing scheme which was hanged on the wall of the 1st defendant's office.

PW1 stated that according to the said plan, the plots were measuring 1/8 of an acre and that the purchase price was agreed at Kshs 100,000/- per plot which amount was payable in installments. PW1 stated that the 1st defendant was yet to obtain consent to subdivide the larger parcel of land, L.R No. 10901/46 of which the plots formed part. PW1 stated that he got other people who were interested in purchasing the plots and on 11th December, 2002, he took the 13th plaintiff to the office of the 1st defendant where they were shown serialised application forms which had plot numbers and a purchase price of Kshs 100,000/-.

PW1 stated that on the same date of 11th December, 2002, on the authority from the other plaintiffs, he purchased application forms for himself and on their behalf and paid deposits on behalf of several plaintiffs. He averred that he paid Kshs. 40,000/- on behalf of the 4th plaintiff for plot numbers 338 and 324 and Kshs. 20,000/- each for plot numbers 322,337, 340 and 323 on behalf of the 3rd, 5th, 8th and 11th plaintiffs respectively. He contended that the said payments were made by way of a cheque at the office of the 1st defendant who issued him with receipts indicating that the purchase price was Kshs 100,000/- per plot.

PW1 stated that he took the plot application forms dated 11th December, 2002 to the other plaintiffs on whose behalf he had made payments for them to execute as evidence of their acceptance of the terms of the sale of the suit plots by Membley to them. He stated that the plaintiffs executed similar application forms which were in three parts. He stated that part III of the form gave the details of the size of the houses that were to be built on the plots which was an indication of the agreed plot sizes. He averred that the 1st defendant signed part I of the said application form while the applicants were to sign parts II and III thereof.

PW1 stated that according to the said application forms, the purchase price was Kshs 50,000/- which was cancelled by the 1st defendant and replaced with Kshs. 100,000/- which was handwritten. He stated that in most of the receipts issued to them, the 1st defendant indicated that the purchase price for the plots was Kshs. 100,000/- per plot. PW1 stated that after they had returned the filled up application forms, the issue of the purchase price never arose again until 7 years later when Membley mentioned for the first time in a letter dated 31st March, 2009 that the purchase price had changed to Kshs. 130,000/-.

PW1 stated he was taken to the suit properties on 11th December, 2002 after paying the deposit aforesaid. He stated that the suit properties comprised of an open field near a river and that the same were not demarcated. He stated that he was informed that the land would be subdivided in 90 days and that the plaintiffs would be allocated plots in the area that had been pointed to him. PW1 stated further that on the invitation of the 1st defendant, they went back to the suit properties in July, 2003 in the company of some of the plaintiffs and found that demarcation had been done and the plot sizes had been reduced. PW1 stated that his letter to the 1st defendant dated 1st August, 2003 protesting about the reduced plot sizes was not responded to. He stated that he wrote subsequent letters following discussions held with the defendants concerning titles and plot sizes and that the defendants promised to rectify the plot sizes. The 1st plaintiff stated that they informed the defendants that they had taken possession of the suit properties and that the defendants in turn wrote a letter dated 18th February, 2009 threatening them with dire consequences for unlawfully occupying the suit properties.

The PW1 stated that they were in possession of the suit properties but were constantly being harassed by goons acting at the behest of the defendants. He denied that they were occupying plots belonging to other people and contended that no complaint had been raised in that regard. PW1 produced as a bundle documents attached to the plaintiffs' list of documents dated 21st February, 2013 as plaintiff's exhibit 1.

PW1 stated that the plaintiffs' claim for interest at the rate of 30% per annum was informed by a meeting held with the defendants where they made it clear that if the defendants were not ready with titles for the suit properties, they would have to refund their money with interest. PW1 stated further that he wanted to build a residential house for his family on the suit properties and that owing to the defendants' failure to issue him with a title for the properties, he continued to occupy rented premises thereby suffering a real financial loss in terms of monthly rent. He stated that he had since put up a house for his family elsewhere but most of the plaintiffs still lived in rental premises.

In cross-examination, PW1 denied that the purchase price of Kshs. 100,000/- was provisional. He averred that he purchased 5 plots for which he paid the full purchase price of Kshs 300,000/- in lump sum. He denied that the plaintiffs had not paid the full purchase price for the disputed plots and averred that the table set out in the statement of Edward Rurii Kanjabi which set out the particulars of the payments received from the plaintiffs for the suit properties omitted some receipts. He admitted that under condition 5 of the application form, the offer was to lapse if payment of the purchase price was not made within the prescribed time.

PW1 attributed the non-payment of the full purchase price on the part of some of the plaintiffs to the reduction in the plot sizes. The 1st plaintiff admitted that the application forms did not indicate that they were buying 1/8 acre plots. PW1 stated that he chose plans for 2 and 3 bedroom bungalows and that when they went to the ground, they found that the plots could not accommodate the intended development as the plots were very small. He contended that they were buying 1/8 acre plots and that he was not aware that they were buying 1/16 acre plots which they rejected.

PW1 stated further that he had constructive permission to take possession of the suit properties. He contended that the 1st defendant sent goons to destroy his fence. He stated that he took possession of some of the suit properties while the defendants sold others to third parties. He stated that they had planted maize, bananas, trees and horticultural crops on the suit properties. He stated that he never took a surveyor to the suit properties and that he only fenced off what the 1st defendant had shown him as comprising of the 43 plots which they purchased.

In re-examination, PW1 stated that the agreements between the plaintiffs and the officials of Membley were contained in receipts, application forms and building prototypes which were issued to them. He stated that the said documents were signed by the 1st defendant and that the purchase price was Kshs 100,000/- per plot. He averred that there was no agreement on the purchase price of Kshs 130,000/-. He maintained that they purchased 1/8 acre plots as shown in the defendants' maps and prototype houses that were to be built on the suit properties. PW1 stated that the defendants' attempt to adjust the sizes of the plots upwards did not increase the sizes to 1/8 of an acre but he nonetheless agreed to take the same.

The 1st defendant, Edward Rurii Kanjabi (DW1) gave evidence in his defence and called 3 witness. DW1 told the court that he worked with Kahawa Sukari Ltd. which owned Membley Housing Scheme. He adopted his statement dated 9th June, 2015 as amended as his evidence in chief. He stated that the purchase price for the suit properties was not agreed upon and that the price discussed with the 1st plaintiff was provisional. He stated that the prices for the suit properties were changed to Kshs. 130,000/- per plot which was rejected by the plaintiffs.

With regard to the plot sizes, DW1 stated that he informed the 1st plaintiff that the plots were 10m by 18m and that when he complained that the plots were too small, he proposed to the plaintiffs to buy 2 plots each and have them consolidated. He contended that the 1st plaintiff rejected this proposal as a result of which there was no agreement on the plot sizes. He contended that the sizes of the suit properties were sufficient for the houses the plaintiffs wanted to build. He stated that the 1st plaintiff had fenced off 70 plots some of which belonged to third parties. He produced the documents in the 1st defendant's bundle of documents dated 9th June, 2015 as a bundle as defendant's exhibit 1.

In cross-examination, DW1 stated that when the 1st plaintiff visited his office after they had placed an advertisement in the newspaper that they were selling plots at the provisional price of Kshs. 100,000/- per plot. He admitted however that the price was not mentioned in the advertisement. He stated that around December, 2002, he showed the 1st plaintiff the suit properties as was represented in a subdivision scheme that was hanged on the wall of his office. He admitted that he signed and issued application forms to the 1st plaintiff which indicated plot numbers. DW1 admitted further that he received part payments from the plaintiffs and issued them with receipts which indicated the purchase price of Kshs 100,000/-. He stated that in the year 2003, the purchase price was enhanced. He admitted that the said change in the price was not communicated to the plaintiffs until much later and that the same was rejected by the 1st plaintiff.

DW1 stated further that it was their practice not to enter into sale agreements with purchasers who had signed application forms which then became the agreements for sale. He stated that the application forms stated that the purchase price was payable within 6 months and that they did not make a formal demand for the balance of the purchase price. DW1 stated that they did not respond to the various letters from the 1st plaintiff because they could not adjust the plot sizes as was demanded by the 1st plaintiff who knew all along that the plots were 10m by 18m having physically seen the suit properties twice. DW1 denied instructing Mr. Onuko (DW2), who was one of their surveyors, to re-demarcate the suit properties. DW1 contended that it was the 1st plaintiff who instructed DW2 to re-demarcate the said properties. He contended that the plaintiffs did not ask for a refund of their purchase price if the 1/8 acre plots were not available. He stated that it was them who offered to refund the purchase price in the event that the plaintiffs were not satisfied with what was on offer. He stated that the 1st plaintiff did not want a refund and averred that they were still willing to refund to the plaintiffs the monies they paid for the suit properties but not at the current market value which was Kshs. 1.5 million per plot. DW1 stated that that the plaintiffs were required to complete the payment of the purchase price within 6 months. He contended that since the plaintiffs did not comply, the sale agreement stood rescinded at the expiry of the said period. DW1 stated that the plaintiffs had taken 43 plots of which they had partly paid for only 20. He stated that they were not willing to give to the plaintiffs the said 20 plots following the lapse of the agreement between them. He stated that the plaintiffs had taken illegal possession of the suit properties since the agreement provided that they were not entitled to take possession until payment of the full purchase price. He stated that the application forms constituted the contracts between the parties.

The 1st defendant's first witness was Valentine Onuko (DW2). DW2 adopted his statement dated 9th June, 2015 as part of his evidence in chief and testified that he was a surveyor by profession. He stated that the total number of residential plots in Membley were 328 measuring 18m by 10m which was about 0.02ha. or 1/16 of an acre. He stated that he had worked for Membley for about 15 years and that Membley had never offered plots bigger than 18m by 10m. He contended that the sizes of the suit properties were sufficient for decent homes.

DW2 stated that he was instructed by Membley to subdivide the larger parcel of land into plots of 10m by 18m. He stated that when the 1st plaintiff saw the plots, he contended that they were too small and that Membley agreed to combine two plots into one which the 1st plaintiff still insisted were too small. He stated that the combined plots were about 1/8 of an acre in size.

In cross-examination, DW2 stated that he was instructed by Membley to combine 10m by 18m plots to create plots measuring 1/8 of an acre for the plaintiffs but that before he could finish the consolidation, the 1st plaintiff expressed dissatisfaction and he was instructed to halt the process. He stated that he had consolidated about 20 plots when he was instructed to undo the same and that the exercise was also impeded by the by the 1st plaintiff who fenced off the area.

The 1st defendant's second witness was Dickson Maina Kingori (DW3). DW3 stated that he was a manager and accountant with Membley for which he had worked since 1998. He adopted his statement dated 9th June, 2015 as part of his evidence in chief. He stated that when the plaintiffs' approached Membley to purchase the suit properties, they identified residential plots measuring 10m by 18m from the map. He contended that after identification, physical inspection of the plots was done followed by the filling of application forms.

DW3 stated that the agreed plot size was 10m by 18m as shown in the maps and subdivision scheme. He contended that a disagreement arose when the 1st plaintiff claimed that what he thought he was buying was different from what he saw on the ground. DW3 averred that the only option that was available to a purchaser who wanted a larger plot was to amalgamate several plots which would lead to a price variation. He contended that amalgamation attempt by them was stopped by the 1st plaintiff who disagreed with the surveyor. DW3 corroborated the evidence of DW1 that Membley was entitled to vary the purchase price from the initial Kshs. 100,000/- to Kshs. 130,000/- since the price of Kshs. 100,000/- was provisional. He stated that the plaintiffs did not accept the new price and a sale agreement was therefore not drawn. DW3 stated that under clause 5 of the application form, the offer was to lapse if the purchase price was not paid within 6 months. He stated that none of the plaintiffs paid the purchase price of Kshs 100,000/-. DW3 stated that the plaintiffs took possession of the suit properties without the defendants' consent, fenced off the same and were carrying out farming activities thereon despite the user thereof being residential. In cross-examination, DW3 stated that he was not involved in the negotiations leading to the sale of the suit properties and was also not present when the 1st plaintiff was taken to the suit properties for the first time.
The 1st defendant's last witness was John Maina Menjo (DW4). DW4 adopted his statement dated 9th June, 2015 as part of his evidence in chief. He told the court that he was the owner of Plot No. 239 and Plot No. 240 which he purchased from one, George Kariuki Kamau at Kshs. 350,000/- each. He stated that the plots measured 10m by 18m. He stated that he had not been able to take possession of his two plots because someone had fenced off the area where the plots are situated including his plots. In cross-examination, DW4 stated that he did not have in court the documents detailing how he acquired the two plots he claimed to own. In re-examination, DW4 stated that there were other people who bought plots in the same area whose plots had also been fenced off.

The submissions:

At the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 22nd May, 2018 while the defendants filed their submissions on 20th December, 2018. The plaintiffs submitted that the 1st plaintiff had authority to appear, plead and/ or act on behalf of the other plaintiffs under Order 1 Rule 13 of the Civil Procedure Rules. The plaintiffs submitted that the application forms that were signed by the parties and the receipts that were issued by the defendants upon receipt of the payments made by the plaintiffs constituted memorandum and satisfied the requirements of section 3(3) of the Law of Contract Act as to what constituted a valid contract for disposition of an interest in land prior to the subsequent amendment which took effect on 1st June, 2003. The plaintiffs cited the case of Peter Mbiri Michuki *v* Samuel Mugo Michuki (2014)eKLR in support of their submission that the amendments to the Law of Contract Act which took effect on 1st June, 2003 do not apply to contracts made prior to the said commencement date.

The plaintiffs submitted that the defendants' contention that there was no valid contract for sale between the parties was baseless as it was grounded on the amendments to section 3(3) of the Law of contract Act which are inapplicable since the transactions in question were entered into between 11th December, 2002 and 15th April, 2003 before the said amendment took effect on 1st June 2003.

The plaintiffs submitted that there was no counter-claim or evidence to support the allegations that the plots occupied by the plaintiffs belonged to third parties. With regard to the plot sizes, the plaintiffs submitted that from the correspondence between parties, the admission by DW2 and the conduct of the parties, the plots offered by the defendants to the plaintiffs measured 1/8 of an acre. The plaintiffs submitted that the defendants deliberately refused to produce before the court the subdivision map which they used to deceive potential buyers. With regard to the price adjustment, the plaintiffs submitted that the parties had settled on a purchase price of Kshs. 100,000/- per plot. The plaintiffs submitted that whereas the defendants' reserved the right to vary the prices, this could not be done where some of the receipts issued by the defendants indicated Kshs. 100,000/- as the price and not provisional price and after a lapse of 6 years. The plaintiffs contended that no evidence had been adduced by the defendants to demonstrate that they were informed of the price adjustment and as such the defendants were estopped from insisting on the alleged adjustment of the purchase price from Kshs. 100,000/- to Kshs 130,000/-.

The plaintiffs submitted that it was the defendants who breached the contracts between the parties. The plaintiffs submitted that the defendants were in breach of their main obligation of transferring to them plots measuring 1/8 of an acre each. The plaintiffs submitted that the defendants had 3 subdivision maps meaning that they kept changing the plot measurements at whim. On the defendants' contention that the contract stood rescinded after the expiry of 6 months from the date of contract after the plaintiffs failed to complete the payment of the balance of the purchase price, the plaintiffs submitted that clause 5 of the application form could only be invoked if the defendants had performed their obligations and issued a demand making time of essence. The plaintiffs submitted further that the defendants waived their rights under the said clause when they continued having meetings with the 1st plaintiff after the lapse of the said 6 months. The plaintiffs relied on Halsbury's Laws of England Vol. 9 para 485, in support of their submission that where time is of essence of a contract and the same has been waived, a party who is not in default has to issue a notice making time of essence. The plaintiffs submitted that the defendants who did not issue the pre-requisite notice were estopped from invoking clause 5 of the application form. The plaintiffs submitted that it would be illogical, unreasonable and unjust to blame the plaintiffs for not having completed the payment of the purchase price within 6 months while the defendants were not ready to transfer to them plots measuring 1/8 of an acre. The plaintiffs submitted that the defendants could not be allowed to benefit from their own fault. The plaintiffs cited Article 159(2) (a) of the Constitution and submitted that the defendants should not be allowed to unjustly enrich themselves after keeping them waiting for 6 years. They argued that the suit properties were still available as no evidence was produced to support the allegation that they had been sold to third parties. The plaintiffs submitted that DW4 did not produce any evidence to support his claim that he purchased some of the suit properties.

The plaintiffs referred the court to the case of National Bank of Kenya Ltd *v* Pipeplastic Samkolit (K)Ltd & another (2001) KLR 112 for the submission that the defendants were bound by the terms of the contracts they had entered into with the plaintiffs and could not be allowed to escape from their bargain. The plaintiffs submitted that the contracts between the parties were still valid and had not been legally repudiated. The plaintiffs submitted that they were entitled to an order for specific performance. The plaintiffs submitted that the holding in the case of Thomas Joseph Openda *v* Peter Martin Ahn (1982-88)1KAR 294 in which the court ordered specific performance was applicable in this case. The plaintiffs relied on the texts, Hanbury & Maudsley, Modern Equity 10th Edition and Chitty's Treatise on the Law of Contract 20th Edition at pg. 390 in support of their submission that land in its nature is unique and rare and as such loss of land by a party entitled to it cannot be measured by money; consequently, a decree of specific performance is readily granted to enforce a contract to convey an interest in land unless special circumstances exist that would militate against such order. The plaintiffs submitted that an order of specific performance would suffice to enable them achieve their desires and aspirations.

With regard to general damages, the plaintiffs cited Chitty's Treatise on the Law of Contract, 20th Edition at pg. 407 and submitted that damages is awarded as compensation to the party aggrieved by the breach of contract and that it is a restitution of what he has lost by the breach. The plaintiffs cited the cases of Mukisa Biscuit Manufacturing Co. Ltd *v* West End Distributors Ltd. (No. 2) (1970)469 and Sundown Lodge Ltd *v* Kenya Tourist Development Corporation HCCC No. 481 of 2003 and submitted that an amount of Kshs. 3,000,000/- would suffice in lieu of each of the plots purchased by the plaintiffs.

In his submissions in reply, the 1st defendant submitted that the plaintiffs' suit was incompetent in that it was brought against one (1) partner only of Membley contrary to the provisions of Order XXIX Rule 1 of the Civil Procedure Rules (now repealed) and also against a non-existent entity known as Membley Housing Scheme. The 1st defendant submitted that he had denied in his defence that Samuel B. Mbugua who was sued as the second defendant was a partner in Membley. The 1st defendant submitted further that he had also denied being a partner in Membley Housing Scheme. The 1st defendant submitted that the plaintiffs had failed to establish that Membley Housing Scheme which they sued exists and if it does, whether it had any relationship with the suit properties. The 1st defendant submitted that the plaintiffs treated the issue of proper party to be sued casually even after the 1st defendant had expressly stated on oath that Samuel B. Mbugua who was sued as the 2nd defendant was not a partner in Membley and produced in court a copy of Certificate of Registration of Membley. The 1st defendant submitted that the plaintiffs' suit is a non-starter and incurably defective.

As to whether there were valid contracts for sale of land which could be enforced through an order of specific performance, the 1st defendant submitted that there were none. The 1st defendant averred that the application forms that were executed by the parties were subject to a formal agreement for sale being drawn by Othieno & Adul Advocates and executed by the parties. The 1st defendant submitted that the application forms aforesaid were subject to contracts which contracts were neither drawn nor executed. The 1st defendant cited the case of East Africa Fine Spinners Ltd. (In receivership) & 3 others *v* Bedi Investment Ltd (1994) eKLR and submitted that an offer subject to contract lacks essential characteristics for its acceptance and as such does not create a contract. The 1st defendant submitted that the acceptance by the plaintiffs of the terms and conditions contained in the said application forms did not amount to contracts capable of being specifically performed.

The 1st defendant submitted further that on 1st June, 2003, section 3(3) of the Law of Contract Act as amended by the statute Law (Miscellaneous Amendments) Act No. 2 of 2002 became operative through Legal Notices No. 188 and 189 of 2002. The 1st defendant submitted that the plaintiffs had relied on the application forms and correspondence exchanged by the parties between 1st August, 2003 and 18th February, 2009 as memorandum and notes evidencing the contracts between the parties. The 1st defendant submitted following the coming into effect of section 3(3) of the Law of Contract Act as amended by the statute Law (Miscellaneous Amendments) Act No. 2 of 2002 on 1st June, 2003 as a foresaid, all correspondence between the parties after 1st June, 2003 were inadmissible to prove the alleged contracts between the parties. The 1st defendant submitted that in the absence of the said correspondence, the application forms and the receipts produced by the plaintiffs in evidence were insufficient to satisfy the essential terms of a contract even under the provisions of the previous section 3(3) of the Law of Contract Act.

The 1st defendant submitted that the plot application forms contained only a provisional selling price and did not define the parcels and the measurements of the plots that were being sold. The 1st defendant cited the case of Baber A. Mawji *v* United States International University & another (1976) eKLR and argued that the said application forms and receipts were deficient in essential terms and as such could not constitute a contract.

On the issues of the size of the suit properties and the price thereof, the 1st defendant reiterated that the plots that were offered for sale to the plaintiffs measured 10m by 18m and that the price of Kshs. 100,000/- was provisional and was increased to Kshs. 130,000/-. The 1st defendant submitted further that none of the plaintiffs had paid the purchase price even if it was assumed that the purchase price was Kshs. 100,000/- in breach of clause 5 of the application form. The 1st defendant averred that the 6 months period within which the purchase price was to be paid was not extended and as such the offer that had been extended to the plaintiffs lapsed.

The 1st defendant submitted that the plaintiffs had failed to perform an essential part of the conditions set out in the application forms being the payment of the proposed provisional selling price and as such they were not entitled to an order of specific performance. In support of this submission, the court was referred to the case of Gurdev Singh Birdi & another *v* Abubakar Madhbuti (1997) eKLR

where the court stated that a plaintiff seeking equitable remedy of specific performance of a contract must show that he has performed all the essential and considerable terms of the contract which he has undertaken to perform. The 1st defendant submitted further that the plaintiffs had neither particularised nor proved the special damages that they sought in the plaint. The 1st defendant cited the case of Caltex Oil (Kenya) Ltd *v* Rono Ltd. (2016)eKLR in support of his submission that for special damages to be awarded, the same must be pleaded and proved.

The 1st defendant submitted further that none of the plaintiffs had pleaded or claimed to have suffered any general damages as a result of the alleged breach of contracts and as such there was no basis for awarding the same. Lastly, the defendants submitted that the unlawful possession of the suit properties by the plaintiffs constituted acts of trespass which the court must address to conclusively determine the rights of the parties.

Determination:

I have considered the evidence tendered by the parties and the submissions of counsel. The parties did not agree on the issues for determination by the court. From the pleadings and the evidence tendered by the parties, the following in my view are the issues that arise for determination in this suit:

1. Whether the plaintiffs' suit is competent;

2. Whether there were contracts for sale of land between the plaintiffs and the defendants;

3. Whether the said contracts for sale if any were breached by the defendants;

4. Whether the plaintiff is entitled to the reliefs sought in the plaint;

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

Whether the plaintiffs' suit is competent:

The 1st defendant claimed that the plaintiffs' suit was incompetent on three grounds. First, the 1st defendant contented that the suit was time barred under the Limitation of Actions Act. Although this issue was raised in the defence, the 1st defendant neither led evidence nor made submissions in respect thereof. In the circumstances, there is no material before the court on the basis of which a determination can be made that the suit herein was filed out of time. The 1st defendant had also contended that this suit was untenable on the ground that the documents alleged to constitute contracts for sale of land between the plaintiffs and the defendants did not satisfy the provisions of section 3(3) of the Law of Contract Act. In his submission, the 1st defendant admitted that the provisions of section 3(3) of the Law of Contract Act that applied to this case were those prior to 1st June, 2003 which provided that:

"No suit shall be brought upon a contract for the 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".

The plaintiffs had contended that the plot allocation application forms and receipts for payments that had been made by the defendants for the suit properties constituted memorandum or note in writing and as such satisfied the conditions of section 3(3) of the Law of Contract Act. The 1st defendant had contended on the other hand that the said application forms and receipts did not constitute a memorandum or note as the same were deficient in material particulars in that the same did not contain the measurements of the suit properties and the final prices. Commenting on the interpretation of section 3(3) of the Law of Contract Act, the court stated as follows in Associated Motors Ltd *v* J. M. Githongo & 2 others [1995] eKLR:

> **"So it is essential that the writing should contain an admission of the existence of the contract and all the terms of it. If it fails to do so, it is not sufficient to satisfy the statute. We are fortified in our conclusion by two cases: first, the decision in *Thirkell v Cambi* [1919] 2 K B 590, where Bankes, L J said at p 595:**
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> **".....If Mr Bevan could have established that the letter of January 2nd recognized that a contract had been made and that its terms were correctly stated in the appellant's letters, I agree it would be immaterial that it also contained a refusal to perform the contract so recognized."**
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> **And Scrutton L J said at p 597:**
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> **".....In order to make that position good (ie a sufficient writing) it is necessary to prove two things, which may be one thing containing two elements, a signed admission that there was a contract and a signed admission of what that contract was."**

I have considered the plot application forms and the receipts that were issued by the defendants to the plaintiffs for the payments that were made by them in light of the provisions of section 3(3) of the Law of contract Act. I am satisfied that the same constitutes an admission that the defendants had agreed to sell the suit properties to the plaintiffs. The forms contain the price at which the suit properties were being sold and the description of each property. I am not in agreement with the contention by the 1st defendant that failure to indicate the measurements of the properties rendered the said documents deficient to satisfy the requirements of the said statute. I wish to add that the 1st defendant stated in his evidence in cross examination that *"The application forms formed the contract between the plaintiffs and us."* This was an admission that there was a contract between the parties evidenced by the said plot application forms. The 1st defendant cannot therefore be allowed to turn round in his submission and claim that there was no contract between the parties.

The competency of the plaintiffs' suit was also attacked on the ground that the suit offended the provisions of Order XXIX Rule 1 of the old

Civil Procedure Rules (now repealed) which provided as follows:

> **" Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct."**

The 1st defendant had contended in his defence that he was the only partner of Membley who was sued and that Samuel B. Mbugua who was sued as his co-defendant was not a partner of Membley or Membley Housing Scheme which was an unknown entity. From the material on record, I have noted that the names Membley Housing and Membley Housing Scheme were being used by the parties interchangeably. In his affidavit in opposition to the plaintiffs' application for injunction, the 1st defendant stated as follows, *"That I am the 1st defendant named in this suit and a partner in the firm Membley Housing Scheme(emphasis added)."* The correspondence between the parties sometimes referred to Membley Housing and at times Membley Housing Scheme. I am in agreement with the 1st defendant that from the evidence on record, the official name of the entity that entered into agreements with the plaintiffs was Membley Housing and not Membley Housing Scheme and this fact was brought to the attention of the plaintiffs very early in the proceedings. If the plaintiffs' advocates were cautious enough, they should have taken the earliest opportunity to amend the plaint to reflect the correct name of the firm with which they entered into the agreements for sale. There is however no evidence before the court that Membley Housing Scheme was a different legal entity separate from Membley Housing. There was also no evidence placed before the court showing that the 1st defendant was prejudiced by the incorrect name of the firm with which the plaintiffs had entered into the agreements for sale in question. The failure by the plaintiffs to get the name of the firm correctly was therefore not fatal to the suit.

With regard to whether or not Samuel B. Mbugua was a partner in Membley, I am of the view that no sufficient evidence was placed before the court to show that he was not a partner. The plaintiffs placed before the court a copy of a letter dated 31st March, 2009 addressed to the plaintiffs previous advocates by Membley Housing which letter was signed by one, S.B. Mbugua who gave his position as Managing Partner (see page 29 of Pexh.1). The 1st plaintiff also led evidence that the 1st defendant had introduced Samuel B. Mbugua as his partner. This evidence was not rebutted. What the 1st defendant placed before the court in proof of the fact that Samuel B. Mbugua was not a partner in Membley was a certificate of registration of Membley that was issued on 29th March, 1990. This to me was insufficient to prove that fact. It is common knowledge that the constitution of partnerships changes. What the 1st defendant should have placed before the court was a search from the Registrar of Companies on Membley. This would have given a true picture of who the partners of Membley were when it entered into the disputed transaction with the plaintiffs. For the foregoing reasons, I find no merit in the 1st defendant's objection to the suit which was based on Order XXIX Rule 1 of the repealed Civil Procedure Rules.

Even if it is assumed that Samuel B. Mbugua was not a partner in Membley, that in my view does not render the suit defective. Order 1 Rule 9 of the Civil Procedure Rules provides that no suit shall be defeated solely on account of misjoinder or non-joinder of parties and that the court may in every suit deal with the matter before it so far as regards the parties actually before it. For the foregoing reasons, it is my finding that the plaintiffs' suit is properly before the court.

Whether there were contracts for sale of land between the plaintiffs and the defendants:

I have dealt with this issue when considering the first issue above. From what I have stated above, it is my finding that the plot application forms and the receipts that were issued by the defendants for the payments that were made by the plaintiffs constituted valid and binding agreements for sale of land between the plaintiffs and the defendants.

Whether the said contracts for sale of land were breached by the defendants:

From the evidence on record, it is clear that the defendants did not complete the said agreements for sale because the plaintiffs insisted that they had purchased plots measuring 1/8 of an acre while the defendants maintained on the other hand that the plots sold to the plaintiffs measured 10m by 18m (1/16 of an acre). As I have held above, the agreements between the parties were evidenced by the plot application forms and receipts that were issued for the payments that were made by the plaintiffs. It is not contested that neither the application forms nor the receipts contained plot measurements. The onus was upon the plaintiffs to prove that the plots which they purchased measured 1/8 of an acre and not 1/16 of an acre as claimed by the defendants. The plaintiffs claimed that a subdivision scheme that was hanged on the wall of the 1st defendant's office showed that the suit properties measured 1/8 of an acre each. This was denied by the 1st defendant and the said subdivision scheme was not produced in evidence. The subdivision scheme that was produced in evidence by the 1st defendant showed that the suit properties measured 1/16 of an acre. I am not in agreement with the plaintiffs' submission that DW2 admitted that the suit properties measured 1/8 of an acre. I am unable to discern the alleged admission from the evidence of DW2. The gist of DW2's evidence considered with the other evidence on record was that he was asked to consolidate 1/16 of an acre plots so as to accommodate the plaintiff's wishes and according to DW1 the prices had to be adjusted for the consolidated plots. I am not satisfied therefore that the plaintiffs discharged the burden of proving that the plots that they purchased from the defendants measured 1/8 of an acre and not 1/16 of an acre as claimed by the defendants. Since it is the plaintiffs who refused to accept the plots offered to them by the defendants, it is my finding that the defendants did not breach the agreements that they entered into with the plaintiffs.

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

The plaintiffs had sought specific performance of the agreements which they entered into with the defendants. 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(supra) 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."

The 1st defendant led uncontroverted evidence that the plaintiffs did not pay the full purchase price for the suit properties within the prescribed period. The plaintiffs having failed to complete the payment of the purchase price for the suit properties they cannot partake of the equitable remedy of specific performance. Again, as I have held above, there is no evidence that the defendants refused to transfer the suit properties to the plaintiffs. The plaintiffs simply did not want what was on offer. The plaintiffs did not satisfy this court that the agreements that they entered into with the defendants entitled them to plots measuring 1/8 of an acre. Having not satisfied the court of the existence of the agreements which they have sought to enforce, the court cannot make an order for specific performance in their favour.

The plaintiffs had sought an alternative prayer for a refund of the payments which they made to the defendants together with interest at the rate of 30% p.a from the date of receipt until payment in full. The 1st defendant did not contest this claim save for the interest which he claimed to have no basis. I am satisfied that the plaintiffs are entitled to a refund for the payments which they made to the defendants. If the defendants were to keep the said payments, they would have unjustly enriched themselves having not transferred the suit properties to the plaintiffs. I am however in agreement with the 1st defendant that the claim for interest by the plaintiffs has no basis. As I have held above, the defendants were not to blame for the non-completion of the agreements entered into by the parties. In the absence of any fault on the part of the defendants, there would be no basis for condemning them to pay interest to the plaintiffs on the purchase price. No evidence was placed before the court showing that the plaintiffs had demanded a refund of the purchase price from the defendants and that they had failed to release the same.

The plaintiffs had also claimed general damages. I am in agreement with the 1st defendant that this claim has no basis. The plaintiffs having failed to establish any fault on the part of the defendants, there would be no basis for such an award. In any event, general damages was merely claimed. It was neither pleaded nor proved.

Who is liable for the costs of the suit?

The rule on costs is that the same normally follow the event. The court however has a discretion to direct otherwise for good reason. Taking into account all the circumstances surrounding this case, I am of the view that each party should bear its own costs of the suit.

Conclusion:

In conclusion, I hereby make the following orders:

1. Judgment is entered for the plaintiffs against the defendants in the sum of Kshs. 670,000/- being a refund of the purchase price paid by the plaintiffs to the defendants.

2. The plaintiffs' prayers for specific performance and general damages are dismissed.

3. Each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 30th day of April 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Nyakundi h/b for Mr. Oyugi for the Plaintiffs

Mr. Githuka for the Defendants

C. Nyokabi-Court Assistant