



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 162 OF 2016

GRACE ZAKAYO LENYAMOI.....PLAINTIFF

VERSUS

WILSON LONAPA.....DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated **4/11/2016** and later amended on **13/12/2016** and filed in court on **14/12/2016** the plaintiff sought the following orders:

- (a) **An order of eviction be issued against the defendant, his servants and agents to vacate from that parcel of land known as West Pokot/Kisaunet/229.**
- (b) **An order of permanent injunction be issued against the defendant, his servants, agents and any other person claiming under him from entering, dealing in or doing any act on that parcel of land known as West Pokot/Kisaunet/229.**
- (c) **Any other relief this honourable court may deem fit and just to grant.**

The Plaintiff

2. According to the amended plaint dated **13/12/2016** the plaintiff entered in a land exchange agreement with the defendant by which it was agreed the defendant would take **62 acres** out of **West Pokot/Kisaunet/229** at a consideration of **Kshs.50,000/=** per acre in exchange for the defendant's commercial plot **West Pokot/Keringet "A"/75** which measure 50 by 100 feet which is located in Makutano town. According to the plaintiff it was an express term of the agreement that the defendant would construct as many rental housing units as the plot could accommodate on the plot commencing **November, 2014**. The plaintiff avers that the defendant took possession of her land in **August, 2014** but failed to cede vacant possession of the plot; he also failed to put up the houses as agreed. The plaintiff also avers that in **2015** the defendant offered motor vehicle registration No. **KBP 649J** valued at **Kshs.900,000/=** as part of the consideration; in the same year the plot was assigned a value of **Kshs.800,000/=**. Thereafter an agreement containing the terms of sale of the motor vehicle and payment of **Kshs.100,000/=**. The plaintiff avers that the terms of the agreement dated **27/8/2014** are still valid. She adds she has performed her part of the agreement while the defendant has neglected to perform his. It's the plaintiff's case that she recently discovered that the 50 by 100 feet plot subject matter of the exchange agreement does not belong to the defendant but to a 3rd party. By reason of foregoing the plaintiff avers that the defendant is in breach of the agreement.

The Defendant's Defence and Counterclaim

3. The defendant filed a defence and counterclaim on **1/12/2016** and amended defence and counterclaim on **20/12/2016**. According to the 2nd pleading the defendant denies that there was any land exchange agreement as alleged by the plaintiff; he also denies that there was any agreement to construct rental houses. He maintains that he has given the plaintiff vacant possession of the plot. The advance of **Kshs.100,000/=** is denied. He denies having breached the agreement and that the agreement dated **27/8/2014** was revoked at the instance of the plaintiff.

4. In his counterclaim, the defendant avers that the plaintiff failed to honour the terms of the agreements relating to the land, plot and motor vehicle dated **20/1/2015**; he avers that he paid **Kshs.180,000/=** sold his motor vehicle **KBP 649J** at **Kshs.900,000/=** and the plot at **Kshs.800,000/=** to the plaintiff thus making a total of **Kshs.1,880,000/=** and that the balance of **Kshs.100,000/=** that remains would be paid upon the transfer; he took possession of the land after the above payments and he has developed the land. He denies having agreed to the purchase of **Kshs.50,000/= per acre** and maintains that only the total sum of **Kshs.1,980,000/=** was arrived at as consideration for the entire **62 acres**. In the counterclaim the defendant seeks an order of dismissal of the plaintiff's claim and a declaration that the defendant is the legal owner of **West Pokot/Kisaunet/229**; he also seeks an order of permanent injunction against the plaintiff restraining from interfering with the suit land.

The Plaintiff's Reply to Defence and Counterclaim

5. In her reply to defence the plaintiff reiterates the averments in the amended plaint and denies the allegations in the defendant's amended statement of defence and counterclaim. The plaintiff reiterates that the agreement was for land exchange of **62 acres** parcel within LR. No. **West Pokot/Kisaunet/229** at **Kshs.50,000/=** per acre with LR. No. **West Pokot/Keringet "A"/75** measuring approximately **50 by 100 feet** and permanent rental houses thereon.

The Plaintiff's Evidence

6. The suit came up for hearing on **14/3/2018**, **25/7/2018** and **3/12/2018**. The plaintiff gave evidence at the first hearing. She reiterated the matters in the plaint and the reply to defence and counterclaim. She adopted her statement filed in this suit as her evidence-in-chief. In a nutshell her evidence is that **West Pokot/Kisaunet/229** is registered in her name and she is in possession of the original title deed a certified copy of which she produced as **P. Exhibit 1**; she inherited the land from her father **Zakayo Lenyamoi Kamania**; she produced certificate of grant. She stated that it is **75 acres**; that she entered into an agreement with the defendant on **27/4/2014** for sale of **62 acres**; that she was not given money but instead the defendant was to build for her rental houses on plot No. **West Pokot/Keringet "A"/75** and when they were complete he would hand them over to her in exchange for the land; at that time the defendant promised to begin the construction and the rains subsidized however the defendant never built the houses and he has never done so todate. The plaintiff produced a copy of an agreement dated **27/8/2014** as **P. Exhibit 3**; that agreement is between her and the defendant and it speaks of sale of **62 acres** at **Kshs.50,000/=**. It also provides that the defendant would construct rental houses on the plot as soon as the rains subsided. The agreement appears to have been signed by both parties and was witnessed by three persons. On **20/1/2015** the defendant visited the plaintiff at her house and an agreement was entered into placing the value of the plot at **Kshs.800,000/=**, that agreement was produced as **P. Exhibit 4** without any demur on the part of the defendant. It was witnessed by **6** people. On the same date motor vehicle **KBP 649J** was valued at **kshs.900,000/=**; another agreement of the same date was executed by the parties herein in the presence of the witnesses in that effect. That agreement was produced as **P. Exhibit 5**. A third agreement bearing the same date was produced as **P. Exhibit 6**. It speaks of sale of **62 acres** of unspecified land within Kishaunet for **Kshs.1, 980,000/=**. It states that a balance of **Kshs.100,000/=** remained unpaid.

7. The plaintiff avers that she went to view the plot no. **West Pokot/Keringet "A"/75** but upon conducting a search she discovered that the land was registered in the name of one **Suleiman Sakwa Mkumba**. She produced as **P. Exhibit 7** a certified copy of the green card showing that plot measures **1.9 hectares** and that it was first registered in the name of the said Suleiman Sakwa Mkumba on **9/4/1994**. It also shows that the title was closed on subdivision on **5/12/1985** and that that subdivision resulted into plots no. **West Pokot/Keringet "A"/772 and 773**. The plaintiff's testimony was that upon inquiry at the site of the said plot she was informed by the owner that the defendant had merely been granted space for the making of bricks on the said plot but did not own it. It was plaintiff's further testimony that after the agreement between her and the defendant was executed on **2014** the defendant took possession of the land and harvested indigenous trees worth about **Kshs.1,600,000/=**, demolished her house and subsequently caused her and her son Noah Yego to be arrested by the police. She averred that though they were acquitted in a criminal case that ensured the defendant is still in wrongful occupation of the land and should be evicted.

8. **PW2, Emmanuel Pkemei Lochale** testified on the same date. His evidence is that he has been a neighbour to the plaintiff for about **20** years; that the defendant is a businessman at Makutano town; that went to the defendant's office where he had been called to go and prepared an agreement for sale of plot No. **West Pokot/Kisaunet/229** measuring **75 acres**; that in the process the defendant asked whether it was possible to exchange the land with a plot and it was agreed so. The consideration was set at **Kshs.50,000/=** per acre however that money was not to be paid to the plaintiff; instead the defendant was to build some rental houses on the plot. He testified that he went and viewed the plot on which the houses were to be built and it was agreed that by **January, 2015** the houses would be ready. Later in **January, 2015** when the time frame for construction thereof had expired he was sent (presumably by the plaintiff) to go and ask the defendant why the houses had not been built and the defendant used the rain as an excuse. However, when the plaintiff conducted a search on the property she discovered that plot did not belong to the defendant hence this suit. With that evidence on the record the plaintiff closed her case.

The Defendant's Evidence

9. **DW1** the defendant testified on **25/7/2018**. His evidence is that he is a businessman; that the plaintiff's land is **73 acres**; that the plaintiff had sold **11 acres** to a third party; that his farm manager informed him that there was a parcel of land, located near a plot which he had bought earlier, which had been put up for sale; that he went saw the land; that at that time, he could only see a small portion of the land; that they departed from the suit land and a proposal was made by the plaintiff's party to have the land sold at **Kshs. 50,000/=** per acre and construction be done for them on a plot; however the plaintiff did not possess any plot and the defendant informed the plaintiff's party that he had bought a plot from one Bakari which had not been transferred to his name. The two parties then went and viewed the plot and went back to his office. Plaintiff liked the plot; the parties agreed that the defendant would go and view the plaintiff's land again; according to the defendant, his hotel manager and the **PW2** must have written something down while at the hotel which he did not get to see and which he later came to see in court. He averred that whereas they had made a proposal he needed to go and view plaintiff's land again as he had not viewed it fully; he dismissed the issue of **Kshs.50,000/=** per acre as not true; he maintained that there was no agreement on price per acre and that his only proposal to the plaintiff's party was that he would build houses for the plaintiff only on certain conditions. He further maintain that the agreements which were produced in court and which he admitted came later. He maintained that on the morning of the next day he went to the suit land and met a person who had bought **11 acres** out of it from the plaintiff; that buyer also agreed to sell his entitlement in the land to the defendant. However the defendant also noticed that contrary to his expectations the lower part of the shamba comprised of a precipice and from that point the two parties failed to agree; the defendant returned to the office and informed the plaintiff's party that the land comprised of stony ground and that he intended to withdraw from the entire agreement but by then he had already paid the plaintiff **Kshs.100,000/=** to the plaintiff to cater for school fees. He demanded back his money and the plaintiff's party said that they were not able to refund. At that juncture the defendant informed them that the plaintiff's land was not enough if construction on the plot was to be considered and he suggested that they agree on a price for the suit land which he would pay upon agreement. He also proposed that they needed to have the chief and area elders and the plaintiff's children present; he called the elders, the chief, the former chief, the neighbouring chief and other persons to enable them place a value and write it down. It was agreed that **Kshs.1,980,000/=** was to be the price of the land. He maintains that the decision was made during the day and that a goat was slaughtered. On that day the plaintiff's party were pleased with his car which was jointly valued at **kshs.900,000/=**. An agreement was written down and the plaintiff took the car at that value. The defendant maintains the chief of the neighbouring location is the one who wrote **P. Exhibit 5**. He also testified that after the agreement was reduced to writing the plaintiff said that she would take the plot and construct houses on it later. According to the defendant, the plaintiff's

acceptance of the car and the money absolved him from having to build rental houses for the plaintiff on the said plot. The defendant acknowledged that **P. Exhibit 4, 5 and 6** were all made on the same date and that in that one day the sum payable for the land as consideration, including previously paid sums, the value of the car and the plot was assessed in the sum of Kshs. **1,980,000/=**; The defendant maintains that the only debt that he owes the plaintiff is the delivery of the title to the plot which is not in his name. According to him he was also to retain Kshs. **100,000/=** and pay her when he gets the title to the suit land from her. However to date she has never availed him the said title.

10. DW2 Samson Chemekuro testified on **3/12/2018** and adopted his written statement as his evidence-in-chief in this matter. He witnessed the making of an agreement for a plot and an agreement for a car. His further evidence is that the plaintiff had land which she had put up for sale while the defendant had a plot valued at Kshs. **800,000/=**. According to him there was no agreement concerning the construction of any house.

11. DW3 , Nelson Mesiningiro. He testified on **3/12/2018** and adopted his written statement as his evidence-in-chief in this suit. According to him the agreement was only in respect of plot No. **West Pokot/Keringet "A"/75** and there was no other agreement.

12. DW4 Alexander A. Reuben, testified on **3/12/2018** and adopted his written statement filed in the record as his evidence-in-chief. He acknowledge the three agreement made on **20/1/2015**. He maintained that consideration for the **62** acre parcel of land amounted to Kshs. **1,980,000/=** of which kshs. **900,000/=** was the value assigned to the car in lieu of cash and Kshs. **800,000/=** was the value of the plot, also given by the defendant to the plaintiff in lieu of cash. He also testified that he, the two parties herein, the plaintiff's husband and one Samson went to inspect the plot. However he acknowledged that the plot was not registered in the defendant's name but in the name of one Bakari Sakwa and maintained that that fact was within the plaintiff's knowledge. With that evidence on record the defendant closed his case.

Submissions

13. The defendant filed his submissions on **15/3/2019**. Citing **Section 3** of the **Law of Contract Act Cap 23** of the Law of Kenya. The defendant submits that pursuant to compliance to provisions of that section the parties executed three different agreements on **20/1/2015** all relating to purchase of **LR. No. West Pokot/ Kisaunet/229** and that the agreements were witnessed by several witnesses, and that they constituted a valid contract which is binding on the parties and from which the plaintiff cannot run away; he maintains that the agreement executed on **27/8/2014** was a mere proposal which was entered into while the parties were still negotiating and that after negotiations were complete they reviewed the proposal by entering into an agreement dated **20/1/2015**. The defendant further submits that the final agreement dated **20/1/2015** does not include the construction of houses for the plaintiff by the defendant on the plot. He further submits that though the plot is not registered in the defendant's name the defendant has commenced the process of conveyancing and subdivision is ongoing and in due time, the title deed will be issued in the name of the plaintiff and that there is no objection from the owner Mr. Bakari. He submits that the plaintiff has refused to take possession thereof and has purported to reintroduce terms that are not reflected in the last agreements. The defendant's further submission is that the agreements dated **20/1/2015** and the agreement dated **27/8/2014** were not denied and that the plaintiff conceded to having signed all the agreement. He avers that the earlier agreement of **27/8/2014** was reviewed by the three agreements and since there is no clause in the latter three agreements the defendant to construct rental houses then the allegations of the plaintiff are baseless. He cites **Section 107** of the **Evidence Act** and submits that the plaintiff is attempting to rescind the last three agreements by giving the court the wrong facts. The defendant concludes by submitting that the court should restrain itself from interfering with the terms of the agreements on behalf of any party in the suit and that since the defendant has proved that he purchased **West Pokot/ Kisaunet/229** and that he has not breached any clause of the agreements dated **20/1/2015**, the only order this court should make is that compelling the defendant to secure a title deed in respect of **West Pokot/ Keringet "A"/75** in the name of the plaintiff and nothing more. Lastly the defendant avers that the balance he owes the plaintiff will be paid on completion of the transfer.

14. I have perused the court record and found no submissions filed on behalf of the plaintiff.

15. The issues that arise in this suit are as follows:

(1) Does the agreement dated 27/8/2014 stand rescinded by the agreement dated 2015 or by the plaintiff's letter dated 3/10/2016?

(2) What orders should issue?

(1) Does the agreement dated 27/8/2014 stand rescinded by the agreement dated 2015 or by the plaintiff's letter dated 3/10/2016?

16. It is common ground in this suit that the two agreements were made and executed between them. However while the plaintiff holds that the terms of the agreement of **27/8/2014** are still valid and effective and maintains that the purchase price remained Kshs. **50,000/=** per acre and that possession of the suit land was taken by the defendant from the date thereof; she is also of the opinion that the agreement dated **29/1/2015** merely assigned value to the defendant's assets, that is the Makutano plot and motor vehicle **KBP 649J** for the purpose of including that value in the purchase price.

17. The plaintiff's position is contrary to the defendant's, who holds that the earlier agreement was rescinded by the latter and that the purchase price of Ksh **50,000/=** per acre does not apply any longer, and that instead, the suit land was valued at a total of Ksh **1, 980,000/=**. The defendant's defence also alleges that he has given vacant possession of his 50 by 100 feet plot at Makutano centre to the plaintiff. However, he does not state when that event occurred.

18. This court's decision is on whether rescission ensued after the execution of the agreements of **29/1/2015**.

19. Rescission of an agreement may be either mutual or unilateral, expressly or by conduct. Since the defendant avers that the rescission of the original agreement of the year **2014** was mutually agreed this court must seek evidence of that mutuality in the record.

20. **PEXh 4** reads that the defendant is desirous of selling plot no 75 situate at Makutano Centre measuring 50 by 100 feet at a consideration of Ksh 800,000/=. The said agreement is a pre-printed form whose gaps are hand-filled. It states that the seller shall give immediate vacant possession of the plot and transfer the land into the names of the purchaser immediately after payment in full. In my view there is no express stipulation in that document that the agreement dated 27/8/2014 is rescinded.
21. **PEXh 5** reads that the defendant herein is desirous of selling motor vehicle **KBP 649J** to the plaintiff for the consideration of Ksh 900,000/= which is reflected as paid in full on the face of the agreement. In my view there also is no express stipulation in that second document that the agreement dated 27/8/2014 is rescinded.
22. **PEXh 6** reads that the plaintiff herein is desirous of selling a plot whose particulars are not given and which is in Kisaunet and which measures 62 acres. It shows the consideration to be Ksh 1,980,000/= and that there is a balance of **Ksh 100,000/=** the particular terms of whose repayment have not been given. In my view there is also no express stipulation in that document that the agreement dated 27/8/2014 is rescinded.
23. However I find **PEXh 6** to be quite deficient in that it does not state the particulars that should identify the land that the parties were intent on transacting on. It is agreed between the parties that after the agreement of 27/8/2014 was executed the defendant was granted vacant possession and the agreement though not providing particulars of the land sold was followed up by positive action on the part of the parties which had the effect of physically identifying the land sold on the ground. It may be said by any onlooker that *“but the plaintiff had only one parcel of land measuring 62 acres and therefore surely she could not have been selling any other land but that parcel?”*
24. In my view that question is a very simplistic one that does not accord with the law and the facts of the instant case. The agreement of 27/8/2014 having been signed by the parties only an express mutual agreement by the parties that it was rescinded, or a repudiatory breach by any of the parties, or, upon breach by one party, a unilateral rescission by a party who was not in breach could render it to stand cancelled. Since there was nothing on the plaintiff’s part to hand over to the defendant, possession having been handed over on 27/8/2014, the agreement dated 20/1/2015 marked **PEXh 6** stands vague for want of particulars of the land that was being sold, and also for want of express stipulation that the agreement dated 27/8/2014 stood cancelled upon its execution.
25. It must be remembered that the agreement of 27/8/2014 had various clauses that could not be simply deemed to have been rescinded because the parties had executed the agreement of 20/1/2015 if the latter agreement did not express state that the former stood rescinded.
26. The two principal conditions of the first agreement were that as part of the terms of payment, the defendant would transfer to the plaintiff plot no 75 located at Makutano to the plaintiff and that he would build as many rental houses on plot no 75 as the plot could accommodate as soon as the rains subsided.
27. In my view the defendant wishes to be choosy as to which clauses in the agreement of 27/8/2014 that he wishes to have retained even after the execution of the agreement of 20/1/15 despite lack of express retention or exclusion by the latter agreement, for example, that the plot at Makutano was still part of an exchange while the construction of houses for the plaintiff on the same plot was not.
28. Unfortunately for him any attempt at this approach only ends up in grotesque consequences because even **PEXh 4** which spoke of a sale did not refer to an exchange but simply set the value of the plot.
29. Unless the plaintiff relies on the agreement dated 27/8/2014 he can not be heard to speak of any exchange, because no monetary value changed hands between the two parties even after **PEXh 4** was executed. Yet he does speak of it and concedes that there was an exchange.
30. In my view, if we are to uphold the principle that both parties to a contract are equally bound by its terms, the defendant can not have his cake and eat it at the expense of the plaintiff. The moment he relies on an exchange”, which can only be found in the agreement dated 27/8/2014, he acknowledges that that agreement is still in force and that it binds him in all its terms, including the term that once the rain subsides, he would construct as many rental houses on the plot as it can hold.
31. The upshot of the foregoing is that I find that the agreement dated 27/8/2014 was not rescinded as alleged by the defendant. Unless rescinded by the plaintiff, it would, subject to what I state herein below, be still in force and bind him fully despite the execution of the documents marked **PEXh.4, PEXh. 5, and PEXh 6.**
32. However the plaintiff appears to have become fatigued with the whole arrangement apparently for reason of non-observance of covenantal terms by the defendant, and she wrote a letter (**PEXh 8**) communicating her rescission of the first agreement dated 27/8/2014 and therefore demanding that the defendant do remove himself from the said land or to *“restrict himself to the 13 acres”* that he had *“paid for”*.
33. It is clear that by writing **PEXh 8** the plaintiff acknowledges receipt of some but not all the consideration for the sale of the suit land. It is now clarified by that demand letter that not the whole land had been sold to the defendant, but only 62 acres out of 75. The explanation is made in the letter that the subsequent agreement made on 20/1/2015 was for purchase of the remaining 13 acres for **Ksh 900,000/=**.
34. It is difficult to know what defendant the meant when he stated at **paragraph 9** of his counterclaim that the plaintiff *“failed to honour the terms of the agreements of land, plot and motor vehicle dated 20/1/2015”* as the terms therein were meant for the defendant to fulfil: to transfer the plot no 75 and the motor vehicle to the plaintiff; the burden was upon his shoulders.
35. I find the plaintiff’s demand letter dated 3/10/2016 to be correct when it states that the land was more than 62 acres and I am convinced that the agreement dated 20/1/2018 must have been for the remainder of the land comprising of almost 15 acres.
36. This court having found that the agreement dated 27/8/2014 bound the parties, and that the plaintiff had given possession of the suit land

as demanded by terms thereof, all the defendant had to do to prove that he was not in breach as alleged by the plaintiff was that he had effected transfer of plot number 75 into the plaintiff's name and that he had constructed as many houses on the plot as it could accommodate within the schedule agreed on in the agreement. This he has not done and were it not for what I state herein below, I would have found him to be solely in breach and the plaintiff entitled to rescind the agreement.

37. The preliminary finding that I arrive at is that the agreement of 27/8/2014 was not automatically rescinded by reason of the execution of **PExh 6**.

38. But was the agreement truly rescinded by dint of the plaintiff's election communicated in her missive dated **3/10/2016**?

39. It is observed at this juncture that the defendant having failed to comply with the terms of the demand letter dated **3/10/16**, the rescission could have, plaintiff's act of rescission, were it not for what I state herein below, have been deemed to have taken effect in respect of the whole agreement.

40. I have noted that the agreement dated **27/8/2014** was drafted without the services of a trained lawyer and hence very poorly drafted. It did not provide for the nature of housing units the defendant would put up, the material to be used, the ancillary services thereto and the time frame within which it was to be done. The timelines for the transfer of the suit land to the plaintiff and the transfer of the plot to the defendant were not provided for; neither was the fact whether the plot would be transferred before or after the houses had been built.

41. The worst regarding that agreement is that it appeared to have been made without any prior official search to confirm that the defendant was the registered proprietor thereof, and it emerged only later that he was not. If the land was registered in the name of another person, it can not be said that the defendant had any land with which to exchange with the plaintiff in the first place, leave alone on which to construct the rental houses the plaintiff was so eager to own.

42. Secondly, the plaintiff's land was not sold as a whole. The title reads **30.0 ha** which translates to roughly **74.18 acres**. About **12 acres** are not accounted for in the sale agreements. The defendant states that some of the land comprised of a precipice but brings no evidence of that to court, or of how much of the land comprised of that topographical relief and his sole evidence on that is not reliable. In the end it is clear that the plaintiff had to subdivide the land in order to transfer to the defendant his share of **62 acres** if we were to go by the agreement of **27/8/2014** alone. Even without any notice of breach shown to have been served upon her it is clear that her giving up of possession of the **62 acres** without formal excision was not the only duty she had under the agreement. In addition, even if the contents of the demand letter are believed, whose effect is to cause the rest of the land in excess of the **62 acres** was to be transferrable to the defendant, she would still not be deemed to have performed her role in the entire agreement as she never transferred the entire title to the defendant. However the second phase of the transaction of approximately **13 acres** is marred by the fact that the document marked **PExh 6** is not specific regarding the **13 acres**, and that it does not give any title number in its particulars, and finally that it reiterates that **62 acres** are being sold while the same **62 acres** were the subject of an earlier concluded agreement which it did not specifically impeach in its terms.

43. In the light of the above the end result of the plaintiff's engagement with the defendant is that very faulty documents were executed which this court can not correct at this stage as it is not the task of the court to rewrite contracts on behalf of the parties.

44. In my view, the most vital document in the transactions between the parties –that is the agreement dated 27/8/2014- having been found to be so faulty in its terms as to leave anyone reading it guessing what it meant, this court can not enforce it by order.

45. Secondly, both parties having failed to deliver fully on their responsibilities in the contracts they executed, it meant that they were having difficulties with implementation of contents of documents they had willingly executed.

46. Thirdly, the defendant having conceded that he did not have title to plot number 75 to transfer to the plaintiff in fulfillment of the terms of the agreement, and the plaintiff having executed the agreement in the mistaken belief that such land existed in the defendant's name, the agreement made on the basis of that mistake can only be deemed to be frustrated by the non-existence of title in the name of the defendant in respect of plot number 75.

47. In the circumstances set out above this court should not order the transfer of the suit land to the defendant as sought by the counterclaim as he has nothing to offer to the plaintiff in return and the only asset – his motor vehicle - that he proffered as part payment is of insufficient value. In the same vein this court can not, even if that had been sought by the plaintiff in this suit, order any specific performance by the defendant, of the transfer of the plot to the plaintiff. This court does not also see how the defendant can be compelled to construct rental houses on a third party's land for the plaintiff's benefit under the agreement.

48. The consequence of the above is that the agreement between the two parties herein can only be deemed to have been frustrated and is incapable of being performed by either party.

(2) What orders should issue?

49. The defendant made the plaintiff to understand that he had land to exchange. Had the defendant demonstrated in this suit that there was land in his name, this court may have made a different decision. However even at the submissions stage five years after the agreement, the defendant is only heard to be hopeful that the plot will be finally registered in his name soon. I do not think that the plaintiff intended to indulge the defendant this long and, suit having been commenced in the absence of such title, the defendant must be taken to possess no such plot. Indeed the defendant must be blamed entirely for the slothful progress of their transaction as there was ample cause for apprehension on the part of the plaintiff when she learnt that the plot was registered in a third party's name, yet she had already surrendered her land in exchange, believing it was the defendant's.

50. The upshot of the foregoing is that the plaintiff has proved her claim against the defendant on a balance of probabilities. I therefore enter

judgment for the plaintiff in the main suit against the defendant in the main suit and I issue the following orders:

(a) An order that the defendant in the main suit and all those claiming under him shall remove themselves from all that parcel of land known as West Pokot/Kisaunet/229 in default of which they shall be forcibly evicted;

(b) An order of permanent injunction to restrain the defendant in the main suit, his servants, agents and any other person claiming under him from entering, dealing in or doing any act on that parcel of land known as West Pokot/Kisaunet/229;

(c) That the counterclaim is hereby dismissed;

(d) That the defendant in the main suit shall bear the costs of both the suit and the counterclaim herein.

Dated, signed and delivered at Kitale on this 30th day of April, 2019.

MWANGI NJOROGE

JUDGE

30/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Karani for the Plaintiff

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

30/4/2019