

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 388 OF 2017

MIGUI MACHARIA MUNGAI 1ST

PLAINTIFF

FLAVIA SUSAN KALANDE 2ND

PLAINTIFF

VERSUS

CHESKA AGENCIES LIMITED 1ST

DEFENDANT

ELDORADO GARDENS LIMITED 2ND

DEFENDANT

BETTY KAGWIRA ITUNGA 3RD

DEFENDANT

THOTHO JULIUS KARIUKI 4TH

DEFENDANT

JUDGEMENT

ELC CASE NO. 388 OF 2017

Judgement

1. The Plaintiffs' commenced this suit vide a Plaint dated 10th June 2017, amended on 4th December 2018, further amended on 10th March 2023 and re-amended on 20th December 2023. They contended that on 8th September 2016, they entered into an agreement for sale of **Nairobi /Block 129/289** hereinafter referred to as the 'suit land' registered to the 1st Defendant and Charged to KCB Bank, for a consideration of kshs.7.5 million, out of which they paid a deposit of kshs.2.5 million upon execution. Further, that the balance of kshs.5 million was expected to be paid on or before completion date which was ninety (90) days from the date of execution and in exchange, the 1st Defendant was expected to supply the completion documents.
2. They claimed that while they were always ready to pay the balance of the purchase price, the 1st Defendant refused to supply them with completion documents thereby frustrating the sale and has continued to draw a rent income of kshs.100,000/= per month at their detriment. They aver that

the 1st Defendant eventually fraudulently sold the suit land to the 2nd Defendant, that proceeded to procure registration in its name.

3. They hence sought the following Orders:

a) A permanent injunction do issue against the Defendants whether by themselves or through their servants or agents or anybody claiming through them whatsoever from selling, transferring or dealing in any manner whatsoever with the parcel of land known as LR No. Nairobi/Block 129/289 situated in Komarock Estate Phase II, Nairobi.

b) An order of specific performance to compel the 1st Defendant to complete the sale by handing over all the relevant completion documents and execute a transfer in respect of that property known as Title Number LR No. Nairobi/Block 129/289 in favour of the Plaintiffs, failing which the same to be executed by the Deputy Registrar, High Court of Kenya.

- c) A declaration do issue to the effect that land parcel number LR No. Nairobi/Block 129/289, situated in Komarock Estate Phase II, Nairobi belongs and or is owned by the Plaintiffs absolutely and consequently the Plaintiffs are entitled to vacant possession.**
- d) An order do issue cancelling certificate of lease in respect of LR No. Nairobi/Block 129/289, situated in Komarock Estate Phase II, Nairobi registered in the names of Eldorado Gardens Limited, the 2nd Defendant and an order be issued that the same be registered in the names of the Plaintiffs.**
- e) A mandatory injunction to compel the Defendants to hand over vacant possession to the Plaintiffs of that property known as LR Number Nairobi / Block/129/289.**
- f) The sum of Kshs.6,700,000/- as mesne profits as at March 2023.**
- g) Costs of this suit together with interest thereon at**

such rate and for such period of time as this Honourable court may deem appropriate.

h) Such other or further relief as this Honourable court may deem appropriate.

4. The suit was opposed by the 1st Defendant vide its statement of defence dated 7th September 2017 and amended on 21st December 2018. It denied allegations levelled against it in the Plaint and claimed that the Plaintiffs only paid a deposit of kshs.1.8 million. It also contended that the Plaintiffs also breached a term of the sale agreement between them, which contemplated that they would pay a sum of kshs. 1.6 million, which was the balance owing to Kenya Commercial Bank Limited hereinafter referred to as 'KCB' before completion date to enable the Bank to release completion documents.
5. The 2nd Defendant filed a Statement of Defence denying allegations levelled against it, in the Plaint and contended that it entered into an agreement with the 1st Defendant on 17th May 2016, before the Plaintiffs purportedly entered into

the subject agreement with the 1st Defendant, thus it is an innocent purchaser for value. Further, that in honoring its agreement for sale between the 1st Defendant and itself, it paid the 1st Defendant's outstanding liabilities with KCB and secured release and discharge of the property as required.

6. The 3rd and 4th Defendants also filed a statement of defence in which they contended that they lawfully purchased the suit land from the 2nd Defendant, who is the registered owner.
7. The matter proceeded for hearing where the respective parties called witnesses.

Evidence of the Plaintiffs

8. The 1st Plaintiff who is also an Advocate of the High Court of Kenya testified as PW1. He acknowledged that by a sale agreement dated 8th September 2016 between the Plaintiffs and the 1st Defendant, the Plaintiffs agreed to buy **Nairobi /Block 129/289** situated in Komarock Estate Phase

II, together with all the buildings and improvements thereon at an agreed purchase price of kshs.7.5 million, out of which the Plaintiffs paid a deposit of kshs.2.5 million upon execution. It was his testimony that there was a condition in the agreement that the balance of the purchase price of kshs.5 million would be paid on or before completion date, which was ninety (90) days from the date of execution and in exchange, the 1st Defendant would supply the completion documents. He claimed that while the Plaintiffs were always ready to pay the balance of the purchase price, the 1st Defendant refused to supply completion documents thereby frustrating the sale and despite being issued with a completion notice dated 7th February 2017, it has still refused to act and continued to draw a rent income of kshs.100, 000/= per month, from the suit land at the detriment of the Plaintiffs. He produced the Plaintiff's amended list of documents dated 11th November 2019 as exhibits 1-18.

9. In cross-examination by Counsel for the 1st Defendant, PW1 revealed that he had a prior Advocate-Client relationship with the 1st Defendant and that he drew the subject agreement for sale where the 1st Defendant was not represented. Further, that as purchasers, the Plaintiffs conducted an official search which revealed that the suit land was Charged to Savings and Loan Kenya Limited for amounts in excess of kshs.4 million and at Clause (7) of the subject agreement, he had captured the issue of redeeming the property so completion documents were to be released after payment of the loan facility. Further, that the discharge of Charge had been indicated as a completion document.
10. He claimed that he was not privy to arrears accumulated on the initial loan of Kshs. 4 million and contended that he is not sure that the deposit paid by the Plaintiffs of Kshs. 2.5 million could have redeemed the amount owed by the 1st Defendant to the Bank.

11. He claimed that the Plaintiffs issued a completion notice on 7th February 2017 to messrs Mwangi Chege & co. Advocates, then acting for the 1st Defendant, two (2) months after the date of completion which was on 8th December 2016. Further, that in the said notice, he demanded for completion documents and indicated that the Plaintiffs were ready to complete the sale by paying the balance of Kshs. 5 million but the advocate for the 1st Defendant did not request for proof of funds and he was not aware whether the Bank was still holding completion documents.

12. He conceded that Clause (7) of the subject agreement indicated that kshs.1.6 million was to be redeemed by the purchasers' financier but there was no letter from their financier indicating that it would redeem the said sum. Further, that in the sale agreement, there is no Clause for refund of the purchase price or for specific performance. He acknowledged that the Plaintiffs did file an application for injunction dated 10th June 2017 restraining the Defendants

from disposing of the suit land and on 15th June 2017, the Court issued injunctive orders, which directed them to deposit the balance of the purchase price being kshs. 5 million in Court within three (3) days of the Order but he made the deposit on 27th June 2017, twelve (12) days after the Court Order.

13. In cross - examination by Counsel for the 2nd Defendant, PW1 denied manipulating the 1st Defendant as his client and pointed out that the subject agreement contained a penalty in case of default by the purchasers being that the vendor would forfeit Kshs. 500, 000/= and refund Kshs. 2 million but there was no provision for interest. He conceded that this Court's injunctive orders of 15th June 2017 were not lodged with the Land Registrar because the Plaintiffs' did not foresee that the 1st Defendant could sell the suit land during the pendency of the suit.

14. In cross-examination by Counsel for the 3rd and 4th

Defendants, PW1 stated that he could not caution the title to

the suit land due to third party interest on the title, being the Charge for a loan against the said property. He insisted that the 3rd and 4th Defendants ought to have been aware of the Plaintiffs' interest in the suit land as the sale agreement between the 2nd Defendant and themselves, was prepared by the advocate for the 2nd Defendant in the matter. He contended that the Plaintiffs' claim of mesne profits is based on projections given by the 1st Defendant as he had no valuation report.

Evidence of the Defendants

- 15.** DW1 was Maureen Wairimu Mwangi, a director of the 1st Defendant. She testified that at the time of the impugned sale agreement, the suit land was Charged to KCB and the Plaintiffs were aware of that status. Further, that it was a term of the said agreement that the balance of the purchase price was to be used to service the loan but the Plaintiffs' refused to pay up, thus the 1st Defendant elected to engage the 2nd Defendant for purposes of liquidating the loan facility.

She confirmed that the 1st Defendant was willing to refund the Plaintiffs' the monies. She produced the 1st Defendant's bundle of documents dated 30th January 2024 as D. Exhibit 1-7.

16. In cross examination by Counsel for the Plaintiff, DW1 acknowledged that the Plaintiffs paid the 1st Defendant a total of Kshs. 2.5 million as deposit but contended that there was nothing stopping it, from entering into an agreement with the 2nd Defendant, since it was under pressure from auctioneers regarding the existing loan.

17. In cross - examination by Counsel for the 2nd Defendant, she revealed that the 1st Defendant sold the suit land for Kshs. 11 million out of which Kshs. 6 million was paid to her, then the 2nd Defendant paid Kshs. 5 million to KCB but she had no proof. She also pointed out that in an email dated 25th January 2017 (D. Ex 4) addressed to the Plaintiffs', the 1st Defendant did acknowledge that it had not obtained

completion documents and was categorical that it was ready to refund the deposit paid.

18. She revealed that the suit land has four (4) two-bedroom houses, out of which two (2) are rented out at kshs.16,000/= per month each, while two others are rented at kshs.18,000/= each, thus they bring an average monthly income of Kshs. 75,000/=, which was being collected by the 2nd Defendant, who had been sold for the said suit land in May, 2016, but signed the transfer form on 18th November 2020.

19. DW2 was Henry Figondo, shareholder and director of the 2nd Defendant. He stated that in 2015, the 2nd Defendant advanced the 1st Defendant loan facilities and the suit land was pledged as security for the advancements. However, the 1st Defendant fell in arrears and as a mitigation measure offered the suit land for sale, which culminated in execution of the agreement for sale dated 17th May 2016. Further, that the loan due to the 2nd Defendant being Kshs. 6 million was

offset against the purchase price while the balance of Kshs. 5 million was to be paid to KCB, that held the property as collateral. He confirmed that upon execution of the sale agreement between the parties, the 2nd Defendant took up possession of the suit land and servicing of the loan with KCB resulting in redemption of the 1st Defendant's liabilities and the discharge of the property. He however did not have any statement to prove this position. It was his testimony that the 1st Defendant then proceeded to execute a transfer and the 2nd Defendant was issued with a title. He produced the 2nd Defendant's list of documents dated 19th May 2023 as Exhibits No. 1-10.

- 20.** In cross-examination, DW2 reiterated that the 2nd Defendant paid the entire purchase price of Kshs. 11 million to acquire the suit land and that before purchase, it conducted due diligence and it was not aware of any Court dispute in the matter. Further, that the 1st Defendant did not inform him of any injunctions issued in the matter touching on the suit

land. He also explained that while he was granted possession immediately in 2016, the transfer was affected in 2020 and he sold the suit land to the 3rd and 4th Defendants free from encumbrances. According to DW2, the four (4) two (2) bedroomed rental units on the suit land fetch an income of about kshs.60,000/= per month.

21. DW3 was the 3rd Defendant. It was her testimony that together with her husband (4th Defendant), they purchased the suit land from the 2nd Defendant vide an agreement for sale dated 14th July 2022, where both parties in the transaction were represented by the law firm of Nelson Gatungo & Company Advocates (the 2nd Defendant's Advocates). She explained that the sale was pursuant to approval by a resolution of the 2nd Defendant's Board of directors. Further, that the agreed purchase price was Kshs. 10,500,000.00/= out of which Kshs. 5,250,000.00/= was paid upon execution of the agreement and the balance was paid in

installments between 23rd August 2022 and 9th February 2023, after which they took possession.

22. She claimed that prior to the purchase, they conducted due diligence which indicated that the 2nd Defendant was the registered proprietor of the suit land as at 1st December, 2020. Further, that the search indicated that there was nil encumbrance on the suit land. She disclosed that they received system generated invoices of unpaid land rents over the suit land, which their Advocate paid through the *ardhisasa* platform. Further, that they settled legal fees payable together with fees for related services such as valuation and stamp duty.
23. She confirmed that the vendor shared the completion documents and that the application for registration of the transfer in their favour has been lodged at the Lands Registry. She produced the 3rd and 4th Defendant's list of documents dated 18th December 2024 as Exhibits 1-7.

24. In cross-examination, DW3 said that together with her spouse the 4th Defendant, they reside in Pennsylvania USA and that the sale agreement between the 2nd Defendant and themselves was signed by their representative, Maurice Ngaire but he does not have a Power of Attorney. She also stated that they collect Kshs. 15,000/= per unit from each of the four (4) units on the suit land, since March 2023 when she came to Kenya but she does not have full occupancy.
25. In re-examination, she reiterated that the transfer to them was executed and they were awaiting title processing.
26. The parties thereafter filed their respective written submissions.

Submissions

27. The Plaintiffs relied on the case of **Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti** to submit that having deposited the entire balance of the purchase price to this Court, they have demonstrated that

they were ready and willing to perform all the terms of the contract thus they are entitled to an order of specific performance. Further, that the title held in the 2nd Defendant's name ought to be cancelled for reasons that the 2nd Defendant procured registration in its own name through fraud, in complete disregard of their interest in the suit land and while the matter was still in court, an action which saw Ms. Munyira Munyi, a director of the 1st Defendant being cited for contempt and sentenced to six (6) months' imprisonment or a fine for the sum of Kshs.200,000/=.

28. On their prayer for mesne profits, the Plaintiffs relied on the following decisions: **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR; Attorney General v Halal Meat Products Limited [2016] eKLR** and **Lydia Akello Ochuka v Cecilia Mwikali Kaloki & another [2019] eKLR** to submit that the person in wrongful possession and enjoyment of the immovable property is liable

for mesne profits. They prayed to be awarded mesne profits of Kshs.100, 000/= from 1st September 2017.

29. On its part, the 1st Defendant submitted that the impugned agreement between the parties had a mandatory completion date of nine (90) days and provided that the balance of the purchase price of Kshs. 5 million was to be paid to the vendor by financiers of the purchasers on or before the completion date. It cited the case of **National Bank Kenya Ltd v Pipeplastic Samkolit (K) Limited and another [2002] 2EA 503** where the court stated that a Court cannot rewrite a contract between the parties.

30. It also relied on the case of **Sisto Wambugu v Kamau Njuguna [1983] eKLR** where the Court held that contracts for the sale of land give the vendor the right to rescind the agreement if the purchaser does not pay at the appointed time.

- 31.** Reliance was also placed on the following decisions: **Amina Abdul Kadir Hawa v Rabinder Nath Anamd & another [2012] KEHC 23709(KLR), Nabro Properties Ltd v Sky Structures Ltd & 2 others (2002)KLR 299** and **Bernard Gathogo kangoro v David M Muchemi & Another Nairobi HCCC NO. 20159 of 2023** to submit that despite this Court's orders of 15th June 2017 that the balance of the purchase price be deposited in Court by 18th June 2017, the Plaintiffs made the deposit on 27th June 2017, twelve (12) days later, thus they failed to demonstrate that they were ready and willing to perform all the terms of the agreement therefore failing the criteria set for grant of specific performance.
- 32.** On whether the 2nd Defendant's title ought to be cancelled, the 1st Defendant submitted that there is no proof of fraudulent transactions or misrepresentation that would call for the said title to be impeached under Section 26 of the Land Registration Act.

33. On the issue of mesne profits, it was submitted that the Plaintiffs have never acquired title to the suit land and neither have they ever been in lawful occupation as the agreement for sale dated 8th September 2016 was never completed. Further, that they have not proved how they arrived at the figure of kshs. 100,000/= per month. To this end, reliance was placed on the following decisions: **John Mithamo Njika v Kellen Nyagala Nguumiri [2015] eKLR** and **Kenya Breweries Limited Kiambu v General Transport Agency Limited [2000] eKLR.**

34. On its part, the 2nd Defendant submitted that title is conclusive evidence of ownership and that its title is not tainted by fraud or misrepresentation as alleged to warrant impeaching it, under Section 26 of the Land Registration Act. Further, that it has met the threshold of an innocent purchaser as described by the Supreme Court in **Sehmi & another v Tabarana Company Limited & 5 others**

(Petition E030 OF 2023 [2005] KESC 21 (KLR) as its acquisition followed proper due diligence and process.

35. It also submitted that it does not have a contract with the Plaintiffs' and as such the claim of specific performance does not attach to it. It reiterated that specific performance should not be ordered where it would cause hardship on a Defendant. To this end, it relied on the following decisions: **Reliable Electrical Engineers v Mantrac Kenya Limited [2006] eKLR** and **Gurdev Singh Birdi & another v Abubakar Madhbuti [1997] eKLR** to buttress its averments.

Analysis and Determination

36. Upon consideration of the pleadings filed herein including testimonies of the witnesses and rivalling submissions, the following are the issues for determination:

- **Whether the Plaintiffs are entitled to an order of specific performance.**

- **Whether the Plaintiffs are entitled to an order of mesne profits.**
- **Whether the Lease registered to the 2nd Defendant should be cancelled.**
- **Whether the 3rd and 4th Defendants should be compelled to hand over vacant possession to the Plaintiffs.**

Whether the Plaintiffs are entitled to an order of specific performance.

37. The Plaintiffs' case is that by a sale agreement dated 8th September 2016, they agreed to purchase **Nairobi /Block 129/289** from the 1st Defendant at a consideration of Kshs. 7.5 million and paid Kshs. 2.5 million as deposit but despite being ready and willing to pay the balance of the purchase price, the 1st Defendant frustrated the sale by neglecting to issue them with completion documents and it eventually fraudulently transferred the suit land to the 2nd Defendant.

38. On its part, the 1st Defendant appears to admit that it rescinded the agreement at the fault of the Plaintiffs' who as at the completion date on 18th December 2016, had not paid the balance of the purchase price of Kshs. 5 million. It avers that by an email dated 25th January 2017, it had indicated to the Plaintiffs that it was ready to refund the deposit paid. It also contended that even after being given a chance to deposit the balance of the purchase price in Court, the Plaintiffs deposited the same twelve (12) days late, contrary to the clear timelines given by the Court.

39. On its part, the 2nd Defendant contends that it purchased the suit land vide a sale agreement dated 17th May 2016 and upon execution of the sale agreement, it took up possession and serviced the outstanding loan Charged on the title to the suit land by KCB resulting in redemption of the 1st Defendant's liabilities, then sold it to the 3rd and 4th Defendants without any encumbrances.

40. At this juncture, the Court is basically called upon to interpret the agreement for sale between the Plaintiffs and the 1st Defendant. In in **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR**, the Court stated that:-

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

41. From the testimony of PW1, I note during cross examination he admitted that they had an Advocate-Client relationship with the 1st Defendant and that he drew the subject agreement for sale where the 1st Defendant was not represented. PW1 further confirmed that they conducted an official search which revealed that the suit land was Charged to Savings and Loan Kenya Limited for amounts in excess of kshs.4 million and that they had agreed they were to repay

the said loan facility so as to obtain the completion documents.

42. On a keen reading of the sale agreement dated 8th September 2016 between the Plaintiffs and 1st Defendant, I note Clause (7) of the said agreement provided that the loan of ksh.1.6 million would be redeemed by the financier of the purchasers' at the completion date and then the difference of the purchase price would be paid to the vendor. As per Clause 5, completion date was to be ninety (90) days from the date of execution. At this juncture, the Court will determine whether the Plaintiffs paid the balance of the purchase price within the requisite time, as provided under the Sale Agreement to enable it make a determination as to whether the Plaintiffs have fulfilled the tenets of specific performance.

43. The requirements for the grant of the remedy of specific performance were set out by the Supreme Court of Uganda in **Manzoor v Baram (2003) 2 E.A. 580** as quoted by the **ELC CASE NO. 388 OF 2017** *Judgement*

Court of Appeal in **Licinus Investment Limited v Dalpiaz**
[2023] KECA 465 (KLR) as follows:

“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.”

44. Further, in **Thrift Homes Limited v Kenya Investments Limited [2015] eKLR** the Court stated that:

“The remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid

enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy.” *Emphasis Mine*

45. Tunoi JA made the following remarks while declining to issue an order of Specific performance in **Gurdev Singh Birdi & Another V Abubakar Madhbuti [1997] KECA 13 (KLR)**, in a judgement in which he concurred with two other judges of the Court;

“.....Secondly, there was no evidence that prior to the filing of the suit the Appellants tendered the balance of the purchase price to the Respondent. This, in my view, only confirms that they were never ready, able or willing to carry out their part of the contract, The Appellants simply could not raise the balance of the purchase price on or before the specified time, i.e. January 31, 1993, and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The

contract not having been completed in January, 1993, the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property more than four years after the event when its current value has materially appreciate..”

46. The question we need to ponder is whether the 1st Defendant was entitled to rescind the sale agreement between the Plaintiffs and itself. In **Samuel Ngige Kiarie v Njowamu Construction Company Limited & another [2019] eKLR**, the Court of Appeal held that;

“The non-payment of the full purchase price as stipulated in a contract automatically renders the agreement immediately voidable and accordingly terminable at the instance of the innocent party.”

47. From the evidence tendered in Court, PW1 admitted that the Plaintiffs had not finished paying the purchase price, in accordance with the Sale Agreement, by the time the suit

land was sold to the 2nd Defendant. Further, even when the Court granted an interlocutory injunction and directed the Plaintiffs to pay the monies in Court, PW1 admitted that they still delayed in doing so and paid twelve (12) days late. It is trite that parties are bound by the terms of their contract and the Court cannot be called upon to rewrite it.

48. At this juncture, I opine that since the Plaintiffs did not even pay monies to KCB that held the title to the suit land as had been agreed upon, so as to obtain the Discharge of Charge, while associating myself with the decisions quoted, even though the Plaintiffs claim they are ready and willing to complete the sale agreement dated the 8th September, 2016 and even deposited monies in Court, I am not satisfied that the Plaintiffs performed their full obligations as per the impugned Sale Agreement prior to filing this suit. Further, the terms of the Sale Agreement were clear and it seems the Plaintiffs who were previously advocates for the 1st Defendant, sought to purchase the suit land on their terms.

In the foregoing, I find that the Plaintiffs are not entitled to specific performance as claimed but a refund of the amounts paid to the 1st Defendant towards the purchase price since DW1 admitted that they were ready to refund it. Further, I note the title to the suit land already passed to a third party.

Whether the Plaintiffs are entitled to an order of mesne profits.

- 49.** On the Plaintiffs' prayer for mesne profits, the Defendants have urged the Court to deny the Plaintiffs the same on the basis that the agreement for sale dated 8th September 2016 was never completed nor did the Plaintiffs take possession of the suit land.
- 50.** On mesne profits, I wish to refer to Section 2 of the Civil Procedure Act, which defines it as follows:

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received

therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;'

51. In the case of **Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR**, the Court of Appeal while dealing with the issue of mesne profits held as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

52. From the evidence tendered in Court, I find that since the Plaintiffs failed to prove payment of the full purchase price at the agreed timelines, demonstrated having taken possession of the suit land and furnished Court with a valuation report, I opine that they have not provided proof of the basis for the demand of mesne profits. In the circumstances while

associating myself with the decisions quoted, I find that the Plaintiffs are not entitled to mesne profits.

Whether the Lease registered to the 2nd Defendant should be cancelled and if the 3rd and 4th Defendants should be compelled to hand over vacant possession to the Plaintiffs.

53. The Plaintiffs have sought for the cancellation of the Lease held by the 2nd Defendant and for the 3rd and 4th Defendants to grant them vacant possession of the suit land. They insist that they are entitled to the suit land. The Defendants have strongly argued that no evidence was proffered to entitle this Court to take that position.

54. On the issue of cancellation of the 2nd Defendant's title as sought by the Plaintiffs. I note the 1st Defendant entered into a Sale Agreement dated the 17th May, 2016 with the 2nd Defendant, that paid the full purchase price, after which the suit land was transferred to it. DW2 admitted that the 2nd

Defendant sold the suit land to the 3rd and 4th Defendants

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that paid the full purchase price and took possession. It further emerged in evidence that transfer was effected to the 2nd Defendant after the completion period of the Sale Agreement between the Plaintiff and 1st Defendant had lapsed on 8th December 2016.

55. On proof of ownership of land, Section 26 of the Land Registration Act of 2012 provides as follows:

'26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which

the person is proved to be a party; or

(b) where the certificate of title has been acquired

illegally, unprocedurally or through a corrupt scheme. Emphasis Mine

56. In the case of **Dr. Joseph Arap Ngok - Vs - Justice Moiwo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997** the Court categorically declared that:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.” Emphasis Mine

57. Based on the evidence before me while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that the Plaintiffs failed to prove that the 2nd Defendant fraudulently acquired the suit land. From the evidence before me, I find that the 2nd Defendant was able to prove it legally acquired the suit land from the 1st Defendant after paying the full purchase price. I opine that even though the 1st Defendant initially sold the suit land to the Plaintiffs that failed to acquire any interest to it, as they did not finalize paying the purchase price, it did not bar the 2nd Defendant from entering into an Agreement of Sale with the 1st Defendant who was the owner of the land. Further, it also did not bar the 2nd Defendant from selling the suit land to the 3rd and 4th Defendants. In the foregoing, I find that the Certificate of title for the suit land, which is in the 2nd Defendant's name is legitimate and will decline to cancel it.

58. I note the Plaintiffs did not plead for refund of the purchase price noting that the 1st Defendant vide its email dated the 25th January, 2017 had expressed its willingness to refund

the deposit of the purchase price paid. In the case of **Adetonn Oladeji (NIG) Ltd vs Nigeria Breweries PLC S.C. 91/2002** Judge Pius Aderemi J.S.C expressed himself as follows:

“.....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

(See also the case of **Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR**).

59. In the foregoing, I am unable to make an Order for refund of the purchase price since the same was not pleaded by the Plaintiff. I direct the Plaintiffs to file a fresh suit to claim the refund of the purchase price from the 1st Defendant and also obtain the monies they deposited in Court.

- 60.** On costs, since the 1st Defendant was responsible for the dispute herein, it should bear the responsibility to cater for the costs of the parties herein.
- 61.** In the foregoing, I find that the Plaintiffs have not proved their case on a balance of probability and will proceed to dismiss it.
- 62.** Costs of the suit is awarded to the Plaintiffs, 2nd, 3rd and 4th Defendants to be borne by the 1st Defendant.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
12TH DAY OF FEBRUARY, 2026**

CHRISTINE OCHIENG
JUDGE

In the presence of:

Ms Macharia holding brief for Mungai for Plaintiffs
Githui for 1st Defendant

Gatungo for 2nd Defendant

Ms Kinyua for 3rd and 4th Defendants

Court Assistant: Joan

ORIGINAL