

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO 114 OF 2019

PATEL RAVJI LALJI	-	1ST PLAINTIFF
DEVRAJ RAVJI LALJI	-	2ND PLAINTIFF
	VS	
TOM ODHIAMBO OWINY	-	1ST DEFENDANT
AMSA JEROTICH KEITANY	-	2ND
DEFENDANT		

JUDGMENT

Introduction

1. By a plaint dated 22/3/2019, the Plaintiffs sought orders for a permanent injunction prohibiting the Defendants from interfering with the Plaintiffs' peaceful occupation of LR No 209/11309 [suit land].
2. It was averred that the Plaintiffs are the registered proprietors of the suit land, having acquired it from the Defendants in October 2010 for Kshs 50 Million, after carrying out the necessary due diligence.
3. It is also averred that after the acquisition, the Plaintiffs took possession, erected a stone perimeter wall and other utilities, and have used the suit land commercially for over 5 years without any adverse claims from any quarter. Currently, the land and improvements are valued at Kshs 300 Million.
4. The Plaintiffs allege that on 23/3/2019, the Defendants, accompanied by hired thugs, forcibly entered the suit land without permission and assaulted two guards at the gate. This assault and illegal entry were reported to Embakasi Police Station under OB NO 38/19.
5. While denying the Plaintiffs' claim, the Defendants filed an amended statement of defence and a counterclaim dated 13/10/2020.

6. The Defendants state that they sold the suit land to the Plaintiffs under a sale Agreement dated 6/10/2013 for Kshs 50 Million, of which Kshs 30 Million was paid as a deposit and the balance was payable upon completion, [90 days from the date of the sale agreement], by RTGS payment to the vendors' Advocates or their order.
7. Later, the Plaintiffs informed the Defendants that they had secured a financier willing to fund the outstanding part of the purchase price, and therefore requested that the Defendants expedite the processing of the completion documents for the registration of the title in the Plaintiffs' names, so that the title could be used as security for the amounts owed to the Defendants. The Defendants agreed and issued the completion documents within four days of signing the sale agreement, resulting in the title being registered in the Plaintiffs' names on 11/10/2013, prior to payment of the remaining purchase price.
8. Pursuant to the terms of the sale Agreement dated 6/10/2013, the Defendants engaged the services of Patrick Suju to construct the perimeter wall at a cost of Kshs 8,891,605/-, with the works completed in December 2013. That the sum remains unpaid to date.
9. The Defendants further contended that the letter dated 1/8/2013, which purported to authorise the remaining payments to Mr Hezbon Omondi and the law firm of Onsando Ogonji & Tiego Advocates, was a forgery. They further contended that this was contrary to clause 3.2 of the sale agreement, which provided that the balance of the purchase price should be paid on completion via RTGS to the Vendor's Advocates or their order.
10. In addition, the Defendants aver that the registration of the title in the Plaintiffs' names was obtained through deceit and fraudulent misrepresentation. They assert that their interest in the suit land expired by effluxion of time due to their failure to pay the remaining balance of the purchase price within 21 days of receipt of the completion documents. Furthermore, they claim that the vendors were

induced by deceit and misrepresentation, and that the sale Agreement should therefore be rescinded or deemed expired by effluxion of time.

11. The particulars of deceit and misrepresentation were pleaded in para 12 of the defence and counterclaim.
12. Further, the Plaintiffs have never taken possession of the suit land due to their failure to pay the remaining balance of the purchase price. The Defendants have been in possession since 22/2/2013, and the Plaintiffs' attempts to evict the Defendants on 22/3/2013 and 23/3/2019, using police officers and hoodlums, were thwarted. The perimeter wall was built by the Defendants pursuant to clause 12.1 of the sale agreement, not by the Plaintiffs.
13. That despite demand for payment of the remaining purchase price, the Plaintiffs have failed to comply and have instead resorted to trickery and deceit to evade their contractual obligations.
14. In their counterclaim, the Defendants reiterated the contents of the defence aforesaid and added that the Plaintiffs did not obtain any financing, that the suit land was not charged as represented to them, and that they neither paid the construction costs nor the remaining purchase price.
15. Particulars of forgery by the Plaintiffs were pleaded under paragraph 26 of the Counterclaim, including the forgery of the letter dated 1/8/2013 and of Mr Omondi's signature on purported acknowledgements of various payments. Pursuant to clause 12.1 of the sale agreement, it was agreed that, in the event of default in payment of the remaining purchase price within 21 days of receipt of the completion documents, the sale Agreement would terminate and the parties would revert to their original positions. Furthermore, the Defendants would be entitled to liquidated damages of Kshs 6 Million.
16. Consequently, the Defendants seek orders that;
 - a. The registration of Patel Ravji Lalji and Devraj Ravji Lalji as proprietors of the suit land is hereby expunged and cancelled from the Register, and Tom Odhiambo Owiny and Amsa Jerotich

Keitany are hereby registered as the proper proprietors of the property.

- b. The Deputy Registrar of the Court shall execute the deed of transfer conveying the suit land from Patel Ravji Lalji and Devraj Ravji Lalji to Tom Odhiambo Owiny and Amsa Jerotich Keitany.
- c. Judgment be and is hereby entered against the Defendants [Plaintiffs] in the counterclaim for the sum of Kshs 14,891,605/- being the liquidated damages together with interests thereon at 12% from 6/10/2013 until payment in full.
- d. Costs of the suit in the plaint and counterclaim be in favour of the Defendants.

The evidence adduced at the hearing

17. PW1- Devraj Ravji Lalji testified on his own behalf and on behalf of the 1st Plaintiffs. He relied on his witness statement dated 29/11/2023 and produced a list of documents marked as PEX No 1-32.
18. He stated that the 1st Plaintiff is his father. They were introduced to the suit land by Hezbon Omondi, who claimed to be the proprietor. However, after examining the documents, including the letter of allotment dated 4/5/99, they found that it was issued in the Defendants' names. Omondi then informed them that the 1st Defendant is his brother and that he was an agent of the Defendants authorised to act on their behalf. Later, in 2011, they met the Defendants at their Advocate's offices and negotiated the sale of the land for Kshs 50 Million. To prevent land grabbers, it was agreed that the Plaintiffs would build a perimeter wall around the suit land. They paid Kshs 558,940/- to the Defendants as the stand premium for the suit land. On 22/2/2013, the Defendants were registered as the legal owners of the suit land.
19. That on 2/5/2013, they paid Kshs 8,062,975/70/- through their company, Devnayaran Enterprises Limited, as full payment for the construction of the perimeter wall.

20. On 6/6/2013, Devnarayan Enterprises Limited remitted Kshs 4 Million to the Defendants' Advocates, Messrs Onsando Ogonji & Tiego Advocates, A/C No [withheld] at Cooperative Bank Limited via RTGS as part of the purchase price. On 27/6/2013, through their associated company, Cadilla Limited, they remitted a further Kshs 26 Million via RTGS to the Defendants' Advocates' A/C No [withheld] at Cooperative Bank Limited. Both payments were duly acknowledged. The amount of Kshs 30 Million was acknowledged under clause 3.1 of the sale Agreement dated 6/10/2013.
21. Later, their Advocates, Robson Harries Advocates, prepared a transfer dated 10/9/2013, which the Defendants executed. The Defendants obtained the necessary consent to transfer the property on 13/9/2013. They paid stamp duty on 1/10/2013 in the sum of Kshs 2,000,040/-.
22. Although the sale Agreement had been prepared by the Defendants' Advocates, it was only executed on 6/10/2013, after the transfer had been executed on 10/9/2013. The transfer was lodged on 11/10/2013, thereby making the Defendants registered owners of the suit land.
23. Although the Agreement provided for the construction of the perimeter wall by the Defendants, the Defendants assured them that, since the Plaintiffs had constructed and paid for the wall on 2/5/2013, there was nothing to worry about, especially as the land was now registered in the Plaintiffs' name. This assurance was relied upon, and they undertook to remit the balance of Kshs 20 Million.
24. Later, in October 2013, Omondi approached them, claiming he had authority to receive part of the remaining purchase price, Kshs 10 Million. They refused to pay him without proper authorisation from the Defendants. He then produced a letter dated 1/8/2013, duly signed by the Defendants, instructing them to pay Omondi and the Defendants' Advocates Kshs 10 Million each. They had no doubt that this aligned with clause 3.2 of the Agreement concerning the mode of payment of the purchase price.

25. That since the payment of the balance of Kshs 20 Million, they have maintained active and continuous possession of the suit land. That in JR 28 of 2017, the 1st Defendants swore an affidavit on 24/9/2018, confirming that he and the 2nd Defendants had sold the suit land to the Plaintiffs. That shortly thereafter, the Defendants, accompanied by hired goons, forcibly entered the suit land.
26. That the claim for Kshs 14 Million is time-barred by virtue of the Limitation of Actions Act.
27. In cross-examination by Mr Koyyoko for the Defendants, PW1 stated that they paid the full purchase price: a Kshs 30 Million deposit and the remaining Kshs 20 Million, paid to Omondi and the Defendants' Advocates in the sum of Kshs 10 Million each, as per the Defendants' instructions conveyed via the letter dated 1/8/2013. The amount of Kshs 30 Million was paid before the execution of the Agreement but was duly acknowledged in the Agreement of 6/10/2013. He did not verify the authenticity of the letter with the Defendants.
28. He stated that he built the wall without any Agreement with the Defendants because he wanted to see whether there were any adverse interests in the property. He did not at any point suggest to the Defendants that he was seeking a loan facility for the purchase or that he intended to charge the suit property. He was in possession of the suit land until 2019, when he was removed by the Defendants.
29. DW1 - Tom Odhiambo Owiny testified and relied on his witness statement dated 27/6/2019, and produced documents in support of his case marked as DEX No. 1-28.
30. He stated that he and the 2nd Defendant were allotted the suit land vide the letter of allotment dated 4/5/1999. They accepted the offer and paid the requisite stand premium and all necessary outgoing charges. The title was registered in their names on 22/2/2013.
31. Shortly thereafter, they sold the land to the Plaintiffs for Kshs 50 Million. A deposit of Kshs 30 Million was paid, leaving a balance of Kshs 20 Million, plus Kshs 8 Million for the costs of constructing the

perimeter wall. At the Plaintiffs' request, they submitted the completion documents to the Plaintiffs' Advocates for registration of the title in the Plaintiffs names before the expected completion date under the sale agreement. He built the perimeter wall in December 2013.

32. He added that the consent relied upon by the Plaintiffs does not include the word 'charge'. The Plaintiffs transferred the suit land to their favour on 11/10/2013, but their purported interest in the suit land terminated 21 days after receipt of the completion documents or the registration of the title in their names.

33. That their letters dated 3/12/2013, 12/12/2013, and 12/2/2014, demanding payment of the balance of the purchase price, have gone unheeded. They did not appoint Omondi or their Advocates to collect the remaining balance on their behalf, and the letter dated 1/8/2013 is a forgery. The Defendants have been in occupation of the suit land from 2013 until 20/3/2019, when the Plaintiffs stormed the land and forcibly evicted the Defendants. That he reported the matter to Embakasi Police Station under OB No 89/20/19.

34. In cross-examination, he stated that completion was 90 days from the date of the sale Agreement dated 6/10/2013. He also stated that completion should have been on 6/1/2014. He stated that he received a deposit of Kshs 30 Million via RTGS. He stated that he directed the Advocate to receive the balance of the purchase price on his behalf or to his order.

35. In addition, he stated that he never signed the letter dated 1/8/2013 purporting to give directions to the Plaintiffs to release the balance of the purchase price, and that his Advocate never received the RTGS for Kshs 10 Million drawn from Guardian Bank Limited.

36. Furthermore, he stated that criminal proceedings are ongoing in relation to the letter dated 1/8/2013, which is a forgery. The Office of the Director of Public Prosecution [ODPP] has expressed its willingness to withdraw the criminal charges. Neither his brother, Mr Omondi, nor his Advocates have been charged with any offence.

37. With respect to the fencing of the property, he stated that he constructed the wall in line with the terms of Clause 12.1 of the sale agreement.
38. He added that the Plaintiffs have not taken possession of the suit land. They were repulsed in 2019. Possession was to be given upon completion of the sale agreement.
39. By default, his lawyer demanded payment of the balance of the purchase price by 3/12/13. However, the title was registered in the Plaintiffs' names before the completion date because the Plaintiffs had informed him that they were seeking financing secured by the title.
40. DW2 - Amsa Jerotich Keitany testified, relying on her witness statement dated 19/12/2022, which reaffirmed the evidence of her co-Defendants. She stated that she came to know the Plaintiffs through the 1st Defendant. They fenced the land in December 2013. She further stated that on 3/12/2013 and 12/3/2014, they demanded the balance in vain, by which time the Plaintiffs had taken possession. She denounced the instructions in the letter dated 1/8/2013 as a forgery. She confirmed that they are currently in possession of the suit land.
41. DW3 - Chief Inspector of Police No 240073, Everlyn Othim, testified and informed the Court that she is a document examiner at the Director of Criminal Investigations [DCI] headquarters. She stated that she examined the Defendants' and one Hezbon Omondi's signatures against known and questioned signatures and concluded that the signatures were made by persons other than the Defendants. She added that she was not given the Plaintiffs' specimen signatures. She stated that the ODPP agreed with her that the signatures are forgeries in its letter dated 8/4/2024. When using the VAC 6000 machine, there is no difference between copies and originals.
42. DW4- Peter Okundi Ogonji testified and introduced himself as an Advocate of the High Court of Kenya, practising as such since 1995. He relied on his witness statement dated 21/10/2021. He stated that his firm acted for the Defendants. The sale Agreement and the transfer documents were perfected and executed on 6/10/2013 and

10/9/2013, respectively. The title was registered in the names of the Plaintiffs to enable them to secure financing to meet the balance of the purchase price. He stated that he had released the completion documents to the Plaintiffs' Advocates on his client's instructions. He added that, by default, he wrote two letters, dated 3/12/2013 and 12/2/2014, to the Plaintiffs' Advocates, demanding payment of the unpaid balance of the purchase price. To date, the Plaintiffs have not paid the balance of the purchase price. He further stated that his law firm did not maintain a bank account with Guardian Bank and had never received Kshs 10 million via cheque No. 634 dated 11/12/2013.

43. He stated that the RTGS transfer payment dated 26/6/2013 for Kshs 26 Million and the RTGS funds transfer dated 6/6/2013 for Kshs 4 Million, together amounting to Kshs 30 Million, related to a sale transaction for L R NO 209/11309.

44. There was another transaction in 2011 between Athi River Housing Limited and Cinantine Enterprises Co Limited, in which his firm also received Ksh 30 Million on 11/5/2011. The Plaintiffs are also directors of Athi Housing Co Ltd or own the land that is the subject of this suit.

45. He stated that his law firm never received the remaining Kshs 20 Million in relation to the transaction. He also said he was not informed of the letter dated 1/8/2013 authorising the Plaintiffs to release Kshs 10 Million to his law firm. Furthermore, he stated that he did not receive the Kshs 10 Million from the Plaintiffs.

46. DW5 - Patrick Omolo Suju testified and relied on his witness statement dated 26/10/2021. He stated that he is a general contractor engaged in construction. Although his written statement stated that he prepared a quote on 4/10/2013 and entered into an Agreement with the 1st Defendants on 9/10/2013 for a cost of Kshs 8,891,605, payable in four instalments, he refuted the contents of that statement.

47. In cross-examination, the witness was emphatic that he never entered into the Agreement dated 9/10/2013 with the 1st Defendants, nor did he carry out the construction of the perimeter wall on the suit land at Dunga Road. He confirmed that he completed only one

contract for Kshs 560,000/-, which he was paid via Mpesa. He stated that he had never received Kshs 8 million from the 1st Defendant for any construction work on the suit land.

48. DW6- Hezbon Omondi testified and relied on his witness statement dated 26/10/2021. He stated that he did not receive the sum of Kshs 10 Million or any other monies from the Plaintiffs in favour of the Defendants.
49. In cross-examination, he stated that he sold a separate piece of land, LR No 209/10638, to the Plaintiffs in 2011 for a purchase price of Kshs 30 Million, of which a deposit of Kshs 5 Million was paid, leaving a balance of Kshs 25 Million. He further stated that the 1st Defendant is his younger brother and that he introduced him to the Plaintiffs, with whom he had previous land transactions.
50. Asked about the letter dated 1/8/2013, he stated that it was a forgery and that he had not received any money, let alone Kshs 10 Million, from the Plaintiffs. He denied the signatures on pages 185-206 of the Plaintiffs' trial bundle. On page 97 of the trial bundle, he conceded that he had received Kshs 3 Million into his Barclays Bank account on 21/11/13. He did not receive Kshs 4.5 Million on 11/12/13. All the signatures have been subjected to forensic examination and found to be forgeries, for which the Plaintiffs have been charged in Court.

The written submissions

51. The Plaintiffs' submissions are dated 1/9/2025. The Defendants' submissions are dated 5/11/25 and 4/11/24 [sic], respectively. I have read and considered these submissions, which now form part of this judgment.

Analysis and determination

52. Having considered the pleadings, the evidence adduced by the parties and the written submissions, the key issues falling for determination are;

- a. Whether the Defendants have proved fraud and or misrepresentation with respect to the sale of the suit land to the Plaintiffs.
 - b. Whether the sale Agreement dated 6/10/2013 has been breached, and if so, by whom?
 - c. Whether the Plaintiffs paid the balance of the purchase price
 - d. Whether the Defendants are entitled to liquidated damages
 - e. Whether the Defendants are entitled to the costs of the construction of the perimeter wall
 - f. Whether the Plaintiffs are entitled to the orders sought in the plaint.
 - g. Who meets the costs of the suit and the counterclaim?
53. It is undisputed that the suit land was acquired by the Defendants via allocation from the Commissioner of Lands on 4/5/1999, and that a title was ultimately registered in their names on 19/2/13.
54. It is also not in dispute that the Defendants sold the suit land to the Plaintiffs by an Agreement dated 6/10/2013.
55. The Plaintiffs have approached this Court seeking orders for vacant possession of the suit property, the title to which is already registered in their names. The Defendants have resisted the Plaintiffs' claim and, by way of counterclaim, sought orders to: cancel the transaction and revert title to the Defendants; forfeit the deposit paid by the Plaintiffs; award liquidated damages of Kshs 6 Million as stipulated in the Sale Agreement; award Kshs 8 Million as the costs of constructing the perimeter wall; award interest at 12% from 6/10/2013 until payment in full; and condemn the Purchasers to pay the costs of the suit and the counterclaim.

Whether the Defendants have proved fraud and or misrepresentation with respect to the sale of the suit land to the Plaintiffs.

56. At this point, I will highlight the key terms of the sale Agreement dated 6/10/2013, which, by and large, have not been disputed. The subject of the sale, the suit land, is LR No 209/11309, hitherto registered in the names of the Defendants.
57. The purchase price is Kshs 50 Million, of which the Plaintiffs have paid Kshs 30 Million, being the deposit, prior to the signing of the sale agreement, a fact duly acknowledged by the Defendants in the Agreement.
58. The parties authorised the Defendants' Advocate to utilise a portion of the deposit to pay land rent and rates in respect of the suit land. The balance of the suit land was payable on the completion date via RTGS to the Defendants' Advocates or their order.
59. The completion date was 90 days from the execution of the sale Agreement or from payment of the balance of the purchase price. Under a standard sale agreement, the orthodox conveyancing sequence is: execution of the sale agreement; payment of the deposit; exchange of the requisite professional undertakings; payment of the balance of the purchase price with completion documents; execution of the transfer documents; presentation of the transfer for registration; registration of title in the Purchaser's name; delivery of vacant possession.
60. In this case, the parties appear to have inverted the sequence in many respects; the deposit of 30 Million was paid in June 2013; the transfer was executed on 9/10/2013; the sale Agreement was executed on 6/10/2013; the rent clearance certificate was obtained on 3/9/2013; there are two consents dated 13/9/2013, one for transfer and another for transfer and charge; the title to the suit land was registered in the Plaintiffs' names on 11/10/2013, about 5 days after the execution of the sale agreement.
61. Clearly, the deposit was paid before the parties executed the sale agreement. The transfer was completed even before the sale Agreement was executed. The question before the Court is whether these transactions were tainted by fraud and/or misrepresentation.

62. The Defendants aver that the suit land was transferred to the Plaintiffs by misrepresentation and/or fraud, contrary to the provisions of the sale agreement. Their case is that the Plaintiffs misrepresented to them that they were seeking a loan facility requiring the title to be in their names to facilitate the release of the loan to pay the balance of the purchase price. This is evidenced by the consent to transfer and charge issued on 13/9/2013. To date, the Plaintiffs have not paid the balance of the purchase price; hence, their plea to cancel the transaction.
63. The Plaintiffs have refuted the claim of a financing arrangement. The Court notes that had there been financing arrangements, there would be a term loan from the lender showing that the loan would primarily be used to pay the balance of the purchase price, the terms of drawdown, and the transaction would involve the tripartite parties.
64. There was no evidence placed before the Court that the Plaintiffs were taking out a loan or that a loan was being arranged. Nor was there any explanation from the Plaintiffs as to why the registration of the title was fast-tracked and/or completion brought forward.
65. The Court of Appeal in *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 affirmed the principle that:
- "A Court of law cannot rewrite a contract for the parties. Where parties have acted upon a particular understanding of their rights and obligations, that understanding constitutes a binding variation of the original terms."
66. It is trite that variation of contract by conduct is binding where it can be established that both parties understood and consented to the departure from the original terms.
67. In the present case, both parties participated in registering the title in the Plaintiffs' name before completion. The Defendants freely executed the transfer document before the sale agreement; willingly and freely provided the completion documents to the purchasers' Advocates; and permitted the Plaintiffs' counsel to obtain the consent

to transfer and the rent clearance certificate. At no stage in the transaction did the Defendants object to the sale on the ground that the balance of the purchase price had not been paid. By these acts, the Defendants represented to the Plaintiffs that registration of title was a valid and binding step in the performance of the contract, despite the balance of the purchase price not yet having been paid.

68. The Court finds that by their conduct in registering title before completion and payment of the balance, the parties varied the terms of the Sale Agreement. The variation separated the obligation to register title from the obligation to pay the balance of the purchase price, a position that contrasted with the original agreement, which provided for a simultaneous exchange.

69. Under the varied arrangement, therefore, the Seller consented to the advance registration of title in the Purchasers' names; and the Purchaser remained obliged to pay the balance of the purchase price, even though, in fact, this obligation was no longer a condition precedent to registration.

70. The legal consequences of registration of title in a person's name cannot be understated. Section 24 of the Land Registration Act, No. 3 of 2012 provides:

"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

71. Section 25 of the said Act provides that the rights of a registered proprietor shall not be liable to be defeated except as provided in the Act, and shall be held free from all other interests and claims whatsoever. The registration of title is therefore not a mere administrative act. It is a vesting act of the highest legal significance. By registering the title in the Purchaser's name, the parties conferred absolute ownership of the suit property on the Purchaser by operation of law.

72. Accordingly, the Court finds and holds that: Although not in dispute, the Defendants accepted the deposit of Kshs 30 Million even before any Agreement had been executed; The registration of title in the Purchasers' names before completion and/or payment of the balance price constitutes a mutual variation of the Sale Agreement by the parties' conduct and is binding on both parties; Upon registration, the Purchasers became the absolute owners of the suit property by virtue of Section 24 of the Land Registration Act; The Defendants cannot, in these circumstances, seek to unravel the registration on the basis of the Purchasers' failure to pay the balance of the purchase price, because it was the Defendants' own act of consenting to the registration that created the situation now complained of; The principle that no man may take advantage of his own wrong, *nemo ex suo delicto meliorem suam conditionem facere potest*, applies here with significance. The Defendants were ably represented by counsel throughout the transaction and, therefore, cannot rely on the consequences of an act to which they were equal and willing participants to defeat the Purchasers' rights.

73. Consequently, I find that there is no evidence of fraud and/or misrepresentation on the part of the Plaintiffs.

Whether the sale Agreement dated 6/10/2013 has been breached, and if so, by whom/ Whether the Plaintiffs paid the balance of the purchase price

74. The Court has already made a finding that the Agreement of sale dated 6/10/2013 was mutually varied by the parties.

75. The key issue for discussion under this subheading is whether the balance of the purchase price was paid by the Plaintiffs and what the consequences of non-compliance were.

76. The parties provided that completion of the purchase and payment of the purchase price shall take place before the completion date by exchange of the completion documents against payment of the balance of the purchase price, to be held by the Defendants'

Advocates until the transfer is registered, but within 21 days of the said exchange. The Defendants were, on or before the completion date, upon receipt of the professional undertaking, to deliver to the Plaintiffs' Advocates the completion documents listed in clause 4.1 of the sale agreement.

77. The Court has established that the completion documents were availed and the registration of the suit land was effected before the balance of the purchase price was paid. There appears to have been no variation in the payment of the purchase price. Accordingly, the balance was payable within 90 days of 6/10/2013, that is, 6/1/2014.

78. It is the Defendants' case that the balance of the purchase price remains unpaid, a period of 13 years after the execution of the sale agreement. Because of non-compliance with this term, the Plaintiffs acquired no interest in the suit property; hence, the order rescinding the sale, cancelling the title in their names, and reverting it to the Defendants as though the sale never took place.

79. The Plaintiffs argue that they paid the balance of the purchase price pursuant to a letter of authority purportedly issued by the Defendants, dated 1/8/2013. For emphasis, the letter is addressed to the 1st Plaintiff as follows;

“ Payment for plot No 209/11309.

We , Tom Odhiambo Owiny of ID No 11045132 and Amsa Jerotich Keitany of ID No 1181672 confirm that the remaining balance of the purchase price is the sum of Kshs 20 Million. We hereby authorise you to remit the sum of Kshs 10 Million to Hezbon Omondi ID No 9482464 on our behalf and the remaining balance of Kshs 10 Million to be remitted to our Advocates, the firm of Onsando Ogonji & Tiego Advocates.

80. It is the position of the Plaintiffs that they paid the balance of the purchase price in the sum of Kshs 10 Million to Hezbon Omondi as follows;

- | | | |
|---------------|---|-------------------|
| a. 16/10/2013 | - | Kshs 800,000/- |
| b. 12/11/2013 | - | Kshs. 1,000,000/- |

- c. 15/11/2013 - Kshs 1,000,000/-
- d. 21/11/2013 - Kshs 3,000,000/-
- e. 11/12/2013 - Kshs 4,500,000/-

81. The Defendants have denied ever issuing instructions vide the above letter or receiving any monies from Hezbon Omondi.
82. Hezbon Omondi gave evidence in Court as DW6 and denied ever receiving the said letter, any instructions from the Defendants, or any sums from the Plaintiffs. However, in his further testimony, he stated as follows;
- “ I received Kshs 3 Million to my account at Barclays Kenya Limited from the Plaintiffs.”
83. DW3 led evidence and informed the Court that, upon examining the letter dated 1/8/2013 and the signatures on the annexed documents, which purported to show that Mr Omondi received the monies aforesaid, she found that the signatures on the letter dated 1/8/2013 and those purporting to be by Omondi were by different persons and therefore were forgeries.
84. The Plaintiffs also led evidence that the sum of Kshs 10 Million was paid to the Defendants' lawyers pursuant to the letter dated 1/8/2013 via RTGS on 11/12/2013.
85. Mr Ogonji, counsel for the Defendants, led evidence as DW4. He confirmed that he acted for the Defendants in the transaction and in other transactions not before the Court. He drafted the sale Agreement and, on the Defendants' instructions, provided the completion documents to the Plaintiffs' Advocates. He confirmed that the deposit of Kshs 30 Million was paid in two tranches of Kshs 26 Million and Kshs 4 Million on 26/6/2013 and 6/6/2013, respectively, through his law firm's account at Cooperative Bank Limited - a/c [withheld] in June 2013, before the parties entered into any formal agreement.
86. He informed the Court that there were two other transactions, reference Nos. 209/10638 and 209/8323 involving the purchase of

land, in which the Plaintiffs were the purchasers, and he and his family sold the suit lands aforesaid. He acted for Mr Omondi and his company in both transactions.

87. He denied ever receiving any monies from the Plaintiffs pursuant to the letter dated 1/8/2013 and stated that he was unaware of that letter. However, he confirmed to the Court that his law firm was paid Kshs 10 Million on 11/12/2013 via a/c No [withheld] at Cooperative Bank of Kenya Limited for other transactions.
88. The Plaintiffs have presented their Guardian Bank statement dated 11/12/2013, RTGS instructions to the bank in favour of the law firm, and an RTGS statement showing receipt of the cash in the law firm's account at Cooperative Bank Limited. There is therefore a clear debit entry of Kshs 10 Million and a corresponding RTGS payment of Kshs 10 Million from the Plaintiffs' company to the law firm's account at Cooperative Bank Limited.
89. I have seen a letter dated 17/12/2013, addressed to Athi River Housing Co Limited, a company associated with the Plaintiffs, from Mr Ogonji, acknowledging receipt of the Kshs 10 Million sent to him on 11/12/2013 via RTGS, strictly on account and without prejudice to his client's rights under the agreements. The letter is referenced as LR No 209/10638.
90. The Court has perused the Sale Agreement dated 11/5/2011 between Cinatine Enterprises Limited [a company associated with Omondi] and Athi River Housing Co Limited, a company associated with the Plaintiffs, in respect of LR No 209/10638. The consideration was Kshs 30 Million, of which a deposit of Kshs 5 Million was paid, leaving a balance of Kshs 25 Million. It is undisputed that the law firm received Kshs 23 Million and Kshs 1 Million on 21/6/2013 and 26/5/2013, respectively, in respect of the said transaction, on behalf of its client, the seller. The transfer of this parcel was registered in favour of Athi River Co Limited on 9/7/2013. It is therefore not true that the sum of Kshs 10 Million could have been attributed to this transaction, which, according to the evidence on record, had been

concluded in July 2013. It must therefore relate to the transaction involving the suit land. The witness stated that by then he was not aware of the letter dated 1/8/2013, nor had he received any instructions from the Defendants to await receipt of the Kshs 10 Million. Even if the Court were to give the benefit of the doubt, it is for the Plaintiffs to recover their monies if, indeed, it relates to the current transaction. I say no more.

91. The Court therefore finds that, although Mr Omondi acknowledged receipt of Kshs 3 Million from the Plaintiffs, there is no evidence that these funds were remitted to the Defendants. Equally, there is no evidence that the sum of Kshs 10 Million, allegedly paid to the law firm, was ever remitted to the Defendants towards payment of the balance of the purchase price.

92. That being the case, the sale Agreement provided for events of default, including a trigger for rescission of the contract. The Agreement provided as follows.

“It was expressly agreed by the Purchaser and the Vendor under clause 12.2 that in the event that the Purchaser is unable to complete payment of the balance of the Purchase price strictly as is stipulated in the terms of this agreement that upon the expiry of Twenty One [21] day Completion Notice duly served upon the Purchaser, the Purchaser shall compensate the Vendor by payment of Kshs. 6,000,000/= being the liquidated damages and shall have no interest or claim in the property whatsoever and the Vendor shall be entitled to sell the Property to any other buyer.

Under Clause 12.3, it is also expressly agreed by the Vendor and the Purchaser that in the event that the Vendor is unable to complete as is stipulated in the terms of this agreement that upon the expiry of a Twenty One [21] day Completion Notice duly served upon the Vendor, the Vendor shall refund the entire purchase price without deduction whatsoever”.

93. It is the Defendants' case that, despite demand, the Plaintiffs have not paid the balance of the purchase price. They refer to two letters dated 3/12/2013 and 12/2.2013, which called for payment of the balance of the purchase price. Clause 12.2 provided that, in the event of default by the Plaintiffs, the Defendants were to issue a completion notice, duly served upon the Plaintiffs. Upon expiry of 21 days, if the default persists, the Defendants' right of rescission of the contract is activated.
94. Evidently, the Sale Agreement expressly provided that the Seller issue a completion notice, calling upon the Purchasers to complete within a stipulated period, as a prerequisite for the Defendants to exercise their right to rescind the Sale Agreement and forfeit the deposit. The Defendants have at no time issued such a notice.
95. The completion notice is a condition precedent to rescission. Under the Sale Agreement, the issuance of a completion notice was a condition precedent to the Seller's right to rescind the contract, forfeit the deposit, and claim liquidated damages. This is a standard conveyancing provision, designed to give the defaulting purchaser a final reasonable opportunity to remedy the default before the drastic remedy of rescission and forfeiture is invoked. By failing to issue any completion notice at any time, the Defendants failed to satisfy the condition precedent to exercising the right of rescission. The Defendants therefore have no right to rescind the Sale Agreement.
96. The failure to issue the completion notice has the following consequences: a) The Defendants' purported right to rescission is not yet crystallised. It cannot be exercised without first issuing a proper completion notice and allowing the Purchaser a reasonable period to comply. b) The Defendants cannot forfeit the deposit without a valid rescission, and there can be no valid rescission without a prior completion notice. c) The Defendants cannot claim liquidated damages as stipulated in the contract because the contractual mechanism for activating those liquidated damages, the completion notice, has not been invoked. d) The parties remain contractually bound to each other

under the varied Sale Agreement, with the Purchaser obligated to pay the balance of the purchase price and the Seller obligated to deliver vacant possession.

97. The Court finds that, by failing to issue a completion notice during the period in which the Purchaser has been in default, the Defendants have acquiesced in the Plaintiffs' continued failure to pay the balance without the contractual machinery being invoked. The Defendants cannot now, after this extended period, invoke contractual remedies that require timely notice as a precondition.

Whether the Defendants are entitled to liquidated damages for default

98. From the foregoing, the Court has no difficulty in holding that the Defendants are not entitled to any liquidated damages at this stage. The prayer is premature for want of a completion notice having been issued in accordance with the sale agreement.

Whether the Defendants are entitled to the costs of the construction of the perimeter wall

99. Under clause 12.1, the Defendants were to build the perimeter wall at the Plaintiffs' cost, which was agreed at Kshs 8 Million, and that sum was to be paid together with the deposit.

100. The Plaintiffs stated that they constructed the wall in May 2013, well before the sale agreement was executed on 6/10/2013. Although this was initially agreed, it was not necessary to include it in the agreement, as by October 2013 the perimeter wall had already been built. They have attached an invoice from one of their companies to the Plaintiffs for Kshs 8,062,975/- inclusive of VAT. However, there was no evidence that the invoice had been paid.

101. The Defendants, on the other hand, have rejected the Plaintiffs' position and insist that they did, in fact, construct the wall in December 2013. They have attached a development approval from the then City Council of Nairobi, dated 14/12/2012, a construction Agreement dated 9/10/2013 between the 1st Defendants and one

Patrick Suju for the sum of Kshs 8,891,605/-, and a number of material quotations.

102. Patrick Suju adduced evidence and denied ever constructing the perimeter wall. He stated that the Defendants had contracted him to build a perimeter wall on a property at Dunga Road in Nairobi, not on the suit land. This direct attack on the Defendants' evidence caused that evidence to collapse.

103. The Court therefore finds, on the balance of probabilities, that the perimeter wall was not constructed by the Defendants.

Whether the Plaintiffs are entitled to vacant possession of the suit land

104. I now turn to the Plaintiffs' suit. As stated elsewhere in this judgement, the Plaintiffs are the registered proprietors of the suit property. By virtue of Section 24 of the Land Registration Act, registration vests absolute ownership of the suit property in the Purchaser. The Purchaser is therefore prima facie entitled to possession of the property.

105. However, this Court cannot, in equity, grant vacant possession to a Purchaser who has not paid the balance of the purchase price and has been in default of their primary contractual obligation since the balance fell due. A Purchaser who seeks the Court's assistance to enforce rights arising from a sale must come to Court having performed, or being ready and willing to perform, their own obligations under that sale. The Purchaser has not paid the balance of the purchase price. They come to Court seeking vacant possession while having defaulted on their primary obligation, namely the payment of the balance of the purchase price. This Court, sitting in equity, will not assist a party in obtaining the fruits of a contract while that party remains in default of their own obligations under the same contract. The equitable maxim he who seeks equity must do equity applies with full force.

106. The Purchasers' prayer for vacant possession is conditional and requires the Purchasers to fulfil their obligation under the Sale Agreement as varied before the prayer can be granted.

107. The Court therefore finds that the Plaintiffs are not entitled to the prayer for vacant possession. In my considered view, the prayer is premature.

108. Final orders for disposal

In the upshot, the Court makes the following orders;

- a. The Plaintiffs' case is unmerited. It is dismissed.
- b. The Defendant's counterclaim is unmerited. It is dismissed.
- c. Each party to meet their respective costs.

109. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY
OF APRIL 2026 VIA MICROSOFT TEAMS.**

**J. G. KEMEI
JUDGE**

Delivered online in the presence of;

1. Mr Githui for the Plaintiffs
2. Mr Ogado for the 1st Defendant
3. Mr Koyyoko for the 2nd Defendant /Plaintiff in the Counterclaim
4. C/A - Ms Elizabeth