



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 426 OF 2009**

**ANTHONY KABUCHO NGURIMU.....PLAINTIFF**

**=VERSUS=**

**JOSVIR TRADERS & AGENCIES LTD.....1<sup>ST</sup> DEFENDANT**

**MBIGI NJUGUNA & CO. ADVOCATES.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

On 2<sup>nd</sup> February, 2007, the plaintiff entered into an agreement for sale with the 1<sup>st</sup> defendant in respect of a property that was described as Plot Number 7 within L.R No. 13041/1 (hereinafter referred to as “the suit property”). The agreement for sale between the plaintiff and the 1<sup>st</sup> defendant which was drawn by the 2<sup>nd</sup> defendant provided as follows: -

1. *“The seller shall sell and the purchasers shall buy plot number 7 within L. R No. 13041/1.*
2. *The Purchaser shall pay the Vendor the sum of Kshs. Two Million Seven Hundred and Fifty Thousand (Kshs.2,750,000/=) on signing this agreement receipt of which the Vendor hereby acknowledges.*
3. *The Vendor shall at his own expenses partition the land and obtain mutation of the portion subject matter of this transaction and secure all other registrable documents to enable the transfer to the purchaser.*
4. *The purchaser will take possession of the said land on payment of balance as per clause 2 of this agreement but can fence and remove the coffee bushes therein.*
5. *The Vendor shall obtain the consent of the Commissioner of land to transfer to the purchaser.*
6. *The purchaser shall pay the cost of transfer and Stamp duty.*
7. *The Vendor shall pay any outstanding fee dues or rates that may be owing at the land office, government or any other authority.*
8. *The advocate’s fees shall be shared by both the vendor and the purchaser.*
9. *The advocate’s instructions are limited to this agreement for sale.*
10. *The Law Society Conditions of sale shall apply to this transaction in so far as they are not inconsistent with the terms and conditions herein contained.”*

The plaintiff brought this suit on 27<sup>th</sup> August, 2009 after a period of over 2 years of the date of the agreement aforesaid seeking the following reliefs against the defendants: -

1. An order compelling the 1<sup>st</sup> defendant to complete and perform the agreement for sale dated 5<sup>th</sup> February, 2007(sic).
2. A permanent injunction restraining the 1<sup>st</sup> defendant, its agents, successors or assigns from selling, transferring, disposing or in any other way offering the suit property to any other party except the plaintiff.
3. In the alternative, a refund of the sum of Kshs.2,770,000/=.

4. Damages in the sum of Kshs.5,750,000/= for loss of bargain.
5. Interest on (3) and (4) above at the rate of 17% per annum from the date of filing suit until payment in full.
6. Any other relief that this Honourable Court might deem just and expedient to grant.

In his plaint dated 14<sup>th</sup> August, 2009, the plaintiff averred that in the agreement for sale dated 5<sup>th</sup> February, 2007(sic) between him and the 1<sup>st</sup> defendant, both parties were represented by the 2<sup>nd</sup> defendant. The plaintiff averred that in the said transaction, he relied entirely on the 2<sup>nd</sup> defendant to carry out the necessary due diligence to ascertain the ownership status of the suit property and/or whether the same was subject to any encumbrance. The plaintiff averred that prior to the execution of the said agreement, the 2<sup>nd</sup> defendant gave him assurance that it was holding the original title of the suit property and that the property was not subject to any encumbrance.

The plaintiff averred that on the strength of the said representation, he executed the said agreement for sale and paid the purchase price of Kshs.2,750,000/= to the 1<sup>st</sup> defendant and a further sum of Kshs.20,000/= to the 2<sup>nd</sup> defendant on account of their fees. The plaintiff averred that he thereafter took possession of the suit property and commenced construction thereon.

The plaintiff averred on the 16<sup>th</sup> April, 2008 he was issued with a certificate by the 1<sup>st</sup> defendant confirming that he was the registered owner of the suit property. He averred that thereafter he followed up with the defendants unsuccessfully the issue of the transfer of the property to his name and the title for the property. The plaintiff averred that on 11<sup>th</sup> February, 2009 officers from the City Council of Nairobi entered the suit property and demolished the structures he had put thereon alleging that he was a trespasser on the property. The plaintiff averred that this development coupled with the defendants' reluctance to register the property in his name made him suspicious of the authenticity of the 1<sup>st</sup> defendant's title over the suit property.

The plaintiff averred that investigations carried out by his advocates on record after that incident revealed that at the time of entering into the said agreement for sale, the defendants had withheld or misrepresented material facts to the plaintiff in order to induce him to enter into the said agreement for sale and to pay the purchase price. The plaintiff averred that the defendants failed to disclose to him that the suit property was the subject of a previous court case and that there was an active case over the suit property in which an order of injunction had been issued restraining the 1<sup>st</sup> defendant from continuing with the sub-division of the suit property. The plaintiff averred that as at 2<sup>nd</sup> February, 2007 when he entered into the said agreement for sale with the 1<sup>st</sup> defendant, the injunction order aforesaid was subsisting. The plaintiff averred that the defendants had represented that the suit property was unencumbered when they knew of the existence of the said injunction and also of the fact that they were not in possession of the title for the suit property.

The plaintiff averred that the 2<sup>nd</sup> defendant who acted for him in the transaction owed him a professional duty to protect his interest in the transaction and not to act to his detriment. The plaintiff averred that in misrepresenting the true facts relating to the suit property to him, the 2<sup>nd</sup> defendant failed to discharge the duty that the 2<sup>nd</sup> defendant owed him and as such the 2<sup>nd</sup> defendant was guilty of negligence.

The plaintiff averred that he also learnt that there was a family relationship between one of the partners of the 2<sup>nd</sup> defendant, one Mbigi Njuguna and a director of the 1<sup>st</sup> defendant one, Joseph Nganga Njuguna. The plaintiff averred that the 2<sup>nd</sup> defendant had a duty to disclose this relationship to him so that he could have the option of an independent legal representation. The plaintiff averred that in view of the said relationship, the 2<sup>nd</sup> defendant had personal interest in the matter which was inconsistent to that of the plaintiff. The plaintiff averred that as a result of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' misrepresentation, he was forced to instruct an advocate in the process of which he incurred costs and related expenses which the defendants were liable to pay to him. The plaintiff averred further that as a result of the defendants' failure to transfer the suit property to him he had been denied the benefit of a bargain. The plaintiff averred that the price of a similar property was in the region of Kshs.8,500,000/= and claimed from the defendants a sum of Kshs.5,750,000/= being the difference between the purchase price and the current market value of the property. The plaintiff also averred that he was entitled to a refund of the purchase price of Kshs.2,750,000/= and the sum of Kshs.20,000/= which he paid to the 2<sup>nd</sup> defendant as legal costs.

The defendants entered appearance through one firm of advocates but filed separate defences. In its defence dated 26<sup>th</sup> September, 2009, the 1<sup>st</sup> defendant admitted that it entered into the agreement for sale with the plaintiff on 5<sup>th</sup> February, 2007(sic) and the terms of the said agreement. The 1<sup>st</sup> defendant averred further that the plaintiff's agents who purchased the suit property on his behalf were made aware of the fact that the suit property was a subdivision of a larger parcel of land known as L.R No. 13041/1 whose deed plans and title documents were still being processed. The 1<sup>st</sup> defendant averred further that the plaintiff's agents aforesaid were also made aware that the 1<sup>st</sup> defendant had purchased L.R No. 13041/1 from one, Samuel Ngunu Kimotho and that it was in the process of obtaining transferable documents from him. The 1<sup>st</sup> defendant averred further that the plaintiff's agents aforesaid were also made aware that L.R No. 13041/1 was part of a hitherto larger parcel of land which was acquired by Samuel Ngunu Kimotho after he won court cases both in the High Court and the Court of Appeal.

The 1<sup>st</sup> defendant admitted that the plaintiff took possession of the suit property and was still in possession. The 1<sup>st</sup> defendant averred that time was not of essence in respect of its obligation under the said agreement for sale and as such it was still in the course of processing and handing over to the plaintiff the title for the suit property.

With regard to the demolition of the structures which the plaintiff had put up on the suit property, the 1<sup>st</sup> defendant averred that the same had nothing to do with it because the City Council of Nairobi who were said to have carried out the demolition had no business interfering with private property.

With regard to the allegations that the defendants failed to disclose the fact that the suit property was the subject of previous litigation and that there was an order of injunction restraining the 1<sup>st</sup> defendant from subdividing the suit property, the 1<sup>st</sup> defendant averred that the plaintiff's agents were well aware of the history of the suit property and that the 1<sup>st</sup> defendant was not a party to HCCC No. 1404 of 2004

and only sought to join the suit to protect its interest and those of the other persons who had purchased portions of the suit property. The 1<sup>st</sup> defendant denied that there was in existence an order of injunction in force as at the time of the execution of the agreement for sale between it and the plaintiff.

The 1<sup>st</sup> defendant denied that it misrepresented facts to the plaintiff or failed to make full disclosure of the facts relating to suit property which were within its knowledge. The 1<sup>st</sup> defendant denied further that the contract that it entered into with the plaintiff was influenced in any way by the relationship that the 1<sup>st</sup> defendant had with one of the partners in the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant denied that the plaintiff had suffered any loss arising from the said agreement for sale.

In their statement of defence dated 26<sup>th</sup> September 2009, the 2<sup>nd</sup> defendant admitted that they acted for the plaintiff and the 1<sup>st</sup> defendant in the agreement for sale dated 5<sup>th</sup> February, 2007(sic) and that the plaintiff was represented by his brother and sister. The 2<sup>nd</sup> defendant denied that the plaintiff relied on them to do due diligence on his behalf prior to purchasing the suit property. The 2<sup>nd</sup> defendant denied further that they represented to the plaintiff that they had in their possession the original title for the suit property. The 2<sup>nd</sup> defendant averred that the plaintiff's agents and the 1<sup>st</sup> defendant had agreed on the terms of the agreement for sale of the suit property and that they were only approached to prepare an agreement for sale. The 2<sup>nd</sup> defendant averred that their instructions and mandate was limited to drawing the agreement for sale on terms agreed upon by the parties and no more. The 2<sup>nd</sup> defendant averred that their instructions did not extend to transferring the suit property to the plaintiff. The 2<sup>nd</sup> defendant denied all the allegations of misrepresentation and non-disclosure of material facts leveled against them by the plaintiff. The 2<sup>nd</sup> defendant averred that the plaintiff's agents were aware of the history of the suit property and that the 1<sup>st</sup> defendant was not involved in HCCC No. 1404 of 2004. The 2<sup>nd</sup> defendant averred further that the injunction alluded to by the plaintiff had lapsed and that the same did not relate to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that the relationship that existed between one of the partners in the 2<sup>nd</sup> defendant and a director of the 1<sup>st</sup> defendant was known to the plaintiff and that the relationship did not affect the agreement between the 1<sup>st</sup> defendant and the plaintiff in any way. The 2<sup>nd</sup> defendant averred that the plaintiff was still in possession of the suit property and was entitled to get a title for the property once processed. The 2<sup>nd</sup> defendant averred that they were strangers to the plaintiff's alleged loss of bargain.

The plaintiff filed replies to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' defences on 7<sup>th</sup> October, 2009 in which the plaintiff denied that he had knowledge of the history of the suit property and that the 2<sup>nd</sup> defendant's engagement was limited to drawing the agreement for sale.

At the trial, the plaintiff gave evidence and called two (2) witnesses. On their part, the defendants called three (3) witnesses in their defence. The plaintiff told the court that at all material times he was residing in the United States of America (U.S.A). He stated that while in the U.S.A, he was called by a partner in the firm of the 2<sup>nd</sup> defendant one, Jane Nyamuringa in November/December, 2006 who told him that she had a friend who was selling land at Kasarani near USIU and that the land was L.R No. 13041/1. On receipt of this information, he asked one of his brothers, Jeremiah Thuku who was in Kenya to go and have a look at the property. His said brother accompanied by his father viewed the property and reported back to him that it was in order. He stated that the said Jane Nyamuringa told him that the land was being sold by Pastor Joseph Nganga and that the 2<sup>nd</sup> defendant had in their possession, the title for the suit property. He asked the said Jane Nyamuringa to confirm that the title had no encumbrance. After two (2) months, he sent to his said brother a sum of Kshs.2,750,000/= which was the purchase price for the property. An agreement for sale was prepared by the 2<sup>nd</sup> defendant and was signed on his behalf by his brother. The 2<sup>nd</sup> defendant was paid Kshs.20,000/= for the said agreement. He stated that after the signing of the agreement and payment of the purchase price, his brother was issued with a certificate of ownership of the suit property by the 1<sup>st</sup> defendant. He stated that the property had never been transferred to him and that his calls to Joseph Nganga Njuguna (DW3) went unanswered. He stated that the 2<sup>nd</sup> defendant acted for the seller and purchaser in the transaction and that when he did a search on the title of the property which was sold to him he found that the same was owned by Samuel Kimotho Mburu and others. He stated that the 1<sup>st</sup> defendant sold to him land that did not belong to it. He urged the court to order the 1<sup>st</sup> defendant to refund the purchase price that was paid to it and also pay for the loss of bargain together with interest. He stated that he sued the 2<sup>nd</sup> defendant because they had a duty to carry out due diligence on the title of the suit property which duty they failed to discharge.

In cross-examination, the plaintiff stated that the 1<sup>st</sup> defendant was not known to him before the transaction and that the 1<sup>st</sup> defendant was known by Jane Nyamuringa who he admitted was her cousin. He stated that he was represented in the transaction by his two (2) brothers and a sister. He stated that he commenced development on the suit property and after about 6 months, the structures he had put up were demolished by the City Council of Nairobi which claimed that the land belonged to someone else. He stated that he was not sure whether the development was approved but the construction commenced before the approval was obtained. He stated that the agreement was not time bound but he wrote to the 1<sup>st</sup> defendant to complete the transaction. He did not however produce a copy of the letter in evidence. The plaintiff produced as exhibits, copies of the agreement for sale dated 2<sup>nd</sup> February, 2007, a receipt of the same date for Kshs.20,000/= that was issued by the 2<sup>nd</sup> defendant, a bankers cheque of the same date for Kshs.2,750,000/= and a certificate of ownership dated 16<sup>th</sup> April, 2008 issued by the 1<sup>st</sup> defendant.

The plaintiff's first witness was his sister, Esther Wangari Ngurimu (PW2). PW2's evidence related to the demolition of the structures on the suit property. PW2 told the court that the employees of the City Council of Nairobi who carried out the demolition told them that there was a complaint that the structures that were demolished were being put up on land that belonged to someone else. She stated that after the demolition exercise, they were not able to access the land. She stated that they were prevented from doing so by a guard who told them that there was a dispute over the ownership of the land. In cross-examination, PW2 stated that the development that was being carried out on the suit property was approved. PW2 did not however produce evidence of such approval.

The plaintiff's last witness was his brother George Ruigu Ngurimu (PW3). PW3 told the court that the plaintiff and he had dealt with the defendants before and that Jane Nyamuringa who was a partner and a wife of the other partner in the 2<sup>nd</sup> defendant, Mbigi Njuguna was her cousin. He stated that Mbigi Njuguna was also a cousin to the main director in the 1<sup>st</sup> defendant, Joseph Nganga Njuguna. He stated that the transaction the subject of this suit was handled by him on behalf of the plaintiff and that 2<sup>nd</sup> defendant acted as the plaintiff's advocates. He

stated that he paid the purchase price in the sum of Kshs.2,750,000/= by way of a bankers cheque and also paid Kshs.20,000/= as the 2<sup>nd</sup> defendant's legal fees. PW3 stated that after the execution of the agreement, Mbigi Njuguna who was a partner in the 2<sup>nd</sup> defendant's firm told him to collect the certificate of ownership from his office awaiting the issuance of a title for the suit property which was to be ready in three (3) weeks' time. He stated that neither the plaintiff nor he had been issued with a title for the suit property.

He stated that at the material time, the plaintiff was staying in the U.S.A and that in January, 2007, Jane Nyamuringa (DW2) called him and asked for the plaintiff's telephone contact which he gave to her and that it was after that that the plaintiff called and asked him to go and pay for the suit property. He stated that the plaintiff obtained information regarding the suit property from Jane Nyamuringa (DW2). In cross-examination, PW3 stated that he executed the agreement for sale on behalf of the plaintiff and that when he executed the said agreement, Plot Number 7 that was purchased by the plaintiff had no title and that the issuance of a title was subject to a subdivision exercise. PW3 admitted that the agreement did not provide that the plaintiff would be issued with a title within a particular time frame and that he had not given the 1<sup>st</sup> defendant a notice to issue him with a title.

In further cross-examination by the 2<sup>nd</sup> defendant's advocate, PW 3 stated that he went to the 2<sup>nd</sup> defendant and asked them to draw an agreement for sale which they did and for which he paid them Kshs.20,000/=. PW3 admitted that clause 10 of the agreement for sale provided that the instructions given to the 2<sup>nd</sup> defendant were limited to the drawing of the agreement for sale. In re-examination, PW3 contended that when he went to the offices of the 2<sup>nd</sup> defendant, they had already prepared the agreement for sale in question.

Joseph Karanja Njuguna (DW3) testified on behalf of the 1<sup>st</sup> defendant. He told the court that he was a director of the 1<sup>st</sup> defendant. He relied entirely on his witness statement dated 21<sup>st</sup> November, 2013. DW3 stated that the plaintiff was a distant cousin of Jane Nyamuringa Ruigu who was a partner in the 2<sup>nd</sup> defendant and that he(DW3) was also a distant uncle to Dominic Mbigi who was the other partner in the 2<sup>nd</sup> defendant. He stated that the 1<sup>st</sup> defendant was in the business of buying and selling land and that the plaintiff who resided in the U.S.A had purchased a number of properties from the 1<sup>st</sup> defendant through his brother George Ruigu Ngurimu, Jeremiah Thuku Ngurimu and his sister, Mary Wanjiru Ngurimu and the 2<sup>nd</sup> defendant had acted in the preparation of the agreements for sale. DW3 stated that in 2004 one, Francis Wambugu Miano and he acting on behalf of the 1<sup>st</sup> defendant entered into an agreement for sale with one, Samuel Ngunu Kimotho who was the registered owner of a seven (7) acre parcel of land known as L.R No. 13041/1. DW3 stated that the title of the property had no encumbrance but the title document was in the custody of the firm of Iseme, Kamau & Maema Advocates who acted for Samuel Ngunu Kimotho in the transaction. DW3 stated that after purchasing the suit property, the 1<sup>st</sup> defendant sub-divided the same into twenty four (24) portions which it sold to various people among them the plaintiff.

He stated that the buyers were given ownership certificates and possession awaiting the processing of the title documents which the 1<sup>st</sup> defendant was pursuing with the Commissioner of Lands. DW3 stated that the sub-division of the suit property was approved by the City Council of Nairobi and the Commissioner of Lands. DW3 stated that they only used the 2<sup>nd</sup> defendant for the preparation of the agreement for sale and that the 2<sup>nd</sup> defendant was not involved at all in the process of sub-dividing the suit property and issuance of titles. DW3 stated that it was the plaintiff's father and a foreman who had participated in the construction of a house on one of the plaintiff's parcels of land who identified and expressed interest in the suit property. He stated that the plaintiff's father later on brought the plaintiff's sister and brother to view the property and after looking at it, they said that it was ideal for the plaintiff. He stated that he discussed the price with them and reached an agreement. He stated that after the plaintiff's siblings paid the purchase price, they went to the 2<sup>nd</sup> defendant to prepare for them an agreement for sale. He stated that the 2<sup>nd</sup> defendant was not involved in the negotiation of the purchase price and they were not required to prepare any conveyance of the suit property.

He stated that at the time of entering into the said agreement for sale, the plaintiff's siblings who acted as his attorneys had from their inquiries and discussion with him knowledge that, the suit property was a sub-division of a larger parcel of land namely, L.R No. 13041/1 which had just been acquired by the 1<sup>st</sup> defendant and that the property had no title documents and the process of obtaining the same was ongoing. DW3 stated further that the plaintiff's agents aforesaid were aware that what the plaintiff would get was a share certificate to show ownership pending the processing of the title documents which was to be availed to him later once the same was ready and that time was not of essence with respect to the 1<sup>st</sup> defendant's obligations to avail a title since the approval process was bound to take some time. He stated that the 1<sup>st</sup> defendant was not a party to HCCC No. 1404 of 2004 and that he was served with court papers in that case towards the end of 2005 and he instructed the 2<sup>nd</sup> defendant to appear in the matter to protect the interest of the 1<sup>st</sup> defendant. He stated that the 1<sup>st</sup> defendant subsequently applied to be joined in the case to challenge the injunction orders that had been issued in the matter so as to protect its interest. He stated that the injunction that had been issued in that case lapsed and was not extended and this enabled him to process a transfer of the property from the name of Samuel Ngunu Kimotho.

DW3 stated that he had tried his best to process titles for all the twenty four (24) subdivisions including the suit property and that what was remaining was for the land office to issue titles since the deed plans were ready. He stated that when the plaintiff's structures on the suit property were demolished he accompanied the plaintiff's representatives to Kasarani Police Station where they were told that the demolition was carried out because the structures were not approved. He stated that this suit was not justified because the plaintiff was in possession of the suit property and a title for the suit property had not been issued by the land office to enable the 1<sup>st</sup> defendant to effect a transfer in favour of the plaintiff. He denied that the plaintiff had called him to demand a title for the suit property. DW3 stated that the plaintiff's suit was premature.

In cross-examination, DW3 confirmed that the 1<sup>st</sup> defendant had received the entire purchase price from the plaintiff and that the plaintiff had complied with his part of the agreement. He stated that the 1<sup>st</sup> defendant had not given the plaintiff a title for the suit property because the same was being processed. He stated that the plaintiff was aware that the process would take long. He stated that the plaintiff's structures on the suit property were demolished because the same were put up without the necessary approvals. He reiterated that the role of the 2<sup>nd</sup> defendant was only to draw the agreement for sale. He stated that given time, the 1<sup>st</sup> defendant was able to complete the agreement for sale by issuing the plaintiff with a title for the suit property although he was not sure how long it would take him to do that. He stated that the 1<sup>st</sup> defendant was not liable to pay damages to the plaintiff.

DW3 produced in evidence as exhibits, copies of Grant No. I.R 85809 for L.R No. 13041/1, agreement for sale dated 16<sup>th</sup> June, 2004 between Samuel Ngunu Kimotho and Joseph Nganga Njuguna and Francis Wambugu Miano in respect of L.R No. 13041/1/, Ministry of Lands Approval of subdivision of L.R No. 13041/1 dated 6<sup>th</sup> April, 2005, City Council of Nairobi's approval of the subdivision of L.R No. 13041/1 dated 26<sup>th</sup> June, 2005, pleadings and orders issued in HCCC No. 1404 of 2004 (O.S), Grant No. I.R 85809 with the transfer of L.R No. 13041/1 to Joseph Nganga Njuguna and Francis Wambugu Miano endorsed thereon on 26<sup>th</sup> May, 2010, Deed Plan No. 308886 for L.R No. 13041/7 and Deed Plan No. 308882 for LR No. 13041/1/1 which was surrendered as a road.

Dominic Njuguna Mbigi (DW1) was the first to give evidence on behalf of the 2<sup>nd</sup> defendant. He told the court that he was an advocate of the High Court and partner in the firm of Mbigi Njuguna & Co. Advocates, the 2<sup>nd</sup> defendant. He stated that he did not at all communicate with PW3 in relation to the transaction involving the suit property. He stated that the only time he talked to PW3 was when the structures on the suit property were demolished and they came to see him for advice. He denied that he represented to the plaintiff that the title deed for the suit property would be issued in 3 weeks. He stated that his firm, the 2<sup>nd</sup> defendant only dealt with the drawing of the agreement for sale and that the property was not identified in the agreement for sale with a title but as a subdivision in a sketch plan. He stated that the agreement was not time bound. He stated that the agreement was executed in the presence of his assistant by the name of Mugo Githinji. He stated that he did not discuss with PW3 the terms of the agreement. He stated that PW3 came to see him after the demolition of the structures on the suit property because he was the partner in the firm dealing with litigation.

In cross-examination, DW1 reiterated that the 2<sup>nd</sup> defendant's instructions were limited to drawing the agreement for sale between the plaintiff and the 1<sup>st</sup> defendant and that the 2<sup>nd</sup> defendant had no duty to advise the plaintiff on the transaction or undertake any due diligence which is usually done in normal conveyancing. He stated that in this case, the plaintiff was aware that he was buying unregistered land which was subject to sub-division.

The 2<sup>nd</sup> defendant's second witness was Jane Nyamuringa Ruigu (DW2). She told the court that she was an advocate of the High Court and a partner in the 2<sup>nd</sup> defendant in charge of conveyancing department. DW2 adopted as her evidence in chief her witness statement dated 21<sup>st</sup> November, 2013. In cross-examination, DW2 stated that the 2<sup>nd</sup> defendant drew the agreement for sale with limited instructions in that the plaintiff was aware that he would not get a title for the suit property immediately. DW2 stated that she gave instructions to the person who drew the agreement for sale. She stated that although there was an ongoing case touching on the suit property there was no order in place restraining the transaction. She stated that the plaintiff had done due diligence before approaching the 2<sup>nd</sup> defendant to prepare the agreement for sale. DW2 stated that if the suit property had a title, she would have carried out a search. She stated that she was unable to do that because the suit property had none. She stated that when the agreement for sale was drawn, the mother title was with the firm of Iseme, Kamau & Maema Advocates. She stated that the plaintiff's agents had already inspected the suit property and paid the purchase price before the 2<sup>nd</sup> defendant was instructed to prepare the agreement for sale. She stated that the plaintiff's agents came to the 2<sup>nd</sup> defendant with a photocopy of a banker's cheque. DW2 stated that she only spoke to the plaintiff after the structures on the suit property were demolished and not before. She stated that she did not speak to the plaintiff prior to the date of the sale agreement and that she only spoke to the plaintiff's brother as she did not have the plaintiff's telephone number.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 7<sup>th</sup> November, 2018 while the 2<sup>nd</sup> defendant filed their submissions on 28<sup>th</sup> January, 2019. The 1<sup>st</sup> defendant did not file submissions. I have considered the pleadings, the evidence tendered by the parties and the closing submissions of counsels. The parties did not agree on the issues for determination by the court. From the pleadings and the evidence tendered, the following in my view are the issues that arise for determination in this suit: -

1. Whether the 1<sup>st</sup> defendant breached the agreement for sale dated 2<sup>nd</sup> February, 2007 between it and the plaintiff.
2. Whether the plaintiff was induced to enter into the agreement for sale dated 2<sup>nd</sup> February, 2007 through misrepresentation and concealment of material facts by the defendants.
3. Whether the 2<sup>nd</sup> defendant acted negligently and unprofessionally in the performance of their duty to the plaintiff.
4. Whether the plaintiff suffered loss arising from the defendants' transgressions if any.
5. Whether the plaintiff is entitled to the reliefs sought.
6. Who should bear the costs of the suit?

Whether the 1<sup>st</sup> defendant breached the agreement for sale dated 2<sup>nd</sup> February, 2007 between it and the plaintiff.

I have at the beginning of this judgment set out the salient terms of the agreement for sale which the plaintiff entered into with the 1<sup>st</sup> defendant. The agreement did not have a date of completion. The same was however subject to the Law Society Conditions of Sale. The Law Society Conditions of Sale (LSK conditions of sale) that was in force when the parties entered into the agreement for sale was 1989 Version. Condition 2(1) (c) of the LSK Conditions of Sale provides that where the agreement does not provide for the completion date, the completion date shall be 42 days after receipt by the vendor of consent to the transaction where the transaction is controlled and 42 days after the date of the agreement where the transaction is not controlled.

A controlled transaction according to the said condition of sale is a transaction which is subject to the Land Control Act, Chapter 302 Laws of Kenya. In the case before the court, the property the subject of the agreement had no title. It was a proposed subdivision of a larger parcel of land known as L.R. No. 13041/1 (hereinafter referred to as "the mother title"). According to the evidence placed before the court by the

1<sup>st</sup> defendant, the mother title was an agricultural land and as such was subject to the Land Control Act. The mother title was however not what was sold to the plaintiff. The plaintiff purchased as I have stated, a proposed subdivision of the mother title. It does not follow automatically that when a mother title is agricultural land, the subdivisions thereof must similarly be agricultural land. The terms and conditions of the mother title could be varied and the user changed during the subdivision process.

In the circumstances, I am unable to say whether the sale of the suit property to the plaintiff was a controlled transaction or not. In the absence of a title and any indication that the land that was being sold to the plaintiff was intended to be agricultural land, I would treat the transaction as not controlled. As mentioned earlier, the completion date for transactions which are not controlled under the LSK Conditions of Sale is 42 days from the date of the agreement. It follows therefore that the completion date for the agreement for sale between the plaintiff and the 1<sup>st</sup> defendant dated 2<sup>nd</sup> February, 2007 was 42 days from the date of the agreement namely, 16<sup>th</sup> March, 2007. It is not in dispute that the agreement between the parties was not completed on or before 16<sup>th</sup> March, 2007. The plaintiff paid the full purchase price to the 1<sup>st</sup> defendant but the property was not transferred to him. The agreement for sale did not provide that time was to be of essence.

Following the failure by the 1<sup>st</sup> defendant to complete the agreement, the plaintiff had an obligation under Condition 4(7) of LSK Conditions of Sale to serve upon the 1<sup>st</sup> defendant twenty-one (21) days' notice to complete the agreement and failure to do so would have entitled the plaintiff to rescind the agreement and demand a refund of the purchase price paid together with interest.

There is no evidence that the plaintiff served upon the 1<sup>st</sup> defendant a completion notice. In his evidence, the plaintiff stated that he had written to the 1<sup>st</sup> defendant to complete the agreement. No evidence of such letter was however placed before the court. In the absence of a completion notice, the agreement for sale between the plaintiff and the 1<sup>st</sup> defendant remains open and enforceable by either party. It is my finding therefore that the 1<sup>st</sup> defendant did not breach the agreement for sale dated 2<sup>nd</sup> February, 2007.

Whether the plaintiff was induced to enter into the agreement for sale dated 2<sup>nd</sup> February, 2007 through misrepresentation and concealment of material facts by the defendants.

The terms and conditions of the agreement for sale dated 2<sup>nd</sup> February, 2007 are self-explanatory. The plaintiff and the 1<sup>st</sup> defendant accepted the same before executing the agreement. There is no evidence before the court that the plaintiff accepted any of the terms of the said agreement through misrepresentation, inducement or concealment of facts. It was not a term of the agreement that the 1<sup>st</sup> defendant was registered as the owner of the suit property or the mother title. It was also not a term of the agreement that the title of the suit property had no encumbrances. The fact that the property was yet to be registered in the name of the 1<sup>st</sup> defendant as at the time of the agreement for sale and that the mother title was subject to an ongoing litigation did not therefore mean that there was misrepresentation and/or concealment of material facts. I am not satisfied from the evidence on record that either the 1<sup>st</sup> defendant or the 2<sup>nd</sup> defendant misrepresented or concealed material facts to the plaintiff when the plaintiff entered into the agreement for sale dated 2<sup>nd</sup> February, 2007.

Whether the 2<sup>nd</sup> defendant acted negligently and unprofessionally in the performance of their duty to the plaintiff.

As I have held above, the agreement for sale between the plaintiff and the 1<sup>st</sup> defendant is still valid and enforceable. It has not been breached by either party. In my understanding, the outcome that the plaintiff intended to achieve under the said agreement was to have the suit property transferred into his name. That in my view is still a possibility. The plaintiff has claimed that the 2<sup>nd</sup> defendant did not carry out due diligence on the title of the suit property and also failed in its duty to disclose to the plaintiff that one of its partners was related to a director of the 1<sup>st</sup> defendant. The agreement between the plaintiff and the 1<sup>st</sup> defendant provided expressly in clause 10 thereof that the duty of the 2<sup>nd</sup> defendant was limited to drawing the agreement on the terms that had been agreed on by the parties. With their instructions limited only to drawing the agreement for sale, I am in an agreement with the 2<sup>nd</sup> defendant that their duty to the plaintiff could not be extended to carrying out due diligence on the title that was held by the 1<sup>st</sup> defendant. In any event, the suit property had no title as of the date of the agreement. With regard to non-disclosure of the relationship between one of its partners and a director of the 1<sup>st</sup> defendant, from the evidence on record, there were previous dealings between the parties prior to this agreement and the relationship between the partners of the 2<sup>nd</sup> defendant and the plaintiff and a director of the 1<sup>st</sup> defendant was common knowledge. In any event, there is no evidence that the agreement dated 2<sup>nd</sup> February, 2007 was influenced in any way to the detriment of the plaintiff by the relationship alluded to. For the foregoing reasons, I am not satisfied that the 2<sup>nd</sup> defendant acted negligently or unprofessionally in the agreement dated 2<sup>nd</sup> February, 2007.

Whether the plaintiff suffered loss arising from the defendants' transgressions if any.

I have already made a finding that the 1<sup>st</sup> defendant has not breached the agreement dated 2<sup>nd</sup> February, 2007. It was not contested by the plaintiff that he was in possession of the suit property and that the 1<sup>st</sup> defendant had not sought to dispossess him of the property. In the absence of any breach of the agreement, I am unable to see what loss that can be suffered by the plaintiff. The plaintiff had led evidence that the structures that he had put up on the suit property had been demolished. There was however no evidence connecting the said demolition to the 1<sup>st</sup> defendant. The plaintiff appears not to have had approved plans when he commenced construction. None was produced in evidence. I am therefore not satisfied that the plaintiff has suffered any loss or damage arising from the agreement for sale dated 2<sup>nd</sup> February, 2007.

Whether the plaintiff is entitled to the reliefs sought.

Having come to the conclusion that the 1<sup>st</sup> defendant has not breached the agreement for sale dated 2<sup>nd</sup> February, 2007, the reliefs sought against it in the plaint are not available to the plaintiff. There is also no basis upon which the 2<sup>nd</sup> defendant can be held liable to the plaintiff. That said, I am of the view that due to the time it has taken to complete the transaction between the plaintiff and the 1<sup>st</sup> defendant, the plaintiff is at risk of losing the suit property and requires protection of the court. I am inclined for that reason to grant the plaintiff an

injunction to preserve the suit property pending the transfer of the property to him.

Who should bear the costs of the suit?

Costs are at the discretion of the court. As a general rule, costs follow the event unless the court orders otherwise for good cause. In this case, no reason has been put forward to warrant a departure from the general rule on costs with regard to the plaintiff's claim against the 2<sup>nd</sup> defendant. The plaintiff's suit against the 2<sup>nd</sup> defendant having failed wholly, he shall bear the costs of the suit. With regard to the claim against the 1<sup>st</sup> defendant, I am of the view that it would only be fair and just in the circumstances if each party bears its own costs.

Conclusion:

In conclusion, I hereby make the following orders: -

1. The plaintiff's suit against the 2<sup>nd</sup> defendant is dismissed with costs to the 2<sup>nd</sup> defendant.
2. Pending the transfer and registration of all that parcel of land known as Plot Number 7 within L.R. No. 13041/1 in the name of the plaintiff, there shall be an injunction restraining the 1<sup>st</sup> defendant by itself, its agents, successors or assigns from selling, transferring, disposing of, or in any other way offering for sale the said parcel of land to any other person.
3. Each party shall bear its own costs of the suit as between the plaintiff and the 1<sup>st</sup> defendant.

**Delivered and Dated at Nairobi this 26<sup>th</sup> day of September, 2019**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Ms. Njoroge for the Plaintiff

Ms. Muyai h/b for Mr. Njoroge for the 1<sup>st</sup> Defendant

Ms. Mwangi h/b for Mr. Mogere for the 2<sup>nd</sup> Defendant

C. Nyokabi-Court Assistant