



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 365 OF 2010

HARISH RAMJI.....1ST PLAINTIFF

BHARAT RAMJI.....2ND PLAINTIFF

ASHVIN RAMJI.....3RD PLAINTIFF

VERSUS

MOMBASA CEMENT LIMITED.....1ST DEFENDANT

NATIONAL SOCIAL SECURITY FUND.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiffs filed suit on 29/7/2010 claiming that they are the registered owners of the parcel of land known as land reference number (L.R. No.) 11895/50 (original number 11895/24/12) as nominees and assignees of Golden Terrace Limited. The Plaintiffs claim that by a letter dated 20/12/2006, the 2nd Defendant allocated Golden Terrace Limited land measuring 120 acres which was to be excised from L.R. No. 11895/24 pursuant to which this company executed the sale agreement dated 22/12/2006 with the 2nd Defendant. The transfer of the land to Golden Terrace Limited was halted when Harp Investco Limited filed **HCCC No. 22 of 2007** against the 2nd Defendant and two other parties. The Plaintiff averred that a consent was recorded in that suit on 16/6/2010 vide which parties agreed to have L.R. No. 11895/24 shared proportionately between Harp Investco Limited and Golden Terrace Limited.

2. The Plaintiffs claim that vide a letter dated 6/1/2010, Golden Terrace Limited assigned its portion of the subdivision of L.R. No. 11895/24 and a transfer was executed in favor of the Plaintiffs. The Plaintiffs claim that the 1st Defendant unlawfully trespassed onto the Plaintiff's land known as L.R. No. 895/50, being a division of L.R. No. 11895/24 and started fencing the land. The Plaintiffs seek a permanent injunction to restrain the 1st Defendant from trespassing, parking its vehicles, erecting a fence or in any way interfering with the Plaintiffs' right as proprietors of L.R. No. 11895/50 together with the costs of the suit.

3. In its Further Amended Defence and Counterclaim filed in court on 5/4/2019, the 1st Defendant averred that L.R. No. 11895/50 (original number 11895/24/12) was wrongfully, fraudulently and illegally registered in the Plaintiffs' names as nominees of Golden Terrace Limited. The 1st Defendant stated that L.R. No. 11895/50 arose out of two (2) parcels of land known as L.R. Nos. 11895/24 and 11895/25 which lie adjacent to each other and are situated in Mavoko Municipality in Machakos District and which were owned by the 2nd Defendant.

4. The 1st Defendant averred that on 22/9/2004 it was registered as the proprietor of L.R. No. 11895/25 which was excised from L.R. No. 11895/24 which on subdivision was given L.R. No. 27159 registered at the Lands Titles Registry Nairobi as I.R. No. 95709. Further, that on 26/11/2006 the 2nd Defendant offered to sell to the 1st Defendant a portion of the remaining land measuring 7.47 acres which is adjoining the 1st Defendant's property. The 1st Defendant averred that it paid Kshs. 672,300/= to the 2nd Defendant upon which possession of the land was given to it. Wetangula Adan Makokha and Company Advocates, acting on behalf of the 2nd Defendant, wrote to the 1st Defendant on 11/12/2008 claiming that it had encroached on the suit land in disregard of the orders issued by the high court despite the fact that this firm which was acting on behalf of the 2nd Defendant had received a deposit towards the purchase of the same property a month earlier. These advocates wrote to the 1st Defendant on 1/9/2009 requiring it to pay the balance of the purchase price in the sum of Kshs. 6,050,700/= which the 1st Defendant paid through its lawyers. The same firm of advocates wrote to the 1st Defendant on 8/1/2010 seeking to vary the terms of the agreement and requested a further payment of Kshs. 8,730,787/= which the 1st Defendant claimed it paid to the 2nd Defendant.

5. The 1st Defendant claimed that it had possession and use of the suit land before title was issued to Plaintiffs on 16/6/2010. Further, that the consent entered into on 16/6/2010 in **HCCC No. 22 of 2007 – Harp Investco Limited v National Social Security Funds Board of Trustees and 3 others** when read with the correspondence recognised the 1st Defendant's interest in the suit land and its entitlement to be issued a title over the land in dispute.

6. The 1st Defendant claimed that the transfer of the land comprised in the certificate of title number I.R. 122714 from the 2nd Defendant to the Plaintiffs was wrongful, deceitful and fraudulent for having been made in breach of both the agreement between the 1st and 2nd Defendants, and the court order of 16/6/2010. The 1st Defendant contended that the Plaintiffs' conduct in accepting the transfer of the suit land was fraudulent because the Plaintiffs knew or should have been aware that the 2nd Defendant had already agreed to transfer the suit land to the 1st Defendant and further, that the transfer was contrary to the decree issued on 1/7/2010. The 1st Defendant further claimed that the 2nd Defendant's conduct in purporting to transfer the suit land to the Plaintiffs was fraudulent in that it contravened the agreement between the 1st and 2nd Defendants as well as the decree in HCCC No. 22 of 2007. Further, that having received consideration from the 1st Defendant, the 2nd Defendant fraudulently transferred the suit land to the Plaintiffs instead of the 1st Defendant which the 1st Defendant maintained was illegal and a nullity.

7. The Defendant averred that it relied on the assurances given to it by the 2nd Defendant and paid the purchase price to the 2nd Defendant and therefore legitimately expected to have the suit land transferred to it. The 1st Defendant contended that the transfer of the suit land to the Plaintiffs should be set aside. It urged the court to dismiss the Plaintiff's claim and declare that the registration of the Plaintiffs as the proprietors of the suit land was done deceitfully, fraudulently and in contravention of the decree issued in HCCC No. 22 of 2007. The 1st Defendant seeks a declaration that it is entitled to a transfer of the suit land and that the register in respect of this land should be rectified by cancelling the registration of the Plaintiffs as proprietors of the suit land. The 1st Defendant seeks a full indemnity against the National Social Security Fund, the 2nd Defendant, in the event of any judgement being obtained by the Plaintiffs against it. It further seeks the sum of Kshs. 300,800,000/= being the current market value of the suit land which it has been deprived of, and in the alternative, a refund of the purchase price paid by the 2nd Defendant in the sum of Kshs. 14,811,287/= together with interest at court rates from 26/9/2006 until the date of payment.

8. The Plaintiffs called two witnesses to testify on their behalf. The 1st Plaintiff gave evidence and stated that he had the authority of the other Plaintiffs to testify in this case. He stated that the 2nd Defendant allocated Golden Terrace Limited 120 acres which was to be excised out of its land known as L.R. No. 11895/24 on 20/12/2006. Golden Terrace Limited executed the agreement for sale dated 22/12/2006 to purchase the land from the 2nd Defendant. The sale and transfer of the land to Golden Terrace Limited was stopped by HCCC No. 22 of 2007 filed by Harp Investco Limited. He stated that a consent judgement was recorded in the suit on 16/6/2010 vide which the parties agreed to have L.R. No. 11895/24 shared proportionately between Harp Investco Limited and Golden Terrace Limited as purchasers.

9. He averred that Golden Terrace Limited nominated the Plaintiffs to be assigned its portion of the subdivision of L.R. No. 11895/24 vide the letter 6/1/2010 and the land was transferred to the Plaintiffs. He stated that the 1st Defendant had unlawfully trespassed onto the Plaintiffs' land known as L.R. No. 11895/50 and started fencing it off. He further stated that the advocates who acted for Harp Investco Limited in the transaction had denied that the 1st Defendant had any interest in the suit land. He produced a copy of the letter from the 2nd Defendant to Golden Terraces Limited dated 20/12/2006 which made reference to the sale of part of L.R. No. 11895/24 measuring 120 acres to the company at the cost of Kshs. 102,000,000/= of which Golden Terrace Limited was required to pay a deposit of 10%. Completion of the sale was to be done within 30 days from the date of execution of the sale agreement. In the letter, the 2nd Defendant indicated that Wetangula, Adan, Makokha and Company Advocates would be its advocates in the transaction. He also produced a copy of the sale agreement drawn by Wetangula, Adan, Makokha and company Advocates dated 22/12/2006.

10. He also produced a copy of the title over L.R. No. 11895/24 registered in the 2nd Defendant's name showing the land measured approximately 114.8 hectares together with a copy of the decree extracted following the consent that was reached in HCCC No. 22 of 2007. The consent stated that the property known as L.R. No. 11895/19 would be shared proportionately by all the purchasers. Secondly, that the purchasers would be liable to pay in full for entire acreage of the land as captioned in title over L.R. No. 11895/24. Each purchaser was to pay for his or her portion of the land at the agreed rate of the purchase price in the sale agreement. The purchasers were liable to pay proportionally the rates, rent, cost of land occupied by electricity supply power lines, land taken up by the Government to widen the roads, land to be surrendered for public utility, costs of subdivision and the vendor's legal costs for the conveyance.

11. He also produced a copy of the transfer drawn by Wetangula Adan and Makokha Advocates dated 27/5/2010 entered into by the 2nd Defendant and the Plaintiffs for the transfer of L.R. No. 11895/50 measuring 3.034 ha. The purchase price is indicated as Kshs. 6,391,365/=. The last page which is the execution page of transfer gives the land reference as L.R. No. 11895/48.

12. The witness stated that the Plaintiffs became aware that the 1st Defendant was on the suit land in 2010. He stated that there was no development on the land but that vehicles used to be parked on the land. He confirmed that the 1st Defendant's land is adjacent to the suit land and that the 1st Defendant's land was fenced with a wall built around its factory.

13. On cross examination, Mr. Patel stated that Golden Terrace Limited was doing property business and that the Plaintiffs paid consideration for this company to assign its rights over the suit land to the Plaintiffs. The witness stated that he did not know how much was paid and also stated that he was not aware if any consideration was paid. He stated that Harp Investco Limited had originally paid a deposit to the 2nd Defendant for the same land. He averred that the Plaintiffs paid the deposit of Kshs. 10,200,000/= to the 2nd Defendant which constituted 10% of the purchase price. He did not have evidence to show the payment was made. He confirmed that he was not involved in the negotiations that resulted in the settlement of the civil suit. He eventually conceded that the consent record in court stipulated that L.R. No. 11895/24 would be shared by all purchasers and not only Harp Investco Limited and Golden Terraces Limited.

14. The witness stated that he dealt directly with the 2nd Defendant and that the money was transferred directly to the 2nd Defendant and not Golden Terrace Limited. He further stated that the Plaintiffs had an agreement with Golden Terrace Limited and that this company was their front. He stated that they paid the deposit on 22/12/2006. Further, that the Plaintiffs visited the suit land between 2006 and 2010 and confirmed that the 1st Defendant bought the adjoining 50 acres. He stated that in 2006 the bushes on the suit land had been cleared and the cement companies were parking their vehicles on the suit land. He conceded that the Kenya Power and Lighting Company transformer serving the 1st Defendant was on the suit land. He later changed his testimony and stated that the Plaintiffs made the payments for the suit

land and not Golden Terrace Limited. He also stated that he paid on behalf of Golden Terraces.

15. When the witness was asked why the transfer was dated 27/5/2010 which was before the consent was recorded in court in June 2010, he responded that they had verbally agreed with the other parties that the transfer would be registered before the case was concluded. He stated that they agreed with Harp Investco Limited but that he did not know who the other purchasers were. He agreed that the transfer was presented for registration on 16/6/2010 at 16.08 hours yet the last page shows that it was registered at 11.50 hours. The witness clarified that L.R. No. 11895/50 was excised from L.R. No. 11895/24/12.

16. Kennedy Muchere Kaburi also gave evidence for the Plaintiffs. He stated that he was a director of Golden Terrace Limited and that the 2nd Defendant allocated Terrace Golden Limited 120 acres which was to be excised from its land known number 11895/24, vide the letter dated 20/12/2006. An agreement for sale was executed on 22/12/2006. The sale could not be concluded owing to the suit filed by Harp Investco Limited in HCCC No. 22 of 2007. A consent was reached between Harp Investco Limited and the 2nd Defendant following which the land was to be shared proportionally between Harp Investco Limited and Golden Terrace Limited. He stated that Golden Terrace Limited verbally assigned its interest in the land to the Plaintiffs under a gentleman's agreement that was not written. He stated that there was no correspondence on the assignment and that the consideration was Kshs. 11,000,000/= paid as a lump sum after the consent was recorded between Golden Terrace Limited and the Harp Investco Limited. He confirmed that the 1st Defendant was not a party to that suit. He produced a copy of the letter dated 6/1/2010 which he wrote on behalf of Golden Terrace Limited to Wetangula Adan Makokha Advocates and Company Limited requesting the advocates to transfer this company's portion to the nominees who are the Plaintiffs in this case. The last paragraph of the letter stated that the company was processing the payment for the balance of its portion.

17. Rushen Delwash gave evidence for the 1st Defendant. He stated that L.R. No. 11895/50 which was originally L.R. No. 11895/24/12 arose out of L.R. No. 11895/24 which was previously owned by the 2nd Defendant. The 1st Defendant acquired the portion known as L.R. N. 11895/25 which was subdivided from L.R. No. 11895/24 on 22/9/2004. This land was given L.R. No. 27159, grant number I.R. No. 95709. The 2nd Defendant offered to sell to the 1st Defendant a portion of the land measuring 7.47 acres which was directly adjoining the 1st Defendant's property on 26/9/2009. He stated that the 1st Defendant paid Kshs. 672,300/= on 28/9/2006 and the further sum of Kshs. 6,050,700/= which could not be banked due to an outstanding court case. The witness stated that the 1st Defendant had been in occupation of the land since September 2009 without any objection from the 2nd Defendant or its advocates. The witness stated that the consent recorded in court in HCCC No. 22 of 2007 recognised that there were other purchasers. The witness relied on the letter it received from Wetangula Adan Makokha and Company Advocates dated 1/9/2009 requesting payment of the sum of Kshs. 6,050,700/= being the balance of the purchase price of the basis that all the interested parties had reached an agreement and the matter had been settled out of court. The witness stated that the 2nd Defendant unlawfully and fraudulently transferred its portion to the Plaintiffs in breach of the court order yet it had no right to assign the 1st Defendant parcel of land.

18. The witness produced photographs showing the land, a copy of the deed plans in respect of L.R. No. 11895/50 and L.R. No. 11895/25. He produced a copy of the letter dated 26/9/2006 from the 2nd Defendant stating that the 2nd Defendant had allocated it part of L.R. No. 11895/11 measuring 7.47 acres. The letter sought a deposit of Kshs. 672,300/= which was forwarded by the 1st Defendant's advocate on 28/9/2006. He also produced a copy of the letter dated 29/1/2007 addressed to the 2nd Defendant forwarding a cheque for Kshs. 6,050,700/= being the balance for the purchase of L.R. No. 11895/11. The letter from Wetangula Adan Makokha and Company Advocates dated 11/12/2008 informed the 1st Defendant that it had encroached on L.R. No. 11895/24 in disregard of an injunction issued in HCCC No. 22 of 2007. The letter stated that L.R. No. 11895/24 had been sold to various purchasers who were in court claiming that the land they bought was smaller than they had contemplated. The letter stated that a surveyor had been appointed to inspect the property and report back to court.

19. Wetangula Adan Makokha and Company Advocates wrote to the 1st Defendants on 1/9/2009 stating that it was acting for the 2nd Defendant and notifying the 1st Defendant that all interested parties in HCCC No. 22 of 2007 had reached an agreement and the matter had been settled out of court. The letter asked the 1st Defendant to pay the balance of the purchase price of Kshs. 6,050,700/= to the 2nd Defendant. Further, the letter stated that the surveyors were in the process of subdividing the land and the 1st Defendant's title deed would be transferred to it upon completion. The 1st Defendant's advocate forwarded the cheque for this sum on 2/9/2009. The letter stated that the 1st Defendant was taking possession of the land being part of L.R. No. 11895/11 and sought the title as a matter of urgency. Wetangula, Adan, Makokha and Company Advocates acting on behalf of the 2nd Defendant wrote another letter to the 1st Defendant on 1/9/2009 asking it to confirm in writing that the terms of the settlement reached in HCCC No 22 of 2007 were acceptable to it and that it was ready to participate in the sale process if it was still interested in the purchase of the land already offered to it. The 1st Defendant responded to the letter on 1/10/2009 intimating that it was not a party to HCCC No 22 of 2007 and that its sole interest was to purchase 7.5 acres that had been offered to it by the 2nd Defendant. The letter sought clarification on some of the terms of the consent judgement while pointing out that the 1st Defendant was not agreeable to paying for the cost of subdivision and the vendor's legal costs.

20. The 1st Defendant's witness produced a copy of the letter dated 8/1/2010 written by Wetangula, Adan, Makokha and Company Advocates to Honourable Ramadhan Kajembe in respect of the sale of L.R. No. 11895/24 (part). The letter asked Mr. Kajembe to reimburse Harp Investco Limited Kshs. 2,000,000 being his portion of the rates, rents, subdivision and survey costs. The letter stated that parties and the 2nd Defendant had agreed to settle the matter out of court and divide the land among all the purchasers. The letter mentioned that his company was not party to the suit but that the 2nd Defendant had insisted that it should be given its portion on the clear understanding that it will comply with the settlement conditions. The 1st Defendant's advocate wrote to Wetangula Adan Makokha and Company Advocates on 22/2/2010 pointing out that the 1st Defendant had paid Kshs. 8,760,587/= for 9.7 acres and sought a receipt for the payments made by the 1st Defendant. In addition, the letter sought a meeting to negotiate and complete the purchase of L.R. No. 11895/24.

21. Parties filed submissions which the court has considered. The Plaintiffs submitted that the suit land was transferred to it by the 2nd Defendant and that the transfer was registered on 16/6/2010. They submitted that the suit land was a subdivision of L.R. No. 11895/24 which was the subject of the consent recorded in HCCC No. 22 of 2007. They maintained that Golden Terrace Limited assigned its rights over the suit land to them. The Plaintiffs relied on the case of **Arthi Highway Developers Limited v West End Butchery Limited and 6 others**

[2015] eKLR in which the court stated that Section 23 of the then Registration of Titles Act gave an absolute and indefeasible title to the owner of the property subject to challenge on grounds of fraud or misrepresentation to which the owner was proved to be a party. The Plaintiffs submitted that the 1st Defendant did not tender any evidence of fraud against them. The Plaintiffs submitted that the error in the description of the suit land in the transfer instrument did not negate the sanctity of their title. The Plaintiffs submitted that no rights were assigned to the 1st Defendant which was not a party to HCCC No 22 of 2007.

22. The Plaintiffs maintained that the 1st Defendant had not produced an agreement for sale signed between it and the board of the 2nd Defendant and therefore its claim was untenable in law. They urged that in the absence of a contract in writing signed by both parties, there can be no valid disposition of an interest in land. The Plaintiffs urged the court to find that they are the registered proprietors of the suit land and that they have been denied the use and quiet possession of their land by the 1st Defendant.

23. The 1st Defendant submitted that the decree in HCCC No. 22 of 2007 related to L.R. No. 11895/24 yet the initial dispute in the claim related to L.R. No 11895/19. It further submitted that all purchasers and not only the Plaintiff and 4th Defendant in that suit would share the land proportionately. The 1st Defendant submitted that it was evident from the subdivisions of land available that the subdivision morphed out of various numbers that is, 11895/19, 11895/11 and 11895/24. It submitted that it was buying 7.47 acres from the 2nd Defendant being part of L.R. No. 11895/11 which later became L.R. No. 11895/50 measuring 3.043 ha and that this translates to approximately 7.47 acres.

24. The 1st Defendant submitted that the transfer of the suit land to the Plaintiff was not pursuant to any agreement but was following the decree in HCCC No. 22 of 2007 which should have encompassed all the purchasers and not just Harp Investco Limited and Golden Terrace Limited. It submitted that it made all the payments for the purchase of the suit land to the 2nd Defendant. The 1st Defendant submitted that Section 3 (3) of the Law of Contracts Act was inapplicable to the Plaintiff's transaction since the Plaintiffs were not parties to that suit. It relied on the correspondence exchanged with the 2nd Defendant's advocates on the sale transaction. It emphasised the fact that Golden Terrace Limited did not make any payment to the 2nd Defendant for the land it was purchasing from the 2nd Defendant.

25. The 1st Defendant took issue with the discrepancy of the land reference numbers appearing in the Plaintiffs' transfer. The transfer mentions L.R. No. 11895/50 while the operational transfer clause refers to L.R. No. 11895/48. The 1st Defendant submitted that the stamp on the transfer shows that it was presented at the Lands Registry on 16/6/2010 at 16.08 hours yet the entry on the registration shows that registration was effected on 16/6/2010 at 11.50 hours which is not possible. The 1st Defendant submitted that this points to the fraud on the part of the Plaintiffs and the 2nd Defendant in the transaction. The 1st Defendant maintained that it had been in possession of the suit land and that the Plaintiffs' second witness confirmed in his testimony that there was no formal agreement nor was there any consideration paid for the assignment of the suit land by Golden Terrace Limited to the Plaintiffs.

26. The 1st Defendant relied on the case of **Sammy Mwangangi and 10 others v Commissioner of Lands and 3 others [2018] eKLR** which quoted the decision in **Civil Appeal number 239 of 2009** in which the court held that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the title as proof of ownership. The court stated that the proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances. The 1st Defendant submitted that the Plaintiffs had failed to provide any evidence of the process leading to their being registered as proprietors of the suit land hence they did not acquire any legal interest in the suit land.

27. In addition, the 1st Defendant drew the court's attention to the ruling delivered in this case by Mr. Justice Mutungi where he stated that the consent judgement in the other suit talked about purchasers without naming them which showed that there were several purchasers. The 1st Defendant pointed out that the Plaintiffs did not appeal against that decision.

28. On its counterclaim, the 1st Defendant submitted that the 2nd Defendant failed to defend its claim and its evidence remained uncontroverted. Further, that the attempt by the 2nd Defendant's advocates to disown their correspondence should be viewed as an attempt to cover up on their role in the fraud perpetuated against the 1st Defendant noting that the funds paid by 1st Defendant to the 2nd Defendant had not been returned.

29. The court directed the parties to present survey plans showing the subdivision of the land to assist the court arrive at a fair determination of the dispute. These were provided to the court by the parties together with copies of titles over L.R. No.11985/48, L.R. No.11985/50, L.R. No. 27159 and L.R. No.11985/24. Parties did not furnish the court with the survey plans in respect of L.R. No.11985/11. The copy of title in respect of L.R. No.11985/50 shows that the 2nd Defendant transferred this suit land to the Plaintiffs on 16/6/2010, and that it measures 3.043 ha. The 2nd Defendant transferred L.R. No. 27159 to the 1st Defendant on 22/9/04. L.R. No.11985/48 measuring 2.02 ha was transferred to Harp Investco Limited on 17/9/2010.

30. L.R. No. 11895/19 which measured 136.07 ha was subdivided to create L.R. No.11895/24. This land and was surrendered by the 2nd Defendant to the Government for subdivision on 22/9/2004. Survey plan F/R number 359/13 shows that L.R. No.11985/24 was first subdivided into twelve portions numbered L.R. No.11985/24/1 to L.R. No.11985/24/12. These subdivisions later became L.R. Numbers 11895/41 to 11895/50 respectively. The suit land, L.R. No.11985/50 was previously L.R. No. 11895/24/12. According to F/R no. 359/13, the 1st Defendant's land lies between L.R. No.11895/49 and L.R. No.11895/50. This means that L.R. No.11895/24 was subdivided into 12 portions out of which only two parcels were transferred to the Plaintiffs and Harp Investco Limited, which confirms that under the consent recorded in HCCC No. 22 of 2007, all purchasers were to share out the portions they had purchased proportionately and not just Golden Terrace Limited and Harp Investco Limited as the Plaintiffs argued.

31. The Plaintiffs' claim is that Golden Terrace Limited assigned its portion of the subdivision of L.R. No. 11895/24 which it was purchasing from the 2nd Defendant. The agreement dated 22/12/2006 between Golden Terrace Limited and the 2nd Defendant was for the sale of 120 acres and indicated the purchase price as Kshs. 102,000,000/= out of which Kshs. 10,200,000/= was to be paid on execution of

the agreement. The balance of Kshs. 91,800,000/= was to be paid in exchange for the completion documents. There was no evidence tendered by the Plaintiffs of payment of the deposit or purchase price made by Golden Terrace Limited to the 2nd Defendant. The letter dated 6/1/2010 from Golden Terrace Limited to Wetangula, Adan, Makokha & company Advocates requesting the firm to transfer Golden Terrace Limited's portion to the Plaintiffs stated that the company was processing payment of the balance of its portion. There is no evidence that payment was subsequently made.

32. No evidence was tendered by the Plaintiff to show how come land measuring only 3.043 ha was transferred to the Plaintiffs yet under the agreement entered into between Golden Terrace Limited and the 2nd Defendant, this company was buying 120 acres which is approximately 48.562 ha. One would have expected the assignment to cover the entire 120 acres stated in the sale agreement, or evidence of how the decision to transfer only 3.043 ha to the Plaintiffs was arrived at. Further, the Plaintiffs did not adduce evidence of payment of the consideration indicated in the transfer of the suit land to their names.

33. The transfer of the suit land was executed by the 2nd Defendant. The 2nd Defendant was not entirely honest in these transactions. It is not clear why it sought and accepted payment from the 1st Defendant on the understanding that it would sell it a portion of its land measuring 7.47 acres then reneged on the transaction. All the while it was represented by the firm of Wetangula Adan Makokha and Company Advocates, which exchanged numerous correspondence with the 1st Defendant and its advocates confirming to the 1st Defendant that the transaction was on course.

34. The decree issued on 1/7/2009 in HCCC No. 22 of 2007 indicates that the claim was in respect of L.R. No. 11895/19 yet the consent recorded related to L.R. No. 11895/24. The correspondence exchanged between the 1st and 2nd Defendants over the sale of 7.47 acres referred to part of L.R. No. 11895/11. The 2nd Defendant's advocates, Wetangula, Adan, Makokha and Company Advocates, informed the 1st Defendant through the letter dated 1/9/2009 that the dispute over the suit land had been resolved by a consent and required the 1st Defendant to pay the balance of the purchase price. They stated that the survey was being undertaken and the 1st Defendant would get its title deed transferred to it on completion of the survey. The court is of the view that the 2nd Defendant and its advocates used the different land references interchangeably to refer to the 2nd Defendant's land which it was selling to various persons.

35. The 1st Defendant led evidence through the correspondence exchanged with Wetangula, Adan, Makokha and Company Advocates to show the negotiations between it and the 2nd Defendant over the sale of 7.47 acres adjoining its land. The 2nd Defendant made the offer to the 1st Defendant on 26/9/2006. The 1st Defendant also tendered evidence of the payments it made to the 2nd Defendant in 2006. Wetangula, Adan, Makokha and Company Advocates wrote to the 1st Defendant on 1/9/2009 informing it that an agreement had been reached in HCCC No. 22 of 2007 while requiring the 1st Defendant to indicate its readiness to continue with the purchase of the land measuring 9.5 acres from the 2nd Defendant. The letter set out additional costs to be met by the purchasers some of which were not agreeable to the 1st Defendant as it stated in its response of 1/10/2009. There was also a second letter from Wetangula, Adan, Makokha and Company Advocates to the 1st Defendant on 1/9/2009 requesting the 1st Defendant to pay the balance of the purchase price of Kshs. 6,050,700/= to the 2nd Defendant. The payment was forwarded on 2/9/2009 and the 1st Defendant's advocates indicated that the 1st Defendant was taking possession of the land as it sought to be given the title as a matter of urgency.

36. Weighing the evidence adduced by the Plaintiffs against that given by the 1st Defendant, the court finds that the Plaintiffs have failed to prove their claim on a balance of probabilities. The court dismisses the Plaintiffs' suit with costs to the 1st Defendant, which will be borne by the 2nd Defendant.

37. The court grants prayers (a), (b), and (c) of the 1st Defendant's counterclaim dated 3/4/2019. The 1st Defendant is awarded the costs of the counterclaim to be borne by the 2nd Defendant.

Dated and delivered at Nairobi this 11th day of October 2019

K.BOR

JUDGE

In the presence of: -

Ms. Sharon Lipwop holding brief for Mr. Issa for the Plaintiffs

Ms. Esther Muigai holding brief for Mr. Ondego for the 1st Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2nd Defendant