



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 741 OF 2011

KENNETH KIRIKA WATENE.....PLAINTIFF

VERSUS

PETER KIMANI KAIRU T/A

KN ASSOCIATES.....1ST DEFENDANT

THE REGISTERED TRUSTEES OF SOCIAL MINISTRY

OF RESEARCH NETWORK CENTRE.....2ND DEFENDANT

MBAGE NJUGUNA NG'ANG'A T/A WARUHIU

K'OWADE & NG'ANG'A ADVOCATES.....3RD DEFENDANT

PRINCIPAL REGISTRAR OF

GOVERNMENT LANDS.....4TH DEFENDANT

COMMISSIONER OF LANDS.....5TH DEFENDANT

JUDGEMENT

1. The Plaintiff entered into an agreement with the 2nd Defendant on 8/2/2006 for the sale of land reference numbers (L.R. No). 5955/21 and 5955/22, Karen, Nairobi (“the Suit Properties”), being residential plots measuring approximately an acre each. The Plaintiff was to undertake the subdivision of L.R. No. 5955/8 to create the Suit Properties. The agreed purchase price was Kshs. 11,000,000/= and the Plaintiff was allowed to access part of these funds before the completion of the sale transaction. The 1st Defendant was the Plaintiff’s advocate in the sale of the Suit Properties.

2. Pursuant to the sale agreement the 2nd Defendant paid the purchase price to the 1st Defendant. The Plaintiff claimed that the 2nd Defendant authorised the 1st Defendant to release the sum of Kshs. 4,600,000/= to the 3rd Defendant against his express instructions not to release the funds. The Plaintiff claimed that the Defendants acted wrongfully and that they maliciously conspired to defraud him of the balance of the purchase price and ownership of the Suit Properties. Further, the Plaintiff claimed that the 3rd Defendant breached the professional undertaking under which he had received the sum of Kshs. 4,600,000/= from the 1st Defendant and that the breach resulted in the Plaintiff’s loss of the balance of the purchase price.

3. The Plaintiff claimed that being his advocate, the 1st Defendant had a fiduciary duty to carry out his instructions and to act in his best interests. The Plaintiff claimed that the 1st Defendant breached the trust as his advocate by continuing to act where there was conflict of interest and while he did not have instructions and that he acted contrary to the Plaintiff’s instructions.

4. The Plaintiff claimed that he suffered loss and damage as a result of the Defendants’ actions and that he lost ownership of the Suit Properties or alternatively, he lost the balance of the purchase price. In the Amended Plaint dated 7/2/2012, the Plaintiff seeks a declaration that the Suit Properties were fraudulently transferred to the 2nd Defendant and that they conferred no titles on it. He sought an order to quash the registration of the 2nd Defendant as the owner of the Suit Properties and also sought a declaration that he is the legal owner of the Suit Properties and that the 4th and 5th Defendants should be directed to cancel the registration of the 2nd Defendant as the owner of the Suit Properties.

5. In addition, he sought a declaration that the 2nd Defendant had not paid the balance of the purchase price of Kshs. 4,600,000/= to him and it was not therefore entitled to possession of the Suit Properties. He also sought vacant possession, damages for trespass and general damages for conspiracy, loss of ownership and possession of the Suit Properties. The Plaintiff sought the alternative prayer that the 1st, 2nd and 3rd Defendants do pay him the balance of the purchase price of Kshs. 4,600,000/= together with interest.

6. The 1st Defendant denied the Plaintiff's claim in his Defence filed in court on 30/5/2012 and averred that he carried out the Plaintiff's instructions until 16/2/2007 when the Plaintiff informed him that during the reconstruction of the lands file for L.R. No. 5955/4 it came to light that a charge registered in 1988 against this parcel of land had been partially discharged. The land was charged to Intra Africa Assurance Company Limited ("Intra Africa") through a transfer of a legal charge from Middle Africa Finance Company Limited dated 11/7/1991. The 1st Defendant averred that a dispute arose between the Plaintiff and Intra Africa as to the level of the Plaintiff's indebtedness to this company. He stated that the Plaintiff negotiated with Intra Africa and the negotiations culminated in the Plaintiff's proposal to pay Kshs. 4,600,000/= to the 3rd Defendant in order to secure the partial discharge of the Suit Properties. He claimed that the Plaintiff had in the past given him instructions to make payments from the sale proceeds he was holding. The 1st Defendant confirmed that he issued the cheque for Kshs. 4,600,000/= to the 3rd Defendant, and that he made known this fact to the Plaintiff. The advocate maintained that he conducted himself with professionalism and due care while representing the Plaintiff in the sale transaction. He added that he took no further steps in the transaction when the Plaintiff withdrew instructions from him.

7. In the Defence filed on 24/2/2012, the 2nd Defendant averred that it paid the full purchase price for the Suit Properties and that it received the completion documents from the Plaintiff's advocate in line with the terms of the agreement of sale. The 2nd Defendant maintained that the release of the sum of Kshs. 4,600,000/= to the 3rd Defendant was done with the full knowledge and concurrence of the Plaintiff following a meeting held on 6/8/2007. The 2nd Defendant added that the Plaintiff was fully aware that part of the sale proceeds deposited with his advocate were to be released to the 3rd Defendant to facilitate the discharge of the encumbrance over the Suit Properties. The 2nd Plaintiff averred that it had presented the conveyance documents for registration at the lands office in 2006 with no knowledge of encumbrance and that this was done prior to obtaining the partial conveyances.

8. The 3rd Defendant pleaded that at the time the Plaintiff purported to sell the Suit Properties to the 2nd Defendant, he was in arrears of Kshs. 7,109,931/= as at 26/3/2007 under the mortgage facility which his client, Intra Africa took over from Middle Africa Finance Company Limited. The Suit Properties were created from the subdivision of L.R. No. 5955/8, which also resulted in the creation of L.R. Numbers 5955/19 and 5955/20. L.R. No. 5955/8 was created from L.R. No. 5955/4. The Plaintiff requested the 3rd Defendant's client to partially discharge the Suit Properties to enable the Plaintiff sell them.

9. The 3rd Defendant averred that the Plaintiff and the 3rd Defendant's client, Intra Africa agreed that Kshs. 4,600,000/= out of the sale proceeds of the Suit Properties would be applied to offset part of the balance owing under the mortgage facility leaving a balance of Kshs. 2,509,931 which was to be secured by L.R. No. 5955/19. The sum of Kshs. 4,600,000/= was to be held by the 3rd Defendant pending the registration of the transfer of the Suit Properties to the 2nd Defendant's name. Intra Africa executed a reconveyance of the Suit Properties which was registered alongside the transfer in favour of the 2nd Defendant. Upon registration of the reconveyance and the transfer, the 3rd Defendant released the sum of Kshs. 4,600,000 to his client, Intra Africa.

10. The 3rd Defendant averred that the Plaintiff's signature was not required for the registration of the reconveyance and that the Plaintiff had not informed Intra Africa of his intention to terminate the sale. The 3rd Defendant denied that it had colluded or conspired against the Plaintiff. Further, the 3rd Defendant contended that the release of the purchase price of Kshs. 4,600,000 was duly sanctioned by the Plaintiff. The 3rd Defendant averred that no cause of action was disclosed against him.

11. The 4th and 5th Defendants filed a Defence on 29/2/2012 denying the Plaintiff's claim. They averred that if at all the Suit Properties were transferred to the 2nd Defendant, then the transfer was legal and regular having complied with the requirements and upon presentation of the requisite documents from the Plaintiff and the 2nd Defendant. Further, that any element of fraud cannot be attributed to the 4th and 5th Defendants.

12. The Plaintiff gave evidence. He testified that the Suit Properties were hived out of L.R. No. 5955/8 which was mortgaged to Intra Africa following a transfer of mortgage from Middle Africa Finance Company Limited to secure payment of Kshs. 1,000,000/= plus interest. He produced a copy of the transfer of mortgage dated 11/7/1991 together and the mortgage dated 2/12/1988 between him and Middle Africa Finance Company Limited.

13. The Plaintiff executed an agreement for sale on 8/2/2006 of the Suit Properties to the 2nd Defendant for Kshs. 11,000,000/=. He was represented by the 1st Defendant in the sale transaction. He stated that through verbal discussions, the 1st Defendant assured him that the mortgage on L.R. No. 5955/8 would not hinder the sale of the Suit Properties because the remainder of L.R. No. 5955/8 would be more than sufficient to secure the balance of the mortgage debt. He stated that Intra Africa indicated that the outstanding loan was Kshs. 7,900,000/= once it knew that he had found a buyer for the Suit Properties. The Plaintiff stated that he knew that that amount was not owed and shared this information with the 1st Defendant and Peter Mbuchi Methu who was the 2nd Defendant's representative in the sale transaction.

14. Under the agreement, a copy of which the Plaintiff produced in evidence, Kshs. 1,500,000 was to be paid as a deposit on execution of the agreement and Kshs. 4,000,000/= would be paid on or before 30/6/2006 following which the 1st Defendant was to hand over to the 2nd Defendant's advocate a signed conveyance together with the deed plan for L.R. No. 5955/21. The 2nd Defendant paid Kshs. 5,500,000/= to the 1st Defendant, which the Plaintiff had unhindered access to. The Plaintiff executed the conveyance over L.R. No. 5955/21 in favour of the 2nd Defendant and deposited it with the 1st Defendant. The 2nd Defendant deposited a further sum of Kshs. 5,500,000 with the 1st Defendant which the Plaintiff was not to access until the conveyances were registered in favour of the 2nd Defendant. The Plaintiff signed the

second conveyance over L.R. No. 5955/22 in favour of the 2nd Defendant on or about 14/12/2006 after the last part of the purchase price was paid.

15. In order to complete this transaction, Intra Africa and the Plaintiff were to execute indentures of partial reconveyances for the Suit Properties. The Plaintiff averred that Intra Africa had no reason to decline to execute the indentures of partial reconveyance over the Suit Properties since to the best of his knowledge he had repaid the mortgage debt in full and the residual subdivisions of L.R. No. 5955/8, that is L.R. Numbers 5955/19 and 5955/20 were sufficient to secure whatever balance there may have been.

16. The Plaintiff stated that he attended a meeting on 6/8/2007 in which he claimed that the 1st and 2nd Defendant's advocates proposed that the balance of the purchase price which the 1st Defendant was holding was to be paid to the 3rd Defendant in exchange for the partial reconveyances. Mr. Peter Mbuchi Methu who at the time was the project director of the 2nd Defendant attended the meeting as well as Mr. Singh Gitau Advocate, who was to take over conduct of the transaction from the 1st Defendant. The Plaintiff claimed that he rejected the proposal to pay out the balance of the purchase to the 3rd Defendant in exchange for the partial reconveyances because in his view he did not owe Intra Africa any money and in any event it was already over secured by L.R. Nos. 5955/19 and 5955/20 hence there was no need to deposit any money with the 3rd Defendant as a precondition for the release of the partial reconveyances.

17. The Plaintiff contended that the 1st Defendant's loyalty in the transaction was split and that there was conflict of interest because the 1st Defendant was the one who made the proposal without the Plaintiff giving him instructions for his intervention in the stalemate between the Plaintiff and Intra Africa whose chairman the Plaintiff claimed was related to the 1st Defendant by marriage. The Plaintiff claimed that the 1st Defendant refused to release the file to Mr. Singh Gitau Advocate who was to take over conduct of the matter. The Plaintiff claimed that he was unable to instruct the 1st Defendant to escalate the matter at the time due to his unfavorable financial position but maintained that his intention was that the 1st Defendant was to cease acting for him. Despite this, the Plaintiff averred that the 1st Defendant persisted on representing him and produced some of the correspondence exchanged including the email written by the 1st Defendant to the 2nd Defendant advocates on 7/8/2007 and the letters dated 8/8/2007 and 21/8/2007 from the 3rd Defendant to the 1st Defendant.

18. The 3rd Defendant sent draft indentures of partial reconveyance to the Plaintiff through the 1st Defendant which the Plaintiff claimed he questioned for it did not make sense to him that the Suit Properties were being partially reconveyed in consideration of payment of Kshs. 4,600,000/= yet the residual part of L.R. No. 5955/8 would still be mortgaged to Intra Africa to secure the outstanding balance of the mortgage debt. The Plaintiff claimed that he declined to execute the partial reconveyances. He produced copies of the emails challenging the loan sum. The Plaintiff claimed that he engaged an independent accountant to calculate his outstanding loan account with Intra Africa which concluded that he had overpaid the loan amount by Kshs. 18,000,000/=.

19. As soon as it was practically possible, the Plaintiff visited Mr. Gichuhi, Intra Africa's chairman on 16/6/2008 to discuss the report of the independent accountant report on the mortgage sum. He claimed Mr. Gichuhi refused to appreciate the report and instead persisted that the Plaintiff still owed Intra Africa Kshs. 7,000,000/ or thereabouts. Intra Africa refused to partially reconvey the Suit Properties to the Plaintiffs and demanded full payment of Kshs. 7,000,000/= before it could reconvey the Suit Properties.

20. The Plaintiff wrote to Intra Africa on 6/5/2008 and proposed to have the mortgage remain on L.R. Nos. 5955/19 and 5955/20 to secure the loan balance of Kshs. 7,109,931/= pending reconciliation of accounts and in return Intra Africa was to partially reconvey the Suit Properties to the Plaintiff and the 3rd Defendant was to hold the purchase price of Kshs. 4,600,000/= pending the registration of the conveyances in favour of the 2nd Defendant. This proposal did not elicit any response from Intra Africa.

21. The Plaintiff wrote to Intra Africa again on 23/6/2008 proposing to have the sum of Kshs. 4,600,000/= deposited with the 3rd Defendant, and the outstanding mortgage debt of Kshs. 2,500,000/= or thereabouts being secured by the remaining plot being L.R. No. 5955/19. Intra Africa did not respond to this proposal.

22. The Plaintiff faulted the 1st Defendant for writing to the 3rd Defendant requesting the 3rd Defendant to confirm that the sum of Kshs. 4,600,000/= would be exchanged with the partial reconveyances without specifying in that letter that the conveyances in question were in respect of L.R. No. 5955/20, 5955/21 and 5955/22. The Plaintiff wrote to the 1st Defendant on 7/7/2008 reiterating that the last proposal he gave to Intra Africa was the last position unless valid reasons were given as to why his offer was not acceptable. He maintained that the negotiations failed because Intra Africa refused to take accounts jointly in accordance with the last verbal proposal.

23. On 23/7/2008 the 1st Defendant informed the Plaintiff that he had decided to return the balance of the purchase price to the 2nd Defendant so that the 2nd Defendant could forward the funds to the 3rd Defendant in exchange for the indentures of partial reconveyances over the Suit Properties. The Plaintiff claimed that he verbally directed the 1st Defendant not to proceed with that line of action and asked him to stop representing him in the matter. He stated that he sent an email to the 1st Defendant on 24/7/2008 at 5.41 a.m. requesting the 1st Defendant to hand over the matter to Mirugi Kariuki and Company Advocates. The Plaintiff produced a copy of the bankers cheque for Kshs. 4,600,000/= dated 23/6/2008 drawn in favour of the 3rd Defendant.

24. On 28/7/2008 the 2nd Defendant's advocate Wambui Mwangiru released the banker's cheque to the 3rd Defendant on the 2nd Defendant's instructions. The cheque was forwarded to the 3rd Defendant in exchange for the indentures of partial reconveyance which the Plaintiff maintained that he had declined to execute. The Plaintiff claimed he had in his possession the original deed plan for L.R. No. 5955/8 which he refused to hand over to the Defendants.

25. On 14/8/2008 the 3rd Defendant sought the 1st Defendant's authority to release the money to his client, Intra Africa. The 1st Defendant informed the 3rd Defendant that he no longer had instructions to represent the Plaintiff in the transaction and advised the 1st Defendant to direct the query to the Plaintiff which the 3rd Defendant did not do. The Plaintiff believed that since he had not executed the indentures of the

partial reconveyances for the land was in possession of the original deed plan, the Defendant would not be able to transfer the Suit Properties to the 2nd Defendant. The Plaintiff was to learn that after he refused to execute the partial reconveyance drawn by the 3rd Defendant, the 1st Defendant in conjunction with Intra Africa prepared another partial reconveyance which excluded his signature. The Plaintiff maintained that the reconveyance was defective for excluding his signature. The Plaintiff later found out that the 3rd Defendant had released the monies to Intra Africa without the Plaintiff's authority. The payments were made as follows: the sum of Kshs. 2,000,000 was paid on 22/5/2009, Kshs. 1,000,000 on 14/10/2009 and Kshs. 600,000/= on 5/11/2009. The 3rd Defendant retained the sum of Kshs. 1,000,000/=.

26. On 3/3/2011 the Plaintiff noticed people clearing the Suit Properties and wrote to the 2nd Defendant reminding it that he had not been paid the full purchase price and that it was therefore not entitled to possession of the Suit Properties. The 2nd Defendant's advocate wrote to the Plaintiff on 5/5/2011 claiming the 2nd Defendant had fully paid the purchase price. The Plaintiff instructed Wairagu and Wairagu Advocates to take up the matter and learned from the correspondences exchanged that the conveyances over the Suit Properties were registered on 19/8/2009 in favour of the 2nd Defendant. The Plaintiff's current advocates Mr. Mugambi Mungania and Company Advocates issued a completion notice dated 7/11/2011 to the 2nd Defendant. The 1st Defendant responded on 8/11/2011 reiterating that the purchase price was paid in full through his firm and that the sum had been disbursed to the Plaintiff and other persons in line with the Plaintiff's instructions.

27. On cross examination, the Plaintiff conceded that the sale agreement did not mention the existence of the encumbrance over the Suit Properties. However, he maintained that he had informed the advocates for both parties of the existence of the encumbrance. He confirmed that the 3rd Defendant's role was to convey partial reconveyance documents from his client Intra Africa. He conceded that it was imperative to first discharge the land because the charge on the original title would automatically go to the subdivided portions. Mr. Kirika confirmed that he had asked the mortgagee to execute partial reconveyances for the two plots. He picked the deed plan from Intra Africa in 2004. He denied that he granted the purchaser possession of the Suit Properties and could not recall when he gave possession. He agreed that the 2nd Defendant paid the full purchase price to the 1st Defendant, the advocate who was representing him in the sale transaction. He also conceded that he had proposed that Kshs. 4,600,000 held by the 1st Defendant was to be released to discharge the encumbrance.

28. He maintained that there were other conditions in his proposal which were not complied with and that the 3rd Defendant released the cheque to Intra Africa against his instructions based on his belief that the money was to be released when the conditions he had proposed were met. For instance, L.R. No. 5955/20 was excluded from the plots to be discharged. The Plaintiff could not produce evidence to show that he had cleared the loan owed to Intra Africa. The Plaintiff conceded that he signed the conveyances but argued that he did not sign the partial conveyances. He retained and did not hand over the original deed plans and the partial conveyances and did not therefore expect the discharge of charge and the transfer of the Suit Properties to be registered at the lands office. He expected the 1st Defendant to retain the conveyance until he delivered the other documents. He maintained that the problem arose when the balance of the sale proceeds of Kshs. 4,600,000/= were released to the 3rd Defendant against his instructions.

29. The Plaintiff called Peter Mbuchi Methu to give evidence. Mr. Methu was an employee of the 2nd Defendant from March 2004 up to December 2007. He stated that he attended the meeting in the 1st Defendant's offices on 6/8/2007. The 2nd Defendant's advocates, the late Wambui Mwagiru also attended the meeting whose main agenda was to undo the deadlock between the Plaintiff and Intra Africa over the indentures of partial reconveyances for the Suit Properties which Intra Africa had declined to release until the Plaintiff paid the mortgage debt. He stated that he proposed during the meeting that the Plaintiff release the balance of the purchase price held by his lawyers to the 3rd Defendant which the 3rd Defendant would retain pending agreement on the disputed accounts. He stated that the 1st Defendant informed him that he was finding it difficult to handle the dispute between the Plaintiff and the chairman of Intra Africa. Further, that the Plaintiff pointed out a conflict of interest on the 1st Defendant's part who he claimed was related by marriage to the chairman of Intra Africa. He stated that it was agreed at the meeting that Mr. Singh Gitau advocate would take over conduct of the transaction from the 1st Defendant who was to hand over the Plaintiff's file. The witness confirmed that before he left the 2nd Defendant's employment, the 2nd Defendant had remitted payment of the purchase price as scheduled. He stated that at the time, the 2nd Defendant had put up temporary structures on the Suit Properties which it was using.

30. The 1st Defendant gave evidence and produced the correspondences exchanged in the transaction. He acted for the Plaintiff in the sale of the Suit Properties. The Plaintiff instructed him on 7/11/2005. He stated that the transaction progressed slowly as there were issues to be resolved before the sale agreement was executed. The Plaintiff required funds to meet various obligations which the 1st Defendant advanced to him against the sale proceeds that were expected once the transaction was completed. The 1st Defendant gave instances when he made payments and issued undertakings for payment to third parties out of the monies paid by the 2nd Defendant towards the purchase price. Such instances included the undertaking in respect of the Plaintiff's children school fees to Nairobi Jeffery Academy and African Nazarene University given on 16/5/2006 and 29/8/2006 respectively. The Plaintiff also instructed him to give undertakings to other payments to third parties.

31. The Plaintiff informed his firm on 16/2/2007 that during the reconstruction of the folio for L.R. No. 5955/4, it was discovered at the lands office that a charge registered against this land in 1988 was only partially discharged. This liability had previously not been disclosed to the 1st Defendant. A dispute arose between the Plaintiff and Intra Africa on the extent of the Plaintiff's indebtedness. The Plaintiff insisted that he paid the liability in full in December 1993 and the property should have been discharged. Feeling uncomfortable to deal with the issue of the discharged or partial reconveyance which was necessary before the completion of the sale of the Suit Property to the 2nd Defendant, the Plaintiff instructed Mwaura and Company Advocates to deal with this issue. Intra Africa was demanding payment of Kshs. 7,109,931/=. The Plaintiff informed him that he had visited Intra Africa's chairman in hospital and persuaded him to accept Kshs. 4,600,000 in order to partially discharge the Suit Properties leaving the balance to be secured by the remainder of the land. In addition, the Plaintiff informed him on 26/5/2008 that he was looking for funds to pay Intra Africa. The Plaintiff wrote to Intra Africa on 23/6/2008 and copied the letter to the 1st and 2nd Defendants proposing to deposit Kshs. 4,600,000/= with the 3rd Defendant in terms of an arrangement he had reached with Intra Africa's chairman to facilitate the partial discharge of the Suit Properties.

32. The 1st Defendant stated that the Plaintiff wrote to him expressing his decision to release the deed plans to Intra Africa pursuant to its obligation to the 2nd Defendant and added that the Plaintiff instructed him to release the sum of Kshs. 4,600,000/= as earlier agreed once Intra Africa agreed to his proposal. The 3rd Defendant wrote to him and confirmed receipt of instructions to release the executed partial reconveyances upon receipt of the sum of Kshs. 4,600,000 and the deed plans. The 1st Defendant wrote to the 3rd Defendant on 7/7/2008 seeking confirmation that his firm would release the executed partial reconveyance once the banker's cheque for Kshs. 4,600,000/= was deposited with them. The Plaintiff wrote to the 1st Defendant stating that the proposal he made to Intra Africa on 23/6/2008 was his last position on the transaction unless valid reasons were given as to why his offer was not acceptable.

33. Upon receipt of confirmation from the 3rd Defendant that he had instructions to accept payment of Kshs. 4,600,000/= and the deed plan, and pursuant to the Plaintiff's instructions, the 1st Defendant stated that he forwarded the banker's cheque for Kshs. 4,600,000/= to the 3rd Defendant on 24/7/2008 through Wambui Mwangi advocate in exchange for the two executed partial reconveyances. The Plaintiff sent him an email on the same day at 3.45 p.m. retracting the instructions to pay Kshs 4,600,000 to the 3rd Defendant. The 1st Defendant advised the Plaintiff that he could not comply with his email since he had already sent out the banker's cheque for Kshs. 4,600,000 in exchange for the executed partial reconveyances. Wambui Mwangi Advocate informed the 1st Defendant that she had forwarded the cheque to Waweru Gatonye advocates who by then were representing the 2nd Defendant.

34. The Plaintiff withdrew instructions from the 1st Defendant. The 1st Defendant informed the 3rd Defendant when he sought authority to pay out Kshs. 4,600,000/= to Intra Africa that he no longer had instructions to act in the matter. Two years later the Plaintiff wrote to Waweru Gatonye and Company Advocates alleging that he never received the balance of the purchase price. He copied the letter to the 2nd Defendant. The letter was forwarded to him. In May 2011, Wairagu and Wairagu wrote to the 1st Defendant on the Plaintiff's instructions seeking all the documents and receipts as proof of payment of the sum of Kshs. 4,600,000/= and proof that indeed the Plaintiff gave instructions for this payment to be made. According to the 1st Defendant, he responded to that letter to the satisfaction of Wairagu and Wairagu Advocates. Six months later the Plaintiff's current advocate wrote a demand letter to the 2nd Defendant for payment of the balance of purchase price together with interest.

35. Mr. Kairu stated that after the commencement of this suit it was brought to his attention that the Plaintiff had been sued in **Milimani CMCC No. 1983 of 2013 – Intra Africa Assurance Company Limited v Kenneth Kirika Watene**. He attached some of the pleadings filed in that suit. He also attached a copy of the amended defence and counterclaim which the Plaintiff filed in **Milimani HCCC (Commercial and Admiralty Division) No. 620 of 2014 – Intra Africa Assurance Company Limited v Kenneth Kirika Watene**. In that suit, the Plaintiff counterclaimed for the sum of Kshs. 4,600,000/= which he claimed Intra Africa wrongly received without his consent.

36. The 1st Defendant emphasized that he was not related to the chairman of Intra Africa, but that his wife was a distant relative of the former Chairman of Intra Africa. He stated that all the payments he made on behalf of Plaintiff were made according to the instructions given to him by the Plaintiff and that the Plaintiff would reduce the instructions to writing were he had given verbal instructions. He confirmed that he did not have any response from Intra Africa accepting the Plaintiff's conditions set out in the letter dated 23/6/2008. Mr. Kairu clarified that by the time he ceased acting after receiving the Plaintiff's email, he had already forwarded the cheque for Kshs. 4,600,000/= to the purchaser's advocate.

37. Dr. Mark Leleruk gave evidence for the 2nd Defendant. He confirmed that the 2nd Defendant entered into the sale agreement with the Plaintiff for the purchase of the Suit Properties. He stated that the agreement was amended to allow the Plaintiff access to the sale proceeds held by his advocate for purposes of settling the subdivision fees and to cater for his personal financial needs. He stated that in consideration of allowing the Plaintiff access to the purchase price before the completion date, the Plaintiff allowed the 2nd Defendant to take possession of the Suit Properties. He stated that with regard to L.R. No. 5955/21 Kshs. 500,000/= was paid on 10/1/2006; Kshs. 1,000,000/= was paid on 8/2/2006 and Kshs. 550,000/= was paid on 26/7/2006. As regards L.R. No. 5955/22, Kshs. 550,000/= was paid on 15/9/2006 and Kshs. 4,950,000/= was paid on 14/12/2006. Upon payment of the full purchase price for the two plots, the Plaintiff and the 2nd Defendant executed conveyances on 28/7/2006 and on 18/12/2006 in respect of L.R. No. 5955/21 and 5955/22 respectively. He stated that the 2nd Defendant took possession of the Suit Properties and received completion documents from the Plaintiff's advocate in accordance with the terms of sale agreement. The 2nd Defendant presented the conveyances over the Suit Properties for registration on 11/8/2006 and 22/12/2006. Upon presentation of the conveyances for registration, the 2nd Defendant discovered that there was a legal charge registered against the Suit Properties in favour of Intra Africa through a transfer of the legal charge from Middle Africa Finance Company dated 11/7/1991. The 2nd Defendant was taken by surprise because the searches done on the land previously had not reflected any mortgage and the Plaintiff had already received the full purchase price and executed conveyances over the Suit Properties.

38. He stated that at a meeting held on 6/8/2007 in the 1st Defendants' offices which the Plaintiff attended, it was agreed that the Suit Properties should be discharged and this would only be possible after the Plaintiff settled the outstanding loan to Intra Africa. The 1st Defendant sought the 2nd Defendant's authority and consent to release the balance of the purchase price of Kshs. 4,600,000/= to the 3rd Defendant so as to procure a partial discharge of the Suit Properties. The witness stated that this sum was held by the 1st Defendant as stakeholder pending registration of the conveyances over the Suit properties in favour of the 2nd Defendant.

39. After Intra Africa committed to discharge the Suit Properties upon receipt of the sum of Kshs. 4,600,000/=, the 2nd Defendant gave its consent to the 1st Defendant to release the funds. The witness stated that the release of the funds was done with the full knowledge and concurrence of the Plaintiff. Intra Africa released the partial reconveyances executed on 25/9/2008 to the 2nd Defendant's advocate on 8/10/2008. He averred that the completion notice dated 7/11/2011 issued by the Plaintiff had no basis as it was issued long after the 2nd Defendant had paid the full purchase price for the Suit Properties and after registration of the conveyances in favour of the 2nd Defendant. He pointed out that the Plaintiff admitted at paragraph 9 of the Amended Plaintiff that the 2nd Defendant paid the full purchase price for the Suit Properties. He produced copies of the correspondence forwarding payment and the conveyances for the Suit Properties.

40. The 3rd Defendant, Mr. Mbage Njuguna Ng'ang'a, gave evidence. He received instructions from Intra Africa on 19/12/2006 to facilitate the forwarding of the original conveyance relating to L.R. No. 5955/8 to the Plaintiff to enable him subdivide the land which was mortgaged to his client. He forwarded the conveyance to the Plaintiff on the undertaking that he would return it by 15/1/2007. His client instructed him to prepare partial reconveyances over the Suit Properties to assist the Plaintiff sell the land. The Plaintiff was to pay Kshs. 4,600,000/= from the sale proceeds in exchange for the reconveyances. Mr. Ng'ang'a stated that he prepared the reconveyances which were signed by Intra Africa. He sent these to the 1st Defendant. It was registered and thereafter a transfer was registered in favour of the 2nd Defendant. He confirmed that he received a cheque for Kshs. 4,600,000/= from 1st Defendant and that he released the money to Intra Africa once he confirmed from the 2nd Defendant's advocate that the transfer in favour of the 2nd Defendant had been registered. He stated that this was a normal conveyancing transaction and that there was no fraud, malice, conspiracy or collusion on his part or on the part of his client. His letter dated 5/8/2008 addressed to the 1st Defendant confirmed receipt of the cheque for Kshs. 4,600,000/= from Waweru Gatonye and Company Advocates. The letter stated that the 3rd Defendant had released the original conveyance and partial reconveyances to Waweru Gatonye to enable the firm register the transfers in favour of their client.

41. He wrote to the 1st Defendant seeking his authority to release the funds to Intra Africa. The 1st Defendant responded on 14th and 22nd August 2008 stating that the Plaintiff had withdrawn instructions from him. The letter returned the partial reconveyance of mortgage to Waweru Gatonye and Company Advocates. Mr. Ng'ang'a stated that he acted for Intra Africa and did not communicate with the Plaintiff regarding the release of the payment to Intra Africa. Mr. Ng'ang'a clarified that the partial reconveyance registered was not executed by the Plaintiff because the Indian Transfer of Property Act (ITPA) did not provide for execution of the conveyance by the mortgagor.

42. Parties filed submissions which the court has considered. The issues for determination are:

- a) Did the 2nd Defendant pay the full purchase price for the Suit Properties?
- b) Did the Plaintiff authorise the 1st Defendant to release the balance of the purchase price in the sum of Kshs. 4,600,000/= to the 3rd Defendant?
- c) Were the Suit Properties fraudulently transferred to the 2nd Defendant?
- d) Should the court grant the orders sought by the Plaintiff?

43. The Plaintiff submitted that the sale agreement gave the completion date as on or before 15/12/2006 and provided that the full purchase price would be paid to the vendor's advocates at which point the purchaser would be entitled to possession of the Suit Properties. The sale agreement did not provide for termination but since it incorporated the Law Society Conditions of Sale (1989 Edition), the vendor or purchaser had to give 21 days' completion notice, which he maintained he gave to the 2nd Defendant.

44. The Plaintiff claimed that the 1st Defendant withheld crucial information when he communicated with the 2nd Defendant's advocate on 24/7/2008 and that he therefore colluded with the 2nd Defendant to return the cheque for Kshs. 4,600,000/= to the 2nd Defendant for onward transmission to the 3rd Defendant. The Plaintiff claimed that these happened against the background of the meeting held on 6/8/2007.

45. The Plaintiff submitted that he disputed the outstanding loan amount claimed by Intra Africa and declined to sign the reconveyance sent by the 3rd Defendant, which in his view made the reconveyance invalid for want of execution by the mortgagee. The Plaintiff faulted the reconveyance registered by the 2nd Defendant for not acknowledging the loan repayment of Kshs. 4,600,000/=. The Plaintiff submitted that he made an offer to Intra Africa which was never accepted but the 1st Defendant nevertheless went ahead to release the cheque for the balance of the purchase price to the 2nd Defendant for onward transmission to the 3rd Defendant. The Plaintiff submitted that the 1st Defendant acted without instructions and deliberately compromised his interests. The Plaintiff added that the 2nd Defendant's recourse lay in clause 4(7) of the Law Society Conditions of Sale (1989 Edition) but not to take it upon itself to complete the transaction as it did.

46. The Plaintiff submitted that the 3rd Defendant acted without his instructions, breached the sale agreement and breached his professional undertaking when he released the sum of Kshs. 4,600,000/= to Intra Africa. The Plaintiff relied on the 1st Defendant's letter dated 14/8/2008 vide which he declined to authorise the 3rd Defendant to release the sum of Kshs. 4,600,000/= to Intra Africa and directed the 3rd Defendant to seek the Plaintiff's authority to do so which he never did.

47. The Plaintiff urged the court to order the 2nd Defendant to restore the Suit Properties following the rescission of the contract. The Plaintiff submitted that the 2nd Defendant is only entitled to a refund of the purchase price less 10% forfeiture pursuant to the Law Society Conditions of Sale (1989 Edition). The Plaintiff further sought general damages for trespass against the 2nd Defendant in the sum of Kshs. 40,000,000/=.

48. The 1st Defendant submitted that he released the funds in his custody on the instructions of the Plaintiff and that it was the Plaintiff who set in motion the release of the sum of 4,600,000/= by making a proposal to Intra Africa who held a mortgage over the suit land. He submitted that he was unaware of the Plaintiff's indebtedness to Intra Africa while acting for the Plaintiff and that this came to the fore much later in the course of the transaction. The 1st Defendant added that he had specific instructions that upon confirmation that the proposal to pay Intra Africa Kshs. 4,600,000/= was acceptable, this sum was to be released. The 1st Defendant relied on the Plaintiff's letter dated 23/6/2008. Paragraphs 2 and 4 of the letter stated as follows:

"I have in the past expressed my objection to surrendering the deed plans of my property on the ground that the charge registered against it has long been cleared. However, in the interest of the buyer and in pursuit of my obligations, I have conceded to releasing

plot no. L.R. No. 5955/19 to Intra Africa Assurance Company Limited. The value of the plot, as you must know, is more than sufficient to secure the balance of the alleged debt, after you release the Kshs. 4,600,000/= as had earlier been agreed. In return for over-securing their assumed interests, I shall expect the reconveyance of plot number L.R. No. 5955/19.

.....

As soon as you have their agreement to the proposal, I shall deliver the deed plan for forwarding to their lawyers alongside the cheque for the amount of Kshs. 4,600,000/=”

49. Following the Plaintiff's instructions, the 1st Defendant submitted that he wrote to the 3rd Defendant seeking to confirm if Intra Africa was agreeable to the Plaintiff's proposal. The 1st Defendant submitted that the Plaintiff had failed to prove any fraud on his part to the required standard and urged the court to dismiss the suit.

50. The 2nd Defendant submitted that it paid the full purchase price of Kshs. 11,000,000/= to the 1st Defendant by 14/12/2006 in accordance with clause 5(b) of the sale agreement. The 2nd Defendant submitted that it performed its obligations under the sale agreement and added that the Suit Properties were legally registered and transferred to its name. And that under clause 6 of the agreement, it could proceed to register the two parcels of land in its name upon payment of the full purchase price for the second parcel of land. Further, that it executed the conveyances in relation to the Suit Properties with the Plaintiff on 28/7/2006 and 18/12/2006. Consequently the 2nd Defendant presented the conveyances for registration at the lands office on 19/8/2009. The 2nd Defendant submitted that the Plaintiff was not required to execute the partial reconveyance under the Government Land Act (GLA), the legal regime that governed the suit land. The applicable form was Form B under the schedule to the GLA.

51. The 2nd Defendant maintained that the Plaintiff had failed to prove that it acted fraudulently in the transfer of the Suit Properties. According to the 2nd Defendant, the release of the sum of Kshs. 4,600,000/= by the 1st to the 3rd Defendant was done with the Plaintiff's knowledge and in any event, the cheque was drawn in favour of the 3rd Defendant. Further, that the 1st Defendant held the funds as stakeholder pending the registration of the conveyances in favour of the 2nd Defendant. It added that there was an agency relationship between the Plaintiff and the 1st Defendant who was his advocate in the transaction. The 2nd Defendant averred that it was a *bona fide* purchaser for value and that its titles over the Suit Properties are protected pursuant to Sections 24, 25 and 26 of the Land Registration Act.

52. The 3rd Defendant submitted that the original conveyance in respect of L.R. No. 5955/4 was mortgaged to and held by Intra Africa to secure the debt owed to it. L.R. No. 5955/4 was subdivided to create L.R. No. 5955/8, which was further subdivided to create L.R. Numbers 5955/19, 5955/20, 5955/21 and 5955/22 and emphasised that Intra Africa had to execute partial reconveyances over the Suit Properties before the registration of the conveyances in favour of the 2nd Defendant could be effected.

53. The 3rd Defendant submitted that the Indian Transfer of Property Act (ITPA) which applied to the impugned sale of the Suit Properties, did not provide for execution of the partial reconveyances by the Plaintiff as the mortgagor. The cheque for Kshs. 4,600,000/= was drawn on 23/6/2008 before the Plaintiff withdrew instructions from the 1st Defendant. The 3rd Defendant learnt of the Plaintiff's withdrawal of instructions from the 1st Defendant on 14/8/2008. The 3rd Defendant added that he gave the professional undertaking to the 2nd Defendant who has not complained of any breach of that undertaking, and that his primary obligation and responsibility was to his client, Intra Africa.

54. The 3rd Defendant submitted that the Plaintiff agreed to the execution and release of the partial reconveyances by Intra Africa for L. R. numbers 5955/21 and 5955/22 in exchange for payment of Kshs. 4,600,000/=. The balance of the loan sum was to continue to be secured by L.R. numbers 5955/19 and 5955/20. Acting on behalf of Intra Africa, the 3rd Defendant released the partial reconveyances to the 2nd Defendant's advocates in exchange for the payment of Kshs. 4,600,000/=. The 3rd Defendant was to hold this sum pending the successful registration of the partial reconveyances and the conveyances in favour of the 2nd Defendant. According to the 3rd Defendant, the Plaintiff was not a beneficiary of the undertaking he gave to the 2nd Defendant.

55. The 3rd Defendant submitted that the Plaintiff had failed to establish to the standards required that he acted fraudulently. The 3rd Defendant summarised the Plaintiff's complaint as being that the sale proceeds of Kshs. 4,600,000/= were not released to him which he contended failed to take into consideration the fact that the suit land was mortgaged to Intra Africa, and that the Suit Properties could not therefore have been sold without the participation of Intra Africa. The partial reconveyances formed part of the completion documents the Plaintiff was expected to deliver to the 2nd Defendant.

56. It is not contested that the Plaintiff entered into the sale agreement dated 8/2/2006 with the 2nd Defendant for the purchase of the Suit Properties which were to be excised from L.R. No. 5955/8 at the agreed consideration of Kshs. 11,000,000/=. Clauses 4, 5 and 6 of the agreement provided for the mode of payment of the purchase price and further stated that payment of the purchase price was to be made to the vendor's lawyers. It is common ground that the 2nd Defendant paid the sum of Kshs. 11,000,000/= to the 1st Defendant in accordance with the agreement. Upon receipt of payment of Kshs. 4,000,000/=: the 1st Defendant as the vendor's lawyer was to hand over to the 2nd Defendant's lawyers a signed conveyance and deed plan for L.R. No. 5955/21 against their professional undertaking not to register the transfer until the purchase price for the second plot was paid to the vendor's lawyers. The Plaintiff could and did access part of the sale proceeds to facilitate the subdivision of the land and to meet his other personal obligations. Of the sum of Kshs. 11,000,000/=: only the sum of Kshs. 4,600,000/= is in dispute. The Plaintiff and the 1st and 2nd Defendants admitted that the sum of Kshs. 11,000,000/= was paid to the 1st Defendant. The 2nd Defendant therefore paid the full purchase price to the 1st Defendant in accordance with the terms of the sale agreement.

57. Clause 8 of the sale agreement stipulated that the properties were sold subject to the terms and conditions on which the Plaintiff held

them but otherwise free from all encumbrances. The Plaintiff did not disclose the existence of the mortgage held by Intra Africa over L.R. No. 5955/8 when he entered into the agreement with the 2nd Defendant. The Suit Properties were to be excised from L.R. No. 5955/8. The Plaintiff contended that the advocates for both parties in the agreement knew of the mortgage but did not lead any evidence to show such knowledge. At the time of entering into the sale transaction for the Suit Properties, the Plaintiff was well aware of the existence of the mortgage over L.R. No. 5955/8 as can be seen from the indenture of partial conveyance dated 30/9/1993 between the Plaintiff and Intra Africa vide which Intra Africa agreed to release and convey L.R. No. 5955/9 to the Plaintiff in consideration of payment of Kshs. 2,382,325/=. The reconveyances was also subject to L.R. No. 5955/8 remaining mortgaged to Intra Africa to secure the balance of the mortgage debt.

58. The completion date under clause 12 of the sale agreement was on or before 15/12/2006. To complete the sale transaction, the Plaintiff was expected to hand over executed conveyances over the Suit Properties, valid rates clearance certificates and photocopies of PIN to the 2nd Defendant's advocates. The completion documents definitely had to include the partial reconveyances executed by Intra Africa after the existence of the mortgage held by Intra Africa came to the fore.

59. In the court's view, both the GLA and the Transfer of Property Act, 1882 applied to the suit land. The Transfer of Property Act, 1882 set out the rights and liabilities of both the mortgagor and the mortgagee. The Plaintiff could not have validly conveyed the Suit Properties to the 2nd Defendant without first discharging the mortgage held by Intra Africa. The correspondence exchanged points to the fact that the Plaintiff knew of this precondition which may be why he contacted Intra Africa and gave proposals on how to secure the balance of the mortgage debt.

60. The Plaintiff's main contention was that he had overpaid the loan but he did not lead any evidence to show that he had fully repaid the loan he owed to Intra Africa. Had the Plaintiff paid off the whole debt as he claimed then it would not have been necessary to retain the mortgage over L.R. No. 5955/8 when L.R. No. 5955/9 was reconveyed to him in November 1993.

61. What the court understands the Plaintiff's complaint to be is that he wished to have the sum of Kshs. 4,600,000/= released to him and have Intra Africa discharge L.R. No. 5955/20 alongside the Suit Properties and retain the mortgage over L.R. No. 5955/19 to secure whatever loan may have been outstanding. The Plaintiff was not too pleased when Intra Africa did not accept his proposals contained in his letters of 6/5/2008 and 23/6/2008. The court does not think Intra Africa as mortgagee was obliged to accede to the Plaintiff's proposal. Intra Africa insisted that the sum of Kshs. 4,600,000/= had to be paid to it before it could execute the partial reconveyances over the Suit Properties. The two letters and other correspondence exchanged between the Plaintiff and the 1st Defendant also confirm that the Plaintiff agreed to pay Intra Africa the sum of Kshs. 4,600,000/= so that he could conclude the sale and transfer of the Suit Properties to the 2nd Defendant. The 2nd Defendant paid the full purchase price for the Suit Properties by December 2006. The conveyances to the 2nd Defendant were registered on 19/8/2009. Looking at the correspondence, the court is satisfied that the Plaintiff authorised the 1st Defendant to release the balance of the purchase price in the sum of Kshs. 4,600,000/= to the 3rd Defendant to facilitate the conveyance of the Suit Properties to the 2nd Defendant.

62. The Plaintiff could not have rescinded the sale of the Suit Properties as he purported to do following the 21 days' notice his advocates issued to the 2nd Defendant on 7/11/2011. The Plaintiff failed to prove fraud on the part of the Defendants in the registration of the Suit Properties in the 2nd Defendant's name or the release of the funds to the 3rd Defendant. Having fulfilled its obligations under the sale agreement, the court finds that the Suit Properties were properly conveyed to the 2nd Defendant.

63. In the court's view, the Plaintiff can only direct whatever claim he may have to Intra Africa. Having filed a counterclaim in **Milimani HCCC (Commercial and Admiralty Division) No. 620 of 2014 – Intra Africa Assurance Company Limited v Kenneth Kirika Watene**, the Plaintiff ought to pursue the issue of the accounts in that suit for a determination as to whether indeed he still owes Intra Africa any money under the mortgage. He can also pursue the reconveyances of L.R. Numbers 5955/19 and 5955/20 and bring the issue of the mortgage held by Intra Africa to an end once and for all.

64. The Plaintiff has failed to prove his claim on a balance of probabilities, it is dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 22nd day of November 2019.

K. BOR

JUDGE

In the presence of: -

Ms. J. Muyai holding brief for Mr. Mugambi Mungania for the Plaintiff

No appearance for the Defendants

Mr. V. Owuor- Court Assistant