



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 732 OF 2015 (formerly HCCC NO. 1823 of 2002)**

**VIRGINIA WANGUI NGUU.....PLAINTIFF**

**=VERSUS=**

**STEPHEN KAMAU KAHUKI.....1<sup>ST</sup> DEFENDANT**

**MINNIE WATIRI KAHUKI.....2<sup>ND</sup> DEFENDANT**

**KENYA COMERCIAL BANK LTD.....3<sup>RD</sup> PARTY**

**JUDGMENT**

The plaintiff brought this suit by way of a plaint dated 11<sup>th</sup> December, 2002. The plaintiff averred that at all material times, she was registered as the owner of all that parcel of land known as Dagoretti/Waithaka/439 (herein referred to as the “suit property”). The plaintiff averred that through undated and unregistered sale agreement made on 12<sup>th</sup> September, 1994, she sold to the 1<sup>st</sup> defendant a portion of the suit property together with improvements thereon at a consideration of Kshs. 1,850,000/=. The plaintiff averred that the 1<sup>st</sup> defendant paid to her Kshs. 100,000/= leaving a balance of 1,750,000/= that was to be paid before the completion date. The plaintiff averred that the 1<sup>st</sup> defendant in total disregard of the said agreement for sale fraudulently and unlawfully induced her to withdraw instruction from Ms. Waruinge & Waruinge Advocates which was acting for her in the matter, after paying legal fees.

The plaintiff averred that the 1<sup>st</sup> defendant’s actions aforesaid denied her; an elderly widow, the benefit of independent legal advice on the transaction. The plaintiff averred that after signing the said agreement for sale, the 1<sup>st</sup> defendant on 2<sup>nd</sup> August, 1995 maliciously and fraudulently misrepresented to her the contents and purposes of a transfer form thereby inducing her to sign the same on the belief that it was just a formal acknowledgment of receipt of the sum of Kshs. 100,000/= that had been paid to her. The plaintiff averred that the 1<sup>st</sup> defendant used the said fraudulently obtained transfer form to transfer a portion of the suit property known as Dagoretti/Waithaka/B971(hereinafter referred to as “Plot No. B971”) to himself and the 2<sup>nd</sup> defendant. The plaintiff averred that the plaintiff undervalued Plot No. B971 as Kshs. 200,000/- while the agreed purchase price was Kshs. 1,850,000/=. The plaintiff averred that she never executed the said transfer form before S. Mutinda Advocate neither did she acknowledge that the consideration for the suit property was Kshs. 200,000/=.

The plaintiff averred that as a consequence of the aforesaid fraudulent actions, misrepresentations and inducements by the 1<sup>st</sup> defendant, she has suffered loss and damage. The plaintiff averred further that at no single time did she intend to transfer Plot No. B971 to the defendants prior to receiving the balance of the purchase price amounting to Kshs. 1,750,000/= which the 1<sup>st</sup> defendant failed to settle even after the completion period was extended to 31<sup>st</sup> December, 1996. The plaintiff sought judgment against the defendants jointly and severally for:

- a) A declaration that the purported transfer of Plot No. Dagoretti/Waithaka/B971 to the defendants was fraudulent, null and void.
- b) A declaration that the agreement to sell a portion of the suit property to the 1<sup>st</sup> defendant was fundamentally breached and could not be performed.
- c) An order directing the defendants to deliver up to the plaintiff or to such other persons as she appoints, the title documents and an executed instrument of transfer in respect of Plot No. B971 situated in Nairobi.
- d) An order that the defendants forthwith concur in doing all acts and things and execute all the necessary deeds and documents in order to effectuate the orders aforesaid.
- e) General damages for fraudulent misrepresentation.

- f) Punitive and exemplary damages for fraudulent misrepresentation and deceit.
- g) Interest on (e) and (f) above at courts rates from the date of filing suit until payment in full.
- h) Cost of the suit and interest thereon.

The defendants filed a defence on 4<sup>th</sup> June, 2003 which was amended on 17<sup>th</sup> April, 2013. The defendants admitted that the 1<sup>st</sup> defendant purchased a portion of the suit property from the plaintiff at a consideration of Kshs 1,850,000/=. The defendants averred that the 1<sup>st</sup> defendant paid Kshs. 100,000/= to the plaintiff upon the execution of the agreement for sale and a further sum of Kshs. 385,000/= receipt of which the plaintiff duly acknowledged. The defendants averred that the said payments left a balance of Kshs. 1,365,000 that was paid by the 1<sup>st</sup> defendant to the plaintiff through a loan facility that he obtained from the 3<sup>rd</sup> party, Kenya Commercial Bank Limited where the 1<sup>st</sup> defendant was an employee.

The defendants denied that the 1<sup>st</sup> defendant induced the plaintiff to withdraw instructions from Waruinge & Waruinge Advocates and contended that, if she did so, it was on her own volition. The defendants denied the particulars of fraud pleaded against them in the plaint and averred that the 1<sup>st</sup> defendant never misrepresented the contents of the transfer form to the plaintiff thereby inducing her to sign the same. The defendants averred that the plaintiff wilfully executed the transfer form upon receipt of the said sum of Kshs. 485,000/= and was paid the balance of the purchase price in the sum of Kshs. 1,365,000/= directly by the 3<sup>rd</sup> party from the proceeds of the loan that the 1<sup>st</sup> defendant had obtained from the 3<sup>rd</sup> party which was secured by Plot No. B971. The defendants averred that upon payment of the full purchase price, the plaintiff gave them possession of Plot No. B971. The defendants averred that they subsequently cleared the loan with the 3<sup>rd</sup> party and the charge over Plot No. B971 was discharged. The defendants averred that if the plaintiff did not receive the balance of the purchase price, it was as a result of the 3<sup>rd</sup> party's failure to remit the same to the plaintiff in accordance with the terms of the loan agreement with the 3<sup>rd</sup> party. The defendants urged the court to dismiss the plaintiff's suit.

The defendants sought and were granted leave on 7<sup>th</sup> May, 2014 to serve a third party notice upon Kenya Commercial Bank Limited, the 3<sup>rd</sup> party herein. The 3<sup>rd</sup> party entered appearance and filed a statement of defence on 27<sup>th</sup> January, 2017. The 3<sup>rd</sup> party averred that the defendants' claim against it was time barred as the cause of action arose from an alleged breach of loan facility that was offered to the 1<sup>st</sup> defendant on 14<sup>th</sup> June, 1995. The 3<sup>rd</sup> party averred that the defendants' claim fell outside the limitation period of 6 years for causes of actions founded on breach of contract. The 3<sup>rd</sup> party averred further that the third party notice served upon it by the defendants was defective for failure to comply with Order I rule 14 (3) of the old Civil Procedure Rules that required a third party notice be filed with the defence.

The 3<sup>rd</sup> party averred further that the plaintiff's claim against the defendants concerned alleged undue influence, fraud and inducement in the sale and transfer of a portion of the suit property to the defendants in respect of which the 3<sup>rd</sup> party played no role. The 3<sup>rd</sup> party averred that it was not a party to the agreement between the plaintiff and the defendants and that there was no connection between the claim brought against it by the defendants and that brought by the plaintiff against the defendants in the plaint. Without prejudice to the foregoing, the 3<sup>rd</sup> party averred that on 21<sup>st</sup> September, 1994 the 1<sup>st</sup> defendant who was its employee, applied for a commercial loan of Kshs 1,365,000/= which was approved through a facility letter dated 14<sup>th</sup> June, 1995. The 3<sup>rd</sup> party averred that the purpose of the facility was to enable the 1<sup>st</sup> defendant purchase a portion of the suit property at a consideration of Kshs. 1,850,000/= of which he had already paid Kshs. 485,000/= to the plaintiff as deposit. The 3<sup>rd</sup> party averred that the loan was to be secured by a legal charge over the said portion of the suit property and was to be repaid monthly at the rate of Kshs. 19,300/= for 8 years.

The 3<sup>rd</sup> party averred that the plaintiff and the 1<sup>st</sup> defendant instructed it through a letter dated 24<sup>th</sup> August, 1995 to pay to the plaintiff Kshs. 1,044,772.50/= through their advocates being the net proceeds of the purchase price after deduction of a sum of Kshs. 320,227.50/= to offset a separate debt that was owed to the 3<sup>rd</sup> party by the plaintiff. The 3<sup>rd</sup> party averred that after it effected the said payment of Kshs. 1,044,772.50/= to the plaintiff, the 1<sup>st</sup> defendant was given possession of the property. The 3<sup>rd</sup> party averred that the charge that was registered against the title of the said portion of the suit property was discharged after the 1<sup>st</sup> defendant completed the payment of the loan and the title thereof was released to him. The 3<sup>rd</sup> party urged the court to strike out the 3<sup>rd</sup> party from the proceedings.

The defendants filed a reply to the 3<sup>rd</sup> party's defence on 6<sup>th</sup> February, 2017 in which it joined issue with the 3<sup>rd</sup> party in its statement of defence save where the same consisted merely of admissions.

At the trial, the plaintiff (PW1) testified that she was staying on the suit property which belonged to her. She stated that in 1994 she entered into an agreement for sale with the 1<sup>st</sup> defendant to sell to him a portion of the suit property measuring  $\frac{1}{4}$  of an acre at a consideration of Kshs. 1,850,000/=. She stated further that the 1<sup>st</sup> defendant paid Kshs. 100,000/= and that their advocates were Waruinge & Waruinge Advocates. She stated that on 2<sup>nd</sup> August, 1995, the 1<sup>st</sup> defendant brought to her a form to sign which she did; thinking that it was an acknowledgement of receipt of a sum of Kshs. 100,000 that had already been paid to her by the 1<sup>st</sup> defendant. PW1 told the court that she did not know what she was signing and that she was not paid any other money by the 1<sup>st</sup> defendant. She added that she did not receive Kshs 1,044,772/= or any further payment from the 1<sup>st</sup> defendant. She told court that the 1<sup>st</sup> defendant transferred the said portion of land measuring  $\frac{1}{4}$  of an acre to his name although he had not paid for it. PW1 relied on her witness statement dated 13<sup>th</sup> July, 2010 as part of her evidence in chief and produced documents attached to her list of documents dated 14<sup>th</sup> July, 2015 as plaintiff's exhibits 1 to 7.

In cross-examination by the defendants' advocate, PW1 stated that she worked as a supervisor of cleaners at Kenyatta National Hospital and not as a nurse. She stated that the signature on the sale agreement in the defendants' bundle of documents dated 28<sup>th</sup> May, 2014 was not hers. She stated that she signed an agreement for sale with the 1<sup>st</sup> defendant at the office of Waruinge & Waruinge Advocates and that the advocate did not explain to her the terms of the said agreement.

The plaintiff stated further that she agreed to sell a ¼ an acre of the suit property to the 1<sup>st</sup> defendant but she was not aware that the 1<sup>st</sup> defendant was going to take a loan from the 3<sup>rd</sup> party to pay the balance of the purchase price. She told the court that she signed the agreement for sale but did not agree that the balance of the purchase price was to be paid after the 1<sup>st</sup> defendant had obtained a loan from the 3<sup>rd</sup> party. She stated that she signed the transfer form because she was given Kshs. 100,000. The plaintiff stated further that she subdivided the suit property after she entered into a sale agreement with the 1<sup>st</sup> defendant. She stated that her tenants were evicted from the suit property by the 1<sup>st</sup> defendant which prompted her to file this suit to challenge the eviction. She stated that she could not remember when the 1<sup>st</sup> defendant evicted her tenants and replaced them with his tenants. She could also not remember whether the 1<sup>st</sup> defendant was receiving rent from the tenants.

The plaintiff stated that she trusted the 1<sup>st</sup> defendant because he was a preacher and she knew that he used to work for the 3<sup>rd</sup> party. She stated that she accused the 1<sup>st</sup> defendant of fraud and reported him to Kabete Police Station where she was advised to file a civil suit. She stated that by the time she entered into the agreement for sale with the 1<sup>st</sup> defendant, she did not have a loan with the 3<sup>rd</sup> party. She stated that the suit property was not charged to the 3<sup>rd</sup> party to secure a loan that she had taken. She stated further that she sold a portion of the suit property because she had a loan with the 3<sup>rd</sup> party of Kshs. 200,000/= and the title of the whole of the suit property was held by the 3<sup>rd</sup> party as security for the loan.

The plaintiff stated that the defendants did not pay the balance of the purchase price and that she used her retirement benefits to clear the loan that she had with the 3<sup>rd</sup> party. She stated that she made the payment at the offices of Oraro & Co Advocates and she was issued with a receipt for Kshs 200,000/=. She stated that she was told that there was interest that had accrued on the said sum of Kshs 200,000/=. She stated that she was told to go to the offices of Oraro & Co Advocates and that she did not sign any document in the said office. She stated that after paying Kshs. 200,000/=: the 3<sup>rd</sup> party gave her back the title deed for the suit property after which she subdivided the property and sold to the defendants a portion thereof. She stated that the 1<sup>st</sup> defendant was to clear the interest that was due to the 3<sup>rd</sup> party and was to pay her the balance of the purchase price. She stated that the firm of Oraro & Co. advocates did not call her to their office to collect money. The plaintiff stated that the portion of the suit property that she sold to the defendants had buildings occupied by her sons.

The plaintiff stated that the defendants did not take possession of the portion of the suit property that she sold to them. She stated that when the defendants took possession, her children were residing on the property and they were evicted by force and replaced with the 1<sup>st</sup> defendant's tenants. She stated that this happened after they had signed the agreement. The plaintiff stated that it was after the eviction that she engaged an advocate to file this suit against the defendants and managed to get back her property. She stated that she did not take any action against the defendants prior to 2002 because the 1<sup>st</sup> defendant kept promising that he would pay the balance of the purchase price. She stated that she came to court when the defendants brought people to occupy the property.

In further cross-examination by the advocate for the 3<sup>rd</sup> party, the plaintiff stated that at the time of entering into a contract with the defendants, she had a loan balance of Kshs 200,000/= together with interest of Kshs 80,000/= that was due to the 3<sup>rd</sup> party. She stated that the defendants were to use the purchase price to clear the outstanding loan and were to give her the balance. She stated further that the sum of Kshs 200,000/= paid to Oraro & Co. advocates was from her retirement benefits from Kenyatta National hospital. She stated that she could not recall when she obtained a loan from the 3<sup>rd</sup> party. She told court that her pension delayed and that the pension could not clear the bank loan in full since there was interest on top of Kshs 200,000/= that was due from her to the 3<sup>rd</sup> party. She stated that she did not know about the interest when she went to Oraro & Co Advocates. She added that it was the 1<sup>st</sup> defendant who informed her of the outstanding interest of Kshs 80,000/=. She stated that she went with the 1<sup>st</sup> defendant to the Land Control Board and obtained consent to subdivide the suit property.

The 2<sup>nd</sup> defendant(DW1) gave evidence on her behalf and on behalf of the 1<sup>st</sup> defendant. She told the court that she was married to the 1<sup>st</sup> defendant who was in the United States of America(USA) and that she was familiar with the case. She stated that she was involved in the transaction between the plaintiff and the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant adopted her witness statement filed in court on 9<sup>th</sup> April, 2018 as her evidence in chief. She testified that they began the process of buying a portion of the suit property in 1994. She stated that she went with the 1<sup>st</sup> defendant to the plaintiff's home where they agreed on the purchase price. She told court that the sale agreement was prepared by Waruinge & Waruinge advocates and signed by the plaintiff and the 1<sup>st</sup> defendant. She added that the sale agreement had special conditions which provided among others that; the plaintiff had a loan with the 3<sup>rd</sup> party secured by the suit property; the plaintiff was to obtain the Land Control Board (LCB) consent, and the defendants were to obtain a loan from the 3<sup>rd</sup> party to finance the purchase price for the property.

The 2<sup>nd</sup> defendant testified that the 1<sup>st</sup> defendant was an assistant manager at the 3<sup>rd</sup> party's Tom Mboya Branch. She stated that they applied for a loan and got a letter of offer from the 3<sup>rd</sup> party. She stated that the loan was to be secured by the property that they were purchasing. She stated that after subdivision, their portion of the suit property became Plot No. B971. She stated that the charge over Plot No. B971 was prepared by Oraro & Rachier Advocates and that they executed the same before the loan was released to them. She stated that the 3<sup>rd</sup> party paid the purchase price to the plaintiff through Oraro & Rachier Advocates. She added that they had a balance of Kshs. 485,000/= to pay to the plaintiff which they paid and the plaintiff acknowledge receipt thereof in the presence of an advocate. She stated that after paying for the property, they took possession of the same. She stated that the property had structures which they took over and rented out. She told the court that they occupied the suit property for 7 years before the plaintiff brought this suit.

The 2<sup>nd</sup> plaintiff told court further that the 1<sup>st</sup> defendant finished paying the loan he took from the 3<sup>rd</sup> party in 2002. She stated that the firm of Oraro & Rachier Advocates confirmed through a letter dated 20<sup>th</sup> May, 2008 that from the loan proceeds, a sum of Kshs 320,227.50/= was paid to the 3<sup>rd</sup> party to clear the plaintiff's loan balance and a sum of Kshs 1,044,772.50/= was paid to the plaintiff. The 2<sup>nd</sup> defendant produced the documents attached to the defendants' list of documents dated 28<sup>th</sup> May, 2014 as defendants' exhibit 1. She stated that Plot No. B971 was registered in her name and the name of the 1<sup>st</sup> defendant jointly. She stated that the plaintiff chased away their tenants and took over the suit property. She stated that the plaintiff had been receiving rent from the property since then. The 2<sup>nd</sup> defendant stated that she could not access the suit property.

In cross-examination by the advocate for the 3<sup>rd</sup> party, the 2<sup>nd</sup> defendant stated that by the time they went to the 3<sup>rd</sup> party for a loan, they had already entered into an agreement for sale with the plaintiff. She stated that when they were negotiating with the plaintiff, the 3<sup>rd</sup> party was not involved. She referred the court to a letter dated 24<sup>th</sup> August, 1995 addressed to Oraro & Rachier Advocates by the plaintiff and the 1<sup>st</sup> defendant. She stated that the 3<sup>rd</sup> party was not involved in writing of the letter. She stated that they were granted possession of the property in 1995 and that the property had few tenants. She stated that the 3<sup>rd</sup> party gave them a loan which they paid in full.

In cross-examination by the advocate for the plaintiff, the 2<sup>nd</sup> defendant stated that they initially paid Kshs. 100,000/= to the plaintiff and paid a further sum of Kshs. 385,000/= in May, 1995. She stated that they paid Kshs. 350,000/= in the office of G.N Gichuhi advocate along Tom Mboya street and the plaintiff, the 1<sup>st</sup> defendant and G.N Gichuhi advocate were present. She stated that she did not know the mode through which the payment was made to the plaintiff. She stated that the firm of Oraro & Rachier Advocates had not come to the picture at that time. She stated that apart from the acknowledgment that was signed by the plaintiff, she had no other evidence to show that the plaintiff was paid Kshs. 485,000/=. She stated that she did not know that G.N Gichuhi was not licensed to practice law. She stated that they did not ask her for a practising certificate.

The 2<sup>nd</sup> defendant stated that the instrument of transfer was prepared by Oraro & Rachier Advocates and that she did not know why the consideration was indicated as Kshs. 200,000/= instead of Kshs 1,850,000/=. She added that the balance of the purchase price in the sum of Kshs 1,044,772.50/= was paid to the plaintiff by Oraro & Rachier Advocates. She stated that they never handled the said sum of Kshs 1,044,772.50/=. The 2<sup>nd</sup> plaintiff stated that she did not know how Oraro & Rachier Advocates paid the plaintiff the said sum of Kshs 1,044,772.50/=. She stated that it was up to the firm of Oraro & Rachier Advocates to tell the court how they made the payment to the plaintiff and that explained why the 3<sup>rd</sup> party was joined in the suit.

#### Submissions:

The 3<sup>rd</sup> party closed its case without calling evidence. After the close of evidence, the plaintiff filed her submissions on 24<sup>th</sup> December, 2018, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their submissions on 25<sup>th</sup> February, 2019 while the 3<sup>rd</sup> party filed its submissions on 1<sup>st</sup> March 2019. The plaintiff submitted that after receiving Kshs. 100,000/= upon execution of the agreement for sale, she did not receive the balance of the purchase price in the sum of Kshs. 1,750,000/=. The plaintiff submitted that the 1<sup>st</sup> defendant fraudulently made it appear as if she had been paid the entire amount of the purchase price in tranches. The plaintiff cited Chapter IV of the Evidence Act and Halsbury's Laws of England, 4<sup>th</sup> Edition volume 17 at paragraph 13 and 14 on the issue of burden of proof. The plaintiff submitted that the burden of proof shifted to the defendants and the 3<sup>rd</sup> party to prove the payment of the balance of the purchase price.

The plaintiff submitted that several acts of fraud and forgery were committed by the defendants. The plaintiffs relied on the case of R.G Patel v Lalji Makani [1957] E.A 314 where it was held that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt. The plaintiff also relied on the case of Mutsonga v Nyati [1984] KLR 425. The plaintiff submitted that she had proved her case on a balance of probabilities. She relied on the case of Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013]eKLR where it was held that registration can be cancelled if fraud is proved.

In their submissions, the defendants submitted at length on whether the plaintiff had proved fraud against them. The defendants referred to the definition fraud in Black's Law Dictionary, 10<sup>th</sup> Edition and the case of Okere v Kinyukia [2007] eKLR where it was held that fraud must be specifically pleaded and proved and that the onus is on the party alleging fraud to do so. The defendants submitted that the standard of proof of fraud was laid in the case of Mutsonga v Nyati (supra) where it was held that charges of fraud must be strictly proved and that something more than a mere balance of probabilities is required. The defendants submitted that the plaintiff had not led any evidence to prove allegations and particulars of fraud pleaded in the plaint. The defendants cited sections 107 and 108 of Evidence Act, Chapter 80 Laws of Kenya and submitted that the plaintiff had not discharged the burden of proof and her case must fail.

The 3<sup>rd</sup> party on its part submitted on four issues. On whether the action against it was time barred, it submitted that a claim for indemnity is based on contract and under section 4(2) of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the relevant period of limitation is 6 years. The 3<sup>rd</sup> party submitted that the same position was taken by the Court of Appeal in Divecon Limited v Samani (1995-1998) E.A 48. The 3<sup>rd</sup> party submitted that in light of the foregoing, the claim by the defendants against it was time barred. On the validity of the 3<sup>rd</sup> party notice, the 3<sup>rd</sup> party referred to Order 1 rule 14(3) of the old Civil Procedure Rules and submitted that the notice was invalid as the defendants should have filed the third party notice at the time of filing their defence. On whether the defendants had proved their claim against the 3<sup>rd</sup> party, the 3<sup>rd</sup> party cited the case of Yafesi Walusimbi v A.G of Uganda [1959] E.A 223 where the court held that in order for a third party to be legally joined in a suit, the subject matter of the notice and the original cause of action must be the same. The 3<sup>rd</sup> party submitted there was no connection between the claim brought against the 3<sup>rd</sup> party by the defendants and that brought against the defendants by the plaintiff. It submitted that the defendants had failed to prove their case against it and should pay the costs of the notice.

#### Determination:

I have considered the evidence adduced by the parties, the submissions of counsels and the authorities cited in support thereof. From the pleadings, the issues arising for determination in this suit can be summarised as follows:

1. Whether the agreement for sale of a portion of the suit property between the plaintiff and the 1<sup>st</sup> defendant and the transfer of Plot No. B971 to the defendants were marred with misrepresentation, fraud, forgery, inducement, deceit and illegality.
2. Whether the plaintiff was paid the full purchase price for Plot No. B971.
3. Whether the plaintiff is entitled to the reliefs sought against the defendants.

4. Whether the 3<sup>rd</sup> party is liable to indemnify the defendants in respect of the plaintiff's claim.

5. Who is liable for the costs of the suit.

Whether the agreement for sale of a portion of the suit property between the plaintiff and the 1<sup>st</sup> defendant and the transfer of Plot No. B971 to the defendants were marred with misrepresentation, fraud, forgery, inducement, deceit and illegality.

I am satisfied from the evidence on record that the plaintiff had agreed to sell to the 1<sup>st</sup> defendant a portion of the suit property measuring ¼ of an acre. I am also satisfied that the terms and conditions of sale were agreed upon by the parties. Apart from the evidence that was adduced by the plaintiff that she trusted the 1<sup>st</sup> defendant because he was a preacher and that he was working for the 3<sup>rd</sup> party, no evidence was placed before the court from which the court could imply that the 1<sup>st</sup> defendant was in a position of influence over the plaintiff. From the terms of the said agreement, the plaintiff was aware that the 1<sup>st</sup> defendant was to take a loan from his employer to purchase the portion of the suit property that was sold to him by the plaintiff.

The agreement for sale between the parties was drawn by Waruinge & Waruinge Advocates. It was indicated in the said agreement that the said firm was acting for both parties. No evidence was placed before the court showing that after the said firm drew the said agreement, it was supposed to do anything further. There was also no evidence that the 1<sup>st</sup> defendant induced the plaintiff to abandon the services of the said firm so that he could have control over her. Since the 1<sup>st</sup> defendant was taking a loan from the 3<sup>rd</sup> party to pay for the property that was sold to him by the plaintiff, the involvement of the 3<sup>rd</sup> party's advocates Oraro & Rachier Advocates in the transaction was normal.

For the 1<sup>st</sup> defendant to obtain a loan from the 3<sup>rd</sup> party, the portion of the suit property that was sold to him had to be transferred to him and charged to the 3<sup>rd</sup> party before the loan was released. In the circumstances, I find nothing strange in the fact that the plaintiff executed a transfer form before she was paid the full purchase price. The plaintiff had also contended that she did not appear before the advocate who witnessed her signature in the said transfer form. That advocate was not called as a witness for the plaintiff to deny that the plaintiff appeared before him.

The plaintiff had also contended that the 1<sup>st</sup> defendant and the 3<sup>rd</sup> party did not pay her the balance of the purchase price. That may be so and I will consider the issue later in this judgment. What I want to say at this stage is that non-payment of the purchase price cannot without more be termed as an act of fraud. The plaintiff claimed also that the amount stated in the transfer form as the consideration for the portion of the suit property sold to the 1<sup>st</sup> defendant was Kshs. 200,000/= instead of Kshs. 1,850,000/=. The plaintiff did not produce a copy of this transfer in evidence. The court has however noted from a copy of the said transfer on record that the plaintiff's allegation is correct. However, understating consideration in the instrument of transfer is evidence of cheating and dishonesty and to me it was directed at the Kenya Revenue Authority which is the collector of Stamp Duty. There is no evidence that the consideration was understated in the transfer form with the intention of defrauding the plaintiff.

Due to the foregoing, it is my finding that the agreement for sale between the plaintiff and the 1<sup>st</sup> defendant was not tainted with misrepresentation, fraud, forgery, inducement, deceit and illegality as claimed by the plaintiff.

Whether the plaintiff was paid the full purchase price for Plot No. B971.

In the agreement for sale between the plaintiff and the 1<sup>st</sup> defendant, the plaintiff admitted receipt of a sum of Kshs. 100,000/= as part payment of the purchase price for a portion of the suit property that she sold to the 1<sup>st</sup> defendant. That left a balance of Kshs. 1,750,000/= to be paid by the 1<sup>st</sup> defendant. The plaintiff claimed that a part from the said sum of Kshs. 100,000/=: no further payment was made to her by the 1<sup>st</sup> defendant. The plaintiff's evidence regarding the loan that she had with the 3<sup>rd</sup> party particularly the quantum thereof was rather confused. However, from the totality of the evidence before the court, I am satisfied that the plaintiff had a loan with the 3<sup>rd</sup> party that was secured by the suit property and which was to be settled with part of the proceeds of sale of the said portion of the suit property.

I am convinced that the plaintiff, the 1<sup>st</sup> defendant and the 3<sup>rd</sup> party had agreed that the loan amount that was outstanding on the plaintiff's loan account with the 3<sup>rd</sup> party would be settled from the purchase price that the plaintiff was to receive from the 1<sup>st</sup> defendant. I am also convinced that as at the close of the transaction, the plaintiff owed the 3<sup>rd</sup> party Kshs. 320,227.50/= as loan. The plaintiff did not dispute the letter dated 24<sup>th</sup> August, 1995 which she addressed to the 3<sup>rd</sup> party's advocates, Oraro & Rachier authorising the 3<sup>rd</sup> party to deduct a sum of Kshs. 320,227.50/= from the purchase price to clear the plaintiff's debt with the 3<sup>rd</sup> party. There was no dispute that the plaintiff's debt was cleared.

After the settlement of that debt, there was still a balance of Kshs. 1,429,772.50 to be paid to the plaintiff. The plaintiff claimed that this amount was not paid by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant contended on the other hand that out of that amount, he paid Kshs. 385,000/= directly to the plaintiff. The 1<sup>st</sup> defendant produced in evidence a document in which the plaintiff was said to have acknowledged receipt of the said payment. According to the said document, the plaintiff and the 1<sup>st</sup> defendant appeared before an advocate by the name G.N. Gichuhi on 30<sup>th</sup> May, 1995 before whom the 1<sup>st</sup> defendant paid to the plaintiff a sum of Kshs. 350,000/=. The plaintiff acknowledged receipt of the said sum of Kshs. 350,000/= and a further sum of Kshs. 135,000/= that she had received earlier which I believe included the initial payment of Kshs. 100,000/=. According to the said document, the plaintiff acknowledged that she had received a total of Kshs. 485,000/= from the 1<sup>st</sup> defendant as at 30<sup>th</sup> May, 1995. The document was contested by the plaintiff on the ground that the advocate who is said to have witnessed the payment had no practising certificate in 1995. If this payment of Kshs. 385,000/= (Kshs. 485,000/= less Kshs. 100,000/=) is taken into account, the balance of the purchase price that was due by the 1<sup>st</sup> defendant to the plaintiff was Kshs. 1,044,772.50.

In the letter dated 24<sup>th</sup> August, 1995 that I have referred to earlier, the plaintiff had acknowledged that what was due to her from the 1<sup>st</sup>

defendant was Kshs. 1,044,772.50. I am of the view that the fact that G.N. Gichuhi advocate had no practising certificate in 1995 did not mean that she could not witness payment of money. She was not called as a witness to dispute the fact that she witnessed the payment of Kshs. 350,000/= to the plaintiff. The plaintiff who disputed her signature in the document aforesaid did not also adduce evidence showing that the signature was forged. Due to the foregoing, I am satisfied that the plaintiff received a further sum of Kshs. 385,000/- from the 1<sup>st</sup> defendant after the initial deposit of Kshs. 100,000/=. That left a sum of Kshs. 1,044,772.50 that was to be paid to the plaintiff after settlement of the plaintiff's debt to the 3<sup>rd</sup> party.

The said amount was to be paid to the plaintiff by the 3<sup>rd</sup> party's advocates, Oraro & Rachier Advocates. No evidence was placed before the court that the said sum of Kshs. 1,044,772.50 was paid to the plaintiff. Neither the 1<sup>st</sup> defendant nor the 3<sup>rd</sup> party produced proof that the said sum of Kshs. 1,044,772.50 was released by the 3<sup>rd</sup> party to Oraro & Rachier Advocates and that the said firm paid the same to the plaintiff.

It is my finding therefore that out of the purchase price of Kshs. 1,850,000/= a sum of Kshs. 1,044,772.50 was not paid to the plaintiff.

Whether the plaintiff is entitled to the reliefs sought against the defendants.

Having held that the sale agreement between the plaintiff and the 1<sup>st</sup> defendant was valid, I am of the view that the plaintiff is not entitled to the declaratory reliefs and orders sought in the plaint. I am of the view that what the plaintiff is entitled to is damages for breach of contract. Since the 1<sup>st</sup> defendant did not pay to the plaintiff the full purchase price, the 1<sup>st</sup> defendant is in breach of the agreement for sale and is liable to the plaintiff for damages. The damages payable in my view is the balance of the purchase price which is Kshs. 1,044,772.50.

Whether the 3<sup>rd</sup> party is liable to indemnify the defendants in respect of the plaintiff's claim.

The 1<sup>st</sup> defendant's right to be indemnified by the 3<sup>rd</sup> party arose when the plaintiff brought these proceedings against the 1<sup>st</sup> defendant. This suit was brought against the defendants on 17<sup>th</sup> December, 2002. The defendants filed their defence on 4<sup>th</sup> June, 2003. As I stated earlier in this judgment, it was not until 14<sup>th</sup> May, 2013 that the defendants sought leave to serve a third party notice upon the 3<sup>rd</sup> party. This was 10 years after they had filed their defence. I am in agreement with the 3<sup>rd</sup> party that the defendant's third party notice should have been filed together with the defendants' statement of defence unless the court ordered otherwise under Order I rule 14(1)(3) of the old Civil Procedure Rules. The third party notice that was served upon the 3<sup>rd</sup> party was therefore defective. I am also in agreement with the 3<sup>rd</sup> party that since the indemnity sought by the defendants was contractual in nature, the same could not be sustained after the expiry of the 6-year limitation period for enforcement of contractual obligations. The claim is therefore not only defective but is also time barred.

Conclusion:

In conclusion, it is my finding that the plaintiff has partially proved her claim against the defendants on a balance of probabilities and that the defendants' third party notice has no merit. I therefore enter judgment on the following terms:

1. The 1<sup>st</sup> defendant shall pay to the plaintiff a sum of Kshs. 1,044,772.50 being the balance of the purchase price of the parcel of land known as Dagoretti/Waithaka/B971 within 90 days from the date hereof together with interest at court rates from the date hereof until payment in full.
2. The third party notice by the defendants against the 3<sup>rd</sup> party is dismissed.
3. Each party shall bear its own costs of the suit and the 3<sup>rd</sup> party notice.

**Delivered and Dated at Nairobi this 5<sup>th</sup> day of December 2019**

**S. OKONG'O**

**JUDGE**

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

Ms. Maina h/b for Mr. Kinga for the Plaintiff

Ms. Kangethe for the Defendants

Ms. Okuta h/b for Mr. Amoko for the 3<sup>rd</sup> Party

Ms. C. Nyokabi-Court Assistant