



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 193 OF 2010**

**(NOW ELC.276'A' OF 2017-THIKA)**

ALTON HOMES LIMITED.....1<sup>ST</sup> PLAINTIFF

JOHN KANGOGO.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

DAVIS NATHAN CHELOGOI.....1<sup>ST</sup> DEFENDANT

JOHN NDUATI NJUGUNA.....2<sup>ND</sup> DEFENDANT

SAMUEL KUGEKA NDEGWA.....3<sup>RD</sup> DEFENDANT

**JUDGEMENT**

By way of *Plaint* dated 27<sup>th</sup> April 2010, the Plaintiffs have sought for the following orders:-

1) A declaration that the 1<sup>st</sup> Defendant's sale and transfer of property Nairobi Block 26/113, to the 2<sup>nd</sup> Defendant on the 14<sup>th</sup> January 2010, was obtained in breach of the law, fraudulently and is null and void ab initio and for the cancellation of the same.

2) The 1<sup>st</sup> Defendant be ordered to specifically perform the first agreement dated 27<sup>th</sup> February 2007, the addendum to the first agreement dated 3<sup>rd</sup> May 2009, and the last agreement dated 4<sup>th</sup> August 2009 and deliver to the 1<sup>st</sup> Plaintiff the original certificate of lease, an executed transfer together with all necessary consents and forms to enable the registration of the property Nairobi Block 26/113, in the name of the 1<sup>st</sup> Plaintiff.

3) All necessary and consequential accounts, directions and inquiries.

4) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants, by themselves or by their agents, servants or otherwise be restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring (other than to the 1<sup>st</sup> Plaintiff) or assigning and/or otherwise dealing with the suit property.

5) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves or by their agents, servants or otherwise be restrained from entering upon the suit property, levying distress upon, attaching the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' furniture and chattels, evicting the 1<sup>st</sup> Plaintiff from and/or in any manner whatsoever interfering with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' occupation of the suit property.

6) The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves or by their agents, servants or otherwise be restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' furniture and chattels distressed from the premises on the suit property.

7) The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves or by their servants, agents or otherwise be directed by an order of mandatory injunction to return to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, and at the said 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' cost, all furniture and chattels distressed from the premises on the suit property.

8) **1<sup>st</sup> and 2<sup>nd</sup> Defendants be ordered to pay damages for breach of contract and unjust enrichment and fraud in the sum of 20 million with interest.**

9) **The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be ordered to pay damages in the tune of Kshs.805,000/= for trespass, wrongful seizure of goods, conversion and illegal distress in lieu of or in addition to prayers 6 and 7.**

10) **Costs of the suit.**

11) **Any other relief the court deems fit.**

In their Complaint, the Plaintiffs pleaded that the 1<sup>st</sup> Defendant breached 3 sets of agreements for sale dated **27<sup>th</sup> February 2007, 3<sup>rd</sup> May 2009 and 4<sup>th</sup> August 2009**, in which he had contracted to sell the suit property to the 1<sup>st</sup> Plaintiff at a price of **Kshs.11,000,000/=** but it did not deliver the completion documents on the expected time. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are accused of fraudulently transferring the property to the 2<sup>nd</sup> Defendant in breach of the agreements entered with the 1<sup>st</sup> Plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are also accused of forcefully and unlawfully seizing and converting the Plaintiffs' chattels.

The 1<sup>st</sup> Defendant filed its Statement of Defence on **7<sup>th</sup> May 2010**, denying the allegations in the Complaint and stated that the 1<sup>st</sup> Plaintiff breached the 3 sets of agreements by failing to pay the agreed purchase price. He further stated that he then terminated the sale transaction and resold the property to the 2<sup>nd</sup> Defendant for **Kshs.12 million**.

The 2<sup>nd</sup> Defendant filed a Statement of Defence and Counter-claim dated **14<sup>th</sup> May 2010**. He stated that he is an innocent purchaser of the property for value without notice and evicted the Plaintiffs as tenants, for rent arrears. He sought an order of eviction of the Plaintiffs together with mesne profits from **14<sup>th</sup> January 2010**, until delivery of vacant possession of the property to him.

The 3<sup>rd</sup> Defendant appointed **Njau Kayai & Co. Advocates** to act for him. However, he did not file any Defence or tender any evidence in response to the Plaintiffs' claim.

The hearing commenced on **23<sup>rd</sup> June 2015**, wherein PW1, the 2<sup>nd</sup> Plaintiff herein, **John Kangogo** stated he was a Director of the 1<sup>st</sup> Plaintiff. He adopted his witness statement sworn on **2<sup>nd</sup> December 2013**, and the Plaintiffs list and bundle of documents as his testimony. He produced evidence of the 3 agreements for sale and payments to the 1<sup>st</sup> Defendant of a total of **Kshs.9,391,668.70** towards the purchase price and **Kshs.7,644,528/=** towards improvements on the property and **Kshs.805,000/=** being the value of the converted chattels. On cross examination, PW1 testified that he entered into occupation of the suit property in **May 2007**, and had not fully paid the purchase price. Counsels for the Defendants questioned PW1 on the cheque payments and the dates they had been made. PW1 also stated that he had been evicted and was not currently in possession of the suit property.

PW2-**David Chege Kariuki**, a practicing Valuer, produced two Valuation Reports contained in the Plaintiffs' bundle and list of documents dated **9<sup>th</sup> April 2014**. He stated that he valued the property at **Kshs.40 million** as at **14<sup>th</sup> February 2014**, and the cost of the converted chattels at **Kshs.640,000/=** as at the same date. On cross examination, he clarified that the **Kshs.40 million** valuation was for the land and buildings.

DW1-**Davis Nathan Chelogoi**, the 1<sup>st</sup> Defendant testified that he indeed entered into an agreement for sale of **Nairobi Block 26/113**, with the 1<sup>st</sup> Plaintiff in **2007**. He adopted his witness statement, list and bundle of documents dated **27<sup>th</sup> May 2014**. He stated that he did not transfer the suit property to the 1<sup>st</sup> Plaintiff because the purchase price was not paid in full. He also testified that he wrote a letter to the advocate of the 1<sup>st</sup> Plaintiff indicating that if the matter was not concluded, he would terminate the agreement and when the 1<sup>st</sup> Plaintiff failed to honour the agreement, he terminated the said agreement. He further testified that he subsequently found another buyer, the 2<sup>nd</sup> Defendant, who purchased the suit property for **Kshs.12 million**. On cross examination, he stated that the purchase price that was paid to him was only **Kshs.6 million** out of the **Kshs.11 million** agreed upon. He further testified that the balance was not paid in full and only **Kshs.2 million** was paid. DW1 was taken through the payments contained in the Plaintiffs' bundle of documents by his Counsel. He confirmed that the account details are his. He also testified that he did not refund the **Kshs.9.3 million** paid by the 1<sup>st</sup> Plaintiff after termination of the sale agreements.

DW2-**John Nduati Njuguna**, the 2<sup>nd</sup> Defendant relied on his witness statement sworn on **15<sup>th</sup> May 2015**. He further testified that the 1<sup>st</sup> defendant transferred the suit property to him for **Kshs.12 million**. The 2<sup>nd</sup> Defendant also testified that the property was occupied at the time of purchase and he was aware of that fact. He testified that he asked the 2<sup>nd</sup> Plaintiff to continue paying rent which he failed to do and that his claim in this matter is for **Kshs.360,000/=** as accrued rent. During cross examination, DW2 stated that he did not have a tenancy agreement with the 2<sup>nd</sup> Plaintiff. He also testified that the agreement for sale between him and the 1<sup>st</sup> Defendant had been lost at the advocate's office.

After *viva voce* evidence, parties proceeded to file their written submissions.

### **Plaintiffs' Submissions**

The Plaintiffs in their submissions dated **22<sup>nd</sup> November 2016**, referred to the agreed statement of issues dated **25<sup>th</sup> November 2013**, which framed 18 issues for trial. The Plaintiffs' written submissions highlighted the various issues for determination before this Honourable Court. Some of the highlighted issues are-; **whether the 1<sup>st</sup> Plaintiff was a tenant/licensee of the 1<sup>st</sup> Defendant; whether the 1<sup>st</sup> Plaintiff is entitled to specific performance and whether the 1<sup>st</sup> Plaintiff is entitled to special and general damages, in addition to and/or in lieu of specific**

**performance damages.** The Plaintiffs further submitted that an order for specific performance ought to be granted to the 1<sup>st</sup> Plaintiff since in the circumstances, the 1<sup>st</sup> Plaintiff was fraudulently deprived of title and possession of the property by all the Defendants. They relied on the rule against sale and transfer *pendente lite* set out in Mawji...Vs...US International University & Another (1976-80) 1KLR and urged the Court to enforce it in this case.

### 1<sup>st</sup> Defendant's Submissions

The 1<sup>st</sup> Defendant filed his submissions on **27<sup>th</sup> March 2017**. He submitted that the Plaintiffs had failed to prove their claim. He further submitted that the 2<sup>nd</sup> Plaintiff was not privy to the contract between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant and therefore has no claim in this suit. He further submitted that the 1<sup>st</sup> Plaintiff had failed to prove any breach in the agreement. He referred to the agreement for sale arguing that the payments had been pegged upon the surrender of the title deed registered in favour of the vendor in exchange and not upon the surrender of the other completion documents. The 1<sup>st</sup> Defendant therefore argued that he completed his part of the bargain and requested for the final cheques of **Kshs.2 million** but the purchaser declined and made pre-conditions extraneous to the agreement. He further argued that the Plaintiffs had failed to prove their claim of fraud and unjust enrichment.

### 2<sup>nd</sup> Defendant's Submissions

The 2<sup>nd</sup> Defendant filed their submissions dated **18<sup>th</sup> November 2016**, and submitted that at the time he bought the property, the Plaintiffs were mere tenants. He further submitted he is an innocent purchaser for value without notice and that upon acquisition of the property, he charged it and obtained a loan which fell into arrears and the property was sold at a public auction and therefore the remedy of specific performance is not available to the Plaintiffs. He further submitted that the Plaintiffs obtained orders for the goods to be returned by the 3<sup>rd</sup> Defendant, but they did not pursue the issue and therefore the order sought with respect to attachment should be dismissed. He prayed that the suit against him be dismissed with costs.

This Court has now carefully considered the available evidence, the exhibits thereto, the relevant provisions of law, the written submissions and the cited authorities and the Court makes the following findings:-

There is no doubt that the 1<sup>st</sup> Plaintiff herein **Alton Homes Ltd** through its Director **John Kangogo**, the 2<sup>nd</sup> Plaintiff entered into sale agreement with the 1<sup>st</sup> Defendant herein **Davis Nathan Chelogoi**. The agreement was over the sale and purchase of **Nairobi Block 26/113**, which was allegedly owned by the 1<sup>st</sup> Defendant as a Government allottee.

It is evident that there are three agreements herein in relation to this transaction. The first sale agreement is dated **27<sup>th</sup> February 2007**, made between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant for purchase of the suit property at price of **Kshs.7,500,000/=** and the said sale agreement had express terms. It is evident that the 1<sup>st</sup> Plaintiff was to deposit **Kshs.3,200,000/=** on execution of the said sale agreement and the balance of **Kshs.4,300,000/=** was payable within a period of **90 days** and the completion date was **27<sup>th</sup> May 2007**. It is evident that the parties herein did not fully meet the terms of the said sale agreement and the parties signed an addendum to the said agreement on **3<sup>rd</sup> May 2009**, with additional terms. The express terms of the said addendum were that the 1<sup>st</sup> Plaintiff would pay an additional **Kshs.2,000,000/=** in equal instalments of **Kshs.1,000,000/=** together with a further payment of **Kshs.1,400,000/=** to be paid to the Government on behalf of the 1<sup>st</sup> Defendant. Further the 1<sup>st</sup> Defendant was to ensure that the suit property was registered in the name of the 1<sup>st</sup> Plaintiff.

It is also evident that by **4<sup>th</sup> August 2009**, the 1<sup>st</sup> Defendant had not yet registered the suit property in the name of the 1<sup>st</sup> Plaintiff and a **3<sup>rd</sup> sale agreement** was entered between the parties. In the 3<sup>rd</sup> sale agreement, the purchase price was revised to **Kshs.11,000,000/=** wherein the 1<sup>st</sup> Defendant acknowledged receipt of **Kshs.6,000,000/=** with a balance of **Kshs.5,000,000/=** which was payable in four instalments. The 1<sup>st</sup> Plaintiff was to pay **Kshs.1,000,000/=** on or before **3<sup>rd</sup> August 2009**, **Kshs.1,000,000/=** on or before **30<sup>th</sup> August 2009**, **Kshs.1,000,000/=** on or before **30<sup>th</sup> September 2009** and the balance of **Kshs.2,000,000/=** upon successful transfer of the property in the name of the 1<sup>st</sup> Plaintiff.

It is also evident that the completion date was 90 days from the date of execution which meant **3<sup>rd</sup> November 2009**. The parties also agreed in Clause 9(c) that this 3<sup>rd</sup> agreement superseded all the other sale agreements. It is also evident from the Plaintiffs **exhibit Nos.48 to 55**, that the 1<sup>st</sup> Plaintiff made various payments to the 1<sup>st</sup> Defendant herein. The 1<sup>st</sup> Defendant acknowledged receipt of **Kshs.500,000/=** together with a cheque of **Kshs.500,000/=** on **4<sup>th</sup> August 2009**. Further the court has seen two cheques dated **30<sup>th</sup> November 2009** and **30<sup>th</sup> December 2009**, for **Kshs.1,000,000/=** each payable to the 1<sup>st</sup> Defendant and drawn from the account of the 1<sup>st</sup> Plaintiff. There is also payment of **Kshs.1,333,400/=** and **Kshs.59,258.70** to **Civil Servants Housing Scheme Fund** by **John Kangogo** the 2<sup>nd</sup> Plaintiff and who is a Director of the 1<sup>st</sup> Plaintiff over **House No.571A**, on behalf of the 1<sup>st</sup> Defendant. That payment was in fulfillment of one of the conditions in the addendum dated **3<sup>rd</sup> August 2009**. The said payment is dated **1<sup>st</sup> October 2009**.

The Plaintiffs alleged that they paid all the agreed monies and they thus met the conditions of the sale agreement. The 1<sup>st</sup> Defendant denied receipt of the money and in cross examination he stated that he could only confirm payment of the cheques issued to him if he was allowed to go through his bank statements. However he did not produce any bank statements to dispute payment of the said cheques and the presumption herein is that all the stated cheques were honoured and the money was paid into the 1<sup>st</sup> Defendant's account.

There is also no doubt that according to the 3<sup>rd</sup> agreement, the completion date was **90 days** from the date of execution of the said agreement which meant on or before **3<sup>rd</sup> November 2009**. Further it is evident that in the said sale agreement dated **4<sup>th</sup> August 2009**, before completion date, the vendor (1<sup>st</sup> defendant) was to fulfil certain conditions and in fulfillment of the stated conditions the 1<sup>st</sup> Defendant (Vendor) was expected to deliver:-

***i. Original title deed***

***ii. A duly executed conveyance in respect of the property in favour of the purchaser.***

***iii. ....***

It is evident that the vendor did not fulfil the above stated conditions on or before **3<sup>rd</sup> November 2009**, because by then the suit property was still not registered in his name. The suit property was registered in the name of the vendor (1<sup>st</sup> Defendant) on **9<sup>th</sup> December 2009**, as can be discerned from the extract of title produced as exhibit in court.

There is also no doubt that by a letter dated **14<sup>th</sup> December 2009**, the 1<sup>st</sup> Defendant demanded for an additional payment of **KShs.13,958,355/=** from the 1<sup>st</sup> Plaintiff on or before **20<sup>th</sup> December 2009**, and threatened to cancel the transaction. It is also evident that the vendor (1<sup>st</sup> defendant) thereafter transferred the suit property to the 2<sup>nd</sup> Defendant on **14<sup>th</sup> January 2010**, for an alleged consideration of **KShs.12,000,000/=**.

From the available evidence, it is evident that the 2<sup>nd</sup> Plaintiff who was a Director of the 1<sup>st</sup> Plaintiff, had taken possession of the suit property by the time the suit property was allegedly sold to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Plaintiff alleged that he took possession in **May 2007**, after the 1<sup>st</sup> Defendant failed to fulfil his obligations under the sale agreement dated **27<sup>th</sup> February 2007**. However, the 1<sup>st</sup> Defendant alleged that 2<sup>nd</sup> Plaintiff took possession as a licensee and not a purchaser. There was no evidence availed at all to the effect that the 2<sup>nd</sup> Plaintiff ever paid rent to the 1<sup>st</sup> Defendant after he took possession **in May 2007**.

Further it is evident that after the 2<sup>nd</sup> Defendant allegedly purchased the suit property, he distrained the 2<sup>nd</sup> Plaintiff for rent through the 3<sup>rd</sup> Defendant. Eventually the 2<sup>nd</sup> Plaintiff was evicted from the suit property. The 2<sup>nd</sup> Defendant alleged that he later defaulted in payment of his loan to the Bank and this suit property was sold to one **Joshua Hollanda**. There was no recent official search produced by the Defendants to confirm that this suit property has now been sold and transferred to **Joshua Hollanda**. However what is evident is that the said suit property was never sold to the 1<sup>st</sup> Plaintiff as per the sale agreements entered between the 1<sup>st</sup> Plaintiff and 1<sup>st</sup> Defendant.

What is also no in doubt is that the 2<sup>nd</sup> Plaintiff is no longer in occupation of the suit property. The Plaintiffs filed this suit against the Defendants and sought for various orders.

The above being the undisputed facts, the court finds that the issues for determination are as follows:-

***i. Did the parties herein enter into valid sale agreements?***

***ii. If so did any of the parties herein breach the terms of the said sale agreement?***

***iii. Was there lawful termination of the said sale agreements?***

***iv. Did the Plaintiffs occupy the suit property LR.No.Nairobi Block 26/113, as tenants or as a purchaser?***

***v. Was 2<sup>nd</sup> Plaintiff ever a tenant of the 2<sup>nd</sup> Defendant and liable for eviction for non-payment of rent?***

***vi. Are the Plaintiffs entitled to the prayers sought, and in the alternative is the 2<sup>nd</sup> Defendant entitled to the prayers sought in the Counter-claim?***

***vii. Who is liable to pay costs of the suit?***

The parties herein had agreed on a set of contested issues which were filed in court on **16<sup>th</sup> December 2013**. However the court is not bound by the above stated issues and has resorted to set its own issues for determination.

The Court will now embark on the issues for determination as follows:-

***i) Did the parties herein enter into valid Sale Agreements***

As the Court had earlier held, there are **three sale agreements** relating to the suit property. These agreements are in relation to sale of **Nairobi Block 26/113**, and they were signed by the parties herein. The sale agreements dated **4<sup>th</sup> August 2009**, superseded all the prior agreements entered in relation to the said property. It is therefore the current sale agreement and the one that the Court will refer to. However the Court will also take into consideration that the other two sale agreements laid a base for the instant transaction and cannot be ignored.

In the sale agreement that superseded all the others, the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of Contract Act which states as follows:-

***3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—***

*(a) the contract upon which the suit is founded—*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.***

Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991, where the Court held that:-

***“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.***

All the above ingredients are met in the instant sale agreement entered between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant and therefore the sale agreement between the two is valid.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants alleged that they subsequently entered into a sale agreement for the sale of the suit property to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant. However, there was no sale agreement produced in court and no evidence of payment of the purchase price. Apart from the Green Card which shows that the suit property was registered in the name of the 2<sup>nd</sup> Defendant on **14<sup>th</sup> January 2010**, there was no valid sale agreement produced in court. This Court cannot hold and find that indeed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into a valid sale agreement for sale of the suit property herein.

***ii) If so did any of the parties herein breach any terms of the sale agreement?***

As the Court has found and held earlier, the basis of the transaction in issue herein were the agreements dated **27<sup>th</sup> February 2007**, wherein the 1<sup>st</sup> Plaintiff paid a deposit of **Kshs.3,200,000/=** towards the purchase of the suit property and the balance was to be paid in 90 days upon the 1<sup>st</sup> Defendant fulfilling certain obligations by the completion date.

Since the 1<sup>st</sup> Defendant had not delivered a title deed in favour of the 1<sup>st</sup> Plaintiff by **May 2007**, the Court cannot hold and find that the 1<sup>st</sup> Plaintiff was in breach of the agreement dated **27<sup>th</sup> May 2007**. However, the 1<sup>st</sup> Defendant had not obtained the original title deed for the suit property. It is obvious that the 1<sup>st</sup> Defendant did not fulfil the conditions that he was supposed to fulfil by the completion date as stipulated by **Clause 5A** of the said sale agreement. Therefore, the 1<sup>st</sup> Defendant was in breach of this agreement.

Further the parties entered into an addendum in respect of the suit property on **3<sup>rd</sup> May 2009** and there were express terms of the said addendum. Again the 1<sup>st</sup> Plaintiff paid the stipulated amount but the 1<sup>st</sup> Defendant did not fulfil the conditions set out in Clause 1(d) of the said Addendum which provided as follows:-

***“The vendor shall be responsible for processing at the Lands Department of all necessary documentations and the issue of the title documents in favour of the purchaser and/or obtain from the Commissioner of Lands proper and duly registered title in respect of the above property in favour of the purchaser”.***

The Court finds and holds that the 1<sup>st</sup> Plaintiff paid the additional **Kshs.2,000,000/=** to the vendor because by **4<sup>th</sup> August 2009**, the vendor acknowledged that the 1<sup>st</sup> Plaintiff had already paid **Kshs.6,000,000/=** towards the purchase price. Further the parties entered into the sale agreement dated **4<sup>th</sup> August 2009**, which superseded all the other agreements entered prior to signing of the said agreement. It was acknowledged that the balance of the purchase price was **Kshs.5,000,000/=** which was to be paid in four instalments. It is also evident from the exhibits produced in court that the 1<sup>st</sup> Defendant paid the first three instalments of **Kshs.1,000,000/=** vide different cheques. However, the balance of **Kshs.2,000,000/=** was payable upon successful transfer of the title to the vendors name. In this sale agreement, the completion date was **90 days**, from the date of execution of the said agreement. Therefore the completion date was supposed to be **3<sup>rd</sup> November 2009**. However, by **3<sup>rd</sup> November 2009**, the 1<sup>st</sup> Defendant had not fulfilled the conditions set out in **Clause 5.3** of the said sale agreement. He had not obtained original title deed in his name and he could not deliver the same to the 1<sup>st</sup> Plaintiff.

Though the 1<sup>st</sup> Defendant alleged that the 1<sup>st</sup> Plaintiff was in breach, it is clear that he did not obtain the title deed in his name until **9<sup>th</sup> December 2009**. In **Clause 1.1a(iv)**, the 1<sup>st</sup> Plaintiff was obligated to pay the balance of **Kshs.2,000,000/=** upon successful transfer of the title to the vendors name. Therefore the 1<sup>st</sup> Plaintiff could only pay **Kshs.2,000,000/=** to the 1<sup>st</sup> Defendant on or after **9<sup>th</sup> December 2009**. However after the 1<sup>st</sup> Defendant obtained the title deed to his name on **9<sup>th</sup> December 2009**, he sought for additional amount of money from the 1<sup>st</sup> Plaintiff vide his letter dated **14<sup>th</sup> December 2009**.

The 1<sup>st</sup> Defendant therefore was in breach of the conditions of the sale agreement dated **4<sup>th</sup> August 2009**. The additional amount demanded by the 1<sup>st</sup> Defendant was not expressly or impliedly stated in the sale agreement dated **4<sup>th</sup> August 2009**, or even the earlier ones. This Court cannot imply any term in the said contract unless it was intended. See the case of **Lulume...Vs...Coffee Marketing Board (1970)EA 155**, where the Court held that:-

***“No term should be implied in a contract unless it was intended”.***

Having now carefully considered the available evidence, the Court finds that the 1<sup>st</sup> Plaintiff and 1<sup>st</sup> Defendant entered into a valid sale agreement, but by completion date, the 1<sup>st</sup> Defendant had not fulfilled all the conditions set therein and he later failed to transfer the property to the 1<sup>st</sup> Plaintiff even after having received substantial amount in respect of the purchase price. The 1<sup>st</sup> Defendant was therefore the one in breach of the sale agreement herein.

***iii) Was there lawful termination of the said sale agreement?***

This Court has held that the parties herein entered into a valid sale agreement with express terms. Each of the party therefore had a duty to observe the terms of the said sale agreement and fulfil their respective obligations. The 1<sup>st</sup> Plaintiff had an obligation to pay the purchase price as stipulated and on time and the 1<sup>st</sup> Defendant had a duty to ensure that the suit property was transferred to the 1<sup>st</sup> Plaintiff herein. It was only upon successful transfer of the title to the Vendor's name (1<sup>st</sup> Defendant) in preparation to meet the conditions that were to be fulfilled on completion date, that the 1<sup>st</sup> Plaintiff was to pay the final amount of **Kshs.2,000,000/=**.

However, it is evident that once the 1<sup>st</sup> Defendant obtained the title in his name, he demanded for additional payment specifically **Kshs.6,930,000/=** which was translated as default at **18%** for **42 months**. It is worth noting that this default clause is stipulated in **Clause 5.3 (b)** of the sale agreement dated **4<sup>th</sup> August 2009**, which states as follows:-

***“When completion is delayed, beyond the contractual date because of the purchaser's fault and if the vendor agrees to extend time, interest payable will be at the rate of 18% on all outstanding sums”.***

This sale agreement was entered on **4<sup>th</sup> August 2009**, and it superseded all the other prior agreements. If there was any default, then it was from **3<sup>rd</sup> November 2009**, and the Court does not understand why the 1<sup>st</sup> Defendant chose to use 42 months whereas the said agreement superseded all the others. Further, even if there was delay, it was not caused by the 1<sup>st</sup> Plaintiff, but by the 1<sup>st</sup> Defendant as he had not obtained title deed in his name by **3<sup>rd</sup> November 2009**. He obtained the same on **9<sup>th</sup> December 2009** and by **14<sup>th</sup> December 2009**, he was demanding for more payment from the 1<sup>st</sup> Plaintiff. It is evident that parties are bound by the contract that they have entered. See the case of **Total Kenya Ltd...Vs...Joseph Ojiem, Nairobi HCCC No.1243 of 1999**, where the Court held that:-

***“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”***

The 1<sup>st</sup> Plaintiff and 1<sup>st</sup> Defendant entered into a sale agreement dated **4<sup>th</sup> August 2009**, and they are bound by the terms therein especially on termination of the said agreement. See the case of **National Bank of Kenya Ltd ...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, where the Court held that:-

***“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.***

Having found that the parties herein are bound by the sale agreement that they entered, then the 1<sup>st</sup> Defendant could not introduce other conditions that were not expressly or impliedly provided for in the said sale agreement.

The 1<sup>st</sup> Defendant stated that it was the 1<sup>st</sup> Plaintiff who was in breach of the sale agreement. However, it is evident that the 1<sup>st</sup> Defendant delayed in having the suit property registered in his name. He cannot blame the 1<sup>st</sup> Plaintiff for failure to remit the balance of the **Kshs.2,000,000/=** as it was a conditional payment upon the successful transfer of the suit property in the name of the Vendor.

The Vendor in his letter dated **14<sup>th</sup> December 2009**, gave the 1<sup>st</sup> Plaintiff until **20<sup>th</sup> December 2009**, to pay the additional balance and failure of the same, he was to automatically cancel the transaction. By writing that letter, the 1<sup>st</sup> Defendant forgot that he was bound by the sale agreement that he voluntarily entered into and he had a duty to fulfil the conditions thereon. He could not unilaterally cancel the transaction. The 1<sup>st</sup> Defendant could not invoke new terms in the contract such as payment of **Kshs.6,930,000/=** in default for a period of **42 months**, whereas he was the one in breach and the said contract was signed on **4<sup>th</sup> August 2009**, and it superseded the earlier contracts. See the case of **Kenya Breweries Ltd...Vs...Natex Distributors Ltd, Nairobi HCCC No.704 of 2000**, where

the Court held that:-

***“Parties to a written contract are bound by its terms and the invocation of nonexistent clause to terminate a contract is not legitimate even though there is a termination clause. However much a party resents the behavior of another party to the contract, it cannot terminate it without following the laid down procedure”.***

Though the sale agreement herein does not contain the termination clause, the said agreement was subject to the Law Society of Kenya

Conditions of Sale. In the said Conditions of Sale (1989) in clause 4 on completion, it provides as follows:-

***“If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition”.***

The 1<sup>st</sup> Defendant did not comply with the above condition and did not give a **Completion Notice** which meant the transaction was to be completed within 21 days of the said service. The 1<sup>st</sup> Defendant arbitrarily terminated the sale agreement herein and this Court finds and holds that the valid sale agreement herein was not lawfully terminated.

***iv) Did the 2<sup>nd</sup> Plaintiff occupy the suit property LR.No.Nairobi Block 26/113 as a tenant or purchaser?***

There is no doubt that as at the time of filing this suit, the 2<sup>nd</sup> Plaintiff who is a Director of 1<sup>st</sup> Plaintiff Company was in occupation of the suit property. There is also no doubt that he had been distrained for rent by the 3<sup>rd</sup> Defendant with instructions from the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant had confirmed that when he allegedly purchased the suit property from 1<sup>st</sup> Defendant, he found the 2<sup>nd</sup> Plaintiff occupying the said property. That the 2<sup>nd</sup> Plaintiff and 2<sup>nd</sup> Defendant met at a **Java Restaurant** and 2<sup>nd</sup> Plaintiff agreed to pay rent of **Kshs.120,000/=** per month. The 2<sup>nd</sup> Plaintiff had alleged that he took possession of the suit property in **May 2007**, when the first contract for sale was supposed to be completed. He had allegedly by then paid **Kshs.3.2 million** as part of the purchase price with a balance of **Kshs.4.3 million** which was to be paid upon completion. Though the 1<sup>st</sup> Defendant alleged that he had no privity of contract with the 2<sup>nd</sup> Plaintiff and that 2<sup>nd</sup> Plaintiff entered into the suit premises as a licensee, it is clear that 2<sup>nd</sup> Plaintiff is one of the Directors of the 1<sup>st</sup> Plaintiff and he is the one who made most the payments to the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant did not deny that the 2<sup>nd</sup> Plaintiff entered into the suit premises in anticipation of the purchase of the same in the **year 2007**. The 1<sup>st</sup> Defendant alleged that 2<sup>nd</sup> Plaintiff was a tenant/licensee. It is trite law that he who alleges must prove. See **Sections 107 and 109** of the **Evidence Act**, which provide:-

**107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.**

**109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.**

The 1<sup>st</sup> Defendant did not avail any evidence to prove that indeed the 2<sup>nd</sup> Defendant was a tenant in the suit premises. The 2<sup>nd</sup> Plaintiff testified that the 1<sup>st</sup> Defendant gave him vacant possession of the suit property after he (1<sup>st</sup> Defendant) failed to meet the condition of the first sale agreement wherein completion was supposed to be on **27<sup>th</sup> May 2007**. Indeed there was no completion on the particular date and this Court would have no reasons to doubt the 2<sup>nd</sup> Plaintiff's evidence. It is evident that from **May 2007**, the 1<sup>st</sup> Defendant never attempted to evict the 2<sup>nd</sup> Plaintiff from the suit premises.

The Court therefore finds and holds that indeed the 2<sup>nd</sup> Plaintiff entered into the suit premises with the permission and knowledge of the 1<sup>st</sup> Defendant and not as a tenant but as an intended purchaser and there was no indication that 2<sup>nd</sup> Plaintiff was entitled to pay rent. The 1<sup>st</sup> Defendant was also in possession of part payment of the purchase price and he cannot deny the 2<sup>nd</sup> Plaintiff's occupation of the suit premises as an intended purchaser.

***v) Was the 2<sup>nd</sup> Plaintiff ever a tenant of the 2<sup>nd</sup> Defendant's and liable for eviction for non-payment of rent?***

From the available evidence, it is evident that the 2<sup>nd</sup> Plaintiff was in occupation of the suit property with the knowledge and permission of the 1<sup>st</sup> Defendant from **May 2007**. It is also not in doubt that the 1<sup>st</sup> Defendant unlawfully terminated the sale agreement between himself and the 1<sup>st</sup> Plaintiff and therefore failed to transfer the suit land to the 1<sup>st</sup> Plaintiff though he was still holding substantial amount of the purchase price. It is also evident that the 1<sup>st</sup> Defendant allegedly transferred the suit property to the 2<sup>nd</sup> Defendant on **14<sup>th</sup> January 2010**, a few days after demanding additional amount of money from the 1<sup>st</sup> Plaintiff.

It is also not in doubt that no sale agreement was produced confirming this transaction between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant. There was also no evidence of payment of **Kshs.12 million** the alleged purchase price. It is also not in doubt that if at all the 2<sup>nd</sup> Defendant purchased the suit property, he purchased it while the 2<sup>nd</sup> Plaintiff was in occupation. He did not purchase a vacant premises. The 2<sup>nd</sup> Defendant admitted that he did purchase the suit property while knowing of the presence of the 2<sup>nd</sup> Plaintiff in the suit premises. He was even aware that the 1<sup>st</sup> Defendant did not complete the intended sale between himself and the 1<sup>st</sup> Plaintiff. Therefore the 2<sup>nd</sup> Defendant was not an innocent purchaser without notice.

The 2<sup>nd</sup> Defendant alleged that when he purchased the suit property, he met the 2<sup>nd</sup> Plaintiff in a **Java Restaurant** and they discussed about the tenancy of the said premises. However, the 2<sup>nd</sup> Plaintiff denied such a meeting and alleged that he was never a tenant of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant therefore had a duty to prove the said allegation given that he is the one who had alleged. The 2<sup>nd</sup> Defendant did not avail any evidence of any tenancy agreement between himself and the 2<sup>nd</sup> Plaintiff.

It is also evident the 2<sup>nd</sup> Defendant did instruct the 3<sup>rd</sup> Defendant to distraint for rent on the suit premises which was occupied by the 2<sup>nd</sup> Plaintiff. However, there was no evidence of any tenancy agreement between the two. This Court finds and holds that there is no evidence whatsoever that the 2<sup>nd</sup> Plaintiff was a tenant of the 2<sup>nd</sup> Defendant and was liable to be evicted for non-payment of rent.

***vi) Are the Plaintiffs entitled to the prayers sought and/or alternatively is the 2<sup>nd</sup> Defendant entitled to his Counter-claim?***

This Court has found and held that the 1<sup>st</sup> Defendant arbitrarily terminated the sale agreement between himself and the 1<sup>st</sup> Plaintiff. The Court has also found that the 2<sup>nd</sup> Plaintiff entered into the suit premises with the permission of the 1<sup>st</sup> Defendant as an intended purchaser. He was therefore not a tenant. The 2<sup>nd</sup> Defendant purchased the suit premises with the knowledge that the 2<sup>nd</sup> Plaintiff was in occupation therein. There was no tenancy agreement between the Plaintiffs and the 2<sup>nd</sup> Defendant and this Court cannot find and hold that 2<sup>nd</sup> Plaintiff was liable to pay rent of **Kshs.120,000/=** per month to the 2<sup>nd</sup> Defendant and that non-payment of the same meant that 2<sup>nd</sup> Plaintiff was liable to eviction. Therefore the distress for rent carried upon the 2<sup>nd</sup> Plaintiff herein was without basis. The 2<sup>nd</sup> Plaintiff obtained a Court Order on **20<sup>th</sup> April 2010** restraining the Defendants from purporting to levy the said distress but the 2<sup>nd</sup> Plaintiff alleges that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not return the distrained goods to him.

The Plaintiffs have come to court seeking for various prayers. Having found that it was the 1<sup>st</sup> Defendant who failed to meet his part of the bargain, are the Plaintiffs entitled to the prayers sought?

The Plaintiffs have asked the Court to declare that the 1<sup>st</sup> Defendant's sale and transfer of the suit property **Nairobi Block 26/113**, to the 2<sup>nd</sup> Defendant on the **14<sup>th</sup> January 2010** was obtained in breach of law, was fraudulent and is therefore null and void *ab initio* and the same should be cancelled.

The 1<sup>st</sup> Defendant admitted that after the 1<sup>st</sup> Plaintiff failed to pay the full purchase price, he cancelled the intended transaction and sold the property to the 2<sup>nd</sup> Defendant. As the Court stated earlier, there was no sale agreement produced in court between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. No evidence of any written contract as is envisaged by Section 3(3) of the Contract Act. There was no evidence of payment of the purchase price. The 1<sup>st</sup> Defendant sold the suit property after he unlawfully terminated the sale agreement between himself and the 1<sup>st</sup> Plaintiff. Even after the 1<sup>st</sup> Defendant terminated the sale agreement between himself and the 1<sup>st</sup> Plaintiff he did not return the part purchase price already paid to him. He instead demanded for more money from the 1<sup>st</sup> Plaintiff. See the case of **Ayub Ndungu...Vs...Marion Waitera Gacheru (2006) eKLR**, where the Court held that:-

***“The law requires that in the case of rescission of a contract for the sale of land the vendor returns the deposit to the purchaser.....”.***

The 1<sup>st</sup> Defendant herein did not return the purchase price and did not complete the sale. He instead allegedly sold the suit property to the 2<sup>nd</sup> Defendant in very unclear terms. If indeed the said sale was done, then the same breached Section 3(3) of the Contract Act.

The 2<sup>nd</sup> Defendant alleged that he sold the suit property to **Joshua Hollanda**. However there was no official search produced in court to show that indeed the 2<sup>nd</sup> Defendant sold the suit land to the said 3<sup>rd</sup> Party. The 2<sup>nd</sup> Defendant had also stated that the suit property was sold by the Bank to the 3<sup>rd</sup> Party. There was no evidence to that effect. If the 2<sup>nd</sup> Defendant sold the suit property to a 3<sup>rd</sup> Party, he did so while litigation was ongoing. The Court will rely on the case of **Mbugua Njuguna...Vs...Elijah Mburu & Another (2004 eKLR)**, where the Court of Appeal held that:

***“Apparently, the Respondent caused the suit land to be partitioned when litigation was pending in the Superior Court and in breach of the orders of injunction in order to impede the course of justice by making it difficult to enforce the orders the Superior Court could have made if it had allowed the appellants claim. The Respondent's action was illegal and had the superior court allowed the appellant's claim, it had jurisdiction to enforce the order of injunction by revoking the partitions and restoring the register of the suit land to the state prevailing at the time the suit was filed in order to give efficacy to its orders”.***

Bearing in mind the above provisions of law and the fact that the 1<sup>st</sup> Defendant unlawfully terminated the sale agreement between himself and the 1<sup>st</sup> Plaintiff and the fact that there was no written contract for sale of the suit property between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant and further no evidence of the sale of this property to a 3<sup>rd</sup> party, the Court finds that the transfer of the suit property to the 2<sup>nd</sup> Defendant on **14<sup>th</sup> January 2010**, was in breach of the law and it is therefore null and void *ab initio* and is liable to cancellation. As provided by Section 80(1) of the Land Registration Act, the Court directs that the register herein be rectified and the registration of the 2<sup>nd</sup> Defendant herein on **14<sup>th</sup> January 2010**, be cancelled forthwith.

The Plaintiffs have also urged the Court to order the 1<sup>st</sup> Defendant to specifically perform the sale agreements and deliver to the 1<sup>st</sup> Plaintiff the documents as specified in the sale agreement dated **4<sup>th</sup> August 2009**.

The Court had earlier found and held that parties are bound by the terms of their contract. In the instant suit, the parties are bound by the terms of the agreements entered between themselves and specifically the sale agreement dated **4<sup>th</sup> August 2009**. In the said agreement, **Clause 5.3(a)** is very clear on the obligations of the vendor before completion date.

The Vendor did not fulfil the said obligations. The 1<sup>st</sup> Plaintiff alleged that it was willing and able to fulfil all the terms of the agreement.

The Plaintiffs have sought for specific performance which is an equitable remedy and is based on existence of a valid and enforceable contract. There is a valid and enforceable contract herein between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. Further, specific performance is granted where complete justice will be done by such an award rather than an award of damages. See the case of **Kisumuwllah Oil Industries Ltd...Vs...**

**Panasiatic Commodities PTA Ltd & Another, Civil Appeal No.100 of 1995**, where the Court held that:-

***“And in a contract relating to the sale and purchase of land, the law takes the view that the purchase of a particular piece of land or particular house (however ordinary) cannot on the vendor’s breach obtain a satisfactory substitute, so that specific performance is available to him”.***

Further it is trite that a party seeking an order of specific performance must show and satisfy the court that he/it can comply and that it must be ready, willing and able to do so and not just mere allegations. Further the said party must show proof that he/it has complied with his/its part of the agreement. See the case of **Nabro Properties Ltd...Vs...Sky Structures Ltd & Others, Civil Appeal No.175 of 2000 (2002) 2 KLR 299**.

Was the 1<sup>st</sup> Plaintiff herein able to satisfy to the court that it was able, ready, willing and able to comply with the terms of the contract?

The parties had agreed through their sale agreement dated **4<sup>th</sup> August 2009**, that the purchase price would be **Kshs.11 million**. The 1<sup>st</sup> Plaintiff had already paid **Kshs.6,000,000/=** and the balance of **Kshs.5,000,000/=** was to be paid in four instalments. From the available evidence, it is evident that the 1<sup>st</sup> Plaintiff did pay the first three instalments of **Kshs.1,000,000/=** each. However the balance of **Kshs.2,000,000/=** was to be paid upon successful registration of the title in the name of the 1<sup>st</sup> Defendant. This registration did not happen until **9<sup>th</sup> December 2009**. Instead of the 1<sup>st</sup> Defendant confirming to the 1<sup>st</sup> Plaintiff that the title was now in his name so that the 1<sup>st</sup> Plaintiff could pay the balance of **Kshs.2,000,000/=**, he demanded for more money especially **Kshs.6,930,000/=** as payment of interest in default for **42 months**. This request for more money was irregular as the 1<sup>st</sup> Defendant had not fully complied with Clause 5.3(a) of the said sale agreement dated **4<sup>th</sup> August 2009**. The 1<sup>st</sup> Plaintiff through its witness **John Kangogo**, the 2<sup>nd</sup> Plaintiff, testified that it was ready, willing and able to complete the sale. The Plaintiffs have thus satisfied the above stated conditions that is the 1<sup>st</sup> Plaintiff was and is ready, willing and able to perform all the terms of the sale agreement **dated 4<sup>th</sup> August 2009**.

Having found that the 1<sup>st</sup> Plaintiff has satisfied the conditions for grant of specific performance, this Court finds and holds that it is just and proper to order that the 1<sup>st</sup> Defendant do specifically perform what he was supposed to perform as pleaded in prayer No.2 of the Plaint herein.

Having also found that the 1<sup>st</sup> Defendant is liable to specifically perform as required by the sale agreement in issue, the Court finds it prudent to restrain the Defendants from any dealings whatsoever on the suit property that would prejudice the 1<sup>st</sup> Plaintiff’s interest on the said suit property. Consequently, this Court allows prayers No.4, 5 and 6 of the Plaint.

On prayer No.7, the Court found and held that the 2<sup>nd</sup> Plaintiff was never a tenant of the 2<sup>nd</sup> Defendant as no tenancy agreement was entered between the two parties. If the 2<sup>nd</sup> Plaintiff was never a tenant of the 2<sup>nd</sup> Defendant, then the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ action of levying distress against the 2<sup>nd</sup> Plaintiff was irregular and unlawful. The 2<sup>nd</sup> Plaintiff was in occupation of the suit property **since 2007** as an intended purchaser. If the ownership of the suit property had changed, which the court found was done under very unclear circumstances, then the 2<sup>nd</sup> Defendant ought to have given the 2<sup>nd</sup> Plaintiff sufficient Notice to move out of the suit premises. The 2<sup>nd</sup> Defendant did not do so. The Court finds that the Plaintiffs are also entitled to prayer No.7 of the claim herein.

On prayer No.8, the Court finds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants actions of selling and purchasing the suit property herein and which premises the Plaintiffs had occupied **since 2007**, and had paid substantial amount of money towards the purchase price and fulfillment of the sale agreement dated **4<sup>th</sup> August 2009**, smacked of fraud and illegality. The 2<sup>nd</sup> Plaintiff suffered mental anguish and embarrassment due to the unlawful distress levied against him. The Plaintiffs deserves to be paid general damages in the tune of **Kshs.5,000,000/=** plus interest from the date of this Judgement to the date of payment in full.

On prayer No.9, it is evident that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants carried an illegal distress against the 2<sup>nd</sup> Plaintiff herein. The Plaintiff have specifically proven their claim. Consequently, the Court allows the Plaintiffs prayer No.9 herein.

On whether the 2<sup>nd</sup> Defendant is entitled to his Counter-claim, the Court finds that he was not an innocent purchaser for value and therefore he is not entitled to any of his prayers sought in the Counter-claim.

#### **vii) Who is liable to pay costs of the suit?**

As provided by Section 27 of the Civil Procedure Act, costs are granted at the discretion of the Court and the said discretion must be exercised judiciously. See **Halsbury’s Law of England**, which provides as follows:-

***“The court has discretion as to whether costs are payable by one party or another, the amount of those cost, and when they are to be paid. Where costs are in the discretion of the court, a party has not right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially. It must not be exercised arbitrarily but in accordance with reason and justice”.***

However, it is also trite that costs follow the event. See the case of *R...Vs...Rosemary Wairimu Munene, Exparte Applicant...Vs...Ihururu Dairy Farmers Cooperative Society Ltd*, where the Court held that:-

***“The issue of costs is the discretion of the court as provided by the law. The basic rule on attribution of costs is that costs follow the event.... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case”.***

Bearing in mind the above provisions of law and the decided cases on the issue of costs, the Court will be guided by the law that costs follow the event. The Plaintiffs herein are the successful litigants and should ordinarily be accorded costs. Consequently, the Court will use its discretion and award costs of this suit to the Plaintiffs who are the successful litigants. The costs to be borne by all the Defendants jointly and severally.

Having now carefully considered the available evidence, the relevant provisions of law, the written submissions and cited authorities, the Court finds that the Plaintiffs have proved their case on a balance of probability. Consequently, the Court enters Judgement for the Plaintiffs against the Defendants jointly and severally in terms of prayers Nos.1, 2, 4, 5, 6, 7, 8 and 9 of the Plaint dated **27<sup>th</sup> April 2010**.

On prayer No.8, the Plaintiffs are entitled to general damages of **Kshs.5,000,000/=** payable by all the Defendants jointly and severally with interest from the date of this Judgement until payment in full. The Court also dismisses the 2<sup>nd</sup> Defendant’s Counter-claim entirely with costs to the Plaintiffs.

Further, the Plaintiffs are entitled to costs of the suit to be borne by all the Defendants jointly and severally plus interest thereon.

On any other relief, the Plaintiffs are entitled to a refund of **Kshs.400,000/=** deposited in Court as security for injunctive order. The said deposit was made on **7<sup>th</sup> March 2011** as per the **Deposit Receipt No.0013045**.

It is so ordered.

**Dated, Signed and Delivered at Thika this 23<sup>rd</sup> day of February 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

No appearance for Plaintiffs though served with Judgement Notice

No appearance for 1<sup>st</sup> Defendant though served with Judgement Notice

Mr. Wanjau holding brief for Mr. Kinga for 2<sup>nd</sup> Defendant

No appearance for 3<sup>rd</sup> Defendant

Diana - Court clerk.

**L. GACHERU**

**JUDGE**

**Court** – Judgement read in open court in the presence of the above advocate. The Judgement Notices had been served and receipted.

**L. GACHERU**

**JUDGE**

**23/2/2018**