



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO.736 OF 2015

JAVID IQBAL KARIM.....1st PLAINTIFF

(as the administrator of the Estate of the late Gulam Fatima)

ABDUL KADHEER MUGHAL.....2nd PLAINTIFF

(in his capacity as the attorney of Hajira Bibi w/o Allah Rahim Wazir

Mohammed Mughal/o Fateh Mohammed Executrix of the Estate of the

late Allah rahim Wazir Mohamed Mughal)

-VERSUS-

ZE YUN YANG.....DEFENDANT

JUDGEMENT

By a **Plaint** dated **6th March 2006**, the Plaintiffs herein brought a claim against the Defendant and sought for the following orders:-

- a. The payment of Kshs.5,499,784/= as claimed under paragraph 10 and 11 of the Plaintiff.**
- b. A declaration that all monies so far paid be forfeited to the Plaintiffs.**
- c. A declaration that the entry relating to the transfer of the property in the name of the Defendant be cancelled and the ownership of the property reverts to the Plaintiffs. And the Plaintiffs be at liberty to sell the property to any other willing purchaser.**
- d. The Defendant do pay to the Plaintiffs mesne profits for occupation of the property from the 1st March 2004, until possession is delivered up to the Plaintiffs.**
- e. And an order that the Defendant do deliver up possession of the said property to the Plaintiffs forthwith In any event:-**
- f. Further or other relief which this Court may deem fit to grant.**
- g. Interest on all sums found due payable to the Plaintiffs at the rate of 14% per annum which at present is the lending rate of the Banks.**
- h. Costs of this action.**

In their statement of claim, the Plaintiffs alleged that by a Sale Agreement dubbed as '**Interim Agreement**' which was entered between the Plaintiffs and the Defendant on the **4th February 2004**, it was agreed that the suit **property LR.No.209/1673**, situated in **Pangani** area of the **Nairobi** would be sold to the Defendant by the Plaintiffs for a consideration of **Kshs.7,500,000/=**. That therefore meant that the final purchase price was to be agreed upon. They further alleged that a sum of **Kshs.5,000,000/=** was paid to them by the Defendant and there

remained a balance of **Kshs.2,500,000/=**. In the said agreement, there were terms and conditions agreed upon and among them was that the Plaintiffs were to give the Defendant the original title deed of the suit property and they were also to give the Defendant vacant possession of the property by **28th February 2004**. Further that the Plaintiffs indeed gave the Defendant the said possession as agreed on **28th February 2004**, and the Defendant took possession and occupied the said property and commenced erection of a wall around the property.

The Plaintiffs further alleged that by a subsequent agreement dated **1st March 2004**, the said property was further agreed to be sold for a sum of **Kshs.10,000,000/=** out of which a deposit of **Kshs.1,000,000/=** was made to the advocate for the Plaintiffs to hold as **stake holder** until completion of the sale. It was further agreed that the Plaintiffs' advocate would use the said deposit to pay the land rates and other expenses to obtain the extension of the term of the lease of the said property. It was their further allegation that the said extension of the lease was done by the Plaintiffs' advocate. Further that the Plaintiffs were ready and able to complete the transaction and therefore their advocate sent over all the documents needed to complete the transfer of the property in favour of the Defendant including the executed transfer of the property. It was also alleged that after the transfer, the Defendant's advocate stamped and registered the transfer in favour of the Defendant and paid **Kshs.6,000,216/=** to the Plaintiffs' advocate and stated that was the final payment of the purchase price. It was further alleged that the Plaintiffs' advocate obtained the discharge of the existing charge against the property and carried out all the work for obtaining extension of the term of the lease and the Defendant is not entitled to claim any monies for the discharge of charge and for the extension of the term of lease. Further that the Defendant is not entitled to any refund of any monies at all. It was the Plaintiffs further allegations that out of the two sale agreements entered between the parties herein, the purchase price was **Kshs.17,500,000/=** of which there is a balance of **Kshs.5,499,784/=** and that is the amount the Plaintiffs are claiming from the Defendant. The Plaintiffs urged the Court to allow their claim as stated in the Plaintiff.

This suit is contested and the Defendant filed his Defence dated **3rd July 2006**, and denied all the allegations made by the Plaintiffs. The Defendant admitted to have entered into the sale agreement with the Plaintiffs and paid **Kshs.5,000,000/=** as part payment to the Plaintiffs and there was a balance of **Kshs.2,500,000/=**. He further averred that the said sale agreement was entered on certain conditions among them the Plaintiffs delivering vacant possession by **28th February 2004**, and procuring a discharge of charge registered over the said property. Further the Defendant was to procure the extension of lease for the property and therefore utilize **Kshs.300,000/=** from the balance of the purchase price and was to pay **Kshs.2.2 million** to the Plaintiffs after deliver of possession of the property to the Defendant. He further averred that the Plaintiffs failed to procure the aforesaid discharge by the agreed date and the aforesaid agreement was subsequently superseded by another sale agreement entered into between the Plaintiffs and the Defendant on **1st March 2004**, whereby it was agreed that the sale price for the property was **Kshs.10,000,000/=**. By virtue of the said agreement, the Defendant paid a deposit of **Kshs.1 million** leaving a balance of **Kshs.9,000,000/=**. He further alleged that as at **1st March 2004**, he had already paid **Kshs.5,000,000/=** to the Plaintiffs pursuant to the agreement dated **4th February 2004**, and therefore the purchase price was **Kshs.15,000,000/=** of which he had paid **Kshs.6,000,000/=** to the Plaintiffs. He further averred that he took possession on **28th February 2004**, and commenced the process of extension of lease.

After the Plaintiffs eventually procured the discharge from **Habib Bank**, and the lease was extended, the property was registered in favour of the Defendant. He further averred that after the deduction of cost of procuring the extension of lease, the balance was **Kshs.6,000,216/=** which sum he paid to the Plaintiffs as the final settlement of the purchase price. He therefore denied owing the Plaintiffs **Kshs.5,499,784/=** as alleged by the Plaintiff in their claim and that the said claim is an effort by the Plaintiffs to unjustly enrich themselves by exaggerating the purchase price of the suit property. The Defendant alleged that there is no justification for him to pay the amount claimed by the Plaintiffs and further averred that the suit is defective and incompetent in law. He urged the Court to strike it out and/or dismiss the same with costs.

In their reply to the Defence, the Plaintiffs alleged that the extension of the term of lease was procured and done by the Plaintiffs' advocate **M. A. Khan**, and not by the Defendant and therefore the Defendant is not entitled to deduct any monies for this work. The Plaintiffs further averred that the Defence is a sham and they urged the Court to dismiss it with costs and the prayers sought in the Plaintiff be allowed.

The matter commenced for *viva voce* evidence on **16th May 2016**, wherein the Plaintiffs called one witness, the 2nd Plaintiff herein. The Defendant too gave evidence for himself and called no witness.

The Plaintiffs' Case

PW1 – Abdul Kadheer Mughal, the 2nd Plaintiff gave evidence and referred to his witness statement dated **25th September 2014**, which he fully adopted. He stated that the suit property is **LR.No.209/1673**, which is situated in Pangani area of Nairobi. He testified that he is a co-owner together with 1st Plaintiff herein. It was his testimony that they entered into a sale agreement with the Defendant to purchase the suit land at **Kshs.7,500,000/=** of which **Kshs.5,000,000/=** was paid to them by the Defendant. That the title deed for this suit land was held by an advocate but after payment of the money that they owed to his client, the said title deed was released to the Defendant. They later entered into a 2nd agreement for **Kshs.10,000,000/=** and a **10%** was paid to them by the Defendant amounting to **Kshs.1,000,000/=**. There was a balance of **Kshs.9,000,000/=** which was to be paid on completion. He alleged that after the transfer, the Defendant paid **Kshs.6,000,216/=** and there was a balance of **Kshs.3,000,000/=** and since there was also another balance of **Kshs.2,500,000/=** the total balance due is **Kshs.5.5 million**. That the Defendant has failed to pay the said amount of **Kshs.5.5 million** and thus the suit herein. He also sought for interest on the amount due.

It was his evidence that the Defendant has put up 160 flats on the property but he has refused to pay them the balance of the purchase price though the Defendant has sold all the flats. He produced the list of documents as exhibit No.1 in court. In cross examination, the Plaintiff admitted the existence of the two sale agreements;- one for **Kshs.7,500,000/=** in which **Kshs.5,000,000/=** was paid to them and another dated **1st March 2004**, for **Kshs.10,000,000/=**. He further admitted that in the second agreement, **Kshs.7,500,000/=** was not included. He also admitted that **Kshs.2,500,000/=** was the balance but he did not include it in the 2nd agreement. He also admitted that he signed the transfer and the transfer was for only **Kshs.10,000,000/=** but there was a previous balance of **Kshs.2,500,000/=**. He denied that the extension of lease was done by the Defendant. He reiterated that the same was done by their advocate.

The Defendant's Case

DW1 – Ze Yun Yang gave evidence and adopted his witness statement dated 6th October 2014. He also produced the list of documents as his exhibits in court. He testified that his advocate for the transaction in issue was **Kihara Muttu** who died a while back. That his advocate dealt with extension of the lease of the suit property and the application for the said extension was done on 18th February 2004, by his advocate **Kihara Muttu**. He admitted that he entered into a sale agreement with the Plaintiffs dated 4th February 2004, for purchase of LR.No.209/1673, for a sum of **Kshs.7,500,000/=**, wherein he paid a down payment of **Kshs.5 million** to the Plaintiffs. The balance was **Kshs.2,500,000/=** which was to be paid upon the Plaintiffs fulfilling certain conditions including discharging of a charge from **Habib Bank Ltd** and procuring extension of lease.

He also stated that the Plaintiffs failed to satisfy the above stated conditions and another agreement dated 1st March 2004, was entered and the purchase price was agreed at **Kshs.10,000,000/=**. The purchase price was therefore raised to Kshs.15 million as he had already paid Kshs.5 million to the Plaintiffs. He also paid **Kshs.1,000,000/=** on 1st March 2004, and the balance was **Kshs.9,000,000/=**. That his advocate **Kihara Muttu** applied for extension of lease of the suit property from the Commissioner of Lands and the total costs of the extension was about **Kshs.2.5 million**, which were met by the Defendant and he was entitled to recover it from the balance of the purchase price. It was his testimony that after the deduction of all the expenses from the balance of **Kshs.9 million**, his advocate remitted **Kshs.6,000,216/=** to the Plaintiffs' advocate as the final settlement of the purchase price.

He further stated that he did not owe the Plaintiffs any money as claimed by them and that he did not breach any of the agreement that they had executed with the Plaintiffs. It was his contention that he performed his part of the agreement faithfully. Further that he constructed apartments on the suit property which he sold to third parties and therefore the Plaintiffs claim for possession of the suit property is therefore untenable. That even if the Plaintiffs were to take possession of the suit property, they would have to pay the current market value of the property to him and the apartments thereon. He urged the Court to dismiss the Plaintiffs' suit with costs.

The parties thereafter filed their written submissions to support their respective positions. In that regard, the **Law Firm of Tariq Khan & Associates**, for the Plaintiffs filed their written submissions on 9th

November 2016, and urged the Court to allow the Plaintiffs' case. They relied on various decided cases among them the case of **National Bank of Kenya Ltd...Vs...Pipeplastic Samkolit(K) Ltd & Another, Civil appeal No.95 of 1999 (2001) KLR 112**, 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 and undue influence are pleaded and proved”.

Plaintiffs also relied on the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi High Court Civil Case No.956 of 1991 (1991)LLR 7670 (HCK)**, 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”.

Further the Plaintiffs also relied on **Section 107 of the Evidence Act** which provides as follows:-

- 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.**

In conclusion, the Plaintiffs urged the Court to find in their favour and relied on the case of **Aziz...Vs...Bhatia Brothers Ltd (2001) 1EA 7 (CAT)**, where the Court held that:-

“A party who has performed his part of the bargain may be assisted by the court to enforce the contract against a defaulting party.”

The Defendant through the **Law Firm of Mucheru, Oyatto & Associates** filed the written submissions on 24th March 2017, and urged the Court to dismiss the Plaintiffs' case. The Defendant relied on the case of **Gimalu Stats Ltd & 4 Others...Vs...Finance Corporation & Another (2006) eKLR**, where the court relied on the case of **Morris...Vs...Baron & Co.** and held that:-

“In the first case (variations) there are no executory clauses in the second arrangements as would enable you to sue upon that alone, if the first did not exist. In the second (rescission) you would sue on the second arrangement alone and the first contract is got rid of either by express words to that effect or because the second dealing with the same subject matter as the first but in a different way. It is impossible that the two should be performed together”.

Further he relied on the case of **Caliph Properties Ltd...Vs...Barbel Sharma & Another (2015) eKLR**, where the Court relied on the case of **Kenya Breweries Ltd...Vs...Okeyo (2002) 1EA** and held that:-

“it is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party”.

He further relied on the case of Kyangaro ...VS...Kenya Commercial Bank Ltd & Another (2004) 1KLR 126, where the Court held that:-

“...he that comes to equity must come with clean hands and must do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. He who comes to equity must fulfill all or substantially and all the outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he had not done equity”.

In conclusion, the Defendant urged the Court to dismiss the Plaintiffs' suit with costs.

This Court has now carefully considered and evaluated the evidence on record together with all the pleadings and the exhibits thereto. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and this Court renders itself as follows:-

There is no doubt that the Plaintiffs herein and the Defendant entered into two sale agreements. The first sale agreement is dated **4th February 2004**, wherein the Plaintiffs agreed to sell to the Defendant the property known as **LR.No.209/1673** for **Kshs.7,500,000/=** which was referred to as part payment. In the said agreement, the Plaintiffs were paid **Kshs.5,000,000/=** and the balance was agreed to as **Kshs.2.5 million** which was to be paid upon fulfillment of certain conditions. It is also not in doubt that in the said sale agreement, the Defendant was allowed to take possession of the suit property by **28th February 2004**, and it was confirmed by the parties in their evidence that he indeed took possession of the suit property on the stated date and even started to erect a wall around the plot. The parties did confirm in their evidence that eventually the Defendant built 160 apartments on the suit property and sold them to 3rd parties. It is also not in doubt that in the agreement dated **4th February 2004**, the Defendant was mandated to apply for extension of lease at a cost of **Kshs.300,000/=** which was to be obtained from the balance of **Kshs.2.5 million** of the purchase price. The balance of **Kshs.2.2 million** was to be paid to the Plaintiffs after the Defendant had taken possession of the suit property.

There is also no doubt that the parties did enter into a second agreement for sale on **1st March 2004**, wherein the parties agreed that the suit property would be sold at **Kshs.10,000,000/=**. This agreement did not clearly state whether it superseded the earlier interim agreement but the parties carried on like there was no earlier agreement. It was agreed that the purchase price would be **Kshs.10,000,000/=** wherein **Kshs.1,000,000/=** was paid to the vendors' advocate upon execution of the agreement as stakeholders. Further the balance of **Kshs.9,000,000/=** was to be paid within 7 days of the registration of the indenture. It is also evident from **clause (v)** of the special conditions that:-

“The Vendors Advocates shall utilize out of the deposit amount paid herein the monies needed to carry out extension of the Government lease of the property being sold”.

From the above clause, it is clear that the amount needed for the extension of the lease was to be utilized from the deposit of **Kshs.1,000,000/=**, which was held by the Vendors advocates as stakeholder.

It is evident that by the time the second sale agreement was entered, the Defendant had already paid **Kshs.5,000,000/=** to the Plaintiffs which was agreed upon in the interim sale agreement of **4th February 2004**.

There was a balance of **Kshs.2,500,000/=**. It is therefore evident that with the payment of **Kshs.1,000,000/=** to the Plaintiffs advocates upon execution of the sale agreement dated **1st March 2004**, the Defendant had paid **Kshs.6,000,000/=** to the Plaintiffs.

From the first sale agreement which was indicated as interim agreement, it was clear that this was part payment agreed at **Kshs.7,500,000/=** and therefore a final agreement was to be reached. This Court will ascertain the intention of the parties from the terms of the contract. See the case of Portgieter...Vs...Stumberg & Another (No.2) 1972 EA 370, where the Court held that:-

“The court ascertains the intention of the parties from the term of the contract, the conduct of the parties and the circumstances of the case”.

Further in the case of Luluma...Vs...Coffee Marketing Board (1970) EA 155, the Court held that:-

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

There is also no doubt that the extension of the lease was later achieved and the suit property was transferred to the Defendant on **23rd February 2005**. It is evident that after the said transfer, the Defendant's advocate enclosed a **cheque No.100542** for **Kshs.6,000,216/=** as the full and final settlement of the balance of the purchase price. He alleged that the balance of the purchase price was arrived at after deduction of all the expenses incurred in facilitation of the extension of lease and transfer of the property to the Defendant. The Plaintiffs disputed this balance and alleged that they are the ones who met the expenses and they should not be penalized.

According to the Plaintiffs the purchase price of the suit property was **Kshs.17,500,000/=** made up of **Kshs.7,500,000/=** referred to in the interim sale agreement of **4th February 2004**, wherein only **Kshs.5,000,000/=** was paid to the Plaintiffs with a balance of **Kshs.2,500,000/=**. Further, the second sale agreement of **Kshs.10,000,000/=** wherein **Kshs.1,000,000/=** was paid on execution of the sale agreement to be held as stakeholder and was also to be utilized to meet expenses for extension of the lease.

To the Defendant the purchase price was **Kshs.15,000,000/=** made up of **Kshs.5,000,000/=** already paid to the Plaintiffs in relation to the interim sale agreement of **4th February 2004**, and **Kshs.10,000,000/=** in relation to the second sale agreement of **1st March 2004**, wherein he paid **Kshs.1,000,000/=** to the Plaintiffs as down-payment. To the Defendant, the balance was therefore **Kshs.9,000,000/=** and after

deductions of the expenses incurred the final and full payment was supposed to be **Kshs.6,000,216/=** which was paid to the Plaintiffs vide **cheque No.10054** dated **17th March 2005**.

The dispute herein is whether the Defendant owes the Plaintiff the balance of **Kshs.5,499,784/=** alleged in the Plaint and whether the Defendant is in breach of the sale agreement and therefore the transfer of the property in his name should be cancelled and the said property revert to the Plaintiffs herein, or whether the Defendant cleared payment of the balance of the purchase price and that the Plaintiffs suit should be dismissed with costs.

The parties herein had on **25th May 2005**, agreed on a number of issues to be determined by this Court. However the Court will collapse them into the following issues for determination.

- i. Which document/documents constituted the agreement for sale of LR.No.209/1673?***
- ii. What was the purchase price for the suit property.***
- iii. What were the payments made by the Defendant towards purchase of the suit property?***
- iv. Who was responsible in obtaining the extension of lease of LR.No.209/1673 and who indeed obtained it?***
- v. What was the cost of extension of the lease?***
- vi. Was the transaction completed and is any party in breach of the agreement for sale?***
- vii. Are the Plaintiffs entitled to the prayers sought in the Plaint?***
- viii. Who is to pay costs of the suit?***

i. Which document/documents constituted the agreement for sale of LR.No.209/1673?

As the Court had indicated earlier, there are two sale agreements herein. The first one was referred to as Interim Agreement and it is dated **4th February 2004**, wherein parties agreed that **Kshs.7,500,000/=** was part payment of the suit property. As the Court had also indicated the intentions of the parties are ascertained from the terms of the contract. This agreement was referred to as Interim Agreement.

Black Law Dictionary, 9th Edition defines '**Interim**' to mean '**Done, made or occurring for an intervening time; temporary or provisional**'

The interim agreement referred herein by the parties meant that it was a temporary agreement and a final agreement was to be entered. Indeed a final agreement was drawn and entered on **1st March 2004**. However, the second sale agreement did not clearly state that it superseded the earlier agreement dated **4th February 2004**. The Court finds that there are two agreements herein which are to be read together over the sale of the suit property. The Court will rely on the case of **National Bank of Kenya Ltd...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999**, 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”.

The Court finds that the parties herein entered into two agreements, interim agreement dated **4th February 2004** and 2nd sale agreement dated **1st March 2004**. Since the second sale agreement did not explicitly state that it superseded the interim agreement, the Court finds that the parties herein are bound by the two agreements entered by the parties herein on separate dates over the same suit property but involving the same parties.

ii. What was the purchase price for the suit property?

Having found that the parties are bound by the two sale agreements, the Court finds that the purchase price of the suit property is **Kshs.17,500,000/=** made of **Kshs.7,500,000/=** stated in the interim agreement and **Kshs.10,000,000/=** stated in the second sale agreement dated **1st March 2004**.

iii. What were the payments made by the Defendant towards purchase of the suit property?

The Court has held and found that parties are bound by the terms of their contract. In the interim agreement, the Defendant paid **Kshs.5,000,000/=** as part payment of the stated interim purchase price. The balance was given as **Kshs.2,500,000/=** in which **Kshs.300,000/=** was to be deducted for payment of extension of lease.

In the second sale agreement, the Defendant first paid **Kshs.1,000,000/=** as **10%** deposit to be held as stakeholder by the Plaintiffs advocates. Later on, on **17th February 2005**, a cheque of **Kshs.6,000,216/=** was paid to the Plaintiffs advocates. From the available evidence, what was paid directly to the Plaintiffs as settlement of the purchase price was **Kshs.5,000,000/=**, **Kshs.1,000,000/=** and **Kshs.6,000,216/=** which comes to a total of **Kshs.12,000,216/=**. Therefore from the available evidence, the amount paid directly to the Plaintiffs as payment of the purchase price is **Kshs.12,000,216/=**. However, from the interim sale agreement of **4th February 2004**, the Defendant was to use

Kshs.300,000/= as expenses for extension of lease. The Court has also seen other written agreement of payment of other expenses by the Defendant. The Court will deal with that in the next issue.

iv. Who was responsible in obtaining the extension of lease and Who actually obtained it?

There are two sale agreements herein which should be read together. In the interim sale agreement, the Defendant was mandated to apply for the extension of the lease at a cost of **Kshs.300,000/=** which was to be deducted from the balance of the purchase price which was **Kshs.2.5 million**. In the second sale agreement, the vendor was the one to apply for the extension of the lease and the Plaintiffs were mandated to use the deposits of **Kshs.1,000,000/=** for that purpose. However, there is an exhibit produced by the Defendant which is an application for extension of lease. The same was applied by **Kihara Muttu Advocate** who was the advocate for the Defendant. The said application was done on **18th February 2004**, and that was before the sale agreement dated **1st March 2004** was executed. The Defendant also produced documents exchanged between the defunct **City Council of Nairobi** and **Commissioner of Lands** over extension of lease of **LR.No.209/1673**, the suit property herein. Though the Plaintiffs in their evidence alleged that the application for extension of lease was done by their advocate, **M. A Khan**, there were no documents produced relating to that application of extension of lease. The Plaintiffs are the one who had alleged that their advocates applied and obtained the extension of lease. They had the onus of proof as provided by **Section 107 of the Evidence Act** which provides:-

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.

The Court will concur with the two authorities produced by the Plaintiffs that the court cannot rely on speculative evidence. See the case of **Rosetta Cooper...Vs...Gerald Nevil & Another (1961) EA 63**, where the Court held that:-

“It is not open for the court to adopt a speculative explanation without any evidence in support”.

Equally, the Court cannot find and holds that the Plaintiffs advocates applied and obtained the extension of lease without any evidence to support that. The Defendant has at least produced an application for extension of lease by his advocates and the documents relating to extension of lease between the two Government Departments. Further in the case of **Peterson Gutu Ondiek...Vs...Daniel Njuguna Gachohi, Nairobi HCCC No.4018 of 1990**, the Court held that:-

“Where evidence exists and the same is not adduced in court, the court may presume that it is not favourable to the party withholding it”.

After analyzing the available evidence, the Court finds that as per the interim agreement, the Defendant was responsible for extension of the lease and the Court finds that indeed his advocate did apply for the same on **18th February 2004**, before the second sale agreement was drawn. The Court therefore finds and holds that the Defendant herein did obtain the extension of lease and as was stated in the interim sale agreement, the cost of the same was **Kshs.300,000/=**.

v. What was the cost of the extension of the lease?

The Court will rely on the available exhibits and evidence to answer this question. Though the Defendant alleged that he spent substantial amount to obtain the extension of lease, the only receipt related to the extension of lease is the one dated **18th February 2004**, for **Kshs.20,000/=**. However, in the interim agreement, the Defendant was mandated to use **Kshs.300,000/=** for the extension of lease which was to be deducted from the balance of **Kshs.2,500,000/=**. The Court finds and holds that the cost of extension of the lease was **Kshs.300,000/=** paid by the Defendant as was mandated in the interim sale agreement dated **4th February 2004**.

vi. Was the transaction completed and was any party in breach of the sale agreements.

The transaction herein was for the transfer of the suit property from the Plaintiffs to the Defendant. The said transaction was indeed completed on **23rd February 2005**. The suit property was transferred to the Defendant and the indenture was registered so on **23rd February 2005**. The suit property is now in the name of Defendant. It was admitted in evidence by the parties that the Defendant did put up 160 flats on the suit property which flats he has now sold to 3rd parties. The transaction was indeed completed. However, the question is whether any of the party was in breach of the sale agreements.

As was indicated in the interim sale agreement dated **4th February 2004**, the Defendant was to pay a balance of **Kshs.2.2 million** upon obtaining vacant possession. Indeed, the Defendant obtained vacant possession on **28th February 2004**, and there is no evidence that he paid the balance of **Kshs.2.2 million** to the Defendant. The second sale agreement was not explicit that it superseded the interim agreement and therefore the Defendant was bound to pay the balance of **Kshs.2.2 million**. However, the Court has seen two other mini-agreements between the Plaintiffs and Defendant wherein Defendant was to pay some expenses which were to be deducted from the balance of the purchase price of the suit property. These amount are **Kshs.310,000/=** being payments to **Mr. Said Mohammed Ambe** and **Mrs Asha Mohammed**, who were tenants in the suit property and the amount of money was to facilitate their vacating of the suit premises. The said payments were done on **23rd February 2004**. The next payment was for **Kshs.182,471/=** which was payment of water bill and the said amount was to be deducted from the balance of the purchase price. It is evident that from the **Kshs.2.2 million**, the Defendant was to deduct **Kshs.497,471/=** as expenses incurred in settlement of bills on behalf of the Plaintiffs. After the said amount is deducted the remaining unpaid amount is **Kshs.1,702,529/=**.

Though the Defendant attached a supplementary list of documents to show the expenses that he incurred on behalf of the Plaintiffs, those expenses are not very clear that they were paid by the Defendant herein and on behalf of the Plaintiffs as there was no written agreement as is evident from the earlier referred agreements.

On the second agreement, it is evident that the Defendant paid **Kshs.1,000,000/=** at the first instance and **Kshs.600,216/=** on **17th February 2005**. The total amount paid by the Defendant to the Plaintiff was **Kshs.7,000,216/=** in regard to 2nd agreement. The balance therefore is **Kshs.2,999,784/=** which remain unpaid from the second agreement. Given that the purchase price was **Kshs.17,500,000/=** and the Defendant has paid **Kshs.12,000,216/=** to the Plaintiffs and he incurred costs of **Kshs.497,471/=** on behalf of the Plaintiffs, the Court finds that the total unpaid balance is **Kshs.4,702,313/=** which the Defendant is bound to pay. The Defendant has not paid the above stated amount and therefore he is in breach of the sale agreements.

vii. Are the Plaintiffs entitled to the prayers sought in their Plaint?

Having found that the Defendant owes the Plaintiffs a balance of **Kshs.4,702,313/=** and not **Kshs.5,499,748/=** as pleaded in the Plaint, the Court finds that the Plaintiffs are only entitled to payment of **Kshs.4,702,313/=**.

However, the Plaintiffs are not entitled to the other prayers as they voluntarily gave the Defendant vacant possession before the full purchase price was paid. The Defendant allegedly built 160 flats and sold them to 3rd parties. This Court cannot cancel the transfer as it was not obtained through **fraud**, and **cancelling** the said transfer and reverting the property to the Plaintiffs would inconvenience other 3rd parties who were not parties to the transaction between the Plaintiffs and Defendant. The Plaintiffs are not entitled to any mesne profits as they voluntarily gave vacant possession to the Defendant.

Having now carefully considered the available evidence, the Court finds that the Plaintiffs are only entitled to the prayer of payment of **Kshs.4,702,313/=** being the balance of the purchase price. The Court disallows the other prayers.

viii. Who is 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. However, it is trite that costs follow the cause. The Plaintiffs herein are the partial successful litigants. The Court finds that the Plaintiffs are entitled to costs of the suit to the extent of its success.

Having now carefully considered the available evidence, the Court finds that the Plaintiffs have proved on a balance of probabilities that the Defendant owes them **Kshs.4,702,313/=** as unpaid balance of the purchase price. Consequently the Court enters judgement for the Plaintiffs against the Defendant for payment of **Kshs.4,702,313/=** as balance of the purchase price plus costs of the suit herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of February 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Mwiti holding brief for Tariq Khan for Plaintiffs

Mr. Njoroge holding brief for Mr. Ngatho for Defendant

Diana- Court clerk.

Court – Judgement read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

23/2/2018