



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 360 OF 2017

(formerly Machakos ELC No. 137 of 2014)

NIXON SUNTE KARAINÉ.....1ST PLAINTIFF

MORRIS KAROKIA KARAINÉ.....2ND PLAINTIFF

VERSUS

EPHRAIM KAINGI MBUTHIA.....1ST DEFENDANT

ESTHER GATHONI GACHUGU.....2ND DEFENDANT

RUTH NJAMBI WAWERU.....3RD DEFENDANT

JUDGEMENT

By a Plaint dated the 22nd October, 2014 and filed on 23rd October, 2014, the Plaintiffs pray for judgement against the defendants in the following terms:

- a) That the 2nd Defendant be ordered to withdraw the caveat on the property KAJIADO/KAPUTIEI NORTH/415
- b) That an Order of Specific performance be granted.
- c) That the Defendants be ordered to pay the costs of this suit.
- d) Any other order that this Honourable Court may see necessary to grant.

All the Defendants were served with summons to enter appearance and filed their respective Defences.

The 1st Defendant filed his Defence dated the 3rd December, 2014 where he admitted to being the absolute proprietor of land parcel number KAJIADO/KAPUTIEI NORTH/415 hereinafter referred to as the 'suit land'. He admits that the Plaintiffs' advocates conducted due diligence and ascertained the suit land was charged to the Housing Finance Company of Kenya (HFCK) for the sum of Kshs. 2.5 million. Further, since the Chargee intended to exercise its statutory power of sale, he entered into an agreement with the Plaintiffs' to sell the suit land by private treaty and pay off the Chargee. He does not deny that the Plaintiffs' visited his residence with the intention of establishing whether the suit land was a matrimonial home and if the family consented to its disposal. He further admits that the Plaintiffs met his wife the 2nd Defendant herein who was informed of the purpose of their visit and she was agreeable in giving her consent, and that upon execution of the agreement the Plaintiffs were to pay Kshs. 300,000 directly to his account to cater for the school fees of their two children. He accepts that they agreed that the Plaintiffs were to pay all the outstanding liabilities with the Chargee so that they could release the original title and Discharge of Charge Instruments, of which they did. He confirms delivering all the completion documents to the Plaintiffs' advocate and the balance of the purchase price was to be paid into his account. He admits that the 2nd Defendant made an application to the Isinya Land Control Board requesting them not to entertain any application for transfer of the suit land and she further placed a restriction/caveat over the suit land claiming spousal consent. The 1st Defendant denied the particulars of fraud and avers that he willingly as well as freely accepted to dispose of the suit land but the 2nd Defendant maliciously placed a restriction over it after she had consented to its sale and transfer. He prays that the Court do direct the 2nd Defendant to lift the caveat imposed over the suit land to enable him complete its transfer.

The 2nd Defendant filed a Defence where she denied knowledge of execution of the agreement over sale of suit land between the Plaintiffs and the Defendant. She denied attending a meeting with the Plaintiffs including 1st Defendant and states that she learnt of the sale of the suit land in July 2014 when the 1st Plaintiff visited her and informed her that the same had been sold to him. She insists her written consent was

necessary before the Plaintiffs made payments over the suit land. She confirms that her contact with the Isinya Land Control Board was to safeguard her matrimonial interests from the apprehended injustice. She denies receiving any cent from the Plaintiffs on the sale of her matrimonial home and particulars of fraud contained in the Plaint. She reiterates that the sale of the suit land was illegal ab initio and the Plaintiffs have no legal right to enforce it against her. She reads conspiracy between the Plaintiffs and the 1st Defendant to render her as well as her children homeless and destitute.

The 3rd Defendant admitted the averments contained in the Plaint except for the allegations of fraud and stated that it is the 2nd Defendant who made an application for a caveat over the suit land claiming spousal consent, knowing fully well that the Plaintiffs had already paid the monies agreed upon, with the 1st Defendant delivering the relevant documents requiring completion of the sale transaction to the Plaintiff. She averred that the Court should direct the 2nd Defendant to lift the caveat/restriction she had registered over the suit land to enable the completion of the transfer to the Plaintiffs' names.

All the parties filed their respective witness statements and list of documents. On the 4th December, 2017 the matter proceeded to full hearing.

Evidence of Plaintiff

PW1 Nixon Sunte Karaine– Examination in Chief

PW1 who is the 1st Plaintiff herein adopted his witness statement and confirmed he bought the suit land on 20th January, 2014 and paid Kshs. 9 million as purchase price. He stated that after paying the purchase price, they were informed that the 2nd Defendant herein who is the wife to the 1st Defendant lodged a caution over the suit land, although the same has not been officially registered. He stated that during negotiation, before they paid the purchase price, they met the vendor's wife within the house situated on the suit land and she gave her consent. He said during the said meeting, he was present including his brother, 1st Defendant, 2nd Defendant and two brokers namely Moses Sepibune and Ebu. He confirmed the consent was oral but they all agreed that everything was later to be reduced in writing. He contended that the 1st and 2nd Defendants were selling the suit land because the 1st Defendant had taken a loan with HFCK but failed to service it. They met the credit manager HFCK and that the balance of the loan was Kshs. 2.5 million which they paid, after which the title deed was released to the Plaintiffs' and 1st Defendant's advocates. He claimed once they got the title deed in their possession, the 2nd Defendant reported to the D.O as well as put a restriction at the Land Registry Kajado. He confirmed they paid the full purchase price but the same has not been refunded to them. Further that the vendor gave them all the completion documents but they are unable to get the consent to transfer because the 2nd Defendant registered a restriction over the suit land. He stated that he wanted the court to compel the Land Control Board to grant consent to transfer suit land and for the 2nd Defendant to give spousal consent. He produced his bundle of documents which were marked exhibits 1'a' –'g'.

During cross examination he confirmed that he undertook a search in 2014 over the suit land and confirmed it was clean. He did not avail the copy of the Certificate of Official Search in court. He stated that in September, 2014, before filing the instant suit, it indicated there was a pending caution. He reiterated that if he noted a dispute over the suit land, he could not have bought it. He claimed they wrote an agreement dated the 31st January, 2014 and he paid Kshs. 300,000 at the time of signing the agreement. Further that they went to the Vendor's home before signing the agreement and met the 2nd Defendant. He denied going to the suit land in July, 2014. He reaffirmed that they had agreed that once they got the title deed from HFCK, 1st Defendant was to furnish them with all the completion documents, then they proceed to the Kajado Registry for registration once they obtained spousal consent. He contended that they were also shown documents of debt from the HFCK. He noted that the Discharge of a Charge related to the suit land. He insists the vendor gave them all the completion documents for the sale including the application for transfer. He further claimed that they have an application for consent which is yet to be determined and that the transferor of the suit land is Morris Karoike Karaine who is the 2nd Plaintiff herein. PW1 stated that they went to the home of the vendor before paying the deposit but there is a mistake on his statement. He reaffirms that the 2nd and 3rd Defendants are the wives to the 1st Defendant but it was only the 2nd Defendant Esther who was present at the home of the vendor when they went there. He contends that the 3rd Defendant agreed to offer spousal consent but on a separate date. He did not know when the vendor went to the Land Control Board but he was supposed to avail to them the completion documents while he was meant to pay the purchase price in ninety (90) days. He further confirmed that Morris the 2nd Plaintiff herein paid part of the purchase price in June 2014 at Family Bank. He insists they paid what they had agreed to pay to the vendors and Esther should be ordered to give spousal consent to enable 1st Defendant transfer the land to them. He confirmed they have an alternative prayer in the plaint which they are abandoning and want the 2nd Defendant to remove the restriction which was registered on 15th July, 2014 as they bought the land in January, 2014. The restriction was registered by virtue of letter dated the 14th July, 2014 from messrs Maina Irungu & Company Advocates and they want an order of specific performance from the registered owner including the person who registered the restriction.

During re-examination he confirmed that the caution form filed by the 2nd Defendant is not dated but the same was sworn on 22nd October, 2014. The caution was never registered. Further the suit land was charged to HFCK on 22nd October, 2010 as indicated in the Certificate of Official Search and this is the loan that they paid. He claims the loan was for Kshs. 2.174 million and it is the Land Registry Kajado who gives Certificates of Official Searches but if there is an omission, then the said Registry is responsible. He reiterates that the spousal consent was not to be given by the 2nd Defendant on the day of transfer and as for the Land Control Board, she was expected to be personally present.

The Plaintiff thereafter closed their case.

Evidence of Defendants

DW1 who was the 1st Defendant herein adopted his statement as evidence and confirmed he sold the suit land to the Plaintiffs and that he had charged it to HFCK but the auctioneers were closing in on him. He stated that he had paid the loan with HFCK for three (3) years but

was unable to continue repaying due to family pressure of paying school fees. He said the only option was to sell the suit land and he informed his wife about the problem with the auctioneers. He claimed the two buyers were brought to him and they took him to their lawyer Mathenge who confirmed he would act for both the vendor and purchasers and charged him Kshs. 60,000/=. He confirmed that the Plaintiffs paid him Kshs. Nine (9) million out of which he paid his loan to HFCK. He insists that he has no problem with transferring suit land to the Plaintiffs but declines to pay costs. Further that he has no cash to refund the purchase price.

During cross examination he stated that he is a former banker who left work and understood the consequences of charging a property to a bank, as it becomes a commercial commodity once it is charged and it is the property of the bank until the money is paid. He averred that the suit land was on the brink of being sold if the Plaintiffs did not come to his rescue, and it could have been sold by the bank in any event. Further that if this happened, the wife could not have stopped the sale. He insists his wife was aware he had charged the suit land to the bank and knew she was residing on a mortgaged property. He claims he told the wife the burden was overwhelming and there was no other way but to sell the suit land and move to another place, by utilizing the balance of the funds. Further that his wife never gave him any money to repay the loan and she sells clothes in the open air market. He confirmed out of the purchase price, he paid Kshs. 2.2 million to the bank, with the balance of about Kshs. 6.8 million benefitting his family through payment of upkeep, school fees and debts. Further that he has benefitted from the money, yet the title is still in his name and this is not fair. He said the land is situated in Kitengela Town behind Eastmatt, it is agricultural land but in practice, it is a commercial plot. Further that he was present in the meeting together with his wife who is the 2nd Defendant herein at their house when the buyers (the Plaintiffs herein) came and he was expected to take documents to their lawyer. He insists it is the buyers and his wife who negotiated, she did not object to the sale of the suit land while his 2nd wife who is the 3rd Defendant herein also did not oppose the said sale as she was not in the picture. She had intimated that if the 2nd Defendant did not object, then she had no objection. He confirmed showing the buyers the suit land as it was part of the verification process for the buyers and providing all the requisite documents to the lawyer, signing the consent and transfer forms and being paid the balance of the purchase price. He later learnt from the lawyers that they were unable to effect the transfer since there was a caution over the suit land, he accepted the averments in the Plaint except for involvement in fraud and that he is aware of the terms within the sale agreement but is unable to refund the monies paid as he used it in the family circles. He was not aware of the later caution and insists it is a mystery why his wife would register a caution knowing fully well he had received the purchase price.

During further cross examination by the 2nd Defendant's counsel he confirmed having worked in the bank until 2010, and that there was a charge over the suit land but the loan was cleared using his benefits then he passed the title to HFCK. He claims when he left employment, he did not do well in business culminating in his inability to repay the loan. Further that in 2012, he initiated the process of selling the suit land and gave some brokers to source for buyers. Further that the development in the suit land is for domestic purposes where he built a house for his family and had stayed thereon from 1994. He contends that he has two wives who do not reside in the same compound but the 2nd Defendant lives on the suit land. He insists he told the 2nd Defendant of his intention to sell the suit land but at that point she said nothing and he was not aware she had registered a caution over it. Further that in 2014, there was a meeting of two brokers, his wife and the two brothers but no agreement was signed as he had not met the lawyer. He took copy of title deed, PIN Certificate, passport photo, Copy of ID and letter from HFCK to the Lawyer. He states that the lawyer asked him for consent to transfer, Discharge from HFCK, Title Deed because his wife and the buyers had already met. Further that the issue of spousal consent was upon the buyers who had already talked to his wife, with the lawyer only calling him to sign, so he cooperated with them. He said once he signed the documents, the lawyer would apply for Special Land Control Board but he does not know why they did so as he only wanted to be paid. He denied hiding the issue of sale of suit land from his wife but did not present his wife to the advocate nor give her a copy of the Sale Agreement. He told the 2nd and 3rd Defendants to go to the lawyers but never took them. He insists he has always resided with the 2nd Defendant on the suit land and that the issue of the sale was adjudicated upon by the DO and Chief but she was adamant that the said land would rather be sold by public auction but contradicted herself as she accepted that proceeds of sale were used in the family yet she registered a caution. Further that by the time they were going to the DO's office, the sale agreement had been executed and, he had a balance of Kshs. 5 million which he proposed to her that they purchase a plot in their joint names and build a family house but she declined. There were several meetings held in June 2014 to deliberate on the issue and he does not understand why she registered the caution which the Land Registrar Kajiado refused to remove and advised them to go to court.

DW2 who is the 2nd Defendant herein confirmed during her examination in chief that the 1st Defendant was her husband but she did not know the 3rd Defendant. She confirmed knowing the faces of the Plaintiffs but did not differentiate their names, and that she met them at the DO's office in July 2014 for the first time. She adopted her statement as evidence in chief. She stated that they built on the suit land in 1993 but moved to it in 1994, and have resided to date, except for her husband who moved out in 2009 to live with another woman she does not know. She denies meeting the Plaintiffs to discuss and negotiate the sale of the suit land but says she only met them at the DC's office and that she registered a caution in 2012 because the husband had sold everything except the suit land. She stated that she met the 2nd Plaintiff around June 2014, who informed her he had a cheque for her husband and told her the suit land had been sold. She contended that on 29th June, 2014 she went to the Lands Office to inquire whether the suit land had been sold but was informed the caution had not been removed. She produced various documents as her exhibits and insists she will not provide spousal consent to sell the suit land as she was not consulted before the same was sold.

During cross examination, she confirmed the suit land was bought from a loan by Bank of India and that from the onset, it was commercial property. She stated that she was aware that if they failed to repay the loan, the bank would sell the suit land and that the loan from bank of India was repaid by the 1st Defendant. She however did not know whether the 1st Defendant had finished repaying the loan but said from the Discharge she knew the same had been repaid. She reaffirmed that the 1st Defendant was being deducted by the bank and that as for the HFCK loan, she confirmed from the Lands Office that the balance was Kshs. 2.5 million. Further that she knew HFCK could sell the suit land if they failed to repay the loan and that she did not repay the said loan. She denied any knowledge of the HFCK loan and said the husband did not inform her but she signed a document from the bank which had been brought by her husband, although she could not recall the year. She further denied signing any spousal consent in 2010 to enable the husband obtain the HFCK loan but did not oppose the taking of the said loan. She was not aware of the auctioneers as the husband left the home in 2009 but comes to see the young child when schools are closed. She contended that the husband did not tell her about the loans and that the caution for 2012 was pending registration as indicated in the search dated the 30th September, 2014. She reiterated that if the Plaintiffs did not buy the suit land, it could have been sold through public auction if the husband failed to repay the loan. She did not know whether the purchase price was used to repay the loan [\[U1\]](#).

In her reexamination, she said she only learnt of the Kshs. 2.5 million.

The 3rd Defendant declined to testify.

The Plaintiffs, 1st and 2nd Defendants filed their respective written submissions that I have considered.

Analysis and Determination

After perusal of the pleadings including documents and witness statements filed and upon hearing the testimonies of PW1, DW1 and DW2, I find that the following are the issues for determination:

- Whether there was a valid Sale Agreement between the Plaintiffs and the 1st Defendant
- Whether the Plaintiffs paid the loan at HFCK as well as settling the full purchase price
- Whether Judgment should be entered on admission as against the 1st Defendant and 3rd Defendant.
- Whether spousal consent was required in this instance where suit land had been charged to HFCK and thereafter sold by private treaty
- Who should bear the costs of the suit?

It is not in dispute that the 1st Defendant was the registered proprietor of the suit land. It is further not in dispute that the suit land had been charged to HFCK.

On the first issue as whether there was a valid Sale Agreement between the Plaintiffs and the 1st Defendant. I wish to interrogate the documents presented. I note the Sale Agreement dated the 31st January, 2014 was duly signed by both the Plaintiffs and the 1st Defendant. The 1st Defendant as DW1 admitted both in his Defence and evidence that he signed the Sale Agreement with the Plaintiffs and furnished them with all the requisite documents. Section 3(3) of the **Law of Contract** provides as follows: **‘(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.’

In the current circumstances, I note all the requirements of section 3 of the Law of Contract Act was adhered to, with the signature of the vendor and purchasers duly attested to by the advocate. I hence find that there was indeed a valid contract between the Plaintiffs and the 1st Defendant.

As to Whether the Plaintiffs paid the loan at HFCK as well as paying the full purchase price. I note clause 4 of the Sale Agreement stated as follows: **‘The property is currently charged to the Housing Finance Company Limited but the Vendor undertakes to redeem the mortgage through his advocates and the property will be sold free of any charges, mortgages and encumbrances.’**

From the Certificate of Official Search dated the 19th September, 2014, at part C, it indicates charge to Housing Finance Co. Ltd to secure Kshs. 2.5 million. PW1 and DW1 both confirmed in court that the Plaintiffs paid the loan at HFCK to enable DW1 redeem the title. It is after the payment that HFCK provided a Discharge and returned to DW1 his title. The Plaintiffs further furnished court with various Bank Payment slips to prove that they indeed paid the loan to HFCK. In relying on the oral evidence of PW1 and DW1 including the above documentary evidence, I find that it is indeed true that the Plaintiffs paid HFCK for the loan owed to the 1st Defendant

On the issue as to whether Judgment should be entered on admission as against the 1st Defendant and 3rd Defendant. I find that both the 1st and 2nd Defendants admitted the Plaintiffs claim but denied the allegations of fraud. DW1 was emphatic that he is ready and willing to transfer the suit land to the Plaintiffs so long as the 2nd Defendant removed the caution which she has lodged against its title.

Order 13 Rule 2 states that: **‘Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.’**

In the case of **Mwaura Karuga Vs. Embakasi Ranching Company Ltd (2014) eKLR** where Justice Kariuki cited in approval the Case of Milimani Commercial HCC 1158/99 **Bullion Bank Limited Versus James Kinyanjui and Anor** where Justice Kasango J relied on the authority of **Cassam Versus Sachania (1982) KLR 191** which states as follows: **‘Judgement on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.’** In relying on this case and based on the facts above, I find that the 1st and 3rd Defendants’ admission in their respective Defences and evidence of the 1st Defendant is indeed an unequivocal and clear admission which does not require interpretation. I will hence enter judgement on admission as against the

1st and 3rd Defendants.

As to whether spousal consent was required in the instance where suit land that had been charged to HFCK was sold by private treaty and whether the 2nd Defendant should be ordered to withdraw the caution registered over the suit land

I note the suit land was charged to HFCK. The 2nd Defendant denies granting spousal consent for the Charge but admits during cross examination that she signed some documents from the bank but could not recall the date. The Plaintiffs only came in to purchase the suit land which was sold by private treaty. The question that begs for an answer is whether a sale by private treaty requires spousal consent, which had already been granted when the property was charged.

Section 98 of the Land Act provides that:

‘(1) If a chargee or a receiver becomes entitled to exercise the power of sale, that sale may be—

(a) of the whole part of the charged land;

(b) subject to or free of any charge or other encumbrance or charge having priority to the chargee’s charge;

(c) by way of subdivision or otherwise;

(d) by private contract at market value;

(e) public auction with reserve price;

(f) for a purchase price payable in one sum or by instalments; or

(g) subject to any other conditions that the chargee shall think fit, having due regard to the duty imposed by section 97(1).’

It was the evidence of the 1st Defendant that he was unable to service the loan with HFCK as he had lost his job and the business was not doing well culminating in his looking for a buyer since 2012, for the charged land. He admits that the Plaintiffs repaid the loan to HFCK and the balance he used to cater for the family expenses. Further, he proposed to the 2nd Defendant that with the balance, they should purchase a plot in joint names and build a house but she declined. This is strange because the suit land as it is was only registered in the name of the 1st Defendant. From the evidence of DW2, I notice an element of dishonesty and bad faith because before the Plaintiffs and 1st Defendant entered into a contract to purchase the suit land, she was in the picture, as meetings were held in her house. Further that in one breath DW2 admitted meeting the 2nd Plaintiff in June 2014, who told her he had a cheque for her husband but initially she denied knowing them and claim she only met them at the DCs office. She further admitted the suit land had been bought by a loan which she never repaid and did not know whether the same was repaid. DW1 and DW3 filed their Defences and except for allegations of fraud, supported the claim of the Plaintiffs. DW1 however exonerated DW3 and claimed she was not a party to the negotiation. What requires demystification is why would DW2 be part of the negotiations and rush to register a caution over the suit land when the purchase price had already been paid claiming it is matrimonial property. She further never denied the 1st Defendant’s averments that he had been looking for a buyer for the suit land from 2012 and that the property was meant to be auctioned.

In the case of **MILIMANI ELC NO. 240 of 2012: E.N.W vs PWM & 2 OTHERS**, Mutungi J held observed as follows: ‘ **...I would like to state that where a property that would otherwise be considered as matrimonial property is tendered as security for a bank loan as in the instant matter, such property becomes a commercial commodity available in the market and liable to be sold by the charge under the Chargee’s statutory power of sale and the exercise of that power of sale cannot be defeated by a claim that such property constitutes matrimonial property.**’ I am persuaded by this case and find that the 2nd Defendant does not have clean hands in this transaction as she already gave her oral consent pending the signing of the Sale Agreement. I note she is the only one opposing the sale, yet she had benefitted from the purchase price. **‘In so far as spousal consent was deemed an overwhelming interest at the time of the sale of suit land, she cannot claim that the transaction has to be complete until she gives her written spousal consent and yet she was well aware that this was a sale by private treaty as the suit land was already charged to the bank when she gave her consent and was commercial commodity that could be auctioned if the 1st Defendant failed to repay the loan.**

The Plaintiffs have demanded for specific performance from the Defendants to transfer the suit land to them. The Plaintiffs claim to have paid the whole purchase price, which fact is not denied by the 1st and 3rd Defendants. DW1 stated that he had been paid the whole purchase price and had since utilized it for family expenses. A fact which was not controverted by DW2. DW1 further stated in his evidence in chief that he is ready to transfer the suit land to the Plaintiffs as he cannot afford to refund the purchase price. I note the Plaintiffs claim for orders of specific performance to have the suit land transferred to them is not opposed by the 1st and 3rd Defendants. In the Sale Agreement at clause 10 parties agreed as follows: ‘ **if the purchasers shall default in or neglect to do anything on his part to be done to effect and complete this transaction and the Vendor shall have complied with his obligations hereunder, the purchasers shall pay to the Vendor a sum of Kshs. 900,000 as liquidated damages being 10% of the purchase price payable herein and if the Vendor shall fail to do anything to complete the transaction, he will refund the entire purchase price plus interest at 21% per annum until payment in full to the Purchasers.** This clause is very clear in terms of specific performance where the contract herein has not been completed. As stated above, DW1 has reaffirmed his readiness to complete the transaction but this is subject to spousal consent from the 2nd Defendant. Further for this contract to be complete, the consent of the Land Control Board is a mandatory requirement.

Section 6 (1) of the Land Control Act provides that ‘ **(1) Each of the following transactions that is to say— (a) the sale, transfer, lease,**

mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;'

I note in the current scenario the Sale Agreement was entered into in January, 2014 and this required the parties to obtain the consent of the Land Control Board within six (6) months of executing this agreement, which is not the case. This hence renders the contract void but the purchasers are entitled to receive a refund of the purchase price paid.

In the case of *Gurdev Singh Birdi & Anor –vs- Abubakar Madhubuti C.A. No.165 of 1996* the Court of Appeal held as follows;

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury’s Laws of England., Fourth Edition, a Plaintiff seeking the equitable remedy of specific performance of a contract:

“must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the Plaintiff has failed in literal performance, or is in default in some non- essential or unimportant term, although in such cases it may grant compensation. Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.”

In relying on the Court of Appeal decision above and the facts as presented, I find that the Plaintiffs cannot have a remedy on specific performance but is only entitled to receive a refund of the purchase price that they had paid including interest of 21% per annum from the date of payment until it is paid in full.

- Who should bear the costs of the suit?

Since the Plaintiffs have been inconvenienced as they entered into the Sale Agreement in good faith and handled their part of the bargain, I find that they are entitled to costs and will award them the costs of this suit.

In the circumstances I find that the Plaintiffs have proved their case on a balance of probability and proceed to make the following order:

- a) The 1st, 2nd and 3rd Defendants do refund to the Plaintiff Kshs. 9,000,000 within the next three (3) months from the date hereof.
- b) The amounts stated in (a) above to attract interest from January 2014 at the rate of 21% per annum, until payment in full
- c) The costs of the suit are awarded to the Plaintiffs

Dated signed and delivered in open court at Ngong this 20th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Mwangi for Plaintiff

N/A for Defendant

[\[U1\]](#)