



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 119 OF 2017

NGERE TEA FACTORY COMPANY LTD.....PLAINTIFF

VERSUS

ALICE WAMBUI NDOME.....DEFENDANT

JUDGEMENT

1. Before me for determination is a matter wherein the plaintiff filed its plaint on the 10th September 2013 wherein it prayed for orders that a declaration do issue that defendant is in breach of the Agreement for sale and the same had been rescinded. The plaintiff also prayed for orders that the defendant returns a sum of Ksh 15,000,000/= and for a declaration that it was entitled to a lien on the property comprised in the Agreement for sale for the return of the deposit and for interest on the deposit at court rate until the return of the same. Lastly, the plaintiff prayed for costs of the suit as well as further or any other relief that this honorable court shall deem fit and just to grant.

2. Upon service of the pleadings the, Defendant filed her defence and counter claim dated the 9th October 2013 on the 10th October 2013

3. That upon compliance with order 11 of the Civil Procedure Rules, the matter was certified ready for hearing on the 13th July 2015 and proceeded with the Plaintiffs case on the 28th June 2017 upon transfer for the Nakuru Environment and Land Court.

The Plaintiffs case

4. It was the Plaintiff's case through its witness Mr. Josiah Mwangi Ndegwa who was the Plaintiff's unit manager. The plaintiff's witness introduced the Plaintiff as a tea factory that belongs to about 9,000 farmers.

5. That on the 29th May 2013 the plaintiff herein entered into an agreement with the defendant herein to buy from her land situate in Nyandarua being No. Nyandarua /Kaimbaga/708 measuring approximately 40.44 hectares at a consideration of Ksh. 28,480,050/= after having carried out a search and having confirmed that indeed the land they wanted to purchase belonged to the Defendant herewith and further having satisfied themselves of the location and the suitability of the soil whereupon they intended to plant eucalyptus trees to be harvested and used as firewood, for the benefit of the farmers, to be used in the boilers in the factory.

6. That during the said negotiations, the Defendant had instructed her agents one Mr. Kanyi and Mr. Kihara to show the plaintiff the beacons to the land and had physically pointed out the suit land to the Plaintiff. Subsequently in between the negotiations, these Agents were changed and now the Plaintiffs' were dealing with one Mr. John Ng'ang'a.

7. That despite receiving a letter dated the 27th February 2013 from Muteithia Kibira Advocates informing the Plaintiff that the suit Land had already been bought by one Hellen Wamuyu Nyamu, they ignored the said letter and proceeded to formalize their transaction.

8. That upon the Plaintiff's satisfaction of their need they paid 52% of the purchase price of ksh 15,000,000/= to the Defendant's counsel Messers Omweno & Co Advocates.

9. That after this payment, they had the land transfer form executed and signed by the Defendant on the 26th July 2013 and that they also received the original title to the land, the signed land control Board forms, Pin Card and passport size photographs

10. That it was when they took the surveyors to the ground in the company of the Defendant's Agent Mr. John Ng'ang'a, so as to fence it and thus take possession that they discovered that they were being shown a different land which was at the furthest end of the one they had been shown before. This subsequent land was rocky with shallow soils which were not suitable for tree planting and that there was a quarry therein.

11. It was the Plaintiff's case that initially they had been shown two pieces of land that had been put up for sale being No. Nyandarua /Kaimbaga/12 and No. Nyandarua /Kaimbaga/708. That the first piece of land had passed the test and they had taken possession of the same and planted trees thereupon but the second parcel of land is the one that had a dispute and which is the subject suit of this case.

12. The Plaintiff further testified that the land which the surveyor showed them was not the land that the Defendant's Agents had previously showed them.

13. The Plaintiff's witness testified that the defendant was in breach of the contract since the land she sold to them had been sold to somebody else. That they still hold the original title in lien until the defendant makes the refund.

14. During his testimony the Plaintiff herein produced various documentary evidence to prove the case being:

i. Exhibit 1-Sale Agreement dated the 29th May 2013 between the Plaintiff and the Defendant Alice Wambui Ndome.

ii. Exhibit 2-Title deed to land parcel No. Nyandarua /Kaimbaga/708 measuring approximately 40.44 hectares.

iii. Exhibit 3-Official search dated 8th April 2013.

iv. Exhibit 4-land transfer form dated the 26th July 2013

v. Exhibit 5-Letter dated 2nd May 2013 from the Defendant's Counsel addressed to the plaintiff mandating Mr. John Ng'ang'a to take the Plaintiffs round the suit property.

vi. Exhibit 6-A resolution dated the 26th June 2013 by the board of Directors of the Plaintiff's Company authorizing Kenya Tea Development Authority (KTDA) to Pay a sum of Ksh. 15,000,000/=.

vii. Exhibit 7- a letter dated the 27th February 2013 from Muteithia Kibira Advocates informing the Plaintiff that the suit Land had already been bought by one Hellen Wamuyu Nyamu.

viii. Exhibit 8- a bank statement showing that KTDA had deposited Ksh 15,000,000/ into the Account of Defendant's counsel Messers Omwenyo & Co Advocates on 4th July 2013.

ix. Exhibit 9- a letter dated the 29th July 2013 from Messers Omwenyo & Co Advocates informing the Plaintiff they they would not incur liability on what had been surveyed. (The letter is to the effect that the defendant would not embark on the process to amend the RIM. That the purchaser can do so and after registration of the transfer of title in their name if they so wish.

x. Exhibit 10 were 7 photographs of the land and terrain that the Plaintiff had first been shown.

xi. Exhibit 11-a demand letter dated the 20th August 2013 rescinding the contract.

xii. Exhibit 12- a response letter dated the 21st August 2013 from Messers Omwenyo & Co Advocates informing the Plaintiff that they would not refund them the money and demanding for the payment of the whole purchase price.

15. During cross examination the Plaintiff's witness informed the court that they had made advertisement of the land they wanted to buy by word of mouth and had been shown the suit land by Mr. Kanyi and Mr. Kihara who were not the defendant's Agents.

16. That the defendant's agent was John N'gang'a from whom they had received an offer on the 2nd May 2013.

17. The Witness also confirmed to having been in the company of 5 members of the Plaintiff's company when they had visited the suit premises which measured about 100 acres, on the 14th May 2013 although they had seen the land earlier.

18. That when they addressed the issue of the purpose of the suit land, they had informed the defendant's Agent Mr. John Ng'ang'a and the vendor was aware of what type of land they required.

19. That upon discovery of the discrepancy in the land they had bought and the one they been shown, a meeting was held on the 7th August 2013 concerning the suit land where the Defendant did not speak since her Agent Mr. Ng'ang'a present.

20. The witness reiterated that initially they had been shown a good fertile piece of land and not the subject suit herein. He also confirmed that he was as a qualified agricultural officer and thus testifying as a profession.

21. When probed by the court, the witness informed the court that they only got the map of the other suit land that was fertile and discovered that it had a different title and was different from the suit land.

22. Counsel for the Plaintiff then prayed for the recorded statements of the other witnesses namely Samwel Nduati Kiarie and Sammy Njoroge Nguchitta to be adopted since they would be giving the same evidence. The Application was not objected to and the court adopted

the said statements as evidence.

23. The Plaintiff filed their submissions on the 15th December 2017 to which Counsel did not wish to highlight but to which they reiterated the evidence they had adduced in court.

24. The Plaintiff's submission is to the effect that although both parties had entered into an agreement to sell and purchase the suit land herein yet the defendant had sold to the Plaintiff a different piece land from what her Agents had showed the Plaintiff in terms of the physical location and material nature in that whereas the land initially showed to the Plaintiffs was arable land, the subsequent land owned by the defendant was a quarry.

25. The Plaintiff's submission on the particulars of the breach of the contract were as follows:

- i. Misdescription or misrepresentation as to the physical location of the property
- ii. Misdescription or misrepresentation as to the quality of the Defendant's actual property.
- iii. Failure to disclose material facts as to the nature and exact size of the property.
- iv. Misleading the purchaser to buy property which is not suitable and yet the defendant was fully briefed and aware of the said objectives.

26. That while relying on the evidence adduced in court as well as the recorded statements of the two witnesses that was adopted as evidence by the court, the plaintiff submitted that they had established that the Defendant herein was in breach of their agreement and as such their contract stood rescinded thus giving rise to the prayers in the Plaintiff.

27. That although the defendant filed his defence and counter claim to the effect that the Plaintiff's claim be dismissed and that that judgment be entered in her favour for specific performance, yet she admitted to having let the entire issue of the size, locality and topography of the suit property to her late brother Mr. Francis Ndegwa and her agent Mr. N'gan'ga and never took the plaintiff to the suit land to point it out to them.

28. The Plaintiff submitted that it was not in dispute that a land sale agreement was executed by the parties and a deposit paid and the executed documents sent to the Plaintiff. That it was also not in dispute that the suit land is currently registered in the Defendant's name and that the Plaintiff hold the said certificate of title as lien.

29. The issues for determination were therefore as follows:

- i. Whether there was a breach of the sale agreement by the defendant's failure to point out the correct physical location of the suit land and description as to the topography and suitability for the purpose as explained by the Plaintiff.
- ii. Whether the sale agreement was validly rescinded by the Plaintiff.
- iii. Whether the Plaintiff is entitled to the remedies sought.
- iv. Whether the Defendant is entitled to the remedies sought in the counterclaim.
- v. Which party shall pay the costs of the suit?

30. On the first issue the Plaintiff referred the court to clause 4.2 of the Plaintiff's exhibit 1 which was to the effect that:

'The vendor shall point out the beacons delineating the property and shall undertake to execute all assurances and documents necessary for the completion and to present himself whenever needed in pursuance of completion'.

31. That clause 6.1 was to the effect that;

'The vendor warrants that she has the capacity to enter into this sale agreement with the purchaser and shall indemnify the purchaser where there is a breach of any of these conditions'

32. That failure to point out the exact position of the suit property beacons delineating the property and proceeding to point out a different land was in violation of Clause 4.2 of the Agreement as it did not give the Plaintiff an opportunity to make an informed opinion as to whether the land they were buying was conducive for tree farming.

33. The plaintiff also relied on the **Halsbury's Law of England Volume 42 paragraph 57** that;

"The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact made by the vendor, the purchaser expected to get. Where, owing to a misdescription, the vendor fails to perform this duty, and the misdescription,

although not proceeding from fraud, is material and substantial, affecting the subject matter of the contract to such an extent that it may reasonably be supposed that, but for the misdescription, the purchaser might never have entered into the contract at all, the contract may be avoided altogether, and if there is a clause of compensation, the purchaser is not bound to resort to it. ‘

34. As to whether the sale agreement was validly rescinded by the Plaintiff, it was their submission that indeed the said agreement was validly rescinded for not having complied with clause 4.2 of the Agreement as the Defendant had been notified by the Plaintiff on the Misdescription or misrepresentation as to the topography, physical location and quality of her land. The Plaintiff relied on the decided case in the **Environment and Land Court No 106 of 2012 Karanja Mbugua and another vs Marybin Holdings Co. Ltd** to state the purpose of rescission of a contract to sale is to restore the parties to their original position before the execution of the Agreement.

35. It was the plaintiff's submission that it was right in rescinding the contract so that parties could be restored to their original position. It was also their submission that in the event the Defendant was not in a position to refund the deposit, then the Plaintiff ought to be allowed to hold the title in lien for the purpose of deposing of the land at market value, recover its deposit and remit the surplus of the sale price if any to the defendant herein.

Defendant's case

36. The defendant gave sworn evidence in Kiswahili language to the effect that indeed she was the proprietor of the suit land that measures 99.95 acres to whose title deed she had given to the Plaintiff herein.

37. The Defendant also testified that her deceased brother one Francis Ndegwa used to take care of the suit land and that he was the one who had shown the same to her agent. She also confirmed that Mr. Ng'ang'a was her agent whom she had instructed to sell the suit land on her behalf and no other agent. That it was the said Mr. Ng'ang'a who had informed her that the plaintiff had wanted to buy the suit land. That although she could not remember how much she was selling the land, yet the agreement between her and the plaintiff was reduced into writing vide the agreement for sale dated the 29th May 2013.

38. At this moment the court noted that the Defendant had issues in remembering details and inquired which language she best understands to which she responded that she understood kikuyu language best.

39. The court then adjourned to let her refresh her mind and compose herself. That upon resuming the hearing of the defence case the Respondent continued to testify but in Kikuyu language where she stated that indeed the purchase price they had agreed with the plaintiff for the suit land was Ksh. 284,850/= per acre thus making it Ksh 28,480,050/= for 100 acres. That she was to be paid in two installments wherein she was paid the first installment of Ksh. 15,000,000/= with a balance of Ksh. 13,480,050/= to be paid later.

40. She confirmed to having given the Plaintiff a copy of her identity card, the original title deed and passport photo and all documents that they required from her.

41. That thereafter the Plaintiff commenced the process of the transfer but after some time when the balance was not forthcoming, she inquired from her agent what the problem would have been to which she was informed that there was a case in court and that the Plaintiffs were complaining that the land sold to them was not the land they had been shown.

42. The defendant stated that there could not have been a mistake as her land was larger than all the other neighboring pieces of land which were much smaller.

43. She testified that at no time had the Plaintiff informed her the purpose and use of the land they intended to purchase from her but that tress could be planted thereon as it is land she had been given by the government for farming.

44. The defendant further testified that she did not understand why the plaintiff had sued her as she did nothing wrong, the land was hers and she did not do anything to suggest that she had defrauded the Plaintiff.

45. She confirmed to having attended the meeting that was called by the Plaintiff to which she had asked her Agent Mr. Ng'ang'a to talk on her behalf and to answer all questions. That although the Plaintiff claimed that they had been shown the wrong piece of land, yet they had not shown her the said wrong piece of land that they had been shown.

46. That she could not therefore understand why the Plaintiff had refused to pay her balance. That the suit land was still vacant as nobody was in possession of the same.

47. In cross examination the Defendant was categorical that then plaintiff's had been shown the beacons of suit land although she did not know at what point it was whether before or after the signing of the agreement.

48. She testified that there was a road between her land and the neighboring land and on the other side, there was a river. That her brother used to plant maize on the said farm and that the quarry was not on the suit land but on the neighbor's land although there was a cliff on the suit land.

49. She also confirmed that indeed the Plaintiff's officials were taken round the suit land by Mr. Ng'ang'a her agent and that she could not afford to refund the plaintiff's money even if they returned her title deed.

50. The Defendant relied on the following documentary evidence:

- i. Df Exhibit 1- Copy of the Title deed to land parcel No. Nyandarua /Kaimbaga/708 measuring approximately 40.44 hectares
- ii. Df Exhibit 2- Map of the suit land.
- iii. Df Exhibit 3-Letter dated 2nd May 2013 from the Defendant's Counsel addressed to the plaintiff mandating Mr. John Ng'ang'a to take the Plaintiffs round the suit property.
- iv. Df Exhibit 4- email dated 20th May 2013 to Messers Omwenyo & Co Advocates from the Plaintiff informing Counsel that the Plaintiff had received a board resolution authorizing the purchase of the suit land.
- v. Df Exhibit 5- Sale Agreement dated the 29th May 2013 between the Plaintiff and the Defendant Alice Wambui Ndome.
- vi. Df Exhibit 6(a)-Email dated 30th May 2013 to Messers Omwenyo & Co Advocates from the Plaintiff informing Counsel that the Plaintiff had agreed to deposit 15 million and asking that the agreement be signed in triplicate and asking for the Defendant's documents for their further dealing.
- vii. Df Exhibit 6(b) letter dated the 30th May 2013 letter from Messers Omwenyo & Co Advocates forwarding the Defendant's documents to the plaintiff.
- viii. Df Exhibit 6(c) letter dated the 10th June 2013 from the Plaintiff forwarding adult executed Sale agreement.
- ix. Df Exhibit 6(d) letter dated the 12th June 2013 from Messers Omwenyo & Co Advocates acknowledging receipt of the duly executed agreement and inquiring on the part payment of Ksh 15 million.
- x. Df Exhibit 6(e) letter dated the 20th June 2013 a follow up of the transmission of Ksh 15 million.
- xi. Df Exhibit 6(f) letter dated the 25th June 2013 a remainder from Messers Omwenyo & Co Advocates to the Plaintiff to remit the 15 Million within 48 hours or the contract to stand rescinded.
- xii. Df Exhibit 6(g) letter dated the 10th July 2013 from Messers Omwenyo & Co Advocates to the plaintiff acknowledging receipt of the Ksh 15 Million and forwarding the original copy of the title deed and the Executed transfer forms, executed form for consent from the land control Board, copies of the vendor's ID card, PIN card and 4 passport size photographs to hold pending payment of the balance of the purchase price.
- xiii. Df Exhibit 6(h) email dated the 4th July 2013 John Ng'an'ga forwarding SWIFT of 15 Million shillings to Messers Omwenyo & Co Advocates.
- xiv. Df Exhibit 7 -Land transfer form dated the 29th July 2013 from Messers Omwenyo & Co Advocates informing the Plaintiff they would not incur liability on what had been surveyed.(the letter is to the effect that the defendant would not embark on the process to amend the RIM. That the purchaser can do so and after registration of the transfer of title in their name if they so wish.)

51. The next defence witness DW2 Mr. John Ng'ang'a testified to the effect that he was an estate agent and that he know both parties to the suit. That in the year 2013 scouts on the ground had informed him that the suit land had been put on offer for sale wherein he got in touch with the defendant's brother Francis (deceased) who then organized for him to meet with the defendant.

52. That indeed they met with the Defendant in Nakuru Town and had a discussion over the modalities of the sale. And upon agreeing on the terms of the sale and since he knew the land in question, he informed the Defendant that he could get a buyer for her wherein she gave verbally authorized him to sell the land on her behalf although she would handle the money matters.

53. That at the time the Defendant had asked for Ksh 284,850/= per acre.

54. That in the process of looking for buyer for the Defendant, he found one Hellen Nyamu who paid a deposit of Ksh1,500,000/= but later got the plaintiff who was willing to buy the same at a higher price and he therefore convinced Hellen not to pursue with the purchase and instead brought the Plaintiff on board.

55. That he even met with the Plaintiff's Chairman in Thika town who invited him to the plaintiff's office. That it was when he went to the said office that he realized that the Plaintiff had acquired papers to the suit land that had been issued to them by some brokers known as Mr. Kanyi and Joshua Kihara, but since this witness had sold another land to the plaintiff's chairman the chairman convened a meeting with the board wherein the plaintiff then initiated the process of purchasing the suit land through the board meeting resolution after parties had agreed on the purchase price of Ksh 28,480,050/= for the entire land that measured about 100 acres. An agreement was thereafter signed by both parties.

56. This witness testified that prior to the signing of the agreement, the Plaintiff had been shown the suit land by the scouts on the ground and that they knew what they were purchasing and the chairman had even informed him that he could not spend more money going to a piece of

land that he already knew. That at no time had the plaintiff informed him the purpose and/or use of the suit land.

57. DW2 also confirmed that he had sold the neighboring piece of land measuring 178 acres to Ikobe tea factory and that that land and the suit land were the only two large tracts of land.

58. The witness DW2 also testified that indeed the deal between the parties had been sealed and that the Defendant had been paid part payment but that it was at the stage of the transfer that things changed.

59. He testified that the change came about because of a disagreement between him and the other two brokers Mr. Kanyi and Joshua Kihara who had insisted that they were the ones who had first proposed the suit land to the Plaintiff which issue was escalated to the board which was pressed to cancel the deal because there were people who had interests with the abroad.

60. DW 2 further testified that he was aware that the Plaintiff had conducted a valuation on the suit land and that a forestry report had been written as this was the usual process before buying land.

61. That on the 7th August 2013 the Plaintiff called a meeting had been held in situ and that the said Kanyi and the Plaintiff's Advocate had also attended. That a representative of Plaintiff had then tried to bring out the issue that that was not the land they had been shown to which the witness responded that it was the land and that he had personally shown it to them to which the Regional manager had become angry and had stated that they would not buy the same.

62. In cross examination, the witness DW2 informed the court that the Plaintiff had been his client to whom he had previously sold two pieces of land in the year 2012 within the same area measuring 79 acres and 170 acres respectively and that in one piece the purchaser had planted tress but he was not aware what had been planted on the second piece of land.

63. That the suit land had been shown to him by the scouts and the Deceased Francis and that the first time he had visited it, he had not gone with the surveyor but in the month of July 2013 he had gone therein with a surveyor who had put beacons thereon.

64. DW2 testified that at the time he sold the suit land, there was no settlement there as yet and that people were grazing on the said land, there was also some farming activity going on therein and that the land and all the surrounding land had a few patches that had stones.

65. That although he had not seen the valuation report, and the forestry report, yet he had been informed of their existence by the Plaintiff's Manager.

66. DW2 also testified that the Plaintiff herein normally conducted deals that ran into billions of shillings and that they could not afford to make mistakes in their businesses. That the disagreement arouse because of the commission that he was to be paid which commission was being claimed by Mr. Kanyi too.

67. That the said land had now appreciated and that he could sell it at a higher price.

68. The defence then closed their case wherein the defence Counsel filed her written submissions on the 5th December 2017 and did not wish to highlight on it.

69. The Defendant's submission in support of her defence and counter claim on the other hand was to the effect that the suit land was identified to the Plaintiff's officials and agents by the title deed, a map and physical identification on the ground and further the Plaintiff conducted due diligence before committing itself to purchase the property.

70. That there was no misrepresentation of any kind and that the Plaintiff's intended action of backing out of the Agreement was because of the internal difference between them in relation to the payment of commission and/or agent fee claimed by two competing agents.

71. The defendant's submission is that they had not made any misrepresentation to the plaintiff regarding the suit land. They referred the court to the evidence by the Plaintiff's witness Mr. Josiah Mwangi Ndegwa who stated both in his statement and in evidence that the suit land and parcel No. Nyandarua /Kaimbaga/12 were shown to them by both Mr. Kanyi and Mr. Kihara agents of the Defendant.

72. That despite the Defendant having denied Knowledge of these two agents in her defence at paragraph 6, paragraph 12 of her statement, yet the Plaintiff did not deem it fit to either enjoin them in the suit or question them in the meeting held on the 7th August 2013.

73. Further that the Plaintiff being a company Limited ought not to have handled an issue like this that involved about Ksh 28 million in such a casual manner.

74. The Defendant's submission was that she had fulfilled her legal obligation to the plaintiff in that in the initial stages of the transaction;

- i. she had identified the prospective purchaser, the size and extent of the property to be sold
- ii. That she had availed the documents of proof of ownership of a good title for transfer to the purchaser(Plaintiff)
- iii. That she had given accurate facts and information on any enquiry by the purchaser

75. The Defendant further submitted that indeed the suit land has been positively pointed out to the Plaintiff and that no evidence had been provided in court of the wrong piece land that had been pointed out to the Plaintiff nor to its description. Further that even before meeting the Defendant, the Plaintiff on his own motion and without consent and Knowledge of the defendant had caused the suit land to be valued by M/S Zanconsult on the 11th February 2013 and the surveyor's report dated 14th February 2013 was issued to the effect that the Land was located in a fertile and productive agricultural zone. The said report is contained in the plaintiffs list of documents marked as No 1 and entitled 'Agreement for sale'

76. The Defendant further submitted that indeed she had complied with the terms and/or obligations set in the agreement and executed the necessary documents and that the transfer had even been exempted by the land control board wherein the Plaintiff's officials had executed the transfer and all that was remaining was the remittance of the balance of the purchase price.

77. On whether the Plaintiff exercised due diligence, it was the defendants submission that the basic legal principle of any land transaction was **buyer beware or caveat emptor**. It was therefore the Plaintiff's responsibility to inquire on the registered number of the suit land, the registered owner, the size of the land, its boundaries the tenure and status of the same concerning encumbrances which according to the evidence placed before the court, the Plaintiff indeed did do due diligence and in addition it was also admitted that they had another land adjacent to the suit land and further that DW2 had sold to the plaintiff two other parcels of land in the same locality, the plaintiff being a company limited whose liability is governed by strict provisions on the Act could therefore not make a mistake like they want the court to believe.

78. The defendant submitted that the real issue for change of mind was quarrel of commission between the agents namely Kanyi, Kihara and Ng'an'ga(DW2) as the court was informed by DW2 that he had been summoned by Kanyi after the part payment of ksh 15 million had been paid and threatened that is he did not share the commission then the contract would have been rescinded, secondly, that the Counsel for the plaintiff (Mr. Ombui) had been present at the meeting that had been called on the suit land on the 7th August 2013 where Kanyi was livid yet, he (counsel) did challenge DW2 on this aspect of evidence. That the reasons therefore raised for the cancellation of the Agreement were not genuine.

79. That the law of contract was application in the instant case. Section 3(3) of the Act is clear to the effect that:

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:

80. That where the same was not in writing then the doctrine of part performance of the terms of the contract would aid the aggrieved party. In essence therefore part performance of the contract between the parties' whether written or oral is binding action in the circumstance as is obtained in the present case.

81. That once the Agreement for sale was executed on the 29th May 2013 and part payment of the purchase price of Ksh 15 million deposited, the Plaintiff acquired a beneficial interest in the suit property. That by the court setting aside the said contract between the parties, it will in fact be making a contract for the parties. The plaintiff relied on the Ugandan decided case of **Behang vs School Outfitters (U)Ltd [2000] 1EA 10 at page 20**

82. On the issue of the defendant's counter claim, it was her submission that the plaintiff owed her Ksh 13,480,050/= that and invited the court to note of the fact that;

i. There was a valid transaction for value contained in writing.

ii. The contract had been substantially performed by the payment of Ksh 15,000,000/= as part payment of the purchase price.

iii. Beneficial ownership interest had been passed to the plaintiff

iv. The Plaintiff had taken possession (by proceeding to the ground to fence) and conveyancing of the title was as good as completed by the time the plaintiff started grumbling.

v. That once the sale Agreement had been executed, the rule of equity that 'Equity looks on that as done which ought to be done' came into operation. As it now stood, the defendant cannot lay claim to the suit land.

83. While placing reliance on the case of **Karanja Mbugua & Another vs Mary Bin Holdings Co. Ltd [2014]eKLR** the Defendant submitted that the allegation by the Plaintiff that the suit land was not suitable for planting trees had no basis to rescind the contract between the parties as it did not form part of the terms of the agreement.

84. The Defendant also relied on the case of **Johnson Joshua Kinyanjui and Vinubhai Virpal Shah vs. Rachael Wahito Thande and**

Another Nairobi court of Appeal Civil Appeal No. 284 of 1997 where it was held that it is trite law that that an agreement which is in law required to be in writing cannot be amended by oral representation or stipulations.

85. The Defendant asked the court to enter judgment for the defendant in the counterclaim for the sum of Ksh.13,480,050/= together with costs for the suit and costs of the counterclaim.

86. I have carefully considered the pleadings and arguments made by the parties. From the evidence it was evident that the prayers sought by the Plaintiff were that a declaration do issue that defendant is in breach of the Agreement and the same had been rescinded. The plaintiff also prayed for orders that the defendant returns a sum of Ksh 15,000,000/= and for a declaration that it was entitled to a lien on the property comprised in the Agreement for the return of the deposit and for interest on the deposit at court rate until the return of the same. Lastly, the plaintiff prayed for costs of the suit as well as further or any other relief that this honorable court shall deem fit and just to grant.

87. On the other hand the Defendant's prayers in her defence and counter claim were that the plaint be dismissed and judgment be entered for the defendant in the counterclaim for the sum of Ksh.13,480,050/= together with costs for the suit and costs of the counterclaim.

88. Considering the evidence adduced in court, the documents produced as exhibits, the recorded statements thereto as well as the authorities cited herewith, I find that indeed there is no dispute that;

i. On the 29th May 2013 the plaintiff entered into an agreement with the defendant herein to buy from her land situate in Nyandarua being No. Nyandarua/Kaimbaga/708 measuring approximately 40.44 hectares at a consideration of Ksh. 28,480,050/=

ii. That the a search having been carried out confirmed that the suit land belonged to the Defendant

iii. That parties agreed that the defendant was to be paid in two installments wherein she was paid the first installment of Ksh. 15,000,000/= on execution of documents and the balance of Ksh. 13,480,050/= was to be paid upon transfer of the suit land.

iv. That later the plaintiff herein rescinded the sale agreement on the allegation that the land they had bought was not the land they had been showed and that the Defendant was in breach of their agreement.

The Issues for Determination:

89. I therefore find the main issues for determination to be as follows:

i. Whether the defendant had a clean title to pass to the Plaintiff.

ii. Whether there was breach of the terms of the Agreement to sale by the Defendant.

iii. whether the sale agreement was validly rescinded by the Plaintiff

90. On whether the defendant had a clean title to pass to the Plaintiff.

Indeed there is no dispute that the defendant herein was the registered proprietor of Land parcel No. Nyandarua /Kaimbaga/708 measuring approximately 40.44 hectares and this having been confirmed by the production of the original copy of the title deed marked as Exhibit 2 and a certificate of official search dated the 29th January 2013, marked as exhibit 3, which all confirmed that the defendant was the registered owner of the suit property and therefore she had a clean title to pass to the plaintiff. A fact that is not denied by either party.

91. On the issue as to whether there was breach of the terms of the Agreement to sale by the Defendant.

It was the Plaintiff's evidence that the Defendant had breached their terms of the agreement in the following ways;

i. She had sold them land that had been sold to someone else by the name of Hellen Wamuyu Nyamu, and as such the land was already encumbered.

ii. The Plaintiff's further lamentation was that the defendant had breached Clause 4.2 of their agreement in that she has failed to point out the exact position of the suit property beacons delineating the property but has instead pointed out a different land which was not conducive for tree farming. That the Defendant had misrepresented to the plaintiff the physical location of the property and its quality.

92. In response to these allegation I find that the evidence adduced in court was to the effect that indeed when the Plaintiff received a letter dated the 27th February 2013 (exh 7) from Muteithia Kibira Advocates informing the Plaintiff that the suit Land had already been bought by one Hellen Wamuyu Nyamu, they ignored the said letter and proceeded to formalize their transaction, Dw2 also confirmed that indeed when the suit land had been put on offer for sale he found one Hellen Nyamu who paid a deposit of Ksh1,500,000/= but later when he got the plaintiff who was willing to buy the same at a higher price and he had convinced Hellen not to pursue with the purchase and instead brought the Plaintiff on board and that explains the reason as to how come the plaintiff got in possession of the original title deed.

93. Turning on the second issue, it is clear from the evidence on record that the Plaintiff herein had done due diligence in that the before the said negotiations, in the month of January 2013, the plaintiffs had been taken by Mr. Kanyi and Mr. Kihara to the suit land and had been

shown the beacons to the land which was physically pointed out to the Plaintiff. That further the Defendant's Agent one Nganga had also taken the plaintiff's representatives twice to the suit land on the 14th May 2013 and on another day that was not disclosed, to view the same and that it was upon their satisfaction that they had paid the defendant Ksh. 15,000,000/= as the first installment.

94. I also find that in the process of due diligence, that the Plaintiff without consent and/or Knowledge of the defendant had also enlisted the services of a land valuer M/S Zanconsult who had valued the suit land on the 11th February 2013 and vide his report dated 14th February 2013 wherein under the General remarks, the valuer found;

‘that the suit Land was located in a fertile and productive agricultural zone. That the size enhances its production/user potential and is taken into account in this valuation.’

95. The said report which is contained in the plaintiffs list of documents marked as No 1 entitled ‘Agreement for sale’ does not mention any quarry being on the suit premises contrary, to the plaintiff's evidence.

96. This confirms the candid evidence by the Defendant and DW2 that indeed the suit land was an agricultural land that had no quarry and also the fact that the Plaintiffs had surveyed the same and had been satisfied with the same to the effect that it had met their specifications and that is why they had paid the Defendant a deposit of Ksh 15,000,000/=.

97. It also confirms that evidence adduced by DW2 that although he had not seen the valuation report, and the forestry reports, yet he had been informed of their existence by the Plaintiff's Manager.

98. It is not therefore proper for the Plaintiff to now turn around and try to run away from fulfilling its obligation as agreed in the contract by stating that the Defendant breached the contract by failing to disclose material facts as to the nature and exact size of the property and also by failing to point out the exact position of the suit property beacons delineating the property

99. Having found that the Plaintiff had prior knowledge of the land they were buying and that they had conducted due diligence, the issue that the Plaintiff had informed the defendant that they wanted land to plant trees, which has been vehemently denied by the defendant and her witness, does not arise herein.

100. I have also looked at the Agreement for sale and nowhere does it stipulate that the plaintiffs were purchasing the suit land for the purpose of planting trees as the plaintiff would want this court to believe.

101. Since the plaintiff was the one buying the land, the clear duty on their part as the purchaser in the contract of sale of land, was to conduct due diligence and inform itself on all the relevant aspects concerning the property that he was seeking to purchase. The rule of caveat emptor applies to contracts for the sale of land, and this responsibility on the part of the Plaintiff is clearly explained in Halsbury's Laws of England, Fourth Edition, Volume 42 at paragraph 51

“Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.”

102. The terms of the Agreement to sale are clear and I find that the defendant herein did not breach any of them. On the contrary, I find that it was the Plaintiff that had breached the said terms by failing to remit the balance of the purchase price within the stipulated time as agreed by the parties. A party cannot run away from the terms of its agreement. It has often been stated that the Court's functions are to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.

103. In the case of **Shah -vs- Guilders International Bank Ltd [2003]KLR** the Court in considering the terms of the parties contract stated-

“The parties executed the same willingly and they are therefore bound by it.”

104. The Plaintiff herein is clearly trying to run away from obligations lawfully imposed and with its full knowledge and participation to which I shall not aid it in that quest but will instead uphold the rights of the Defendant to recover monies lawfully owed to her.

105. In **Aiman vs Muchoki (1984) K. L. R. 353** the Court of Appeal held;

“In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer”.

106. For reasons stated hereinabove, the Plaintiffs case is dismissed in total. Judgment is entered for the defendant in the counterclaim for the sum of Ksh.13, 480,050/= with **interest on the same at court rates from the 10th September 2013 until payment in full. The defendant is also awarded** costs for the suit and the counterclaim.

107. It is so ordered.

Dated and delivered at Nyahururu this 21st day of March 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE