



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Faraj & 2 others (Environment and Land Case Civil Suit
154 of 2016) [2025] KEELC 1023 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 154 OF 2016
LL NAIKUNI, J
FEBRUARY 28, 2025**

BETWEEN

KHAMIS MATANO ALI PLAINTIFF

AND

CHEIDA FARAJ 1ST DEFENDANT

UMARI UWEZO MWAKITUKU 2ND DEFENDANT

**KENNETH O MARENDE, JONAH NG'ENO BIRIR, SHIMAKA N LEONARD
T/A MARENDE BIRIR SHIMAKA & CO 3RD DEFENDANT**

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to a Civil Suit instituted by the Plaintiff vide a Plaint dated 2nd June, 2016 and filed before court on 10th June, 2016. It was against the 1st, 2nd and 3rd Defendants herein.
2. Upon service of the Summons to Enter Appearance dated 16th June, 2016, the 3rd Defendant filed a memorandum of Appearance dated and filed on 11th July, 2016, a Statement of Defence dated 17th August, 2016.
3. Despite all efforts to serve the 1st Defendant, the Plaintiff was compelled to seek for leave to serve him by way of substituted service as evidenced by the affidavit of service dated 3rd May, 2016 and sworn by Maita Dzitu Mwangome a court process server but still he never entered appearance and hence never participated in the instant proceedings. Subsequently, on 29th August, 2016, the Plaintiff made a request for Judgement against the 2nd Defendant who had failed to enter appearance within the prescribed time. Consequently, on 21st September, 2016, interlocutory Judgement was entered against the 2nd Defendant for the sum indicated in the Plaint being Kshs 1,775,000/- plus costs and interest.



II. The Plaintiff's Case

4. Based on filed pleadings at all times material to this suit, the 1st Defendant was an alleged owner of all that property known as plot sub division Msa/Mwembe Legeza/1459. The 2nd Defendant was described as the 1st Defendant's agent while the 3rd Defendants were Advocates in the transaction. By an agreement dated 16th May, 2015 and drawn by the 3rd Defendants, the 1st Defendant sold to the Plaintiff the suit property at a consideration of a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-). The Plaintiff paid the full purchase price was paid and the transfer of the title deed was made in the name of the Plaintiff.
5. However, the 1st Defendant failed to do so within a reasonable time as per the terms of the Agreement to date. According to the Plaintiff, he carried out an official search on the suit property and established that the same was registered in the names of one Issa Suleiman Kalolo since November 2012. Thus, the Plaintiff made a demand for the payment of the Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00) from the Defendants. In spite of this, and all efforts to have the purchase price refunded had to date proved futile and necessitated this suit.
6. The Plaintiff held that the Defendants acted fraudulently in the sale agreement dated 16th May, 2025 under the following particulars:-
 - a. Offering the property for sale when she knew she was not the owner
 - b. Presenting fake Letter of Offer purporting it to be genuine letter of allotment
 - c. Entering into an agreement of sale when she knew she had no title to pass
 - d. Fraudulently receiving a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-) when she had not title to pass
 - e. Failing to comply with the terms of the agreement for sale
7. The Plaintiff further listed the 3rd Defendants [though indicated as 1st Defendant in the Plaintiff] particulars of fraud as follows:-
 - a. Presenting that parcel of land known Plot No Sub - Division No Msa/Mwembe Legeza/1459 as a genuine parcel of land of land belonging to the 1st Defendant
 - b. Presenting a fake search certificate purporting it to be genuine certificate of search of Plot No Sub - Division No Msa/Mwembe Legeza/1459.
 - c. Failing to provide a time frame in the agreement of sale as to when the transaction would be concluded
 - d. Failing to advise the Plaintiff on his rights
 - e. Allowing the 1st Defendant to sign the agreement of sale when they knew or ought to have known that the 1st Defendant had no title to pass to the Plaintiff.
8. Thus, the Plaintiff prayed for Judgement against the Defendants jointly and severally for:-
 - a. Kshs 1,775,000.00/-
 - b. Interest at court rates
 - c. Costs of the suit and interest



9. Hearing of this suit proceeded on 31st October, 2022.

A. Examination in Chief of PW – 1 by M/s. Shihundu Advocate.

10. PW - 1 testified and was sworn in Kiswahili language. He identified himself as MOHAMED MATANO ALI. He lived in Majengo of Mvita. He was a Land Broker. He was the brother to Khamisi Matano Ali. He stated that he tendered evidence on behalf of the Plaintiff Khamis Matano Ali who is his brother and resided in Dubai. He availed a Power of Attorney to court for this effect.
11. The case was about a 50 X 100 feet Plot at Bamburi Mwembelegeza within the County of Mombasa. The witness testified that his brother had been informed of the suit property by a friend who had intimated to him that he knew the 2nd Defendant a broker in land. That the broker was called and the parties convened at Advocate Shimaka's office they entered into sale agreement and where a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-) was paid to the 1st Defendant as consideration for the suit parcel. The witness further stated that the broker was paid a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) and the Advocate paid fees amounting to a sum of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/-).
12. He stated that the Plaintiff was promised that the title deed would be ready within one month. However, the said promise was never fulfilled. He conducted an official search at the lands office which revealed that the suit property was in the names of someone else who he did not know. AS result of this that the Plaintiff decided to seek for legal recourse and a demand letter was made to the Law firm of Messrs. Marende Birir, Shimaka & Company Advocates.
13. That to date, the Plaintiff had never been registered as the owner of the suit property and neither had he received a refund of the purchase price and the incidentals thereto. The witness produced the Plaintiff's list of documents as Plaintiff Exhibits numbers 1 to 6 and placed reliance on the witness statement dated 10th June, 2016. It was further prayed that the sum totalling to a sum of Kenya Shillings One Million Seven Seventy Five Thousand (Kshs. 1,775,000/-) be awarded the Plaintiff.

B. Cross – Examination of PW -1 by M/s. Kyalo Advocate.

14. PW – 1 stated that he was testifying on behalf of his brother and was not physically present during the transaction. He stated that he was not aware of any letter of offer but was sure that an agreement had been entered into and the advocate was to receive a sum of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/-). On being referred the letter dated 12th May, 2016 by the Registrar of Title, he stated that the Registrar had indicated that there was no record for the suit land in their offices and that the said records were still being held by the department of Land Adjudication and settlement (SFT). He stated that the same had not yet been presented to their offices for registration.
15. However, PW – 1 stated that based on the contents of the letter dated 13th May, 2026 from the Land Adjudication officer indicated that the plot was allocated to Mr. Gheida Faras, the 1st Defendant. He stated that before going to the Advocate, his brother had a family friend called Ali who was the one who introduced him to the Broker. The Broker took them to Mr. Shimeka. He stated that Advocate Shimaka was to be blamed as he was the one to process the title deed and he was the one to carry out the search. Had he been the one undertaking the transaction, he could have first of all conducted an official search.



C. Re - examination of PW – 1 by M/s. Shihundu Advocate.

16. PW – 1 testified that the advocate had received a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000./). He confirmed that the letter by the District Adjudication Officer indicated the property was for the 1st Defendant but the search never showed the names of the 1st Defendant. That according to the sale agreement it was the Advocate who was to process the title deed. He was paid to perform this task. That was all.
17. The Plaintiffs case was marked as closed.

III. The 3rd Defendant’s case.

18. In its defence, the 3rd Defendants filed their Statement of Defence dated 17th August, 2016. The averments raised in the Plaint were denied in toto save for the descriptive nature of the parties. At paragraph 4 of the defence, it was stated that the purported official search carried out on Plot No. Sub – division Mombasa/Mwembelegeza/1459 by the Plaintiff was questionable, fake and/or fraudulent as there were no records of the suit property as per the office of the Registrar of Titles Mombasa. The records over the suit property were at the department of Land Adjudication and Settlement [SFT].
19. In response to the issues raised under Paragraphs 9, 10 & 11 of the Plaint, the 3rd Defendants denied any liabilities and negligence of whatever and that the 3rd Defendant acted fraudulently or negligently or had to pay any amounts to the Plaintiff.
20. The 3rd Defendant averred that if at all there was any fraudulent dealings on their part as alleged, which they denied, then it wholly and solely caused by the oversight and/or negligence of the Plaintiff being the purchaser in the said transaction and the 3rd Defendant was not a party to the said agreement but was merely an Advocate for both parties and conducted due diligence as required professionally.
21. Under Paragraphs 6 of the Defence, the 3rd Defendant provided the following particulars depicting the negligence by the Plaintiff as follows:-
 - a. Failing to take heed of the doctrine of “Caveat emptor”.
 - b. Agreeing that he had inspected and surveyed land and that he purchased the same with full knowledge of its actual state and condition and he shall take the land as it stood.
 - c. Agreeing that he had conducted a search against the title and had full knowledge of the terms and conditions pursuant to which the 1st Defendant held title to the land.
22. While the 3rd Defendant denied in toto the contents of Paragraph 11 to the effect that the Plaintiff had suffered loss and damage as a result of the said transaction amounting to a sum of Kenya Shillings One Million Seven Seventy Five Thousand (Kshs. 1, 775, 000/-), it admitted those of Paragraphs 12 and 13 of the Plaint respectively that there was no other pending proceedings in any Court regarding the cause of action and that this Court had jurisdiction as the cause of action arose in Mombasa.
23. The 3rd Defendants prayed that the Plaintiffs suit be dismissed with costs. Defence hearing commenced on 3rd October, 2023.

D. Examination in Chief of DW – 1 by M/s. Kyalo Advocate.

24. DW - 1 was sworn and testified in English language. He identified himself as Mr. Shimaka Necheza Leonard. He was an Advocate of High Court of Kenya bearing Admission numbers P/105/8899/11. He was the Managing Partner of the Law firm trading in the names and style of Messrs. Marende,



- Necheza & Company Advocates. He informed the Court that the 3rd Defendant was his Senior Partner while the 4th Defendant was his Partner in the then Law firm trading as Marende, Birir Shimaka & Company Advocates located in Mombasa.
25. On 17th August, 2016, he filed in Court a list of six (6) documents and which he produced as the 3rd Defendant Exhibits Numbers 1 to 6. There were:-
- a. A copy of the Sale Agreement dated 16th May, 2015;
 - b. A copy of a letter dated 1st December, 1998;
 - c. A copy of a letter by the Advocates dated 12th April, 2016.
 - d. A copy of a letter from the District Land Adjudication & Settlement Office dated 13th April, 2016;
 - e. A copy of a letter by the Advocates to the Land Registrar Mombasa dated 12th April, 2016.
26. He stated that in April 2015 the purchaser went to his office in company of a Land agent called Wezo and a vendor, one Mr. Gheida Faraj. But during that month he had not been in office. Before drawing the sale agreement, he advised them to first of all inspect the property and conduct an official search. On 16th May, 2016 the parties appeared before him in chambers where the vendor presented to him a Letter of Allotment issued on 1st December, 1998.
27. DW – 1 then proceeded to draft the sale agreement for the sale of the property – terms and conditions stipulated thereof. It was duly executed on 16th May, 2016 before him. Payment of the purchase price of a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-) was made to the Vendor. That upon payment the purchaser confirmed he had inspected, surveyed and bought it the suit property on as it was basis. He proceeded to take possession of the same. However sometimes in the year 2016 April, the witness testified that the purchaser appeared and informed counsel that someone else was laying claim on the suit parcel. As a result, the witness did a letter dated 12th April, 2016 [Defendant Exhibit No. - 3] addressed to the District Land Adjudication officer inquiring on the suit property and the same was responded to stating that the property was allocated to one Mr. Gheida Faraj. At the same time, he did a similar letter of inquiry dated 12th April, 2016 authored to the Land Registrar. Vide a letter dated 12th May, 2026, the Land Registrar responded to the letter and confirmed that the land was still under the Settlement Fund Trustees (SFT) and the records had not yet been presented to the lands office for their registration or action whatsoever.
28. The 3rd Defendant stated that the Plaintiff never indicated any fraud on the part of the 3rd Defendant. The court was urged to dismiss the Plaintiffs claim as payment of the purchase price was done directly to the vendor.
29. In his further testimony, DW - 1 claimed that there seemed to be some sort of conspiracy between the Plaintiff and the 1st and 2nd Defendants. In expounding on the same, he stated that the said parties who were the main culprits had been left out in the matter as no effort to trace them had been made. That the 3rd Defendant had simply acted in his capacity as an advocate. That at the time of preparing the agreement there was no title deed but only a Letter of Offer, that the Land Registrar in his letter of 12th May, 2016 [Defendant Exhibit No. 6] confirmed that there was no file to the property. The official search of 18th March, 2016 showed the property belonged to someone else – Mr. Isaa Suleiman Kazozo. He was never sued by the Plaintiff. In conclusion, DW – 1 prayed that the suit against the 3rd Defendant be dismissed with costs.



E. Cross – examination of DW – 1 by M/s. Omondi Advocate.

30. The witness testified that when the parties went to his office in April, 2016 he advised them to conduct an official search of the property. He never saw the official search. That the agent was known to him and not the vendor. By the time he drafted the sale agreement, the Vendor only presented to him a Letter of Offer. He did not have a title deed. He did not know the Vendor. He only knew the Land Broker. He never confirmed that the property belonged to the Vendor or not.
31. On being referred to the Defendant's Exhibit No. 2 – the Letter of Offer dated 1st December, 1998, DW – 1 confirmed that the Purchaser went to his offices and confirmed the 10% deposit of the purchase price had been paid. He stated that he was aware the purchaser had taken possession of the suit parcel but had no proof of the same. He was acting for both the Vendor and the Purchaser. They were both lay persons. The purchase price was paid directly from the Purchaser to the Vendor and not through the Law firm. He refuted the claim that he had been paid a sum of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/-) as legal fees. Instead, he stated that he had only been paid a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) by the Vendor and nothing by the Purchaser. He knew the standard conveyancing took 90 days. But for this one he was not aware how long it took as they proceeded to do it themselves.

F. Re - Examination of DW – 1

Nil

The 3rd Defendant case was marked as closed.

IV. Submissions

32. Upon the closure of the Plaintiff and the 1st, 2nd & 3rd Defendants case on 16th December, 2024, the Honourable Court directed that parties to file written submission with respect to their case.
33. Unfortunately, at the time of preparing this Judgement, there were no submissions on record from either of the parties. The position is confirmed from the CTS system. Pursuant to that, the Honourable Court will proceed to delivered its Judgement on its own merit accordingly.

V. Analysis & Determination

34. I have carefully assessed all the filed Pleadings by the parties herein, the oral and documentary evidence adduced herein, the provisions of *the Constitution* of Kenya, 2010 and the statutes.
35. For the Honourable Court to arrive at an informed, reasonable and Equitable decision, it has condensed the subject matter into two (3) issues for its determination. These are:-
 - a. Whether the suit instituted by the Plaintiff herein through a Plaint dated 2nd June, 2016 has any merit or not.
 - b. Whether the Plaintiff is entitled to the prayers sought.
 - c. Who will bear the costs of the suit.

ISSUE No. a). Whether the suit instituted by the Plaintiff herein through a Plaint dated 2nd June, 2016 has any merit or not.

36. Before the Honourable Court commences on the analysis under this Sub – heading, the Honourable Court will embark on the brief facts of this case. From the filed pleadings, in the year 2015 this was case



- where a sale of land transaction was unsuccessful on allegations of it being marred by acts of omission and commission bordering on negligence and fraudulent means meted by the 1st, 2nd and 3rd Defendants herein. Briefly, the Plaintiff as the prospective purchaser was led by a close friend to the 1st Defendant whom he was made to understand by the 2nd Defendant, a Land Broker, being the legally and absolute registered owner to the suit land had intention of disposing it off.
37. Upon the encounter of the Plaintiff, the 1st and the 2nd Defendants, herein it was proposed that they engage an Advocate to undertake the sale transaction on their behalf. Indeed, the 2nd Defendant highly recommended the 3rd Defendant as the appropriate law firm to undertake the task having successfully done the same in the past. On their arrival at the law firm offices, the Advocate who was not presently in office communicated to them through supposedly through phone whereby he advised them to first of all conduct an official search against the suit property. It is not clear whether this took place as no such search was ever produced in Court.
38. However, on 16th May, 2015, while in the presence of the Advocates the parties presented them selves in possession of the Letter of Offer dated 1st December, 1998 (Defendant exhibit No. 2.) as proof of ownership. The terms and conditions of the sale were deliberated on and a Sale Agreement was drafted by the Advocate – Defendant Exhibit No. 1. It was agreed the Advocate acts for both the Vendor and the Purchaser. The purchase price and/or the consideration was agreed for a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00). The agreement was duly executed and payments made. According to the 3rd Defendant the Purchaser paid upon the purchase price directly to the vendor and he released them to finalise the transaction on their own. He holds that he was only paid a sum of Kenya Shillings Twenty Thousand (Kshs. 20, 000/=) out of the agreed sum of Kenya Shillings Seventy Five Thousand (Kshs. 75, 000/=) only by the Vendor as for the professional services rendered in the transaction whatsoever.
39. It was later on that the Vendor came back to the Advocates offices complaining that upon conducting official search at the office of the Land Registry Mombasa that he found out that the suit property had already been registered in the names of a third party – one Mr. Isaa Suleiman Kazozo and he felt duped. It was based on this information that the Advocate immediately wrote a letters dated 12th April, 2016 to the District land Adjudication Offices and copied to the Land Registrar making inquiry over the suit land. Thereafter, the two offices responded to his inquiry – DLASO wrote a letter dated 13th April, 2016 indicating that the suit property was allotted to Gheisa Faraj and yet no payments had been made against the said plot. On its part, the Land Registrar through a Letter dated 12th May, 2016 held that all records pertaining to the suit plot were still being held by the department of the Land Adjudication and Settlement- (SFT). The records had not as yet been released to them for the registration purposes by the Land Registrar.
40. Clearly, upon getting this information, there is no evident of any practical or appropriate action that the 3rd Defendant took to that effect. It appears the matter ended there. Resultantly, the Plaintiff decided to institute this suit. That is adequate on brief facts.
41. Now turning to the issues for analysis under this sub heading. The Honourable Court will endeavour to decipher on the following significant issues for its consideration. These are:-
- i. Whether there was a valid contract in this transaction.
 - ii. Whether there was any good title to be transferred.
 - iii. Whether there existed any acts of negligence, omission, mistake and/or fraudulent aspects in this transaction.



42. Firstly, the Honourable Court will endeavor to deliberate on the principles of the Law of Contract – nature, meaning and scope of Contracts and the breach of it thereof. Contracts are governed by the provisions of the “The Laws of Contract, Cap. 23”, the Land Act, No. 6 of 2012 among other Laws of Kenya. Contract is an agreement entered between one or more than one person with another or others creating an obligation for a consideration and its enforceable or recognizable in law. There are other definition of Contract as being a promise or a set of promise, for breach of which the law gives a remedy or the performance of which the law in some way recognized as a duty. It is trite law that Courts cannot re – write contracts for parties, neither can they imply terms that were not part of the Contract. In the case of “Rufale – Versus – Umon Manufacturing Company (Ramsboltom) (1918) LR 1KB 592, Scrutton L.J held as follows:

“The first thing is to see what the parties have expressed in

The contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract” .

In simple terms, Courts do not make contracts to parties.

Courts do not even try to improve the contracts which the parties have made themselves. If the express terms are perfectly clear and ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.

43. The validity of Contract in sale of land are provided for under both the provisions of Sections 38 and 39 of the Land Act, No. 6 of 2012 which states:-

Section 38 (1):- “Other than as provided by this Act or by any other written law no suit shall be brought upon a Contract for the disposition of an interest in land:-

- a. The Contract upon which the suit is founded:
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
 - iii. the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

Section 39:- “If, under a contract for the sale of land, the Purchaser has entered into possession of the land, the Vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the Purchaser by:-

- a. Resuming possession of the land peaceably; or
- b. Obtaining an order for possessions of the land from the court in accordance with the provisions of Section 41.

The provision of Section 3 of the Law of Contract Act provides that:

- i. No suit shall be brought upon a contract for the
“(3) disposition of an interest in land unless—
The contract upon which the suit is founded—
- ii. is in writing;



iii. is signed by all the parties thereto; and

The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

The provision of Section 40 of the *Land Act*, No. 6 of 2012 provides for the damages from the breach of Contract. It provides:-

40 “Nothing in Section 39 of the Act
(1) prevents a vendor from claiming damages and Mesne Profits from the Purchaser for the breach of a Contract of sale or for breach of any other duty to the Vendor which the Purchaser may be under independently of Contract or effects the amount of damages that the Vendor may claim..”

(2) Any term express or implied in a contract or other instrument that conflicts with this section shall be inoperative. Further, the provision of Section 38 of the *land Act*.....

44. The Court in the case of “Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991, opined as follows over an agreement for sale of land; -

“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”.

45. It is not in doubt that the parties herein duly executed a Sale Agreement dated 16th May, 2015 for the sale of the suit land – terms and conditions stipulated thereof. It was produced as the Plaintiff Exhibit Number 6. Specifically, the terms include:-

- a. The purchase prices of Kshs One Million Five Hundred Thousand Only [Kshs 1,500,000/-] whose receipt the vendor acknowledged.
- b. The sale was subject to the law society of Kenya conditions of sale [1989 edition]
- c. The completion date shall be upon obtaining and registration of title deed in the name of the purchaser by vendor from the date of execution of the agreement or at any earlier date as parties may agree.
- d. Advocates for both the vendor and purchaser was the 3rd Defendants.
- e. The property was sold free from any encumbrances.
- f. The purchase agreed and confirmed that he had inspected and surveyed the land with full knowledge of its actual state and condition and shall take the land as it stands. That the



purchaser had conducted a search against the title to the land and had full knowledge of the terms and conditions pursuant to which the vendor held title.

- g. On cumulative remedies any remedy or right conferred upon the vendor or the purchaser for breach of the agreement including the right of rescission shall be in addition to and without prejudice to all other rights and remedies available to them.
46. The sale agreement is in writing and was made in the presence of the 3rd Defendants. Both the vendor and purchaser signed the agreement and the same was attested to by the 3rd Defendant, an extra signature was noted at the bottom of page 6 of the agreement, it is presumed that the same belonged to a witness. The agreement further contains the full description of the parties and the land subject of the same. According to the Plaintiff, the Letter of Offer dated 1st December, 1998 and the Letter dated 13th April, 2016 being Defendant from the District Land Adjudication and Settlement being Plaintiff Exhibit Number 5 acted as sufficient proof that the suit property belonged to the 1st Defendant herein. For all these reasons, therefore, the Honourable Court finds that there existed a valid land sale agreement between the Plaintiff and the 1st Defendant herein.

ISSUE No. b). Whether the Plaintiff is entitled to the prayers sought.

47. Under this sub – title, having established that there existed a valid sale agreement between the parties, the next cause of action would be to interrogate whether the Plaintiff is entitled to the prayers sought in the Plaint. Ideally, the 1st Defendant was to ensure that the suit property was transferred to the Plaintiffs ownership and possession, that has not been the case. It is the Plaintiffs case that the 1st Defendant and the 3rd Defendant acted fraudulently and failed to facilitate this transfer and thus owe him refund of the purchase price and interest.
48. Among the vitiating factors to the contract is the fact that the suit property is registered in the names of a third party one Issa Suleiman Kazozo from November 2012. Further, it is the 3rd Defendants case that there are no records of the suit property from the lands registry and that the same were traced to the land adjudication and settlement section. With this information in mind, the question that stands out is whether there was fraud on the part of the Defendants. ‘Fraud’ has been defined in Blacks Laws Dictionary as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further from the Black’s Law Dictionary Ninth Edition at Page 731 also defines ‘fraud’ as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” It has been held by the Court of Appeal that a party is required to prove the issue on a standard beyond a mere balance of probability See *Ratilal Gordhanbhai Patel – Versus - Halfi Makanji* (1953) EA 314, *Eva Kimea & Another – Versus - Nawal Abdulrahman, Abdalla* C.A No. 52 of 2014 Malindi and *Malindi C.A No. 26 of 2013 Kalume Karisa Mbithe & Another Vs Bromine Investment Limited*. Further, on the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In the case of *“Koinange & 13*



others – Versus - Charles Karuga Koinange 1986 KLR at page 23 the court held that:-

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

49. It is not in doubt that the 1st Defendant was well aware that the suit property was not registered in his names. In a nutshell, had the 1st Defendant acquire absolute and legal proprietary rights, interest and title to the suit land to have been capable of transferring it? Or put it different, what is this that the 1st Defendant passing on to the Plaintiff? Legally speaking, a Letter of Offer dated 1st December, 1998 does not certainly confer proprietary rights on the person the same has been addressed to and envisaged under the provision of Sections 24, 25 and 26 of the *land Registration Act*, No. 3 of 2016.
50. In support of this legal position, I wish to cite the case of: “Philma Farm Produce & Supplies & 4 others - Versus - The Attorney General & 6 others (2012) eKLR, the court held as follows:

“The Petitioners’ claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the Petitioner claim must fail...Even if I were to assume in the Petitioners’ favour that the 2nd to 5th Petitioners were partners and that they were entitled to the allotment of the suit property, acceptance of the allocation was a conditional offer to be accepted within the time limited and by payment of all the sums of money demanded within that period.”

51. Be that as it may, the Letter of Offer has a Pre – condition to be fulfilled by stating as follows:-

“This Letter is valid for 90 days from the date of this letter. Within this period you should pay the 10% deposit for the plot and be documented accordingly failure to which will lead to the cancellation of the offer without further notices..” During the pendency of this proceedings, the 1st Defendant failed to demonstrate on the fulfilment of these conditions in form of a letter of Acceptance and receipt of payment of the 10% deposit. Indeed, the District land Adjudication and Settlement Officer vide its letter dated 13th April, 2016 holds:-

“The Plot was allocated to one GHEIDA FARAS (Sic). According to our record no payment have yet been made for this plot”.

Further, this position is even cemented by the land Registrar who indicated through his letter of 12th may, 2016 that the records on this Plot had never been presented to them from the offices of the District Land Adjudication and Settlement for their registration. Clearly, then this plot was never registered in the names of the 1st Defendant or anyone else for that matter. All these facts were well within the knowledge of the 1st defendant at the time he was purporting to be transacting it with the Plaintiff in the presence of the 3rd Defendant. In a nutshell, the 1st Defendant only had a Letter of Offer from DLASO but subject to the fulfilment of the pre – conditions enshrined thereof therefore did not have



the capacity to transact on the land as one cannot give what you do not possess. In saying so, I will invoke the principle of “nemo dat quod non habet” and heavily place reliance on the holding in the case of:- “Daniel Kiprugut Maiywa – Versus - Rebecca Chepkurgat Maina (2019) eKLR where the Honourable Court pronounced itself as follows:

“The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract. This principle was applied in the case of Haul Mart Kenya limited – Versus - Tata Africa Kenya limited (2017) eKLR and Katana Kalume vs Municipal Council of Mombasa (2019) eKLR.”

52. Bearing the above in mind, it is also clear that there was outright fraud and misrepresentation of facts at the time of entering into the sale transaction. Undoubtedly, the aspect of fraud has been successfully proved as against the 1st and 2nd Defendants. I believe it will be questioned as to how the 2nd Defendant who acted as a land broker in this transaction can be held liable for fraud. It has been admitted by the Plaintiff and the 3rd Defendant that the 2nd Defendant was present during the transaction, the Plaintiff states that upon making known his interest in purchasing land, he had engaged his brother in law who referred him to the 2nd Defendant. It is the 2nd Defendant who had introduced them to the 1st Defendant as the owner of the suit property and consequently the vendor in the transaction. The 2nd Defendant was therefore the 1st Defendant’s agent. It is trite that an agent of a disclosed principal cannot be held personally liable but with few exceptions which include fraud, in the case of “Victor Mabachi & Another – Versus - Nuturn Bates Ltd [2013] eKLR” and “Anthony Francis Wareheim t/ a Wareham & 2 others – Versus - Kenya Post Office Savings Bank Civil Application Nos. Nai 5 & 48 of 2002. In the instant dispute the aspect of fraud has been proved, the 2nd Defendant is thus liable for his actions.
53. Lastly, I wish to address the issue of professional negligence and fraud on the part of the 3rd Defendant as a Law firm. The evidence of DW - 1 was that the parties in the contract appeared before him with the intent of executing a land sale agreement. He listed those present as the Plaintiff, the 1st and 2nd Defendants. It is noted that Counsel indicated the 2nd Defendant introduced the parties and it is then that DW - 1 advised them to conduct due diligence before proceeding with the transaction. In his defence, DW - 1 opined that the Plaintiff had purchased the suit property after acknowledging that the same was the 1st Defendant’s property and that he had agreed to have inspected and surveyed the land beforehand. The Counsel referred to paragraph 10 of the agreement on the condition of the land and sought to be exonerated from the fraud allegations.



54. The 3rd Defendant through the Counsel Mr. Shimaka is an Advocate of this court. Clause 5 of the Sale Agreement shows that the Law firm acted for both the Vendor and the Purchaser in this transaction. It is alleged that he was paid a sum of Kenya Shillings Seventy Five Thousand (Kshs. 75,000/-) for rendering professional services. From a strict Conveyancing parlance, the Advocates were expected to have undertaken due diligence on the transaction including conducting official search, drafting the sale agreement and explaining its terms and conditions to the parties; witnessing its execution; preparing transfer documents; payment of stamp duty and other statutory requirements; registration and issuance of the new title in the names of the Purchaser. In conclusion, the Advocate is to ensure the handing over of the title to the Purchaser.
55. On the contrary, the above process never happened. The Advocate stated that his only role was to draft the agreement. After the signing of it, he let the parties proceed on with the rest of the transaction until the Purchaser came back to his office complaining of having been duped. But even then, the Advocate who was on record as acting for both the parties in this transaction took a very casual or peripheral role of merely drafting a letter of inquiry to the DLASO offices and the Land Registrar. It is my own view that this what the Advocate ought to have done from the very beginning. It is a case of putting a cart before the horse. This Honourable Court would have expected the Advocate to have at least advised on seeking court order for on placing some restriction through registration of inhibition or injunctive orders or caution against the property as provided for under the various provision of the Law in order to preserve it. This never happened. Clearly, the Advocated acted in bad faith in executing their professional services to their clients – an evidence of negligence.
56. Paradoxically, this assertion was refuted by Counsel who claimed that the parties exchanged the purchase price, without showing any acknowledgement of the receipt to tgis effect; having been paid only paid a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) by the Vendor and nothing by the Purchaser without displaying any official receipt of payment. Neither of the parties produced any evidence to back up these allegations on legal fees. All said and done, the whole scenario appears completely untidy and unprofessional. I am compelled to seek refuge from Advocate Ambrose Weda [Esq]’s book ‘The Ideal Lawyer’ addresses the core functions of a contemporary ideal lawyer. At page 19 of the same, progressive discussions are made on the role of a lawyer (read a Law firm) to plead and litigate the clients cause, an excerpt of the same is as follows:-
- a. “An ideal lawyer has the sworn duty to prosecute or defend the clients cause with much vigour and gusto, total diligence and dedication with utmost care, speed, accuracy and courage”.
57. Similarly, in the case of: “Gitonga Kamiti & Another – Versus - Rose M. Simba & Another [2012] eKLR Mutava J had the following to say; -
- “The legal profession is a high fidelity calling. It is built on utmost trust and confidence. When a client seeks Counsel and assistance from an advocate, they expect nothing short of flawless prudence, care and circumspection”.
58. In my opinion, therefore, the Learned Counsel on behalf of the law firm should be well versed with issues pertaining land transactions more specifically the procedures and law governing the same. Despite pleading that the Plaintiff had confirmed having done due diligence before entering into the agreement, the Counsel should have called for documents confirming the 1st Defendants ownership, if they did, then it was imperative of them to advise the Plaintiff against the transaction. Thus, I discern that the 3rd Defendant was a key player in the impugned transaction who failed to discharge his duties with diligence. Hence, the Plaintiff’s claim against the 3rd Defendant wholly succeeds. However, in an attempt to balance the interest of all parties herein and in the interest of justice, I wish to point out that



the Plaintiff on his part was also not pro - active in carrying out proper due diligence before proceeding with the transaction. There is a lot of laxity and indolence noted perhaps it was because he had engaged the services of the Counsel. A rather tricky position.

59. Be that as it may, the provision of Clause 15 of the Agreement provides remedies cumulative aspects for any remedy or right conferred upon either party for breach of the agreement including the right of rescission and any other remedies available. The Plaintiff seeks for a refund of the purchase price and interest thereto. The Plaintiff is therefore entitled to a refund of the purchase price as sought.
60. On interest, the Court has the discretion to grant as provided for by the provision of Section 26 of the [Civil Procedure Act](#) which provides,

- “26. Where and in so far as a decree is for the payment of money, the Court may,
- (1) in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.
- (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum.

61. This dispute is hinged on a liquidated claim. The sole purpose of interest will be to compensate the Plaintiff of the damage incurred as a result of the Defendants actions. For these reasons, I hold that the Plaintiff has demonstrated that he is entitled to interest and it would be fair to grant the same as this court hereby does.

ISSUE No. c). Who will bear the costs of the suit.

62. It is trite law that the issue of costs is at the discretion of the Court. Costs mean the award a party is granted at the conclusion of the legal proceedings or action in any litigation. The proviso of Section 27 of the [Civil Procedure Act](#), Cap. 21 provides that costs follow the events. By events it means the result of outcome of the said legal action or proceedings.
63. In this case, the Plaintiff's case has succeeded in proving its case and thus he is entitled to costs to be borne by the 1st, 2nd and 3rd Defendants jointly and severally.

VI. Conclusion & Disposition

64. The upshot of all this, having caused an indepth analysis to the framed issues herein, the Honourable Court based on the principles of Preponderance of probability and balance of Convenience, finds that the Plaintiff has successfully established its case. For avoidance of doubt, the Court specifically proceeds to make the following orders:-
- a). THAT Judgement be and is hereby entered in favour of the Plaintiffs against the 1st, 2nd & 3rd Defendants jointly and severally in the following terms:-
- i. Liquidated damages in the sum of Kshs 1,775,000.00/-
- ii. Interest on [a] above at court rates until payment in full



- b). THAT the costs of the suit to be awarded to the Plaintiff to be borne by the 1st, 2nd & 3rd Defendants jointly and severally .

JUDGEMENT DELIVERED THROUGH THE MICRO – SOFT VIRTUAL TEAMS SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2025

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HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT & LAND COURT AT MOMBASA

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Mohamed Advocate for the Plaintiff.
- c. M/s. Kyalo Advocate for the 3rd Defendant.
- d. No appearance for the 1st & 2nd Defendants.

