



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MOMBASA**

**ELC SUIT NO.460 OF 2011**

**MICHAEL NDUNGU MBUGUA**

**LILY K. MUSINGA**

**FRANCIS KIARIE KARIUKI.....PLAINTIFFS**

**VERSUS**

**CECILIA WANJIRU COOPER alias CECILIA WANJIRU ERNEST...1<sup>ST</sup> DEFENDANT**

**MICHAEL MURIITHI MUTHIL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs herein entered into an agreement dated 7<sup>th</sup> July, 2010 with the 1<sup>st</sup> Defendant. The subject matter of the said agreement was for sale of a portion of land measuring 1/8 of an acre which was to be excised from land no. 1435 (original no. 464/49) Section 1 Mainland North. The Purchase price of the said portion was agreed at Kshs. 7,000,000/=.

2. The Plaintiffs pleaded that they made a down payment of Kshs. 1,050,000/= and the balance of Kshs. 5,950,000/= was to be paid after the subdivision of plot no. 1435/1/MN and completion of the transfer. Further, the Plaintiffs claim that they have adhered to the terms of the agreement and have made several part payments of the purchase price to the 1<sup>st</sup> defendant.

3. The Plaintiffs contend that the 1<sup>st</sup> Defendant commenced and finalized the process of sub-division and change of user in respect of MN/1/1435 and subsequently obtained registration of the titles therefrom by June, 2011. Accordingly, the Plaintiffs state that after the subdivision they were entitled to plot no. MN/1/17640. However, the Plaintiffs fault the 1<sup>st</sup> Defendant for not availing the original certificate of title deed, plan and duly executed transfer for the said portion of land to allow the Plaintiffs to pay the outstanding balance of the purchase price.

4. The Plaintiff claim that the 1<sup>st</sup> Defendant has breached the agreement dated 7<sup>th</sup> July, 2010 as she has purported to sell the portion of land, MN/1/17640 to a 3<sup>rd</sup> party. Further, the Plaintiff allege that the 1<sup>st</sup> Defendant has offered to refund to the Plaintiffs part of the purchase price received being Kshs. 3, 244, 320/=. However, the Plaintiffs insist on specific performance of the agreement dated 17<sup>th</sup> July, 2010. For these reasons, the Plaintiffs sought for the following reliefs:

a) An order of specific performance in respect of the sale agreement dated 7<sup>th</sup> July, 2010, specifically compelling/directing the 1<sup>st</sup> Defendant to avail the documents stated in special conditions no. (d) of the sale agreement including a duly executed transfer for plot no. MN/1/17640 in favor of the Plaintiff's within thirty days of this date of the order.

b) In default of compliance with (a) above, the deputy registrar of the court to execute a transfer of Plot No. MN/1/17640 in favour of the Plaintiffs' and cause the same to be registered in the land titles registry and a title be issued in favour of the Plaintiffs.

c) That the ownership in respect of the land registry records for plot no. MN/1/17640 be amended/cancelled and the plaintiff's name be substituted thereto and registered as proprietors.

**1<sup>st</sup> Defendant**

5. The 1<sup>st</sup> Defendant responded to the Plaintiff by way of a statement of defence dated 14<sup>th</sup> September, 2011.

6. The 1<sup>st</sup> Defendant admits that she entered into an agreement with the Plaintiffs for the sale of land. However, the 1<sup>st</sup> Defendant states that

the only amount received from the Plaintiffs upon execution of the agreement dated 7<sup>th</sup> July, 2010 is Kshs. 350,000/=. The rest of the money paid by the Plaintiffs, the 1<sup>st</sup> Defendants contends were paid in breach of the agreement.

7. The 1<sup>st</sup> Defendant claims that she was willing to give the completion documents to the Plaintiffs. However, the Plaintiffs frustrated the completion of the sale of the land as they failed to pay the balance of the purchase price. Alternatively, the 1<sup>st</sup> Defendant states that clause (D) of the sale agreement required that the 1<sup>st</sup> Defendant delivers the documents enumerated therein upon receipt of the full purchase price.

8. The 1<sup>st</sup> Defendant states that she is entitled to sell the subdivisions created from plot no. MN/1/1435 as the sale agreement did not identify the plot to be conveyed to the Plaintiffs.

9. It is the 1<sup>st</sup> Defendant's case that the Plaintiffs breached the agreement dated 17<sup>th</sup> July, 2010 by failing to pay the full purchase price. This being the case the 1<sup>st</sup> Defendant states that on 2<sup>nd</sup> August, 2011 she served the Plaintiffs with a notice dated 2<sup>nd</sup> August, 2011 formally rescinding or revoking that sale agreement.

10. Upon rescission of the agreement, the 1<sup>st</sup> Defendant alleges that she tried to refund to the Plaintiffs the money despite breach of the agreement by the Plaintiffs but the Plaintiffs refused to receive the money.

11. It is the 1<sup>st</sup> Defendant's case that the Plaintiffs are not entitled to the equitable remedy of specific performance or injunction but to a refund of their money which the 1<sup>st</sup> Defendant is willing to do.

### **2<sup>nd</sup> Defendant**

12. The 2<sup>nd</sup> Defendant responded to the Plaintiffs by way of a statement of defence and counter claim dated 25<sup>th</sup> August, 2011.

13. The 2<sup>nd</sup> Defendant avers that he was not aware of the agreement dated 17<sup>th</sup> July, 2010 between the Plaintiffs and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant claims that he only became aware of the agreement after he had bought the subject plot of land and sought registration of the same at the Land's Office.

14. In his counter claim, the 2<sup>nd</sup> Defendant states that the 1<sup>st</sup> Defendant agreed to sell to him land no. MN/1/17460 at Kshs. 11,000,000/= and an agreement to that effect was duly executed on 5<sup>th</sup> July, 2011. The Defendant claims that he paid the purchase price in full and the 1<sup>st</sup> Defendant gave him all the completion documents and signed the transfer but the transfer could not be registered as the Plaintiffs had placed a caveat on the suit land.

15. It is the 2<sup>nd</sup> Defendant's case that he is a purchaser for value without notice therefore he should be allowed to register his transfer. Therefore, the 2<sup>nd</sup> Defendant prays for a declaration that he is the rightful owner of plot no. LR MN/1/17640; an order directing the defendants (in the counter-claim) to lift the caveat placed on the suit land, failure to which the Registrar of Titles should lift the caveat; and general damages for the loss occasioned as a result of the caveat placed by the Defendants.

### **Hearing**

16. When the matter came up for hearing two witnesses testified on behalf of the Plaintiffs and witnesses testified for the defence.

17. PW1 and PW2, the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs respectively testified that the Plaintiffs agreed to buy an 1/8 of land comprised in parcel no. MN/1/1435 from the 1<sup>st</sup> Defendant at Kshs. 7,000,000/=. They subsequently entered into a written agreement dated 7<sup>th</sup> July, 2010. PW1 and PW2 stated that the 1<sup>st</sup> Defendant agreed to pursue the change of user of the plot from residential to commercial. PW1 and PW2 stated that they paid part of the purchase price totaling to Kshs. 3,244,220/=.

18. PW1 and PW2 continued in their testimony that the 1<sup>st</sup> Defendant began the process of change of user and sub-division of the land. After sub-division, PW1 and PW2 state that their plot was MN/1/17640 but they did not receive the deed plans. The witnesses stated that despite the agreement providing for the completion of the transaction within 90 days, the 1<sup>st</sup> Defendant failed to do so. The witnesses faulted the 1<sup>st</sup> defendant for not providing the completion documents. However, PW1 and PW2 testified that the 1<sup>st</sup> Defendant decided to increase the purchase price over and above the agreed Kshs. 7,000,000/=. Later, PW1 and PW2 claim that they learnt that the 1<sup>st</sup> Defendant was selling the suit land to another person therefore they placed a caveat on the land.

19. Upon cross-examination, PW2 admitted that his witness statement signed on 1<sup>st</sup> November, 2014 was made after the witness statement of PW1. However, PW2 claimed that the two statements were different. PW2 stated that his statement was not meant to fill the gaps in the Plaintiffs' case. PW2 admitted that the 1<sup>st</sup> Defendant was his client who he had represented. PW2 further admitted that in the land transaction he was both the buyer and the advocate for all the parties in the transaction. PW2 also admitted that the agreement dated 7<sup>th</sup> July, 2010 was drawn by his firm. PW2 and PW1 admitted that the agreement did not define the 1/8 acre portion being excised from MN/1/1435.

20. PW1 and PW2 stated that the agreement had a completion date of 90 days but the excising of the 1/8 acre had no time limit. The witnesses claimed that although the 1<sup>st</sup> Defendant defaulted they did not invoke the default clause in the agreement choosing to go for completion of the agreement. PW2 stated that he was holding the mother title for the 1<sup>st</sup> defendant as her advocate but later surrendered it to her. PW2 contended that he registered a caveat on parcel MN/1/17639 because it was next to the parcel they were buying MN/1/17640 and it

had a well that they were supposed to use. However, PW 2 admitted that the agreement did not provide that the Plaintiffs would utilize the well on plot no MN/1/17639. PW2 further admitted that the agreement did not provide for change of user.

21. PW1 and PW2 stated that they only became aware of the 2<sup>nd</sup> Defendant when PW2 registered a caveat on the suit land. PW2 stated that he held the mother title prior to subdivision but later surrendered the same to the 1<sup>st</sup> Defendant. Further, PW2 indicated that he had received the deed plans for the land from the 1<sup>st</sup> Defendant. The witnesses claimed that the balance of the purchase price had not been paid because the transfer was not done and that the completion period had lapsed thus the agreement had expired. Despite the expiration of the agreement, PW2 implied that the agreement had been extended as the parties therein were friends. Also, PW2 states that clause no. B in the agreement which was a default clause only covered the purchaser.

22. On re-examination, the witnesses stated that they had no claim against the 2<sup>nd</sup> Defendant. The witnesses claimed that the land no. MN/1/1435 which was a leasehold conveyed interest in the nature of joint ownership thus when the 1<sup>st</sup> Defendant's husband died his interest in the land was conveyed to the 1<sup>st</sup> Defendant. PW2 claimed that upon division, plot no. MN/1/17640 which they were purchasing was less than an 1/8 of an acre the size they had agreed in the agreement. Further, PW2, stated that there was no demand made for payment of the purchase price within 90 days from the date of the agreement.

23. DW 1, the 1<sup>st</sup> Defendant adopted her statement dated 15<sup>th</sup> September, 2011 as her defence. She acknowledged that she entered into an agreement dated 7<sup>th</sup> July, 2010 with the Plaintiffs in which she was to sell a parcel of land measuring 1/8 of an acre to the Plaintiffs at Kshs.7,000,000/=.

24. Upon cross examination, DW 1 stated that she initially held interest in the land jointly with her husband and upon his demise in 1999 the interest reverted to her. She admitted that she was to obtain the sub-divisions for the land but denied that the balance of the purchase price was to be paid upon completion of sub-divisions. DW1 admitted that she secured approval for the sub-division on 29<sup>th</sup> December, 2010 outside the 90 days indicated in the agreement. DW1 stated that she received some money as part of the purchase price after the lapse of the 90 days completion period in the agreement.

25. DW1 stated that the plot number for the suit land was not indicated in the agreement dated 7<sup>th</sup> July, 2010. DW1 claimed that she refunded the monies paid by the Plaintiffs but they did not accept the refund. DW1 admitted that she requested the 1<sup>st</sup> Plaintiff to increase the purchase price before selling the suit land to the 2<sup>nd</sup> Defendant. DW1 stated that she only sold the suit land to the 2<sup>nd</sup> Defendant because she realized that the Plaintiffs would not pay the balance of the purchase price.

26. DW1 stated that vide agreement dated 5<sup>th</sup> July, 2011, she sold the suit land to the 2<sup>nd</sup> Defendant for Kshs.11, 000, 000/= and the 2<sup>nd</sup> Defendant paid the purchase price in full. DW1 claimed that she then executed a transfer in favour of the 2<sup>nd</sup> Defendant and had the original title for the suit land to the 2<sup>nd</sup> Defendant. DW1 stated that she was never invited by the 3<sup>rd</sup> Defendant to collect the balance of the purchase price and the Plaintiffs never gave any reason for the delay in payment of the balance. DW1 insisted that there was no supplementary agreement between her and the Plaintiffs.

27. On re-examination, DW1 stated that the agreement dated 7<sup>th</sup> July, 2010 did not specify the portion of plot no. 1435 that she was selling unlike the agreement dated 5<sup>th</sup> July, 2011 which specified that the land being sold was plot no, 17640. Further, DW1 stated that the agreement dated 7<sup>th</sup> July, 2010 did not include a sketch map. DW1 admitted that the sale with the Plaintiffs was not completed within 90 days and there was no extension of the period.

28. DW1 claimed that the agreement dated 7<sup>th</sup> July, 2010 did not specify who was to prepare the transfer but the same was to be done by the 3<sup>rd</sup> Plaintiff and he never prepared the transfer. DW1 avers that the installments of the purchase price which she received from the Plaintiffs were not provided for in the agreement. Further, DW1 avers that plot no. 17640 is not an 1/8 of an acre and that she had not agreed to sell plot no. 17640 or 17639 to the Plaintiffs. Her case is that the 1/8 of an acre indicated in the agreement was never identified.

29. DW2, the 2<sup>nd</sup> Defendant adopted his statement dated 25<sup>th</sup> August, 2011 as his evidence. DW2 testified that vide an agreement dated 5<sup>th</sup> July, 2011 he had entered into an agreement with the 1<sup>st</sup> Defendant for the sale of the suit land. DW2 stated that the 1<sup>st</sup> Defendant was selling him the suit land at Kshs. 11,000,000. He testified that he paid 10% of the purchase Price on the date of execution of the agreement and paid the balance within 30 days from the date of the agreement.

30. DW2 averred that he signed the transfer dated 26<sup>th</sup> July, 2011 and the 1<sup>st</sup> Defendant gave him the completion documents which he presented to the lands registry but they were rejected because of the caveat that had been placed on the suit land. DW2 claimed that prior to registration of the transfer he was not aware that the suit land had been sold to the Plaintiffs. DW2 stated that he is in physical possession of the suit land and that he had built a boundary wall, dug a borehole and installed electricity. DW2 urged the court to declare him as the owner of the suit land and to lift the caveat placed on the title of the suit land.

31. On cross-examination, DW2 stated that he was not aware that the 1<sup>st</sup> Defendant had sold the suit land to the Plaintiffs. DW2 claimed that he had no dealings with the Plaintiffs. DW2 insisted that he has dug the borehole on the suit land. He also stated that if the suit land had been sold to the Plaintiffs, the suit land would not have been available for him to buy. DW2 stated that he had not seen any transfer signed in favour of the Plaintiffs. Further, DW2 stated that he did a search at the land registry prior to purchasing the suit land and the search showed that the 1<sup>st</sup> Defendant was the registered owner of the suit land.

## **Submissions**

32. The Plaintiffs filed their submissions on 7<sup>th</sup> November, 2017 while the 1<sup>st</sup> Defendant filed her submissions on 11<sup>th</sup> December, 2017 and the 2<sup>nd</sup> Defendant on 30<sup>th</sup> November, 2017.

33. Mr. Mogaka, learned Counsel for the Plaintiffs submitted that the Plaintiffs entered into a sale agreement dated 7<sup>th</sup> July, 2010 with the 1<sup>st</sup> Defendant in which the 1<sup>st</sup> Defendant agreed to sell to the Plaintiffs an 1/8 of an acre to be excised from sub-division no. 1435 (original no. 464/49) Section 1 Mainland North at a consideration of Kshs. 7,000,000/=. Counsel stated that the plaintiffs had duly inspected the land and identified the portion that they were purchasing.

34. Counsel contended that the agreement included a special condition at Clause A which provided that the completion date shall be 90 days from the date of the agreement and extension of the completion date shall be by mutual agreement of the parties. Mr. Mogaka submitted that the 1<sup>st</sup> Defendant undertook the sub-division of the mother land and the same was completed on 22<sup>nd</sup> October, 2010 outside the 90 days completion period. Further, Counsel also pointed out that the 1<sup>st</sup> Defendant during cross-examination had admitted that the new grants to the sub-divided portions were ready on 20<sup>th</sup> June, 2011 and were forwarded for registration on 28<sup>th</sup> June, 2011 also outside the completion period of 90 days. Counsel opined that the 1<sup>st</sup> defendant had failed to obtain the completion documents within the 90 days provided in the agreement.

35. Mr. Mogaka submitted that the portion that the Plaintiffs were purchasing after the sub-division was plot no. 17640/1/MN. Counsel stated that the Plaintiffs paid a total of Kshs. 3,244,220/= to the 1<sup>st</sup> Defendant being part of the purchase price. However, Counsel conceded that part of this money was paid outside the completion period with some of the payments being made between 29<sup>th</sup> October, 2010 and 22<sup>nd</sup> June, 2011.

36. Mr. Mogaka while relying on Section 120 of the Evidence Act opined that the 1<sup>st</sup> defendant having failed to obtain the sub-divisional approvals and cause their registration within the completion period and having continued to receive payments from the Plaintiffs after the completion period without obtaining the relevant consents and completion documents is by law through her conduct precluded by the principles of waiver, acquiescence and estoppel from prejudicing the Plaintiffs' interest in plot no. MN/1/17640. Counsel cited the case of **Chase International Investment Corporation and Another v. Laxman Keshra and 3 others [1978] eKLR** where the Court of Appeal quoted Lord Denning **MR in Moorgate Mercantile Co. Ltd v. Twitchings [1975] 3 WLR 286** as follows:

**“...the effect of estoppel on the true owner may be that his own title to the property, be it land or goods, has to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct-what he has led the other to believe-even though he never intended it...The new rights and interests so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a case of action.”**

37. Mr. Mogaka submitted that the Plaintiffs have been ready, willing and able to conclude the contract dated 7<sup>th</sup> July, 2010 but the same has been delayed by the 1<sup>st</sup> Defendant who failed to obtain the sub-division approval, other completion documents and failed to execute the transfer in favour of the Plaintiffs within the agreed period.

38. Mr. Mogaka submitted that the 1<sup>st</sup> Defendant purported to sell the suit land to the 2<sup>nd</sup> Defendant via the agreement dated 5<sup>th</sup> July, 2011. Counsel contended that the suit land was not available for sale to another party before lawful revocation of the agreement dated 7<sup>th</sup> July, 2010. Further, Counsel submitted that the attempt by the 1<sup>st</sup> Defendant to rescind the agreement dated 7<sup>th</sup> July, 2010 vide a letter dated 2<sup>nd</sup> August, 2011 was mischievous and an afterthought since the attempted rescission was done after the 1<sup>st</sup> Defendant had entered into the agreement of 5<sup>th</sup> July, 2011 and after this suit had been filed.

39. Mr. Mogaka submitted that the 2<sup>nd</sup> Defendant was not privy to the contract dated 7<sup>th</sup> July, 2010 therefore the counter-claim lodged by the 2<sup>nd</sup> Defendant cannot be sustained as against the Plaintiffs.

40. Mr. Oddiaga, learned Counsel for the 2<sup>nd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant bought the suit land from the 1<sup>st</sup> Defendant vide the agreement dated 5<sup>th</sup> July, 2011 for a consideration of Kshs. 11,000,000/= and the 2<sup>nd</sup> Defendant paid the purchase price in full. Mr. Oddiaga stated that the transfer was executed in favour of the 2<sup>nd</sup> Defendant and all the completion documents were handed to the 2<sup>nd</sup> Defendant and it is only at the point of registration of the transfer that the 2<sup>nd</sup> Defendant noticed that there was a caveat placed against the suit land. Counsel contended that the 2<sup>nd</sup> Defendant was a purchaser for value without notice and as such he should not be punished for the mistakes of the Plaintiffs and the 1<sup>st</sup> Defendant.

41. Mr. Oddiaga submitted that the 2<sup>nd</sup> Defendant had satisfied the terms of the agreement dated 5<sup>th</sup> July, 2011 by paying the full purchase price. Therefore, Counsel submits that the agreement cannot be interfered with by any third party. Counsel contends that the agreement dated 7<sup>th</sup> July, 2010 between the 1<sup>st</sup> Defendant and the Plaintiffs was not satisfied as the Plaintiffs did not pay the balance of the purchase price. Counsel, therefore opined that the agreement dated 7<sup>th</sup> July, 2010 could not supersede that dated 5<sup>th</sup> July, 2011 which was duly satisfied. Counsel cited the case of **Purple Rose Trading Company Limited v. Bhanoo Shashikant Jai [2014] eKLR** where the court held as follows:

**“When the appellants sought the relief of specific performance of sale of the Respondents property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement... which ought to have been performed by them and they had not acted in contravention of the essential terms of the said agreement...It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property...as stipulated in the agreement. There was, however no express stipulation nor any indication in the agreement that time was of the essence of the agreement.**

**The appellant's failure to deliver up the balance of the purchase price of the suit property by the appointed date...did not bring the agreement to an end. It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff 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 dated of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim...The moment the Plaintiff went into equity, and asked for specific performance and it was proved that he himself was guilty of the breach of contract...the court of equity would refuse to grant specific performance of the agreement and would leave the parties to their rights...When the appellants come to court seeking the relief of specific performance, they had not performed their one essential part of the agreement, namely; payment of the balance of the purchase price of the said property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice."**

42. Further, Mr. Oddiaga submitted that the 2<sup>nd</sup> Defendant was not aware of the agreement between the Plaintiffs and the 1<sup>st</sup> Defendant thus the 2<sup>nd</sup> Defendant has an absolute and unqualified defence against a claim by any prior equitable owner.

43. Mr. Asige, learned Counsel for the 1<sup>st</sup> Defendant submitted that at the time of execution of the agreement dated 7<sup>th</sup> July, 2010, the registered proprietors of land sub-division no. 1435 (original no. 464/49) Section 1 Mainland North were Leonard Quintine Tyrell Cooper and Cecilia Wanjiru Ernest. Counsel continued that the 1<sup>st</sup> Defendant had no legal capacity to sell an 1/8 of an acre of the aforementioned land to the Plaintiffs in the absence of Leonard Quintine Tyrell Cooper. Further, Counsel argued that the agreement dated 7<sup>th</sup> July, 2010 was prepared by the 3<sup>rd</sup> Plaintiff who was also who was a purchaser and was acting for both the purchasers. Counsel states that the 3<sup>rd</sup> Plaintiff acted unethically and unprocedurally and his triple role in the agreement tainted the transaction.

44. Mr. Asige submitted that the agreement dated 7<sup>th</sup> July, 2010 did not provide that the Plaintiffs were buying plot no. MN/1/17640 but rather an 1/8 of an acre of sub-division no. 1435 (original no. 464/49) Section 1 Mainland North. Counsel stated that plot no. MN/1.17640 came into existence on 28<sup>th</sup> June, 2011 long after execution of the agreement dated 7<sup>th</sup> July, 2010. Accordingly, Counsel opined that the court cannot issue an order of specific performance for what was not in the agreement.

45. Mr. Asige submitted that the agreement was conditional upon obtaining sub-division of an 1/8 of an acre from sub-division no. 1435 and the said sub-division was not obtained as was required by the agreement therefore the agreement was voided. Alternatively, Counsel contended that the agreement did not provide which party had the legal obligation to obtain the sub-division therefore it could not be inferred that the vendor failed to obtain sub-division. Counsel also stated that obtaining a change of user for the suit land was not a term of the agreement.

46. Mr. Asige stated that plot no. MN/1/17640 was a 1/10 of an acre and not an 1/8 of an acre as provided in the agreement. Consequently Counsel submitted that an order of specific performance cannot in equity issue to enforce and compel the 1<sup>st</sup> Defendant to transfer plot no. MN/1/17640 which is different in acreage from what was provided in the agreement.

47. Mr. Asige submitted that the Plaintiffs claim that there was a mutual agreement and understanding as between themselves and the 1<sup>st</sup> Defendant on the payments towards the purchase price was not part of the agreement dated 7<sup>th</sup> July, 2010 therefore it is not the subject of this suit.

48. Mr. Asige stated that the Plaintiffs breached the agreement on the very day of execution as they did not pay the deposit of Kshs. 1, 050,000/= which as provided in the agreement. Instead, Counsel stated that the Plaintiffs paid a deposit of Kshs.350, 000/=. Counsel pointed out that the Plaintiffs further breached the agreement by paying part of the purchase price being Kshs. 3, 244, 200/= by way of installments yet payment by installments was not provided in the agreement.

49. Mr. Asige submitted that time was of essence in the agreement and the date of completion was set at 90 days from the date of the agreement. Counsel stated that the 90 days lapsed on 8<sup>th</sup> October, 2010 and the transaction had not been completed hence the agreement had lapsed. Further, Counsel contended that there was no mutual extension of the completion date by the parties.

50. As to the issue of the well, Mr. Asige submitted that the agreement provided that the Purchasers would share the well on the vendors remaining portion of land but the agreement did not identify the portion of the land where the well was located. Therefore, Counsel contends that this term of the agreement was vague and hence could not be enforced.

51. Mr. Asige submitted that the 1<sup>st</sup> Defendant did not receive the full purchase price from the Plaintiffs thus she was not obliged to deliver the documents provided for in Clause "D" of the Special Conditions in the agreement.

52. Mr. Asige submitted that jurisdiction in equity is exercised on the principle that equity follows the law. Counsel submits that where a contract is void at law, equity will not attempt to enforce such a contract by specific performance. In this instance, Counsel states that the agreement dated 7<sup>th</sup> July, 2010 had been breached by the Plaintiffs and was no longer enforceable.

53. As to the sale of the suit land to the 2<sup>nd</sup> Defendant, Mr. Asige submitted that the sale which was based on the agreement dated 5<sup>th</sup> July,

2011 was valid as the suit land was available for sale at the time.

54. In response to the submissions by the Defendants, Mr. Mogaka submitted that parties are bound by the pleadings. Counsel argued that the 1<sup>st</sup> Defendant had not pleaded in her pleadings the issue that the 3<sup>rd</sup> Plaintiff failed to protect her interests in the transaction and that of oppressive terms of the agreement.

55. As to the issue raised by the 1<sup>st</sup> Defendant that she lacked the capacity to transact on account of the absence of her cojoint owner LEONARD QUENTINE TYRRELL COOPER, Mr. Mogaka stated that LEONARD QUENTINE TYRRELL COOPER died in 1999 and his proprietary interest in the land was transferred to the surviving tenant who is the 1<sup>st</sup> Defendant by virtue of joint ownership.

#### **Issues for Determination**

56. Having analysed the pleadings filed, evidence adduced and submissions rendered, I frame the following issues for determination:

- i) Was the agreement of 7<sup>th</sup> July 2010 breached and by who?
- ii) Are the orders sought in the plaint available to the plaintiffs?
- iii) If answer to (ii) is yes what is the fate of the 2<sup>nd</sup> defendant's claim?
- iv) Who bears the costs of this suit?

57. At clause D of the special conditions of the agreement dated 7<sup>th</sup> July 2010, it is provided thus, *“upon receipt of the full purchase price, the vendor shall deliver to the purchasers the following documents (read completion documents).”* The agreement required the 1<sup>st</sup> defendant to avail the completion documents upon payment of the purchase price in full. Had the plaintiffs paid the purchase price in full on or before the 90<sup>th</sup> day? The answer is negative. The plaintiffs were therefore in breach of this clause.

58. Further under clause 6, the parties made time to be of essence. The agreement provided that the time shall be of essence in respect of all the purchasers payment obligations hereunder. The duration was set under special condition A to be Ninety (90) days from the date of the agreement. Extension of the completion date was provided to be by mutual agreement of the parties. The question this Court pauses is, was the time extended by mutual consent?

59. The plaintiffs' evidence is that the excising of the 1/8 acre had no time limit. This Court is alive of its duty not to rewrite contracts for parties unless coercion, fraud or undue influence are pleaded and proved, see **National Bank of Kenya Ltd vs Pipe plastic Samkolit (K) Ltd (2002) 2 E A 503**. The plaintiffs in paragraph 6 of the plaint pleaded that through mutual agreement and understanding they effected part payment of the purchase price the last payment being made on 22<sup>nd</sup> June 2011 to enable the 1<sup>st</sup> defendant meet her obligations by way of settling the statutory charges.

60. There was nothing made in writing that extended the time, at least none was produced in evidence. From the evidence of the plaintiffs they presume the extension of time was thus by conduct. This is so because the only correspondence besides the part payments was made on 29<sup>th</sup> July 2011, 5<sup>th</sup> August 2011 and 12<sup>th</sup> August 2011. The 1<sup>st</sup> defendant has denied there was any mutual agreement on the extension of time.

61. In the case of **Doge vs Kenya Cannors Ltd (1989) KLR 127** at page 128 it was held that the principle of equity and justice is called into action as stated. *“that when a man by his conduct or words had led another to believe that he may safely act on that would not be allowed to go back on what he has said or done.”* This principle would apply where there is proof of such conduct and the burden was upon the plaintiffs.

62. Similarly, the 1<sup>st</sup> defendant was also required to fulfil her obligations under the sale agreement within the 90 days period. Under clause **D**, she was to avail the original certificate of Title of the 1/8 excised from title no. CR No 8377/1 of subdivision No 1435 (original No 464/49) section 1 MN; duly executed transfer in favour of the purchasers; and all the documents listed thereunder. Clause **1** of the sale agreement described the property sold as 1/8 of the subdivision No 1435. The certificate of grant available (at the time of the execution of the sale agreement) was in respect of the whole land and not the sold portion. This implies that all documents listed under clause **D (a) – (h)** and were not available.

63. According to the plaintiffs' letter dated 12<sup>th</sup> August 2011, the 3<sup>rd</sup> plaintiff confirms that the original title for sub-division 1435 was given to him to hold. At paragraph 5 of that letter, Mr Kiarie wrote that the 1<sup>st</sup> defendant called into his offices sometime in January 2011 to collect the same as it was needed for purposes of surrender. I can therefore safely conclude that the 1<sup>st</sup> defendant did not comply with clause **D (a)** of their agreement within the 90 days period.

64. Further the evidence adduced does indicate that the 1<sup>st</sup> defendant did not have the remainder of the completion documents ready as per the requirements of clause **D (b) – (h)** within the set time. In the alternative, she has not demonstrated that she did notify the plaintiffs that these documents were ready for collection. From the evidence on record the completion of processing of the relevant documents was after the expiry of the 90 days.

65. My determination in regard to the first question is that both the plaintiffs and the 1<sup>st</sup> defendant were in breach of the terms of agreement

of 7<sup>th</sup> July 2010 time having been made of essence.

66. This brings the next question on whether the orders sought in the plaint are available to the plaintiffs. The plaintiffs' case is that they are entitled to the suit property by virtue of their sale agreement of the 7<sup>th</sup> July 2010. The 1<sup>st</sup> defendant refutes this claim stating that she revoked the said agreement pursuant to a breach on the part of the plaintiffs. This brings into question was the breach by the plaintiffs occasioned partly by the 1<sup>st</sup> defendant?

67. The sale agreement of 7<sup>th</sup> July 2010 did not give the plot number sold because the size sold which was an 1/8 of an acre was to be excised from the main title sub-division No 1435. The subdivision was indeed done as the plaintiffs have in their evidence stated that the 1<sup>st</sup> defendant delivered to 3<sup>rd</sup> plaintiff on 9<sup>th</sup> November 2010 five deed plans Nos 314513, 314515, 314516, 314517 and 314518. The deed plans were subsequently given grant numbers MN/1/17639, 17638, 17640, and 17642. The selected plot No 17640 the size is given as 0.0504 ha as per the subdivision Scheme Approval dated 29<sup>th</sup> December 2010. Plot No 17638 is approximately 0.1746, Plot No 17639 is 0.0342 and plot No 17642 is 0.0608. The 5<sup>th</sup> grant number is not given but the omission is not material to this case.

68. In answer to paragraphs 18, 19, 20, 22 and 68 (iv) & (v) of the 1<sup>st</sup> defendant's submission, the standards of measurement an acre of land is equivalent to approximately 0.4 of a hectare. An 1/8 of an acre is equivalent to 0.05 of a hectare. Out of the copies of the sub-division schemes provided, it is only grant No 17640 that measures 0.05 ha which is the equivalent of 1/8 of an acre. This probably explains the reason why the plaintiffs are levying claim to this plot.

69. The 1<sup>st</sup> defendant stated that she cannot transfer this plot to the plaintiffs because of the plaintiffs' breach. The Court having found that both parties were in breach of the agreement, it will be unfair to have one party take advantage over the other if their conduct is provided otherwise. It is therefore imperative to look at the conduct of both parties in this case to determine whether they took steps that expressed an intention to extend time to complete the terms of the agreement.

70. The plaintiffs made part payments way after the 90<sup>th</sup> day which payments the 1<sup>st</sup> defendant received. Secondly the 1<sup>st</sup> defendant delivered to the plaintiffs' advocates the deed plans of the subdivisions on 9<sup>th</sup> November 2010 after the lapse of the 90 days. Further the 1<sup>st</sup> defendant left the main title of the whole land subdivision 1435 with the 3<sup>rd</sup> plaintiff until January 2011. That all these time, the 1<sup>st</sup> defendant was receiving payments referred to as "*being further payment towards settlement of the purchase price in respect of sale of an 1/8 acre of plot No 1435.*" This is indicated in all vouchers which she signed acknowledging receipt. For instance, the vouchers dated 6<sup>th</sup> December 2010, 20<sup>th</sup> December 2010, 12<sup>th</sup> January 2011 and 18<sup>th</sup> February 2011.

71. The 1<sup>st</sup> defendant stated that the plaintiffs breached the agreement from the initial stages by not paying the agreed deposit as a one – off payment. Yet she still went on to continue transacting/dealing with the plaintiffs. Her conduct does show that she was intent on continuing with the sale transaction inspite of the alleged breach. Her change of mind vide her letters dated 2<sup>nd</sup> & 5<sup>th</sup> August 2011 were thus made too late in the day. It can only be concluded to be as a result of being offered a higher sum of money by the 2<sup>nd</sup> defendant pursuant to second agreement of 5<sup>th</sup> July 2011. If this Court does allow the 1<sup>st</sup> defendant to rescind the first agreement inspite of her conduct having shown she had accepted to receive money from the plaintiffs, it would amounts to condoning unjust enrichment and the same would defeat the principle of estoppel. The case of **Nabro Properties Ltd vs Sky Structures Ltd & 2 Others (2002)KLR 299** is in support of the plaintiffs' case.

72. The 1<sup>st</sup> defendant stated that she did not have capacity to transact because the title was jointly owned by her and her late husband. However, at the time of entering into this agreement, the fact of death of her husband had been entered into the register. In law, the interest held by husband automatically reverted to her. In any event, she could not have sought the consent of the deceased as the same could not be given or refused since the dead do not talk.

73. In light of the above finding, I am satisfied that the plaintiff is entitled to orders of specific performance. Further from the grants that were created from the sub-division No 1435 it is only plot No 17640 that is an 1/8 of acre for which the plaintiffs are entitled to. For this reason, I make a finding in favour of the plaintiffs and enter judgement as per prayer (a) & (b) of the plaint.

74. The last question is having found for the plaintiffs, what is the fate of the 2<sup>nd</sup> defendant's counter-claim? There is no dispute that there is no privity of contract between the 2<sup>nd</sup> defendant and the plaintiffs. The 2<sup>nd</sup> defendant's claim if at all lies as against the 1<sup>st</sup> defendant who sold to him the exact portion of the plots he had sold to the plaintiffs. Accordingly I do not find for the 2<sup>nd</sup> defendant since he did not bring a claim against the 1<sup>st</sup> defendant. The counter-claim is thus dismissed.

75. Who bears costs of the suit? Having found that both the plaintiffs & 1<sup>st</sup> defendant had breached their initial agreement and taking into consideration the evidence given by both the plaintiffs and the 1<sup>st</sup> defendant, I exercise my discretion to order that each party shall bear their respective costs of this suit.

**Dated signed & delivered at Mombasa this 2<sup>nd</sup> day of August 2018**

**A. OMOLLO**

**JUDGE**