



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC MISC. SUITS NO. 152 AND NO. 153 OF 2013**

**JOSEPH GICHUHI KAMAU.....1<sup>ST</sup> PLAINTIFF**

**MBOCHE NENE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SALOME WACHEKE KANYINGI.....DEFENDANT**

**JUDGMENT**

**Background:**

The plaintiffs herein filed separate suits against the defendant before the Senior Principal Magistrate's Court at Limuru. In the said cases, the plaintiffs in their respective complaints both dated 29<sup>th</sup> October, 2010 alleged that the defendant had breached separate sale agreements that the defendant had entered into with them in respect of portions of all that parcel of land known as L.R. No. Ngirubi/Ndiuni/433 (hereinafter referred to only as "the suit property").

In Limuru SPMCC No. 379 of 2010, Joseph Gichuhi Kamau v Salome Wacheke Kanyingi, Joseph Gichuhi Kamau (hereinafter referred to only as "the 1<sup>st</sup> plaintiff") alleged that on 22<sup>nd</sup> July, 2010, he entered into a sale agreement with the defendant under which the defendant sold to him a portion of the suit property measuring 2 acres at a consideration of Kshs. 350,000/-. He averred that pursuant to the terms of the said agreement, he paid to one, Thomas Ruo Mbugua on the instructions of the defendant, a sum of Kshs. 260,000/-. The 1<sup>st</sup> plaintiff averred further that in addition to the said sum of Kshs. 260,000/-, he incurred further expenses amounting to Kshs. 100,850/- in the transaction. The 1<sup>st</sup> plaintiff averred further that on 17<sup>th</sup> September, 2010, the defendant purported to serve him with a notice terminating the said agreement. The 1<sup>st</sup> plaintiff averred that the defendant had failed to complete the said agreement by transferring to him the portion of the suit property that he had purchased and had instead sought to partition the suit property and sell portions thereof to third parties. The 1<sup>st</sup> plaintiff sought the following reliefs against the defendant:

- a) Specific performance of the agreement for sale dated 22<sup>nd</sup> July, 2010 and in default, the registrar of the court to be empowered to execute all the documents and do such acts as are necessary to complete the sale.
- b) Special damages of Kshs. 340,450/- for breach of contract in lieu of or in addition to specific performance.
- c) A permanent injunction to restrain the defendant from alienating, trespassing, cultivating, tilling, selling, offering for sale, disposing, charging, mortgaging, creating lien or any other way dealing with the suit property.
- d) Such other or further relief that the court may deem fit and just to grant
- e) Costs of the suit.
- f) Interest on (b) and (e) at court rates.

In Limuru SPMCC No. 380 of 2010, Mboche Nene v Salome Wacheke Kanyingi, Mboche Nene (hereinafter referred to only as "the 2<sup>nd</sup> plaintiff") averred that on 27<sup>th</sup> September, 2010, he entered into a sale agreement with the defendant under which the defendant sold to him a portion of the suit property measuring one (1) acre at a consideration of Kshs. 150,000/-. He averred that he paid the said sum of Kshs. 150,000/- to the defendant in full and incurred further expenses amounting to Kshs. 20,000/- in the transaction. The 2<sup>nd</sup> plaintiff averred that the defendant had failed to complete the agreement by transferring the portion of the suit property that he had purchased to him and had instead given him oral notice terminating the agreement without any lawful cause. The 2<sup>nd</sup> plaintiff averred further that the defendant had sought to partition the suit property and to sell portions thereof to third parties. The 2<sup>nd</sup> plaintiff sought the following reliefs against the

defendant:

- a) Specific performance of the agreement for sale dated 27<sup>th</sup> September, 2010 and in default, the registrar of the court to be empowered to execute all documents and do such acts as are necessary to complete the sale.
- b) Special damages of Kshs.170,000/- for breach of contract in lieu of or in addition to specific performance.
- c) A permanent injunction to restrain the defendant from alienating, trespassing, cultivating, tilling, selling, offering for sale, disposing, charging, mortgaging, creating lien or any other way dealing with the suit property.
- d) Such other or further relief that the court may deem fit and just to grant
- e) Costs of the suit.
- f) Interest on (b) and (e) at court rates.

On 19<sup>th</sup> April, 2013, Limuru SPMCC No. 379 of 2010 and Limuru SPMCC No. 380 of 2010 were transferred to this court for hearing and final determination on separate applications that were brought in Misc. Application No. 152 of 2013 and Misc. Application No. 153 of 2013. By a consent dated 26<sup>th</sup> May, 2014, Limuru SPMCC No. 379 of 2010 and Limuru SPMCC No. 380 of 2010 were consolidated. On 18<sup>th</sup> September, 2014, the court directed that the two cases be registered and given new case numbers for the Environment and Land Court. This direction by the court was not complied with and this explains why the two cases have retained the numbers for the miscellaneous applications through which they were transferred to this court from the lower court. On 17<sup>th</sup> March 2015, the court struck out the defences that had been filed by the defendant on 25<sup>th</sup> November, 2010 and directed that the suits would proceed as an undefended due to the defendant's failure to comply with the directions given by the court under Order 11 of the Civil Procedure Rules.

The evidence by the parties:

The hearing of the consolidated suits commenced on 19<sup>th</sup> December, 2017 when the 1<sup>st</sup> plaintiff (PW1) gave evidence and adopted his witness statement filed in court on 24<sup>th</sup> September 2012 as part of his evidence in chief. He testified that in 2010, the defendant offered to sell to him a portion of the suit property measuring two (2) acres at a price of Kshs 350,000/-. PW1 stated that the defendant approached him to buy the land following a disagreement over a sale agreement the defendant had entered into with one, Thomas Ruo Mbugua in respect of the suit property. PW1 stated that following that disagreement, Thomas Ruo Mbugua was demanding a refund of the purchase price that he had paid to the defendant.

PW1 stated that he accompanied the defendant to her advocate who handled the transaction between her and Thomas Ruo Mbugua and was shown a repudiation agreement that the defendant had entered into with Thomas Ruo Mbugua in respect of the sale agreement between them. PW1 stated that he paid Kshs. 270,000/- to Thomas Ruo Mbugua on 15<sup>th</sup> September, 2010 being a refund that was due to him from the defendant under the said repudiation agreement and incurred further expenses amounting to Kshs. 100,000/- in the transaction. He stated that on 20<sup>th</sup> September, 2010, his advocates on record received a letter dated 17<sup>th</sup> September, 2010 from the defendant's advocates instructing them to refund to him (PW1) Kshs. 270,000/- that was held in their office on account of the purchase price because the defendant was not interested in proceeding with the transaction. He stated that his advocates responded to the said letter demanding completion of the agreement.

PW1 stated further that they had executed a transfer and obtained the Land Control Board (LCB) consent but the defendant refused to accompany him to the lands office for the registration of the said transfer. He stated that a surveyor went to the suit property and curved out his 2 acres after which he took possession thereof before he was forcefully evicted from the property by the defendant using goons. He stated that he reported the incident to the police and the defendant together with her two children were arrested and charged with the offence of stealing his crops. He stated that the defendant's son was convicted and sentenced to serve a two (2) year jail term. PW1 produced the documents that were attached to his list of exhibits dated 1<sup>st</sup> November, 2011 as P. EXh. 1 -21 respectively.

In cross-examination, PW1 stated that the defendant went to his home to request him to buy the disputed portion of the suit property and that a purchase price of Kshs. 350,000/- was agreed upon for the 2 acres that the defendant sold to him. PW1 stated further that he was to pay to the defendant Kshs. 80,000/- after deducting expenses which included survey fees. He stated that the said sum of Kshs. 80,000/- which was payable to the defendant was spent in expenses incurred pursuant to the sale agreement between them. He stated that Kshs. 7,000/- which was indicated as an expense was for a phone which he purchased for the defendant while Kshs 25,000/- was an expense incurred while tracing the defendant's son at the defendant's request.

PW1 stated further that when the LCB consent was issued on 8<sup>th</sup> July, 2010, the parties had only entered into an oral agreement and that the written agreement for sale between him and the defendant was entered into on 22<sup>nd</sup> July, 2010. PW1 stated further that he received the repudiation letter dated 17<sup>th</sup> September, 2010 after he had paid Kshs 270,000/- to Thomas Ruo Mbugua and incurred other expenses.

In re-examination, PW1 explained that some of the expenses he incurred were for the LCB consent which he obtained prior to entering into the agreement for sale dated 22<sup>nd</sup> July, 2017 with the defendant. He stated that he had not agreed with the defendant on the expenses which were deductible from the sum of Kshs. 80,000/- that was payable to the defendant. PW1 stated further that he realised that the defendant was not interested in completing the sale of the portion of the suit property that she had sold to him when she failed to accompany him to the lands office for the transfer and when a third party emerged at the same time alleging that the same land had been sold to him.

The 1<sup>st</sup> plaintiff did not call any witness and the 2<sup>nd</sup> plaintiff (PW2) gave evidence after him. PW2 told the court that the defendant had agreed to sell to him a portion of the suit property measuring one (1) acre at a consideration of Kshs. 150,000/- which he paid in full. He stated that he paid the last installment of the purchase price through a cheque for Kshs 20,000/- dated 27<sup>th</sup> September, 2010. He produced the documents that were attached to his list of documents dated 6<sup>th</sup> October, 2014 as P.EXH. 22.

PW2 stated that with the defendant's consent, he used part of the purchase price in subdividing the suit property. He stated that he was put in possession of the portion of the suit property that he had purchased but had received threats from the defendant's agents who even harvested his potatoes. PW2 stated that he was not invited for the LCB meeting.

In cross-examination, PW2 stated that although the defendant executed the agreement for sale dated 27<sup>th</sup> September, 2010, her name did not appear against her signature. He stated that Margaret Wanjiku who witnessed the agreement for sale did not also sign the agreement. He stated further that he did not have a receipt to support the survey fee of Kshs 1500/-. PW2 stated that the defendant acknowledged receipt of payment in the agreement. He stated that the defendant obtained consent of the LCB to subdivide the suit property into three (3) portions. He contended that his name was not on the LCB consent that was issued to the defendant owing to fraud on the part of the defendant who never turned up for the LCB meeting as had been agreed.

#### Submissions:

The plaintiffs filed joint submissions dated 31<sup>st</sup> January, 2018 on 2<sup>nd</sup> February, 2018. In their submissions, the plaintiffs reiterated the contents of the pleadings and the evidence that was adduced by the parties at the trial. The plaintiffs submitted that the defendant was in breach of the agreements that she entered into with the plaintiffs by refusing to transfer to the plaintiffs their respective portions of the suit property. The plaintiffs submitted that after they had met their side of the bargain, the defendant who had the habit of selling the suit property and changing her mind after being paid did just that. The plaintiffs submitted that they had taken possession of their respective portions of the suit property but were subjected to harassment and threat of eviction by the defendant. The plaintiffs submitted that the defendant's statement of defence having been struck off, the defendant did not tender any explanation for her failure to complete the sale agreements with the plaintiffs and for her continued harassment of the plaintiffs. With regard to the defendant's contention that no LCB consent was obtained for the transactions involving the plaintiffs and the defendant, the plaintiffs submitted that the issue had been raised by the defendant in an interlocutory application that the defendant had brought to strike out the suit and the application was dismissed on 6<sup>th</sup> July, 2012 with the court commenting that the plaintiffs could make an application for extension of time to apply for consent of the Land Control Board (LCB). The plaintiffs submitted that since the ruling of the court on the issue of the LCB consent was not appealed, the issue was res judicata. The plaintiffs submitted further that in any event, LCB consent had been issued and that although the 2<sup>nd</sup> plaintiff was not informed of the date for the LCB meeting, the consent that was issued included the portion of the suit property that he purchased from the defendant. On case law, the plaintiff relied on the case of Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri[2014]eKLR where the Court of Appeal found that a constructive trust had been created in favour of purchasers who had been put in possession and that such constructive trust was not subject to LCB consent. The plaintiffs submitted further that the court has power under section 8(2) of the Land Control Act, Chapter 202, Laws of Kenya and section 59 of the Interpretations and General Provisions Act, Chapter 2 Laws of Kenya to extend time for the plaintiffs to apply for consent of the LCB if the court finds that the consent was not obtained. The plaintiffs urged the court to do substantive justice in the matter rather than procedural justice. In conclusion, the plaintiffs submitted that they had proved their cases beyond reasonable doubt and urged the court to enter judgment in their favour as prayed in their respective plaints.

In response to the plaintiff's submissions, the defendant filed her submissions on 9<sup>th</sup> March, 2018. The defendant argued that an order for specific performance was not available to the 1<sup>st</sup> plaintiff because of his failure to pay the full purchase price. The defendant submitted that out of the agreed purchase price of Kshs. 350,000/-, the 1<sup>st</sup> plaintiff only presented evidence of payment of Kshs. 260,000/- which payment he made by a cheque to Thomas Ruo Mbugua. The defendant submitted that the alleged expenses of Kshs. 80,450/- which the 1<sup>st</sup> plaintiff claimed to have incurred were never agreed upon between the parties and were not proved. The defendant submitted that since the 1<sup>st</sup> plaintiff did not fully perform his part of the agreement, he was not entitled to specific performance.

The defendant submitted further submitted that the alleged sale transaction between the 1<sup>st</sup> plaintiff and the defendant was null and void pursuant to the provisions of section 6(1) of the Land Control Act, Chapter 302 Laws of Kenya for want of LCB consent. The defendant argued that the letter of consent dated 8<sup>th</sup> July, 2010 that was issued 14 days prior to the agreement for sale dated 22<sup>nd</sup> July, 2010 was invalid as it ought to have been sought and obtained within 6 months of the date of the agreement.

With respect to the 2<sup>nd</sup> plaintiff's case, the defendant submitted that the alleged agreement for sale dated 27<sup>th</sup> September, 2010 was not signed by the defendant and was therefore not binding on her. The defendant submitted that no evidence was tendered by the 2<sup>nd</sup> plaintiff to prove that the 2<sup>nd</sup> plaintiff paid to the defendant the sum of Kshs 130,000/- which he claimed to have paid before the sale agreement was entered into. The defendant contended that the only payment that was made by the 2<sup>nd</sup> plaintiff was Kshs. 20,000/- which the plaintiff paid to her through a cheque dated 27<sup>th</sup> September, 2010.

The defendant submitted further that the mandatory LCB consent was never obtained in respect of the alleged agreement for sale between her and the 2<sup>nd</sup> plaintiff thereby rendering the transaction null and void. The defendant contended that the letter of consent dated 8<sup>th</sup> July, 2010 that was produced in evidence by the 1<sup>st</sup> plaintiff could not protect the 2<sup>nd</sup> plaintiff, who claimed to have entered into an agreement for sale with her on 27<sup>th</sup> September, 2010. The defendant contended that the court had no powers to extend time to obtain the requisite consent under section 8(2) of the Land Control Act since there was no application for extension of such time before the court.

With regard to the case of Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri(supra) that was relied on by the plaintiffs in support of their constructive trust argument, the defendant submitted that the case was inapplicable and distinguishable. The defendant submitted that in that case, the court was dealing with purchasers who had paid the full purchase price and had been put in possession by the vendor which was not the case herein. The defendant submitted further that the Land Control Act had not been repealed and remained the

primary statute with respect to consents to transactions affecting agricultural land and the plaintiffs had a duty to demonstrate that they had complied with the same. With regard to the ruling that was made by the court on the application by the defendant to strike out the 2<sup>nd</sup> plaintiff's suit, the defendant submitted that the court did not make any conclusive finding on the applicability or otherwise of the Land Control Act.

#### Determination:

The parties did not frame issues for determination by the court. From the pleadings and the evidence tendered at the trial, the following are in my view the issues arising for determination in this suit:

1. Whether the 1<sup>st</sup> plaintiff is entitled to specific performance of the agreement for sale dated 22<sup>nd</sup> July, 2010.
2. Whether the 2<sup>nd</sup> plaintiff is entitled to specific performance of the agreement for sale dated 27<sup>th</sup> September, 2010.
3. Whether the plaintiffs are entitled to damages in lieu of or in addition to specific performance and if so how much?
4. Whether the plaintiffs are entitled to the injunctive reliefs sought.
5. Who should bear the costs of the suit?

#### Whether the plaintiffs are entitled to specific performance:

The law on specific performance is settled. Specific performance is a discretionary remedy which is only granted where there exists a valid and enforceable contract. The court will not order specific performance if the contract suffers from some defect such as failure to comply with the formal requirements, mistake or illegality which makes the contract invalid or unenforceable. In **Chitty on Contract, 30<sup>th</sup> edition, volume 1 at paragraph 27-003** the authors have stated as follows:

**“The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract...it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”**

Since specific performance is a discretionary remedy, even where the Plaintiff has satisfied all the conditions for grant of the relief, the court can decline to grant the same for good reason. In the case of Amina Abdulkadir Hawa v Rabinder Nath Anand & Another [2012] e KLR, the court cited Chitty on Contracts, 28<sup>th</sup> Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

**“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles.....specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party.....severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”**

The defendant attacked the agreements for sale that she allegedly entered into with the plaintiffs on many fronts. The first point of attack was based on **section 6(1)** of the Land Control Act. The defendant had contended that failure to obtain the LCB consent rendered the alleged agreements for sale null and void. **Section 6(1)** of the Land Control Act has been the subject of many decisions in our courts. In **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (supra)** that was cited by the plaintiffs, the Court of Appeal granted an order of specific performance in favour of the appellants where the LCB consent had not been obtained. In **overturning the decision of the High Court which had held** that failure to obtain the LCB consent rendered the transactions between the appellants and the respondent void and unenforceable against the respondent, the court stated that the respondents who had paid the purchase price and were in possession of the suit properties had acquired an implied or constructive trust which was not a disposal or dealing with land for purposes of section 6(1) of the Land Control Act. In **David Sironga Ole Tukai v Francis Arap Muge & 2 others (2014) eKLR** the Court of Appeal constituted differently disagreed with the decision in **Macharia Mwangi Maina (supra)** by holding that it was a departure from previous consistent decisions on the application of the doctrines of equity to the Land Control Act. The Court stated as follows:

**“... First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import doctrine of equity in the Act. This is one simple message of Section 3 of the Judicature Act. Consequently, invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act has, in our view, no legal foundation. We have also noted that this Court has previously held in a line of consistent decisions and in very clear terms that there was no room for application of the doctrines of equity in the Land Control Act.”**

In a most recent decision, the Court of Appeal in **Willy Kimutai Kitilit v Michael Kibet (2018) eKLR** disagreed with the **David Sironga Ole Tukai (supra)** decision and held that doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land

Control Act. The Court stated as follows:

**“A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2))...The Land Control Act does not, unlike Section 3 (3) of the Law of Contract Act and Section 38 (2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions...Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case...There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution. The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black’s Law Dictionary, Ninth Edition will suffice for our purpose: “1. ---2. The body of principles constituting what is fair and right. 3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances --- 4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict” Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board. For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.”**

In the present case, it is not disputed that the LCB consent dated 8<sup>th</sup> July, 2010 was obtained before the agreement for sale dated 22<sup>nd</sup> July, 2010 between the 1<sup>st</sup> plaintiff and the defendant was entered into. Under the Land Control Act, LCB consent should be obtained within 6 months of the agreement for sale. The Act does not provide for instances where LCB consent can be obtained before a sale agreement is made. I am of the view that there was no valid agreement for sale between the 1<sup>st</sup> plaintiff and the defendant as at 8<sup>th</sup> July, 2010 on the basis of which LCB consent could have been issued. The LCB consent dated 8<sup>th</sup> July, 2010 could not therefore validate an agreement for sale dated 22<sup>nd</sup> July, 2010 that was not in existence when it was issued. For the 2<sup>nd</sup> plaintiff, no consent of whatsoever nature was obtained in respect of the alleged agreement for sale dated 27<sup>th</sup> September, 2010. I am not in agreement with the submission by the 2<sup>nd</sup> plaintiff that the consent dated 8<sup>th</sup> July, 2010 covered also the agreement for sale that the 2<sup>nd</sup> plaintiff entered into with the defendant. Neither the application for the said consent nor the consent letter makes any reference to the 2<sup>nd</sup> plaintiff.

It follows from the foregoing that no valid LCB consent was obtained in relation to the two agreements for sale that the plaintiffs claim to have entered into with the defendant. It is also not disputed that the plaintiffs have not made an application for extension of time within which to apply for LCB consent. The law as I understand it from the decisions of the majority judges of the Court of Appeal is that failure to obtain LCB consent for a controlled transaction still renders the transaction void and unenforceable but the transaction can be saved on equitable grounds by importing the equitable principle of constructive trust where the circumstances so permit. In this particular case, I am not persuaded that equity would come to the aid of the plaintiffs. As I have found herein below, the plaintiffs did not prove that they paid the purchase price in full for the portions of the suit property which they claim to have purchased from the defendant. In the absence of the LCB consent and my finding that the plaintiffs’ cannot seek the aid of equity, the alleged agreements for sale that the plaintiffs entered into with the defendant are void and unenforceable. That being my finding, the order of specific performance cannot be issued in favour of the plaintiffs.

Even if the court was to hold that lack of the LCB consent did not vitiate the sale agreements between the plaintiffs and the defendant, an order for specific performance would still not issue because I am not satisfied that the plaintiffs fully performed their part of the two contracts. It is not in dispute that the 1<sup>st</sup> plaintiff paid Kshs. 260,000/- to Thomas Ruo Mbugua through a bankers cheque and a further sum of Kshs. 10,000/- in cash to the defendant on account of the purchase price for the portion of the suit property that he purchased from the defendant. The 1<sup>st</sup> plaintiff admitted that he did not pay to the defendant the balance of the purchase price in the sum Kshs. 80,000/-. The 1<sup>st</sup> plaintiff claimed that this amount was consumed by expenses that he incurred in relation to the sale transaction. Clause 3(b) of the agreement dated 22<sup>nd</sup> July, 2010 indicates that Kshs 80,000/- was payable to the defendant after deduction of expenses. Apart from a list of the alleged expenses at page 23 of the 1<sup>st</sup> plaintiff’s list of exhibits dated 1<sup>st</sup> November, 2011(P.EXH 17), no evidence was placed before the court in proof of the alleged expenses or that they were incurred. In the absence of any evidence to prove that the 1<sup>st</sup> plaintiff incurred Kshs. 80,000/- in expenses, the 1<sup>st</sup> plaintiff was liable to pay to the defendant the said sum of Kshs. 80,000/-. The 1<sup>st</sup> plaintiff did not therefore pay the purchase price in full for the portion of the suit property that he purchased from the defendant. The 1<sup>st</sup> plaintiff’s failure to pay the purchase price in full disentitles him to an order for specific performance as he is in breach of an essential term of the agreement. In the case of Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Madhbuti CA No. 165 of 1996, the court stated that an applicant seeking the relief of specific performance must demonstrate that he has performed or is ready and willing to perform all the terms of the agreement and that he is not in breach of the essential terms of the agreement.

The 2<sup>nd</sup> plaintiff is sailing in the same boat. A part from lack of LCB consent that I have already dealt with, the agreement for sale allegedly

entered into between the 2<sup>nd</sup> plaintiff and the defendant suffers from other legal deficiencies. The 2<sup>nd</sup> plaintiff testified that the agreement dated 27<sup>th</sup> September, 2010 was witnessed by one, Margaret Wanjiku who did not attest the same. A perusal of the agreement dated 27<sup>th</sup> September, 2010 shows that the same was signed by two persons whose identities are not disclosed. One of the signatories is indicated to have been a witness. There is no indication that the agreement was signed by both the 2<sup>nd</sup> plaintiff and the defendant. The agreement in my view fails to satisfy the requirements of section 38 of the Land Act and section 3 of the Law of Contract Act which prohibits the bringing of a suit based on a contract for disposition of an interest in land unless the contract is in writing, signed by all the parties and attested by a witness present when the contract is signed. The agreement dated 27<sup>th</sup> September, 2010 is therefore unenforceable and cannot support an order for specific performance.

Whether the plaintiffs are entitled to damages in lieu of or in addition to specific performance and if so how much?

Section 7 of the Land Control Act provides that if any money or valuable consideration has been paid in the course of a controlled transaction that becomes void under the Act, the money or consideration is recoverable as a debt from the person to whom it was paid. The plaintiffs are entitled to a refund of the monies that they paid to the defendant on account of the purchase price under the two agreements that I have held to be void and unenforceable for want of LCB consent. It would amount to unjust enrichment if the defendant was to retain those payments. As an alternative, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs prayed for special damages in the sum of Kshs. 340,450/- and 170,000/- respectively in lieu of or in addition to specific performance. What the plaintiffs are entitled to as I have mentioned above is a refund of the monies they paid to the defendant on account of the purchase price and not damages for breach of contract since no such breach was established. With respect to the 1<sup>st</sup> plaintiff, it is not in dispute that he paid Kshs. 260,000/- to Thomas Ruo Mbugua in accordance with the agreement for sale dated 22<sup>nd</sup> July, 2010 and also paid Kshs. 10,000/- to the defendant making a total of Kshs. 270,000/-. The defendant admitted this amount in her statement of defence dated 24<sup>th</sup> November, 2010 that was struck out and expressed her willingness to refund the same to the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> plaintiff is entitled to a refund of this amount together with interest.

With respect to the 2<sup>nd</sup> plaintiff, the only evidence of payment that was placed before the court was a copy of a cheque dated 27<sup>th</sup> September, 2010 for Kshs 20,000/-. No evidence was placed before the court in support of the additional sum of Kshs. 150,000/- which the 2<sup>nd</sup> plaintiff claims to have paid to the defendant. The 2<sup>nd</sup> plaintiff has proved the payment of Kshs. 20,000/- and he is entitled to that amount together with interest.

Whether the plaintiffs are entitled to the injunctive reliefs sought:

In view of my findings above, the plaintiffs have not established any legal or equitable interest in the suit property that can be protected by an order of injunction. Consequently, the injunctive relief sought by the plaintiffs cannot be granted.

Who should bear the costs of the suit:

Costs normally follow the event. However, in the circumstances of this case, I am of the view that justice would be better served if each party to the suit bears its own costs the suit.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiffs against the defendant as follows:

1. The defendant shall pay to the 1<sup>st</sup> plaintiff a sum of Kshs. 270,000/- together with interest at court rates from the date of filing suit until payment in full.
2. The defendant shall pay to the 2<sup>nd</sup> plaintiff a sum of Kshs. 20,000/- together with interest at court rates from the date of filing suit until payment in full.
3. Each party shall bear its own costs of the suit

**Delivered and Dated at Nairobi this 22<sup>nd</sup> day of November, 2018**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of**

No appearance for the Plaintiffs

No appearance for the Defendant

John - Court Assistant