



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 2067 OF 2007

LEO INVESTMENT LTD.....PLAINTIFF

=VERSUS=

ESTUARINE ESTATE LTD.....DEFENDANT

J U D G M E N T

Introduction

1. This suit relates to Land Reference Number 214/253 situated along Limuru Road within Nairobi City County [hereinafter referred to as “**the suit property**”]. The suit raises four broad questions to be answered within the context of the existing legal framework on contracts for disposition of interest in land. The first question relates to the legal validity of a suit predicated upon a land sale contract which has been executed by only one party. The second question relates to the operativeness and enforceability of such a contract through a plea of specific performance. The third question is whether or not the remedy of damages for breach of an unsigned contract for disposition of an interest in land would lie. The last question is whether or not a land disposition contract signed by only one party does vest a cognizable interest in land capable of protection through a caveat.

Facts

2. There is common ground regarding key facts and general background to this suit. Indeed, the two witnesses who testified on behalf of the parties in the suit largely concur on the factual background. Through a letter dated 30/7/2004, the Plaintiff offered to buy the suit property from the defendant at a purchase price of Kshs 12,500,000. The plaintiff identified Abu Kassam as its Advocate for the purpose of the transaction. On 19/11/2004, the defendant through A R Rebelo Advocate wrote to Abu Kassam Advocate acknowledging the latter’s letter dated 10/9/2004 and advising that the defendant was negotiating a sale to another party. Negotiations between the parties in this suit were revived and a deal firmed up in early 2005. Consequently, A R Rebelo [advocate for the vendor] forwarded to A Kassam [advocate for the purchaser] a draft sale agreement for the latter’s approval. Subsequently, the agreement for sale was approved with some amendments. On 19/1/2005, A R Rebelo forwarded three copies of the final agreement to the plaintiff’s advocate, to be executed by the purchaser. Full text of the letter forwarding the agreement read as follows:-

“K/MC/LIL/M

522/REL/15

19/1/2005

A Kassam

Advocate

2nd floor

Diamond Plaza

Masari Road

NAIROBI

RE: PROPOSED SALE OF LR NO 214/253

I enclose herewith 3 copies of the agreement incorporating the amendments you requested for execution by your client.

Please note that the amendment being special condition number 5 is not an admission by my client that there is any “flaw” in the conveyance dated 26th June 1996.

However my client shall execute any document which you consider appropriate to pass title to your client subject of course to the terms of the agreement.”

3. It would appear Kassam requested for more amendments to the agreement, leading to a second set of agreement for sale, forwarded by Rebelo through the latter’s letter dated 1/2/2005. The letter dated 1/2/2005 read as follows:-

K/MC/LIL/M

522/REL/15

1/2/2005

A Kassam

Advocate

Diamond Plaza

Masari Road

NAIROBI

“Subject to Contract”

Dear Mr Kassam

RE: PROPOSED SALE OF LR NO 214/253

I enclose herewith 3 copies of the agreement for sale incorporating the amendments you requested in full.

I have made the following further amendments:

(i) clause 8 to make it clear that your client shall be put in possession only after

conveyance is registered in its favour.

(ii) the completion date to 30 days from the date of agreement for sale as you say your client has the necessary funds to complete under its immediate control.

(iii) special condition 7

I enclose herewith a copy of the 2005 rates demand and my client’s notice of objection thereto.

Please note that the amendment of my original draft which was request by you as special condition 5 is made without prejudice and is not to be construed as an admission by my client that there is a “flaw” in the conveyance dated 26th June 1996 in its favour.”

4. On receipt of the agreement for sale, Kassam caused the agreement to be executed by the Plaintiff. Through a forwarding letter dated 18/2/2005, Kassam forwarded the agreement to Rebelo, to be executed by the Defendant. On 21/2/2005 the plaintiff through a letter dated 21/2/2005, forwarded to Rebelo Cheque Number BBK 004151 for Kshs.1,250,000, being 10% of the purchase price. It was received by Rebelo’s Office on the same day.

5. On 16/3/2005, Kassam wrote to Rebelo requesting for the plaintiff’s copy of the duly executed agreement for sale. What followed was a letter dated 22/3/2005 from Rebelo to Kassam returning the cheque and advising that the defendant had decided not to sell the suit property. Subsequent correspondence involved forwarding and return of the very cheque, forth and back, by the parties’ advocates.

6. On 27/6/2005, the plaintiff through the Firm of Mohammed & Muigai Advocates wrote to the defendant’s advocates, Rebelo, refowarding the returned cheque and requiring the defendant to execute and return to the plaintiff’s advocates a copy of the signed agreement within seven days. Paragraphs 5, 6, 7, 8 and 9 of the letter read as follows:-

“June 27/2005

Aurelio R. Rabelo

Advocate

Ibis Valley, Gem Lane

(Off Mander Road)

P. O. Box 44485-00100

Kileleshwa

NAIROBI

Dear Sir

RE: PROPOSED SALE OF LR NO 214/253

.....
.....

We have carefully studied the matter and have advised the client that in the circumstances of

the case your client is not entitled to resile from the agreed sale.

If your client were to contend that no sale agreement was signed, then it is on record that the sale agreement which you sent to Mr. Kassam was to be treated as an engrossment for execution by the parties. Our clients duly executed it in triplicate and forwarded it to you together with a cheque for 1.25 million in payment of the deposit.

The said cheque was retained by you for over one month thereby indicating clear and unequivocal acquiescence of the transaction.

We are thereby returning the said cheque to you and require our client's copy of the sale agreement duly executed by your client within the next seven (7) days whereupon we will let you have a draft conveyance for your approval.

If our client's copy of the sale agreement as aforesaid duly executed by your client is not returned to us within seven (7) days our instructions are to file suit for specific performance and/or damages."

7. The defendant through Rebelo wrote back to M/s Mohammed & Muigai Advocates on 9/8/2005 returning the cheque and maintaining that it would not execute the agreement for sale. It is this refusal by the defendant to execute the agreement for sale which triggered the filing of this suit. A perusal of the Title reveals that on 2/02/2005, the plaintiff caused a caveat to be registered against the title.

Plaintiff's claim

8. Through a Plaint dated 3/11/2006, the Plaintiff commenced this suit seeking a declaration that the sale agreement executed by the plaintiff is valid and binding on the defendant. Secondly, the plaintiff seeks an order of specific performance compelling the defendant to complete the material sale agreement. The plaintiff also seeks general damages, costs and interest. The plaintiff contends that the defendant made a misrepresentation by inducing the plaintiff to execute a sale agreement with no intention to complete the contract.

9. In paragraph 11 of the Plaint, the Plaintiff gives the following particulars of malice, inducement and misrepresentation:-

(i) Pretending to offer the suit property for sale to a third party when the same had already been sold to the plaintiff.

(ii) Entering into a false sale transaction knowing and/ought to have known that the same was false.

(iii) Inducing the plaintiff to execute the sale agreement with no intention to conclude the same on its part

(iv) Refusing to execute the sale agreement without any just cause.

(v) Retaining the deposit cheque.

(v) Failing to give any reason as to why it failed to execute the sale agreement."

Defence & Counterclaim

10. On 24/1/2017, the defendant filed a statement of defence and counterclaim dated 22/1/2007. In the defence, the defendant contends that this suit is contra-statute because there is no contract between the parties herein as contemplated by Section 3 (3) of the Law of Contract Act, Section 5 of the Civil Procedure Act and Section 54 of the Transfer of Property Act. In this regard the defendant contends that

there is no cause of action against it. Lastly, the defendant contends that there is no valid contract to be specifically performed.

11. In its counterclaim, the defendant contends that the plaintiff wrongfully lodged and has maintained a caveat against the suit property, restraining all dealings on the Title. It further contends that, as a result of the caveat, the defendant has lost various opportunities to sell the property and it has suffered loss and damages. The defendant prays for dismissal of the plaintiff's suit and judgment in its favour on the counterclaim for, inter alia, an order lifting the caveat, general damages for wrongful lodging and continuation of the caveat and costs of the suit.

12. In a reply to defence and defence to the counterclaim dated 6/2/2007, the plaintiff reiterates the averments made in the plaint. In answer to the counterclaim, the plaintiff contends that the defendant does not have any interest in the suit property capable of being conveyed to a third party as it is only holding the suit property in trust for the plaintiff.

Evidence

13. The plaintiff called one witness, **PW1 - Rahim Chatur**, a director of the plaintiff company. He adopted his witness statement dated 11/6/2012 as his evidence in chief and gave brief oral evidence to supplement the written statement. In both his written statement and oral evidence, PW1, Rahim Chatur, narrated the chronology of events. This chronology is essentially the same as what is set out in the preceding paragraphs. He contended that the plaintiff's offer to purchase the suit property was accepted by the defendant and that he lodged the caveat to preserve the suit property. He faulted the defendant's action of accepting the plaintiff's offer and simultaneously inviting other offers for the same property. He contended that once the cheque of Kshs.1,250,000 was sent to the defendant's advocate, the defendant became a trustee holding the suit property for the benefit of the plaintiff. He denied writing any letter to the commissioner of lands regarding the suit property.

14. The defendant called one witness, **DW1 - Zain Abdul Latif Yusuf Vaiani**, a director of the defendant company. She adopted her witness statement dated 23/4/2012. In addition, she gave a brief oral testimony. She stated that on 30/7/2004, the plaintiff offered to purchase the suit property at Kshs 12,500,000. She contended that, in the course of negotiations, she learnt that PW1 had written to the commissioner of lands on 30/10/2004, passing off as Estuarine Estate Limited (the defendant) seeking to establish whether the suit property was a road reserve. She got suspicious and decided not to accept the plaintiff's offer. She stated that on 19/11/2004, the defendant's advocate wrote to the advocate of the plaintiff notifying him of the defendant's decision not to sell the suit property to the plaintiff. She contended that, in spite of this information, the plaintiff's advocate proceeded to forward a cheque of Kshs 1,250,000 to the defendant's advocate in February 2015.

Plaintiff's Submissions

15. On the legal implications of Section 3(3) of the Law of Contract Act, counsel for the plaintiff, Mr. Luseno, submitted that the formal requirements for contracts involving sale of immovable property do not imply that there would be no contract if the formal requirements are not satisfied. He contended that the formality requirements do not vitiate the contractual enforceability of the contract and that a disposition which does not comply with the formal requirements may nonetheless take effect as a specifically enforceable contract. Counsel submitted that there was an accepted offer and that the defendant having accepted the offer and received the cheque for the 10% deposit, the defendant was, in law, not entitled to reject the already accepted offer. Mr Luseno submitted that the legislative intention would not be met if a party who fails to attend to the formality requirements of Section 3(3) of the Law of Contract Act were to be allowed to invoke his failure as a ground for insulating himself. He invited the court to take into account the special circumstances of this case while interpreting Section 3(3) of the Law of Contract Act. He urged the court not to be so inflexible as to permit unfairness and hardship to a purchaser who has signed an agreement prepared by a vendor who is now keen to re-negotiate the purchase price.

16. Counsel for the plaintiff further submitted that the present case is distinguishable from other cases

where the courts have pronounced themselves on the legal implications of Section 3(3) of the Law of Contract Act because in the present case, there is an agreement drawn by the defendant, forwarded to the plaintiff, executed by the plaintiff and returned to the defendant to be executed by the defendant; and the defendant is holding the 3 sets of the agreement post completion period.

17. On the use of the word “shall” in Section 3(3) of the Law of Contract Act, counsel argued that the word only signifies that the matter is prima facie mandatory. He argued that “shall” should be interpreted to be merely directory in a case where there is proof of substantial compliance.

18. On whether or not the plaintiff is entitled to the relief of specific performance, counsel for the plaintiff argued that there was already a binding agreement for sale and the same could only be rescinded in accordance with the law. He contended that the defendant’s contention that it had “decided not to sell” the suit property was not a legal ground for rescission. He urged the court to grant the order of specific performance based on the agreement that was executed by the plaintiff and forwarded to the defendant’s advocate to be executed by the defendant.

19. On the defendant’s counterclaim for damages on account of the lodging and continuation of the caveat, counsel for the plaintiff submitted that the plaintiff lodged the caveat in its capacity as purchaser of the suit property and the application was evaluated and registered by the Registrar of Titles in exercise his statutory power within the framework of Section 57 of the Registration of Titles Act. He contended that the decision to register the caveat was made by the Registrar; not by the Plaintiff. He further submitted that Part XI of the repealed Registration of Titles Act provided a forum for challenging an unlawful or unreasonable caveat. He faulted the defendant for bringing a counterclaim for general damages whereas it had not challenged the caveat through the framework of Section 57 of the Registration of Titles Act and judicial review mechanism provided under the Law Reform Act. Counsel submitted that to the extent that the counterclaim is disguised as a statutory forum of redress provided under Section 57 of the repealed Act, the same is totally defective. Counsel further submitted that to the extent that these proceedings have not challenged the decision of the Registrar and no judicial review order is sought, the prayer for general damages is not merited. He contended that damages were provided for under Section 57 if only the Plaintiff invoked the forum of redress set out under the Act.

Defendant’s Submissions

20. Counsel for the defendant, Mr Havi, submitted that cognizance of the plaintiff’s claim is expressly barred by the provisions of Section 3(3) of the Law of Contract Act and Section 5 of the Civil Procedure Act. He relied on **Schon Noorani Vs Damji Ramji Patel & 2 others (2006) eKLR** to buttress this view. Counsel further submitted that a contract for sale of land comes into force only after its execution by both the vendor and the purchaser. He contended that neither party can be compelled to enter into a contract. He submitted that the relationship between the plaintiff and the defendant over the suit property remained a promise to enter into a contract for sale and such promise is not enforceable in law. He relied on the Court of Appeal decision in **Lucy Mirigo & 555 others Vs Ministry of Lands & 4 others (2014) eKLR**.

21. On the question of specific performance, counsel for the defendant submitted that the plaintiff’s claim is barred by Section 3(3) of the Law of Contract Act and as such, an order of specific performance does not lie. Secondly, he submitted that there cannot be an order of specific performance of an unsigned contract for sale of land.

22. On the question as to whether or not the defendant is entitled to damages as a result of the caveat lodged by the plaintiff against the title, counsel for the defendant submitted that there was no executed agreement and that no consideration passed from the plaintiff to the defendant. Counsel contended that the plaintiff was not a purchaser entitled to lodge a caveat under Section 57 of the repealed Registration of Titles Act. He further contended that the caveat was lodged wrongfully and without any reasonable cause and was lodged in contravention of Section 57(3) of the repealed Registration of Titles Act.

23. On the issue of damages arising from the caveat, counsel for the defendant submitted that the

defendant's claim for damages is anchored on Section 57 (12) of the repealed Registration of Titles Act and is informed by the view that the caveat was lodged wrongfully and without reasonable cause. He urged the court to assess damages at Kshs 11,500,000, this being the difference between the offer from the plaintiff and the subsequent offer from Balozi Housing Co-operative Society which aborted as a result of the existing caveat.

24. Before I pronounce myself on the key issues in this suit, I should mention that this suit was allocated to me in March 2017. Trial took place before the Hon Onguti J during the transition period under the new constitutional framework. The suit was commenced in the High Court of Kenya under the repealed Constitution. When parties appeared before me, they both requested that the matter proceeds from where it had reached. Upon this request, and guided, by the transitional framework in Section 22 of the Sixth Schedule to the Constitution of Kenya 2010, I proceeded from where the matter had reached.

Analysis & Determination

25. Parties framed a statement of eleven issues dated 11/2/2008 and filed in court on 19/12/2007. Taking into account the pleadings and the statement of issues framed by the parties, I would condense the eleven issues into the following six key issues:

(i) Is the plaintiff's suit statute - barred under of the provisions of Section 3(3) of the Law of Contract Act and Section 5 of the Civil Procedure Act?

(ii) Is the plaintiff entitled to an order of specific performance on the basis of the unsigned agreement for sale of land?

(iii) Is the plaintiff entitled to damages against the defendant on the basis of the unsigned agreement for sale of land?

(iv) Does the unsigned agreement for sale of land vest in the plaintiff legal or equitable interest in the suit property capable of protection by a caveat?

(v) Is the defendant entitled to damages against the plaintiff on account of the caveat lodged by the plaintiff against the suit property?

(vi) Should either of the parties be condemned to bear costs of this suit?

26. Upon receipt of the agreement for sale duly signed by the plaintiff, the defendant did not sign and return a signed copy of the agreement to the plaintiff as expected by the plaintiff; the defendant instead decided to keep the agreement. The defendant then proceeded to write back to the plaintiff advising that it had decided not to sell the suit property. The resultant scenario is that there was no contract executed by both parties as required under Section 3(3) of the Law of Contract Act. The key issue which then arises out of this scenario is the question as to whether or not the plaintiff's suit is statute barred under the provisions of Section 3(3) of the Law of Contract Act. The second key issue which is closely related to the first issue is the question as to whether or not the plaintiff is entitled to an order of specific performance on the basis of the unsigned agreement for sale. The third issue which arises out of this scenario is the question as to whether or not the plaintiff is entitled to general damages for breach of the unsigned agreement. I will deal with the three issues simultaneously because they are related and the legal framework and guiding jurisprudence is largely the same.

27. Section 3(3) of the Law of Contract Act provides as follows:-

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded:

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”

The plaintiff seeks against the defendant the following relief:

“(a) An order declaring that the Sale Agreement entered by the plaintiff in respect of all that parcel of land known as Nairobi/Block 213/253 (sic) is valid and binding on the Defendant.

(b) An order of specific performance compelling the defendant to complete the Sale Agreement in respect of all that parcel of land known as Reference Number 213/253 Limuru Road.

(c) General damages

(d) Costs

(e) Interest”

28. The Law of Contract Act (Cap 23) was enacted in 1960 and its purpose was to apply the English common law of contract to Kenya with certain modifications. The legal significance of this piece of legislation is that, from time to time, the prevailing English common law of contract applies to Kenya. Whenever the English common law of contract changes so does Kenya’s law of contract. The only exception, however, is contained in Section 2 of the Law of Contract Act which provides that where there is a specific written law in Kenya regulating specific contracts, that written law prevails. One such specific written law regulating specific contracts is Section 3(3) of the Law of Contract Act which provides a regulatory legal framework for contracts for the disposition of an interest in land. It contains a framework on formal requirements for contracts involving disposition of interest in land.

29. This legal framework on formal requirements for contracts involving disposition of interest in land traces its history to the United Kingdom’s 1677 Statute of Frauds which stipulated that certain classes of contracts had to be supported by written evidence. Its object was to prevent fraudulent claims based on false parol evidence. The efficacy of the Statute of Frauds was however whittled down by judicial construction. It was repealed by the Law Reform (Enforcement of Contracts) Act of 1954. The provisions of the Statute of Frauds were subsequently re-enacted in Section 40 of the English Law of Property Act of 1925. Section 40 of that Act provided as follows:-

“No action may be brought upon any contract for sale of or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereto by him lawfully authorized”.

30. It is this framework in Section 40 of the English Law of Property Act of 1925 that was imported into Kenya’s Law of Contract Act under Section 3(3). The framework was amended in 2002 to completely remove the doctrine of specific performance and the operation of written memoranda as sufficient proof of contract. The amendment took legal effect in June 2003.

31. The legal framework in Section 3(3) of the Law of Contract Act was informed by the desire to settle the uncertainty surrounding the pre 2003 framework which hitherto permitted written memoranda and part performance as saving elements in non-compliant land disposition contracts. In my view, Section 3(3) of the Law of Contract Act makes a strict formal requirement whose legal ramification is to completely preclude the cognizance of any non-compliant contract for disposition of interest in land.

Unlike in the pre-2002 framework, written evidence by way of memoranda would not save a non-compliant contract. Similarly, the doctrine of part performance was abolished by the framework in Section 3(3) of the Law of Contract Act. The net effect is that a contract which does not meet the formal requirements set out in Section 3(3) of the Law of Contract Act is a nullity *ab initio*.

32. In the present dispute, the material contract was signed by only one party, the Plaintiff. There is ample jurisprudence on the legal validity of a land sale contract that is signed by only one party. In **Kukal Properties Development Limited Vs Tafazzal H Maloo & 3 Others (1993) eKLR** the Court of Appeal pronounced itself on a similar dispute where only one party had signed the agreement for sale of land. Commenting on the legal framework in Section 3(3) of the Law of Contract Act, **Muli JA** held as follows:

“With the greatest respect, the learned trial judge misdirected himself completely. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?.....”

It is trite law on this point and is made beyond doubt under Section 3(3) of the Law of Contract Act (cap 23) Laws of Kenya)

I hold that the intended agreement between the appellant and the Porbunderwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law”

33. **Kwach JA** pronounced himself on the same legal framework and issue as follows:-

“The agreement in question was not signed by the appellant or anyone authorized by the appellant to sign it. The Porbunderwallas could not rely on the provision because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree for specific performance. And as to the judge’s holding that the appellant was estopped from denying the validity of the agreement, this is quite clearly erroneous on the authority of *Patterson Vs Kanji (1956) 23 EACA 106*, where the Court of Appeal for East Africa held that there can be no estoppel against an Act of Parliament. The result is that the order for specific performance in favour of this couple should never have been made at all because it clearly had no legal basis”

34. Informed by the legal framework in Section 3(3) of the Law of Contract Act, and guided by the prevailing jurisprudence on the tenor and import of that legal framework, I hold the view that it would be an affront to the unequivocal text of the statute and to the well-established principles of statutory interpretation to hold that a suit seeking to enforce an unsigned contract for the disposition of an interest in land is tenable within the existing statutory framework and prevailing jurisprudence. To the contrary, such a suit is a nullity *abinitio* to the extent that it seeks to enforce an unsigned contract. Similarly, a suit seeking damages for breach of an unsigned contract for disposition of an interest in land is a nullity *ab initio*. The court is urged by counsel for the plaintiff to give Section 3(3) of the Law of Contract Act an interpretation that upholds and enforces an unsigned land sale contract. The court’s view is that such an interpretation will be contrary to the clear letter of the statute, would fly in the face of the prevailing jurisprudential principles of interpretation and would gravely undermine and frustrate the object for which the legal framework was enacted. Secondly, it would infringe the public policy underpinning the legal framework. For the above reasons, I hold that the Agreement for sale of the suit property in this suit is unenforceable on the ground that it was not signed by the defendant. I similarly hold that the plaintiff’s suit herein is a nullity to the extent that it seeks an order of specific performance of the unsigned agreement. It is also a nullity to the extent that it seeks general damages for breach of an unsigned contract for disposition of an interest in land.

35. I would, however, add that the validity or otherwise of a suit arising from a scenario of non-

compliance with the mandatory formal requirements of Section 3(3) of the Law of Contract Act does depend on the precise plea made to the court and the actual relief sought from the court by the plaintiff. In this regard, whereas a suit for specific performance or damages for breach of a non-compliant contract is a nullity, a suit for restitution (recovery of money paid in furtherance of a non-compliant contract) or a suit for declaration of a constructive trust arising from the non-compliant contractual relationship would be a valid suit. Indeed, the House of Lords had this view in **Kleinwort Benson Vs Lincoln City Council (1998) I WLR 574** when interpreting a similar legal framework. The Court of Appeal of Kenya was similarly of the same view in **Macharia Mwangi Maina & 7 Others Vs Davidson Mwangi Kagiri [2014] eKLR**.

36. The fourth issue is the question as to whether or not the unsigned agreement for sale vested in the plaintiff a legal or equitable interest in the suit property capable of protection by caveat. It is trite law that a contract consists of three fundamental elements; offer, acceptance and consideration. In the suit under consideration, a statutory interest would have crystallized if the formal statutory requirements had been satisfied and the essential elements of a contract existed. In the present suit, apart from lack of execution by the vendor, the cheque forwarding 10% deposit was returned unencashed. In essence, consideration did not pass. To this extent, the plaintiff did not acquire a crystallized legal interest in the suit property. There is no evidence of any of the key features of an equitable relationship or crystallized equitable interest in the suit property in favour of the plaintiff. Besides non-compliance with the statutory formal requirements of Section 3(3) of the Law of Contract Act, the contract lacked completeness in terms of essential elements. Possession was not given to the plaintiff and purchase price was not accepted by the vendor. To this extent, the plaintiff acquired neither a legal nor an equitable interest in the suit property.

37. Against the set of facts set out in the opening paragraphs of this judgment, the defendant makes a counterclaim for damages on account of the caveat lodged by the plaintiff. I would not have hesitated to award the defendant damages on account of the caveat were it not for the fact that the defendant largely contributed to the unfortunate scenario in which the parties have found themselves in. Indeed, Aganyanya J (as he then was) observed this when the defendant sought a court order to remove the caveat. In his wisdom, the Registrar of Titles too declined to remove the caveat. It is noted that the defendant stayed with the agreement and cheque for close to one month. Secondly, to date, the defendant has not returned to the plaintiff the unsigned agreement. Against this background, the defendant is, in my view, undeserving of damages. I accordingly decline to grant the defendant the prayer for damages as pleaded in the counterclaim.

38. I have deeply reflected on the question as to whether or not to award costs in this suit. Given the role of the defendant in creating the dispute which culminated in this suit, I would not award it costs of the suit.

Disposal

39. I make the following final orders in disposing the plaintiff's suit and the defendant's counterclaim herein.

(a) The plaintiff's suit is hereby dismissed.

(b) The caveat lodged by the plaintiff against the suit property Land Reference Number 214/253 is hereby vacated and the Land Registrar is hereby ordered to remove it forthwith.

(c) The defendant's counterclaim for damages is hereby dismissed.

(d) Parties shall bear their respective costs of the suit and counterclaim.

In conclusion, I thank the two counsel, Mr. Steve Luseno and Mr. Nelson Havi for their incisive submissions.

Dated, signed and delivered at Nairobi on this 23rd day of June 2017.

B M EBOSO

J U D G E

In the presence of:-

No appearance for the Plaintiff

Miller holding for Havi for the Defendant

Hilda - Court clerk