REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 341 OF 2012

SIMON KAMAU GATUHI……..…….……PLAINTIFF

VERSUS

STEPHEN WAINAINA KAMONJO .....….....….1ST DEFENDANT

GEOFFREY W WACHIRA …….....……2ND DEFENDANT

JUDGMENT

(Plaintiff seeking inter alia specific performance for land measuring 3/8th of an acre sold to him by the 1st defendant; initial agreement being for 1/2 acre but no 1/2 acre available; plaintiff stating that they had a gentleman's agreement to have the acreage reduced to 3/8th of an acre and the purchase price to be reduced pro rata; no agreement for 3/8th of an acre; gentleman's understanding not enforceable as the law requires contracts over land to be in writing; parties having had disputes over whether plaintiff would be refunded the purchase price; 1st defendant selling same portion to the 2nd defendant and no more land available; specific performance not suitable remedy in the circumstances; remedy of the plaintiff lies in damages; plaintiff awarded damages and 1st defendant ordered to refund the purchase price paid)

PART A : INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a plaint which was filed on 2 September 2011. In his plaint, the plaintiff has pleaded inter alia that on 5 May 2007, the 1st defendant sold to him a parcel of land measuring 1/4 of an acre to be excised from the land described as LR No. 20833. It is pleaded that this land parcel LR No. 20833 was successfully subdivided and the 1st defendant issued with title to the portion registered as LR No. 20833/6. It is averred that on 18 July 2009, the plaintiff entered into another sale agreement vide which he purchased a portion of land measuring 1/2 acre from the 1st defendant, to be excised from LR No. 20833/6. He has pleaded that on 24 July 2009, he took possession of the land and started utilizing it. He has further pleaded that on 17 April 2010, an agreement was entered into between himself and the 1st and 2nd defendants, vide which it was inter alia agreed that the 1st defendant would refund the plaintiff the sum of Kshs. 1,100,000/= before 30 June 2010, failure to which the plaintiff will continue being in possession of the parcels of land that he purchased. It is averred that in July 2011, the 2nd defendant unlawfully entered the parcel of land and started developing it. In the suit, the plaintiff has asked for orders to have the defendants permanently restrained from the portion of land that he purchased and for an order of specific performance to compel the 1st defendant to transfer the said portion of land to him.

2. In his defence, the 1st defendant has pleaded inter alia that the plaintiff breached the terms of the sale agreements and therefore the 1st defendant was at liberty to proceed to deal with the land.

3. On the part of the 2nd defendant, it was pleaded that on 21 April 2008, he entered into a sale agreement with the 1st defendant for the sale of land measuring 1/4 acre from LR No. 20833/6 and he took possession immediately. He thereafter entered into another sale agreement on 27 November 2011 for an additional portion measuring 100 X 150 feet. He has admitted being a party to the agreement dated 17 April 2010, between the plaintiff and 1st defendant, but has averred that no obligations or benefits accrued to him over the same. He has pleaded that he has extensively developed the land in dispute by putting up permanent houses and a dairy farm and he cannot be restrained from doing that which has already happened.

PART B : EVIDENCE OF THE PARTIES

4. In his evidence the plaintiff testified that he was introduced to the 1st defendant by a land agent identified as Mr. Noru. On 5 July 2007, they agreed with the 1st defendant for the sale of 1/4 acre to be excised from LR No. 20833 at a consideration of Kshs. 400,000/=. On that day, he paid Kshs. 300,000/= and it was left for the 1st defendant to subdivide the land so as to excise this portion. However, by 2009, the land had not been subdivided and he gave a notice to the 1st defendant. He stated that he later met with the 1st defendant who explained that he had not embarked on the subdivision for lack of funds. He testified that in order to raise money for this exercise, the 1st defendant proposed to sell to the plaintiff an additional 1/4 acre of land. The plaintiff agreed, and they wrote another agreement on 18 July 2009. The agreement identified the land being sold as 1/2 an acre, and the plaintiff explained that it combined the first 1/4 acre sold, with the second 1/4 acre, so as to have a consolidated agreement for a 1/2 an acre of land. The total purchase price for the 1/2 acre portion was listed as Kshs. 850,000/=. On the day of this second agreement, the plaintiff paid a sum of Kshs. 75,000/=, meaning that he had now paid Kshs. 375,000/= and left a balance of Kshs. 475,000/=. He testified that a sum of Kshs. 175,000/= was to be paid after the land was surveyed and beacons put in place for this 1/2 acre portion and that on the date of survey, he did pay the sum of Kshs. 175,000/= which was acknowledged.

5. When this 1/2 portion was measured, it happened to extend to the grave where the father of the 1st defendant was buried. So that the grave was not interfered with, the 1st defendant requested that the acreage being purchased be reduced to 3/8th of an acre. According to the plaintiff, the amount he was to pay thus got reduced to Kshs. 675,000/=, and since he had already paid a total sum of Kshs. 550,000/=, he was only left with a balance for Kshs. 75,000/= which he stated was to be paid after the land was transferred to him. He testified that the land is yet to be transferred to him but he is in possession of the original title deed to LR No. 20833/6 which accrued to the 1st defendant after the mother title, LR No. 20833, was subdivided, which title deed was given to him by the 1st defendant. Since the 1st defendant did not embark on the subdivision, the plaintiff testified that he took it upon himself to proceed with the same. He engaged a firm of physical planners known as Naku Plan Consultants for the subdivision and change of user of the property from agricultural to residential and they drew a plan where his plot was identified as 'Plot B'. He paid the consultants a total of Kshs. 131,400/= in the month of March 2011. In the same month, he also paid land rates of Kshs. 4,680/= and Kshs. 3,000/= for the rates clearance certificate. Since he lived in Nairobi, Mr. Noru, made these payments on his behalf and also used to check on the status of the land.

6. In the year 2010, he was informed by Mr. Noru, that the 2nd defendant was on the land putting up a structure. He asked Mr. Noru to make a report to the police, which was done, and he stated that the OCS summoned them to a meeting. They all met at the police station on a Saturday, 17 April 2010, and had a discussion which resulted into a written agreement of the same day. That agreement was signed by himself, the two defendants, and Mr. Noru. He testified that in the agreement, he offered to sell back the property to the 1st defendant at the prevailing market rate of Kshs. 1, 100,000/= which money was to be paid before 30 June 2010. If the money was not paid, the same agreement stated that he would remain in possession and permitted him to develop the land. He stated that the money was never paid. He was of the view that the 2nd defendant could not purchase the land from the 1st defendant because it now no longer belonged to him as he had already purchased it.

7. In cross-examination, he testified inter alia that it was the duty of the 1st defendant, as seller, to subdivide the land. He affirmed that the agreement to adjust the acreage from 1/2 acre to 3/8th of an acre , so as to accommodate the grave, was not put down in writing. He asserted that owing to the reduced acreage, the purchase price was thus to be reduced to Kshs. 625,000/= , but this was also not put down in writing. He testified that he received the original title deed in the year 2009 and proceeded with subdivision after receiving verbal instructions from the 1st defendant. He stated that the 1st defendant was familiar with Naku Plan Consultants since it is them who had earlier subdivided the land on his behalf for the sale of other plots. When they went to the police station on 17 April 2010, the subdivision of the land was in process but not complete.

8. He testified that the agreement of 17 April 2010 was done at the police station but denied that the 1st defendant was coerced to sign it. He stated that he is the one who recorded the said agreement. He was of the view that the 2nd defendant was a party to the agreement and not a mere witness to it. He testified that the 2nd defendant was nowhere on the land when the land was being subdivided in the year 2009 and he only came to know of his presence in the year 2010. He stated that the 2nd defendant had started developments in the year 2010, but stopped, only to re-emerge and continue with developments in the year 2011. He testified that if the 2nd defendant had done due diligence, he would have discovered that the original title deed is in his (plaintiff's) possession. He insisted that the 2nd defendant is not an innocent purchaser for value since he was aware that the property had an issue and that the 2nd defendant breached the agreement of 17 April 2010 by continuing being in possession. He however agreed that in their said agreement, it was not the 2nd defendant, but the 1st defendant, who was to refund him the money that he had paid.

9. In re-examination, he testified that although they had no agreement to sell 3/8th of an acre, the 1st defendant executed all documents for subdivision so as to create a plot measuring 3/8th of an acre. He stated that this was verbally agreed and that they also verbally agreed that he could proceed with the subdivision. He insisted that the subdivision plan was in his favour and not that of the 2nd defendant and that the 2nd defendant did not feature anywhere when the subdivision was being done.

10. PW-2 was Timothy Njora Noru who works as a property agent. He affirmed that the parties first agreed to enter into a sale agreement for 1/4 of an acre in the year 2007, and they later in the year 2009, entered into a second agreement for the purchase of an additional 1/4 acre. A sale agreement was done for 1/2 acre of land, which consolidated the sale of the two 1/4 acres, at a total purchase price of Kshs. 850,000/=. He testified that the plaintiff was given the original title deed when he paid the additional sum of Kshs. 175,000/= on 12 August 2009. He stated that what was purchased was to be excised from LR No. 20833/6 which is land measuring about 1 and 1/4 acres. He testified that the plaintiff and 1st defendant authorized him to get a surveyor to carve out the plaintiff's portion of 1/2 acre. A subdivision plan was done and the plot to be sold to the plaintiff was marked as 'B' which was 0.149 Ha or 3/8ths of an acre which is what resulted after reducing the acreage that fell on the grave. He later went to the land in the year 2011 and found that the 2nd defendant had fenced it. A report was then made to the police which culminated in the agreement of 17 April 2010. He stated that the agreement was never performed by the defendants. He testified that the 2nd defendant embarked on developments and built a house after this agreement while aware that the property had been sold to the plaintiff.

11. In cross-examination, he agreed that the plaintiff still owed money to the 1st defendant as part of the purchase price but stated that the 1st defendant had asked the plaintiff to pay for the subdivision and processing of title. He testified that although the survey plan drawn bears the date 2011, the beacons had already been put much earlier, probably in the year 2008. On the agreement of 17 April 2010, the plaintiff was to be refunded Kshs. 1, 100,000/= because, in his view, that was the value of the land at that time although a valuation was not conducted. He stated that they all went to the police station voluntarily by mutual agreement. He testified that they chose to go to the police station since it was a weekend and law firms had closed. According to him, the 2nd defendant was only a witness to the agreement but no obligations were imposed upon him. The Officer Commanding the Police Post, where the agreement was done, was present when the agreement was signed, but he insisted during re-examination that the environment at the police station was very friendly and it is not that they had gone there because of a report made but because they had agreed to do so.

12. In his defence, the 1st defendant affirmed that he did indeed enter into an agreement with the plaintiff on 5 May 2007 for the sale of the first 1/4 acre. He agreed that out of the purchase price of Kshs. 400,000/=, he was paid Kshs. 300,000/=, but asserted that he has never been paid the balance to date. He testified that they did not go to the ground and never identified the site for this 1/4 acre. He testified that in the year 2009, the plaintiff wanted to buy another 1/4 acre and they entered into a new agreement for 1/2 acre of land on 18 July 2009. According to him, this nullified their earlier agreement. The purchase price for the 1/2 acre was agreed at Kshs. 850,000/=. On 8 April 2008, he sold to the 2nd defendant, a 1/4 portion of land which he showed him on the ground. He testified that in the year 2009, after it was realized that the plaintiff's portion fell on a grave, the plaintiff asked for a refund of his money because the land could not reach the 1/2 acre that he purchased. He did not have any funds and he therefore talked to the 2nd defendant to purchase an additional plot measuring 50 X 100 feet to enable him raise money to refund the plaintiff. They agreed and entered into another agreement with the 2nd defendant dated 27 November 2009 for the sale of this additional portion. He stated that he offered to pay back the plaintiff in installments but the plaintiff refused and reported him to the police. He accepted that the plaintiff had paid him Kshs. 550,000/= but while at the police station, the plaintiff multiplied this money by two and demanded payment of Kshs. 1, 100,000/=. He stated that at the police station, he was given the option of refunding the plaintiff or going to jail, and only signed the agreement that was drawn because they were at the police station. He said that he is ready to refund the plaintiff the sum of Kshs. 550,000/= which is what he received from him.

13. Cross-examined by Mr. Biko, learned counsel for the 2nd defendant, he explained that he never informed the plaintiff that he had sold land to the 2nd defendant because he had sufficient land for both of them. He denied having sold to the 2nd defendant, the same land that he sold to the plaintiff. He stated that the 2nd defendant had paid him in full but he has not yet transferred the land sold to him owing to another development plan prepared by the plaintiff. He disowned the plan prepared by the plaintiff because he had not sold to the plaintiff any land measuring 3/8th of an acre. He pressed the point that he only agreed to refund the plaintiff Kshs. 1,100,000/= under coercion.

14. Cross-examined by Mr. Waiganjo, learned counsel for the plaintiff, he did not contest that in their first agreement, the balance of Kshs. 100,000/= was to be paid within 30 days or on completion of survey, whichever was earlier. He agreed that he had not yet done survey. He held the view that their new combined agreement for 1/2 acre nullified this first agreement. He stated that the 1/4 acre in the first agreement was sold to another person for the sum of Kshs. 1 Million although he has not been paid a cent since the mother title is still held by the plaintiff. He affirmed that his whole land is 1 and 1/2 acres. He testified that they went to the site about one month after the second agreement that he had with the plaintiff when the surveyors went to the ground. He stated that the 50 X 100 feet plot that he sold to the 2nd defendant in their second agreement was part of what he intended to sell to the plaintiff. He denied that they agreed with the plaintiff to reduce the acreage that the plaintiff was purchasing from 1/2 to 3/8th of an acre. He stated that he was initially ready to refund the plaintiff a sum of Kshs. 850,000/= but since a lot has now happened, he can only refund what he was paid, which is Kshs. 550,000/=. He never paid any money to the plaintiff after signing the agreement at the police station. He denied having permitted the survey plan which carved out the 3/8th plot of an acre. He stated that he wrote to have these documents rejected although he did not carry the said letter. He placed all the blame upon the plaintiff because according to him, he kept shifting posts. 15. He agreed that he has set aside a portion of 3/8th of an acre to transfer to the 2nd defendant and that at the moment he has no more land to give to the plaintiff.

16. On his part, the 2nd defendant testified that they had their first agreement with the 1st defendant in 2008 when he purchased a 1/4 portion of land from him. Later, the 1st defendant sold to him another portion measuring 50 X 100 feet (about 1/8th of an acre). He took the land and fenced it. He never met the plaintiff on the land and first came to know him while at the police station. He stated that the agreement at the police station did not impose any obligations on him and did not nullify any earlier agreements.

17. In cross-examination, he stated that he was shown the first 1/4 acre when he purchased it. He did not know where the plaintiff's portion fell. He stated that he only came to know that the plaintiff is holding

the original title deed while in court but there before, the 1st defendant had stated that he has possession of it. He gave the history of the land; that it was initially big land owned by the father of the 1st defendant and was subdivided to his beneficiaries, one of whom was the 1st defendant, upon his demise. He agreed that none of the developments that he has on the land have been approved. He stated that he never followed up on whether the plaintiff had been refunded after the agreement of 17 April 2010. Neither did he inquire where this portion identified as 'B' in the said agreement, fell.

PART C : SUBMISSIONS OF COUNSELS

18. In his submissions, Mr. Waiganjo for the plaintiff inter alia submitted that in their first agreement, the balance of Kshs. 100,000/= only became payable once survey was done and that the plaintiff had yet to undertake the survey. He referred me to the second agreement for the 1/2 acre and to its terms especially on payment of the balance as noted therein. He submitted that the parties entered into a gentleman's agreement to reduce the plaintiff's acreage to 3/8th of an acre because the full 1/2 acre fell on the grave. He averred that the 1st defendant frustrated the subdivision to the extent that the plaintiff embarked on it himself at his own cost. He argued that the 1st defendant did not table any evidence to show that he had protested against the subdivision done by the plaintiff. He submitted that the 1st defendant sold the very portion that he had earlier sold to the plaintiff. On the agreement of 17 April 2010, he offered that none of the parties have pleaded any coercion or undue influence and he referred me to Order 2 Rule 10 (1) of the Civil Procedure Rules. He argued that the mere fact that the agreement was drawn in the police station is not evidence of coercion and that the parties did endorse their signatures on the document. He was of the view that this is an afterthought. He submitted that the court cannot re-write a contract between parties and he referred me to some authorities on this point. He submitted that even after the said agreement, the 1st defendant never refunded the plaintiff anything. He believed that the 2nd defendant was aware of the plaintiff's interest, latest when the agreement of 17 April 2010 was drawn, but instead of maintaining the status quo, he proceeded to develop the property. He also pointed out that the developments are unapproved thus illegal. He submitted that a court of law cannot condone an illegality. He was of opinion that the plaintiff deserves the order of specific performance but if not available, to order the 1st defendant to refund the value of the land at the current market rates with interest and that the plaintiff deserved being paid damages.

19. On the part of the 1st defendant, it was submitted by the law firm of M/s Ng'ang'a and Associates, counsels for the 1st defendant, that the plaintiff repudiated the contract by demanding a refund. It was further submitted that there was no fraud in the agreements between the defendants. On the agreement of 17 April 2010, it was asserted that agreements are not done in police stations and it was only signed under undue influence and therefore void. It was submitted that there was no explanation on how the figure of Kshs. 1, 100,000/= in the agreement was arrived at. Counsel stated that the remedy of specific performance cannot be available to the plaintiff as he never paid the full purchase price. They asked that the plaintiff's case be dismissed with costs. Counsel also referred me to various authorities which I have read.

20. On the part of the 2nd defendant, Mr. Biko submitted that the dispute herein is purely contractual. He averred that the initial agreement of 5 May 2007 was premised on several factors which were never done and the plaintiff demanded a refund thus renouncing the contract. He was of opinion that the agreement entered into in the police station was conceived under a weight of duress and coercion. He submitted that the plaintiff is not entitled to any damages for trespass. It was further submitted that the 2nd defendant is an innocent purchaser for value and that a mandatory injunction cannot issue against him. He argued that the plaintiff cannot make any claims against the 2nd defendant for want of privity of contract.

PART D. ANALYSIS AND DECISION

21. I have considered the pleadings, the evidence and the submissions of counsel.

22. There is no dispute that the plaintiff and the 1st defendant first entered into an agreement on 5 May 2007 through which the plaintiff was purchasing a portion of 1/4 acre from the 1st defendant. I have looked at the sale agreement which appears to me to be homemade although attested by an advocate. As

would not be unusual with such documents, it is quite poorly drawn and I am rather taken aback, that the plaintiff, who is an engineer by profession, did not deem it fit, to seek a professional to guide them on this agreement. Be as it may, the said portion of land was being sold at Kshs. 400,000/= and the sum of Kshs. 300,000/= was paid through a banker's cheque. I will not say much about this agreement because the same parties, on 18 July 2009, entered into a second agreement which to me appears to have overridden the first agreement of 5 May 2007.

23. This second agreement was drawn by an advocate and the portion of land being sold is 1/2 acre out of the land parcel No. 20833/6. Both the plaintiff and the 1st defendant are in agreement that this portion of 1/2 acre noted in this agreement comprises of the initial 1/4 acre that was sold on 5 May 2007, and an additional 1/4 acre which the plaintiff also desired to purchase from the 1st defendant.

24. In this agreement of 18 July 2009, the purchase price is noted to be Kshs. 850,000/= with the sum of Kshs. 375,000/= being acknowledged at the time the agreement was executed. The balance of the purchase price was to be paid as follows as noted in Clause 3 of the agreement :-

> *3. The balance of Kshs. 475,000/= will be paid as follows :-*
>
> *(a) The seller undertakes to survey and put beacons on or before the 24th day of July 2009.*
>
> *(b) After the survey and beacons have been put in place, the buyer will pay the seller an amount of Kshs. 175,000/=.*
>
> *(c) The seller undertakes to obtain consent and approval from the municipal council.*
>
> *(d) After the fulfillment of clause (c) above the buyer will pay amount of Kshs. 200,000/=.*
>
> *(e) The balance of Kshs. 100,000/= will be paid after the transfer of the said portion of 1/2 an acre has been effected.*

25. The other clauses in the agreement provided as follows:-

> *4. That the buyer will take possession after beacons have been put in place that is on or before the 24th day of July 2009.*
>
> *5. The buyer is at liberty to do any lawful development on the said land once in possession.*
>
> *6. That the transaction herein shall be completed within 6 months from the date of signing this agreement.*
>
> *7. The buyer shall pay all the stamp duty and any other expenses associated with the transfer.*
>
> *8. The seller will incur the costs of sub-division and other expenses.*
>
> *9. That any party that default this agreement will pay a liquidated damages (sic) equivalent to 30% of the purchase price.*
>
> *10. The advocates costs for preparing this agreement will be shared by the parties.*

26. From the above agreement, it will be seen that the duty to undertake survey was that of the seller. It was also his duty to obtain consent and approval from the municipal council. It will further be observed that it was a clause of the agreement that survey works and beaconing was to be done on or before 24 July 2009. It was after this was undertaken that the plaintiff would have to pay the sum of Kshs. 175,000/= and the other payments were to be made once consent is obtained from the Municipal Council and transfer effected. The agreement has a completion date of 6 months and any party in default would pay 30% of the purchase price as damages. As far as I can see it, this contract was fully self executing

complete with a default clause in case any party was in breach.

27. It is not very clear to me when the survey was done since no precise date was given to me by either the plaintiff or the 1st defendant, but it does appear that a survey exercise was conducted so as to excise the plaintiff's 1/2 acre portion from the parent title, and the plaintiff himself stated that he did pay the sum of Kshs. 175,000/= after this survey exercise. Unfortunately, it happened that the 1/2 portion partly fell on the 1st defendant's father's grave and at this juncture, it was not possible to extract the 1/2 portion intended for the plaintiff. According to the 1st defendant, the plaintiff then repudiated the agreement and demanded a refund. The plaintiff's version is of course different. He contended that they then agreed that the acreage would be reduced to 3/8th of an acre after which he proceeded to get a draft survey plan and change of user for this acreage approved at his own cost. This is where the Plot 'B' measuring 3/8th acre and which the plaintiff now wants specific performance of, was derived from. In his evidence, the plaintiff argued that because the acreage was reduced, the purchase price also got reduced by an equal percentage, and thus he was only to pay a total of Kshs. 625,000/= for 3/8ths of an acre of which he had already paid Kshs. 550,000/= thus leaving a balance of Kshs. 75,000/= which according to him was only payable after the transfer was effected.

28. I am afraid that this cannot be the case. The contract herein was over sale of land and the law requires that such contracts be in writing for them to be enforced. The parties of course had a written contract whereby 1/2 acre of land was to be sold, and that contract is fully enforceable. However, they had nothing in writing where this contract was varied, and that being the case, the only contract that is enforceable is that of 18 July 2009 and not any verbal agreement that the plaintiff may wish to place reliance on. This stems from the provisions of Section (3) of the Law of Contract Act, Cap 3, Laws of Kenya, which is drawn as follows :-

> *(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, nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

29. The issues herein do not fall within the exceptions noted in Section 3 (3) above. I have no written agreement before me whereby the plaintiff and the 1st defendant agreed to have the land sold to the plaintiff reduced from 1/2 acre to 3/8th of an acre and where the purchase price got reduced on a pro rata basis owing to the reduction in acreage. Neither do I have any agreement where the seller agreed to have the buyer proceed with subdivision of the land and where the buyer would claim back the cost. Mr. Waiganjo in his submissions, stated that this was a gentleman's understanding, but I am afraid a such, are not enforceable when dealing with immovable property.

30. The plaintiff could of course have been at liberty to take less acreage, without prejudice, but he could not qualify that by stating that the purchase price is reduced pro rata. That would have needed another written agreement. If he took less acreage, without prejudice, he would still be bound by all the other terms of the agreement.

31. I am not therefore convinced that there is any agreement between the parties where the acreage sold was varied and where the purchase price was also reduced pro rata. Neither do I have any agreement where the seller allowed the purchaser to proceed and carve out 3/8th of an acre and have the plan for the same approved. The plaintiff cannot now claim the benefit of any 3/8th of an acre and cannot attempt to enforce a survey plan which did not have the approval of the seller. If he felt that there was a breach of

the terms, he had the option of renegotiating the contract and come up with another written agreement, or repudiate the contract and claim damages since this was one of the negotiated clauses of their contract. He could not unilaterally re-write the contract and attempt to bind the 1st defendant with the terms thereof.

32. I could have stopped it at that, but there is the other agreement that was drawn at the police station on 17 April 2010. At this time, the plaintiff had already noticed that the 2nd defendant was on part of what he purchased and he chose to involve the police. When the parties met at the police station, they came up with the following agreement which states as follows :-

> *This agreement between Stephen Wainana Kamonjo, Simon Kamau Gatuhi and Geoffrey W. Wachira on this day of 17th April 2010 states as follows :-*

That the three agree that :-

> *i. The said property, Plot No. LR No. 20833 B remains for the time being in possession of Simon Kamau Gatuhi.*
>
> *ii. That Mr. Stephen Wainaina Kamonjo to pay a sum of Kenya Shillings One Million One Hundred Thousand Only to Mr. Simon Kamau Gatuhi.*
>
> *iii. That the said payment be made on or before 30th June 2010 in full amount.*
>
> *(iv) That no development will be done on the said plot between now and 30th June 2010.*
>
> *iv. That Mr. Simon Kamau Gatuhi will be free to start any development on the said plot if Mr. Stephen Wainaina Kamonjo fails to pay the said amount of One Million One Hundred Shillings (Kshs. 1,100,000/=) on or before 30th June 2010.*

This agreement made on this day between

> *1. Stephen Wainaina Kamonjo 17 April 2010.*
>
> *2. Simon Kamau Gatuhi*
>
> *3. Geoffrey W. Wachira*
>
> *Witness*
>
> *Timothy N. Noru*
>
> *Copy to*
>
> *OCCPP, Mwariki.*

33. A look at the above agreement will show that it is a tripartite agreement with some terms. At this time, the plaintiff must have been fairly frustrated, if not agitated, that he has yet to get his land while another person seems to be in possession of part of it. Despite this, in my view, there was absolutely no reason as to why the plaintiff thought it wise to proceed to the police station to force an agreement from the defendants. The plaintiff was of course at liberty to make a formal report if he thought that there was a crime that had been committed and if that was the case, he ought to have let the police do their investigations and charge any person found to have committed any criminal offence. I would have had no problem with such an approach. But what the plaintiff did was to proceed to take advantage of a police station and police presence so as to force an agreement with the defendants. Despite the plaintiff and his witness explaining that all parties agreed to proceed to the police station so as to do an agreement, I absolutely do not buy that. Police stations are not premises where agreements for sale of land are prepared and I am not going to encourage parties to be writing agreements over land in places such as these. Police

stations serve a different purpose.

34. It was said that the parties chose the police station because it was a Saturday, and lawyers do not work on this day. There is no substance in such statement. I take judicial notice that quite a number of advocates do work on Saturdays and it cannot be said that it is impossible to get an advocate over a weekend. But even if this were the case, the parties could simply have waited for the following Monday, or any other week day to sort out their issues before an advocate or other suitable mediator. There is no excuse to drawing an agreement over land at a police station. I am unable to enforce the agreement of 17 April 2010, because I have no doubt in my mind that it was obtained through intimidation and coercion. The very environment under which it was drawn is an intimidating environment and I am unable to be persuaded that a person who is in such environment can be argued to have exercised his free will. That aside, as a matter of public policy, the court ought to frown over such agreements as they are prone to open up channels of corruption which should not be encouraged. I am unable to bring myself to enforcing that agreement entered into at the police station on 17 April 2010 and I declare it as null and void for reasons that it was procured under circumstances that bring one to the conclusion that the agreement was entered into through coercion and/or duress. Again, I wonder why, given the status of the plaintiff, he again thought it wise to bypass professional advice before proceeding to the police station. He clearly ought to have known better.

35. I have mentioned before that the contract that the plaintiff had with the 1st defendant was self-executing, meaning that if there was any breach on the part of the 1st defendant on the terms thereof, the plaintiff could repudiate the contract and claim damages, or assert any other equitable remedies in court. There was actually a breach, in my view, by the 1st defendant. He never carved out a 1/2 acre of land to the plaintiff and never proceeded to obtain consent or approval from the Municipal Council as agreed in their contract. He was clearly at default.

36. Although the plaintiff has in this suit sought the equitable remedy of specific performance, I do not think that it is a suitable remedy to award, given the surrounding circumstances. For starters, I am not very sure if there is any land that is available to the plaintiff. The 1st defendant stated that he sold the land that the plaintiff was to purchase to other persons so that he can raise money to refund the plaintiff. I have some doubts as to the availability of land to the plaintiff and I do not wish to make an order that is in vain. I do not think that the 2nd defendant ought to be affected because to me, his first purchase was of 1/4 of an acre which is not that which the plaintiff claims. The only portion that he purchased, which the plaintiff can lay claim to, is the extra 1/8th acre, but I have no evidence that he was aware of the previous sale to the plaintiff, and in my view, he is an innocent purchaser for value and ought not to be caught in the crossfire between the plaintiff and the 1st defendant.

37. Secondly, the order of specific performance is being sought for the Plot 'B' which is a plot measuring 3/8th of an acre. The parties have no agreement for this acreage of land and the the 1st defendant did not approve the subdivision plan which created it. I would not want to enforce a term and endorse a process which was never agreed by the parties.

38. It is for the above reasons that I am not persuaded that the equitable remedy of specific performance is available in the circumstances of this case. In the same vein, the plaintiff cannot get the order of permanent injunction that he has sought against the defendants.

39. The plaintiff's appropriate remedy is in damages as noted in the agreement that he had with the 1st defendant. There is no question that the 1st defendant was in breach and I have already explained above why the agreement cannot now be enforced as drawn and why an order of specific performance cannot issue. The parties agreed that if there was any party in breach, then such party would pay damages equivalent to 30% of the purchase price. The purchase price in the agreement was of Kshs. 850,000/= and 30% of this sum is Kshs. 255,000/=. This is what the plaintiff deserves as damages from the 1st defendant for breach of the contract. Ordinarily, damages accrue interest at court rates from the time of award, but these are liquidated damages, built within the contract, and in my discretion interest on this sum will accrue from the time of filing suit. The plaintiff had also paid a sum of Kshs. 550,000/= to the 1st defendant. He must also be refunded this money and in addition to the damages, I also order the 1st

defendant to refund the plaintiff the amount of Kshs. 550,000/= with interest at court rates from the date of filing suit.

40. I also award the plaintiff the costs of this suit as against the 1st defendant only. I make no award as to costs either in favour of or against the 2nd defendant.

41. Judgment accordingly.

42. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-