



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1250 OF 2016

(FORMERLY HCC NO. 112 OF 2004)

JOSEPHINE MORAA NYAMWEYA 1ST PLAINTIFF

CHARLES GEKONDE OTARA 2ND PLAINTIFF

VERSUS

HARON KING'OINA BOGITA DEFENDANT

J U D G M E N T

1. Introduction and Background:

The plaintiffs vide a plaint dated 14th July 2004 filed in court on the same date instituted the instant suit against the defendant claiming that the defendant had trespassed onto their land parcel **Central Kitutu Daraja Mbili/2603** (the suit property). The plaintiffs claimed that the defendant had demolished their semi permanent structures on the suit property and had started assembling building materials with a view to starting some construction. The plaintiff sought orders for the eviction of the defendant from the suit property and an injunction restraining the defendant from in any manner interfering with the suit property.

2. The defendant filed a defence dated 24th August 2004 denying he was a trespasser on land parcel 2603 (the suit property) and averred that the said suit property was fraudulently obtained from land parcel **Central Kitutu/Daraja Mbili/1233** which the defendant stated he had purchased from one Charles Gekonde Otara on 3rd June 2003 and took possession of the same and was residing therein. The defendant denied the plaintiff was entitled to the orders sought in the plaint.

3. The suit was on 23rd May 2013 fixed for hearing on 18th December 2013 by consent of all the parties. On 18th December 2013 only the 2nd plaintiff and his counsel attended court (the 1st plaintiff having died on 25th June 2012). The defendant and his advocate did not attend court and the hearing proceeded ex parte and judgment was delivered on 29th May 2014 in favour of the 2nd plaintiff and the defendant was ordered to vacate the suit property within 45 days from the date of judgment failing which an eviction order was to issue on application of the 2nd plaintiff.

4. The defendant by a Notice of Motion dated 25th June 2014 inter alia applied to set aside the ex parte proceedings and the judgment entered in favour of the 2nd plaintiff and to have the suit heard on its merits. Further the defendant sought leave to amend his statement of defence to plead a counterclaim. **Okongo, J.** by a ruling delivered on 19th December, 2014 allowed the defendant's said application and granted leave to the defendant to file the amended defence within 14 days from the date of the ruling.

5. The Counterclaim;

The defendant filed the amended defence and counterclaim dated 15th January 2015 on 26th January 2015. The plaintiff's application to have the amended defence and counterclaim struck out on account of being filed out of time dated 13th February 2015 was abandoned and the suit was directed to proceed to hearing on merit.

6. The defendant by the amended defence and counterclaim filed on 26th January 2015 pleaded a counterclaim where he named the 2nd plaintiff as the 1st defendant and one, Charles Gekonde Otara as the 2nd defendant who he claimed had vide an agreement dated 3rd June, 2003 sold to him land parcel No. **Central Kitutu/Daraja Mbili/1233** which included two housing units which the 2nd defendant to the counterclaim had constructed thereon. The defendant through the counterclaim averred that the full consideration of kshs. 1,900,000/= was to be paid to the 2nd defendant in the counterclaim within six (6) months from the date of the agreement for sale. The defendant/plaintiff in the counterclaim stated that on the expiry of the period of six (6) months he had paid a total sum of kshs.1,150,000/= leaving a balance of kshs.500,000/=. He stated he approached the 2nd defendant to the counterclaim to extend the completion period and that the 2nd defendant to the counterclaim agreed to grant an extension upto 3rd January 2004 and/or thereabout.

7. The defendant/plaintiff in the counterclaim further stated that in January, 2004 when he sought to pay the sum of kshs.500,000/= being the balance of the purchase price to the 2nd defendant in the counterclaim, the wife of the 2nd defendant in the counterclaim informed him that the 2nd unit/house on the suit property had already been sold to the 1st defendant to the counterclaim and her late husband, Elizaphan Nyamweya Obare (deceased) at the price of kshs. 950,000/=.

8. The defendant/plaintiff to the counterclaim states that he challenged the alleged second sale in Kisii CMCC No. 141 of 2004 seeking the nullification of the same and a permanent injunction. The application for injunction in the Chief Magistrate's Court was dismissed and the defendant/plaintiff to the counterclaim states that the 2nd defendant in the counterclaim unlawfully used the dismissal of the interlocutory application in Chief Magistrate's Court to cause the caution that the defendant/plaintiff in the counterclaim had registered against the title **Central Kitutu/Daraja Mbili/1233** to be removed thereby paving the way for the subdivision of the property and consequent transfer of one of the subdivisions thereof land parcel **Central Kitutu/Daraja Mbili/2603** on which one of the housing units stood to the 1st defendant in the counterclaim.

9. The defendant/plaintiff in the counterclaim withdrew the suit before the Chief Magistrate's Court and filed the instant counterclaim where he seeks the following orders:-

a. The cancellation of the subdivision of Central Kitutu/Daraja Mbili/1233 and the resultant numbers and the restoration of the original number Central Kitutu/Daraja Mbili/1233 in the register.

b. Specific performance by the 2nd defendant to the counterclaim as the plaintiff to the counterclaim is willing to complete forthwith the remaining purchased price.

c. An order directing the 2nd defendant to the counterclaim to execute all the necessary transfer documents to effect or facilitate the transfer of the two units to the plaintiff to the counterclaim failure to which this honourable court's Deputy Registrar to be authorized by this court to do so on their behalf.

d. Any other relief(s) this Honourable court will deem fit to grant in the circumstances of this counterclaim.

e. Costs and interest at court rates of this counterclaim.

10. The 2nd defendant to the counterclaim upon being served entered appearance and filed a statement of defence dated 27th May 2015. The 2nd defendant to the counterclaim denied the allegations set out in the counterclaim and in particular denied having entered into any agreement of sale with the plaintiff to the counterclaim as alleged stating that the plaintiff to the counterclaim was only a tenant in one of the housing units in land parcel **Central Kitutu/Daraja Mbili/1233**. The 2nd defendant in the counterclaim denies that he had authorized any member of his family to enter into the alleged agreement of sale dated 3rd June 2003 which agreement at any rate the 2nd defendant states the plaintiff did not honour. Further the 2nd defendant to the counterclaim states that the agreement became null and void as no application for the consent of the land control board was made within the prescribed period of six months pursuant to the provisions of the **Land Control Act**, Cap 302 of the Laws of Kenya.

11. The 2nd defendant to counterclaim admits he entered into a sale agreement with one Elizaphan Nyamweya Obare (now deceased) dated 2nd January 2004 but denies having been a party to the suit filed by the plaintiffs in the counterclaim in the Chief Magistrates Court and consequently was unaware of the averments in paragraphs 24 and 27 of the counterclaim. In consequence, the 2nd defendant avers that the counterclaim discloses no reasonable cause of action against him and sought for the dismissal of the counterclaim with costs.

12. The trial proceeded before me on diverse dates commencing on 22nd September 2015 when the plaintiff, Josephine Moraa Nyamweya (PW1) testified and closed the plaintiffs' case. The trial closed on 19th May 2017 after the testimonies of two witnesses for the defendant/plaintiff to the counterclaim testified and one witness for the 2nd defendant to the counterclaim testified. The parties filed their respective final submissions as directed by the court. The plaintiffs submissions were filed on 16th June 2017, the defendant/counterclaimant on 26th July 2017 and the 2nd defendant to the counterclaim on 28th July 2017.

13. Evidence by the parties:

The 2nd plaintiff who testified as PW1 stated that the 1st plaintiff was her husband but that he passed away in May 2012 as per the copy of the death certificate dated 25th June 2012 produced as **"PEX1"**. She stated that her late husband purchased land from Charles Gekonde Otara pursuant to an agreement of sale dated 5th January 2004 produced as **"PEX.2"**. The agreement related to the purchase of one housing unit on land parcel **Central Kitutu/Daraja Mbili/1233**. The purchase price was kshs.950,000/= which was paid in full to the vendor upon the execution of the agreement for sale.

14. The witness testified that the relevant application for the consent of the Land Control Board for the subdivision of land parcel 1233 was made and was granted as per (**"PEX.3 and 4"**). That following the subdivision one of the resultant subdivisions being land parcel **Central Kitutu/Daraja Mbili/2603** was transferred to the 1st plaintiff and 2nd plaintiff to hold as joint tenants on 10th June 2004 as per the copy of the abstract of title produced as **"PEX.5"**. The plaintiffs were issued with a title deed for land parcel **Central Kitutu/Daraja Mbili/2603** on 10th June 2004, (**"PEX.6"**).

15. PW1 further testified that though the suit property was sold and transferred to them they have never been able to take possession as the defendant refused to vacate the premises which precipitated the filing of the instant suit by the plaintiffs. The witnesses further stated that once the defendant learnt the property had been sold to them he filed a suit in the Kisii Magistrate's Court vide CMCC No. 141 of 2004 seeking orders of restraint against the plaintiffs but that the defendant in 2010 withdrew the suit before the Chief Magistrate's Court.

16. PW1 testified that at the time she and her late husband were buying the house, they never knew the defendant had any interest in buying the house/plot and that their intention was to occupy and reside in

the house. The 2nd plaintiff testified that they never knew that the defendant and Dr. Gekonde Otara had entered into an arrangement/transaction respecting the plot the subject of their sale agreement with Dr. Otara.

17. In cross examination by Mr. Momanyi advocate for the defendant/ counterclaimant, the witness stated that the premises the subject of sale comprised 4 residential houses which were constructed in two pairs comprising of 2 units each. She stated that each of the 4 houses had a separate gate and each house was fenced off by barbed wire fence. The witness further stated her husband was buying the last house (No. 4) which the defendant was residing in. The witness further stated she resides in one of the houses which she has rented from one Samuel Ngure who had purchased two of the other houses from Dr. Otara. She affirmed that at the time she moved into the house she found the defendant there. The witness reiterated at the time they entered the agreement to buy the house they had no knowledge that the house had been sold to the defendant or any other person.

18. The defendant testified through one Friday Kinara, his daughter to whom he had donated a power of attorney for the purpose (DW1). The witness placed reliance on a witness statement she had recorded on 7th November 2016 and the witness statement recorded by the defendant on 30th September 2015 and the documents filed as per the list dated 30th September 2015. The documents were admitted in evidence as “**DEx.1-5**”. The witness testified that her father, the defendant herein entered into an agreement to purchase two housing units on land parcel **Central Kitutu/Daraja Mbili/1233** dated 3rd June 2003 at the purchase price of kshs. 1.9Million (“**DEx.4**”). The witness stated that the defendant had paid a total of kshs. 1.4Million towards the purchase price leaving a balance of kshs. 500,000/= which the witness stated was paid to Dr. Otara’s wife in January 2004. It is at the time of payment of the balance of kshs.500,000/= that the witness stated her father learnt that Dr. Otara had sold the property to another person prompting the defendant to place a caution against the title in December 2003 as shown in the copy of official search (“**DEx.5**”).

19. DW1 stated that Dr. Otara is not truthful when he states he never entered into any sale agreement with the defendant as he admitted the agreement. The witness further testified the removal of caution placed by the defendant was irregular as the Chief Magistrate’s court never gave an order for the removal of the caution. The witness reiterated that the defendant was entitled to the two units which he purchased and which he has since redeveloped by putting up a perimeter fence, sinking a borehole and putting up a steel gate.

20. On cross examination by Mr. Otara advocate for the 2nd defendant to the counterclaim the witness affirmed that all the houses have separate compounds and separate entrances. The witness further stated before the alleged sale the defendant was a tenant and was occupying one house. The witness further admitted the completion date as per the sale agreement dated 3rd June 2003 was on or before 3rd December 2003. She admitted that by the completion date her father had not completed payment of the purchase price and that he sought an extension of time which was granted verbally for a period of about 1 month. The witness stated she was aware the agreement was subject to the consent of the land control board and stated that no application for the consent was made.

21. The witness further stated her father took the balance of kshs.500,000/= to Dr. Gekonde Otara’s wife but that Dr. Gekonde declined to accept the money stating that he had already sold the unit to another person. The witness further stated she was not aware who executed the agreement as she was not present when the agreement was made. She could not tell whether it was the wife of Dr. Otara who signed the agreement for him. The witness stated she noted from the documentation presented before the court that the plaintiffs are presently the registered owners of land parcel **Central Kitutu/Daraja Mbili/2603** but her position was that the transfer to the plaintiffs was fraudulent and therefore ought to be annulled.

22. DW2 Kefa Nyamweya stated in his evidence that between 2002-2007 he used to work as a caretaker for Charles Gekonde Otara, the 2nd defendant to the counterclaim. He stated that he was approached by the wife of Dr. Otara to find a tenant for her for one of the houses and that he introduced the defendant/counterclaimant who negotiated and rented one of the housing units. The witness further stated

the wife of Dr. Otara later informed him that she wanted to sell two of the houses and the defendant expressed an interest to buy the houses. The witness indicated he never witnessed Dr. Charles Gekonde Otara sign the agreement dated 3rd June 2003. The witness further stated that Dr. Charles Gekonde Otara entered into an agreement with the 1st plaintiff (deceased) after 3rd December 2003. He further stated that the agreement dated 3rd June 2003 had provided for the full purchase price to be paid within 6 months from the date of the agreement and that the agreement also provided for liquidated damages in the event of default.

23. Evelyn Kwamboka Otara daughter of the 2nd defendant to the counterclaim testified on his behalf pursuant to a power of attorney registered on 26th October 2015 as CRPA/17858. The witness stated her father was the owner of land parcel **Central Kitutu/Daraja Mbili/1233** and affirmed that she was fully aware of the nature of instant case and was competent to testify on behalf of her father.

24. She testified that the agreement dated 3rd June 2003 shows her father to be the vendor and Haroun Kingoina Bogita and Isoe Muruli as the purchasers. She stated the agreement was not signed by her father, Charles Otara. She stated the person who signed the agreement on behalf of her father was Dr. Christa Mariane Otara who is her step mother. She stated her step mother did not hold a power of attorney from her father and none was referred to in the agreement. She stated the agreement provided for consideration of kshs. 1.9Million and provided for completion within 6 months. She stated the payment was not made within 6 months as provided and after the lapse of the period her father opted to sell one of the units to the plaintiffs.

25. The witness stated that on 2nd January 2004 her father sold one unit to Elizaphan Nyamweya (1st plaintiff – now deceased) as per the agreement and after payment of the full purchase price title was processed and transferred to the joint names of the plaintiffs. The witness further testified that land parcel **1233** was subdivided and a portion of the resultant subdivisions was transferred to the plaintiffs in June 2004 and asserted therefore land parcel **1233** ceased to exist and orders of specific performance of the contract are incapable of being granted. The witness however stated her father would still be willing to transfer the one unsold unit to the defendant provided the full purchase is paid. The witness adopted the witness statement by her father as part of her evidence. The documents as per the 2nd defendant's supplementary list of documents filed on 24th November 2015 were produced as **"DW3Ex.1-3"**. The 2nd defendant's Notice of Motion dated 27th May 2015 and the annexures thereto were produced as exhibits **"DW3Ex.4(a), (b) and (c)"**.

26. The witness in cross examination by Mr. Momanyi advocate for the defendant reiterated the evidence she had given in chief. She reiterated that the defendant and Denis Isoe occupy two of the units. She stated that she was not aware that any extension for the agreement dated 3rd June 2003 was given but asserted that her father declined to accept the payment of kshs.500,000/= from the defendant on 3rd January 2004 since he had already sold the house to the plaintiffs to meet an urgent financial need. The witness maintained her father did not breach any agreement with the defendant. The witness stated that although her father was willing to ratify the agreement dated 3rd June 2003 the purchasers failed to honour the same and he was therefore not bound by the same.

27. Analysis and determinations;

Having reviewed the pleadings, the evidence and having reviewed and considered the submissions by the parties the following issues stand out for determination:-

i. Whether the 2nd defendant to the counterclaim respectively entered into an agreement for sale of a portion of land parcel Central Kitutu/Daraja Mbili/1233 firstly, with defendant/counterclaimant on 3rd June 2003 and secondly, with the plaintiff on 5th January 2004?

ii. Whether the agreement of sale dated 3rd June 2003 alleged to have been entered into

between the defendant/counterclaimant and the 2nd defendant to the counterclaim was performed within the period provided for completion in the agreement and if not, whether the completion period was extended?

iii. Whether the agreement dated 3rd June 2003 is valid and therefore capable of being specifically performed?

iv. Whether the agreement dated 5th January 2004 between the plaintiff and the 2nd defendant to the counterclaim was validly entered into and/or was fraudulent as alleged by the defendant/counterclaimant?

v. What orders should the court make?

28. This is a case where there are allegedly two competing agreements. The plaintiff's position is that her late husband entered into an agreement with Dr. Charles Gekonde Otara, the 2nd defendant to the counterclaim to purchase one housing unit which the latter had constructed on land parcel **Central Kitutu/Daraja Mbili/1233**. The 2nd defendant to the counterclaim acknowledges this agreement which was made on 5th January 2004 and he went ahead to process the subdivision of the subject land and transferred the title to the one unit to the plaintiff and her deceased husband held as joint tenants. An application for consent for subdivision and the consent thereof have been tendered in evidence and so has the application for consent to transfer and the consent to transfer. From the documents tendered in evidence, it is apparent that the consent to subdivide was given vide letter of consent No. 32605 dated 12th May 2004 while the consent to transfer was given vide letter of consent No. 32649 of the same date. The said Charles Gekonge Otara executed a transfer in favour of the plaintiffs and the plaintiffs were issued with a title deed on 10th June 2004.

29. The defendant for his part alleges the 2nd defendant to the counterclaim was acting in collusion with the plaintiffs with the objective of defrauding him since he had already entered into an agreement dated 3rd June 2003 to purchase the house that the 2nd defendant offered to sell to the plaintiffs. The plaintiffs deny they had any knowledge that the 2nd defendant to the counterclaim had entered into any agreement with the defendant to sell the house to him.

30. The 2nd defendant to the counterclaim is far from being clear or explicit on the sale agreement dated 3rd June 2003. On one hand he denies that he had entered into the agreement and on the other he seems to take the position that he avoided the agreement since the defendant failed to honour the terms as to payment of the purchase price. The defendant through his daughter who testified pursuant to a power of attorney donated to her denied executing the agreement stating that the signature on the agreement is that of his wife who had no authority to represent him as he had not donated a power of attorney to her. Besides, he argued that the defendant failed to complete the agreement within the 6 months period as provided in the agreement. The defendant/counterclaimant did not furnish any evidence to show or demonstrate that the completion period had been extended. The assertion that the extension was granted verbally was denied by the 2nd defendant. The agreement having been in writing, the same could only be varied in writing and there was no document and/or instrument to evidence the variation.

31. The agreement of sale dated 3rd June 2003 under Clause (b) (1) and (ii) provided as follows:-

(b)The purchase price of Kenya Shillings One Million Nine Hundred Thousand only (kshs.1,900,000/=) payable as hereunder:-

(i) Kshs.250,000/= to be paid by the time of signing of this agreement and signature upon this document is testimony of acknowledgement of such receipt.

(ii) The balance of kshs.1,650,000/= to be paid and/or cleared within six months from the date hereof.

There is no dispute that the defendant did not honour condition (b) (ii) of the agreement as he states he sought for an extension to be able to complete. There is no evidence that the extension was indeed sought and/or granted. In the absence of such evidence the agreement lapsed on 3rd December 2003 and as from that date either party to the agreement was free to rescind and/or avoid the same. A court of law will not read into a written agreement terms that were not included and that is why parties to an agreement must explicitly set out the terms of their agreement. The duty of the court is merely to construe and/or give interpretation to contracts. **Njagi, J.** (as he then was) put it succinctly in the case of **Kyangavo –vs- Kenya Commercial Bank Ltd & Another [2004] KLR 126** when he stated:-

“Parties to a contract are at liberty to negotiate whatever conditions they like. If a condition is harsh or unfair, then the other party is at liberty to reject it. However, once the parties have agreed to terms, it would be unfair thereafter for one of them to claim that some conditions or conditions was or were unfair. By accepting the harsh conditions in the first instance he will have compromised himself. One has made ones bed, so one must lie in it...”.

32. So even if the 2nd defendant was to be said to have ratified the agreement entered with the defendant/counterclaimant possibly with his wife (2nd defendant's) the agreement became voidable after 3rd December 2003 for non performance and it is the court's holding and finding that as at 5th January 2004 when the 2nd defendant entered the agreement with the plaintiff the agreement entered with defendant had lapsed.

33. The defendant/counterclaimant has submitted that the plaintiffs induced the breach of the defendant/counterclaimant's agreement with the 2nd defendant to the counterclaim. This was not pleaded in the counterclaim as against the plaintiffs and in my view cannot be properly raised in submissions. Like fraud, where a party relies on inducement, the particulars of the acts that constitute inducement ought to be specifically pleaded to afford the opposite party an opportunity to offer rebutting evidence. In the case of **Ochieng & 2 Others t/a Aquiline Agencies –vs- First National Bank of Chicago [1990] KLR** the Court of Appeal while considering the ingredients of inducing a breach of contract held *inter alia*:-

“The essential ingredients of the tort of inducing a breach of contract are that the wrongdoer knew or acquired knowledge of the contract in question and its essential terms, that he so acted or interfered whether by persuasion, inducement or procurement or other means to show that he intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party, that the breach was directly attributable to such act or interference and that damage was occasioned or was likely to be occasioned to such other party.”

In the instant case, I have not found any acts by the plaintiffs which could be classified as inducement to occasion breach of the agreement held by the defendant/counterclaimant. If anything the 2nd defendant to the counterclaim who was in dire need of money appears to be the one who went looking for them after the contract with the defendant/ counterclaimant ran out without the defendant performing his obligations under the contract.

34. The 2nd defendant to the counterclaim further pleaded and has submitted that the alleged agreement between the defendant/plaintiff in the counterclaim and the 2nd defendant to the counterclaim became null and void for want of consent of the Land Control Board under the provisions of the **Land Control Act**, Cap 302 of the Laws of Kenya. Section 6(1) of the Act provides:-

6(1) Each of the following transactions that is to say-

- a. The same, transfer, lease, mortgage, exchange, partition or other disposal of or a dealing with any agricultural land which is situated within a land control area;**
- b. The division of any such agricultural land into two or more parcels to be held under**

separate titles, other than the division of an area;

C.

Is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

Section 8 of the Act provides:-

8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party thereto.

35. There is no dispute that the land the subject matter of the sale to the defendant/counterclaimant falls within a land control area within the meaning of the Land Control Act. The transaction that the counterclaimant purported to enter into was a controlled transaction and it was therefore mandatory for the consent of the Land Control Board to be sought and obtained. The defendant/counterclaimant agrees none was sought. The sale agreement dated 3rd June 2003 consequently became null and void after the expiry of 6 months from the date thereof by operation of the law. The court cannot enforce a contract that the law declares to be null and void. There is simply no agreement that can be enforced. The court cannot order the specific performance of a contract that has become null and void.

36. In respect to the issues I set out for determination, it is my finding on the first issue that indeed the defendant/counterclaimant and the plaintiff had each entered into an agreement of sale to purchase a portion of land parcel **Central Kitutu/Daraja Mbili/1233**. Although the indication is that the 2nd defendant to the counterclaim did not execute the agreement dated 3rd June 2003, my own view and finding is that he ratified the same and was prepared to honour the same if the terms were complied with. It is my finding that the terms of the agreement were however not complied with as the defendant/counterclaimant did not pay the full purchase price within the period allowed under the agreement. As relates to the agreement dated 5th January 2004 between the plaintiffs and the 2nd defendant to the counterclaim, it is my finding that there was such an agreement and the same was validly entered into. This agreement was fully complied with and was completed by the 2nd defendant to the counterclaim effecting transfer of land parcel **Central Kitutu/Daraja Mbili/2603** a resultant subdivision from land parcel **1233** to the plaintiffs. Although the defendant has argued the transfer to the plaintiffs was fraudulent, no evidence of fraud has been adduced to justify a finding that the transfer was fraudulently obtained.

37. In regard to the third issue whether or not the agreement of 3rd June 2003 is valid and therefore capable of being specifically performed, it is the court's finding that the agreement lapsed on 3rd December 2003 and there is no evidence that the same was extended. The 2nd defendant's conduct of offering the suit land to the plaintiff and by entering into the agreement dated 5th January 2004 is clear manifestation that he had avoided the agreement with the defendant dated 3rd June 2003. Besides, the agreement was subject to the provisions of the **Land Control Act**, Cap 302 Laws of Kenya and to the extent that no application for consent was made and no consent was given by the Land Control Board within six months of the date of the agreement, the said agreement became null and void for all purposes and is therefore not capable of being specifically performed.

38. In regard to issue number four (iv), I have already found and held that the agreement dated 5th January 2004 between the plaintiff's husband and the 2nd defendant to the counterclaim was validly entered into and no fraud has been proved and/or demonstrated by the defendant to vitiate the agreement. The agreement was completed and the plaintiffs were validly registered owners of land parcel **Central Kitutu/Daraja Mbili/2603**.

39. Conclusion and Decision;

From my foregoing evaluation and analysis, it must have become patently clear that I have come to the conclusion that the plaintiff is the lawful and registered owner of land parcel **Central Kitutu/Daraja Mbili/2603**. As such registered owner the plaintiff is in terms of Sections 24, 25 and 26 of the **Land Registration Act, 2012** entitled to absolute rights of ownership which entail exclusive rights of possession and use. As it is evident from the evidence that the defendant and/or his agents are in possession of the said parcel of land, it is my determination the defendant's occupation and possession is unlawful and constitutes trespass. In the premises, it is my finding and holding that the plaintiff has proved her case against the defendant on a balance of probabilities and I enter judgment in favour of the plaintiff in the following terms:-

1. The defendant shall vacate and deliver vacant possession of LR No. Central Kitutu/Daraja Mbili/2603 to the plaintiff, Josephine Moraa Nyamweya within a period of 60 days from the date of this judgment.

2. In the event the defendant fails to comply with (1) above an order for the forcible eviction of the defendant and/or his agents shall issue on application by the plaintiff.

3. Costs of the suit are awarded to the plaintiff.

40. As relates to the counterclaim, it is my finding and holding that the counterclaim has not been proved on a balance of probabilities and the same is ordered dismissed with costs to the defendants in the counterclaim.

41. Orders accordingly.

Judgment dated, signed and delivered at Kisii this 6th day of October, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Masese for the plaintiff

Mr. Momanyi for the defendant

Mr. Masese for Otara for 2nd defendant to the counterclaim

Milcent court assistant

J. M. MUTUNGI

JUDGE