



**Thaiya & another v Mbithe & 3 others (Environment & Land Case 564 of 2008) [2024] KEELC 1180 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1180 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 564 OF 2008**

**MD MWANGI, J  
FEBRUARY 27, 2024**

**BETWEEN**

**FRANCIS NDICHU THAIYA ..... 1<sup>ST</sup> PLAINTIFF**

**NANCY NJERI NDICHU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ROSE MBITHE ..... 1<sup>ST</sup> DEFENDANT**

**PAUL MUSILI WAMBUA ..... 2<sup>ND</sup> DEFENDANT**

**GITAARI BOORE KITHINJI ..... 3<sup>RD</sup> DEFENDANT**

**LYDIA WANJA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This case was originally filed by the two Plaintiffs way back in the year 2008. The 1<sup>st</sup> Plaintiff however passed on before the conclusion of the case. The 3<sup>rd</sup> Defendant too passed on during the pendency of this case. The case was therefore concluded by the 2<sup>nd</sup> Plaintiff, Nancy Njeri Ndichu against the 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Defendants.
2. The Plaintiff's case was that on 7<sup>th</sup> November, 2006, she entered into an agreement for sale of the parcel of land marked as number 2 which was a subdivision of the parcel of land known as L.R. No. 7793/39 for the sum of Kshs 12,000,000/-. Under the stipulations of the agreement, the purchase price was to be paid in terms of clause 1.2 of the special conditions. The balance, according to the Plaintiff was to be paid upon successful registration of the transfer in favour of the Plaintiffs. The vendor was to construct or cause to be constructed a house similar in finishing to the sample house and to the sample architectural drawings shown to her. Possession of the property was to be given upon full payment of the purchase price by the purchasers.



3. The Plaintiff asserted that pursuant to the said agreement, she paid a sum of Kshs 1,200,000 on 31<sup>st</sup> October, 2006 being the 10% deposit of the purchase price.
4. She subsequently made further payments as follows:Kshs 500,000/= on 8<sup>th</sup> January, 2007,Kshs 3,000,000/= on 13<sup>th</sup> April, 2007,Kshs 700,000/= on 27<sup>th</sup> July, 2007Kshs 750,000/= on 24<sup>th</sup> August, 2007,Kshs 1,000,000/= on 15<sup>th</sup> February, 2008, andKshs 830,000/= on 13<sup>th</sup> March, 2008.
5. Consequently, the Plaintiffs aver that they fully discharged their obligations under the contract. They accused the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of failing and or neglecting to discharge their obligations and or to complete the subject agreement and instead transferred the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Plaintiffs accused the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of breach of contract. They particularized the breach at Paragraph 8 of the Amended Plaint.
6. It was the Plaintiff's case that the transfer of the suit property by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was unlawful and illegal. The particulars of illegality are pleaded at Paragraph 9 of the Amended Plaint.
7. The Plaintiff pray for an order of specific performance against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant & mesne profits at the rate of Kshs 150,000 per month being the monthly rent from the date of actual completion to the date the property shall be transferred to the Plaintiffs. In the alternative, the Plaintiffs claim for a refund of Kshs 8,180,000/= paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Kshs 23,000,000/= being damages for loss of bargain.
8. The Plaintiffs asserted that they were have at all material times been ready and willing to make payments for the balance of the purchase price in terms of the agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
9. The Plaintiffs prayed for Judgment against the Defendants jointly and severally for:
  - a. An injunction against the Defendants restraining them by themselves, their servants, agents or otherwise howsoever from selling, charging, pledging, disposing of, or in any manner alienating the suit property herein to wit L.R. No. 7793/61.
  - b. An injunction do issue against the Defendants herein by themselves, their servants, agents, or otherwise howsoever from entering or in any manner interfering with the Plaintiff's quiet possession of the suit property herein to wit 1.R No. 7793/61.
  - c. Mandatory injunction do issue against the defendants compelling them by themselves, their servants, agents or otherwise howsoever to cede possession of the suit property herein to wit L R. No 7793/61.
  - d. A mandatory injunction do issue against the Defendants compelling them by themselves, their servants, agents or otherwise to undertake the transfer of the property to the Plaintiffs.
  - e. In default of the Defendants executing the relevant transfers, the Deputy Registrar of the High Court do execute the relevant transfer effecting a transfer of the suit property to wit LR No. 7793/61 to the plaintiffs herein.
  - f. An order cancelling the purported transfer lodged in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
  - g. An order for specific performance against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in respect of the agreement for sale dated 7<sup>th</sup> November 2006.
  - h. Mesne profits at a rate of Kshs. One Hundred and fifty Thousand Shillings (Kshs 150,000/=) a calculated from the 7th May, 2007 until the date of completion.



In the Alternative and without prejudice to the foregoing prayers.

- i. Damages for loss of bargain on the suit property for the sum of Kshs 23,000,000/=.
- j. Refund of the sum of Kshs Eight Million One Hundred and eighty Thousand Shillings Only (8,180,000/=) being the deposit paid.
- k. Any other relief that this Honourable Court may deem fit to grant.
- l. Costs of the suit.

### **Response by the Defendants**

10. The Defendants acknowledge the agreement for Sale between the Plaintiffs and the 1st and 2nd Defendants dated 7th November 2006.
11. The 2<sup>nd</sup> Defendant in his statement of Defence avers that it was a term of the Sale Agreement that payment of the balance of the purchase price was to be on or before the completion date and not upon successful registration as alleged by the Plaintiff. He restates the provisions of Clause 1.2 of the Special Conditions of the Agreement.
12. The 2<sup>nd</sup> Defendant argues that contrary to the terms of payment stated under the Agreement, the Plaintiffs defaulted not only in respect of the amounts payable but also the timelines. He averred that although the Plaintiffs paid the deposit as agreed; the subsequent terms and conditions of payments were not complied with. The 2nd instalment was made a few days past the agreed 60 days and the amount paid was Kshs. 700,000/= less Kshs. 500,000/=.
13. The 2nd Defendant further states that the 3rd instalment was made more than a month after the expiry of the prescribed 60 days. However, the Plaintiffs paid a sum of Kshs. 3 Million instead of 2,4 Million. Although the excess covers the balance for the 2nd instalment, the Plaintiffs remained in arrears of Kshs. 100,000/=. He contends that as at 13th March, 2008, the Plaintiffs had only paid a sum of Kshs. 3,280,000/=.
14. The 2nd Defendant therefore argues that it is in fact the Plaintiffs who breached the terms and conditions of the said Agreement. He particularizes the breach at Paragraph 10 of the Statement of Defence.
15. Regarding the additional Kshs. 2 Million, the 2nd Defendant states that parties agreed to the additional sum on the purchase price was to cater for the rising costs of construction and other variables. The Plaintiffs cannot therefore feign ignorance of the same.
16. The 2nd Defendant therefore vehemently denies that the 1st and 2nd Defendants neglected to discharge their obligations under the Agreement. On the contrary, it is the Plaintiffs who breached the Agreement. As such, the rescission of the Agreement was in order.
17. Having rescinded the Agreement, the 2nd Defendant asserts that, it was within the 1st and 2nd defendants' rights to transfer the house to the 3rd and 4th Defendants as they did.
18. He further argues that the remedy of specific performance is unavailable to the Plaintiffs as the Sale Agreement was lawfully rescinded on account of the Plaintiffs' breach. He contends that the Plaintiffs did not suffer any loss and damage as they were authors of their own misfortunes.
19. On the averment by the Plaintiffs about their willingness to complete payment of the balance of the purchase price, the 2nd Defendant argued that the offer was too late in the day as there no longer exists an enforceable contract between the parties; the same having been duly rescinded. In any event, the



same is overtaken by events as the subject property was duly transferred to the 3rd and 4th Defendants. The 2nd Defendant prays that the Plaintiff's suit be dismissed with costs.

### **The 3rd & 4th Defendants' case**

20. The 3rd & 4th Defendants filed their statement of Defence dated 8th February, 2012. However, as earlier noted, the 3rd Defendant passed on hence the suit against him abated. Their case was defended by the 4th Defendant alone. The 4th Defendant denied being aware of any Agreement entered into by the Plaintiffs' and the 1st and 2nd Defendants on the 7th November, 2006 in regard to the suit property.
21. The 4th Defendant avers that pursuant to the Agreement of Sale dated 2nd February, 2009 between themselves (3<sup>rd</sup> & 4<sup>th</sup> Defendant) on one part and the 1st and 2nd Defendant on the other hand, the suit property was lawfully transferred to them. Subject to the said transfer, the 4th Defendant avers that they lawfully acquired proprietary interests in the suit property. She asserts that they obtained a clean Certificate of ownership on the 24th June, 2009 having paid the purchase price of Kshs. 19,972,115/= after a credit discount for unfinished works for a sum of Kshs. 427,885/=.
22. It is the 4th Defendant's case that prior to their purchase of the suit property, they conducted due diligence which showed that the suit property was free from any encumbrances. She therefore denies the particulars of illegalities levelled against her. She maintains that if any illegalities were committed by the 1st and 2nd Defendants, the same cannot be the basis for rectification or cancellation of her title. She argues that she and her deceased husband are bona fide purchasers for value without notice.
23. She states that the particulars of loss and mesne profits claimed are extortionist and cannot therefore lie as against them. Further, that the orders of specific performance cannot equally issue as the loss was not occasioned by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
24. The 4th Defendant asserts that an order of rectification of the title in favour of the Plaintiffs will occasion irreparable harm and deprive her of her matrimonial home. She further avers that they have made considerable developments on the suit property hence acquiring a similar property at an amount equivalent to the purchase price they purchased it at is not possible. She prays that the Plaintiff's suit be dismissed with costs.

### **4th Defendant's Notice of Indemnity**

25. The 4th Defendant filed a Notice of Indemnity as against the 1st and 2nd Defendants for indemnity and contribution for any losses that may arise against her from the judgement in this suit. The grounds for the notice are that the 1st and 2nd Defendant jointly sold her the suit property knowing that the Plaintiffs had a claim and interest over it. Further that the 1st and 2nd Defendant purported that the subject property was unencumbered. The 1st and 2nd Defendant thereby received a sum of Kshs. 20,000,000/= being the full purchase price. The 4th Defendant asserts that in addition to the purchase price she too has incurred monetary losses in defending the suit.

### **Evidence adduced for the Plaintiff:**

26. When the matter came up for hearing, the Plaintiff, Nancy Njeri Ndichu, testified as PW 1 in her case. She adopted her Witness Statement dated 2nd November, 2020 as her evidence in-chief. She also produced the documents on the Plaintiff's List of Documents dated 2nd November, 2020 and 6th August, 2012 as Plaintiff's Exhibits. They were duly marked as such respectively.
27. In cross-examination by the 1st Defendant's Counsel, the Plaintiff stated that she seeks to enforce an agreement dated 7th November, 2006 to which she was a party. It was her evidence that the terms of



- the agreement were binding upon both sides. She was buying a house from the 1st and 2nd Defendant at a sum of Kshs. 12 Million.
28. She averred that she paid a sum of Kshs. 1.2 Million at the time of signing the agreement. The amount was paid on 31st October, 2006. The money was paid to Musyoka and Wambua Advocates. The balance of the purchase price was paid in accordance with the Special condition 1.2 of the Agreement.
  29. PW 1 did confirm that they did not pay a further sum of Kshs. 1.2 Million within the 60 days. She was buying the property jointly with her husband. She stated that they did not manage to pay the other amounts on time as well. She averred that the whole transaction was to be completed in 6 months by which time they should have paid the full purchase price.
  30. It was PW 1's further evidence that she never got possession of the property. She alleged that someone else was given possession of the property.
  31. The witness alleged that despite having someone else in occupation, the Seller continued taking money from them. She denied receiving any notice of rescission of the agreement from the Seller.
  32. She confirmed having a meeting with the 1st Defendant. However, she had no minutes of the alleged meeting neither could she remember the date of the meeting. She however maintained that it was after the expiry of the completion period of 6 months. By the time they were having the meeting, she claimed that she had paid a total of Kshs. 8.1 Million. She reiterated that the property was worth Kshs. 12 Million.
  33. PW 1 confirmed that they did not pay the remainder of the purchase price. She stated that they were not aware that the house was being built by the money they were paying. However, she was aware that they were to pay the purchase price as per the Schedule in the agreement.
  34. PW 1 informed court that she is aware that the house had been transferred to the 3rd & 4th Defendants. Although she moved court to stop the transfer by way of injunction, she was not aware that her prayer for an interlocutory injunction had been declined by the court.
  35. In reference to the prayers sought, she confirmed that she has a claim for mesne profits in the sum of Kshs. 150,000/= per month from the year 2007 up to date.
  36. In cross-examination by Counsel for the 2nd Defendant, PW 1 stated that the 2nd Defendant too was involved in the transaction. On 14th March, 2007, she had received a Letter from the Advocate who was acting for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the transaction demanding payment of the 2nd deposit of the purchase price confirming both Defendants were involved in the transaction.
  37. PW I further confirmed that she has a prayer for Loss of bargain in the sum of Kshs. 23 Million, which figure was to be explained by her Valuer.
  38. In cross-examination by Counsel for the 4th Defendant, PW 1 testified that the purpose of joining the 4th Defendant was because the property which they own is the subject matter of this suit. She stated that the 4th Defendant was not known to her before she was joined into the proceedings.
  39. PW 1 insisted that they had put a caveat on the suit property. Therefore, if the 4th Defendant had conducted a search on the suit property, she would have known that there was a caveat.
  40. Referring to the Official Search in her documents, PW 1 confirmed that the transfer to the 3rd Defendant (deceased) was done on 29th June, 2009. The encumbrance section indicates a charge to Stima Sacco. The entries do not show a caveat entered on the title. The Certificate of title shows it was registered in the name of Paul Musili Wambua.



41. PW 1 agreed that the 4th Defendant was an innocent purchaser going by the documents shown to her. The witness stated that all the fraud, if any and misrepresentation could only then have been conducted by the 1st & 2nd Defendants.
42. In re-examination, PW 1 stated that she paid Kshs. 1.2 Million before execution of the agreement. She stated that she had paid a total of Kshs. 8.1 Million which was more than what was provided for under the schedule.
43. PW 1 further stated that the last sum of money she paid was a sum of Kshs. 830,000/= in the late 2008. She stated that she never received a completion notice from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants; neither a demand for the balance of the purchase price. She stated that whereas the instant suit was filed on 28th November, 2008, the transfer to the 4th Defendant was done in the year 2009 way after they had already filed the instant suit.
44. The witness further stated that at the time of execution of the Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the mother title had been subdivided but the units (subdivisions) did not have an L.R Number.
45. Mr. Joram Mugo testified as PW 2. He testified that he is a registered Valuer employed by Icon Valuers Limited. It was his testimony that he was engaged by the Plaintiff's Advocates to conduct a Valuation on the suit property. Pursuant to the said instructions, he conducted a valuation and prepared the Report dated 2nd November, 2020.
46. In cross-examination by the 2nd Defendant's Counsel, PW 2 stated that he was denied access to the premises for purposes of valuation as indicated in the Report. Therefore, he was not able to measure the size of the house and other details. He stated that he relied on an earlier Report which he however, did not attached to his Report. The construction and accommodation details are based on the previous valuation. He could not tell if there were any renovations.
47. Cross-examined by Counsel for the 4th Defendant, PW 2 stated that he arrived at the figure of Kshs. 43.3 Million from a formula ordinarily used by Valuers. He stated that the basis and methodology of his valuation had been explained.
48. He stated that the property is visible from outside. He confirmed that he had attached Satellite photographs at Page 14. He stated that the property can be identified from the map. As for situation on the ground, he pointed out to the explanation at Page 4 of the Report.
49. In re-examination, PW 2 testified that he got the size of the land from the map. As for the size of the house, he got it from the google images. He stated that if there were improvements on the suit property other than what he had seen, then the value of the property would definitely have changed.

**Evidence adduced for the Defendants:**

50. During the Defence hearing Rose Mbithe testified as DW1. She adopted her Witness Statements dated 15th March, 2013 and 20th April, 2022 as well as her Replying Affidavit deponed on the 20th April, 2022 as her evidence in- chief. She stated that she was not disputing the agreement dated 7<sup>th</sup> November, 2006, signed by herself, the Plaintiff and the 2<sup>nd</sup> Defendant. She averred that in the said agreement, the suit property subject of this matter was in the name of Paul Musili Wambua (the 2<sup>nd</sup> Defendant herein) measuring 5 acres. She averred that the Plaintiffs were to purchase a portion of the said land. As a real estate developer, she had a joint venture with the registered owner of the suit property.



51. She stated further that as a developer, her sole responsibility was to finance the development of the said property whereas all the other terms and conditions were set out in the said sale agreement.
52. DW1 testified that the purchase price for the suit property was Kshs. 12,000,000/= and that the Plaintiff did not honour the terms of payment. The Plaintiff only paid the deposit and did not honour the schedule of payment. She stated further that the terms of payment influences or affects a development due to the hiking of prices.
53. DW1 denied having received any monies from the Plaintiffs at all. She stated that all the money was paid to the Law Firm of Musyoka & Wambua Advocates and that she was not aware if the 4<sup>th</sup> Defendant had filed an indemnity notice against her.
54. She further averred that at the time of sale of the suit property to the 4<sup>th</sup> Defendant, there was no existing agreement between herself and the Plaintiffs and that she did not handle any transactions as the same was done by the Lawyers, that is, Musyoka and Wambua Advocates.
55. DW1 stated that in her statement of defence, she has denied the Plaintiff's claim against her in its entirety.
56. During Cross-Examination by counsel for the 2<sup>nd</sup> Defendant, DW1 stated that she did not dispute the agreement of 7<sup>th</sup> November, 2006. That the money paid by the Plaintiff was expended on the construction of the house and that the payments made by the Plaintiffs were not paid in accordance with the timelines agreed in the sale agreement.
57. Upon Cross-examination by counsel for the 4<sup>th</sup> Defendant, DW1 confirmed that she informed the 4<sup>th</sup> Defendant, Lydia Wanja about the previous purchaser of the suit property (the Plaintiff herein) although she had not included that information in her statement of defence or in her witness statement.
58. Regarding the indemnity notice particularly number (c), one of the particulars is failing to disclose to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants that the Plaintiffs had claimed an interest in the suit property. DW1 admitted that she did not particularly respond to the accusation alleged in the indemnity notice.
59. DW1 asserted that at the time of sale of the suit property to the 4<sup>th</sup> Defendant, there were no injunctions barring the sale of the suit property and that it was free for sale. She stated that she had information that the 4<sup>th</sup> Defendant's husband was a Lawyer and therefore she presumed that she (the 4<sup>th</sup> Defendant) knew all the procedures that needed to be followed.
60. DW1 confirmed that in the sale of agreement of the year 2009 with the 4<sup>th</sup> Defendant, she was a Vendor of the suit property and that in accordance with the terms of sale agreement, the purchase price was payable to the Vendors' Advocates. She further stated that the 4<sup>th</sup> Defendant was right to take title of the suit property as the same was clean and the 4<sup>th</sup> Defendant had paid the full amount of the purchase price. That why they handed over the house to the 4<sup>th</sup> Defendant.
61. DW1 asserted that though she warranted a good title in the agreement with the 4<sup>th</sup> Defendant, she was only a developer and not the proprietor of the Land.
62. In Cross-examination by the Plaintiff's Counsel, DW1 stated that in the sale agreement of 2006, it is stated that her relationship with the 2<sup>nd</sup> Defendant was explained in a separate agreement that was not before the Court.
63. She stated further that in the agreement, the Vendors acknowledged receipt of the deposit of the purchase price upon execution of the agreement. She averred that the Plaintiffs delayed in payments and that only the 1<sup>st</sup> instalment was paid as per the timelines in the schedule.



64. DW1 averred that clause 1.2 of the agreement had set out how the balance of the purchase price was to be paid. She stated that the 1<sup>st</sup> instalment after execution of the agreement was payable within 60 days. The sum of Kshs 500,000/= was therefore paid 3 days later.
65. DW1 confirmed that by 13<sup>th</sup> April, 2007, the Plaintiffs had paid a total sum of Kshs. 5.4 Million; that under the contract, as at 13<sup>th</sup> April, 2007, the money that ought to have been paid was Kshs. 4.8 Million and that completion was supposed to be within 6 months.
66. DW1 stated further that she was not able to confirm whether the firm of Musyoka Wambua Advocates received money after the completion date and that she didn't know how the contract with the Plaintiffs was terminated.
67. DW1 denied having knowledge of a caveat being placed on the title of the suit property as she was not informed about it. She insisted that she had disclosed to the 4<sup>th</sup> Defendant that there was a previous purchaser of the suit property who had defaulted in payment for the same. She also confirmed that at the time of sale of the suit property to the 4<sup>th</sup> Defendant in 2009, this case had been filed and it was pending in court. Further, DW1 stated that she consulted the 2<sup>nd</sup> Defendant who is a Lawyer and he assured her that he knew what he was doing.
68. DW1 continued to state that the purchase price by the 4<sup>th</sup> Defendant was paid to the firm of Musyoka Wambua & Co. Advocates and that her costs were reimbursed from that purchase price. She however denied having knowledge of the time when the full purchase price was paid and whether it was paid before the transfer of the suit property to the 4<sup>th</sup> Defendant or after the transfer.
69. Upon re-examination, DW1 admitted that she was not the registered owner of the suit property and so she had no right to transfer the same. She also admitted that in the sale agreement dated 2<sup>nd</sup> February, 2009 at Paragraph 1, she is described as a Vendor together with the 2<sup>nd</sup> Defendant.
70. DW1 also admitted that at clause (A) of the sale agreement, there is an explanation that the 2<sup>nd</sup> Defendant was the registered proprietor of the suit property.
71. DW1 however denied having personal knowledge of how monies were paid to the law firm of Musyoka & Wambua Advocates but admitted that she got her reimbursement from the Law Firm.
72. DW1 averred that according to the schedule of payments, as at 13<sup>th</sup> April, 2007, only Kshs. 4.7 Million had been paid and not Kshs. 5.4 Million.
73. DW1 asserted that receipt of the instalment money after the due date was not equal to a waiver of the Vendors' right to terminate the agreement. She denied being aware of any orders from the court barring the transfer of the suit property. She admitted that the 4<sup>th</sup> Defendant had taken possession of the suit property and that they are still in possession of the same.
74. The 2<sup>nd</sup> Defence witness, DW 2, was Professor Paul Musili Wambua. He adopted his Witness Statement dated 16th January, 2021, the Replying Affidavit sworn on 7th April, 2022 as well as a Further Witness Statement dated 7th April, 2022 as his evidence in-chief.
75. The 2<sup>nd</sup> Defendant confirmed the agreement dated 7<sup>th</sup> November, 2006 between himself, the 1<sup>st</sup> Defendant and the Plaintiffs whereof the terms and conditions were binding on all the parties.
76. It was the 2<sup>nd</sup> Defendant's testimony that there was a special condition 1.1 which set the completion date at 6 months after execution of the agreement. He stated that clause 1.2 provided the schedule of payment and that the total amount received from the Plaintiffs was Kshs 7.9 million.



77. The witness stated that the deposit of Kshs 1.2 million was paid as per the schedule but the 2<sup>nd</sup> instalment which was paid outside the schedule period was not even fully paid and neither did the Plaintiffs seek for an extension of time nor did they give any explanation.
78. He averred that the 3<sup>rd</sup> instalment was also paid outside the schedule period. The total purchase price was not paid; that was breach of the agreement on the part of the Plaintiffs as they defaulted payment severally and further, that pursuant to Clause 5 of the agreement of 2006, the Vendors had the right of rescission.
79. It was DW2's further evidence that he issued a Notice of Rescission after the completion date. He alleged that he communicated to the Plaintiffs of their intention to forfeit 10% of the purchase price and refund the balance of the purchase price. He offered to refund the balance after forfeiture of 10% but his offer was rejected.
80. DW2 averred that notice for removal of caveat was duly issued and the caveat was removed before the property was sold to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
81. He denied having been served with an injunction barring him from selling the suit property. He averred that he passed a good title to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in accordance with the Law.
82. DW2 asserted that the Plaintiffs breached the terms of the agreement. He however admitted that he was ready to refund the sums of money received after deduction of 10% which was to be forfeited as per the agreement owing to the breach of the agreement by the Plaintiffs.
83. Upon cross-examination by counsel for the 1<sup>st</sup> Defendant, DW2 stated that the Plaintiffs did not at any one time serve them with a completion Notice. He was the one who had served the Plaintiffs with a rescission notice. He stated further that a verbal notice had been made to the Plaintiffs before the formal rescission notice was made.
84. It was DW2's testimony that pursuant to clause 5 of the agreement, there were only two options. The first one was to extend time for payment of the purchase price upon request while the second one was to rescind the agreement, forfeit 10% of the monies paid and refund the balance of the monies received without interest upon re-sale of the property.
85. DW2 asserted that Re-sale of the suit property was contemplated in the sale agreement.
86. DW2 stated in cross-examination by Counsel for the 4<sup>th</sup> Defendant that there were no encumbrances on the suit property at the time of entering into the sale agreement dated 2<sup>nd</sup> February, 2009. He averred that there were no orders or any restrictions prohibiting the sale of the suit property. He reiterated his earlier testimony that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had paid the purchase price in full and in accordance with the sale agreement. He asserted that the transfer in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was dated 9<sup>th</sup> March, 2009 and was registered in June, 2009.
87. DW2 admitted that he had agreed to transfer the suit property in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendant before payment of the full purchase price upon assurance by the 3<sup>rd</sup> Defendant's brother, who was well known to him, that payment would be completed without any issue.
88. DW2 denied having sold the suit property in secret. He however could not recollect whether he disclosed to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants that there was a suit in court. He stated that he sold the 3<sup>rd</sup> and 4<sup>th</sup> Defendants the suit property with a clean title.



89. DW2 admitted that at Paragraph 10.1 of the sale agreement with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, he warranted that he had a good title with power to enter into the agreement and perform the transactions. He asserted that there was clear evidence that he had good title at the time of sale.
90. He admitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not remove the caveat. The same was removed by the Land Registrar who was empowered to do so under the law upon notice to the caveator(s).
91. DW2 insisted that the indemnity filed against him by the 4<sup>th</sup> Defendant was misplaced and had no basis in Law. He reiterated his earlier testimony that he completed the transfer of title in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who have been in possession of the suit property for years.
92. When Cross-examined by Counsel for the Plaintiff, DW2 stated that the suit property was in his name and that his Law firm acted for both the Vendor and the Purchasers in his initial agreement. He asserted that in the second transaction of 2009, he also acted for the purchasers.
93. DW2 stated further on cross examination that he had explained to the parties the dangers of using one advocate/law firm in the transaction but they still opted to use one. According to DW2, he did not personally handle the transactions. He stated that the transactions were handled by another advocate in the law firm by the name of Esther Manthi.
94. DW2 added that clause 5 of the sale agreement with the Plaintiffs made provisions for default. The default by the Plaintiffs was late payment of instalments contrary to the provisions of the sale agreement.
95. It was DW2's testimony that they sent several reminders to the plaintiffs to make payments on time whenever there was a delay in payment. The letter dated 14<sup>th</sup> March, 2007 in which they reminded the Plaintiffs of the provisions of the agreement is proof of the reminders. He admitted that such letters were not completion notices but letters notifying the Plaintiffs of their breach of agreement.
96. DW2 stated that they continued to receive more money from the Defendants even after sending the notices on breach of agreement to the Defendants. He alleged that after the completion date, he had a meeting with the Plaintiffs who explained their difficulties in raising the balance of the purchase price.
97. DW2 alleged that he had explained to the Plaintiffs the challenges he was experiencing as a result of rise of prices of building materials. That was why they were discussing an additional amount on top of the agreed purchase price. That was the farther reason why they continued to receive money even after the completion date. He asserted that the discussions with the Plaintiffs started immediately after the completion date and they continued all the way to the year 2009. He admitted being aware of the fact that the suit property had a caveat issued vide an order of the High Court but denied that the proceedings of the High Court were brought to his attention.
98. He asserted that there was no caveat at the time of transferring the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
99. DW2 also stated that the agreement of 2006 with the Plaintiffs was not subject to the Law Society Conditions of Sale and that Clause 7 thereof only amended the Law Society conditions in regard to payment of interest.
100. He stated that the Law Society conditions of sale require issuance of a 21 days' notice making time of essence where the agreement does not specifically make time to be of essence. He admitted not having issued a 21 days' notice.



101. He maintained that he disclosed all information that was within his knowledge to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. DW2 also admitted having transferred the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants way back before the completion date and before receiving the bulk of the purchase price. He stated that the purchase price of the suit property was Kshs 20 million although they had indicated it as 7 million in the transfer form. He clarified that 7 million was the value of the land alone at the time it was transferred, without development. He asserted that it was not for purposes of evading stamp duty.
102. He stated that as at the time of transfer of the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the developments were not yet complete and that he could not recollect the stage at which the construction was.
103. DW2 asserted that they had given the value of the plot to be Kshs 4 million and the construction which had been undertaken by then as Kshs 3 million.
104. In re-examination, DW2 reiterated his earlier testimony that there was no caveat in place on the suit property at the time of the transfer of the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
105. He stated that the sale of the suit property to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was 3 years after the sale agreement signed with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
106. DW2 stated that the High Court order in regard to the caveat had extended the payment period by 30 days and that he was not aware of any further orders by the court.
107. DW2 declared to the best of his knowledge that there was neither a caveat nor any other encumbrances barring the transfer of the suit property to any other party.
108. DW2 stated that the reason why he continued to receive payment after the completion date was because discussions with the Plaintiffs were ongoing but he sold the plot after it became clear that the Plaintiffs were not willing to honour the terms of the agreement, even without the proposed additional sum of Kshs 2 million. He asserted it was 3 years after they were granted the opportunity to complete payment.
109. DW2 asserted that the Plaintiffs had failed to honour the terms of the agreement and that unless they had expressly waived their rights to rescind the agreement, the delay did not bar them from exercising their rights. He stated that by the time of signing the new agreement with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, they had every right to re-sell the suit property.
110. DW2 reiterated his earlier testimony that he transferred the suit property after he had been given an undertaking by the 3<sup>rd</sup> Defendant's brother and that the figure of 7 million was based on the value of the property by then.
111. Lydia Wanja, an Advocate of the High Court of Kenya currently working for KETRACO testified as DW 3. She stated that the 3<sup>rd</sup> Defendant (now deceased) was her husband. She also produced the documents listed on the Bundle of Documents dated 8th February, 2012 which were marked as exhibits in the order they are listed. She also confirmed filing an Indemnity Notice against the 1<sup>st</sup> & 2<sup>nd</sup> Defendants dated 16th February, 2022.
112. DW 3 stated that before purchasing the suit property, she conducted a search with their previous Advocates- Chahenza, in January 2009. However, while picking their file from the said Law Firm, the search was missing. Efforts to trace it were futile. She averred that the search confirmed that the title was issued under the Registered Titles Act (now repealed) and showed the 2<sup>nd</sup> Defendant as the proprietor of the land.



113. The Witness denied knowledge of a previous transaction involving the suit property. She stated that she learnt of it later, when they had already purchased the suit property and taken possession in August, 2010. She could not tell if her husband was informed about the previous transaction as he was working out of the country. She averred that her deceased husband would have informed her if he had been told as she was the one who was dealing with the matter on their behalf. In any event the 1st & 2nd Defendant have not controverted her averments that she was not aware of the previous transaction.
114. DW 3 denied that the 2nd Defendant informed her about the previous transaction. She averred that had she known of the alleged previous transaction, she would not have bought suit property since there were other properties around the same area.
115. It was her evidence that she had not met the Plaintiffs before taking possession of the suit property. She averred that she only met the 1st Plaintiff in 2010 and the 2nd Plaintiff in court during the hearing. She stated that at the time of taking possession, the suit property was not complete. Further, she denied knowledge of the institution of the instant suit as nobody ever approached them claiming ownership.
116. DW 3 further testified that there was no caution/caveat on the title at the time of the purchase of the suit property. The Search they conducted showed that it was a clean title. She averred that the copy of the title in her bundle of documents at Page 2 only shows the transfers to her and the husband. There is no other entry thereof.
117. The Witness further referred to the official search produced by the Plaintiffs dated 28th October, 2020. She stated that the search, under the proprietorship section, shows an entry done on 29th June, 2009 being a transfer to her and her deceased husband. The only other entry indicated thereon was on 8th October, 2015 after the death of her husband (3rd Defendant). As for the encumbrance section, DW 3 stated that the only entry was a charge to Stima Sacco Limited for a sum of Kshs. 20 Million. There is no other encumbrance on the title.
118. In addition, the Witness asserted that she bought the suit property at a sum of Kshs. 20 Million. She averred that pursuant to the Agreement, the completion period was 180 days from the date of the Agreement being 2nd February, 2009. It was however erroneously indicated as 31st August, 2009. She averred that they had a discussion with the 2nd Defendant before signing the Agreement since they only had Kshs.15 Million. It was then agreed that the 3rd and 4th Defendants could then have the title to enable them use the title as collateral to source for funds. However, despite signing the completion documents and availing a Cheque for Stamp Duty, the 2nd Defendant never sent them the Supplementary Agreement.
119. Regarding the Indemnity Notice she stated that she filed it against the 1st & 2nd Defendants as they were both Vendors of the suit property. She insists that pursuant to the Agreement, the 2nd Defendant gave a warranty that he had a good and valid title to the property. She urged the Court to direct that they (the 3rd & 4th Defendants) be indemnified in the event that the court orders that the property be transferred to the Plaintiffs.
120. DW 3 opined that the Plaintiffs were not entitled to the prayers sought. She maintains that she innocently entered into the transaction and paid the value agreed with the seller. She insists that they are bona fide purchasers for value. The 2nd Defendant never disclosed about the instant suit and the Plaintiffs' interest.
121. In cross-examination by the Plaintiff's Counsel, DW 3 stated that indeed the Plaintiffs' had a purchaser's interest in the suit property. She confirmed that the Law Firm of Musyoka & Wambua represented them in the transaction. She averred that up to May, 2009, they had paid a sum of Kshs.



- 15,430,000/= prior to the transfer. The amount was inclusive of the Kshs. 400,000/= they paid for Stamp Duty.
122. It was DW 3's further evidence that the transfer was done before the completion date. She confirmed that she had not attached the Charge in favour of Stima Sacco. She stated that by the year 2012, the suit property was encumbered.
  123. In reference to Stamp Duty, it was her evidence that the Kshs. 400,000/= reflected the 4% of the value of the property, which amount was forwarded to the 2nd Defendant's Law Firm. After the demise of her husband, she became the sole registered proprietor of the suit property.
  124. During cross-examination by the 1st Defendant's Counsel, DW 3 stated that the suit property was in the name of the 2nd Defendant. Upon purchase, the transfer was done and she has been in possession for over 13 years. She stated that the 1st Defendant was a contractor. She confirmed that the money was paid in accordance with the provision of the agreement to the Vendors' Advocates.
  125. It was her evidence that although she had been joined to the proceedings in the year 2012, she only filed notice of indemnity in the year 2022. She averred that she had however not filed a notice of claim against co-defendants. She reiterated the fact that she had done due diligence on the title which confirmed that the suit property was unencumbered. This position is evident from the title exhibited in court which shows that no entry of a caveat had been made on the title.
  126. DW 3 further stated that the Stamp Duty she paid was assessed by the Collector of Stamp Duty. Subsequently, a transfer was done in their favour. It is only thereafter that they charged the suit property to Stima Sacco in the year 2017.
  127. She argued that the reason she issued the notice of indemnity to the 1st Defendant was because she did not disclose some material facts about the existence of a suit and the Purchaser's interest by the Plaintiffs over the suit property. Further, that the 1st Defendant too received the purchase price of Kshs. 20 Million from them together with the 2nd Defendant. She stated that she believes that she has a valid title over the suit property.
  128. When cross-examined by Counsel for the 2nd Defendant, DW 3 stated that she only became aware of the suit when she was served with the application seeking their joinder. She reiterated that she holds a valid title that was transferred to them by the 2nd Defendant. If there was a caveat, it would have appeared in the encumbrance section.
  129. DW3 further averred that the 2nd Defendant warranted that he had a good title. She reiterated that the Plaintiff only visited in 2010 with a Valuer. The transfer in her favour was successful. In her opinion, the Sacco charged the suit property because they confirmed it was a good title.
  130. In re-examination DW 3 stated that the charge was registered in the year 2017. The amount for the charge does not in any way relate to the purchase price of the suit property. She averred that her indemnity is just in case the court finds in favour of the Plaintiff. She stated that although she paid a sum of Kshs. 400,000/= for stamp duty, she was yet to be paid the balance by the 2nd Defendant after only Kshs. 280,000/= was apparently paid.
  131. Mr. Cosmas Chahenza, an Advocate working with HKM Advocates testified as DW 4. He stated that at the time of filing the defence he was working with Soita & Saende Advocates. He adopted his Witness Statement dated 16th February, 2022 as his evidence in-chief.
  132. In cross-examination by Counsel for the Plaintiff, DW 4 confirmed that he in deed prepared the 4th Defendant's List of Documents before Court. He confirmed his assertions contained in his witness



statement that the search the 4th Defendant had presented to him was in January 2009. He denied that he was the one who did the transaction on behalf of the 4th Defendant. He confirmed seeing the search.

133. Counsel for the 1st Defendant did not cross-examine the Witness.
134. In cross-examination by Counsel for the 2nd Defendant, DW 4 stated that he discussed the details of the transaction with the 4th Defendant as his client in executing her instructions to prepare a statement of defence.
135. In re-examination, DW 4 stated that he was the one who filed the Indemnity Notice on behalf of the 4th Defendant.

### **Court's directions**

136. The court directed parties to file written submissions in support of their respective cases. Parties complied. The Plaintiff's submissions are dated 20th July, 2023 while those of the 1st Defendant are dated 23rd August, 2023. The 2nd Defendant's is dated 6th October, 2023 whereas the 4th Defendant's submissions are dated 9th October, 2023. The Court has had a chance to read through the said submissions and considered them accordingly.

### **Issues for determination**

137. It is not in contention that the Plaintiffs and the 1st and 2nd Defendants had entered into an agreement for sale dated 7th November, 2006. The subject matter was a house designated as House No. 2 that was to be developed on LR. No. 7793/61. The purchase price was Kshs. 12,000,000/= that was to be paid as per the schedule in Clause 3 of the Agreement as follows: -
  - a. Kshs. 1,200,000/= was to be paid on or before sixty (60) days from the date of the execution of the Sale Agreement;
  - b. Kshs. 2,400,000/= was to be paid on or before sixty (60) days next following the period stated above; and
  - c. The balance of Kshs. 8,200,000/= was to be paid on or before the completion date or within fourteen (14) days upon the successful registration of the transfer in favour of the Purchasers.
138. The 2nd Defendant contended that the Plaintiffs failed to adhere to the payment schedule as agreed necessitating the rescission of the agreement by the 1st & 2nd Defendants and the subsequent sale and transfer of the suit property to the 3rd and 4th Defendants by an instrument of transfer dated 24th June, 2009. The issues for determination are therefore as follows: -
  - A. Whether the Plaintiffs defaulted in payment of the purchase price in accordance with the agreed schedule.
  - B. Whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had acquired a lawful and indefeasible title to the suit property.
  - C. Whether the Plaintiff is entitled to the orders sought.
  - D. Who orders should issue on costs.

### **Analysis and Determination**

- A. Whether the Plaintiffs defaulted in payment of the purchase price in accordance with the agreed schedule



139. It is settled law, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it.
140. In *William Kazungu Karisa vs Cosmas Angore Cnzera* (2006) eKLR, the court held that the basic rule of the law of contract is that parties must perform their respective obligations in accordance with terms and conditions of the contract executed by them and an agreement could only be amended or varied by the consent of the parties. Parties to the material agreement having voluntarily executed the agreement, this court has no basis to vary any clause, however harsh it may be.
141. The agreed purchase price for the suit property was Kshs. 12,000,000/=. The agreement was categorical in the schedule of payment as already tabulated above. Whereas the Plaintiffs made timely payment of the 1st instalment (deposit of 10% of the purchase price), they clearly failed to pay the 2nd instalment of Kshs. 1,200,000/= fully on or before the 7th January, 2007 in accordance with special condition 1.2 (i). This too was the case in respect to the 3rd instalment of Kshs. 2,400,000/=.
142. The 2nd Defendant contends that the Plaintiffs paid in total a sum of Kshs. 7,800,000/= and not Kshs. 8,180,000/= as alleged. Completion was to be within six (6) months.
143. Special Condition 1.3 provided that against the receipt of the balance in full or on receipt of a suitable professional undertaking for payment thereof, from the Financier's Advocates in the event that the Purchasers were being financed, the Vendors' Advocates were to deliver the completion documents.
144. It is my finding that by failing to pay the balance of the purchase price as agreed, the Plaintiffs breached the agreement for sale. Even a delay of one day amounts to a default.

B. Whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had acquired a lawful and indefeasible title to the suit property.

145. I will handle this issue sequentially with the third issue, i.e. whether the Plaintiff is entitled to the orders sought.
146. The Plaintiffs had initially filed this case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only. However, and pursuant to leave granted on 26<sup>th</sup> January, 2012, the Plaintiffs jointed the 3<sup>rd</sup> and 4<sup>th</sup> Defendants into the case. Accordingly, the Plaintiffs in the amended plaint added a further prayer seeking cancellation of 'the purported transfer lodged in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' and, for good reason, I must say, introduced two alternative prayers namely:
- i. "Damages for loss of bargain on the property for the sum of Kshs 23,000,000/=.
  - ii. Refund of the sum of Kshs Eight Million one hundred and eighty thousand shillings only (8,180,000) being the deposit paid."
147. From the evidence adduced before the Court, it is not in dispute that the title to the suit property is in the name of the 3<sup>rd</sup> & 4<sup>th</sup> Defendants; (subsequently in the name of the 4<sup>th</sup> Defendant upon demise of the 3<sup>rd</sup> Defendant). She holds a Certificate of title issued on the 24<sup>th</sup> June, 2009, under the Registration of Titles Act (now Repealed).
148. The Plaintiffs in their submissions rightly submitted that the provisions of the Registration of Titles Act (RTA) are applicable to the subject transaction to the extent that the subject transactions took place before the promulgation of the *Land Registration Act* in the year 2010. That submission by the



Plaintiffs is extremely important in this matter and I believe it informed the Plaintiffs' amendment of their pleadings.

149. I have in mind the provisions of Sections 23 and 24 of the RTA, now repealed.

150. Section 23 of the said Act provided that:

“The Certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is the indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”

151. The provisions of Section 23 of the repealed RTA sharply contradicts with the provisions of Section 26(1) of the [Land Registration Act](#), which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

152. So, the title held by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants by virtue of Section 23 of the repealed RTA, is conclusive evidence that the 3<sup>rd</sup> & 4<sup>th</sup> Defendants are proprietors of the land and the indefeasible owners thereof.

153. The only challenge that the Plaintiffs would have mounted against the title by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in accordance with the provisions of Section 23 of the RTA would have been on grounds of fraud or misrepresentation. Instead, the Plaintiffs under paragraph 9 of the amended plaint averred that the transfer of the suit property by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was unlawful and illegal. They went ahead to particularize the illegality under paragraphs (i) – (v). I must point out that none of the particulars allege fraud or misrepresentation on the part of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

154. The law is clear as regards fraud as pronounced by Tunoi, J (as he then was) in the well-known case of *Vijay Morjaria -vs-Nausingh Madhusingh Darbar & Another* [2000] eKLR. The learned Judge stated that:

“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must off course, be set out, and then it should be stated, that these acts were done fraudulently. It is also settled Law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

155. The Plaintiffs have clearly not pleaded particulars of fraud against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants; neither have they proved any fraud on the part of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.



156. As regards the standard of proof of fraud, the Court of Appeal in *Kinyanjui Kamau vs. George Kamau* [2015] eKLR stated that:

“It is trite Law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs. Ndolo* [2008], KLR (G & F) 742, wherein the Court stated that; “... we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary Civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases ... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts”.

157. I would say the same for misrepresentation. The Plaintiffs have not proved that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants made any misrepresentations to them in any way. The burden of proof is always on he who alleges to prove. This position is well captured under Section 107 of the *Evidence Act* which provides that: -

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

158. Halsbury’s Law of England 4<sup>th</sup> Edition, Volume 17 puts it so well that:-

“The legal burden of proof is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect to a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case.”

159. The legal burden is discharged by way of evidence. No such evidence was adduced by the Plaintiffs before the court to prove the allegations of misrepresentation.

160. This notwithstanding, I am convinced that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were bona fide purchasers for value without notice.

161. Black’s law Dictionary 8<sup>th</sup> Edition defines “bona fide purchaser” as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

162. The 4<sup>th</sup> Defendant herein avers that she is an innocent purchaser for value without notice of the Plaintiff’s Purchaser’s beneficial interest. In the case of *Lawrence Mukiri -vs- Attorney General* and 4



Others [2013] eKLR the court defined the threshold for a purchaser to successfully rely on the bona fide doctrine, in the following words:

“...a bona fide for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following: -

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) The vendors had a valid title;
- (e) He purchased without notice of any fraud;
- (f) He was not party to any fraud.”

163. A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against a claim of any prior equitable owner.

164. On the same issue, the Supreme Court in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] eKLR re-affirmed the Court of Appeal’s decision in the case Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

165. From the record, it is evident that an Agreement for sale was entered into between the 1st & 2nd Defendants on one part and the 3rd & 4th Defendants on the 2nd February, 2009. The Purchase price therein is indicated as Kshs. 20,000,000/= . A transfer instrument dated 9th March, 2009 was subsequently executed and duly registered in favour of the 3rd and 4th Defendants. The 2<sup>nd</sup> Defendant in his testimony before the court duly acknowledged receipt of the full purchase price from the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

166. This brings me to the question whether the 3rd and 4th Defendants exercised due diligence before purchasing the subject property. DW 3 stated that before purchasing the suit property, she conducted due diligence and carried out a search with her previous Advocates, which search showed that the subject property was registered in the name of the 2nd Defendant and was unencumbered. Although the alleged search was listed in her list of documents she did not produce it as an exhibit as the same allegedly went missing from their file. DW 4 who drafted their Statement of Defence herein, confirmed seeing it but could not tell how it disappeared from the file.

167. The Plaintiff on the other hand contend that they registered a Caveat on the property to forbid the registration of any dealings on the suit property. A caveat was subsequently registered on 6th June, 2008.

168. Although the Plaintiff has adduced a copy the Caveat, no evidence has been adduced to confirm that an entry was made on the Certificate of Title. Such an entry would have appeared at the encumbrance section.



169. The 3rd & 4th Defendants purchased the subject property in February, 2009. Further, it was the 4th Defendant's evidence that they only came to learn of the Plaintiff's purchaser's interest in the suit property when they were served with the application to be joined in the suit. By that time, they had already purchased the suit property and taken possession of it.
170. It is my finding that the 3rd & 4th Defendant have on a balance of probabilities demonstrated that they are bona fide purchasers for value without notice of the Plaintiff's purchaser's interest in the suit property.
171. I proceed to section 24 of the repealed RTA. It provided that:
- “ Any person deprived of Land or of any interest in Land in consequence of fraud or through the bringing of that Land under the operation of this Act (RTA) or by the registration of any person as proprietor of the Land or interest or in Consequence of any error or mis-description in any grant or Certificate of Title or entry or Memorial in the register, or any Certificate of Search, may bring and prosecute an action at Law for the recovery of damages against the person upon whose application the Land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or mis-description.”
172. Damages were therefore the allowable remedy for the Plaintiffs, if at all, either against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, should they succeed in their claim against either of them.
173. Having said so, and from my above findings, the prayer for cancellation of the transfer in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants fails.
174. Consequently, the prayer for specific performance cannot be available in the circumstances. Neither would the orders of mandatory injunction issue as sought compelling the Defendants to undertake the transfer of the suit property to the Plaintiffs; or to the cede possession of the suit property. They are both equitable remedies. Equity follows the law, in any event.
175. In the case of *Reliable Electrical Engineers Ltd. -vs- Mantrac Kenya Limited* (2006) eKLR, wherein Justice Maraga (as he then was) stated that: -
- “ Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles.
- The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”
176. The prayers for injunction against the Defendants to restrain them from selling, charging, pledging, disposing or in any other manner alienating the suit property or entering into or interfering with the Plaintiffs' quiet possession of the suit property have long since been overtaken by events. The 4<sup>th</sup>



Defendant as I have already stated is the proprietor of the suit property and has evidentially been in possession since the year 2009.

177. That only leaves me with three (3) prayers to consider, mesne profits at the rate of Kshs 150,000/=, damages for loss of bargain and refund of the amounts paid by the Plaintiffs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in accordance with their agreement of 7<sup>th</sup> November, 2006. The agreement is not in dispute.
178. From her evidence before the Court, the Plaintiff Nancy Njeri Ndichu, in responding to questions under cross-examination admitted that she did not manage to pay all the instalments of the purchase price in full as agreed. With regard to the 2<sup>nd</sup> instalment that was due on 7<sup>th</sup> January, 2007, the Plaintiff paid Kshs 500,000/= on 8<sup>th</sup> January, 2007. With regard to the instalment of Kshs 2.4 million that was due on 7<sup>th</sup> March, 2007, the Plaintiffs did not make the payments until 13<sup>th</sup> April, 2007 when they paid a sum of Kshs 3,000,000/=. This left a balance of Kshs 100,000/=.
179. Clearly, the Plaintiffs were in breach of the terms of the agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as I have already found anyway. This breach entitled the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to issue a Completion Notice and eventually in case of non-compliance, a rescission notice was to follow.
180. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' purported Completion notice is dated 28<sup>th</sup> March, 2007. It is in form of a letter which in part reads as follows:
- “If you do not adhere to the repayment schedule within the next 14 days, from the date hereof, our client shall rescind the said agreement. We are instructed to advise that any payments thereafter made to our client on account of the sale agreement shall be received without prejudice to our client's aforesaid rights under the sale agreement.”
181. It is well settled that for a completion notice to qualify as such, it must be unequivocal. The purported completion notice by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was not unequivocal; it was ambiguous. Whereas it purports to communicate the intention to terminate the agreement, it at the same time expresses the intention of the Vendors to continue receiving money in respect to the purchase price. The Vendors intended to have 'their cake and eat it at the same time'.
182. The import of this finding is that the Plaintiffs were entitled to a refund of the entire amounts paid. Under clause 5.1 of the agreement between the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the vendors would only have been entitled to retain the 10% deposit upon issuance of a proper completion notice. The party not in breach was obligated to serve a notice of completion upon the defaulting party. The rescission was consequential to the notice.
183. From the evidence before the Court, the total amount paid by the Plaintiffs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants under the terms of their agreement was Kshs 7,980,000/=. From the evidence adduced before this court, the Plaintiff effected the payments as follows; Kshs. 1,200,000/= at execution of the contract Kshs 500,000/= on 8<sup>th</sup> January, 2007 Kshs. 3,000,000/= on 13<sup>th</sup> April, 2007 Kshs. 700,000/= on 27<sup>th</sup> July, 2007 Kshs. 750,000/= Vide Cheque and acknowledged on 24<sup>th</sup> August, 2007 Kshs. 1,000,000/= Vide Cheque issued on 15<sup>th</sup> February, 2008 Kshs. 830,000/= on 13<sup>th</sup> March, 2008
- Total of Kshs. 7,980,000/=
184. The court makes a finding in favour of the Plaintiffs against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in that regard. The same shall be payable with interest at court rates from the date of filing suit until payment in full.



185. Mesne profits are special damages that must not only be specifically pleaded but strictly proved. No proof of mesne profits was offered by the Plaintiffs in this case. In any event, the Plaintiffs had not acquired proprietary rights and or possession of the suit property to warrant a claim for mesne profits.
186. The Court of Appeal in the case of Attorney General -vs- Halal Meat Products Limited [2016] eKLR considered when mesne profits could be awarded. The court stated as follows: -
- “It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18<sup>th</sup>Ed. para 34-42.”
187. Although the Plaintiff for an order of mesne profits no basis of grant of such an award was made. The Plaintiff did not even quantify the same and further considering that she has been found to be in breach of the contract, such an order cannot issue.
188. Nyamweya J (as she then was) in the case of Karanja Mbugua & another -vs- Marybin Holding Co. Ltd [2014] eKLR stated as follows with regard to mesne profits: -
- “This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of [Civil Procedure Act](#).”
189. Loss of bargain is an equitable remedy. A party claiming same must prove that they performed their obligations fully under the contract. The finding of default against the Plaintiffs deny them the remedy of loss of bargain.
190. Costs follow the event. Consequently, I award the costs of the suit to the 2<sup>nd</sup> Plaintiff and the 4<sup>th</sup> Defendant against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.

## **Conclusion**

191. In light of the above findings, the court makes the following disposal orders:
- i. Judgement be and is hereby entered in favour of the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for a Refund of the sum of Kshs. 7,980,000/= (Seven million, nine hundred and eighty thousand) with Interest at court rates from the date of filing of this suit till payment in full.
  - ii. The Plaintiff and the 4<sup>th</sup> Defendant shall have the costs of the suit as against the 1st and 2nd Defendants.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Ms Wambui for the 4<sup>th</sup> Defendant



Ms Gitau holding brief for Mr. Wandabwa for the Plaintiff

Ms. Matata for the 2<sup>nd</sup> Defendant

No Appearance for the 1<sup>st</sup> Defendant

Court Assistant: Yvette.

**M.D. MWANGI**

**JUDGE**

