REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 642 OF 2009

PAUL OGANGA OGADA.....PLAINTIFF

VERSUS

NARAN NANJI KARSAN PATEL.....1ST DEFENDANT

MARUTI COURTS LIMITED.....2ND DEFENDANT

JUDGMENT

The Plaintiff's Case

In a Plaint dated 24/11/2009, the Plaintiff averred that the Defendants engaged his services to supply construction materials and other related services to a site at Egerton University, totaling to Kshs. 25 Million. The Plaintiff avers that after due supply and completion of works, the Defendants made part payments totaling to Kshs. 5,400,000/- as follows:

i. Cheque No. 000458 for Kshs. 1,400,000/-
ii. Cheque No. 000465 for Kshs. 500,000/-
iii. Cheque No. 100679 for Kshs. 100,000/-
iv. Cheque No. 653086 for Kshs. 500,000/-
v. Cheque No. 100686 for Kshs. 100,000/-
vi. Cheque No. 001297 for Kshs. 400,000/-
vii. Cheque No. 000601 for Kshs. 400,000/-
viii. Cheque No. 653097 for Kshs. 400,000/-
ix. Payment in Cash Kshs. 1,600,000/-

Further to the payments outlined above, that the Defendants caused Plot No. LR 209/6810 to be registered jointly in the Plaintiff's and the 2nd Defendant's names, in an attempt to complete payment of the agreed amount. It is the Plaintiff's averment that the Defendants have yet to clear the outstanding balance of Kshs. 11.6 Million. Consequently, the Plaintiff prays for Judgment to be entered against the Defendants jointly and severally for:

a. The outstanding balance in the sum of Kshs. 11.6 Million, together with interest at 24% from 5th October 2005.
b. Transfer of Plot No. L.R 209/6810 in the Plaintiff's name.
c. Costs of the suit.

The Plaintiff filed a witness statement sworn on 10/11/2011 together with a bundle of supporting documents, which he adopted as part of his evidence. He testified that he worked at Egerton University

as Procurement Manager until 2001 and also had a supply and transport business where he supplied sand, cement, ballast and timber to construction sites using his vehicles with the following registration numbers: KZC 665, KXB 880, KXX 510, KYX 736 and KAA 753X. The Plaintiff testified that he met the 1st Defendant in 1997, when a contractor trading as Carpentocraft Building and Contractors Ltd was hired by Egerton University to construct a science block and student hostel. The Plaintiff stated that he approached the 1st Defendant requesting to be one of his suppliers, and an agreement was reached and he commenced supplying sand, ballast and timber.

It was the Plaintiff's evidence that the 1st Defendant would pay him after receiving payment from Egerton University which he continued to receive until 2005. The Plaintiff testified that sometime in 2002 he got an opportunity to purchase Plot No. L.R. 209/6810 at Kshs. 8 million, and that he asked the 1st Defendant to settle the outstanding balance to facilitate the purchase. However, that the 1st Defendant notified him that he had not received payment from Egerton University, but that he would borrow some money from the 2nd Defendant, and on condition that the Plaintiff and 2nd Defendant were jointly registered as proprietors of the said plot until such time the 1st Defendant would have received his payment from the University.

Content with the said arrangement, the Plaintiff states that he received funds from the 2nd Defendant, initially Kshs. 1.2 million which he paid as deposit towards the purchase of the house, and subsequently Kshs. 6.8 million in settlement of the purchase price. It is the Plaintiff's testimony the said Kshs. 8 Million was given to him as part payment of the outstanding balance owed to him by the 1st Defendant. Further, that he took possession of the said property in 2002 upon the purchase, and that the Defendants have never claimed ownership thereof nor demanded to be paid rent or any profits derived therefrom.

The Plaintiff contended that the Defendants had thus far paid him a total of Kshs. 13.4 million leaving an outstanding balance of Kshs. 11.6 million, but that the 1st Defendant assured him of full payment and transfer of the property as soon as they receive payment from the Egerton University. The Plaintiff refuted the allegations made by the Defendants in the counter-claim and testified that at no time did he borrow money from the 2nd Defendant, neither did he undertake to reimburse the 2nd Defendant. He maintained that the funds advanced for purposes of purchasing the property was part of the Kshs. 25 million owed to him by the Defendants. The Plaintiff testified that throughout his engagement with the Defendants, he dealt with Mr. Batuk Patel of Caperntocraft, but the day to day monitoring of the supplies was done by his late wife because at the time he was still an employee of Egerton University.

In support of his case, the Plaintiff produced a copy of the title deed of Plot No. L.R 209/6810 as the Plaintiff's Exhibit.1. He also relied on the list of documents filed on 24/10/2011 comprising of a letter addressed to him by the Defendant on 16/11/2005 and his letter to the 1st Defendant dated 20/1/2006. The list of documents also included two demand letters addressed to the Defendants by his advocates on 6/3/2006 and 30/6/2006.

On cross-examination, the Plaintiff stated that he started to deal with the 1st Defendant in 1997 when he was a Purchasing Officer at the Egerton University, but that he operated a supplies business under Parma Investment. The Plaintiff admitted that he had no written agreement with the 1st Defendant, and that he had also not furnished the court with delivery notes. He testified, however, that the deliveries were made using his vehicles which are all registered under Parma Investment. In respect to the property, the Plaintiff stated that he had objection to the joint registration of plot No. L.R 209/6810 with the 2nd Defendant. He also admitted that he made no contributions towards the purchase of the property including payment of land rates.

In reference to a note dated 7/8/2002 annexed at page 8 of the Defendant's Supplementary List of Documents filed on 15/11/2011, the Plaintiff testified that the same is a breakdown of a loan of Ksh. 15 million he had asked from the 1st Defendant for purposes of constructing a house on his Karen property, whereby its title would be the security of the said loan. He also admitted to have requested from the 1st

Defendant an amount of Kshs. 1.5 Million for his son's school fees as evidenced in his note dated 24/1/2003. In reference to a note he addressed to the 1st Defendant on 6/5/2004, the Plaintiff testified that the undertaking of a refund of Kshs. 500,000/= was in respect to a different transaction from the subject matter herein.

The Plaintiff was referred to the note dated 16/11/2005 in his bundle of documents and admitted that the same did not indicate the author and to whom it was addressed to. The Plaintiff stated however, that one could discern from the contents therein that it was written by the 1st Defendant and that the same was delivered to him by the 1st Defendant's driver. The Plaintiff admitted that he did not indicate that the 1st Defendant owed him money in the letter he wrote to the 1st Defendant dated 20/1/2006. He also admitted that the 1st Defendant did not sign any acknowledgement of debt. It was his evidence that he demanded payment and the transfer of title because he was aware that Egerton University settled the amount owed to the 1st Defendant in 2005.

On re-examination, the Plaintiff stated that he sued the Defendants because he dealt with the 1st Defendant when he traded as Carpentocraft Ltd as well as in his capacity as a director of the 2nd Defendant, and also because the part payments were made by the 2nd Defendant. The Plaintiff stated that he entered into an oral agreement with the 1st Defendant because they were very good friends. Further that he did not have delivery notes because the day to day running of the supplies was managed by his late wife. He maintained that the Egerton University in 2005 paid the Defendants Kshs. 477 million for the work done despite the termination of their contract before June 2002.

The Defendants' Case

The Defendants filed a Defence and Counterclaim dated 11/12/2009, wherein they denied engaging the Plaintiff for provision of any services or the receipt of construction materials during the pendency of any construction works as alleged or at all. They further denied that there was an outstanding amount of Kshs. 11.6 million owing the Plaintiff, or of the existence of an agreement in respect of payment of the said sum to the Plaintiff. The Defendants stated that the suit did not disclose when the alleged cause of action arose averring that if all any cause of action existed, that the same was time barred.

The Defendants admitted that they advanced money to the Plaintiff in 2002, but denied that the advancements were payments for services rendered or goods supplied by the Plaintiff as alleged. It was their averment that money given to the Plaintiff was advanced as a loan upon the Plaintiff's request. Further, that the registration of Plot No. L.R 209/6810 in the joint names of the Plaintiff and 2nd Defendant was because the property was financed by the 2nd Defendant at the Plaintiff's request, and therefore that the joint registration was to safeguard the 2nd Defendant's interests, and at the same time afford the Plaintiff adequate opportunity to reimburse the 2nd Defendant. The Defendants stated that since the purchase of the said property, the Plaintiff had made no attempt in repaying the sums advanced to him, and that he continued to enjoy the rents and profits derived from the property to their exclusion.

In their counter-claim, the Defendants averred that on diverse dates and at the request of the Plaintiff, the 2nd Defendant with the authority of the 1st Defendant advanced a total of Kshs. 5.4 million being friendly loans on the understanding that the Plaintiff would reimburse the said sums to the 2nd Defendant. The Defendants further averred that the Plaintiff approached them to assist him in the purchase of Plot No. L.R. 209/6810 at Woodley Estate, Nairobi, which the 2nd Defendant financed at a purchase price of Kshs. 8 Million. It is the Defendants' averment that as indicated in transfer document dated 8/3/2002, the property was jointly registered in the names of the Plaintiff and 2nd Defendant pending such time that the Plaintiff would reimburse the 2nd Defendant the sums advanced together with the purchase price.

The Defendants reiterated that the Plaintiff continues to enjoy the rents and profits from the said property to their exclusion, as a result of which they continue to suffer loss and damage in that they are deprived of the sum of Kshs. 15,520,260/- being sums advanced to the Plaintiff together with the costs of purchase

and related expenses of Plot No. L.R. 209/6810, as well as the use and benefit of the said property. On the foregoing, the Defendants prayed that the suit against them be dismissed with costs and judgment be entered in their favour as follows:

i. The Plaintiff be ordered to render to the 2nd Defendant a full and comprehensive account of sums received on account of the property known as Plot No. 209/6810.
ii. Judgment be entered against the Plaintiff for the sum of Kshs. 15,520,260/- being sums advanced to the Plaintiff and the costs of purchase and related expenses of Plot No. 209/6810 together with interests thereon at commercial rates prevailing from 8/3/2002 until payment in full.
iii. The Defendants be awarded the costs of the counter-claim together with interests thereon at such rate and for such period of time as the court may deem fit
iv. Any other or further reliefs the court may deem appropriate to order.

The 1st Defendant filed a witness statement dated 20/12/2011 together with 4 sets of bundle of documents which he adopted as part of his evidence. The 1st Defendant testified that he was as a sub-contractor of MK Brothers Ltd and later Carpentocraft Ltd who were contracted by Egerton University for the construction of a physical science block and students hostels at a consideration of 350 million. DW1 admitted that there were local suppliers for the contract who delivered stones, sand and cement, but denied ever engaging the Plaintiff to supply materials or knowledge of the Plaintiff's company Parma Investment.

It was DW1's evidence that he came to know the Plaintiff because he was the Purchasing Officer of the Egerton University and that by virtue of his capacity the Plaintiff could have helped him obtain some payments. DW1 refuted the claim that they had an oral agreement, testifying that entries were made at the gate of Egerton University of every vehicle bringing deliveries.

In respect to the sum of Kshs. 5.4 million given to the Plaintiff, the 1st Defendant testified that the same was advanced on a friendly basis, part of which was to assist in payment of his son's school fees and the remainder to start businesses, which the Plaintiff was to repay when he disposed of his properties in Karen and Madaraka. The 1st Defendant testified that he did not owe the Plaintiff any money and thus the money advanced to the Plaintiff was not a reimbursement. In reference to the Plaintiff's letter to him dated 20/1/2006, DW1 testified that he had instructed his watchman not to allow the Plaintiff in because he was unhappy with the Plaintiff's endless demands for money and not because he owed him money.

As regards the property Plot No. L.R. 209/6810, the 1st Defendant testified that the Plaintiff informed him that he would be asked questions as regards such a large purchase as he was employed as a Purchasing Officer. Thus, he agreed to pay for the house through the 2nd Defendant on condition that the title will be registered jointly in the names of the Plaintiff and the 2nd Defendant, and that he would withhold the title. The 1st Defendant testified that he did not actively take part in the purchase transaction other than forwarding the cheques upon demand. The 1st Defendant also testified that the Plaintiff engaged the services of an architect for purposes of developing the property without his involvement, but that the Plaintiff failed to pay for the architectural services upon demand forcing the 1st Defendant to pay about Kshs. 300,000/- to avoid a lawsuit.

The 1st Defendant made reference to the note addressed to him by the Plaintiff dated 7/8/2002 asking for a loan of Kshs. 15 million for purposes of constructing a house on his Karen property, and that he advanced a further Kshs. 1.2 million to Sam-con Ltd to assist the Plaintiff to purchase a hearse when he commenced his funeral service business. It was his testimony that by virtue of the Plaintiff asking a loan from him confirms that he did not owe him anything.

The 1st Defendant claimed a total of Kshs. 15, 520,260/- being the purchase price of the property together with the rent and profits derived therefrom and council rates. He contends that the title to the property can only be transferred to the Plaintiff when he pays the purchase price property at the current market rate, together with all the rent he has received and interest. The first set of supporting documents filed on

29/8/2011 in support of the Defence case, comprised of: a copy of the title to o. L.R 209/6810 showing joint registration; copies of receipts evidencing payments of land rates and rents paid by the 2nd Defendant; correspondence between the Plaintiff and the 1st Defendant; and letters of demand addressed to the Defendants by the Plaintiff's advocates. The Defendant's Supplementary list of documents filed on 15/11/2011 comprised of correspondence, sale agreement and copies of cheques in respect to the purchase of No. L.R 209/6810 and payment of council rates; and letters of demand of fees for consultancy services addressed to the Plaintiff by the firm of Arch Concepts Architects.

The Defendant's Further Supplementary list of documents filed on 13/4/2012 contained, *inter-alia*, bundle of statements, invoices and delivery notes and payment receipts between Carpentocraft Building Contractors and various companies for the period between July 1997 and December 1998. The Defendants' Second Further Supplementary list of documents consisted of an Official Search Documents and General Payment Advice from the Registrar of Motor Vehicles which divulged the following information about the motor vehicles the Plaintiff had testified he owned and used to supply goods and materials to the Defendants:-

KZC 665:	Lorry/truck registered in the Plaintiff's name as at 1/7/1997
KXB 880:	Station Wagon registered under the name of Malik Autos Limited as at 1/7/1997
KXX 510:	Lorry/Truck registered in the name of Mungai Sarah as at 1/7/1997
KYX 736:	Motorcycle registered in the name of Meshack K. Maina as at 1/7/1997
KAA 753X	(No Official Search Document provided)

On cross-examination, the 1st Defendant stated that though he had an interest in No. L.R 209/6810, he never demanded the Plaintiff to give vacant possession because of their close relationship. He stated further that the Plaintiff's name was on the title because he is the one who came up with the proposal of purchasing the house, and also because the Plaintiff wanted his assistance as a friend. DW1 admitted that the Plaintiff was not in possession of the property illegally. He however claimed entitlement to the property testifying that the Plaintiff made no contribution towards the purchase, thus the Plaintiff must pay for the property before the 2nd Defendant's name can be discharged from the title. DW1 admitted to writing a note to the Plaintiff dated 16/11/2005, and stated that the letter was in response to the Plaintiff's endless demands for money and that he was citing reasons why he could advance any more money to him. DW1 also admitted that the Plaintiff had lorries but testified that he knew that the said vehicles carried yields of the University to the Cereals Board.

On re-examination, DW1 testified that he did not make any demands from the Plaintiff in respect to the suit property because the 2nd Defendant's name is registered thereon. DW1 maintained that in his letter of 16/11/2006, he did not mention nor mean that he owed the Plaintiff.

The Submissions

Both parties filed submissions in further support of their respective cases. The firm of Omangi, Musanga Advocates filed submissions on behalf of the Plaintiff dated 22/10/2014. Counsel submitted that the Defendants were estopped by their conduct from stating that payments made to the Plaintiff were done so on a friendly basis. It was counsel's submission that the piecemeal payments made by the Defendants confirm the Plaintiff's assertions that, first, they were not philanthropic actions, and secondly, the payments were made on the basis of receipt of payment from the Egerton University. Further, that part payment did in fact signify the existence of an implied contract. It was submitted for the Plaintiff that the demand made by the Defendants after filing of his suit was an afterthought and an attempt to hide behind a counterclaim, as they made no demand for reimbursement of the said money.

In respect to limitation of time, counsel submitted that the Defendants paid the Plaintiff in piecemeal and therefore time did not start to run until the year 2006 when the Defendants failed to remit the balance. As regards the Defendants' claim of mesne profits, counsel submitted that the same could only be sought where a person was in wrongful possession of the property and therefore, that the Defendants' claim was misplaced since the Plaintiff's occupation thereof had not been termed illegal or wrongful. Counsel submitted further that the Defendants had not availed a valuation report to ascertain the market value of the property. On the issue of payment of council rates and rents, counsel submitted that the same was rightfully being paid by the Defendants as they still owed the Plaintiff. As regards costs, it was submitted for the Plaintiff an award of costs cannot be sustained in the absence of demand made prior to the institution of the suit.

Kipkenda & Co. Advocates for the Defendants filed submissions dated 10/11/2004. On whether there was a contractual relationship between the parties, counsel submitted that even where there was an oral agreement as alleged by the Plaintiff, the onus was upon him to prove the existence of such relation by establishing performance by either side. In support of this submission, counsel relied on the case of **Gospel Assembly Church Academy of Music & Another v Munene Ngotho (2005) eKLR HCCA (Nrb.) No. 90/2003** wherein Visram J. (now JA.) held that "**....the receipt is evidence of the transaction that took place, a transaction that has not been disputed under oath...A written agreement outlining the transaction of sale and purchase is not mandatory. Here, the oral agreement was evidenced by the issue of a receipt."**

It was submitted that the Plaintiff had failed to avail evidence, such as purchase orders, delivery notes, invoices or receipts as proof of supply of assorted materials to the Defendants. Counsel also submitted that the Plaintiff did not show where the materials were sourced from and that the mode of delivery was doubtful as some of the vehicles alleged to have delivered the supplies is a motorcycle and station wagon car. It was further submitted that the Plaintiff did not produce books of accounts evidencing remittance of Value Added Tax on the received amount of Kshs. 5.4 million whereas the Plaintiff had admitted that the supplies were subject to VAT.

As regards the Kshs. 5.4 million advanced to the Plaintiff by the Defendants, counsel submitted that the same was advanced as friendly loans on a fragmentary basis and on diverse dates upon the Plaintiff's requests to assist him meet hospital bills, start a funeral service business and pay his son's school fees, and on the understanding that the Defendants would be reimbursed in the future. Counsel pointed out to the undertaking made by the Plaintiff to the Defendant on 6/5/2004 for the recovery of Kshs. 500,000/- from the sale of a car, submitting that this was an indication that the Kshs. 5.4 Million was indeed a loan and not payment of services rendered as claimed.

Counsel further submitted that the same concept applied to the money paid to purchase Plot No. L.R. 209/6810, thereby explaining the joint registration of the Plaintiff and the 2nd Defendant. It was submitted that such registration was meant to safeguard the 2nd Defendant's interest pending payment from the Plaintiff. Counsel submitted that if at all the Plaintiff had supplied materials to the Defendants, nothing would have stopped the Plaintiff from obtaining an undertaking from Egerton University that money due to the 1st Defendant would settle his balance before paying the 1st Defendant.

As regards Plot No. L.R. 209/6810, counsel submitted that the Plaintiff was under an obligation to render accounts of the rent received from the said property to the Defendants in view of their joint registration, and particularly because the purchase of the same was financed by the 2nd Defendant. Therefore, that the Plaintiff's continued receipt of rent without accounting for the same amounted to unjust enrichment considering that he did not contribute towards the purchase. It was also submitted that the Defendants were entitled to the rents and profits derived from the property until such time the Plaintiff redeems the property from the 2nd Defendant. Counsel submitted that the Defendants had established their claim of Kshs. 15,520,260/- against the Plaintiff and also that they should be awarded the costs of both the suit and the counter-claim.

The Issues and Determination

The undisputed facts in this suit is that the Plaintiff received some payments from the 1st Defendant, and that the property known LR. No. 209/6810 is registered in the name of the Plaintiff and 2nd Defendant. The other issues arising from the Plaintiff's claim and Defendants' counterclaim which are disputed are as follows:

1. Whether there were any contracts entered into between the Plaintiff and Defendants.
2. If the answer to issue 1 is in the affirmative, whether there is an amount of Kshs 11.6 million due to the Plaintiff from the Defendants.
3. Whether the Plaintiff is liable to repay the Defendants the sum of Kshs 15, 520,260/=.
4. Whether the property known as LR. No. 209/6810 should be transferred to the Plaintiff's sole name.
5. Whether the Plaintiff should give an account of the monies received on account of LR .No. 209/6810.
6. Whether the parties are entitled to the relief sought.

Whether there were any contracts entered into between the Plaintiff and Defendants

The Plaintiff claims that there was a contract between himself and the Defendants who engaged his services to supply construction materials and other related services to a site at Egerton University, totaling to Kshs. 25 Million. The Defendants on the other hand claim to have lent the Plaintiff the sum of through friendly loans. Neither of the parties produced any evidence of written contracts to this effect.

As a general rule, oral contracts, as much as written contracts, are fully enforceable in law and oral contracts can be made quite informally and no writing or other form is necessary. The terms of such oral contracts are inferred from the words or conduct of the parties. In **Halsbury's Laws of England 4th (ed.) Re-Issue Vol. 9(1)** paragraph 602 at page 339 a contract is defined as follows:

> **" ...the most commonly accepted definition is, a promise or set of promises which the law will enforce. The expression 'contract' may, however be used to describe any or all of the following: (1) that series of promises or acts themselves constituting the contract; (2) the document or documents constituting or evidencing that series of promises or acts, or their performance; (3) the legal relations resulting from that series."**

The Plaintiff in this respect relied on two letters, one written by the 1st Defendant and the other by himself, to show the existence of the contract and terms thereof. The contents of the said letters are reproduced in the following paragraphs.

The first letter which is shown to be dated 16th November 2005 is not signed nor addressed to any particular person, but the Plaintiff claimed that it was written to him by the 1st Defendant. The letter states as follows:

> **"There is absolute no change since we met last as everything is practically at halt due to referendum thing.**
>
> **Everyone is talking of 2 to 3 weeks after the referendum. There is some movement on the sale but no money has yet come.**
>
> **In fact since we met last I have been running business by borrowing from friends and some of them have start falling due for repayment and I am stressed.**
>
> **I will sincerely call you if some movement is possible.**
>
> **Thanks**
>
> **NB.**

I could not come as I had to open the office as the man in the office has gone to India and Tihi is not back."

The second letter is dated 20th January 2006 and is addressed to a Mr. Patel, presumably the 1st Defendant, and is signed by the Plaintiff. On its part it states as follows:

"20/1/2006

Dear Mr. Patel.

I hope you started the year well. I am also fine. You are aware that I have tried to leave some two letters for you but the watchmen were very rude. The last one was fairly bad, so what is going on? It is good to know so that I know what to do. You are aware there are issues we need to sort out. We have been friends for along time but the treatment I am now getting is not fair.

1. **Please let us sort out the title deed so that I can look for money to develop this place because am getting sickly and need to get a rest. Also give me what you had agreed.**
2. **The other issue is the boy who kept the documents he has a felling*(sic)* that you gave me the money and I have refused to pass it to him. Let us sort out the issue so that the documents can be destroyed.**
3. **We came back from Sudan last week we seem to have got some American to fund one of the project. He wanted to have a word with the contract but may be when he comes back.**
4. **Please let us met on Thursday 26/1/2006 at JAVA – ABC at 9:30 – 10:00a.m**

Let us sort out a few things.

PAUL O. OGADA"

It is evident from the letters hereinabove that there was some business relationship between the parties, and some money exchanged. The Plaintiff and 1st Defendant also admitted to having been friends in their oral testimony. However, there is no mention of any agreement to supply goods and materials to Egerton University in the said letters, and the references to the business relationship between the parties is in vague terms. The letters refer to projects to be funded, and payment of money by the 1st Defendant but it is not clear what the payment is in relation to.

The elements of a valid contract, whether oral, simple or written are stated in **Halsbury's Laws of England 4th (ed.) Re-Issue Vol. 9(1)** paragraph 603 at page 340 as follows

> **"To constitute a valid contract (1) there must be two or more separate and definite parties to the contract; (2) those parties must be in agreement, that is, there must be consensus on specific matters (often referred to in the older authorities as 'consensus ad idem'); (3) those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (4) the promises of each party must be supported by consideration or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise."**

An examination of the above evidence produced by the Plaintiff therefore shows that there is no reference as to the contract between the Plaintiff and Defendants for the supply of goods and materials to Egerton University and no clarity as to the terms of that contract if any. In addition, the Plaintiff claimed that the said contract was being undertaken by a firm he owned with his deceased wife known as Parma Investments, but did not bring any evidence as to the existence of the said firm, or of any deliveries of good and materials to the Defendants made by the said firm.

Lastly, his evidence of the motor vehicles that supplied the said goods namely the vehicles registered as KZC 665, KXB 880, KXX 510, KYX 736 and KAA 753X was controverted by the Defendants who

showed that the said vehicles were not owned by Parma Investments as claimed, and only one of the vehicles, the one registered as KZC 665, was actually registered in the Plaintiff's name. It is thus the finding of this Court that no contract has been proved by the Plaintiff as between him and the Defendants for the supply of goods and materials to Egerton University.

The Defendants on their part relied on various notes written by the Plaintiff as evidence of Plaintiff's intention to borrow money and agreements to advance him money. The first such note is one written and signed by the Plaintiff dated 24th January 2003 and states as follows:

"Date: 24/1/2003

Dear Patel,

We spoke. Please find enclosed proforma invoice to allow you apply for the loan of Kshs. 5 million agreed upon from the bank.

As agreed I would like the 1.5m for school fees on Wednesday or Thursday. I would also like to have the letter from the bank to Samcon to allow them to start working on the vehicles.

We will discuss other details later.

Paul."

The second note is on the Plaintiff's letterhead and is dated 7th August 2002. It is an unsigned breakdown of sum sums as follows:

"TEMPORARY LOAN 15,000,000

CONSTRUCTION 12,000.000

BALANCE 3,000,000

1. DR. PATRICK OMWANDA AMOTH 500,000/=

2. PAUL O. OGADA 200,000/=

3.SCHOOL FEES

9/8/2002 & 26/8/2002 2,300,000"

The last evidence of a friendly loan to the Plaintiff relied upon by the Defendants was a signed letter dated 6th May 2004 from the Plaintiff to the 1st Defendant as follows:
"6TH MAY, 2004

MR. BATUK PATEL

NAIROBI.

Dear Mr. Patel.

As we discussed this morning, this is to give you the undertaking that you will recover the 500,000/= from Mr. Onono's payment towards the car sale. Kindly do the needful.

PAUL O. OGADA"

The Defendants also produced in evidence a cheque payment by the 2nd Defendant to the Plaintiff dated 23rd January 2002 for Kshs 1,000,000/=, and the Plaintiff admitted in evidence that the 1st Defendant did pay Kshs 1.2 million to Sam-con Ltd on his behalf as deposit for some motor vehicles.

The only evidence thus of actual payments made by the Defendants to the Plaintiff is of Kshs 2.7 million shillings. It was not shown how these payments were linked to or consequent to the notes that were produced in evidence by the Defendants. This Court finds that out of this amount it is only the payment of Kshs 500,000/= in which the Plaintiff expressly gives an undertaking to repay. The circumstances in which the other two payments of Kshs 1,000,000/= and Kshs 1.2 million were made are not clear, and this Court cannot find that they were advanced as friendly loans as alleged by the Defendants as there was no express or implied promise by the Plaintiff to repay the said sums. This Court has in this respect paid regard to the definition of a contract of loan of money as stated in **Chitty on Contracts: Volume II, Specific Contracts, Thirtieth Edition** at paragraph 38-238 at page 909 as follows:

> **"A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest"**

Whether there is an amount of Kshs 11.6 million due to the Plaintiff from the Defendants.

On this issue, this Court has already found that there was no evidence brought of any contract for the Plaintiff to supply of goods and services to the Defendants. The Plaintiff's claim for Kshs 11.6 million owed to him by the Defendants arises from the payments he states were due to him under the said alleged contract, and must therefore accordingly fail. This Court in this regard also notes that the Plaintiff did not bring any evidence of the consideration that was to be paid under the alleged contract, nor of the payments he alleged were made to him by the Defendants by way of personal cheques and cash.

Whether the Plaintiff is liable to repay the Defendants the sum of Kshs . 15, 520,260/=

As to the issue of repayment of the moneys alleged to have been advanced to the Plaintiff by the Defendants, this Court has already found that the only instance where such a friendly loan could be inferred is with respect to the payment of Kshs 500,000/- that the 1st Defendant made to a Mr. Onono and which the Plaintiff undertook to repay. The Plaintiff in this regard did not bring any evidence of payment of the said sum.

The Defendants also sought the payment of the money advanced and expenses incurred to purchase the property known as LR. No. 209/6810. The Court notes from the evidence of payments for the said property, that the cheques were drawn in the name of, and paid to the seller of the property , namely James Ogoda Muga, who also signed a sale agreement dated 1/02/2002 and transfer dated 08/03/2002 in favour of the Plaintiff and 2nd Defendant. The said money was therefore neither paid to nor loaned to the Plaintiff. In addition, the 2nd Defendant was consequently registered as a co-owner of the said property, and cannot therefore now demand back payment without relinquishing his ownership.

This Court therefore finds that the Plaintiff is liable to pay the Defendants the sum of Kshs 500,000/= being the amount proved by the Defendants to have been advanced on the Plaintiff's behalf and which the Plaintiff also undertook to repay. As the said undertaking did not allude to any interest payable, the Defendants' claim for payment of interest on this sum cannot lie.

Whether the property known as LR. No. 209/6810 should be transferred to the Plaintiff's sole name.

Evidence was brought of the sale agreement and transfer of the property known as LR. No. 209/6810 to the Plaintiff and 2nd Defendant. No allegation has been made by either of the parties of fraud in the said sale and transfer. What the Plaintiff alleges is that it was bought and paid for by the Defendants as part of

the payments due to him under the contract to supply goods and services to them. This court has found that no such contract existed, and therefore no such payment was due to the Plaintiff. The Defendants also claim a refund of the money paid for the suit property, which this Court has found is not merited. Therefore, the legal effect and purchase and registration of LR. No. 209/6810, and the determination of the issue whether the said property can be registered in the sole name of the Plaintiff, will have to be guided by the normal principles of law that apply to real property.

A perusal of the title to the said property that was produced in evidence shows that it was registered under the repealed Registration of Titles Act, and was transferred to the Plaintiff and 2nd Defendant jointly on 15th April 2002. The incidents of joint ownership also known as a joint tenancy is that each party is presumed hold both the legal and beneficial interest in the two properties in equal shares, and also in the event of severance of the joint tenancy. The Indian Transfer of Property Act which was the substantive law that applied to land registered under the Registration of Titles Act provided as follows under sections 45 and 46:

> **"45. Where immovable Property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.**
>
> **In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.**
>
> **46. Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interest in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests"**.

The Plaintiff and 2nd Defendant are therefore deemed to be equal owners of LR. No. 209/6810 until and unless the joint ownership is severed in the manner allowed by law. At the time of the dispute arose the applicable law in this regard was common law which is explained in **Halsbury's Laws of England 4th (ed.) Re-Issue Vol. 39(2)** paragraphs 198-206 at page 145 to 149**.** In summary where a legal estate was vested in joint tenants it could be

severed under common law by notice in writing to the other joint tenants, or by doing such other acts and things that would normally sever a legal interest in land such as disposition of one's interest or an agreement between the parties to sever the tenancy. The Plaintiff did not bring any evidence of such severance.

A transfer of LR. No. 209/6810 to the Plaintiff's sole name cannot therefore be ordered by this Court unless the provisions of the law as regards the severance of the joint tenancy between the Plaintiff and 2nd Defendant are met. The law in this regard is now provided in section 91 of the Land Registration Act of 2012 which provides that an instrument signifying an agreement by joint tenants to sever the joint tenancy be registered in section 91(7). The said section provides as follows:

> **91. (1) In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.**
>
> **(2) Except as otherwise provided in this Act, if two or more persons, not forming an association of persons under this Act or any other way which specifies the nature and content**

of the rights of the persons forming that association, own land together under a right specified by this section, they may be either joint tenants or tenants in common.

(3) An instrument made in favour of two or more persons and the registration giving effect to it shall show—

(a) whether those persons are joint tenants or tenants in common; and

(b) the share of each tenant, if they are tenants in common.

(4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

(a) dispositions may be made only by all the joint tenants;

(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or

(c) each joint tenant may transfer their interest *inter vivos* to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.

(5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

(7) Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.

(8) On and after the effective date, except with leave of a court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common."

Whether the Plaintiff should give an account of the monies received on account of LR .No. 209/6810

The nature of a joint tenancy is described in **Halsbury's Laws of England 4th (ed.) Re-Issue Vol. 39(2)** paragraphs 196 at page 145 as follows**:**

"Each joint tenant has an identical interest in the whole land and every part of it. The title of each arises by the same act. The interest of each is the same in extent, nature and duration….At common law the interest of each must vest at the same time. These are the four unities of title, interest, possession and time…"

Therefore each joint tenant of the legal estate is entitled to possession of the property, however situations may arise where not all the tenants are in possession. In such situations, the position under common law as to whether the joint tenant in possession was liable to pay the other joint tenants rent were decided by the courts under a process known as equitable accounting, which was the practice of the courts to require a co-owner in sole occupation to give credit for an occupation rent. However, this only arose if the other joint owners had been turned out of the property rather than if they left voluntarily. There is now a more recent approach as stated in **Murphy vs Gooch (2007) EWCA Civ 603** that an occupation rent may be paid where it is necessary to do justice or equity between the parties.

In the present case the 2nd Defendant did not bring any evidence that he had requested possession of LR. No. 209/6810 which had been denied by the Plaintiff at the time the suit property was purchased in 2002 or since the said purchase. It is the finding of this Court that the 2nd Defendant therefore acquiesced to the Plaintiff's sole possession for over 10 years, and cannot now demand an account of rent for the said period.

Whether the parties are entitled to the relief sought.

From the f findings in the foregoing, it is evident that the Plaintiff has not shown a *prima facie* case to entitle him to the reliefs he seeks in his Plaint. As regards the Defendants' Counterclaim they have partially succeeded, and even then only with respect to one prayer that has not been allowed in its entirety. In the circumstances I am of the view that it would not be fair and in the interests of justice to condemn the Plaintiff to pay the Defendant's full costs of their counterclaim. It would also not be appropriate to order the Plaintiff to pay the costs of the suit as it was manifest from the evidence adduced by the parties that there has been a course of dealing between them that led to this suit, the exact nature of which they were not willing to reveal to the Court.

I accordingly enter judgment for the Defendants as against the Plaintiff only to the extent of ordering that the Plaintiff shall pay the Defendant the sum of Kshs 500,000/= together with interest at court rates from the date of this judgment until payment in full. The prayers in the Plaintiff's Plaint and the remaining prayers in the Defendants' Counterclaim are denied. Each party shall bear their costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 29th day ofJanuary, 2015.

P. NYAMWEYA

JUDGE