REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1327 OF 2007

PRECAST PORTAL STRUCTURE LIMITED…..…….. PLAINTIFF

VERSUS

RICCARDO LIZIER…….....……..…..…..1ST DEFENDANT

PIETRO LANGUI…….....……..…....…2ND DEFENDANT

IVREA GROUP.....3RD DEFENDANT

CATHOLIC ARCHDIOCESE, NAIROBI.....4TH DEFENDANT

JUDGMENT

Introduction

The Plaintiff commenced this suit by way of a Plaint dated 8th June 2004 as amended on 30th March 2005. The Plaintiff avers that at all material times, the 1st and 2nd Defendants were the registered owners of Land Reference no. 9953/1 registered under grant no. IR/16910 situated on Kamiti Road near Zimmerman, Nairobi. The Plaintiff alleges that on diverse dates in the year 1990, the 1st and 2nd Defendants obtained through the Plaintiff's director Sergio Lolli, soft loans amounting to Kshs 450,000/-

The Plaintiff contends that the 1st and 2nd Defendants approached it for a further advance of Kshs 150,000/-, and that parties agreed that the money loaned earlier and the additional Kshs 150,000/-be deemed consideration for a 0.57 hectares plot which was to be excised from Land Reference no. 9953/1. According to the Plaintiff, the 1st and 2nd Defendants who were in the process of subdividing their land identified the plot on the ground to the Plaintiff.

It is the Plaintiff's averment that in anticipation of putting up its own office on the plot and at the 1st and 2nd Defendants' invitation, it relocated its office from industrial area to LR No. 15314/5 which was registered in the 2nd Defendant's name. The Plaintiff alleges that the Defendants allowed it to occupy LR No. 15314/5 pending finalization of the subdivision and completion of the contract but at a rent.

The Plaintiff stated that the 1st and 2nd Defendants subdivided land Reference no. 9953/1, and that the plot they had contracted for was registered as LR No. 15314/10 (herein after "the suit property"). The Plaintiff contends that the 1st and 2nd Defendants failed and/or refused to transfer the suit property to it

and instead, donated the plot to the 4th Defendant. According to the Plaintiff, the transfer in the 4th Defendant's favour which was registered on 5th January 2004 was fraudulent, irregular and unlawful. It is the Plaintiff's averment that before the transfer, the 4th Defendant had notice of the Plaintiff's interest in the land.

It is contended that by a letter dated 20th March 2004, the 1st and 2nd Defendants offered LR 15314/5 which was occupied by the Plaintiff and measured 0.2150 hectares together with monetary compensation in lieu of the suit property. It is the Plaintiff's case that it has been in occupation of LR 15314/5 since 1991 and that the 1st and 2nd Defendants wants to evict it before the dispute in respect to the two plots is determined, which action is punitive, malicious and unfair. The Plaintiff has sought judgement against the Defendants jointly and severally for:

a. An injunction to restrain the Defendants, their servants and or agents from constructing, developing, trespassing, selling, transferring, giving in exchange, changing or in any other way encumbering or utilizing LR 15314/10 Kamiti Road Nairobi.
b. A declaration that the Plaintiff is the sole legal beneficial owner of LR No. 15314/10 Kamiti Road Nairobi.
c. A declaration that transfers of LR No. 15314/10 Kamiti Road Nairobi to the 3rd Defendant is fraudulent and/or irregular.
d. An order for cancellation of certificate of title IR 93733 being the title document for LR No. 15314/10.
e. An order compelling the Defendants to transfer LR No. 15314/10 to the Plaintiff forthwith.
f. An injunction to restrain the 1st and 2nd Defendants from evicting, harassing, threatening to evict, trespassing into or in any other way interfering with the Plaintiff's occupation and quiet enjoyment of land reference number 15314/5 Kamiti Road Nairobi.
g. An order that the Plaintiff does deposit the monthly rent of Kshs 5,000/- into an interest earning account in the name of the advocates on record for the parties herein.

The Plaintiff also prayed for other orders in two sets of alternative prayers. In the first set of alternative prayers it sought the following orders:

a. An order compelling the 1st and 2nd Defendants to transfer LR 15314/5 to the Plaintiff forthwith.
b. In default, the Registrar of the court does execute transfer documents in place of the 2nd Defendant.
c. That plot numbers 15314/10 and 15314/5 be valued and the 1st and 2nd Defendants be ordered to pay the Plaintiff the difference in the value of the two plots.

The orders sought by the Plaintiff in the second set of alternative prayers were as follows:

a. The Defendants be ordered to pay the Plaintiff the prevailing market value of LR 15314/10.
b. General damages for breach of contract
c. General damages for loss of business
d. Special damages of Kshs 735,000/- being rent for the alternative premises.
e. Interest on special and general damages
f. Cost of the suit.

The Plaintiff's Case

The hearing of this suit commenced on 25th November 2010 when the Plaintiff called two witnesses. Sergio Lolli (PW1) testified that he was 77 years old and was a retired road engineer. He stated that he was one of the directors and also a chairman of the Plaintiff, whose business was construction of heavy structural work for go downs in concrete pre-fabrication. PW1 informed the court that the 1st and 2nd Defendants were known to him for a period of about 30 years and that they were directors of the 3rd Defendant.

PW1 averred that he acquired heavy earth moving equipment from Tanzania, and that his relationship with the 1st Defendant began when the 1st Defendant who was constructing a dam between Isinya and Namanga hired some of his equipment. PW1 contended that while looking for land to put his equipment, he found land which was on sale but that he did not have money to buy it.

The evidence of PW1 was that he then inquired from the 1st Defendant whether he was interested in the land, and that the 1st Defendant agreed to buy the land which was known as LR Numbers 9953 and 9952. PW1 stated that it was later agreed that he keeps his machinery on the land in consideration of his taking care of and supervising the 1st Defendant's equipment. He averred that during the time he was on the 1st Defendant's land, the 1st Defendant was importing a lot of things from Italy and that the 1st Defendant run short of money and borrowed loans from him.

It was the evidence of PW1 that at one time the 1st Defendant needed a loan of Kshs 150,000/- in return for one of the sub-divisions which the 1st Defendant was preparing. PW1 contended that the agreement was verbal and that he accepted the offer and chose one of the subdivisions which was suitable for him. While stating that the 1st Defendant told him that the plot was approximately Kshs 550,000/- but that he needed Kshs 150,000/- to clear some containers, PW1 averred that he had already loaned the 1st Defendant over Kshs 400,000/- and that the total loan was about Kshs 600,000/-.

According to this witness, there were 2 plots of 5 acres each and that the land he identified fell under LR Number 9952. PW1 made reference to a sketch in his bundle of documents dated 7th July 2008 and averred that the plot he identified was number 5 on the sketch plan and that it was 1.5 acres. He averred that they later entered into an agreement and he made reference to an underlease in his bundle of documents signed between him and the 1st and 2nd Defendants.

While stating that the plot was supposed to be transferred to him immediately after the subdivision, PW1 averred that he took possession of the same immediately, and started constructing a boundary wall which was stopped by the City Council of Nairobi since he did not have a title deed and approved plans. PW1 stated that he initially demanded for the title from the 1st and 2nd Defendants verbally, and that they later exchanged correspondences which were in his bundle of documents. The evidence of PW1 was that the 1st and 2nd Defendants never denied that he was entitled to the plot.

PW1 stated that he never got any title or a copy of the approved sub-division. He averred that he was storing his equipment on LR 15314/5 which was plot no. 2 on the sketch plan, where he was paying rent whose receipts were in his supplementary list of documents. PW1 contended that he wanted to build a big go-down on plot no. 5 and that when he realized he could not build, he decided to sell the plot. While stating that he had identified a buyer who was willing to pay 5 million, PW1 averred that the transaction could not go through since he did not have any title and that the 1st Defendant refused to sign any papers.

It was the evidence of PW1 that he later learnt that the 1st Defendant was developing the plot which he had contracted to sell to him. He averred that he went to the Catholic Church and informed them that the land belonged to him and made reference to a letter dated 20th December 2002 to this effect, addressed to the Catholic Mission in Ruaraka. According to PW1, the Catholic Church did not respond to their letter and that he kept raising the issue with the 1st and 2nd Defendants. He made reference in this respect to demand letters dated 28th October 2002 and 21st November 2002 addressed to the 1st and 2nd Defendants.

PW1 averred that the Plaintiff placed a caveat on the suit property and sought assistance from the Kasarani District Officer, who ordered the 1st Defendant to stop construction on the disputed plot through a letter dated 18th February 2004 whose copy was exhibited. It was the evidence of PW1 that they held a meeting where the 1st Defendant presented before the District Officer title deeds dated 22nd December 2003 for LR 15314/10 and 15314/5 registered in the name of the 4th and 2nd Defendants respectively, and that the 1st Defendant informed them that they were expecting another title.

According to the witness, a visit to Ardhi house revealed that the titles were all forged. PW1 contended that the 3rd Defendant wrote to him a letter dated 20th March 2004 acknowledging his claim, and stated that the Defendants made promises which they never honoured. PW1 contended that he was not occupying the smaller plot and made reference to related cases HCCC No. 187 of 2007 and HCCC No 3645 of 1995 whose copy of judgements he produced as exhibits. PW1 stated that he was seeking specific performance and transfer of the suit property to him as well as special damages and cost of the suit.

During cross examination, PW1 stated that he had visited plot no. 5 about five months prior to testifying before the Court and that there was a boundary wall of iron and steel all round. While stating that he had possession of plot no. 5 for about 2 years, PW1 informed the Court that he removed all the top black cotton soil and replaced it with murram. He contended that the Chief of Roysambu accompanied him to the District Officer who stopped the Defendants from constructing.

PW1 stated that the agreement in his bundle of document is not dated and registered. He averred that he accepted alternative compensation at the instance of the 1st and 2nd Defendants after the donation to the church had been made. He contended that HCCC No. 187 of 2007 and HCCC No 3645 of 1995 were in respect to other sub plots and not plot no. 5. He stated that he was not accusing the church of any fraud and was not seeking anything from the church.

In re-examination, PW1 averred that HCCC No. 187 of 2007 and HCCC No 3645 of 1995 were in respect to plot no. 3 of the subdivision plan. He maintained that it was the 1st Defendant who was building on plot no. 5 and not the church. He contended that he notified the church of his interest one year before the said land was transferred to them.

The Plaintiff called Charles Kipkurui Ngetich (PW2) who testified that he was a Registrar and had been in the lands office for slightly over 5 years. He stated that he held a Bachelors of Art degree, a Bachelors of Law degree, diploma in law and was also an advocate of the High Court of Kenya. PW2 made reference to a title in respect to Grant no. I.R 16910 and LR Number 9953 and stated that there were no records in their office showing the land had been subdivided. He contended that although entry no. 11 shows that a sub-division was approved by the City Council of Nairobi in 1998, there was no subdivision certificate from the City Council of Nairobi in their records.

PW2 averred that they had deed files in respect to L.R Numbers 9953/1 and 9953/2 which had nothing and seemed to have been tampered with. He stated that the transfer documents in respect to IR 16910 was a transfer to the 1st Defendant for LR No. 9953/2 executed on 24th September 1982 and registered on 28th September 1982, and that according to their records, the said property was still in the name of the 1st Defendant. Further, PW2 testified that there was also a transfer done on 5th January 2004 with respect of LR No. 9953/1, and that the transfer was from the 1st and 2nd Defendants to the 2nd Defendant.

While stating that a copy of the deed plan had been plucked out from their file, PW2 stated that they did not have evidence of issuance of any title. PW2 made reference to a copy of a title in his deed file and contended that the document was not sealed. He also made reference to a decree in respect to HCCC No. 3645 of 1995 which was registered and stated that there was confusion since it appeared that the decree had been rejected. He stated that a caveat in respect to LR No. 9953, title IR 16910/1 was reflected as entry no. 16 and that there was no record to show any amalgamation of the two land parcels.

PW2 made reference to a title in respect of LR 15314/10 in the name of the Catholic Diocese and stated that it seemed to be a forgery because the IR number was missing. He contended that IR 37031/8 has a recitation which showed that the certificate should have been entry no. 8 on the title and that the mother title should have been IR 37032/8. While stating that although entry no. 13 shows that the mother title was actually IR 16910, PW2 informed the Court that from their records, he could not tell whether there was any subdivision of the sub plot.

PW2 contended that the certificate of title issued to the Catholic Archdiocese Nairobi for LR 15314/10 had its origin in I.R 370232/8 and that it gave rise to 93733, 93730 and 6 others. He averred that there

was a proposed amalgamation of LR 9953/1 and 9953/2. PW2 did not have the original titles for LR 15314/10 and 15314/5, and contended that copies of the titles had been removed from the deed files. It was his evidence that receipt of rates payment certificates preceded registration of documents and that Land Reference numbers were issued by the Director of Survey, and that they only issued I.R numbers.

PW2 produced a copy of a certificate of title for IR No. 37032, LR No. 9953/1 as Plaintiff Exhibit 3 and a transfer for LR 9953/2 from Henry Anthony and Christine Marguerite Paule Anthony to the 1st Defendant dated 24th September 1982 was produced as Plaintiff Exhibit 4. He further produced a transfer dated 12th December 2003 for LR 9952/1 from the 1st and 2nd Defendants to the 2nd Defendant, a certified copy of the IR register and receipt for rates payment for 15314/5 and 15314/10 as Plaintiff Exhibit 5, 6 and 7 respectively.

According to PW2, no transaction could be carried out on the files in the state they were in and that the only solution would have been to recall the titles from the original owners. His evidence was that it was not possible for them to reconstruct the title unless they received court directions to that effect. This particular witness was unavailable to complete his testimony and for cross-examination, having been transferred to another work station, and the Plaintiff's counsel requested that his testimony remain on the record.

The Plaintiff called Geoffrey Swanya Birundu (PW3) as its last witness. PW3 stated that he was a Deputy Chief Land Registrar and was an officer of the Court. He informed the Court that he had worked with the lands office for close to 15 years. His evidence was that that they did not have the records for LR 9953/1 and 9953/2, and he contended that the records could have been lost or misplaced. He informed the Court that they also did not have the title to 15314/5 and 15314/10.

According to this witness, the Registrar's Book which shows the sequencing of registration indicated that titles 15314/5 and 15314/10 were registered and given I.R nos. 37032/5 and 37032/8 respectively. PW3 averred that although he appended his signature to titles for LR 15314/10 and 15314/5, the titles and their correspondence files were either misplaced or lost. His contended that the only remedy in such a situation was to call for the original title from the registered owners who would have been expected to prepare and file a deed of indemnity.

PW3 informed the Court that the deed of indemnity was intended to indemnify the government and the Department of Lands if there has been any other transaction altering the status of the original title. He averred that where title was lost due to no fault of the registered owner, a title could be reconstructed where a copy was availed. The evidence of PW3 was that reconstruction could also be ordered by the Court.

During cross examination, PW3 stated that in the registration diary, LR 15314/10 was given I.R number 93733/1 which could not exist if the title had not been issued and registered. He averred that the Catholic Archdiocese of Nairobi indicated on the title was the registered owner and further, that one could not say that there was fraud in the processing of the title by just looking at the document.

During re-examination, PW3 contended that during reconstruction of a file, he does not go behind the documents brought by the parties such as the transfers to find out if they were fraudulent. Lastly, PW3 averred that it was not possible to tell whether parties engaged in fraud before presenting the documents at the lands office.

The Defendants' case

The 1st, 2nd and 3rd Defendants filed a statement of defence dated 20th July 2004 where they admitted having obtained a friendly loan from the Plaintiff but contended that it was fully repaid. The 1st, 2nd and 3rd Defendants denied the allegation that there was an agreement to the effect that the said loan was to be deemed as consideration for a 0.57 hectares plot which was to be excised from LR No. 9953/1.

According to the Defendants, the under lease executed in 1991 determined three days before 1st April 2003 when the term of the head lease expired and therefore, that no claim could be sustained by the Plaintiff against them in respect to the underlease. It was also contended by the Defendants that there was no consideration for the alleged sale of the suit property and that the underlease passed no proprietary rights to the Plaintiff.

The 1st, 2nd and 3rd Defendants denied that the Plaintiff had a purchaser' interest on the suit property and averred that they were under no obligation to transfer the suit property after the expiry of the term of the underlease. According to the 1st, 2nd and 3rd Defendants, the 4th Defendant lawfully acquired ownership of the suit land after grant of a new lease from the government, and the allegations of fraud were denied and the Plaintiff put to strict proof.

The 4th Defendant filed a statement of defence dated 13th June 2005 wherein it denied the Plaintiff's claim in its entirety and averred that it was not and had never been privy to any agreement between the Plaintiff and the 1st, 2nd and 3rd Defendants for the sale of any of the 1st and 2nd Defendants' parcels of land to the Plaintiff. The 4th Defendant avered that it purchased the suit property from the 1st and 2nd Defendants for the sum of Kshs 200,000/- and that a transfer of the same was drawn and registered in the Lands Titles Registry in Nairobi on 5th January 2004, whereof a certificate of title registered as I.R 93733/1 was issued it.

The 4th Defendant contended that it was an innocent purchaser for value without notice and that its title to LR 15314/10 which was obtained for value and legally cannot be impeached. The 4th Defendant averred that the 1st and 2nd Defendants were not its agent and denied the allegation of fraud, irregularity and or unlawfulness outlined in the Plaint.

The Defendants did not call any witnesses to give evidence at the hearing of this suit..

The Issues and Determination

At the close of evidence, parties were directed to file and serve their submissions. The Plaintiff's Advocate filed submissions dated 21st January 2015, while the 4th Defendant's Advocates filed submissions dated 3rd March 2015. The 1st, 2nd and 3rd Defendants did not file any submissions.

It is not disputed that the suit property herein being LR Number 15314/10 is registered in the name of the 4th Defendant who has title to the same. Having considered the pleadings, evidence and submissions by the parties, I find that the issues that require determination are as follows:

1. Whether the Plaintiff has any entitlement to LR Number 15314/10.
2. Whether the 4th Defendant is an innocent purchaser for value of LR Number 15314/10
3. Whether the Plaintiff is entitled to the reliefs sought.

Whether the Plaintiff has any entitlement to LR Number 15314/10 .

The Plaintiff in submissions dated 21st January 2015 stated that the basis of its case was a contract between it and the 1st and 2nd Defendants trading in the name and style of the 3rd Defendant. The Plaintiff submitted that the contract can be implied in the conduct of the parties and that it was also reduced into writing in an undated underlease made between it and the 1st and 2nd Defendants executed in 1991.

Counsel for the Plaintiff stated that the subject matter of the underlease was a lease of a portion of 0.57 hectare identified as number 5 for the remainder of the term of the head lease less the last three day and secondly, a transfer of the said portion by the 1st, 2nd and 3rd Defendants to the Plaintiff upon which the

underlease would stand surrendered. It is the Plaintiff's submission that no party denied the existence of the contract in whatever form and further, that the Defendants had admitted the existence of the contract and expressed willingness to be bound by it. The Plaintiff further submitted that the Defendants in the said underlease, agreed, acknowledged and undertook to transfer to it 0.57 hectares which was to be excised from amalgamation and subdivision of Land Reference numbers 9953/1 and 2.

While stating that the consideration for the contract was Kshs 600,000/- as testified by PW1, the Plaintiff argued that it was verbally agreed that in lieu of the sum being repaid, the Defendant would allocate to PW1 or his nominee a subdivision marked a number 5 on Land Reference Number 9952. The Plaintiff submitted that this position had not been controverted save by a mere averment in the Defence which was not substantiated by oral or documentary evidence and further, that the 1st, 2nd and 3rd Defendants acknowledged its claim by executing the underlease.

The Plaintiff submitted that as can be discerned from their bundle of documents, the 1st and 2nd Defendants acknowledged its claim on behalf of the 3rd Defendant, and even pleaded with the Plaintiff for more time to enable them procure the title deeds from the lands office. The Plaintiff submitted its claim for Land Reference number 15314/10 is legitimate as evidenced by a letter dated 20th March 2003 from the 3rd Defendant through the 2nd Defendant. Counsel contended that since the Plaintiff's claim to Land Reference number 15314/10 has at all material times been acknowledged by all parties, there is no plausible explanation why the 1st , 2nd and 3rd Defendants sought to sell Land Reference 15314/10 to the 4th Defendant save that it was to perpetuate fraud.

While submitting that the Defendants' averment that the term of the underlease for Land Reference 15314/10 abated upon the head lease term abating and that the new lease granted by the government did not recognize the Plaintiff's claim had no basis, the Plaintiff argued that even the title passed to the 4th Defendant had to be extended by the Commissioner of Lands as it had already expired. Counsel submitted the Defendants can't plead effluxion of the term of the head lease as their reason for not complying with their part of obligations, whereas the validity of the head lease is a preserve of the state.

It was submitted that the Plaintiff was never called upon to meet the cost of extension of the head lease and that the Defendants' assertion that the lease was a different property upon renewal was an afterthought, evasive and designed to defraud the Plaintiff by denying it entitlement. Counsel argued that as a result of the Defendants' refusal to transfer Land Reference number 15314/10 to the Plaintiff, the Plaintiff has been gravely inconvenienced.

The Court notes that the fact that a contract by way of an underlease was entered into between the Plaintiff and the 1st and 2nd Defendants is not contested. The said undated executed underlease made between the parties was produced as evidence before the Court. The Defendants in their Defence dated 20th July 2004 also admitted that the execution of the underlease took place in 1991. The Plaintiff averred that the contract reduced into writing a verbal agreement between the parties that in consideration for the monies advanced, the 1st and 2nd Defendants would transfer to the Plaintiff 0.57 hectares from their Land Reference no. 9953/1 which they were in the process of subdividing.

The Plaintiff's allegation of having advanced a loan to the Defendants was admitted by the 1st, 2nd and 3rd Defendants in their statement of defence dated 20th July 2004. The Defendant however, contended that the loan was fully repaid. The 1st, 2nd and 3rd Defendants did not adduce any evidence to substantiate the claim that they repaid the loan. Under section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. See **Munyu Maina vs. Hiram Gathiha Maina, Nyeri CA No. 239 of 2009**. How the 1st and 2nd Defendants repaid the loan was a fact within their personal knowledge, and it was incumbent upon them to rebut the evidence of PW1 that the loan was in exchange for a transfer of a 0.57 hectares plot to the Plaintiff.

The 1st, 2nd and 3rd Defendants denied that the Plaintiff had a purchaser' interest on the suit property. The Plaintiff however furnished evidence of correspondences exchanged between it and the 1st and 2nd Defendants where the said Defendants acknowledged the Plaintiff's claim which evidence was not controverted. The Plaintiff furnished a copy of a letter dated 20th December 1995 from its director complaining to the 3rd Defendant through the 1st and 2nd Defendants, that issuance of a title deed for a subdivided plot purchased from the said Defendants had taken extremely long.

The 1st Defendant responded to the Plaintiff through a letter dated 22nd December 1995 stating that they were willing to finalise the issuance of the title deed and assuring the Plaintiff that they had paid all the required fees. In a further letter dated 2nd March 1996, the 2nd Defendant wrote to the Plaintiff as follows:

"2/3/1996

PRECAST PORTAL STRUCTURES

P.O BOX 14560

NAIROBI

ATTN: MR. S. SHAH

Dear Sir,

RE: YOUR REQUEST OF THE TITLE DEED

We refer to the above mentioned letter regarding the issue of the title deed.

We have communicated with the officers of the Land Office and have informed us that by Wednesday next week the first stage of processing the title deed will be through (sic)

Therefore please, we wish to kindly request you to give us more time e.g a month to enable u to proceed with the next stage

Yours faithfully

For: Ivrea (K)Ltd

Piero Langiu

The 1st, 2nd and 3rd Defendants further acknowledged that the Plaintiff had a legitimate claim to Land Reference number 15314/10 in their letter of 20th March 2004 which reads as follows:

"IVREA GROUP

P.O BOX 65057

RUARAKA

NAIROBI.

20/3/04

PRECAST PORTAL STRUCTURES

P.O BOX 14558

NAIROBI

ATTN:MR. SERGIO LOLLI

RE: DIPUTED LAND ISSUES

We refer to your letter of 10th February 2004, to the meeting at the DO Kasarani, and another one at Queen of Apostles Church. Allow me to acknowledge and appreciate your willingness to sort out all the issues amicably to the reasonable satisfaction of all the parties concerned.

This is our response with reference to the above mentioned letter and meetings:

1. **All parties-Mr. Lizier and Mr. Langui and those who have attended the meetings-acknowledge your legitimate claim to LR No. 15314/10.**
2. **In spite of that (no. 1 above) you have expressed your willingness to give up your rights over LR No. 15314/10 in exchange for LR No. 15314/5 plus adequate compensation for the difference between LR No. 15314/10 and LR No. 15314/5.**
3. **Both Mr. Lizier and myself are in agreement and ready to transfer LR No. 15314/5 to yourself as soon as possible.**
4. **However, we would prefer further discussions to establish what more would be owed to you, taking into account storage claims, developments, taxes and lease extension taxes.**

We remain open and ready continue (sic) with our dialogue with confident hope that we shall arrive at amicable solutions for the benefit of us all.

Yours faithfully

For: IVREA group

Piero Langiu

Director

CC: CID KASARANI

This letter substantiates the evidence of PW1 that the Plaintiff was legitimately entitled to LR 51314/10.

The 1st, 2nd and 3rd Defendants further contended that they were under no obligation to transfer the suit property to the Plaintiff after expiry of the term of the head lease. They averred that the underlease executed in 1991 determined three days before 1st April 2003 when the term of the head lease expired, and that following expiry of the term of the head lease, the Plaintiff could not sustain any claim against them based on the underlease.

In my view, this argument cannot lie since the 4th Defendant in its submission admitted that the transfer between it and the 1st and 2nd Defendants is dated 12th December 2003. It follows that the head lease was renewed in the 1st and 2nd Defendant's favour who instead of honouring their obligations, entered into a different contract with the 4th Defendant in a bid to deny the Plaintiff of its entitlement.

It would therefore be unjust to allow the 1st and 2nd Defendants to evade their obligations under the guise that the expiry of the head lease determined the underlease when there is uncontroverted evidence that the 1st and 2nd Defendants refused to process the Plaintiff's title expeditiously long before the head lease expired. The Plaintiff's letters dated 16th August 1995, 20th December 1995, 12th January 1996, 26th February 1996, 26th March 2002, 10th July 2002 and demand letters dated 28th October 2002 and 21st November 2002 demanding the issuance of a title precede the expiry of the head lease on 1st April 2003.

In my view, the Plaintiff has on a balance of probabilities established its claim to LR 15314/10.

Whether the 4th Defendant is an Innocent Purchaser for Value of LR Number 15314/10

Counsel for the Plaintiff argued that the 4th Defendant was not an innocent purchaser for value without notice of the Plaintiff's claim. It was submitted that on 20th December 2002, the Plaintiff wrote to the 4th Defendant asserting its legal and beneficial right to Land Reference number 15314/10. Counsel argued that while aware of the existing dispute, the 4th Defendant went ahead to accept the donation of Land Reference Number 15314/10 from the 1st, 2nd, and 3rd Defendants which was dishonest and fraudulent.

The Plaintiff submitted that the purported transfer to the 4th Defendant was not the first in time and that since it was not without notice, it to be declared null and void *ab initio* and further, the title for IR 93733, Land Reference number 15314/10 issued in favour of the 4th Defendant should be cancelled together with all entries entered in the register.

The 4th Defendant in its submissions argued that the Plaintiff had failed to prove any fraud on its part. The 4th Defendant relied on the case of **Charles Gathuma Munge vs. Peter Icharia Munge & Another (2014) eKLR** where the court stated that the party alleging fraud had the burden of proving the allegations of fraud. Counsel contended that the Plaintiff tendered evidence of fraud against the 1st and 2nd Defendants but that no evidence was tendered to prove fraud against the 4th Defendant.

It was submitted that in his evidence, PW1 confirmed that the 4th Defendant was not to blame for the Plaintiff' misfortunes. Counsel argued that without any evidence connecting the 4th Defendant to the particulars of fraud pleaded by the Plaintiff, the 4th Defendant was an innocent purchaser for value without notice.

The 4th Defendant referred the Court to the case of **Selina Mecca Wekesa vs. Kennedy Ellam Wekesa & 7 Others (2014) eKLR** where the Court relied on Black's Law Dictionary (7th Edition) to define fraud as a knowing misrepresentation of the truth or concealment of material facts to induce another to act to his detriment or an unconscionable dealing especially in contract law. Counsel urged the Court to find that the Plaintiff had failed to connect the 4th Defendant with any fraudulent acts and had thus failed to discharge the high evidentiary burden required to prove fraud.

The Court in this respect notes that save for stating that it notified the 4th Defendant of its legal and beneficial interest in the suit property before the transfer, the Plaintiff did not plead or prove any fraud on the part of the 4th Defendant. In the case of **Nairobi Permanent Markets Society & 11 others -vs- Salima Enterprises & 2 others (1997)e KLR** , the Court of Appeal held that in the absence of any allegations of fraud or misrepresentation perpetrated by the company in the acquisition of the suit land, the company as the registered proprietor was the absolute and indefeasible owner.

In addition there is a legal requirement that a registered proprietor should be aware of the circumstances where a title has been acquired illegally, unprocedurally or fraudulently, before his or her title can be rectified. The provisions of section 80(2) of the Land Registration Act are clear that a register shall not be rectified to affect the title of a proprietor who is in possession and has acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default. No such knowledge or cause was proved on the part of the 4th Defendant to render its title liable to rectification.

Whether the Plaintiff is entitled to the reliefs sought.

Counsel for the Plaintiff in her submissions relied on the doctrine of specific performance urging that the Plaintiff had come to court with clean hands and had performed its part of obligation in full. The Plaintiff

urged that in addition to cancellation of title to Land Reference number 15314/10, the 1st, 2nd and 3rd Defendants should be compelled to transfer the said parcel to the Plaintiff and in default, that the Court's registrar be directed to execute the transfer forms.

The counsel submitted that it was also imperative for the Court to order the reconstruction of the deed file for Land Reference number 15314/10. It was submitted that previous injunctive orders restraining the Defendants from evicting the Plaintiff from Land Reference 15314/5 were not registered owing to the missing deed file and that as a consequence, the Plaintiff was evicted from the said parcel.

Counsel argued that based on the Plaintiff's case on the loss of business opportunities, the loss of user, rent incurred in leasing Land Reference number 15314/5, the Plaintiff should be awarded general damages of Kshs 100,000,000/- as compensation. Counsel submitted that considering the location of Land Reference number 15314/10 which is on the road, the Plaintiff would have enjoyed the land for more than 25 years through rental income or plain business had it been allowed to construct go downs in 1991 when the underlease was executed.

The Plaintiff made reference to the case of **Francis Mwangi Mucheru vs. Hannah Mbura Kiarie, Civil Appeal No. 194 of 1997** for the proposition that specific performance is an equitable remedy and that a party seeking it must come to court with clean hands, and must have performed his obligations under the agreement sought to be enforced or show that he is and was always ready to perform its part of the agreement.

Reliance was also placed on the case of **Lucy Momanyi t/a LN Momanyi & Company vs. Nurrein MA Hatimy and Another Civil Appeal No. 139 of 2002** where it was stated that admissions have to be obvious and must leave no room for doubt that the parties passed out of the stage of negotiations into a definite contract. The Plaintiff submitted that this is a clear case where a party had admitted the opposing party's claim.

it was submitted by the 4th Defendant that the prayer of specific performance sought by the Plaintiff cannot issue as against the 1st and 2nd Defendants since they had already transferred the suit plot to the 4th Defendants. Counsel for the 4th Defendant argued that the 1st and 2nd Defendants had also transferred other subplots to third parties who were not parties to this suit. The 4th Defendant submitted that Court orders should not be issued in vain and contended that an order for specific performance cannot be enforced since titles to sub plots the subject of this suit are no longer registered in the name of the 1st and 2nd Defendants.

The 4th Defendant relied on the case of **Geoffrey Kinuthia Njoroge vs. Macro Ventures Developers Ltd, Nairobi ELC No. 324 of 2012** where the Court stated that since the remedy of specific performance is equitable and discretionary, the order will not issue where damages are an adequate remedy and where the granting of the order will cause disproportionate hardship to the Defendant. Counsel submitted that since the 1st and 2nd Defendants had already transferred the suit property to the 4th Defendants, they could not comply with an order for specific performance.

It was also submitted that in the event that the Court were to order the transfer to the Plaintiff, the 4th Defendant who is an innocent purchaser for value and had already constructed a church and a priest residence in the suit property would suffer severe hardship. The 4th Defendant further submitted that the orders sought in the amended plaint could not issue since the suit had abated against the 1st Defendant who had not been substituted.

According to the 4th Defendant, the most appropriate remedy was for the 1st and 2nd Defendants to compensate the Plaintiff for the value of the suit property which can be ascertained at a later stage. Lastly, the 4th Defendant submitted that damages were an adequate remedy for the Plaintiff as against the 1st and 2nd Defendants.

The court has considered the arguments made by the Plaintiff and 4th Defendant, and notes that with regard to the remedy of specific performance, in the case of **Reliable Electrical Engineers (K) Ltd vs. Mantrac Kenya Limited (2006) eKLR** it was held that being an equitable and discretionally remedy, specific performance will not be ordered where there is an adequate alternative remedy and that even where damages are not an adequate remedy, specific performance may still be refused where it will cause severe hardship to the defendant.

In my view, since no fraud was attributed to the 4th Defendant, an order for specific performance would be inappropriate in the circumstance of this case as it would subject the 4th Defendant to hardship as it had built a church and a priest's residence on the disputed parcel.

Secondly and more significantly, a key requirement for specific performance to issue is that the terms of the contract sought to be enforced must be certain and precise so as to be capable of exact performance. This is stated in **Halsbury's Law of England Volume 44 (1), 4th Edition (Re-issue)** at paragraph 840 as follows:

> **" Where it is sought to enforce specific performance of a contract, the court must be satisfied (1) that there is a concluded contract which would be binding at law if all proper formalities had been observed and in particular that the parties have agreed, expressly or impliedly, on all the essential terms of the contract, and (2) that the terms are sufficiently certain and precise that the court can order and supervise the exact performance of the contract."**

One of the grounds therefore for refusing specific performance is where there is uncertainty as to the subject matter of the contract entered into by parties. This may arise as in this case where the subject matter was not finally determined at the date of the sale agreement, but was left to be determined thereafter. The contract that is subject to specific performance in this suit is the undated underlease executed by the Plaintiff and 1st and 2nd Defendants. It describes the subject property as follows in recitals:

> **"AND WHEREAS IN CONSIDERATION of the services rendered by Lesee in such amalgamation and subdivision of the new plot to the Lessors, the Lessors hereby agree to lease unto the Lesee one such plot bearing No. 5 as depicted in the plan annexed hereto containing by measurement nought decimal five seven of an hectare (0.75 hectares) hereinafter called "the said land") for a complete period of lease enjoyed by the Lessors less three days from the date of execution of this presents..."**

It is not possible to state with certainty that the subject property referred to in the underlease is the same one referred to in the Plaint as it is described differently. In addition the said plot is now no longer registered in the 1st and 2nd Defendant's names but in the name of a third party, being the 4th Defendant. The remedy of specific performance will therefore not be appropriate in the circumstances of this case. The consequential orders sought by the Plaintiff in its main prayers in the Plaint as to declarations of ownership, cancellation of the 4TH Defendant's title and a permanent injunction in relation to of LR 15314/10 cannot also accordingly issue.

The Plaintiff also sought in its first set of alternative prayers orders compelling the 1st and 2nd Defendants to transfer LR 15314/5 to it and also sought the difference in value of plot numbers 15314/10 and 15314/5 upon valuation. The Plaintiff however did not bring any evidence to show the ownership of LR 15314/5 and specifically that the said parcel of land was owned by the 1st and 2nd Defendants, so as to enable this Court make such an order. In addition no evidence of the value of LR 15314/5 was presented to assist this Court in making a determination as to whether there was any difference in value between the said parcel of land and LR 15314/10. These alternative prayerscannot therefore be granted.

The Plaintiff further sought in its second set of alternative prayers an order to be paid the prevailing market value of LR 15314/10 and general damages for breach of contract and loss of business. The measure of damages if any that can be payable in the instant case is that applicable to breach of contract,

as the Plaintiff herein has only succeeded in showing that there was a contract between it and the 1st and 2nd Defendant for the lease of the suit property, based on the executed underlease they entered into, and the various correspondence they exchanged thereafter referred to in the foregoing.

The applicable principles in this regard are that a contract breaker is only responsible for resultant damage which he ought to have foreseen or contemplated when the contract was being made as being not unlikely, or liable to result or flow naturally from his breach. This is commonly referred to as the rule in **Hadley vs Baxendale**. See also **Halsbury's Laws of England, Fourth Edition, Volume 12** paragraphs 1174 – 1176 at pages 462 -464 in this respect.

In addition the principles to take into account in assessing general damages in a case where specific performance is not granted were set out in the case of **Amina Abdul Kadir Hawa –vs- Rabinder Nath Anand & Another** (2012) eKLR thus:-

"On general damages for breach, which this court has found payable as opposed to an order for specific performance, the principles guiding its award which this court has to bear in mind when making the assessment are:-

I. **These are discretionary, meaning the court has to ensure that it exercises its discretion judiciously and with a reason.**
II. **They are not meant to enrich a party but to compensate him/her for the injury suffered.**
III. **These should not be inordinately too low or too high".**

It is evident that the Plaintiff's expectation was that it would get title and possession of the land that it contracted with the 1st and 2nd Defendants, and this is a reasonable expectation that this Court finds flowed naturally from the underlease the said parties executed. In the circumstances, the Plaintiff is entitled to be paid damages as would enable it acquire an equivalent parcel of land. A valuation report in the Plaintiff's supplementary list of documents placed the value of the suit property at 25,000,000/- as at 9th November 2009. The valuation report was not challenged, and will assist this Court determine a reasonable measure of general damages in this regard.

The Plaintiff in addition also sought special damages of Kshs 735,000/- being rent for the alternative premises it had to lease after failing to get possession of the suit property for the 1st and 2nd Defendants. It brought evidence of 86 receipts of the rent it paid between 22nd December 1995 to 16th July 2004, totaling to Kshs 811,014.75. The Plaintiff has therefore met the requirement of proof of special damages sought, in light of the requirement stated by the Court of Appeal in **Hahn -vs- Singh , (1985) KLR 716,** that special damages must not only be pleaded but must also be strictly proved. The Plaintiff is accordingly entitled to the said special damages.

It is therefore the finding of this Court that the remedies available to the Plaintiff are the alternative remedies sought of general and special damages arising from the breach of the underlease entered into. As to which party is liable to pay any damages found to be due to the Plaintiff, this Court finds that any liability and/or negligence in the failure to register the Plaintiff's underlease and/or give it title and possession of the suit property can only be attributable to the 1st and 2nd Defendants, which are the parties that the Plaintiff contracted with in the underlease with respect to the suit property. This Court finds that the Plaintiff had no dealings with the other Defendants in this regard, and the 3rd and 4th Defendants are therefore not liable to pay any damages.

It was submitted by the 4th Defendant that the 1st Defendant is since deceased and the suit against him has abated. However, no evidence was placed before the Court of the fact or date of the said death, and the Court cannot make any finding in this regard. Lastly, as the Plaintiff has succeeded in his suit as against the 1st and 2nd Defendants, the said 1st and 2nd Defendants shall meet the costs of this suit.

Arising from the above-stated reasons, this Court enters judgment for the Plaintiff as against the 1st and

2nd Defendant as follows:

a. The 1st and 2nd Defendant herein shall jointly and severally pay the Plaintiff general damages for breach of contract of a sum of Kshs 30,000,000/= with interest at court rates with effect from the date of this judgment until the date of full payment.
b. The 1st and 2nd Defendants herein shall jointly and severally pay the Plaintiff special damages of a sum of Kshs 811,014/75 with interest at court rates with effect from the date of this judgment until the date of full payment.
c. The 1st and 2nd Defendants shall jointly and severally meet the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____22nd____ day of _____April____, 2015.

P. NYAMWEYA

JUDGE