



**Sandy Creek Holdings Limited v Hewa Bora Limited & another (Environment & Land Case E119 of 2021) [2024] KEELC 4994 (KLR) (19 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 4994 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E119 OF 2021  
AE DENA, J  
FEBRUARY 19, 2024**

**BETWEEN**

**SANDY CREEK HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**HEWA BORA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LEWIS KAMAU KANYOKO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Plaintiffs case**

- 1 The plaint instituting this suit is dated 15/8/2017. In order to contextualize the suit, it is necessary to give a summary of the Plaintiff's case. It is pleaded that prior to 9/9/2014, the Plaintiff was the registered proprietor of all the land comprised in Title No Kwale/Ramisi Phase II S S/969 (hereinafter referred to as the suit property) measuring approximately 2.0639 Acres. That vide an agreement dated 28/5/2014 [hereinafter referred to as the Agreement] the Plaintiff and 1<sup>st</sup> Defendant contracted for the sale of the suit property at a consideration of Kshs 16,464,000/-. That in pursuance of clause 3.1 of the sale agreement the 1<sup>st</sup> Defendant made a deposit of Kshs 8,232,460/ in three instalments to the Plaintiff being 50% deposit of the purchase price.
- 2 It is averred that upon payment of the last installment the Plaintiff discharged its contractual obligations and transferred the suit property to the 1<sup>st</sup> Defendant and who was issued with a title on 9/9/2014. That the balance for the purchase price being Kshs 8,232,460 was partially paid on 22/10/2015 leaving a balance of Kshs 6,432,460/- which has never been paid. It is averred that the 1<sup>st</sup> Defendant has breached the terms of the contract by failing to pay the balance. That as a result, the Plaintiff has suffered loss and seeks compensation.
- 3 It is averred at paragraph 10 of the plaint that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly made fraudulent and deceitful representations to the Plaintiff causing the Plaintiff to enter into an agreement with them.



The particulars of fraud are listed. The Plaintiff prays for judgement against the Defendants jointly and severally for;

- a. A declaration that the 1<sup>st</sup> Defendant is in breach of the sale agreement made as of 28/5/2014 between the Plaintiff and the Defendant and is not entitled to enjoy the full legal and beneficial rights and interests in the land comprised in title no Kwale/Ramisi Phase II S S/969 unless and until the 1<sup>st</sup> Defendant pays in [c] below to the Plaintiff in full.
- b. A permanent injunction restraining the 1<sup>st</sup> Defendant whether by itself or through its shareholders, directors, officers, disclosed or undisclosed agents, employees, servants or other person whatsoever from selling, transferring, charging, mortgaging, developing, wasting, damaging, alienating or otherwise dealing in any manner whatsoever with the land comprised in title no Kwale/Ramisi Phase II S S/969.
- c. The sum of Kenya shillings 6,432,460.00 together with interest thereon at the agreed contractual rates of 5% per annum above the base lending rate prescribed by the Central Bank of Kenya from the contractual due date of 15/11/2015 until payment in full
- d. Damages for fraudulent and deceitful misrepresentation
- e. Interest at court rates on [c] and [d] above from the date of judgement until payment in full
- f. Costs of the suit.

#### **1<sup>st</sup> and 2<sup>nd</sup> Defendants' Case**

- 4 In a rebuttal of the Plaintiff's case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a defence dated 23/1/2018. The Defendants deny the averments raised by the Plaintiff and state that the Plaintiff does not deserve the prayers sought. The Defendants further filed a counterclaim to the Plaintiff's suit. It is the Defendants case that after the agreement was entered into, they in good faith duly paid 50% of the purchase price being Kshs 8,232,000/- plus an additional 1,800,000/- making a total of Kshs 10,032,000/-.
- 5 That on diverse dates in October 2015 the 1<sup>st</sup> Defendant requested the Plaintiff to accompany him on the suit property to verify the beacons but they were accosted by hostile squatters who said they owned the suit property. That this information had not been disclosed by the Plaintiff to the Defendants. At paragraph 15 of the defence, the Defendants list particulars of breach of the sale agreement herein and state that they were deliberately misled by the Plaintiff into purchase of the property.
- 6 The alleged fraud is further listed and particularized as having been committed by one Christopher Githaiga Nottingham a director of the Plaintiff. It is further averred that the Plaintiff admitted to the presence of squatters on the suit property and that a suit had been filed against them being ELC No 111 of 2016 Susan Wangechi & 8 Others V Shabaan Salim Nyere & 6 Others. That the Plaintiff jointly with the defendants have unsuccessfully tried to place beacons and a fence on the suit property as the same are always destroyed. That the Plaintiff was quick to transfer the suit property to the Defendants without evicting the squatters and which actions have caused the 1<sup>st</sup> and 2<sup>nd</sup> Defendants immense loss and damages. The particulars of loss and damage are listed under paragraph 21 of the defence.
- 7 The Defendants pray that judgement be entered against the Plaintiff in the counterclaim as follows;
  - a. A declaration that the Plaintiff is in breach of contract of sale of land dated 28<sup>th</sup> may 2014.
  - b. An order that the transfer of title to land dated 9<sup>th</sup> September 2014 be and is hereby reversed.



- c. An order that the Plaintiff refunds the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally Kshs 13,463,150/- plus interest at agreed contractual rate of Kshs 5% per annum with effect from 28<sup>th</sup> May 2014 till payment in full.
- d. General damages for breach of contract.
- e. Interest at court rates on [a], [b] and [c] above from date of judgment till payment in full.
- f. Costs of this suit.
- g. Any other relief that this honourable court may deem fit and just to grant.

## Evidence

- 8 The matter was set down for hearing on 11/11/21, 13/2/23 and 23/05/23.
- 9 Plaintiff Witness 1 Christopher Erick Githaiga Nottingham a shareholder and director of the Plaintiff company adopted his statement filed before court on 15/08/2017 as his evidence in chief and produced the bundle of documents dated 18/08/2017 paginated 1-95 "PEX 1".
- 10 On Cross-Examination the witness testified that he had met Lewis Kamau Kanyoro the 2<sup>nd</sup> Defendant for the first time in Gigiri Nairobi and had not met the 1<sup>st</sup> Defendant's directors prior to this. On being shown Plans/Brochures (see item 5 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant list of documents) PW1 denied that the brochure showed most of the property is under water. Describing the location of the suit property he stated there were two settlement schemes, Kinondo Settlement Scheme which was on the beach front and 200M to the right is Ramisi Settlement Scheme. He pointed that the suit property was not a beach plot nor adjacent to the ocean and that it is not in Ramisi phase 1 but 2. He denied the property under sale was in the interior.
- 11 The witness further averred that the plot was sold on willing buyer willing seller basis and had nothing to do with effectiveness of the marketing. He admitted that the defendant paid 50% of the purchase price. That the agreement was executed by an advocate who acted for both the parties.
- 12 Upon being referred to the emails exchanged between the Plaintiff and Defendants on 14<sup>th</sup> October, 2014, 8<sup>th</sup> November 2015, 31<sup>st</sup> March 2016. The Plaintiff denied there was pressure exerted on the Defendant to pay. He confirmed being aware of ELC case No. 111 of 2016 and that it was awaiting judgment.
- 13 PW1 admitted he received notice on 25/5/2016 on his inability to deliver vacant possession from LA Oketch Advocate. He denied that there were squatters on the land as confirmed by a ruling in the matter awaiting judgement and that the people referred to as squatters were trespassers who kept removing the beacons.
- 14 Referring to clause 4 (4) of the sale agreement the witness denied there was material non-disclosure at the time of executing the sale agreement. He denied the allegation that the Defendants were victims of fraud and reiterated the Defendants had refused to pay the balance of the purchase price since 2014 to date. He indicated that under the default clause he had opted to sue rather than sale the suit property.
- 15 On Re-Examination the witness clarified that the title is in the name of the 1<sup>st</sup> Defendant who had not surrendered the title and had infact asked the Plaintiff to re-sale. That the Defendants had not annexed any evidence indicating they had filed a report to the police on the alleged attack by the squatters.
- 16 With the above evidence the Plaintiffs case was closed.



- 17 Defendant Witness 1 Lewis Kamau Kanyoko testified that he was a director of the 1<sup>st</sup> Defendant and had authority from his co-directors to appear in the matter. The witness adopted the defence of 26/01/2018, witness statement of 23/01/2018 and the list of documents dated 23/01/2018 (DEXB 1-9) as part of his evidence. He confirmed that he was aware of the agreement for sale of 28/05/2014. That the genesis of this matter arose while he was working in Rwanda where a senior member of the church offered to refer him to a friend who was disposing land.
- 18 According to the witness, he was shown the brochures (see item 5 of defence bundle) and became interested in purchasing the land. That he paid part of the purchase price and legal fees for the joint lawyer at the time and acknowledged by the seller. That on visiting the site he noted the location was different. He also found groups of armed youth who threatened to kill the Defendants for invading their property. That the beacons placed were destroyed and efforts to erect a fence frustrated. The witness stated that they were also not able to get security from police officers despite visiting the police station severally.
- 19 The witness added that the Plaintiff had informed him that they would be enjoined in the suit in ELC Mombasa against the squatters. However his opinion was that the said suit would not resolve the squatter issue. The witness expressed fear for his life and safety.
- 20 According to DW1 the Plaintiff had breached several clauses of the sale agreement enumerated in paragraph 14 of the defence. That there was non-disclosure of the squatters, overriding interests and that there was no capacity to give vacant possession then and now. That though he had sent a notice for the Plaintiff to remedy the breach through L.A Oketch Advocates, todate nothing has been done to remedy the breaches. He prayed that the suit be dismissed as there was breach of the agreement.
- 21 On cross examination the witness confirmed he was a Plaintiff in Mombasa ELC No. 111 of 2016 and Hewa Bora the 1<sup>st</sup> Defendant herein was the 8<sup>th</sup> Plaintiff and George Ndungu Gitau (the joint lawyer) was the 4<sup>th</sup> Plaintiff. That he was not aware that George also bought land on the same scheme and he did not also know the outcome of the said case. The witness testified that he was not aware that the other Plaintiffs took possession since 2016 after interlocutory judgment as he had stopped following up on the land following the attack by the squatters.
- 22 DW1 added that he was interested in more properties as evidenced by the email communication. He stated the subdivision map attached to his bundle did not include plot No. 81. The witness gave a description of the properties and stated that from what had been presented to him by the Plaintiff, with regard to the plot in Funzi he was to be a neighbor to the then vice president. The plots in this subdivision were less than an acre and non was 2.6 acres. On clause 8.1 (a)(b)(c) of the agreement, DW1 confirmed same had been in the agreement during signing and he took and trusted his lawyers advise that it was fine to retain the clause. He conceded he did not raise any issue with the said clauses. He conceded to visiting the property, noted the disparities with what had been shown to him but didn't raise any issue because the lawyer had not advised him on the same. That though he instructed L.A. Oketch Advocate to write the letter dated 25/5/2016 after vising the land, he conceded the same did not refer to the issue of discrepancies noted on the ground. He further conceded his letter dated 6/4/2017 though written on his instructions didn't refer to alleged conspiracy of fraud. That as per the said letter he was willing to respect the agreement by payment of the balance of 6,431,000.
- 23 The witness insisted that his Advocate at the time of entering into the contract with the Plaintiff was conflicted and had taken the Plaintiff's side. DW1 confirmed the title to the suit property was in his name. That despite discovery of the fraud, he had not surrendered it for cancellation nor sought to re-transfer it to the Plaintiff. According to him it would have been unprocedural to do so during the pendency of these proceedings.



24 On re-examination he indicated the mob on the property was big comprising women and men. He could not confirm if the Defendants in ELC No. 111 of 2016 were the ones in the property. That he was incited to buy a luxury home in a gated community with club house, Gokert racing and which was being developed. That he was interested in having land next to the beach. He termed the title deed as a useless piece of paper and stated that he would be willing to transfer back the title. At this juncture Defendant's case was closed.

### Submissions

25 Parties filed and exchanged final written submissions.

### Plaintiff's Submissions

26 The Plaintiff's submissions are filed before court on 18/9/2023. The Plaintiff identified five issues for determination as follows; -

- i. Whether there exists a valid contract for the sale of land between the parties.
- ii. Whether there was a breach of the contract, and if yes, by which party.
- iii. Whether there was fraud on the Plaintiffs part which would serve to vitiate the contract.
- iv. Whether the Plaintiff is entitled to all or any of the orders sought.
- v. Who should bear the costs of this suit.

27 On whether a valid contract exists, it is submitted that both PW1 and DW1 for the Plaintiff and 1<sup>st</sup> Defendant voluntarily executed the agreement for sale under common seal and witnessed execution with their common Advocate. That the agreement meets the legal threshold and is legally binding to the parties.

28 On whether there was breach of the contract the Plaintiff submitted that it is proven and admitted by the Defendants that a sum of Kshs 6,432,000/- remains unpaid to date. That the suit property was transferred to the 1<sup>st</sup> Defendant as mutually agreed. That grant of vacant possession was not a precondition for payment of the balance of the purchase price. The Defendants persistent refusal to pay the balance is a conscious breach of clauses 6 and 11.1 of the agreement read together with the LSK conditions of sale. That the 1<sup>st</sup> Defendant having refused to pay the full purchase price is therefore not entitled to vacant possession as stipulated under the LSK conditions of sale. Referring to the provisions of Sections 107, 108 and 109 of the *Evidence Act* it submitted the Defendant failed to prove how the contract has been breached by the Plaintiff. Reliance is placed on *Mbuthia Macharia V Annah Mutua Ndwiga & Another* [2017] eKLR.

29 Citing the Court of Appeal holding in *RG Patel V Laid Makanji* [1957] EA 314 that fraud should be proved by a standard that is beyond reasonable doubt it is submitted that the evidence of DW1 did not meet this threshold. Giving several definitions of fraud from Black's Law Dictionary, 10<sup>th</sup> Edition the court is urged to disregard the allegations of witchcraft, promises to be the then Vice presidents neighbor and which we were being advance for the first time. That even amidst these allegations and noting that the property was not a beach property after site visit the Defendant went ahead with personal knowledge to deposit Kshs. 1,800,000/= in part liquidation of the purchase price instead of rescinding the contract. The court is referred to the case of *Central Kenya Ltd V Trust Bank Limited & 4 Others* [1996] eKLR. Moreover there was no plea of coercion or undue influence as DW1 conceded the 1<sup>st</sup> Defendant voluntarily entered into the agreement.



- 30 Further citing the provisions of Section 97(1) of the *Evidence Act* on exclusion of oral evidence by documentary evidence, it is submitted the court cannot rewrite the parties contract. The Court of Appeal case of National Bank of Kenya Limited Vs. Pipeplastic Samkolit (K) Ltd & another ((2001) eKLR is relied upon to buttress this point.
- 31 On the proceedings in ELC Case No. 111 of 2016 it is contended that the pleadings therein evidence that the 1<sup>st</sup> Defendant herein being the 8<sup>th</sup> Plaintiff therein sued as the registered proprietor of the suit property thus asserting its ownership rights to the property, yet they seek to run away from the same in the current proceedings. That indeed the court issued positive orders in favor of the registered proprietor of the suit property that is the 1<sup>st</sup> Defendant.
- 32 The court is invited to note that DW1 was a well-educated widely travelled expatriate holding a senior position in global organizations capable of understanding a contract drafted in English and his belated excuses should be disregarded.
- 33 On whether the Plaintiff is entitled to the orders sought Counsel for the Plaintiff submits that having proved its case the Plaintiff is entitled to the prayers sought in the plaint. That all the required notices were served upon the Defendants and that it is therefore entitled to sue under clause 10.1(a) for specific performance to enforce payment of the outstanding balance and to be awarded the rest of the prayers sought.
- 34 On interest as prayed it is submitted that the court has power to award interest on a money decree at such rate as it may deem fit as conferred by section 26 of the *Civil Procedure Act*. The holding of the Court of appeal in Highway Furniture Mart Limited Vs. Permanent Secretary Office of the President & Another (2006) eKLR is cited together with Special Condition 8(3) of the LSK conditions of sale. As to the award of damages the court was invited to invoke its discretion. On Costs the Court is referred to the provisions of section 27 of the *Civil Procedure Act*.

### **1<sup>st</sup> and 2<sup>nd</sup> Defendants' Submissions**

- 35 The Defendants filed their submissions on 24/7/2023. It is submitted that 21 days lapsed before the Plaintiff would deliver vacant possession as per the notice that was issued to them by L. A. Oketch Advocate on behalf of the Defendants. Highlighting the contents of Clauses 4.3, 6.2, 14.5 -14 and 10 of the Sale Agreement it is submitted the same were breached by the Plaintiff. That PW1 admitted he had sued the squatters in ELC Case No. 111 of 2016 to resolve the squatter issue. That the Plaintiff had the alternative remedy of selling the property in place of the balance of the purchase price but did not in bad faith knowing the location and its diminished value. That the Defendants are therefore entitled to a refund of the deposit paid plus 30% of the purchase price as liquidated damages.
- 36 The Defendants maintain that they were misled into buying the suit property believing it was 200 metres away from the beach and are therefore victims of fraud and malice of the Plaintiff's actions.
- 37 Counsel for the Defendants submits that Section 3 of the *Law of Contract Act* and Sections 38,39,40,41 and 42 of the *Land Act* 2012 call for respect of all the conditions of a valid contract that has been reduced in writing. The court is referred to the holding in Muranga ELC no 484 of 2017 Joseph Kangethe Irungu V Peter Ng'ang'a Muchoki & Others. The Plaintiff's further submit that the only remedy for the parties was to enforce clauses 10.1 and 10.2 of the sale agreement as to default. On this the court is urged to be guided by Nairobi ELC No 209 of 2019 General Properties Limited V Saika Two Estate Developers Limited where Mogeni J. stated that the courts will not allow a person to keep advantage which he has obtained by fraud.



38 The Defendants conclude by submitting that the Plaintiff's case has failed in law and equity to meet the required standard of proof and that court is urged to dismiss the suit with costs to the Defendants.

### **Issues for Determination**

39 I have carefully considered the pleadings filed in this case, the oral testimonies of the witnesses, the documents placed before this court and submissions by counsels in support of their cases. The following issues arise for determination;-

1. Was there a valid contract existing between the parties.
2. If yes was the said contract breached and by which of the parties.
3. Whether there was fraud or misrepresentation on the part of the Plaintiff and if yes what are the ensuing consequences
4. What are the available remedies based on (2) and (3) above considering the orders sought in both the Plaintiff and the Counterclaim.
5. Which party should bear the costs of the suit and counterclaim

40 My understanding of the facts in this matter is that sometime in 2014 the Plaintiff and the 1<sup>st</sup> Defendant entered into agreement for sale of the suit property which was signed by the parties. They used the same advocate for the transaction. It was a term of the agreement that upon 50% payment of the purchase price the Plaintiff would release the completion documents to the advocate for purposes of transfer of the property to the 1<sup>st</sup> Defendant. This was effected and the suit property was transferred in the same year. According to the agreement the 50% balance of the purchase price was to be paid in one instalment on or before 30/11/2015 which is the completion date and which was 18 months from the date of signing of the agreement. However the balance was not fully paid on the 30/11/2015 but a part instalment was paid to the Vendor Plaintiff and since then the remaining balance has never been paid. That the Defendant later imposed conditions outside the sale agreement demanding vacant possession of the property before full payment when at all times it had made the Plaintiff believe they were capable of and were going to complete the transaction. This the Plaintiff terms dishonesty on the part of the Defendants culminating into these proceedings.

41 On the other hand the Defendants position is that they were misled into entering into the agreement. Firstly because on site visit they were shown a property which was not a beach property contrary to what had been marketed to them would be a high end beach property in a gated community and whose developments were ongoing. The Defendants term this as fraudulent. Secondly that the property was occupied by squatters a fact which the vendor Plaintiff did not disclose to the Defendants which was material non-disclosure on the part of the Plaintiff. That the Plaintiff did not have capacity to give vacant possession. They also claim that the Plaintiff is the one in breach of contract. Pursuant to this they issued the requisite notice for completion and demanded that they would only pay the balance upon vacant possession and thus the orders they seek herein.

### **Was there a valid contract existing between the parties.**

42 What constitutes a valid contract is set out in Section 3 of the [Law of Contract Act](#) Chapter 23 of the Laws of Kenya. Section 3(3) states;-

3. Certain contracts to be in writing



- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless —
- (a) The contract upon which the suit is founded—
    - (i) Is in writing;
    - (ii) Is signed by all the parties thereto; and
  - (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

43 Both parties agreed in their submissions that the agreement for sale meets the above legal threshold. The dispute herein is anchored on the Agreement for Sale of land that is the suit property. It is dated 28/05/2014 produced by both parties as part of their evidence in court. My review of the said agreement which is in writing, reveals that it is made between Sandy Creek Holdings Limited the Plaintiff herein and Hewa Bora Limited the 1<sup>st</sup> Defendant. It is for the sale of title No. Kwale/Ramisi Phase II S.S/969. It is sealed and signed by the Directors of both the vendor and purchaser in the presence of Gitau Gikonyo Advocate. It is my finding that there was a valid agreement/contract existing between the parties and which was binding.

#### **Was the above contract breached and by which of the parties**

44 Having made the above finding, I will proceed to interrogate whether there was breach of the agreement and by which of the parties. The Plaintiff pleads that he sold the suit property for Kshs. 16,464,000/= to the 1<sup>st</sup> Defendant. The court notes that the sale price corresponds with the purchase price given in clause 1(f) of the Agreement. From the evidence given by both parties in court the said purchase price is not in dispute.

45 From my review of the pleadings and supported by the evidence of both PW1 and DW1 there is no contestation that the 1<sup>st</sup> Defendant paid the 50% deposit as stipulated under clause 3.1 of the Agreement. PW1 also admitted during cross examination that the Defendant paid 50% of the purchase price. He also testified that out of the balance of the purchase price being Kshs.8,232,460 the 1<sup>st</sup> Defendant made a payment of Kshs. 1,800,000.00 on 22/10/2015 leaving the balance of Kshs. 6,432,460.00. To me there is also no dispute that the balance of the purchase price Kshs. 6,432,460.00 remains unpaid. This was after the 1<sup>st</sup> Defendant made a part payment of Kshs. 1,800,000 which explains the balance of Kshs. 6,432,460.00. This is admitted in paragraph 12 of the Defence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated 23/01/2018 thus:-

In good faith, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants duly paid 50% of the purchase price being Kshs. 8,232,000 plus an additional Kshs. 1,800,000 bringing the total to Kshs.10,032,000.

46 PW1 however testified that the balance of the purchase price was to be paid on or before the Completion date of 15/11/2015 and the Defendant was in breach of clauses 1.1(b) and (c), 2.1,4.1,5.1 and 5.2 of the Agreement.

47 It was incumbent upon the Plaintiff to prove that indeed there was breach on the part of the Defendants of the above clauses including all the allegations made against the Defendants. The following sections of the *Evidence Act* chapter 80 of the Laws of Kenya speak to the burden of proof as follows:-



Section 107(1)

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

Section 108 further provides:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Section 109 stipulates:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

48 I will now review the clauses 1.1(b) and (c), 2.1,4.1,5.1 and 5.2 of the Agreement stated to have been breached. I find it necessary to reproduce them verbatim;-

Clause 1.1 (b) states: -

Balance of Purchase Price’ means the sum of Kenya shillings Eight Million Two Hundred Thirty Two Thousand only (Kshs. 8,232,000.00).

Clause 2.1 reads

The Vendor shall sell and the Purchaser shall Purchase the Property at the Purchase Price

Clause 4.1 reads

The sale of the Property is conditional on the Parties agreement that the Vendor shall allow a period of Eighteen (18) months for the Purchaser to complete the transaction.

Clause 5.1 reads

The Balance of the Purchase Price shall be paid by the Purchaser to the Vendor on or before the 30<sup>th</sup> November 2015

Clause 5.2 reads

The Balance of the Purchase Price shall be paid by the Purchaser to the Vendor in one (1) instalment.

49 How were the above clauses breached by the Defendants. The particulars of breach are pleaded under paragraph 8 of the plaint and echo the contents of the above clauses except that the balance of the purchase price was not paid as envisaged under the said clauses. I note that according to clause 5.1 the balance of the purchase price was to be paid on or before 30<sup>th</sup> November 2015 in one instalment. I have already pointed that the payment in instalments is admitted in paragraph 12 of the Defence as well as at paragraph 9 and 17 of DW1 statement which he also adopted as part of his evidence. The specific instalment on the balance of the purchase price is the additional Kshs. 1,800,000 referred to earlier. It



is therefore clear that this deadline was not complied with as relates to the full payment of the purchase price and this is prima facie a breach of the said term of agreement.

- 50 But having made the above observation we must surmount the hurdle why the same has not been paid. DW1 evidence in chief is that after remitting some payments which were acknowledged by the Plaintiffs he visited the suit property, on return to Kenya in October 2015. That they found groups of armed youth who threatened to kill them for invading their property. He ran away after the situation got worse and that he raised concern over the incident with the Plaintiff who assured that it would be resolved. That later the Plaintiff decided to sue the said invaders in ELC 111 of 2016 which has not resolved the problem. That the squatter issue was never disclosed to them and which was a material non-disclosure. That the Plaintiff had no capacity to give vacant possession then and now.
- 51 In view of the above reasons, the court has to review the agreement and what it provided in respect of completion, possession and the balance of the purchase price.

With regard to possession? Clause 6 provides as follows: -

Possession

6. The Property is sold with vacant possession on Completion.
- <sup>1</sup>6.2 On Completion of Sate (Sic this should be sale) and upon receipt by the vendor of the Balance of the Purchase Price, the Vendor shall immediately grant vacant possession of the Property to the Purchaser.

52. From the above clauses vacant possession was conditional upon completion and payment of the Balance of the purchase price which is given as one date that is 30/11/2015. There is no doubt that the balance of the purchase price was never paid even as at the date of the filing of the instant suit. Based on these clauses the agreement is clear that there would be no vacant possession in the absence of completion and full payment of the balance of the purchase price. It was not therefore expected that the Plaintiff would hand over vacant possession before the full amount of the purchase price was paid. The agreement clearly states that the property is sold in vacant possession at completion but in this case there was no completion. And I think the Plaintiff's submission that the 1<sup>st</sup> Defendant having failed and refused to pay the full purchase price had not become entitled to vacant possession of the suit property, is correct.
53. DW1 pleads that the Plaintiff was in breach of clause 4.3 for failing to disclose that the land under sale was not vacant or accessible due to occupation by hostile squatters. It is submitted that this was a material fact. Clause 4.3 of the agreement is under SPECIAL CONDITIONS and provides;
- ‘The parties shall co-operate fully in all actions necessary to procure the satisfaction of the Conditions herein including, but not limited to, the provision by all parties of all information reasonably necessary to make any notification or application that the Purchaser or the Vendor deem to be necessary or as requested by any relevant authority, keeping all Parties informed of the progress of any notification and providing such assistance as may reasonably be required.’
54. It is further submitted that the Plaintiff was in breach of clause 14.6 and 14.10 for failure to disclose that there were overriding interests in the form of third parties claiming ownership over the same land.
55. Let me state firstly that based on the terms of the agreement the above claims could only be raised after completion as already shown above. Secondly clause 8 is on DISCLAIMER where the Purchaser admits that it has inspected the property and purchases it with full knowledge of its actual state and



condition as it stands. Further it reiterates that the purchaser enters into this agreement solely as a result of its own inspection and on the basis of the terms of the agreement and not in reliance upon any representation either written or oral or implied made by or on behalf of the Vendor. DW1 on being shown the agreement in cross-examination confirmed that his company was the purchaser and that it executed the agreement under seal and witnessed the seal. Upon being shown the attestation he confirmed it was voluntary. He confirmed he read the agreement. On being shown the DISCLAIMER in clause 8 and reading it out to the court he confirmed that the clause did exist at the time of signing the agreement. He stated he was advised to leave it as such. That he trusted the advocate. To me the content of the entire clause 8 is very weighty and it baffled me the Defendant would agree to signing the agreement without the benefit of visiting the suit property and on mere trust. How can the Defendants then raise the issue of non-disclosure when he freely executed the agreement which included this disclaimer and chose not to visit the suit property?

56. It is my finding that the Defendants were in breach of the agreement as it relates to the above clauses.
57. Having established that there was breach on the part of the Defendants for the reasons given in my above analysis it is incumbent upon the court to establish the other alleged causes of the breach. The Defendants are essentially pleading fraud on the part of the Plaintiff. The particulars of fraud by the Plaintiff are particularized under paragraph 15 of the Amended Defence and Counterclaim to have been through its director PW1 herein.
1. Misrepresenting to the 1<sup>st</sup> Defendant that Mr. Christopher Githaiga Nottingham is a wealthy land owner with large scale high cost resort project at the coast including shopping malls, racing tracks and villas.
  2. Convincing the 1<sup>st</sup> Defendant to pay 50% of the Purchase Price before physically visiting the suit premises.
  3. Failing to disclose to the 1<sup>st</sup> Defendant that the suit premises was not vacant and or free from any encumbrances.
  4. Transferring to the 2<sup>nd</sup> Defendant the suit premises while aware that it was valueless because of its occupation by violent squatters.
  5. Obtaining further funds for activities such as beacons, fencing and filing suit while at all material times he was aware that such activities were futile in securing vacant possession of the suit premises
  6. Failing to refund the 1<sup>st</sup> and 2<sup>nd</sup> Defendant the deposit of Kshs. 13,463,150 despite various requests to do so.
58. Before I proceed to analyze the above particulars it is necessary to look at what constitutes fraud in law. In the case of *General Properties Limited V Saika Two Estate Developers Limited* (2021) eKLR cited by the Defendants the court adopted the definition of fraud as in *Blacks Law Dictionary*, 9<sup>th</sup> Edition thus;

‘Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud in the sense of a court of equity, properly includes all acts, omissions and concealments which



involve a breach of legal equitable or equitable duty, trust, or confidence justly reposed and are injurious to another or by which an undue and unconscientious advantage is taken over another.’

59. It is trite that the standard of proof for fraud is on a slightly higher level than that of a balance of probabilities see *Ratil Patel Vs Lalji Makanji EA 1957* and *Vijay Morjaria Vs Nansigh Darbar & Another (2000) eKLR*.
60. DW1 told the court that it had always been his desire to purchase a beach property near the Indian Ocean. That he was given brochures that had images of beach hotels, gated community with race truck which aligned to his desire and on this strength entered into the agreement. It was his evidence that when he visited the property he noticed that the location was not what it was presented to be in the brochures and the other facilities were not reflected on the ground. I will first look at the description of the property as contained in the Agreement of sale.
61. Clause 1(e) defines the Property to mean;

‘. the interest comprised in all that piece/parcel of land known as Title Number; Kwale/ Ramisi Phase II S.S/969(including all the building, improvements, fixtures and fittings situated thereon, if any).

Clause 8.1 (c) is to the effect that the agreement contains the entire agreement between the parties and which to me I think is the essence of section 97 (1) of the [Evidence Act](#) here below: -

#### Part VI – Exclusion Of Oral By Documentary Evidence

97. Written contracts and grants (1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act. 3

62. Arising from the above legal provision and the terms of the agreement neither of the parties can be permitted to bring evidence outside the agreement to explain the intentions of the parties in relation to description of the property. This means therefore the brochures cannot be introduced to explain what the suit property entailed. This position was further affirmed by the Court of Appeal in *National Bank of Kenya Limited -Vs- Pipe Plastic Samkolit (K) Ltd & another ((2001) eKLR* where the court emphasized that parties are bound by the terms of their contract and the court cannot not rewrite the agreement for the parties. In any event the DW1 stated in his evidence that the Defendants desired a beach property. Yet to me he never insisted on having the full description included in the agreement.
63. DW1 produced a copy of a notice dated 25/5/2016 by L.A. Oketch Advocate which he confirmed was issued under his instructions. This the letter is headed ‘Default Notice/Breach of Agreement....’. on cross examination on the content thereof he conceded the same did not refer to the issue of discrepancies noted on the ground. The court perused the letter and has confirmed the same. On the letter dated 6/4/2017 (see page 85-86 of Plaintiff bundle) from the defence counsel G.W. Wainaina & Co. advocates to Muthoga Gaturu & Company Advocates DW1 conceded on cross examination it did not make any reference to the allegations of conspiracy. The court too has perused both correspondence and confirms this. That as per the said letter he was willing to respect the agreement by payment of the balance of 6,431,000.



- 64 DW1 produced Plans/Brochures for the proposed luxury Resort to support his claim that the property was marketed as a beach property as an exclusive gated community with race tracks and villas. The same comprise of LKK(i) and LKK(ii). DW1 was indeed cross examined extensively on the location vis a vis the brochures. He insisted that what was shown to him is not what was sold to him. On being referred to the Supplementary Affidavit sworn by PW1 on 14/02/2018 containing the complete brochure he admitted LKK'T therein is a directional map. This I noted is what is explained by PW1 in Paragraph 5(1) of the said affidavit that the same was a directional map of the Diani and Ramisi areas. Indeed DW1 admitted that there were two projects he was introduced to, in Diani and another in Funzi Island. The witness conceded that he wanted to first look at the Diani project. This is corroborated by page 96 of Supplementary affidavit. The Plaintiff was able to demonstrate that DW1 presented before court an incomplete set of the brochures which could not have given the full picture that the project he purported to be the one he was shown was the one in Funzi and which was not related to the Diani property. My perusal of the complete brochure confirms the same were for the developments in Funzi island and were the ones to be the exclusive gated community.
- 65 On the claim that the Plaintiff fraudulently convinced the 1<sup>st</sup> Defendant to pay the 50% Purchase Price before physically visiting the suit premises, I think this has already been addressed in my earlier discussions when discussing the allegations of material non-disclosure. Additionally while it is the Defendants case that the misrepresentations were perpetrated through the Plaintiffs agent George Gitau, the defendants never sought to enjoin him to the present proceedings. DW1 stated in cross examination that he did not want to heap blame on anybody.
- 66 This court has noted the instalment paid on the balance of the purchase price being Kshs. 1,800,000/= was paid on 22/10/2015. I note that this was around the same time DW1 visited the suit property. DW1 stated he visited the suit property, on return to Kenya in October 2015. Why then did the Defendant proceed to make this instalment in part liquidation of the purchase price if he had a problem with the property? This judgment would be incomplete without considering ELC No 111 of 2016 Susan Wangechi & 8 Others V Shabaan Salim Nyere & 6 Others. My perusal of the pleadings show that the Defendants were party to the proceedings. The people who the Defendants allege were the conspirators are also shown to have purchased land therein. DW1 did sign the verifying affidavit confirming the content of the pleadings. He also indicated to the court he had stopped following up on the land after the alleged attack by the squatters.
- 67 In summing up my entire analysis and discussion of the issues will refer to the case of Bernard Gathogo Kangoro v David M Muchemi & another [2006] eKLR where the court stated thus; -

If it is taken that the completion date was 21st August, 1992 then the failure of the special condition as to the clearing out of squatters could not possibly have arisen before that date. The lawful course, therefore, would have been for the plaintiff to turn up with the transfer document and the balance of purchase price, on the stroke of the completion date, and then raise the objection that the “squatters” were still on the suit land; for the 1st defendant had all along undertaken to have anyone being on the suit land removed as at the completion date. There is much evidence that the plaintiff was raising objection in advance about the special condition on squatters; but there is no evidence that the plaintiff observed the completion date, by bringing forth the balance of the purchase price, and also the conveyance documents – for execution by the vendor. On those facts, I have no doubts in my mind that the apprehensions in the plaintiff’s mind led him to fail to perform his part in the land-sale agreement of 22nd July, 1992. Both counsel for the defendants have illuminated a significant point in the plaintiff’s flawed case in this suit: his first duty was to transfer to himself the suit land, which was the crucial element in the whole transaction,



and thereafter raise secondary questions as to any shortfalls in the mode of delivery by the 1st defendant. This submission has much merit, in my opinion, and goes into the well – recognised principle of contract, that a party must take reasonable steps to mitigate his losses. If the plaintiff genuinely apprehended loss on the land sale agreement, he was expected to take action to mitigate such possible losses; and if he did, no doubt a legal process of recompense would be available.

- 68 I think I have stated enough to show the Defendants were in breach of the sale agreement, had themselves to blame and were not duped or forced into entering the agreement including the location of the suit property. Based on the foregoing analysis it is my finding that the Defendants did not prove the allegations of fraud misrepresentation and fraud against the Plaintiff as particularized herein to the required standard of proof.
- 69 Having made the finding that the Defendants were in breach of the terms of the sale agreement and in addition to the above finding it follows therefore the Counterclaim is not sustainable and must collapse for want of merit.
- 70 The next issue will be to address the remedies available to the Plaintiff in other words is the Plaintiff entitled to the prayers sought in his pleadings? Clause 10.1 is on Default/Breach of Agreement on the part of purchaser and stipulates the vendor may give a 21 days' notice to the vendor remedy the breach and on failure to comply the purchaser has the option to sue for all the sums due and unpaid and for specific performance or rescind the agreement.
- 71 Arising from the above it is clear that the Plaintiff vendor opted for the option to sue under the present suit and which according to the agreement was at his sole choice. PW1 produced in evidence a completion notice dated 11/5/2016 to the 1<sup>st</sup> Defendant (see page 43). My perusal of the said notice shows the 1<sup>st</sup> defendant is notified of being in breach of clause 5 for failing to pay the balance of the purchase price and to make good the same within 21 days. It is states that failure to remedy the breach the Vendor will exercise option 10(1)(a) to (e). The notice is copied to Ms. Gitau Gikonyo & Company Advocates. There is contention that the notice was never received. This notice in my view complied with the requirements for notice as stipulated in the sale agreement. The notice was not complied with and instead the Defendant issued a default notice dated 25/5/2016 through L.A. Oketch Advocate for breach of the agreement. The Vendor then instituted the instant proceedings. Prayer (C) of the Plaintiff read together with prayer (A) to me is in tandem with the terms of the agreement herein. It is not in dispute the property is registered in the name of the 1<sup>st</sup> Defendant and therefore the balance must be made good. The said prayers have already been listed elsewhere in this judgment and essentially the Plaintiff is seeking specific performance arising out of the breach.
- 72 The Plaintiff also craves interest on the balance of the purchase price at 5% per annum above the base lending rate prescribed by the Central Bank of Kenya from the contractual due date of 15/11/2015 until payment in full. I have noted the extensive submissions for adjustment of interest. The Plaintiff submits that the parties having under clause 11 incorporated the 1989 LSK Conditions of Sale into the contract the special condition 8(3) of the same is applicable but subject to the adjustment to 5% as provided under clause 11.2 of the agreement and being the base lending rate published by the Central Bank of Kenya as per the current legal framework of the property with all expenses with interest. There was no rejoinder on this from the Defendants. I see no reason why interest should not be paid as per the terms of agreement.
- 73 The Plaintiff craves for general damages for fraudulent and deceitful misrepresentation by the defendant. While I'm aware that general damages is actionable perse it is also to the discretion of the



court. The Plaintiff did not make submission to guide the court on this item. This court has already awarded interest to the Plaintiff and I think it should suffice.

74 As to the prayer for permanent injunction it is my opinion that the said orders cannot issue. I say so because the court has already made a finding that the orders A and C are merited. In any event the title is in the name of the 1<sup>st</sup> Defendant. I see no basis for granting the orders for permanent injunction.

75 The Plaintiff has also sought under prayer E for interest at court rates on prayer C from the date of filing the suit. While I don't see the justification for granting such an order having already granted interest under the terms of the Contract, Counsel for the Plaintiff did not make any submissions in support of this prayer.

76 The upshot of the foregoing is that this court finds that the Plaintiff has proved its case to the required standard. The court hereby enters judgment for the Plaintiff against the Defendants jointly and severally. The following orders shall and hereby issue;-

1. A declaration that the 1<sup>st</sup> Defendant is in breach of the sale agreement made as of 28/5/2014 between the Plaintiff and the Defendant and is not entitled to enjoy the full legal and beneficial rights and interests in the land comprised in title no Kwale/Ramisi Phase II S S/969 unless and until the 1<sup>st</sup> Defendant pays in 2) below to the Plaintiff in full.
2. The sum of Kenya shillings 6,432,460.00 together with interest thereon at the agreed contractual rates of 5% per annum above the base lending rate prescribed by the Central Bank of Kenya from the contractual due date of 15/11/2015 until payment in full.
3. The Counterclaim is hereby dismissed with no orders as to costs.
4. The Defendants shall bear the Plaintiffs costs for the suit.

**DELIVERED VIA EMAIL WITH CONSENT OF THE PARTIES THIS 19<sup>TH</sup> DAY OF FEBRUARY 2024.**

.....

**A.E. DENA**

**JUDGE**

Ruling delivered by email with the consent of the parties.

