



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 106 OF 2012**

**KARANJA MBUGUA..... 1<sup>ST</sup> PLAINTIFF**

**MARY ANNE MWENDWA MWITI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MARYBIN HOLDING CO. LTD.....DEFENDANT JUDGMENT**

**Introduction**

The Plaintiffs entered into a sale agreement with the Defendant dated 14<sup>th</sup> July 2010 for the sale of the property known as Title No. Nairobi/Block 93/282 (“the suit premises”) at a consideration of Kshs.10,000,000/-. The agreement provided for a completion period of 90 days from the date of execution. The Defendant paid the deposit of 10% of the purchase price and the Plaintiffs gave vacant possession of the premises to the Defendant on 4<sup>th</sup> October 2010 in exchange of the deposit.

On 29<sup>th</sup> November 2010 the Plaintiffs’ advocates forwarded to the Defendant completion documents to facilitate the registration of the transfer in the Defendant’s favour, where after the balance of the purchase price would be released to Plaintiffs. The Plaintiffs issued the Defendant with a 21-day completion notice on 7<sup>th</sup> January 2011, and subsequently issued him with a Notice of Rescission on 1<sup>st</sup> February 2011 and a 10-day notice to return vacant possession of the premises. The Plaintiffs have now filed this suit seeking various reliefs as against the Defendant.

**The Plaintiffs’ Case**

The Plaintiffs filed a Plaint dated 22<sup>nd</sup> February 2011. They averred that upon issuing the 21-day completion notice, the Defendant’s lawyers wrote to their lawyers on 14<sup>th</sup> January 2011 contending that the registration process was underway. However, that on conducting a search of the title, it was revealed that the transfer from to the Defendant had been registered on 24<sup>th</sup> December 2010. Consequently, on expiry of the completion notice, the Plaintiffs issued the notice of rescission of the sale agreement, and further, gave the Defendant a 10-day notice to vacate the premises. The Plaintiffs aver that despite issuance of the notice to vacate the premises, the Defendant has failed and is unwilling to vacate.

The Plaintiffs prayed for judgment against the Defendant for:

- a. An order directing the Defendant to give vacant possession of the suit premises to the Plaintiffs.
- b. An order that the registration of the transfer effected on 24<sup>th</sup> December 2010 against the suit property at the Lands Registry Nairobi be vacated.
- c. An order that the proprietorship section of the register of the property of title No. Nairobi/Block

- 93/282 be rectified by the reinstatement of the Plaintiffs as the proprietors of the said property in place of the Defendant.
- d. A permanent injunction against the Defendant restraining them by themselves, servants or agents from dealing with, selling, alienating, charging or transferring the suit property to any party whatsoever.
  - e. Damages for loss of use of the suit property from the date the sale agreement was rescinded until determination of the suit.
  - f. Mesne profits.

The 1<sup>st</sup> Plaintiff, Karanja Mbugua, (PW1) filed a statement and gave oral evidence on behalf of the Plaintiffs. He stated that he is a businessman, and reiterated that the Plaintiffs agreed to give vacant possession of the premises upon receipt of the deposit of the purchase price, to expedite the sale transaction. PW1 stated that he executed the transfer documents and completed the transfer in December 2010, but that the Defendant failed to remit the balance of the purchase price which caused him to issue to the Defendant a notice of completion. PW1 testified that the Defendant failed to comply with the completion notice hence the notice to give vacant possession.

It was PW1's testimony that there was a mortgage on the property at the time of entering into the sale transaction. He contended that the Defendant was aware of this fact, and that its Advocate wrote a letter of undertaking dated 8/9/2010 to the Kenya Commercial Bank. According to PW1, the Defendant was to pay the mortgage to Kenya Commercial Bank and the balance of the purchase price was to be remitted to the Plaintiffs. However, the same was never done and interest on the mortgage loan kept accruing and had reached Kshs.5.2 million in mid-2012.

PW1 testified that failure of the Defendant's advocate to honour the undertaking led the Plaintiffs to institute a disciplinary suit against him with the Law Society of Kenya Disciplinary committee, where the said advocate was found guilty of professional misconduct. PW1 urged the court to find in the Plaintiffs favour, stating that other than the 10% deposit of the purchase price, they have no property nor the proceeds therefrom. Further, that they could be getting rental income from the same.

On cross-examination, PW1 admitted that one of the terms of the sale agreement was that the property would be sold free from any encumbrance. He also admitted that the agreement incorporated the Law Society Conditions of Sale of 1989 which makes provision of a 90-day completion period, which would have been October 2010. PW1 further admitted that there was a mortgage prior to the execution of the sale agreement, and stated that the letter from the Bank's lawyers to the Defendant's lawyer was to notify the Defendant of the exact amount it was supposed to pay to settle the outstanding amount owed to the bank. PW1 also admitted that the completion documents were handed over to the Defendants on 29/11/2010, which was over four months past the agreed date, and that there was delay on the Plaintiffs' part in this regard.

PW1 testified further that the professional undertaking given by the Defendant's advocate on 8/9/2010 was to the effect that payment of the redemption amount and the accrued interest would be made to the bank within 60 days. He testified that he is aware the Defendant released Kshs. 5 Million to his advocates who acknowledged receipt of the same on 1/9/2010. However, that the said advocate failed to honour the undertaking hence the disciplinary proceedings filed against him. PW1 stated that he did not deem it necessary to join the said advocate to these proceedings, having already dealt with the matter at the Law Society of Kenya Disciplinary Committee.

PW1 affirmed to seeking prayers of cancellation of title and rectification of the register due to fraud on the part of the Defendant, in that having sold him their property they were yet to receive the proceeds. PW1 contended that they completed the transaction in 2010 and handed over vacant possession even before completion, and that the Defendant had ample time to comply and complete the transaction but failed to do so.

On re-examination, PW1 clarified that prior to instituting the suit he was not aware that the Defendant had forwarded Kshs. 5 Million to its advocates, since the letter acknowledging receipt was not copied to

the Plaintiffs. PW1 also stated that the Defendant did not make a complaint as to the delay in obtaining the completion documents. Further, that the delay in furnishing the completion documents did not absolve the Defendant from paying the balance of the purchase price.

### **The Defendant's Case**

The Defendant in an Amended Defence dated 3/7/2013 averred that after receiving the 10% deposit, the Plaintiffs forwarded the completion documents on 30/11/2010 in breach of the sale agreement, and having sought no extension thereof. Consequently, that the delay in completing the registration process in time was occasioned by the said delay in forwarding of the crucial documents. In that regard, the Defendant averred that the Plaintiffs were estopped from giving deadlines as they caused the delay, spilling beyond the 90 days agreed upon by the parties.

The Defendant also contended that the registration process was still on going at the lands office as late as 14/1/2011, which process was not within its control. Further, that the registration documents were lodged at the Lands offices on 24/12/2010 and as a matter of procedure, the registration documents are dated when received. Therefore, that even though the registration appears to have taken effect on 24/12/2010, this was the date of presentation but that the actual registration went through in mid-January 2011. The Defendant avers that it did not heed to the notice of intention to sue as the Plaintiffs were only trying to reverse the transaction too late in the day.

It is the Defendant's averment that the Plaintiffs have failed to disclose important information relating to the sale transaction, namely that soon after signing the sale agreement, it became apparent that the Plaintiffs could not release completion documents as the property had been charged to Kenya Commercial Bank. For this reason, the Defendant contends that the Plaintiffs could not comply with their 90 days completion date in view of the terms of the sale agreement that the property would be sold free of encumbrances.

The Defendant further avers that on 18/8/2010 the Kenya Commercial Bank wrote to the Plaintiffs advising that their debt stood at Kshs.4,706,903.15 accruing an interest of 13.5% per annum, and sought professional undertaking from their lawyers to enable them release the said documents. Following this letter, and in realization of the exposure of liability they had subjected the Defendant, the Plaintiffs on 19/8/2010 wrote to the Defendant's then Advocates, M/s Horeria Kamau & Company Advocates, requesting them for their professional undertaking to the bank.

As a result, the Defendant claims, the Plaintiffs acted negligently to their own detriment by: failing to state clearly in the sale agreement that the suit premises was subject to a charge to Kenya Commercial Bank Ltd; failing to issue a professional undertaking through their Advocates to Kenya Commercial Bank Ltd for the redemption of the debt; and failing to amend the sale agreement dated 14/7/2010 vide an addendum to incorporate the charge and redemption scheme as requested for by the chargee on 13/8/2010.

The Defendant further avers that even though advocates for both parties were embroiled in a tussle over professional misconduct at the Law Society of Kenya Disciplinary Committee, he is an innocent Purchaser for value and has not committed any fraudulent activity, and must therefore be afforded the protection of the law. In urging the court to dismiss the suit with costs and interest thereto, the Defendant avers that the suit as framed and the reliefs sought are untenable, unreasonable and are defective beyond cure, and further that the Court lacks jurisdiction to hear and determine this suit.

The Defendant's Director, Arthur Amukhoye Shikwe (DW1), filed a witness statement and gave oral evidence. He stated that he is a civil servant and an accountant by profession working in Kisumu. It was his testimony that he carried out renovation works on the suit premises after he took possession, which renovations cost him about Kshs. 2.5 Million. DW1 testified that all that time he awaited the completion documents from the Plaintiffs, and that his advocate's letter to the Plaintiffs asking for an earlier completion date had no response.

DW1 testified that he was shown a letter dated 13/8/2010 from Kenya Commercial Bank indicating that the Plaintiff's premises had a mortgage and asking his advocates to give a professional undertaking. He testified that he was advised that the same was not part of the sale agreement, and that the Plaintiffs sought to introduce new terms which had not been agreed upon. It was his testimony that he was never notified of the mortgage.

DW1 further testified that the completion documents were availed to him sometime in December 2010, whereas the same were supposed to be released within 3 months of execution of the sale agreement. However, that on his part, he remitted Kshs. 5 Million to his lawyer in August 2010 to be conveyed to the Plaintiffs. DW1 referred the court to his advocate's letter dated 1/9/2010 acknowledging receipt of the said amount of money. It was DW1's evidence that he was willing to remit the balance of the purchase price but that he received notices to complete and rescission together with the notice to give vacant possession in January and February 2011, following which he withheld the payment of the balance of the purchase price. DW1 contended that the Defendant has always been willing to complete the purchase as demonstrated by the Kshs. 6 Million he had already remitted.

On cross-examination, the Defendant admitted that the issue of vacant possession was not in the agreement, but was agreed between the advocates for both parties, and also that the issue of the renovation of the suit premises is not stated in his pleadings or witness statement. The Defendant stated that he came to know of the mortgage loan for the first time when his advocate received the letter from Kenya Commercial Bank dated 19/8/2010, and after the execution of the sale agreement. The Defendant confirmed that the deposit of the purchase price was paid to the Plaintiffs but that the Kshs. 5 Million is still being held by his advocates. The Defendant further confirmed that the suit premises are currently registered in the name of the Defendant and that he is in possession thereof.

### **The Issues and Determination**

Arising from the evidence given by the parties, it is not disputed that the Plaintiffs provided the completion documents although after a delay, and that the Defendant is yet to pay the balance of the purchase price. Further, it is also not disputed that the Plaintiffs' loan liability that was secured by the suit premises remains unpaid. Lastly, it is not disputed that the suit premises are currently registered in favour of, and occupied by the Defendant. This court in light of the foregoing facts finds that the issues for determination are as follows:

1. Whether there was a breach of the sale agreement by the Defendant's Advocate's failure to pay the outstanding loan balance secured by the mortgage over the suit premises.
2. Whether the sale agreement was validly rescinded by the Plaintiffs.
3. Whether the Plaintiffs are entitled to the remedies sought.
4. Which party shall bear the costs of the suit.

### ***Whether there was a breach of the sale agreement by the Defendant's Advocates failure to pay the outstanding loan balance due on the mortgage over the suit premises***

It was submitted for the Plaintiffs on this issue that the Defendant acknowledged that the premises was mortgaged in favour of Kenya Commercial Bank following the letter of professional undertaking dated 8/9/2010 issued by the Defendant's advocate, in which the Defendant undertook to discharge the redemption sums, which discharge was to be taken into account in the reduction of the balance of the purchase price. Counsel submitted that it is trite law that an agreement might incorporate other terms by reference or even by implication, for instance the Law Society of Kenya's Conditions of Sale which were incorporated under clause 5 of the sale agreement.

Further, that extrinsic evidence will be admitted where it is necessary to show that an agreement has been materially altered or varied. Hence, in this case the letter of undertaking is admissible to show that the sale agreement has been varied and or altered to include the Kenya Commercial Bank mortgage encumbrance. Counsel referred the court to the letter requesting the professional undertaking and the response thereto, and submitted that the said letters both referred to the present transaction thus

confirming knowledge of the mortgage and that the terms thereto had been incorporated in the sale agreement.

The counsel for the Defendant on his part submitted that the courts have a duty to interpret and give effect to the intention of the parties at the time of entering into a contract, and that it is not open to court to amend or impose new obligations on parties which they did not intend nor foresee at the time of making a contract. Consequently, that the Defendant cannot be liable in respect of arrangements made between the Plaintiffs and other parties outside of the sale agreement. Counsel urged the court to employ the “Parole Evidence Rule” in rejecting the oral evidence and all extrinsic material in terms of letters and the professional undertaking issued by the Defendant’s advocates without his express authority, and contested the Plaintiffs’ arguments that the sale agreement of 14/7/2010 was amended to include the mortgage with Kenya Commercial Bank.

I have perused the sale agreement entered into by the Plaintiffs and Defendant dated 14<sup>th</sup> July 2010. The terms as to payments were clause 3 and 4 thereof which required a deposit payment of 10% of the purchase price of Kshs 10,000,000/=, and the balance of Kshs 9,000,000/= was to be paid within 14 days of receipt by the Purchaser’s Advocate of the duly registered transfer in favour of the purchaser, and vacant possession being given to the purchaser. Clause 7 provided that the suit property was being sold free from encumbrances.

It is evident from the terms of the agreement that there was no requirement for the Defendant to give any undertaking or to pay the outstanding loan amounts secured by the suit property. The Plaintiffs have argued that this term was introduced and should be implied by subsequent correspondence between the Kenya Commercial Bank, the Plaintiffs’ Advocate and the Defendant’s Advocate.

I have perused the said correspondence attached in the Plaintiff’s bundle of documents. I note in this regard that the Kenya Commercial Bank first sought the professional undertaking from the Plaintiffs’ Advocate in their letter dated 13<sup>th</sup> August 2010, whereupon the Plaintiffs’ Advocate in a letter dated 19<sup>th</sup> August 2010 asked the Defendant’s Advocate to provide the undertaking. The Kenya Commercial Bank then wrote to the Defendant’s Advocate in a letter dated 30<sup>th</sup> August 2010 asking for the said undertaking. The Defendant’s Advocate thereupon gave the professional undertaking to pay the redemption amount in a letter dated 8<sup>th</sup> September 2010.

It is settled law that no action may be brought upon any contract for the sale or disposition of land, unless that agreement upon which the action is brought, or a memorandum or note of it is in writing and signed by the party to be charged or by some other person authorized by him or her. This requirement is found in section 3(3) of the Law of Contract Act. There is no special form in which the memorandum or contract in writing needs to be in, and indeed it can be formed by more than one document. It is provided as follows in this regard in **Halsbury’s Law of England Volume 42, 4<sup>th</sup> Edition** at paragraph 33 as follows:

**“There are three situations in which a memorandum may be constituted by two or more documents. First, if all documents are signed by or on behalf of the party to be charged, and when laid side they can be seen to refer to the same transaction, then no further, evidence is needed to connect the documents and they may be read together. Secondly (although this is slightly more doubtful), if only one of the documents is signed by or on behalf of the party to be charged, but the documents when placed side by side manifestly refer to the same transaction, then they may be read together. Thirdly, if only one of the documents is signed by or on behalf of the defendant, but that document contains some express or implied reference to another document, then oral evidence is admissible to identify that other document and the two documents may be read together”.**

In the present suit, the letter by the Plaintiffs’ Advocate to the then Defendant’s Advocate dated 19<sup>th</sup> August 2010 read as follows:

**“19<sup>th</sup> August 2010**

**Horeria Kamau & Company Advocates,**

**Standard Building 4<sup>th</sup> FI Kenyatta Avenue/Wabera Street**

**NAIROBI.**

**Dear Sirs,**

**RE: SALE OF L.R NO. NAIROBI/BLOCK 93/282**

**We refer to the above matter.**

**As you are aware the property is currently mortgaged and we enclose herewith a copy of a letter from the mortgagee confirming the loan amount and with instructions on the professional undertaking.**

**We now request you to forward you undertaking to the said lawyers to enable us proceed with the Discharge of Charge as we work towards completion.**

**Yours faithfully**

**NAMACHANJA AND MBUGUA ADVOCATES**

**Patrick Mbugua**

**c.c.        1.        Clients**

**2.        Wamaitha Kang'engethe & Company Advocates**

**Kencom House, 1<sup>st</sup> /floor,**

**Nairobi.”**

The subsequent professional undertaking by the then Defendant's Advocate dated 8<sup>th</sup> September 2010 stated as follows:

**“Date:    8<sup>th</sup> September, 2010**

**Wamaitha Kang'ethe & Company Advocates,**

**Kencom House,**

**1<sup>st</sup> Floor City Hall Way,**

**P. O. Box 35155-00600,**

**NAIROBI.**

**Dear Sir,**

**RE:        Charge Over: Title Number Nairobi/Block 93/282**

**Your client: Kenya Commercial Bank Limited**

**Our client: Maybin Holdings Limited**

**Borrowers: Karanja Mbugua & Mary Anne Mwendwa Mwiti**

**We confirm that we act for the purchaser herein and acknowledge your letter dated the 30<sup>th</sup> August 2010.**

**We herein give our professional undertaking in the following terms:-**

- i. That pending payment of the Redemption Amount of Kshs.4,944,406.59 with interest thereon to the Bank, we shall hold the KCB Charge, the Discharge and the Title documents (together “the Documents”) to your order returnable intact on demand and we shall not release the said Documents to any Advocate or persons whatsoever (other than the land Registrar for registration of the documents approved by you, for any purpose whatsoever without first obtaining your written consent which shall only be granted on such other Advocate complies with the undertaking or not you shall continue to hold such responsible on our undertaking herein provided;**
- ii. That we shall not utilize the Documents for any purpose other than for registering the Discharge or Charge, together with the Transfer in favour of our client the purchaser simultaneously;**
- iii. That we shall present the Exchange of Charge for registration without simultaneously presenting the Transfer to the Purchaser, it being a condition that if any document is rejected for the purposes of registration, then no instrument will be registered;**
- iv. That we shall pay to your client Bank the Redemption Amount with accrued interest up to and including the date of redemption within sixty (60) days from the date of undertaking failing which the offer will automatically lapse.**
- v. Subject to No. (iv) above we shall within seven (7) days of the due and effective simultaneous registration of the Discharge of Charge and the Transfer, pay by way of transfer to your client’s account the Redemption Amount and accrued interest.**
- vi. That we shall pay you your handling charges of Kshs.34,800/=.**

**Yours faithfully,**

**HORERIA KAMAU & COMPANY ADVOCATES**

**Michael K. Horeria.**

**c. c Namachanja, & Mbugua Advocates,**

**Shelter Afrique Centre, 6<sup>th</sup> Floor,**

**Longonot Rod, Upper Hill,**

**P. O. Box 16301-00100,**

**NAIROBI.**

**c. c. Client.”**

The above sets of correspondence on the professional undertaking were signed by the Plaintiffs’ and Defendant’s Advocates, who are not only were specifically described in the sale agreement as such in clause 6, but deemed to be their agents in law and bind them in any agreement. In addition, the said correspondence specifically referred to the parties and suit premises that were the subject of the sale agreement dated 14<sup>th</sup> July 2010. I find that the said correspondence and professional undertaking must therefore be read together with the said sale agreement. Further, that the said correspondence specifically introduced new terms to the said sale agreement in terms of the professional undertaking by the

Defendant's Advocate and payment of the loan liability.

Therefore, to the extent that the Plaintiffs' loan redemption amount was not paid by the Defendant, there was a breach of the sale agreement on its part. In this regard I also note that although DW1 brought evidence that the Defendant paid Kshs 5,000,000/= to its advocate, as long as this amount of money was not remitted to the Plaintiffs or used to pay the loan redemption sum, then the Defendant will still be liable for the acts of default or negligence on the part of its Advocate, who was acting as its agent. Lastly, I also find that the Parole evidence rule is not applicable in the circumstances of this case. The parole evidence rule is defined in **Black's Law Dictionary, Ninth Edition** at page 1227 as follows:

**“The common-law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing. This rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form. This rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form”**

In the present case the said correspondence was entered into after the sale agreement had been entered into, and sought to reach agreement on new terms of the agreement. Further, the correspondence was in writing, and signed by the Advocates of the Plaintiffs and Defendant with the express intention of adding new terms to the agreement that had been entered into.

#### ***Whether the sale agreement was validly rescinded by the Plaintiffs***

Counsel for the Plaintiff submitted in this regard that the Plaintiffs sought to make time of the essence in the payment of the balance of the purchase price by issuing the completion notice dated 7/1/2011 seeking that the balance be paid within 21 days thereof, in accordance with clause Special Condition D of the Sale Agreement and Clause 4(7) of the Law Society of Kenya Conditions of Sale. Counsel submitted further that the Plaintiffs were entitled to rescind the agreement when the completion notice was not complied, and that they did so by the letter dated 1/2/2011 in accordance with Clause 4(7) (d) of the Law Society of Kenya Conditions of Sale.

It was counsel's submission that parties be returned to the positions they were in before entering into the sale agreement in view of the fundamental breach of the terms of the sale agreement by the Defendant. Further, that the courts have also held that the rescission of a contract to sell land can only arise where the party in default has been notified of the default, and given an opportunity to rectify the same. Counsel referred the court to the decisions of the Court of Appeal in this regard in **Edward Mugambi vs. Jason Mathiu Civil Appeal No. 286 of 2002 (2007) eKLR** and **Njamunyu vs. Nyaga (1993) KLR 282** .

Counsel for the Defendant submitted that the completion contemplated in the sale agreement was successful completion of registration and title in the Defendants favour, and thereafter release of the sale proceeds to the Plaintiffs which has not come to pass. Counsel reiterated the position that 24/12/2010 was date the documents were booked for registration not the actual registration. Further, that given that the Plaintiffs only released the completion documents on 1/12/2010 it would have called for extra-ordinary ability to conduct valuation, payment of stamp duty and registration within two weeks to 24/12/2010. Consequently, the Plaintiffs' principal reason of seeking rectification is extremely convoluted and does not hold.

This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position. See **Halsbury's Law of England Volume 42, 4<sup>th</sup> Edition** at paragraph 242 in this respect.

In Njamunyu vs. Nyaga (1993) KLR 282 the Court of Appeal stated the law on completion once time is made of essence as follows at page 287:

**“The principle to be acted in such a case is stated in 9 Halsbury’s Laws (4<sup>th</sup> Edn) p. 338, para 482, i.e:**

**‘Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this will fulfil the intention of the parties’**”

In the present case the contract between the Plaintiff and Defendant dated 14<sup>th</sup> July 2010 provided for rescission under Special Condition D as follows:

**“If for any reason whatsoever other than non-completion by the fault of the Vendors this transaction shall not be completed on the completion date the vendors shall issue the Purchaser with a completion notice and should the purchaser not complete the transaction as dictated by the said Notice the Vendors shall rescind the sale agreement and the purchaser shall forfeit the deposit paid.”**

The completion notice in this case was contained in a letter by the Plaintiffs’ Advocate addressed to the Defendant’s Advocate dated 7<sup>th</sup> January 2011. The said letter required the Defendant to complete the transfer of the property within 21 days and made time of the essence. The Defendant’s Advocate in a letter dated 14<sup>th</sup> January 2011 stated that the registration documents had been lodged on 24<sup>th</sup> December 2010, but did not thereafter confirm if the registration had been finalized, nor give evidence of the documents lodged for registration, a fact noted by the Plaintiffs’ Advocate in its letter dated 1<sup>st</sup> February 2011 in which they rescinded the sale agreement. In addition the Defendant also failed to pay the balance of the purchase price as required by the sale agreement.

In the circumstances, given that the 21-day completion notice given by the Plaintiffs lapsed on or about 28<sup>th</sup> January 2011 and by that date the Defendant had not given any confirmation of compliance, this court finds that the Plaintiffs validly rescinded the sale agreement in their letter dated 1<sup>st</sup> February 2011. It is also finding of this court that it was reasonable in the circumstances of this case for the Plaintiffs to have given the notice of completion on 7<sup>th</sup> January 2011, having given vacant possession to the and the completion documents to the Defendant 4<sup>th</sup> October 2010 and 29<sup>th</sup> November 2010 respectively. Lastly, the court finds that the Defendant cannot seek refuge in the delay by the Plaintiffs to forward the completion documents, as it waived its rights arising from any breach of the sale agreement thereof by accepting the said completion documents and proceeding to transfer the suit premises to itself.

### ***Whether the Plaintiffs are entitled to the remedies sought***

On the remedy sought of rectification of the title to the suit property, the counsel for the Plaintiffs submitted that the Defendant acquired possession and proprietorship of the suit premises by way of fraudulent misrepresentation to the Plaintiffs that it was in a position to pay the balance of the purchase price when in fact it is not ready, willing and able to do so. Further, that the court should therefore order for a restitution of the parties to their prior position, and that the register of the suit property be rectified to reinstate the Plaintiffs as the registered proprietors over the suit property. In support of this submission counsel referred the court to a decision by Aluoch J. (as she then was) In Harrison Kamau Ng’ang’a vs. Attorney General & Another High Court Civil Suit 1241 of 2003; (2004) eKLR where the Kiambu Land Registrar was directed to cancel an entry in the register in favour of a defendant who had breached an agreement, and have an entry recorded in the proprietorship section in favour of the plaintiff.

The Plaintiffs’ counsel further submitted that the representation made to the Bank’s advocates by counsel for the Defendant gave the Plaintiffs comfort in giving vacant possession over the premises. Therefore in failing to honour the undertaking, and further failing to pay the balance of the purchase price amounted to fraudulent misrepresentation to the detriment of the Plaintiffs as the Defendant must have known all along

that he was unable to complete, or has refused to complete its part of the bargain. It was his submissions that the transfer effected in the Defendant's favour is null on account of its having been procured by fraudulent means and or deceit.

On behalf of the Defendant, it was submitted that it is a cardinal rule that title to land is sacrosanct and the doctrine of indefeasibility of title must be therefore be upheld by this court. It was the Defendant's counsel's submission that from the evidence available, there was sufficient consideration provided on execution of the sale agreement, and a further amount of Kshs. 5 Million deposited with the Defendant's counsel to be conveyed to the Plaintiffs and the court ought therefore to safeguard the Defendant's title. On the issue of rectification, the counsel submitted that the Plaintiffs had made no more than passing comments on the allegation of fraud on the part of the Defendant, contrary to the provisions of section 80 of the Land Registration Act. Counsel submitted that the Plaintiffs neither provided specific proof nor particularized the allegations as required by law. Moreover the Plaintiffs did not provided any proof of demand of payment of the balance of Kshs.9,000,000/= and refusal thereof by the Defendant.

The determination by this court on the above remedies is that it has already been found that the Defendant was in breach of the terms of the sale agreement entered into by the Plaintiff and Defendant on 14<sup>th</sup> July 2010, and that the said sale agreement was validly rescinded by the Plaintiffs. The legal effect of rescission of a sale agreement is that the parties are restored to their former position. In the present case the pre-contractual position of the parties is that the Plaintiffs were the registered owner and in possession of the suit premises, and that the Defendant is to be put back to the financial position it was at the time of entering into the sale agreement, and refunded any money that it paid under the sale agreement.

In addition, section 143 of the repealed Registered Land Act which was the legal regime under which the suit premises was registered at the time of the sale agreement and filing of this suit, provided that the court may order rectification of the register by directing that any registration be cancelled where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. Similar provisions are found in section 80 of the Land Registration Act of 2012. The facts of this case clearly lend themselves to a finding that the registration of the suit premises in the Defendant's name was by mistake, as the Defendant did not fulfill its part of the bargain to entitle it to such registration.

To this extent the Plaintiffs are therefore deserving of the remedies of cancellation of the transfer of the suit premises in favour of the Defendant, the rectification of the register of the suit premises to restore them to their previous status as owners, and to the grant of vacant possession of the suit premises. As for the restoration of the Defendant to its pre-contractual position, the amount of money paid to the Plaintiffs under the sale agreement was the deposit of Kshs 1,000,000/=. The refund of a deposit is however dependent on the terms of a contract, and if the contract gives the vendor the express right of forfeiture on non-performance, then the deposit will be forfeited in the event of such non-performance. This is mainly for the reason that a primary purpose of a deposit is as security for the performance of the contract. In the present case Special Condition D of the sale agreement entered into by the Plaintiffs and Defendant specifically provided that upon rescission of the agreement the Defendant would forfeit any deposit paid.

In addition this court having found that the Defendant breached the said agreement, and given that it has been in possession of the suit premises since December 2010, it would be inequitable to refund the deposit paid to the Defendant. The court also notes in this regard that the Defendant did not bring any evidence of the renovations it claims to have made to the suit premises, and did not make any counterclaim in this regard.

On the remedies sought of damages and mesne profits, counsel for the Plaintiffs submitted that the suit premises, being in the prime estate of South B, Nairobi, it followed that their value must have escalated by now, and that an award of Kshs.45,000/= per month from 4/10/2010 until delivery of judgment would be appropriate as mesne profits. In terms of damages for loss of use, counsel urged the court to be guided by the accrued debt to the Kenya Commercial Bank. It was his submission that the mortgage debt be taken up and paid off by the Defendant on account of having breached the contract resulting in the escalation of the mortgage debt, and also for reason of having issued the letter of undertaking to pay the

outstanding debt.

For the Defendant, it was submitted that the Plaintiffs are driving an unconscionable bargain for reasons that firstly, they have imposed upon the Defendant the onerous burden of redeeming a mortgage without prior knowledge who therefore stood to be greatly prejudiced. Secondly, in seeking cancellation of the transfer after the Defendant has heavily invested in the suit property with costly renovations, improvements and fittings, and if the property were to revert to the Plaintiffs and be put up for sale it would fetch double the amount of the current purchase price. Counsel urged that this court being a court of conscience, should not countenance such an eventuality.

This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act. The said provisions state as follows with regard to a decree for possession and mesne profits:

**“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-**

- a. **For the possession of the property.**
- b. **For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.**
- c. **Directing an inquiry as to rent or mesne profits from the institution of such suit until :-**
  - i. **The delivery of possession to the decree-holder**
  - ii. **The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or**
  - iii. **The expiration of three years from the date of the decree, whichever even first occurs.**

**(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”**

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.

The Plaintiffs has also claimed damages incurred as a result of the Defendant’s breach. The general rule as to payment of damages when a purchaser wrongfully fails to complete a contract for sale of land is the injury sustained by the vendor in terms of the contract price of the property less the market price at the time fixed for completion. (See McGregor on Damages, Eighteenth Edition at paragraph 22-034 to 22-035.) No such injury has been suffered by the Plaintiffs in this case as the court has found that the suit premises be returned to their ownership and possession.

The Plaintiffs in this case claim that the injury they sustained was its mortgage debt that should be taken up and paid off by the Defendant. However, this mortgage debt was already existing at the time the Plaintiffs entered into the sale agreement with the Defendant, and cannot therefore be said to be damage naturally arising out of the breach of the said agreement as required by the rule in Hadley v Baxendale (154) 9. Exch, 241 stated by Alderson P.at page 354 as follows:

**“Where two parties have made a contract which one of them has broken the damages which the other ought to receive... should be such as may fairly and reasonably be considered either as arising naturally, i.e according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made a contract as the probable result of a breach of it”**

The only damages would be reasonably expected as arising from the Defendant's breach in the circumstances of this suit are any consequential losses incurred as a result of non-payment of the mortgage debt, for example in terms of interest payable on the said mortgage debt. However the Plaintiffs did not bring any evidence or particulars of such consequential loss, that would have formed the basis of any award of damages by the court.

***Which party shall bear the costs of the suit***

Lastly, on the prayer for costs, the applicable law is found in section 27 (1) of the Civil Procedure Act which provides that costs largely follow the event, and the court is given discretion to determine which party will meet the costs and to what extent. In the present suit this court has reached conclusions that are largely in favour of the Plaintiffs in the findings hereinabove, and therefore finds that the Plaintiffs are entitled to the costs of this suit.

**The Orders**

In conclusion, this Court finds that the Plaintiffs have proved their case on a balance of probabilities as shown in the foregoing, and I accordingly enter judgment for the Plaintiffs as against the Defendant as follows:

1. The Land Registrar, Nairobi County is hereby ordered to forthwith cancel the registration of the transfer effected against the title No. Nairobi/Block 93/282 in favour of Maybin Holding Company Limited and any other consequential transfers.
2. The Land Registrar, Nairobi County is hereby ordered to forthwith rectify the proprietorship section of the register of the property known as. Nairobi/Block 93/282 by cancelling any entry of proprietorship and title if any, issued to Maybin Holding Company and any consequential entries, and to register and issue a new title to Karanja Mbugua and Mary-Anne Mwendwa Mwiti as the proprietors of the said property.
3. The Plaintiffs shall meet the costs of such cancellation of transfer and title and rectification of the register of the property known as. Nairobi/Block 93/282 as ordered herein above in orders (1) and (2).
4. The Defendant, its agents, servants and any persons claiming through them are hereby ordered to vacate the parcel of land known as Nairobi/Block 93/282 within 90 days of service of the judgment decree by the Plaintiffs. In default, an order for eviction to issue.
5. The Plaintiffs shall retain the sum of Kshs 1,000,000/= being the sum of money paid to them by the Defendant as deposit, and forfeited pursuant to the sale agreement entered into by the parties herein on 14<sup>th</sup> July 2010.
6. The Defendant shall bear the costs of this suit save for the costs specified in order (3) hereinabove.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_5<sup>th</sup>\_\_\_\_ day of  
\_\_\_\_May\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**