



REPUBLIC OF KENYA



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**Hudani v Mukunya & 5 others (Civil Appeal 353 of 2018)
[2022] KECA 93 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 93 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 353 OF 2018
HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA
FEBRUARY 4, 2022**

BETWEEN

NIZAR HUDANI APPELLANT

AND

ELIZABETH MUGURE MUKUNYA 1ST RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED 2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

THE REGISTRAR OF TITLES 4TH RESPONDENT

VIJAY MORJARIA & HITESH MORJARIA 5TH RESPONDENT

FIDELITY COMMERCIAL BANK LIMITED 6TH RESPONDENT

(An appeal against the Judgment of the Environment and Land Court of Kenya at Nairobi (A.K. Bor, J.), dated 25th January 2018.) IN (ELC CAUSE No. 721 of 2007)

JUDGMENT

1. Nizar Hudani (the appellant herein), has filed this appeal against the judgment of Bor J dated 25th January 2018.
2. The appeal arises from a suit that had been filed at Environment and Land Court in Nairobi in 2017, in which the appellant had sought inter alia “against the first defendant an order for specific performance directing the first defendant to specifically perform her obligations under the sale agreement dated 17th July 2006 with all such orders and directions as may be necessary to effectually vest the title of the property known as Land Reference number 7785/793 (original number 7785/2/12) in the plaintiff and for transfer thereof in the plaintiff’s name.”



3. The appellant had further sought as against all the respondents jointly and/or severally a declaration that the purported transfer, registered as number I.R 85248/5 of the property known as Land Reference number 7785/973 (original number 7785/3/12] (“the suit property”) to the 5th respondent and the purported charge registered as number I.R 85248/6 in favour of the 6th respondent was fraudulent, in breach of the court orders, null and void.
4. The matter was heard by Bor J who in a judgment delivered on 25th January 2018, dismissed the same with an order that each party bears its own costs having found that the appellant had failed to prove his case on a balance of probability and further directed that the appellant be refunded deposit of the purchase price amounting to Kshs 680,000/= plus interest at court rates to be calculated from the date he paid the same to the 1st respondent till payment in full.
5. The appellant was aggrieved by the aforesaid judgment thus provoking the instant appeal raising a whopping 24 grounds of appeal. The grounds of appeal therein faulted the trial court for failure to appreciate that the 1st respondent was bound by the Sale Agreement dated 17th July, 2006; failure to find that the appellant was ready, willing and able to complete his part of the bargain; failure in finding that time was of the essence in the Sale Agreement; failure in not finding that the 1st respondent breached the Sale Agreement; failing to find that the 2nd respondent was estopped from transferring the property to the 5th respondent in view of the court order given on 15th October, 2007; for failing to find that the 1st respondent who sold the property to the 5th respondent was merely a trustee on behalf of the appellant; failing to find that there was collusion on the part of all the respondents in transferring the property to the 5th respondent; for failing to find that the appellant suffered loss on account of the actions of the 1st respondent and finally, on ordering for refund of the deposit when the appellant had not prayed for an order of refund.
6. The 5th respondents also filed a Notice of Cross Appeal dated 10th April 2019, faulting the High Court for inter alia dismissing their counter claim for the sum of Kshs 150,000 being architects costs for drawing architectural plans, Kshs 75,833 being monthly interest due on the commercial loan taken by them and Kshs 18,000 per month being fees paid to guards to secure the suit property during the period the injunction instigated by the appellant was in force, and for failure to provide costs for the suit against the appellant.
7. The brief facts in this appeal are as follows: by an agreement for sale dated 17th July 2006, the 1st respondent agreed to sell the suit property to the appellant at an agreed consideration of Kshs 6,800,000/=. It was a term of the sale agreement that the appellant was to forward to the respondent’s advocate, 10% of the purchase price as deposit and the appellant was further to pay the outstanding amount of the charge to the 2nd respondent to redeem the title and in the alternative the appellant’s advocate was to give an undertaking to the 2nd respondent to pay the aforementioned sum.
8. Subsequent thereafter, and after the appellant paid the deposit, the parties did not complete the sale prompting the 2nd respondent to sell the suit property in exercise of its statutory power of sale to the 5th respondent who in turn charged the same to the 6th respondent thus leading to the institution of a suit before the Environment and Land Court, the genesis of this appeal. The 1st respondent admitted having signed the Sale Agreement. However, it was her position that whereas she was ready and willing to fulfil her part of the bargain under the contract, the appellant was not ready to do so prompting the 2nd respondent to exercise its statutory power of sale.
9. Before the hearing of the appeal, the 2nd respondent filed a motion on notice seeking to expunge from the record, the affidavit of service of Daniel Munyoli Ndongoi sworn on 22nd October, 2007 which was not part of the record before the trial court.



10. The appeal was urged by way of written submissions with oral highlights by the parties on 1st November 2021. Mr. Oraro SC, appeared with Ms Sarvia and Ms Mukami for the appellant whereas Mr. Ohaga SC appeared for the 2nd respondent. Mr. Eredi appeared for the 3rd and 4th respondents whereas Mr. Mogere appeared for the 5th respondent while Mr. Ouma appeared for the 6th respondent. There was no appearance for the 1st respondent.
11. It was submitted for the appellant that based on the grounds outlined in the Memorandum of Appeal, the following issues arose in the appeal:
- “ 1. Whether there was a breach of the agreement of sale and if so by which party?
 2. Whether the sale and transfer of the suit property to the 5th respondent was procured by fraud.
 3. Whether the 2nd respondent was estopped from selling and transferring the suit property to the 5th respondents.
 4. Whether the transfer of the suit property to the 5th respondents and the charge in favour of the 6th respondent was registered in breach of the court order given on 15th October 2007.
 5. Whether the appellant is entitled to specific performance and/or damages.
 6. What orders should be made regarding costs and interest.”
12. As to the 1st issue, it was submitted that the appellant and the 1st respondent had entered into a sale agreement, in which inter alia it was a term of the said agreement that completion date was ninety days from the receipt of title and discharge of charge documents and that the appellant would pay the amount of the charge to the 2nd respondent to redeem the title and in the alternative the appellant’s advocates would give an undertaking to the bank to pay the aforementioned sum. It was submitted that the 1st respondent took no steps whatsoever to fulfil her obligations under the sale agreement once she had executed the same, since it was her obligation to get the 2nd respondent to confirm the amount outstanding under the charge, together with interest thereon so that the appellant could either pay for the same or provide an acceptable undertaking to the 2nd respondent through his advocates in order to obtain title and the discharge of charge as provided under the sale agreement.
13. It was further submitted that there was no privity of contract between the appellant and the 2nd respondent with regard to the 2nd respondent’s charge over the suit property and only the 1st respondent was in a position to obtain the 2nd respondent’s confirmation of the amount owing under the charge, to enable the appellant pay the same in exchange for the original title and discharge, and that the appellant on his part initially provided an opportunity to the 1st respondent to fulfill her obligations vide a letter dated 5th October 2007, enclosing two bankers cheques in the sum of Kshs 4,600,000/= and Kshs 400,000/= which was duly returned by the 2nd respondent vide a letter dated 8th October 2007, and that as such, the learned Judge erred in law and fact in finding that the appellant had inordinately delayed, failed to demonstrate that he was ready, willing and able to complete the agreement and that the 1st respondent was entitled to withdraw from the sale.
14. As to whether the sale and transfer of the suit property to the 5th respondent was tainted with fraud, it was submitted that the appellant had obtained an order for injunction on 15th October 2007, which was notified to the 2nd respondent on the same date and further served on 17th October 2007 and that in addition, two caveats had earlier been registered against the title to protect the appellant’s interest



- but nevertheless, the respondents proceeded to have the transfer in favour of the 5th respondent and a charge in favour of the 6th respondent registered without regard to the injunction, the caveat emptor and the caveats against the title.
15. It was thus submitted that as such, there was ample evidence of fraud attributable to the 1st, 2nd, 5th and 6th respondents and that the registration of the transfer in favour of the 5th respondent and the charge in the name of the 6th respondent was intended to defeat the unregistered interest of the appellant
 16. It was contended by the appellant that the 2nd respondent was estopped from selling and transferring the suit property to the 5th respondent since in the first place, the 2nd respondent was clearly made aware of the sale agreement and the transaction between the 1st respondent and the appellant even before the sale agreement had been executed and that further, the 2nd respondent expressly confirmed vide its letter dated 12th January 2007, to the appellant's advocate that it had no objection to the sale of the suit property to the appellant, provided that the sale proceeds were paid directly to it and thereafter proceeded to approve the terms of a draft transfer of the suit property.
 17. It was submitted that the 2nd respondent thereby led the appellant to believe that it would execute a transfer of the suit property to him and release it together with the original title deed of the suit property, executed transfer and the clearance certificate to him in exchange for the balance of the purchase price, pursuant to which the appellant caused his advocate to give the 2nd respondent his professional undertaking to pay the balance of the purchase price to the 2nd respondent in exchange for the duly executed completion documents and that the appellant having altered his legal position; by first causing his advocate to give his professional undertaking to pay the balance of the purchase price to the 2nd respondent and thereafter by tendering payment of the estimated charge debt to the 2nd respondent, based on the 2nd respondent's express representation that it would directly transfer the suit property to him thus, the 2nd respondent was estopped from purporting to sell the suit property to any other party such as the 5th respondents.
 18. On the issue as to whether the transfer of the suit property to the 5th respondents and the charge in favour of the 6th respondent were registered in breach of the court order given on 15th October 2007, it was submitted that on 15th October 2007, the High Court had issued an injunction restraining the 1st and 2nd respondents from transferring or otherwise alienating the suit property which order was served on the 2nd, 3rd and 4th respondents on 17th October 2007 and that as such, the said respondents were aware of the existence of the said order restricting transfer of the suit property, yet on 18th October 2007, the same was transferred to the 5th respondents and a charge in favour of the 6th respondent registered on the same day.
 19. It was urged that the appellant was entitled to an order for both specific performance and damages since the evidence on record clearly showed that the appellant was at all times willing, ready and able to pay though the same was not a requirement of law and that further the appellant had led substantive evidence in connection with his claim for special damage. It was further submitted that the Learned Judge erred in awarding damages and not assessing the same.
 20. Finally, on costs and interest, it was submitted that in as much the power to award costs was discretionary and the High Court having ordered each party to bear its own costs, this Court can interfere with a Judge's discretion where it is satisfied that there was inter alia a misdirection.
 21. The appellant thus urged this Court to consider the fraudulent acts of the respondents and grant costs and interests in his favour.



22. Regarding the motion dated 8th July 2019, filed by the 2nd respondent seeking to expunge from the record an affidavit of service of Daniel Munyoli Ndogoi on the grounds that it was not part of the record before the High Court and had been included in the Record of Appeal without leave of the Court, it was submitted by the appellant that the affidavit of service having been filed before the High Court and having been put in evidence by the appellant, the same was part of the record of the High Court and cannot be said to have been “sneaked” in as alleged by the 2nd respondent.
23. The 1st respondent did not file any submissions and neither was she represented.
24. On the other hand, and as regard to the motion dated 8th July 2019, it was submitted for the 2nd respondent that they were seeking to expunge from the court record the affidavit of service of Daniel Munyoli Ndongoi because it was not part of the record before the High Court and that the same had been included and/or sneaked into the Record of Appeal without leave of the Court. Furthermore, the same was not among the bundle of documents in the High Court and as such, the appellant’s conduct in seeking to introduce the same was un procedural, irregular and amounts to an abuse of the court process. Accordingly, the same ought to be expunged from the record.
25. As regards the main appeal, it was submitted that the following issues fall for determination as against the 2nd respondent:
- “ 1. Whether the 2nd respondent acted in breach of the agreement of sale;
 2. Whether the sale was tainted with fraud;
 3. Whether the 2nd respondent was estopped from selling the property;
 4. Whether the transfer was registered in breach of a court order; and
 5. Whether the plaintiff is entitled to the orders sought.”
26. As to whether the 2nd respondent acted in breach of the sale agreement, it was argued that repudiation can only arise between parties to a contract or agreement and that in the instant case, the agreement was between the appellant and the 1st respondent and that as such it was impossible for the 2nd respondent who was not privy to the agreement to act in breach of any term of the agreement or repudiate the same.
27. As regards whether the sale and transfer of the property was tainted with fraud, it was submitted that despite the 2nd respondent giving consent for the sale of the suit property, it was not privy to the agreement for sale and could therefore not accept payment after being advised by the 1st respondent that the agreement had been repudiated and that the 2nd respondent could not therefore interfere with the 1st respondent’s freedom to contract or inquire into the circumstances of repudiation of the agreement for sale and that the 2nd respondent owed the 1st respondent a duty of confidentiality and could not disclose to the appellant the amount owed by the 1st respondent without the consent of the 1st respondent and that at all material times, the 2nd respondent remained the chargee and the 1st respondent the customer in default of her obligations under the charge and that the charge was registered long before the alleged caveat by the appellant.
28. In addition, that the appellant had not provided and proved to Court how the respondents colluded or perpetrated fraud against him in the transaction and neither was there any specific evidence to demonstrate fraud on part of the 2nd respondent and that in absence of the same, the Court could not infer fraud from the appellant’s submissions.



29. With regard to third issue namely; whether the 2nd respondent was estopped from selling and transferring the suit property to the 5th respondents, it was submitted that the 2nd respondent's implied duty to transfer the property arose as a consequence of the agreement for sale between the appellant and the 1st respondent. That, the 2nd respondent despite accepting that the draft transfer was in order for execution stipulated the condition that the appellant was required to enter into an agreement for sale with the bank and forwarded the draft agreement for approval to the appellant. It was submitted that there has never been an agreement between the appellant and the 2nd respondent and that the appellant failed to comply with the condition imposed by the 2nd respondent and that in the circumstances estoppel did not arise.
30. With regard to whether the transfer of the property was in breach of a court order, it was submitted that the said orders had been granted ex-parte with a condition that an undertaking as to damages be filed within 4 days and that the appellant did not file an undertaking as to damages and that as such, in absence of the undertaking, the injunction order did not take effect or become operative and that the same remained a mere piece of paper and further, the 2nd respondent was neither served with the order nor did he have notice of the terms thereof.
31. Finally, with regard to the prayers sought by the appellant, it was submitted that the order of specific performance sought by the appellant was a discretionary remedy granted only when there was a breach of contractual obligations and that in the instant case, there was no privity of contract between the appellant and the 2nd respondent and as such the remedy could not issue. As regards the claim for special damages, it was submitted that the 2nd respondent was not privy to the contract of sale between the 1st respondent and the appellant, nor was it the vendor of the property and as such, the claim for special damages against it was moot.
32. The 3rd and 4th respondents too did not file written submissions. Be that as it may, when the parties appeared before us for plenary hearing on 1st November 2021, Mr. Eredi for the 3rd and 4th respondents submitted that no relief had been sought against the 3rd and 4th respondents and as such, they were urging the court to affirm the judgment of the High Court. In addition, that the contract of sale was between the appellant and the 1st respondent. As regards the caveat lodged on the suit property, counsel submitted that the charge over the suit property by the 2nd respondent ranked higher in priority.
33. On the other hand, it was submitted for the 5th respondents that the issues that arise in the appeal for determination were as follows:
- a. What is the extent of the appellant's and the 5th respondent's interest over the suit property?
 - b. Whether the appellant is entitled to specific performance?
 - c. Whether the allegations of fraud have been proved?"
34. As regards the first issue, it was submitted that the 5th respondents enjoy an indefeasible title over the suit property as the registered owners having bought the land for value through a private treaty from the 2nd respondents exercising statutory power of sale, the appellant's only legitimate claim lay against the 1st respondent, which claim was limited by the fact that an overriding interest prevented the 1st respondent from passing any interest in the suit property to the appellant. It was further submitted that if the 1st respondent's right of redemption was extinguished by the exercise of statutory power of sale, then any right that the appellant as a buyer had stood extinguished and he had no claim in statutory law, equity, or in common law once statutory power of sale was exercised.



35. As to whether the appellant was entitled to specific performance, it was submitted that the appellant could not gain from the 1st respondent a better claim to the suit property than the 1st respondent herself had and that the suit property was subject to a charge and it was not open to the 1st respondent to enter into any contract which would defeat that charge nor did she have any power to do so and that in fact, such a transaction needed the consent of bank to sell the property which consent was never obtained.
36. As to whether the allegations of fraud were proved, it was submitted that allegations of fraud were quasi criminal in nature, requiring the party asserting them to specifically plead and prove the same to a standard beyond the balance of probabilities but below the burden of beyond reasonable doubt and that while the appellant repeatedly sought to impute fraud into the transaction, his assertions failed on the basis that mere assertions do not arise to discharge the burden of proof on them for fraudulent collusion to be proved against the 5th respondents.
37. On the cross appeal it was submitted that the same turn's on the court's determination of proper, just and appropriate instances where the Court can interfere and set aside the Trial Judge's decision on a question of damages and that in the circumstances of this case, justice demands that the 5th respondent be reimbursed the costs borne to maintain the suit property over the years while awaiting finalization of the matter which costs were in their very nature special damages as they did not directly flow from breach of contract but arose from exceptional circumstances where the 5th respondents were prevented from enjoying their legally and regularly acquired land by the actions of the appellant.
38. As regards costs, it was submitted that it is trite law that costs flow to the successful party unless the other party has pleaded good reasons and that in this case, no adverse finding was made against the 5th respondents and that as such, they ought to have been awarded costs.
39. Finally, it was submitted for the 6th respondents that the appellant had made vague and very general allegations of fraud and collusion against the 6th respondent and that no evidence of fraud or collusion was exhibited before the Trial Court and none was available before this Court.
40. It was further submitted that as at the date of the registration of charge, the 6th respondent was not a party to the suit and cannot therefore be held to have conspired to defeat a court order it was not party to, with parties that had not been served with and was therefore not aware of the said court order. It was further submitted that the appellant's claims against the 6th respondent based on fraud were time barred having been brought after three years from the date on which the cause of action accrued and ought to have been struck out. Consequently, the 6th respondent urged the Court to dismiss the appeal with costs.
41. We have considered the grounds of appeal, the rival submissions by the parties, the cited authorities and the law. We are required as a first appellate court by rule 29 of the [Court of Appeal Rules](#), to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
42. Before we embark on the thrust of the appeal, we propose to deal with the motion dated 8th July 2019, filed by the 2nd respondent in which they seek an order to expunge from the record the affidavit of service of Daniel Munyoli Ndongoi sworn on 22nd October 2007. The gist of the application is that the said affidavit was not part of the record before the trial court and the same had been filed without leave of the Court.
43. We have carefully perused the record and it is evident that the affidavit of service of Daniel Munyoli Ndongoi sworn on 22nd October 2007 was not part of the record before the trial court. Indeed, the



appellant at paragraph 3 (e) of his replying affidavit sworn on 11th March 2020, admitted as such when he deposed;

“accordingly, even though the Ndongoi affidavit of service may not have been part of the trial bundle of documents prepared by the parties for use at the hearing of the suit before the Superior Court, there is no doubt that the same is indeed part of the Court Record of the Superior Court as the same was filed twice in the Superior Court.” (Emphasis ours.)

44. Again, the High Court at paragraph 28 of its judgment stated *inter alia* :

“there is no affidavit of service showing when the court order was served on the 1st and 2nd defendants.”

45. It is evident from the record that the affidavit of service of Daniel Munyoli Ndongoi dated 22nd October 2007, was not part of the record before the Trial Court, and the same was introduced/included in these proceedings without leave of this Court.

46. Accordingly, the affidavit of service of Daniel Munyoli Ndongoi dated 22nd October 2007, is hereby expunged from the record having been introduced in the record of appeal irregularly.

47. Going back to the crux of the appeal and from the record, it is our considered opinion that the appeal can be narrowed down into 5 main issues for determination as follows:

- “1. Whether there was a breach of the sale agreement dated 17th July, 2006 and if so by which party?
2. Whether the sale and transfer of the suit property to the 5th respondent was procured by fraud?
3. Whether the transfer of the suit property to the 5th respondent and charge in favour of the 6th respondent was effected in breach of the court order issued on 15th October 2007?
4. Whether the appellant was entitled to an order of specific performance and/or damages?
5. Who should bear the costs of this appeal?”

48. With regard to the first issue, it is indeed not in dispute that the appellant and the 1st respondent had entered into a land sale agreement dated 17th July 2006, in which the 1st respondent had agreed to sell to the appellant the suit property at an agreed consideration of Kshs 6,800,000/= pursuant to which the appellant paid 10% of the purchase price as a deposit. It is also not in dispute that the 2nd respondent was not a party to the said agreement. It is also not in dispute that prior to the sale agreement, the suit property had been charged to the 2nd respondent a fact that was well within the appellant’s knowledge.

Clause 1 1.1 (a) of the agreement provided that the “completion date” means ninety days from the receipt of the Title and Discharge.

Clause 2 2.3 of the aforesaid agreement provided as follows:

- 2.3 The purchaser shall pay the outstanding amount of the charge to the co-operative Bank to redeem the Title and in the alternative the Purchaser’s Advocate shall give an undertaking to the bank to pay the aforementioned sum.” (Emphasis ours.)



Clause 3 3.1 of the sale agreement further provided:

“3. Completion

3.1 On payment of the purchase price to the Vendor’s Advocate and upon receipt of discharge of charge from the Co-operative Bank and the Title the Vendor’s advocate shall forward the following documents to the Purchaser’s advocate;

- a. Duly executed transfer of the property in triplicate;
- b. Title Deed of the Property;
- c. Valid Rates and Land Rent Clearance Certificate;
- d. Consent to transfer.”

49. It is not in dispute that the appellant’s advocate had informed the 1st respondents advocate vide a letter dated 3rd October 2006, that the appellant was ready, willing and able to complete the transaction and further sought the 1st respondent’s confirmation whether completion documents were available so that payment of the balance of the purchase price could be made before 17th October 2006, in exchange for completion documents.
50. Indeed, the 1st respondent’s advocates wrote back to the appellant’s advocate’s on 17th October 2006, indicating that the appellant had failed to remit the balance of the purchase price to the 1st respondent or the 2nd respondent for it to release the completion documents and further demanded a professional undertaking in respect of the 2nd respondent’s charge.
51. Thereafter, the parties exchanged various correspondences culminating with appellant’s Advocate’s forwarding to the 2nd respondent 2 bankers cheques on 5th October 2007, (15 months after the date of the agreement), for Kshs 4,600,000/= and Kshs 400,000/= to redeem the charge and interest respectively and undertook to pay the difference if the interest was more than the sum forwarded. The 2nd respondent subsequently responded on 8th October 2007 stating that it was not bound to release the original title to the appellant and consequently returned the two cheques to the appellant advising that the 1st respondent had since repudiated the agreement.
52. From the foregoing, it is evident that despite the appellant making numerous promises that he was ready, willing and able to actualize the agreement by paying the balance of the purchase price, the same was not forthcoming. The appellant knew very well that the suit property was charged to the 2nd respondent who was not a party to the sale agreement and he did not pay the outstanding amount of the charge to the 2nd respondent to redeem the title or alternatively, neither did his advocates give an undertaking to the 2nd respondent to pay the aforementioned sum as covenanted between the appellant and the 1st respondent in clause 2 2.3 of the agreement. How then did the appellant expect the 1st respondent or her advocate for that matter to forward the completion documents provided for in clause 3 3.1 of the agreement (supra), when he had not fulfilled his part of the bargain as provided for in clause 2 2.3 of the agreement?
53. Having carefully considered the evidence on record, the only time that the appellant attempted to pay the balance of the purchase price was on 5th October 2007, which was 15 months after he had entered into the sale agreement with the 1st respondent on 17th July 2006, when his advocates forwarded 2 cheques for Kshs 4,600,000 and Kshs 400,000 to the 2nd respondent, which cheques were duly returned by the 2nd respondent stating that it was not bound to release the original title to the appellant and that



the appellant's recourse lay properly against the 1st respondent which was in any event one day after the 2nd respondent had already executed a transfer of the suit property in favour of the 5th respondent on 4th October 2007 in exercise of its statutory power of sale.

54. The contention by the appellant that he was able, ready and willing to complete the transaction and that indeed in the face of resistance from both the 1st and 2nd respondents he deposited the amount due to the 2nd respondent before the completion date was without factual basis and was actually not supported by any evidence. As a matter of fact, the 2nd respondent owed the appellant no legal obligation as it was not a party to the agreement between the appellant and the 1st respondent. Prudent practice would have been to involve the 2nd respondent right from the beginning as it held a legal charge over the suit property and there is no way the 1st respondent would have transferred the suit property to the appellant without the 2nd respondent's approval/consent.
55. The Learned Judge at paragraph 23 of her judgment while considering *inter alia* which party was in breach of the sale agreement stated as follows:

“The plaintiff entered into the agreement of sale with the 1st defendant on 17/7/2006 and paid the deposit of Kshs 680,000/= to the 1st defendant, knowing very well that the suit property was charged to the bank. The plaintiff's advocates were required to give an undertaking to pay the bank the outstanding loan sum. His advocates wrote to the bank three months after entering into the agreement with the chargor. The plaintiff failed to demonstrate that he was ready, willing and able to complete the agreement by paying the balance of the purchase price. It was only after he learnt that the bank was selling the suit property that the plaintiff's advocates forwarded the two cheques for Kshs 4.6 million and 400,000/= to the bank on 5th October 2007.

24. A party who does not complete on the day fixed for completion is not in fundamental breach of the contract provided he is ready to complete within a reasonable time. The plaintiff failed to meet his obligations under the sale agreement. There was inordinate delay on the part of the plaintiff, he entered into the agreement on 17/7/2006 and failed to remit the balance of the purchase price for more than a year. Unreasonable delay in performing the obligation of completion would entitle a party to make time of the essence for the contract.

25. The court finds that the 1st defendant was entitled to withdraw from the sale since the plaintiff had failed to pay the outstanding amount of charge to the bank and his advocates also failed to give an undertaking to the bank to enable the bank release the title document. The loan sum continued to attract interest at the agreed rate during this time.” (Emphasis ours.)

56. Nobody could have put it better than the Learned Trial Judge. In view of the foregoing, and from the circumstances of this case, we have no reason to fault the Learned Judge for the finding that; “the plaintiff failed to meet his obligations under the sale agreement.”

Consequently, we hold and find that there was a breach of the sale agreement by the appellant and as a result this ground of appeal must fail.

57. The other issue for our consideration is whether the transfer of the suit property to the 5th respondent was tainted by fraud. It was contended by the appellant *inter alia* that the 2nd respondent failed to disclose that it had received a letter dated 9th August 2007, from the 1st respondent and copied to the 5th respondent confirming that the 1st respondent had agreed to sell the suit property to the 5th respondent at a price less than the purchase price payable under the sale agreement and asking the 2nd respondent



- to facilitate the transaction and that there was ample evidence of fraud attributable to the 1st, 2nd, 5th and 6th respondents in that the transfer in favour of the 5th respondent and charge in the name of the 6th respondent was intended to defeat the registered interest of the appellant.
58. As we had alluded to earlier, it is indeed not in dispute that the 2nd respondent was not a party to the sale agreement between the appellant and the 1st respondent dated 17th July 2006. It is also not in dispute that at all material times leading to this suit the suit property remained charged to the 2nd respondent a fact that was well within the appellant's knowledge. It is also not in dispute that the 1st respondent defaulted in her obligations under the charge pursuant to which the 2nd respondent exercised its statutory power of sale and transferred the suit property to the 5th respondents on 18th October 2007, who subsequently registered a charge over the same in favour of the 6th respondent.
59. The mere fact that the 2nd respondent expressly confirmed to the appellant that it would transfer the suit property to him if the balance of the purchase price under the sale agreement was paid to it in our view does not and cannot amount to fraud. In any event, the appellant never fulfilled this obligation. Likewise, the mere fact that the 2nd respondent entered into an agreement with the 5th respondent to sell the property by private treaty without disclosing to the appellant cannot amount to fraud since as we had observed earlier the 2nd respondent was not a party to the sale agreement between the appellant and the 1st respondent. As such it owed the appellant no legal obligation. As a matter of fact, the 2nd respondent vide its letter dated 8th October 2007, returned the two cheques for Kshs 4,600,000/= and Kshs 400,000/= that had been tendered by the appellant being payment of the amount due under the charge on 5th October 2007 stating *inter alia* it was not in a position to release the title documents to the appellant. How can the appellant then contend that there was fraud on part of the 2nd respondent?
60. It has been stated time and time again that fraud allegations are very serious as they are quasi criminal in nature and where raised, they must be proved on a balance higher than that of the balance of probabilities in civil case cases.
61. Sections 109 and 112 of the [Evidence Act](#) provide that:
- “ 109. 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.”
- “ 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
62. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)



63. Regarding, the standard of proof, this Court (differently constituted) in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows: -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)

64. From the circumstances of this case, save for making generalized vague allegations of fraud, the appellant was not able to prove any single allegation of fraud against any of the parties herein and this Court cannot purport to infer any fraud on any of the parties herein without tangible evidence. As a matter of fact, the transfer of the suit property to the 5th respondent by the 2nd respondent was above board and indeed as was rightly contended by the 6th respondent and in our considered opinion rightly so, the documents before the Trial Court clearly evidenced the transaction between the 5th and 6th respondents as a normal secured loan facility that was first perfected and thereafter funds disbursed. Regarding the caveats that had been lodged by the appellant ostensibly to protect his interests as a purchaser, the same were lodged long after the suit property had been charged to the 2nd respondent who did not give their consent to the caveat, and as such the said caveats were of no legal consequence. Consequently, nothing turns on this ground of appeal and the same must as well fail.

65. The other issue for our consideration is whether the transfer of the suit property to the 5th respondents and charge in favour of the 6th respondent was perfected in breach of the court order given on 15th October 2007.

It was submitted for the appellant that it was not in dispute that on 15th October 2007, the High Court had issued an injunction restraining the 1st and 2nd respondents from transferring or otherwise alienating the suit property which injunction order was served upon the 2nd, 3rd and 4th respondents on 17th October 2007 and that despite the 2nd, 3rd and 4th respondents being aware of the existence of the order restricting transfer of the suit property; on 18th October 2007, the 2nd respondent transferred the same in favour of the 5th respondents and a charge in favour of the 6th respondent registered on the same day.

66. On the other had it was submitted for the 2nd respondent that the injunction order in question was granted ex-parte in the absence of the 2nd respondent or its advocates on record and that the letter dated 15th October 2007 informing the 2nd respondent of the order did not bear any mark of the 2nd respondent to show it was actually served nor was it signed and there had never been an affidavit of service on record to demonstrate service of the said order.

67. We have indeed perused the letter dated 15th October 2007, addressed to the 2nd respondent by the appellant's then advocate informing the 2nd respondent *inter alia* that the High Court had granted an interim injunction against the 1st and 2nd respondents restraining them howsoever from dealing with the suit property. It is imperative to note that the said letter is not signed and neither is there an endorsement/stamp of acknowledgement from the 2nd respondent indicating when the same was served upon the 2nd respondent. It is therefore not clear when exactly the same was served upon the 2nd respondent if at all, as alleged by the appellant. Additionally, the letter in the last paragraph reads: “I



am faxing this letter to you immediately.” Again, there is no evidence that the said letter was faxed to the 2nd respondent as indicated in the letter.

68. The High Court while considering this issue at paragraph 26 of the judgment stated as follows:

“The plaintiff’s advocate filed this suit and wrote to the bank on 15th October 2007 informing the bank that the court had issued an interim injunction restraining the bank and the borrower from dealing with the suit property. The letter which was sent by fax, stated that the copy of the order would be served later.

27. The court issued the injunctive order on 16/10/2007. The court stamp certifying the order as a true copy of the original is dated 29/10/2007. The application for registration of the order against the suit property lodged at the lands office is dated 30/10/2007 and is endorsed “the property has been transferred.”

28. From the copy of the search it is apparent that the suit property was transferred to the 5th defendant on 18/10/2007 for Kshs 6.5 million. There is no affidavit of service showing when the court order was served on the 1st and 2nd defendants. The copy of the certificate of urgency on the court file was stamped by the 2nd defendant on 17/10/2007 at 11.00am. however, no copy of the order served was attached to the application for injunction. The plaintiff failed to prove when the court order restraining dealings with the suit property was served on the 2nd defendant.

29. The onus of showing that the court order was served rested on the plaintiff. In the absence of evidence of when the court order was served, the court is unable to find that the 2nd defendant was in breach of the court order when it transferred the suit property to the 5th defendant.” (Emphasis ours.

69. From the circumstances of this case and in absence of satisfactory evidence as to whether the 1st and 2nd respondents were served with the order of injunction, this Court is unable to interfere with the finding arrived at by the High Court that in absence of evidence of when the court order was served, the 2nd respondent was in breach of the court order when it transferred the suit property to the 5th respondent. The appellant did not prove that indeed the 1st and 2nd respondents were served with the alleged court order and neither was the alleged process server called as a witness. This may well explain the desperate attempts by the appellant to sneak into the record of appeal, the affidavit of service that we have since expunged. Accordingly, this ground of appeal is without merit and the same is dismissed.

70. The High Court was also faulted for failing to issue an order of specific performance and failing to make an award for damages. With regard to the order of specific performance, it is indeed not in dispute that the appellant had sought *inter alia* an order of specific performance against the 1st respondent directing her to specifically perform her obligations under the sale agreement dated 17th July 2006. It is trite law that an order for specific performance is a discretionary remedy which discretion is exercised judiciously depending on the circumstances of each case. From the circumstances of the case, an order for specific performance would not have been tenable having found that indeed it was the appellant who was in breach of the sale agreement.

71. Secondly even if we had found otherwise, and as we had alluded to earlier, the 2nd respondent was not a party to the sale agreement between the appellant and the 1st respondent. The appellant entered into a sale agreement with the 1st respondent knowing very well that the suit property had been charged to the 2nd respondent. At this point one may pose the question thus; would the appellant’s interest as a purchaser override that of the 2nd respondent as a chargee? Would the 1st respondent in the



circumstances transfer the suit property to the appellant without the consent of the 2nd respondent? The answer is rather obvious.

72. Faced with a similar situation in the case of *Millicent W. Mugbi Vs. Speedway Investment Ltd & CFC Stanbic Limited*, Milimani HCCC No. 768 of 2009 Kimaru J stated persuasively thus;

“In the present application it is apparent that the plaintiff is predicating her application on the agreement that she entered with the 1st defendant on 30th May, 2007. As is evident from the facts of this application, to be valid and enforceable, the said agreement for the sale of the suit property had to be consented to by the mortgagee, the 2nd defendant. As a mortgagee, the 2nd defendant had an interest in the suit property because it had advanced money to the 1st defendant for the construction of the flats on the said property. The 1st defendant could not, in law, part with possession of the suit property without the consent or the approval of the 2nd defendant.

Can the Plaintiff enforce the said agreement she had with the 1st Defendant, as against the 2nd Defendant? As has been stated earlier in this Ruling, it was clear that the 2nd Defendant was not a party to the agreement between the Plaintiff and the 1st Defendant. The Plaintiff was aware that for the said agreement to be valid and enforceable, the 2nd defendant had to give its consent. The Plaintiff cannot plead ignorance because page 13 of the agreement clearly provided that without consent of the 2nd Defendant, the agreement would be invalid. The Plaintiff’s visit to the 2nd Defendant’s offices is further proof that the Plaintiff was aware that the sale of the suit property would not be valid without the 2nd Defendant’s consent. Having evaluated the facts of this application, it was apparent to this Court that, if the Plaintiff has any case in connection with the debacle relating to the determination of the purchase consideration of the suit property, then the party that she should pursue is the 1st Defendant. The 2nd Defendant, as the Americans would say, had nothing to do with it.

This Court is not therefore persuaded by the Plaintiff’s argument that the agreement that is the subject of this suit is such that it can be enforced against the 2nd Defendant to enable the Plaintiff obtain ownership and possession of the suit property. The 2nd Defendant was a stranger to the said agreement.”

73. On damages, the appellant had sought *inter alia* special damages under the following heads;

- a) Loss of profits on planned scheme development- Kshs 95,534,256.60
- b) Costs of additional civil works required for adjoining plot necessitated by non-completion of purchase of the suit plot-Kshs 9,484,627.32
- c) Amalgamation and subdivision costs incurred on scheme development- Kshs 1,285,575.00
- d) Cost of reversal of amalgamation of two plots- Kshs 500,000.00.”

74. It is trite law that special damages must not only be pleaded but must also be strictly proved. From the pleadings on record, it is also imperative to note that the special damages were being sought as against the 1st, 2nd, 5th and 6th respondents. Having found that the 1st, 2nd, 5th and 6th respondents were not at fault in anyway and that it was actually the appellant who was in breach of the sale agreement, would the appellant in turn lay a claim for special damages as against the said respondents?



75. Looking at the pleadings as drafted, it is our considered view that the claims for special damages were speculative as they were hinged on events that were yet to happen and it was not certain for a fact that indeed they would happen. How could the appellant for example claim *inter alia* special damages for loss of profits on planned scheme development and costs of additional civil works required for adjoining plot necessitated by non-completion of purchase of the suit property when he had not legally acquired it.
76. This issue was aptly captured by the trial court when at paragraph 39 of the judgment it stated thus:
- “the plaintiff is a consultant engineer. It would not be prudent to seek approval to amalgamate and develop any property before acquiring legal title over that property. The court is unable to finding (sic) favour of the plaintiff for it was not prudent for him to incur the costs of seeking approval for the amalgamation of the suit property with the other plot he was purchasing way before he had completed the purchase of the suit property.”
77. Consequently, this ground of appeal is without merit and the same is hereby dismissed. We however hasten to add that from the circumstances of this case, the High Court erred in making a finding at paragraph 43 of the judgment *inter alia* that the appellant was entitled to damages since such finding was without any factual or legal basis.
78. Turning to the Cross Appeal by the 5th respondents, the Learned Judge was faulted for dismissing the respondents counter claim for the sum of Kshs 150,000.00/= being architects cost for drawing architectural plans, Kshs 18,000/= being monthly fees paid to guards to secure the suit property and Kshs 75,833/= being monthly interest due to commercial loan taken by the respondents. It was the 5th respondents’ submissions that damages were owed to them on the basis that they had been restrained from any use of the suit property for about 10 years and were unable to realize their investment despite bearing significant financial burden to finance the facility taken to procure the same.
79. From the circumstances of this case, it is our considered view that the claim for special damages was too remote to be awarded as there was no nexus between the claim and the injunctive orders that were issued by the High Court. Further, the 5th respondents did not indicate when the said injunctive orders were vacated.
80. This Court (differently constituted) in the case of [Johnson Mugwe Wanganga v Joseph Nyaga Karingi](#) [2014] eKLR, had this say regarding remoteness of damages:
- “In contract, the principle relating to remoteness of damage is enunciated in the case of *Hadley –v- Baxendale*, (1854) 9 Exch. 341. For loss to be recoverable, the damages should be such as may fairly and reasonably be considered either 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 the contract as the probable result of the breach. In the instant case, it is our considered view that loss of trade debts and non-repayment of bank loans are not anticipated as the natural and probable consequence of breach of a landlord-tenant relationship. If any such loss was suffered, the damage is remote. The trade debtors are persons known to the respondent; breach of landlord tenant relationship does not relieve the trade debtors their obligation to pay the respondent.”
81. Indeed, as was rightly pointed out by the High Court, these were costs that the 5th respondents, nevertheless would have incurred if the injunctive orders had not been issued. Consequently, nothing



turns on this point. The upshot of the foregoing is that the 5th respondent's cross appeal is without merit and the same is hereby dismissed with no order as to costs.

82. We think we have said enough to demonstrate that this appeal is devoid of merit. Accordingly, we hereby dismiss the same in its entirety. Considering the litigation history in this matter, the order that commends itself to us is that each party will bear its own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

