



**Sagoo & another v Mwicigi & 3 others (Civil Appeal 410 of 2018)  
[2022] KECA 83 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 83 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 410 OF 2018  
MA WARSAME, F SICHALE & HA OMONDI, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**MANOHAR SINGH SAGOO ..... 1<sup>ST</sup> APPELLANT**

**SURINDER KAUR SAGOO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CAROLINE NJERI MWICIGI ..... 1<sup>ST</sup> RESPONDENT**

**PRAMOD PATEL ..... 2<sup>ND</sup> RESPONDENT**

**KANDIE KIMUTAI & CO. ADVOCATES ..... 3<sup>RD</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL ON BEHALF OF THE REGISTRAR  
OF TITLES ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land  
Court of Kenya at Nairobi (Bor, J) dated 25th January, 2018 in  
ELC Case No. 177 of 2016 (formerly Civil Suit No. 872 of 2006)*

**JUDGMENT**

1. The appeal before us is a 1<sup>st</sup> appeal. Our mandate as a 1<sup>st</sup> appellate court is as enunciated in several decisions of this Court including *Selle vs. Associated Motor Boat Co. of Kenya & others* [1968] EA 123 wherein it was stated:

“An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the



trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abdul Hameed Saif -vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270.”

2. The suit, the subject of this appeal was commenced by way of a plaint dated 10<sup>th</sup> August, 2006 filed by Caroline Njeri Mwicigi (the 1<sup>st</sup> respondent herein and the then plaintiff). In the plaint, Monohar Singh Sagoo and Surinder Kaur Sagoo (the appellants herein) were named as the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively whilst Pramod Patel, an advocate of the High Court of Kenya (the 2<sup>nd</sup> respondent herein) and the firm of Kandie Kimutai (the 3<sup>rd</sup> respondent herein) were named as the 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively. The 2<sup>nd</sup> respondent acted for the appellants in the transaction whilst the 3<sup>rd</sup> respondent was one of the three lawyers who acted for the 1<sup>st</sup> respondent having taken over from the firm of AGN Kamau & Company Advocates who had drawn the sale agreement dated 28<sup>th</sup> June, 2005 between the appellants and the 1<sup>st</sup> respondent.
3. In the plaint the 1<sup>st</sup> respondent averred that on 28<sup>th</sup> June, 2005, she entered into a sale agreement with the appellants for sale of her property known as LR 7785/792 (the suit property); that subsequently, the appellants breached the sale agreement; that on 10<sup>th</sup> November, 2005, she wrote to the 3<sup>rd</sup> respondent, her lawyer then, complaining of the breach of the sale agreement by the appellants; that on 24<sup>th</sup> November, 2005, the 3<sup>rd</sup> respondent issued 21 days' notice, being the notice of completion to the appellants; that on 26<sup>th</sup> November, 2005, the 2<sup>nd</sup> respondent, in his capacity as counsel for the appellants acknowledged receipt of the completion notice; that on 19<sup>th</sup> December, 2005, she again wrote to the legal firm of the 3<sup>rd</sup> respondent instructing them to demand for the return of her original title documents and that the appellants together with the 2<sup>nd</sup> respondent in collusion with the 3<sup>rd</sup> respondent caused the registration of the transfer of the suit property to be effected. The appellant amended her plaint on 18<sup>th</sup> April, 2011 so as to bring in the Attorney General (on behalf of the Registrar of Titles as the 5<sup>th</sup> defendant, now the 4<sup>th</sup> respondent). The orders sought in the amended plaint were as follows:
  - “(a) A declaration that the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as proprietors of the parcel of land known as L.R. No. 7785/792 (Runda Estate) pursuant to the agreement dated 28<sup>th</sup> June, 2005 purported to have been made between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other agreement purportedly made between the said parties is fraudulent and null and void *ab initio*.
  - b. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendant either by themselves or through their agents, servants or any other person from alienating, selling transferring or in any other way interfering with the Plaintiff's ownership and possession of parcel of land number L.R. No. 7785/792 (Runda Estate).
  - c. ....(amended).
  - d. An order directing the Defendants jointly and severally to return to the plaintiff the original title document to parcel of land L.R. Number 7785/792 bearing the name of the Plaintiff as proprietor thereof.
  - e. An order directed at the 5<sup>th</sup> Defendant for cancellation of entry number 2 dated the 19<sup>th</sup> December, 2005 on the Certificate of Title Number I.R. 96373 over all that piece/parcel of land known as L.R. – 7785/792 and comprising by



measurement one decimal two one four (1.214) hectares or thereabouts and as delineated on Deed Plan Number 196095.

- f. Damages and interest thereon.
  - g. Costs of the suit and interest thereon.
  - h. Any other relief deemed fit and expedient.”
4. The 1<sup>st</sup> and 2<sup>nd</sup> appellant and the 2<sup>nd</sup> respondent filed a joint statement of defence dated 22<sup>nd</sup> September, 2006 which was subsequently amended on 5<sup>th</sup> July, 2013 in which the trio averred that the sale agreement of 28<sup>th</sup> June, 2005 was varied by a subsequent agreement dated 1<sup>st</sup> November, 2005; that whereas they received the notice of completion dated 24<sup>th</sup> November, 2005, they complied with the contents thereof; that they were not privy to any instructions given to the 3<sup>rd</sup> respondent and denied having been in collusion with the 3<sup>rd</sup> respondent, the then 1<sup>st</sup> respondent’s lawyers, in effecting an unlawful transfer of the 1<sup>st</sup> respondent’s property.
  5. The 1<sup>st</sup> respondent filed a reply dated 12<sup>th</sup> July, 2013 to the amended defence of the appellants and the 2<sup>nd</sup> respondent joining issue with the appellants.
  6. The pleadings having come to a close, the trial proceeded before Bor, J who in a judgment dated 25<sup>th</sup> January, 2018 found in favour of the 1<sup>st</sup> respondent. It is this finding that provoked the instant appeal. In the Memorandum of Appeal dated 21<sup>st</sup> November, 2018, the appellant listed 8 grounds of appeal which we shall advert to as condensed in the appellant’s written submissions dated 18<sup>th</sup> November, 2019.
  7. On 29<sup>th</sup> September, 2021, the appeal came up before us for plenary hearing vide a virtual platform due to the Covid 19 Pandemic and the established protocols thereto. Mr. Inamdar, learned counsel for the appellants in arguing the appeal, relied on the appellant’s written submissions as aforesaid as well as his list of authorities. It was contended on behalf of the appellants that the suit property was transferred to the appellants vide a transfer dated 19<sup>th</sup> December, 2005; that the 1<sup>st</sup> respondent challenged the transfer on the basis that she had rescinded the contract of sale; that when the matter proceeded to trial the 3<sup>rd</sup> and 4<sup>th</sup> respondents did not participate as Mr. P.K Kandie, the proprietor of the 3<sup>rd</sup> respondent, an advocate retained by the 1<sup>st</sup> respondent had since died; that at the time the 1<sup>st</sup> respondent executed the sale agreement on 28<sup>th</sup> June, 2005, she was using the services of AGN Kamau, Advocate, and the appellants were then represented by Pramod Patel, the 2<sup>nd</sup> respondent; that the terms of the contract were *inter alia*, the purchase price was Kshs 10 million of which the sum of Kshs 1 million was to be paid directly to the 1<sup>st</sup> respondent as a deposit, upon which the original title was released to the 2<sup>nd</sup> respondent on the professional undertaking to hold it pending completion; that consequent to the execution of the agreement, the 1<sup>st</sup> respondent appointed the 3<sup>rd</sup> respondent as his advocate and vide the 2<sup>nd</sup> respondent’s letter dated 19<sup>th</sup> August, 2005, a new completion date of 5<sup>th</sup> October, 2005 was agreed upon. In particular, reference was made to the letter of 19<sup>th</sup> August, 2005 addressed to Messrs Kandie Kimutai & Co. Advocates whose contents were as follows:

“Dear Sirs,

RE: SALE OF L.R. NO. 7785/792 – RUNDA ESTATE CAROLINE NJERI MWICIGI  
TO MR. MRS. SAGOO

I refer to your letter and to our telephone conversation of this morning.



I have now taken my client's instructions who have agreed to complete the transaction on 5<sup>th</sup> October, 2005. You confirmed that this date is acceptable to your client and that you are now redrawing the Agreement for Sale to feature this date and yourselves as the Vendor's Advocates. In all other respects the conditions of the previous Agreement for Sale will be adopted.

On the foregoing basis I am releasing a Bankers cheque for Kshs 1,000,000/= to your client.

In consideration of my client making the early initial payment to the Vendor the Grant will be held as lien and my clients to have the liberty to impose a caveat protecting a Purchaser's interest if necessary. (emphasis ours)

Please confirm the foregoing.

Yours faithfully,

PRAMOD PATEL.”.

8. Mr. Inamdar reiterated that although the 2<sup>nd</sup> contract entered into by the parties was dated 1<sup>st</sup> November, 2005, it had a completion date of 5<sup>th</sup> October, 2005 and that the dating of the contract was an error as the 1<sup>st</sup> respondent admitted in cross-examination that she signed the 2<sup>nd</sup> contract, albeit being undated. It was contended further that although the 3<sup>rd</sup> respondent issued a notice of completion dated 24<sup>th</sup> November, 2015, it was not clear whether the notice of completion was invoking the 1<sup>st</sup> or 2<sup>nd</sup> contract; that contrary to the judge's finding, the 21 days of completion would mean that the notice would expire on 16<sup>th</sup> December, 2005 and not on 25<sup>th</sup> December, 2005 as the judge had found; that at the time of the notice (24<sup>th</sup> November, 2005) the 1<sup>st</sup> respondent was not in a position to complete as the original rates clearance certificate had expired on 18<sup>th</sup> November, 2005; that the 2<sup>nd</sup> respondent had given a professional undertaking on 5<sup>th</sup> November, 2005 to the 3<sup>rd</sup> respondent who in turn, on 8<sup>th</sup> November, 2005 handed over an executed transfer together with a valid rates clearance certificate which expired on 18<sup>th</sup> November, 2005. In support of their position that a vendor who issues a notice of completion must be in a position to complete, the decision of *Boniface Kevin Omondi & Another vs. Malborough Properties Ltd* [2015] eKLR was called to aid. In that decision, Mabeya, J. held:

“To my mind, when a party issues a completion or termination notice as in this case, that party must himself be ready, able and willing as at the date of the notice to complete the contract”.

9. The appellants' argument is that a valid clearance certificate was furnished on 16th December, 2005 to the 2nd respondent; that the 3rd respondent in a handwritten letter dated 23rd December, 2005 requested and received an advance of Kshs 20,000.00 from the 2nd respondent to pay Mr. Gichere as “part of his commission”, hence the 1st respondent is estopped from resiling on her contractual obligation as these actions on the part of the 3rd respondent were tantamount to waiver of the completion notice; that application for the registration of the transfer was lodged on 19th December, 2005; that although the stamps on the transfer are dated 10th November, 2005, the stamp duty had been paid by 23rd November, 2005, whilst the date of registration was 19<sup>th</sup> December, 2005 and “acceptance of valuation is shown as 23<sup>rd</sup> January, 2006”; that the balance of the purchase price was paid on 23<sup>rd</sup> January, 2006, well within the 7 days of registration of the transfer and that the allegation(s)



of fraud against the appellants were not proved to the required standard. In the written submission, counsel enjoined us as follows:

“The Appellants pray that, in the event this Appeal succeeds, this Honourable Court be pleased (sic) order the release of the said funds to the 1<sup>st</sup> Respondent. In the event the Appeal fails, then to order the release of the said funds to the Appellants”.

10. Mr. Odera for the 2<sup>nd</sup> respondent fully associated himself with Mr. Inamdar’s submissions and added that the 1<sup>st</sup> respondent was bound by the actions of her advocate, the 3<sup>rd</sup> respondent. Further, that a notice of completion can be waived by implication as was the case here, the 3<sup>rd</sup> respondent having done so on behalf of his client, the 1<sup>st</sup> respondent.
11. Miss Njoroge for the 1<sup>st</sup> respondent relied on the appellant’s submissions filed on 7<sup>th</sup> November, 2019. She submitted that although the 1<sup>st</sup> respondent had entered into a sale agreement with the appellants, the sale was rescinded pursuant to a notice issued under the Law Society conditions of sale; that in spite of the rescission, the appellants proceeded to transfer the property unto themselves; that to-date, the 1<sup>st</sup> respondent had not received the balance of the purchase price; that following the 2<sup>nd</sup> respondent’s professional undertaking on 5<sup>th</sup> November, 2005 for the payment of the balance of the purchase price, the 3<sup>rd</sup> respondent forwarded the completion documents to the 2<sup>nd</sup> respondent on 8<sup>th</sup> November, 2005 cautioning that the date of expiry of the rates clearance certificate was on 18<sup>th</sup> November, 2005. She posited that the transfer could not have been registered on 19<sup>th</sup> December, 2005 and stamp duty assessed on 23<sup>rd</sup> January, 2006. Finally, counsel contended that condition 22 (5) of the Law Society conditions of sale provided for forfeiture of the 10% deposit in the event of breach of a sale agreement.
12. In a brief rejoinder, Mr. Inamdar reiterated that the notice to complete was served after the rates clearance certificate had expired; that a professional undertaking is between advocates, hence it was not for the 1<sup>st</sup> respondent to raise the issue that the 2<sup>nd</sup> respondent gave a professional undertaking without being placed in funds; that the balance of the purchase price was paid on 23<sup>rd</sup> January, 2006 which was within 7 days of registration of the transfer.
13. Having considered the record, the written and oral submissions made before us and the authorities relied upon in light of our mandate, it is our view that the facts surrounding the dispute are fairly straight forward. It is not in dispute that the 1<sup>st</sup> respondent entered into a sale agreement dated 28<sup>th</sup> June, 2005. The completion date was given as 15<sup>th</sup> September, 2005. The purchase price was Kshs 10,000,000.00 out of which a sum of Kshs 1,000,000.00 was paid to the 1<sup>st</sup> respondent as a deposit. Paragraph 4 of the sale agreement provided that the sale was subject to the Law Society Conditions of Sale (1989 conditions). Further, paragraph 12 of the agreement of sale provided that:

“The balance of the purchase price will be deposited with the purchaser’s advocates who will give a professional undertaking to release the same to the vendor’s advocates upon registration of the transfer in favour of the purchaser and handing over of vacant possession.”
14. It would appear that the terms of the sale agreement were not adhered to hence the issuance of a notice of completion dated 24<sup>th</sup> November, 2005 issued by the 3<sup>rd</sup> respondent on behalf of the 1<sup>st</sup> respondent. It is instructive to note that this was after the completion date of 15<sup>th</sup> September, 2005 had long expired.



The notice of completion had been prompted by the 1<sup>st</sup> respondent's letter dated 10<sup>th</sup> November, 2005 to his then advocates, the 3<sup>rd</sup> respondent. The letter stated:

“Dear Mr. Kandie,

SALE OF LR 7785/792 – RUNDA TO MR. & MRS. SAGOO

Further to our telephone conversation with you yesterday, I wish to advise that I am reluctant to transfer the above property unless I have concrete evidence that the agreed balance of shs 9,000,000/= is actually being held by the purchaser's advocates as per para.12 (clause) of our agreement. I will not accept part payment or delayed payment.

On 8<sup>th</sup> November, 2005, the purchasers verbally informed me that they have deposited shs 6,000,000/= with their advocates and that the remaining shs 3,000,000/= would be deposited later. I had been made to believe that the conditions of clause 12 of our agreement had been fulfilled. I feel that paying the stamp duty would only complicate things further.

Please forgive me if I say that I cannot take the undertaking given seriously.

Yours faithfully

Signed.

CAROLINE N. MWICIGI”.

15. Consequent to the instructions given by the 1<sup>st</sup> respondent who was expressing her misapprehension as to whether the 2<sup>nd</sup> respondent was in possession of the balance of the purchase price of Kshs 9 million, the notice to complete dated 24<sup>th</sup> November, 2005 was addressed to the 1<sup>st</sup> and 2<sup>nd</sup> appellants and marked for the attention of the 2<sup>nd</sup> respondent. It stated:

“Mr. & Mrs Sagoo

Dear Sir,

RE: SALE OF LR. NO. 7785/792 – RUNDA ESTATE TO YOURSELVES

We refer to our letter 8<sup>th</sup> November, 2005 and regret that you have not paid the balance of the purchase price.

You were furnished your (sic) Advocate with the completion documents on 8<sup>th</sup> November, 2005. The amount outstanding now is Kshs 9,000,000/= which is long overdue and our client has been ready and willing to complete the sale as informed earlier.

Accordingly, Under Condition 25(1) of the Law Society Conditions of Sale to the Agreement we give you this notice that if you do not complete this sale and pay the balance of the purchase price and interest and other charges as per the agreement by the 22<sup>nd</sup> day after the service of this notice upon you, the vendor will be entitled to rescind the agreement for sale Under Law Society Condition No. 25(2) whereupon the provisions set out in Condition 25(3) shall come into play, one of which is the forfeiture of the deposit to the vendor.

Please note this seriously.

Yours faithfully,

KANDIE KIMUTAI & CO. ADVOCATES

P.K.KANDIE



CC. 1. PRAMOD PATEL ADVOCATE  
JUBILEE INSURANCE EXCHANGE  
NAIROBI

2. CLIENT”;

16. The 2<sup>nd</sup> respondent, as the appellant’s counsel responded to the notice of completion two days later vide a letter dated 26<sup>th</sup> November, 2005, addressed to Messrs. Kandie Kimutai & Co. Advocates. In his letter, he stated that he would be placed in funds “... on Tuesday, 29<sup>th</sup> November, 2005”.
17. It is noteworthy to state that as at 26<sup>th</sup> November, 2005, the 2<sup>nd</sup> respondent was not in possession of the balance of the purchase price and he informed the 3<sup>rd</sup> respondent that he would be put in funds on 29<sup>th</sup> November, 2005. This is notwithstanding the fact that on 5<sup>th</sup> November, 2005, the 2<sup>nd</sup> respondent had written the following:

“Messrs Kandie Kimutai & Co Advocates,

Dear Sirs,

RE: SALE OF L.R. NO. 7785/792 – RUNDA ESTATE CAROLINE NJERI MWANGI  
TO MR. & MRS. SAGOO

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I refer to my copy letter of 27<sup>th</sup> October, 2005.

I confirm to you my professional undertaking to let you have the balance of the purchase price being Shs 9,000,000/= in favour of the purchaser within seven days of the registration of the Transfer.

Now please do let me have the completion papers.

Yours faithfully,

PRAMOD PATEL.”

18. In short, the 2<sup>nd</sup> respondent was not in funds as at 5<sup>th</sup> November, 2005 and neither was he in funds by the 26<sup>th</sup> November, 2005. The 2<sup>nd</sup> respondent’s letter of 26<sup>th</sup> November, 2005 was followed by another letter dated 9<sup>th</sup> December, 2005 addressed to the 3<sup>rd</sup> respondent wherein the 2<sup>nd</sup> respondent “confirmed that he had been put in funds”. He stated:

“Messrs Kandie Kimutai & Co. Advocates,

Dear Sirs,

RE: SALE OF L.R. NO. 7785/792 – RUNDA ESTATE TO MR. & MRS. SAGOO

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I refer to my letter of 26<sup>th</sup> November, 2005.

Please let me have the extended Clearance Certificate so that I can present the Transfer for registration before the holidays.

My client has deposited the balance of the purchase price with me which I will hold in trust as per the terms of the Agreement for Sale. Yours faithfully,



PRAMOD PATEL\*\*

CC. Mr. & Mrs. Sagoo

NAIROBI.”

19. Indeed, it was on the basis of falsehood perpetrated by the 2<sup>nd</sup> respondent on 5<sup>th</sup> November, 2005 by giving a professional undertaking, yet he had not been placed in funds that the 1<sup>st</sup> respondent's title as well as a valid rates clearance certificate was given to the 2<sup>nd</sup> respondent on 8<sup>th</sup> November, 2005. The rates clearance had a validity period of upto 18<sup>th</sup> November, 2005. As no registration was undertaken, the rates clearance certificate expired on 18<sup>th</sup> November, 2005.

20. The actions of the 3<sup>rd</sup> respondent were frowned upon the 1<sup>st</sup> respondent in her letter dated 13<sup>th</sup> January, 2006 addressed to Pramod Patel Advocate. She wrote:

“Please refer to a letter by my advocates Kandie Kimutai advocates dated 24<sup>th</sup> November, 2005, a copy of which is enclosed for your case of reference. This notice expired on the 16<sup>th</sup> December. On 19<sup>th</sup> December, 2005, I gave notice through the said advocates stating that I had on that date rescinded the agreement, a copy of which is attached.

I am therefore perturbed to note that you proceeded to lodge the document for registration on 19<sup>th</sup> December, 2005.

I wish to put it on record that no instructions and/or consent were sought from me after the expiry of this notice and I therefore consider the agreement as cancelled and your action irregular.

Yours faithfully,

CAROLINE N. MWICIGI.”

21. The above letter is the second warning given to the purchasers and their advocates. No doubt, the 3<sup>rd</sup> respondent acted in an unprofessional manner in going against his client's (the 1<sup>st</sup> respondent's) instructions. The letters from the 1<sup>st</sup> respondent of her rescission of the contract were emphatic. It is on the basis of the 3<sup>rd</sup> respondent's actions of going against the 1<sup>st</sup> respondent's instructions that the appellants argue that the notice of completion had been waived but, did that mean that the appellants with the assistance of the 2<sup>nd</sup> respondent could use trickery to have the 1<sup>st</sup> respondent's suit property transferred to the appellants? It is this lack of candidness on the part of the appellants together with the 2<sup>nd</sup> respondent that we think will determine the outcome of this appeal. He who comes to equity must come with clean hands.

21. In our view, the appellants set out to purchase the suit property but did not have funds which they could have placed with the 2<sup>nd</sup> respondent. The sale agreement was dated 28<sup>th</sup> June, 2005. The completion date was given as 15<sup>th</sup> September, 2005. Again, it would appear that another agreement was entered into on 1<sup>st</sup> November, 2005 (the second agreement). Its completion date was given as 5<sup>th</sup> October, 2005, a date long past, given that the second sale agreement is dated 1<sup>st</sup> November, 2005. Although the appellants contended that the second agreement gave the completion date as 5<sup>th</sup> October, 2005, this agreement was disowned by the appellant. Mr. Inamdar was of the view that it was not clear whether the completion notice of 24<sup>th</sup> November, 2005 was in respect of the agreement of 26<sup>th</sup> June, 2005 or 1<sup>st</sup> November, 2005 which had a completion date of 5<sup>th</sup> October, 2005. The 21 days given in the notice of 24<sup>th</sup> November, 2005 was after the expiry of the two completion dates, be it 15<sup>th</sup> September, 2005 and/or 5<sup>th</sup> October, 2005 but suffice to state that the period of completion started



running from 24<sup>th</sup> November, 2005. It therefore does not matter whether there was a second agreement dated 1<sup>st</sup> November, 2005 with a completion date of 5<sup>th</sup> October, 2005. In our view, nothing turns on the contention that it was not clear whether the completion notice was in respect of the agreement of 26<sup>th</sup> June, 2005 or 1<sup>st</sup> November, 2005. The question is whether the appellants were in a position to complete the transaction even with an extended period of time.

22. It is clear from the sequence of events that whereas the 1<sup>st</sup> respondent was willing and ready to sell the suit property, the appellants were not on the same page with her. The 1<sup>st</sup> respondent entered into the sale agreement dated 28<sup>th</sup> June, 2005. The completion date was 15<sup>th</sup> September, 2005. The original title document for the suit property as well as a valid clearance certificate were duly handed over to the 2<sup>nd</sup> respondent on 8<sup>th</sup> November, 2005, the appellant's lawyers based on their undertaking of 5<sup>th</sup> November, 2005. Having complied with her obligations, the least the 1<sup>st</sup> respondent expected was the appellants to fulfil their part of the bargain. When her expectation was not met, she caused her lawyer, Messrs Kandie Kimutai & Co. Advocates to issue a Notice of Completion dated 24<sup>th</sup> November, 2005. The notice was for 21 days and it was to expire on the 16<sup>th</sup> December, 2005. On receipt of the Notice of Completion, the 2<sup>nd</sup> respondent vide a letter dated 26<sup>th</sup> November, 2005 undertook to complete by 29<sup>th</sup> November, 2005\*\*. In his letter dated 26<sup>th</sup> November, 2005, he stated:

“ Messrs Kandie Kimutai & co. Advocates

Dear Sirs,

RE: SALE OF L.R. NO. 7785/792 – RUNDA ESTATE TO MR. & MRS SAGOO

I refer to your letter of 24<sup>th</sup> November, 2005 addressed to my client Mr. & Mrs. Sagoo and referred to me and also to our telephone conversation of the same day.

As I had indicated to you when we last spoke on the telephone, I will be placed in funds ready to complete on Tuesday, 29<sup>th</sup> November, 2005 and I had in the circumstances asked that you obtain for me an extended Clearance Certificate. The Purchasers will bear the cost of having the Clearance extended.

Please let me have the Clearance Certificate so I can present the Transfer for registration upon my undertaking already given.

Yours faithfully,

PRAMOD PATEL.”

23. It is clear beyond per adventure that in the said letter, the 2<sup>nd</sup> respondent indicated that he had not been placed in funds, a clear admission that the professional undertaking of 5<sup>th</sup> November, 2005 was based on falsehood, deceit and deception.
24. In his letter of 26<sup>th</sup> November, 2005, the 2<sup>nd</sup> respondent undertook to complete by 29<sup>th</sup> November, 2005. Again, that was not to be. On 19<sup>th</sup> December, 2005, the 1<sup>st</sup> respondent called for the return of her original title. Her request for the return of her original title fell on deaf ears and in spite of lack of confirmation of placement of funds by the 29<sup>th</sup> November, 2005 as undertaken by the 2<sup>nd</sup> respondent in his letter of 26<sup>th</sup> November, 2005, the second respondent proceeded to present the transfer for registration on 19<sup>th</sup> December, 2005.
25. In our view, it was callous and unprofessional for the 2<sup>nd</sup> respondent to have presented the transfer documents for registration and yet he was not in possession of the balance of the purchase price. Indeed, this lack of professionalism is evident right from the time (5<sup>th</sup> November, 2005) the 2<sup>nd</sup>



- respondent called for the original title and the transfer documents as well as a valid rates clearance certificate on the pretext that he was in possession of the balance of the purchase price.
26. The appellants' position was that the agreement of 28<sup>th</sup> June, 2005 had been varied by another agreement dated 1<sup>st</sup> November, 2005. The 1<sup>st</sup> respondent denied having been a party to this agreement. In particular, she was categorical that she did not append her signature on this agreement. We may not know exactly the origin of this agreement, but it is curious to note that it had a completion date of 5<sup>th</sup> October, 2005, a date long past from the date it is alleged it was entered into, that is 1<sup>st</sup> November, 2005. However, in our view, nothing turns on this purported agreement as the completion date given therein (5<sup>th</sup> October, 2005) was equally disregarded. It does not matter in our view that the rates clearance certificate given to the 2<sup>nd</sup> respondent on 8<sup>th</sup> November, 2005 had expired as what is material is that the appellants had been given the original certificate of title, a transfer duly signed by the 1<sup>st</sup> respondent and a valid clearance certificate which lapsed in the hands of the 2<sup>nd</sup> respondent.
27. There was also the contention by the appellants that the notice of completion dated 24<sup>th</sup> November, 2005 had been waived by the letter from Kandie Kimutai of 14<sup>th</sup> December, 2005 and 28<sup>th</sup> January, 2006. Again in our view, nothing turns on this. The crux of the matter is that the appellants had the property transferred unto themselves through deceit and without them being in a position to pay the balance of the purchase price. We think that the 1<sup>st</sup> respondent performed her part of the deal and the delay in finalization of the transaction was solely caused by the appellants. We do not see how and why the appellant is blaming the 1<sup>st</sup> respondent when they were given adequate time and opportunity to pay the balance of the purchase price.
28. The sum of Kshs 8,970,000.00 was subsequently deposited in Court and Notice of payment into court is dated 22<sup>nd</sup> September, 2006. The said money is still in court. We can only say this was long in coming. The 1<sup>st</sup> respondent sought to sell her property in an uptown estate for a total purchase price of Kshs 10 million. This was in the year 2005. Today, the value of the property given inflationary trends has greatly increased. The sale agreement was not breached by her but by the appellants whom as we have stated earlier, entered into a sale agreement without being in possession of the full purchase price and used all the tricks in the book to purport to transfer the suit property unto themselves.
29. One more issue deserves our comment. The appellants' position is that they presented the transfer for registration on 19<sup>th</sup> December, 2005 and that this is the date the conveyance was registered. It is however curious to note that the assessment of stamp duty was done on 23<sup>rd</sup> January, 2006. Is that to say the transfer was effected before payment of stamp duty? In our view, all these lapses do not place the appellants in good stead. There was too much that was going on, including the possibility of defrauding the collector of stamp duty, which again clearly reflects on the credibility of the appellants and their Advocates. In our view, the 1<sup>st</sup> respondent legally and correctly was entitled to rescind the contract due to the acts and omissions of the appellants. We cannot in any way fault the 1<sup>st</sup> respondent on the manner she acted in the circumstance narrated before us. We think the appellants are the authors of their alleged misfortune.
30. We believe we have said enough to demonstrate that this appeal is without merit. It is hereby dismissed with costs to the 1<sup>st</sup> respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

