



**Tuinuke Pamoja Credit Capital Ltd & 9 others v Mwangi & 5 others (Environment & Land Case 1232 of 2016) [2024] KEELC 4397 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4397 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1232 OF 2016**

**JO MBOYA, J  
MAY 27, 2024**

**BETWEEN**

**TUINUKE PAMOJA CREDIT CAPITAL LTD ..... 1<sup>ST</sup> PLAINTIFF  
ASHFORD PILLARS INVESTMENT ..... 2<sup>ND</sup> PLAINTIFF  
LUCY GATHONI GIKERI ..... 3<sup>RD</sup> PLAINTIFF  
JOHNSTONE BWIRE ..... 4<sup>TH</sup> PLAINTIFF  
DUNCAN MUSIEGU AVALA ..... 5<sup>TH</sup> PLAINTIFF  
MARIAM KAWIRA MWIRICHIA ..... 6<sup>TH</sup> PLAINTIFF  
PETER MURAGE ..... 7<sup>TH</sup> PLAINTIFF  
JOHN NGANGA ..... 8<sup>TH</sup> PLAINTIFF  
EBENEZER LANDS VIEW COMPANY LIMITED ..... 9<sup>TH</sup> PLAINTIFF  
DANNSIL INVESTMENTS ..... 10<sup>TH</sup> PLAINTIFF**

**AND**

**PAUL MWAURA MWANGI ..... 1<sup>ST</sup> DEFENDANT  
HANNAH WARUGURU MWANGI (BEING SUED AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF SIMON RYBOY  
MWANGI) ..... 2<sup>ND</sup> DEFENDANT  
KAMAHUHA TRADERS LIMITED ..... 3<sup>RD</sup> DEFENDANT  
NAIROBI CITY COUNTY GOVERNMENT ..... 4<sup>TH</sup> DEFENDANT  
JAMII BORA BANK LIMITED ..... 5<sup>TH</sup> DEFENDANT  
RAFIKI DTM (K) LIMITED ..... 6<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. The Instant suit was commenced by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs in terms of the Plaint dated the 4<sup>th</sup> of October 2016 and in respect of which the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs [who were the original Plaintiffs] sought for the following reliefs:
  - i. A permanent injunction restraining the Defendants, their servants and/or agents from harassing, intimidating and/or alienating all that parcel of land known as L.R No. Nairobi/Block 126/457 and Nairobi Block 126/458.
  - ii. A declaration that the amounts so far paid exceed the pro rata amount so agreed.
  - iii. Costs of the suit.
  - iv. Any other/further reliefs that the honorable court may deem fit to grant.
2. Upon being served with the Plaint and Summons to enter appearance, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants duly entered appearance and thereafter filed a Statement of Defense dated the 10<sup>th</sup> of January 2019 and in respect of which same [1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants] denied the claims by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein.
3. On the other hand, the 4<sup>th</sup> Defendant duly entered appearance and filed a Statement of Defense dated the 8<sup>th</sup> of May 2019. Similarly, the 4<sup>th</sup> Defendant denied the claims by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff[s] and thereafter sought to have the Plaintiffs' case dismissed with costs.
4. Other than the foregoing, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein also proceeded to and filed another suit, namely, ELC No. 1232 of 2016, and which suit was filed vide Plaint dated the 7<sup>th</sup> of October 2016. Nevertheless, the Plaint under reference was subsequently amended resting with the Amended Plaint dated the 21<sup>st</sup> of November 2016, and in respect of which the current 1<sup>st</sup> and 2<sup>nd</sup> Defendants [who were Plaintiffs' therein] sought for the following reliefs:
  - i. That an order of specific performance do issue directed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to jointly and severally pay the Plaintiffs forthwith the sum of Kshs. 16,400,000/= only with interests as special damages, being the outstanding balance on the consideration and inclusive of the 25% default penalty for breach of the Sale Agreement for the sale and purchase of L.R No. Nairobi Block 126/457 and Nairobi Block 126/458.
  - ii. That in the alternative and without prejudice to number [1] above, the Honorable Court do declare the Agreement for sale dated the 17<sup>th</sup> of December 2012 as lapsed and that of 11<sup>th</sup> June 2015; as rescinded due to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' default, and allow the Plaintiffs to refund the purchase monies received from the Defendants less 25% of the purchase price chargeable as the default penalty, and which payment should be in simultaneous exchange and discharge of the Titles to L.R No. Nairobi Block 126/457 and Nairobi Block 126/458.
  - iii. A permanent injunction do issue directed to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants whether by themselves, their agents, servants, agents or whatsoever, restraining



them from further subdividing or selling off to third parties; or in whatsoever manner dealing with the properties known as L.R No. Nairobi Block 126/457 and Nairobi Block 126/458 until payment in full of the consideration owing to the Plaintiff, together with interest thereon at court rates from the date of the Sale Agreement.

- iv. That any third party or person claiming a purchaser's interests be restrained by way of a permanent injunction from entering, constructing or dealing with any portion of the said properties known as L.R No. Nairobi Block 126/457 and Nairobi Block 126/458.
  - v. That an Eviction and demolition order do issue directed to the Nairobi County Council, to remove any person or structures from the properties known as L.R No. Nairobi Block 126/457 and Nairobi Block 126/458.
  - vi. General and exemplary damages for breach of contracts of 17<sup>th</sup> December 2012 and 11<sup>th</sup> June 2015 by the Defendants.
  - vii. The Defendants be condemned to meet the costs of the suit and interests thereon.
5. Instructively, the suit [whose details have been outlined in the preceding paragraph] was consolidated with the original suit, namely, ELC No. 1208 of 2016. Furthermore, the original suit [ELC No. 1208 of 2016], was constituted as the lead file.
6. Other than the foregoing, the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs sought for and obtained Leave to be included in the suit and which Leave was duly granted. Consequently and in this regard, the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs thereafter filed [sic] a Statement of Defense and Counterclaim in opposition to the claims enumerated at the foot of ELC No. 1232 of 2016.
7. Vide the Counterclaim dated the 24<sup>th</sup> of August 2021, the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs sought for the following reliefs:
- i. A permanent/perpetual injunction restraining the Defendants herein and/or their agents and/or servants, from encroaching, trespassing and/or in any other way interfering with the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Plaintiffs, allottees and/or owners of land being L.R No. Nairobi/Block 126/457 [sic] pending the hearing and determination of this suit.
  - ii. A declaration that the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiff are the owners of the suit properties.
  - iii. Special damages amounting to Kshs. 4,170,540/= only.
  - iv. General damages for trespass.
  - v. Costs of the suit.
  - vi. Any other or further reliefs that this Honorable Court deems fit and just to grant.
8. For good measure, the pleadings [whose details have been highlighted herein before], constitute the totality of what has been filed by the parties as pertains to the subject matter.



9. Additionally, it is also imperative to underscore that the suit, namely, ELC No. 1232 of 2016 which had been filed by the current 1<sup>st</sup> and 2<sup>nd</sup> Defendants, also included or brought on board other Defendants. For good measure, the said suit introduced M/s Jamii Bora Bank Ltd and Rafiki DTM Kenya Ltd, who were sued as the 5<sup>th</sup> and 6<sup>th</sup> Defendants, respectively.
10. Notably, the 5<sup>th</sup> and 6<sup>th</sup> Defendants [details in terms of the preceding paragraph], proceeded to and filed their Statements of Defense and in respect of which same [5<sup>th</sup> and 6<sup>th</sup> Defendants] denied the claims that were being agitated by the current 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
11. First forward, the matter beforehand was fixed for case conference [pretrial directions] on various dates including the 21<sup>st</sup> of November 2022 whereupon the parties confirmed that same [parties] had filed and exchanged all the requisite pleadings, List and bundle of documents and the witness statements. In this regard, the parties confirmed that the suit was thus ready for Hearing.
12. Pursuant to and as a result of the foregoing, the court duly confirmed the suit as ready for Hearing culminating into same suit being set down for Hearing.

#### EVIDENCE BY THE PARTIES:

##### a. PLAINTIFFS' CASE:

13. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' case revolves and/or gravitates around the evidence of one witness, namely, Samuel Mwai Kariuki. Same testified as PW1.
14. It was the testimony of the witness that same is one of the Directors of the 1<sup>st</sup> Plaintiff herein. In this regard, the witness averred that by virtue of being one of the directors of the 1<sup>st</sup> Plaintiff, same [witness] is thus conversant with the facts of this matter.
15. On the other hand, the witness averred that same has since recorded a Witness Statement dated the 4<sup>th</sup> of October 2016 and wherein same [witness] has outlined the relevant facts attendant to and in respect of the subject dispute. Furthermore, the witness has averred that same is conversant with and knowledgeable of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
16. Suffice it to point out that the witness thereafter proposed to adopt and rely on the contents of the Witness Statement dated the 4<sup>th</sup> of October 2016. For good measure, the witness statement under reference was duly admitted and constituted as the evidence in chief of the witness.
17. Additionally, it was the evidence of the witness that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein sold two parcels of land to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. In any event, the witness added that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs proceeded to and executed the Sale Agreements.
18. It was the further testimony of the witness that the purchase price as pertains to the two properties which were sold to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein was agreed in the sum of Kshs. 25,000,000/= only.
19. Furthermore, the witness averred that the properties which were being sold to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff[s] were stated to measure 10 acres. In any event, the witness added that the price per acre was Kshs. 2,500,000/- only.
20. It was the further evidence of the witness that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein proceeded to and paid part of the purchase price, but however, discovered that the two [2] parcels of land which were being sold fell short of the 10 acres which had hitherto been covenanted to.
21. Be that as it may, the witness [PW1] averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have filed the instant suit and same are seeking for various reliefs inter-alia an order for [sic] specific performance.



22. On cross examination by learned counsel for the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein entered into and executed a Sale Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants over and in respect of L.R No. Nairobi Block 126/457. Furthermore, the witness averred that after entering into the Sale Agreement, the Title to and in respect of the said property was transferred and registered in the name of the 1<sup>st</sup> Plaintiff on the 1<sup>st</sup> of February 2013.
23. Whilst under further cross examination, the witness averred that the 1<sup>st</sup> Plaintiff became the lawful and legitimate proprietor of L.R No. Nairobi Block 126/457. In any event, the witness added that it is the 1<sup>st</sup> Plaintiff who sold a portion of the said property to and in favor of the 9<sup>th</sup> Plaintiff herein.
24. Other than the foregoing, it was the evidence of the witness [PW1] that the 1<sup>st</sup> Plaintiff also sold portions of L.R No. Nairobi Block 126/457 to some other persons, including Peter Murage, John Ng'ang'a and Dansil Investments Ltd.
25. On further cross examination, the witness averred that at the time when the 1<sup>st</sup> Plaintiff was selling portions of L.R No. Nairobi Block 126/457 to the various purchasers, there was a Caution which had been registered against the said properties. For good measure, the witness averred that the Caution under reference was registered on the 16<sup>th</sup> of July 2014.
26. It was the further evidence of the witness that the Caution which had hitherto been registered against the Title of L.R No. Nairobi Block 126/457 was subsequently removed by one Paul Mwaura Mwangi, namely, the 1<sup>st</sup> Defendant herein.
27. On cross examination by learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs entered into and executed Sale Agreements in respect of the suit properties. Furthermore, the witness averred that the Sale Agreements were dated 17<sup>th</sup> December 2012.
28. It was the further evidence of the witness that the properties which were being sold to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were L.R No's Nairobi Block 126/457 and 458, respectively.
29. Besides, the witness averred that the Sale Agreements stipulated that the total purchase price was Kshs. 25,000,000/= only.
30. Whilst under further cross examination, the witness averred that the Sale Agreements also stipulated the contractual timelines including the completion period. In this regard, it was the testimony of the witness that the completion duration was stipulated to be 90 days from the date of execution of the Sale Agreement.
31. Other than the foregoing, it was the evidence of the witness that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein did not pay the purchase price in respect of the two properties within the stipulated duration. Nevertheless, the witness added that same did not pay the purchase price within the stipulated duration because the Vendors did not have the Certificate of Title at the time of the sale of the suit properties.
32. Additionally, it was the testimony of the witness that at the time when same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] entered into the Sale Agreement, the suit properties were in the name of Ngondu Farmers Cooperative Society Limited; and not in the names of the Vendors. However, the witness added that the suit properties were subsequently transferred to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, albeit on the instructions of the Vendors.
33. Whilst under further cross examination, the witness stated that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have since paid to and in favor of the Vendors [1<sup>st</sup> and 2<sup>nd</sup> Defendants] the sum of Kshs. 23,250,000/= only.



34. Be that as it may, whilst under further cross examination, the witness herein stated that even though the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have paid to and in favor of the Vendors the sum of Kshs. 23,250,000/= only, same [witness] has however not brought forth documents to show that the Vendors have been paid the said amounts.
35. On the other hand, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs duly executed the Sale Agreement dated the 17<sup>th</sup> of December 2012. In any event, the witness averred that prior to entering into the sale agreement, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had occasioned to visit the suit properties.
36. On the other hand, it was the further testimony of the witness that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs subsequently discovered and/or established that the suit properties were not measuring 10 acres. For good measure, the witness averred that it was discovered that the suit properties were less in acreage. Nevertheless, it was the testimony of the witness that even though the suit properties are said to be measuring 10 acres, same [witness] has however not tendered any documents to confirm that the suit properties were less than the 10 acres or at all.
37. Whilst under further cross examination, it was the testimony of the witness that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein entered into and executed a further Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In this regard, the witness highlighted and referenced the Agreement dated the 11<sup>th</sup> of June 2015.
38. Furthermore, it was the testimony of the witness that other than the Agreement entered into on the 11<sup>th</sup> of June 2015, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs also entered into another Agreement dated the 17<sup>th</sup> of December 2021.
39. Other than the foregoing, it was the testimony of the witness that the Vendors herein subsequently removed the Caution which had been lodged against the suit properties, albeit on the understanding that same [Vendors] were to be paid the balance amounting to Kshs. 10,100,000/= only. However, the witness clarified that the said balance was never paid to and in favor of the Vendors.
40. On cross examination by learned counsel for the 4<sup>th</sup> Defendant, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have sued the 4<sup>th</sup> Defendant because the 1<sup>st</sup> Defendant informed same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] that it was the 4<sup>th</sup> Defendant who had carried out and/or undertaken demolition of the various structures which were standing on the suit properties.
41. Be that as it may, the witness has averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were able to undertake investigations to ascertain the person who was culpable [responsible] for undertaking the demolitions on the suit properties.
42. In this regard, the witness averred that same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] were able to establish and confirm that the demolitions were undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein and not otherwise.
43. Whilst under further cross examination, it was the testimony of the witness that after undertaking due investigation, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein came to the conclusion that the 4<sup>th</sup> Defendant, the Nairobi City County Government, was not involved in the demolition.
44. Furthermore, it was the testimony of the witness that same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] do not have any complaint as against the 4<sup>th</sup> Defendant.
45. Whilst under further cross examination, it was the evidence of the witness that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are keen to withdraw their suit as against the 4<sup>th</sup> Defendant.
46. However, the witness added that same [witness] are waiting for the case to end before the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs can withdraw the suit as against the 4<sup>th</sup> Defendant.



47. On cross examination by learned counsel for the 5<sup>th</sup> Defendant, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs borrowed the sum of Kshs. 7,200,000/= only from Jamii Bora Bank Ltd. In any event, the witness confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were offered a banking facility which was duly executed and signed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
48. Whilst under further cross examination, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs duly executed the instrument of Charge in favor of the 5<sup>th</sup> Defendant. For good measure, the witness clarified that the Charge instrument [ Document] was dated the 10<sup>th</sup> of March 2014.
49. Additionally, it was the testimony of the witness that it is the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs who Charged the land to the bank with a view to procuring the banking facility. However, the witness conceded that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have not fully repaid the banking facility.
50. On cross examination by learned counsel for the 6<sup>th</sup> Defendant, the witness pointed out that the 6<sup>th</sup> Defendant herein was not a party to the Sale/Purchase Agreement. Furthermore, the witness also clarified that the 6<sup>th</sup> Defendant was also not a party to the subsequent Agreement for the removal of the Caution.
51. Whilst under further cross examination by learned counsel for the 6<sup>th</sup> Defendant, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have only laid a Complaint against the Vendors and not the bank.
52. Other than the foregoing, it was the testimony of the witness that the 6<sup>th</sup> Defendant herein disbursed the loan facility which had been applied for by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. However, it was the further testimony of the witness that the loan facility which had been granted to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs is yet to be fully liquidated and/or settled.
53. On re-examination, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs entered into a subsequent Agreement for purposes of removal of the Caution. In any event, the witness added that prior to entering into the Agreement of the removal of the Caution, same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs], paid to the Vendors the sum of Kshs. 500,000/= only.
54. Other than the foregoing, it was the testimony of the witness that M/s Jamii Bora Bank Ltd paid to and in favor of the Vendors the sum of Kshs. 13,700,000/= only. Furthermore, it was the evidence of the witness that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have been paying the loan facility but same [loan facility] is still outstanding.
55. With the foregoing testimony, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' case was duly closed.
  - b. THE 3<sup>RD</sup> TO 10<sup>TH</sup> PLAINTIFFS' CASE:
56. The 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs' case also revolves around the testimony of one witness namely, Peter Murage. Same testified as PW2.
57. It was the testimony of the witness that same is the 7<sup>th</sup> Plaintiff and thus same [witness] is conversant with the facts of this matter. Furthermore, the witness averred that same is conversant with the rest of the Plaintiffs, who have also authorized and mandated same [witness] to attend court and testify on their behalf.
58. Other than the foregoing, the witness averred that same has since recorded a Witness Statement dated the 30<sup>th</sup> of August 2021, and which statement same [witness] sought to adopt and rely on as his evidence in chief. Instructively, the Witness Statement dated the 30<sup>th</sup> of August 2021 was thereafter adopted and constituted as the evidence in chief of the witness.



59. Additionally, the witness adverted to a list and bundle of documents dated the 30<sup>th</sup> of August 2021 and thereafter sought to adopt and produce same [documents] as exhibits before the court. Suffice it to point out that the documents at the foot of the list and bundle of documents were thereafter tendered and produced before the court as Exhibits P1 to P10 on behalf of the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs herein.
60. Other than the foregoing, the witness alluded to the Counterclaim dated the 24<sup>th</sup> of August 2021 and thereafter sought to adopt and rely on the contents thereof. For good measure, the witness invited the court to proceed and grant the reliefs alluded to thereunder.
61. On cross examination by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, the witness averred that same is before the court to testify on his own behalf and the rest of the Plaintiffs [ namely, the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs].
62. Furthermore, the witness averred that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs bought cumulatively three acres cut out of L.R No. Nairobi Block 126/458. In any event, the witness added that the said piece of land was at the material point in time registered in the name in the of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
63. Whilst under further cross examination, the witness averred that before buying the portion of the suit property, same [witness] carried out and undertook due diligence over the suit property. Nevertheless, the witness added that at the time of purchasing the suit properties, same [suit properties] were Charged to the 5<sup>th</sup> and 6<sup>th</sup> Defendants.
64. It was the further testimony of the witness that at the time the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were selling a portion of the suit property, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were having difficulties in repaying the loan facilities with the 5<sup>th</sup> and 6<sup>th</sup> Defendants.
65. It was the further testimony of the witness that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs made payments directly to and in favor of the banks, namely the 5<sup>th</sup> and 6<sup>th</sup> Defendants. However, the witness testified that though the payments were made directly to the banks, same [payments] were being received by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
66. Whilst under further cross examination, the witness stated that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs do not have any problems with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. For good measure, the witness added that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs are not making any claims as against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
67. On the other hand, the witness averred that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs are aware that there are third parties who are laying a claim to ownership of the suit properties. In addition, the witness averred that the 3<sup>rd</sup> parties who are laying a claim to ownership of the suit properties are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.
68. Whilst under further cross examination, the witness averred that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs are only laying a claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. In any event, it was the testimony of the witness that the demolition which was undertaken was not done by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
69. Other than the foregoing, it was the testimony of the witness that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs have not been issued with any Certificate of Title over and in respect of the plots which same [3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs] bought.
70. On cross examination by learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the witness averred that same [3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs], were buying three acres of land from the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein. At any rate, the witness averred that prior to commencing the purchase of the land from the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, same [witness] conducted a Search over the suit properties.



71. Whilst under further cross examination, the witness stated that the Search which same conducted showed that the land in question was Charged to and in favor of M/s Rafiki Enterprises [the 6<sup>th</sup> Defendant herein].
72. It was the further testimony of the witness that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs were purchasing portions of the suit properties around March 2015. However, the witness added that by the time in question, the suit properties were duly charged to the banks.
73. Furthermore, the witness averred that by the time same were buying portions of the suit properties, the Charge which had been registered over the suit properties had not been discharged.
74. It was the further testimony of the witness that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs had Sale Agreements with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, and the Sale Agreements have been tendered and produced before the court. Nevertheless, whilst under further cross examination, the witness conceded that the Sale Agreements have neither been tendered nor produced before the court.
75. On further cross examination, the witness averred that the 10<sup>th</sup> Plaintiff herein is a sole proprietorship. For good measure, the witness added that same [witness] is the owner of the business name, namely the 10<sup>th</sup> Plaintiff. However, the witness admitted that same has not tendered a copy of the Certificate of Registration of the 10<sup>th</sup> Plaintiff before the court.
76. Whilst under further cross examination, the witness averred that it is him [witness] who was selling various portions of the suit properties to the rest of the Plaintiffs. However, the witness clarified that same did not have any Certificate of Title over and in respect of the plots which same [witness] was selling.
77. On further cross examination, the witness averred that the sale of the various portions of the suit properties were not being undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. To the contrary, the witness averred that it was him [witness] who had acquired portions of the suit properties and thereafter subdivided same before selling the resultant plots to various third parties.
78. On further cross examination, the witness averred that same [witness] has filed various documents showing the demolitions that were undertaken on portions of the suit properties.
79. Further and in any event, the witness [ PW2] has averred that the demolitions in question were carried out and undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.
80. Nevertheless, whilst under further cross examination, the witness averred that same does not have any evidence to confirm and/or prove that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were involved in the demolition of the structures which were standing on the suit properties.
81. Additionally, it was the evidence of the witness that the documents which same has tendered and produced before the court at pages 42 to 81 of the bundle of documents is a Valuation Report. However, the witness has clarified that the document beforehand has neither been signed by the Author thereof nor the Client. In any event, the witness added that same is not a Valuer.
82. On the other hand, it was the testimony of the witness that same [witness] did not interact with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in respect of the transactions over the suit properties.
83. On re-examination by learned counsel for the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs, the witness averred that at the time the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs were transacting over the suit properties, there was a Caution that had been registered by Paul Mwaura Mwangi.



84. On the other hand, it was the testimony of the witness that same [witness] did not have any relationship with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. In any event, the witness clarified that same [witness] did not purchase any plot from the said Defendants.
85. It was the further testimony of the witness that it was the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were responsible for the demolition of the structures that have been built on the suit properties. Furthermore, the witness added that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein had previously admitted that it was same [1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants] who were responsible for the demolitions.
86. With the foregoing testimony, the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs' case was duly closed.
- c. 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS' CASE:
87. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' case similarly revolves around the evidence of one witness, namely, Paul Mwaura Mwangi. Same testified as DW1.
88. It was the testimony of the witness that same is the 1<sup>st</sup> Defendant herein whilst the 2<sup>nd</sup> Defendant, now deceased, was his [witness] mother. In addition, the witness averred that the 2<sup>nd</sup> Defendant died in March 2018.
89. On the other hand, it was the testimony of the witness that the 3<sup>rd</sup> Defendant is a limited liability company in which same [witness] is a Director.
90. Other than the foregoing, the witness averred that same [witness] is privy to and conversant with the facts of this matter. In any event, the witness added that same has since recorded a Witness Statement dated the 23<sup>rd</sup> of July 2021, which same sought to adopt and rely on as his evidence in chief.
91. Suffice it to state, that the Witness Statement dated the 23<sup>rd</sup> of July 2021 [ the Statement] was thereafter adopted and constituted as the evidence in chief of the witness.
92. Furthermore, the witness adverted to a list and bundle of documents dated the 23<sup>rd</sup> of July 2021, containing 13 documents and which documents the witness sought to tender and produce before the court.
93. Notably, the documents at the foot of the list dated the 23<sup>rd</sup> of July 2021 were thereafter tendered and produced before the court as Exhibits D1 to D13 respectively, on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
94. Other than the foregoing, the witness adverted to what same called a Counterclaim dated the 23<sup>rd</sup> of July 2021. For good measure, the witness sought to adopt the contents thereof.
95. It was the further testimony of the witness that same is conversant with the two properties beforehand, namely L.R No. Nairobi Block 126/457 and 458, respectively. For good measure, the witness added that the two properties belonged to himself and the 2<sup>nd</sup> Defendant [Now deceased].
96. It was the further testimony of the witness that same [witness] entered into a Sale Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein, pertaining to and concerning the sale of the two properties. Furthermore, the witness added that the two properties were being sold for the sum of Kshs. 25,000,000/= only.
97. On cross examination by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, the witness averred that same entered into Sale Agreements with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. Furthermore, the witness clarified that the said Agreements were in respect of the two properties, namely, L.R No. Nairobi/Block 126/457 and 458, respectively.



98. Whilst under further cross examination, the witness averred that the purchase price was agreed in the sum of Kshs. 25,000,000/= only. However, the witness added that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs did not pay the entirety of the purchase price in respect of the suit properties.
99. Whilst under further cross examination, the witness averred that same was authorized to sell the suit properties to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. In any event, the witness averred that the suit properties were transferred and registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to enable same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] to obtain funds from the banks and thereafter to pay the purchase price.
100. Furthermore, the witness averred that upon the Transfer and Registration of the suit properties in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, the Titles of the two properties were Charged to the 5<sup>th</sup> and 6<sup>th</sup> Defendants by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein.
101. It was the further testimony of the witness that upon the Charge of the two properties, the two banks released and/or disbursed various monies directly unto him. However, the witness stated that same [witness] could not ascertain how much money was paid by either bank.
102. Nevertheless, it was the testimony of the witness that same received the aggregate sum of Kshs. 13,700,000/- from the two banks.
103. Furthermore, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on one hand and himself [witness] on the other hand, undertook reconciliation and ascertained the total monies which had been paid. In this regard, the witness clarified that it was ascertained that the total monies paid out and indeed received by himself amounted to Kshs. 14,850,000/= only.
104. It was the further testimony of the witness that after undertaking reconciliation with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, the two parties entered into a further Agreement on the 11<sup>th</sup> of June 2015, wherein it was confirmed that the total amount of monies so far paid amounted to Kshs. 14,850,000/= only. For good measure, the witness averred that the said Agreement forms part of the documents which have been tendered and produced before the court.
105. Whilst under further cross examination, the witness averred that the total amount of money that remained due and owing at the foot of the Sale Agreement [exclusive of the penalties], amounted to Kshs. 10,150,000/= only.
106. On the other hand, it was the testimony of the witness that same [witness] has also filed a Counterclaim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein as pertains to ownership of the suit properties.
107. Besides, the witness also averred that other than the balance of the purchase price which has not been paid to date, same [witness] has also incurred further costs including the payments which were made to the 5<sup>th</sup> and 6<sup>th</sup> Defendants, towards discharging the suit properties.
108. On cross examination by learned counsel for the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs, the witness averred that the two [2] properties were never registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. However, the witness clarified that the suit properties belong to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
109. Whilst under further cross examination, the witness testified that it is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who authorized the Transfer and Registration of the suit properties in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. Furthermore, the witness added that the Transfer in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs was to facilitate the Charging of the two [2] properties, to enable the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to procure monies towards payments of the deposit of the purchase price.



110. On the other hand, the witness averred that same [witness] was duly informed of the intention of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to sell portions of the suit properties to third parties.
111. Whilst under further cross examination, the witness averred that same [witness] entered into an Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on the 11<sup>th</sup> of June 2015 and wherein the total balance [aggregate] due and payable was confirmed to be Kshs. 10,150,000/= only.
112. Other than the foregoing, the witness averred that at the foot of the Counterclaim, same [witness] has sought to be paid the sum of Kshs. 16,400,000/= only. Nevertheless, the witness added that the said amount is inclusive of the penalty arising from the default by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to comply with the terms of the said Agreement [Contract].
113. Whilst under further cross examination, the witness averred that same was aware of various structures which had been constructed on portions of the suit properties. However, the witness added that the structures in question were illegal insofar as same [structures] had not been authorized by himself [witness].
114. Furthermore, the witness averred that same is aware that there were demolitions which were carried out on the suit properties. However, the witness added that same was not involved in the demolition of the structures complained of.
115. Whilst under further cross examination, the witness averred that same is not aware of the person who was responsible for the demolitions of the structures which were standing on the portion of the suit properties. In any event, the witness averred that at the point in time when the demolitions were being conducted, same was outside the country.
116. On re-examination by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the witness averred that the purchase price over and in respect of the two properties was agreed at in the sum of Kshs. 25,000,000/= only. Furthermore, the witness stated that it is himself who authorized and sanctioned the Transfer of the two properties to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
117. On further re-examination, the witness averred that the Transfer of the suit properties to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs was on the promise that the said Plaintiffs were going to pay the balance of the purchase price. However, the witness clarified that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs failed to comply with the terms of the contract.
118. Other than the foregoing, the witness averred that at the time when the suit properties were being sold to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, same [witness] did not undertake any Survey to ascertain the acreage of the suit properties.
119. Additionally, it was the evidence of the witness that the suit properties were sold to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs albeit on the basis of the Title documents which the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had been able to ascertain. In any event, the witness added that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had occasion to visit the suit properties prior to and before the execution of the Sale Agreements.
120. On the other hand, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein confirmed and acknowledged that same had only paid the sum of Kshs. 14,850,000/= only. In this regard, the witness reiterated that the balance that remained due and owing from the sale of the suit properties was Kshs. 10,150,000/- only.



121. Whilst under further re-examination, the witness averred that the claim at the foot of the Counterclaim, relates to the balance of the purchase price and the penalty which is payable on account of breach of the terms of the Sale Agreement.
122. In any event, the witness added that same has since incurred further costs by discharging the Titles of the suit properties which were hitherto Charged in favor of the 5<sup>th</sup> and 6<sup>th</sup> Defendants herein.
123. Finally, the witness averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein entered into and executed a further Agreement dated the 11<sup>th</sup> of June 2015, and wherein same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] acknowledged the balance of Kshs. 10,150,000/= only. Nevertheless, the witness added that the said balance has never been paid to date.
124. With the foregoing testimony, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' case was duly closed.
  - d. 4<sup>TH</sup> DEFENDANT'S CASE:
125. Though the 4<sup>th</sup> Defendant duly entered appearance and filed a Statement of Defense, same [4<sup>th</sup> Defendant] however did not tender and/or adduce any evidence during the trial.
126. In any event, it is worth recalling that PW1 testified and informed the court that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein did not have any claim as against the 4<sup>th</sup> Defendant. Furthermore, PW1 added that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were ready and willing to withdraw the claim as against the 4<sup>th</sup> Defendant.

#### **5<sup>TH</sup> DEFENDANT'S CASE:**

127. Suffice it to point out that though the 5<sup>th</sup> Defendant had also been sued and/or impleaded, the suit as against the 5<sup>th</sup> Defendant was compromised vide Consent which was entered into and adopted by the court on the 2<sup>nd</sup> of October 2023. For coherence, the claim that was hitherto standing in favor of the 5<sup>th</sup> Defendant was duly settled upon payment of the sum of Kshs. 6,000,000/= only [whose payment was confirmed and acknowledged by the 5<sup>th</sup> Defendant].

#### **6<sup>TH</sup> DEFENDANT'S CASE**

128. Similarly, the dispute which led to the joinder of the 6<sup>th</sup> Defendant was resolved vide Consent entered into and endorsed by the court on the 2<sup>nd</sup> of October 2023, whereupon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants paid to and in favor of the 6<sup>th</sup> Defendant the sum of Kshs. 5,000,000/= only.
129. Arising from the foregoing, the 6<sup>th</sup> Defendant's case was therefore marked as duly settled.

#### **PARTIES SUBMISSIONS:**

130. At the close of the Hearing, the advocates for the various parties covenanted to file and exchange written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
131. Pursuant to and in line with the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs proceeded to and filed written submissions dated the 9<sup>th</sup> of May 2024, whereas the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs filed written submissions dated [sic] the 15<sup>th</sup> of January 2024.
132. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed written submissions dated the 8<sup>th</sup> of March 2024. For good measure, the three [3] sets of written submissions [details highlighted in the instant paragraph as well as the preceding paragraphs], form part of the record of the court.



133. Even though the court has not reproduced and/or rehashed the contents of the written submissions, same [written submissions] shall be taken into account whilst crafting the judgment beforehand.
134. Additionally, it is imperative to underscore that the court is indeed grateful to the parties and the respective advocates for the comprehensive submissions which have been filed, and whose contents have gone along way in illuminating the issues in controversy at the foot of the subject matter.

#### **ISSUES FOR DETERMINATION:**

135. Having reviewed the pleadings and the evidence tendered [both oral and documentary], and upon consideration of the written submissions filed by and on behalf of the respective parties, the following issues crystalize [emerge] and are thus worthy of determination:
  - i. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs accrued any lawful Title to the suit properties which would enable same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] to alienate the suit properties to and in favor of the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs;
  - ii. Whether the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs acquired and/or accrued any Title to and/or interests over the suit properties;
  - iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs breached the terms of the Sale Agreement [Contract] which was entered into with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or otherwise.
  - iv. What reliefs if any, ought to be granted.

#### **ANALYSIS AND DETERMINATION:**

##### **ISSUE NUMBER 1**

Whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs accrued any lawful Title to the suit properties which would enable same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] to alienate the suit properties to and in favor of the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs.

136. It is common ground that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein entered into and executed a Sale Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pertaining to and concerning the sale of two properties, namely, L.R No's Nairobi Block 126/457 and 458, respectively. For good measure, the Sale Agreement which was entered into on the 17<sup>th</sup> of December 2012 was tendered and produced before the court as exhibit D3 on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
137. Furthermore, it is worthy to point out that the Sale Agreement [details in terms of the preceding paragraph] was voluntarily entered into and executed by the parties. Consequently, there is no gainsaying that the parties to the Sale Agreement agreed to be bound by the terms thereof.
138. Additionally, it is important to recall that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other hand, agreed that the Titles of the suit properties were to be transferred to and registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, who were thereafter at liberty to Charge the Titles in question to a banking institution with a view to obtaining monies to be paid to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, on account of deposit towards the purchase price.
139. Pertinently, the Titles to and in respect of the two properties were indeed transferred to and registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. For good measure, copies of the Certificate of Leases showing the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs as the registered owners were tendered and produced before the court as exhibits D5 and D6, respectively, on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.



140. Other than the foregoing, it is also worthy to recall that upon the Titles of the suit properties being transferred to and registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, same Titles of the suit properties were Charged to and in favor of the 5<sup>th</sup> and 6<sup>th</sup> Defendants. For coherence, the Charging of the Titles of the two [2] properties was part of the terms of the Sale Agreement entered into and executed on the 17<sup>th</sup> of December 2012.
141. Furthermore, there is no gainsaying that upon the Charging of the Titles of the suit properties, the 5<sup>th</sup> and 6<sup>th</sup> Defendants released and disbursed the sums of Kshs. 7,200,000/= and Kshs. 6,500,000/= respectively to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants; and which monies constituted part of the deposit of the purchase price.
142. For coherence, DW1 indeed confirmed receipt of the sum of Kshs. 13,700,000/= only, which same [DW1] acknowledged was paid by the two banking institutions. In this respect, it suffices to reproduce the salient aspects of the evidence by DW1 whilst under cross examination by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
143. Same [DW1] stated as hereunder:
- I do confirm that I received the sum of Kshs. 7,200,000/= only before the removal of the Caution. I also received the sum of Kshs. 6,500,000/= only. Furthermore, all I know is that the said monies were made towards the purchase price of the two properties.
144. Other than the foregoing, it is not lost on this court that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other hand had agreed that the two properties would be sold in the sum of Kshs. 25,000,000/= only.
145. Furthermore, the Sale Agreement [Contract] stipulated that the total purchase price would be payable within 90 days.
146. Be that as it may, it is important to underscore that the Titles of the suit properties were transferred to and registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs long before the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs paid the consideration [purchase price] to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
147. In any event, it is important to underscore that the Transfer and Registration of the suit properties to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs was undertaken on the mutual understanding that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs would utilize the Certificates of Title to procure and obtain monies and thereafter pay same to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
148. To my mind, even though the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs caused the Titles to and in respect of the suit properties to be transferred and registered in their [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] name, same did not acquire absolute and exclusive ownership to the suit properties or at all. Instructively, the Transfer and Registration of the suit properties in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs was subject to the beneficial rights and interests of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants thereto.
149. In any event, there is no gainsaying that the contract pertaining to and/or concerning the sale of the suit properties to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs could only materialize and come to conclusion upon the payment of the agreed consideration and not otherwise.
150. Pertinently, I beg to state and underscore that where the agreed consideration has not been fully paid and/or liquidated, then no lawful rights and/or interests can pass to and in favor of the Purchaser, in this case the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.



151. To this end, it is imperative to take cognizance of the holding of the Supreme Court [the Apex Court] in the case of *Moi University vs Zaippeline & another (Petition 43 of 2018)* [2022] KESC 29 (KLR) (Civ) (17 June 2022) (Judgment), where the court stated and held thus:

37. It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* [2011] JMCA Civ 16 ought to ordinarily reflect the following principles:

“[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

152. Notably, the Supreme Court of Kenya [ the Apex Court] elaborated on the ingredients that underpin a contract and observed that consideration is a salient and critical ingredient in matters concerning contracts. Consequently and in this regard, where evidence abounded that the consideration did not move, then the contract in question is vitiated.

153. The significance of consideration in a contract was also highlighted in the case of *Elizabeth Wamboi Githinji & 29 Others vs Kura* [2019]eKLR [per Otieno Odek JA] where same stated and held thus:

140. I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility. If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA Title is defeasible.

154. From the foregoing, I hold the humble view that for as long as the total purchase price [consideration] had not been paid by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the manner that was agreed upon, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs cannot pretend that same became the lawful and legitimate owners of the suit properties and thus at liberty to deal with same [suit properties] at their pleasure.

155. Put differently, for as long as the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have not fully paid the purchase price [a fact which was reiterated by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs vide Agreement dated the 11<sup>th</sup> of June 2015] there is no way that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs could hold themselves as exclusive and absolute owners of the suit properties.

156. Other than the foregoing, it is also appropriate to take cognizance of the provisions of Section 25 of the *Land Registration Act*, 2012, which qualifies the rights of the registered owner of a particular property. For good measure, the rights of a registered owner are limited by inter-alia; the fiduciary rights and overriding interests which do affect the designated Title.



157. For ease of reference, the provisions of Section 25 [ Supra] are reproduced as hereunder:

25.

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

158. Arising from the foregoing analysis, my answer to issue number one is threefold. Firstly, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein entered into and executed a Sale Agreement [Contract] wherein same procured the registration of the suit properties in their name, as a precursor to obtaining the funds for payments to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

159. Secondly, the circumstances under which the Titles to and in respect of the suit properties were transferred to and registered in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs does not show that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs acquired absolute and exclusive rights to the suit properties.

160. Thirdly, for as long as the entire purchase price [read consideration] had not been paid, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants held vested interest akin to lien over the suit properties which limited and/or restricted the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' rights to deal with the suit properties.

#### ISSUE NUMBER 2

Whether the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs acquired and/or accrued any Title to and/or interests over the suit properties.

161. Though the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had not fully paid the purchase price [read consideration] to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, same purported to sell and/or dispose of portions of the suit properties in favor of third-parties, namely, the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs.

162. Nevertheless, it is worth recalling that the Titles to and in respect of the suit properties were transferred to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to enable same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] to Charge the properties and procure monies towards payment of the purchase price.

163. Notably, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs proceeded to and indeed Charged the properties to and in favor of the 5<sup>th</sup> and 6<sup>th</sup> Defendants herein. For good measure, the Charge to and in favour of the 5<sup>th</sup> and 6<sup>th</sup> Defendants remained in existence up to and including the 2<sup>nd</sup> of October 2023, when a Consent was entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on one hand and the 5<sup>th</sup> and 6<sup>th</sup> Defendants on the other hand.



164. Nevertheless, evidence was tendered before the court that during the existence and/or subsistence of the Charge in favor of the 5<sup>th</sup> and 6<sup>th</sup> Defendants, [ details in terms of the preceding paragraph], the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs purported to enter into sale agreements pertaining to sale of portions of the suit properties.
165. Suffice it to point out that the claim by and on behalf of the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs is premised on the fact that same bought and acquired portions of the suit properties either directly from the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs or through persons who had bought from the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein.
166. Nevertheless, the critical question to be dealt with and/or addressed relates to whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein could deal with and/or purport to alienate portions of the suit properties during the existence of a Charge thereto.
167. Be that as it may, it is common knowledge that where a property, the suit properties not excepted is the subject of a legal Charge, the owner of the property [namely the chargor] is divested of any rights and/or authority over the charged property subject only to the equity of redemption.
168. Put differently, where a property is the subject of a Charge, the Chargor thereof cannot purport to alienate and/or sell a portion of the said property albeit without the Consent and/or permission of the Chargee [banking and/or financial institution].
169. However, in respect of the instant matter, it has been contended by the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs that same acquired portions of the suit properties from the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, even though the suit properties were still Charged to the 5<sup>th</sup> and 6<sup>th</sup> Defendants.
170. Premised on the foregoing, the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs are now seeking that the court be pleased to decree that same [3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs], acquired lawful rights to and/or in respect of portions of the suit properties.
171. However, in my humble view, for as long as the suit properties were still Charged to the 5<sup>th</sup> and 6<sup>th</sup> Defendants, [ a fact which was conceded to and acknowledged by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs] there is no way the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs could purport to deal with and/or acquire portions thereof or at all.
172. In any event, it is worth recalling that PW2 who testified for and on behalf of the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs confirmed that at the time when same [3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs] were acquiring portions of the suit properties, same [suit properties] were still Charged to the 5<sup>th</sup> and 6<sup>th</sup> Defendants.
173. For ease of reference, it is appropriate to reproduce the evidence of PW2 whilst under cross examination by learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and wherein same stated as hereunder:

“The 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs bought the property around March 2015. By the time of purchase of the properties, there was a Charge over the suit properties.”
174. From the foregoing testimony, there is no gainsaying that by the time the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs were endeavoring to purchase and/or acquire portions of the suit properties, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had no capacity to [sic] sell and/or alienate portions thereof.
175. Before departing from the issue herein, it is appropriate to take cognizance of the provisions of Sections 87 and 88 of the [Land Act](#) 2012[2016], which provides as hereunder:

87. Chargee’s consent to transfer If a charge contains a condition, express or implied that chargor prohibits the chargee from, transferring, assigning,



leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.

88. Implied covenant by the chargor
- (1) There shall be implied in every charge covenants by the chargor with the chargee binding the chargor—
- (a) to pay the principal money on the day appointed in the charge agreement, and, so long as any of the principal money or any part thereof remains unpaid, to pay interest on the money thereon or on so much of the money that for the time being remains unpaid at the rate and on the days and in the manner specified in charge agreement;
  - (b) to pay all rates, charges, rent, taxes and other outgoings that are at all times payable in respect of the charged land;
  - (c) to repair and keep in repair all buildings and other improvements upon the charged land or to permit the chargee or chargee's agent to enter the land and examine the state and condition of such buildings and improvements at after a seven days notice to the chargor until the charge is discharged;
  - (d) to ensure by insurance or any other means that may be prescribed or which are appropriate, that resources will be available to make good any loss or damage caused by fire to any building on the land, and where insurance is taken out, it is done so in the joint names of the chargor and chargee with insurers approved by the chargee and to the full value of all the buildings;
  - (e) in the case of a charge of land used for agricultural purposes, to use the land in a sustainable manner in accordance with the principles and any conditions subject to which the land or lease under which the land is held, and in compliance with all written laws and lawful orders applicable to that use of the land;
  - (f) not to lease or sublease the charged land or any part of it for any period longer than a year without the previous consent in writing of the chargee, which consent shall not be unreasonably withheld;
  - (g) g) not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld;

176. Consequently and in view of the foregoing, I find and hold that the 3<sup>rd</sup> to the 10<sup>th</sup> Plaintiffs herein who purported to be dealing with the suit properties during the subsistence of the Charge, albeit without the Consent of the Chargees [5<sup>th</sup> and 6<sup>th</sup> Defendants], cannot contend that same acquired any lawful rights and/or interests to the suit properties or at all.



177. Put differently, this court cannot find and hold that the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs acquired and/or accrued any lawful rights and/or interests over portions of the suit properties on the face of the explicit provisions of Sections 87 and 88 of the Land Act 2012 [2016].
178. In a nutshell, my answer to issue number two [2] is to the effect that the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs did not acquire and/or accrue any legal rights to and/or in respect of the suit properties capable of being protected by this court or at all. [See the holding in the case of Innercity Properties Ltd vs Housing Finance & Another; Josephine Mukuhi & Another [Interested Parties] [202]eKLR and Paul Gatete Wangai & 13 Others vs Capital Realty Ltd & Another [2020]eKLR].

ISSUE NUMBER THREE:

Whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs breached the terms of the Sale Agreement [Contract] which was entered into with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or otherwise.

179. It is common ground that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein entered into and executed a Sale Agreement over and in respect of the suit properties with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Notably, the Agreement under reference is dated the 17<sup>th</sup> of December, 2012.
180. It is worthy to recall that the terms of the said Agreement [Contract], were contained and highlighted in the body thereof. Instructively, it was agreed between the parties that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants [Vendors], were to facilitate the Transfer and Registration of the suit properties to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, albeit prior to the payment of the deposit.
181. Furthermore, it was also agreed that upon the Transfer and Registration of the suit properties in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs], would Charge the suit properties with a view to procuring the funds for onward payment of the deposit of the purchase price.
182. For good measure, it is worthy to point out that indeed the Titles of the suit properties were ultimately Charged to and in favor of the 5<sup>th</sup> and 6<sup>th</sup> Defendants. Furthermore, the 5<sup>th</sup> and 6<sup>th</sup> Defendants thereafter proceeded to and disbursed the monies arising from the Charge to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
183. During the course of the Hearing, DW1 testified and confirmed that same [DW1], received an aggregate of Kshs. 13,700,000, from the 5<sup>th</sup> and 6<sup>th</sup> Defendants, respectively.
184. Be that as it may, it is not lost on the Court that the parties herein had agreed that the suit properties were being sold at an aggregate sum of Kshs. 25,000,000.
185. Consequently, upon receipt of Kshs. 13,700,000 only, there remained a balance of the purchase price, which was due, owing and payable to the Vendors [ namely, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein].
186. First forward, the 1<sup>st</sup> Defendant herein who testified as DW1, averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs failed to process and pay the balance of the purchase price and as a result of the failure to liquidate the balance of the purchase price, DW1 was constrained to register a Caution against the Titles of the suit properties.
187. Instructively, DW1 pointed out that the lodgment and registration of the Caution against the suit properties was informed by the failure on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to comply with the terms of the Sale Agreement, and in particular, to pay the balance of the purchase price.



188. Moreover, DW1 also testified that subsequent to the registration of the Caution, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein scheduled and convened a meeting with him [DW1], which meeting culminated into another Agreement dated the 11<sup>th</sup> of June 2015, being entered into and executed.
189. Pertinently, it was pointed out that the Agreement dated the 11<sup>th</sup> of June 2015, was to address and indeed addressed the question of the aggregate amount of monies which had hitherto been paid; the balance due and payable and the removal of the Caution which had been lodged by DW1.
190. It was the further testimony of DW1 that arising out of the Agreement dated 11<sup>th</sup> of June 2015, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs confirmed that same had paid an aggregate of Kshs. 14,850,000 only, leaving a balance of Kshs. 10,150,000 only, due, owing and payable.
191. At any rate, DW1 pointed out that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs promised to pay and/or settle the outstanding balance [Kshs. 10,150,000 only], without further delay.
192. Nevertheless, it was the evidence of DW1 that despite the promises by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs], failed and neglected to pay the balance of the purchase price, either in the manner promised or at all. For coherence, the balance of the purchase price remained due, owing and outstanding up to and including the time when the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed ELC No. 1232 of 2016.
193. From the foregoing analysis, what becomes evident and apparent is that despite the clear terms of Sale Agreement which was entered into and executed by the parties, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs failed to comply with the terms thereof. Significantly, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs did not pay the balance of the purchase price within the stipulated 90-day period from the date of payment of the deposit.
194. Secondly, there is no gainsaying that even though the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs also prompted the entry into and execution of a follow-up Agreement [Agreement dated 11<sup>th</sup> of June 2015], same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs], also failed to abide by the terms of the latter Agreement.
195. Quite clearly, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs failed to comply with and/or adhere to the terms of the contract. Consequently and in this respect, I encounter no difficulty in finding and holding that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs indeed breached the terms of the Sale Agreement.
196. Other than the failure to pay the balance of the purchase price in accordance with the terms of the Sale Agreement; as well as the subsequent Agreement dated 11<sup>th</sup> of June 2015, there is also evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs indulged in various endeavors to sell and alienate portions of the suit properties to third parties, including the 3<sup>rd</sup> and 7<sup>th</sup> Plaintiffs herein.
197. For the avoidance of doubt, it is imperative to recall that by the time the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were entering into secondary agreements with the 3<sup>rd</sup> and 7<sup>th</sup> Plaintiffs pertaining to the sale of portions of the suit properties, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein had not paid the full purchase price.
198. To my mind, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein were engaging in activities whose import was calculated to alienate and/or dispose of various portions of the suit properties even before same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs], had acquired lawful Title to the properties.
199. To my mind, the conduct of entering into secondary agreements with 3<sup>rd</sup> parties, inter-alia; the 3<sup>rd</sup>, 7<sup>th</sup> and 10<sup>th</sup> Plaintiffs, constitutes yet another perspective of breach of the Sale Agreement [Contract which the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as pertains to the sale of the suit properties].



200. Thirdly, it is also not lost on the Court that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are the ones who Charged the Titles of the suit properties to the 5<sup>th</sup> and 6<sup>th</sup> Defendants herein. Notably, the banking facilities were indeed offered to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
201. Nevertheless, even though the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are the ones who procured and obtained the banking facilities, and for which the Titles of the suit properties were offered as security; the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs however failed to liquidate the banking facilities.
202. Owing to and arising from the failure by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to liquidate and/or repay the monies at the foot of the banking facilities, the 5<sup>th</sup> and 6<sup>th</sup> Defendants threatened to exercise their Statutory Power of Sale, and in particular, to dispose of the suit properties.
203. Suffice it to point out that it took the intervention of the 1<sup>st</sup> Defendant, to salvage the Titles of the suit properties by paying off the monies which were owing and due to the 5<sup>th</sup> and 6<sup>th</sup> Defendants.
204. To this end, it is worth recalling that the 1<sup>st</sup> Defendant actually entered into two [2] sets of Consent[s] with the 5<sup>th</sup> and 6<sup>th</sup> Defendants, culminating into the payment of the sum of Kshs. 6,000,000 in favor of the 5<sup>th</sup> Defendant, and Kshs. 5,000,000 in favor of the 6<sup>th</sup> Defendant, respectively.
205. In my humble view, the failure and/or neglect by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to liquidate the banking facilities that were extended in their favor, constitutes yet another perspective of Breach of the Sale Agreement that the said 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had entered into with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
206. Without belaboring the point, it is worth stating that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs developed a nonchalant [laissez-faire] attitude which could have culminated into the disposal of the suit properties by the Chargees.
207. To my mind, had the suit properties been sold vide Statutory Power of Sale, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who hitherto owned the properties, and who had not been fully paid the purchase price, would have lost the properties because of the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
208. In a nutshell, I come to the conclusion that evidence abound to confirm that indeed the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were in breach of the Sale Agreement [Contract] which was entered into and executed with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
209. Before departing from the issue herein, it is worth mentioning that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had contended that same were buying the 2 properties on the understanding that same [the 2 properties] measured 10 Acres.
210. Nevertheless, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs contended that subsequent to the entry into and execution of the Sale Agreement, same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs], discovered that the 2 properties did not measure 10 Acres as hitherto promised.
211. Despite the averments and allegations which were being propagated by PW1 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, it is worth recalling that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs entered into and executed the Sale Agreement and in respect of which Clause 2.1 provided as hereunder:

- “2. 1 The Vendors shall sell and the Purchasers shall purchase the land at the purchase price.
2. 2 The Vendor sells the land in its present and actual state and shall ensure all the beacons thereto are in place.”



212. From the express terms [ clauses] of the Sale Agreement, there is no gainsaying that what was being sold to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs was the suit properties in their present and actual state. In any event, the 2 properties were already surveyed and were assigned parcel numbers.
213. Arising from the foregoing, it behooved the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to undertake due diligence, including procuring a Certificate of Official Search, undertaking a Physical Search and even carrying out Survey, if and where it was deemed apposite.
214. Notwithstanding the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein entered into and executed the sale agreement [Contract], and to my mind, having entered into the said contract, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs cannot seek to renege [resile] from the clear and unequivocal terms thereof.
215. Simply put, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are bound by the terms of the Sale Agreement which was negotiated and concluded at arm's length. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs cannot now seek to unilaterally vary or alter the terms of the Sale Agreement.
216. In respect of the foregoing exposition, it suffices to take cognizance of the holding of the Court of Appeal in the case of *Centurion Engineers & Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021)* [2023] KECA 1289 (KLR), where the Court of Appeal stated as follows:

22. As this Court has severally stated, and now a longstanding principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. In *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR at 507, this Court stated:

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.”  
See also *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR.”

217. The binding nature of a contract was also highlighted and elaborated by the Supreme Court of Kenya [the Apex court], in the case of *Moi University vs Zaippeline & another (Petition 43 of 2018)* [2022] KESC 29 (KLR) (Civ) (17 June 2022) (Judgment) where the Apex court observed and held as hereunder:

37. It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* [2011] JMCA Civ 16 ought to ordinarily reflect the following principles:

“[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

In terms of the evidentiary value of the contract, section 97(1) of the *Evidence Act* which provides that:



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

218. Arising from the foregoing, my answer to issue number three [3] is to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein are culpable for breach of and non-compliance with the terms of the Sale Agreement [Contract].

#### ISSUE NUMBER FOUR

What reliefs if any, ought to be granted?

219. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein filed ELC No. 1208 of 2016 vide Complaint dated the 4<sup>th</sup> of October 2016, and in respect of which same sought for two pertinent reliefs, namely:

- i. A permanent injunction to restrain the Defendants [who are the current 1<sup>st</sup> to 4<sup>th</sup> Defendants] from alienating the suit properties; and
- ii. A declaration that the amount so far paid exceeds the pro rata amount so agreed.

220. In respect of the claim for permanent injunction, it is my humble view that even though the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs became registered as the proprietors of the suit properties, the registration of the suit properties did not vest in the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs the statutory privileges underpinned by Sections 24 and 25 of the Land (Registration) Act, 2012.

221. On the contrary, though the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs procured and obtained registration of the suit properties in their favor, same [1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs], were essentially Trustees on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pending liquidation of the entire purchase price.

222. In the circumstances, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein cannot seek to procure and obtain an order of permanent injunction as against the lawful and legitimate owners of the suit properties.

223. To my mind, the issuance of [sic] an order of permanent injunction in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein would be tantamount to countenancing the breach of the contract and to insulate the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs from satisfying lawful liabilities attendant to the suit properties.

224. As pertains to the prayer for declaration that the amount so far paid exceeds the pro rata amount agreed upon, it is my finding and holding that such an order cannot issue and/or be granted. Simply put, the issuance of such an order would be tantamount to rewriting the terms of the Sale Agreement dated 17<sup>th</sup> December 2012; which mandate and/ or power is not vested in the Court.

225. For good measure, such an endeavor would be inimical to the established position of the law and in particular, the clear provisions of Sections 97 and 98 of the *Evidence Act*. [See also the decision in the case of National Bank of Kenya vs Pipeplastic Samkolit Kenya Ltd & Another {2001} eKLR.]

226. On the other hand, the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs also filed what was described as a Counterclaim. For coherence, same is dated the 24<sup>th</sup> of August 2021, and in respect of which same [3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs], sought for inter-alia; an order of permanent injunction; declaration of ownership; special damages of Kshs. 4,170,540 only and general damages for trespass.



227. Despite the various reliefs sought by and on behalf of the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs, it is imperative to recall that this court has had occasion to consider whether the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs acquired and/or accrued any lawful rights to and in respect of the suit properties.
228. Pertinently, the court found and held that the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs herein were engaging in paper transactions with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, who at the material point in time had no capacity to sell and/or purport to alienate portions of the suit properties.
229. Furthermore, it is also worth recalling that the court found and held that at the time when the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs were purporting to deal with the suit properties, the Titles of the suit properties were indeed Charged to the 5<sup>th</sup> and 6<sup>th</sup> Defendants and hence, no dealings could be undertaken pending the discharge of the Titles. {See Sections 87 and 88 of the [Land Act](#), 2012[2016].}
230. As pertains to the prayer for special damages amounting to Kshs. 4,170,540 only, it is important to point out that same is predicated on the basis of alleged demolitions that were effected against the structures that had been constructed on portions of the suit properties. However, two things do arise.
231. Firstly, though the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs have contended that same erected structures on portions of the suit properties which were thereafter demolished, no evidence of any approval by the Planning authority [which is a prerequisite], was ever tendered and/or produced before the court.
232. Secondly, even assuming for the sake of arguments only that the photographs which were tendered before the court would suffice [which is not the case], there is the issue that special damages must not only be pleaded, but must be specifically proved.
233. Nevertheless and towards an endeavor to prove the special damages, the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs placed before the court a copy of a Bill of Quantities [ which was referenced as a Valuation Report by PW2] which was neither signed by the author nor the client. Quite clearly, such a document cannot anchor a claim for special damages.
234. Additionally, it is also not lost on this court that a Bill of Quantities is an expert document and hence, same can only be tendered and produced before a court of law by the expert, namely, [The author thereof]. However, in respect of this case, the impugned document was neither tendered nor produced by the expert.
235. Simply put, the document upon which the Claim for special damages is premised, is devoid of probative value and hence same [Bill of Quantities], is merely a piece of paper that cannot add value to the claim by the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs.
236. As concerns the manner of pleading and proving a claim for special damages, it suffices to adopt and reiterate the established position espoused vide the case of Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR, where the Court of Appeal held as hereunder:

Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that:



“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.

237. Finally, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also filed their own case, namely, ELC No. 1232 of 2016, and which was consolidated with the current suit. For good measure, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants impleaded various reliefs at the foot of the amended Plaintiff dated 21<sup>st</sup> November 2016.
238. To start with, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants [Plaintiffs vide ELC No. 1232 of 2016], sought for an order of specific performance to compel the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the said suit [the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein], to pay the balance of the purchase price as well as the 25% penalty for breach of the Sale Agreement.
239. Despite the prayer for specific performance, the Court has since found and held that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein are culpable for breach of the Sale Agreement and hence the prayer for specific performance cannot issue and/or be granted.
240. Secondly, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants [who are Plaintiffs in ELC No. 1232 of 2016], have also sought for an order to rescind the Sale Agreement [Contract], and thereafter to decree that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs [who are 1<sup>st</sup> and 2<sup>nd</sup> Defendants in ELC No. 1232 of 2016], be refunded the purchase price paid less 25% on account of default of the penalty.
241. To my mind, the prayer for rescission of the contract and refund of the purchase price so far paid less 25%, sounds reasonable, logical and lawful. Nevertheless, it is not lost on the court that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein have since accumulated further liability by paying off the 5<sup>th</sup> and 6<sup>th</sup> Defendants.
242. For coherence, it is worth recalling that the 1<sup>st</sup> Defendant indeed entered into a Consent with the 5<sup>th</sup> and 6<sup>th</sup> Defendants, culminating into the payment of an aggregate sum of Kshs. 11,000,000, as a precursor to the discharge of the Titles of the suit properties [ which Titles had been charged by and at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs].
243. Arising from the foregoing, I am therefore prepared to decree that the Transfer and Registration of the suit properties in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein be cancelled and/or revoked, and the Register thereof be rectified to reflect the name of the 1<sup>st</sup> Defendant together with such other legal representative of the 2<sup>nd</sup> Defendant [subject to compliance with the *Law of Succession Act*].
244. Other than the foregoing, I am also prepared to order and decree that the 1<sup>st</sup> Defendant shall be entitled to discount the sum of Kshs. 11,000,000, which was paid to and in favor of the 5<sup>th</sup> and 6<sup>th</sup> Defendants, as well as 25% penalty from the monies that were paid by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs; and thereafter to refund the balance [if any].
245. From the foregoing observation, the arithmetic shall work as hereunder:
- i. Total monies paid by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs amounted to Kshs. 14,850,000;
  - ii. Less the sum of Kshs. 11,000,000;
  - iii. Less a 25% penalty of Kshs. 6,250,000.
246. Arising from the arithmetic [details in terms of the preceding paragraph], what becomes apparent is that the total monies to be deducted from the purchase price hitherto paid far exceed the portion of



the purchase price that was paid. Consequently, it is apparent that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs would still be obliged to pay [ refund] to the 1<sup>st</sup> Defendant further reimbursement of Kshs. 2,400,000.

247. Other than the foregoing, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had also sought for an order of eviction of the 3<sup>rd</sup> parties who have been in occupation of the suit properties. Instructively, the order of eviction is intended to evict the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs, who are the persons who are in occupation of the suit properties, albeit on the basis of some purported sale agreements which in any event, the court has found to be invalid.
248. In my humble view, the 1<sup>st</sup> Defendant who is entitled to the suit properties becomes the legitimate owner of the suit properties and in this respect, same is therefore entitled to inter-alia; exclusive and absolute ownership. [See the decision in Mohanson Kenya Ltd vs Registrar of Titles {2017}eKLR.] [See also Moya Drift Farm Ltd vs Theuri {1973} EA].
249. In a nutshell, it is my humble view that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants [though the 2<sup>nd</sup> Defendant is deceased], are entitled to Judgment in terms of the amended Plaint vide ELC No. 1232 of 2016.

#### **FINAL DISPOSITION:**

250. From the foregoing analysis, it must be crystal clear that the Plaintiffs herein [Plaintiffs in respect of ELC No. 1208 of 2016], have failed to establish and prove their claim to the requisite standard. In this regard, the claim by and on behalf of the said Plaintiffs must fail.
251. Conversely, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants [Plaintiffs in ELC No. 1232 of 2016], have indeed established and demonstrated their entitlement to and in respect of the suit properties. Furthermore, same have also demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs vide ELC No. 1208 of 2016, are indebted unto same.
252. Premised on the foregoing, the Court therefore proceeds to make the following final orders:
- A. The suit by and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs [ELC No. 1208 of 2016], be and is hereby dismissed with costs to the 1<sup>st</sup> Defendant;
  - B. The suit [Counterclaim], by the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs be and is hereby dismissed with costs to the 1<sup>st</sup> Defendant;
  - C. Judgment be and is hereby entered in favor of the 1<sup>st</sup> Defendant as hereunder:
    - i. The Transfer and Registration of the suit properties [L.R. No. Nairobi Block 126/457 and 458], in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs be and is hereby cancelled and revoked;
    - ii. The Register in respect of L.R. No's Nairobi Block 126/457 and 458, be and is hereby rectified to reflect the names of the 1<sup>st</sup> Defendant and such other legal representative of the 2<sup>nd</sup> Defendant [now deceased], as the lawful owners thereof;
    - iii. The Chief Land Registrar be and is hereby ordered to recall the Certificates of Lease in respect of the two properties, bearing the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs;
    - iv. The Chief Land Registrar shall proceed to process and issue the Certificate of Leases in respect of L.R. No's Nairobi Block 126/457 and 458 to and in favor of the 1<sup>st</sup> Defendant herein;



- v. The 1<sup>st</sup> Defendant is hereby mandated and authorized to deduct the sum of Kshs. 11,000,000 [paid to the 5<sup>th</sup> and 6<sup>th</sup> Defendants] and 25% penalty from the total purchase price which had hitherto been paid by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs;
- vi. Nevertheless and upon undertaking arithmetic, it is evident that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein are indebted to the 1<sup>st</sup> Defendant in the sum of Kshs. 2,400,000 Only, which amount becomes due and payable to the 1<sup>st</sup> Defendant;
- vii. The 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs be and are hereby ordered to vacate and hand over vacant possession of various portions of the suit properties [namely L.R. No's Nairobi Block 126/457 and 458], to the 1<sup>st</sup> Defendant within 120 days from the date hereof;
- viii. In default to vacate and hand over vacant possession in terms of Order (vii) hereof, the 1<sup>st</sup> Defendant shall be at liberty to levy eviction against the Plaintiffs herein and in this regard, an eviction order shall issue;
- ix. In the event of such eviction being levied, the costs/expenses if any, shall be certified by the Deputy Registrar and thereafter be recovered from the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs;
- x. There be and is hereby granted a permanent injunction to restrain the Plaintiffs in ELC No. 1208 of 2016, from entering upon, remaining on, occupying, building and/or in any other manner dealing with L.R. No's Nairobi Block 126/457 and 458, respectively, which lawfully belong to the 1<sup>st</sup> Defendant;
- xi. Item (vi) being the sum of Kshs. 2,400,000 that is due and payable to the 1<sup>st</sup> Defendant by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, shall attract interest at court rates [14%] from the date hereof until payment in full;
- xii. Costs of the suit [ELC No. 1232 of 2016], be and are hereby awarded to the 1<sup>st</sup> Defendant [Plaintiff in ELC No. 1232 of 2016].

253. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY, 2024.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE.**

***In the presence of:***

*Benson – Court Assistant.*

*Mr. T.G. Murage for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs;*

*Dr. Okubasu and Mr. D. Musyoka for the 3<sup>rd</sup> to 10<sup>th</sup> Plaintiffs;*

*Mr. A.S. Kuloba for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants;*

*No appearance for the 4<sup>th</sup> Defendant*

*No appearance for the 5<sup>th</sup> Defendant*

*No appearance for the 6<sup>th</sup> Defendant*



