IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 150 OF 2011

BETWEEN

VOI DEVELOPMENT COMPANY LTD ….....1ST APPELLANT

CHRISTOPHER L. CANNAN ….....2ND APPELLANT

JOHN KELL CAMPBELL .....3RD APPELLANT

AND

AGAM INVESTMENTS LTD ….....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Odero, J.) dated 11th March, 2011)

in

H.C.C.C. No. 308 of 2007)

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CONSOLIDATED WITH

CIVIL APPEAL NO. 174 OF 2011

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JUDGMENT OF THE COURT

These appeals were consolidated for ease of hearing and as they arose from the same judgment and decree by **Odero, J**. with **Civil Appeal No.150 of 2011** being turned into the pilot file. The genesis of

the appeals is a suit mounted in the High Court by **Agam Investments Ltd** "*the Respondent*" against **Voi Development Company Ltd, Chris Cannan** and **John Kell Campbell**, "the *1st*, *2nd* and *3rd appellants*" respectively.

In the suit, the respondent claimed that by an agreement dated 30th July, 1997 the 1st appellant agreed to sell and the respondent agreed to purchase from it Plot Numbers 15031/41, 42, 118, 119, 120, 121, 123 and 124 respectively hereinafter *"the suit premises"* at an aggregated sum of Kshs.550,000/- inclusive of agency fees. In the said agreement the 1st appellant was represented by Ezazera Products hereinafter *"Ezazera."* The agreement Agency fees was agreed at Kshs.150,000/- meaning that the purchase price for the suit premises was actually Kshs.400,000/-. Pursuant to the agreement, the respondent paid the full purchase price in two instalments on 16th September and 12th October, 1997 respectively. Upon payment as aforesaid, the 1st appellant gave the respondent vacant possession of the suit premises. Subsequently, the 1st appellant's surveyors drew up the deed-plans for the suit premises that were duly approved by the Director of Survey, paving way for the issuance of the titles. By a letter dated 24th November, 1983, the Commissioner of Lands required the 1st appellant to surrender part of the land covered under the initial grant that gave rise to the suit premises in exchange of a new grant in respect thereof to cater for residential, industrial and commercial user contemplated. The purchase of the suit premises aforesaid was on the basis of that understanding and on the representation by the 1st appellant that it would comply fully with the aforesaid condition. On that understanding, the respondent embarked on the development of the suit premises by putting up a tourist hotel by the name, **Zomeni Lion Hill Camp**. However on or about 29th September, 2007, the 1st appellant closed the road access to the suit premises thereby denying access to the hotel by tour operators, tourists, hotel owners and employees demanding the return of deed-plans in respect of plot numbers 123 and 124. Apprehensive of heavy losses that would be occassioned with the closure of the hotel and under circumstances of extreme duress, the 1st respondent released to the 1st appellant the said deed-plans. Subsequent thereto, the 1st appellant demanded the return of all the other deed-plans. The demand having not been fulfilled by the respondent, the 1st appellant falsely and maliciously lodged a complaint with the Voi Police Station that the respondent had stolen or fraudulently obtained deed-plans for the suit premises. The respondent further pleaded that the closure of the road and demand by the 1st appellant for the return of the deed-plans was meant to facilitate the fraudulent sale by the appellant of the two plots out of the suit premises to the 2nd and 3rd appellants who were already aware that the said plots were not available for sale having already been sold to the respondent. By reason of all these matters, the respondent suffered loss and damage, hence the suit in the High Court. In the suit, the respondent sought for declarations that the purported sale of Plot Nos. 123 and 124 to the two appellants was fraudulent, null and void, that such sale be cancelled or nullified, that the respondent purchased the entire eight plots, paid full purchase price and was therefore entitled to be registered as the proprietor, an order for specific performance against the 1st appellant to transfer and register the suit premises in favour of the respondent, a mandatory injunction compelling the 1st appellant to open and keep open the road to the suit premises, a perpetual injunction restraining the appellants in any manner interfering with the respondent's possession and use of the suit premises, general, punitive and aggravated damages and lastly costs.

In its defence, the 1st appellant denied entering into any transaction with the respondent, neither was it a party to any transaction for the sale of the suit premises. That the sale agreement, if any, was entered into between parties who were strangers to it and to that extent, the agreement was defective, illegal, null, void and unenforceable. The 1st appellant further averred that it was still in occupation and possession of the suit premises there having been no transfer executed. That the respondent had through deceit and fraudulent means obtained the deed-plans for the suit premises from its surveyor without its consent and authority. That the complaint it lodged at Voi Police Station was still pending investigations and was a confirmation that the respondent had obtained the deed-plans through deceit, malice and fraudulent means.

The defence by the 2nd and 3rd appellants was simply that they were innocent purchasers of the two plots, for valuable consideration without notice, whose interest could not be wished away. Otherwise,

they were strangers to the suit. Finally, they pleaded that the respondent had not established any cause of action against them to entitle it to the prayers sought in the plaint.

The hearing of the suit commenced before Odero, J. on 15th July, 2009 when **Surjeet Singh Basil** *"Basil"* testified on behalf of the respondent. Briefly, his testimony was that he together with his wife, sister and her husband were directors of the respondent. By a letter dated 10th March, 1997 addressed by the 1st appellant to Ezazera it informed Ezazera that it had been allocated plot Nos.41, 42, 118, 119, 120, 121, 123 And 124 measuring approximately 10 acres that had been excised from the mother title **L.R. No. 9665.** In turn Ezazera by a letter dated 25th July, 1997 addressed to **Basil**, and or his Nominee(s) offered to sell him the suit premises at a consideration of Kshs.550,000/-. Basil was taken in with the idea and on 30th July, 1997 entered into a formal agreement between himself and or his nominee(s) and **Samuel Mazera Mwamunga** and his wife **Esther Kisaghu Mwambui** trading as Ezazera Products for the purchase of the suit premises. By that agreement, the property sold were the suit premises, that is to say Plot Nos.15031/41, 42, 118, 119, 120, 121, 123 and 124 totalling approximately 10 acres which were the subject of allocation in favour of the vendors from 1st appellant under the letter of allocation dated 10th March 1997. The agreed purchase price was Kshs.550,000/-. The suit premises were sold subject to vacant possession upon completion and that Ezazera would arrange directly with the 1st appellant for the transfer of the said plots to the respondent. However out of the purchase price Ezazera was to retain Kshs.150,000/- as agency fees. Pursuant to the agreement Kshs.200,000/- was paid to the 1st appellant on 16th September, 1992. The receipt indicated that the money had been received on account of "letter of allotment No.053 of 10th March, 1997 for plots Nos. 15031/41, 42, 118, 119, 120, 121, 123, 124 ..." The balance of the purchase price was subquently paid on 12th October, 1997. The lawyer appointed to act for both parties was **Rajinder Kapila Esq**., *"Kapila"* At some point it was suggested to him by the respondent that the 1st appellant had agreed to sell to it plot Nos L.R. 15031/116, 117 and 127 in consideration of the respondent giving back to it plots Nos 123, & 124, and further agreeing to pay the 1st appellant an additional sum of Kshs.100,000/-. However, it would appear, this never came to pass. By a letter dated 20th November, 1997, Kapila forwarded to the 1st appellant six transfer forms in respect of plot Nos.41, 42, 118, 119, 120 and 121 with the original deed-plans annexed to each transfer for its execution. The six transfers were duly executed by the 1st appellant in favour of the respondent. On 17th March, 1998, Kapila asked the 1st appellant to avail to him the original grant in order to facilitate the registration of the transfers and finalisation of the transaction. But that was not to be. Though new titles were ready with regard to the suit premises, they could not be registered in the absence of the mother title held by the 1st appellant who had declined to release it to the lands office.

Surprisingly on or about 30th March, 2007 the 1st appellant entered into yet another sale agreement with the 2nd and 3rd appellants in respect of plot Nos.122, 123 and 124. But that agreement was only executed by Mr Eliud Mwamunga, *"Mwamunga"* on behalf of the vendor. Again instead of the purchase price going to the 1st appellant, in terms of the agreement, it was pocketed by Mwamunga personally. To Basil therefore the 2nd and 3rd appellants could not have been said to have paid the purchase price to the 1st appellant. He further testified that the sale agreement was in any event not witnessed by the company secretary as required under the law. Subsequent thereto, the 1st appellant demanded from the respondent the release of deed-plans for plots 123 and 124 by a letter dated 25th September, 2007. When the respondent failed to comply the access road to its hotel was closed by the 1st appellant. This compelled him to release the two deed-plans on 29th September, 2007 to save its business from collapse. Besides, the 1st appellant had reported to Voi Police station that the respondent had stolen the deed-plans for the suit premises.

The witness knew the 2nd and 3rd appellants as he had met them locally and in the United Kingdom. On one occasion he found them with Mwamunga on an adjoining plot belonging to one, **Wilfred Njiru** "*Njiru"*. The witness contacted Njiru who came and told the trio that the property was his. Then Mwamunga took them to some other plots on the other side of the hill. He subsequently spoke to the 2nd and 3rd appellants in the United Kingdom and informed them that the two plots shown to them

belonged to his company and warned them to exercise caution before they signed any documents for sale. Despite the warning, the 2nd and 3rd appellants went ahead and signed the sale agreement with the 1st appellant in March 2007. He was therefore compelled to come to court because the two plots; 123 and 124 had been taken away from him though they were part of the suit premises. He therefore prayed that the suit premises be transferred and registered in its name and titles do issue.

On the part of the 1st appellant, Mwamunga testified as the chair and managing director of the 1st appellant. The other directors were **Vinoo Shah, Josiah Chola** and **David Kalinga**. Though he knew the respondent, it was his testimony that at no time did the 1st appellant ever enter into a sale agreement with it. He conceded though that the 1st appellant did issue a letter of allotment to Ezazera in respect of the suit premises for a consideration of Kshs.40,000/- per acre payable to the 1st appellant. The offer was made to Ezazera and not to any other person. He denied dealing with the respondent nor did he enter collectively or individually into an agreement with the respondent in relation to the suit premises. Though aware that Ezazera had dealings with the respondent, it was his evidence that it never granted Ezazera a Power of Attorney to represent it. Though the plots were sold by Ezazera to the respondent they had not been registered in the name of Ezazera. Accordingly, Ezazera had no authority to sell them. The 1st appellant did not receive the proceeds of the sale nor was it a party to the agreement. Similarly the respondent was not a party to the sale as the purchaser was Basil or his nominee. He conceded though that the signatures on the transfers from the 1st appellant to the respondent were his. He further conceded that in total the 1st appellant transacted over six plots out of the suit premises and that the total purchase price received was Kshs.363,758/- and not Kshs.550,000/-. He went on to state that at no time did he receive a sale agreement or a transfer from the respondent or its advocate , Kapila in respect of plots 123 and 124. He confirmed though that the respondent was buying six plots out of the suit premises. The plots had been surveyed by **Edward Marenye Kiguru,** *"Kiguru" on* his instructions. That the respondent acquired the deed-plans of the suit premises without his knowledge or authority. Since there were no sale agreements between the 1st appellant and the respondent over plots 123 and 124, no injunction could issue against it to restrain it from selling those two plots to the 2nd and 3rd appellants. The six plots were sold and transferred but the consent of the Commissioner for Lands was required for their registration. In conclusion, he testified that he was aware that he was required to surrender the mother title to the Commissioner of Lands to effect the subdivision into separate titles. Otherwise, the respondent's claim over plots 123 and 124 was ill-conceived.

The second witness called by the 1st appellant was Kiguru, a licenced land surveyor. He testified that in late 1990's, he received instructions from the 1st appellant to carry out subdivision of its property **LR 9665**. He acted on the instructions and eventually produced the necessary deed-plans. The whole property was split into commercial and residential sections. They came out as **LR 15030** and **LR 15031** respectively. **Plots 123** and **124** were subdivisions of 15031 which was residential. He released the deed-plans for the two plots together with six others in 1998 to Kapila on the instructions of the 1st appellant. Otherwise he was not party to the transaction.

The 3rd appellant testified on his own behalf and on behalf of the 2nd appellant. His testimony was that in January 2007, they were looking for land overlooking Tsavo National Park to build a hotel. They were introduced to Mwamunga who agreed to sell them some plots. They were shown plots next to Njiru's plots but they did not like them. Njiru and Basil were present. They were then taken by Mwamunga to see other plots facing Tsavo gate which they liked as they had a good view of the park. Basil did not claim then that the plots were his. He just left and returned to his hotel. There was no fence nor any developments thereon. It was then that they entered into the sale agreement dated 30th March, 2007 for three plots, 122, 123 and 124 at a consideration of Kshs.2,400,000/- which they duly paid. The money was paid to Mwamunga though. They then fenced the plot and posted a security guard. They followed it up with a topographical survey. All this time nobody claimed ownership of the plots. By a letter dated 5th December, 2007, Mwamunga authorised them to pursue the title. They were therefore bona fide purchasers for value for the said three plots. He denied that they had colluded with Mwamunga to acquire the two plots belonging to the respondent. However, in November, 2007, they received a

demand letter from the respondent's lawyer regarding plots which they claimed belonged to the respondent. This was followed by a visit to them in the United Kingdom by Basil and a discussion ensued. He further testified that they innocently purchased the three plots and had no idea that they belonged to someone else. They would never have purchased them if they had known that problems as regards their ownership would arise. That Basil never showed them title to those plots and indeed they were vacant. Neither were they fenced. On that basis they prayed for the dismissal of the suit.

This wrapped up the formal hearing of the suit. Counsel for respective parties then agreed to file and exchange written submissions. This was followed by the highlighting of the same on 21st December, 2010. In a judgment delivered on 11th March 2011, Odero, J. found for the respondent as prayed for in the plaint. As for damages, she awarded the respondent Kshs.500,000/-.

That judgment triggered these two appeals. **Civil Appeal No.150 of 2011** was filed by the 1st appellant against the respondent whereas the second appeal being **Civil Appeal No.174 of 2011** was filed by 2nd and 3rd appellants against the respondent. The grounds of appeal in both are similar. They all fault the learned Judge's finding that Ezazera was an agent of the 1st appellant for purposes of the agreement for sale dated 30th July 1997, that the agreement was executed by Basil on his own behalf and that of his unspecified nominee(s) meaning the respondent without any credible evidence, that in any event the agreement was void *ab initio* by dint of **section 3** of the Law of Contract Act, that the respondent's suit was incurably defective on account of the verifying affidavit having been sworn by an person who was not a director of the respondent, that neither the 1st appellant nor the respondent were privy to the agreement, that the Judge was biased against Mwamunga, whom she unfairly and without any evidence considered a fraudulent person and a liar, that the Judge erred in finding that the sale of plot numbers 123 and 124 to the 2nd, and 3rd appellants was fraudulent, null and void. That the Judge erred in nullifying the sale agreement dated 30th March, 2007 entered into between the 2nd, 3rd appellants and the 1st appellant, despite the credible evidence of payment in full of the purchase price. Further, that the Judge erred in declaring that the respondent purchased the suit premises from the 1st appellant, paid the full purchase price and was entitled to be registered as the proprietor thereof. That the Judge erred therefore in granting all the prayers sought in the plaint. The appellants in both appeals further complained that the Judge erred in failing to consider that Basil was at the time of filing suit neither a shareholder nor a director of the respondent and that his testimony was not truthful nor credible. That the Judge did not take into consideration submissions by their respective advocates and failed to exhaustively analyse the evidence on record thus arriving at a wrong decision.

The appeals came before us for hearing on 14th October, and 4th November, 2013 respectively. Urging both appeals on behalf of the appellants **Mr Kibe Mungai** assisted by **Mrs Mary Kariuki**, learned counsel submitted that the agreement for sale was executed between Mwamunga and Basil. Accordingly, the 1st appellant was not a party to the agreement. At no time was Mwamunga acting on behalf of the 1st appellant. The same goes for Ezazera. Counsel further submitted that though there was an implied suggestion that Ezazera may have been acting as an agent of the 1st appellant, that would have required a resolution by the 1st appellant. There was no such resolution. Counsel further submitted that the sale agreement set out the capacities of the parties. There was no mention of an agent or a resolution to that effect from the 1st appellant. That the Mwamungas of Ezazera were not directors of the 1st appellant and could not therefore have acted on its behalf. The suit was filed and prosecuted on the wrong premise and on the assumption that Ezazera was the agent of the 1st appellant. There was therefore a misjoinder of parties. There was no nexus in terms of pleadings that established the relationship between Basil and the respondent. Counsel went on to submit that the relationship between Basil and the respondent was not known. If the respondent was a nominee, then the agreement was null and void as it did not sign the same. It was not even a nominee as no deed of nomination or a resolution to that effect was evidenced. Counsel further submitted that receipts exhibited by the respondent as proof of payment of the purchase price were not issued by the 1st appellant. Neither were the payment made by the respondent or Basil. The payment was made by Ezazera and the purpose indicated. It was the 1st appellant's further submission that if it executed the agreement, by dint of ***section 3*** of Law of Contract

Act, the appellant's seal and signature by director and or company secretary would have been required. There was no such evidence. The same applied to all the transfers. The two plots, 123 and 124 were bought by the 2nd and 3rd appellants. They were never part of the initial agreement and since the sale never went through, they were available for sale and transfer. They had not been transferred to Basil or any other person. Finally, counsel submitted that the intemperate language used by court against Mr Mwamunga should be condemned by this Court. After all Mr Mwamunga was a mere witness and not a party to the suit. In support of his submissions, counsel relied on following authorities; **Nairobi Permanent Market Society and Others vs Salami Enterprises and Others (1995-1998) 1 EA 232 (CAK), Munyinyi and Another vs Githunguri and Others (2012) 1 EA 199 (CAK), Kukal Properties Development Ltd vs Maloo and Others [1990-1994] EA 281 (CAK), Wagiciengo vs Gerrard [1982] KLR 336, Agricultural Finance corporation vs Lengetia Limited [1985] KLR 765** and **Harambee Co-operative Savings & Credit Society vs Mukinye Enterprises Ltd [1983] KLR 611** which we have carefully read and considered.

In response, Mr Kinyua, learned counsel for the respondent submitted that the 2nd and 3rd appellants were aware that the respondent had purchased plot numbers 123 and 124. In any event the 2nd and 3rd appellants did not pay any purchase price for the said plots. The same if at all was paid to Mwamunga in his personal capacity and to a company run by him and his son; Mwamunga and Mwamunga Associates. The agreement was in any event invalid having been signed only by one director, Mwamunga and the accountant. Reverting to ***Civil Appeal No.150 of 2011***, counsel submitted that Basil entered a valid sale agreement with Ezazera who was an agent for both vendor and purchaser. The agreement had a special condition that Ezazera was to arrange for the transfer of the suit premises from the 1st appellant directly to the respondent. The agreement was valid as what was required under the Law of Contract Act then was a document in writing. There was evidence that the 1st appellant forced the respondent to surrender the deed-plans. That evidence confirmed that there was indeed a contract. Otherwise on what basis was the 1st appellant threatening to refund the purchase price or cancel the letter of allotment? The letter of allotment refers to all the plots. None of the plots were therefore available for alienation to any other party other than the respondent. Counsel relied on the same authorities as the appellant. On that basis, counsel urged us to dismiss the appeals with costs.

This is a first appeal. That being so we are called upon to revisit and analyse afresh the evidence tendered before the trial court so as to reach our own conclusion. However this jurisdiction has to be exercised cautiously since we did not have as the trial court did, the benefit of seeing and hearing the witnesses as they testified and we must therefore give due allowance. See **Peters v Sunday Post (1958) EA 424** and **Selle v Associated Motor Boat Company Limited (1968) EA 123**.

Having said so, it is clear to us that the determination of this appeal must turn on whether or not there were valid, legal and binding sale agreements between the 1st appellant and the respondent, and between the 1st appellant and the 2nd and 3rd appellants. Though the learned Judge in her judgment framed about nine isues for determination, the above was really the crux of the matter.

Dealing with the first issue, the starting point must be the contents of the letter dated 10th March, 1997, addressed by the 1st appellant to Ezazera for this is the genesis of the dispute pitting the 1st appellant against the 1st respondent. By the said letter, the 1st appellant informed Ezazera that it had allocated the eight plots to it at a consideration of Kshs.40,000/- per acre. In pertinent paragraphs the letter stated:-

> "... **you are required now to pay a minimum of 50% of the total purchase to be given possession of the plot and the balance is payable upon transfer. All payments must be made in bankers cheque drawn in favour of Voi Development Co. Ltd. This offer is valid for 45 days from the date of this letter** ... **Payment will be acknowledged by official company receipts**."

It would appear that Ezazera was aware that Basil and or his nominee(s) was interested in purchasing the

plots since by a letter dated 25th July, 1997, it offered to sell the same to him at a consideration of Kshs.550,000/-. Subsequent thereto and specifically on 30th July, 1997 an agreement was duly entered into between Ezazera as the vendor and Basil and or his nominee(s) as the purchaser. By that agreement all those plots totaling approximately 10 acres and which were subject to allocation in favour of Ezazera from the 1st appellant by virtue of the letter of allocation dated 10th March, 1997, were sold to Basil and or his nominee. One of the special condition in the agreement was that Ezazera would arrange directly with the appellant for the transfer of the suit premises into the name of the purchaser. From the evidence on record the full purchase price was paid to the 1st appellant by Basil. Subsequent thereto Kapila, advocate, who was acting for both parties had the deed-plans forwarded to him by the 1st appellant's surveyor, Kiguru and in turn had the transfers prepared and forwarded to the 1st appellant for execution. Kiguru confirmed that he forwarded the deed-plans to Kapila on the instructions of the appellant. For Mwamunga to turn around and claim that the deed-plans were obtained fraudulently and without his knowledge and/or consent smacks of deceit. Six of the transfers were duly executed by the 1st appellant in favour of the respondent on 29th November, 1997. How can he then claim that the 1st appellant never knew the respondent! Kapila acknowledged receipt of the duly executed transfers and asked for the original grant in order to facilitate registration of the transfers and finalisation of the transaction. That was when he hit a stone wall. Tired of procrastination by the appellant, Kapila fired off a letter to the appellant dated 31st August 1998 and rendered himself thus:-

> "**... my client has paid to you the full purchase price, but as you have not delivered to me the original title deed and the duly executed surrenders, it has not been possible for me to attend to the registration of the transfers in favour of my client … I now serve upon you a Notice and require you to deliver to me …**
>
> **a) Either the original grant with the change of user endorsed thereon or**
>
> **b) …**
>
> **c) Return to me the remaining transfers which are still held by you for execution ..."**

This threat did not bear any fruits. As things stand now, the suit premises have yet to be registered in the name of the respondent. It would appear that at some point the 1st appellant had a change of mind and did not wish perhaps to conclude the transaction. Through its chair; Mwamunga, it filed a false report with Voi Police Station that the deed-plans had been illegally obtained from it through deceit and fraudulent misrepresentation by Basil. Pursuant to this report, police swung into action, harassed the respondent until it was compelled to hand over to the 1st appellant all the eight deed-plans for the suit premises. It had also closed access to the respondent's hotel to coerce it into dancing to its bidding.

From this narration, and the documentary evidence on record, there can be no doubt at all that there was an agreement for the sale of the suit premises by the 1st appellant to the respondent, with Ezazera acting as its agent. The respondent paid the agreed consideration and was acknowledged, not only by the official receipts issued by the 1st appellant, but also by execution of the transfer documents. The 1st appellant cannot now be heard to claim that there was no such agreement and that no consideration was paid. Indeed more damning evidence against the 1st appellant is its own letter dated 5th December, 2007 addressed to the respondent. In pertinent paragraphs, the letter reads;

> ***"... For avoidance of doubts the records in our possession confirm that your plots are four title. L.R. No.15031/121, 15031/120, 15031/119 and 15031/118 fully paid for which the instruments of transfer executed to your favour … M/s Ezazera Co. is still our and your agent ..."***

This letter simply confirms that there were dealings over the suit premises between the 1st appellant and the respondent through Ezazera contrary to what the 1st appellant pleaded in its defence as well as its testimony. The letter also confirms payment of consideration as well as the role of Ezazera in the transaction. It was acting as an agent of the appellant in the transaction. In the light of this clear and

unambiguous admission of agency relationship between Ezazera and 1st appellant, can the 1st appellant be heard to fault the transaction on account lack of agency relation or want of resolution of the 1st appellant appointing Ezazera as such an agent or even privity of contract? We think not. Under cross-examination during the trial, Mwamunga, conceded thus:-

> ***"... the 6 transfers were signed by directors of Voi Development Company being E. T. Mwamunga who is myself and Mr Vinoo Shah. It is my evidence that Agam Investments only purchased 6 plots and not 8. In 1997 the proprietors of Ezazera Products were Samuel Mazera Mwamunga and Esther Kisagu Mwambui, his wife. Samuel Mazera Mwamunga is my son and Esther is my daughter in law. In our defence Voi Development has stated that Ezazera Products is a total stranger to it ..."***

From the conduct of Mwamunga as Chairman of the 1st appellant, defence filed as well as the evidence he tendered, it is quite apparent that he had little regard for the truth. He was simply a dishonest and untruthful witness. How could he have denied knowledge of Ezazera, when it was an outfit fronted by his son and daughter-in-law? How could he feign ignorance of the existence of Ezazera when by a letter under his own hand, he confirmed that indeed Ezazera was acting in the transaction as the agent of the 1st appellant where he was the chairman and chief executive? How can he deny knowledge of the respondent when by his own admission the appellant had at least sold to it six plots and consideration received, whereupon he executed the transfers? We cannot therefore begrudge the learned Judge for reaching the conclusion that;

> **"... Mr Mwamunga DW1 as he testified, he did not strike me as an honest or reliable witness. He was evasive and belligerent with counsel whilst under cross-examination. On several occasions, he would make an assertion only to have to eat his words later upon being presented with proof of the contrary. In my view DW1 was neither open nor truthful about facts of this transaction and clearly he was more interested in concealing facts to suit his purposes ..."**

In our view the learned Judge was quite justified to reach such conclusion given the evidence and circumstances. She had the benefit of seeing him as he testified and to appreciate his demeanour. We have no such opportunity. This being a finding of fact regarding the demeanour of a witness we cannot readily interfere with it unless it is demonstrated to us that the Judge had no basis reaching such decision. There has been no such demonstration. Further we discern no intemperate language on Mwamunga by the Judge as claimed by the 1st appellant.

On the evidence on record, there is a clear nexus between the activities of Ezazera and the 1st appellant with regard to the transaction. It was established that Ezazera had authority to bind the appellant as its duly appointed agent.

Then there is the letter dated 27th October, 2007 addressed by the 1st appellant to the respondent. In that letter the 1st appellant threatens to cancel the agreement and to refund the purchase price to the respondent. The relevant part of that letter is in these terms:-

> **"... Take Notice therefore that unless you surrender to the company within 7 days from the date of this letter the deed-plans for the above sub-plots in similar manner as you did under pressure for the 2 subject plots namely LR No.15031/124 and 15031/123 we will proceed to cancel the letters of allotment issued in respect of any of the subject plots and refund to you any money paid by yourselves in respect of allotment ..."**

One wonders if indeed there was no agreement between the 1st appellant and the respondent on what basis then would the 1st appellant be threatening to cancel the letters of allotment? Again if there had been no agreement, on what basis would the 1st appellant be threatening a refund? It is also instructive that under cross-examination, Mwamunga admitted having issued receipts for the full payment of the

purchase price for the entire suit premises including plot numbers 123 and 124. under his hand and on behalf of the 1st appellant. He conceded to a handwritten letter he wrote and signed about the loss of a banker's cheque for the sum of Kshs.200,000/- being the first instalment of the purchase price paid to the 1st appellant by the respondent. The letter was to the effect that the cheque was mislaid or lost and his company meaning the appellant was seeking a replacement cheque for the paid amount. Two significant points arise here. The letter was addressed to the bank through Basil, and that the 1st appellant gave an undertaking to the bank that should the lost cheque be found, it would be forwarded to the bank through Basil for destruction. How can Mwamunga then turn around and claim that no consideration was paid for the transaction?

Closely tied to this is the fact that the 1st appellant gave possession of the suit premises to the respondent. Under the terms of the agreement, possession was to be given upon payment of 50% of the purchase price. The respondent paid full purchase price in 1997 and was given possession. This is confirmed by various letters on record by the 1st appellant addressed to the respondent referring to the respondent's hotel and the use of the words like "**the road to your hotel**" How could the respondent have put up a tourist hotel on the suit premises under the nose of the 1st appellant without being in possession and without the 1st appellant challenging the development on account of trespass. The breathing of hot and cold at the same time by Mwamunga quite vexed **Njagi J.** in his ruling on an interlocutory application filed in the suit delivered on 9th May, 2008. The Judge was particularly concerned by the averment in the defence and affidavits by the 1st appellant that it had possession of the suit premises. The Judge referred to a letter by the 1st appellant addressed to the hotel for the attention of Basil in which the appellant used the phrase "**your hotel"** and **"your premises."** The Judge found that the hotel was situate on 2 plots forming part of the suit premises and wondered aloud how the 1st appellant could claim to be still in possession of the suit premises. We also add our voices to the serious lack of candour on the part of Mwamunga. Having reached this conclusion, the trial court was quite right to treat his evidence as self serving and meant to mislead the court. With that conclusion nothing much could be attached to his testimony. It had no probative value at all. The court was thus only left with evidence of the respondent in this regard to act on.

We will now address the issue of the transfers executed in favour of the respondent by the 1st appellant. Were they six or eight? On this issue, we would agree with submissions of counsel for the respondent that if the appellant executed even one transfer to transfer only one plot, it would be bound to execute the remaining transfers because all the plots were the subject of a single agreement and a single letter of allotment. If each of the eight plots were subject of separate and distinct agreement, letter of allotment , consideration paid and separate receipts issued then perhaps it would have been possible to reach conclusion on each plot separately. However, this was not the case. Here the irresistible conclusion is that the appellant sold the suit premises because there was only one letter of allotment for the suit premises, only one agreement of sale for the suit premises, only one bankers cheque for payment of the 50% deposit for the suit premises, only one bankers cheque for payment of the balance of the purchase price for the suit premises, only one receipt regarding the payment of the deposit for suit premises and only one receipt for payment of the balance of the entire purchase price for the suit premises. Indeed by the appellant's letter dated 27th October, 2007, the 1st appellant implicitly concedes that that deed-plans had been prepared. Though six were in the possession of the respondent, the other two plots 123 and 124 had been taken from the respondent through duress, if the 1st appellant's letter dated 27th October, 2007 is anything to go by. We surmise therefore that the appellant sold to the respondent the entire suit premises and not six and or even four as the 1st appellant testified to.

The other issue we wish to address briefly is the application of **section 3** of the Law of Contract Act, then in place at the time the agreement was entered into. It is the appellants' case that the agreement was invalid as it offended the said provisions of the law. The provisions then required that the contract for the disposition of an interest in land be in writing, signed by all the parties thereto and the signatures attested by a witness who was present when the contract was signed by such a party. Thus, if the 1st appellant executed the agreement, by dint of the aforesaid provision of the law its seal and signature of a director and or company secretary would have been necessary, yet this was not the case. Consequently,

the contract was a nullity. The respondent countered that submission by stating that the law applicable then was the law of contract Act before the amendment in 2003. What was required then was a document in writing. In this case the respondent signed the agreement and later on the transfers and received cheques for payment of the purchase price in full.

In our view, the invocation of the provisions of **section 3(3)** of the Law of Contract Act is all in vain and is coming too late in the day. Parties acted on the agreement in whatever form that it was. There was part if not substantial performance. The 1st appellant received the full purchase price for the suit premises and executed transfers in favour of the respondent on the basis of the said agreement. Indeed it even surrendered possession of the suit premises to the respondent whereupon it proceeded to put up a tourist hotel. In a nutshell, we think that there was sufficient written memoranda to show that there was indeed an agreement for the sale of the suit premises by the 1st appellant to the respondent. Indeed and as already stated a substantial part of the agreement had been performed, leaving only the registration of the transfer into the respondent's name. In any event equity regards as done that which ought to be done.

Then there is the peripheral issue of the capacity of Basil to transact the business on behalf of the respondent. The argument by the appellants is that he had no capacity or authority to tie or bind the respondent to the transaction as he was neither a director or shareholder. The respondent counters this argument by stating that Basil was its nominee. We have no doubt at all in our minds that whilst entering the agreement, receiving the full purchase price for the suit premises, executing the transfers, giving possession and handling correspondence, the appellant, its agent and even lawyers at the time knew that indeed Basil was acting either in person or as nominee. It is there in the agreement. The suit could not thus be defeated on that basis.

Closely tied to this issue is the question of the misjoinder of the parties to the suit. To the 1st appellant, to the extent that neither the 1st appellant nor the respondent were parties to the agreement, they could not sue or be sued. The suit could only have been generated by either Ezazera or Basil. In essence, the appellant is pleading privity of contract. However, we are unable to agree, since it was established by the appellant's own admission in a communication that Ezazera was acting as its agent in the transaction. Further it was also established that Basil was all along acting in person or as a nominee. In any event **Order 1 Rule 6** of the Civil Procedure Rules gave the respondent an option to join as parties to the suit all or any of the persons liable on the contract. Further, **Rule 9** of the same order provides that **"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it ..."**

For all the foregoing therefore, we are in agreement with the finding of the trial Judge that **"the 1st defendant did enter an agreement to sell to the plaintiff the said plots"** and that **"it is as clear as daylight that the sale agreement entered into and executed by the 1st defendant and the plaintiff involved 8 sub-plots as the subject matter which 8 plots were 15031/41, 42, 118, 119, 120, 121, 123 and 124."**

We now turn to consider whether there was a valid and legally binding sale agreement between the 2nd and 3rd appellants and the 1st appellant with regard to plot numbers 123 and 124. The starting point is the purported sale agreement dated 30th March, 2007. The vendor therein was the 1st appellant whereas the 2nd and 3rd appellants were the purchasers. The terms of the agreement were that the purchase price would be paid to the 1st appellant. It is however evident that the 2nd and 3rd appellants never paid the purchase price to the 1st appellant. Instead the cheque dated 30th March, 2007 in the sum of Kshs.720,000/- being the down payment of the purchase price was paid to Mwamunga as an individual and not as the chair or director of the 1st appellant. The cheque was written in his name. Much as he may be the Chairman of the 1st appellant, the two are separate legal entities whose roles are separated and distinct. From the evidence on record another cheque of Kshs.1,680,000/- representing the balance of the purchase price was made payable to E. T. Mwamunga and Mwamunga Associates Ltd, a company

associated with Mr Mwamunga and his son. There is no nexus whatsoever between this company and the 1st appellant save that Mwamunga is a share holder and chair of the 1st appellant and also a share-holder with his son in E. T. Mwamunga and Mwamunga Associates Ltd. None of the monies paid on account of the purchase price was ever banked in the account of the 1st appellant held at Kenya Commercial Bank, Voi branch. Yet **Clause 5(c)** of the sale agreement required that the purchase price be paid to the 1st appellant. It is not alleged that Mwamunga received the same on behalf of the 1st appellant. It is not clear under what circumstances then that he received those payments. As correctly observed by the trial Judge:-

> ***"The 1st defendant being a limited company is a separate legal entity totally distinct from its Chairman Mr Mwamunga. The fact that DW1 was the Executive Chairman did not entitle him to receive and retain payments due to the company. There is no evidence that DW1 later released this sum of Kshs.2.4 million to the 1st defendant. Therefore as things stand, the legal position is that no payment has been received by the vendor, the 1st defendant in pursuance of the sale agreement signed on 30th March, 2007. There is no company resolution signed by the other director, whom the Court was informed was a Mr Vinoo Shah, authorising the 2nd and 3rd defendants to remit the purchase price to Mr Mwamunga instead of to (sic) the 1st defendant. His action in diverting the purchase price to himself is illegal and cannot be sanctioned or sanitized by this Court … The 2nd and 3rd defendants cannot therefore claim to have purchased plot numbers 123 and 124 when no single cent has been shown to have been received by the vendor who was the 1st defendant. On this basis, I find that they have no legally valid claim to these two plots ..."***

We could not have put it any better. We think that Mwamunga mistakenly assumed that the suit premises belonged to him and he could deal with it as he deemed fit because of his position as Chairman of the 1st appellant. It is this errorneous and mistaken belief that led him into thinking that he would receive the entire purchase price in his personal capacity and into his private pockets because he was the 1st appellant and the 1st appellant was him. Of course this was legally untenable. The agreement was not even amended to allow or correct Mwamunga's actions complained of. The 2nd and 3rd appellants having failed to pay to the 1st appellant the consideration under the agreement, the said agreement was rendered unenforceable, null and void. Accordingly, the 2nd and 3rd appellants could not claim to have purchased plots 123 and 124 anchored on the said agreement. We would therefore once again agree with the trial Judge in her finding that the 2nd and 3rd appellants having not paid the consideration to the appellant, they had no legally valid claim to the 2 plots.

That said, can the 2nd and 3rd appellants hinge their entitlement to the two plots on the concept of innocent purchasers for value without notice as an alternative? In our view and given the evidence and circumstances of the case, such claim cannot be sustained as the trial Judge correctly found. No consideration passed to the 1st appellant. In any event, the two appellants cannot be said to be such purchasers because they knew from Basil at the **locus in quo** and in United Kingdom when he paid them a visit that the plots were not available for sale since he had already purchased them on his behalf and/or of the respondent.

The 3rd appellant did testify thus "**Mr Basil (PW1) came to see us in United Kingdom. We held a friendly discussion about three plots. He said he had previously bought plots 123 and 124**." Further it is telling that under cross-examination the 3rd appellant conceded that **"... I later saw receipts Mr Basil paid for plot 123 and 124. Had we seen those receipts before our purchase we would not have insisted to buy plots 123 and 124 ..."** Evidence on record shows that the meeting in the United Kingdom between Basil and the two appellants took place prior to 2nd July, 2007. However the balance of the purchase price was paid on 29th August, 2007 long after the meeting in United Kingdom. The 2nd and 3rd appellants cannot therefore claim to be innocent purchasers because they were aware at the time that the plots belonged to the respondent. At this juncture, it may be necessary to revisit the evidence on record on this aspect of matter. The 3rd appellant did testify that sometimes in January 2007 they met Mwamunga who offered them land as they were desirous of putting up a hotel in the area. They agreed to

purchase three plots; 15031/122, 123 and 124 in Voi at a consideration of Kshs.2,400,000/-. An agreement dated 30th March 2007 was duly drawn and a deposit of Kshs.720,000/- made followed by a bankers cheque for the balance on 29th, August, 2007. It was his evidence that throughout the transaction no objection was raised to their purchase of the plots by any third parties who had interest in the same. It was only after the full payment of the purchase price in August 2007 that they received a demand letter from the respondent's advocates that they became aware of a dispute over the plots. That is what informed their contention that they were innocent purchasers.

The story of the respondent on the other hand was that in early 2007 he met the 2nd and 3rd appellants viewing the plots. Njiru who owned some plots in the vicinity also came around. The two then warned the appellants to be wary purchasing the plots in the area and pointed out to them their respective plots. This encounter was conceded to by the 2nd and 3rd appellants only that they disputed the discussions that ensued. They denied that they were warned not to buy the plots. If that be the case one wonders why Basil and Njiru would bother to go to the scene in the first place. Certainly they were not sight-seeing. They were there to assert title to their respective plots. First forward, Basil visits the duo in the United Kingdom and informs them that he was the owner of the plots, a full month before they paid the balance of the purchase price. The duo having been so alerted nonetheless still proceeded to complete the transaction. Again, why would Basil take an expensive trip to the United Kingdom, if it was not for him to assert his claim to the suit premises. Given the foregoing, we are, just as the trial Judge convinced that they were not innocent purchasers for value without notice. They proceeded to conclude the transaction in the full knowledge that the plots were being claimed by Basil. It is possible that infact the duo conspired with Mwamunga, well knowing that the plots were sold but since they were bent on putting up a tourist hotel similar and in competition with the respondent, threw caution to the wind and went ahead with the purchase anyway! This may perhaps explain why though they claimed to be shrewd businessmen nonetheless ended up paying the consideration directly to Mwamunga and his other company instead of the 1st appellant. We conclude by saying that the 2nd and 3rd appellants were not, given the circumstances, innocent purchasers for value without notice just as the trial Judge held.

Finally, though counsel filed several authorities, they were not helpful at all for purposes of determining this appeal as such determination turned mainly on factual matters of the case. In the upshot, the appeals lack merit and are accordingly dismissed with costs to the respondent.

Dated and delivered at Malindi this 7th day of February, 2014.

H. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR