



**Odero & 2 others (Suing as the office bearers of Lakeland Welfare Club) v Raget & 4 others
(Environment & Land Case 41 of 2015) [2024] KEELC 4841 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 41 OF 2015
SO OKONG'O, J
JUNE 19, 2024**

BETWEEN

**GEORGE TED ODERO 1ST PLAINTIFF
NAFTALI ARODI OYUGI 2ND PLAINTIFF
CATHERINE ODERO 3RD PLAINTIFF
SUING AS THE OFFICE BEARERS OF LAKELAND WELFARE CLUB**

AND

**PAULINE ADHIAMBO RAGET 1ST DEFENDANT
DEBRA OJANY MALLOWA 2ND DEFENDANT
ROBERT OCHOLA 3RD DEFENDANT
LAND REGISTRAR, KISUMU COUNTY 4TH DEFENDANT
THE HON ATTORNEY GENERAL 5TH DEFENDANT**

JUDGMENT

The plaintiffs' case

1. The plaintiffs brought this suit against the defendants on 18th February 2015 through a plaint dated 3rd February 2015. The plaintiffs amended the plaint on 10th January 2020. In their amended plaint filed on 17th January 2010, the plaintiffs sought the following reliefs;
 1. Specific performance of the agreement for sale dated 29th September 2010 between the plaintiffs and the 1st defendant;
 2. A declaration that the transfer of Title No. Kisumu/Fortternan/516 and Title No. Kisumu/Fortternan/518 by the 1st defendant to the 2nd and 3rd defendants was illegal, null and void;



3. Rectification of the registers for Title No. Kisumu/Fortternan/516 and Title No. Kisumu/Fortternan/518 by deleting the names of the 1st and 2nd defendants as the proprietors thereof;
 4. A declaration that the consolidation of Title No. Kisumu/Fortternan/516 and Title No. Kisumu/Fortternan/518 that resulted in Title No. Kisumu/Fortternan/1129 was illegal, null and void;
 5. Eviction of the 1, 2nd and 3rd Defendants from the suit properties;
 6. A permanent injunction restraining the defendants from entering into, cultivating, fencing, building, selling, developing, disposing, transferring and/or in any other manner interfering with Title No. Kisumu/Fortternan/516 and Title No. Kisumu/Fortternan/518;
 7. In the alternative to prayer 6 above, a permanent injunction restraining the defendants from entering into, cultivating, fencing, building, selling, developing, disposing, transferring and/or in any other manner interfering with Title No. Kisumu/Fortternan/1129;
 8. In the alternative to prayers 6 and 7 above, damages;
 9. Exemplary damages;
 10. Any other relief the court may deem fit to grant;
 11. Costs of the suit, and
 12. Interest.
2. The plaintiffs' case is that on 29th September 2010, they entered into an agreement of sale with the 1st defendant in which the 1st defendant agreed to sell and the plaintiffs agreed to purchase all those parcels of land known as Title No. Kisumu/Fortternan/516 and Title No. Kisumu/Fortternan/518 (hereinafter together referred to as "the suit properties" and separately as "Plot No. 516" and "Plot No. 518" respectively) from the 1st defendant at a consideration of Kshs. 4,950,000/-. The plaintiffs averred that they paid the purchase price in full and that the sale was to be completed within 90 days from the date of the agreement. The plaintiffs averred that the consents of the Land Control Board for the transaction were obtained on 24th November 2010 and 20th January 2011.
 3. The plaintiffs averred that for the purposes of the transfer of the suit properties to the plaintiffs, the 1st defendant handed to the plaintiffs the title deed for Plot No. 516 and promised to hand over to the plaintiffs the remaining title deed for Plot No. 518 at a later date. The plaintiffs averred that the 1st defendant also executed the instruments of transfer of the suit properties in favour of the plaintiffs. The plaintiffs averred that in breach of the said agreement of sale between the plaintiffs and the 1st defendant, the 1st defendant illegally and fraudulently transferred the suit property to the 2nd and 3rd defendants. The plaintiffs averred that the 2nd and 3rd defendants were aware of the 1st defendant's fraud and participated in the same. The plaintiffs averred that the 2nd and 3rd defendants subsequently consolidated the suit properties that resulted in Title No. Kisumu/Fortternan/1129 (hereinafter referred to only as "the consolidated title"). The plaintiffs pleaded several particulars of fraud and breach of contract against the 1st, 2nd and 3rd defendants.
 4. The plaintiffs averred that the 4th and 5th defendants acted fraudulently and/or negligently by allowing and effecting the illegal transfer of the suit properties to the 2nd and 3rd defendants. The plaintiffs pleaded several particulars of negligence and/or fraud on the part of the 4th and 5th defendants. The plaintiffs averred that as a result of the fraud, corrupt scheme and/or negligence of the defendants, the plaintiffs had suffered loss by being denied the title, possession and use of the suit properties despite



paying the full purchase price. The plaintiffs averred that the defendants' actions complained of were intentional and malicious, and were calculated to make an illegal gain. The plaintiffs averred that they were entitled to exemplary damages.

The 1st defendant's case

5. The 1st defendant filed a defence dated 14th April 2015 which she amended on 6th March 2020. In her amended defence filed on 12th March 2020, the 1st defendant admitted that she entered into an agreement for sale of the suit properties with the plaintiffs on 29th September 2010. The 1st Defendant admitted that the purchase price for the suit properties was Kshs. 4,950,000/- and that the agreement was to be completed within 90 days from the date of the agreement.
6. The 1st defendant averred that the plaintiffs in breach of the agreement of sale failed to complete the payment of the full purchase price within 90 days and had not cleared the same at the time of filing suit. The 1st defendant averred that the plaintiffs chose to pay the purchase price at their convenience with the last of such payments of Kshs. 40,000/- have been made on 7th August 2013 which left a balance of Kshs. 35,000/-. The 1st defendant averred that her application for consent to transfer the suit properties to the plaintiffs was rejected by the Land Control Board for the reason that the plaintiffs had not completed the payment of the balance of the purchase price.
7. The 1st defendant averred that she notified the plaintiffs of her intention to terminate the agreement of sale for non-payment of the full purchase price. The 1st defendant averred that she did not recall handing over the title deed for Plot No. 516 to the 2nd plaintiff. The 1st defendant denied that she executed and handed over the instruments of transfer of the suit property to the plaintiffs. The 1st defendant averred that she signed some documents that she later learnt were transfer forms at a cyber café in Nairobi at the request of the 2nd plaintiff who undertook not to register the same until the plaintiffs had paid the full purchase price. The 1st defendant denied that the transfer of the suit property to the 2nd and 3rd defendants was illegal and fraudulent and that the plaintiffs had suffered loss and damage as a result thereof.
8. The 1st defendant averred that upon selling the suit property to the 2nd and 3rd defendants, she notified the 2nd plaintiff of the same in June 2013 and communicated her willingness to refund all the payments that had been made to her on account of the purchase price of the suit property. The 1st defendant averred that the 2nd plaintiff admitted that the plaintiffs were the ones who had breached the agreement of sale between them and the 1st defendant and expressed willingness to receive the refund of the purchase price that they had paid to the 1st defendant subject to the modalities of receipt of the same being worked out. The 1st defendant averred that the 2nd plaintiff did not inform her how he wanted the refund made and as a result of that she deposited a total sum of Kshs. 4,905,000/- in the plaintiffs' account. The 1st defendant averred that she was not holding any money paid to her by the plaintiffs on account of the purchase price for the suit property. The 1st defendant urged the court to dismiss the plaintiff's suit with costs.

The 2nd and 3rd defendants' case

9. The 2nd and 3rd defendants filed a defence to the original plaint on 8th July 2015. The 2nd and 3rd defendants averred that they had no notice or knowledge of the agreement of sale dated 29th September 2010 between the plaintiff and the 1st defendant at the time they purchased the suit properties from the 1st defendant. The 2nd and 3rd defendants denied that the transfer of the suit properties to them was illegal and fraudulent. The 2nd and 3rd defendants averred that before they purchased the suit properties,



they conducted the necessary due diligence which did not disclose any third-party interest in the suit properties.

10. The 2nd and 3rd defendants averred that having properly and procedurally entered into an agreement of sale of the suit properties with the 1st defendant on 1st March 2013, they had acquired absolute and indefeasible ownership of the suit properties together with all the rights and privileges ancillary thereto. The 2nd and 3rd defendants urged the court to dismiss the plaintiffs' suit with costs.

The 4th and 5th defendants' case

11. The 4th and 5th defendants filed a defence to the original plaint on 16th April 2015. The 4th and 5th defendants denied the plaintiffs' claim in its entirety. The 4th and 5th defendants denied that they were involved in the alleged fraudulent transfer and registration of the suit properties in the name of the 2nd and 3rd defendants. The 4th and 5th defendants urged the court to dismiss the plaintiffs' suit with costs.

The evidence

12. At the trial, the 2nd plaintiff (PW1) gave evidence on behalf of the plaintiffs. PW1 adopted his witness statement dated 3rd February 2015 as part of his evidence in chief and produced the plaintiffs' bundle of documents of the same date as Plaintiffs' exhibits 1 to 12. PW1 stated that the 1st defendant gave them the original title for Plot No. 516 which was still in their possession. On cross-examination by the advocate for the 1st defendant, PW1 admitted that the agreement of sale was to be completed within 90 days and that by 29th December 2010, the plaintiffs had not cleared the payment of the purchase price. He stated that the last payment on account of the purchase price was made on 7th August 2013. PW1 stated that the parties did not agree to extend the completion period. He stated that when the plaintiffs filed the suit, he was not aware that the 1st defendant had refunded the purchase price paid to her by the plaintiffs. On re-examination, PW1 stated that the plaintiffs made payments to the 1st defendant after the completion period and the same was received.
13. PW1 was re-called and gave further evidence in chief and was further cross-examined and re-examined. In his evidence on re-call, PW1 told the court that he was the secretary of Lakeland Welfare Club and was representing the other plaintiffs. He stated that there was a criminal case at Nyando Law Court against the 1st defendant. He produced the proceedings of that case as Plaintiffs' exhibit 15 and the judgment in the matter as Plaintiffs' exhibit 16. He stated that the 1st defendant was convicted and sentenced to pay a fine of KShs. 20,000/- or serve 6 months in prison. He stated that the 1st defendant was charged with several counts the particulars of which were set out in the judgment.
14. The 1st defendant (DW1) testified after the close of the plaintiffs' case. DW1 adopted her witness statement filed in court on 26th October 2020 as her evidence in chief and produced the documents attached to the list of documents dated 23rd October 2020 also filed on 26th October 2020 as exhibits. DW1 told the court that she was not paid the full purchase price by the plaintiffs. She stated that at the time she rescinded the agreement of sale between her and the plaintiffs in 2013, a sum of KShs. 70,000/- was outstanding. DW1 stated that the agreement was to be completed by 29th September 2010 by which date the full purchase price should have been paid. DW1 stated that the plaintiffs did not make the payment of the purchase price in accordance with the terms of the agreement of sale. DW1 stated that she refunded to the plaintiffs the entire purchase price that was paid to her. DW1 stated that she was paid KShs. 4,880,000/-. She stated that the figure came to KShs. 4,905,000/- as a result of some money that she added. She stated that the refund was made to the plaintiffs through RTGS on 8th December 2014 and the plaintiffs were notified of this payment through a letter dated 17th December



- 2014 by DW1's then advocates, Ashitiva & Company Advocates. DW1 stated that this suit was filed after she had made the said payment.
15. DW1 stated that she had no land to transfer to the plaintiffs because she had already transferred the suit properties to the 2nd and 3rd defendants. DW1 stated that there was no basis for the damages sought by the plaintiffs. She denied that she breached the agreement she entered into with the plaintiffs. DW1 stated that although she went with the plaintiffs to the Land Control Board for consent, the consent was not granted. She termed the consent produced in evidence by the plaintiffs a forgery.
 16. On cross-examination by the advocate for the 2nd and 3rd defendants, DW1 stated that she sold the suit properties to the 2nd and 3rd defendants after the plaintiffs had failed to complete the agreement that she entered into with them. She stated that she did not inform the 2nd and 3rd defendants that she had entered into an earlier agreement of sale with the plaintiffs. She stated that she did not know the 2nd and 3rd defendants before the sale transaction between them. DW1 stated that she rescinded the agreement of sale with the plaintiffs because the plaintiffs breached the same.
 17. On cross-examination by the plaintiffs' advocate, DW1 reiterated that she was not paid the full purchase price of Kshs. 4,950,000/-. DW1 stated that the plaintiffs had not completed the payment of the full purchase price by the completion date of 29th December 2010. DW1 stated that although the plaintiffs had breached the agreement, she was patient with the plaintiffs. She stated that she did not terminate the contract immediately after the breach in 2010 because the plaintiffs started making further payments in 2011. She stated that she allowed them to continue making the payment because she needed money to pay a mortgage loan. She stated that she did not know that by conduct she had varied the terms of the agreement of sale. DW1 denied having come to Kisumu by air and staying in a hotel. She denied receiving the payments of Kshs. 35,000/- appearing in tables "B" and "C" in paragraph 11(A), (B) and (C) of the witness statement of PW1. She stated that the cost for the application for the Land Control Board consent was Kshs. 500/-. She stated that on all the occasions she attended the Land Control Board meetings, she travelled from Nairobi to Muhoroni by road and stayed at a place in which she paid Kshs. 1,000/-. DW1 admitted that she was charged at Nyando Law Court and was convicted.
 18. In re-examination, DW1 admitted that she obtained the consents of the Land Control Board for the transaction with the plaintiffs but claimed that she subsequently revoked the same.
 19. The 3rd defendant (DW2) gave evidence on his behalf and on behalf of the 2nd defendant. DW2 adopted his witness statement dated 13th May 2015 filed on 8th July 2015 together with their defence as his evidence in chief. DW2 also produced a bundle of documents dated 29th May 2015 filed on 8th July 2015 and supplementary bundle of documents dated 19th May 2022 and filed on 14th September 2022 as defendants' exhibits 2 and 3 respectively. DW2 stated that the 2nd defendant and he were the registered proprietors of the suit properties.
 20. On cross-examination by the 1st defendant's advocate, DW2 stated that the suit properties were sold to them by the 1st defendant whom they had not known before the transaction. DW2 stated that they were cultivating coffee and fruits on the suit properties. On cross-examination by the plaintiffs' advocate, DW2 stated that the 2nd defendant was his aunt and that after they learnt that the 1st defendant was selling the suit properties, they got in touch with her and handed her over to their advocates who handled the transaction. He stated that they entered into an agreement with the 1st defendant on 1st March 2013 and were issued with title deeds on 20th May 2013. He stated that the suit properties were vacant when they purchased the same. He stated that there was no one in occupation of the suit properties and that they were not informed that the properties had been sold to the plaintiffs. He stated



that they came to know that there was a dispute over the suit properties when the present suit was filed. The 4th and 5th defendants did not call evidence.

The submissions

21. After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed submissions dated 20th December 2023, the 1st defendant filed submissions dated 6th February 2024 while the 2nd and 3rd defendants filed submissions dated 22nd February 2024. The plaintiffs submitted that they were entitled to an order of specific performance of the agreement dated 29th September 2010. The plaintiffs submitted that the 1st defendant continued to receive from the plaintiffs the payment of the balance of the purchase price even after the lapse of the completion period and did not rescind the agreement of sale between the parties. The plaintiffs submitted that the 1st defendant had already received the full purchase price for Plot No. 516 and had also handed over to the plaintiffs the original title deed in respect thereof which amounted to a transfer of the property to the plaintiffs. The plaintiffs submitted that they had made a case for an order of specific performance of the agreement between the parties concerning this property.
22. The plaintiffs submitted further that the transfer of the suit properties to the 2nd and 3rd defendants was illegal. The plaintiffs submitted that having been paid in full in respect of Plot No. 516, the 1st defendant obtained a consent of the land control board, executed an instrument of transfer and handed over to the plaintiffs the original title deed for Plot No. 516 so that the plaintiffs could proceed with the registration of the transfer of the property in their favour. The plaintiffs submitted that the 1st defendant subsequently obtained a provisional title deed for Plot No. 516 by fraudulently misrepresenting to the Land Registrar Nyando that the original title deed for the property was lost. The plaintiffs submitted that the 1st defendant was charged and convicted for this act of misrepresentation. The plaintiffs submitted that in the circumstances, the 2nd and 3rd defendants did not obtain a good title for Plot No. 516 from the 1st defendant. The plaintiff submitted that similarly, Plot No. 518 was fraudulently transferred to the 2nd and 3rd defendants to whom a good title was not transferred by the 1st defendant. The plaintiffs submitted that the registers for suit properties should be rectified by deleting the names of the 2nd and 3rd defendants as the proprietors thereof.
23. The plaintiffs submitted in the alternative that if the court finds no basis for ordering specific performance, the court should award damages. The plaintiffs submitted that they were entitled to exemplary damages against the defendants on account of their inappropriate conduct. The plaintiffs submitted that the defendants colluded to manipulate the land registration process in favour of the 2nd and 3rd defendants. The plaintiffs submitted that only an award of exemplary damages would deter such conduct.
24. In her submissions, the 1st defendant submitted that there was a fundamental breach of the agreement of sale dated 29th September 2010 by the plaintiffs. The 1st defendant submitted that time was of essence in relation to the completion period. The 1st defendant submitted that the plaintiffs failed to prove that they paid the full purchase price within the completion period which lapsed on 29th December 2010. The 1st defendant submitted that failure to pay the full purchase price was a breach of the said agreement of sale. The 1st defendant submitted that since the plaintiffs had breached the agreement of sale dated 29th September 2010, the 1st defendant was entitled to rescind the agreement and sell the suit properties to the 2nd and 3rd defendants.
25. The 1st defendant submitted further that the Plaintiffs were not entitled to an order of specific performance since it was the plaintiffs who had breached the agreement of sale dated 29th September



2010. The 1st defendant submitted that there was no basis for the rectification of the registers for the suit properties by the cancellation of the registration of the 2nd and 3rd defendants as proprietors of the suit properties and their eviction from the said properties. The 1st defendant submitted that the 2nd and 3rd defendants acquired the suit properties lawfully after the 1st defendant had rescinded the agreement of sale with the plaintiffs.
26. The 1st defendant submitted further that the plaintiffs were not entitled to orders of a permanent injunction and exemplary damages. The 1st defendant submitted that the plaintiffs had not demonstrated that the 1st defendant had breached the agreement of sale dated 29th September 2010 so as to warrant the grant of the said orders. On the issue of costs, the 1st defendant submitted that she had demonstrated that; the plaintiffs breached the agreement of sale dated 29th September 2010, the 1st defendant had refunded the payment that was made to her on account of the purchase price before the filing of the suit and that no demand letter was served upon her before the filing of the suit. The 1st defendant submitted that she was entitled to the cost of the suit.
27. The 2nd and 3rd defendants submitted on their part that they were bona fide purchasers of the suit properties without notice of any defect in the titles that were held by the 1st defendant. The 2nd and 3rd defendants submitted that they carried out due diligence which confirmed that the 1st defendant was the registered owner of the suit properties. The 2nd and 3rd defendants submitted that the 1st defendant had an apparent valid title to the suit properties and that the 2nd and 3rd defendants purchased the properties in good faith without notice of the fraud alleged by the plaintiffs. The 2nd and 3rd defendants averred that in any event, the plaintiffs did not prove the acts of fraud alleged against the 2nd and 3rd defendants to the required standard.
28. The 2nd and 3rd defendants submitted that having acquired the suit properties lawfully, their titles to the said properties were indefeasible. The 2nd and 3rd defendants submitted that the plaintiffs had failed to establish that the 2nd and 3rd defendants acquired the suit properties illegally and fraudulently leading to the conclusion that the 2nd and 3rd defendants were bona fide purchasers of the suit properties without notice of any defect in the titles thereof. The 2nd and 3rd defendants urged the court to dismiss the plaintiffs' suit as against them with costs.

Analysis and determination

29. I have considered the pleadings and the evidence tendered by the parties in support of their respective cases. I have also considered the submissions. The following in my view are the issues arising for determination in this suit;
1. As between the plaintiffs and the 1st defendant, who breached the agreement of sale dated 29th September 2010?
 2. Whether the plaintiffs are entitled to an order for specific performance.
 3. Whether the plaintiffs are entitled to the rectification of the registers of the suit properties.
 4. Whether the plaintiffs are entitled to general and exemplary damages.
 5. Whether the plaintiffs are entitled to the other reliefs sought in the amended plaint.
 6. Who should bear the costs of the suit?



As between the plaintiffs and the 1st defendant, who breached the agreement of sale dated 29th September 2010?

30. The terms of the agreement of sale dated 29th September 2010 are not disputed. The plaintiffs purchased the suit properties from the 1st defendant at a consideration of Kshs. 4,950,000/-. The completion period was 90 days from the date of the agreement. The completion date was therefore 29th December 2010. It is not disputed that the plaintiffs did not pay the full purchase price by 29th December 2010. From their evidence, the plaintiffs had paid only a sum of Kshs. 2,400,000/- as at 29th December 2010. The plaintiffs paid a further sum of Kshs. 2,515,000/- by 7th August 2013 making a total of Kshs. 4,915,000/-. This left a balance of Kshs. 35,000/- due and payable by the plaintiffs according to the evidence adduced by the plaintiffs. The plaintiffs claimed that they incurred expenses amounting to Kshs. 71,000/- in obtaining the Land Control Board's consent which should be deducted from the purchase price. The plaintiffs neither proved such expenses nor any agreement with the 1st defendant that the same were recoverable from the purchase price.
31. From the foregoing, it is my finding that it was the plaintiffs who breached the agreement of sale between them and the 1st defendant by their failure to pay the purchase price in full and within the completion period. By the time, the 1st defendant entered into the second agreement of sale with the 2nd and 3rd defendants on 1st March 2013, the plaintiffs still owed the 1st defendant a sum of Kshs. 75,000/-. The 1st defendant had no obligation to hand over to the plaintiffs the original title deeds for the suit properties until the full purchase price for the suit properties which were sold together was paid. At the time of filing this suit, there was still a sum of Kshs. 35,000/- due and owing by the plaintiffs to the 1st defendant. The plaintiffs paid the purchase price that was payable within 90 days for almost 3 years and still remained with a balance to pay. The agreement dated 29th September 2010 was therefore breached by the plaintiffs by nonpayment of the full purchase price.

Whether the plaintiffs are entitled to an order for specific performance.

32. In the Supreme Court of Uganda case of *Manzoor v Baram* [2003] 2 E.A 580 that was cited in the case of *Thrift Homes Limited v. Kays Investment Limited* [2015]eKLR, the court stated as follows on specific performance:

“Specific performance is an equitable remedy grounded in the equitable maxim that “equity regards as done, that which ought to be done”. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance.”



34. In *Amina Abdulkadir Hawa v. Rabinder Nath Anand & Another* [2012] eKLR, the court cited *Chitty on Contracts*, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles...specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party...severe hardship may be a ground for refusing specific performance even though it results from a circumstance which arises after the conclusion of the contract which affect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”

35. In *Gurdev Singh Birdi and Marinder Singh Ghatora v. Abubakar Madhubuti* CA No.165 of 1996 it was stated that:

“...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

36. I have made a finding that the plaintiffs had not paid the full purchase price at the time they brought this suit and as such were in breach of the contract dated 29th September 2010 between them and the 1st defendant. A party in breach of a contract for the sale of land is not entitled to an equitable remedy of specific performance. It is also not disputed that the suit properties are no longer registered in the name of the 1st defendant. The suit properties were transferred and registered in the names of the 2nd and 3rd defendants who consolidated the same to form Plot No. 1129. The suit properties are therefore not in existence. I have found below that there is no basis for rectifying the registers for the suit properties by cancellation of the registration of the 2nd and 3rd defendants as the proprietors of the suit properties. The 1st defendant cannot therefore transfer the suit properties to the plaintiffs. It is my finding therefore that an order for specific performance is not available to the plaintiffs.

Whether the plaintiffs are entitled to the rectification of the registers of the suit properties.

37. The suit properties were registered under the *Registered Land Act*, Chapter 300 Laws of Kenya (now repealed) at the time they were sold to the plaintiffs by the 1st defendant. Sections 27 and 28 of the *Registered Land Act* provide as follows:

27. Subject to this Act -



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
- Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.
38. Section 143(1) and (2) of the [Registered Land Act](#) provides as follows:
- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.
39. When the 1st defendant sold and transferred the suit properties to the 2nd and 3rd defendants, the [Registered Land Act](#) had been repealed and the relevant law that was in force was the [Land Registration Act](#) 2012. Sections 24, 25, 26 and 80 of the [Land Registration Act](#) 2012 provide as follows:
24. Subject to this [Act](#)—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- 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.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

40. In their amended plaint, the plaintiffs averred that the 1st defendant illegally and fraudulently transferred the suit properties to the 2nd and 3rd defendants who in perpetuation of the illegality and the fraud proceeded to consolidate the suit properties. In their particulars of fraud against the 2nd and 3rd defendants, the plaintiffs averred that the 2nd and 3rd defendants; colluded with the 1st defendant to have the suit properties transferred to them in disregard of the agreement between the plaintiffs and the 1st defendant, colluded with the 4th and 5th defendants to defraud the plaintiffs, conspired to perpetuate the fraud by consolidating the suit properties, and bought the suit properties with knowledge that the 1st defendant had entered into an agreement to sell the same to the plaintiffs and had received the purchase price.



41. In *Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 E.A KLR 269, the Court of Appeal held that:

" Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt".

42. In *Kampala Bottlers Ltd. v Damanico (UG) Ltd. East Africa Law Reports* [1990-1994] E.A141(SCU), the Supreme Court of Uganda stated that:

" To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters."

43. The evidence that was adduced by the plaintiffs fell short of proving the particulars of fraud pleaded against the 2nd and 3rd defendants. The plaintiffs did not prove that the 2nd and 3rd defendants knew or had a way of knowing that the 1st defendant had entered into an agreement of sale with the plaintiffs. The evidence adduced by the 2nd and 3rd defendants that there was no encumbrance registered against the titles of the suit properties and that the suit properties were vacant when they purchased the same was not rebutted in any material respect. The 2nd and 3rd defendants were not parties to the criminal case at Nyando Law Court and did not have an opportunity to test the veracity of the evidence that was adduced before that court. The plaintiffs cannot therefore rely on the evidence that was adduced in that case by a witness who never testified in this suit to rebut the evidence given before this court by the 2nd and 3rd defendants to the effect that the suit properties were vacant when they purchased the same.

44. The plaintiffs did not also establish that the 2nd and 3rd defendants were involved in the processing of the provisional title deed for Plot No. 516 which was done based on false information that was given to the Land Registrar by the 1st defendant. I find the allegations of fraud, conspiracy, and collusion pleaded against the 2nd and 3rd defendants not proved to the required standard. The plaintiffs have also not convinced this court that the 2nd and 3rd defendants' registration as the proprietors of the suit properties was effected illegally or through misrepresentation, unprocedurally or through a corrupt scheme. I therefore find no basis for cancelling the 2nd and 3rd defendants' titles to the suit properties which in any event have ceased to exist after consolidation.

Whether the plaintiffs are entitled to general and exemplary damages

45. In *Joseph Urigadi Kedeva v. Ebby Kangishal Kavai*, Kisumu Civil Appeal No. 239 of 1997 (UR) the court stated as follows:

...As to the award of Kshs. 250,000/= as general damages,..We respectfully agree. There can be no general damages for breach of contract..."

46. In *Consolata Anyango Ouma v. South Nyanza Sugar Co. Ltd* (2015)eKLR the court stated as follows:

" The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see *Kenya Industrial Estates Ltd v Lee Enterprises*



Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

47. In *Capital Fish Kenya Limited v. The Kenya Power & Lighting Company Limited* [2016] eKLR, the court stated as follows:

“ On the second issue, the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the appellant relied on the Nigerian case of *Marine Management Association & Another v National Maritime Authority* (2012) 18 NWLR 504.

...The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent’s conduct into the exceptions it alluded to above. In this case the mere fact that the appellant wrote several letters to the respondent without remedial measure being undertaken immediately cannot amount to oppressiveness, insolent or vindictive behaviour. The correspondence was responded to explaining what was being undertaken. The fact that the respondent took no corrective action only making incessant promises that the issue was under investigations is not of itself evidence of high handedness, outrageous, or insolent conduct. Further there was no agreement at the time as to the real cause of power outages. There was a blame game between them which went on for a long time. In those circumstances we do not see how the respondent can be accused of being oppressive, high handed, outrageous, insolent or even vindictive.”

48. I have found earlier that the plaintiffs failed to perform their part of the agreement of sale between them and the 1st defendant. In the circumstances, there is no basis for an award of general damages for breach of contract to the plaintiffs. In any event, as stated in the above cited cases, as a general rule, general damages are not payable for breach of contract. There are however exceptions. Even if I had found that the 1st defendant breached the agreement of sale dated 29th September 2010, the plaintiffs had a duty to demonstrate that the said breach fell within the said exceptions. As stated by the Court of Appeal in *Capital Fish Kenya Limited v. The Kenya Power & Lighting Company Limited*(*supra*), I am not persuaded that the conduct of the 1st defendant herein complained of by the plaintiffs can be said to have been oppressive, high-handed, outrageous, insolent or vindictive. The plaintiffs have therefore not proved that they are entitled to general damages from the 1st defendant for breach of contract. Having held that the plaintiffs are not entitled to general damages for breach of contract, it is not necessary for me to consider whether a case had been made for an award of exemplary damages.



Whether the plaintiffs are entitled to the other reliefs sought in the plaint

49. In addition to the reliefs that I have considered, the plaintiffs also sought declarations and an injunction. These reliefs were sought on the basis that the 1st defendant was in breach of the agreement of sale between her and the plaintiffs and that the sale of the suit properties to the 2nd and 3rd defendants was illegal, null and void. Having found that that is not the case, there is no basis for these reliefs which I decline to grant.

Who should bear the costs of the suit

50. As a general rule, costs follow the event unless the court for good reason orders otherwise. In the present suit, the plaintiffs have not succeeded in their claim against the defendants. There is no reason given by the plaintiffs why the defendants should be denied the costs of the suit. I will however not award the 1st defendant the costs for defending the suit since she was found to have been involved in giving false information to a land registrar for which she was charged, convicted and sentenced at Nyando Law Court. Although I did not find her crime material to the issues that were before me for determination, I am of the view that it would amount to condoning criminal conduct if the court were to award the 1st defendant the costs of the suit. I will therefore award the costs of the suit to the 2nd and 3rd defendants, and the 4th and 5th defendants only.

Conclusion

51. In conclusion, I find no merit in the plaintiffs' suit. The suit is dismissed with costs to the 2nd, 3rd, 4th and 5th defendants.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF JUNE 2024

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd and 3rd Defendants

N/A for the 4th and 5th Defendants

Ms. J.Omondi-Court Assistant

