



**Global Ten Investments Limited v Kanorero River Farm Limited & another (Environment & Land Case 745 of 2011) [2024] KEELC 5432 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5432 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 745 OF 2011  
OA ANGOTE, J  
JULY 18, 2024**

**BETWEEN**

**GLOBAL TEN INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**KANORERO RIVER FARM LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**OTIENO OKEYO TRADING AS OTIENO OKEYO & COMPANY  
ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff instituted this suit by way of a Plaint dated 21<sup>st</sup> December 2011, in which it has sought for the following orders:
  - a. The sum of Kshs. 9,000,000 being the amount due and owing from the Defendants to the Plaintiff under the said agreement plus interest thereon till payment in full.
  - b. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
2. The Plaintiff's case is that the 1<sup>st</sup> Defendant was the proprietor of land known as L.R. Number 209/14310 situate in Nairobi, Kenya, measuring 0.4346 hectares (hereinafter known as the suit property), and that at all material times, the 2<sup>nd</sup> Defendant was the 1<sup>st</sup> Defendant's advocate in the sale and purchase of the 1<sup>st</sup> Defendant's property.
3. The Plaintiff averred in the Plaint that by way of an agreement dated 11<sup>th</sup> May 2011, the 1<sup>st</sup> Defendant agreed to sell to it the suit property at the price of Kshs. 60 million; that as per the agreement, Kshs. 9 million was to be paid as a deposit upon signing the agreement and that the balance of Kshs. 51 million was to be paid on completion.



4. It was an additional term of the contract that the 1<sup>st</sup> Defendant would erect a boundary fence prior to completion of the sale; that the property was to be free of encumbrance; and that if the transaction would fail due to the Plaintiff's fault, any amount paid by the Plaintiff would be refunded less Kshs. 2 million, which would be retained by the 1<sup>st</sup> Defendant.
5. The Plaintiff depones that it duly paid the deposit of Kshs 9 million by way of cheques and that the deposit was paid on the professional undertaking dated 11<sup>th</sup> May 2011 given by the 2<sup>nd</sup> Defendant to hold it as a stakeholder pending the carrying out of an official search and successful registration of the transfer in the Plaintiff's favour.
6. According to the 1<sup>st</sup> Defendant, it was a term of the undertaking that the 2<sup>nd</sup> Defendant would fully refund the deposit on the purchase price, in the event that the search reveals any position contrary to or adverse to the 1<sup>st</sup> Defendant's title, interest or right in the property or in the instance that the transaction fails due to the 1<sup>st</sup> Defendant's fault, and that the 1<sup>st</sup> Defendant warranted that there was no adverse claim or dispute in respect of the property regarding ownership.
7. The Plaintiff asserts that in flagrant breach of the agreement, the 1<sup>st</sup> Defendant failed to immediately disclose to the Plaintiff the adverse claims over the property by Muthangari Police Station as required by the agreement.
8. It is the Plaintiff's case that the claims by the Kenya Police over the suit property were raised on 7<sup>th</sup> June 2011 during a meeting held at Muthangari Police Station, which was attended by the 1<sup>st</sup> Defendant's directors; that the meeting was convened in response to a letter that had been written by the 1<sup>st</sup> Defendant's directors to the Commissioner of Police and that the 1<sup>st</sup> Defendant further failed to erect a boundary fence around the property as agreed.
9. Additionally, the Plaintiff averred, in carrying out its due diligence through its surveyors, it established that the actual area or acreage of the property was approximately 0.3103 hectares, rather than 0.4346 hectares; that the acreage of the suit property was material to the sale agreement and that on that ground, the contract is voidable.
10. The Plaintiff asserts that despite repeated requests made by the Plaintiff, the Defendants have refused or neglected to take any steps to clarify the adverse claims by Kenya Police and Muthangari Police Station and that thereupon, it rescinded the agreement and made several requests to the Defendants to refund the entire deposit as per the sale agreement and the undertaking dated 11<sup>th</sup> May 2011.
11. In its Defence, the 1<sup>st</sup> Defendant denied that there was any undertaking given to the Plaintiff's Advocates by its Advocates with respect to registering the transfer in favour of the Plaintiff. It denied any claims by the Kenya Police or Muthangari Police Station adverse to its proprietorship of the suit property, as purported by the Plaintiff.
12. The 1<sup>st</sup> Defendant denied breaching the terms of the agreement and contended that it did erect a boundary fence around the suit property, and stationed guards around the same; that the records at the Ministry of Lands and the Survey of Kenya establish that the size of the suit property is 0.4346 Hectares and that it did not misrepresent the acreage of the subject property.
13. It was averred by the 1<sup>st</sup> Defendant that the sale agreement is consequently not voidable for that reason and denied that the Plaintiff lawfully or otherwise terminated the sale agreement dated 11<sup>th</sup> May 2011. It was averred that if the Plaintiff indeed rescinded the agreement, such termination was due to fundamental breaches on the Plaintiff's part.



14. In its counterclaim, the 1<sup>st</sup> Defendant averred that the Plaintiff's conduct amounted to fraud; that it contracted to pay the balance of the purchase price when it had neither the means nor the capacity to pay the balance before or on 11<sup>th</sup> August 2011 and that it used unlawful and uncontractual reasons to avoid its obligations under the sale agreement.
15. The 1<sup>st</sup> Defendant averred that the breaches of the agreement by the Plaintiff include failing to pay the balance of the purchase price when it was due to the 1<sup>st</sup> Defendant; failing to disclose to the 1<sup>st</sup> Defendant that it never had the full purchase price at or before the signing of the agreement and purporting to unlawfully and uncontractually terminate the sale agreement and disregarding authentic and official Government of Kenya documents showing the acreage of the suit property and ownership of the same.
16. The 1<sup>st</sup> Defendant asserted that it suffered the following losses: Kshs. 4million that was paid to the Land Commission Agent that introduced the parties; Kshs. 2 million as legal fees; Kshs. 1,368,2008/- spent on fencing and guarding of the property as per the Plaintiff's instructions; Kshs. 737,100/- as director's expenses and Kshs. 2 million as per the sale agreement.
17. The 1<sup>st</sup> Defendant consequently claimed Kshs. 26,810,200/- from the Plaintiff with interest at court rates from the date of filing till payment in full, and costs of the counterclaim.
18. In its Defence to Counterclaim, the Plaintiff sought that the 1<sup>st</sup> Defendant's counterclaim be dismissed with costs together with interests, and that judgement be entered in the Plaintiff's favour against the 1<sup>st</sup> Defendant.
19. The 2<sup>nd</sup> Defendant also opposed the suit through a Defence dated 17<sup>th</sup> February 2012. They averred that the 2<sup>nd</sup> Defendant is not aware of any revelation or proof of any adversity to the 1<sup>st</sup> Defendant's title. They assert that the 1<sup>st</sup> Defendant did erect a boundary fence around the suit property with the authority of the City Council of Nairobi and the co-operation of the 1<sup>st</sup> Defendant's neighbour.
20. According to the 2<sup>nd</sup> Defendant, the Government of Kenya through the Director of Surveys, confirmed in an official Deed Plan No. 241329 that the acreage of the suit property is 0.4346 hectares; that any measurement done by the Plaintiff's surveyor was without the knowledge, participation or concurrence with the Defendants and denied that there was any misrepresentation as to the acreage of the suit property.
21. The 2<sup>nd</sup> Defendant averred that he obtained all the completion documents within the duration of the contract for the sale of the suit property and requested the Plaintiff's advocates on 12<sup>th</sup> July 2011 to avail the balance of the purchase price in exchange of the completion documents.
22. According to the 2<sup>nd</sup> Defendant, the Plaintiff's advocates however failed to pay the balance and that the Plaintiff is therefore in breach for failing to pay the balance of the purchase price when it fell due and by executing a contract for sale of property without possessing the ability to complete the same.
23. The 2<sup>nd</sup> Defendant averred that upon the Plaintiff obtaining a search from the lands office, he was instructed by the 1<sup>st</sup> Defendant to release part of the deposit to the 1<sup>st</sup> Defendant, and that he made the payments as follows:
  - a. Sale's commission-Kshs. 4,000,000;
  - b. Land rent and rates- Kshs. 402,190;
  - c. Permissions from the City Council to fence the property and rates clearance certificate – Kshs. 12,500;



- d. Registrar of Companies to update company's returns to date- Kshs. 75,000;
  - e. Fencing and guarding the property – Kshs. 1,388,200;
  - f. Payment to the 1<sup>st</sup> Defendant's directors- Kshs. 1,000,000.
24. The 2<sup>nd</sup> Defendant averred that having completed the conveyance as instructed by the 1<sup>st</sup> Defendant, he was also authorized by the 1<sup>st</sup> Defendant to withdraw Kshs. 2 million being legal fees, taxes and disbursements from the Plaintiff's deposit and that they are maintaining a balance of Kshs. 142,110 of the deposit made as at the date of this suit.
25. The 2<sup>nd</sup> Defendant denied that there was any adverse claim known to them. That the alleged rescission by the Plaintiff was unlawful, void and of no consequence as the reasons advanced by the Plaintiff were non-existent and that the Plaintiff having unlawfully terminated the contract, it cannot claim the deposit from the 2<sup>nd</sup> Defendant, which monies are no longer with the 2<sup>nd</sup> Defendant.
26. The 2<sup>nd</sup> Defendant asserts that the Plaintiff's suit against him is void, unlawful and un-maintainable as there was no privity of contract between the Plaintiff and him, that he acted professionally on behalf of a disclosed principal and cannot be sued in the same suit with the principal over the same subject matter on the same grounds and lastly, that the alleged undertaking, having been given to a professional party in a professional capacity, cannot be enforced by a different party in this suit.

## Hearing and Evidence

### Plaintiff's witnesses

27. The Plaintiff's first witness, (PW1), was the Chairman of the Plaintiff's company. He relied on his statements dated 21<sup>st</sup> December 2011 and 7<sup>th</sup> April 2016. He also relied on the bundle of documents dated 21<sup>st</sup> December 2011 and a supplementary bundle dated 17<sup>th</sup> April 2016.
28. PW1 testified that he entered into a sale agreement with the 1<sup>st</sup> Defendant for the purchase of L.R No. 209/4310; that the agreed purchase price for the land was Kshs. 60,000,0000 and a deposit of Kshs. 9,000,000 was paid to the 1<sup>st</sup> Defendant's Advocate, the 2<sup>nd</sup> Defendant in this suit and that the deposit was to be held until the process of registration was over.
29. PW1 averred that the sale transaction was not completed as there was an adverse claim by Muthangari Police Station over the suit property; that they commissioned a surveyor who went to the ground and found that the acreage of the land to be purchased was not what was indicated in the title deed and that after a meeting with Muthangari Police, they decided to rescind the agreement.
30. According to PW1, they requested for a refund of the deposit which did not materialise; that there was no agreement that the deposit was to be spent and that the deposit plus interest should be refunded.
31. PW1 denied giving Mr. Maina authority to access the funds for purposes of fencing the plot because it was the 1<sup>st</sup> Defendant who was to fence the property. He testified that he was in a financial position to complete the sale when he terminated the agreement.
32. The Plaintiff's second witness, (PW2), was a registered surveyor who testified that she was approached by the Plaintiff to carry out a survey of the suit property situated along James Gichuru Road next to Muthangari Police Station and that when she went to carry out the survey, she could not access the land as the police said that the land was public land which was not available for survey. She averred that it was only when the Plaintiff's director talked to the police that she was given access.



33. She testified that she carried out a survey; that in the property, there were two permanent buildings while the other one was semi-permanent; that the buildings were occupied by the police; that the land was adjacent to a river and that there is a dam on the land.
34. It was the evidence of PW1 that she found that there was a mismatch between what was on the title and what was on the ground; that the area that was on the ground was less than what was indicated on the title and that when a private property borders a river, the boundary is at the centre line of the river, although it is physically impossible to pick the middle of the river.
35. The Plaintiff's third witness, PW3, was No. 63967 attached to Muthangari Police Station. He stated that he was called to produce minutes and that the minutes arose from a meeting held on 7<sup>th</sup> June 2011, in which the directors of the 1<sup>st</sup> Defendant's company were in attendance.
36. It was the evidence of PW3 that the minutes noted that the 1<sup>st</sup> Defendant's directors had annexed one of the buildings belonging to the Police station, which was jeopardizing the security of the officers. According to PW3, the minutes show that there was a boundary dispute between the 1<sup>st</sup> Defendant and the police station. He indicated that he was not at the meeting, but it was Michael Kahari who attended the same.
37. At the request of Plaintiff's Counsel, the court conducted a site visit to the suit property on 9<sup>th</sup> October 2019. In attendance were two directors of the Plaintiff's company, a surveyor and the Plaintiff's advocate, Mr. Kinuthia. The Surveyor, Dr. Eunice Nduati explained the positions of the beacons as they were in 2011 when the land was surveyed. Although the Defendants were in court when the court scheduled the site visit, they did not attend the same.
38. The court noted that at that time, a huge part of the suit property had been fenced by Muthangari Police Station, which was in the process of completing a permanent stone perimeter fence. It was explained that a apportion of the plot which was purchased by the Plaintiff went deep into the boundary which was being put up at that time.
39. The remaining portion of the suit property was a small triangular parcel next to the river, which was at that time being occupied by individuals making furniture.
40. The court noted that the remaining portion was too small to be of any commercial value. The surveyor explained that the land on the ground was not equivalent to what was in the title. Further, the court noted that the land which the Plaintiff sought to purchase included some permanent houses which were occupied by the police.

### **The Defendant's witnesses**

41. The Defendant's first witness, DW1, was Maina Chege who is the 1<sup>st</sup> Defendant's Director. He adopted his witness statement dated 20<sup>th</sup> February 2012 as his evidence in chief. He also produced a bundle of documents dated 20<sup>th</sup> February 2012 as DEXB1 and a supplementary bundle dated 26<sup>th</sup> July 2016 as DEXB2.
42. DW1 testified that the Plaintiff was introduced to him by an agent, who was not party to the sale agreement. He stated that he paid Kshs. 4 million to the agent as his commission. He asserted that although the agreement was not specific that the commission should be paid from the deposit paid by the Plaintiff, it was implied. He admitted that he instructed the advocate to pay the commission. It was the evidence of DW1 that the Plaintiff was aware that a commission was to be made to the agent.



43. DW1 stated that he met the Plaintiff's chairman two weeks after signing the agreement, in the presence of the advocates at Silver Springs Hotel, and he raised the issue of the agent's commission, and it was agreed. He also asserted that he used the deposit to obtain the rates clearance, to fence the suit property and to provide guards. He stated that there was no specific provision on whether he could utilize the deposit.
44. DW1 asserted that there has never been a dispute on the boundary after signing the agreement; that they only share a beacon and boundary with Muthangari Police Station and that they were not stopped from fencing the land.
45. DW1 denied that there was a meeting held at Muthangari Police Station on 7<sup>th</sup> June 2011 and denied being present at that meeting. He testified that Joram Shivaji is not a Director of the 1<sup>st</sup> Defendant and that the Plaintiff informed him verbally that he needed the title to raise money from off-shore funding.
46. In cross-examination, he averred that they were not shown a search showing that the land has an adverse claim; that he has never seen documents showing that the land was reserved for Muthangari Police Station; that he has never seen documents from the land registrar showing any discrepancy in the acreage and that he has never been served with a 21 days completion notice with particulars of the 1<sup>st</sup> Defendant's breach.
47. The Defendant's second witness, DW2, was Fredrick Otieno Okeyo, who is the Managing Partner of the 2<sup>nd</sup> Defendant. He adopted his witness statement dated 22<sup>nd</sup> April 2015 as his evidence in chief. He testified that he gave a professional undertaking to the Plaintiff's Advocate, Ashitiva Advocates, and that the undertaking has never been enforced.
48. DW2 asserted that it was agreed between the parties that the funds be released to the vendor for purposes of obtaining the completion documents and that the payment was not made to them but it was for the benefit of the 1<sup>st</sup> Defendant and the same was released on the basis of the agreements by the parties.

### **Submissions**

49. Counsel for the Plaintiff submitted that the 1<sup>st</sup> Defendant was the proprietor of the suit property; that as per the sale agreement dated 11<sup>th</sup> May 2011, the 2<sup>nd</sup> Defendant received the deposit of Kshs. 9 million on 11<sup>th</sup> May 2011 on the 1<sup>st</sup> Defendant's behalf from the Plaintiff's advocates, M/S Nyachae & Ashitiva and that the said sum was paid on an undertaking by the 2<sup>nd</sup> Defendant to hold the same as a stakeholder for both the Plaintiff and the vendor pending the carrying out of an official search on the property and registration of the transfer in the Plaintiff's favour.
50. Counsel submitted that the 1<sup>st</sup> Defendant, in breach of the term, conditions and warranties in the agreement, failed to immediately disclose to the Plaintiff that there were adverse claims to the suit property and as a result, the 1<sup>st</sup> Defendant failed to erect a boundary fence around the suit property and that the 1<sup>st</sup> Defendant misrepresented the acreage of the suit property which was material to the contract and amounted to breach of the agreement.
51. Counsel relied on Conditions 18 and 11(3) and (4) of the Law Society Conditions of Sale (1989) on misdescription and compensation, and on rescission. Counsel also relied on the case of Ann Mumbi Hinga vs William Mwangi Gathuma & Another [2017] eKLR and Colleta Mutanu Kyule v Charles Joseph Masila & another [2014] eKLR.
52. The 1<sup>st</sup> Defendant's Counsel submitted that the Plaintiff failed to avail evidence to ascertain its allegation that the 1<sup>st</sup> Defendant misrepresented to him the area and/or acreage of the suit property.



53. According to Counsel, the Plaintiff's surveyor conducted a topographical survey, and did not involve procuring the cadastral plan for the property and the F/R numbers for the property neighbouring the property and that the report was never authenticated by the Director of Survey who is the authority on acreage of properties registered in Kenya. Further, it was submitted, no proof of misrepresentation on the 1<sup>st</sup> Defendant's part was ever proven at the hearing.
54. Counsel relied on the case of *Davis Masha Jome vs Damaris Karanja & Another* [2021] eKLR, where the court held that the land shall not be deemed to have been surveyed or resurveyed until the plan has been authenticated by the signature of the Director or a Government surveyor.
55. It was Counsel's submission that the issue of the boundary between the suit property and Muthangari Police Station has been determined by the court in ELC No. 460 of 2018 and the Government Surveyor has already re-established the beacons of the two properties. He urged that the suit property is intact with an acreage of 0.4346Ha.
56. It was counsel's further submission that a boundary dispute cannot amount to a dispute contemplated by the sale agreement and could not vitiate the agreement.
57. The 1<sup>st</sup> Defendant's counsel submitted that the 1<sup>st</sup> Defendant was excluded from the site visit because when Mr. Maina Chege of the 1<sup>st</sup> Defendant and his advocate converged at the court at 2pm, there was nobody; that they visited the Deputy Registrar's office and called the court clerk to no avail and that the outcome of the site visit was not made available to the 1<sup>st</sup> Defendant.
58. It was counsel's submission that from the alleged minutes from the Muthangari meeting, the 1<sup>st</sup> Defendant had already commenced fencing the suit property as at 7<sup>th</sup> June 2011 and that the 1<sup>st</sup> Defendant put up the temporary boundary fence and no contradictory evidence was pleaded by the Plaintiff.
59. Counsel submitted that the Plaintiff cannot be refunded the deposit of Kshs. 9 million because it is the Plaintiff who breached the sale agreement; that the Plaintiff did not rebut the 1<sup>st</sup> Defendant's claim that it did not have the financial resources to pay the balance of the purchase price and that the Plaintiff authorized the 1<sup>st</sup> Defendant to use the deposit for purposes of obtaining the completion documents and have the property fenced and guarded.
60. Counsel submitted that the 2<sup>nd</sup> Defendant ought not to have been sued in the same matter as its disclosed principal, the 1<sup>st</sup> Defendant. Counsel relied on the Court of Appeal's decision in *Victor Mabachi & Another v Nuturn Bates Ltd* [2013] eKLR, *Anthony Frances Warehein t/a Wareham & Kenya Post Office Savings Bank Ltd Application No. Nai. 5 & 48 of 2002* and *Dr. John Chiama & 6 Others v Managing Trustee NSSF & Another* [2012] eKLR.
61. Counsel submitted that where an agreement does not provide for happening of events which would entitle a party to rescind, a party may only rescind if the conduct of the other party is such as to amount to a repudiation of the contract and parties can be restored to their former position. Counsel relied on the case of *Beatrice M. Nzioka vs Charles Ongwen* [2014] eKLR and *Halsbury's Laws of England*, Volume 42, 4<sup>th</sup> Edition at paragraph 242.
62. According to Counsel, the Plaintiff failed to make an objection under Condition No.10 of the LSK Conditions of Sale (1989) and therefore the rescission letter dated 21<sup>st</sup> July 2011 does not amount to rescission under the LSK Conditions of Sale. He relied on the Court of Appeal's decision in *Manohar Singh Sagoo & Another vs Caroline Njeri Mwicigi & 3 Others* [2022] KECA 83 (KLR) and *Sagoo vs Sagoo* [1983] KLR 365.



63. Counsel for the 2<sup>nd</sup> Defendant submitted that the 1<sup>st</sup> Defendant is not in breach of the sale agreement as there was no agreement mutually agreed upon by the parties with respect to acreage, which the 1<sup>st</sup> Defendant failed to honor
64. That the Plaintiff's surveyor's evidence is extrinsic evidence that cannot override the terms of the Agreement for Sale and that ascertainment of the acreage ought to have been part of due diligence before signing the sale agreement.
65. Counsel submitted that the undertaking dated 11<sup>th</sup> May 2011 was issued by the 2<sup>nd</sup> Defendant to Messrs Nyachae & Ashitiva, and that there is no privity of contract between the Plaintiff and the 2<sup>nd</sup> Defendant.
66. They submitted that any claim arising thereon can only be instituted by the Plaintiff's Advocate and not the Plaintiff's name. Counsel relied on Order 52 Rule 7 of the Civil Procedure Rules 2010 on the procedure for enforcement of an undertaking. Counsel also relied on the Court of Appeal's decisions in Harit Sheth t/a Harit Sheth Advocate vs K.H. Osmond t/a K.H. Osmon Advocate [2011] eKLR, Muiruri vs Credit Bank & Another (Civil Appeal No. 263 of 1998) KLR NO.6576 CAK and Waruhiu Kowade & Nganga Advocates vs Mutune Investments Limited [2016] eKLR.
67. Counsel further submitted that there can be no proceedings against the advocate and his client in the same suit seeking to enforce the undertaking. Counsel relied on the cases of Dr. John Chiama & 6 others vs Managing Trustee NSSF & Another [2012] eKLR, David Karanja Thuo t/a (Practising as D.K. Thuo & Co. Advocates) vs Njagi Wanjeru (Practising as Njagi Wanjeru & Co. Advocates) [2010] eKLR, Nelson Andayi Havi t/a Havi & Company Advocates vs Jane Muthoni Njage t/a J.M Njage & Company Advocates [2015] eKLR and the Court of Appeal's determination in Victor Mabachi & Another vs Nuturn Bates Ltd (2013) eKLR.

### **Analysis and Determination**

68. The dispute between the parties herein concerns the sale agreement dated 11<sup>th</sup> May 2011, in which the 1<sup>st</sup> Defendant agreed to sell to the Plaintiff the suit property, L.R. Number 209/14310 situate in Nairobi Kenya measuring 0.4346 hectares, at a consideration of Kshs. 60 million.
69. It is not disputed that the Plaintiff paid the deposit of Kshs. 9 million to the 2<sup>nd</sup> Defendant, who was the 1<sup>st</sup> Defendant's counsel in the transaction. It is the Plaintiff's case that contrary to the sale agreement, the 1<sup>st</sup> Defendant failed to immediately disclose to him the adverse claims over the property by the Kenya Police and particularly Muthangari Police Station as required.
70. It is the Plaintiff's case that after due diligence, they came to learn that the acreage of the suit property was 0.3103 hectares, rather than 0.4346 hectares as indicated on the title; that the 1<sup>st</sup> Defendant failed to fence the suit property as agreed and that in accordance with the professional undertaking, as the breach was on the part of the Vendor, the deposit ought to be returned to them fully.
71. The 1<sup>st</sup> Defendant has denied breaching the terms of the agreement. It contended that it did erect a boundary fence around the suit property, and stationed guards around the same; that the records at the Ministry of Lands and the Survey of Kenya indicate that the size of the suit property is 0.4346 Hectares and that it did not misrepresent the acreage of the subject property.
72. The 1<sup>st</sup> Defendant testified that there is no contention over ownership of the suit ownership with Muthangari Police Station and that the Plaintiff's action of contracting to pay the balance of the purchase price when it had neither the means nor the capacity to pay the balance before or on 11<sup>th</sup> August 2011 was fraudulent.



73. It was the testimony of the 1<sup>st</sup> Defendant that the Plaintiff unlawfully terminated the sale agreement and that they suffered losses to the tune of Kshs. 26,810,200 which they have claimed in the counterclaim with interests.
74. Having considered the pleadings, the evidence and the submissions filed, the following issues arise for this court's determination:
- a. Whether the 1<sup>st</sup> Defendant breached the contract.
  - b. Whether the Plaintiff lawfully rescinded the contract.
  - c. Whether the 1<sup>st</sup> Defendant's counterclaim is merited.
75. This court is alive to the hallowed principle that a court cannot rewrite a contract. In *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* [2011] eKLR the Court of Appeal stated as follows:
- “A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
76. In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* [2017] eKLR the Court of Appeal similarly stated that: -
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
77. In the sale agreement dated 11<sup>th</sup> May 2011, the parties contracted under Clause 7.2, that the purchaser has inspected the suit property prior to signing the contract. In the same clause, the Vendor was also bound to erect a boundary fence of wooden posts and barbed wire.
78. Clause 7.2 provided as follows:
- “The Purchaser has inspected the property and has taken notice of the identity thereof and of its actual state and condition and the Vendor shall not be called upon to improve the property in any manner whatsoever but shall be called upon to point out and replaced beacons at their cost. In addition, the Vendor shall prior to completion hereof, erect a boundary fence over the property comprised of wooden posts and barbed wire.”
79. The Plaintiff averred that the Defendant failed to erect the fence before completion. The 1<sup>st</sup> Defendant has presented evidence to show that it duly constructed the barbed wire fence around the suit property. The completed fence was further confirmed by the survey report produced by the Plaintiff's surveyor, PW2.
80. Considering that the said fence was to be constructed within 90 days from 11<sup>th</sup> May 2011, which is 11<sup>th</sup> August 2011, this court is satisfied that the Defendant has established that the fence was duly constructed within the stipulated time. The fence remains on the suit property, as confirmed by the report of this court during the site visit conducted on 9<sup>th</sup> October 2019.
81. The second and third concern by the Plaintiff is the purported claim by the neighbouring Muthangari Police Station over the suit property, and the claim that the 1<sup>st</sup> Defendant misrepresented the acreage of the suit property. The area of the suit property indicated on the title is 0.4346Ha. The Plaintiff however asserts that it contracted the services of a surveyor who found that the area of the suit property was 0.3103 ha and not 0.4346Ha as indicated on the title.



82. In his testimony, the 1<sup>st</sup> Defendant's director, Mr. Maina Chege, averred that there was no boundary dispute with Muthangari Police Station. He testified that the contractor who constructed the Muthangari Police fence, unduly extended the fence towards its land, He stated that he instituted ELC No. 460 of 2018 on 27<sup>th</sup> April 2022 on for encroachment and the ruling has however never been delivered.
83. This court is persuaded that there indubitably exists a boundary dispute between the 1<sup>st</sup> Defendant and Muthangari Police Station. This is apparent from the minutes of the meeting held at Muthangari Police Station on 7<sup>th</sup> June 2011. In that meeting, it was noted that the 1<sup>st</sup> Defendant had sent a letter to the Inspector General of Police concerning the determination of the boundary between the suit property and Muthangari Police Station.
84. While the 1<sup>st</sup> Defendant's director has denied being present at that meeting, he failed to impeach the validity of the said minutes, which were produced as an exhibit by PW3. Further, if indeed there was no dispute, then there would have been no need to approach the court through ELC No. 460 of 2018.
85. As noted by the Plaintiff's surveyor during the site visit by the court, to actualize the acreage indicated in the deed plan, the existing fence needs to be adjusted towards Muthangari Police Station. During the site visit, it was also noted that there were some structures on the suit property which were occupied by police officers. Further, this court took cognizance of the fact that the suit property as fenced is too small to be of any commercial value.
86. The 1<sup>st</sup> Defendant has additionally contended that this dispute does not amount to a dispute contemplated by the sale agreement and could not vitiate the agreement. The warranties on the part of the Vendor are set out in Clause 8 of the Sale Agreement. This court takes notice of the following sub-clauses:
- “ Clause 8.4:
- ‘There is no adverse claim or dispute in respect of the property regarding ownership, boundary, easement, right of way or any other such matter
- Clause 8.6:
- ‘The vendor has to the best of its knowledge disclosed to the Purchaser all material information relating to the property
- Clause 8.7:
- ‘The vendor will immediately disclose in writing to the Purchaser any events or circumstances which may arise or become known to it after the date of this agreement and prior to the completion which are inconsistent with the warranties or which had they occurred on or before the date of the agreement would have constituted a breach of the warranties or which are material to be known by the Purchaser for value of the property.’”
87. It is apparent that the 1<sup>st</sup> Defendant warranted that there was no existing boundary dispute with respect to the suit property, which was manifestly untrue. Having found that that the 1<sup>st</sup> Defendant was in breach of the contract, what follows is the consideration of whether the rescission by the Plaintiff was lawful.
88. The facts in this case are that through the letter dated 30<sup>th</sup> June 2011, the Plaintiff's advocate brought to the attention of the Defendants the claim by Muthangari Police Station concerning the suit property.



They sought clarity on the claim by the third party and sought that the Defendants addresses the same in the context of clauses 8.4 and 8.7 of the Agreement for sale.

89. Instead, through the letter dated 12<sup>th</sup> July 2011, the 2<sup>nd</sup> Defendant gave notice to the Plaintiff's Advocate to complete the sale under the LSK Conditions (1989). The Plaintiff's advocates, through the letter dated 13<sup>th</sup> July 2011, reiterated the concerns raised in the earlier letter concerning the claim by Muthangari Police Station.
90. The Plaintiff's advocate further stated that his client's surveyor had established that the actual acreage on the ground was smaller and was at variance with the conveyance forwarded to them. In the letter, the Plaintiff's advocate indicated that he had been instructed to ask for the immediate refund of the deposit.
91. The 2<sup>nd</sup> Defendant, in his letter dated 18<sup>th</sup> July 2011 stated that the measurement indicated on the deed plan was the accurate measurement of the subject property. Counsel referred the Plaintiff's advocate to Condition 18 of the LSK Conditions of sale, which dealt with misdescription of property.
92. In the letter dated 21<sup>st</sup> July 2011, the Plaintiff's advocate gave notice that the agreement stood rescinded on account of the 1<sup>st</sup> Defendant's breach of Clause 8.7 of the agreement, by failing to disclose the claim by the police over the suit property, and further, that the acreage on the ground was much smaller than the acreage described in the title.
93. They stated that the 2<sup>nd</sup> Defendant was required to immediately refund and remit the deposit of Kshs. 9 million which was paid to the 2<sup>nd</sup> Defendant to hold the same as stakeholders.
94. The 1<sup>st</sup> Defendant has disputed the validity of this rescission. The law on rescission of a contract of sale of land is that if the contract contains a condition entitling the Vendor to rescind on the happening of certain events, and those events happen, then the Vendor may rescind. The converse is true.
95. The sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant did not provide for rescission of the agreement. It makes no provision on the steps and measures that ought to be taken in the instance of breach. It only provides that any notices shall be provided in writing and served personally on the contractual parties.
96. The Law Society Conditions 1989, which the parties incorporated in the contract, is then applicable herein. Condition 11 on rescission provides as follows:

“Rescission

- i. Where a purchaser makes an objection or a requisition under Condition 10 with which the vendor is unable to comply or with which he is unwilling to comply on reasonable grounds of difficulty, delay or unreasonable expense, the vendor may give to the purchaser written notice referring to this Conditions, specifying his grounds and requesting withdrawal of the objection or requisition within a specified period being not less than seven (7) days.
- ii. If the purchaser fails to withdraw the objection or requisition within the period specified by the notice, the vendor may by notice in writing to the purchaser rescind the contract.



- iii. On rescission the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.
  - iv. The purchaser has no claim against the vendor for costs, compensation or otherwise.
  - v. Where the contract becomes void under any law the provisions of sub-conditions (3) and (4) apply.”
97. Condition 15 further prescribes that before contract, the vendor must disclose to the purchaser the existence of all rights, privileges, latent easements or other liabilities know to him to affect the suit property. Sub-condition 3 provides that where before completion the purchaser discovers any matter which should have been disclosed, he may by notice in writing to the vendor rescind the contract according to Conditions 11(3) and (4).
98. Condition 18(2) further provides that where there is any misdescription, error, omission or misstatement in the contract which is pointed out before completion, the purchaser may rescind the contract in writing to the vendor to be given within 14 days of such discovery, or by notice in writing, require the payment or allowance of compensation.
99. What is apparent is that on 21<sup>st</sup> July, 2021, the Plaintiff’s advocates served upon the 2<sup>nd</sup> Defendant a notice rescinding the agreement. In the notice, the Plaintiff’s advocate informed the 2<sup>nd</sup> Defendant, to refund and remit the deposit of Kshs. 9,000,000. That money was never refunded, thus the present claim.
100. Considering the circumstances and the evidence before this court, it is the finding of the court that the sale agreement was lawfully rescinded by the Plaintiff. Pursuant to clause 7.4, the Plaintiff is entitled to a refund of Kshs. 9,000,000 that it paid.
101. In the counterclaim, the 1<sup>st</sup> Defendant has asserted that it fulfilled its obligations under the sale agreement by obtaining all the completion documents and that the Plaintiff is in breach for failing to pay the balance of the purchase price when it fell due.
102. The 1<sup>st</sup> Defendant has consequently claimed for Kshs. 26,810,200 from the Plaintiff with interest at court rates from the date of filing the suit until payment in full, and costs of the counterclaim.
103. This court has indeed found that it is the 1<sup>st</sup> Defendant which breached the agreement, and that the Plaintiff validly rescinded the agreement. Pursuant to clause 7.4 of the agreement, the Plaintiff is entitled to the entire purchase price “without any deductions whatsoever.”
104. The expenses incurred by the 1<sup>st</sup> Defendant in the process of completing the sale agreement cannot be attributed to the Plaintiff. Indeed, the agreement did not provide that the costs to be incurred by the 1<sup>st</sup> Defendant in perfecting the agreement would be paid by the Plaintiff.
105. That being the case, and having found that it is the 1<sup>st</sup> Defendant who breached the agreement, it is the finding of this court that the 1<sup>st</sup> Defendant is not entitled to the prayers in the counter claim.



106. The 2<sup>nd</sup> Defendant having issued a professional undertaking to the Plaintiff's Advocate, which was contained in the 2<sup>nd</sup> Defendant's letter dated 11<sup>th</sup> May 2011, he was validly sued in this matter. In the said letter, the 2<sup>nd</sup> Defendant stated as follows:

“The payment is made on our Professional Undertaking which we hereby give you to hold the same as stakeholders pending the carrying out of the official search on the property and the registration of transfer in favour of your client, and that we shall promptly refund the same to the Purchaser through you devoid of any deductions whatsoever within three (3) days of receiving a copy of the official search results from you, in the event that such search results shall reveal any encumbrance and/or any position contrary to or adverse to the Vendor's titles, interest in or right to the property or should the sale herein fail on the part of the vendor.”

107. A stakeholder was defined by the Court of Appeal in *George Muriani Muboro t/a A.M Muboro Advocate vs Ndungu Kamiti Civil Appeal No. 233 of 2003*, as quoted in Lucy Muthoni Muthumbi v Shamira Chepkemei Chelang'a & 2 Others [2020] eKLR as follows:

“... A stakeholder is a person with whom money is deposited pending the decision of a bet or a wager or one who holds money or property which is claimed by rival claimants but in which he himself claims no interest...A stakeholder has a duty to deliver the money or property to the owner or owners once the right to legal possession or ownership has been established...”

108. Indeed, the 2<sup>nd</sup> Defendant, under the sale agreement, had a professional obligation to hold the deposit as a stakeholder, and he promised to do so in writing.

109. Pursuant to clause 4.2, the 2<sup>nd</sup> Defendant is obligated to refund the deposit to the purchaser's advocate “should the sale herein fail on the fault of the vendor.” Consequently, this court makes a finding that the said deposit of Kshs. 9,000,000 should be paid by the Defendant jointly and severally to the Plaintiff's advocate, for onward transmission to the Plaintiff.

110. In conclusion, this court finds that the Plaintiff has proved its case on a balance probability, and makes the following orders:

- a. The Defendants to jointly and severally refund the Plaintiff, through its advocate on record, the sum of Kshs. 9,000,000.
- b. The Defendants to jointly and severally pay the Plaintiff, through its advocate on record, interest on the above sum at court rates from the date of filing this suit until payment in full.
- c. The 1<sup>st</sup> Defendant's counter claim is dismissed with costs.
- d. The 1<sup>st</sup> Defendant to pay the costs of the suit.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Mayega for Nyacholi for Plaintiff

Ms Ochola holding brief for Bundotich for 2<sup>nd</sup> Defendant



Court Assistant: Tracy

