



REPUBLIC OF KENYA



**Masters Kenya Limited & another v Desert Runners Services (K) Ltd & 3 others (Environment & Land Case 916 of 2013) [2023] KEELC 19815 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19815 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 916 OF 2013  
EK WABWOTO, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**MASTERS KENYA LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**STEPHEN KAMAU NDUNGU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DESERT RUNNERS SERVICES (K) LTD ..... 1<sup>ST</sup> DEFENDANT**

**JOHN SALEH OKECH ..... 2<sup>ND</sup> DEFENDANT**

**SYLVIA LITUNDA ..... 3<sup>RD</sup> DEFENDANT**

**HOUSING FINANCE CORPORATION OF KENYA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By way of a further Amended Originating Summons, the Plaintiffs seeks for the following orders:
  - a) That this Honourable Court do issue a declaration that there has never been an absolute sale of land parcel No. Ngong /Ngong /20987 by the 1<sup>st</sup> Plaintiff/Applicants to the 1<sup>st</sup> Defendant/ Respondent.
  - b) That the Honourable Court do issue an order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents, their agents and /or servants from evicting the 1<sup>st</sup> and the 2<sup>nd</sup> Plaintiffs/Applicants from the land parcel No. Ngong /Ngong/ 20987.
  - c) (i) That this Honourable Court be pleased to declare that the transfer of Land Reference No. Ngong/Ngong/20987 dated 11<sup>th</sup> April, 2013 between the 1<sup>st</sup> Plaintiff/Applicant and the 1<sup>st</sup> Defendant and the resultant charge of the said property on the same date by the 4<sup>th</sup> Defendant is illegal, null and void for all purposes for want of non-payment of the balance of the purchase price, non-payment of the Stamp Duty on the transfer of the suit property by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>



and 4<sup>th</sup> Defendants to Kenya Revenue Authority (KRA) on the suit property and as such do issue an order directing Ngong Land Registrar to vest Land parcel No. Ngong/Ngong/20987 in the name of the 1<sup>st</sup> Plaintiff/Applicant.

On The Alternative

- (ii) That the 1<sup>st</sup> and or 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants/Respondents do repay the entire amount of the loan to the 4<sup>th</sup> Defendant/ Respondent, refund monies to the 1<sup>st</sup> Plaintiff/Applicant paid to the 1<sup>st</sup> Defendant as a refund of their expenses of transfer and the commission they received from the 1<sup>st</sup> Plaintiff/Applicant and the money paid on their behalf by the representative of the 1<sup>st</sup> Plaintiff/Applicant to their loan account held by the 4<sup>th</sup> Defendant on its behalf by the 1<sup>st</sup> Plaintiff/ Applicant and the balance of the purchase price acknowledged in the agreement dated 1<sup>st</sup> March, 2013 and which the balance has not been paid as was stated in the second Agreement of 15<sup>th</sup> March, 2013 plus interest at commercial rates from when the first agreement was entered into on the 1<sup>st</sup> March 2013 until payment in full and in default the 5<sup>th</sup> Respondent be ordered to register the Land Parcel No. NGOG/Ngong/20987 to revert back to the 1<sup>st</sup> Plaintiff.
  - d). That the Honourable Court be pleased to issue an order for damages for breach of the Agreement dated 15<sup>th</sup> March, 2013 by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
2. The said summons was supported by an affidavit sworn by Stephen Kamau Ndungu, the 2<sup>nd</sup> Plaintiff herein on 12<sup>th</sup> April, 2022. The Summons was contested by the Defendants.
  3. The 1<sup>st</sup> Defendant filed a Cross-Originating Summons dated 10<sup>th</sup> December, 2021 in which the following orders were sought:
    - i. A declaration that by virtue of the Loan agreement dated 15<sup>th</sup> March 2013 between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff and the 1<sup>st</sup> defendant, the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs are liable to settle the loan of Kshs 7,000,000/= advanced directly to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff by the 4<sup>th</sup> defendant plus interest now due and owing to the 4<sup>th</sup> defendant.
    - ii. A mandatory injunction does issue compelling the 1<sup>st</sup> & 2<sup>nd</sup> plaintiff and/or the 4<sup>th</sup> defendant to refund to the 1<sup>st</sup> defendant together with interest at the 4<sup>th</sup> defendant rates the sum of Kshs 2,366,542/- paid by the 1<sup>st</sup> defendant to the 4<sup>th</sup> defendant's loan account in the aborted sale of 1<sup>st</sup> March 2013 which sale the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff have since renounced.
    - iii. A mandatory injunction does issue compelling the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs to settle the entire loan balance due to the 4<sup>th</sup> defendant in default of which the 4<sup>th</sup> defendant be at liberty to sell the charged property being Ngong/Ngong/20987 ("the suit property") to recover the sum and owing as well as refund the 1<sup>st</sup> defendant its Kshs 2,366,542/- together with interest at the 4<sup>th</sup> defendants rates.
    - iv. Damages for breach of contract dated March 1, 2013 and 15 March 2013.
    - v. Costs of this summons.
    - vi. Any other Orders as the interests of justice will require.
  4. The Cross Originating Summons was supported by the Affidavit sworn by Stephen Gakere Macharia, a Director of the 1<sup>st</sup> Defendant on 10<sup>th</sup> December, 2021.



5. The 4<sup>th</sup> Defendant filed a statement of Defence to the Cross Originating Summons dated 20<sup>th</sup> June, 2022 in which they sought inter alia the dismissal of the Plaintiff's suit with costs.

### **The Plaintiff's Case**

6. It was the Plaintiff's case that in 1999, he borrowed a mortgage loan from the 4<sup>th</sup> Defendant which he repaid and later on different occasions borrowed other 4 loans charging the same suit property to Barclays Bank of Kenya Ltd and HFCK Bank as security which loans were repaid.
7. The 1<sup>st</sup> Plaintiff averred that from May, 2007 to August, 2012, he had paid the 4<sup>th</sup> Defendant Kshs 3,545,206/- by way of monthly repayments, instalment of Kshs 55,393.55 and that his property had been valued for Kshs 15,000,000/-.
8. It was also averred that the 1<sup>st</sup> Plaintiff entered into an agreement dated 1<sup>st</sup> March, 2013 and another agreement dated 15<sup>th</sup> March, 2013. It was also averred that pursuant to the said agreements, the sum of Kshs 7,000,000/- that was paid to them by the 1<sup>st</sup> Defendant with a loan from the 4<sup>th</sup> Defendant, Kshs 2,366,542.60 was transferred to its account in final payment of the previous loan amount.
9. It was also averred that out of Kshs 7,000,000/- paid to the Plaintiffs by the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant received from the Plaintiffs a total sum of Kshs 1,263,618/- being refund of claim for their expenses of transfer of the suit property and their commission.
10. The Plaintiffs also averred that they made a local arrangement between the parties upon which they had to acknowledge to have received the deposit of sale for the suit property being Kshs 8,000,000/- in the agreement dated 1<sup>st</sup> March, 2013 which was done by the 4<sup>th</sup> Defendant's appointed advocate who also executed a professional undertaking for the transfer of the suit property from Masters Kenya Limited to Desert Runners Limited.
11. It was also averred that the purpose of the second agreement dated 15<sup>th</sup> March, 2013 was entered into by the parties to safeguard the suit property against misuse.
12. The Plaintiffs further averred that pursuant to the agreement dated 15<sup>th</sup> March, 2013, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were paid Kshs 1.1. million by the Plaintiffs. This payment included a refund of payment paid to the 4<sup>th</sup> Defendant, initial deposit for the first month loan repayment instalment of the 1<sup>st</sup> Defendant and the remaining balance was for the other expenses and commissions.
13. It was averred that the 1<sup>st</sup> Defendant was paid Kshs 163,618/- paid through the Plaintiff's representative to the 4<sup>th</sup> Defendant on 28<sup>th</sup> June, 2013 and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants breached the contract agreement dated 15<sup>th</sup> March, 2013 by issuing an eviction notice of the Plaintiffs from the suit property.
14. The plaintiffs also averred that the suit property was grossly undervalued at the point of effecting the transfer to be worth Kshs 2,000,000/= which contradicts the 4<sup>th</sup> Defendant's Valuers who had valued it at Kshs 15,000,000/-. It was also averred that the Stamp Duty was never paid by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
15. It was also averred that the transfer of the suit property to the 1<sup>st</sup> Defendant, subsequent charge for a facility by the 4<sup>th</sup> Defendant as security for the loan was illegal and invalid for non-payment of Stamp Duty.
16. During trial, the 2<sup>nd</sup> Plaintiff, Stephen Kamau Ndungu testified on behalf of the Plaintiffs and relied on his witness statement, affidavit and other documents on record. He also added that the suit property was his matrimonial property. He also stated that he has never taken any loan from the 4<sup>th</sup> Defendant



though he admitted owing the 1<sup>st</sup> Defendant Kshs 7,000,000/- less payment made which now stands at Kshs 5,800,000/=. On cross-examination by counsel for the 1<sup>st</sup> Defendant, he stated that there were two agreements herein and that he is the one who voluntarily transferred the suit property to the 1<sup>st</sup> Defendant. He also stated that the title of the suit property had been charged for a loan which he defaulted. He also stated that he is yet to vacate the house even though it is still charged in favour of the 4<sup>th</sup> Defendant. He also stated that the 1<sup>st</sup> Defendant was to pay him Kshs 8,000,000/-.

17. On further cross-examination by Counsel for the 1<sup>st</sup> Defendant, he confirmed that he was to repay Kshs 7,000,000/- pursuant to the agreement dated 15<sup>th</sup> March, 2013 out of which he has only made 2 instalments. He also confirmed being issued with an eviction notice dated 8<sup>th</sup> July, 2013.
18. When cross-examined by Counsel for the 4<sup>th</sup> Defendant, he stated that the 1<sup>st</sup> Plaintiff had initially charged the suit property to the 4<sup>th</sup> Defendant and he defaulted in payment of the loan. He then received a notice from the 4<sup>th</sup> Defendant demanding Kshs 2,084,764.80. This prompted him to approach the 1<sup>st</sup> Defendant and offered to sell the property. He also confirmed voluntarily transferring the suit property to the 1<sup>st</sup> Defendant which transaction was brought to the attention of the bank. He also stated that he had defaulted on the loan even though he didn't know how much it was. He also stated that the bank was not a party to the agreement dated 15<sup>th</sup> March, 2013. He also maintained that the charge in favour of HFCK was null and void for failure to fulfil the special conditions. He also stated that the matter would be settled should the 1<sup>st</sup> Defendant pay him Kshs 8,000,000/= with interest.

#### **The Case of the 1st Defendant**

19. It was the 1<sup>st</sup> Defendant's case that the plaintiffs and the 1<sup>st</sup> defendant entered into the agreement dated 1<sup>st</sup> March 2013 for the sale of Title No Ngong/Ngong 20987 at Kshs 15,000,000/-. The agreement dated 1<sup>st</sup> March 2015 was to be completed within 60 days. That the charged sum of Kshs 7,000,000/- was paid by the 4 defendant to the plaintiffs through the 1<sup>st</sup> defendants loan account and which sum the Plaintiffs acknowledged receipt. Upon the plaintiffs receiving the sum of Kshs 7,000,000/- they declined to complete the agreement dated 1<sup>st</sup> March 2023 and instead insisted that the sale of Title No. Ngong/Ngong/20987 was not absolute. The plaintiffs further refused to give up possession of Title No. Ngong/Ngong/20987 and instead arm-twisted/blackmailed the 1<sup>st</sup> defendant through a subsequent agreement dated 15<sup>th</sup> March 2023 so that the plaintiffs would take up the 1<sup>st</sup> defendant's loan with the 4 defendant. The plaintiff thereafter refused to take up the 1<sup>st</sup> defendant's loan despite the agreement of 15/03/2013 clearly providing that the plaintiffs would service the loan as opposed to completing the sale of the property to the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant was forced to continue servicing the same so as not to be listed at the credit reference bureau.
20. It was also the 1<sup>st</sup> Defendant's case that the 1<sup>st</sup> defendant serviced the loan to the tune of Kshs 2,366,542/- but thereafter informed the 4<sup>th</sup> defendant to pursue the plaintiffs for the loan or sell the suit property noting that he was not benefiting from the property nor did he benefit from the loan funds. As at now the 1<sup>st</sup> defendant although the registered owner of the suit property, they do not have possession of the same, the plaintiffs having declined to pass possession to the 1<sup>st</sup> defendant pursuant to the sale agreement of 01/03/2013 and the loan with the 4<sup>th</sup> defendant is in arrears despite the plaintiffs taking up the loan liability vide the agreement of 15/03/2023 which they similarly breached. Since the 4<sup>th</sup> defendant's loan is still due as a result of the plaintiff's breach, Title No. Ngong/Ngong/20987 should be sold and the excess of the sale price given to the 1<sup>st</sup> defendant so that they can recover Kshs 2,366 542/- plus interest.



21. During trial, Stephen Gakere, D.W.1 testified on behalf of the 1<sup>st</sup> Defendant. He also adopted and relied on his statement and bundle of documents on record. He added that the 2<sup>nd</sup> Plaintiff is still in possession of the suit property and that the Plaintiffs have no registrable interest in the land. He urged the court to grant the reliefs sought in the Cross-Originating Summons and dismiss the Plaintiffs' suit.
22. On cross-examination by Counsel for the 4<sup>th</sup> Defendant, he stated that he approached the bank to finance him. He also stated that he had no claim against the bank since the agreement dated 15<sup>th</sup> March, 2013 was between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. He also stated that the transfer of the suit property was done lawfully.
23. When cross-examined by the 2<sup>nd</sup> Plaintiff, he stated that he had an agreement with the 1<sup>st</sup> Plaintiff. The property was valued at Kshs 15,000,000/= and the Plaintiffs received a total of Kshs 7,000,000/= He also stated that the agreement dated 15<sup>th</sup> March, 2013 was never taken to the bank. On further cross-examination by the 2<sup>nd</sup> Plaintiff, he stated that the Plaintiffs were to service the loan of Kshs 7,000,000/= failure to which the property was to be sold. The notice of eviction was issued because the Plaintiffs defaulted.
24. When asked whether or not stamp duty was paid, he stated that the same was duly paid since the property could not be transferred without payment of stamp duty.
25. When re-examined, he stated that the agreement dated 1<sup>st</sup> March, 2013 was signed by Mr. Kamau who acknowledged receipt of the money and that the loan was never repaid.

#### **The Case of the 4<sup>th</sup> Defendant**

26. It was the 4<sup>th</sup> Defendant's case that the plaintiffs sold Title No Ngong/Ngong/20987 to the 1<sup>st</sup> defendant who then charged the same for Kshs 7,000,000. The agreement dated 1<sup>st</sup> March 2015 was to be completed within 60 days. The transfer of Title No Ngong/Ngong/20987 and charge of Kshs 7,000,000 were pursuant to the agreement of 1<sup>st</sup> March 2013. That the charged sum of Kshs 7,000,000 was paid by the 4<sup>th</sup> defendant to the plaintiffs through the 1<sup>st</sup> defendant's loan account. The 1<sup>st</sup> defendant serviced the loan of Kshs 7,000,000 to the tune of Kshs 2,366,542/= but thereafter informed the 4<sup>th</sup> defendant that it was not averse to the sale of Title No. Ngong/Ngong/20987 by public auction as it would no longer be servicing the loan for a property that it was not in possession of. As of now the 1<sup>st</sup> defendant is not in possession of Title No Ngong/Ngong/20987 whose possession is with the plaintiff but is still expected to pay the loan. Title No Ngong/Ngong/20987 is registered to the 1<sup>st</sup> defendant hence his legal property and charged to the 4<sup>th</sup> defendant who have an encumbrance on the 1<sup>st</sup> defendant's title.
27. It was also averred that there was no evidence that Title No. Ngong/Ngong/20987 was fraudulently transferred to the 1<sup>st</sup> defendant and fraudulently charged to the 4<sup>th</sup> defendant.
28. Mary Gathungu, D.W.2, a Debt Manager with the 4<sup>th</sup> Defendant testified on their behalf. She relied and adopted her witness statement dated 11<sup>th</sup> February, 2019 and a bundle of documents on record. She also added that the Chargor had an obligation to pay the loan. The same was not serviced and the bank issued statutory notices and to date, over Kshs 12,000,000/= remains in arrears.
29. It was her testimony that the bank never breached any terms of the agreement and that the notices were lawfully issued. She also stated that the bank was not privy to the agreement dated 15<sup>th</sup> March, 2013 and there is no reason why the bank should be stopped from realizing its security.



30. When cross-examined by Counsel for the 1<sup>st</sup> Defendant, she stated that the 1<sup>st</sup> Plaintiff is in possession of the suit property and that the vendor acknowledged receipt of Kshs 8,000,000/= and only Kshs 2,300,000/= was paid.
31. When cross-examined by the 2<sup>nd</sup> Plaintiff, she stated that the agreement of 15<sup>th</sup> March, 2013 was never signed by the bank. She also stated that there are no orders stopping the bank from selling the property.

### **The Plaintiffs' submissions**

32. The Plaintiffs filed written submissions dated 4<sup>th</sup> July, 2023 and further submissions dated 4<sup>th</sup> September, 2023 which the court has considered. It was submitted that the agreed consideration for the sale of the suit property was Kshs 15,000,000/=. The Plaintiffs received Kshs 7,000,000/= leaving a balance of Kshs 8,000,000/=. It was also submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants breached the agreement dated 15<sup>th</sup> March, 2013 and that the Plaintiff was duped to transfer the suit property without full payment.
33. The Plaintiffs also submitted that there was misrepresentation from their Advocates F. Chege Ng'ang'a Advocates and B.M. Kanyiri & Co. Advocates who misadvised him into signing the two agreements and therefore the court should give justice and consider his case.
34. The Plaintiffs in their submissions also extensively referred previous proceedings in the matter and stated that the officers from DCI did not testify in the matter with a view of proving allegations of forgery as against the 1<sup>st</sup> to 3<sup>rd</sup> Defendants.
35. The Plaintiffs concluded their submissions by urging this court to grant them Kshs 10,000,000/= for breach of agreement dated 15<sup>th</sup> March, 2013 and other reliefs sought.

### **The 1st Defendant's submissions**

36. The 1<sup>st</sup> Defendant filed written submissions dated 17<sup>th</sup> July, 2023 through the firm of J. Makumi & Co. Advocates. Counsel outlined the following issues for consideration by the court; who between the Plaintiffs and the 1<sup>st</sup> Defendant breached the agreements dated 1<sup>st</sup> March, 2013 and 15<sup>th</sup> March, 2013, was there fraud on the part of the 1<sup>st</sup> or 4<sup>th</sup> Defendants, who between the Plaintiffs and the 1<sup>st</sup> Defendant is entitled to the reliefs sought and what are the most appropriate remedies to grant.
37. It was submitted that the Plaintiffs refused to complete the agreement dated 1<sup>st</sup> March, 2013 when they refused to give vacant possession of the Title No. Ngong/Ngong/20987 and instead offered to cancel the sale and take up a loan obligation from the 1<sup>st</sup> Defendant. The Plaintiff was therefore in breach of the said agreement.
38. In respect to the agreement dated 15<sup>th</sup> March, 2013, it was submitted that the Plaintiffs equally breached the said agreement by refusing to service the loan. The said agreement has no clause barring the 1<sup>st</sup> Defendant from securing possession of Ngong/Ngong/20987 in the event the Plaintiffs failed to make payments to the 1<sup>st</sup> Defendant.
39. On whether there was fraud on the part of the 1<sup>st</sup> or 4<sup>th</sup> Defendant, it was submitted that the Plaintiffs willingly executed the agreement and no evidence was tendered that their signatures were forged. It was also submitted that the Forensic Document Examiner Report dated and stamped on 18<sup>th</sup> October, 2018, the Forensic Examiner concluded that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' signatures were made by the same authors. Hence, therefore, the Plaintiffs did not meet the burden of proving fraud and conspiracy which burden is higher than in ordinary civil cases. The 1<sup>st</sup> Defendant cited the following cases in



support of this issue: *Evans Otieno Nyakwara v Cleophas Bwana Ongaro* [2015], eKLR, *Nancy Kaboya Amadira v Expert Credit Limited & another* [2015] eKLR among others.

40. In respect to the reliefs sought, it was submitted that the Courts cannot rewrite the contract for the parties. The Plaintiffs in the agreement dated 1<sup>st</sup> March, 2013 acknowledged receipt of Kshs 8,000,000/= from the 1<sup>st</sup> Defendant so as to secure Kshs 7,000,000/= from the 4<sup>th</sup> Defendant through the 1<sup>st</sup> Defendant loan account and that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants acknowledged that they had not paid Kshs 8,000,000/= to the Plaintiffs so that they would get the Plaintiff to settle their loan of Kshs 7,000,000/= to the 4<sup>th</sup> Defendant. It was also submitted that the Plaintiffs prayers related to particular clauses/ bargain which the Plaintiffs agreed to but failed to deliver on.
41. It was also submitted that the 4<sup>th</sup> Defendant should not be barred from realizing its security.
42. The 1<sup>st</sup> Defendant also submitted that the Plaintiffs Further Amended Originating Summons ought to be dismissed for failure to satisfy that they are deserving of the orders sought.
43. The 1<sup>st</sup> Defendant concluded its submissions by urging the court to dismiss the Further Amended Originating Summons and grant the reliefs sought in the Cross-Petition.

#### **The 4th Defendant's submissions**

44. The 4<sup>th</sup> Defendant filed written submissions dated 10<sup>th</sup> August, 2023. Counsel submitted on the following issues:
  - (i) Whether or not the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant entered into a valid Agreement for the sale of the suit property.
  - (ii) Whether or not there was a valid and enforceable legal charge over the suit property.
  - (iii) What remedies should the court grant.
45. It was submitted that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. In the instant case, both the Plaintiffs and the 1<sup>st</sup> Defendant admit that they entered into a sale agreement dated 1<sup>st</sup> March, 2013 for the sale of the suit property at an agreed purchase price of Kshs 15,000,000/=. As per the said agreement, the vendor acknowledged that he had been paid Kshs 8,000,000/= as part payment and the balance of Kshs 7,000,000/= was to be paid by the purchaser's financier, Housing Finance Bank. It was also submitted that the 1<sup>st</sup> Plaintiff had a clear intention to dispose the suit property to the 1<sup>st</sup> Defendant and that is why he agreed to discharge the property with the consent of the bank. There was honest belief that the bank had been paid Kshs 8,000,000/=.
46. It was also submitted that the Plaintiffs attempt to import the agreement dated 15<sup>th</sup> March, 2013 to amend the agreement dated 1<sup>st</sup> March, 2013 as far as the 4<sup>th</sup> Defendant's interest was concerned was illegal and unlawful and the Plaintiffs are estopped from relying on the same.
47. On whether there was a valid and enforceable legal charge over the suit property, it was submitted that the 4<sup>th</sup> Defendant was not a party to the agreement dated 15<sup>th</sup> March, 2013 and therefore there is no way the 4<sup>th</sup> Defendant could have breached the said agreement. The 4<sup>th</sup> Defendant urged this court to declare the said agreement null and void as it was meant to defeat the charge. It was also submitted that no evidence was adduced to support the allegation that stamp duty was never paid.



48. The 4<sup>th</sup> Defendant also submitted that pursuant to sections 80 and 90 of the *Land Act*, the 4<sup>th</sup> Defendant acquired interest and in the event of default, he has the right to enforce its statutory power of sale.
49. In respect to the reliefs sought, the 4<sup>th</sup> Defendant submitted that this court should uphold the sale and transfer of the suit property pursuant to the agreement dated 1<sup>st</sup> March, 2013 and that the agreement dated 15<sup>th</sup> March, 2013 should be deemed null and void to the extent that the 4<sup>th</sup> Defendant was not privy to the same. The 4<sup>th</sup> Defendant also submitted that the court should hold that the 4<sup>th</sup> Defendant is at liberty to exercise its statutory power of sale and realize its security, the 1<sup>st</sup> Defendant to pay the 1<sup>st</sup> Plaintiff any outstanding balance of the purchase price and that this court should also dismiss the suit together with the Cross Originating Summons as against the 4<sup>th</sup> Defendant with costs.

### **Issues for determination**

50. The parties herein never agreed on the issues for determination. However, after considering the pleadings filed by all the parties, the evidence adduced, the written submissions filed and the law, this court is of the humble view that the following are the key issues for determination:
- i. Whether there was any breach of the agreements dated 1<sup>st</sup> and 15<sup>th</sup> March, 2013.
  - ii. Whether there was any fraud on the part of the 1<sup>st</sup> and 4<sup>th</sup> Defendant.
  - iii. Whether there was a valid and enforceable legal charge herein.
  - iv. Whether are the appropriate remedies to be granted herein.
  - v. What orders should issue as to costs.

### **Analysis and Determination:**

#### **Issue No. 1. Whether there was breach of the agreements herein.**

51. The Plaintiffs and the 1<sup>st</sup> Defendant pleaded and particularized breach of agreements dated 1<sup>st</sup> March, 2013 and 15<sup>th</sup> March, 2013.
52. Breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing.
53. The agreement dated 1<sup>st</sup> March, 2013 stipulated as follows at clause 1(a) and ((b): that the purchase price of Kshs 15,000,000/= of which Kshs 8,000,000/= has already been paid to the vendor (the 1<sup>st</sup> Plaintiff herein) and Kshs 7,000,000/= shall be paid by the purchaser's Financier within 14<sup>th</sup> days of receipt of the transfer in favour of the Purchaser and simultaneously a charge in favour of the Financier. In the said agreement, parties also agreed that the completion period shall be 60 days from 1<sup>st</sup> March, 2013.
54. During trial, evidence was adduced to the effect that on 1<sup>st</sup> March, 2013, the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants approached the 4<sup>th</sup> Defendant and intimated that they had entered into a sale agreement with the 1<sup>st</sup> Plaintiff through the 2<sup>nd</sup> Plaintiff for the purchase of the suit property Title No. Ngong/Ngong/20987 and requested the 4<sup>th</sup> Defendant to advance them a loan facility to finance the balance of the purchase price being Kshs 7,000,000/=. It was also evident that the 4<sup>th</sup> Defendant gave



- the 1<sup>st</sup> Defendant an offer for a loan facility of Kshs 7,000,000/=. The 1<sup>st</sup> Defendant accepted the offer and gave the suit property as security for the said facility.
55. The 4<sup>th</sup> Defendant carried out due diligence and processed the facility and registered a charge on the suit property. A loan amount of Kshs 7,000,000/= was disbursed as was agreed by the parties.
56. It was also evident that a charge was then registered in favour of the 4<sup>th</sup> Defendant and that the loan was not serviced by the 1<sup>st</sup> Defendant.
57. The 2<sup>nd</sup> Plaintiff in his evidence denied ever receiving Kshs 8,000,000/= (as had been stated in the agreement) and this prompted the parties to enter into another agreement dated 15<sup>th</sup> March, 2013.
58. In view of the foregoing, it is evident that in so far as it relates to the agreement dated 1<sup>st</sup> March, 2013, the 1<sup>st</sup> Defendant breached the said terms by failing to pay the 1<sup>st</sup> Plaintiff the sum of Kshs 8,000,000/= which had been agreed and also for failing to secure another sum of Kshs 7,000,000/= which was to be obtained from its financier within 14 days.
59. In respect to the agreement dated 15<sup>th</sup> March, 2013, it was agreed by the parties that the sum of Kshs 8,000,000 acknowledged in the sale agreement dated 1<sup>st</sup> March 2013 has not been paid to the “Borrower” (now the 1<sup>st</sup> Plaintiff). It was also agreed that the borrowed loan shall be secured by the parcel of land and the development thereon known as Ngong/Ngong/20987. The Parties also agreed that the said loan shall be serviced by the borrower on a monthly basis at the rate of Kshs 164,000/= per month to be deposited by the borrower into the account of the lender. It was also agreed that the loan repayment shall be for a maximum period of 6 years whichever is earlier and that the borrower shall transfer the title to the property into the lender and Housing Finance names. Parties also agreed that the property shall be charged to Housing Finance by the lender to secure the loan to the borrower. In the said agreement, it was also agreed that if the borrower fails to repay the loan, the lender may after 60 days’ notice to the borrower sell the property herein to recover the loan balance plus any other costs that the lender shall incur in the process.
60. During trial, evidence was adduced to the effect that pursuant to the agreement dated 15<sup>th</sup> March, 2013, the 1<sup>st</sup> Defendant serviced the loan to the tune of Kshs 2,366,542/= So as to avoid being listed at the credit reference bureau but thereafter advised the 4<sup>th</sup> Defendant to sell the charged property since the plaintiff had refused to vacate the suit property.
61. It also emerged that pursuant to the agreement dated 15<sup>th</sup> March, 2013, the 1<sup>st</sup> Defendant loaned the Plaintiff the sum of Kshs 7,000,000/= repayable in monthly instalments of 6 years. The advance payment of 1<sup>st</sup> instalment of a sum of Kshs 164,688.00 was part of the 1<sup>st</sup> Defendant’s list of expenses refunded. On 28<sup>th</sup> June, 2013, the Plaintiff paid the 2<sup>nd</sup> instalment of Kshs 163,618.00 to the account of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Plaintiffs also argued that he had made payment to the tune of Kshs 1,263,618/= leaving a balance of Kshs 5,736,382/=. However, when cross-examined by Counsel for the 1<sup>st</sup> Defendant, he conceded that he had only paid 2 instalments after receiving a loan of Kshs 7,000,000/=.
62. From the evidence tendered and upon considering the agreement, the 1<sup>st</sup> Plaintiff breached the said agreement when the loan of Kshs 7,000,000/= was not serviced as required. This prompted the 1<sup>st</sup> Defendant to pay the sum of Kshs 2,366,542/= towards the payment of the loan.



**Issue No. 2 Whether there was any fraud on the part of the 1<sup>st</sup> and 4<sup>th</sup> Defendants.**

63. In the Further Amended Originating Summons, the Plaintiffs pleaded particulars of fraud committed and breach of contract at paragraph h (i) – (v) as follows:
- i. Non-payment of the initial deposit of the suit property.
  - ii. Breach of contract agreement dated 15<sup>th</sup> March, 2013.
  - iii. Fraud on denial of signatures in agreement dated 15<sup>th</sup> March, 2013 through affidavits filed in court and statements recorded at Directorate of Criminal Investigations (DCI).
  - iv. Non-payment of Kenya Revenue Authority (KRA) transfer Stamp Duty on the suit property from the 1<sup>st</sup> Plaintiff/Applicant to the 1<sup>st</sup> Defendant.
  - v. Fraudulent transfer of the suit property from the 1<sup>st</sup> Plaintiff to the 1<sup>st</sup> Defendant.
64. Fraud is defined under the *Black's Law Dictionary* 10th Edition as “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”.
65. How then can fraud be proved? The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012 *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR held:
- “Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.
66. Similarly, the Court of Appeal decision in the case of *John Kamunya & Another v John Nginyi Muchiri & 3 Others* [2015] eKLR held that:
- “We find that the law is clear as put by Mr. Karanja that matters of “fraud” must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine.”
67. To succeed in claiming fraud the Plaintiffs not only need to plead but also particularized it by laying out water tight evidence which the court would consider. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. In this respect, it is appropriate to recognize and take cognizance of the succinct exposition of the Law by the Supreme Court in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, where the court stated and held thus:
- (49)Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”[50]This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:“...



a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51)In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.”

68. During the hearing of the suit, the 2<sup>nd</sup> Plaintiff when cross-examination by Counsel for the 1<sup>st</sup> Defendant confirmed that he voluntarily transferred the suit property and title to the 1<sup>st</sup> Defendant which title was later charged by the 4<sup>th</sup> Defendant. On cross-examination by Counsel for the 4<sup>th</sup> Defendant, he equally confirmed that he voluntarily sold the suit property to the 1<sup>st</sup> Defendant.
69. Stephen Gakere, the Director of the 1<sup>st</sup> Defendant also stated in cross- examination by the 2<sup>nd</sup> Plaintiff that he paid stamp duty prior to transfer of the property. He also reiterated that the property could not be transferred without payment of stamp duty.
70. Mary Gathungu, also stated in her evidence that the 4<sup>th</sup> Defendant did due diligence before charging the property.
71. In the instant case, upon analyzing the evidence that was tendered herein, it is the finding of this court that the Plaintiff have not tendered sufficient evidence that prove the particulars of fraud as against the Defendants to the satisfaction of this court and this court agrees with the submissions made by the 1<sup>st</sup> Defendant on the issue that the Plaintiffs failed to discharge this burden.

### **Issue No. 3 Whether there was a valid and enforceable legal charge herein.**

72. It was the 4<sup>th</sup> Defendant’s case that the transactions leading to the discharge of charge, transfer of the suit property to the 1<sup>st</sup> Defendant and subsequent charge in its favour was lawful, procedural as it was done with the knowledge, consent and approval of the Plaintiff. A charge is a creature of equity; essentially a charge creates an equitable proprietary interest in the asset being secured. It arises when there is agreement between creditor and debtor that the creditor has an equitable proprietary interest in the secured asset as a security for a debt. Section 2 of the Land Act further defines a charge as follows:  

“Charge” means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge.
73. Evidence was tendered herein to the effect that the 4<sup>th</sup> Defendant did due diligence before charging the property. This court has also considered the evidence that was adduced to the effect that that the 4<sup>th</sup> Defendant at the time of charging the property was not a party to the agreement dated 15<sup>th</sup> March, 2013 between the Plaintiffs and the 1<sup>st</sup> Defendant.
74. The evidence that was adduced by the 4<sup>th</sup> Defendant was never controverted by any party and as such, the 4<sup>th</sup> Defendant cannot be faulted for its role in the transaction. In view of the foregoing, it is the finding of this this court that the charge by the 4<sup>th</sup> Defendant was valid.



**Issue No. 4 What are the appropriate reliefs for the court to grant herein.**

75. The Plaintiffs sought several reliefs as enumerated in the Further Amended Originating Summons. The 1<sup>st</sup> and 4<sup>th</sup> Defendant were opposed to the same. Having considered the evidence that was tendered herein, it is the finding of this court that the Plaintiffs were in breach of the agreement dated 15<sup>th</sup> March, 2013 and as such, they have not been able to prove their case to the required standard. It is the court's finding that they are not entitled to the reliefs sought.
76. The 1<sup>st</sup> Defendant also sought for several reliefs as were set out in the Cross-Originating Summons. Pursuant to the finding of this court, it is also evident that the 1<sup>st</sup> Defendant was also in breach of the agreement dated 1<sup>st</sup> March, 2013 which then prompted the parties to have another agreement dated 15<sup>th</sup> March, 2013 only for the same to be breached by the Plaintiff.
77. Parties should always be aware of the consequences and repercussions before entering into any agreement. Parties should not merely enter into agreements with the sole purpose of not honouring them. In reference to above issue, I place reliance on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit & another* (2001) KLR 112 the court stated that:
- “A Court of law cannot re-write 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”.
78. In the agreement dated 15<sup>th</sup> March, 2013, the 1<sup>st</sup> Plaintiff had accepted receiving Kshs 7,000,000/= as loan and had further agreed to service the same. It is also not clear as to what amount and arrears was in dispute as between the parties herein. Hence therefore, the 1<sup>st</sup> Defendant herein has also not been able to prove the Cross-Petition to the required standard.
79. In *Photo Production v Securicor Ltd* (1980) AC 827 at page 848 Lord Diplock remarked that, characteristically, commercial contracts are a source of primary legal obligation upon each party to it to procure that whatever has been promised will be done. Lord Diplock continued:
- “...breaches of primary obligation give rise to substituted or secondary obligations on the part of the party in default and ... may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligation also arise by implication of law generally common law.....”
80. I also wish to make reference to the dictum in the case of *Ibrahim Seikei T/A Masco Enterprises v Delphis Bank* (2004) eKLR where the court held
- “we must protect the intention of the parties so that every party adheres to his contractual duty to the other. The appellant was advanced the money on the strength of the security he provided to the bank and had an obligation to repay the monies under the terms agreed. Banks do not give monies as gratuity or love for human kind. I cannot issue an injunction against a party wanting to exercise its statutory power of sale merely because the amount due is in dispute.”
81. Parties also sought for general damages for breach of contract. However, as a general rule, general damages for breach of contract are not awardable. The damages that are to be compensated by the party can only be known by the party and is claimed in specific terms which have to be proved.



### **Issue No. 5. What orders should issue as to costs?**

82. On the issue of costs, it is trite law that costs shall follow the event but it is also noteworthy that this court retains the discretionary right on award of costs. Having considered the circumstances of this matter, I will direct each party to bear own costs of the Originating Summons and Cross-Originating Summons.

### **Final Orders**

83. In the end, the following orders are hereby issued in respect to the Plaintiffs' Further Amended Originating Summons and the 1<sup>st</sup> Defendant's Cross Originating Summons;

- i. A declaration is hereby made that the sale and transfer of the suit property to the 1<sup>st</sup> Defendant herein was lawful and valid.
- ii. A declaration is hereby made that the charge registered in favour of the 1<sup>st</sup> Defendant is lawful and valid.
- iii. The 1<sup>st</sup> Defendant is hereby ordered to pay the Plaintiffs any outstanding balances in respect to the purchase of the suit property within 90 days from today.
- iv. Pursuant to order (iii) above and after the 90 days stipulated therein, the 4<sup>th</sup> Defendant is at liberty to exercise its statutory power of sale and realize its security registered over the suit property Title No. Ngong/Ngong/20987.
- v. Any other relief not expressly granted is declined.
- vi. Each party to bear own costs of the suit and the Cross Originating Summons.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2023.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:

1. Mr. Kamau Stephen Ndungu the 2nd Plaintiff appearing in person.
2. Mr. Makumi for the 1st Defendant.
3. No appearance for the 2nd Defendant.
4. No appearance for the 3rd Defendant.
5. Mr. Munene for the 4th Defendant.
6. Court Assistant; Caroline Nafuna.

