



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 222 OF 2018**

**NICHOLAS THUO KABAIKU....PLAINTIFF**

**VERSUS**

**SERAH NJERI MBATIA.....DEFENDANT**

**JUDGEMENT**

1. The Defendant who holds a power of attorney from John Mwangi Kagochi, the registered owner of land reference number (L.R. No.) 15003/30 situated in Nairobi (“the Suit Property”) entered into an agreement with the Plaintiff dated 8/9/2017 vide which the Defendant was to sell the Suit Property to the Plaintiff at the agreed consideration of Kshs. 30,000,000/=. The Plaintiff was required to pay a deposit of Kshs. 2,800,000/= on or before the date of execution of the agreement. The agreement provided for the payment of the balance of the purchase price and completion was to take place on 8/12/2017 or on an earlier date agreed by the parties. The agreement also provided for what would happen in the event of default by either party.

2. The Plaintiff paid the deposit as agreed through the firm of Righa & Mburu Advocates who represented both parties in the sale transaction. The Plaintiff’s claim is that despite being ready to complete the transaction the Defendant purported to rescind the sale agreement after the advocate who represented both parties lodged the completion documents at the lands office for purposes of registering the transfer of the land to the Plaintiff without payment of the balance of the purchase price being made.

3. In the plaint filed in court on 10/5/2018, the Plaintiff sought a permanent injunction to restrain the Defendant or her agents from leasing, charging, selling, transferring to third parties or alienating the Suit Property. He also sought a declaration that the rescission notice dated 9/2/2015 was null and void and an order for specific performance to compel the Defendant to complete the sale of the Suit Property. Further, he sought an order for the Defendant to refund the sum of Kshs. 600,000/= which he paid on her behalf as capital gains tax for the transaction together with a refund of Kshs. 880,060/= paid as stamp duty for the transaction which he claimed was lost through the Defendant’s breach. The Plaintiff also seeks general damages for breach contract, punitive or exemplary damages and the costs of the suit.

4. The Defendant denied the Plaintiff’s claim in her defence filed in court on 27/6/2018 and averred that the Plaintiff and the advocate who acted for both parties in the sale transaction hatched a scheme to defraud the Defendant in which the advocate failed to remit the completion documents to the financier and instead commenced the transfer of the title over the Suit Property to the Plaintiff at the lands office. The Defendant averred that she never requested the Plaintiff to pay either the stamp duty or the capital gains tax. She maintained that the move to transfer the title to the Plaintiff was fraudulent and calculated to ensure that she lost her title to the Suit Property and the balance of the purchase price.

5. That upon realising that the Plaintiff was fraudulently transferring the title over the land to his name through his advocate, she moved speedily to freeze the transfer and subsequently recalled her documents. She pleaded particulars of fraud on the part of the

Plaintiff and his advocate as well as particulars of the Plaintiff's breach of contract. She counterclaimed for a declaration that the Plaintiff breached the terms of sale agreement dated 8/9/2017 and that he should forfeit the deposit which she sought to retain pursuant to clause G (i) (a) of the sale agreement. She also sought general damages for breach of contract and costs of the suit.

6. The hearing of the suit proceeded on 16/6/2021 when both the Plaintiff and the Defendant testified. The Plaintiff produced a copy of the sale agreement dated 8/9/2017. He stated that he paid the deposit of Kshs. 2,800,000/= by RTGS. He obtained a loan facility in September 2017 from the Consolidated Bank of Kenya Limited (Consolidated Bank) for the sum of Kshs. 7,000,000/= to enable him pay the balance of the purchase price. On 17/11/2017 Kale Maina and Bundotich Advocates who were acting for Consolidated Bank issued a professional undertaking to the Defendant's advocates in which they undertook to pay the balance of the purchase price within 45 days of receipt of the completion documents.

7. He stated that Righa & Mburu Advocates received the professional undertaking but did not release completion documents to the bank's advocates. That Righa & Mburu Advocates chose to lodge the transfer documents for registration at the lands office. He paid stamp duty of Kshs. 1,365,000/= to Righa Mburu & Company Advocates on 31/10/2017. He stated that the Defendant faulted the registration process and withdrew the transfer documents including the title deed from the lands office.

8. The Plaintiff stated that he later learnt that the Defendant issued a three days' rescission notice on 9/2/2018 which she served upon Righa & Mburu Advocates instead of delivering it to him or sending it through his address in compliance with paragraph G (i) (a) of the Special Conditions of Sale which required a 21 days' notice to be issued to the purchaser in the event of default. He maintained that he did not breach the agreement and that no notice was issued to him as required under the agreement. The Plaintiff maintained that it was the Defendant who breached the agreement and that he was keen, able and willing to complete the transaction but the Defendant was frustrating completion.

9. Further, that he lodged a complaint with the Law Society of Kenya (LSK) on 15/2/2019 against Mburu Joseph Braimoh Ndung'u of Righa & Mburu Advocates over his unprofessional handling of the conveyance transaction. He instituted a formal complaint against the advocate before the Disciplinary Tribunal in Disciplinary Cause Number 195 of 2019.

10. He produced a copy of the title over the Suit Property, a Special Power of Attorney donated to the Defendant, a copy of the RTGS confirming the transfer of the sum of Kshs. 2,800,000/= on 9/9/2017. He produced a copy of a letter dated 17/11/2017 from Kale Maina and Bundotich Advocates giving a professional undertaking to pay the firm of Righa & Mburu Advocates the sum of Kshs. 27,200,000/= towards the purchase of the Suit Property within 14 days of the registration of the transfer and charge in favour of the purchaser and the bank respectively. He also produced evidence of the transfer of the sum of Kshs. 1,365,000/= on 31/10/2017 to Righa & Mburu Company Advocates. He produced a copy of the payment slip issued by the Kenya Revenue Authority for the sum of Kshs. 880,060/= on account of stamp duty paid on 6/2/2018 reflecting the Defendant's name and her pin number. He produced a copy of the application for registration of the transfer which was lodged by Righa & Mburu Advocates on 7/2/2018 at the lands office. He also produced copies of the letters written by Wachira Maina & Co Advocates on 5/3/2018, 9/2/2018 and 25/4/2018 to the Chief Land Registrar, Righa & Mburu Advocates and Njuru and Company Advocates respectively regarding this dispute. He also produced copies of his advocates' letters dated 24/4/2018 and 7/5/2018 addressed to the Defendant and her advocates respectively.

11. On cross examination, the Plaintiff confirmed that the agreement was not subject to financing and that he had not paid the full purchase price by 8/12/2017 which was the date of completion. He maintained that he did not see the rescission notice issued by the Defendant advocates. He did not know that the title had been lodged for transfer before he completed paying the balance of the purchase price of Kshs. 27,000,000/= and that he learnt of this later. He reiterated that he had paid the advocate Kshs 1,365,000/= as stamp duty and the advocate informed him that he had taken the documents to the bank's lawyers. He blamed the advocate for lodging the documents at the lands office instead of taking them to the bank. He also blamed the Defendant for going to the lands office with her advocate and retrieving the title instead of informing him of what had transpired. He later learned that the Chief Land Registrar issued summons for his attendance.

12. He stated that the Defendant had been asked by the bank's lawyers to retrieve the documents from lands office and take them to the bank but she refused to do so. He confirmed that they signed the transfer documents at the time when he paid the deposit towards the purchase price. He was emphatic that he would not have been interested in transferring the Suit Property before fully paying the purchase price. He stated that he called the Defendant to pay her cash but she refused.

13. He denied that he colluded with the advocates. He later learnt that the advocates indicated the consideration of Kshs. 5,000,000/= on the transfer yet he had paid the correct stamp duty to the advocates. He added that the Defendant wanted him to increase the purchase price to Kshs. 35,000,000/=. He maintained that it was the Defendant who colluded with the advocates. He clarified that he paid the stamp duty to Mr. Mburu Advocate so that on completion he could pay the duty because he was going to South Africa. He blamed Mr. Mburu for understating the value of the land and added that the valuer gave it a value of Kshs. 22,000,000/=. Mr. Mburu paid stamp duty of Kshs. 800,000/= and retained Kshs. 400,000/= as a result of which he took him to the Law Society of Kenya. The Plaintiff concluded his testimony by stating that he was ready to complete the transaction.

14. In her evidence, the Defendant admitted that the Plaintiff paid the deposit of Kshs. 2,800,000/= in accordance with the sale agreement and was to pay the balance of Kshs. 27,200,000/= by 8/12/2017. She confirmed that the Plaintiff sought the services of Consolidated Bank to finance the balance of the purchase price and that the bank instructed Kale Maina & Bundotich Advocates who issued a professional undertaking to the parties' joint advocate on 17/11/2017.

15. That upon receipt of the undertaking, she forwarded the completion documents to the advocates who acknowledged receipt of the original deed for onward transmission to the bank's advocates. That after submitting the completion documents, she was waiting for payment of the balance of the purchase price on or before the completion date. When the completion date reached and the Plaintiff had not made payment in accordance with agreement, she decided to grant him more time. She stated that despite giving the Plaintiff more time, he did not honour the terms of the agreement and that she therefore instructed their mutual advocate to issue the completion or rescission notice to the Plaintiff which was dated 26/1/2018. She stated that the Plaintiff did not comply and she then instructed Wachira Maina & Co. Advocates to issue a final rescission notice on 9/2/2018. She stated that the Plaintiff refused to comply and the sale agreement was rescinded in terms of the contract.

16. She added that despite the Plaintiff refusing to pay the balance of the purchase price, and the sale agreement being rescinded, the Plaintiff fraudulently and illegally lodged the transfer documents at the lands registry since his advocate had the completion documents in his possession which were intended to be sent to the bank's advocates. On realising the magnitude and corrupt moves which the Plaintiff and his advocates had hatched, he immediately instructed his advocates to halt the transfer process which was done through the letter dated 2/3/2018 addressed to the Chief Land Registrar. The transfer was halted and the Plaintiff's advocate representative was summoned to appear before the Land Registrar on 15/3/2018. When the Plaintiff and his advocates did not honour the summons, the transfer documents were released to her.

17. She maintained that the Plaintiff breached the terms of the sale agreement and tried to transfer the Suit Property to his name despite the agreement being rescinded. Further, that the Plaintiff refused to pursue the bank facility to finance the transaction to its conclusion because he wanted to engage in illegal dealings. She added that had the transfer gone through, she would have suffered immense loss. She claimed that the Plaintiff's conduct was fraudulent and criminal. She produced copies of the sale agreement, title over the Suit Property, letter of offer for banking facilities dated 6/9/2017 from Consolidated Bank to the Plaintiff, the transfer duly signed by both parties and witnessed by Braimoh J N. Mburu Advocate.

18. The Defendant also produced a copy of the letter dated 26/1/2018 which Righa & Mburu Advocates wrote to the Plaintiff and copied to the Defendant giving him 21 days to complete the transfer. She produced copies of the letters her advocates Wachira Maina Advocates wrote on 9/2/2018, 2/3/2018 and 5/3/2018 to Righa & Mburu Advocates and the Chief Land Registrar. She also produced a copy of the letter dated 13/2/2018 which she wrote to the Branch Manager of Consolidated Bank making reference to the agreement for the sale of the Suit Property while requesting the bank to remit the sum of Kshs. 27,200,000/= to her bank account. She produced a copy of the letter dated 2/3/2018 from the Chief Land Registrar to Righa & Mburu Advocates regarding the objection to the registration of the transfer over the Suit Property as well as the summons dated 6/3/2018 addressed to Mburu Joseph of Righa & Mburu Advocates, which bear a stamp dated 7/3/2018. She also produced copies of the special power of attorney dated 21/8/2017 together with the rates clearance certificate and the consent to transfer of the Suit Property.

19. On cross examination, the Defendant stated that she did not know whether Mr. Mburu Advocate took the documents to the bank's lawyers. She stated that she asked Mr. Mburu to forward the documents to the bank. Further, that she had evidence that the Plaintiff colluded with Mr. Mburu Advocate to present the documents to the lands office instead of presenting them to the bank. She confirmed that the Plaintiff remitted the stamp duty on 31/10/2017 which was before the completion date. She admitted that the Plaintiff gave her Kshs. 600,000/= on 5/2/2018 to pay the capital gains tax and that she paid the tax to Kenya Revenue Authority through her *itax* account so that the completion documents could be sent to the bank's advocates.

20. She confirmed that there was nothing to show that the rescission notice which their common lawyer issued was ever given to the Plaintiff. She did not report the commission of fraud to the police and did not lodge any complaint against Mr. Mburu Advocate with the LSK. She stated that she was not willing to complete the transaction because she had lost business due to the delay and therefore did not wish to sell the Suit Property. She stated that she was cancelling the agreement. She had not refunded the Plaintiff the deposit of Kshs. 2,800,000/= and Kshs. 600,000/= which the Plaintiff gave her to pay as tax. She was not prepared to refund the stamp duty which the Plaintiff had paid. She maintained that she did not collude with Mr. Mburu Advocate to retain the Plaintiff's money.

21. She stated that she had a right pursuant to paragraph G (i) of the sale agreement to retain the deposit if there was breach and added that the Plaintiff and the lawyer were in breach of the contract. She stated that she was not interested in completing the transaction because of the fraud and maintained that the stamp duty which was paid directly to the government should have been paid after the full purchase price had been paid to her. She conceded that the Plaintiff gave her money to pay as capital gains tax because she did not have money to pay to the government. She explained that she gave the Plaintiff the three days' rescission notice because there was urgency in stopping the registration of the transfer of the land in favour of the Plaintiff.

22. Parties filed submissions which the court considered together with the authorities they relied on. The Plaintiff submitted that he did not breach the sale agreement and that he did all that was required of him and went beyond by remitting Kshs. 600,000/= to the Defendant to enable her pay the capital gains tax. He submitted that the Defendant breached the agreement by failing to ensure that her advocates forwarded the completion documents to the financier's advocate upon receipt of the professional undertaking from the financier's advocate. Secondly, that the notices she purported to issue were in breach of the agreement and were never delivered to him. He submitted that the three days' rescission notice dated 9/2/2018 did not comply with the agreement and was addressed to the firm of Righa & Mburu Advocates yet clause G (i) (a) and clause I (a) (ii) of the agreement required the issuance of a 21 days' notice which had to be served on him personally or through his postal address.

23. Thirdly, the Plaintiff submitted that the Defendant breached the agreement by attempting to unlawfully forfeit and retain the deposit which he had paid. Lastly, that she breached the agreement by refusing to complete the transaction despite the Plaintiff's demand and willingness to complete. The Plaintiff pointed out that the Defendant confirmed in court that she was not interested in completing the transaction and was unwilling to refund the deposit paid plus the stamp duty and capital gains tax which in the Plaintiff's view would amount to unjust enrichment. The Plaintiff submitted that the Defendant was intent on retaining the deposit and reselling the Suit Property at a higher price.

24. The Plaintiff submitted that the Defendant had not proved the allegations of collusion and fraud and pointed out that a higher standard of proof of fraud was required in civil matters. The Plaintiff pointed out that he reported the rogue advocate to the Advocates Disciplinary Committee and that his own actions did not show any fraud or collusion. He urged that he had a valid letter of offer from the bank and should be allowed to complete the transaction.

25. The Plaintiff maintained that there was a valid and enforceable contract which had not been rescinded and urged the court to issue an order of specific performance. He made reference to special condition J of the agreement regarding the enduring nature of the agreement and added that an award of damages would not do him justice because the land was unique. He urged the court to find that he would suffer irreparable loss if he lost the opportunity to complete the sale agreement and acquire the Suit Property. He relied on the decision in **Godfrey Ngatia Njoroge v James Ndung's Mungai [2019] eKLR**. He added that since the Defendant resided in the United States of America, it would be cumbersome and difficult to enforce an award of damages against her. He urged the court to order a refund of the capital gains tax which was paid directly to the Defendant and the stamp duty which he paid to the government because these were likely to be lost if the parties executed a fresh transfer.

26. The Defendant submitted that the Plaintiff breached the contract by failing to complete the transaction on or before 8/12/2017. She maintained that a rescission notice was issued to the Plaintiff on 26/1/2018 in accordance with clause G (i) (a) of the sale agreement. Further, she contended that the Plaintiff breached the agreement by purporting to make the transaction subject to him obtaining the balance of the purchase price from Consolidated Bank yet clause B (i) stated that the purchase price was to be paid whether the Plaintiff was financed or not. The Defendant submitted that the Plaintiff chose to bypass payment of the balance of the purchase price by fraudulently lodging the transfer documents at the lands registry.

27. She added that if indeed the Plaintiff were candid and willing to complete the transaction he would have ensured that the financier's advocate received the completion documents rather than try to lodge the transfer in a bid to defeat her right to the

balance of the purchase price. She relied on the complaint dated 26/9/2019 which the Plaintiff lodged with the LSK in which he indicated that he instructed his advocate to proceed with haste and procure the completion documents for onward transmission to Kale Maina and Bundotich Advocate for registration of the transfer in his favour and the charge in favour of the financier. In that complaint, the Plaintiff pointed out that the advocate did not heed his instructions and instead of forwarding the completion documents to Kale Maina and Bundotich Advocates, he proceeded to lodge the documents for registration of the transfer in his favour and the charge in favour of the financier. The Defendant submitted these sentiments in the Plaintiff's complaint to LSK proved that the Plaintiff breached the contract by failing to ensure that the financier received the completion documents. The Defendant relied on the decision in **Salim Hussein Dungarwalla v Uzima Press Limited and 2 others [2018] eKLR**.

28. The Defendant submitted that the Plaintiff fraudulently dealt with the Suit Property and that he colluded with his advocate to dispossess her of the Suit Property without paying the balance of the purchase price. That having been served with the rescission notice requiring him to complete the transaction within 21 days, the Plaintiff ignored the notice and instructed his advocate to lodge the transfer documents despite the fact that he had not paid the balance of the purchase price. She denied that she was trying to enrich herself unjustly and submitted that on the contrary it was the Plaintiff who stood to gain if the fraudulent transfer of the Suit Property were registered in his name without payment of the balance of the purchase price.

29. She submitted that she had no option but to move quickly to stop the transfer at the lands registry due to the fraud that was being perpetrated by the Plaintiff and his advocate. She added that she stood to lose the balance of Kshs. 27,200,000/= and the Suit Property and that the second rescission notice was due to the urgency of the situation because the transfer process was going on. She added that the Plaintiff's refusal to regularise the fraudulent dealings which he undertook led to the decision to have the transfer process halted based on the Plaintiff's advocate's failure to honour the summons from the Land Registrar. The Defendant maintained that the Plaintiff colluded with his advocate and fraudulently lodged the transfer document without paying the balance of the purchase price in a bid to dispossess her of the land and in breach of the sale agreement.

30. The Defendant pointed out that they were represented by the same advocate in the transaction and that a rescission notice was issued giving the Plaintiff 21 days to remedy his breach failing which the agreement would stand rescinded. The Defendant submitted that the Plaintiff could not be allowed to hide behind issues of form yet he was well aware of the substance and of his breach. Further, that the Plaintiff could not purport that he received the rescission notice which was stated to have been served upon him by his advocate. The Defendant submitted that the second rescission notice was sent to the Plaintiff's advocate out of necessity because the Plaintiff and his advocate had fraudulently lodged the transfer documents at the lands registry. She explained that she had to deal with the situation hurriedly because she stood to lose her property if the transfer were registered in favour of the Plaintiff. She submitted that the second notice was justified due to the prevailing circumstances and that the rescission notices were valid.

31. The Defendant submitted that stamp duty and capital gains tax were paid to the Government and she was not therefore liable to refund those sums paid by the Plaintiff. She pointed out that the Plaintiff deposited the amount to be paid as stamp duty in his advocates account and that he could not therefore seek specific performance and a refund at the same time. The Defendant submitted that the Plaintiff had failed to prove his case on a balance of probabilities. On the other hand, that she had proved the Plaintiff's breach of the sale agreement and his fraudulent dealings with his advocate in attempting to transfer the Suit Property to his name. She urged the court to allow the counterclaim.

32. The issue for determination is who between the Plaintiff and the Defendant breached the sale agreement and what reliefs should the court grant to the aggrieved party. It is not disputed that on 8/9/2017 the Plaintiff entered into an agreement with the Defendant to purchase the Suit Property at the agreed consideration of Kshs. 30,000,000/= and that the Plaintiff paid the deposit of Kshs. 2,800,000/= in accordance with the terms of the agreement. It emerged from the evidence of both parties that the Plaintiff remitted the sum of Kshs. 1,365,000/= on 31/10/2017 on account of the stamp duty to the account of their common advocates, M/s Righa & Mburu Advocates which the advocates were expected to pay to the government at the time of registration of the transfer of the Suit Property. The Defendant admitted that she received the sum of Kshs. 600,000/= on 5/2/2018 from the Plaintiff to enable her pay the capital gains tax which she paid to Kenya Revenue Authority through her *itax* account. This was so that the documents could be sent to the bank's advocates.

33. The sale agreement provided at paragraph B of the special conditions that Consolidated Bank would finance the balance of the purchase price on the security of a charge over the Suit Property. The Bank was to give an undertaking regarding payment of the balance of the purchase price. The proviso to the condition which the Defendant relied stated that the agreement was subject to the purchaser obtaining financing from the bank or any third party. The Defendant admitted in her evidence that upon receiving the

undertaking from Kale Maina and Bundotich Advocates on 17/11/2017 she forwarded the completion documents to their common advocate. It is therefore uncontroverted that the Plaintiff had obtained the necessary financing for the balance of the purchase price and the bank's lawyers gave the undertaking to hold the completion documents in trust pending payment of Kshs. 27,200,000/= vide RTGS within 45 days of receipt of the completion documents.

34. The completion documents were never forwarded to Kale Maina and Bundotich Advocates who represented Consolidated Bank because the advocate who acted for both the Plaintiff and the Defendant in the sale transaction decided to lodge the transfer for registration at the lands office. The Defendant contended that the advocate was acting in collusion with the Plaintiff to deprive her of the balance of the purchase price and the land. She did not lead any evidence to show the Plaintiff's role in their common advocate's fraudulent act of proceeding to register the transfer in favour of the Plaintiff when he was required to forward the completion documents to the advocates for the financier who had already given an undertaking to release the balance of the purchase price.

35. So far as reasonably possible, the court should give effect to what the parties agreed upon. Clause (C) 2 of the agreement made it the duty of the purchaser's advocate to carry out the registration of the transfer and stipulated that he would provide the day book number to the vendor's advocates. This contradicted clause 6 which indicated that Righa & Mburu Advocates would be the vendor's and purchaser's advocates.

36. Clause G provided that if the sale was not completed on the completion date through the purchaser's default then the purchaser was to give the purchaser 21 days' notice to pay the full purchase price. That notice was to be sent to the purchaser's address given in special condition I. No evidence was given of how the rescission notice dated 26/1/2018 which the Defendant contends was given to the Plaintiff by Righa & Mburu Advocates was served upon the Plaintiff. The court notes that the second rescission notice dated 9/2/2018 which Wachira Maina and Company Advocates issued was addressed to Righa & Mburu Advocates and not the Plaintiff as the purchaser. The court is not satisfied that the Defendant rescinded the sale in the manner prescribed in the agreement. Evidence was not given of how the notice was served on the Plaintiff.

37. Looking at the documents which the Defendant relied on, it is not clear why the Defendant instructed their common advocate to write to the Plaintiff on 26/1/2018 and give him notice to complete the transaction within 21 days and then on 13/2/2018 she wrote to the bank which was financing the Plaintiff requesting it to pay the balance of the purchase price of Kshs. 27,200,000/= to her bank account whose details she gave in the letter. Since she was in communication with the bank financing the purchase of the land she could have followed up the bank to ensure that it received the completion documents so that the transfer and charge could be registered for the bank to honour its undertaking to pay the balance of the purchase price.

38. Evidence was given that the Plaintiff remitted the full sum required for stamp duty of Kshs 1,365,000/= to the advocate who acted for both parties in the sale. There was nothing to prove that the Plaintiff participated in getting the transfer documents lodged at the lands office. On the contrary it is the advocate who lodged the transfer at the lands office for registration and even tried to underpay the stamp duty due on the transfer by understating the value of the land. The Plaintiff lodged a formal complaint of professional misconduct against Mr. Braimoh N. Mburu of Righa & Mburu Advocates in February 2019. The Plaintiff's keenness to complete the transaction is shown by his willingness to advance the Defendant the sum of Kshs. 600,000/= to enable her pay the capital gains tax. This he must have done to facilitate the speedy conclusion of the sale transaction.

39. The Plaintiff demonstrated that he was ready and able to complete the sale transaction but that the Defendant refused to complete. The Plaintiff alluded to the fact that the Defendant wanted to increase the purchase price to Kshs. 35,000,000/=:, which the Defendant did not dispute in her evidence. There is a valid and enforceable contract which has not been rescinded. The Defendant failed to prove that the Plaintiff was in breach of the sale contract or that he acted fraudulently. Her counterclaim is dismissed with costs to the Plaintiff.

40. The Plaintiff proved his case on a balance of probabilities. The rescission dated 9/2/2018 is null. An order of specific performance is issued to compel the Defendant to complete the sale of the Suit Property to the Plaintiff by releasing the completion documents to the Plaintiff's financing bank upon receipt of an acceptable professional undertaking. The Defendant and her agents are restrained from leasing, charging, selling, transferring to third parties, or otherwise dealing with the Suit Property.

41. The Defendant will refund the Plaintiff the sum of Kshs. 600,000/= which the Plaintiff paid as capital gains tax on her behalf. In default, this sum will be deducted from the balance of the purchase price due to the Defendant. The court declines to direct the

Defendant to refund to the Plaintiff the sum of Kshs. 880,000/= which the parties' former advocate paid as stamp duty when he irregularly lodged the transfer for registration at the lands registry. The Plaintiff can only recover this sum from the firm of Righa & Mburu Advocates or alternatively, he can seek to be given credit for that sum by the Collector of Stamp Duty at the time of registering the transfer. The Plaintiff is awarded the costs of the suit.

**DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2021**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Moses Njuru for the Plaintiff

Mr. Wachira Maina for the Defendant

Mr. V. Owuor- Court Assistant



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