



IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 209 OF 2019

GENERAL PROPERTIES LIMITED.....PLAINTIFF

VERSUS

SAIKA TWO ESTATE DEVELOPERS LIMITED.....RESPONDENT

JUDGEMENT

1. For determination before me is matter wherein the plaintiff commenced this suit by way of plaint dated 19/06/2019 against the Defendant seeking the following orders:

- a) A declaration be issued that the Agreement for sale of Land Registration Number 209/4292 otherwise known as Solar House dated 30/05/2018 has been duly rescinded due to default by the Defendant.
- b) An order of permanent injunction be and is hereby issued restraining the Defendant, its servants and or agents or any one of them from lodging any caution or interfering with the parcel of land known as Land Registration Number 209/4292 otherwise known as Solar House on the basis of the agreement dated 30/05/2018 or in the alternative an order do issue lifting or removing any caution lodged by the Defendant against the Land Registration Number 209/4292 otherwise known as Solar House on the basis of the agreement dated 30/05/ 2018.
- c) An order do issue directing the Land Registrar Nairobi to effect or facilitate the order issued in (b) above is observed and effected.
- d) A declaration be issued that the deposit being 10% of the Purchase price that was paid by the Defendant to the Plaintiff has been forfeited to the Plaintiff as damages for breach of contract.
- e) Costs of the suit.
- f) Any other and further relief that this Court may deem fit and just to grant.

2. From the record the service of summons was effected on the Defendant on the 30/09/2021 as evidenced by the affidavit of service dated 30/09/2021

Plaintiff's case

3. It was the Plaintiff's case through its witness PW I Mr. Charles Kiiru Muhia who is the Chairman of Peter the Rock which also owns General Properties Limited. That sometime on 30.05.2018, the Plaintiff and the Defendant entered into an agreement for sale of Land Registration Number 209/4292 otherwise known as Solar House (herein referred to as 'suit property') for the purchase price of Kshs 520,000.000.00.

4. The Plaintiff, through the witness statement by Charles K. Muhia dated 19th June 2019, stated that by way of a letter dated 30th April 2018, the defendant categorically and in no uncertain terms expressed clear intentions to purchase Land Registration Number 209/4292 otherwise known as Solar House situated along Harambee Avenue in Nairobi by making an unequivocal offer letter.

5. That it was a further condition that the Defendant/Purchaser would pay 10% of the purchase price being Kshs 52,000,000.00 to be held by the Vendor's advocates as a stakeholder pending the completion of the agreement. The Defendant proceeded to pay Kshs 52,000,000.00 as required by the terms of the agreement and remained with a balance of Kshs 468,000,000.00 that was to be paid to the Vendor's advocates through its advocate's bank account.

6. The witness further stated that through a letter dated 17th May 2018 the Defendant/Purchaser recommended some minor amendments to the agreement and the reviewed agreement was sent to their advocates office on 18th May 2018. They confirmed that they were also doing their own due diligence.

7. Through the witness statement, it is the plaintiff's contention that by a letter dated 31st May 2018, the defendant's advocates confirmed the agreement was fine for their client and confirmed too that their client had made a deposit of Kshs. 52,000,000.00 being 10% of purchase price as required by the terms of the agreement.

8. Having amended the agreement, the plaintiff stated that through a letter dated 6th June 2018, the plaintiff's advocates forwarded to the defendant's advocates office duly executed copies of the agreement in quadruplicate. Thereafter, on 14th August 2018 the plaintiff's advocates alerted the defendant's advocates that the completion date of 90 days was near and enquired of their plans to complete the transaction by paying the balance of the purchase price.

9. It was a condition of the agreement that time was of essence and that the balance of Kshs 468,000,000.00 was to be paid within Ninety (90) days from 30.05.2018. It was a term of the agreement that the agreement was to be completed within ninety (90) days from the date of agreement which the Defendant breached the conditions in the agreement.

10. The Plaintiff avers that it was a term of the agreement in clause 5.4 that upon breach by the Defendant, the Plaintiff had the right to retain 10% of the purchase price and the Defendant to forfeit the 10% deposit as liquidated damages for breach of the contract without the necessity of the Plaintiff issuing a rescission notice to the Defendant.

11. Despite demand to the Defendant to forfeit the 10% deposit as agreed, the Defendant has blatantly refused and adamantly neglected to honor the agreement of sale of land and has continued to threaten the Plaintiff with legal action making this suit inevitable.

12. All the Plaintiff's averments were corroborated by a witness Charles K. Muhia, a director to the plaintiff.

Defendant's case

13. The Defendant claims that in or around the beginning of the year 2018, the plaintiffs approached the defendant with an offer to sale the plaintiff's property being the suit property herein.

14. The Defendant also, claims that they sought from the plaintiff's directors for further information on the property, as part of the due diligence to enable the defendant to resolve on whether to proceed with the transaction and in what terms. The plaintiff presented to the defendant, in a documentary form, the monthly rental income of the building from January 2016 to year 2021, was as follows: -

a) total monthly rent as of December, 2016 was Seven million, five hundred and twenty eight thousand nine hundred and fifty (Kshs. 7,528,950);

b) total monthly rent as at December 2017 was eight million seven hundred and thirty three five hundred and eighty two (Kshs. 8,733,582);

c) total monthly Ten Million One Hundred and Thirty Thousand, Nine Hundred and Fifty Six Shillings (Kshs. 10,130,956) for the

year 2018;

Plaintiff further undertook to the defendant that the average monthly rental income for the subsequent years were as follows: -

d) total monthly Eleven Million, Seven Hundred and Fifty One Thousand, Nine Hundred and Nine (Kshs. 11,751,909) for the year 2019;

e) total monthly Thirteen Million Eight Hundred and Thirteen Thousand, Three Hundred and Sixty Eight (Kshs. 13,632,214) for the year 2020;

f) total monthly Fifteen Million Eight Hundred and Thirteen Thousand Three Hundred and Sixty Eight (Kshs. 15, 813,368) for the year 2021.

15. The Defendant states that the foregoing undertaking, information on the income of the property was presented to the defendant in an unambiguous tabulation. On the strength of the undertaking of the representation on the income generated by the property, the defendant entered into an agreement for sale, with the plaintiff for the purchase of the property on 30th May 2019.

16. The defendant approached Family Bank looking for a facility in order to pay the balance of the purchase price but the defendant's applications for credit were unusually rejected by the financial institution. On the basis of the strength of the representation made by the plaintiff to the defendant, the defendant continued pursuing credit, to enable it complete the transaction.

17. The Defendant avers that incognizant of the defendant's difficulties, the plaintiff encouraged the defendant to secure credit. The plaintiff inter alia extended the completion period and supplied the defendant with some of the documents required for purposes of facilitating the acquisition of the credit facility by the defendant. The plaintiff declined and or inordinately delayed to provide some of the documents under the disguise that it was impractical to provide.

18. In extending time, the defendant stated that the deposit stood forfeited, but proceeded to extend the time in any event. The defendant approached Co-operative Bank for a loan facility. After conducting the due diligence and analyzing the representations of the plaintiff, vis-a-viz actual rent schedules and the tenants agreements, the Co-operative bank discovered rental represented by the plaintiff was false and grossly exaggerated. The Co-operative bank immediately abandoned the process of processing the defendant's credit facility.

19. The defendant avers that the monthly rental income that the plaintiff represented that it averaged between 7million and 8million, only amounted to actual monthly rental income of 1.56Million. Thus the plaintiff breached an undertaking and or a collateral contract to the extent that it represented the annual rental income of the property as what it was not.

20. It is the defendants claim that the plaintiff defrauded and misrepresented to the defendant as to the true income of the property, in order to induce the defendant into buying the property. That the conduct of the plaintiff amounts to unjust enrichment. The defendant prays this court to render substantive justice and return the parties to where they were before the agreement was entered, *Status quo ante*,

21. The defendant states that the plaintiff caused delay in furnishing the defendant with all the documents requested and when it eventually supplied it amounted not only to material non-disclosure but active deception.

Defendant's Counterclaim

22. The Defendant filed a counterclaim against the Plaintiff via Counterclaim dated 16th December 2019 seeking the following judgement:

a) the plaintiff's suit be and is hereby dismissed in its entirety and the defendant's counterclaim be allowed as prayed.

b) A declaration do issue that the plaintiff breached conditions and warranties of the purchase agreement and the defendant was right in rescinding agreement dated agreement dated 30th May, 2018.

c) An order declaring that the sale agreement of parties dated 30th May, 2018 was duly and validly rescinded and/or terminated and the defendant was discharged from performing the agreement.

d) An order that the deposit of Kshs. 52,000,000 paid to the defendant be refunded to the defendant in full with interest at a rate of 4% above the Co-operative bank lending rate from the date it was paid.

e) The plaintiff to pay the defendant costs of the suit and counter claim with interest.

f) Any other or further relief that this honourable court may deem fit and just to grant.

23. It is the Defendant's contention that the plaintiff creates the false impression that the defendant is solely to blame for the frustration in the agreement entered upon by the parties for the purchase of the suit property, an allegation that the defendant hereby denies.

24. The defendant avers that the plaintiff is guilty of fraud, misrepresentation and breach of a warranty of the purchase agreement. That the plaintiff induced the defendant, through fraud and misrepresentation, to enter into the purchase agreement. The plaintiff approached the defendant with the intent to sell to it the suit property.

25. That the plaintiff through its director, gave an undertaking that turned out later to be a misrepresentation as listed above. That It was in consideration of and on the basis of the foregoing information on the rental income, that the defendant entered into the purchase agreement with the plaintiff. The above figures of rental income were a misrepresentation. The plaintiff concealed material facts and provided misleading information.

26. The defendant states that he viewed the purchase of the building as a viable investment on the basis of the information supplied to it by the plaintiff as to the rental income of the building, which information turned out to be false. The plaintiff improperly induced the defendant to sign the contract dated 30th May, 2018.

27. It was only after the plaintiff furnished the defendant with copies of the tenancy agreement and rent schedules that the real rent income was established. Upon discovery of the misrepresentation and the fraudulent schemes, the defendant rescinded the agreement with the plaintiff and informed the plaintiff of its decision to rescind the purchase agreement. The plaintiff and or its directors are using the property herein as an instrument to defraud the unsuspecting members of the public. The plaintiff urges this honorable court to restrain the sale of the house until the plaintiff refunds the Fifty-Two Million Shillings (Kshs. 52,000,000) paid by the defendant. If they are allowed to sell the house/property, the plaintiff shall never be able to recover. The plaintiff company is not an investment company, and it has no other known assets. The plaintiff is in dire straits, and it cannot afford to refund the deposit given already.

28. The Defendant denies the alleged claim by the Plaintiff. He avers that the claim is merely a ploy to coerce the defendant to fall prey to the plaintiff's extortionist ploys and to unjustly enrich itself. That subsequently, the defendant properly lodged the caveat on the title of the land the subject matter of these proceedings and same should be maintained until the hearing and determination of these proceedings.

29. The defendant despite being duly served to attend court on 29/09/2021 and 07/10/2021 did not attend court.

Plaintiff's Further Response

30. The Plaintiff reiterates that the Defendant is the author of its breaches that led to rescission of the agreement and denies knowledge of the particulars of misrepresentation as listed in the defendant's counterclaim.

31. The Plaintiff denies specifically that it provided any information on rental income to lure the Defendant into an agreement and put the defendant to strict proof.

32. The Plaintiff denies specifically the particulars of fraud therein and puts the Defendant to strict proof of each particular.

33. During his testimony the witness for the Plaintiff herein produced various documentary evidence to prove ether case being:

i. Exhibits 1, 3,7,9,12,14,16,18,20,21,23, 25,27,29 and 31. Various correspondence from the defendant advocates.

ii. Exhibit 2,4,5,8,9,13,15,17,19,22,24,26,28,30 and 32. Various correspondence from the plaintiff advocates

iii. Exhibit 6 being the Sale Agreement

34. The Plaintiff avers that without prejudice to anything herein denied, the Plaintiff states that the Defendant's counter claim is frivolous, vexatious and an abuse of the process of court and shall at opportune time apply for it to be struck out with costs.

35. Lastly, the Plaintiff prays that the Defendant's Counter Claim be dismissed with costs and judgment be entered for the Plaintiff as prayed in the Plaintiff.

36. The plaintiff's evidence was uncontroverted because the defendant despite being served and a return of service dated 27/9/21 for the mention of 29/09/21 and the return of service dated 30/09/21 for the hearing of 7/10/21 being filed in court did not attend both the mention and the subsequent hearing and neither did the defendant file any written submissions.

The Plaintiff's Submissions

37. The Plaintiff's submissions are dated 19th October 2021. Their claim is against the defendant for breach of contract as they were to purchase Land Reference No. 209/4292 commonly known as "Solar House". The plaintiff is the registered owner of the suit property. The plaintiff reiterated the statements made in the pleadings on record under the brief history of the matter.

38. The Plaintiff contends that the key issues for determination are as follows: -

i. Whether the Defendant breached the Terms of Agreement or Sale of Land Registration Number 209/1292 dated 30th May 2018,

ii. Whether the Plaintiff was entitled under the Agreement lor Sale of land dated 30 May 2018 to treat as forfeited Kshs 52,000,000.00 paid by Defendant's director as deposit.

iii. Whether Agreement for Sale of land dated 30th May 2018 was self-contained and exclusive in respect to sale and purchase of land Registration Number 209/ 4292.

iv. Whether the Plaintiff committed any act amounting to misrepresentation or fraud as its alleged by the Defendant.

v. Whether the Defendant was the sole architect of its misfortunes leading to breach of Agreement for sale of land Number 209/1292.

vi. Whether the Plaintiff is entitled to the prayers sought in the plaintiff,

vii. Whether the Defendant is entitled to prayers in the Defendant's Counter Claim.

39. The plaintiff submitted that it relied on section 3(3) of the Law of Contract Act Cap 23, Laws of Kenya.

Whether the Defendant breached the Terms of Agreement or Sale of land Registration Number 209/1292 dated 30th May 2018"

40. The plaintiff contended that from the onset, a contractual relationship must contain such elements as required by law for it to be binding. The elements include *inter alia*; offer, acceptance, consideration and intention to create a legal relationship. It relied on the cases of *Garvey v Richards (2011) JMCA*; *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co. KG (2010) UKSC 14*; *Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd (2020) eKLR*; *Balozi Kenya v KPLC (2021) eKLR*.

41. The plaintiff submitted that the Defendant initiated a contractual relationship when it made an offer letter to purchase Solar House (See Exhibit 1). The Plaintiff would have turned down the offer as proposed by the Defendant. The Plaintiff would also have given a counter-offer. However, Exhibit 2 shows that the Plaintiff was pleased by the offer. The Plaintiff accepted it and drafted an Agreement for sale of land. As expressed in detail above, the defendant shaped, fashioned and curved the most suitable terms they considered fair to them for inclusion in the Agreement. They then communicated to the Plaintiff the said terms hoping the Plaintiff would accept them. The terms in Exhibit 1 addressed among other issues parties, property description, consideration and terms of Payments of consideration.

42. The plaintiff submits that they prepared as required by law, a draft agreement for sale, the same was reviewed by the defendant, amended and the final agreement for sale was executed on 30/5/2018 as per section 3(3) of the Law of Contract Act. It relied on *Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki (2018) eKLR*; *Attorney General of Belize et al Vs Beliza Telecom Ltd & Another (2009) IWL 1980*; *National Bank of Kenya vs Pipeplastic Samkolit (K) Ltd & another (2001) eKLR*.

43. It is their contention that the defendant could have included a provision that the balance was being financed by a bank. That the defendant proposed the purchase price, knew the deposit payable, proposed 90 days as completion date therefor the transaction was clear in his mind. The defendant was not able to pay the balance within 90 days or at all. They relied on *KINLUC Holdings Ltd v Mint Holdings Ltd & Another (1998) eKLR*.

Whether the Plaintiff was entitled under the Agreement for Sale of land dated 30 May 2018 to treat as forfeited Kshs 52,000,000.00 paid by Defendant's director as deposit.

44. They submitted that the defendant was served with completion notice but did not rectify the default by paying the balance, therefore the Plaintiff is entitled under the agreement to retain 10% deposit as liquidated damages. They relied on **Condition 13.4 of the Law Society Conditions of Sale 2015** and the case of *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co. K.G (2010) UKSC 14*.

Whether Agreement for Sale of land dated 30th May 2018 was self-contained and exclusive in respect to sale and purchase of land Registration Number 209/ 4292.

45. It is the Plaintiff's submission that the parties are bound by what was provided in the agreement for sale. They relied on the case of *Urithi Housing Co-operative Society Ltd v Ndimba Tea Factory Ltd (2021) eKLR*.

Whether the Plaintiff committed any act amounting to misrepresentation or fraud its alleged by the Defendant.

46. The plaintiff submitted that the defendant stated that the director personally went to Solar House where he was shown and given a two-page flow chart/schedule of rental income. That they entered into an agreement subject to the strength of income generated from solar house. The plaintiff contends that that allegation is further from the truth. That if the defendant needed any information, he would have requisitioned it from the Plaintiff.

47. The plaintiff further contends that they supplied the defendant with documents as per Exhibit 5, 9 and 10 by way of Exhibit 12 and the defendant alluded to bank financing but did not request for information or documents. That it is only on Exhibit 18, 20 and 21 dated 8/10/2018 and 17/10/10/2018 respectively that the defendant requested rent schedules for bank's consideration. It is submitted that the said rent schedules were not to make a difference to the terms of the already executed agreement. That it is therefore misleading for the defendant to claim fraud, misrepresentation and breach of warranty when the documents were only asked for after defaulting on the agreement.

48. Additionally, the plaintiff submitted that the claim by the defendant alleging that the plaintiff bloated the value of the property when the defendant was the one who proposed the purchase price and deposit is misleading. They relied on **condition 6.2 of the Law Society Conditions of Sale 2015** and the case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited (2017) eKLR*.

Whether the Defendant was the sole architect of its misfortunes leading to breach of Agreement for sale of land Number 209/1292.

49. The plaintiff contends that the above submissions only show that the defendant is not only the author of its misfortune but the executor thereto. They submitted that the only other person the defendant may possibly point to is its advocates.

Whether the Plaintiff is entitled to the prayers sought in the plaint.

50. The plaintiff submitted that the parties anticipated an event of default. That that was the reason they made a provision for it. It is their contention that that the agreement has to be followed as agreed. They relied on the case of ***Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki (2018) eKLR***.

Whether the Defendant is entitled to prayers in the Defendant's Counter Claim.

51. It is their submission that the agreement was simple and time was of the essence even after extensions. They relied on the case of ***Kihuba Holdings Limited v Charo Karisa Ngulu (2021) eKLR and Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others (2018) eKLR***.

52. Lastly, the plaintiff submits that the court should vacate the cautions and caveat, listed in the defendant's list of documents, for the interest of justice. That while allowing the Plaintiff's prayers in the Plaint, the court should dismiss the Defendant's Counter-claim so as to pronounce itself to indolent purchasers.

The Defendant's Submissions

53. The Defendant did not file written submissions.

Determination.

54. Having read and considered the pleadings, the evidence adduced at the hearing by the plaintiff which remains uncontroverted, the written submissions by the plaintiff and all other materials placed before me, the issues that commend themselves for determination are as follows; whether the defendant is in breach of the terms of the agreement of sale of LR 209/4292 dated 30/05/2018" Whether the plaintiff is entitled to the reliefs sought" Whether the plaintiff committed any acts amounting to misrepresentation of facts or fraud" Whether the defendant is entitled to reliefs sought in the counter-claim" Who should bear the cost of the suit"

55. It is not in dispute that the Plaintiffs case is uncontroverted. That being the case he retains the burden to proof his case, albeit, on a balance of probabilities.

56. As to whether the defendant breached the agreement for sale, Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

"a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

57. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of ***Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.*** held as follows:

"The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

58. Equally in the case of ***Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board (1973) I WLR 601 at 609***, held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

59. Based on the above decisions, the starting point for me will be the agreement that the parties signed and the terms therein. According to the agreement the defendant was to pay the balance of the purchase price on or before the completion date which was ninety (90) days from the date of the agreement dated 30th May 2018.

60. It is the Plaintiff’s position that the Defendant breached the agreement and failed to meet the obligations set out in the agreement to wit; breaching the conditions in the agreement, entering into an agreement without sufficient funds to complete and failure to pay the balance of the purchase price even after extension of completion period.

61. The completion date for the agreement was 90 days from the date of signing i.e. 30/05/18. The Plaintiff issued a notice to complete on 14/08/2018 and followed with another reminder on 24/08/2018. Another letter dated 30/08/2018 reminded the defendant that the completion date was long overdue and that they were in default as outlined in Clause 5.2 of the agreement; and the plaintiff gave a further 21 days completion notice to rectify the default. The fact of the matter is that the Defendant did not complete the transaction as per the agreement and I find and hold that the defendant was in breach of the aforestated agreement.

62. The Plaintiff has annexed a copy of a letter dated 14/09/2018 from the defendant where they pleaded for 60 days for them to secure funding and in a letter dated 20/09/2018 the Plaintiff advocates wrote a letter to the defendant’s accepting their request of extension subject to 10% deposit being forfeited and the balance of the purchase price to accrue interest at market rate. This further puts the probity of the agreement into question.

63. The defendant has also pleaded misrepresentation and fraud on the part of the plaintiff. The claim has not been proved at all.

64. The definition of fraud in my view has to be exhaustive. Courts must be careful not to create definitional strictures in the manner in which fraud is defined. Fraud as it may well be said manifests in various fashions and flairs and it is important that Courts are vigilant to identify its head howsoever it postures itself. For this case I shall adopt the definition given in Black’s Law Dictionary, 9th Edition which defines fraud as thus;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

65. Fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The Court cannot infer fraud from the pleadings. It must be pleaded in a particularized manner and proven by leading evidence. The former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” See also the case of **Koinange & 13 others v Koinange [1968] KLR 23**.

66. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that; -

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not

necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308**).

67. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see **Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

68. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. The onus was on the Plaintiff to prove fraud on the part of the Defendant. He did discharge that duty. In the case of **Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc135/1998** it was held that whether there was fraud is, however, a matter of evidence.

69. Equally in the case **Emfil Ltd v Registrar of Titles Mombasa & 2 others [2014] eKLR** this Court pronounced itself as follows on the issue: -

“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....”

70. Lord Denning LJ in a famous dictum in the case of **Lazarus Estates Ltd v Beasley [1956] 1 QB 702, 712** stated that;

“No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever ...” (emphasis is mine).

71. Section **71 to 75 of the Land Act** addresses the issue of placing of caveats on land and providing guidance on deciding whether a caution ought to be removed, the Court should consider whether the Cautioner has a substantial point in his favour. However, from the evidence produced by the defendant the same is in the negative as the sale agreement was breached.

72. The Defendant lodged a caveat on 7/10/2019 claiming the purchaser's interest on the plaintiff's property L.R.209/4292 but never appeared in court or presented any evidence to support why the caveat should not be removed. The plaintiff's prayer for removal of the caveat is uncontroverted.

73. The lodging of caution on any property is governed by **Section 71(1)** of the **Land Registration Act**, which provides:-

“A person who: -

a) **Claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;**

b) ...

c) ...

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.”

74. Therefore, from the above provision of law, a person who lodges caution over any property is one who claims right whether contractual or otherwise.

75. The cautioner did not appear in court to defend or justify their action of lodging the caveat in issue. The Court is persuaded by

the findings in the case of *Maria Nganga Gwako....Vs... Charles Mwenzi Nganga, Civil Appeal No.287 of 2012 (2014) eKLR*, where the Court held that:-

“When a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place.....

In the absence of any reasonable cause shown by the Respondent as to why the said caution should not be removed, the application for the removal of the same must succeed”.

Section 73(1) of the Land Registration Act, states as follows: -

“A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar”.

76. The cautioner has not applied to remove the Caveat. However, the Plaintiff who claim ownership interest has done so. The defendant who is the cautioner has not raised any objection on why the caveat should not be removed. The Court finds that there is no basis for continuing to have the caveat lodged against the said title.

77. Is the plaintiff entitled to reliefs sought" Having held that the defendant is guilty of breach of the contract, the next thing I need to determine is the question of reliefs. In the case of **Hadley Vs Baxendale (154) 9. Exch 214 where Anderson P at page 354** stated as follows:

“Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e. according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it.”

78. Further in the case of **Millicent Perpetua Atieno Vas Louis Onyango Otieno (2013) e KLR**, the Court of Appeal quoted with approval **Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183** on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

“where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain.....”

79. The agreement contains a clause on default. The defendant being in default, the agreement provided that:

“in the event the vendor is unable to complete this agreement, the purchaser may rescind the agreement and the vendor/beneficiary shall refund the entire deposit paid and 100% of the purchase price as liquidated damages but less any outgoings and disbursements that may have been reasonably incurred at the express and or implied direction of the purchaser in addition to any other remedies available in law”.

80. It is clear that the parties anticipated an event of default. I find no valid reason to deny the plaintiff in the sum of Kshs 52,000,000/- as agreed in the agreement by the parties where either party who was at fault would forfeit 10% of the purchase price and on the part of the vendor they would have to pay interest. In the circumstances I am persuaded and convinced that the plaintiff is entitled to the 10% which was paid by the defendant as a condition of the sale agreement.

81. In my conclusion, the Defendant is in breach of contract and the claim being undefended I grant the Plaintiff's prayers as follows; -

a) *Removal of the Caveat registered as LR NO. 209/4292 against the title of the suit*

b) The Land Registrar in Nairobi is directed to effect or facilitate the order issued in (b) above

c) The deposit of 10% of the Purchase price that was paid by the Defendant to the Plaintiff is forfeited to the Plaintiff as damages for breach of contract.

d) The defendant's counter-claim is dismissed

e) Costs of the suit and the counter-claim are in favour of the Plaintiff.

Orders accordingly.

Dated, signed and delivered this 1st Day of November 2021.

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MOGENI J.

JUDGE

In the presence of

Mr WanyingiFor Plaintiff

NA.....Defendant

Mr. Vincent Owuor Court Assistant.



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