THE ARBITRATION ACT 1995 (REV. 2010)

AND

THE CHARTERED INSTITUTE OF ARBITRATORS
(KENYA BRANCH) ARBITRATION RULES 1998

ARBITRATION BETWEEN

PAUL OPIRA (VENDOR).....1ST CLAIMANT
EVERGREEN INVESTMENTS LTD.....2ND CLAIMANT

AND

VIKING LTD (PURCHASER) ….....RESPONDENT

FINAL AWARD

ARBITRATOR: **Paul Ngotho FCIArb, Arbitrator**
7th Floor, Tower A
Eden Square
Chiromo Road
P O Box 1870 - 00606
Nairobi

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A. THE PARTIES, REPRESENTATIVES AND ADDRESSES

1. The **1st Claimant** is Mr Paul Opira (**"Mr Opira"**), P O Box 31360 – 00204, Nairobi. The 2nd Claimant is Evergreen Investments Ltd of c/o P O Box 69191 – 00930 Nairobi. It is a limited liability company incorporated in Kenya. The 1st Claimant is a director and shareholder of the 2nd Claimant.

2. The **2nd Claimant** has acquired the 1st Claimant's interest in the property. Its joinder in these proceedings was by consent. In any case, the vendor is described in the Agreement for Sale as Mr Opira including his "personal representatives and assigns".

3. Both Claimants are represented by Ms Salome Mwatu of Mwatu Advocates of 4th Floor, ACE Building, Kenyatta Avenue, P. O. Box 4641 – 00400, Nairobi. Her email addresses are: info@mwatuadvocates.co.ke and salomemwatu@yahoo.com

4. The Respondent is Vaiking Ltd, P O Box 17259 – 00703 Nairobi (**"the Respondent"**). It is a limited liability company incorporated in Kenya. The contact person during the sale transaction was Mr Gilbert Tunu ("Mr Tunu")

5. The Respondent is represented by Waiyaki Tanui & Co Advocates, NBK Plaza, 4th Floor, Timboroa Highway, P O Box 35209 – 00504 Nairobi. Mr Mutiso Nyali, an advocate in that firm, attended the proceedings. His emails are: mutiso@waiyakitanui.co.ke and wnyali@yahoo.com

B. BACKGROUND

6. The 1st Claimant owned a vacant parcel of land known as Land Reference No. 46715/587 in Athi River just off Mombasa Road in Machakos County beyond the City of Nairobi. The property was a leasehold title for 99 years from 1st November 1995.

7. The parcel extended to about 2.028 hectares or 5.011 acres. The Respondent bought part of the land following an Agreement for Sale dated 22nd January 2007.

8. The areas of the parcels after sub-division are shown in the deed plans dated 23rd August 2007 and in the new titles registered on 26th September 2007 as follows:

LR Number	Area (Ha)	Owner immediately after Subdivision
46715/587/1	0.1926	Local authority - access road*
46715/6319	0.9177	Mr Opira (1st Claimant)
46715/6320	0.9177	Viking Ltd (Respondent)
Total	2.0280	

* This portion was surrendered by the 1st Claimant to the local authority free of charge as a subdivision condition.

9. It is worth noting early that the 1st Claimant and the Respondent got 0.9177 of a hectare each. Most significantly, the Respondent's land is less than the 1.014 ha,

which is the area it understands from the Agreement it was entitled to from the 1st Claimant.

10. Property LR No. 46715/6319 was at first transferred to Night Promotions Ltd and then to the 2nd Claimant while LR No. 46715/6320 was transferred to the Respondent. The 2nd Claimant is currently developing LR No. 46715/6319 with 7 blocks of multi-storey apartments and a swimming pool for sale and is apprehensive that it might not get a completion certificate in view of the location of the boundary wall erected by the Respondent. The location of that wall was contested by both sides.

11. Property LR No. 46715/6319 is charged to Big Bank of Kenya Ltd, but the 1st Claimant submitted that it held a signed discharge from Barclays. The apartments on that property were in the process of being sold to third parties. The parties to these proceedings did not wish to notify any of those parties of this arbitration.

12. The Respondent has carried out some improvements on property LR No. 46715/6320 including erecting a boundary wall, excavating the site and back-filling it with hardcore.

C. THE DISPUTE

13. A dispute has arisen, essentially on what acreage the Respondent was entitled to under the Agreement for Sale.

D. THE ARBITRATION AGREEMENT

14. Clause No. 8 of the Agreement for Sale provides that,

> *"any dispute and questions whatsoever which shall arise between the parties hereto touching on this agreement or relating to the rights and liabilities of either party hereto shall be referred to an arbitrator to be appointed by agreement of both parties and in the absence of agreement by the Chairman of the Kenya Inter-Professional Society and the decision of such arbitrator shall be final and binding on the parties hereto."*

E. ARBITRATOR APPOINTMENT, ACCEPTANCE AND DISCLOSURES

15. The parties attempted to appoint an arbitrator themselves as stipulated in the arbitration agreement but were unsuccessful.

16. I was appointed the Sole Arbitrator in this matter by the Chairman of the Kenya Inter-Professional Society in a letter dated 1st December 2012 and copied to the parties, following a request from the 1st Claimant.

17. Having confirmed that my appointment was in compliance with the procedure specified by the parties in the arbitration agreement, I accepted the appointment on 16th November 2012 in a letter to the parties and in a separate letter to the appointing authority.

18. Prior to accepting the appointment, I checked and found no circumstances to disclose that were likely to give rise to justifiable doubts as to my impartiality or independence.

19. I am aware of my continuing obligation to make disclosures. I disclosed to the Respondent when the Claimants' advocate contacted me. The parties agreed that the contact did not qualify for my disqualification.

F. THE CONTRACT

20. The 1st Claimant sold property LR No. 46715/6320 for Ksh.7,500,000/= to the Respondent following the Agreement for Sale dated 22nd January 2007 "Agreement" drawn by Mame & Company Advocates, who according to Clause No. 6 of the agreement acted as the advocate for both parties in that transaction. The agreed completion date was "on or before 20th April 2007".

21. The critical terms of the Agreement for Sale with respect to these proceedings are found in the **Special Conditions** within the agreement:

> *(i) "The Vendor **undertakes**, upon execution thereof to immediately commence the process of subdividing the land into two portions of ...**1.014 hectares each**.." (Special Condition Clause A)*
>
> *(ii) "The vendor undertakes, and shall have the surveyor provide for an access road adjacent the boundary with Land Reference Number 12715/588 **into** the sub-divided parcel up for sale." (Special Condition Clause C)*
>
> *(iii) The agreement allowed the Respondent to take possession of its portion **immediately** and to build sheds and garages upon the execution of the agreement and payment of the deposit, pending the sub-division and completion of the sale. (Special Condition Clause D)*
>
> (iv) Each party was to bear its legal fees and disbursements. (Clause 5 in the Agreement of Sale)

22. As is common practice the Agreement incorporated, in its Clause 4, The Law Society Conditions of Sale 1989 Edition ("LSK Conditions") into the contract except where specifically modified by the parties.

G. THE CLAIM

23. The Claimants claim the following:

(i) An order for the Respondent to demolish the existing boundary wall the Respondent has built near the surveyed boundary line.

(ii) Replacement of the beacons as per the deed plans at the Respondent's cost.

(iii) Damages for “lost opportunity and time” and for the inconvenience suffered by the Claimants during the development of their scheme due to the Respondent's alleged encroachment/wall.

(iv) The costs they have incurred in the course of the arbitration.

24. The Respondent's position is that it was shown where to build the boundary wall between the 2 parcels by the 1st Claimant's authorised agents and that, therefore, the wall cannot constitute an encroachment.

H. THE COUNTER-CLAIM

25. The Respondent claims that it is entitled to 1.014 hectares and that the subdivision which resulted in its portion being 0.9177 of a hectare is inaccurate and fraudulent. It seeks:

(i) An order to re-survey the land in order to have its portion extended to 1.014 ha. as per the Agreement of Sale. In the alternative, the Respondent seeks compensation of the land it lost.

(ii) A refund of Ksh.92,210/= from the 1st Claimant being legal fees paid by the Respondent to their common advocate allegedly on behalf of the 1st Claimant.

(iii) Interest on the above sum of Ksh.92,210/= from the date the Respondent paid it to the date of reimbursement in full.

(iv) General damages for breach of contract.

(v) Dismissal of the Claimant's case with costs.

(vi) Any other Relief I find fit.

26. The Claimants' position is that the“sub-divided equal part” in the Agreement meant 0.9177 ha, which is half the portion available for distribution after the surrender of 0.1926 ha of road reserve to the local authority and that, therefore, the 1st Claimant had the subdivision carried out in compliance with the Agreement. The relevant Special Conditions state:

*B. It is a fundamental term of this Agreement shall have the piece of land sub-divided … the Purchaser purchases **the sub-divided equal parcel**"*

*C. The Vendor undertakes, and shall have the surveyor provide for an access road … **into** the subdivided parcel up for sale"*

I. ARBITRATION PROCEDURE

27. I held a Preliminary Meeting in Nairobi Serena Hotel on 27th November 1012.

28. The parties declined my request for them to consider negotiation or mediation (under someone else) of the dispute, to save time and costs, having been unsuccessful in their earlier attempts to settle the dispute amicably through common friends.

29. The parties adopted the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules of 1998 "the "Rules") to govern these proceedings.

30. They allowed me to take an inquisitorial approach during these proceedings. They also allowed me to use my expertise in property matters provided that I disclosed the relevant information to the parties for comment.

31. Neither the parties nor myself were then or later aware of circumstances giving rise to justifiable doubts on my independence and impartiality.

32. The parties would not agree on a simplified procedure, so I adopted a full procedure with Written Statements, Witness Statements, Expert Reports, Written Submissions, two Oral Hearings and written Closing Submissions.

33. The other main documents presented by the parties to me are copies of the Agreement, transfers, titles of properties LR. Numbers 46715/587, 46715/587/1, 46715/6319 and 46715/6320, an earlier sub-division plan of LR No. 46715/587 dated 14th January 1997 and plans for construction of the contentious wall duly approved by the Municipal Council of Mavoko.

34. Using the inquisitorial powers which were granted to me by the parties, I drew the attention of the parties to the LSK Conditions, the Survey Act Cap. 299 and the Survey Regulations (L.N. 168 of 1994, L.N. 96 of 1999) to the parties in my Order for Directions No. 6 of 11th March 2013.

35. Apart from routine applications from both sides for extensions of time etc, the Claimant made a belated application to submit 3 Witness Statements after I had closed the submission of written statements, but prior to the oral hearings. The Respondent opposed the application but I accepted the application in view of the importance of a party's right to be heard and also of the finality of arbitration which means that a party would not have another forum to be heard on the merits.

36. I held Oral Hearings in the Serena Hotel Board room on 4th and 29th July 2013. All the witnesses who appeared gave evidence on oath. The proceedings were recorded in transcripts, which I forwarded to the parties for comment but none of the parties responded.

37. The Claimants presented the following witnesses at the hearing:

(i) Mr Joseph Bell ("Mr Bell") is a Licensed Surveyor as an expert witness.

(ii) Mr Mant Mwago ("Mr Mwago"), an advocate of the High Court of Kenya as a witness of fact.

(iii) Mr Opira, the 1st Claimant as a witness of fact.

(iv) Mr Albert Murungo ("Mr Murungo"), who was a director of the 2nd Claimant as a witness of fact.

38. The Respondent presented Mr Kihura, a director of the Respondent company as a witness of fact. It also presented a report from F K Mihaka, Surveyor.

39. The parties supplied me with enough evidence for me to reach a decision without me having to make a site visit.

40. I later invited the parties to address me on costs and interest just before finalising this award in order to ensure completeness of the award.

41. The parties did not ask for any special form of award. Therefore, the default form of award as specified in the Act and the Rules apply.

J. MATTERS NOT IN DISPUTE

42. The following matters are not in dispute:

(i) Validity of the agreement for sale

(ii) That the Law Society Conditions of Sale of 1989 were applicable to the sale.

(iii) Validity of the arbitration agreement.

(iv) That the price of property LR No. 46715/6320 was Ksh.7,500,000/=.

(v) That the purchase price was paid in full.

(vi) The parties' rights to own and occupy their respective parcels other than the disputed strip of land.

(vii) The identities of the three parties and their respective interests.

(viii) That the land was subdivided longitudinally as specified in the Agreement of Sale.

(ix) That the Respondent took early possession of the property, with the 1st Claimant's consent, before the survey was conducted and that it was shown where to build the boundary wall by the Claimant's land surveyor acting as the 1st Claimant's agent.

(x) That it was the 1st Claimant's responsibility to have the land sub-divided as per the Agreement of sale and at its cost.

(xi) That the Respondent paid his own and the 1st Claimant's shares of the legal fees payable to their joint advocate for this transaction.

K. AMENDED FINAL LIST OF ISSUES FOR DETERMINATION

43. The parties would not agree on a joint list of issues for determination. They submitted separate lists each with 14 – 21 issues from which I prepared a consolidated list, which I submitted to the parties for comment and revised accordingly to arrive at the following Amended Final List of Issues for Determination:

"1. Is the 1st Claimant in breach of contract for having the portion it sold to the Respondent surveyed to 0.9177 of a hectare instead of 1.014 hectares, i.e. exactly 50% of the original acreage of 2.028 hectares?

2. Was the sale price of Ksh. 7,500,000/= based on the acreage of 1.014 ha.?

3. Whether or not the Respondent acquiesced to the net acreage of 0.9177 ha. by signing the transfer documents and accepting the title.
4. Was it lawful for the Respondent to build the subject boundary wall?

5. Whether or not the 1st Claimant lost its right over the portion of LR No. 46715/6319 it claims was encroached by the Respondent for not objecting when the Respondent constructed the wall.

6. Was it a term of the contract that the parties would share equally, or at all, the legal and other transaction cost?

7. Who shall bear the cost of reinstating beacons or re-surveying the 2 plots?

8. Who shall bear the costs of these proceedings?"

L. THE CONTENTIONS, EVIDENCE AND FINDINGS ON THE LISTED ISSUES

44. Issue No.1 - Is the 1st Claimant in breach of contract for having the portion it sold to the Respondent surveyed to 0.9177 of a hectare instead of 1.014 hectares, i.e. exactly 50% of the original acreage of 2.028 hectares?

45. This is the primary issue for determination in this dispute. All the others are incidental.

46. The Agreement stipulated the exact acreage sold/bought in very clear language. Sample the following:

> *"The vendor is desirous of selling one decimal nought one four (1.014) hectares out of the total acreage of two decimal nought two eight (2.028) hectares … The Vendor is desirous of purchasing the said 1.014 hectares"* (Preamble)
>
> *"The Vendor sells and the Purchaser purchases **one decimal nought one four (1.014) hectares** out of Land Reference Number 46715/587, which comprises of two decimal nought two eight (2.028) hectares or thereabouts". (Clause No. 1 of the Agreement)*

47. Those clauses are simple, clear and free of ambiguity, but their implementation and differing interpretations have given the parties much grief.

48. Those clauses do not state how much land the vendor (1st Claimant) would be left with. They restrict themselves to what is sold/bought. It is of no interest to a purchaser how much land the vendor is being left with. Put differently, the acreage being retained by the vendor is not the subject of the Agreement for Sale.

49. The Respondent understood the contract to mean that it was buying 1.014 hectares net of road reserve, while the 1st Claimant says he believed he was selling 1.014 hectares gross of some acreage that would be taken by the road reverse.

50. The 1st Claimant **undertook**, in Special Condition A, to subdivide the land into two portions of 1.014 hectares each. Obviously he simply could not, since he did not have 2.028 hectares to apportion once the local authority claimed 0.1926 of a hectare for a road reserve. Instead, he set aside 0.1926 ha to the road and divided the remainder into 2 equal portions of 0.9177 ha each.

51. Mr Kihura's reaction was that the 1st Claimant's argument that the parties should share equally what remained after the road surrender was not what the contract provided and that such an approach to sub-division would have made sense only if the Respondent and the 1st Claimant had owned the land jointly and wished to share it between themselves which was obviously not the case here.

52. The Respondent's position is that the 1.014 ha. provided for in the agreement is the net area due to him and that it cannot be affected by the local authority's requirement for the surrender of land for the road, and that any land claimed by the

council to facilitate the subdivision should come from the 1st Claimant's portion.

53. The Respondent claimed that the 1st Claimant was by 2007 fully aware of the requirement to surrender the road strip to the local authority. Mr Kihura submitted a sub-division plan dated 14th January 1997 which is for all practical purposes the one that the 1st Claimant executed in 2007.

54. The 1st Claimant says that the 1997 plan aborted and that the subdivision plan he executed in 2007 was different. Whether the 1997 plan was the one carried out in 2007 or not is not important. The critical thing is whether or not he was, prior to executing the Agreement on 22nd January 2007, aware that the local authority would require the surrender of the road strip. I find that he was. If in doubt, he could have easily verified the position by making an enquiry from the local authority prior to executing the Agreement.

55. It follows, then, that he should have taken that into account in the transaction by either providing for the sale of 1.014 ha and being left with less land himself or offered to sell 0.9177 to the Respondent.

56. Taking the 1st Claimant's argument further would lead to an absurdity. Supposing, for argument's sake, the local authority or some other statutory body had claimed a whole hectare of land leaving 1.028 ha, would the 1st Claimant have rightfully transferred to the Respondent 0.514 ha, i.e 50% of the the net/balance area of 1.028 without consultations or renegotiations? The 1st Claimant's approach is simply untenable.

57. The transfer conveying the parcel LR No. 46715/6320 from the 1st Claimant to the Respondent and signed by both directors of the Respondent company shows clearly that parcel conveyed measures 0.9177 of a hectare. The Claimants say that, therefore, the Respondent was, from the date the Respondent signed the transfer, aware of the size of the land it purchased and should not after so many years claim more land. That leads to the LSK Conditions which stipulate as follows:

> *Condition No. 10*
>
> *"(1) Within 14 days after delivery to him of the abstract, title deeds or copies, the purchaser may give the vendor notice in writing of any objection to or requisition on:*
>
> *(a) title or evidence of title; or*
> *(b) the **description** of the property; or*
> *(c) the abstract; or*
> *(d) the contract, as regard matters not herein specifically provided for;*
>
> ***Subject to any objection or requisition, the purchaser is deemed to accept the vendor's title.***
>
> ***(2) No objection or requisition may be made subsequently unless it could***

not have been made on the information supplied by the vendor.

(3) All objections and requisitions shall be answered in writing within fourteen (14) days after receipt and, if not answered, are deemed to be correct.

(4) Time is of the essence in this Condition"

Condition No. 12(2) with respect to leaseholds

"The purchaser is deemed to have notice of the contents of the lease or underlease creating the interest sold and the sale is not affected by any partial, incomplete or inaccurate statement in the contract with respect to the lease or underlease."

Condition No. 14.(5)

"Subject to this Condition, and after he has had an opportunity of inspecting the property, the purchaser has notice of the identity of the property and of its actual state and condition and he takes it subject to such state and condition"

Condition No.18.(1)

No compensation *is payable nor may the contract be rescinded in respect of any description,* ***measurement or quantity*** *which is substantially correct* ***nor in respect of any matter of which the purchaser has notice*** *under sub-conditions 12(2), 14(5) or 20(1).*

I note that the titles before and after the subject subdivision were leasehold.

58. Clearly, the 1st Claimant belatedly "mitigated" the loss of land to an access road by apportioning it proportionately to the 2 parcels. Whatever the case, the 1st Claimant had no authority to unilaterally make a decision adverse to the Respondent.

59. Mr Bell is a Licensed Surveyor with over 40 years of experience. He was called by the 1st Claimant as an independent expert. He told me that the "correct way" to subdivide property LR No. 46715/587 was to first allow for the road reserve and then divide the remainder land into two equal portions.

60. He admitted at the hearing that he was not, when he carried out the survey, aware of the 1st Claimant's contractual obligation to sell 1.014 hectares to the Respondent. He also admitted that it would not have been unlawful to allocate 1.014 ha to LR 46715/6320. All the same, he cannot be faulted for carrying out the survey the way he did as he was simply following the 1st Claimant's instructions.

61. It transpired at the hearing that Mr Bell had not carried out the subdivision himself and that he did not have personal knowledge of the property as he had never been to the property. He had carried out the survey through his associate or assistant by the name Mr Alois Mutua.

62. Mr Mwago was, quite understandably, hesitant to comment on how the sub-division should have been carried out as he had acted as the advocate for both parties in the transaction.

63. I find that the 1st Claimant breached the contract by selling to the Respondent 0.9177 ha instead of 1.014 ha.

64. However, the Respondent's claim for general damages for breach of contract fails due to the provisions in the various LSK Conditions quoted in para. 57 above. Condition No. 10 specifically makes time of the essence in that clause.

65**. Issue No. 2 - Was the sale price of Ksh. 7,500,000/= based on the acreage of 1.014 ha.?**

66. The short answer is “yes”.

67. Clause 2 of the Agreement states that,

> *“The consideration passing from the Purchaser to the Vendor is Kenya Shillings Seven Million Five Hundred Thousand (Ksh.7,500,000/=)...”*

68. Furthermore, Special Condition A provides that,

> “*The Vendor undertakes, upon execution hereof to immediately commence the process of subdividing the land into two portions of once decimal nought one four (1.014) hectares each at this own cost and shall also obtain the necessary consents to subdivide and transfer one of the subdivided portions.”*

69. Read together, the two provisions and the others quoted above demonstrate beyond any doubt that the Respondent paid Ksh.7.5m for the purchase of 1.014 hectares. It would be most absurd if the parties had agreed on a price of Ksh.7.5m regardless of the acreage.

70. Land is sold by the acre/hectare. Once the land in a specific location has been identified, the item most robustly negotiated is the unit price, which is then applied to the acreage/hecterage to arrive at the total price.

71. Therefore, I have no difficulty in finding that the sale price of Ksh. 7,500,000/= was the price for 1.014 ha.. The upshot of this is that the Respondent, having received 0.9177 of a hectare was short-changed for 0.0963 of a hectare i.e. 0.2380 of an acre.

72. **Issue No. 3 - Whether or not the Respondent acquiesced to the net acreage of 0.9177 ha. by signing the transfer documents and accepting the title.**

73. According to the four LSK Condition quoted in para 57 above, the Respondent lost its right to demand the area it was entitled to under the contract when it failed to detect the shortfall in time. Time is of the essence in that clause.

74. Indeed, the conveyance, which as noted above shows lesser acreage that what is in the Agreement, is deemed to have been prepared by the Respondent, according to LSK Condition No. 24.(1), which states,

> *"The conveyance shall be prepared by **the purchaser** and delivered to the vendor for perusal and approval not less than Fourteen (14) days before the completion date"*

75. Therefore, the Respondent had adequate notice of the size of the parcel being transferred to him.

76. The Respondent seeks re-survey of the subject parcels such that its portion would be extended to 1.014 hectares as provided in the agreement. It is barred by LSK Condition No. 10 from having the land re-surveyed now or from getting any compensation for its loss.

77. I find that the Respondent acquiesced to the net acreage of 0.9177 ha.

78. I also find that its loss has been mitigated by the fact that it had, prior to the date of signing the subject transfer, established its claim on the ground by erecting a fence at the position shown by the 1st Claimant and taken possession of the property.

79. Issue No. 4 - Was it lawful for the Respondent to build the subject boundary wall?

80. The Claimants claim that the Respondent's wall has encroached on the Claimant's property LR. No. 46715/6319 and are apprehensive that they might not be granted a Completion Certificate for their new project in view of the current location of the boundary wall. They admitted that they did not verify the position of the wall prior to embarking on their project.

81. It turned out that the boundary wall was not on the position shown on the deed plan to mark 0.9177 of a hectare or the one marking 1.014 hectares but a totally different location marking 0.9398 of a hectare according to unchallenged evidence submitted by F K Muhaka engaged by the Respondent.

82. The Respondent submitted a report from F K Muhaka with a sketch of the site and a calculation of the area fenced off by the Respondent. F K Muhaka signed the repost as a "Surveyor", and, significantly, not as a "Licensed Surveyor", and did not submit a CV or attend the hearing. All the same, his/her sketch and workings were not disputed by the parties or by Mr Bell.

83. The Respondent built the wall with the 1st Claimant's full knowledge, at the location pointed out by the 1st Claimant's knowledge. I find that it was lawful for the Respondent to build the subject boundary wall where it did.

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84. Consequently, the Claimants' claims for damages for lost trespass, opportunity, time and inconvenience and for demolition of the wall fail.

85. Issue No. 5 - Whether or not the 1st Claimant lost its right over the portion of LR No. 46715/6319 it claims was encroached by the Respondent for not objecting when the Respondent constructed the wall.

86. As noted above, the current boundary wall was erected by the Respondent at the position shown by the 1st Claimant and with the 1st Claimants full consent.

87. The 1st Claimant cannot later turn round and say that the wall was built at the wrong place and demand its demolition.

88. Therefore, I find that the 1st Claimant lost its right over any portion of LR No. 46715/6319 behind the existing boundary wall.

89. Issue No. 6 - Was it a term of the contract that the parties would share equally, or at all, the legal and other transaction cost?

90. Clause No. 5 in the Agreement of Sale states that,

> *"Each party shall bear its Advocates legal charges and expenses in connection with the sale transaction but the Purchaser shall bear the charges relating to Stamp Duty on the Transfer and the requisite registration charges at the Lands Office, while the Vendor shall be responsible for obtaining the completion documents at his own costs"*

91. At the conclusion of the sale, the joint advocate raised 2 fees notes both dated 15th January 2008, one addressed to the 1st Claimant and the other one to the Respondent for the services rendered to the respective parties.

92. The Respondent settled both fee notes but now claims a refund of Ksh.92,210/= inclusive of VAT which he claims to have paid on behalf of the 1st Claimant. It is now seeking a refund of that sum and interest from the 1st Claimant.

93. The Respondent insists it made the payment in order to hasten the processing of a mortgage it was arranging with its bank using its new title and that it make the payment on account pending a refund from the 1st Claimant.

94. The 1st Claimant's defence is that there was a tacit or gentleman's agreement under which the Respondent would take responsibility for the 1st Claimant's legal fees.

92. He told me at the hearing that fact that the Respondent did not demand a refund for so many years as proof that the Respondent understood that no refund was payable and that the demand was an afterthought.

95. The 1st Claimant insisted that the Respondent had agreed verbally, after the signing of the contract, to take the responsibility of paying the 1st Claimant's fees. His written statement says that the Respondent "**undertook** to pay my legal fees for the whole transaction despite the agreement stating that each party was to pay its legal fees".

96. Mr Mwago had by the time of the hearing fallen out with the Respondent. That aside, he was careful not to be seen to be siding with either side, having acted for both parties in the subject transaction. The most he let out during cross examination was saying that, *"if my recollection is right I remember Mr Kihura saying he will take care of Opira's fees".*

97. Nothing turns on the fact that Mr Mwago issued 2 separate invoices to his 2 clients. It was in order for him to bill his 2 clients separately in the absence of instructions to the contrary.

98. I find, on the balance of probability that the Respondent agreed to take responsibility of the 1st Claimant's share of the legal fees. The Respondent's claims for both a refund and the attendant interest fail.

99. Issue No.7 - Who shall bear the cost of reinstating beacons or re-surveying the 2 plots?

100. My findings above lead to the recognition, by default, of the existing boundary wall built by the Respondent as the boundary between the two parcels.

101. The 1st Claimant was responsible for the subdivision costs under Special Condition No. A of the Agreement.

102. It does not matter who removed the beacons since they had been put at the wrong place. Suffice to say that no evidence was given to support the 1st Claimant's view that the Respondent removed the beacons which had been placed earlier.

103. I find that the 1st Claimant is still responsible for the cost of installing the new beacons, at the location directed below, and for all the incidental costs.

104. Issue No.8 - Who shall bear the costs of these proceedings?"

105. I repeatedly alerted the parties of the possibility of the costs ending up being disproportionately high and suggested a simplified procedure in order to save time and costs but all in vain.

106. Costs follow the event. The Respondent has generally successfully defended itself against the Claimants' claims but has lost its counter-claim. In such a case, the Respondent would get most of the costs it has incurred in these proceedings. On this count alone, I would have awarded the Respondent 75% of its costs.

107. However, the Respondent spent considerable time and costs responding to the Claimant's numerous applications during these proceedings. I held two oral hearings at the Claimants' insistence, but they turned out not to be very helpful even though they generated over 100 pages of transcripts. The Claimants requested me to prepare a contract for my engagement even though all the terms were contained in my Order for Directions No.1 and the applicable arbitration rules. They even requested me to

prepare summons, which I am not allowed to issue under the Act or the Rules.

108. Therefore, the Claimants shall be responsible for 90% of the Respondent's costs and for 90% of my fees.

109. Interest

110. Interest was not on the listed issues but it was pleaded. The parties agreed that 1.5% per month was a reasonable rate.

M. OPERATIVE AWARD

111. I now **award and direct** as follows because of the reasons given above:

(i) The Claimants shall forthwith and at their cost obtain the necessary consents and install the beacons along their side of the existing boundary wall between properties LR Numbers 46715/6319 and 6320. The beacons shall be positioned at ground level, where the wall touches the ground.

(ii) The Claimants shall bear the cost of all the necessary survey, legal, application and any other procedure or works necessary for the above process including the production of new titles and deed plans, if necessary.

(iii) The 2nd Claimant and the Respondent shall on request fill the necessary forms and present, on receipt of the necessary undertakings, surrender the existing titles and deed plans to facilitate the above directions.

(iv) The Claimants shall forthwith pay 90% of the Respondent's costs

(v) The Claimants, being liable for 90% of my fees and disbursements, shall forthwith reimburse to the Respondent the appropriate amount.

(vi) The sums awarded in orders numbered (iv) and (v) above shall attract interest at a rate of 1.5% per month compounded annually from 1st February 2014 to the date of payment in full.

112. Seat of this Arbitration is Kenya.

113. This award is final on all matters decided on.

N. CLOSING REMARKS

114. Being mindful of the finality of arbitration and the fact that land is a very emotive matter in Kenya, I requested the parties to consider allowing me to “decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law”, which I can do only if expressly authorised by the parties [s. 29.(5) of the Act]. The parties did not agree, and so I have not applied that provision in this award.

115. If I had such latitude, I would have considered allowing the Claimants to take land as per the existing deed plans and titles and awarding the Respondent a sum of money sufficient to buy a parcel similar to the one it would have lost.

Dated at Nairobi on: *17th January 2014*

Signature: *PaulNgotho* **Paul Ngotho, FCIArb, Arbitrator.**

Witness: Signature *TonyArapMwakenya* **Name** *Tony Mwakenya*

ID No.: *69429603* **Postal Address:** *P O Box 2948 – 00100, Nairobi, Kenya*