Mwita & another v The Board of Trustees NSSF (Sued on behalf of National Social Security Fund) (Civil Suit 701 of 2004) [2023] KEHC 397 (KLR) (Civ) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 397 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 701 OF 2004

CW MEOLI, J

JANUARY 24, 2023

BETWEEN

KENNEDY MWITA ..... 1ST PLAINTIFF

PATRICIA MWITA ..... 2ND PLAINTIFF

AND

THE BOARD OF TRUSTEES NSSF ..... DEFENDANT

SUED ON BEHALF OF NATIONAL SOCIAL SECURITY FUND

JUDGMENT

1. Kennedy Mwita and Patricia Mwita, (hereafter the 1st and 2nd Plaintiff/ Plaintiffs) vide the amended plaint dated August 2, 2006 sued against The Board of Trustees NSSF (National Social Security Fund, and hereafter the Defendant) seeking several reliefs including specific performance of the terms of offer and acceptance by preparing the tenancy purchase agreement in respect of L.R No. KIT/101/175 B for execution by both parties and completion of the suit property to thirty percent level; a declaration that the mortgage repayment be due from the date of execution of the tenant purchase agreement; and a permanent injunction restraining the Defendant either by itself, servants or agents whatsoever from selling, leasing, repossessing or otherwise interfering with the Plaintiff's quiet enjoyment of the suit premises.

2. It was averred that the Plaintiffs are the joint tenants/proprietors of all that property commonly known as LR. No. KIT/101/175B in Kitisuru – Nairobi (hereafter the suit property/premises) having accepted the offer of a Tenancy Purchase Agreement by the Defendant on the September 13, 1999 which offer required the Plaintiff to make a deposit of ten (10%) percent of the purchase price, which condition thy complied with . That subsequently, the Defendant postponed and or delayed the formal handing over and execution of the Tenancy Purchase Agreement. That eventually, the Defendant

invited the Plaintiffs to take possession of the suit premises and communicated the regular payments expected to be made on the tenancy but the Defendant had subsequently unilaterally de-activated the Plaintiffs' account without notice in breach of the Tenancy Purchase Agreement.

3. It was further averred that the Defendant has continued to interfere with the Plaintiffs quiet enjoyment of the suit premises while threatening to evict the Plaintiffs and that notwithstanding demand and notice of intention to sue being given, the Defendant has refused to perform its obligations as agreed.

4. The Defendant filed a statement of defence dated August 10, 2004 which was amended on October 17, 2006 and further amended on June 19, 2013, denying the key averments in the plaint. The Defendant averred that it offered to sell the suit premises to the Plaintiffs by way of a Tenancy Purchase Scheme which offer contained specific obligations and was to subsist only temporarily and hence a contract was entered into between the parties herein. That in total breach of the terms of the letter of offer, the Plaintiffs failed to pay monthly installments stipulated thereunder and despite invitations, failed to sign the tenant purchase contract subject to which the Plaintiffs were offered the suit premises, whose terms the Plaintiffs were familiar with and had accepted.

5. It was further averred that Plaintiffs have defaulted in their obligations to pay the agreed monthly installments to the tune of Kshs. 16,830,997.95/- and are consequently in breach of the terms of both the letter of offer and contract having refused and or neglected to remedy the same despite notice. As such, the Plaintiffs elected or must be held to have elected to become simple tenants as opposed to tenant-purchasers. That as a consequence of the breach, the Defendant had no option but to sell the suit property to a third party and the Plaintiffs ought to indemnify and or compensate the Defendant against any loss that may be occasioned by any proceedings taken by the third party or anyone claiming under them.

6. The further amended defence also raised a counterclaim seeking several reliefs, including a declaration that the Plaintiffs were in default of both the terms of the letter of offer and of the contract and hence the Defendant was entitled to and did properly sell the suit premises to the third parties; an order directed at the Plaintiffs to compel them to vacate and hand over vacant possession of the suit premises to the Defendant within a period to be stipulated by the honorable court failing which the Defendant would be at liberty to evict the Plaintiffs and to take possession of the suit premises; a declaration that the Plaintiffs are liable to indemnify and or compensate the Defendant against any loss that may be occasioned by actions or proceedings that may be taken by the third parties to whom the Defendant had sold the suit premises; and a declaration that the Plaintiffs are simple tenants or tenants-at-will and that they are liable to and should forthwith pay the Defendant the implied monthly rent of Kshs. 16,830,997.95/- on account of rent arrears as of January 15, 2013.

7. In the alternative to the foregoing reliefs, the Defendant sought an order compelling the Plaintiffs to elect between being tenants at will and being tenant-purchasers and upon such election, to either - (i) pay rent arrears of Kshs. 16,830,997.95/- as at 15.01.2013 and to continue paying the implied monthly rent of Kshs. 61,722/- or (ii) to sign the contract and to forthwith pay the arrears of Kshs. 17,223,283.95/- immediately or within such period as the honorable court may direct, and in the event of default by Plaintiffs to make such election, the Defendant be entitled to exercise that election instead and to forthwith exercise the Defendant's rights flowing from such election; costs of the suit; and interest on the amounts sought at the contractual rate of 15% per annum.

8. The Plaintiffs thereafter filed a reply to defence and a defence to the counterclaim denying the key averments in the Defendant's counterclaim and in turn the Defendant equally filed a reply to defence to the Plaintiffs defence to the counterclaim.

9. During the trial, the 1st Plaintiff testified as PW1 and indicated to the court that the 2nd Plaintiff is his wife. He adopted his witness statement dated August 1, 2011 and further statement dated June 18, 2018. He stated that in the year 1999 he learnt about the proposed sale of the suit property from a newspaper, successfully applied to the Defendant to purchase the same and was thus allocated suit property located in Kitisuru , Nairobi. That the total purchase price was Kshs. 4,900,000/- with a deposit of 10% which the Plaintiffs paid; that the Defendant was obligated to provide amenities such as electricity, water and a tele-communication line to the subject property pending handing over and execution of the Tenancy Purchase Agreement (hereafter the TPA) at 30% completion.

10. That by 2005 the Defendant was yet to provide the aforementioned amenities and even after the Plaintiffs took possession of the suit property, the Defendant neither provided the TPA nor the agreed amenities. It was his evidence further that upon taking possession the Plaintiffs continued to service the loan until April of 2012 when the Defendant de-activated the mortgage account and rendering continued instalment payments impossible and claimed to have sold the property to a third party as such were unwilling to continue receiving payments. With respect to the Defendant's counterclaim the 1st Plaintiff stated that the Defendant has not regularly supplied statement of accounts indicating how the arrears of over Shs.17 million inclusive of interest had been arrived and that the Defendant had already restricted the Plaintiffs' access to the mortgage account and similarly failed to avail the TPA for their execution. Hence the counterclaim ought to be dismissed. The Plaintiff produced the documents in his list of documents dated March 12, 2009 as PExh.1 –15, 17- 21.

11. During cross-examination it was his evidence that in January of 2003 Defendant informed the Plaintiffs that the suit property was ready for handing over and payments were to begin in March of 2003. That the first installment on the suit property Kshs. 71,725/- and that he had produced evidence in respect of payments for March 2012 to June 2012. He stated that when the Plaintiffs took possession, the house was 30% complete but the Defendant did not avail the TPA to facilitate payment of the monthly installments. That in the absence of the TPA the relationship between the parties was governed by the letters of offer dated December 30, 1999 and January 31, 2003 the terms of which the Plaintiffs complied with .

12. Asserting that payments were made in respect of the suit property, he admitted however that he had not tendered the records of the total amount paid. It was his evidence further the Plaintiffs had made improvements to the suit property worth more than Shs.25 million as evidenced in his valuation report. In re-examination he expressed willingness to settle the balance on the purchase price upon provision of the TPA by the Defendant for execution.

13. Jane Waithera Mbugua testified as PW2 she identified herself as a valuer with Lloyd Masika Valuers having worked with the said company for 15 years. She testified that the estimated value of the suit property at the time of valuation was Kshs. 12,200,000/- and produced the valuation report dated 01.08.2007 in the list of documents dated 08.08.2011 as PExh.16. She confirmed during cross-examination that as of the date of the valuation, the construction of the premises was complete and occupied by the Plaintiffs. That further on August 16, 2010 a desktop valuation was done on the property, and it was given an open market value of Kshs. 25,000,000/- which report was however not produced in evidence.

14. On behalf of the Defendant, Haron Muthua Mwangi testified as DW1. He stated that he was an internal auditor having worked for the Defendant for twenty (20) years hence familiar with the instant matter. He equally adopted his witness statement dated June 2, 2011 and produced as exhibits the documents in the list of documents filed on January 22, 2008 as DExh.1 -19. It was his evidence that upon activation of their account the Plaintiffs did not comply with the demand to make the

initial installment of Kshs. 71,725/- and as of April 5, 2011 the arrears on the account stood at Kshs. 13,322,828.18/-. That on account of the Plaintiffs' default the house was sold in August of 2005 to a third party who lodged a prohibition in respect of the property. Concerning the counterclaim it was his evidence that the Defendant seeks the accumulated rent arrears. He asserted that there was an executed agreement between the parties and acknowledged the payments received from the Plaintiffs in 2012. It was his evidence that the Plaintiffs are still in possession however lacked commitment regarding the purchase of the property.

15. During cross-examination he confirmed that upon the offer of, the Defendant accepted down payment from the Plaintiffs and that parties were subsequently to execute the TPA which event did not happen due to default by the Plaintiffs. It was his evidence that the Plaintiff's mortgage account was closed down in 2004 and subsequently re-opened in 2012 and closed again in the following year due to non-payment. That the suit premises was sold to a third party on account of the Plaintiffs default. He admitted his awareness of attempts made by the Plaintiffs to make payments which were unsuccessful as their account had been closed.

16. In re-examination he asserted that the correspondences between the communicated to the Plaintiffs on the installments to be made. That the Defendant never received communication from the Plaintiffs that they were unable to make payments on account of the closure of their account and that the only reason the account was closed, and property sold to a third party was non-payment by the Plaintiffs. He however admitted that payments were subsequently received from the Plaintiffs between 2012 and 2013.

17. Richard Kasiva testified as DW2. He testified that he worked as a tenant scheme and mortgage bonds accountant with the Defendant, a position he held since 2004 and was hence familiar with the dispute. He equally adopted his witness statement dated October 28, 2021 and reiterated that he relied on the adduced documents in support of the defence and counterclaim. Under cross examination he confirmed that no TPA had been executed between the parties. He asserted that third party who bought property due to the Plaintiffs default are currently the registered owners of the premises as per the Defendant's records however a transfer was yet to be effected as such the suit property was still owned by the Defendant.

18. He reiterated that the Defendant had provided the amenities to the suit property as purposed but he did not have any material before the court evidencing the same. That the Plaintiff were in arrears and owed the Defendant as pleaded in the counterclaim and that the offer letter was binding despite the absence of the TPA. On re-examination he emphasized that the Plaintiffs were aware of the required payments by dint of the offer letter and that as at taking possession of the premises the same was 30% complete as agreed between the parties. In conclusion he urged the court to allow the counterclaim as prayed.

19. The parties filed submissions at the close of the trial. On behalf of the Plaintiffs, counsel six issues for determination, namely, whether the Defendants complied with the terms of the letter of offer of sale of the suit property to the Plaintiffs; whether the Plaintiffs have performed their part of the terms of sale agreement; whether the Defendant prevented the Plaintiffs from effecting their monthly repayment to the fund; whether the Plaintiffs have suffered any loss or damage as a result of the defendant's refusal to provide the sale agreement for execution; whether the Defendant established any basis for its counterclaim against the Plaintiffs; and reliefs available to the Plaintiffs.

20. Pointing an accusing finger at the Defendant the Plaintiffs' counsel reiterated the Plaintiffs' evidence that upon taking possession of the suit property the Plaintiffs had proceeded to complete it while demanding the TPA which was not forthcoming and that the Defendant had unilaterally prevented

the Plaintiffs from making payment leading to the accumulation of the arrears allegedly owed. That based on its conduct, the Defendant ought not to be allowed to load exorbitant interest charges. Counsel asserted that the Plaintiff had spent funds equivalent to the value of the suit premises to render it habitable after the Defendant taking possession at 30% completion. Hence, the counterclaim is misplaced and intended to dispossess the Plaintiffs of their property.

21. Counsel contended that the allegations of breach against the Plaintiffs are misleading and misguided as no TPA had been executed thus agreement capable of being breached or violated existed. Citing the decisions in *Lucy Njoki Waithaka v ICDC* [2001] eKLR, *Paola Da Fano v Salim Abdalla Bakshuweni* [2013] eKLR, *John Njuguna Mugo v Kenya Commercial Bank Limited* [2018] eKLR and *Rose Muthoni Mwaura v John Nganga Njogu* [2012] eKLR counsel urged the court to allow the Plaintiffs' suit as the Defendant was guilty of frustrating the Plaintiffs' attempts to legalize their ownership and occupation of the suit premises for more than twenty years.

22. On the part of the Defendant, it was submitted that by the letter dated January 31, 2003 the Plaintiffs were given and or took possession of the suit premises on the terms and understanding therein. That by the further deposit payments and the act of taking possession, the Plaintiffs *ipso facto* ratified the terms of the letter or terms of contract dated January 31, 2003 and thereby represented to the Defendant that they would abide by the terms. Hence the Plaintiffs are estopped from disowning the said representations. It was contended that the Plaintiffs' default prompted the Defendants to offer the suit property to a third party and it was no longer viable to receive payments from the Plaintiffs.

23. It was further argued that the Plaintiffs in part-fulfillment and recognition of their obligations made sporadic payments, the last one being in 2012. That given their conduct, the Plaintiffs could not allege absence of a binding agreement. Counsel urged the court to make a finding that in the absence of any other contract , the parties were bound by the letter of January 31, 2003. And that the Plaintiffs' claim seeks to vary the terms of the contract setting off what is rightfully owed to the Defendant, by citing improvements to the suit premises yet the suit premises was sold and accepted by the Plaintiffs at 30% completion.

24. In conclusion it was asserted that the Defendant's counterclaim seeks to enforce the terms of engagement between the parties and the court ought to decline the Plaintiffs' invitation to re-write the contract between respective parties. Counsel urged the court to dismiss the Plaintiffs suit and allow the Defendant's counterclaim with costs.

25. The court has considered the pleadings, evidence as well as the submissions of the respective parties. The question for determination is whether on a balance of probabilities the parties have established their respective claims and if so, what relief ought to be granted. The court proposes to deal simultaneously with the two claims before it.

26. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act* which provides that;

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. 108. The burden of proof in a suit or proceeding lies on that person who would fail if

> no evidence at all were given on either side.... 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

27. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

> "[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

28. The dispute herein relates to the terms of the tenant purchase in respect of the suit property and alleged breach thereof . It is undisputed that as of the date of the hearing of the case, the parties herein were yet to execute a formal TPA in respect of the suit premises. Indeed, that failure lies at the root of this dispute. Nonetheless, from the evidentiary material tendered before this court it is undeniable based on PExh.1 and PExh.4 that the parties had agreed on preliminary terms of the envisaged TPA regarding the initial purchase price being Kshs. 4,000,000/- and later revised upwards to Kshs. 4,900,000/- on account of additional amenities to be provided by the Defendant. It is further undisputed that the Plaintiffs paid the 10% deposit requirement being Kshs. 490,000/- as per PExh.2, PExh.3 and further payment via P. Exh.6 in view of the revised purchase price, and thereafter took possession of the suit property pursuant to the letter P.Exh. 8. Further payments were made in 2012 per P. Exh.20. Both letters (P. Exh.7 & 8) indicated the monthly instalments payable in respect of the purchase price to be Kshs. 61,722.00 commencing before handing over, although the total repayment period was not stated.

29. Thus, it appears that until this dispute arose, the transaction and relationship between the parties was premised upon the two letters, namely PExh.7 and PExh.8. The letter dated April 27, 2000 (PExh.7) by the Defendant in response to the Plaintiffs' application to purchase the suit property in part read as follows;

> " Re. Nssf Tenant Purchase Scheme –kitusuru 175b (30% Complete)
>
> We refer to your application dated 30.09.1999 for purchase of LR 101/No.175B (30% complete) through the above scheme.
>
> We are pleased to inform you that your application has been approved and the shell of the house (30% level of completion) shall be handed to you when it is constructed to that level. Please note that when the shell is constructed to 30% level you will be required to sign the Tenant Purchase Agreement. Once the Agreement is signed and the house handed over to you, you will be required to make the following payments;-
>
> 1. 1st Monthly installment Kshs. 61,722.00
> 2. Annual Creditor Insurance Premium
> 3. Annual Fire & Domestic Insurance Premium
> 4. Annual Land Rent
> 5. Annual Land Rate

You will be advised on amount payable for items 2, 3, 4 and 5 when the house is handed over to you. Please note that your subsequent monthly payment shall be Kshs. 61,722.00.ie item 1 above....." (sic)

30. The Defendant's further letter to the Plaintiffs dated 31.01.2003 (PExh.8) read in part as follows;

" Re: Tenant Purchase Scheme

We are pleased to inform you that the above house in now ready for handover. The Tenant Purchase Agreement are under preparation and will be mailed to you in due course.

The following payments are required before formal handover can take place;

1. Kshs. 61,722.00 1st Instalment repayment for the month of March 2003 Clause 2 (b)
2. Kshs. 8,379.00 Creditors Insurance Premium for the period March 2003 – June 2003 Clause 7.
3. Kshs. 1,624.00 Fire and Domestic Insurance Premium for the period March 2003-June 2003 Clause 8 (i)

Total Kshs. 71,725.000

i. Please note that your subsequent total monthly instalments shall be Kshs. 61,722.00 i.e Item 1 above

ii. Creditors Insurance Premium (2(b)above) is renewable on 1st July every year until loan is cleared.

iii. Fire and Domestic Insurance Premium (3(b)above renewable on 1st July every year until loan is cleared)

iv. Annual Land Rent is payable every year in January.

v. Annual Land Rates is payable every year in January

You will be advised on amount payable for item IV and V in due course...." (sic)

31. Besides the foregoing admitted letters, the Defendant introduced in evidence its asserted terms of the envisaged TPA through sample TPAs marked D. Exh.5 and D.Exh.18 and claimed that the Plaintiffs were in breach of the TPA. Evidently, these samples were neither executed by nor in reference to the Plaintiffs herein. As such, the samples are of no probative value to the specific terms of engagement between the Plaintiffs and the Defendant. The Plaintiffs position was that there was no breach of the TPA as no such TPA had been executed between the parties. This latter fact is plain on the evidence before the court. Nevertheless, based on contents of the advertisement marked P. Exh.1 as read with the letter P.Exh.4 , the letters PExh.7 and PExh.8, and despite the non-execution of the TPA, the essential elements of a contract, namely offer, acceptance, and consideration were fulfilled. In other words, contrary to the disavowals of the Plaintiffs and given the conduct of both parties, P. Exh.8 encapsulated terms of the contract between both parties. The sticking point is whether there was compliance by the respective parties of the key terms contained in the two letters.

32. The main obligations of the parties under the two letters are not difficult to discern. Although by P.Exh. 7 the handing over of possession of the premises to the Plaintiffs was supposed to happen after execution of the TPA , by P.Exh. 8 and undisputed evidence, the handing over happened before the

TPA was executed, the Defendants promising that the TPA would "be mailed to you (Plaintiffs) in due course". Evidently the key obligation on the part of the Defendant was upon handing over, to procure for execution the TPA in respect of the suit property described in P.Exh. 1 and with amenities itemized in P.Exh. 4, while the Plaintiffs were obligated to pay a first instalment of, and continue making monthly instalments in the sum of Kshs. 61,722.00 towards the purchase price. From the contents and tenor of the letter, it is clear that P.Exh. 8 captured the key clauses in the proposed TPA and that the complete terms would be captured in the TPA.

33. What can be gathered from the oral and documentary evidence by the respective parties is that there was part compliance with respective key obligations by both sides . Regarding the requirement for regular and/or full payment of instalments on the part of the Plaintiffs there was only partial compliance. As for the Defendant's obligation for the provision of the TPA for execution by the Defendant, no TPA was executed and the Plaintiffs disputed the provision of amenities promised vide P.Exh. 4 and the basis for the upwards review of the purchase price. The Defendants have not explained why the TPA could not be executed prior to the handing over of the suit property or activation of the Plaintiffs' mortgage account. Their blanket claim that the reason was failure by the Plaintiffs to pay instalments as they fell due appears unconvincing with regard to the period before the handing over. Did the Defendants give possession to the Plaintiffs and activate their mortgage account when they were already in default?

34. The Plaintiffs by way of letters in 2003 , namely, PExh.5 and PExh.9 and correspondence marked P.Exh.21 had complained that the Defendant had failed to comply with the contents of its letter PExh.4 by which it had adjusted the initial sale price to cater for additional amenities in respect of the suit property including electric power up to the plot, water supply up to the plot boundary, telephone supply up to the plot and construction of planned tarmac roads and storm water drainage along the plot boundary. Other issues raised concerned the erection of beacons in respect of the suit property and encroachment thereon by the contractor. DW1 was hard-pressed during his evidence to confirm that the Defendant indeed provided the additional utilities that were the reason for the revised purchase price.

35. The Defendant despite handing over the suit property to the Plaintiffs in January 2003 per P.Exh.7 did not thereafter provide the TPA for execution. The Defendant waited until December 29, 2003 to communicate via the letter D.Exh. 11 of even date that the loan account would be activated January 1, 2004. Why was the TPA not availed for execution before this? And despite a demand for the TPA contained in the Plaintiffs' advocates' letter dated June 11, 2004 (P.Exh.11) in apparent response to the Defendants letter of May 17, 2004 asserting that the Plaintiffs were in arrears of four months , the Defendant did not provide the TPA for execution while evidently keen to demand payment of arrears, before purporting to levy distress in 2004 and to sell the property to third parties in 2005.

36. On the other hand, while it appears that the Plaintiffs paid the first instalment, hence obtaining possession, there is no evidence whatsoever that the Plaintiffs on their part paid further installments required of them on a regular basis as stipulated in P. Exh.8. Default on their part resulting in 2004 in the deactivation of the loan account which was subsequently reactivated in 2012. Thus, from the material presented before this court by the Plaintiffs, it appears that, other than for the initial deposit of Kshs 490,000/- the Plaintiffs had made further installments totaling Kshs. 250,000/- as shown in PExh.20 and admitted by DW1. Evidently, from the substantial developments captured in the Plaintiffs' valuation report of the suit property of 2010 and marked P.Exh. 19, the Plaintiffs' failure to pay must lie elsewhere, and not in the lack of means. The fact that the loan account was closed from 2004 to 2012 is no excuse; having chosen to remain in occupation of the suit premises , the Plaintiffs ought to have continued to make payments on the outstanding purchase price to the Defendant through any of the Defendant's bank accounts, as a show of commitment and good faith.

37. Despite their default, the Plaintiffs have since 2003 been in possession of and enjoying the use of the suit property. He who desires equity must do equity; whatever the reasons advanced to justify the Plaintiffs' default, two wrongs do not make a right. That said, the court agrees with the Plaintiffs' submission that the Defendant ought not to be allowed to benefit from its own default particularly with regard to its clear failure to provide for execution, the TPA , and to satisfy its own undertaking to provide additional amenities which were charged on the revised purchase price. Moreover, between 2004 the and 2012, the Defendant deactivated the Plaintiffs' account making it difficult but not impossible for them to make payments. And while claiming to have sold the property to third parties, the Defendant accepted payments made to them by the Plaintiffs between 2012 and 2013.

38. The principle enunciated by the Court of Appeal in Civil Appeal No. 397 of 2017 *Ngaira v Cheng'oli* [2022] KECA 80 (KLR) is applicable to this case. In that case, the Court while discussing the conduct of parties where there had been a breach of the terms of their agreement approved the words of Lord Reid in *Steadman vs. Steadman* [1976] A.C. 536, 540 to the effect, *inter alia*, that:-

> " If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn round and assert that the agreement is unenforceable."

39. Having found that indeed both parties herein were in default, the next question is, what reliefs ought to issue in this case? The facts of this case call to mind the decision of Kuloba, J (as he then was) in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where in his characteristic pithy style, the learned Judge stated:

> " No one can improve his condition by his own wrong. The latin of it is *Nemo ex suo delicto meliorem suam conditionem facere potest*...it is an ancient dictum of our law, that a person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, *Allegans suam turpitudinem non est audiendus*.... By which they meant that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong and in equity, the maxim holds good that he who comes into equity must come with clean hands... *Null prendra advantage de son tort demesne*... meaning no man shall profit by the wrong that he does, and *Nullus commodum capere potest de injuria sua propria*... which means, no one can gain an advantage by his own wrong."

40. The court must therefore grant reliefs that are just and equitable, taking into account the peculiar facts of this case and the proven conduct on the part of the parties herein. The Plaintiffs key prayer is for an order of specific performance. Concerning this remedy, the Court of Appeal in *Thrift Homes Limited vs. Kenya Investments Limited* [2015] eKLR stated *inter alia*, that: -

> " The remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy."

41. The remedies sought by the parties represent their competing interests. The Plaintiffs have developed and improved the suit premises to completion from the shell it was (30% completion) at the time of the agreement and have been in occupation since 2003. According to P.Exh.19, in 2010 the property was valued at Kshs. 17,500,000/- which value has probably doubled by now. The contract represented

in P.Exh. 7 & 8 is enforceable, and in the court's opinion the Plaintiffs are entitled to an appropriate order for specific performance.

42. On the other hand, the Defendant still holds the title to the suit property, having made an investment from which it has not received full returns by way of payment of the full purchase price. The sums paid by the Plaintiff prior to the filing of the suit include the 10% deposit of Kshs 490,000/-, and further installments totaling Kshs. 250,000/- as per PExh.20, leaving a balance of Kshs 4,160,000/-. The Defendant is undoubtedly entitled to the balance of the purchase price the Plaintiffs having evinced every intention to proceed to execute the TPA in order to retain the suit property which they have occupied and improved substantially over 20 years.

43. The Defendant claims arrears to the tune of Kshs. 17,223,283.95/- presumably comprising the balance of the purchase price i.e. Kshs. 4,160,000/- and accrued interest. However, under the terms contained in P.Exh.7 & 8 the parties had not agreed on the interest rate to be charged in respect of the proposed TPA whereas no TPA was actually executed between the respective parties . Neither DW1 nor DW2 explained how the interest and total sums claimed in the counterclaim were arrived at, the former witness admitting that the Defendant had never furnished a statement of account to the Plaintiffs. Thus, the basis for the Defendant's asserted contractual interest rate of 15% was not demonstrated.

44. In *CFC Stanbic Limited v John Maina Githaiga & Another* [2013] eKLR the Court of Appeal observed that:-

> " Sections 26 and 27 of the *Civil Procedure Act*, [CPA], lay down the law relating to the grant of interest and the setting of effective dates thereof. The said provisions provide that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests.
>
> In *Shah V Guilders International Bank Ltd*, [2003] KLR, the Court of Appeal regarding S 26 (1) of the CPA held:
>
> "This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:
>
> (1) the period before the suit is filed;
>
> (2) the period from the date the suit is filed to the date when the court gives its judgment; and
>
> (3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.
>
> We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has not discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."
>
> Accordingly, the High Court should in its discretion award and fix the rate of interest payable.
>
> Regarding the issue of the commercial rate of interest applicable and the total amount of interest payable could only, in our view, be proved with evidence. From the record, the respondent did not produce any documentary evidence to show the contractual rate of interest applicable. Accordingly, the interest payable would, therefore, be discretionary

as provided for by S 26 of the *CPA* and subject to evidence produced to support the claim....."

45. Applying the foregoing *dicta* to the facts of this case, the court will allow interest on the outstanding purchase price at court rates from the date of filing of the Defendant's counterclaim.

46. Hence, both the respective parties' claims have succeeded in part and the court will enter judgment for the Plaintiffs and Defendant, respectively, in the following terms:-

    a. In favour of the Plaintiffs, an order of specific performance is hereby issued directing the Defendant to forthwith prepare for the execution by the parties, an appropriate Tenancy Purchase Agreement in respect of the suit property and incorporating in part, the relevant terms of this judgment, all within 30 days of this judgment.

    b. In favour of the Defendant, a declaration is hereby issued to the effect that the Plaintiffs are liable to pay arrears on the outstanding purchase price amounting to Kshs. 4,160,000/- (Four Million One Hundred and Sixty Thousand) together with interest thereon, calculated at court rates from the date of the filing of the Defendant's further amended defence and counterclaim, until full payment.

    c. In favour of the Defendant, a declaration is hereby issued to the effect that the entire sum comprising the outstanding purchase price and interest as stated in (b) above, shall become due and payable in full not later than 45 (forty-five) days calculated from date of execution of the Tenancy Purchase Agreement in (a) above.

    d. For the avoidance of doubt, the Defendant by itself, its servants or agents shall not attempt to sell, lease, repossess the suit premises or otherwise interfere with the Plaintiffs' quiet enjoyment of the suit premises unless and until the period of 45 (forty-five) days lapses without the Plaintiff making the full payment as prescribed in (c) above.

    e. Any reliefs sought and not specifically granted herein are denied.

    f. Each party will bear its own costs in the suit.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF JANUARY 2023

C. MEOLI

JUDGE

In the presence of:

For the Plaintiffs: N/A

For the Defendant: Mr. Ashitiva

C/A: Carol