



REPUBLIC OF KENYA



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**Njenga v Africa Reit Limited & 3 others (Environment & Land Case
1544 of 2013) [2023] KEELC 19301 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1544 OF 2013**

LC KOMINGOI, J

JULY 26, 2023

BETWEEN

PATRICK KARANJA NJENGA PLAINTIFF

AND

AFRICA REIT LIMITED 1ST DEFENDANT

**NOEL MUTUNGA MALINDA (SUED IN HIS CAPACITY AS THE EXECUTOR
OF THE LATE MARTIN KITISYA MALINDA) 2ND DEFENDANT**

CATHERINE NDUKU MALINDA 3RD DEFENDANT

CONSOLATA NDINDA MALINDA-ABE 4TH DEFENDANT

JUDGMENT

1. By a plaint dated 25th November 2013, amended on 24th April 2014 and further amended on 8th November 2016, the Plaintiff prays for judgement to be entered against the Defendants for;
 - a. An injunction restraining the Defendants whether by themselves, their officers, servants or agents or any of them from occupying, selling, disposing of or in any other way interfering with the interests of the Plaintiff in the property known as Apartment Number B6 on Land Reference Number 1/153, Wood Avenue, Nairobi.
 - b. Specific performance on the part of the Defendants of the agreement dated 6.5.2010 and amended on 16.8.2010.
 - c. In the alternative, a declaration of breach of contract and a refund of the deposit on the purchase price and 13 monthly instalments wrongfully retained by the 2nd Defendant in the sum of ksh.3,469,825.00 together with interest thereon at court rates from 6.5.2010 until payment in full.



- d. Mesne profits at market rates from November 2010 until the date of judgement or such other dates as this Honourable Court may determine.
 - e. Damages for breach of contract being the current market price of Apartment Number B6 on Land Reference Number 1/153, Wood Avenue Nairobi together with interest thereon at court rates from the date of filing suit until payment in full.
 - f. Aggravated damages together with interest thereon at court rates from the date of judgement until payment in full.
 - g. Costs of the suit.
 - h. Any other relief his Honourable court may deem fit and just to grant.
2. The Plaintiff contends that on or about 15th October 2008, the 1st Defendant in the context of its business as a real estate investment company and promoter of a development on the property known as Land Reference No.1/153 and the 2nd Defendant in his capacity as the duly authorized Attorney of the 3rd Defendant on the other part entered into a Property Development Agreement in the terms of which the 2nd Defendant agreed to transfer the said property to the 1st Defendant in the terms of which agreement the 1st Defendant would procure and /or ensure the construction of residential apartments on the property.
 3. He further contends that as consideration for the transaction, the 2nd Defendant would be entitled to retain 1 duplex apartment, 1 3-bedroom apartment and 2 2-bedroom apartments in his name/his nominees' names.
 4. The Plaintiff avers that the project was completed and he entered into an agreement dated 6.5.2010 and amended on 16.8.2010 with the 2nd Defendant for the purchase of one of the said apartments namely Apartment B6 on Land Reference No.1/153 Wood Avenue Nairobi. He contends that the 1st Defendant consented to the sale and issued it with an offer letter dated 15th October 2008 for apartment B6 and in line with the agreement, he paid a deposit and monthly instalments amounting to Ksh. 3,469,825.00 to the 2nd Defendant.
 5. He also contended that the 1st Defendant notified his advocates that it would transfer the apartment to the 2nd Defendant who would in turn transfer to him instead of transferring to him directly but despite requests, the 1st Defendant is yet to transfer the suit apartment to the 2nd Defendant so as to allow the assignment of lease from the 2nd Defendant to himself to proceed.
 6. It is also his case that while the transaction was on, the 3rd Defendant revoked the Power of attorney previously held by the 2nd Defendant to deal with the suit property and appointed the 4th Defendant as her Attorney. He contends that to date, Apartment B6 on Land Reference No.1/153 Wood Avenue has never been transferred to him.

The 1st Defendant's case.

7. The 1st Defendant filed a statement of defence dated 13th May 2014. It admits that it entered into the Property Development Agreement dated 15th October 2008 but denies offering the Plaintiff apartment B6 for sale and avers on a without prejudice basis that the offer was cancelled vide letter dated 17th May 2010.



8. It contends that it did not at any point enter into any agreement with the Plaintiff and that it did not receive any sum of money from him .It further contends that it had no obligation to transfer the suit property to the Plaintiff.

The 2nd Defendant's case.

9. The 2nd Defendant filed a statement of defence dated 20th June 2014. He admits to selling the suit property to the 1st Defendant pursuant to a Power of Attorney donated by the 3rd Defendant but contends that it was revoked on 20th October 2010 and following the revocation, he ceased to have capacity to perform any agreement he had enter into on behalf of the 3rd Defendant.
10. He contends that the duty to perform the agreement dated 6th May 2010 and 16th August 2010 shifted to the 4th Defendant who was appointed attorney of the 3rd Defendant on 20th August 2001.

The 3rd and 4th Defendant's case.

11. The 3rd and 4th Defendants filed an undated joint statement of defence on 10th June 2014. They admit that the 2nd Defendant was a donee of a Power of Attorney issued to him by the 3rd Defendant and the latter having been a known and disclosed principal, the 2nd Defendant was thereby and throughout an agent of the 3rd Defendant and as such, acquired no beneficial /proprietary interest in the land known as LR No.1/153 capable of transfer to anyone else.
12. They argue that they are strangers to the transaction between the Plaintiff and the 2nd Defendant.

Evidence of the Plaintiff.

13. PW1 Patrick Karanja Njenga the Plaintiff testified on 4th February 2020. His witness statement dated 25th November 2013 was adopted as part of his evidence in chief. He produced his bundle of documents of even date as P.Exhibit 1 and a supplementary list of documents as P.Exhibit 2.
14. In his witness statement, he stated that sometime in 2010, he entered into an agreement with the 2nd Defendant for the sale of apartment B6 situate on LR No.1/153 wood Avenue Nairobi .The 2nd Defendant held the property by virtue of a Power of Attorney dated 13th May 1997 and registered as Number IP/A31789/1 appointing him as the lawful attorney and agent of his mother; the 3rd Defendant in her capacity as registered lessee.
15. He further stated that the 2nd Defendant's ownership of the suit apartment arose from a development agreement dated 15th October 2008, which was entered into between the 1st Defendant and the 2nd Defendant .The 2nd Defendant agreed to provide LR No.1/153 to the 1st Defendant and the 1st Defendant agreed to construct residential apartments on the property. On 18th February 2009, a conveyance was made between the 1st Defendant and the 3rd Defendant of the said property and executed by the 2nd Defendant by virtue of his Power of Attorney.
16. As part of consideration, the 2nd Defendant was entitled to retain 1 duplex, 1 3-bedroomed flat and 2 2-bedroomed flats. It was further agreed that any agreement for sale of the apartments would be entered into between the 1st Defendant and the prospective purchaser.
17. PW1 further stated that he expressed interest in apartment B6 and following negotiations with the 2nd Defendant, they agreed that he would appoint him as his nominee and then have the 1st Defendant directly transfer the apartment to him and the purchase price would be paid directly to the 2nd Defendant.



18. He stated that their agreement was communicated to the 1st Defendant which approved it. Further, by a letter of allotment dated 5th May 2010, he was offered the suit apartment by the 1st Defendant in his capacity as the 2nd Defendants nominee. Subsequently, on 6th May 2010, an agreement for assignment of the suit apartment was entered into between him and the 2nd Defendant, in which the 2nd Defendant agreed to assign it for a consideration of ksh.12,500,000/= .Ksh 1.5 million was payable at execution and the balance of ksh.11 million was to be paid in 120 equal instalments of Ksh. 153,805.84 over a period of 10 years at an interest rate of 11.25% per annum.
19. PW1 averred that on 17th May 2010, the 1st Defendant's then advocates wrote to the 2nd Defendant's Advocates at the time informing them that they would no longer be allotting the property directly to him but would instead allot it to the 2nd Defendant who would in turn transfer to him. He added that despite requests to the 1st Defendants' advocate to conclude the assignment and lease of apartment B6 to the 2nd Defendant, the same has not been forthcoming.
20. He further averred that due to the change in nature of the original transaction, the agreement dated 6th May 2010 was amended through a variation dated 16th August 2010 signed by him and the 2nd Defendant reflecting among other terms that the interest rate would be reduced to 11% and the sublease would be from the 2nd Defendant to him and that he was required to pay ksh.151,525/=.He complied and paid the deposit and instalments from July 2010 to July 2011.He added that in June 2011, the 2nd Defendant offered him a discount. At the time, the sum owing was ksh.9,030,175/= which was then discounted to ksh.8 million and communicated to his advocates Messrs. Muthaura Ayugi and Njonjo Advocates.
21. He stated that despite requests, the 1st Defendant is yet to transfer the suit apartment to the 2nd Defendant so as to allow the assignment of lease from the 2nd Defendant to himself to proceed.
22. PW1 also averred that on 20th August 2010, the 3rd Defendant revoked the Power of Attorney registered as IP/A 31789/1 wherein she had appointed the 2nd Defendant as her lawful attorney then irrevocably appointed the 4th Defendant as her attorney with the power to ;among other things, lease, acquire, sell convey or otherwise dispose of property belonging to the 3rd Defendant from the date of appointment until notice of the 3rd Defendant's death. He added that as a result of the 1st and 2nd Defendant's breach of the agreement and the revocation of the 2nd Defendant's Power of Attorney, the transaction has proved difficult.
23. When he was cross-examined, he stated that he had an agreement with the 2nd Defendant. It was not executed by the 1st Defendant who was a developer but there is a letter stating that it consented. He further stated that about May 2011, he learnt of the dispute between the Defendants who are family members. He was informed of the dispute by the 2nd Defendant and the 3rd Defendant confirmed it.
24. He also stated that he stopped making payments towards the purchase of the apartment and that the 2nd Defendant had promised that he would sort out the misunderstanding with his mother. At the time had paid over k.sh 3 million and had a balance of ksh.9 million. He added that the 2nd and 3rd Defendants have not made any demand of the balance.
25. When he was re-examined and referred to P.Ehibit 1 which contains a letter of allotment dated 5th May 2020 for Apartment B6 addressed to him by the 1st Defendant, he stated that he accepted the offer and there was an agreement between himself and the 1st Defendant at page 3 of the Plaintiff's bundle of documents.



26. When referred to clause 5(2) (a) of the property development agreement, he stated that the balance outstanding was ksh.9,030,975/= but it was discounted to ksh.8million by an agreement of the parties.
27. On 27th October 2021, the Plaintiff's further list of documents dated 21.4.2021 was produced by consent and marked as P. Exhibit 3. The Plaintiff then closed his case.

Evidence of the Defendants.

28. The Defendants called three witnesses. DW1 Joyce Wanjiru Ndungu, the 1st Defendant's Group director testified on 27th October 2021. Her witness statement dated 6.12.2016 was adopted as part of her evidence in chief.
29. In her statement, she acknowledged the property development agreement dated 15th October 2008 entered into between the 1st Defendant and the 2nd Defendant who was the duly appointed attorney of the 3rd Defendant. She stated that the agreement did not include any provision allowing a tripartite agreement with any other party outside it.
30. She further stated that clause 5 and 6 of the agreement allowed the 2nd Defendant to nominate a person to purchase any of the units he was entitled to retain. She added that the 1st Defendant with instructions from the 2nd Defendant did issue the Plaintiff with a letter of allotment with respect to Apartment No.B6 as a nominee of the 2nd Defendant.
31. She averred that in the course of the agreement, the 1st Defendant obtained legal advice from its advocate at the time that a direct transfer to any other person (nominee) would constitute stamp duty fraud. Subsequently, the 1st Defendant through a letter dated 17th May 2010 informed the 2nd Defendant that it would no longer be in a position to allot the property directly to the Plaintiff but would instead allot the same to the 2nd Defendant to deal with as he wishes.
32. She stated that the 1st Defendant has never received any monies from the Plaintiff with respect to the suit property or with respect to any other transaction related to the suit. She further stated that in compliance to the Property Development Agreement, the 1st Defendant transferred the suit property to the 4th Defendant who was nominated by the 3rd Defendant as her Attorney. She added that the Plaintiff has no claim against the 1st defendant as no privity of contract between the 2 parties has been established and further that the 1st Defendant has no interest in the suit property.
33. She testified that the project was completed on 22nd July 2011 and at the time, the Power of Attorney to the 2nd Defendant had been revoked and given to the 4th Defendant.
34. The 1st Defendant then forwarded the occupation certificate to the project lawyers M/S Kaplan and Stratton as there was a dispute between the Plaintiff and the 3rd Defendant. He stated that they heard about the Plaintiff about May 2010 through the project lawyers.
35. DW1 also told the court that while the allotment letter at page 20 of the consolidated bundle is in the 1st Defendant's letter head, the signature is not by the authorized signatories of the 1st Defendant.
36. When she was cross-examined, she stated that the letter of allotment is unknown to the 1st Defendant, it did not lodge any report of fraud/seek to investigate it.
37. She further stated that the project was completed successfully and that the 1st Defendant was to share profits with the 2nd Defendant as per the Property Development agreement and since he had a Power of Attorney from the 3rd Defendant. She pointed out that the 2nd Defendant owes the 1st Defendant ksh.2 million as the accounts at page 126-129 of the consolidated bundle indicate. She added that



- prior to entering into the property development agreement, the 1st Defendant's lawyers had done due diligence and confirmed the power of Attorney held by the 2nd Defendant was authentic and that the suit property was owned by the 3rd Defendant.
38. She stated that at present, the suit property is in the 1st Defendant's name though it has signed a transfer to the management company but it has not been registered. She added that the 1st Defendant objected to transfer of the suit apartment to the Plaintiff since he is a stranger to the 1st Defendant and at the completion of the project, the 2nd Defendant's Power of Attorney had been revoked.
 39. When referred to clause 5.2(a) of the Property Development agreement, he stated that the 2nd Defendant was entitled to the retained apartments which were to be registered in his name or his nominee and that apartment B6 fell within the retained apartments.
 40. She stated that the 2nd Defendant nominated the Plaintiff and the 1st Defendant was to draft a sale agreement within 30 days. She further stated that while the mother title is registered to the management company, the lease to apartment B-6 was left blank for the 2nd -4th Defendants to agree but it was handed over to the 4th Defendant who had a power of Attorney from the 3rd Defendant and the project's advocates and she does not know whether it was rented out or it is occupied.
 41. DW1 also averred that the 1st Defendant decided it would transfer Apartment B6 directly to the 2nd Defendant who was entitled to it as consideration for the suit land.
 42. When referred to the statement sworn on 23rd May 2014 by Wainaina Kinyanjui, she stated that she knows Mr. Kinyanjui's signature and it is as appears at page 152 of the consolidated bundle and that the signature at page 219 of the same bundle is not similar to that of Wainaina Kinyanjui.
 43. She also stated that the 1st Defendant dealt with the 2nd Defendant only in his capacity as donee of a Power of Attorney from the 3rd Defendant and a transfer in favour of the 1st Defendant was effected on 18th February 2009. She further stated that she did not see any transfer from the 3rd Defendant to the 2nd Defendant.
 44. When referred to the letter of allotment at page 20 of the consolidated bundle, she stated that the signature appearing there is not known to her. She further stated that the letter would have been witnessed by the project lawyers and executed by Wainaina Kinyanjui or another director; Joyce Wainaina. She pointed out that she is familiar with their signature and they did not sign the said allotment letter and that the Plaintiff has not told the Court who signed the letter. She added that that she could have signed it as a senior manager but she did not.
 45. She also stated that if the 1st Defendant was to sell the apartments, the money would be paid through M/S Kaplan & Stratton Advocates and that the 1st Defendant never got any information that the 2nd Defendant had paid the money.
 46. When she was re-examined, she stated that the allotment letter at page 20-22 of the consolidated bundle is not signed by directors of the 1st Defendant nor its management. She also reiterated that the 1st Defendant never dealt with the Plaintiff.
 47. DW2, Noel Mutunga Malinda, a cousin to the 2nd Defendant and the executor of his will testified on 27th October 2021. His witness statement dated 27th October 2014 was adopted in evidence. He produced the list of documents dated 27th October 2014.
 48. He stated that the 2nd Defendant was appointed by the 3rd Defendant on 13th May 1997 as her attorney with regards to the suit property. On 15th October 2008, he transferred the property to the



- 1st Defendant. The Property Development Agreement dated 15th October 2008 provided that the 2nd Defendant would get 1 duplex apartment, 1 3 bedroom apartment and 2 2- bedroom apartments in his name. It was also agreed that any agreement for sale of the apartments would be made between the 1st Defendant and a prospective buyer.
49. He stated that apartments were constructed by the 1st Defendant and in 2010, the Plaintiff entered into an agreement for the purchase of Apartment B6 situated on LR No.1/153 Wood Avenue .On 20th October 2010, the 3rd Defendant revoked the Power of Attorney she had granted to the 2nd Defendant and appointed the 4th Defendant as her lawful attorney.
50. He added that the 2nd Defendant was not aware of any further on goings about the transaction between the Plaintiff and the 1st Defendant and that the withdrawal of Power of Attorney was communicated to the 1st Defendant before construction of the apartments.
51. When cross-examined, he stated that he is familiar with the dispute as the 2nd Defendant; Martin (deceased) and the 4th Defendant are his cousins. He further stated that the 3rd Defendant told him that she was being neglected by her children after the demise of her husband. She added that she is aware that she granted a Power of Attorney to the 2nd Defendant on 13th May 1997 and revoked it on 20th August 2010.
52. He stated that he does not dispute the agreement for the assignment of apartment B6 by the 2nd Defendant to the Plaintiff and the amended agreement at page 23-31 of the consolidated bundle of documents. He further stated that the said agreement was executed validly and that the Plaintiff made payments to the 2nd Defendant but he cannot confirm sine he did not see.
53. He stated that the Power of Attorney to the 2nd Defendant was revoked and that he is aware that the Plaintiff stopped making payments for the apartment as per information from the Plaintiff and the 2nd Defendant's Advocates.
54. He stated that as executor of the 2nd Defendant's estate, he filed for confirmation of grant and following the Plaintiff's objection to its confirmation, the suit property was excluded.
55. He further stated that after the 2nd Defendant's Power of Attorney was revoked, the 2nd Defendant had no power to influence the on goings in the suit property as the 4th Defendant was now to deal with the Plaintiff. He added that at page 39 of the consolidated bundle, there is a stamp duty declaration and page 92 of the same bundle show the Plaintiff made payments via RTGS.
56. DW2 also averred that the Plaintiff also deposited cash to Martian properties as the cash deposit slip at page 52 of the consolidated bundle shows .He further stated that the only entity associated with the 2nd Defendant was Martian Communication Limited and he does not know whether the 2nd Defendant had a partner and he does not know his shareholding either in Martian Properties.
57. He stated that the 2nd Defendant passed away on 17th March 2013 and he started dealing with his estate in mid-2013 after the will was read. He added that he saw documents regarding payments made by the Plaintiff in 2016 and saw the agreement between the Plaintiff and the 2nd Defendant around the same time. He added that he can confirm payments but there was no sale to Martian Properties Limited
58. When re-examined, he stated that the 2nd Defendant disposed apartment B6 as the donee of the 3rd Defendant's Power of Attorney.
59. DW3 Consolata Ndinda Malinda – Abe, the 4th Defendant testified on 28th October 2021. Her witness statement dated 9th June 2014 was adopted as part of her evidence. She stated that the 3rd Defendant is



her mother while the 2nd Defendant was her elder brother and his three other siblings are deceased. She further stated that her late further John David Munyao purchased LR No.1/53 Nairobi from a Jessie Eshikhali Opembe in 1978. Upon his demise, and by his will dated 3rd September 1985, he bequeathed it among other properties to the 3rd Defendant for her upkeep.

60. She stated that by a power of Attorney dated 13th May 1997, the 3rd Defendant appointed the 2nd Defendant to be her lawful attorney and agent. She further stated that for many years, the 2nd Defendant would collect rent from the suit property but he did not account for it.
61. She stated that around 2008, she came to learn that the 2nd Defendant in his capacity as the 3rd Defendant's attorney had entered into a property Development Agreement with the 1st Defendant and 24 flats had been constructed at the property. Further, 4 flats as well as 40% of profits from the sale were to be retained by the 2nd Defendant in his capacity as the 3rd Defendant's attorney but he never remitted the funds.
62. She contended that the 2nd Defendant started claiming ownership of the suit property and subsequently took out proceedings before the Disciplinary Committee of the Law Society of Kenya in which he challenged the 3rd Defendant's ownership to the suit property. He claimed that the 3rd Defendant's lawyers had acted for him in his own right and not the 3rd Defendant and that the property involved in the transaction was his and not hers. A ruling was entered against him
63. She stated that 3rd Defendant revoked his Power of Attorney by a written revocation dated 20th August 2010 and pointed her attorney the same day .When she commenced dealing with the suit property as the 3rd Defendant's attorney, she discovered that the 2nd Defendant had purposed to sell apartment B6 without the 3rd Defendant's knowledge. She states that the alleged sale was in excess of authority granted to the 2nd Defendant by the Power of Attorney dated 13th May 1997 and neither her nor the 3rd Defendant received any proceeds from the sale of Apartment B6.
64. When she was cross –examined, she stated that she met Wainaina Kinyanjui at the offices of M/S Kaplan & Stratton in July 2011 after she was granted the Power of Attorney. When referred to clause 7.1 of the property Development agreement between the 1st Defendant and the 2nd Defendant, she stated that the 2nd Defendant had the authority to execute it.
65. She further stated that she has had interactions with the 1st Defendant and the properties including apartment B6 were handed over to the 3rd Defendant's Advocates. She added that apartment B6 is currently occupied and it is managed by herself and her sisters through a company by the name Katalina Holdings Limited. The said company's directors are Tracy Wavinya, M.Colletta, N.Malinda, Balmoy Abe who is her son, the 3rd Defendant (deceased) and herself. She added that her late brothers are not directors/shareholders of Katalina Holdings Limited and that it receives ksh.90,000/= in rent from apartment B6.
66. She Stated that she has always dealt with the 3rd Defendant's affairs before 2010 but she learnt about the sale of apartment B6 between 2009-2010 .She further stated that 2nd Defendant also discussed its sale in the presence of the 3rd Defendant and one of their uncles.
67. She stated that the 3rd Defendant was not willing to sell apartment B6.She added that she was once sick and was admitted and it is the 2nd Defendant's wife who visited her and payed the bills. She pointed out that they were close but they fell out when the 3rd Defendant claimed for her properties.



68. She stated that the 2nd Defendant moved his family to the suit property in 1996-1997 without the 3rd Defendant's consent. She further stated that she was not aware of any boundary dispute in respect of the Sui property.
69. She stated that the 1st Defendant was registered proprietor of LR No 1 /153 but she does not know who the current owner is. She further stated that she would not know what documents regarding the suit property were surrendered to Kaplan and Stratton.
70. When referred to the correspondence at page 188 of the consolidated bundle dated 26th April 1997 from the 2nd Defendant addressed to Richard G Mbai of Kaplan & Stratton advocates and copied to the 3rd Defendant informing her of the agreement to sell the suit property and renovate property on Jabavu lane, she stated that the 3rd Defendant did not object as she donated to the 2nd Defendant the Power of Attorney dated 13th May 1997 thereafter.
71. She also cited the documents at page 200 to 203 of the consolidated bundle to state that the 3rd Defendant received legal advice during the preparation of the power of attorney at page 144 of the bundle which gave the 2nd Defendant power to sell the suit property. She further stated that she did not contest it and that it was duly signed by the 3rd Defendant.
72. She stated that there were issues with the Jabavu lane property between 1997 -2010 as it was sold without the 3rd Defendant's knowledge and the proceeds paid to the 2nd Defendant's account but there is no evidence to that effect.
73. She stated that the 3rd Defendant revoked the 2nd Defendants power of attorney in 2010 once she realized that the 2nd Defendant was not being honest but before that, there were family meetings though no civil or criminal proceedings were initiated against the 2nd Defendant by the 3rd Defendant.
74. She stated that Noel Mutunga got in touch with the Plaintiff after they learnt of the sale of apartment B6. Further, they did not challenge the sale of LR 1/153 as it had taken place. She added that she had no duty to complete the transaction between the Plaintiff and the 2nd Defendant as apartment B6 belongs to the 3rd Defendant.
75. She also stated that the 3rd Defendant passed away and succession proceedings of her estate were commenced at Machakos. She is the executor and the intended beneficiary of apartment B6 would be Katalina Holdings Limited though there is an order; page 115 of the consolidated bundle, that apartment B6 is excluded from the estate.
76. She also stated that the 2nd Defendant acknowledged receipt of ksh.1.5 million as down payment of the purchase price of apartment B6 through Martian properties.
77. After the close of the oral submissions, parties were directed to file final written submissions.

The Plaintiff's Submissions.

78. They are dated 31st March 2022. They raise the following issues for determination;
 - a. In what capacities are the 1st, 2nd, 3rd and 4th Defendants sued and is there a disclosed cause of action against them?
 - b. Did Martin have capacity to contract with the Plaintiff in the manner he did with respect to Apartment B6 on Land Reference No.1/153?



- c. Did Martin breach the terms of the assignment agreement (as amended? And did the other Defendants commit any breach?
 - d. What reliefs are available to the Plaintiff?
79. On the issue whether Martin had capacity to contract with the Plaintiff, the Plaintiff submits that Martin held a Power of Attorney donated on 13th May 1997 which authorised him to enter into the assignment agreement with the Plaintiff dated 16th May 2010 and the amendment thereto dated 16th August 2010 which were signed while the Power of Attorney was still in force.
80. He points out that the 2nd Defendant does not deny the assignment and that the 4th Defendant admitted on cross-examination that no transaction carried out by Martin using the said Power of Attorney was challenged/contested. He added that evidence suggests that the objection on assignment agreement by the Defendant is not based on want of form/authority but ulterior motive.
81. He also argues that the moment Martin transferred the parent property to the 1st Defendant through the conveyance dated 18th February 2009 as expressly authorised to do so, the 3rd Defendant's proprietary interest in the parent property ceased and any subsequent transaction on any apartments erected upon the parent property did not need sanctions by the provision of the original Power of Attorney.
82. He submits that the 2nd Defendant breached the assignment agreement as amended by failing to obtain the necessary consents from the relevant persons before completion date, failure to pay for the cost of stamp duty, registration fees and other disbursements payable on the lease. He further submits that the 1st Defendant breached their terms of the Project Development Agreement and that the 4th Defendant had a legal duty to take over implementation, of any agreements entered into by the 2nd Defendant.
83. He points out that the firm of Kaplan & Stratton represented the 3rd Defendant, the 1st Defendant and currently represents the 3rd and 4th Defendant thus it cannot be said that all those parties were not aware of the existence and terms of the original Power of Attorney issued to the 2nd Defendant and that the 2nd Defendant or his nominee was entitled to receive the suit apartment.
84. He urges the court to award him mesne profits at market rates from November 2010 in terms of the valuation report by Etwons Property consultants as at page 95-104 of the consolidated bundle as the evidence was not contested by the Defendants. He further urges the court to set off the balance of the purchase price being ksh.9,030,175.00/= from the sums collected by the 3rd Defendant from the mesne profits and deem the balance of the purchase price as fully settled.
85. In the alternative, he seeks a declaration of breach of contract, a refund on the purchase price and 13 monthly instalments wrongfully retained by the 2nd Defendant in the sum of ksh.3,469,825.00 with interest at court rates from 6.5.2010 until payment in full as well as damages for breach of contract at ksh.23,500,000/= which is the market value of the suit apartment as per the valuation by Etwons Property consultants.

The 1st Defendant's Submissions.

86. They are dated 20th June 2022 and raise the following issues for determination;
- a. Whether privity of contract exists between the Plaintiff and the 1st Defendant.
 - b. Whether the Plaintiff has a cause of action against the 1st Defendant as claimed in the plaint.



87. The 1st Defendant cites the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR to submit that the principle of privity of contract envisages the position that the autonomy of the will of the parties should be respected. It points out that it did not at any stage during the life of the Property Development Agreement enter into any agreements with the Plaintiff with regards to any property included or mentioned therein.
88. It adds that it is trite law that courts will not import or infer non-existent terms into a contract already agreed between the parties. It cites the case of Pius Kimaiyo Langat v Co-operative Bank Of Kenya Ltd [2017] eKLR for that position.
89. It invokes Order 2 Rule 15 (2) of the Civil Procedure Rules and urges the cause to strike the suit against it out as there is no factual relationship between it and the Plaintiff which entitles the Plaintiff to obtain a remedy against it.
90. It also relies on the case of Samuel Kamau Macharia v Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] e KLR as well as the case of B.Mathayo Obonyo v South Nyanza Sugar Co.Ltd [2019]e KLR to submit that there is no cause of action against it.

The 2nd Defendant's Submissions.

91. They are dated 16th June 2022. They raise the following issues for determination;
 - a. Whether there was a contract between the Plaintiff and the 2nd Defendant and whether there was a breach of the obligations by the 2nd Defendant
 - b. What was the effect of the revocation of the Power of Attorney to the contractual obligations of the 2nd Defendant.
 - c. Whether Martin exceeded the powers donated to him under the Power of Attorney.
92. Relying on the case of Freeman and Lockyer(a firm) v Buckhurst Park Properties (Mengel)LTD [1964] ALL ER 630 ,the 2nd Defendant submits that he acted within the Power of Attorney donated to him as agent of the 3rd Defendant .He had an obligation to transfer the suit apartment as provided in the agreement of 6.5 2010 and upon revocation of his Power of Attorney, the duty to perform contractual obligations in relation to the suit apartment automatically fell upon the 4th Defendant who was the subsequent donee. He cites the case of CBB v MIB & another [2014] eKLR to submit that the revocation did not affect the validity of the agreement entered between the Plaintiff an the 2nd Defendant but only served to transfer the contractual obligations to the subsequent Donee.
93. He relies on the case of Penazzi Livio v Mario Cibra Romanini [2010]e KLR to submit that the Power of Attorney dated 13.5.1997 bestowed actual authority upon the 2nd Defendant and that he did not exceed it. He points out that during cross-examination, the 4th Defendant conceded that there was no evidence that the 2nd Defendant did not account for proceeds of the sale to the 3rd Defendant

The 3rd and 4th Defendants' Submissions.

94. They are dated 1st September 2022 and raise the following issues for determination;
 - a. Whether under the Power of Attorney given to Martin in this case, the attorney could sell land on which the flat was built.
 - b. If the answer to the above is 'yes', whether the attorney could sell without the donor's approval and for his own benefit.



- c. If the answer to the above is ‘no’, whether the attorney’s alleged sale was fraudulent.
 - d. If the answer to the above is ‘yes’ whether the fraud vitiated the sale.
 - e. Whether in any case the Plaintiff was subject to caveat emptor in these circumstances.
 - f. If the answer to the above is ‘ yes’ whether the Plaintiff discharged his duty in these circumstances; and
 - g. Whether, in any event the Plaintiff is entitled to the prayers sought.
95. It is the 3rd and 4th Defendants’ submission that while it is not disputed that the 3rd Defendant appointed the 2nd Defendant as his Attorney on 13th May 1997, the same was amended by way of correspondence dated 23rd May 1997 such that the actual and specific authority given by the 3rd Defendant to the 2nd Defendant was not to sell LR No.1/153.They cite the case of Re estate of Nicole Polcino (deceased) 2008 e KLR to submit that the 2nd Defendant exceeded the authority given to him.
96. They further submit that as per the ruling of the disciplinary Committee of the Law Society Of Kenya issued on 11th June 2012, and the evidence of the 4th Defendant that Martin started claiming ownership of the 3rd Defendant’s title, it is manifest he had no authority to sell the suit property but only to enter into the Property Development Agreement for development purposes thus the alleged sale was fraudulent
97. They cite the case of Diamond Trust Bank Kenya ltd v Said Hamad Sahamisi & 2 others [2015] eKLR, Reuben v Grat Finagall Consolidated[1906]AC 439,Farquaharson Bros & Co v C King & Co.[1902] AC325 to submit that the 2nd Defendant’s fraud in this smatter would invalidate any purposed sale of the flat to the Plaintiff.
98. They also submit that by the Plaintiff’s claim fails because of his failure to discharge his duty of care regarding the purported sale of the apartment as required under the doctrine of caveat emptor.
99. They further submit that the agreement of 18th February 2009 did not constitute a binding contract capable of specific performance and that the 2nd Defendant had no further or other proprietary interest in the land by extension and the apartment.

Analysis and Detemination.

100. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:
- a. Whether the 2nd Defendant had capacity to contract in the manner that he did herein
 - b. Whether revocation of the 2nd Defendant’s Power of Attorney invalidated the assignment agreement dated 6.5.2010 and the amendment dated 16.8.2010
 - c. Is there privity of contract between the Plaintiff and the 1st Defendant?
 - d. Is the Plaintiff entitled to the reliefs sought?
 - e. Who should bear costs of this suit?
101. As per the Power of Attorney dated 13th May 1997 and contained at page 114 of the consolidated bundle dated 24th October 2021, the 3rd Defendant donated to the 2nd Defendant power to sell LR No.1/153.



102. Subsequently, by a Property Development Agreement dated 15th October 2008, the 2nd Defendant provided the suit property to the 1st Defendant for purposes of construction of 24 flats. Neither the 1st nor the 2nd Defendant dispute the said agreement.
103. The 3rd and 4th Defendants argue that the said Power of Attorney was amended by way of correspondence dated 23rd May 1997 to the effect that the 2nd Defendant was stripped off the authority to sell the suit property. The said letter does not speak to an amendment of any part of the Power of Attorney dated 13th May 1997. In my view, the argument that the 2nd Defendant exceeded the powers donated on 13th May 1997 have no basis. DW3 confirmed that the 3rd Defendant has never contested the sale of LR 1/153 Wood Avenue. Further, this argument which was brought up in the submissions of the 3rd and 4th Defendants is contrary to DW3's evidence in cross-examination that the 2nd Defendant had authority to sign the Property Development agreement.
104. Subsequently, the suit property was transferred to the 1st Defendant vide a conveyance dated 18th February 2009. It has not been contested by the 3rd Defendant either.
105. By an agreement dated 15th October 2018 the 2nd Defendant in his capacity as the agent of the 3rd Defendant was entitled to some apartments.

Clause 5 (2) (a) of the said agreement provides;

“The owner shall be entitled to retain/duplex 1 three bedroomed flat, 2 two bedroomed flats (“the Retained Apartments”) in his name or such other person as he may nominate. For this purpose AfriREIT shall within thirty (30) days of this Agreement enter into a Sale Agreements (defined below) with the owner of the sale of the Retained Apartments to the owner. In addition, the owner shall be entitled to receive a share of the profits as indicated in Clause d (1) below”.

106. In pages 74 – 76 of the consolidated Bundle there is a letter of Allotment dated 5th May 2010 in favour of the plaintiff. He was offered Apartment B6 and he accepted.
107. In pages 79-85 of the consolidated bundle. There is an agreement of sale between Martin Kitisya Malinda (2nd Defendant) and the Patrick Karanja Njenga (Plaintiff) dated 6th May 2010 for Kshs.12,500,000/= The same was amended on 16th August 2010.
108. Under Clause 6.1 (a) of the agreement dated 15th October 2008, it was provided that any agreements for the sale of the apartments would be entered into between the 1st Defendant and the prospective purchaser. Therefore, the 1st Defendant is privy to the contract between the Plaintiff and the 2nd Defendant by virtue of this clause.
109. DW1 testified that the 2nd Defendant informed the court that it had identified the Plaintiff as its nominee for apartment B6. However she refuted the offer letter dated 5.5.2010. She however failed to prove that it was a forgery. She did not call a document examiner to give evidence of its authenticity. Further, the 1st Defendant also admitted to cancelling the offer letter on grounds that transferring apartment B6 to the Plaintiff would constitute stamp duty fraud.

When DW1 was cross-examined by Mr. Nyaribo for the Plaintiff, she admitted that Apartment B6 is among the Retained Apartments. She also admitted that the 2nd Defendant nominated the Plaintiff in May 2010 while the Power of Attorney was revoked on 20th August 2010. She also stated that Apartment B6 was handed over to the 4th Defendant.



110. The Plaintiff led evidence that as at July 2010, she had paid the 2nd Defendant Kshs. 3,469,825.00 and had an outstanding balance of Ksh.9,030,175.00 towards the purchase price of apartment B6. DW3 testified DW2 acknowledged receipt of Ksh.1.5 million as down payment for purchase of apartment B6.
111. On 20th August 2010, the Power of Attorney donated to the 2nd Defendant by the 3rd Defendant was revoked and another one issued to the 4th Defendant on the same date over the same property. The 2nd Defendant argues that it was discharged from obligations arising from the suit property when his Power of Attorney was revoked. While I take a similar view, I note that the 2nd Defendant had listed apartment B6 as forming part of his estate and bequeathed it to his son in his will executed on 12th February 2008 but the same was excluded from his estate vide a ruling issued on 14.12.2016 in Succession cause No.2106 of 2013 In the Matter of the Estate of Martin David Kitisa Malinda(deceased)
112. DW2 Noel Mutunga Malinda admitted on cross-examination by the Plaintiff's counsel that the Plaintiff made payment to Martin Kitisa Malinda. He said he got this from the records.
113. The 4th Defendant claims that she is not obliged to complete the transaction over apartment B6 between the Plaintiff and the 2nd Defendant. My view is that as the holder of the 3rd Defendant's Power of Attorney, she was obliged to complete the transaction.
114. I am of the opinion that this case calls for specific performance. The 1st Defendant testified that the lease to apartment B6 was left blank. The property is still registered in the 1st Defendant thus it can convey the suit apartment to the Plaintiff. It would be unrealistic to conclude that the Plaintiff and the 2nd Defendant never entered the assignment agreement. Further, when the 4th Defendant was appointed a Donee of the 3rd Defendant with regard to the suit property, she had a role to see that the transaction was concluded.
115. In the case of Reliance Electrical Engineers Vs. Mantric (K) Ltd (2006)eKLR Maraga J (as he then was), stated that

“The jurisdiction of Specific Performance is based on the existence of invalid enforceable Contract. It will be ordered if the contract suffers from some defect such as failure to comply with the formal requirements or mistake on illegality, which makes the contract invalid or unenforceable.

Even where a contract is valid and enforceable, Specific Performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate remedy where the claimant can readily get the equivalent of what he contracted from another source. Even when damages are not an adequate remedy Specific Performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant”.

116. Halsburys Laws of England (4th Edition) Paragraph 487 Volume 44 provides that; “A plaintiff seeking Specific Performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications and which ought to have been performed



at the date of the contract in the action. However, this rule only applies to terms which are essential and considerable.

The court does not bar a claim on the ground that the Plaintiff has failed in literal performance or is in default in some non-essential or unimportant term although it may grant compensation”

117. In *Anne Murambi v John Munyao Nyamu & another* [2018] eKLR; the Court stated, “...Secondly, an order of specific performance is an equitable remedy and is granted at the discretion of the court. This discretion is governed by certain principles. For instance, the remedy will not be granted if its enforcement will entail great hardship or if the vendor’s title is in doubt or if its enforcement would entail protracted or difficult litigation. Lastly, the essence of an order of specific performance is that the contract remains in force and the parties are required to discharge their obligations under the contract....”

I am satisfied that the Plaintiff is entitled to an Order of Specific Performance.

118. Apartment B6 is on the hands of the 4th defendant though the land on which is erected is registered on the name of 1st defendant’s name. I agree with the 2nd defendant’s submissions, that the actual authority donated to Martin Kitisa by the 3rd defendant under the Power of Attorney granted the 2nd defendant powers to enter into Agreements such as the one entered with the Plaintiff.

119. The plaintiff told the court that he stopped making payments when there arose a dispute between the 2nd Defendant and the 3rd Defendant. He had paid Kshs.3,469,825/= leaving a balance of Kshs.9,030,175.

For whatever reason the plaintiff did not pay the balance of the purchase price. For this reasons I decline to award any mesne profits.

120. I have considered the circumstances of this case and I decline to grant any damages.

121. Accordingly, Judgment is entered for the plaintiff as against the defendants jointly and severally as follows:

- a. That a permanent injunction is hereby issued restraining the Defendants whether by themselves, their officers, servants or agents or any of them from occupying ,selling, disposing of or in any other way interfering with the interests of the Plaintiff in the property known as Apartment Number B6 on Land Reference Number 1/153,Wood Avenue, Nairobi.
- b. That an order of Specific Performance is hereby issued compelling the 1st, 3rd and 4th Defendants to register the plaintiff as the owner of Apartment Number B6 on LR. NO. 1/153 wood Avenue Nairobi upon payment of the balance of the purchase piece of Kshs.9,030,175/= within one hundred and twenty (120) days from the date of this judgement.

In default the Honourable Deputy Registrar of this court to execute transfer forms on the plaintiff’s favour.

- c. The plaintiff shall have cost of the suit and interest.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF JULY 2023.

L. KOMINGOI

JUDGE.

In the presence of:



N/A for the plaintiff.

N/A for the 1st Defendant.

N/A for the 2nd Defendant.

N/A for the 3rd and 4th Defendants.

Court Assistant – Mutisya.

