



Alton Homes Limited & another v Chelegoi & 4 others (Environment & Land Case 371 of 2019) [2023] KEELC 19806 (KLR) (30 August 2023) (Judgment)

Neutral citation: [2023] KEELC 19806 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 371 OF 2019**

**EK WABWOTO, J
AUGUST 30, 2023**

BETWEEN

**ALTON HOMES LIMITED 1ST PLAINTIFF
JOHN KANGOGO 2ND PLAINTIFF**

AND

**DAVIS NATHAN CHELEGOI 1ST DEFENDANT
JOHN NDUATI NJUGUNA 2ND DEFENDANT
SAMUEL KUGEKA NDEGWA 3RD DEFENDANT
JOSHUA OMONDI HALLONDA 4TH DEFENDANT
COMMERCIAL BANK OF AFRICA LTD 5TH DEFENDANT**

JUDGMENT

1. The dispute in this suit relates to property Land Reference Number Nairobi Block 26/113 (“the suit property”). The Plaintiffs avers that the 1st Defendant contacted to sell the property to the 1st Plaintiff but later transferred the same to the 2nd Defendant. It was also averred that the 2nd Defendant forcefully took possession of the property from the 1st Plaintiff with the assistance of the 3rd Defendant and converted the 1st and 2nd Plaintiffs chattels in the process.

The Plaintiff’s case.

2. Through a plaint dated 27th April 2010, the Plaintiffs sought for the following reliefs:
a. A declaration that the 1st Defendant’s sale and transfer of property Nairobi Block 26/113 to the 2nd Defendant on the 14th day of January, 2010 was obtained in breach of the law, fraudulently and is null and void ab initio and the cancellation of the same.



- b. The 1st Defendant be ordered to specifically perform the first agreement dated the 27th day of May, 2007, the addendum to the first agreement dated the 3rd day of May, 2009, and the last agreement dated the 4th day of August, 2009, and deliver to the 1st Plaintiff the original certificate of lease, an executed transfer together with all necessary consents and forms to enable the registration of the property Nairobi Block 26/113 in the name of the 1st Plaintiff.
 - c. All necessary and consequential accounts, directions and inquiries.
 - d. The 1st and 2nd Defendants by themselves or by their agents, servants or otherwise howsoever be restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring (other than to the 1st Plaintiff) or assigning and/or otherwise dealing with property Nairobi Block 26/113.
 - e. The 1st, 2nd and 3rd defendants by themselves or by their agents, servants or otherwise howsoever be restrained from entering upon property Nairobi Block 26/113, levying distress upon, attaching the 1st and 2nd Plaintiffs' furniture and chattels, evicting the 1st Plaintiff from and/or in manner whatsoever interfering with the 1st and 2nd Plaintiff's occupation of property Nairobi Block 26/113.
 - f. The 2nd and 3rd defendants by themselves or by their agents, servants or otherwise howsoever be restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with the 1st and 2nd Plaintiff's furniture and chattels distressed from the premises on property Nairobi Block 26/113.
 - g. The 2nd and 3rd defendants by themselves or by their agents, servants or otherwise howsoever be directed by an order of mandatory injunction to return to the 1st and 2nd Plaintiffs, and at the said 2nd and 3rd defendants' cost, all the furniture and chattels distressed from the premises on property Nairobi Block 26/113.
 - h. The 1st and 2nd Defendants be ordered to pay the 1st and 2nd Plaintiffs damages for breach of contract, unjust enrichment and fraud in the sum of Kshs 20,000,000.00 together with interest thereon at court rates from the date of filing of this suit until payment in full in lieu of or in addition to specific performance.
 - i. The 2nd and 3rd defendants be ordered to pay the 1st and 2nd Plaintiffs' damages in the sum of Kshs 805,000.00 for trespass, wrongful seizure of the 1st and 2nd Plaintiffs' goods, conversion and illegal distress in lieu of or in addition to prayers f. and g above.
 - j. The 1st, 2nd and 3rd defendants be ordered to pay the 1st and 2nd Plaintiffs' costs of this suit together with interest thereon at court rates from the date of filing of suit until payment in full.
 - k. Any such other or further relief as this Honourable court may deem appropriate.
3. The Plaintiff averred that at all material times, the 1st defendant was the beneficial owner as allottee from the Government of the Republic of Kenya of property Nairobi Block 26/113 ("the property") under a tenancy purchase agreement dated the 20th day of January, 2005, between the 1st Defendant and the Government of the Republic of Kenya ("the tenancy purchase agreement")
 4. By an agreement in writing dated the 27th day of February, 2007, and made between the 1st Plaintiff and the 1st Defendant ("the first agreement"), the 1st Defendant agreed to sell and the 1st Plaintiff agreed to purchase the property at the price of Kshs 7,500,000.00.
 5. There were express terms of the first agreement amongst other, that:-



- a. A deposit of the purchase price in the sum of Kshs 3,200,000.00 was paid to the 1st Defendant on execution of the first agreement receipt whereof the 1st Defendant acknowledged.
 - b. The blanket of the purchase price in the sum of Kshs 4,300,000.00 would be paid within 90 days from the date of execution of the first agreement and would be utilized by the 1st Defendant in settling the sum due to the Government of the Republic of Kenya under the tenancy purchase agreement.
 - c. The completion date would be the 27th day of May, 2007, but the parties could agree to extend the same.
 - d. On completion date, the 1st Defendant would deliver to the 1st Plaintiff an executed instrument of transfer of the property and necessary consents and forms to enable the registration of the property in the name of the 1st Plaintiff.
 - e. The sale and purchase would be subject to the Law Society Conditions of sale (1989), in so far as they would not be inconsistent with the conditions contained in the first agreement.
6. In the month of May, 2007, the 1st Defendant gave the 1st Plaintiff vacant possession of the property pending the 1st Defendant's performance of his obligation under the first agreement and the law, the 1st Plaintiff having paid the entire purchase price and the same was thereafter, occupied as residence by the 2nd Plaintiff.
 7. The 1st Defendant was unable to perform his obligations under the first agreement in time and deliver to the 1st Plaintiff an executed instrument of transfer of the property and necessary consents and forms to enable the registration of the property in the name of the 1st Plaintiff whereupon the completion date was extended and the first agreement varied by an addendum in writing dated the 3rd day of May, 2009, and made between the 1st Plaintiff and the 1st Defendant ("the addendum to the agreement")
 8. It was also averred that the 1st Defendant was again, unable to perform his obligations under the first agreement as revised by the addendum to the first agreement in time and deliver to the 1st Plaintiff an executed instrument of transfer of the property and necessary consents and forms to enable the registration of the property in the name of the 1st Plaintiff whereupon the completion date was extended and the first agreement and the addendum to the first agreement varied by another agreement in writing dated the 4th day of August, 2009 and made between the 1st Plaintiff and the 1st Defendant ("the last agreement")
 9. The Plaintiff averred that the 1st Defendant breached the agreement dated 4th August 2009 and fraudulently sold and transferred the property to the 2nd Defendant at a consideration of Kshs 12,000,000/= particulars of breach and fraud which were particularized at paragraph 20 of the plaint.
 10. The Plaintiffs also averred that since taking possession of the property in May 2007 they had renovated and redeveloped the same incurring a sum of Kshs 7,644,528.00. It was also averred that on 17th April 2010, the 2nd and 3rd Defendant wrongly broke and entered the house and took possession of their furniture depriving the Plaintiffs of their use consequently of which the Plaintiff suffered loss and damages of Kshs 805,000/- particulars of which were pleaded at paragraph 30 of the plaint.
 11. At the trial, John Kangogo the 2nd Plaintiff testified as PW1. He adopted his witness statement dated 2nd December 2013 and produced his bundle of documents dated the same date and a further bundle of 09th April 2014. He produced evidence of the 3 agreements for sale. He also added that he acquired



- the suit property from the 1st Defendant and that he paid the entire purchase price. He also stated that he had no contractual relationship with the 2nd to 5th Defendants and the Third Party.
12. On cross-examination by the Advocate of the 1st Defendant he stated that only the 1st Plaintiff entered into a sale agreement with the 1st Defendant. He also stated that he paid Kshs 9,391,658/- as the purchase price and that a sum of Kshs 2 million was to be based on a professional undertaking. He also stated that he was not aware if the professional undertaking was ever issued by the Advocates. He further stated that he had not received any communication on whether the sale agreement had been rescinded and neither has he sought any prayer to nullify the sale agreement.
 13. On further cross-examination by Counsel for the 1st Defendant he also stated that he took possession of the property in August 2009 which was before the completion date stipulated in the sale agreement and that no extension was ever sought. He also stated that the completion period had lapsed as at the time of making payment and that parties were entitled to rescind the agreement. He also confirmed receiving the rescission letter. He also stated that he was not aware if 1st defendant had sold the property to 2nd Defendant. He also stated that he protested to the cancellation of the agreement. He conceded that on 14th January 2020 the 2nd defendant was already registered as the owner of property. He further stated that he renovated the house at his own costs.
 14. On cross-examination by Counsel for the 4th Defendant, he stated that he had paid the full purchase price but could not remember if the postdated cheques were cashed neither could he remember if his account was debited. He also stated that he did not have any receipts for confirmation of the payment made. He also stated that he could not remember if the Kshs 2,000,000/- was ever paid. He also stated that he is not aware if the property is registered in the names of the 4th Defendant. It was also his testimony that he had not made any claim against the 4th and 5th Defendants. He also stated that in the previous judgment, he had been granted possession of the suit property and allowed to carry out the eviction.
 15. When cross-examined by the Counsel for the 5th Defendant he stated that he was not aware that at the time of filing suit, the 2nd Defendant had already obtained a title to the suit property. He conceded to being aware of the ruling by Okwengu J. (as she then was) which confirmed that he was aware of the change of ownership at the time of filing suit. He also stated that he was not aware that the property had been Charged to a Third party.
 16. On further cross-examination by Counsel for the 5th Defendant he stated that he believed that the 1st Defendant was the owner of the property since the transfer of the property to other parties was fraudulent.
 17. On cross-examination by Counsel for Third party he stated that the court had declined to grant him an injunction. He also stated that he personally signed the caution and had the same registered but cannot understand how the same was removed. He also stated that the Third party was not a party to the initial proceedings.
 18. In re-examination, he reiterated that the agreement dated 9th August 2009 was the last operative agreement and that Kshs 2,000,000/- was to be paid after the transfer.

The case of the 1st Defendant.

19. The 1st Defendant filed a statement of defence dated 7th May 2010. He also relied on witness statement dated 27th May 2014. He stated that the 1st Plaintiff breached the 3 sets of agreement for sale by failing



to pay the agreed price, whereinafter he terminated the sale transaction and resold the property to the 2nd Defendant for Kshs 12,000,000/-

20. During trial, Davis Nathan Chelegoi, DW1 testified that he entered into an agreement dated 27th May 2007 of Kshs 7.5 million with the 1st Plaintiff which was not concluded. He also stated that they also entered into an addendum agreement dated 3rd May 2009. The price to be added was Kshs 2 million and the sale price was Kshs 9.5 million which was also not concluded. According to him another addendum was entered into vide another agreement dated 4th August 2009 and the purchase price was Kshs 11 million. He also stated that the Plaintiff paid about Kshs 6 million which was taken as a deposit of purchase price. The balance was to be paid later as was agreed in that agreement of 4th August 2009 and the balance of Kshs 2 million was never paid and has never been paid to date.
21. The 1st Defendant also stated that he insisted for cancellation of the transaction between him and the 1st Plaintiff.
22. On cross-examination by Counsel for the Plaintiff, he stated that the agreements of 4th August 2009 was the last of the agreements done. He also stated that he had been paid Kshs 6,000,000/- as at the time of signing the agreement and Kshs 5,000,000/- was the remaining balance. He also stated that only Kshs 2,000,000 was paid out of the Kshs 5,000,000/- that was due. He also stated that there was an acknowledgment of Kshs 500,000/- paid on 4th August 2009, then another one for Kshs 280,000/-, Kshs 500,000/-, a receipt of Kshs 1,333,400/- another receipt of Kshs 59,258.70 a credit advice of Kshs 990,000/- dated 2nd October 2009 and two cheques of Kshs 1,000,000/-. He also stated that the agreement was terminated due to default and that the money that had been paid by the Plaintiffs was converted into rent.
23. On cross-examination by Counsel for the 4th Defendant, he stated that there was no evidence that he had received the cheques whose copies had been filed at page 53 of the Plaintiffs bundle of documents. He also maintained that a sum of Kshs 3,000,000/- had not been paid to him at the time of cancellation of the agreement.
24. When re-examined, he stated that he did not refund any money since the money that was paid was converted into rent. He also stated that after terminating the transaction, there was a deficit of Kshs 3,000,000/- which is still pending. He also stated that he never received a balance of Kshs 5,000,000/- and that is why he indicated his intention of cancelling the agreement.

The case of the 4th Defendant.

25. Winnie Hollanda, DW2 testified on behalf of the 4th Defendant. He stated that he is the wife to the 4th Defendant. The 4th Defendant filed a statement of defence and counterclaim dated 20th September 2021.
26. The 4th defendant averred being a stranger to the averments made by the Plaintiff and stated that he was a bonafide purchaser for value having acquired the suit property on April 2014 from the Third Party. In the counterclaim the following orders were sought: -
 - a. A declaration that orders of specific performance are not appropriate in these circumstances.
 - b. A declaration that the 4th Defendant acquired good title for L.R. No. Nairobi/Block 26/113
 - c. General damages for unlawful eviction.
 - d. Special damages of Kshs 3,006,708/-



- e. Aggravated and punitive damages.
 - f. Costs of the suit and interest against the Plaintiffs.
27. During trial, DW2 told the court that they were not aware of any issues in respect to the property until when they were evicted.
 28. On cross-examination by Counsel for the 5th Defendant, she stated that she was aware that her husband had charged the property to the 5th Defendant.
 29. When cross-examined by Counsel for the Third party, she stated that the property was purchased through auction and a search was done before purchase.
 30. On cross-examination by Counsel for the Plaintiff she still maintained that the property was purchased from the Third party and all payments were made through the Third Party. She also stated that she did not have any agreement for sale between themselves and the Third party. She also stated that the 2nd Defendant had never disclosed to them that there was a pending suit in respect to the property.
 31. When re-examined, she stated that the Third party had written a letter indicating that they hold the title to the property. The purchase price was made to the Third party. She also stated that no eviction notice was received.

The case of the 5th Defendant.

32. The 5th Defendant filed a statement of defence dated 1st February 2022. They also filed a witness statement dated 13th September 2021 and bundle of documents dated 16th September 2021. In their defence, the 5th Defendant averred that the Plaintiffs as well as the 1st to 3rd defendant were strangers to them. It was also averred that pursuant to a letter of offer dated 9th February 2016, the 5th defendant advanced the sum of Kshs 2,000,000/- and 20,000 USD to Crane Travels and Tours Limited on the terms and conditions contained in the aforesaid facility letter.
33. It was also averred that it was a term of the said facility that the same would be secured by a First Legal Charge over all that property known as Nairobi Block 26/113 (“the suit property”) registered in the name of the 4th Defendant.
34. As part of due diligence, the 5th defendant conducted and was issued with a certificate of official search dated 6th April 2016 in respect of the suit property. The official search aforementioned did not reveal any encumbrance on the suit property as at the said date save for the charge registered in favour of the 5th Defendant. No inhibition, caution, restriction or court order was registered against the title to the suit property and it was therefore clear that there were no competing interests in relation to the suit property at the time of the creating and perfection of the charge.
35. It was also averred that having been satisfied that the suit property was free from any encumbrance, the 5th defendant then created and registered a First Legal Charge dated 1st April, 2016 over the suit property.
36. It was also averred that, the 5th Defendant therefore acquired a legal right and interest over the suit property as charge and the Plaintiffs’ claim was overtaken by events since the suit property changed hands and is currently charged to the 5th Defendant.
37. Jackson Nyaga (DW3) gave evidence on behalf of the 5th Defendant. He adopted his witness statement dated 13th September 2021 and also produced bundle of documents contained in the 5th Defendants bundle dated 14th February 2022.



38. On cross-examination by Counsel for the 4th Defendant, he reiterated that the 5th Defendant did due diligence when registering the charge.

The case of the Third Party.

39. The Third Party filed a Statement of defence dated 19th January 2022. The Third Party averred being a stranger to the Plaintiffs as well as the 1st, 3rd, 4th and 5th defendants herein and further being a stranger to the transactions if any pleaded in the plaint between the parties.
40. It was also averred that the 2nd defendant is known to the Third Party as he was at all material times relevant to this suit, a customer of the Third Party and enjoyed banking facilities and services offered by the Third Party at his request and instance.
41. In the year 2011 or thereabouts, the 2nd defendant as the Director of Uchumi International Agencies Limited, applied for a loan facility of Kenya Shillings Fifteen million (Kshs 15,000,000/-) from the Third Party.
42. The said facility was to be secured by a charge over the property known as Nairobi/Block/26/113 which property was registered in the name of the 2nd Defendant.
43. Having been satisfied that the suit property was free from any encumbrances after conducting its due diligence, the Third Party then created and registered a charge against the suit property.
44. The third party therefore acquired a legal interest over the suit property as a charge. That the Third Party fully complied with the provisions of the Land Act 2012 and conducted all due diligence before and after perfection of the security and therefore the security was regularly registered.
45. The 2nd Defendant then defaulted in servicing the loan facility and the Third Party instructed the firm of Cheptumo & Company Advocates to pursue recovery process as prescribed in law.
46. In the year 2013 or thereabout, the Third Party instructed to do valuation of the property known as Nairobi/Block 26/113 to enable recovery.
47. A three months' notice was then issued to the 2nd defendant and Uchumi International Agencies Limited.
48. Subsequently, the firm of Cheptumo & Company Advocates informed the Third Party that they had found a purchaser for the property and the 2nd Defendant was agreeable to the property known as Nairobi/Block 26/113 being sold and the proceeds of the sale being used to defray the outstanding liabilities.
49. The Third Party was agreeable to the sale. The transaction was completed and the bank discharged the property after paying the purchase price to the 2nd Defendant's loan account.
50. During trial, Isaac Onyango, DW4 testified on behalf of the Third Party. He adopted his witness statement dated 24th January 2022 and also relied on the Third Party bundle of documents dated 26th January 2022 as his evidence in chief.
51. When cross-examined by Counsel for 4th Defendant, he stated that the Third Party never had any intention of frustrating the transaction.
52. On cross-examination by Counsel for the Plaintiff, he stated that when the Third Party charged the property, they were not aware of any pending dispute. He stated that the funds were released sometimes in 2011 and that the second defendant never disclosed to them the existence of any suit. He further



stated that if the same could have been brought to their attention, then the charge would not have been accepted.

53. When re-examined, he stated that due diligence was done before the property was charged and they were not aware of any claim against the property.

The Plaintiff's submissions.

54. The Plaintiff filed their detailed submissions dated 17th March 2023 through Havi & Company Advocates. In the opening paragraphs of their submissions, the Plaintiffs explained the dispute before court, brief history of the matter and the respective claims of the parties.

55. The Plaintiffs submitted on several issues which I will proceed to summarize herein. On whether the 1st Plaintiff was a tenant/Licensee of the 1st Defendant, it was submitted that the 1st Plaintiff paid the balance of the purchase price and was granted vacant possession of the property in May, 2007, pending completion by the 1st Defendant, in terms of clause 2 (b) of the agreement dated 27th February, 2007. The 1st Defendant stated that the 1st Plaintiff was a licensee, for the reason that the 1st Plaintiff did not pay the balance of the purchase price on time. The 1st Defendant did not provide evidence of any demand to the 1st Plaintiff, it at all there was delay in the 1st Plaintiff's payment of the balance of the purchase price.

56. Clause 2 (b) of the agreement dated 27th February, 2007 provides that:-

“As to the balance of Kshs 4,300,000/- within the next ninety (90) days from the date of execution and of which amount the vendor shall liquidate the entire balance of the purchase price due from him to the Government of Kenya and thereafter immediately grant vacant possession of the said property to the purchaser.”

57. The completion date for the agreement was 27th May 2007. At paragraph 11 of its plaint, the 1st Plaintiff only stated that it was given vacant possession in May, 2007, having paid the balance of the purchase price in terms of the agreement dated 27th February 2007. The 1st Plaintiff further stated that he occupied the property through the 2nd Plaintiff as an owner and not as a tenant/licensee of the 1st Defendant.

58. It was also submitted that the agreement was clear that vacant possession of the property would be given to the 1st Plaintiff upon payment of the balance of the purchase price as an owner and not as a tenant/licensee. The fact that the Plaintiffs were in occupation of the property in May, 2007 and at the time of filing this suit on 27th April, 2010, proves the 1st Plaintiff's occupation in terms of the agreement and not as a tenant/licensee liable to pay rent to the 1st Defendants.

59. The Plaintiffs argued that extrinsic evidence is not admissible to change the terms of the agreement dated 27th February, 2007. Reliance was placed to Section 98 of the Evidence Act, Cap 80 of Laws of Kenya to effect that: -

“When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms...”



60. It was also argued that the claims by the 1st Defendant that the 1st Plaintiff took possession of the property as a tenant/licensee are intended to vary the express terms of a written agreement. That is not permissible in law.
61. On whether there was breach of agreement dated 27th February 2007, the Plaintiffs submitted that there was breach by 1st Defendant since the Plaintiffs had been put in possession of the property in terms of clause 2(b) of the agreement and that completion documents were not given by 27th May 2007. Reliance was made to the case of Amina Abdul Kadir Hawa –vs- Rabinder Nath Anand & Another (2012) eKLR in support of this position.
62. As to the terms and breach of the addendum agreement dated 3rd May 2009, it was submitted that the addendum is exhibited at pages 37 to 40 of the Plaintiffs' list and bundle dated 2nd December, 2013. The addendum acknowledged the 1st Defendant's and the 1st Plaintiff's entry into the agreement dated 27th February 2007. It provided that the 1st Plaintiff would pay an additional Kshs 2,000,000.00 to the 1st Defendant, Kshs 1,000,000.00 on execution of the addendum and Kshs 1,000,000.00 on or before 31st May 2009. The 1st Plaintiff would pay Kshs 1,400,000.00 to the Government of Kenya on behalf of the 1st Defendant. The completion documents would be released to the 1st Plaintiff upon payment by the 1st Plaintiff of the said balance. The processing of the title in the name of the 1st Plaintiff was the responsibility of the 1st Defendant.
63. On breach of the addendum dated 3rd May, 2009 it was submitted that the 1st Plaintiff performed its obligations and that the 1st Defendant was not ready with completion documents. The 1st Defendant's response at paragraph 6 of the Statement of Defence was a mere denial since as per the copy of the green card that was produced in evidence, the 1st Defendant was not the registered owner of the property until 9th December 2009 and could not have possibly completed the sale transaction before then.
64. In respect to the agreement dated 4th August 2009, it was submitted that the 1st Defendant did not perform any of his obligations under the agreement dated 4th August 2009. The 90th day from 4th August 2009 was 4th November, 2009. The 1st Defendant obtained registration of the title of the property in his name on 9th December 2009 outside the completion period. He did not have or deliver the completion documents within 90 days from 4th August 2009. He did not provide the undertaking under clause 4 in respect to the postdated cheques in the total sum of Kshs 2,000,000.00. Instead, the 1st Defendant wrote to the 1st Plaintiff on 15th December 2009 demanding Kshs 13,958, 355.00 by 20th December 2009 failing which the sale transaction would have to be cancelled. The Plaintiffs described this action as a breach on the part of the 1st Defendant.
65. On termination of the agreement dated 4th August 2009 it was submitted that on 16th December 2009, the 1st Plaintiff wrote to the 1st Defendant asking for completion documents. The 1st Defendant did not comply but purported to demand more money from the 1st Plaintiff and threatened to cancel the sale and that the purported termination was unlawful. The 1st Defendant claims to have terminated the agreements in terms of the letter dated 21st December 2009 from O.N. Ojwang & Company Advocates to Kipsang & Mutai Advocates. It was submitted that the said letter was exhibited at page 11 of the 1st Defendant's list and bundle. The letter alleges the 1st Plaintiff's failure to comply with the conditions of payment. It was contended that the said claim was false, in view of the documented evidence at pages 48 to 55 of the Plaintiff's list and bundle dated 2nd December 2012 that the entire balance of Kshs 3,000,000.00 was paid post –dated cheques for kshs 2,000,000.00 released to the 1st Defendant.
66. The Plaintiffs further submitted that 1st Defendant could not terminate the agreement for sale without refunding the entire purchase price of Kshs 9, 391, 668.70 paid to him by the 1st Plaintiff. Reliance was



made to the case *Ayub Ndungi –vs- Marion Waithera Gachera* (2009) eKLR. where the court stated as follows:

“the law requires is that in the case of a rescission of a contract for the sale of land the vendor returns the deposit to the purchaser in order to escape liability to pay damages for breach of contract. The Plaintiff has not given any evidence of such notice having been issued. He says he cannot even remember when he rescinded the contract which clearly shows that no rescission can be inferred. It is important to point out here that rescission will only be allowed where restitution is possible, which cannot be the case where possession has been given to the purchaser who has thereafter developed the land.”

67. In respect to the sale and transfer to the 2nd defendant it was submitted that the particulars of fraud in respect to the sale and transfer of the property to the 2nd Defendant are pleaded and particularized at paragraph 20 of the plaint dated 27th April 2007. The 1st and 2nd Defendants are accused of entering into the subsequent transfer of the property to defeat the 1st Plaintiff's right to the property under the agreement dated 4th August 2009.
68. The only available evidence that the property was transferred to the 2nd Defendant by the 1st Defendant is the green card exhibited at page 61 of the Plaintiff's list and bundle dated 2nd December 2013. There is no evidence of an agreement for sale, payment from the 2nd Defendant to the 1st Defendant of the claimed transfer value of Kshs 12,000,000.00 or of the instrument of transfer. The 1st and 2nd Defendants did not tender any evidence whatsoever of the sale and transfer. The transaction was mysterious and secret. The transaction between the 1st and 2nd Defendants has all the hallmarks and badges of a fraudulent transaction.
69. The green card at page 61 of the Plaintiffs' list and bundle of documents dated 2nd December, 2013 indicates that the 1st defendant obtained title to the property on 9th December 2009. He transferred it to the 2nd Defendant on 14th November 2010 a record 35 days.
70. It was also submitted that the 2nd Defendant cannot be a bonafide Purchaser for value without notice since he has not demonstrated what consideration if any, he paid for the property, he also obtained a transfer of the property when the same was in occupation of the Plaintiffs and further he had notice of the 1st Plaintiff's interest over the property. The Plaintiffs also referred to a text of Kerr on the Law of Fraud and Mistake, 7th Ed.
71. On whether the Plaintiffs were tenants of the 2nd Defendant, it was submitted that the 1st Plaintiff occupied the property through the 2nd Plaintiff, as a purchaser thereof from the 1st Defendant in terms of the agreement dated 27th February 2007, addendum dated 3rd May, 2009 and agreement dated 4th August 2009. There was no tenancy relationship between the Plaintiffs and the 1st and 2nd Defendants. The 2nd Defendant was at pains to explain the claimed tenancy and power to evict. The Plaintiffs were not liable for the eviction for non-payment of rent in the manner done by the 2nd and 3rd defendants or at all.
72. The Plaintiffs submitted that in the ruling delivered on 25th February 2011, the court dealt with the issue at where it was held that: -

‘It is evident that the 2nd applicant is in possession of the suit property, although its status is unclear. The 2nd respondent who is now the registered owner of the suit property has claimed that it was agreed between him and the 2nd applicant that the 2nd applicant would remain in the premises as a tenant. There is however nothing to substantiate this allegation.



The possibility of the 2nd respondent using the distress process to illegally hound the 2nd applicant out of the premises cannot be overlooked.”

73. In respect to the reliefs sought, the Plaintiffs submitted that the 1st Plaintiff contracted to purchase the property for Kshs 11,000,000.00. A total of Kshs 9,391,668.70 was paid to the 1st Defendant. The 1st Plaintiff took possession and made improvements on the property at the costs of Kshs 7,644,528.00. The 1st Plaintiff lost the property and the chattels therein valued at kshs 805,000.00 in an unlawful eviction conducted by the 2nd and 3rd defendants. There can be no denial that the Plaintiffs suffered damage and loss.
74. At paragraph 21 of the Plaint, the Plaintiffs have claimed a total of Kshs 20,000,000.00 on account of special damages. Kshs 9,391,668.70 represents the actual amount of money paid to the 1st Defendant for the purchase of the property. Kshs 7,644,528.00 represents the cost of the improvements on the property. The improved value of the property was Kshs 20,000,000.00 as at 27th April 2010. The 2nd and 3rd Defendants defied the orders of the High Court and of the Court of Appeal to return the chattels to the Plaintiffs. The Plaintiffs also claimed the loss suffered on account of the chattels taken away in the sum of Kshs 805,000.00 and evidence was tendered in support thereof in terms of the valuation dated 14th February, 2014.
75. The Plaintiffs also requested the court to cancel the transfer to the 2nd Defendant and for an order of specific performance in favour of the Plaintiffs. Reliance was made to the cases of Mbugua Njuguna –vs- Elijah Mburu & Another (2004) eKLR, Hasamuddin Gulamhussein & others –vs- Kidogi Basi Housing Cooperative (2009) eKLR, Elijah Kipkorir Barmalel & Another –vs- John Kiplagat Cheronno & 3 Others (2010) eKLR and Malhotna –vs- Chavidhury (1979) 1 ALL ER 186.
76. The Plaintiffs also sought for special and general damages in addition to and in lieu of specific performance. The Plaintiffs submitted that the property was alienated in contravention with the doctrine of lis pendens. The Plaintiffs framed their final relief sought as follows “the cancellation of the transfer of the property to the 2nd Defendant, the dismissal of the defense and counter claim dated 14th May 2010 by the 2nd Defendant, the dismissal of the Defense and counterclaim dated 20th September 2021 by the 4th Defendant, specific performance and consequential injunctions in terms of prayers (a) to (g) of the plaint dated 27th April 2010. Additionally; the 2nd and 3rd defendants be ordered to pay the 1st and 2nd Plaintiffs Kshs 805,000.00 on account of special damages for chattels converted, together with interest thereon at 12% p.a from 27th April, 2010 until payment in full; the 2nd and 3rd Defendants be ordered to pay the 1st and 2nd Plaintiffs Kshs 724,500.00 on account of trespass, wrongful seizure of chattels, conversion and illegal distress together with interest thereon at 12% p.a from 27th April 2010 until payment in full; and the 1st, 2nd and 3rd defendants be ordered to pay the 1st and 2nd Plaintiffs costs of this suit together with interest thereon at 12% p.a. from 27th April 2010 until payment in full.”

The 1st Defendants written submissions.

77. The court record shows that no written submissions had been filed by the 1st Defendant as at the time of preparation of this judgment.

The 2nd Defendants written submissions.

78. The 2nd Defendant never participated in the trial and neither did he file any written submissions despite being granted an opportunity to do so.



The 3rd Defendants written submissions.

79. The 3rd Defendant never participated in the trial neither did he file any written submissions despite service and being granted an opportunity to do so.

The submissions of the 4th Defendant.

80. The 4th Defendant filed written submissions through the firm of OG Law LLP Advocates. The following issues were outlined for consideration by the court;
- i. Whether there was any fraudulent sale between the Plaintiffs that affected the 4th Defendant's title.
 - ii. Whether the third party's exercise of the charges power of sale to the 4th Defendant is impeachable.
 - iii. Whether the 4th Defendant's title is affected by allegations of defects in title.
 - iv. Whether the Plaintiffs are entitled to an order of specific performance.
 - v. Whether the 4th Defendant is entitled to the orders being sought.
81. It was submitted that the Plaintiffs did not file any pleading against the 4th Defendant despite them seeking cancellation of their title. Counsel submitted that the allegations of fraud that were pleaded by the Plaintiffs were not proved during trial. Reliance was placed in the cases of Jose Estates Limited – vs Muthemu Farm Limited & 2 others (2019) eKLR and Central Bank of Kenya Limited –vs- Trust Bank Limited & 40 Others (1996) eKLR.
82. On whether the Third Party exercise of the statutory power of sale to the 4th Defendant was unlawful, it was submitted that the statutory power of sale exercised by the 3rd party was lawful and was exercised in good faith and without any evidence of competing interest from the Plaintiff or any other person and that the Third Party had capacity to sell the 2nd Defendant having defaulted in repaying the loan.
83. It was also submitted that the 4th Defendant is a bonafide purchaser for value without notice of any fraud or impropriety. It was submitted that there was no evidence of registration of a caveat and there was no way that the 4th Defendant would have known any existence of a pending suit.
84. It was also submitted that the 4th Defendant had proved during trial that he holds a certificate of lease registered in his name and dated 16th May 2014 showing that he is the true and registered owner of title number Nairobi/block/26/113 which he acquired after payment of consideration to the Third party.
85. It was further submitted that the 4th Defendant paid the stamp duty for the sum of Kshs 967,690/- and the transfer was thereafter registered in the 4th Defendants favour. Reliance was placed to the cases of Jose Estates Limited –vs- Muthemu Farm Limited & 2 others (2019) eKLR and Katende -vs- Hander & Company Limited (2008) 2 E.A 173.
86. It was also submitted that whereas the Plaintiffs submissions raised the issue of lis pendens, the same was never raised against the initial defendants in the suit. The same was also not raised against the 4th Defendant, the doctrine is therefore not applicable.
87. The 4th Defendant further submitted that the Plaintiffs claim is based on prayers that cannot be implemented without causing hardship to a party who has not participated in the Plaintiffs' transaction with the 1st Defendant. Counsel cited the following decision to support the 4th Defendant's case; Bruce



Joseph Bockle –vs– Coquers Limited (2014) eKLR and Cieri Plains Company Limited & 2 others – vs- Ecobank Kenya Limited (2017) eKLR.

88. The 4th Defendant also faulted the Plaintiff for claiming that the title was acquired fraudulently. It was submitted that the Plaintiffs had failed to prove the alleged fraud on a standard above the balance of probabilities.
89. Counsel also submitted that the 1st Plaintiff did not perform its end of the bargain as provided for in the contract for sale between it and the 1st Defendant. It was the 1st Defendant's testimony during hearing that on the 27th February 2007, he entered into an agreement with the 1st Plaintiff for the sale of the suit property at a consideration of Kshs 7,500,000/- plus encumbrances. The agreement was supposed to be honoured within 90 days being the 27th May 2007. The 1st Plaintiff did not strictly honour the same and yet time was of the essence in the said contract.
90. Subsequently, the parties re-negotiated the contractual terms which was reduced into an addendum dated 3rd May 2009 wherein the 1st Plaintiff was to pay an additional Kshs 2,000,000/- and the remainder of the entire price of Kshs 1,400,000/- would be paid directly to the Government to liquidate the 1st Defendant's liability of statutory payments that had encumbered. Again the 1st Plaintiff failed to strictly comply with the said agreement and the timelines that had been set.
91. As a result of the 1st Plaintiff's breach of the 1st agreement and its addendum, the parties re-negotiated and a new, distinct and separate contract dated 4th August 2009 was entered into where the purchase price was now Kshs 11,000,000/- with Kshs 6,000,000/- already being paid. Timelines were set on how and when the balance was to be remitted with the completion date being set at 90 days from 4th August 2009 to 3rd November 2009.
92. During cross examination of the Plaintiff by the advocate for the 4th Defendant, it became apparent that the cheques for the sum of Kshs 1,000,000/- dated 30/12/2009 were never paid and hence therefore the Plaintiffs were not justified in seeking specific performance when the Kshs 2,000,000/- was still outstanding.
93. The 4th Defendant cited the cases of George Njenga Kagai –vs- Samwel Kabi Njoroge & Another (2019) eKLR and Biley Olouch Okun Onanda –vs- Ayub Muthee Migweta & 2 others (2017) which the court has considered.
94. The 4th Defendant also claimed general damages for unlawful eviction, special damages and aggravated and punitive damages together with costs and interests against the Plaintiffs.
95. Counsel cited the cases of Larnet Leiyagu –vs- Attorney General (2018) eKLR, the court awarded Kshs 1,500,000/- for unlawful eviction and Munaver Alibhai t/a Diani Gallery –vs- South Coast Holdings Limited (2020) eKLR where the Plaintiff was awarded Kshs 2,000,000/- as general damages for unlawful eviction.
96. The 4th Defendant also claimed special damages of Kshs 3,006, 708/- and costs of the restoration of the house.
97. Counsel also cited the cases of Peter Mauki Kaijenga & 9 others –Vs- Chief of the Defence Forces & Another (2019) eKLR, Godfrey Julius Ndemba Mbogori & Another –vs- Nairobi City Council (2007) eKLR, Ken Odondi & 2 others –vs- James Okoth Omburah t/a Okoth Omburah & Company Advocates (2013) eKLR and Isaiah M' Mugambi M'Muketha –vs- Attorney General & 2 others (2016) eKLR and urged the court to award aggravated and punitive damages of Kshs 3,000,000/-



98. The 4th Defendant also sought indemnity against the Third Party, should the court find that the Plaintiffs claim for specific performance is merited.

The 5th Defendant's submissions.

99. The 5th Defendant filed written submissions dated 17th April 2023 through Wainaina Ireri Advocates. Counsel identified three issues for determination;

- a. Whether the legal charge registered over the suit property in favour of the 5th Defendant is valid.
- b. Whether the Plaintiffs are entitled to orders of cancellation of the transfer of the suit property to the 2nd Defendant and specific performance.
- c. Who should bear the costs of the suit.

100. On their first issue, Counsel submitted that the 5th Defendant undertook due diligence before advancing an overdraft facility in the sum of Kshs 2,000,000/- and USD 20,000/- in terms of letter of offer dated 9th February 2016. The facility was secured by a first legal charge dated 1st April 2016 over the suit property which security the 5th Defendant still holds to date.

101. It was also submitted that even though the Plaintiffs have alleged that the 1st Defendant fraudulently transferred the suit property to the 2nd Defendant, the Plaintiffs did not plead or tender any evidence to demonstrate that either the 4th Defendant or the 5th Defendant had any notice of the alleged fraud or that they participated in such fraud and the case of Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) –vs- Stephen Njoroge Macharia (2020) eKLR was cited in support.

102. It was also submitted that the Plaintiffs are not entitled to the orders of cancellation of the transfer and specific performance on the grounds that the 1st Plaintiff did not settle the full purchase price in respect of the suit property. Reliance was placed in the cases of Gicurder Sigh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti Civil Appeal No. 165 of 1996 and George Njenga Kagai – vs- Samuel Kabi Njoroge & Another.

103. The 5th Defendant also urged the court to dismiss the suit with costs.

The Third Party written submissions.

104. The Third Party's written submissions were dated 4th April 2023 and filed by Ngaywa and Kibet Partners LLP. Counsel for the Third Party outlined brief facts of the case and proceeded to submit that the charge by the Third party and the subsequent transfer of the property to the 4th Defendant was valid. It was submitted that during the hearing, it was the Third Party's evidence that it acquired legal interest and for a value in the suit without any notice of a default in title or a pending dispute in court and hence acquired a good title on the basis of the doctrine of an innocent purchaser for value without notice.

105. Counsel also submitted to the court that, the Third Party prior to exercising its statutory power of sale, conducted an official search and the certificate of search dated 19th June 2013 indicated that the property was registered in the names of Nduati John Njuguna and the only encumbrance to the property was the charge registered against the property by the Third Party and hence thereafter, the Third party proceeded innocently unaware of any fraudulent dealings on the suit property or a pending suit over the property.



Issues for determination.

106. The Plaintiffs and the 1st and 2nd Defendant's advocates had initially agreed on 18 issues for determination, however after considering the pleadings filed by all the parties, the documents adduced in evidence and the oral testimony tendered by the witnesses and further the written submissions filed by the parties, this court is of the humble view that the following are the key issues for determination,
- i. Whether the 1st Plaintiff was a tenant/licensee of the 1st Defendant.
 - ii. Whether the Plaintiffs were tenants of the 2nd Defendant.
 - iii. Whether there was any breach of the agreements herein.
 - iv. Whether there was any fraudulent sale and transfer of the suit property to the 2nd Defendant.
 - v. Whether the legal charge by the 5th Defendant and the Third Party and transfer of the suit property to the 4th Defendant was valid.
 - vi. Whether the Plaintiffs are entitled to the reliefs sought in their plaint.
 - vii. Whether the 4th Defendant is entitled to the reliefs sought in the counterclaim.
 - viii. What orders should issue as to costs of the suit and counterclaim.

Analysis and Determination.

107. I shall now proceed to analyze the issues sequentially.

Issue No. 1.

Whether the 1st Plaintiff was a tenant licensee of the 1st Defendant.

108. During trial and the cross-examination and re-examination of the 1st Defendant, it was his testimony that the money paid by the 1st Plaintiff was never refunded since the same was converted into rent.
109. The Plaintiffs while submitting on this issue submitted that the claims by the 1st Defendant that the 1st Plaintiff took possession of the property as a tenant/licencee are intended to vary the express terms of a written agreement which is not permitted in law.
110. From the evidence that was tendered herein, the 2nd Plaintiff in cross examination denied ever being a tenant/licence of the 1st Defendant. The 1st Defendant did not deny that the 2nd Plaintiff entered into the suit premises in anticipation of the purchase of the same in the year 2007. Save for merely alleging that the 2nd Plaintiff was a tenant/licence of the 1st Defendant, the 1st Defendant did not adduce any evidence before this court to confirm the same. The 2nd Plaintiff testified that the 1st Defendant gave him vacant possession of the suit property after the 1st Defendant had failed to meet the condition of the sale agreement wherein completion was supposed to be on 27th May 2007. It was evident during trial that there was no completion on the anticipated date.
111. In view of the foregoing, it is the finding of this court that the 2nd Plaintiff herein was never a tenant/licence of the 1st Defendant but as a purchaser, a position which was well known to the 1st Defendant.

Issue No. 2

Whether the Plaintiffs were tenants of the 2nd Defendant.



112. The 2nd Defendant pleaded that the Plaintiffs were mere tenants at the time that he bought the property.
113. The Plaintiffs while submitting on this issue submitted that there was no tenancy relationship between the Plaintiffs and the 1st and 2nd Defendants and that the 2nd Defendant was at pains to explain the claimed tenancy and power to evict. It was also submitted that the Plaintiffs were not liable for the eviction for non payment of rent in the manner done by the 2nd and 3rd Defendants or at all.
114. The Plaintiffs also referred to a ruling delivered on 25th February 2011 in which the court pronounced itself on the issue by finding that there was nothing to substantiate the allegations that the Plaintiffs were tenants to the 2nd Defendant.
115. This court has considered the evidence adduced herein, and it is inclined to agree with the Plaintiffs' submissions on the issue and arrives at the finding that the Plaintiffs were not tenants of the 2nd Defendant.

Issue No. 3

Whether there was any breach of the agreements herein

116. In the instant suit, it was evident that there were several agreements in relation to the transaction, It is evident that there are three agreements herein in relation to this transaction. The first sale agreement is dated 27th February 2007, made between the 1st Plaintiff and the 1st Defendant for purchase of the suit property at price of Kshs.7,500,000/= and the said sale agreement had express terms. It is evident that the 1st Plaintiff was to deposit Kshs.3,200,000/= on execution of the said sale agreement and the balance of Kshs.4,300,000/= was payable within a period of 90 days and the completion date was 27th May 2007. It is evident that the parties herein did not fully meet the terms of the said sale agreement and the parties signed an addendum to the said agreement on 3rd May 2009, with additional terms. The express terms of the said addendum were that the 1st Plaintiff would pay an additional Kshs.2,000,000/= in equal instalments of Kshs.1,000,000/= together with a further payment of Kshs.1,400,000/= to be paid to the Government on behalf of the 1st Defendant. Further the 1st Defendant was to ensure that the suit property was registered in the name of the 1st Plaintiff.
117. Breach of agreement is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the agreement, or performs defectively, or incapacitates himself from performing.
118. In this case, though the 1st Defendant alleged that the 1st Plaintiff was in breach, it was evident during trial that, that the 1st Defendant did not obtain the title deed in his name until 9th December 2009. In Clause 1.1a(iv), the 1st Plaintiff was obligated to pay the balance of Kshs.2,000,000/= upon successful transfer of the title to the vendors name. Therefore the 1st Plaintiff could only pay Kshs.2,000,000/= to the 1st Defendant on or after 9th December 2009. However, after the 1st Defendant obtained the title deed to his name on 9th December 2009, he sought for additional amount of money from the 1st Plaintiff vide his letter dated 14th December 2009.
119. The 1st Defendant therefore was in breach of the conditions of the sale agreement dated 4th August 2009. The additional amount demanded by the 1st Defendant was no expressly or impliedly stated in the sale agreement dated 4th August 2009, or even the earlier ones. This Court cannot imply any



term in the said contract unless it was intended. See the case of Lulume...Vs...Coffee Marketing Board (1970)EA 155, where the Court held that:-

“No term should be implied in a contract unless it was intended”.

120. Having now carefully considered the available evidence, the Court finds that the 1st Plaintiff and 1st Defendant entered into a valid sale agreement, but by completion date, the 1st Defendant had not fulfilled all the conditions set therein and he later failed to transfer the property to the 1st Plaintiff even after having received substantial amount in respect of the purchase price. The 1st Defendant was therefore the one in breach of the sale agreement herein.

Issue No. 4

Whether there was any fraudulent sale and transfer of the suit property to the 2nd Defendant.

121. It was the 4th Defendant's case that he is a bonafide purchaser for value, having acquired the suit property on 4th April 2014 in a market overt from the Third Party. In his written submissions which were filed after the hearing of the suit, he submitted that the Plaintiffs never led any evidence on any fraud as against the 4th Defendant's acquisition of the property.
122. A party alleging fraud must specifically plead the particulars of fraud and lead evidence to prove the allegations of fraud. Fraud is defined under the Black's Law Dictionary 10th Edition as “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”. To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the Defendants. How then can fraud be proved? The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR held;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.

Similarly, the Court of Appeal decision in the case of John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR held that:

“we find that the law is clear as put by Mr. Karanja that matters of “fraud” must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine.”

123. In the instant case, the transfer of the suit property to the 2nd Defendant was fraudulent. The green card that was produced in evidence by the Plaintiffs indicated that the 1st Defendant obtained the title to the property on 9th December 2009. He then transferred it to the 2nd Defendant on 14th November 2010. There was no agreement between the 1st and 2nd Defendants at that time. The suit property was not in occupation of the 1st Defendant but by the 2nd Plaintiff at that time.



Issue No. 5

Whether the legal charge by the 5th Defendant and the Third Party and the transfer of the suit property to the 4th Defendant was valid.

124. It was the 4th Defendant and Third Party's case that the legal charge by the Third Party and subsequent transfer of the suit property to the 4th Defendant was valid.
125. During trial, evidence was adduced to the effect that at the time of charging the property the Third Party was not aware of any pending transaction between the 1st Defendant and the 2nd Defendant. Neither was it made aware of the alleged existence of the Plaintiff and its alleged claim over the suit property. This evidence was never controverted by any party and as such the Third Party and the 4th Defendant cannot be faulted for their role in respect to the said transaction. On whether the Third Party exercise of the statutory power of sale to the 4th Defendant was unlawful, it was submitted that the statutory power of sale exercised by the Third Party was lawful and was exercised in good faith and without any evidence of competing interest from the Plaintiff or any other person and that the Third Party had capacity to sell. It was also submitted that the 4th Defendant is a bonafide purchaser for value without notice of any fraud or impropriety. It was submitted that there was no evidence of registration of a caveat and there was no way that the 4th Defendant would have known any existence of a pending suit.
126. In view of the foregoing, it is the finding of this court that the charge by the 5th Defendant and the Third Party and the subsequent transfer of the suit property to the 4th Defendant was valid.

Issue No. 7

Whether the Plaintiffs are entitled to the reliefs sought in their plaint.

127. The Plaintiffs sought various reliefs in their Plaint. The Plaintiffs also submitted extensively in their written submissions as to why this court should grant the said prayers as sought. The 4th and 5th Defendant together with the Third Party urged this court not to grant the Plaintiffs the reliefs sought having maintained the position that the Plaintiffs had not proved their case to the required standard.
128. The Plaintiffs in their written submissions dated 17th March 2023, urged this court to cancel the transfer of the suit property to the 2nd Defendant, to dismiss the 2nd Defendant's and 4th Defendant's counterclaim, to grant them an order of specific performance and consequential injunctions in terms of prayers (a) to (g) of their Plaint. They also urged this court to grant them a sum of Ksh 805,000/- on account of special damages for chattels converted together with interest thereon at 12% p.a from 27th April 2010 until payment in full. The Plaintiffs also urged this court to order the 2nd and 3rd Defendants to pay them a sum of Ksh 724,500/- on account of trespass, wrongful seizure of chattels, conversion and illegal distress together with interest at 12% p.a. The Plaintiffs also prayed for costs of the suit.
129. This court while analyzing the issues for determination was able to find that indeed the Plaintiffs proved their case as against the 1st to 3rd Defendants. However, in respect to the orders of specific performance that were sought, the evidence adduced in court did not justify the grant of that claim.
130. Specific performance is an equitable remedy which, like all equitable remedies, is available at the court's discretion. In *Gurder Singh Birdi & Marinder Singh Gatora vs. Abubakar Madhubuti*, Civil Appeal No. 165 of 1996, it was held that the underlying principle in granting the equitable relief of specific performance is that, "the Plaintiff must show that he has performed all the terms of the contract



which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

131. Further, in *Thrift Homes Ltd vs. Kenya Investment Ltd* 2015 eKLR, the court stated that: -

“specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.

132. In view of the foregoing, this court shall proceed to grant only prayers (a), (g), (i) and (j) of the Plaint dated 27th April 2010.

Issue No. 7

Whether the 2nd and 4th Defendant are entitled to the reliefs sought in the counterclaim.

133. The 2nd and 4th Defendants herein filed counterclaims in their respective statement of defenses wherein the sought for several orders. However, during trial, the 2nd Defendant never called any witness to lead evidence in support of his suit. A counter claim is just like a suit which ought to be proved to the required standard. In view of the foregoing, the 2nd Defendant’s counterclaim has not been proved to the required standard to warrant the grant of the reliefs sought in the said counterclaim.

134. In respect to the 4th Defendants counterclaim, the 4th Defendant was able to adduce evidence through Winne Hollanda who testified as DW2 in support of the 4th Defendant’s case and counterclaim. This court having analyzed and evaluated the said evidence which was unconverted is satisfied that the 4th Defendant’s has been able to prove his counterclaim to the required standard and is deserving of the orders sought.

135. In respect to special damages, It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required. The 4th Defendant was also able to plead and prove the same. The 4th Defendant adduced evidence to prove that he was unlawfully evicted from the suit premises and was forced to seek alternative place of residence where he was paying rent of Ksh 75,000/= from 4/03/2019 to August 2021 as evidence from the bank transfers produced in court. The 4th Defendant also produced in evidence the valuation report for the cost of the renovation of the house amounting to Ksh 753,208/- and further evidence of payment of Ksh 3,500/- being costs of the police assistance.

136. In respect to general damages for unlawful eviction, the 4th Defendant made reference to the cases of *Larnet Leiyagu –vs- Attorney General* (2018) eKLR, the court awarded Kshs 1,500,000/- for unlawful eviction and *Munaver Alibhai t/a Diani Gallery –vs- South Coast Holdings Limited* (2020) eKLR where the Plaintiff was awarded Kshs 2,000,000/- as general damages for unlawful eviction.

137. Being guided by the above and having been satisfied that the 4th Defendant was able to prove his counterclaim to the required standard, I will equally proceed to award Kshs 2,000,000/- to the 4th Defendant as general damages for unlawful eviction.



Issue No 8.

What orders should issue as to costs of the suit and counterclaim.

138. On the issue of costs, the general rule is that costs follow the event in accordance with the provision to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason directs otherwise. I find no reason to hold otherwise. The 1st to 3rd Defendants shall bear the costs of the suit and counterclaim which costs are awarded to the Plaintiffs and the 4th Defendant.

Final orders

139. Before I conclude, I must sincerely thank all the Advocates for their well written submissions and the authorities that were cited which were extremely useful to this Court.

140. In the end, the suit by the plaintiffs and the counterclaim by the 2nd and 4th defendants are disposed as follows:

- a. The counterclaim by the 2nd defendant is dismissed.
- b. Prayers (a), (g), (i) and (j) of the Plaint dated 27th April 2010 are granted.
- c. Prayers (a), (b) and (d) of the 4th Defendant's counterclaim dated 20th September 2021 are granted.
- d. The 4th Defendant is granted general damages for unlawful eviction of Ksh 2,000,000/-
- e. The 1st, 2nd and 3rd defendants shall bear the costs of the suit and counterclaim.

Judgment accordingly

Dated, signed and delivered virtually at Nairobi this 30th day of August 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Ms. Akoth h/b for Mr. Nelson Havi for the Plaintiffs.

Mr. Kibira h/b for Mr. Ombwayo for the 1st Defendant.

Mr. Odhiambo for the 4th Defendant.

Mr. Ngugi h/b for Ms. Kariuki for 5th Defendant.

N/A for the other parties.

