REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 50 OF 2005

(Consolidated with HCCC MISC. NO. 274 OF 1999 (O.S))

MARGARET WANGECHI WACHIRA..... PLAINTIFF

Versus

MARY WANJIRU GITAU.....1ST DEFENDANT

COMMISSIONER OF LANDS …….....….....2ND DEFENDANT

K-REP BANK LIMITED …….....……3RD DEFENDANT

JUDGMENT

Consolidated suits

[1] On 1.11.2005, this suit was consolidated with NBI HCCC NO 274 OF 1999. The latter suit was the earlier in time and was commenced by way of an Originating Summons under the previous Order XXXVI Rule 3 and 12 of the Civil Procedure Rules of the Repealed Civil Procedure Rules seeking the following orders:-

> ***1) THAT the Plaintiff is entitled to an order for vacant possession against the Defendant on a failed contract of sale.***
>
> ***2) THAT the Plaintiff is entitled to damages for breach of contract.***
>
> ***3) THAT the Defendant is duty bound to pay the Plaintiff the equivalent of Kshs. 22,000/- per month from the date of taking possession until the date of giving vacant possession.***
>
> ***4) THAT costs of this summons be provided for.***

[2] An objection has been raised by the Plaintiff on the competence of the OS. I wish to deal with the objection before I proceed on the merit of the entire case as consolidated.

Preliminary objection: OS incompetent?

[3] The Plaintiff argued as a preliminary point of law that the Defendant's suit namely, HCCC

No. 274 of 1999 (OS) is incompetent and, therefore, the prayers sought therein cannot be granted by the Court. The said preliminary objection is also contained under paragraph 29 of the Plaintiff's witness statement filed herein on 14th September 2012. Order XXXVI Rule 3 and 12 of the repealed Civil Procedure Rules was similar to Order 37 Rule 3 and 12 of the Civil Procedure Rules 2010). Rule 3 states as follows:-

> **"A Vendor or Purchaser of immovable property or their representative respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract)."**

[4] But at Paragraph 6 and 7 of the Affidavit in support of the Originating Summons, the 1st Defendant (Applicant) expressly deposes that she **rescinded** the Agreement for Sale after the Plaintiff (Respondent) failed to honour her part and pay the balance of the agreed purchase price. According to the Plaintiff, the issues raised in the Originating Summons relate to questions affecting or related to the existence or validity of the contract for sale of the property and these issues are expressly excluded by the express provisions of Order 36 Rule 3. The Plaintiff thinks that the Originating Summons is incompetent and the Applicant should have approached the court by way of a substantive suit in the form of a Plaint. They submitted further, that, the Originating Summons is incompetent in that the issues in dispute between the parties are complex and cannot be determined by the simple procedure of an originating summons. Whereas the Applicant (1st Defendant) avers that the Sale Agreement has been rescinded, the Plaintiff (Respondent) has alleged and produced evidence to demonstrate that the contract is still valid and enforceable. The procedure by Originating Summons is designed to deal with simple matters and not intended for determination of complex and contested issues of law and fact as are present in this particular case. They argued also that the court also would not have jurisdiction to award damages as prayed in the Originating Summons. They cited the following relevant cases in support of their submissions on the issue, to wit 1) **Floriculture International Limited vs Central Kenya Limited & Others Civil Appeal No. 121 of 1995;** 2) **Kenya Commercial Bank Limited vs. James Osebe Civil Appeal No. 60 Of 1982; 3) Kibutiri vs. Kibutiri Civil Appeal No. 30 of 1982** .

[5] The Defendant submitted that the Originating Summons field by the 1st Defendant on 11th March, 1999 is primarily concerned with an issue of possession of the property. The 1st Defendant is calling for the court's intervention so that the Plaintiff can vacate the suit property. Possession is an issue that arose from the Sale Agreement dated 9th January 1997 between the Plaintiff and the 1st Defendant. The issue of possession is, therefore, within the purview of and anticipated under order 36 of the former Civil Procedure Rules. The Originating Summons is not raising questions on the validity or existence of the Sale Agreement dated 9th January 1997. The averments by the 1st Defendant in paragraph 7 of the Supporting Affidavit to the Originating Summons that she "rescinded" the contract does not make the Originating Summons incompetent since reference to ''rescission'' was meant to give the court full details on the matter. According to the Defendant, the Originating Summons does not raise convoluted issues as alleged by the Plaintiff. To that extent, the Defendant submitted that the Originating Summons is competent and should be admitted by the court.

[6] I take the following view of the matter. A preliminary objection should be one which is straight forward and not entangled in factual or evidentiary issues. It should also be one which is capable of disposing of the case entirely. For this see the cases of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors (1969) EA 696.** See also a work of court in the case of **Engineer E.M Kithimba vs. AG & Another [2014] eKLR** on Preliminary Objection, that:

A preliminary objection was clearly delineated in the case of MUKISA BISCUITS MANUFACTURING CO. LTD v WEST END DISTRIBUTOR LTD [1969] E.A 696 where Law JA stated the following:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

And J.B Ojwang J (as he then was) made it clearer in the case of Oraro Vs Mbajja where he stated:-

"I think the principle is abundantly clear. A "preliminary objection" correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed. I am in agreement … that 'where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

[7] The Preliminary Objection herein is based on inferences or deductions made out of factual or evidentiary material filed in court. It is inviting the court to probe the evidence provided and find that the OS is incompetent. The request clearly veers off the known path of preliminary objection. In addition, two things have happened in this case which have a direct bearing on the objection. One; the two cases have been consolidated. And two; the court on 31.5.1999 gave directions that the OS shall be disposed of by way of *viva voce* evidence. Under Order 36 of the repealed CPR and Order 37 of the Civil Procedure Rules, 2010, where it appears to the court at any stage of the proceedings that the proceeding should for any reason be continued as if the cause had been begun by filing a plaint, the court has power to order affidavits filed in the OS to stand as pleadings and the cause shall henceforth proceed as if it were a plaint. Parties will then be required to satisfy all the pre-trial and attendant requirements on a suit. Whereas I agree that the procedure provided under Originating Summons is meant for simple and straight forward and which are not complex and convoluted. But, in the presence of the power of the court to dispose of the matter through *viva voce* evidence or as if the OS were a plaint, and especially where the court has exercised its discretion to have the OS heard through *viva voce* evidence, it would be undesirable to take out a preliminary objection that the OS is incompetent based on the argument that OS should only deal with simple matters. For those reasons, I find the objection herein is not a true preliminary objection in the sense of the law and I dismiss it. I will, therefore, proceed to examine the merit of the consolidated suit.

The suit

[8] The Plaintiff in the Amended Plaint filed on 28th May 2008 seeks for the following prayers; namely:-

i ***An injunction restraining the Defendants whether by themselves, their servants, officers or agents from selling, charging, leasing, hiring or alienating the property known as Lease No. Nairobi/Block 104/411 and/or from presenting or registering any transaction and/or from dealing or interfering in any manner whatsoever with the said property and/or from interfering or disturbing the Plaintiff's quiet possession of the property until further orders of this honourable court.***

ii) A declaration that the Certificate of Lease issued on 21st January 2004 in respect to Lease No. Nairobi/Block 104/411 is fraudulent and therefore null and void ab initio and an order directing the 2nd Defendant to cancel the same forthwith.

iii) A Declaration that the Charge dated 25th June 2004 registered in favour of the 3rd Defendant is illegal, null, void and unenforceable and an Order directing the Registrar of Leases to cancel the same forthwith.

iv) An order directing the 1st Defendant to forthwith sign a Transfer of the suit property in favour of the Plaintiff and in default, the Deputy Registrar of this Court to sign the Transfer document and/or any other necessary documents.

v) Damages.

vi) Any other relief as this court may deem fit to grant in the interests of justice.

[9] Whereas the 1st Defendant in an Originating Summons filed against the Plaintiff as HCCC Misc. No. 274 of 1999 on 11th March 1999 seeks for the following orders:-

i) THAT the Plaintiff is entitled to an order for vacant possession against the Defendant on a failed contract of sale.

ii) THAT the Plaintiff is entitled to damages for breach of contract.

iii) THAT the Defendant is duty bound to pay the Plaintiff the equivalent of Kshs. 22,000/- per month from the date of taking possession until the date of giving vacant possession.

iv) THAT costs of this summons be provided for.

THE PLAINTIFF'S CASE AND SUBMISSIONS

[10] The Plaintiff filed own witness statement on 14.9.2012 and documents in support of her case. She was the only witness. She testified on 4.2.204 and 19.3.2014. She stated that the suit property is L.R. NBI B104/411 situate in Ushirika Estate, Nairobi and on it is erected a three bedrooms Maisonette. According to her testimony, the Plaintiff and the 1st Defendant entered into a sale agreement wherein the Plaintiff was the buyer and the 1st Defendant the seller of the suit property on terms agreed upon and reduce into an agreement in writing. The agreement is dated 9.1.1997 and was subject to the Law Society of Kenya conditions of sale which are also attached to the agreement. According to the agreement, the purchase price was Kshs. 3,400,000. She paid Kshs. 400,000 as deposit to Ndungi & Co Advocates who acted for both parties to the agreement. The completion date was 31.1.1997, but it was attainable, hence later alteration of terms of the agreement. The subsequent variation of the terms of the agreement were that; she will pay a sum of Kshs. 2,400,000 to Ndungi & Co Advocates and pay the balance of Kshs. 800,000 directly to HFCK toward a loan taken by the 1st Defendant and which had been secured by the suit property. It was her testimony that she paid; Kshs. 400,000 on 9.1.1997, Kshs. 1,000,000 on 22.1.1997, Kshs. 1,000,000 and Kshs. 50,000 to Ndungi & Co Advocates; and Kshs. 100,000 directly to the 1st Defendant on 20.10.1997; a total of Kshs. 2,550,000. The receipts are contained at pages 29, 30, 35, 36 and 43 of the Plaintiff's bundle of documents. She then paid a total of Kshs. 1,389,659.15 to HFCK. She deposited the money directly into the loan account belonging to the 1st Defendant. In total, the Plaintiff claimed she paid a sum of Kshs. 3,939,659.15 toward the purchase of the suit property. The excess payment was, therefore, Kshs. 539,659.15. According to her, she paid the entire purchase price.

[11] On repayment of the entire loan with HFCK, the Bank released the Lease documents to Ndungi & Co Advocate after he called up for the documents in his letter dated 3.2.1997. The letter was copied to both the buyer and the purchaser. The Plaintiff and the 1st Defendant were aware of the release of the Lease documents by Archer & Wilcok Advocates. Unfortunately, before the

completion of the transaction, Mr Ndungi of Ndungi & Co Advocates passed on and LSK took over the administration of the firm. At the time of his death, transfer of the suit property had not been done. After taking over the firm, LSK wrote to the parties in the agreement and assured them that their money was safe. She engaged King'ara & Co Advocates while the 1st Defendant engaged Cheloti & Etole Advocates. Both lawyers engaged in communication on the suit transaction. She referred to letter at pages 37-42 of the Bundle of Documents filed by the Plaintiff. LSK also wrote to the 1st Defendant's advocate.

[12] The Plaintiff went on and stated that, on issuance of letters of administration is done, she expected to the parties to push forward with the remaining part of the transaction. But later, LSK said that Ndungi's clients account did not have enough to pay the 1st Defendant. LSK said that only Kshs. 698,000 was available to pay the 1st Defendant. The first Defendant was called to receive the money but she asked the Plaintiff to receive it. The Plaintiff beseeched the 1st Defendant to take the money but she refused because it was not enough. The Plaintiff testified that she could not agree with the 1st Defendant's argument since LSK was following the law and was to pay the balance. The Plaintiff insisted that the late S.K. Ndungi was the advocate for both parties. And therefore, the money she paid was the 1st defendant's.

[13] The Plaintiff did not stop there. She said that the letter at page 57 by Cheloti and Etole was addressed to her and copied to King'ara- the letter alleged that she was in breach of the contract for sale. But according to her, she was not as she had paid everything to Ndungi and HFCK as agreed. She paid the loan to HFCK loan as agreed. After the letter and much harassment, the parties met and agreed that she continues to pay the loan to HFCK. The letter dated 2/6/1998 to King'ara Advocate confirms the meeting they had and the agreement reached. She was to pay the arrears on the loan and the balance thereof, for purposes of the agreement between the parties was Kshs. 850,000. The last instalment to HFCK was payable on 28/5/1999. And the Advocates for the 1st Defendant were advised of the clearance of the loan on 22/10/1999 by King'ara Advocate. He wrote the letter to HFCK asking them to confirm that the total sum owing had been paid. They confirmed. King'ara Advocate, then took over all the documents which are now with Kangethe Advocate-her current advocates on record. The Plaintiff testified that she has the original Leases- Kang'ethe gave her the documents i.e. the lease, certificate of lease, discharge of charge (undated. But, she was surprised to learn that another Lease was issued on the suit property hence this suit. She also learnt after carrying out a search that the 1st Defendant had charged the property again. The Certificate of Lease was issued on 21/1/2004 to the 1st Defendant. A Gazette Notice number of August 2003 alleged that the original Certificate of Lease was lost. She referred to page 68 of the Plaintiff's Bundle of Documents. The Plaintiff claimed that she had not seen the Gazette Notice as she never expected anything of the sort to take place. She was dissatisfied with the Gazette Notice. She stated that she did not also see the affidavit by 1st Defendant. See letter at page 64 and 71.

[14] The Plaintiff was emphatic that she was never the 1st Defendant's tenant. The suit property consists in a house which was vacant when she bought it and was given vacant possession of by the 1st Defendant. She has been living in the said house since 1997. Page 92 and 93 contain letter by Kang'ethe and Co. Advocates on the matter. When she learned of the said unfortunate happenings, she fled a caution on the property- see page 96. She also applied for and the Judge granted an injunction which prohibited any dealings on the land. See page 97-98.

[15] She, however, laments that living in the property has not been quiet. First, the Defendant alleged she was a tenant and even sent auctioneers to take away the Plaintiff's properties on alleged distress for rent. They distressed and sold her household goods. The Plaintiff also gave testimony that she has sued K-Rep Bank Ltd because they went to her house as chargees wanting to auction it. The 1st Defendant used the house as security for the loan she obtained from K-Rep. The 1st Defendant charged the property which the Plaintiff had the original Lease to, thereby, committing fraud on the Bank. But, the loan with K-Rep loan is the 1st Defendant's and such be

treated as such.

[16] The Plaintiff was categorical that she did her part in the sale transaction and the house should be transferred to her by the 1st Defendant. The fraudulent Lease on the suit property which was issued to the 1st Defendant should also be cancelled. The loan taken by and advance to the 1st Defendant and the charge thereof should be discharged from the suit property. The 1st Defendant should repay her said loan to K-Rep Bank without involving the suit property which belongs to the Plaintiff. The Plaintiff produced a bundle of documents to support her claim on the suit property and was marked as Plaintiff's Exhibit 1. The Plaintiff stated that the 1st Defendant is not entitled to any damages. Instead, the 1st Defendant should pay damages to the Plaintiff. She emphasized she was not a tenant in the suit premises. She purchased it and, therefore, the owner. The claim by the 1st Defendant on the suit property should be dismissed.

[17] On cross-examination, the Plaintiff stated that the initial completion date of 9.1.1997 was moved to 28.8.1998 upon mutual agreement of the parties. The variation was therefore not any problem. But with the variation, the parties agreed that she should continue repaying the loan with HFCK. She referred counsel for the Defendants to the letter dated 2.6.1998 at page 59 of the Bundle of Documents produced by the Plaintiff. She said that the arears on the loan were for three months and was a sum of Kshs. 88,000 but which she paid in full. She insisted she overpaid the purchase price. The overpayment was as a result of the loan with HFCK whose repayment was part of the purchase price and was to be paid by the Plaintiff directly to the bank. She confirmed she defaulted in repaying the loan for the stated three months but regularized the payment and thereafter faithfully repaid the loan in full. She gave the reason for default to her absence out of the country. Whereas she admitted the default would attract penalty interest she was of the firm view and belief such penalty for default of three months only would not accumulate to Kshs. 539,000 and the bank had not made a demand off extra money from her. She was repaying a sum of Kshs. 22,000 per month.

[18] She confirmed Ndungi was the advocate for both parties in the agreement. Etole came in later for the seller, i.e. the 1st Defendant. She testified that she was not aware that the 1st Defendant had withdrawn instructions from Ndungi & Co Advocates and the 1st Defendant never informed her of the change of advocates. The Plaintiff stated that at one time, the 1st Defendant asked her to pay her some money and paid her a sum of Kshs. 100,000 on 25,10.1997 through the office of Ndungi although at that time Ndungi had passed on. She collected the money from the said office. She insisted this case is not an afterthought but a legitimate venture to vindicate her rights on and have the suit property transferred to her. She has always been serious in having the property transferred to her and the original tittle documents were in the file which was released by LSK after the administration of the firm of Ndungi & Co Advocates, except, no sooner had she started on the process that the 1st Defendant sued her in 274 of 1999 and according to the Plaintiff, it was inappropriate to proceed with a transfer in the presence of court proceedings. She then filed this case in 2005 when she discovered the 1st Defendant had obtained another Lease deed on the suit property in order to ask the court to compel the 1st Defendant to transfer the suit property to her. The discovery of the new Lease was made by the Plaintiff's advocates when he searched the property. At the time, the Plaintiff had managed to remove the caveat which had been placed by the 1st Defendant on the suit property.

[19] When she was cross-examined by counsel for K-Rep Bank Limited, the 3rd Defendant, the Plaintiff was clear that she was living in the suit premises and the ought to have carried out a physical visit of the suit premises over and above the official search in the registry. To her that was absolutely before giving the loan. She stated further that, the Bank sent its representatives to the suit premises when they needed to sell it. According to the Plaintiff, the Bank was careless in that respect as it would have readily discovered she was living in the premises.

[20] Further and in re-examination, the Plaintiff referred the court to the letter dated 2.7.1997 at

page 38 of the Plaintiff's documents which show that Cheloti & Etole Advocates kept on following the money from Ndungi & Co Advocates but the 1st Defendant only changed her position when LSK informed her advocates that they will only pay 40% of the claim. She offered to pay over the sum of Kshs. 698,000 which she received from LSK after the 1st Defendant refused to receive it from LSK and confirmed she is still willing to pay over the said sum of money to the 1st Defendant even after much suffering in the hands of the 1st Defendant. She stated that

[21] The Plaintiff also filed submissions. It the submissions, the Plaintiff listed the following to be issues arising from the pleadings and evidence for determination;-

1. ***Whether the Plaintiff has paid to the 1st Defendant the agreed purchase price of Kshs. 3,400,000/- and thereby fulfilled her obligations in the Sale Agreement.***

2. ***Whether the Sale Agreement was rescinded by the 1st Defendant and whether the alleged rescission is valid and proper in law.***

3. ***Whether the Plaintiff has been a Tenant in the suit premises and if she is liable to pay any rent.***

4. ***Whether the 1st defendant was dishonest and/or fraudulent in acquiring the duplicate Lease in respect of the suit property and in charging the Lease to the 3rd Defendant.***

5. ***Whether the 3rd Defendant was negligent and/or fraudulent in issuing the duplicate Lease to the 1st Defendant.***

6. ***Whether the duplicate Certificate of Lease issued on 21st January 2004 and the Charge registered in favour of the 3rd Defendant are valid.***

7. ***Whether the 1st Defendant is entitled to an order of vacant possession of the property.***

8. ***Whether the 1st Defendant is obliged to sign a transfer of the property in favour of the Plaintiff.***

Matters in respect of the so called preliminary objection, as well as the consolidation have already been decided upon and so the court will not repeat the submissions of the parties on the two issues. The relevant submissions by the Plaintiff which answers the issues were that, after several interlocutory proceedings, the court issued an injunction order was made on 18th March 2003 stopping the 1st Defendant from entering the suit premises or attaching the Plaintiff's property until the hearing and determination of the suit. The Plaintiff rehashed the evidence by the Plaintiff. I will also not reproduce it as it has already been analysed in the first part of the case by the Plaintiff as it was recorded by the court. But, the following submissions on the pertinent terms of the sale agreement dated 9th January 1997 is relevant:-

i. That the agreed purchase price was Kshs. 3,400,000/-.

ii. That the Advocate for both the Vendor and the Purchaser was M/s Ndungi & Company Advocates.

iii. That the purchaser shall deposit Kshs. 400,000/- with M/s Ndungi & Company Advocates upon signing the agreement.

iv. That the purchaser shall deposit the full balance of the Purchase price with M/s Ndungi & Company Advocates on or before 31st January 1997.

v. That M/s Ndungi & Company Advocates shall pay off the mortgage outstanding on the account of the Vendor with Housing Finance Company of Kenya Ltd and release the balance of the Purchase price to the Vendor not more than seven (7) days after registration.

vi. That M/s Ndungi & Company Advocates would do everything necessary to ensure an efficient transfer of the property to the purchaser and payment to the Vendor.

vii. That the property was being sold in vacant possession and free from encumbrances.

viii. That the completion-date for the sale transaction was 31st January 1997.

ix. That the sale was otherwise subject to the Law Society conditions of sale (1989 Edition) in so far as they are not inconsistent with the conditions contained in the Sale Agreement between the parties.

[22] But, the submissions of the Plaintiff emphasized that thereafter and after discussions with the 1st Defendant, the terms of the Agreement for Sale were amended orally by mutual consent and understanding of both parties and they agreed that the purchaser would take over and pay directly the mortgage outstanding on the account of the vendor with Housing Finance Company of Kenya and such payments would be taken into account as part of the sale price. The completion date was also extended to an indefinite date. She gave a schedule of payments she made towards the purchase price apart from those she made to HFCK as follows:-

Date	**Amount (Kshs)**	**Payee**
9.1.97	400,000/-	Ndungi & Co. Advocates
22.1.97	1,000,000/-	Ndungi & Co. Advocates
19.3.97	1,000,000/-	Ndungi & Co. Advocates
13.5.97	50,000/-	Ndungi & Co. Advocates
25.10.97	100,000/-	Mary Wanjiru Gitau
Total	**2,550,000/-**	

[23] She also submitted on and gave a schedule on the repayment of the loan with Housing Finance Company Limited as follows:-

DATE	**AMOUNT**
26/02/97	Kshs. 44,000.00
02/07/97	Kshs. 22,000.00
29/08/97	Kshs. 22,000.00
19/09/97	Kshs. 22,000.00
03/11/97	Kshs. 21,000.00
29/01/98	Kshs. 22,000.00

08/05/98	Kshs.	44,000.00
07/07/98	Kshs.	44,000.00
24/08/98	Kshs.	66,000.00
13/01/99	Kshs.	200,000.00
18/01/99	Kshs.	300,000.00
19/01/99	Kshs.	318,659.15
09/02/99	Kshs.	88,000.00
15/03/99	Kshs.	22,000.00
20/04/99	Kshs.	66,000.00
28/07/99	Kshs.	44,000.00
28/05/99	Kshs.	44,000.00
TOTAL	**Kshs.**	**1,389,659.15**

[24] The Plaintiff stressed that the above payments were made as such at the request and with full of the 1st Defendant.

[25] The other area of emphasis was the fraud committed by the 1st Defendant in obtaining another Certificate of Lease in March 1997 with the full knowledge of the 1st Defendant of the existence of the original Certificate of Lease dated 20th December 1994 in respect of the suit property together with an undated Discharge of Charge duly signed by Housing Finance Company of Kenya Ltd which had been released to M/s Ndungi & Company Advocates by M/s Archer & Wilcock Advocates to facilitate the transfer and registration of the suit property in favour of the Plaintiff. The necessary professional undertakings were also exchanged between the Advocates prior to the release of the Lease. See letters dated 3rd February 1997 and 10th March 1997 at page 31 and 33 of Plaintiff's Exhibit 1. A complete copy of letter dated 10th March 1997 written by Archer & Wilcock Advocates is attached in the Plaintiff's Supplementary List of documents filed on 20th March 2014 with the leave of the court. The Plaintiff submitted that there was no document or declaration sworn by the 1st Defendant to prove how the original Lease was misplaced as alleged and that the 2nd Defendant had a duty to require sufficient proof from the 1st Defendant before proceeding to issue a fresh Lease to the property. The Plaintiff therefore is of the view that the office of the 2nd Defendant had acted negligently and prejudiced her interests.

[26] The Plaintiff also submitted that after the death of S.K. Ndungi Advocate, the parties met in June 1998 in the presence of their respective Advocates and mutually agreed that the Sale transaction was still valid and on course. See letters dated 2nd June 1998 and 5th June 1998 at pages 59 and 60 of Exhibit 1. The Plaintiff was requested by the 1st Defendant and her lawyers to continue paying the outstanding mortgage debt at Housing Finance Limited on behalf of the 1st Defendant since S.K. Ndungi Advocate had not redeemed the Mortgage with the money she had paid to his firm as initially agreed in the Agreement for Sale. See special condition no. 3 in the Agreement for Sale. Following the death of S.K Ndungi Advocate his firm wrote to the 1st Defendant on 2nd July 1997 (see pages 38 and 41 of Plaintiff's Exhibit 1) and 6th August 1997 and confirmed that the money the Plaintiff had deposited on account of the 1st Defendant was safe and

that they would proceed to release the funds to the 1st Defendant immediately the Letters of Administration were issued. The 1st Defendants Advocates pursued the issue directly with the firm of S.K Ndungi & Company Advocates as the Plaintiff continued to service the loan with Housing Finance Limited. See correspondence at pages 37 to 42 of Plaintiff's Exhibit 1. The Plaintiff submitted that the 1st Defendant did not raise any issue regarding outstanding balance of the purchase price all the time when she was servicing the loan on her behalf. It is only on 26th March 1998 when Cheloti & Etole Advocates wrote to the Plaintiff complaining that the sale transaction had taken too long. See letter at page 57 of Plaintiff's Exhibit 1. The said Advocate, however, never indicated to the Plaintiff in his letter that time was of essence neither did he issue a completion notice of 21 days as required by the law. The Plaintiff testified that according to her, the sale transaction was therefore not cancelled in accordance with the agreed terms and it is still valid to-date. She received cheque No. 039329 for Kshs. 698,000/- after the 1st Defendant ignored numerous calls to collect the cheque on the reason that it was not enough to clear the balance of purchase price neither was it her money. Despite several offers to the 1st Defendant to pay her the said sum of Kshs. 698,000/- the 1st Defendant flatly declined her offer. See letter dated 9th February 2000 at page 66 of Plaintiff's "Exhibit 1". Therefore, the Plaintiff has paid the entire purchase price but the 1st Defendant she has refused and/or declined to sign a Transfer of the suit property in favour of the Plaintiff and/or to complete the sale transaction and has instead been alleging that she has never received the full purchase price from the firm of Ndungi & Company Advocates or from the Plaintiff. The 1st Defendant subsequently purported to rescind the Agreement for sale and filed **Milimani HCCC No. 274 of 1999 (O.S).**

[27] The Plaintiff also laid weight on the harassments she received from the 1st Defendant who has twice in the recent past instructed auctioneers to levy distress on the Plaintiff's household goods on the pretext that the Plaintiff owed her rent arrears. See auctioneers notice of Proclamation at pages 69, 72 and 73 of Plaintiff's Exhibit 1. The wrongful distress and sale of the Plaintiff's household goods was carried through in spite of a court order having been issued in Milimani HCCC No. 274 of 1999 (OS) restraining the 1st Defendant from levying the attachment and/or from interfering with the Plaintiff's possession of the property and while the suit was still pending determination. The Plaintiff filed **CMCC No. 487 of 2004, Milimani** seeking damages for the value of her household goods which were wrongfully sold by the 1st Defendant and the suit is still pending determination. The Plaintiff has fulfilled all her obligations in the Sale Agreement and she does not owe any money to 1st Defendant as alleged.

[28] The Plaintiff further submitted that the 1st Defendant proceeded to take a loan and encumber the new Lease with a Charge for Kshs. 500,000 in favour of the 3rd Defendant notwithstanding that her suit namely, Milimani HCCC No. 274 of 1999 (OS) was still pending and further notwithstanding the fact that the Plaintiff had paid the entire purchase price and taken possession of the property since February 1997. The Plaintiff argued that the said action by the 1st Defendant was intended to prejudice her position and render useless any final orders which may be given by the court in Milimani HCCC No. 274 of 1999 (OS). The Plaintiff submitted that when she became aware that the 1st Defendant had fraudulently acquired a fresh Lease, she instructed her Advocate on record to issue an appropriate demand letter to the Defendants. See letter dated 15th December 2004 at page 92 of Exhibit 1 and also to file a Caution with the Nairobi Land Registry. See pages 95 and 96. The Registrar of Leases however declined to register the same and instead advised her to obtain a Prohibitory Order to stop further dealings on the property. She complied and filed this suit and the court issued an order of injunction on 28th January 2005 prohibiting any further dealings with the property. The order was confirmed in a Ruling delivered on 17th June 2005 and the court prohibited any further dealings with the property until this suit is heard and determined. See the Order at page 97 to 98. The C.I.D. Kilimani received the report on the fraud but declined to investigate the allegations.

[29] In mid-August 2007, an officer of the 3rd Defendant Mr. Japheth Rotich visited the

Plaintiff's home on the suit property and threatened to advertise and sell the same through a public auction to recover a loan facility of Kshs. 500,000/- together with accrued interest thereon which was allegedly granted to the 1st Defendant and secured by a charge dated 28th June 2004 over the suit property (see the Charge at page 74 to 89 of Plaintiff's Exhibit 1). But, the Plaintiff submitted that the purported Charge dated 25th June 2004 registered in favour of the 3rd Defendant is illegal, null, void and unenforceable for reasons that it is based on an invalid Lease which was fraudulently obtained by the 1st Defendant. The 3rd Defendant was negligent in that it did not carry out any inspection and valuation of the property before advancing the loan to the 1st Defendant. And had the 3rd Defendant done so, it would have realized that the property did not belong to the 1st Defendant and that it was the subject of litigation. The Charge should, therefore, be cancelled. The Certificate of Lease fraudulently acquired on 21st January 2004 should also be cancelled and the 1st Defendant be restrained from selling the suit property or seeking any or further financial accommodation on the suit premises.

[30] The Plaintiff submitted that the 1st Defendant did not call any witness except herself. She testified on her witness statement filed on 14th September 2012 as follows:-

i. That she knew the Plaintiff in January 1997 when she wanted to sell the suit property namely; Nairobi Block 104/411.

ii. That both parties went to Ndungi & Company Advocates where the transaction was to be handled from and a Sale Agreement dated 9th January 1997 was prepared and signed by both parties.

iii. That the Plaintiff assured her that the transaction would take a month and hence they agreed that the firm of Ndungi and Company Advocates would act for the both of them in the transfer of the property.

iv. That the agreed purchase price for the property was Kshs. 3,400,000/-.

v. The Plaintiff paid a deposit of Kshs. 400,000/- upon signing the Agreement and the balance was to be paid by 31st January 1997.

vi. That she voluntarily agreed to give the Plaintiff vacant possession of the property in January 1997 pending completion of the sale transaction after the Agreement was signed.

vii. The transaction was not completed as agreed in January 1997. In March 1997 after realizing that the transaction was nowhere near conclusion, she withdrew her instructions from Ndungi and company Advocates and gave instructions to Cheloti and Etole Advocates to act on her behalf.

viii. That by the time she withdrew her instructions from Ndungi & Company Advocates, she had received a sum of Kshs. 800,000/- only from Ndungi & Company Advocates.

ix. She thereafter instructed her Advocates Cheloti and Etole Advocates to obtain a Rates Clearance Certificate, Land Rents Clearance Certificate and Consent to transfer which would only be released to the Plaintiff upon payment of the full payment. However, the Plaintiff failed to pay up.

x. That she only allowed the Plaintiff vacant possession of the property on the understanding that the Plaintiff would remit monthly instalments of Kshs. 22,000/- per month as rent to Housing Finance Company of Kenya towards her mortgage repayments pending the completion of the transaction. She denied categorically that the Plaintiff was given possession as a purchaser.

xi. That the Plaintiff was irregular and at times defaulted in the said repayments culminating in Housing Finance Company of Kenya threatening to auction the property.

xii. That subsequently, a meeting was held with the Plaintiff on 2nd June 1998 together with the respective Advocates and it was agreed that the Plaintiff would clear the mortgage balance of Kshs. 850,000/-.

xiii. The Plaintiff failed and/or neglected to honour the Sale Agreement and therefore she rescinded the contract for sale on 26th August 1998.

xiv. That the Plaintiff took vacant possession of the suit property in January 1997 and had remained in possession to-date without paying the full purchase price.

xv. That the Plaintiff is in default of the sale agreement and she is entitled to damages for breach of contract and costs of the suit as prayed in the Originating Summons namely; HCCC No. 274 of 1999.

xvi. Regarding the original Lease, she stated that she was not aware that it was with the Advocates for the Plaintiff and that she made efforts to trace the same with Housing Finance and her Advocates before she finally applied for a provisional Lease. The lost Lease was Gazetted and she was issued with a Provisional Lease.

xvii. She denied having acted fraudulently in acquiring the new Lease.

[31] The Plaintiff also submitted that the 2nd Defendant and the 3rd Defendant filed only their respective Statement of Defence but did not call any witness or produce any evidence at the trial to controvert the evidence presented by the Plaintiff. The two Defendants did not even shake the credibility of the Plaintiff's testimony and evidence and the court should simply find as such.

[32] The Plaintiff answered the first issue in the affirmative that she fully discharged her obligations under the terms of the Sale Agreement dated 9th January 1997. And that she has sufficiently demonstrated by evidence that she has so far paid to the 1st Defendant a total sum of Kshs. 3,939,659.15 which exceeds the agreed purchase price of Kshs. 3,400,000/-. According to Clause 6 of the Agreement, the firm of Ndungi & Co. Advocates was handling the transaction on behalf of both the vendor and the purchaser. Mr. Ndungi Advocate was therefore the authorised agent for the Vendor in law and all the payments made to the said firm are deemed to have been made to the Vendor of the property (the 1st Defendant) and the 1st Defendant is therefore estopped from denying that the payments were not made. The Plaintiff beseech the court to find and hold that the 1st Defendant received the entire sum paid as purchase price to Ndungi & Co Advocates and not on a sum of Kshs. 800,000/- as she alleges. Transactions especially payment of money to the 1st Defendant from her Advocates i.e. Ndungi & Co Advocates are confidential and it is only the 1st Defendant who is privy to what transpired between them. The only available remedy of the 1st Defendant is to pursue the firm Ndungi & Company Advocates and/or his estate for recovery of any monies she did not receive from the firm. The 1st Defendant's allegation that she discontinued the firm of Ndungi & Company Advocates from handling the transaction on her behalf vide a letter dated 4th March 1997 (page 15 of 1st Defendant's list of documents) has no validity and it should be disregarded for the following reasons:-

a. The letter was not written to the Plaintiff and the purported addition of her name at the top left hand corner of the letter was a deliberate alteration clearly meant to mislead this honourable court. It is odd and unusual for the date of the letter to be sand-witched between the names of the purported two (2) addresses of the letter. Furthermore, no evidence was produced to show that the purported letter was ever sent to the Plaintiff informing her not to make any payments to the firm of Ndungi & Company Advocates.

b. The letter does not have any receiving stamp of either from Ndungi & Co. Advocates or the Plaintiff.

c. The 1st Defendant and her Advocates continued to write numerous letters to the firm of Ndungi & Company Advocates and to pursue the payments made on account. Indeed on 2nd July 1997 and 6th August 1997 the firm of Ndungi & Co. Advocates wrote back and confirmed that all the monies paid on account of the sale transaction was safe and that the funds would be released to the 1st Defendant immediately the letters of administration were issued (see correspondence at page 37 to 42 of Plaintiff's Exhibit 1"). The 1st Defendant also continued to receive and accept more money from the Plaintiff even after the death of Mr. Ndungi Advocate (see acknowledgment letter at page 43 of Plaintiff's Exhibit 1). She only changed her stand after it became apparent that there were no sufficient funds in the client account of Ndungi & Company Advocates to pay her.

[33] The Plaintiff submitted that she paid the money to the firm of Ndungi & Company Advocates as per the established practice in such cases and the Plaintiff should not be condemned to pay twice. She cited literally work in the book ***Law of Contract, Eleventh Edition*** **at Pages 476 to 478** that if the buyer of goods who pays an agent wishes to avoid double payment, he must prove that the authority to receive the payment existed in fact and/or that he did what was the usual and well recognised practice. Therefore, the Plaintiff posits that the 1st Defendant is estopped by law and by virtue of her own conduct from alleging that the firm of Ndungi & Company Advocates did not have authority to receive the payments on her behalf merely because she failed to receive the funds after pursuing them relentlessly through the numerous letters written by her lawyers, Cheloti & Etole Advocates.

[34] The Plaintiff answered issue 2 in the negative and stated that the 1st Defendant's assertion that she rescinded the Sale Agreement vide her Advocates letters dated 26th March 1998 and 14th April 1998 (**see page 57 and 58 of Plaintiff's Exhibit 1)** does not hold any ground and should be disregarded. The purported rescission is not proper or valid in law for several reasons. First, the purported letter dated 26th March 1998 (**at page 57**) did not specify the nature of the breach and what the Plaintiff required to do in order to rectify the breach as stipulated by **clause 4(6)(a)(b)&(c)** of the Agreement for Sale. Secondly, the notice is for 14 days instead of 21 days as expressly stipulated in **clause 4(6)(c)** of the Agreement for Sale. Thirdly, whereas the letter dated 14th April 1998 **at page 58** indicated that the contract had been rescinded from the said date, the next letter **at page 59** dated 2nd June 1998 shows that the parties subsequently met and agreed that the Plaintiff should continue servicing the mortgage at Housing Finance and to complete the balance of the purchase price by 28th August 1998. This effectively meant that the earlier rescission had been withdrawn by mutual consent of both parties and the 1st Defendant is estopped in law from relying on the said rescission. Fourthly, the subsequent letter dated 26th June 1998 at page 61 of Exhibit 1 which purported to rescind the Agreement is also invalid since it was written **before** the expiry of the agreed date of completion namely, the 28th August 1998 as per the letter dated 2nd June 1998 **at page 59 of Exhibit 1**. Fifthly, the Plaintiff continued to service the mortgage at Housing Finance Limited with the express consent of the 1st Defendant and without any objection from the 1st Defendant. The 1st Defendant completely abandoned this duty to the Plaintiff and she is therefore deemed to have waived the purported rescission by virtue of her own conduct. In any event, the Plaintiff argued that the Agreement for Sale dated 9th January 1997 did not have a specific time of completion and the parties did not stipulate that time was of essence. It was imperative important for the 1st Defendant to serve a proper notice upon the Plaintiff stipulating the specified date of completion and thereby make time of essence. On this point the Plaintiff relied on the case of **Njamuyu vs. Nyaga Civil Appeal No. 20 of 1982** where the Court of Appeal held that before an Agreement can be rescinded, the party in default should be notified of the default and given reasonable time within which to rectify it. she also relied on the case of **Wambugu vs. Njuguna Civil Appeal No. 10 of 1982** where the Court of Appeal held that:-

> **"Where an agreement does not state that time is of essence (as was the case here) and neither does the Vendor give notice for making time of essence, such a Vendor having failed to take the necessary steps to make time of essence could not repudiate the**

contract on the ground of unreasonable delay by the Purchaser to perform. In such a case the making of time of the essence has been waived and time can only be made of essence by fixing of a reasonable time for performance"

The Plaintiff reinforced her said position by citing yet another case; that of **Sagoo vs. Dourado Civil Appeal No. 24 of 1982** which held that any notice required by law or the contract is only deemed effectively given if it is delivered to the Advocate for the party and if a notice arrives at the address of the person to be notified at such time and by such means of communication that it would in the normal course of business come to the attention of that person. On the basis of the foregoing, the purported rescission by the 1st Defendant is invalid in law since time was not made of essence by service of a proper notice and further as a result of the representations made by the 1st Defendant when she allowed the Plaintiff to continue paying the mortgage.

[35] The Plaintiff refuted she was ever or at all been a Tenant in the suit premises or is liable to pay any rent thereto. The Plaintiff testified that it was the 1st Defendant who gave her possession of the suit property after the Sale Agreement was signed. During cross-examination, the 1st Defendant also admitted that she granted possession of the suit property to the Plaintiff as a purchaser awaiting completion of the Agreement for Sale. At paragraph 10 of her witness statement filed herein, the 1st Defendant further expressly admits having granted the Plaintiff vacant possession of the suit property. The agreement between the parties was not a Tenancy or Lease Agreement but one of purchase of the suit premises. **Clause 6(1)** of the Agreement for sale dated 9th January 1997 signed between the parties expressly states as follows:-

<u>Possession before completion</u>

i. **Where the Purchaser takes possession of the property before completion other than a Lease or Tenancy entered into before the contract, the Purchaser occupies the property as licensee of the Vendor and not as tenant and the taking of possession is not an acceptance of the Vendor's Lease or waiver of the purchaser's right to make requisitions or objections to Lease"**

The Plaintiff further referred the court to the letter at **page 59 and 60** of the Plaintiff's List of documents (**Exhibit 1**) which were written by the 1st Defendant's Advocates. The letter at page 59 expressly states that both parties agreed in a meeting that the Plaintiff should continue paying the outstanding mortgage arrears at Housing Finance and it was further agreed that the outstanding loan balance for the purposes of the Sale Agreement was Kshs. 850,618.30 being the total debt payable by the Plaintiff on behalf of the 1st Defendant. The letter dated 5th June 1998 at page 60 was further reminding the Plaintiff to clear the outstanding loan arrears.

Furthermore, at page 18 of the 1st Defendant's list of documents, the letter dated 20th March 1997 expressly states that the sum of Kshs. 849,381.70 which was then outstanding and payable to Housing Finance Company Limited would be deducted from the agreed sale price.

In view of the foregoing, it is manifestly clear that the Plaintiff took possession of the house as a Purchaser awaiting completion and not as a Tenant as alleged. The 1st Defendant admitted in evidence having severally levied distress against the Plaintiff purportedly to recover rent arrears (see auctioneer's Proclamation and Notification of Sale at pages 69, 72, and 73 of the Plaintiff's Exhibit 1) and selling the Plaintiff's household goods to recover the alleged rent arrears. But, the Proclamation; attachment and sale of the Plaintiff's household assets were all illegal since the Plaintiff was not a Tenant in the premises and I urge your Lordship to hold accordingly.

[36] In all, the Plaintiff was of the view that the 1st defendant was dishonest and/or fraudulent in acquiring a duplicate Lease in respect of the suit property and in charging the Lease to the 3rd Defendant, for she has all along been aware that the original Lease had been released by Housing

Finance Company of Kenya Ltd to M/s Ndungi & Company Advocates and subsequently to the Plaintiff's Advocates M/s Kengara & Company Advocates for the purpose of completing the transfer in Plaintiff's favour as evidenced by the several correspondence produced in the Plaintiff's list of documents filed herein. In this regard, the Plaintiff referred to the letter dated 10th March 1997 (see Plaintiff's Supplementary List of documents filed on 20th March 2014) written by Archer & Wilcock Advocates duly appointed by Housing Finance Company Ltd to Ndungi & Company Advocates forwarding the original Lease documents and the discharge of Charge for the purpose of registration of the transfer in favour of the Plaintiff. The 1st Defendant being the owner of the mortgage account at Housing Finance Company Ltd was obviously aware about this letter and/or arrangement and the letters were copied to her. I further refer to all the letters written by Cheloti & Etole Advocates on behalf of the 1st Defendant to the firm of Ndungi & Company Advocates and subsequently to M/s Keng'ara & Company Advocates pursuing the payment of the balance of the purchase price and/or the completion of the sale transaction. All these correspondences is attached in the Plaintiff's Exhibit 1 and also in the 1st Defendant's list of documents filed herein and they clearly demonstrate that the 1st Defendant was aware about the sale transaction and the whereabouts of the original Certificate of Lease. At no time did the 1st Defendant and/or or her lawyers write any letter enquiring the whereabouts of the Lease and no letter to that effect was produced by the 1st Defendant in evidence during the hearing of the case.

According to the Plaintiff, the Statutory Declaration attached to the 1st Defendant's Supplementary List of documents filed on 18th March 2014 was false in several material aspects. Whereas the 1st Defendant deposed at paragraph 8 that the Lease was lost and all efforts to retrieve the file/Lease from the go-downs of Law Society of Kenya have been fruitless, she did not produce any letter written to Law Society of Kenya by either herself or her lawyers enquiring about the Lease and/or a letter from Law Society of Kenya confirming that the Lease was lost as alleged. Secondly, at paragraph 9 of the said Declaration, the 1st Defendant boldly lied that she had settled the loan due to Housing Finance Company Ltd and failed to disclose that it was the Plaintiff who had paid the loan on her behalf and that she had not refunded her the money. The 1st Defendant knew this fact and further that she was in possession of the Lease document and the property as a Purchaser. It is therefore the Plaintiff's submissions that the 1st Defendant acquired the duplicate Lease through dishonesty and fraudulent misrepresentations made to the 3rd Defendant and the duplicate Lease is not valid in law and should be cancelled forthwith. The 3rd Defendant is equally guilty for failing to require production of necessary evidence from the 1st Defendant before issuing the duplicate Lease. Further, the 1st Defendant's action of taking a loan and charging the suit property in favour of the 3rd Defendant was a further fraudulent act. It is astonishing that during the cross-examination the 1st Defendant admitted that she has not repaid the loan due to the 3rd Defendant to-date and she gave the reason of the default to be; the Plaintiff had not paid her the full purchase price. It is obvious the default was deliberately to cause the property to be auctioned by the 3rd Defendant as a result whereof the Plaintiff would lose the property. This is yet another means employed by the 1st Defendant to circumvent the order of injunction herein stopping her from interfering with the Plaintiff's quiet possession of the suit property pending the hearing and determination of this suit.

[37] Similarly, the 3rd Defendant was negligent in creating a Charge against the suit property and the Charge registered in favour of the 3rd Defendant is invalid. Had the Bank carried out a proper due diligence on the property as well as instructing a qualified Valuer to visit the property and conduct a physical inspection before creating the Charge, they would have discovered that the Plaintiff was in actual possession of the property as a Purchaser and not the 1st Defendant. They would also have discovered that the property was the subject of litigation in this honourable court and therefore declined to lend any money to the 1st Defendant who had falsely misrepresented to the 3rd Defendant that she was the lawful owner of the property merely because her name appeared as the registered owner in the records at the lands registry. The Plaintiff therefore

testified that the 3rd Defendant was negligent and the charge was invalid in law having been registered against a duplicate Lease fraudulently acquired by the 1st Defendant. The 3rd Defendant did not call any evidence at the trial to controvert the evidence of the Plaintiff or to show they carried out due diligence exercise on the property. The Plaintiff, therefore, is convinced that the 3rd Defendant is the author of its own mis-fortunes. The existence of the charge on the suit property will definitely prejudice the interests of the Plaintiff who is a Purchaser of the property yet she did not enjoy the loan facilities granted to the 1st Defendant.

[38] In view of the above, the Plaintiff submitted that the 1st Defendant is not at all entitled to vacant possession of the suit property or an award of damages as prayed for in the Originating Summons filed herein, namely HCCC No. 274 of 1999 (OS). Instead, the 1st Defendant should be compelled to sign a transfer of the property in favour of the Plaintiff**.** The Plaintiff overpaid by Kshs. 539,659.15. Even if the Court was to accept the 1st Defendant's contention that the Plaintiff delayed in completing the payment of the mortgage debt due to Housing Finance Limited leading to an escalation of the loan amount from Kshs. 850,618.30 (**see letters at page 59 and 60 of Plaintiff's Exhibit 1**), the 1st Defendant would not be entitled to any rebate. It emerged in evidence that both parties varied the terms of the agreement orally and agreed that the Plaintiff should take over and pay the outstanding mortgage directly on behalf of the 1st Defendant. The Plaintiff has been in possession of the suit property for 17 years since the Agreement for Sale was signed by both parties. The Plaintiff has further demonstrated that she has already paid the full purchase price to the 1st Defendant who has refused to transfer the property to the Plaintiff. Furthermore, the 1st Defendant has employed all illegal means available to her including levying illegal distress and selling the household assets of the Plaintiff, fraudulently obtaining a duplicate Lease of the suit property, charging the suit property to the 3rd Defendant and deliberately refusing to service the loan with the sole purpose of forcing an auction of the property. The Court should end the Plaintiff's lengthy agony by granting the prayers sought in the suit together with the costs of the suit. The court should also dismiss the 1st Defendant's Originating Summons (**HCCC No. 274 of 1999**) with costs.

1ST DEFENDANT'S CASE AND SUBMISSIONS

[39] The 1st Defendant also gave own evidence based on her witness statement filed on 14th September 2012. She did not call any other witness. She also filed written submissions in support of her standpoint in the matter. She testified that she is the registered owner of the suit property as per the title documents produced in court. She accepted she knew the Plaintiff as a person who intended to buy the suit property. A sale agreement dated 9th January 1997 was then prepared by Ndungi & Co Advocates. She confirmed that she accepted the said firm of advocates to also act as her advocates in the transaction. She also confirmed that the loan balance with HFCK at the time of the agreement was Kshs. 850,000. According to her, the purchase price was to be paid in a month's time. She said she received a deposit of Kshs. 400,000 on signing the agreement. The Balance including the loan balance was to be paid in a month, i.e. 31st January 1997. On receipt of the deposit, she gave the Plaintiff vacant possession of the suit property as she pays the balance of the purchase price. The 1st Defendant, in her evidence stated that the Plaintiff also paid a sum of Kshs. 300,000 as a refund to the previous person who had intended to purchase the suit premises. She also received Kshs. 100,000. The total sum she received is Kshs. 800,000. According to her, she expected to have been paid all her money and the loan fully repaid by 31st January 1997. But the purchase price had not been paid as agreed. She then withdrew instructions from Ndungi & Co Advocates in March 1997 and engaged another advocate M/S Cheloti & Etole Advocates. Thereafter through the letter dated 14th April 1998, she stated that she rescinded the agreement with the Plaintiff. The Plaintiff together with her advocate M/S S.K. King'ara approached her with a request that she extends the completion agreement. She accepted. They then promised to pay off the balance by 28.8.1998. She did not receive the balance as agreed yet again. To her, for as long as the Plaintiff did not pay the balance, the Plaintiff remained a tenant in

the suit premises. She treats her as a tenant do-date.

[40] The 1st Defendant also testified that the Plaintiff defaulted in paying the loan at HFCK thus suffered penalty interest. The Plaintiff continued to pay Kshs. 22,000 per month to HFCK just like the previous tenant used to. She explained the distress for rent against the Plaintiff was as a result of the default by the Plaintiff to pay the monthly instalment to HFCK. She also explained the obtainance of the replacement title to the suit property; because the original one was lost and despite frantic effort it could not be traced in Ndungi's office. She was aware Ndungi was in possession of the title but she also said that she checked with HFCK and their lawyers on the whereabouts of the original title but in vain. She also told the court that she sought help from the LSK and physically visited their godowns but in vain. She then reported the loss to the police and was issued with a police abstract. The loss of the Certificate of Title was later announced in the Kenya Gazette which was not challenged. She then applied for another title through the letter dated 11.4.2003. The laid down procedure was followed before she was issued with another title.

[41] According to the letter to Ndungi Advocate, the balance as at 20.3.1997 was Kshs. 1,849,381.70 after deducting the loan deposits made by the Plaintiff. She insisted that the Plaintiff was still in breach of the sale agreement. And the Plaintiff's suit should be dismissed with costs. She told the court that she was not able to educate her children due to the breach herein. She should also be paid for the 16 years she has been denied the suit premises by the Plaintiff.

[42] On cross-examination by the advocates by the 2nd and 3rd Defendants, she stated that the new title was obtained regularly and the charge created was proper. But on cross-examination by Mr Kangethe, the 1st Defendant admitted that the Plaintiff requested for and was given vacant possession after the signing of the agreement. Except, the 1st Defendant insisted that, despite the absence of any tenancy agreement, the Plaintiff entered the premises as a tenant and was to pay a monthly rent of Kshs. 22,000. To her all payments which she received from the Plaintiff were rents. She also stated that the loan to HFCK was to be paid as one-off payment and was not to be deducted from the purchase price. But when she was referred to the letter dated 10.3.1997, she said that the letter talks of ''deducting the amount due to HFCK'' which was not a contradiction from what she had just stated. She, however, admitted that she had changed their original agreement when she agreed that the Plaintiff should pay money directly to HFCK on account of her loan with HFCK. She admitted it was her obligation to ensure the loan is repaid to HFCK.

[43] The 1st Defendant denied having received from Ndungi a sum of Kshs. 1,000,000 on 22.1.1997 although she agreed that Ndungi had acknowledged having received the said sum from the Plaintiff on her (1st Defendant's) account. She was also shown other receipts from Ndungi Advocate and her response was that said the receipts from Ndungi evidences Ndungi received the money but he did not pay the money to her. She, however, admitted having received Kshs. 100,000 inn October 1997 when the Sale Agreement herein was still in force. She confirmed that she was in constant touch with the office of Ndungi Advocate. Although Ndungi was her advocate in the transaction, she could not agree with counsel that Ndungi was her agent and that he received the money in question on her behalf. On the letter dated 4th March 1997, the 1st Defendant said that there is nothing to show that it was received by Ndungi Advocate, and it was not copied to the Plaintiff. She admitted that she did not inform the Plaintiff that she had changed advocates in the transaction. Again, the 1st Defendant said that although all the letters from Cheloti & Etole appearing at pages 40-42, 57-61 refer to letters to Ndungi on the account of the 1st Defendant, Ndungi was not her advocate. Nonetheless, she told the court that the letter dated 2.7.1997 from Ndungi to Etole Advocates confirmed that the money paid by the Plaintiff on the account of the 1st Defendant was safe. She vehemently denied that she changed her position on the money paid to Ndungi when she realized that there were no sufficient funds in Ndungi's Clients Account to pay the entire balance of the agreement.

[44] The 1st Defendant testified on cross-examination that although she had rescinded the

agreement through the letter dated 14.4.1998, they revived the agreement on 2.6.1998 wherein it was agreed that the Plaintiff will clear the loan balance with HFCK. According to her testimony, the 1st Defendant accepted that she did not issue a completion notice of 21 days when the Plaintiff failed to complete the transaction on 28.10.1998 as required by clause 7 of the sale agreement. She admitted that she did not pay a penny towards the loan with HFCK but the Plaintiff did. She, however, insisted that the Plaintiff paid the money as rent. By the time she applied for a new title, the loan with HFCK had been paid in full. She, therefore, recanted the averments in paragraph 3 of her Statutory Declaration for not being incorrect in so far as they averred that the loan had not been repaid. When asked whether her advocates wrote asking for the title from Ndungi or LSK, her answer was in the negative. She just insisted the title was with Ndungi but was looked for in vain.

[45] She stated in cross-examination that she was not able to repay the loan with K-REP Bank because the Plaintiff was not paying anything. She refuted claims by the Plaintiff that she was called upon by LSK to receive Kshs. 700,000. When she was shown a letter from King'ara Advocate dated 9.2.2000, she said that letter was not brought to her attention by her advocates. To her she has not been paid full purchase price.

[46] In re-examination, the 1st Defendant affirmed that although she received Kshs. 300,000, the said amount is not indicated anywhere in her documents. She clarified paragraph 9 of her declaration which stated that she had repaid the loan.

[47] In the submissions, the 1st Defendant stressed that the narration of the events leading up to the suit herein to be an accurate account. She responded to each of the issues raised for determination by the Plaintiff. On the first issue; she submitted that the Plaintiff is still in breach of the Sale Agreement and has not cleared the balance of the purchase price. The 1st Defendant is adamant that she was only paid Kshs. 800,000/= out of the whole purchase price which was Kshs. 3,400,000/=. The 1st Defendant is of the view that the Plaintiff did not produce proof to show that she indeed paid some of the monies to the late Ndungi's law firm. Being that the value of the transaction was not a paltry one, that is, Kshs, 3,400,000, it is expected that a reasonable and prudent buyer would present proof of payment apart from the receipts that were issued by the laws firm facilitating the transaction. For instance, copies of the folios of the payment cheques of the alleged Kshs. 1,000,000 i.e. cheque number 27013. The cheque folio is missing in the Plaintiff's bundle of documents. The omission is suspicious**.** It is also curious to note that the mode of the payment supposedly made on 19th March 1997 is not shown although a receipt by the late Ndungi's Law firm is produced. The 1st Defendant posed the question: Could the law firm have been so casual and irregular in the manner that it was acknowledging receipt of hefty payments? The inconsistency in the manner in which the receipts have been drawn is glaring and raises questions on the authenticity of the receipts. The 1st Defendant then postulated a hypothesis due to the inconsistencies it is possible that the receipts came from somewhere else other than the office of the late Ndungi (Advocate).

[48] The 1st Defendant also took issue with the supposed payments that was made after the 4th March, 1997. This date is significant because it is the date that the 1st Defendant effectively terminated her instructions to Ndungi & Company Advocates and appointed the firm of Cheloti & Etole Advocates to act on her behalf in the transaction. Consequently Ndungi & Company Advocates was not authorised to receive any payments on behalf of the 1st Defendant. Once such a letter had been issued to Ndungi & Company Advocates, it is expected that the late Ndungi immediately informed the Plaintiff that he was no longer acting for the 1st Defendant in the transaction especially because the Plaintiff and the late Ndungi enjoyed a close relationship(according to the Plaintiff's testimony). Therefore, it is strange that the Plaintiff would supposedly continue making payments through the late Ndungi's office even though she had been informed that the later was representing the 1st Defendant. Although the Plaintiff has asked the court to disregard the letter terminating instructions for it is characterized with "odd and

unusual" matters, the 1st Defendant was of the view that is not a sufficient reason to disregard it as different people have different styles of formatting and writing letters. The letter should also not be disregarded merely because it does not have an acknowledgement stamp from Ndungi & Co. advocates. The 1st Defendant maintains that the letter was delivered to Ndungi & Co. Advocates. Thought it is uncommon for law firms (like Ndungi & Co. Advocates) to omit acknowledging receipt of letters, in rare occasions, this happens. This could be one of those instances. Furthermore, lay people like the 1st Defendant may not appreciate the importance of having a letter stamped or signed as sign of acknowledgement and thus she may not have insisted for a mark of acknowledgement. Moreover, the late Ndungi wrote to Cheloti & Etole Advocate on 15th March 1997(on page 34 of the Plaintiff's bundle) and seemingly was forwarding a set of transfer of lease forms for execution by the 1st Defendant. The question begs: Could the late Ndungi have been writing randomly to Cheloti & Etole Advocates with regard to the transaction concerning the suit property? The 1st Defendant submitted that Ndungi & Co. Advocate was forwarding the set of transfer of leases for the suit property to Cheloti & Etole Advocates because they had been adequately informed that the latter was acting for the 1st Defendant in the transaction.

[49] The 1st Defendant further submitted that, after the demise of Mr. Ndungi, the 1st Defendant, through the firm of Cheloti & Etole Advocates, wrote to the firm of Ndungi & Co. Advocates asking the latter to transfer funds that she was holding on behalf of the 1st defendant and also to be appraised on the process of administration and /or winding up of the law firm of the deceased. Ndungi & Co. Advocates responded and indicated that they were sorting out the issues of administration and/or winding up of the law firm. More important and germane to the 1st Defendant's case is that they indicated they would release the 1st Defendant's monies to Cheloti & Etole Advocates once the process of administration/winging up is complete (see the relevant letters at page 37,38,39,40,41,&42 of the Plaintiff's bundle of documents). But the letters from the late Ndungi's office are silent on how much it held on behalf of the 1st defendant. It is only after the administration that it emerged that the actual amount that the late Ndungi's client account was holding for the 1st defendant was only Kshs. 698,000/=. The 1st Defendant therefore believes that the Plaintiff had paid only Kshs. 698,000 on account of the 1st Defendant.

[50] The 1st Defendant also submitted on the alleged overpayment on the mortgage account thus overpayment of the purchase price by Kshs. 539,659.15. The overpayment is intrinsically related to the mortgage repayment and was as a result of the penalties and interest charged by the Housing Finance Corporation of Kenya (HFCK) due to the default by the Plaintiff. Therefore, it is not the fault of the 1st Defendant that the Plaintiff ended up making an overpayment of the mortgage balance of Kshs. 850,000 and hence the latter is not entitled to a refund.

[51] The 1st Defendant wrote several letters with the sole aim of getting out of the sale Agreement through a rescission. These letters are the one dated 26th March 1998, 14th April 1998 and 26th June 1998. It is arguable that the letters do not have the strict form for letters of rescission. However it is clear that the Plaintiff had frustrated the 1st Defendant severely and severally and the intention of the 1st Defendant was one: just to get out of the transaction because the Plaintiff had immensely frustrated her. The court should, therefore, as a court of equity, look at the intention of the 1st Defendant and not the form of the letters because Equity looks at the intention rather than the form. The intention of the 1st Defendant was to rescind the contract. The Plaintiff failed to fulfil her obligations in the transaction even after the completion date was extended to 28th August 1998. For instance, the Plaintiff cleared the mortgage balance sometimes in July 1999. Furthermore, she is still in breach because she has not paid all the purchase monies to the 1st Defendant. The Plaintiff has come to court with "dirty hands" and iss not entitled to the Orders sought. The best that can be done is to treat the Plaintiff as a tenant liable to pay rent for she has had possession and use of the suit premises. Therefore, the 1st Defendant as a lay person was in order to assume the Plaintiff was a tenant at a monthly rent of Kshs. 22,000, but payable to

the Housing Finance Corporation of Kenya (HFCK) for purposes of defraying her mortgage balance. Indeed, the 1st Defendant's testimony was that HFCK threatened to sell the suit property because the Plaintiff was irregular in her remission of the monies to HFCK. The Plaintiff was uncooperative and continued being in arrears and it was at this point, at the imminent threat of losing her house that she took action in order to secure her interest and enforce her rights as the owner of the property.

[52] On the basis of the foregoing, the 1st Defendant is convinced that she is entitled to orders sought in the Originating Summons. She is entitled to vacant possession of the property as she had rescinded the Sale Agreement dated 9th January 1997. The 1st Defendant argued that she was not dishonest or fraudulent in acquiring a duplicate Lease in respect of the suit property. The 1st Defendant acquired the Lease in the proper way as can be seen from the Supplementary List of Documents that she filed on 19th March, 2014. The Plaintiff had a chance to object to the issuance of a duplicate Lease after a notice was in the Kenya Gazette on 22nd August 2003 asking any party, including the Plaintiff, to lodge an objection with the registrar to the issuance of a duplicate Lease. However, the Plaintiff did not object. Her testimony that "She was not aware that the notice had been published in the gazette notice" is merely ignorance which in law is not sufficient excuse for her inaction. It was the submission of the 1st Defendant that, in any case, it was the onus of the 2nd Defendant to ask for further evidence if he was not satisfied with the evidence that had been presented by the 1st Defendant. But, the 2nd Defendant did not make any request for further information from the 1st Defendant on the loss of the Lease. Once the 1st Defendant was issued with the duplicate Lease, she went ahead to charge the property. The 1st Defendant stated clearly that she charged the property in order to get a loan for school fees for one of her children. Her intention was not malicious as alleged by the Plaintiff, that is, charging the property and then defaulting in repaying the loan so that the property can be auctioned off by the 3rd Defendant. Another important thing is the way the plaintiff obtained the original Lease. The Plaintiff neither proffered an explanation nor produced any document showing that she got the Lease from her then lawyer, M/s. Keng'ara & Co. Advocates. Therefore, the 1st Defendant formulated a hypothesis; the it is probable that she may gotten the original Lease from somewhere else other that from Mr. Keng'ara's office, say from the late Ndungi's office in collusion with mischievous employees of the deceased's law firm?

[53] In light of the foregoing, the 1st Defendant submitted that she is not obliged to sign a transfer of the Property in favour of the Plaintiff because the 1st Defendant still has not been paid the full purchase price. Essentially, there is an outstanding obligation on the part of the Plaintiff which precludes her from having a transfer of the property registered in her favour. The humble submission is that the present case by the Plaintiff is an afterthought for she took almost 6 years after clearing the mortgage balance before filing the present suit. It is obvious, the 1st Defendant urged, that the Plaintiff was hesitant to file the present suit because she was afraid details of her unpleasant conduct would emerge. They urged the Court to dismiss the Plaintiff's suit with costs.

THE 2ND DEFENDANT'S CASE AND SUBMISSIONS

[54] The 2nd Defendant did not call any witnesses but it filed submissions. The 2nd Defendant argued that the Plaintiff has failed to prove her case against the 2 & 3nd Defendant on a balance of probability as required by law and it ought to be dismissed with costs to the 2nd Defendants. The 2nd Defendant denied that there was fraud and or illegality on his party by issuing a new certificate of Lease to the first 1st Defendant as the 2nd Defendant followed all the procedures required by law. The 1st Defendant swore an affidavit and or a declaration that the Certificate of Lease is lost which culminated to the 2nd Defendant to gazette the Lease document in the Kenya Gazette for 60 days and after being satisfied that there was no complain, the 2nd Defendant issued a new Certificate of Lease as required by Law. The 1st Defendant in examination in chief testified

that she is the one who approached the 2nd Defendant for the issuance of the new Certificate of Lease as she claimed that the original has lost. The 2nd Defendant, who is the Land Registrar, relying on the 1st Defendant's affidavit followed the law and thereafter issued a new Certificate of Title. As the Land Registrar, he had no reason to deny the 1st Defendant a new certificate of lease. The 2nd Defendant submitted it did no wrong in issuing a new certificate of lease and urges the court to dismiss the suit against the 2nd Defendants with costs.

3RD DEFENDANT'S CASE AND SUBMISSIONS

[55] The 3rd Defendant did not also call any witnesses but filed submissions. It described itself in the submissions as ''more of an innocent bystander caught up in the issues between the Plaintiff Margaret Wangechi Wachira and the other parties to the suit, more so the 1st Defendant Mary Wanjiru Gitau''. The Bank was not aware of any of the transactions that had taken place between the Plaintiff and the 1st Defendant. Neither was it aware of the procuring of a replacement Lease from the 2nd Defendant by the 1st Defendant. Further, the Bank was not aware of the existence of HCC MISC NO.274 of 1999(OS). They argued that it is not feasible that the Bank could not have been aware of the ongoing on the suit property and yet go ahead to take the property as security. It stated it is prudent lender. As is the usual practice of any bank, the Bank did due diligence and conducted a search on the suit property which was duly signed and sealed by the custodian of Leases in the name of Registrar. There is no suggestion by the Plaintiff that the search, including the one done by the Plaintiff and tendered by her in evidence, was no authentic. No order of any court was registered against the Lease at the time the Bank was charging the property. Indeed no order has been registered against the Lease to date. The original Lease as well as the new one is show the property is registered in the 1st Defendant's name. In the humble submission of the Bank, the propriety or veracity of the charge by the Bank has not been challenged. To state therefore that the Bank was negligent is not only unfounded, but also quite harsh. The credit policy for banks will naturally require that a Report and Valuation be obtained as a precursor to disbursing its funds. The Valuer in discharging his duty as such as an agent of the Bank has no duty, legal or otherwise, to interview house holders or neighbours. They invited the court to take cognizance of the following;-

I. Rent was paid and a Rent Clearance Certificate (in the name of the Bank's customer i.e. the 1st Defendant) issued.
II. Consent to Charge was granted.
III. The charge was not rejected when presented for registration.

All the aforesaid documents are contained in the Bank's list of documents which form part of the court record.

[56] The 3rd Defendant also took issue with the Plaintiff's testimony that in seeking financing from the Bank, the 1st Defendant lied to the Bank. The Plaintiff cannot in the same vein cite the Bank for being negligent. Finally, it is worthy of note that as soon as the dispute between the Plaintiff and the Bank's customer (i.e. the 1st Defendant) came to the attention of the bank, the recovery process (of the suit premises) was promptly brought to a halt. The Bank had been acting in good faith. For the reasons aforesaid, they beseech the court to dismiss the suit against the Bank with costs.

THE DETERMINATION

Issues

[57] The following are the issues for determination:

1. ***Whether the Originating summons herein is competent.***

2. ***Whether the Sale Agreement was rescinded by the 1st Defendant and whether the alleged rescission is valid and proper in law.***
3. ***Whether the Plaintiff has been a Tenant in the suit premises and if she is liable to pay any rent.***
4. ***Whether the 1st defendant was dishonest and/or fraudulent in acquiring the duplicate Lease in respect of the suit property and in charging the Lease to the 3rd Defendant.***
5. ***Whether the 3rd Defendant was negligent and/or fraudulent in issuing the duplicate Lease to the 1st Defendant.***
6. ***Whether the duplicate Certificate of Lease issued on 21st January 2004 and the Charge registered in favour of the 3rd Defendant are valid.***
7. ***Whether the Plaintiff has paid to the 1st Defendant the agreed purchase price of Kshs. 3,400,000/- and thereby fulfilled her obligations in the Sale Agreement.***
8. ***Whether the 1st Defendant is entitled to an order of vacant possession of the property.***
9. ***Whether the 1st Defendant is obliged to sign a transfer of the property in favour of the Plaintiff.***

[58] Some of the issues are inextricably bound and may not be discussed and determined separately without a dull repetition. I will, therefore, where appropriate discuss those issues which are intertwined together but nonetheless, make a distinct decision on each. But there are those which are stand alone and I shall discuss and determine them as such.

Is the OS Competent?

[59] I dealt with the competence of the OS as a preliminary issue and citing ample legal support, I held it was competent. The issue ends there.

Whether the agreement dated 9th January 1997 was rescinded

[60] The 1st Defendant made the following submissions on the issue:-

> ***''The 1st Defendant wrote several letters with the sole aim of getting out of the sale Agreement through a rescission. These letters are the one dated 26th March 1998, 14th April 1998 and 26th June 1998. It is arguable that the letters do not have the strict form for letters of rescission. However it is clear that the Plaintiff had frustrated the 1st Defendant severely and severally and the intention of the 1st Defendant was one: just to get out of the transaction because the Plaintiff had immensely frustrated her''.***

[61] The 1st Defendant relied on the alleged frustrations to mean that the intention of the 1st Defendant could not have been anything else other than rescinding the contract in question.

[62] But what does the law say in such scenario? The Plaintiff submitted that the 1st Defendant's assertion that she rescinded the Sale Agreement vide her Advocates letters dated 26th March 1998 and 14th April 1998 (**see page 57 and 58 of Plaintiff's Exhibit 1)** does not hold any ground and should be disregarded. The Plaintiff stated that the purported rescission is not proper or valid in law for several reasons.

[63] As rescission has the effect of terminating the entire contract and restoring the parties to the contract to their pre-contractual positions, it has to be done in accordance with the law, and agreement of the parties where it has been provided for. A letter of rescission must first and foremost be clear that it is rescinding the contract and should give the basis for the rescission. Secondly, it must be due as per the agreement of the parties. Thirdly, where it is written on expiration of time, there must be proper notice or provision making time to be of essence. I note the letter dated 26th March 1998 (**at page 57**) did not specify the nature of the breach and what the Plaintiff was required to do in order to rectify the breach as stipulated by **clause 4(6)(a)(b)&(c)** of the Agreement for Sale. The said letter also gave a notice of 14 days instead of 21 days as

expressly stipulated in **clause 4(6)(c)** of the Agreement for Sale. Of great significance is that, the parties again met- and this is confirmed by the on dated 2nd June 1998 **at page 59-** and agreed on new terms, the most important one being that the completion date was now to be 28th June 1998. Also parties agreed to meet again on 28th June 1998, I suppose to assess the compliance thereof. According to the new terms, the Plaintiff should continue servicing the mortgage at Housing Finance and to complete the balance of the purchase price by 28th August 1998. All these happened despite and after the letter dated 14th April 1998 **at page 58** which had indicated that the contract had been rescinded from the date of the letter. The legal effect of the subsequent agreement is that the agreement dated 9th January 1997 continued to be in force as varied by the parties. As such, any purported rescission was blown away and was of no legal effect. The parties relied and acted on these new terms and the 1st Defendant would be estopped by law from falling back to a rescission which had been effectively removed by mutual agreement of both parties. The conduct of parties here including the 1st Defendant becomes extremely important in deciding the question of rescission.

[64] The foregoing notwithstanding, the letter dated 26th June 1998 at page 61 of Exhibit 1 which purported to rescind the Agreement was premature as it was written before the expiry of the agreed date of completion, that is, 28th August 1998 as agreed and confirmed by the letter dated 2nd June 1998. The letter was also not clear on the breach. Moreover, in the absence of a specific date of completion in the Agreement for Sale dated 9th January 1997 or notice to the Plaintiff which expressly insisted on and made time to be of essence, it would be difficult for the 1st Defendant to rescind the agreement herein. The law on this subject is not in doubt as to be called upon to justify its existence. See the case of **Njamuyu vs. Nyaga Civil Appeal No. 20 of 1982** where the Court of Appeal held that before an Agreement can be rescinded, the party in default should be notified of the default and given reasonable time within which to rectify it. See also the case of **Wambugu vs. Njuguna Civil Appeal No. 10 of 1982** where the Court of Appeal held that:-

> ***"Where an agreement does not state that time is of essence and neither does the Vendor give notice for making time of essence, such a Vendor having failed to take the necessary steps to make time of essence could not repudiate the contract on the ground of unreasonable delay by the Purchaser to perform. In such a case the making of time of the essence has been waived and time can only be made of essence by fixing of a reasonable time for performance"***

[65] As part of the purchase price consisted in repayment of a loan to HFCK, the special nature of mortgages would dictate what reasonable time of completion of the agreement would entail. Repayment period is fixed by the mortgage instrument and any adjustments including of repayment is only possible as provided by law, the charge and by mutual consent of parties. The 1st Defendant was the common party in both the agreement dated 9th January 1997 and the charge with HFCK. The Plaintiff could only make repayments as per the charge on behalf of the 1st Defendant and each payment made is part of the purchase price. Therefore, insisting that repayment of the loan to HFCK should have been made by 28th June 1998 without reference to HFCK is neither here nor there and may not be used as a basis for rescission unless the charge or by agreement of the parties to the charge it is so varied or agreed. These observations bring me to the next issue.

Whether the Plaintiff was a tenant on the suit property

[66] Repayment of the loan at HFCK was part of the agreement and was part payment of the purchase price of the suit property. The Plaintiff took possession of the suit premises pursuant to clause 6 of the sale agreement dated 9th January 1997 and with the permission of the 1st Defendant. The said clause 6 is explicit that, unless there is a lease or tenancy agreement between

the 1st Defendant and the Plaintiff on the suit premises, such taking of possession before completion of the agreement makes the Plaintiff a licensee of the 1st Defendant and not a tenant. A Licensee is not a tenant and both terms are different. Clauses such as clause 6 are usually included in agreements where purchase price is paid in future so as to enable the licensee to take possession of the suit property as he fulfils some acts of contractual obligations without being labelled a trespasser in the future should the deal not fall through. And possession by a licensee does not amount to a lease profit a prendre. But despite these realities of fact and law, the 1st Defendant has insisted that since the Plaintiff breached the contract, she is to be treated as a tenant and that all payments made by her through Ndungi & Co Advocates and to HFCK should be treated as rent for the demised premises. In law, where a party breaches a contract of sale, the remedy would be in an award for damages or specific performance or return of any value or consideration which may have passed between the parties or for mesne profits or other income which the party may have been entitled to, were it not for the breach. And, therefore, I conscientiously hesitate to hold that a purchaser of suit premises should be treated as a tenant in the event of breach of the contract of sale. Perhaps, the best I can make out of the 1st Defendant's argument is that it is beneficial in assessing damages or loss of rent or income from the suit property should she be successful but it cannot be granted as a substantive remedy lest the court should be inventing a new remedy of sort. I move to the next issue. On the basis of this finding, the other issue on the lawfulness of the distress for rent is also answered; they were all illegal and without any legal basis.

Whether the 1st defendant was dishonest and/or fraudulent in acquiring the duplicate Lease in respect of the suit property and in charging the Lease to the 3rd Defendant

[67] The Plaintiff testified that, all along the 1st Defendant was aware that the original Certificate of Lease, Transfer as well as the Discharge of Charge were in the custody of Ndungi & Co Advocates having been released by Housing Finance Company of Kenya Ltd to M/s Ndungi & Company Advocates and subsequently to the Plaintiff's Advocates M/s Kengara & Company Advocates for the purpose of completing the transfer in Plaintiff's favour as evidenced by the several correspondence produced in the Plaintiff's list of documents filed herein. The obtainance of a duplicate Certificate of Lease and creating a charge on the suit property was therefore, dishonest and/or fraudulent. The 1st Defendant testified that she made all frantic efforts to trace the documents from the LSK, HFCK as well as Ndungi & Co Advocates but in vain. She testified further that after fruitless search she decided to apply for a duplicate Certificate of Lease from the Land Registrar. Her comfort is that she followed the law to the letter and therefore the Certificate of Lease was properly obtained. I note from the documents and evidence on record that the original title documents including the Certificate of Lease were handed over to Ndungi & Co Advocates through the letter dated 10th March 1997 written by Archer & Wilcock Advocates who were duly appointed by Housing Finance Company Ltd to Ndungi & Company Advocates. The purpose of the release of the documents was to enable discharge of Charge and subsequent registration of the transfer in favour of the Plaintiff. The 1st Defendant was the borrower and holder of the mortgage account at Housing Finance Company Ltd. All letters pertaining to the transaction and forwarding of the documents were copied to the 1st Defendant and she did not deny the said letters or knowledge of them. Even the advocates for the 1st Defendant, Cheloti & Etole Advocates, kept on writing letters to the firm of Ndungi & Company Advocates and subsequently to M/s Keng'ara & Company Advocates pursuing the payment of the balance of the purchase price and/or the completion of the sale transaction. What is astonishing is the letter by the 1st Defendant to Chief Land Registrar dated 29th December, 1999 in which she stated that the Bank i.e. HFCK informed her that the title documents were released to Ndungi & Co Advocates by Archer & Wilcock Advocates. She also makes a startling observation in the letter, that the said original title documents had not been retrieved from Ndungi & Co Advocates and therefore the Plaintiff may have access to them. She made those disclosures honestly and in the hope of persuading the Chief Land Registrar to place a restriction on the suit land and prevent any registration of change of ownership. That is not all. The late Ndungi wrote to Cheloti & Etole Advocate on 15th March 1997-letetr at page 34 of the Plaintiff's bundle- and was forwarding a set

of transfer of lease forms for execution by the 1st Defendant. When I put all these correspondences together and the evasive answers the 1st Defendant gave in cross-examination on the matter, I am convinced that the 1st Defendant was aware about the whereabouts of the original Certificate of Lease and the entire transaction the whole time. I agree with the submission by the Plaintiff that that is the reason why the advocates for the 1st Defendant did not seek to find out the whereabouts of the original Lease. One thing that was clear is that the 1st Defendant could not fathom the fact that there was no enough money in Ndungi's clients account to pay off the balance of the purchase price. She believed because Ndungi & Co Advocates had not paid her the money he received, she was entitled to vacant possession of her house. And, the demeanour of the 1st Defendant portrayed an agitated person who was ready to go to any length in getting the Plaintiff out of the suit premises; and that explains why she carried out distress for rent and eventually charged the suit property to the 3rd Defendant. In the circumstances, there is nothing to show that the 1st Defendant made frantic efforts to trace the whereabouts of the original Certificate of Title as she claimed in the Statutory Declaration attached to the 1st Defendant's Supplementary List of documents filed on 18th March 2014 or in her evidence in court. That aspect of the testimony of the 1st Defendant does not bear any truth or based on any cogent evidence which may persuade the court from saying there could be some truth therein. Based on the evidence provided, the testimony by the 1st Defendant that she was not aware of the whereabouts of the original Certificate of Lease is wholly false and only intended to justify the actions by the 1st Defendant in levying distress for rent, selling of the Plaintiff's household items, obtaining a duplicate Certificate for Lease and charging the suit property to the 3rd Defendant. The 1st Defendant's deposition at paragraph 8 that the Lease was lost and all efforts to retrieve the file/Lease from the go-downs of Law Society of Kenya have been fruitless, are not supported by evidence whatsoever. There is no letter to or from LSK to demonstrate any inquiries on the whereabouts of important documents as the original title documents of the suit property. Adhering to the law is one thing; and making a bona fide application for a duplicate Certificate of Lease under the law is another. The 1st Defendant may have followed the procedures laid down in law but the application was not bona fides and was tinctured with false information. The averments at paragraph 9 of the said Declaration by the 1st Defendant are also not true disclosure or statement of fact- and the 1st Defendant confirmed and stated the correct position that it was the Plaintiff and not her who paid the loan to Housing Finance Company Ltd. It is therefore a coherent inference from the facts presented in court that the 1st Defendant acquired the duplicate Lease through dishonesty and misrepresentations made to the 3rd Defendant. But whether the duplicate Certificate of Lease should be cancelled or whether the charge on should be declared null and void will depend on the overall impression on justice the court will take out of the entire case. I will revert to those issues later. Also, some of these findings will feature in my decision on the ultimate issue; whether the Plaintiff paid the purchase price as agreed. Meanwhile, let me determine the other issues which are closely related to the one I have just determined.

Whether the 3rd Defendant was negligent and/or fraudulent in issuing the duplicate Lease to the 1st Defendant

[68] Even if the 1st Defendant misrepresented the fact of loss of the original Certificate of Lease of the suit property to the3rd Defendant, there is nothing to show that the 3rd Defendant was fraudulent or negligent. The Land Registrar ordinarily receives information from the Owner of the land on the loss of the title document in form of a Statutory Declarations to give it legal force. On receipt of such information and on being satisfied that the Certificate of Loss cannot be found, the Land Registrar gazettes the loos and intention to issue a new certificate of lease on expiry of sixty (60) days. The Gazette Notice serves as means of informing the public of the loss and possibility of issuance of a new title document so that any person with relevant information or challenge to raise it with the relevant Land Registrar. Although the 1st Defendant obtained the new Certificate fraudulently and through misrepresentation, the 3rd Defendant did his work as by law required and as I have stated, there is nothing to show he was fraudulent or negligent in the issuance of the new

title documents.

What about the alleged negligence by the 2nd Defendant in creating a charge on the suit property?

[69] On one hand, I have found that the 1st Defendant obtained the new Certificate of Lease herein fraudulently and through misrepresentation. On the other hand, I have found that the 3rd Defendant was not negligent but only acted on information provided by the 1st Defendant. The 3rd Defendant as a bank finds itself between a rock and a hard place. The bank searched the suit property and argued that it did sufficient due diligence. It submitted that it could not have done more. It urged also that it was not aware of the going on in the suit property, and if it was, as a prudent bank, it would not have taken the suit property as security for loan. As a sign of good faith, it halted all steps towards recovery of the suit property. Therefore, the bank argued it was not negligent at all in creating a charge over the suit property. The Plaintiff on the other hand is of the view that, had the 1st Defendant engaged a professional valuation before the creation of the charge, it would have realized that the property was occupied by the Plaintiff and was the owner.

[70] These arguments are not new. But I should state that due diligence goes beyond mere search in the lands Registry especially in the wake of fraudulent land deals which most of the time affects security taken by banks. it is not far-fetched argument that a proper and professional valuation which must involve physical inspection of the suit property which is a dwelling house will be interested in establishing the occupancy of the suit premises and the nature thereof as a necessary factor in creation of a charge. It is no doubt land laws in Kenya have taken a real paradigm shift where persons living on or occupying the property are persons of or with interest on the land which the mortgagee cannot ignore simply because it carried out the registry search. The failure by the bank to carry out inquiries about other interests on the land does not diminish those interests. By way of example, where a mortgagee does not establish there are persons occupying or using land at the time of creating a charge will not remove the mortgagee's obligation to obtain all the required consents from or serving any statutory notices on such persons if such are persons who are recognized by law to give consent or receive notice within the mortgage structure of our laws. Similarly, this point will be revisited after I have deal with the penultimate issues; 1) whether the Plaintiff paid the purchase price; 2) whether the 1st Defendant should be compelled to sign the transfer of the suit property in favour of the Plaintiff; and) whether the 1st Defendant is entitled to vacant possession of the suit property.

Whether the Plaintiff has paid to the 1st Defendant the agreed purchase price of Kshs. 3,400,000/- and thereby fulfilled her obligations in the Sale Agreement.

[71] This is the linchpin of the ultimate decision of the court on the issues herein. I am able to discern the bone of contention to be; whether the money the Plaintiff paid the purchase price as agreed between the parties. Here we cannot avoid determining two stick points. The first one, the position of the law about money paid to Ndungi & Co Advocates by the Plaintiff. Is it the 1st Defendants or the Plaintiff's? In fact that is where the major problem lies. The second one, and which is as entangled like the first- the repayments to HFCK and the aspect of overpayment.

[72] The Plaintiff provided a schedule and receipts of all the payments she made to Ndungi & Co Advocates. She testified that she made a total of Kshs. 2,550,000 through Ndungi & Co Advocates. Although the 1st Defendant argued that the counterfoils for the payment cheques were not provided, that is not an absolute requirement especially where receipts by the said firm of Advocates have been produced. The 1st Defendant just doubted the authenticity of the receipts and made wild hypothesis that the receipts may have been obtained elsewhere other than from the firm of Ndungi &Co Advocates without offering any evidence in support of such a serious allegation. There is nothing to doubt those receipts. Again the 1st Defendant merely stated that the LSK did not state the actual amount paid into the clients account on the 1st Defendant behalf in this transaction. There is nothing which may make the court to infer that by paying Kshs. 698,000 the

administrator of the estate of Ndungi Advocate meant that the Plaintiff had only paid a sum of Kshs. 698,000 to the firm of Ndungi & Co Advocates in respect of the transaction in question. The record shows that the 1st Defendant was following up through her advocates; the balance of money paid by the Plaintiff to Ndungi & Co Advocates on her behalf and specifically in respect of the sale of the suit premises. At no time did the 1st Defendant seek for any information on the actual amount paid to Ndungi & Co Advocates. The correspondences herein, between the firms of Cheloti & Etole Advocates and Ndungi & Co Advocates did not also raise the question as to the amount they were expecting from the firm of Ndungi and Co Advocates as the balance les the mortgage sum payable to HFCK. It seems that was never an issue in controversy between the parties at the time. No wonder the letter dated 2nd July 1997 from Ndungi & Co Advocates which apparently was in reply to a letter dated 2nd July written by Cheloti & Etole Advocates made assurances of that the money paid to the firm of Ndungi & Co Advocates on account of the 1st Defendant was safe. Another important piece of evidence; the letter dated 2nd June 1998 only dealt with the repayment of the mortgage and said nothing about any other outstanding balance of the purchase price. These things support a conclusion that the actual amount paid to Ndungi & Co Advocates was not in controversy especially noting the said advocate acted for both parties at some time. In view of the above, I find that there is enough and uncontroverted evidence that the Plaintiff paid a sum of Kshs. 2,550,000 to Ndungi & Co Advocates. Out of these sums, Kshs. 100,000 was received direct by the 1st Defendant.

[73] The next hurdle is; the money paid to Ndungi Advocates whose money was it? This case presents quite unique circumstances and may fall within what I may call ‘’hard or scarry-edge cases’’. But as a court of justice, we are experienced at resolving such cases. The question as to when Ndungi & Co Advocates ceased from being the advocate for the 1st Defendant is critical in the resolution of this dispute which requires high sense of justice to the parties. From the evidence adduced, a sum of Kshs. 400,000 and Kshs. 1,000,000 was paid on 9.1.97 and 22.1.97 respectively by the Plaintiff to Ndungi & Co Advocates. The 1st Defendant asserted that she withdrew her instructions from Ndungi & Co Advocates on 4th March 1997 through a letter dated 4th March 1997. I understand her arguments to be that any payments made after 4th March 1997 Ndungi & Co Advocates were not payment to the 1st Defendant’s advocates and therefore, not payment to her. Thus, according to the said 1st Defendant’s standpoint, such payments made after 4th March to Ndungi & Co Advocates constitute Plaintiff’s money. I will not have any difficulties with the said argument if indeed I find that instructions from Ndungi & Co Advocates were withdrawn by the 1st Defendant on 4th March 1997. But even before I make the finding on the issue of withdrawal of instructions from Ndungi & Co Advocates, I will make one clear finding on the payments made on 9.1.1997 and 22.1.1997 of Kshs. 400,000 and Kshs. 1,000,000 to Ndungi & Co Advocates on this transaction. At the time, Ndungi & Co Advocates was acting for both parties and their agreement was clear on that aspect. As I have found that the Plaintiff made payment of a sum of Kshs. 2,550,000 to Ndungi & Co Advocates and the amounts paid on 9.1.1997 and 22.1.1997 fall within the period when Ndungi & Co Advocates acted for both parties, I hereby find and hold that the amount of money being Kshs. 400,000 and Kshs. 1,000,000 was properly paid to the advocate for the 1st Defendant in accordance with the sale agreement herein. The said sum of money constitute purchase price toward the suit property. I find comfort in one little piece of evidence provided by the 1st Defendant; The 1st Defendant in her cross-examination as well as examination in chief clearly stated that the Plaintiff had also paid a sum of Kshs. 300,000 to the previous prospective purchaser of the suit property. The money was paid as a refund of money which had been paid to the 1st Defendant by the previous prospective purchaser. She admitted the payment and she said that money is not reflected anywhere. What I do not understand is how such amount which is not small by the standards of 1997 could be paid as a side arrangement from the agreement of 9th January 1997. That is problematic as the Plaintiff did not state that she made a refund to another previous prospective purchaser. And in any case if that were the case, I did not hear the 1st Defendant to be saying that the sum of Kshs. 300,000 was over and above the agreed consideration of Kshs. 3,400,000. The 1st Defendant is the one who introduced the subject of

refund and she did not tell the court how the money was paid on her behalf by the Plaintiff. It is not clear if she made the refund herself after receipt of the money from the Plaintiff. The only plausible explanation is that the said Kshs. 300,000 was part of the money paid by the Plaintiff. The 1st Defendant also admitted having received a sum of Kshs. 100,000 from the Plaintiff. All these things vindicate the holding of the court that the money paid on 9.1.1997 and 22.1.1997 was paid to the account of the 1st Defendant.

[74] What about the sum of Kshs. 1,000,000 and Kshs. 50,000 paid on 19.3.1997 and 13.5.1997? From the evidence presented, the Plaintiff paid these monies to Ndungi & Co Advocates. But the 1st Defendant argues that the said sums of money were not paid to her advocates as she had already withdrawn instructions from Ndungi & Co Advocates and appointed Cheloti & Co Advocates. There is nothing to show that the letter dated 4th March 1997 was delivered to the Plaintiff or Ndungi & Co Advocates. I discern from the record and correspondences availed to court that Ndungi & Co Advocates continued to transact business for the 1st Defendant in the transaction in question and the pointed example is that he received the Original documents of title from Archer & Wilcock Advocates which were forwarded through their letter dated 10th March 1997. He also gave professional undertaking which is ordinarily given by the advocate for the vendor. But again, the late Ndungi wrote to Cheloti & Etole Advocate on 15th March 1997-letter at page 34 of the Plaintiff's bundle- and was forwarding a set of transfer of lease forms for execution by the 1st Defendant. From this correspondence, it is clear that, as at 15th March 1997, the late Ndungi was aware the advocates for the 1st Defendant were Cheloti & Etole Advocates. What, therefore, is the justice the case demands?

[75] Is it in order in the circumstances of this case to lay blame squarely on the Plaintiff or the 1st Defendant in respect of each person's contractual obligations? I think not. I do not also think this is a pure case where the doctrine of *in pari delicto* would apply whereat the court will not ordinarily involve itself in resolving one side's claim over the other; or to want to leave the parties where it finds them, in accordance with the maxim, *in pari delicto potior est conditio defendentis et possidendis.* I am also not persuaded at all that I should take the view that whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. Except I must admit that this case presents peculiar and or unique circumstances, and therefore, the court will be guided by high sense of justice; fairness and proportionality that is depicted by the facts of the case; required by judicious adjudication of cases and on application of the law in determining the foregoing question. There are a number of issues which comes to bear on this matter. First, the Plaintiff paid money to the firm of Ndungi & Co Advocates in the belief that she was doing so on account of the 1st Defendant. Going by evidence and court's analysis, the payments which are in issue should be Kshs. 1,000,000 and Kshs. 50,000 paid to Ndungi & Co Advocates on 19.3.1997 and 15.5.1997, respectively. I have already stated that it is not clear exactly when the 1st Defendant withdrew instruction from the firm of Ndungi & Co Advocates although as at 15th March 1997, Ndungi & Co Advocates correspondence shows Ndungi & Co Advocates was aware the advocates for the 1st Defendant were Cheloti & Etole Advocates. There is, however, nothing to show the late Ndungi Advocate informed the Plaintiff of the change of advocates. But what is critical is that, parties herein continued with the agreement of 9th January 1997 beyond the demise of Ndungi Advocate and made several variations to it. A new completion date was set to be 28th August 1998 for repayment of the loan to HFCK. According to the agreement as varied on 2nd June 1998, the Plaintiff was to repay the loan to HFCK but it is curious to note that there is nothing which shows that the terms of the loan and charge between the 1st Defendant and HFCK were ever altered in line with the agreement between the Plaintiff and the 1st Defendant. I have already made a finding that, in the circumstances, repayment of the loan should only have been on the terms of the mortgage. The Plaintiff continued to make repayments to HFCK until eventually the entire loan was repaid. There is one issue though; the claim of overpayment and the contra-claim that the overpayments on the loan account was occasioned by the default of the Plaintiff in repaying the loan on time. But, I will determine that aspect later. Nonetheless, the loan repayment

was completed and it is not in doubt it was by the Plaintiff. In this scenario the 1st Defendant has not effectively received the total purchase price of the suit property. Except, there are other factors to consider and the court takes great exception to the manner in which the 1st Defendant handled the transaction especially after it became clear the account of Ndungi & Co Advocates did not have sufficient funds to pay the whole claim. The deficiency of funds in the account of Ndungi & Co Advocates is not the mistake of the Plaintiff at all. Those are matters which only the Administration of estate would know. Also, the conduct of the 1st Defendant especially in levying two distresses for rent, selling of the seized goods belonging to the Plaintiff, obtaining a duplicate title document on misrepresentation of facts and charging; is most deplorable and will also be considered in and will have a bearing to this my decision. The above analysis and the evidence presented put the court in a position to make decisions on this suit which was consolidated with the OS.

Is the 1st Defendant entitled to an order of vacant possession of the suit property?

[76] On the evidence available, the circumstances of this case and the applicable law, the court is convinced that the 1st Defendant is not entitled to an order of vacant possession of the suit property. She will however not remain without a remedy at least in the circumstances of this case as shall be borne out presently.

Is the 1st Defendant obliged to sign a transfer of the property in favour of the Plaintiff?

[77] I think so. The Plaintiff paid the purchase price albeit part of it did not reach the 1st Defendant due to the death of Ndungi Advocate and the insufficiency of funds in his clients account. She testified that the 1st Defendant refused to take the sum of Kshs. 698,000 paid by the LSK. But she is willing and able to pay the same over to her. I should make a finding here that a sum of Kshs. 400,000 and Kshs. 1,000,000 paid to Ndungi & Co Advocates on 9.1.1997 and 22.1.1997, respectively were properly paid and received on the account of the 1st Defendant. Similarly, the sum of Kshs. 100,000 received by the 1st Defendant on 25.10.1997 was also in a part payment of the purchase price for the suit property. And a sum of Kshs. 850,618/-30 paid to HFCK was also in part payment of the purchase price for the suit property. The overpayment of Kshs. 539,649.15 paid to HFCK will not form part of the purchase price although it will be useful mitigation in the overall decision of the court as shall become clear shortly. Therefore, the finding of the court is that the total purchase price paid to the 1st Defendant is a sum of Kshs. 2,250,618.30. In the peculiar circumstances of this case, a sum of Kshs. 1,149,381.70 would be due to the 1st Defendant. I direct the Plaintiff should pay the said sum of Kshs. 1,149,381.70 to the 1st Defendant within the next 45 days but in accordance with the directions which the court shall give when addressing the plight of the loan advanced to the 1st Defendant by the 3rd Defendant. I will not condemn her to pay interest on the said sum because she had paid over the purchase price that was to be paid to Ndungi & Co Advocates but a misfortune occurred which irreparably affected both parties. Equally, and I stated this earlier, the fact that she overpaid the loan to HFCK by a sum of Kshs. 539,649.15, acts as a mitigating factor. There is no evidence that a default of two months attracted a penalty of Kshs. 539,649.15. The submission by the 1st Defendant that the Plaintiff's default occasioned the penalty interest of Kshs. 539,649.15 is not supported by evidence and is not entirely defensible. Only HFCK would shed light on this aspect but it is not a party in the suit. More was told; the two unlawful distresses for rent levied upon and the subsequent sale of the seized goods is yet another punishment which was unfairly met upon the Plaintiff by the 1st Defendant. That is not the end of things. The 1st Defendant's fraudulent conduct in obtaining a new tile document and creating a charge over the suit premises does not ignite any love from a court of equity. These things work against the 1st Defendant in getting interest on the sum due to her.

[78] Accordingly, as I promised elsewhere above, I direct the duplicate Certificate of Lease

issued by the 2nd Defendant to be cancelled as the original one is and has always been available and is the only authentic document of title on which all dealings on the suit property ought to have been and shall be transacted. I will not, however, declare the charge created on the suit property to be invalid except it shall be discharged once the balance of the loan thereto has been paid out of the sum of Kshs. 1,149,381.70 awarded to the 1st Defendant herein. The parties should agree on the most efficacious way of executing this order.

Injunction

[79] On the basis of the findings of the court, I hereby issue a permanent injunction restraining the 1st Defendants whether by themselves, their servants, officers or agents from selling, charging, leasing, hiring or alienating or interfering or disturbing the Plaintiff's quiet possession of the suit property known as Lease No Nairobi/Block 104/411. I also restrain the 3rd Defendant from selling the suit property. Similarly, except for purposes of transferring the suit property in the name of the Plaintiff, the 2nd Defendant is restrained from registering any transaction and/or from dealing in the suit property whatsoever.

[80] The Plaintiff's and the 1st Defendant's cases succeed to the extent expressly stated by the judgment. Therefore, I have granted only the reliefs which have been specifically granted.

Costs

[81] In the circumstances of the case, and taking the results of the entire litigation, I order that each party shall pay own costs of the suit.

Dated, signed and delivered in court at Nairobi this 28th day of January 2015

F. GIKONYO

JUDGE