



**Mark Rays East Africa Limited v Kenya Industrial Estates Limited & another (Environment & Land Case 671 of 2013) [2022] KEELC 15080 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15080 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 671 OF 2013  
SO OKONG'O, J  
NOVEMBER 24, 2022  
(FORMERLY HCCC NO. 698 OF 2001)**

**BETWEEN**

**MARK RAYS EAST AFRICA LIMITED ..... PLAINTIFF**

**AND**

**KENYA INDUSTRIAL ESTATES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MERCY GACHOYA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit against the 1<sup>st</sup> Defendant in the High Court on May 14, 2001 through a plaint of the same date. The suit was subsequently transferred to this court and given its current case number. The plaint was amended on November 15, 2012. In its amended plaint, the Plaintiff averred that one, Kipng'eno Arap Ngeny (hereinafter referred to only as "Arap Ngeny") had purchased all that property known as LR No 209/11504 off Likoni Road, Industrial Area, Nairobi (hereinafter referred to only as "the suit property") from the 1<sup>st</sup> Defendant through a tenant-purchase scheme.
2. The Plaintiff averred that following discussions that were held between the Plaintiff, Arap Ngeny and the 1<sup>st</sup> Defendant, the Plaintiff entered into an agreement with Arap Ngeny and the 1<sup>st</sup> Defendant dated July 31, 1998 under which Arap Ngeny sold the suit property to the Plaintiff at a consideration of Kshs 8,300,000/-. The Plaintiff averred that a portion of this sum of Kshs 8,300,000/- was to be paid to Arap Ngeny directly while the other portion comprised of the balance of the purchase price for the suit property that was owed by Arap Ngeny to the 1<sup>st</sup> Defendant under an earlier agreement and in respect of which the Plaintiff assumed full liability to the 1<sup>st</sup> Defendant. The Plaintiff averred that the said balance of the purchase price due to the 1<sup>st</sup> Defendant was to be secured by a legal charge over the suit property.



3. The Plaintiff averred that under the said agreement, a sum of Kshs 4,104,732/- out of the purchase price of Kshs 8,300,000/- was to be paid to Arap Ngeny on the completion of the agreement between the Plaintiff and Arap Ngeny and the balance of Kshs 4,195, 268/- which was Arap Ngeny's liability to the 1<sup>st</sup> Defendant was to be paid by the Plaintiff to the 1<sup>st</sup> Defendant over a period of ten (10) years. The Plaintiff averred that the said sum of Kshs 4,195, 268/- was to be secured by a charge that was to be registered against the suit property in favour of the 1<sup>st</sup> Defendant. The Plaintiff averred that the completion date of the agreement between it and Arap Ngeny was one month from the date of the agreement; that is July 31, 1998 and that in the event that the agreement was not completed, the agreement was to stand cancelled. The Plaintiff averred that time was the essence in respect of the parties' obligations under the agreement.
4. The Plaintiff averred that pursuant to the said agreement, he paid a sum of Kshs 4,104,732/- to Arap Ngeny and waited for the execution and registration of the charge over the suit property. The Plaintiff averred that the said charge was neither executed nor registered.
5. The Plaintiff averred that it took possession of the suit property on or about November 4, 1998 with the understanding that it would be issued with a clear title that it would charge to the 1<sup>st</sup> Defendant. The Plaintiff averred that in breach of the agreement dated July 31, 1998 aforesaid, the 1<sup>st</sup> Defendant failed and/or refused to transfer the suit property to it and to have it charged. The Plaintiff averred that the 1<sup>st</sup> Defendant also refused to advise the Plaintiff on how it wanted the balance of the purchase price to be secured.
6. The Plaintiff averred that on or about September 8, 1998, the 1<sup>st</sup> Defendant wrote to the Plaintiff unilaterally setting out new terms and/or conditions in breach of the earlier agreed terms and conditions. The Plaintiff averred that the 1<sup>st</sup> Defendant's new terms and/or conditions were unconscionable, unlawful and fraudulent.
7. The Plaintiff averred that the 1<sup>st</sup> Defendant's new terms and conditions also amounted to misrepresentation in that the Plaintiff would not have proceeded with the purchase of the suit property from Arap Ngeny had the 1<sup>st</sup> Defendant put forward the new terms and conditions at the outset and in any event before the signing of the agreement dated July 31, 1998. The Plaintiff set out the particulars of the 1<sup>st</sup> Defendant's alleged fraud and misrepresentation.
8. The Plaintiff averred that despite the agreement dated July 31, 1998, the subsequent payment by the Plaintiff of a sum of Kshs 4,104,732/- to Arap Ngeny and the 1<sup>st</sup> Defendant's agreement to give the Plaintiff a loan of Kshs 4,195,268/- being the balance of the purchase price for the suit property, the 1<sup>st</sup> Defendant failed to transfer the suit property to the Plaintiff and to have the same charged to the 1<sup>st</sup> Defendant and to prepare and have executed a loan agreement or loan facility letter containing the terms and conditions of under which the 1<sup>st</sup> Defendant would borrow the said sum of Kshs 4,195,268/- from the 1<sup>st</sup> Defendant.
9. The Plaintiff averred that after its said letter dated September 8, 1998, the 1<sup>st</sup> Defendant stated putting pressure on the Plaintiff to make payments despite the fact that there were no agreed terms and conditions of borrowing by the Plaintiff from the 1<sup>st</sup> Defendant. The Plaintiff averred that the 1<sup>st</sup> Defendant continued to arbitrarily seek lump sum payments from the Plaintiff and/or monthly payments without any legal justification. The Plaintiff averred that it paid to the 1<sup>st</sup> Defendant under duress a total sum of Kshs 1,300,000/-. The Plaintiff averred that the 1<sup>st</sup> Defendant's unilateral alteration of the terms and conditions of the agreement that the Plaintiff had reached with the 1<sup>st</sup>



Defendant put the Plaintiff into great financial difficulties as it had to look for alternative means of raising funds for the illegal and unlawful demands for payments made by the 1<sup>st</sup> Defendant.

10. The Plaintiff averred that on January 23, 2001, the 1<sup>st</sup> Defendant gave it 14 days notice of its intention to repossess Shed No 36 (the suit property) among other Sheds that belonged to the Plaintiff claiming that the Plaintiff was in arrears in its loan repayment to the 1<sup>st</sup> Defendant.
11. The Plaintiff averred that due to continued illegal demands by the 1<sup>st</sup> Defendant for payment, the Plaintiff leased the suit property to the 2<sup>nd</sup> Defendant at a monthly rent of Kshs 60,000/- with effect from February 1, 2001 so that it could meet the 1<sup>st</sup> Defendant's said demands for payment. The Plaintiff averred that on February 2, 2001, it paid to the 1<sup>st</sup> Defendant a sum of Kshs 160,000/-.
12. The Plaintiff averred that on February 12, 2001 or thereabouts, the 1<sup>st</sup> Defendant proceeded to Shed No 36 (the suit property) as well as to the Plaintiff's other properties (Shed No 15 and Shed No 48) in the absence of the Plaintiff's Managing Director and illegally and unlawfully threw out forcefully the Plaintiff's employees in Shed No 48 and the employees of the Plaintiff's tenant in Shed No 15 and locked the premises without any lawful justification. The Plaintiff averred that the 1<sup>st</sup> Defendant's action amounted to trespass.
13. The Plaintiff averred that following the 1<sup>st</sup> Defendant's said acts of trespass, the Plaintiff's Managing Director went to the 1<sup>st</sup> Defendant's offices and drew the attention of the 1<sup>st</sup> Defendant to its unlawful and unjustified actions. The Plaintiff averred that the 1<sup>st</sup> Defendant refused to open up its premises that it had locked and to allow its Managing Director to access the Plaintiff's offices that were situated in Shed No 48. The Plaintiff averred that the 1<sup>st</sup> Defendant demanded that the Plaintiff's said Managing Director writes a repayment commitment on terms that was dictated by the 1<sup>st</sup> Defendant's manager.
14. The Plaintiff averred that among the commitments that the Plaintiff's Managing Director was required to make were that; the Plaintiff would immediately write to the 1<sup>st</sup> Defendant surrendering Shed No 15 and Shed No 36 (the suit property), the Plaintiff would immediately pay Kshs 100,000/- to the 1<sup>st</sup> Defendant, the Plaintiff would pay Kshs 400,000/- in the next 30 to 40 days and that the Plaintiff would pay Kshs 100,000/- monthly against the remaining Shed No 48 where the Plaintiff's office was situated.
15. The Plaintiff averred that on the same day while the Plaintiff's Managing Director was still in the 1<sup>st</sup> Defendant's offices, the 1<sup>st</sup> Defendant's General Manager handed over to the Plaintiff's Managing Director a blank piece of paper and forced him to write on it the said repayment commitments that he had dictated for the reopening of the Plaintiff's offices and those of its tenants.
16. The Plaintiff averred that after its Managing Director had been forced to write down the said repayment commitment that was dictated by the 1<sup>st</sup> Defendant as aforesaid, the 1<sup>st</sup> Defendant opened its Managing Director's office so that the Plaintiff could issue it with a cheque for Kshs 100,000/- and a postdated cheque for Kshs 60,000/- which was payable on February 16, 2001. The Plaintiff averred that after receipt of the said payments, the 1<sup>st</sup> Defendant opened the suit property for the Plaintiff. The Plaintiff averred that the 1<sup>st</sup> Defendant's actions of February 12, 2001 were oppressive, coercive and made the Plaintiff's Managing Director to act under duress.
17. The Plaintiff averred that on February 16, 2001, the 1<sup>st</sup> Defendant wrote to the Plaintiff to the effect that it had repossessed Shed No 36 (the suit property) and Shed No 15 pursuant to the agreement that had been reached between the parties. The Plaintiff averred that the purported repossession was unlawful, illegal, null and void in that the same was not in accord with the agreement dated July 31, 1998 between the parties.



18. The Plaintiff averred that it had brought to the attention of the 1<sup>st</sup> Defendant the fact that it had rented out Shed No 36(the suit property) to a third party so that it could use the rent accruing therefrom to pay the debt that was due to the 1<sup>st</sup> Defendant from the Plaintiff.
19. The Plaintiff averred that it discovered upon filing this suit that on or about April 23, 2001, the 1<sup>st</sup> Defendant had purported to sell the suit property to the 2<sup>nd</sup> Defendant who was the Plaintiff's tenant in the premises. The Plaintiff averred that the purported sale was in breach of the contract between the Plaintiff and the 1<sup>st</sup> defendant and was also fraudulent, illegal, null and void.
20. The Plaintiff averred that as a result of the 1<sup>st</sup> Defendant's wrongful, illegal and malicious conduct, the Plaintiff had suffered great embarrassment and humiliation and as such the Plaintiff was entitled to aggravated, and special damages in the sum of Kshs 26, 739,356/- comprising of loss of rental income in the sum of Kshs 23,628,248/- and loss incurred on bank loans and costs in the sum of Kshs 3,111,108/-.
21. The Plaintiff sought judgment against the 1<sup>st</sup> Defendants for;
  - a. Specific performance of the contract between the Plaintiff and the 1<sup>st</sup> Defendant.
  - b. A declaration that the 1<sup>st</sup> Defendant's act of repossessing the suit property is illegal, unlawful, null and void.
  - c. A declaration that the purported sale of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant is fraudulent, illegal, null and void.
  - d. An injunction restraining the 1<sup>st</sup> Defendant, its auctioneers, servants and agents from trespassing upon the suit property, harassing, evicting, denying access, obstructing or in any manner whatsoever interfering with the Plaintiff's business operations conducted on the said property, use, peaceful occupation and/or possession and/or enjoyment of the suit property or doing any act or thing affecting the Plaintiff's interest in the property.
  - e. An account of the payments made by the Plaintiff to the 1<sup>st</sup> Defendant up to date and a refund of any monies found to have been overpaid by the Plaintiff together with interest at commercial rate.
  - f. Special damages in the sum of Kshs 26,739,356/-.
  - g. Damages for breach of contract and/or condition to allow peaceful and quiet enjoyment of the suit premises.
  - h. Damages for trespass.
  - i. Aggravated damages.
  - j. Costs of the suit.
  - k. Interest on (e), (f), (g), (h) and (i) at commercial rates.
  - l. Any other relief that the court may deem fit to grant.

**The Defence:**

22. The 1<sup>st</sup> Defendant filed a statement of defence on June 21, 2001. The 1<sup>st</sup> Defendant filed amended statement of defence on December 7, 2012 and further amended defence and counter-claim on June 30, 2017. In its further amended defence and counter-claim dated June 30, 2017, the 1<sup>st</sup> Defendant averred that the suit property was unregistered. The 1<sup>st</sup> Defendant admitted that there was a tripartite



- agreement dated July 31, 1998 between the Plaintiff, the 1<sup>st</sup> Defendant and Arap Ngeny. The 1<sup>st</sup> defendant averred that under that agreement, the Plaintiff offered to purchase the suit property at Kshs 8,300,000/-.
23. The 1<sup>st</sup> Defendant averred that the Plaintiff paid to Arap Ngeny Kshs 4,104,732/- being part of the purchase price and took over the obligations of Arap Ngeny under the then existing mortgage loan agreement between Arap Ngeny and the 1<sup>st</sup> Defendant under which a sum of Kshs 4,195,268/- remained outstanding. The 1<sup>st</sup> Defendant averred that the Plaintiff failed to meet its obligations under the said mortgage as concerns payment of the monthly installments and as such the Plaintiff was not entitled to remain in possession of the suit property or to have the same transferred to it.
  24. The 1<sup>st</sup> Defendant averred that the tripartite agreement between the parties gave the 1<sup>st</sup> Defendant a right to deal with the suit property in any manner it deemed fit to secure its interest therein. The 1<sup>st</sup> Defendant averred that following the breach by the Plaintiff of its obligations under the mortgage loan agreement aforesaid, it took possession of the suit property and took steps to mitigate its losses that were accruing in perpetuity. The 1<sup>st</sup> Defendant averred that the suit property was owned by the 1<sup>st</sup> Defendant and as such it could not register a charge against its title. The 1<sup>st</sup> Defendant averred that it had no contractual obligation to register a charge over the suit property.
  25. The 1<sup>st</sup> Defendant averred that it took over possession of the suit property after the Plaintiff surrendered the same through a letter dated February 12, 2001. The 1<sup>st</sup> Defendant denied that it breached the agreement that it entered into with the Plaintiff and contented that it acted with reasonableness, prudence, good faith and without malice. The 1<sup>st</sup> Defendant averred that the Plaintiff had agreed to assume the obligations of Arap Ngeny and that it failed to abide by the same. The 1<sup>st</sup> Defendant denied that it was involved in any fraud or misrepresentation.
  26. The 1<sup>st</sup> Defendant averred that the Plaintiff was contractually bound to make payment towards the balance of the purchase price for the suit property and that it had no obligation to advance a loan to the Plaintiff. The 1<sup>st</sup> Defendant denied that it used duress or coercion to obtain possession of the suit property from the Plaintiff. The 1<sup>st</sup> Defendant averred that it repossessed the suit property after the Plaintiff surrendered the same due to its inability to meet its obligations under the tripartite agreement. The 1<sup>st</sup> Defendant averred that the surrender of the suit property by the Plaintiff to the 1<sup>st</sup> Defendant was voluntary.
  27. The 1<sup>st</sup> Defendant averred that upon repossessing the suit property it sold the same to the 2<sup>nd</sup> Defendant and the Plaintiff was duly informed of the development. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant was the owner of the suit property and was in possession thereof. The 1<sup>st</sup> Defendant averred that the Plaintiff's claim was an afterthought. The 1<sup>st</sup> Defendant denied that the Plaintiff's Managing Director was coerced by the 1<sup>st</sup> Defendant's General Manager to make a written commitment on how the Plaintiff was going to meet its obligations. The 1<sup>st</sup> Defendant averred that any payment that was made by the Plaintiff was for the purposes of reducing the arrears of the instalments that were due from the Plaintiff to the 1<sup>st</sup> Defendant and in fulfilment of its obligations arising from its occupation of the suit property. The 1<sup>st</sup> Defendant denied that the Plaintiff had suffered loss to the tune of Kshs 26,739,356/- or at all.
  28. In its counter-claim, against the Plaintiff and the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant reiterated the contents of its defence and averred that on or about April 23, 2001, the 1<sup>st</sup> Defendant entered into a sale agreement with the 2<sup>nd</sup> Defendant in respect of Shed No 36(the suit property). The 1<sup>st</sup> Defendant averred that it sold the suit property to the 2<sup>nd</sup> Defendant at a consideration of Kshs 5,900,000/- of



which the 2<sup>nd</sup> Defendant paid a sum of Kshs 1,475,000/- as a deposit and was to pay the balance in the sum of Kshs 4,425,000/- within 90 days from the date of the agreement.

29. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant was allowed to take possession of the suit property on the understanding that she would complete the payment of the balance of the purchase price within the agreed completion period which was to be on or before July 23, 2001. The 1<sup>st</sup> Defendant averred that in breach of the said agreement of sale, the 2<sup>nd</sup> Defendant failed to pay the balance of the purchase price within the prescribed period and remained in occupation of the suit property.
30. The 1<sup>st</sup> Defendant averred that as a result of the said breach, the 1<sup>st</sup> Defendant converted the status of the 2<sup>nd</sup> Defendant to that of a tenant and the 2<sup>nd</sup> Defendant was under an obligation to pay to it rent on a monthly basis. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant refused to pay rent to the 1<sup>st</sup> Defendant citing the existence of this suit as the reason for her failure to complete the payment of the balance of the purchase price and/or rent. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant had admitted her status as a tenant. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant was in rent arrears from May 1, 2001 to June 30, 2016 to the tune of Kshs 17,903,000/-.
31. The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant had failed to complete the payment of the balance of the purchase price in the sum of Kshs 4,425,000/- as well as to pay monthly rent as aforesaid despite the fact that she was in occupation of the suit property.
32. The 1<sup>st</sup> Defendant sought judgment against the 2<sup>nd</sup> Defendant for;
  - a. Rent arrears from May 1, 2001 to June 30, 2016 in the sum of Kshs 17,903,000/-.
  - b. Rent at the rate of Kshs 178,000/- per month with effect from July 1, 2016 until vacant possession is delivered.
  - c. Vacant possession of the suit property.
  - d. Interest on (a) and (b) at court rate.
  - e. Costs of the suit.
  - f. Any other or further relief the court may deem just to grant.
33. The Plaintiff filed a reply to the 1<sup>st</sup> Defendant's further amended statement of defence and defence to the counter-claim on July 17, 2017. The Plaintiff averred that it fully complied with the terms and conditions of the agreement that it entered into with the 1<sup>st</sup> Defendant. The Plaintiff denied that it voluntarily surrendered the suit property to the 1<sup>st</sup> Defendant. The Plaintiff averred that it was entitled to ownership, possession and occupation of the suit property. With regard to the counter-claim, the Plaintiff averred that the 2<sup>nd</sup> Defendant entered the suit property as a tenant of the Plaintiff to which the 2<sup>nd</sup> Defendant was paying monthly rent.
34. The 2<sup>nd</sup> Defendant filed a statement of defence on April 9, 2014. On July 14, 2017, the 2<sup>nd</sup> Defendant filed a mended defence to the claim by the Plaintiff and defence to the counter-claim by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant admitted that it leased the suit property from the Plaintiff but contended that she was not aware neither was she privy to the contractual obligations that the Plaintiff owed to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant averred that it purchased the suit property from the 1<sup>st</sup> Defendant after lawful repossession of the same from the Plaintiff and advertisement of the same for sale in the daily newspapers without notice of any fraud or illegality in the process leading to the said repossession.



35. The 2<sup>nd</sup> Defendant averred that the Plaintiff voluntarily surrendered the suit property to the 1<sup>st</sup> Defendant through a letter dated February 12, 2001 whose terms were discussed and agreed upon between the Plaintiff and the 1<sup>st</sup> Defendant in the presence of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant averred that after the Plaintiff surrendered the suit property to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant ceased to be the Plaintiff's tenant on the premises. The 2<sup>nd</sup> Defendant averred that it was given possession of the suit property lawfully by the 1<sup>st</sup> Defendant and that she had since then been in occupation and possession of the same as of right. The 2<sup>nd</sup> Defendant averred that the Plaintiff did not sue the 2<sup>nd</sup> Defendant and as such it could not associate the 2<sup>nd</sup> Defendant with the alleged fraud pleaded against the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant averred that the Plaintiff was not entitled to the reliefs sought in its plaint.
36. In her defence to the counter-claim by the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant averred that the 1<sup>st</sup> Defendant advertised the suit property for sale through bids in the local newspapers and the 2<sup>nd</sup> Defendant's bid was successful. The 2<sup>nd</sup> Defendant averred that she subsequently entered into a sale agreement with the 1<sup>st</sup> Defendant on April 23, 2001. The 2<sup>nd</sup> Defendant averred that prior to the purchase of the suit property, she was in occupation of the same as a tenant of the Plaintiff. The 2<sup>nd</sup> Defendant averred that she withheld payment of the balance of the purchase price following the institution of this suit in May 2001 and subsequent issuance of an injunction order against the 1<sup>st</sup> Defendant on July 23, 2001. The 2<sup>nd</sup> Defendant averred that following the filing of this suit and issuance of the said order, it was mutually agreed that the completion of the agreement for sale, that is, the payment of the balance of the purchase price would be put on hold to await further orders by the court.
37. The 2<sup>nd</sup> Defendant averred that she was and still is ready and willing to complete the sale agreement with the 1<sup>st</sup> Defendant upon the dismissal of the Plaintiff's suit. The 2<sup>nd</sup> Defendant averred that she was in possession of the suit property as the owner thereof and not as a tenant of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant averred that the 1<sup>st</sup> Defendant did not let the suit property to the 2<sup>nd</sup> Defendant either expressly or impliedly under any default clause in the agreement dated April 23, 2001 between the parties. The 2<sup>nd</sup> Defendant averred that at all material times, the 1<sup>st</sup> Defendant regarded her as an owner of the suit property and not as a tenant and this fact is clear in the statement of defence by the 1<sup>st</sup> Defendant.
38. The 2<sup>nd</sup> Defendant denied that she had admitted that she was a tenant on the suit property. The 2<sup>nd</sup> Defendant averred that she forwarded to the 1<sup>st</sup> Defendant the rates demand so that the 1<sup>st</sup> Defendant could settle the pre-2001 rates and interest. The 2<sup>nd</sup> Defendant averred that as the beneficial owner of the suit property, she had paid a sum of Kshs 714,700/- on September 30, 2015 towards the outstanding rates. The 2<sup>nd</sup> Defendant averred that there was no landlord and tenant relationship between her and the 1<sup>st</sup> Defendant and as such she was not liable to the 1<sup>st</sup> Defendant for rent. The 2<sup>nd</sup> Defendant denied that she was in breach of the agreement dated April 23, 2001. The 2<sup>nd</sup> Defendant averred in the alternative that the 1<sup>st</sup> Defendant's counter-claim was time barred under sections 4(1) (a), 7 and 8 of the *Limitation of actions Act*.
39. The Plaintiff filed a reply to the 2<sup>nd</sup> Defendant's amended defence and defence to the counter-claim by the 1<sup>st</sup> Defendant. The Plaintiff averred that the 2<sup>nd</sup> Defendant was aware of the contractual relationship between the Plaintiff and the 1<sup>st</sup> Defendant. The Plaintiff averred that as at the time of the illegal purchase of the suit property, the 2<sup>nd</sup> Defendant was aware of the fraud and illegality of the purported repossession of the suit property by the 1<sup>st</sup> Defendant.



### **The evidence tendered by the parties:**

40. The Plaintiff called three witnesses. The Plaintiff's first witness was Zipporah Muthoni Ndungu(PW1). PW1 told the court that she was the wife of one, Simon Ndungu Gathaiya, deceased (hereinafter referred to as "the deceased") who was a former Managing Director of the Plaintiff. PW1 stated that the Plaintiff was a family company and that she was one of its directors. She adopted her witness statement filed in court on September 10, 2013 as part of her evidence in chief and produced the documents attached to the Plaintiff's list of documents filed on September 10, 2013 as PEXH 1. In her witness statement, PW1 to a large extent reiterated the contents of the Plaintiff's further amended plaint. It is not necessary to rehearse here the contents of the plaint that I have highlighted above at length.
41. On cross-examination by the advocate for the 1<sup>st</sup> defendant, PW1 stated the Plaintiff assumed full liability of Arap Ngeny to the 1<sup>st</sup> Defendant in respect of a sum of Kshs 4,195,268/- that remained outstanding from Arap Ngeny to the 1<sup>st</sup> Defendant. She stated that the said sum of Kshs 4,195,268/- was to be paid through a mortgage. PW1 stated that the Plaintiff did not pay the said sum of Kshs 4,195,268/- in full to the 1<sup>st</sup> Defendant. PW1 stated that the suit property was repossessed on December 16, 2000. PW1 stated that the Plaintiff had paid a sum of Kshs 1,300,000/- of the said amount as at the time the suit property was repossessed. PW1 stated that the 1<sup>st</sup> Defendant had undertaken to give the Plaintiff a mortgage loan to be repaid within a period of 10 years. PW1 stated that the Plaintiff requested for a loan on June 4, 1998 and the same was accepted by the 1<sup>st</sup> Defendant through a letter dated July 13, 1998. She stated that she had no understanding of how a mortgage arrangement works.
42. PW1 admitted that the Plaintiff was yet to complete the payment of the said sum of Kshs 4,195,268/- that remained outstanding from Arap Ngeny to the 1<sup>st</sup> Defendant. She denied that the agreement between the Plaintiff and the 1<sup>st</sup> Defendant was to be completed within one month. She stated that the one-month completion period applied to the agreement between the Plaintiff and Arap Ngeny only. PW1 stated that she did not have a copy of the tenancy agreement that the Plaintiff entered into with the 2<sup>nd</sup> Defendant. She reiterated that the deceased was forced to surrender the suit property to the 1<sup>st</sup> Defendant. She stated that the deceased wrote the surrender letter dated February 12, 2001 under duress.
43. On cross-examination by the 2<sup>nd</sup> Defendant's advocate, PW1 stated that she used to visit the suit property on a need basis. She stated that she was not present when the Plaintiff was evicted from the premises on February 12, 2001. PW1 stated that the Plaintiff had entered into an agreement with the 1<sup>st</sup> Defendant to purchase three sheds and that the Plaintiff had written to the 1<sup>st</sup> Defendant on January 2, 2001 to the effect that its mortgage account with the 1<sup>st</sup> Defendant was in arrears. PW1 stated that the Plaintiff sought indulgence from the 1<sup>st</sup> Defendant that was not extended.
44. PW1 stated that the 1<sup>st</sup> Defendant wrote to the Plaintiff on January 23, 2001 claiming that the Plaintiff had breached the agreement that it had with the 1<sup>st</sup> Defendant. PW1 stated that the 1<sup>st</sup> Defendant gave the Plaintiff 14 days to clear the arrears in default of which it would repossess the sheds. PW1 admitted that the Plaintiff wrote to the 1<sup>st</sup> Defendant on February 12, 2001 surrendering the suit property. PW1 claimed however that the letter was written under duress. She stated that the letter was written by the Plaintiff within the 14 days notice that was given to the Plaintiff by the 1<sup>st</sup> Defendant to clear the arrears and that the Plaintiff was allowed to sell the shades that had been surrendered. PW1 stated that the Plaintiff considered the shades lost.



45. PW1 admitted further that the 1<sup>st</sup> Defendant notified the Plaintiff through a letter dated February 17, 2001 that it had repossessed Shade 15 and Shade 36(the suit property). PW1 stated that the Plaintiff acknowledged receipt of the said letter and wrote to the 1<sup>st</sup> Defendant on February 17, 2001 making various requests. PW1 stated that in the Plaintiff's letter, the Plaintiff did not state that it was coerced to surrender shed No 15 and the suit property. PW1 admitted further that the Plaintiff had written to the 2<sup>nd</sup> Defendant on June 14, 2001 in which letter the Plaintiff had explained the reasons for its financial difficulties. PW1 stated that the Plaintiff did not have a tenancy agreement with the 2<sup>nd</sup> Defendant. PW1 stated that the Plaintiff had instructed the 2<sup>nd</sup> Defendant to pay rent directly to the 1<sup>st</sup> Defendant on the Plaintiff's account. PW1 stated that it was until May 2001 that she learnt that the 2<sup>nd</sup> Defendant had Purchased the suit property. On examination by the court, PW1 stated that the deceased died on February 18, 2009 and that the Plaintiff had no claim against the 2<sup>nd</sup> Defendant and that was why the Plaintiff did not sue her. She stated that the Plaintiff's claim was against the 1<sup>st</sup> Defendant which repossessed the Plaintiff's sheds.
46. The Plaintiff's second witness was David Chege Kariuki(PW2). PW2 was a valuer. He adopted his witness statement dated October 6, 2014 as his evidence in chief. PW2 told the court that he visited Shed No 36(the suit property) on September 18, 2014 and valued it using the cost of construction method. He stated that he assessed the market value of the property at Kshs 50,000,000/-. He stated that he subsequently assessed the loss of rent that the Plaintiff had suffered at Kshs 26,580,000/-. He stated that he prepared a report dated September 25, 2014 that he produced in evidence as PEXH 2.
47. On cross-examination by the 1<sup>st</sup> Defendant's advocate, PW2 stated that the suit property was identified to him by PW1 and that in arriving at a market value of Kshs 50,000,000/- he relied on comparable sales. He stated that at the time of his visit to the suit property, there was a tenant in occupation. He stated that he did not inquire from the tenant the rent that it was paying.
48. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, PW2 stated that the rent loss was calculated from February 2001 which was the month when the Plaintiff stopped receiving rent from the property following its eviction. He stated that his instructions were to carry out a market valuation.
49. The Plaintiff's third witness was Cyrus Gichuki Wairegi(PW3). PW3 adopted his witness statement dated May 22, 2017 as his evidence in chief. PW3 told the court that he was an employee of the Plaintiff and that he was in charge of production. He stated that the Plaintiff was involved in manufacturing consumer products and import and export of SC Johnson Wax Products. He stated that the Plaintiff's offices and production site were in Shed No 48 in Industrial area. PW3 stated that on February 12, 2001 while he was at work in shed No 48, the officers from the 1<sup>st</sup> Defendant came to the premises and informed him and one, Ms Laurenzia Muthoni that they had come to close shed No 48. He stated that they were asked to get out of shed No 48 after which the premises were closed and locked by the 1<sup>st</sup> Defendant's padlocks. On cross-examination by the 1<sup>st</sup> Defendant's advocates, PW3 stated that he was not aware whether the deceased was forced to surrender the two Sheds. He stated further that his colleague Laurenzia Muthoni confirmed that Shed No 36 had also been locked by the 1<sup>st</sup> Defendant's said officers.
50. The 1<sup>st</sup> Defendant called one witness, Reginald Mangau Kimanthi(DW1). DW1 was the 1<sup>st</sup> Defendant's manager in charge of operations. He adopted his witness statement and supplementary witness statement dated April 30, 2014 and July 27, 2019 respectively as his evidence in chief and produced the documents attached to the 1<sup>st</sup> Defendant's list of documents dated May 5, 2014 and June 30, 2017 as DEXH 1 and DEXH 2 respectively. DW1 stated that the Plaintiff surrendered the suit property to the 1<sup>st</sup> Defendant when it failed to meet its obligations to the 1<sup>st</sup> Defendant.



51. DW1 stated that the 1<sup>st</sup> Defendant entered into an agreement for sale with the 2<sup>nd</sup> Defendant in respect of the suit property and that the 2<sup>nd</sup> Defendant did not fulfil the terms of the agreement within the time that was stipulated therein. DW1 stated that that was the reason why they were claiming rent from the 2<sup>nd</sup> Defendant. DW1 stated that the completion period was 90 days from April 23, 2001 and that the 2<sup>nd</sup> Defendant did not complete the agreement within the said period but remained in occupation of the property. DW1 stated that as at the time he was giving evidence, the 2<sup>nd</sup> Defendant had not paid the balance of the purchase price. DW1 stated that the 2<sup>nd</sup> Defendant was also not paying rent to the 1<sup>st</sup> Defendant. DW1 stated that the 1<sup>st</sup> Defendant was seeking the reliefs sought in its counter-claim.
52. On cross-examination by the Plaintiff's advocate, DW1 stated that as at July 31, 1998, the suit property was owned by the 1<sup>st</sup> Defendant but it did not have a title for the same. He stated that the property was within a larger parcel of land owned by the 1<sup>st</sup> Defendant. He stated that the suit property was for Shed No 36 and that its title was yet to be processed. DW1 stated that the property had been sold to Arap Ngeny around March 1989 and that there was an existing mortgage account between the 1<sup>st</sup> Defendant and Arap Ngeny. He stated that the Plaintiff was to take over Arap Ngeny's mortgage. He stated that the mortgage between the 1<sup>st</sup> Defendant and Arap Ngeny was informal in that it was not registered. He stated that the Plaintiff had not completed the payment of the purchase price for the suit property as at the time the same was repossessed by the 1<sup>st</sup> Defendant. He stated that the Plaintiff had paid a sum of Kshs 1,240,000/- only.
53. He stated that the Plaintiff had purchased a total of three Sheds in respect of which it was making payment under different accounts. He stated that the agreement with the Plaintiff was for the sale of the suit property and that no mortgage account was created. He stated that there was no mortgage between them but a sale. He stated that the 1<sup>st</sup> Defendant had a long repayment plan with Arap Ngeny but a Charge could not be created because the suit property had no title. He stated that no title had been processed in respect of the suit property and that the letter of allotment that was held by Arap Ngeny was illegal.
54. DW1 stated that he was in the employment of the 1<sup>st</sup> Defendant in 1998 but was working in another department. He stated that he was not present when the Plaintiff surrendered the suit property. He stated that when the suit property was repossessed, the same was vacant. He stated that the 1<sup>st</sup> Defendant sold the same to the 2<sup>nd</sup> Defendant after repossession. He stated that the 2<sup>nd</sup> Defendant took possession of the same in April 2001. He stated that he was not aware that the 2<sup>nd</sup> Defendant was a tenant of the Plaintiff and that she was paying rent to the Plaintiff. DW1 stated that after the 1<sup>st</sup> Defendant entered into a sale agreement with the 2<sup>nd</sup> Defendant an order of injunction was issued against the 1<sup>st</sup> Defendant. DW1 stated that the Plaintiff vacated the suit property on his own volition.
55. On cross-examination by the 2<sup>nd</sup> Defendant's advocate, DW1 stated that the Plaintiff surrendered the suit property and did not demand back the same. He stated further that the Plaintiff did not at any time raise the issue of duress. He stated that the suit property was sold to the 2<sup>nd</sup> Defendant at a negotiated price of Kshs 5,900,000/- of which the 2<sup>nd</sup> Defendant paid Kshs 1,475,000/- as down payment. He stated that the 2<sup>nd</sup> Defendant was a purchaser of the suit property and not a tenant of the 1<sup>st</sup> Defendant on the property. He stated that the Plaintiff was granted an order of injunction on July 23, 2001 that restrained any dealing with the suit property which order was still in force. He stated that on receipt of the said order, the 1<sup>st</sup> Defendant stopped all the transactions involving the suit property. He said that the sale of the suit property to the 2<sup>nd</sup> Defendant could not be completed as a result of the said court order. He stated however that the court order came after the completion period. DW1 stated



that the rent they were claiming from the 2<sup>nd</sup> Defendant was scientifically arrived at in that it was what was being paid by the other tenants.

56. The 2<sup>nd</sup> Defendant, Mercy Waitherero Gachoya(DW2) was the last to give evidence. DW2 adopted her witness statement and further witness statement filed in court on April 9, 2014 and September 4, 2017 respectively as part of her evidence in chief. She also produced her bundle of documents and further bundle of documents filed on April 9, 2014 and September 4, 2017 respectively as DEXH 3 and DEXH 4. DW2 stated that she was present when the Plaintiff's deceased director Simon Gathaiya signed the letter dated February 12, 2001 surrendering the suit property to the 1<sup>st</sup> Defendant.
57. DW2 stated that as at the time that the Plaintiff surrendered the suit property, she had already taken possession of the same and her goods were inside. She stated that on February 12, 2001, she found the suit property locked and she went to the Plaintiff's office that was in Shed No 48 which she found also locked and the staff outside. She stated that when the deceased came and found his office locked, he went to the 1<sup>st</sup> Defendant's General Manager's office where a meeting was arranged which she attended. DW2 stated that the 1<sup>st</sup> Defendant's General Manger explained to the deceased that the Plaintiff's Sheds had been locked because the Plaintiff was in arrears in respect of all the Sheds. She stated that it was at that meeting that the deceased offered to surrender Shed No 15 and Shed No 36(the suit property) so that he could retain Shed No 48. She stated that the deceased reflected on the situation before surrendering the two Sheds. She denied that the deceased was forced to sign the letter of surrender. She stated that the Plaintiff had no other option left in the circumstances. She stated that Shed No 15 was sold after the surrender and the buyer was still occupying it. She stated that the Plaintiff did not file a suit in respect thereof. DW2 stated that she successfully bid for the suit property and subsequently entered into an agreement for sale with the 1<sup>st</sup> Defendant on April 23, 2001.
58. DW2 stated that the sale of the suit property was not completed because the Plaintiff filed this suit challenging the sale and the court issued an order stopping the completion of the agreement until the case is heard and determined. DW2 stated that after the sale agreement, she stopped paying rent because she became a purchaser and not a tenant. She stated that the 1<sup>st</sup> Defendant recognized her as the owner of the suit property even in its pleadings filed herein. DW2 stated that she rejected the 1<sup>st</sup> Defendant's attempt to convert her to a tenant through a letter dated September 8, 2015 as she was not one. DW2 stated that she was still ready and willing to complete the agreement. DW2 confirmed that she was still in possession of the suit property.
59. On cross-examination by the 1<sup>st</sup> Defendant's advocate, DW2 reiterated that the Plaintiff surrendered the suit property voluntarily back to the 1<sup>st</sup> Defendant and that she did not complete the agreement of sale that she entered into with the 1<sup>st</sup> Defendant due to this suit. She stated that even before the order was issued, she had been informed of the filing of the suit by the 1<sup>st</sup> Defendant's advocates. DW1 stated that she held a number of meetings with the 1<sup>st</sup> Defendant at which it was agreed that the sale be completed after the conclusion of the suit. DW2 admitted that the 1<sup>st</sup> Defendant wrote to her on September 8, 2015 giving her an option of either moving out of the suit property or becoming a tenant of the 1<sup>st</sup> Defendant. She confirmed that she had remained in occupation of the suit property and that from the date of the agreement of sale she had not paid rent to the 1<sup>st</sup> Defendant.
60. On cross-examination by the advocate for the Plaintiff, DW1 stated that she entered into a tenancy agreement with the Plaintiff in early 2001 and that the same was not reduced into writing. She stated that the agreed rent was Kshs 60,000/- which she initially paid to the Plaintiff and subsequently to the 1<sup>st</sup> Defendant. DW1 stated that at a meeting that was held in the 1<sup>st</sup> Defendant's office on February 12, 2001, it was agreed that she would henceforth pay rent to the 1<sup>st</sup> Defendant. She stated that she only paid rent to the Plaintiff once before she started making payments to the 1<sup>st</sup> Defendant. She stated that



she only paid the rent for March and April 2001 before the agreement for sale that she entered into with the 1<sup>st</sup> Defendant.

61. On examination by the Court, DW2 stated that she was the one paying land rates for the suit property and that in addition to the initial deposit, she made additional payments to the 1<sup>st</sup> Defendant that brought her total payment on account of the purchase price for the suit property to Kshs 3,300,000/- which was more than 50% of the purchase price.

#### **The Submissions:**

62. After the close of evidence, the court directed the parties to make closing submissions in writing. The plaintiff filed its submissions dated August 13, 2021. The Plaintiff framed a total of 16 issues for determination. The Plaintiff submitted that it had proved its case against the 1<sup>st</sup> Defendant on a balance of probabilities. The Plaintiff submitted that the agreement dated July 31, 1998 that it entered into with the 1<sup>st</sup> Defendant was not a pure agreement for sale of land but a tenant mortgage scheme agreement under which the Plaintiff was to take over the obligations of Arap Ngeny in respect of the suit property. The Plaintiff submitted that it fulfilled its part of the agreement while the 1<sup>st</sup> Defendant failed to do so and unlawfully evicted the Plaintiff from the suit property. The Plaintiff submitted that if the relationship between the Plaintiff and the 1<sup>st</sup> Defendant was that of a buyer and a purchaser, terms such as “mortgage” and “mortgage areas” could not have been used by the 1<sup>st</sup> Defendant in their communication. The Plaintiff submitted that if the arrangement was that of a pure sale agreement, the 1<sup>st</sup> Defendant could not have charged interest on arrears and if the Plaintiff was in default, the easiest thing for the 1<sup>st</sup> Defendant to do would have been to refund to the Plaintiff the purchase price that it had paid. The Plaintiff submitted that the 1<sup>st</sup> Defendant was supposed to create a mortgage that should have formed a legal basis for the parties’ relationship which it failed to do.
63. The Plaintiff submitted that the 2<sup>nd</sup> Defendant was not a credible witness. The Plaintiff submitted that the 2<sup>nd</sup> Defendant purportedly purchased the suit property that the Plaintiff had already purchased at a gross under value. The Plaintiff urged the court to find that there was collusion between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff submitted that it had proved its case against the 1<sup>st</sup> Defendant and as such it was entitled to the reliefs sought in its amended plaint. The Plaintiff submitted that the suit property had not been transferred to any third party and as such an order for specific performance could still be given. On the issue of accounts, the Plaintiff submitted that it had demonstrated that there were payments that it made that the 1<sup>st</sup> Defendant had not accounted for. The Plaintiff submitted that it was also entitled to general damages under various heads. The Plaintiff submitted that an award of Kshs 20,000,000/- would be adequate compensation for the 1<sup>st</sup> Defendant’s breach of contract. For trespass, the Plaintiff submitted that an award of Kshs 500,000/- would be reasonable. The Plaintiff submitted that the actions of the 1<sup>st</sup> Defendant complained of warranted and an award of aggravated damages of Kshs 1,000,000/-. Finally, the Plaintiff submitted that it was entitled to costs and interest on the damages claimed.
64. In its submissions, the 1<sup>st</sup> Defendant submitted that the dispute before the court was in respect of Shed No 36(the suit property). The 1<sup>st</sup> Defendant submitted that it sold the suit property on behalf of the Government of Kenya to Arap Ngeny through a letter of offer dated March 13, 1989. The 1<sup>st</sup> Defendant submitted that the title for the suit property was only to be processed upon payment of the full purchase price. The 1<sup>st</sup> Defendant submitted that Arap Ngeny did not finish the payment of the purchase price and sold the property to the Plaintiff.
65. The 1<sup>st</sup> Defendant submitted that the Plaintiff also failed to pay the balance of the purchase price that remained outstanding from Arap Ngeny and surrendered the property back to the 1<sup>st</sup> Defendant



- who sold the same to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant also failed to pay the full purchase price as a result of which the suit property remained public land. The 1<sup>st</sup> Defendant submitted that a similar dispute had been heard by Obaga J and dismissed in *Zipporah Muthoni Ndungu v Kenya Industrial Estates Limited* [2021]eKLR.
66. The 1<sup>st</sup> Defendant submitted that it was not disputed that the Plaintiff was to pay to the 1<sup>st</sup> Defendant a sum of Kshs 4,195,268/- under the tripartite agreement dated July 31, 1998 between the Plaintiff, Arap Ngeny and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant submitted that through a letter dated June 4, 1998, the Plaintiff sought to know how to repay the said amount that was owed to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant submitted that in a letter dated September 8, 1998, the 1<sup>st</sup> Defendant communicated to the Plaintiff how the outstanding amount was to be paid. The 1<sup>st</sup> Defendant averred that the Plaintiff made part payment and thereafter defaulted. The 1<sup>st</sup> Defendant submitted that the Plaintiff surrendered the property to 1<sup>st</sup> Defendant on February 12, 2001 and the 1<sup>st</sup> Defendant sold the same to the 2<sup>nd</sup> Defendant on April 23, 2001 at Kshs 5,900,000/-. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant paid a sum of Kshs 1,475,000/- and was to pay the balance of Kshs 4,425,000/- before the completion date that was 90 days from the date of the execution of the agreement that fell on July 23, 2001.
67. The 1<sup>st</sup> Defendant submitted that by July 31, 2001, the 2<sup>nd</sup> Defendant had not paid the balance of the purchase price. The 1<sup>st</sup> Defendant submitted that by a letter dated September 8, 2015, the 2<sup>nd</sup> Defendant was asked to choose either to vacate the suit property or to agree to be treated as a tenant. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant remained in occupation of the suit property but refused to pay rent.
68. The 1<sup>st</sup> Defendant submitted that it did not breach the agreement dated 31<sup>st</sup> July 1998. The 1<sup>st</sup> Defendant submitted that the said agreement did not specify how the loan amount of Kshs 4,195,268/- was to be paid. The 1<sup>st</sup> Defendant submitted that the said agreement only provided that the Plaintiff would assume full liability for Arap Ngeny's outstanding mortgage. The 1<sup>st</sup> Defendant submitted that it could not be faulted for specifying the terms of repayment in its letter dated September 8, 1998 to the Plaintiff. The 1<sup>st</sup> Defendant submitted that the said letter did not in any way contravene the terms of the agreement of July 31, 1998. The 1<sup>st</sup> Defendant submitted that the Plaintiff was aware of the terms of repayment of the outstanding loan and that there was no other agreement that the 1<sup>st</sup> Defendant was to enter into with the Plaintiff.
69. The 1<sup>st</sup> Defendant averred that if the Plaintiff found the terms set out in the 1<sup>st</sup> Defendant's letter of September 8, 1998 unfavourable, it had the option of not accepting the same and rescinding the agreement that it had entered into with Arap Ngeny. The 1<sup>st</sup> Defendant submitted that the Plaintiff on receipt of the said letter requested the 1<sup>st</sup> Defendant to open a mortgage account and to consider a repayment period of 10 years. The 1<sup>st</sup> Defendant submitted that it did not accept the Plaintiff's request and the Plaintiff commenced making payment in accordance with the terms that were contained in the letter dated September 8, 1998.
70. The 1<sup>st</sup> Defendant submitted that when the Plaintiff was served with a repossession notice, the Plaintiff admitted its indebtedness. The 1<sup>st</sup> Defendant submitted that the Plaintiff by its conduct accepted the terms of the letter dated September 8, 1998 and was estopped from claiming that the same was issued in breach of the agreement of July 31, 1998. The 1<sup>st</sup> Defendant submitted further that the suit property had no title and as such a charge could not be registered. The 1<sup>st</sup> Defendant submitted that in any event, it was not obliged to create a mortgage which was meant to secure its interest. The 1<sup>st</sup> Defendant submitted that creation of a mortgage was not a condition precedent to the Plaintiff repaying the loan.



- The 1<sup>st</sup> Defendant submitted that it had the option of registering a charge or deciding on any other way of securing the loan amount.
71. On the issue of repossession of the suit property, the 1<sup>st</sup> Defendant submitted that the suit property was not repossessed but was surrendered by the Plaintiff to the 1<sup>st</sup> Defendant together with others through a letter dated February 12, 2001 when the Plaintiff became unable to service the loan.
  72. The 1<sup>st</sup> Defendant submitted that the Plaintiff was not entitled to the reliefs sought in its plaint. The 1<sup>st</sup> Defendant submitted that the agreement dated July 31, 1998 was duly performed by the parties thereto and as such there was nothing remaining to be specifically performed. The 1<sup>st</sup> Defendant submitted that in any event, if specific performance meant reverting the suit property to the Plaintiff that was untenable because the Plaintiff never settled the purchase price in full. The 1<sup>st</sup> Defendant submitted that a party in breach of an agreement of sale is not entitled to an order for specific performance. With regard to the order sought to the effect that the repossession of the suit property was unlawful, the 1<sup>st</sup> Defendant reiterated that the premises were surrendered and not repossessed. The 1<sup>st</sup> Defendant submitted further that there was no evidence tendered in proof of the allegation that the Plaintiff was coerced to surrender the suit property.
  73. On the declaration sought that the sale of the suit property to the 2<sup>nd</sup> Defendant was illegal, the 1<sup>st</sup> Defendant submitted that the Plaintiff having voluntarily surrendered the suit property, there was nothing illegal in the sale of the same to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant submitted that for the same reason, the Plaintiff was not entitled to an order of injunction sought to restrain the 1<sup>st</sup> Defendant from trespassing on the suit property.
  74. On the prayer for accounts, the 1<sup>st</sup> Defendant submitted that in its amended plaint, the Plaintiff stated that it had paid Kshs 1,300,000/- which was only a fraction of Kshs 4,195,268/- loan that it took over from Arap Ngeny exclusive of interest. The 1<sup>st</sup> Defendant submitted that in a letter dated January 23, 2001, the Plaintiff was notified that it was in arrears to the tune of Kshs 2,320,508/- and that the outstanding loan amount was Kshs 6,100,635/-. The 1<sup>st</sup> Defendant submitted that the Plaintiff admitted being in arrears. The 1<sup>st</sup> Defendant submitted that since there was no overpayment, the request for accounts was not merited.
  75. On the special damages claimed, the 1<sup>st</sup> Defendant submitted that the Plaintiff being in breach was not entitled to damages and that in any event, the alleged special damages was not proved. The 1<sup>st</sup> Defendant submitted further that the Plaintiff was not entitled to damages for breach of contract, damages for trespass and aggravated damages.
  76. On its counter-claim, the 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant had not sought specific performance of the agreement dated April 23, 2001 that the 1<sup>st</sup> Defendant rescinded through a letter dated September 8, 2015 and as such the counter-claim was not challenged and should be allowed. The 1<sup>st</sup> Defendant submitted further that the 2<sup>nd</sup> Defendant's contention that the counter-claim was time barred had no basis in that the 2<sup>nd</sup> Defendant made payments to the 1<sup>st</sup> Defendant until 2006 and remains in possession of the suit property. The 1<sup>st</sup> Defendant submitted further that the letter of recession of the contract was issued by the 1<sup>st</sup> Defendant on September 8, 2015 and as such time could only start running from 2015 for the purposes of *Limitation of Actions*.
  77. On whether the 2<sup>nd</sup> Defendant breached the agreement dated April 23, 2001, the 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant was supposed to make the payment of the balance of the purchase price in the sum of Kshs 4,425,000/- on or before 23<sup>rd</sup> July 2001 which was the 90<sup>th</sup> day from the date of the agreement. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant did not make the payment and as



- such she breached the agreement. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant who claimed to have been prevented from making payment by an order that was issued herein on July 23, 2001 did not produce such order in evidence and that in any event, the order was made before the 2<sup>nd</sup> Defendant was joined in the suit as a party. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant who was not a party to the suit could not have been prevented by the said order from paying the balance of the purchase price.
78. The 1<sup>st</sup> Defendant submitted further that the suit was at one time dismissed for want of prosecution and that upon reinstatement of the suit the said orders were not restored. The 1<sup>st</sup> Defendant submitted that there was nothing that prevented the 2<sup>nd</sup> Defendant from making payment of the balance of the purchase price. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant made payments to it as late as 2012. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant could not have made these payments if there was an order stopping her from doing so. The 1<sup>st</sup> Defendant submitted that it had proved its counter-claim and as such was entitled to the reliefs sought therein.
79. The 2<sup>nd</sup> Defendant filed Submissions dated February 27, 2022. The 2<sup>nd</sup> Defendant submitted that its submissions were in respect of its defence to the Plaintiff's claim in the main suit and the 1<sup>st</sup> Defendant's counter-claim. The 2<sup>nd</sup> Defendant submitted that on May 15, 2001, the court made an order herein for *inter alia* the maintenance of *status quo* pending the hearing of the Plaintiff's interlocutory application for injunction on May 28, 2001. The 2<sup>nd</sup> Defendant averred that on July 23, 2001, the court issued orders restraining the Plaintiff from having any dealings with the suit property pending the hearing and determination of the suit.
80. The 2<sup>nd</sup> Defendant submitted that the Plaintiff's suit against the 1<sup>st</sup> Defendant was misconceived to the extent that it was seeking to enforce the tripartite agreement dated July 31, 1998. The 2<sup>nd</sup> Defendant submitted that the agreement was between the Plaintiff and Arap Ngeny and did not impose any contractual obligations upon the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant submitted that the role of the 1<sup>st</sup> Defendant was only to approve the sale of the suit property by Arap Ngeny to the Plaintiff. The 2<sup>nd</sup> Defendant submitted that there was no agreement between the Plaintiff and the 1<sup>st</sup> Defendant to be specifically performed. The 2<sup>nd</sup> Defendant submitted that the Plaintiff had not pleaded in its plaint the contractual obligations in the tripartite agreement dated July 31, 1998 that the 1<sup>st</sup> Defendant defaulted on and/or failed to perform which the 1<sup>st</sup> Defendant should be compelled to perform. The 2<sup>nd</sup> Defendant submitted that the 1<sup>st</sup> Defendant had no obligation under the agreement dated July 31, 1998 to charge or mortgage the suit property.
81. The 2<sup>nd</sup> Defendant submitted that the Plaintiff did not plead that its claim or cause of action was based on the pre-sale agreement letters dated June 4, 1998 and July 13, 1998. The 2<sup>nd</sup> Defendant submitted that the amended plaint is clear that the Plaintiff was seeking to enforce the tripartite agreement dated July 31, 1998. The 2<sup>nd</sup> Defendant submitted that the Plaintiff confirmed at the trial that the said letters did not form part of the agreement dated July 31, 1998. The 2<sup>nd</sup> Defendant submitted that the transaction between the Plaintiff and the 1<sup>st</sup> Defendant was an ordinary assignment to the Plaintiff of a debt that was owed by Arap Ngeny to the 1<sup>st</sup> Defendant.
82. On the issue of the alleged repossession of the suit property by the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant submitted that the Plaintiff admitted in its plaint that it wrote the letter dated February 12, 2001 addressed to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant submitted that in the correspondence by the Plaintiff to the 1<sup>st</sup> Defendant after its letter dated February 12, 2001, the Plaintiff never complained that it had been coerced to sign the letter or subjected to duress while writing the letter. The 2<sup>nd</sup> Defendant submitted that the issue of coercion and duress was introduced into this suit through a mended plaint dated November 15, 2012 that was filed after 11 years from the date of the letter dated February 12,



2001. The 2<sup>nd</sup> Defendant submitted that the issue of coercion and duress was an afterthought and the same was not proved.
83. The 2<sup>nd</sup> Defendant submitted that the Plaintiff voluntarily surrendered the suit property and as such the alleged breaches of the agreement dated July 31, 1998 did not arise. The 2<sup>nd</sup> Defendant submitted further that the reliefs sought by the Plaintiff in its amended plaint could not be granted. The 2<sup>nd</sup> Defendant submitted that the Plaintiff's witness stated at the trial that the Plaintiff had no claim against the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant submitted that the Plaintiff should be deemed to have abandoned its prayer seeking a declaration that the sale of the suit property to the 2<sup>nd</sup> Defendant was fraudulent, illegal, null and void. The 2<sup>nd</sup> Defendant submitted that in any event, the order could not be granted in the absence of the 2<sup>nd</sup> Defendant whom the Plaintiff did not join as a party in its suit. The 2<sup>nd</sup> Defendant submitted further that the Plaintiff did not acquire the suit property having failed to pay for the same in full and subsequently surrendered the same. The 2<sup>nd</sup> Defendant submitted that the Plaintiff did not tender any evidence in support of the alleged fraud, bad faith and illegality pleaded against the 2<sup>nd</sup> Defendant.
84. The 2<sup>nd</sup> Defendant submitted that she entered into an agreement for sale with the 1<sup>st</sup> Defendant on April 23, 2001 upon accepting the 1<sup>st</sup> Defendant's offer after which she paid a sum of Kshs 1,475,000/-. The 2<sup>nd</sup> Defendant submitted that the balance of the purchase price was to be paid within 90 days of the agreement but the order of status quo came up on May 15, 2001. The 2<sup>nd</sup> Defendant submitted that the said order of *status quo* was extended and ultimately the court issued an order on July 23, 2001 restraining the 1<sup>st</sup> Defendant from having any other dealing with the suit property pending the hearing of the suit. The 2<sup>nd</sup> Defendant submitted that the *status quo* order of May 15, 2001 and the final orders of interlocutory injunction made on July 23, 2001 were made within the 90 days completion period.
85. The 2<sup>nd</sup> Defendant submitted that she could not have proceeded with the purchase of the suit property upon learning of the filing of this suit and of the said orders and that this explained the discussions she had with the 1<sup>st</sup> Defendant to put the agreement on hold/suspended pending the discharge of the said orders. The 2<sup>nd</sup> Defendant submitted that the 1<sup>st</sup> Defendant did not prove that the 2<sup>nd</sup> Defendant failed to complete the agreement for sale and that she was converted into a tenant. The 2<sup>nd</sup> Defendant submitted that it did not fail to complete the payment of the purchase price for the suit property. The 2<sup>nd</sup> Defendant submitted that the payment was not made for the reasons already given above. The 2<sup>nd</sup> Defendant submitted that the said balance of the purchase price was also not demanded by the 1<sup>st</sup> Defendant as claimed by the 1<sup>st</sup> Defendant at the trial. The 2<sup>nd</sup> Defendant submitted that even rent was not demanded by the 1<sup>st</sup> Defendant from the 2<sup>nd</sup> Defendant although it claimed to have converted her into a tenant. The 2<sup>nd</sup> Defendant submitted that the 1<sup>st</sup> Defendant's contention that its letter dated September 8, 2015 amounted to a rescission of the agreement dated April 23, 2001 was misconceived. The 2<sup>nd</sup> Defendant admitted that it made some voluntary without prejudice deposits to the 1<sup>st</sup> Defendant after the initial deposit until September 29, 2006. The 2<sup>nd</sup> Defendant submitted that the payment of Kshs 500,000/- that she made on March 16, 2012 was made after discovering that this suit had been dismissed on January 20, 2012 for want of prosecution. The 2<sup>nd</sup> Defendant urged the court to dismiss the Plaintiff's suit and the 1<sup>st</sup> Defendant's counter-claim with costs.

#### **Analysis of the Issues Arising and Determination Thereof:**

86. I have considered the pleadings and the evidence tendered by the parties herein in support of their respective cases. I have also considered the submissions of counsels. The parties did not agree on the



issues for determination by the court. Each party framed its own issues. In my view, the following are the issues arising for determination in this suit;

- a. Whether the 1<sup>st</sup> Defendant breached the agreement dated July 31, 1998 between the Plaintiff, the 1<sup>st</sup> Defendant and Arap Ngeny.
- b. Whether the terms and conditions contained in the letter dated September 8, 1998 were in breach of the said agreement dated 31<sup>st</sup> September 1998 and as such unlawful, fraudulent and amounted to misrepresentation.
- c. Whether the Plaintiff surrendered the suit property to the 1<sup>st</sup> Defendant or the same was unlawfully repossessed by the 1<sup>st</sup> Defendant.
- d. Whether the sale of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was fraudulent, illegal, null and void.
- e. Whether the Plaintiff is entitled to the reliefs sought in its amended plaint.
- f. Whether the 2<sup>nd</sup> Defendant breached the agreement dated April 23, 2001 between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant by failing to pay the balance of the purchase price on or before July 23, 2001.
- g. Whether the 2<sup>nd</sup> Defendant's status on the suit property was converted by the 1<sup>st</sup> Defendant to that of a tenant and as such the 2<sup>nd</sup> Defendant was obliged to pay rent to the 1<sup>st</sup> Defendant.
- h. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in its counter-claim against the 2<sup>nd</sup> Defendant.
- i. Who is liable for the costs of the suit?

**Whether the 1<sup>st</sup> defendant breached the agreement dated July 31, 1998 between the plaintiff, the 1<sup>st</sup> defendant and Arap Ngeny.**

87. In the agreement dated July 31, 1998, the Plaintiff was referred to as the purchaser, Arap Ngeny as the vendor and the 1<sup>st</sup> Defendant as the mortgagee. The agreement was an agreement of sale of the suit property by Arap Ngeny and to the Plaintiff. I am in agreement with the submission by the 2<sup>nd</sup> Defendant that the agreement dated July 31, 1998 was between the Plaintiff and Arap Ngeny and that the 1<sup>st</sup> Defendant was brought in merely to extend its approval to the transaction. I have gone through all the clauses of the said agreement. None placed an express obligation on the 1<sup>st</sup> Defendant to do or refrain from doing anything. The Plaintiff claimed that the 1<sup>st</sup> Defendant had an obligation to prepare and execute a mortgage over the suit property. There is no such obligation imposed on the 1<sup>st</sup> Defendant under the agreement. The Plaintiff had taken over an existing mortgage. It is therefore not clear as to which other mortgage it wished to have created over the suit property. I am an agreement with the 2<sup>nd</sup> Defendant that the transaction between the Plaintiff and the 1<sup>st</sup> Defendant was simply that of assignment of a debt whereby Arap Ngeny assigned his debt with the 1<sup>st</sup> Defendant to the Plaintiff. The Plaintiff was simply to step into the shoes of Arap Ngeny and continue meeting Arap Ngeny's obligations to the 1<sup>st</sup> Defendant. The Plaintiff having assumed Arap Ngeny's "full liability to the 1<sup>st</sup> Defendant in respect of the outstanding mortgage balance with Kenya Industrial Estates Limited of Kshs 4,195,268/-" it was expected to continue servicing the loan on the same terms and conditions that Arap Ngeny had agreed on with the 1<sup>st</sup> Defendant unless the 1<sup>st</sup> Defendant agreed to vary the said terms.



88. The Plaintiff did not tell the court the terms and conditions of the mortgage loan between Arap Ngeny and the 1<sup>st</sup> Defendant. Those were the terms and conditions that bound the 1<sup>st</sup> Defendant pursuant to the tripartite agreement dated July 31, 1998. It was the duty of the Plaintiff to find out from Arap Ngeny what those terms and conditions were before entering into the agreement dated July 31, 1998. The terms were communicated to the Plaintiff by the 1<sup>st</sup> Defendant through a letter dated September 8, 1998. The 1<sup>st</sup> Defendant had no obligation to communicate these terms to the Plaintiff before the Plaintiff entered into the agreement dated July 31, 1998 with Arap Ngeny. The Plaintiff was purchasing the suit property from Arap Ngeny and not from the 1<sup>st</sup> Defendant. In any event, the Plaintiff accepted the offer to purchase the suit property from Arap Ngeny on June 23, 1998 with the full knowledge that there was a mortgage loan outstanding on the property that had to be cleared before a title was issued to it. Before accepting this offer, the Plaintiff had written to the 1<sup>st</sup> Defendant on June 4, 1998 requesting to “take over” Arap Ngeny’s “mortgage on Shed No 36”. As at June 23, 1998 when the Plaintiff accepted Arap Ngeny’s offer to purchase the suit property, there is no evidence that the 1<sup>st</sup> Defendant had responded to the Plaintiff’s letter dated June 4, 1998 and had accepted the terms on which the Plaintiff wished to take over the said mortgage. In its said letter dated June 4, 1998, the Plaintiff requested for 10 years to pay the mortgage. The Plaintiff who was taking over the mortgage from Arap Ngeny must have been aware of the terms of that mortgage to be able to make this request to the 1<sup>st</sup> Defendant. The Plaintiff is expected to have obtained information from Arap Ngeny on this loan before making the offer. It is therefore not correct as suggested by the Plaintiff that it was as a result of representations made by the 1<sup>st</sup> Defendant that made the Plaintiff to enter into the agreement dated July 31, 1998 with Arap Ngeny.
89. From the material on record, I am of the view that the Plaintiff is not sincere about this mortgage issue for several reasons. As at the time the Plaintiff purchased the suit property from Arap Ngeny which property Arap Ngeny had purchased through a mortgage loan from the 1<sup>st</sup> Defendant, the Plaintiff itself was servicing two mortgage loan accounts with the 1<sup>st</sup> Defendant for Shed No 15 and Shed No 48. The Plaintiff did not produce the mortgages or charges for these Sheds in evidence. The Plaintiff did not also produce the mortgage that was assigned to it by Arap Ngeny in evidence. The Plaintiff was well aware that these properties including the suit property had no titles and as such mortgages could not be created in respect thereof. The arrangement that was referred to as a mortgage was some form of a tenant purchase agreement whereby purchasers were allowed to pay the purchase price over a period of time with interest. This is what was communicated to the Plaintiff by the 1<sup>st</sup> Defendant through its letter dated September 8, 1998. At no time did the Plaintiff raise the issue of the 1<sup>st</sup> Defendant having not drawn a mortgage instrument or the terms of engagement. As I have mentioned, the terms and conditions of engagement were those that applied to Arap Ngeny’s mortgage that the Plaintiff took over.
90. Due to the foregoing, I am not persuaded that the 1<sup>st</sup> Defendant breached the agreement dated July 31, 1998. The Plaintiff has not convinced me that there was anything that the 1<sup>st</sup> Defendant was required to do under the said agreement that it failed to do. It is therefore my finding that the 1<sup>st</sup> Defendant did not breach the agreement dated July 31, 1998 and that it was in fact the Plaintiff who breached the same by failing to pay the balance of the mortgage loan that it took over from Arap Ngeny. I found it surprising that the Plaintiff feigned ignorance of the terms and conditions of the mortgage loan that it took over from Arap Ngeny. First, the Plaintiff could not have entered into the agreement dated July 31, 1998 with Arap Ngeny without knowing those terms. Secondly, the Plaintiff acknowledged severally its indebtedness to the 1<sup>st</sup> Defendant and the fact that it was in arrears on its repayment obligations. What arrears was it talking about if it had no idea what was payable to the 1<sup>st</sup> Defendant? I will leave the issue to rest there with the foregoing findings.



**Whether the terms and conditions in the letter dated September 8, 1998 were in breach of the said agreement dated July 31, 1998 and as such unlawful, fraudulent and amounted to misrepresentation.**

91. As I have stated earlier, the agreement dated July 31, 1998 did not contain the terms and conditions under which the Plaintiff was taking over the mortgage loan that Arap Ngeny owed to the 1<sup>st</sup> Defendant. The terms and conditions of the said mortgage loan were between the 1<sup>st</sup> Defendant and Arap Ngeny and the same were assigned to the Plaintiff under the tripartite agreement dated July 31, 1998. In other words, the Plaintiff was to continue paying the outstanding loan on the terms and conditions on which Arap Ngeny had agreed with the 1<sup>st</sup> Defendant unless the 1<sup>st</sup> Defendant agreed to vary the same. Again as mentioned above, the Plaintiff had written to the 1<sup>st</sup> Defendant on June 4, 1998 requesting to be allowed to take over the mortgage loan that was owed by Arap Ngeny. In the letter, the Plaintiff made a further request that the mortgage loan he was taking over be repaid within a period of 10 years. It is this letter that the 1<sup>st</sup> Defendant responded to through the letter dated September 8, 1998. In the letter dated September 8, 1998, the 1<sup>st</sup> Defendant gave the Plaintiff the mortgage balance as at August 31, 1998 and confirmed that the outstanding amount was attracting interest at the rate of 25% per annum. The 1<sup>st</sup> Defendant also confirmed its willingness to transfer Arap Ngeny's mortgage account to the Plaintiff and the terms under which the transfer would be effected. In response to this letter, the Plaintiff wrote to the 1<sup>st</sup> Defendant on September 30, 1998 in which the Plaintiff renewed its request to be allowed to pay the mortgage loan that it had taken over within a period of 10 years. This request was not accepted by the 1<sup>st</sup> Defendant which insisted that the Plaintiff complies with the terms it had set out in the letter dated September 8, 1998.
92. The Plaintiff has contended that the terms that were set out in the 1<sup>st</sup> Defendant's letter dated September 8, 1998 were in breach of the tripartite agreement dated July 31, 1998. The Plaintiff has not pointed out which clause of the agreement dated July 31, 1998 was breached by the 1<sup>st</sup> Defendant and in what manner. The Plaintiff has contended that it was not aware that the outstanding mortgage loan was attracting interest at the rate of 25% per annum. As I mentioned earlier, the Plaintiff had two active mortgage loan accounts with the 1<sup>st</sup> Defendant as at the time it took over this third mortgage loan from Arap Ngeny. The Plaintiff was aware that the mortgage loans were attracting interest. The Plaintiff has not convinced me that the 1<sup>st</sup> Defendant had at any time undertaken not to charge interest on the mortgage loan that the Plaintiff took over from Arap Ngeny or that the interest rate of 25% was above what Arap Ngeny was paying or what the Plaintiff was paying for his then existing two loans. There is nowhere in the agreement dated July 31, 1998 where the 1<sup>st</sup> Defendant represented to the Plaintiff that the then outstanding mortgage loan of Kshs 4,195,268/- would not attract interest or that the 1<sup>st</sup> Defendant would not impose terms and conditions for the taking over of the mortgage loan by the Plaintiff from Arap Ngeny. I am not satisfied that any of the terms in the letter dated September 8, 1998 were in breach of the agreement dated July 31, 1998. In any event, the Plaintiff accepted the said terms and paid to the 1<sup>st</sup> Defendant a sum of Kshs 1,300,000/- inclusive of a down payment of Kshs 830,000/-. I am not persuaded that the 1<sup>st</sup> Defendant misled the Plaintiff to enter into the agreement dated July 31, 1998 with Arap Ngeny. The misrepresentation pleaded against the 1<sup>st</sup> Defendant has not been proved. The letter dated July 13, 1998 (Page 4 PEXH 1) on which the Plaintiff put reliance in support of its misrepresentation claim was simply a communication by the 1<sup>st</sup> Defendant to the agent of Arap Ngeny of its approval of the sale of the suit property by Arap Ngeny to the Plaintiff and of its willingness to grant the Plaintiff a mortgage for Kshs 4,195,268/- being the amount that was due from Arap Ngeny to the 1<sup>st</sup> Defendant as at July 31, 1998. The letter did not contain any terms and conditions on which the 1<sup>st</sup> Defendant was going to grant the said mortgage. It was the duty of the



Plaintiff to ascertain the terms and conditions under which it was going to take over the mortgage loan from Arap Ngeny before entering into an agreement of sale with him. The consequences of its failure to do that cannot be blamed on the 1<sup>st</sup> Defendant.

93. It is my finding from the foregoing that the terms and conditions set out in the 1<sup>st</sup> Defendant's letter dated September 8, 1998 were not in breach of the agreement dated July 31, 1998. The same were therefore not unlawful and fraudulent as claimed by the Plaintiff neither were they tainted with misrepresentation.

**Whether the plaintiff surrendered the suit property to the 1<sup>st</sup> defendant or the same was unlawfully repossessed by the 1<sup>st</sup> defendant.**

94. As at December 31, 2000, the Plaintiff was indebted to the 1<sup>st</sup> Defendant to the tune of Kshs 13,323,103/- on its three mortgage accounts of which a total sum of Kshs 5,191,249/90 was in arrears (See page 24, DEXH 1). As at that date, mortgage loan in respect of the suit property was in arrears to the tune of Kshs 2,346,558/-. By a letter dated January 2, 2001 to the 1<sup>st</sup> Defendant, the Plaintiff admitted that its mortgage accounts were in arrears a situation that it attributed to collapse of the business it was undertaking. The Plaintiff admitted that it wrote the letter dated February 12, 2001 surrendering among others the suit property back to the 1<sup>st</sup> Defendant. The Plaintiff contended that its Managing Director was coerced and put under duress to write the said letter through which it surrendered the suit property. I am unable to pick any form of coercion from the tone of the letter. I am in agreement with the 2<sup>nd</sup> Defendant who was present when the letter was written that the Plaintiff's Managing Director wrote the letter after a lot of reflection on the situation in which the Plaintiff was in. This fact can be seen from the proposals that was made by the Plaintiff. My view on this issue is fortified by the fact that in the correspondence between the Plaintiff and the 1<sup>st</sup> Defendant following this letter of February 12, 2001, the 1<sup>st</sup> Defendant did not mention that it was coerced to write the letter. The issue was raised before this court through amendments made 11 years after the alleged coercion. I am in agreement with the submissions by the defendants that this was an afterthought.
95. I find the alleged coercion or duress not proved. I therefore find that the suit property was surrendered to the 1<sup>st</sup> Defendant by the Plaintiff due to the Plaintiff's inability to service the mortgage loan that was advanced to it by the 1<sup>st</sup> Defendant. The property was not unlawfully repossessed by the 1<sup>st</sup> Defendant as alleged by the Plaintiff.

**Whether the sale of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was fraudulent, illegal, null and void.**

96. The 1<sup>st</sup> Defendant sold the suit property to the 2<sup>nd</sup> Defendant after the same was surrendered to it by the Plaintiff as aforesaid. In the letter of surrender dated February 12, 2001, the Plaintiff gave the 1<sup>st</sup> Defendant liberty to sell the suit property to recover the outstanding amount. Neither the 1<sup>st</sup> Defendant nor the 2<sup>nd</sup> Defendant have any issue with the agreement of sale dated April 23, 2001 that they entered into in respect of the suit property as far as its validity is concerned. I find nothing fraudulent or illegal in the said agreement. The same is therefore not null and void as claimed by the Plaintiff.

**Whether the plaintiff is entitled to the reliefs sought in its amended plaint.**

97. From the findings above, the Plaintiff has not proved its case against the Defendants. It is therefore not entitled to the reliefs sought in the amended plaint dated November 15, 2012.



**Whether the 2<sup>nd</sup> defendant breached the agreement of sale dated April 23, 2001 between the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant by failing to pay the balance of the purchase price on or before July 23, 2001.**

98. The agreement dated April 23, 2001 provided that the 2<sup>nd</sup> Defendant was to pay the purchase price of Kshs 5,900,000/- to the 1<sup>st</sup> Defendant by making a down payment of Kshs 1,475,000/- being 25% of the purchase price and the balance in the sum of Kshs 4,425,000/- within 90 days from the date of the agreement. It is common ground that the 2<sup>nd</sup> Defendant paid a sum of Kshs 1,475,000/- in accordance with the terms of the agreement and was required to pay the balance of the purchase price aforesaid on or before July 23, 2001. It is common ground that the 2<sup>nd</sup> Defendant did not pay the balance of the purchase price as provided for in the agreement between her and the 1<sup>st</sup> Defendant. Despite this failure to abide by the terms of the agreement dated April 23, 2001, the 2<sup>nd</sup> Defendant has contended that she did not breach the said agreement. The 2<sup>nd</sup> Defendant has put forward several reasons why she did not pay the balance of the purchase price and which according to her excuses the said breach and keeps the contract alive.
99. In my view, whether or not the 2<sup>nd</sup> Defendant breached the said agreement and whether the reasons put forward by the 2<sup>nd</sup> Defendant excuse the breach and keeps the agreement alive must be determined from the terms of the agreement between the parties. Clause 5 of the agreement provided that in the event of cancellation of the agreement by the 2<sup>nd</sup> Defendant or failure to pay the balance of the purchase price within 90 days or any other breach or sufficient reason that would have entitled the 1<sup>st</sup> Defendant to cancel the sale, the 2<sup>nd</sup> Defendant would be entitled to a refund of the moneys paid to the 1<sup>st</sup> Defendant less 10% to cover the 1<sup>st</sup> Defendant's administration costs.
100. Clause 7 of the agreement provided further that the 1<sup>st</sup> Defendant had unfettered right of re-entry into the suit property and repossession thereof in the event that the 2<sup>nd</sup> Defendant failed to pay the said balance of the purchase price. Clause 19 on the other hand provided that nothing in the agreement was to be construed to disentitle the 1<sup>st</sup> Defendant from cancelling the sale at any time before the suit property was transferred to the 2<sup>nd</sup> Defendant.
101. In her defence to the 1<sup>st</sup> Defendant's counter-claim, the 2<sup>nd</sup> Defendant contended that she withheld the payment of the balance of the purchase price to the 1<sup>st</sup> Defendant following the filing of this suit in May 2001 and the issuance of a temporary injunction on July 23, 2001 against the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant contended that following the filing of this suit and the issuing of the said order, the 1<sup>st</sup> Defendant agreed with the 2<sup>nd</sup> Defendant that the completion of the agreement by payment of the balance of the purchase price be held in abeyance awaiting further orders by the court. The 2<sup>nd</sup> Defendant averred that it was further agreed between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant that the law of contempt and the doctrine of *lis pendens* applied and as such it was necessary to wait for the determination of the suit before proceeding with the transaction. The 1<sup>st</sup> Defendant denied entering into any agreement with the 2<sup>nd</sup> Defendant to extend the completion period.
102. The burden was on the 2<sup>nd</sup> Defendant to prove that under the agreement dated April 23, 2001 between her and the 1<sup>st</sup> Defendant, she was entitled withhold the payment of the balance of the purchase price while remaining in possession of the suit property possession of which was handed over to her pursuant to the terms of the said agreement or that they had agreed with the 1<sup>st</sup> Defendant to extend the completion period until the hearing and determination of this suit.
103. It is common ground that the 2<sup>nd</sup> Defendant was not a party to this suit until it was added as a party on March 25, 2014. The orders made herein on May 15, 2001 and July 23, 2021 were directed at the



1<sup>st</sup> Defendant. The orders did not restrain the 2<sup>nd</sup> Defendant from paying the balance of the purchase price to the 1<sup>st</sup> Defendant in performance of her contractual obligation to the 1<sup>st</sup> Defendant. It was up to the 1<sup>st</sup> Defendant to decide how it was going to fulfil its part of the bargain in light of the suit that had been filed and orders given. There was no provision in the agreement dated April 23, 2001 that allowed the 2<sup>nd</sup> Defendant not to perform her part of the contract in the event that a suit was filed against the 1<sup>st</sup> Defendant. The only options that were available to the 2<sup>nd</sup> Defendant under the agreement in my view in the event that the 2<sup>nd</sup> Defendant felt that the orders issued against the 1<sup>st</sup> Defendant in this suit would cause a delay on the part of the 1<sup>st</sup> defendant to complete the agreement or would frustrate the completion of the agreement was to cancel the agreement under clause 5 thereof or to fulfill her part of the agreement and thereafter call upon the 1<sup>st</sup> Defendant to fulfil its part in default of which she could rescind the agreement for non-performance. The other option that was available was to agree with the 1<sup>st</sup> Defendant to extend the completion period.

104. There is no evidence before the court in support of the 2<sup>nd</sup> Defendant's contention that the 1<sup>st</sup> Defendant had agreed to extend the completion period until this suit was determined or until further orders by the court. There is nothing in the correspondence that was produced by the 2<sup>nd</sup> Defendant as part of DEXH.4 showing that there was an agreement reached between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant that the completion period for the agreement dated April 23, 2001 would be extended. In any event, most of those correspondence was exchanged several years after the expiry of the completion period. Even if it is assumed that the agreement to extend the completion period was verbal, I am unable to see how the parties who had entered into a written agreement of sale could vary the same verbally. Due to the foregoing, it is my finding that the 2<sup>nd</sup> Defendant breached the agreement dated 23<sup>rd</sup> April 2001 by her failure to pay the balance of the purchase price to the 1<sup>st</sup> Defendant.

**Whether the 2<sup>nd</sup> defendant's status on the suit property was converted by the 1<sup>st</sup> defendant to that of a tenant and as such the 2<sup>nd</sup> defendant was obliged to pay rent to the 1<sup>st</sup> defendant.**

105. The 2<sup>nd</sup> Defendant's status in the suit property was that of a purchaser and not a tenant. On the 2<sup>nd</sup> Defendant's breach of the agreement of sale dated April 23, 2001, the 1<sup>st</sup> Defendant had the right to rescind the agreement and demand possession from the 2<sup>nd</sup> Defendant. By a letter dated September 8, 2015, the 1<sup>st</sup> Defendant informed the 2<sup>nd</sup> Defendant that the sale of the suit property had been frustrated by this suit and asked the 2<sup>nd</sup> Defendant to choose either to agree to be treated as a tenant of the 1<sup>st</sup> Defendant in the suit property on terms that were communicated to her by the 1<sup>st</sup> Defendant or vacate the suit property within 30 days of the letter.
106. The 2<sup>nd</sup> Defendant did not vacate the suit property neither did she accept to be a tenant of the 1<sup>st</sup> Defendant on the terms that the 1<sup>st</sup> Defendant had proposed. In the said letter dated September 8, 2015, the 1<sup>st</sup> Defendant had indicated that if the 2<sup>nd</sup> Defendant failed to choose any of the two options, it would take steps to have the 2<sup>nd</sup> Defendant evicted from the suit property. Since the 2<sup>nd</sup> Defendant did not choose to be a tenant of the 1<sup>st</sup> Defendant and did not accept the tenancy offer that the 1<sup>st</sup> Defendant had put forward, it is my finding that the 2<sup>nd</sup> Defendant's occupation of the suit property was not converted to a tenancy. In other words, the 2<sup>nd</sup> Defendant was not the 1<sup>st</sup> Defendant's tenant. The 2<sup>nd</sup> Defendant was therefore not liable to pay rent to the 1<sup>st</sup> Defendant.

**Whether the 1<sup>st</sup> defendant is entitled to the reliefs sought in its counter-claim against the 2<sup>nd</sup> defendant.**

107. In its counter-claim, the 1<sup>st</sup> Defendant has claimed rent areas from May 1, 2001 to June 30, 2016 and further rent from July 1, 2016 until possession is given. Having made a finding that the 2<sup>nd</sup> Defendant



was not the 1<sup>st</sup> Defendant's tenant, the 1<sup>st</sup> Defendant's rent claim has no basis and the same is not for granting. The 1<sup>st</sup> Defendant has also claimed possession of the suit property and costs. I have made a finding that the 2<sup>nd</sup> Defendant breached the agreement of sale dated April 23, 2001 between her and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant has remained in occupation of the suit property now for over 20 years without completing the payment of the purchase price or paying rent for the same to the 1<sup>st</sup> Defendant. Since the 2<sup>nd</sup> Defendant breached the agreement dated April 23, 2001, the 1<sup>st</sup> Defendant was entitled to rescind the same and demand possession. The 1<sup>st</sup> Defendant demanded possession of the suit property from the 2<sup>nd</sup> Defendant which the 2<sup>nd</sup> Defendant refused to handover. I am satisfied that a case has been made out by the 1<sup>st</sup> Defendant for possession of the suit property. The 2<sup>nd</sup> Defendant cannot continue in occupation of the suit property in respect of which it is neither an owner nor a tenant. It is worth noting that although the 2<sup>nd</sup> Defendant has claimed that she is ready and willing to complete the agreement, she has not sought the performance of the agreement.

#### **Who is liable for the costs of the suit and the 1<sup>st</sup> defendant's counter-claim?**

108. Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and an incidental to a suit is at the discretion of the court. As a general rule, costs follow the event. In this case the Plaintiff has failed in its claim against the 1<sup>st</sup> Defendant while the 1<sup>st</sup> Defendant has succeeded in its counter-claim against the 2<sup>nd</sup> Defendant. I will award the 1<sup>st</sup> Defendant the costs of the Plaintiff's suit. As for the costs of the 1<sup>st</sup> Defendant's counter-claim against the 2<sup>nd</sup> Defendant, I have noted that the 1<sup>st</sup> Defendant has not succeeded in a major part of its claim against the 2<sup>nd</sup> Defendant. I will order that each party bears its own costs of the 1<sup>st</sup> Defendant's counter-claim against the 2<sup>nd</sup> Defendant.

#### **Conclusion.**

109. In conclusion, I hereby make the following orders in the matter;
- a. The Plaintiff's suit is dismissed.
  - b. Judgment is entered for the 1<sup>st</sup> Defendant against the 2<sup>nd</sup> Defendant for vacant possession of LR No 209/11504 (Shed No. 36). The 2<sup>nd</sup> Defendant shall vacate and handover possession of the said property to the 1<sup>st</sup> Defendant on or before January 31, 2023 in default of which the 1<sup>st</sup> Defendant shall be at liberty to apply for warrant for her forceful eviction from the property.
  - c. The 1<sup>st</sup> Defendant shall have the costs of the main suit to be paid by the Plaintiff.
  - d. Each party shall bear its own costs with regard to the 1<sup>st</sup> Defendant's counter-claim against the 2<sup>nd</sup> Defendant.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Muriithi for the Plaintiff

Ms. Bosibori h/b for Mr. Langat for the 1<sup>st</sup> Defendant

Mr. Njagi for the 2<sup>nd</sup> Defendant

Ms. J. Omondi-Court Assistan

