



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 129 OF 2015

KILIFI COLOURS & DREAMS LIMITED.....PLAINTIFF

-VERSUS-

SOSO INVESTMENTS LIMITED.....1ST DEFENDANT

EMMANUEL PATRICK BAHA.....2ND DEFENDANT

JUDGEMENT

Background

1. This suit was initially filed by the Plaintiff as against the 1st Defendant solely as *Mombasa HCCC No. 65 of 2009*. It was subsequently transferred to this court on 27th July, 2015.

2. By its Plaint dated and filed at Mombasa on 4th March, 2009 as amended on 14th September, 2009 and further amended on 4th December 2014 but filed herein on 27th May, 2015 at Mombasa, Kilifi Colours & Dreams Limited the Plaintiff prays for judgment against the 1st Defendant for: -

a) A declaration that the suit property belongs to the Plaintiff, an order that the 1st Defendant do give vacant possession of the suit property together with improvements thereon and a permanent injunction against the 1st Defendant, its servants, agents or hirelings from remaining on, trespassing onto or having any dealings with the suit property.

b) Mesne profits of Kshs. 200,000/= per month from 1st January, 2009 until when the 1st Defendant will give vacant possession of the suit property.

c) Interests at Court rates on (b) above from the date of filing suit until payment in full.

d) Costs of and incidental to this suit

e) Any other further remedy that this Honourable Court may deem fit to grant.

3. Those prayers are borne from the Plaintiff's contention that pursuant to a transfer registered as No. C.R. 15549/11, the Plaintiff is the registered proprietor as the owner of the suit land that is Group XI/65 (Orig. No. XI/31/7) Kilifi having purchased it from Emmanuel Patrick Baha (the 2nd Defendant). It is the Plaintiff's case that, Soso Investments Limited (the 1st Defendant) continues to occupy the suit land wrongfully and illegally thereby causing the Plaintiff loss of income and usage.

4. The Plaintiff avers that it notified the 1st Defendant of the purchase of the suit land vide letters dated 23rd July, 2008 and 12th January, 2009. It further avers that vide a further letter dated 26th January, 2009 it gave the 1st Defendant notice to quit, vacate and handover vacant possession of the suit land but the 1st Defendant is yet to yield the suit land.

5. The Plaintiff further avers that the 1st Defendant has been in occupation of the suit land illegally and unlawfully as there is no lease nor tenancy agreement between the Plaintiff and the 1st Defendant.

6. But in its Statement of Defence and Counterclaim filed on 24th March, 2009 as amended on 2nd March, 2012, the 1st Defendant denies that

the Plaintiff is the owner of the suit property and puts the Plaintiff to strict proof thereof.

7. The 1st Defendant further denies having been notified of the purchase of the suitland or being given notice to vacate the same and invites the Plaintiff to strict proof of its claims.

8. The 1st Defendant avers that it is the proprietor of the suit property and that as such owner it has not entered into any sale agreement with the Plaintiff. It is further the 1st Defendant's case that if indeed the Plaintiff has purchased the suit property from the 2nd Defendant then such sale is irregular and wrongful.

9. By way of its counterclaim, the 1st Defendant enjoined the 2nd Defendant into these proceedings and avers that it purchased the portion of the land together with building and loose assets the subject matter herein known as Group No. XI/31 from the 2nd Defendant for the sum of Kshs. 6.5M on 12th January, 2002 and by the said agreement it undertook to offset the loan the 2nd Defendant obtained from Kenya Commercial Bank, Kilifi using the suit property as collateral.

10. The 1st Defendant further avers that on 20th September, 2002 it duly paid off the loan balance in the sum of Kshs. 2.3 Million at Kenya Commercial Bank but was informed by the Bank that it cannot be given the original title deed comprised in the suit property as it is the 2nd Defendant who was authorized to collect it personally. The 1st Defendant avers that it made an additional payment in the sum of Kshs. 200,000/- to the 2nd Defendant on or about 28th November 2002.

11. The 1st Defendant further avers that it kept paying for the suit property and business and by the year 2009 it had made payments totaling the sum of Kshs. 5.5 Million leaving a balance of only Kshs. 950,000/- but when it was ready to pay the balance in the year 2008, the 2nd Defendant kept avoiding the 1st Defendant until the year 2009 when its director was served with court papers notifying them that the property had been transferred to the Plaintiff.

12. The 1st Defendant further avers that the agreement of 12th January, 2002 was that it was purchasing the said Plot No. Group XI/31 together with the structures therein and after the first payment the 1st Defendant company in addition to the purchase price, incurred great expenses in renovation.

13. The 1st Defendant asserts that the Plaintiff and the 2nd Defendant were in collusion acting in cahoots and clandestinely by subdividing the suit property with full knowledge of the 1st Defendant's rights therein.

14. The 1st Defendant further asserts that the Plaintiff's claim arises from a fraudulent acquisition of the title for Plot No. Group XI/31 thereby rendering the subdivision, sale and transfer of the same null and void and the same should be revoked and cancelled and the title be reverted to the 2nd Defendant.

15. Accordingly, the 1st Defendant urges the court to dismiss the Plaintiff's suit and instead to enter judgment in its favour for: -

a. A declaration that the 1st Defendant is the lawful owner of plot Group no. XI/31 CR 1554 and the 2nd Defendant be compelled to transfer the said land to itself.

b. Revocation and cancellation of the subdivision and transfer to Kilifi Colours & Dreams Limited dated 15th December, 2008 as CR. 44741/1.

c. Costs.

d. Interests

e. Any other relief the Honourable court may deem just to offer.

16. Emmanuel Patrick Baha (the 2nd Defendant) was enjoined in these proceedings by way of the 1st Defendant's Counterclaim. In his Statement of Defence dated 3rd April, 2012 and filed on 4th April, 2012, the 2nd Defendant while admitting entering into a sale agreement for the sale of Mkwajuni Motel together with the buildings improvements and loose assets situated on Plot No. Group XI/31 for the sum of Kshs 6.5M on 12th January, 2002 avers that it is the Defendant who failed to complete the transaction within 60 days and further failed to regularize the 2nd Defendant's mortgage loan attached to the motel by Kenya Commercial Bank Ltd within the agreed timelines thereby rendering the sale agreement void.

17. The 2nd Defendant further avers that he made several verbal and written demands to both the 1st Defendant and his advocate vide various letters dated 10th February, 2005, 11th May, 2005, 5th November, 2005, 7th November, 2006 and 23rd July, 2008 for payment of the purchase price in full but the 1st Defendant refused to pay rendering the sale agreement null and void as the completion date of 60 days had lapsed.

18. The 2nd Defendant denies that the 1st Defendant carried out renovation and incurred the alleged or any expenses and denies that the structures on Plot Group XI/31 were run down and in a bad state as stated by the 1st Defendant and invites the 1st Defendant to strict proof of the alleged expenses incurred for renovation.

19. The 2nd Defendant further avers that the sale agreement was for the sale of Mkwajuni Motel which is 5 acres and not Plot Group XI/31 as the same had already been subdivided prior to the sale agreement and thus denies the allegations of fraud as particularized by the 1st Defendant in paragraph 16 of the Counterclaim.

20. The 2nd Defendant avers further that the 1st Defendant was notified in writing vide letters dated 12th February, 2009 and 26th February, 2009 that the property has been sold to the Plaintiff to which the 1st Defendant failed and/or refused to respond to. It is further its case that the sale agreement of 12th January, 2001 is null and void as it was devoid of the Land Control Board Consent and thus the same stands rescinded.

The Plaintiff's case

21. At the trial the Plaintiff called its director, Cannobio Pietro (PW1) as a sole witness in their case. PW1 told the court that he is the Chairman and director of the Plaintiff Company. He testified that their company bought the suit land measuring 1.922 hectares on 22nd October, 2008 and that it was transferred to their company on 28th November, 2008 by Emmanuel Patrick Baha (the 2nd Defendant).

22. PW1 testified further that he only knows the 1st Defendant as a tenant and not as the owner of the suit land since the title deed he saw does not have the 1st Defendant as the owner thereof. PW1 further told the court in addition to their prayer for a declaration as the owners of the land, he also prays for mesne profits in the sum of Kshs. 200,000/- as the 1st Defendant continues to occupy the suit land without their permission and even after being notified to vacate the same.

23. On cross-examination, PW1 told the court that before they bought the suit land they visited the same and found structures thereon which included an old bar and restaurant which was almost collapsing and which had been closed. PW1 further testified that he also saw some workers on the suit land carrying out some chores but he did not talk to them. He further told the court that the 2nd Defendant never told him that the suit land had been sold to another person and or that there had been a KCB mortgage on the suit land.

24. PW1 further told the court that nevertheless the Plaintiff paid the sum of Kshs 8 Million to the 2nd Defendant. Out of this amount, the 2nd Defendant received 10% of the purchase price but the balance remained with his lawyer Sachdeva Advocates to be paid to the 2nd Defendant once he removed the people occupying the property. PW1 further told the court that he only learnt later that in the year 2009 there was a previous sale agreement between the 2nd Defendant and the 1st Defendant. He had earlier been told that the persons on the suit land were tenants although he did not see the tenancy agreement between the 2nd Defendant and them. PW1 further told the court that at some point in time he sent the auctioneers to evict the 1st Defendant from the suit property. It had not paid rent to them. The 1st Defendant did not however vacate the land and remain in occupation to-date.

The Defence Case

25. The 1st Defendant equally called one witness in support of their case at the trial. Francis Samuel Kazungu Baya (DW1) told the Court he is a Director of the 1st Defendant company and that he knows the Plaintiff herein. DW1 further told the Court that the dispute herein is in respect of the property known as CR 15544/11 Kilifi in which the 1st Defendant runs a hotel business.

26. DW1 further testified that they entered into a sale agreement on 12th January, 2002 with then then owner of the said property to purchase the same at the sum of Kshs. 6.5 Million. It was a term of their agreement that the seller (the 2nd Defendant) would pay for arrears of the bills for water and electricity.

27. DW1 further testified that he was notified of a loan charged to the property for the sum of Kshs. 2.3 Million and as they wanted to take up the property after having paid a half of the purchase price, they were forced to pay for the loan as the bank also sought clearance before they could take over the property. He further told the court that he went to KCB Bank and paid the outstanding loan in the sum of Kshs 2.3 Million. In addition, he paid for the other bills including water and electricity that were in arrears. DW1 however told the court that he did not have some of the receipts to indicate payment since most of the receipts were kept by his lawyer, one Chalalu who is now deceased. He testified that his said lawyer gave him some copies of the documents but kept the rest in his office.

28. DW1 told the court that he took over possession of the premises immediately after execution of the sale agreement and that at that time, the hotel was totally dilapidated and he had to start from the scratch. In the end, he paid a sum of Kshs 50,000/- to the lawyers. That left a balance of Kshs 955,000/-but they had not paid the remaining amount as they had been waiting for the title deed to be issued to them.

29. DW1 further told the court that after the death of his lawyer the 2nd Defendant gave a notice to vacate the suit land. He had previously not received any notice from the 2nd Defendant either demanding the balance of the purchase price or indicating that they were cancelling the sale agreement. The 2nd Defendant had also not complained of late payments of the purchase price prior to that.

30. DW1 told the court that on 12th January 2009 he received a letter of even date informing him that the property had been resold to the Plaintiff herein and that now their payments had been converted into rent payments for the term that they had been in possession of the suit premises. He told the court that the subsequent sale agreement between the Plaintiff and the 2nd Defendant was unlawful and ought to be revoked as it is tainted with fraud.

31. On cross-examination by the Plaintiff, PW1 conceded that the 1st agreement does not acknowledge any money paid by the 1st Defendant but insisted that they paid the sum of Kshs. 2.3 Million on 20th September, 2002 in relation to the suit land. He repeated his statement that however, he does not have copies of the receipts as his lawyer, Chalalu kept them before he died.

32. On further cross-examination by the 2nd Defendant, DW1 admitted that when they signed the sale agreement of 12th of January, 2002, they did not pay any money even though they immediately took over the possession of the suit premises. He told the court the sale agreement did not specify the acreage of the land he was purchasing but insisted that the property was about 4.5 acres in size. He also conceded that before he took possession of the suit land, it had been sub-divided and one portion sold to one Arnold Okari and another to a partner of the Plaintiff.

2nd Defendant case

33. The 2nd Defendant Emmanuel Patrick Baha (DW2) also testified as a sole witness in his case at the trial. Adopting his statement dated 17th August, 2018 DW2 told the court he was registered as the proprietor of the said Group IX/31 CR 15540/1 measuring two decimal two five 2.225 Ha on 19th November 1979. He further told the court that in 1997 he subdivided the said land into 6 portions and sold the subdivisions to various buyers of which the suit land Group XI/65 registered as CR.44741 measuring 1.922 hectares was sold to the Plaintiff, Kilifi Colours & Dreams Limited for the sum of Kshs. 8 Million paid in full.

34. DW2 testified that he had first entered into a sale agreement for the sale of the property with the 1st Defendant, Soso Investment Ltd in the year 2002 but they failed to pay the full purchase price and on 11th June, 2004, the 1st Defendant through its lawyers, wrote to him that they were unable to complete the transactions as they were constrained financially.

35. DW3 told the Court that the suit premises had a bar, discotheque and accommodation amenities which the 1st Defendant has been running as from the time of execution of the aborted agreement in the year 2002. He told the Court that following the 1st Defendant's breach, he had rescinded the contract and treated the monies paid as rent for the five years the 1st Defendant had been in occupation.

36. DW2 asserted that he had since entered into another agreement with the Plaintiff and that the suit land now belongs to the Plaintiff. He denied that in selling the suit land he colluded with the Plaintiff to defraud the 1st Defendant.

37. On cross-examination by the 1st Defendant, DW2 told the court that the sale agreement of 12th January, 2002 was not completed as the suit land had been charged to KCB Bank. While they had agreed that the 1st Defendant was to pay some money to the Bank to enable them retrieve the title and transfer the same, DW2 told the Court he could not remember if the sum of Kshs 2.3 Million was paid to the Bank by a Bankers cheque.

38. DW2 further testified that he had made some mistakes by giving DW1 the keys for the premises in the suit land before the completion of the agreement. He insisted that the premises in the suit land were in a good condition at the time of the sale and stated that in fact he was renting it out for the sum of Kshs 50,000/- a month prior to the sale.

39. DW2 further told the court that the agreement of 28th May 2002 indicated that some monies had been paid but told the Court he had no recollection of how much money had been paid by the 1st Defendant.

40. He conceded that he subsequently sold the suitland for 8 Million to the Plaintiff without informing the 1st Defendant of the sale. The 1st Defendant only became aware of the sale when they were asked to vacate the suitland by the Plaintiff. The 1st Defendant refused to do so thereby stopping the Plaintiff's advocate from releasing the balance of 90% of the purchase price paid by the Plaintiff in full to himself.

41. On further cross examination by the Plaintiff, DW2 told the court that the Plaintiff is entitled to the suit land as it has been transferred to its name and that the 1st Defendant were notified of the sale and ought to vacate the suit land. He further told the court that he is ready to calculate the rent for the period the 1st Defendant has been in occupation for refund as he regarded the 1st Defendant as a tenant.

Analysis and Determination

42. I have perused and considered the pleadings filed by all the parties herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the respective parties.

43. By a rather inelaborate 5-paragraph Sale Agreement dated 12th January 2002, Emmanuel Baha (the 2nd Defendant) agreed to sell to Soso Investment Ltd (the 1st Defendant) a property described at paragraph 5 of the Agreement as:

“All that piece or parcel of land situated at Kilifi, known and registered(as) Group XI/31 Mkwajuni Motel together with buildings, improvements and loose assets in their present condition allowing for fa(ir) wear and tear. The inventory of the loose assets to be provided later.”

44. The Agreement drawn by Chalalu Kofa Chalalu & Company Advocates put the purchase price for the property at Kshs 6,500,000/- and went on to describe the mode of payment of the said sum at paragraphs 5 thereof as follows: -

5. Mode of Payment and Special Conditions

a) That, (the) premises are sold subject to a mortgage that the Vendor has with Kenya Commercial Bank Ltd, Kilifi Branch.

b) That, the Vendor has also fallen in arrears in electricity and water bills so as to rend(er) (the) premises operational (sic)

c) That, in consideration of the Purchaser agreeing to pay off the said electricity bills, which the Vendor does hereby undertake to re-imburse the Purchaser, on or before the conclusion of this transaction is it hereby set out, the Vendor hereby undertakes to sale(sic) the said property to the Purchaser.

d) That, the Purchaser shall have the option of purchasing the said property within sixty (60) days regularize as the Vendor ascertain with a view of settle his indebtedness(sic) with M/s Kenya Commercial Bank Ltd so that on completion of Transfer the Purchaser shall clear Title to property.

e) The Purchaser shall be liable for the payment of all legal fees, transfer and stamp duty including costs of the preparation of this Agreement.

f) The Law Security (sic) condition of sale apply to this agreement mutalis mutandis.

45. While the badly drafted Paragraph 5(d) of the Agreement would appear to imply that the transaction was to be completed within 60 days, it is apparent that that did not happen. Indeed, upon cross-examination at the trial herein, the 1st Defendant's director Francis Samuel Kazungu Baya (DW1) conceded that while they immediately took up possession of the suit property, the first payment towards the transaction was made some eight (8) months later on 20th September 2002 when a sum of Kshs 2.3 Million is said to have been released to Messrs Kenya Commercial Bank Ltd to off-set the outstanding mortgage.

46. By a Supplementary Sale Agreement dated 28th November 2002, the 1st Defendant made a direct payment to the 2nd Defendant of the sum of Kshs 200,000/- described as further part payment towards the purchase of the property and was to be deducted from the balance of the purchase price.

47. According to the 1st Defendant, they kept on paying for the suit property and the business operated therein and by the year 2008, they had made payments totaling the sum of Kshs 5.5 Million, thereby leaving out a balance on the purchase price in the sum of Kshs 950,000/-. The 1st Defendant told the Court that when they were ready to pay the balance in the year 2008, the 2nd Defendant started avoiding them and in the year 2009 they came to be served with the suit papers herein.

48. The 2nd Defendant does not deny entering into the Sale Agreement with the 1st Defendant. It is however his case that the sale was for only five acres of land and not the entire property and the 1st Defendant failed to complete the transaction within the agreed 60 days and to regularize the outstanding mortgage charged to the Bank within the agreed timelines. The 2nd Defendant told the Court that he made several demands over the years for the 1st Defendant to complete the transaction but he failed to do so.

49. Subsequently and by an Agreement of sale dated 22nd October 2008 the 2nd Defendant executed a second agreement with Messrs Kilifi Colours & Dreams Ltd (the Plaintiff herein) wherein he agreed to sell the property referred to therein as "all that piece of land situated in Kilifi containing by measurement 1.922 Ha or thereabouts and known as Sub-Division No. IX/65 together with all the buildings and improvements and structures thereon at a consideration of Kshs 8,000,000/-.

50. From a perusal of the second agreement, it is apparent that the 2nd Defendant was paid a sum of Kshs 800,000/- being 10% of the purchase price and that the balance of Kshs 7,200,000/- was to be held by his Advocate and to be released upon delivery by the 2nd Defendant of a number of documents to the Plaintiff including the original title and duly executed transfers.

51. While Clause 8 of the Second agreement provided that the property was sold in vacant possession free from all encumbrances, squatters and encroachments, it is evident that the 1st Defendant was at the time of execution of this agreement in occupation of the suit premises and operating the business therein known as Mkwajuni Motel.

52. Be that as it may, it is apparent that the 2nd Defendant fulfilled some of his obligations under the second agreement and on 15th December 2008, the property comprised in Title No. Group XI/65 (Original No. XI/31/7) Kilifi was transferred to the name of the Plaintiff herein. It is however apparent that the efforts by the Plaintiff to take over possession of the premises have been thwarted by the 1st Defendant company which also claims ownership thereof.

53. As to whether the Plaintiff was aware of the 1st Defendant's presence in the suit premises prior to the purchase and transfer of the property, the Plaintiff's director Cannobio Pietro (PW1) testified during cross-examination that they had visited the same prior to the sale and that they found structures thereon which included an old bar and restaurant which had been closed. PW1 further told the Court that he saw some workers on the compound but assumed that those in the premises were tenants.

54. That view was probably informed by the 2nd Defendant's own perception of those who were in the suit premises. During his own cross-examination at the trial herein, the 2nd Defendant told the Court that the 1st Defendant had failed to pay the purchase price as agreed and that he regarded them as tenants and was prepared to calculate the rent for the period they had been in occupation.

55. According to the 1st Defendant, the 2nd Defendant had approached him offering the suit property for sale. It was the 1st Defendant's case that the property which comprised of a hotel building, accommodation facilities and a discotheque were in a dilapidated state and it was subsequently compelled to expend large sums of money renovating the same. The 1st Defendant's director (DW1) further told the Court that at some point in time, the 2nd Defendant would approach him for payments in Nairobi and that he would give him money without any further

agreements being executed.

56. It was in that context that the 1st Defendant told the Court they had as at the year 2008 paid up to the sum of Kshs 5.5 Million to the 2nd Defendant and that the 2nd Defendant thereafter started evading them and was not available to receive the balance of the purchase price in the sum of Kshs 950,000/-. There was however very little by way of evidence in support of this proposition by the 1st Defendant.

57. Other than a Bankers Cheque made out some eight (8) months after the agreement was executed in the sum of Kshs 2.3 Million and a Supplementary Agreement dated 28th December 2002 wherein the 2nd Defendant acknowledged receipt of the sum of Kshs 200,000/-, there was nothing else placed before the Court to demonstrate any further payments made to the 2nd Defendant. Neither were there any receipts of any expenditure made towards the rehabilitation and or renovation of the Mkwajuni Motel, the business the 1st Defendant took over and has been running on the suit premises since 12th January 2002 when they entered into an agreement for the sale of the premises with the 2nd Defendant.

58. Questioned about the details of the alleged payments at the trial herein, DW1 told the Court that the transaction was handled by his Advocate Kofa Chalalu who had since passed on without providing him with the documentation in relation to the transactions.

59. As it were, the 2nd Defendant denied that the Mkwajuni Motel was in a dilapidated state when sold to the 1st Defendant and it was incumbent upon the 1st Defendant to demonstrate that the premises were in the state it alleges them to be and that they had spent any monies towards its rehabilitation. As already pointed out, the Sale Agreement executed by the 1st and 2nd Defendant was as bare as they can ever get. It neither spelt out the condition of the premises being sold nor gave the 1st Defendant authority to repair the premises and to deduct the amount spent on the repairs from the purchase price.

60. For whatever its worth, the Agreement between the 1st and 2nd Defendants by implication required completion to be done within 60 days and I did not understand the basis upon which the 1st Defendant made payments some eight months later and was still purporting to pay the purchase price more than six years after the date the transaction ought to have been completed.

While the 2nd Defendant did not strike this Court as one who was entirely truthful about the two sale transactions he had entered into in regard to the self -same suit property, it was apparent that the 1st Defendant was equally very economical with the truth and was out rightly trying to take advantage of the 2nd Defendant. I say so because the scanty sale agreement relied on by the parties was on the admission of the 1st Defendant prepared by its own Advocates. That Agreement neither provided for any consideration to pass to the 2nd Defendant at the execution thereof nor what would happen in the event the 1st Defendant defaulted in the payments. And while it did not provide for a date for the 2nd Defendant to grant possession of the premises, the 1st Defendant somehow took possession of the same and started running the business thereon on the very 12th day of January 2002 when the Agreement was executed.

61. In his Replying Affidavit sworn on 29th October 2009 and filed herein on 30th October 2009, the 2nd Defendant in trying to object to his being enjoined into these proceedings by the 1st Defendant gives a detailed chronology of the correspondence that went on between the parties between the year 2002 and 2008 when he eventually notified the 1st Defendant of his intention to exercise his right to rescind the Agreement and re-sell the suit premises.

62. A perusal of the correspondence annexed to the Replying Affidavit reveals that as at 11th June 2004, the 1st Defendants were claiming to have paid the entire purchase price save for an outstanding balance of Kshs 993,510/-. That letter does not make it clear when the other payments were made and while it purports to attach a copy of a Statement containing the itemized record of payments, no such Statement is attached.

63. On 1st October 2004, Messrs Y.A. Ali & Company Advocates for the 2nd Defendant wrote back inter alia demanding interest at 15% on the balance of the purchase price and further demanding that the transaction be concluded within 60 days. That letter was not responded to until sometime on 11th May 2005 when the 1st Defendants Advocates reverted asking for time to get further instructions from their client.

64. On 7th November 2006, the 2nd Defendants Advocates wrote directly to the 1st Defendant as follows: -

“RE: MKWAJUNI HOTEL

We refer to the above matter and our several letters sent to your advocate Chalalu Kofa, to which he has failed to reply to with your specific instructions as to the payment of the purchase price. The last correspondence received by your advocate dated 11th May 2005 he was still seeking instructions from you.

We have therefore decided to write to you directly so this matter can be finalized.

Kindly revert to us soonest about payment of the purchase price.”

65. Having failed to solicit any response from the 1st Defendant for another two years, the 2nd Defendant's Advocates on 23rd July 2008 wrote to the 1st Defendants, again directly as follows:

RE: MKWAJUNI MOTEL

We refer to our letter of 7th November 2006 and we have received no response from you. In the circumstances, our client's instructions are that, as you are not interested in completing this transaction which has now taken seven years, our client is now proceeding to sell the property to other interested buyers.

66. Apparently, there was again no response from the 1st Defendant and some three months down the line on 22nd October 2008, the 2nd Defendant true to his word, proceeded to execute the second Sale Agreement with the Plaintiff herein. By a letter dated 12th January 2009, the 2nd Defendant's Advocates wrote to the 1st Defendant informing them of the sale and asking them to hand-over to the new owners forthwith.

67. As stated in *Halsbury's Laws of England, 4th Edition, Volume 9, Page 340 at Paragraph 485*: -

“In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given.”

68. Considering a similar scenario in *Njamunyu –vs- Nyaga (1983) KLR 282* the Court of Appeal reiterated the position that where completion has not taken place as intended by the parties the issue between them is when thereafter. Before the agreement is rescinded the party in default should be notified of the default and given reasonable time within which to rectify its default.

69. Guided by the foregoing position in law, it is my considered view that the 1st Defendant had defaulted in terms of the conditions of the Sale Agreement executed between itself and the 2nd Defendant. Accordingly, the 2nd Defendant having given notice to the 1st Defendant and upon the 1st Defendant failing to rectify its default within a reasonable time, the 2nd Defendant was perfectly in order to enter into the second Sale Agreement executed between itself and the Plaintiff herein on 22nd October 2008. It was noteworthy that while the 1st Defendant denied receipt of the 2nd Defendant's letters, it acknowledged receipt of the letters sent to it notifying them of the sale. Those letters were sent to the same address.

70. Consequent upon the execution of the Second Agreement, the suit premises were transferred to the Plaintiff herein on or about 15th December 2008. The Plaintiff has however been unable to gain vacant possession of the premises as a result of the occupation thereof by the 1st Defendant on the purport that they are the owners thereof. Arising from my findings as outlined above, it is evident that I did not find any basis for the 1st Defendant's refusal to vacate the premises.

71. In the premises, I am satisfied that the Plaintiff has proved its case as against the 1st Defendant on a balance of probabilities. No basis was however given to me for the claim of mesne profits at Kshs 200,000/- per month from the time the 1st Defendant was granted notice to vacate the premises in the year 2009. The Plaintiff was aware of and or should have with due diligence become aware of the 1st Defendant's presence in the premises. I was also not persuaded that the Plaintiff stood to make the sum of Kshs 200,000/- per month from the premises.

72. Accordingly, and in the circumstances herein, the 1st Defendant's Counterclaim is hereby dismissed with costs. Judgment is instead entered for the Plaintiff against the 1st Defendant as prayed at paragraph 'a' of the Plaintiff.

Dated, signed and delivered at Malindi this 19th day of February, 2021.

J.O. OLOLA

JUDGE