



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 78 OF 2007**

**EUNICE LAMBA.....PLAINTIFF**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND**

**BOARD OF TRUSTEES.....1<sup>ST</sup> DEFENDANT**

**FLORENCE MAINA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. This dispute relates to a parcel of land known as Kitisuru 101/E49 (“the Suit Property”) situated in Nairobi which the 1<sup>st</sup> Defendant owned. The Plaintiff claimed that the 1<sup>st</sup> Defendant agreed to sell the Suit Property to her on 1/3/2004 at the agreed price of Kshs. 2,750,000/= and that under the tenant purchase agreement, she was to pay a deposit of Kshs. 275,000/= to the 1<sup>st</sup> Defendant and the balance together with interest through monthly instalments. The Plaintiff claimed that she was to be put in possession of the Suit Property by the 1<sup>st</sup> Defendant upon execution of the tenant purchase agreement and payment of the initial deposit. She claimed that the 1<sup>st</sup> Defendant had on numerous occasions acknowledged the existence and validity of that agreement in writing.

2. The Plaintiff claimed that sometime in mid-2006 the 2<sup>nd</sup> Defendant purported to enter into an agreement with the 1<sup>st</sup> Defendant for the purchase of the Suit Property, took possession of the land and begun constructing on it. The Plaintiff contended that that was done fraudulently and that she had suffered loss and damage of Kshs. 15,195,930 on account of the market value of the property, the perimeter fence and gate that she had erected together with the instalments she had paid.

3. She sought an injunction to restrain the 2<sup>nd</sup> Defendant from trespassing, remaining on, or building any structures or interfering with her title, possession and interest in the Suit Property. She also sought a declaration that she had a right to the immediate and actual possession of the Suit Property and that she was entitled to the transfer and ownership of the land. She sought a mandatory injunction to compel the Defendants to demolish and remove the buildings or materials lying on the Suit Property failing which she would remove them at a cost to be borne by the Defendants. In addition, she sought to be reinstated and restored to the Suit Property in the Further Amended Plaint dated 24/10/2011. Alternatively, she sought special damages of Kshs. 15,195,930/=.

4. The 1<sup>st</sup> Defendant denied the Plaintiff’s claim or that she had suffered loss as she contended. The 1<sup>st</sup> Defendant contended that the Plaintiff’s remedy lay in damages only for a refund of any sum of money which she may have paid to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant maintained that it issued all the requisite notices to the Plaintiff and denied the particulars of collusion set out by the Plaintiff in its Amended Defence dated 2/11/2011. It urged the court to dismiss the Plaintiff’s suit with costs.

5. In her Further Re-amended Defence and Counterclaim dated 15/11/2011, the 2<sup>nd</sup> Defendant denied the Plaintiff’s claim and the particulars of fraud she gave. She averred that she entered into a tenant purchase agreement with the 1<sup>st</sup> Defendant dated 23/6/2006 and became the purchaser of the Suit Property on the basis of that agreement. She averred that she made the periodic payments stipulated in the agreement and that pursuant to the tenant purchase agreement she undertook substantial development of the Suit Property and constructed a residential house on it. She counterclaimed possession and quiet enjoyment of the Suit Property as against the Plaintiff and a permanent injunction against the 1<sup>st</sup> Defendant to restrain it from interfering with her lawful possession of the land.

6. The 2<sup>nd</sup> Defendant claimed that the 1<sup>st</sup> Defendant had purported to renege on its obligations under the agreement and that it breached the tenant purchase agreement. She claimed that the 1<sup>st</sup> Defendant had colluded with the Plaintiff to stop her construction and had occasioned loss to her in the sum of Kshs. 10,000/= per day with effect from 19/1/2007. She gave the cost of the construction she had already undertaken as Kshs. 4,600,000 and loss of bargain for the suit premises of Kshs. 6,600,000/=. As at the end of May 2007, she claimed that she had paid

Kshs. 712,816 to the 1<sup>st</sup> Defendant in respect of the purchase of the Suit Property and was expected to make monthly payments of Kshs. 35,000/=. She sought an order for the 1<sup>st</sup> Defendant to refund her the sum of Kshs. 712,816/= which she paid to it pursuant to the tenant purchase agreement as well as Kshs. 35,000 per month from June 2007 together with interest.

7. The Plaintiff gave evidence. She entered into a tenant purchase agreement with the 1<sup>st</sup> Defendant on or about 1/3/2004. The 1<sup>st</sup> Defendant drew the tenant purchase agreement and gave her three copies to execute and return for the 1<sup>st</sup> Defendant to execute its part. She duly paid the deposit of Kshs. 275,000/=. She claimed that after executing the agreement and paying the deposit she returned the copies of the agreement to the 1<sup>st</sup> Defendant and took possession of the Suit Property. She cleared the bushes, leveled the ground, erected a fence around the land and put up a gate.

8. Sometime in October 2004 she was posted by the Immigration Office to work in India as an Immigration Attaché. She claimed that she informed the 1<sup>st</sup> Defendant through Mr. Atulo that she would be out of the country from December 2004 and left him her forwarding address through which the 1<sup>st</sup> Defendant could contact her. She averred that with the knowledge that she was out of the country, the 1<sup>st</sup> Defendant's officials conspired to defraud her of the Suit Property by failing to communicate to her regarding the land, concealing the tenant purchase agreement she had executed and going ahead to allocate the Suit Property to the 2<sup>nd</sup> Defendant. While she was in India she received a call from her friend sometime in 2007 who informed her that somebody was constructing on her property. She returned to the country and upon inquiry from the 1<sup>st</sup> Defendant she was informed that the Suit Property had been repossessed and allocated to the 2<sup>nd</sup> Defendant because she failed to honour the notices the 1<sup>st</sup> Defendant sent to her. She denied ever receiving any notices from the 1<sup>st</sup> Defendant. She faulted the 2<sup>nd</sup> Defendant for continuing to construct on the Suit Property against the directions of the 1<sup>st</sup> Defendant urging her to stop the construction to allow the issue of ownership to be resolved. She maintained that she was the legal owner of the Suit Property.

9. She produced a receipt issued by the 1<sup>st</sup> Defendant for the deposit for Kshs. 277,280/= dated 5/10/2004 together with a statement generated by the 1<sup>st</sup> Defendant which shows that the 1<sup>st</sup> instalment was due on 1/4/2004. She produced a valuation report prepared by Kenya Valuers and Estate Agents Limited which gave the value of the Suit Property in May 2011 as Kshs. 14,000,000/=. The copy of the tenant purchase agreement which the Plaintiff executed on 1/3/2004 was attached to the valuation report and also included a copy of the survey plan for the area. She produced another receipt dated 4/10/ on which the year is not clear for the payment of Kshs. 275,000/=. The land reference number on that receipt had been written Tassia but was crossed out and Kitisuru written over that. She also produced a receipt dated 18/3/2004 for the payment of Kshs. 13,000/= and the statements in respect of her account with the 1<sup>st</sup> Defendant showing she paid a total of Kshs. 742,983/=. The copy of the 1<sup>st</sup> Defendant's offer dated 26/2/2004 which she produced stated that it was subject to contract. The letter dated 1/3/2004 forwarded the signed agreement to the 1<sup>st</sup> Defendant. She produced copies of the 1<sup>st</sup> Defendant's letters dated 16/1/2007 and 1/2/2007 beseeching the 2<sup>nd</sup> Defendant to stop further construction until the issue as to who was entitled to the Suit Property was determined by the court. She produced a copy of the bankers cheque for Kshs. 350,000 dated 19/1/2007 drawn in favour of the 1<sup>st</sup> Defendant.

10. During cross examination, she admitted that she was late in making some monthly instalments but maintained that in case of default the 1<sup>st</sup> Defendant was to notify her. She did not have a copy of her letter which notified the 1<sup>st</sup> Defendant of her new address in India. During the hearing she indicated that she was abandoning her claim for damages so that she could pursue the Suit Property. She admitted that she had other transactions with the 1<sup>st</sup> Defendant in Hazina. She paid the deposit of Kshs. 275,000/= on 4/12/2003 which was well before the 1<sup>st</sup> Defendant offered to sell the Suit Property to her. She was in India from 2004 to 2009. She maintained that she received a letter of offer from the 1<sup>st</sup> Defendant and complied with the conditions of sale despite the 1<sup>st</sup> Defendant not giving her a copy of the signed tenant purchase agreement. She admitted that she defaulted in making payment for the Suit property, and explained that that was because she was going through marital problems at the time and was preparing to travel to India. She claimed that the 1<sup>st</sup> Defendant accepted her last payment in 2007. She neither received any notice from the 1<sup>st</sup> Defendant on her default nor did she receive any notice of rescission of the agreement.

11. Daniel Obebo gave evidence for the 1<sup>st</sup> Defendant. He stated that he was the Loans Officer working in the Capital and Money Market Department of the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant made an offer to the Plaintiff on 26/2/2004 to sell to her the Suit Property at Kshs. 2,750,000/= payable by a deposit of Kshs. 275,000/= and thereafter in 180 equal instalments of Kshs. 34,641 each payable monthly. He gave the breakdown of the payments the Plaintiff made which amounted to Kshs. 1,350,130.93/=.

12. He stated that clause 10(a) of the tenant purchase agreement entitled the 1<sup>st</sup> Defendant to rescind the agreement and repossess the Suit Property after issuing a notice in writing to the Plaintiff, which he maintained was issued to the Plaintiff. He stated that upon default by the Plaintiff, the 1<sup>st</sup> Defendant treated the amount she paid as money received on account held in trust and repayable on demand.

13. He stated that following the default by the Plaintiff to secure a contract of sale, the 1<sup>st</sup> Defendant aborted the sale with the Plaintiff and made an offer to the 2<sup>nd</sup> Defendant. He maintained that there was no legal or contractual relationship between the Plaintiff and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant offered to sell the Suit Property to the 2<sup>nd</sup> Defendant on 23/6/2006 for Kshs. 2,750,000/= and they entered into an agreement which was executed by both parties. He stated that the 1<sup>st</sup> Defendant received payment from the 2<sup>nd</sup> Defendant of Kshs. 3,306,945/= towards the purchase of the Suit Property. He stated that the 2<sup>nd</sup> Defendant defaulted on the monthly instalments.

14. The witness later averred that the 1<sup>st</sup> Defendant did not enter into any contractual agreement with the 2<sup>nd</sup> Defendant who he claimed was not entitled to recover the amount she paid for the Suit Property. The 1<sup>st</sup> Defendant instructed Value Zone Limited to value the Suit Property and in the valuation report dated 19/8/2019 it gave the value of the Suit Property as Kshs. 38,000,000/= at that time. He opined that the 1<sup>st</sup> Defendant held the money it received from both the Plaintiff and the 2<sup>nd</sup> Defendant in trust and was willing and ready to release the funds together with accrued interest to the Plaintiff and the 2<sup>nd</sup> Defendant.

15. Mr. Obebo produced copies of the receipts showing the payments the Plaintiff made and those made by the Defendant. He also produced a copy of the valuation report together with the copy of the certificate of lease over the Suit Property held by the 1<sup>st</sup> Defendant. He

maintained on being cross examined that the 1<sup>st</sup> Defendant did not receive the signed tenant purchase agreement from the Plaintiff. He stated that the 1<sup>st</sup> Defendant sent notices to the Plaintiff through ordinary mail. He was emphatic that the Suit Property was repossessed when the Plaintiff fell into arrears and that the 1<sup>st</sup> Defendant thereafter sold it to the 2<sup>nd</sup> Defendant who also defaulted in making payment.

16. The 2<sup>nd</sup> Defendant gave evidence. She stated that she received a letter of offer from the 1<sup>st</sup> Defendant dated 19/5/2006 offering to sell the Suit Property to her and paid the 10% deposit required. She paid the 1<sup>st</sup> instalment together with the insurance premium. She signed a sale agreement with the 1<sup>st</sup> Defendant and a tenant purchase agreement was forwarded to her vide a letter dated 27/6/2006. She stated that she continued paying the monthly instalments of Kshs. 35,000/= and paid a total of Kshs. 1,247,816/=.

17. She obtained the architectural blueprints and after obtaining a bill of quantities from Lui Consulting, she instructed a contractor to construct her house on the Suit Property. The contractor carried out the work until January 2007 when the 1<sup>st</sup> Defendant stopped him from continuing. She stated that by the time the construction was stopped, she had paid the contractor Kshs. 1,790,645.50/=. She received a letter on 16/1/2007 from the 1<sup>st</sup> Defendant stopping any further construction on the land. The 1<sup>st</sup> Defendant's letter dated 1/2/2007 directed her to take possession of the Suit Property to safeguard the building materials on site.

18. She produced a valuation report which showed that by 2008 the developments on the Suit Property were valued at Kshs. 9,700,000/=. The architects gave her a second interim certificate for Kshs. 1,446,960.80. The contractor gave an invoice for Kshs. 1,446,960.80 being his fees as at 24/1/2007. The quantity surveyor valued the work at Kshs. 3,724,560/=. She claimed that the contractor was also demanding interest on the unpaid sum of Kshs. 1,446,960.80 and damages of Kshs. 10,000/= per day for work stoppage in accordance with the building contract. She stated that she incurred costs of Kshs. 259,000 for site clearance, fencing and erecting a site office on the Suit Property.

19. She produced various documents including copies of the offer for sale dated 19/5/2006; the acceptance by the 1<sup>st</sup> Defendant dated 29/5/2006; the letter dated 19/6/2006 seeking payment of insurance premium; the 1<sup>st</sup> Defendant's letter dated 27/6/2006 which forwarded the executed tenant purchase agreement together with the agreement which was lodged at the lands office on 8/8/2007; the 1<sup>st</sup> Defendant's letter dated 16/1/2007 urging her to maintain the status quo on the Suit Property as the 1<sup>st</sup> Defendant sought an amicable solution to the dispute; and the 1<sup>st</sup> Defendant's letter dated 1/2/2007 authorising her to take possession of the Suit Property to safeguard her building materials until the suit filed by the Plaintiff was determined.

20. She tendered in evidence copies of the receipts issued by the 1<sup>st</sup> Defendant upon her payment of the purchase price; the drawing plans for the development; and the bills of quantities. She also produced the quotation of the architect's fees dated 22/6/2006 and the building estimates done by the engineers together with other correspondence. She produced a copy of the agreement and the Conditions of Contract for Building Works published by the Joint Building Council of Kenya, April 199 Edition.

21. She produced a valuation report showing that the work done on her plot as at 30/1/2007 was worth Kshs. 3,724,560/=. She produced the interim certificate issued by the architect and the invoices. She produced copies of receipts issued to Richard Maina Kimani by Plansteel Engineering Company for Kshs. 400,000/=, Kshs. 650,000/=, Kshs. 190,645/= and Kshs. 550,000/= dated 11<sup>th</sup>, 5<sup>th</sup>, 26<sup>th</sup> and 17<sup>th</sup> January 2007 respectively. She also produced a copy of the letter dated 24/1/2007 from Plansteel Engineering Company Limited indicating that they would be charging liquidated damages of Kshs. 10,000/= per day in accordance with the contract until the work resumed due to the stoppage of the works.

22. She produced an invoice from Plansteel Engineering Company Limited dated 5/2/2007 and a demand letter dated 16/3/2007 seeking liquidated damages of Kshs. 550,000 for 55 days. She produced a copy of her response dated 31/3/2007 notifying the contractor that there was a dispute over ownership of the Suit Property in court. She produced a copy of the valuation report dated 31/1/2008 done on the Suit Property which gave its value then as Kshs. 9,700,000/=. She produced receipts issued by Milano Commercial Agencies for landscaping, site clearance, erecting perimeter fence and site office all totaling Kshs. 279,000/=. She produced her statement of account with the 1<sup>st</sup> Defendant running from 6/6/2006 until 5/2/2008.

23. Parties filed submissions which the court has considered. The Plaintiff submitted that there was a valid contract of sale between her and the 1<sup>st</sup> Defendant over the Suit Property. She submitted that she paid the deposit on 4/12/2003 and executed the tenant purchase agreement and forwarded it to the 1<sup>st</sup> Defendant on 1/3/2004 but the 1<sup>st</sup> Defendant failed to return the executed agreement to her. She faulted the 1<sup>st</sup> Defendant for not producing the executed sale agreement even after her advocates served a notice to produce the agreement during the hearing of the suit on the 1<sup>st</sup> Defendant. She maintained that she was granted possession of the Suit Property and continued paying the monthly instalments.

24. The Plaintiff relied on clause 10 (a) of the agreement which stipulated that if the purchaser was in default she would be given 37 days' notice to remedy the default. She conceded that she delayed in paying some instalments when she was transferred to New Delhi on government assignment but maintained that the 1<sup>st</sup> Defendant did not issue any notices to her based on the fact that that none were sent to her by registered post. She urged that as soon as she could she remedied the situation and made lump sum payments which the 1<sup>st</sup> Defendant accepted.

25. She pointed out that at the time when she regularised her payments was when the 1<sup>st</sup> Defendant entered into an agreement with the 2<sup>nd</sup> Defendant for the sale of the Suit Property. The Plaintiff submitted that the 1<sup>st</sup> Defendant's right to resell the Suit Property did not arise and that even if it did, then the 1<sup>st</sup> Defendant waived that right when it engaged the Plaintiff in negotiations for completion after the completion date. The Plaintiff submitted that it was entitled to an order of specific performance and urged that her interest over the Suit Property being first should be allowed to prevail. She urged that as at the date of filing suit she was up to date with her instalments which signaled her intention to complete the sale transaction.

26. The Plaintiff cited various authorities including **Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR**, **Shah v Padamshi [1982] eKLR** and **Beatrice Muthio Nzioka v Charles Akelo Ong'wen [2014] eKLR**. She concluded that the Suit Property was unique land on which she intended to construct her retirement home.

27. The 1<sup>st</sup> Defendant submitted that the Plaintiff did not execute and return the tenant purchase agreement to it. It conceded that it continued to receive instalments from the Plaintiff on account. It submitted that the Plaintiff defaulted in remitting the monthly instalments agreed upon following which it issued notices to the Plaintiff in accordance with clause 10 (a) of the tenant purchase agreement. The 1<sup>st</sup> Defendant submitted that it issued the notices to the Plaintiff's last known address which was the same address the Plaintiff used in her verifying affidavit. The 1<sup>st</sup> Defendant agreed with the Plaintiff that without evidence of certificates of posting for the notices it cannot prove that it sent the notices to the Plaintiff. Flowing from this the 1<sup>st</sup> Defendant submitted that it did not lawfully rescind the sale agreement with the Plaintiff.

28. The 1<sup>st</sup> Defendant pointed out that the Plaintiff had abandoned the other reliefs in the Further Amended Plaint and was only pursuing specific performance but urged that the Plaintiff was not entitled to an order of specific performance because she did not comply with the terms of the agreement and that she had failed to demonstrate that she had been willing and ready to perform her part of the agreement at the time she filed suit.

29. With respect to the 2<sup>nd</sup> Defendant's counterclaim, the 1<sup>st</sup> Defendant submitted that it did not have the capacity to enter into the agreement with the 2<sup>nd</sup> Defendant because it had not properly rescinded the agreement with the Plaintiff. It therefore submitted that the agreement it got into with the 2<sup>nd</sup> Defendant was null and void. The 1<sup>st</sup> Defendant expressed its readiness and willingness to refund the monies it received from the Plaintiff and the 2<sup>nd</sup> Defendant.

30. The 2<sup>nd</sup> Defendant submitted that there was no binding agreement between the Plaintiff and the 1<sup>st</sup> Defendant which was capable of termination. The 2<sup>nd</sup> Defendant submitted that the transaction between the Plaintiff and the 1<sup>st</sup> Defendant failed to meet the legal requirements of Section 3 (3) of the Law of Contract Act. Further, that the Plaintiff had failed to demonstrate that she could comply and was ready and able to pay the consideration for this court to grant the order for specific performance that she sought. The 2<sup>nd</sup> Defendant pointed out the discrepancies regarding the date when the Plaintiff paid the 10% deposit on 4/12/2003 and the receipt dated 4/12/2003 bearing alterations which showed L.R. No. 97/43 for Tassia and not Kitisuru. The 2<sup>nd</sup> Defendant pointed out that the Plaintiff defaulted in remitting her monthly payments towards the purchase price even before she was posted to work in New Delhi. She maintained that the 1<sup>st</sup> Defendant duly issued notices to the Plaintiff when she failed to remit the monthly payments which notices warned the Plaintiff that if she failed to remedy the default the 1<sup>st</sup> Defendant would repossess the Suit Property.

31. The 2<sup>nd</sup> Defendant urged the court to grant the reliefs she sought in her Re-amended Defence and Counterclaim claiming that her evidence was uncontroverted by the Plaintiff or the 1<sup>st</sup> Defendant. She submitted that she complied with the conditions for the sale of the Suit property and made the requisite payments when they fell due. She submitted that she obtained the blueprints from her architects for the proposed house she was to construct including the bill of quantities. She commenced construction on the Suit Property until the court stopped the development. She added that she had a valid tenant purchase agreement dated 23/6/2007 which was registered at the lands office on 8/8/2007. She submitted that she had specifically pleaded and proved the special damages she sought in the counterclaim through documentary evidence.

32. The main issue for determination in this suit is whether the court should grant the reliefs sought by the Plaintiff or those sought by the 2<sup>nd</sup> Defendant. It is not in dispute that the tenant purchase agreement between the Plaintiff and the 1<sup>st</sup> Defendant was never executed. This is borne out by the fact that the Plaintiff's notice to produce this document served upon the 1<sup>st</sup> Defendant did not yield any result. The court notes that the Plaintiff paid the deposit of being 10% of the purchase price three months before the 1<sup>st</sup> Defendant offered to sell her the Suit Property and that that payment may well have been in respect of the Tassia plot that the Plaintiff was purchasing from the 1<sup>st</sup> Defendant.

33. It is also not in dispute that the Plaintiff defaulted in remitting the monthly instalments she had agreed upon with the Defendant. The Plaintiff submitted that the completion of the tenant purchase agreement was to occur over a period of 180 months which would have run from 2004 to 2019. She would still have been required to pay the monthly instalments when they fell due and not later for her to perform her contractual obligations.

34. The Plaintiff did not prove that at the time she filed this suit she was able, ready and willing to perform her obligations under the tenant purchase agreement which in any event was never executed by both parties and therefore did not meet the legal requirements of Section 3 (3) of the Law of Contract Act. The court declines to grant the order of specific performance sought by the Plaintiff. The Plaintiff's recourse lies in the 1<sup>st</sup> Defendant refunding the monies she paid to it together with interest at court rates from the date of filing suit until the sum is fully paid.

35. The 1<sup>st</sup> Defendant is to blame for the situation the Plaintiff and the 2<sup>nd</sup> Defendant found themselves in regarding the sale of the Suit Property for it terminated its agreement with the Plaintiff on account of her failure to remit her monthly payments but appeared to change its position to urge that it could not have lawfully entered into another agreement with the 2<sup>nd</sup> Defendant because it had not rescinded its agreement with the Plaintiff by sending her notices through registered post. There was no validly executed contract between the Plaintiff and the 1<sup>st</sup> Defendant. It was improper for the 1<sup>st</sup> Defendant to accept the lump sum payment from the Plaintiff after it had entered into an agreement with the 2<sup>nd</sup> Defendant over the same land.

36. The 2<sup>nd</sup> Defendant has proved on a balance of probabilities that she entered into an agreement with the 1<sup>st</sup> Defendant vide which it agreed to sell the Suit Property to her and duly paid the purchase price as agreed under the tenant purchase agreement. She took possession of the land and commenced development on it while paying the monthly instalments until January 2007 when the 1<sup>st</sup> Defendant and the court

stopped her from continuing with the construction on the suit land.

37. The 1<sup>st</sup> Defendant entered into an agreement with the 2<sup>nd</sup> Defendant for the sale of the Suit Property and it would not only be unjust to allow it to benefit from leading the 2<sup>nd</sup> Defendant to believe that it could lawfully sell her the Suit Property which it had repossessed from the Plaintiff, but also unconscionable to allow it to retain the Suit Property whose value has significantly appreciated over the years while this suit was pending in court. The 1<sup>st</sup> Defendant did not demonstrate that the 2<sup>nd</sup> Defendant defaulted in paying the monthly instalments when they fell due. From the evidence adduced, the 2<sup>nd</sup> Defendant was up to date with her payments until the Plaintiff filed this suit in 2007 and the 2<sup>nd</sup> Defendant was stopped from further constructing on the Suit Property.

38. The court allows the 2<sup>nd</sup> Defendant's counterclaim dated 15/11/2011 in terms of prayers 12 and 13. The court declines to grant the other prayers sought in the counterclaim. The 2<sup>nd</sup> Defendant did not adduce any evidence of payment of Kshs. 10,000/= per day which she claimed as damages against the 1<sup>st</sup> Defendant for stoppage of her construction.

39. The Plaintiff's claim to the Suit Property fails and she is to be refunded the sum of Kshs. 1,350,130.93 which she paid to the 1<sup>st</sup> Defendant together with interest at court rates from the date of filing suit until payment in full. The 1<sup>st</sup> Defendant will bear the costs of the suit and of the counterclaim.

Delivered virtually at Nairobi this 1<sup>st</sup> day of February 2021.

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. D. Nderitu holding brief for Mr. J. Awele for the Plaintiff

Ms. A. Oduor holding brief for Ms. C. Olendo for the 1<sup>st</sup> Defendant

Mr. Njenga Muchai for the 2<sup>nd</sup> Defendant

Mr. V. Owuor- Court Assistant