



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE 528 OF 2017

(FORMERLY MILIMANI ELC NO.1077 OF 2014)

(FORMERLY HCC. CASE NO.1088 OF 2003)

KARUNGA WOMEN COMPANY LIMITED.....PLAINTIFF

-VERSUS-

STEPHENSON KINGARA NG'ANG'A.....1ST DEFENDANT

KINGARA INVESTMENT LIMITED.....2ND DEFENDANT

JUDGMENT

By a *Plaint* dated **23rd October 2003**, the Plaintiff brought this suit against the Defendants herein and sought for the following orders:

- a. Mesne profits.**
- b. Special Damages equivalent to the value of the suit property.**
- c. Punitive and exemplary damages**
- d. General damages**
- e. Costs of this suit**
- f. Interest on (a) , (b),(c),(d) and (e) at Court rates**
- g. Such further or other orders as this Honourable Court may deem fit.**

In their statement of claim, the Plaintiff averred that at all material times relevant to the suit, upto **7th August 2001**, they were the registered proprietor of the suit property and around **1987**, they charged it to **Kenya Finance Bank Limited**, which is now under liquidation and secured a loan facility of **Kshs.1,500,000/=** advanced to it for purposes of developing the property. Due to financial difficulties, it was unable to service the loan and the bank opted to exercise its statutory power of sale. However, the 1st Defendant approached their Directors who were illiterate and offered to intercede on their behalf and forestall further adverse action. The Plaintiff believed these were good intentions and on **5th June 1995**, the parties met and agreed the 1st Defendant would negotiate with the bank redemption of their loan account; he would initially deposit a sum of **Kshs.2,000,000/=** of his own money with the bank and negotiate how the balance would be paid; take over management of the suit property for purposes of collecting rent from the Plaintiff's tenants which he would forward to the bank and deposit in its loan account, Upon the bank being satisfied with the running of the Plaintiff's account, then the parties would thereafter agree on how the Plaintiff's would compensate the 1st Defendant for his assistance.

It was the Plaintiff's allegation that following the said meeting, the 1st Defendant prepared what he purported to be the Minutes of what transpired and relying on his representations, the Plaintiff's officials/

Directors signed the resolutions but they later learnt the said resolution did not reflect what was discussed at the meeting as the 1st Defendant

took advantage of their illiteracy.

They particularized the misrepresentations and deceit as; deceiving them that the purported minutes/resolutions reflected the discussions at the meeting and causing the Plaintiff's officials to sign the minutes by pretending they were genuine; taking advantage of the Plaintiff's Directors' illiteracy and misleading them, concealing the true contents of the alleged minutes.

In pursuance of the agreement, the Plaintiff allowed the 1st Defendant to take possession of their said property and the Defendants started collecting rent from the tenants and continued to collect until the property was sold. In trusting the genuineness of the 1st Defendant and believing he would perform his part, the Plaintiff's Directors did not follow up with the bank but in breach of the agreement, the 1st Defendant failed to pay the loan arrears and therefore by **October 1996** the issue between the Plaintiff and the bank had never been resolved and the Plaintiff only came to know that the 1st Defendant offered to purchase the suit property from the bank and procured the Plaintiff's officials to execute an agreement for sale of the suit property dated **9th October 1996**, in favour of the 2nd Defendant by representing to its officials/Directors that they were executing, mere papers related to income tax department over the suit property and therefore its conduct was fraudulent.

Further, the Plaintiff particularized fraud by the 1st Defendant as misrepresenting to the Plaintiff and taking advantage of the illiteracy of its officials/Directors that the documents they were executing were papers related to income tax over the suit property, failing to disclose to them that they were executing a sale agreement, pretending that the Plaintiff could sell the property while the same was charged to the bank, purporting that the 2nd Defendant was buying the suit property.

It was their contention that the agreement could not be performed as Plaintiff was not in a position to sell the suit property as the property was charged to the bank, the bank could not discharge the suit property as the Plaintiff's account had not been redeemed, suit property could not be sold by private treaty, the bank was subsequently placed under liquidation by the **Central Bank of Kenya**.

The Plaintiff averred that in the meantime while the foregoing was taking place, the Defendants continued collecting rent amounting to **Kshs.57,000/=** per month and failed to remit the same either to the Plaintiff or to the Bank and eventually in exercise of its Statutory Power of Sale, the Bank sold the suit property for **Kshs.2,800,000/=** contrary to the value of the land of **Kshs.4,000,000/=** which was as a result of the 1st Defendant failing to perform its part of the agreement reached on **5th June 1995**.

It further averred that the Plaintiff learnt that the Notification of sale was served upon one **Simon Ng'ang'a**, a son to the 1st Defendant and Director of the 2nd Defendant who described himself as the caretaker and the said notification was never forwarded upon the Plaintiff. The highest bidder of the suit property during the Public Auction was **M/S Rune Farm** and the same **Simon Ng'ang'a** signed the sale agreement on their behalf and on **7th August 2001**, the suit property was transferred to the name of **Alice Wangari Ng'ang'a** and **Mary Wanjiru Kingara**, who are the wife and daughter-in-law of the 1st defendant respectively. It was its contention that the loss of the suit property is directly attributable to the Defendants whose main aim was to acquire the suit property for themselves which they have done by proxy.

The suit is contested and the Defendants filed their statement of Defence on **6th November 2003**, and denied all the allegations made in the Plaintiff. The 1st Defendant averred that if there was any meeting held on **5th June 1995**, the said Plaintiff's Directors having read and understood the implications of the resolutions and agreement voluntarily signed them. They denied taking possession of the suit property and collecting rent from the tenants and the Court was urged to dismiss the suit with costs and interest.

The matter proceeded for hearing by way of viva voce evidence and the Plaintiff called one witness and the Defendants called two witnesses.

PLAINTIFFS CASE

PW1 - Kellen Thumbi Ndirangu, adopted her witness statement dated **23rd March 2011**. She also produced her list of documents filed on **17th July 2009** and **20th May 2011**. She testified that she is the Director and treasurer of **Karunga Women Company Limited**, the Plaintiff herein. Further, that the Plaintiff had put up a building on the suit property and had taken a loan of **Kshs.1,500,000/=** and used the property as security. However, the Plaintiff was unable to service the loan which had accumulated to **Kshs.5,000,000/=**. The Plaintiff then requested **Mr. Kingara** to assist them with payment of the loan by taking the management of their building and then take over the loan payment. It was her evidence after the payment of the loan, the Plaintiff and 1st Defendant were to agree on the repayment of the said loan to the 1st Defendant. That the Bank went under and **Mr. Kingara** purchased their property without their knowledge. She stated that she does not know how to read and write, but she signed some documents that she did not know what they were about, but when she refused to sign, **Mr. Kingara** told her that the purpose of the documents was to confirm that they had cleared the loan payment. She later discovered that she was signing a sale agreement when the bank informed them that they had sold the suit property to **Mr. Kingara** and who later rented it out. It was her testimony that **Mr. Kingara** was to collect rent from the property after he had offset their loan. The tenants remained on the suit property even after he took over the management and the Defendants were collecting **Kshs.28,000/=** per month. She testified that **Mr. Kingara** never deposited the rent collected with the bank and eventually the Defendants bought the suit property without their consent at **Kshs.2,800,000/=**. She asked the Court to allow their claim.

On cross-examination, she testified that the Company had about 80 women and a number of them have since died. The decisions were being made by the **Chairlady**, the **Secretary** and the **Treasurer**. She became the treasurer in **1979** and the other officials have since died. It was her evidence that the three officials/Directors went to the bank and took a loan of **Kshs.1,500,000/=** and they were to pay **Kshs.20,000/=** per month. Initially they were paying **Kshs.5,000/=** and the repayment was for one year and they had a grace period of five months.

She testified that they used to collect about **Kshs.25,000/=** per month as rent and one of the officials was to collect it and deposit in the bank. However, the Plaintiff ran behind in loan repayment and the bank demanded **Kshs.5,000,000/=** from the Plaintiff and **Mr. Kingara** agreed to initially pay **Kshs.2,000,000/=** for them as they were unable to pay the loan. It was her evidence that **Mr. Kingara** did not pay the lumpsum

of **Kshs.2,000,000/=** and he defaulted on their agreement and the bank called them in the **year 1999** and informed them that **Mr. Kingara** had bought the house. She testified that **Mr. Kingara** deposited the money in his account and they were later told that the bank went under and **Kshs.2,000,000/=** deposit did not settle the loan. It was her further testimony that **Mr. Kingara** summoned them to an Advocates office and asked them to sign some documents and when she refused, he persuaded her as he claimed that they were meant to bring the claim from the bank. She then signed the documents but they did not inform the bank and only became aware it was a sale agreement when the bank informed them that **Mr. Kingara** had bought the property and the property registered in the name of his wife and daughter. She stated that the Plaintiff's Secretary was illiterate. It was her evidence that the collected monthly rent was always deposited in the bank. Further that the Plaintiff had built the ground floor and members made their monthly contributions to build the rooms in the property and by the time the property was sold by the bank to **Mr. Kingara**, it was in the Company's name and that she did not know how the property was sold and **Mr. Kingara** ought to tell them how he purchased the property.

DEFENCE CASE

DW1 - Stephenson Kingara Nganga, the 1st Defendant herein adopted his witness statement dated **16th January 2018** and also produced his bundle of documents filed on **8th February 2018**. He testified that he is the **Director of Kingara Investment Limited**. That the Plaintiff came to him seeking assistance as their property was being sold by the bank as they had borrowed **Kshs.1,500,000/=** for construction of a building at Ruiru. He testified that the interest had accumulated to **Kshs.9,000,000/=** and since he could not help them they allowed him to talk to the bank. After several meetings with the Bank officials, he agreed to pay **Kshs.4,000,000/=** and further held a meeting with the women who were members of the Plaintiff in **1995** and when he informed them about the status of the loan, they resolved to sell the property, to him with no objection. When he visited the property the condition was bad and the Plaintiff had not completed the construction and when he advised them to look for a good contractor to do repairs, they gave a list of what was needed and the Company agreed to buy out the property at **Kshs.4,000,000/=** and the bank was holding the documents. That he informed the bank about the resolution but the Bank refused to allow the said sale as it wanted a deposit of **Kshs.6,000,000/=** from him before forfeiting the other interest. The Company negotiated further and the purchase price was reduced to **Kshs.5,000,000/=**. He testified that the **Kshs.5,000,000/=** was the agreed purchase price for the property and when he informed the Plaintiff of the development, and since they were desperate, they agreed to the said arrangement. He testified that his Advocates then drew a sale agreement and he explained it to Plaintiff's officials, who signed the agreement and DW1 paid the money to the bank. That he paid an initial **Kshs.2,000,000/=** to the bank and he was advanced **Kshs.3,000,000/=** by the bank wherein he was to pay **Kshs.100,000/=** per month. However, the bank collapsed before the property was transferred to him. He got a letter from the contractor who stopped further construction as they had not been paid. He then left everything to his Advocates after the bank wanted to sell the property through Public Auction. However, he objected the said sale and went to court but lost the case. Then the property was sold in a public auction and he does not know how the case was concluded. He urged the Court to dismiss the Plaintiff's suit.

On cross-examination, he testified that he knew some of the women and some of them did not know how to read and write but the Secretary was literate and as he had interacted with her. He testified that he did not know who prepared the resolution reached on **5th June 1995**, as he did not prepare it, but he took it to the officials to sign. He was not aware of the meeting referred to by the Plaintiff but he confirmed that the Plaintiff signed the documents because they had legal advice. That he had initially offered to purchase the property for **Kshs.4,000,000/=** and confirmed that the letter dated **17th October 1996** was written by the Plaintiff's officials. However he finally purchased the property for **Kshs.5,000,000/=** and there was a Sale Agreement which he signed dated **9th October 1996**, before his Advocate who explained to the Plaintiff's officials the import of the same before they signed it. Further that he was to deposit **Kshs.2,000,000/=** with the bank and he wrote a letter to the bank to pay that money from his account and the money was later used to purchase the property.

It was his contention that the Liquidator wanted to stop the sale. He was given possession of the property by the Plaintiff and he did not find any tenants and he renovated the building. It was his testimony that by a letter dated **22nd April 1996**, he told the bank that there were tenants in the building and that he did not continue to collect rent as he asked the tenants to move out because he wanted to renovate the building. He also stated that he was not aware that the Plaintiff had asked him to stop collecting rent from the building. Further that the building was never in his name and that by the time he was taking over from the Plaintiff, the ground floor had been built and he did built several floors thereafter. It was his evidence that the property was sold by public auction for **Kshs.2.8 million** and he had offered **Kshs.5,000,000/=** before and he did not know what happened. He acknowledged that **Mary Wanjiru Kingara**, is his wife and denied having a hand in the process and he did not know how his wife acquired the suit property.

On re-examination, he stated that he did not write the letter dated **12th October 1996**, and the money in his account was to pay the purchase price through his authorization.

DW2 - Wangai Nyuthe, an Advocate of the High Court of Kenya and a former partner at the **K.Mwaura & Co. Advocates** who were advocates for both parties adopted his witness statement dated **28th November 2014**. He further testified that in **1996**, the parties requested him to do a sale agreement in respect to the plot in **Ruiru Town No.94**. The Plaintiff was represented by two officials whom he talked to and prepared the sale agreement and the plot was sold for **Kshs.5,000,000/=** after he explained to them what the agreement entailed. He also prepared a transfer of lease and the parties signed. One **Kellen Thumbi** and **Margaret Wanjiku** signed on behalf of the Plaintiff and they had the official seal of the Company which was affixed. He produced the letters from **K. Mwaura & Co. Advocates**, as exhibits and confirmed that they were genuine letters. It was his evidence that none of the parties objected to the clauses of the **Sale Agreement**.

On cross-examination, he stated that he had not met the Plaintiff's officials before and the sale agreement was clear. He testified that he identified the women by their Identity Cards and they also had the Company's resolution and the 1st Defendant also identified them to him. He further testified that in the transfer of lease, though it is a statutory form, he did not indicate who appeared before him and how he identified them. Further that after the agreement, he represented the Defendants as the relationship between the parties became bad because the bank that financed the Defendants went under. He denied that the transaction collapsed with the bank because even as the bank went under, it was still demanding the money. He stated that the 1st Defendant was to pay **Kshs.2,000,000/=** and though he did not act for him in that transaction, he believes that the money was paid as it was in the Defendants' Account. He stated that the officials of the Plaintiff were not illiterate as they had discussed the matter and the allegations that they did not understand the language of the document is an afterthought.

On re-examination he confirmed that the instructions that he received is what is in the pleadings and it is upon the Plaintiff to produce evidence and the Court to make determination.

After the close of *viva voce* evidence, the Court directed the parties to file written submissions and the Plaintiff through the **Law Firm of Theuri Wanjohi & Co. Advocates**, filed their submissions on **11th July 2018** and submitted that the Defendants were in breach of their agreement and the Plaintiff is entitled to recover the value of the land from the Defendants.

The Defendants through the **Law Firm of C.N Kihara & Co. Advocates**, filed their rival written submissions on **16th October 2018**, and relied on various provisions of the law and decided cases amongst them **Section 4(2)** of the **Limitations of Actions Act Cap 22, Laws of Kenya**. It was submitted that the Plaintiff's suit is time barred and the Court cannot grant the reliefs sought.

The Court has now carefully read and considered the pleadings herein. The Court has further considered the evidence on record together with the exhibits thereto. The Court too has considered the written submissions, the cited authorities, the relevant provisions of law and renders itself as follows:-

There is no doubt that the Plaintiff, **Karunga Women Company Limited** was incorporated in **1973** as is evident from the **Certificate of Incorporation** dated **12th November 1973** on **page 103** of the Plaintiff's Supplementary bundle of documents.

There is also no doubt that the said Company was allotted **Plot No.Ruiru Town/94 on 22nd March 1973** as can be discerned from the **Certificate of Official Search** dated **15th June 2000**.

It is also not in doubt that in the **year 1987**, the Plaintiff did obtain a loan of **Kshs.1,500,000/=** from **Kenya Finance Bank Ltd**. The said loan was secured by the Certificate of title for **Ruiru Town/94**, owned by the Plaintiff. The parties were also in agreement that on the suit property, there was a building that had been constructed upto ground floor wherein the plaintiff had rented some rooms to different tenants as at the year **1995**. It is also not in doubt that the Plaintiff had ran into trouble with the Bank since the loan repayment was in arrears and the said Bank had threatened to sell the suit property by Public Auction.

Further, it is clear that in the **year 1995**, (specifically on **5th June 1995**), the Plaintiff's members and the **1st Defendant** held a meeting wherein the issue of bailing out the suit property was discussed. Plaintiff through its witness **Kellen Thumbi** averred that the agreement reached was that the **1st Defendant** was to assist them pay the loan to the Bank and in return he would take control of the rent collection from the suit premises and after settlement of the loan, the Plaintiff and **1st Defendant** would meet again and agree on how the Plaintiff would repay the **1st Defendant's** loan. However, the **1st Defendant** has alleged that in the said meeting of **5th June 1995**, the Plaintiff requested him to purchase the suit property which he reluctantly agreed and thereafter began the transaction process. However, this is a disputed issue which will be determined by the court.

What is not in dispute is that the **1st Defendant** began the process of purchasing the suit property which culminated in the execution of the **Sale Agreement** dated **9th October 1996**, which was drawn by the **Law Firm of K. Mwaura & Co. Advocates**, which Law Firm acted for both parties. From the **Sale Agreement**, it is clear that the suit property was being purchased for **Kshs.5,000,000/=**, wherein the **1st Defendant** was to pay down payment of **Kshs.2,000,000/=** with the Bank and the balance of **Kshs.3,000,000/=** was to be given by the Bank as a loan to the Defendants and the suit property was to be used as security.

However, the Bank went under before the finalization of the transfer process and therefore the Plaintiff's Loan remained unpaid. It is also evident that by then, the Defendants had taken possession of the suit property and were collecting rent. The Plaintiff testified that as at **1995**, the rent being collected was **Kshs.28,000/=** which the Defendants later doubled to **Kshs.57,000/=**.

However, the Defendants did not repay the loan and the sale transaction did not materialize. The suit property was eventually sold by way of **Public Auction** on **28th February 2001** for **Kshs.2,800,000/=**. The property was purchased by **Rune Farm Ltd** and was later registered in the joint names of **Alice Wangare Nganga** and **Mary Wanjiru Kingara** on **7th August 2001**.

The Plaintiffs alleged that the two are daughter-in-law and wife of the **1st Defendant**. DW1 admitted the above facts.

From the above analysis, it is clear that even after the meeting of the Plaintiff and **1st Defendant** on **5th June 1995**, the Plaintiff eventually lost the suit property in **2001** when it was sold through the instructions of the Liquidator by way of **Public Auction**. The Plaintiff has alleged that the **1st Defendant** misled them and cheated them out of their suit property which was eventually purchased by his relatives in the year **2001** for **Kshs.2,800,000/=**, yet **6 years** earlier the suit property was being sold at **Kshs.5,000,000/=**. The Plaintiff has urged the Court to allow its claim.

The above being the undisputed issues, the Court will proceed and frame issues for determination. The Court has considered the court record and have noted that only the Plaintiff filed Statement of issues. The Defendants did not file their issues for consideration by the court. The Plaintiff had identified fourteen issues for determination. However the Court is not bound by the said issues and will proceed to frame its own issues for determination. Consequently, the Court finds the issues for determination are:-

i. Whether the suit is time barred?

ii. What was the agreement between the Plaintiff and the 1st Defendant over the suit property?

iii. Was there breach of trust by any of the parties herein?

iv. Is the Plaintiff entitled to the prayers sought?

v. Who is to bear costs of this suit?

i) Whether the suit is time barred?

The Defendants have averred that the Plaintiff's suit is founded on **Fraud** and the said **Fraud** was allegedly discovered in **1999**. However, the Plaintiff did not file the suit until the year **2003**. It is trite that the issue of Limitation goes to the jurisdiction of the court and jurisdiction is everything. Without jurisdiction, the court has no option but to down its tools. See the case of **The owners of the Motor Vessel 'Lilian S'...Vs... Caltex oil (Kenya) Ltd 1989 KLR 1**, where the Court held that:-

"..Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

It is also trite that the Defence of Limitation must be pleaded before a party can rely on it and for the court to entertain it. The Defendants herein had filed a **Preliminary Objection** on **3rd December 2014** and had alleged that the suit herein was time barred. The said **Preliminary Objection** was canvassed by way of written submissions which rival submissions were duly filed by both parties. However, instead of the court granting a Ruling date, the matter was set down for hearing. The parties therefore canvassed the issue of Limitation at an earlier stage and later left it to court to decide but the same has also been submitted upon by the Defendants in their instant written submissions. This Court therefore has no option but decide on the said issue. See the case of **Housing Finance Company of Kenya...**

Vs...J.N Wafubwa (2014) eKLR, where the Court held that:-

"However where as is the case here, the parties have canvassed the issue and left it to court, the court can pronounce judgment on it though it was not pleaded."

Further, the Court can still make a decision on unpleaded issues as was stated in the case of **Odds Jobs...Vs...Mubia(1970)EA 476** where the Court of Appeal held that:-

"A court may base its decision on unpleaded issue if it appears from the course followed at the trial court that the issue has been left to the court for decision."

The Defendants have submitted that the whole suit must fail due to the fact that the suit is founded on acts of tort and breach of trust and also on allegations of fraud. That the said issues should have been brought to court within a period of **3 years** after discovery of the said action. Further, that the Plaintiff testified that they discovered that the 1st Defendant has mislead them in **1999**, but however this suit was not filed until **2003**. See **Section 4** of the **Limitations of Actions Act, Cap 22 Laws of Kenya** provides that:-

"An action founded on tort may not be brought after the end of three 3 years from the date on which the cause of action accrued."

However, the Plaintiff submitted that the issue herein is involving land and the suit can only be time barred if the suit was brought after **12 years** as

provided by **Section 7** of the **Limitation of Actions Act** which provides:-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"

This Court has considered the pleadings and particularly the **Plaint**. The Plaintiff's cause of action hinges on alleged **Agreement** that was entered between the Plaintiff and the 1st Defendant on **5th June 1995**. The Plaintiff alleged that the 1st Defendant did breach the said agreement by going against what the parties agreed. Therefore this Court finds that the Plaintiffs' suit is founded on a mixture of breach of an agreement entered on **5th June 1995** and breach of trust.

At the core of the said agreement is ownership of the suit property **Ruiru Town/94** which is a **claim** over land. The law of Limitations is very clear that a claim over land becomes time barred after **12 years**. See **Section 7** of the **Limitation of Actions Act**.

Therefore, this Court finds that the Plaintiff's suit herein was filed in the **year 2003** and the cause of action had occurred in the **year 1995** and therefore the suit is not time barred as alleged by the Defendants. See the case of **Judith Wanjiru Thwagi & 2 Others...vs...David Nyoike Waweru & 19 Others (2018)eKLR**, where the Court held that:-

"Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued having found that the right of action accrued in the month of November or thereby in the year 2006, clearly 12 years had not lapsed prior to the filing of the present suit"

ii) What was the agreement between the Plaintiff and the 1st Defendant over the suit property?

The Court had earlier noted that there is no doubt that a meeting was held on **5th June 1995** between the Plaintiff and the 1st Defendant wherein **Plot No.Ruiru Town/94** was discussed. The Plaintiff owned the said property but which property was on the verge of being sold by the bank (**Kenya Finance Bank Ltd**) by **Public Auction** due to loan arrears. The Plaintiff alleged that in the said meeting, they discussed how the 1st Defendant was to bail the Plaintiff out by clearing the said loan with the Bank and the 1st Defendant was given possession of the suit property and collection of rent which rent was about **Kshs.28,000/=**. However, the 1st Defendant produced an alleged agreed way forward or resolution for **Plot No.Ruiru Town/94**, which had been reached between himself and the Plaintiff. That the meeting had resolved that the 1st Defendant (**Stephen Kingara**) could sell the building to a willing buyer other than the Bank, and the Plaintiff handed over authority to the 1st Defendant to discuss the building with the Bank.

The Plaintiff through its witness PW1 stated that the Plaintiff's members were illiterate and unsophisticated and that they did not understand what the 1st Defendant drafted as resolutions of the meeting. It is clear from the evidence of PW1 and DW1 that the Plaintiff was desperate to salvage its property. This Court also believe that the Plaintiff which was a Company made of a group of Women who were mostly illiterate had sought the assistance of DW1 to secure the suit property, but not to have the same sold. The Court says so because there was a threat from the Bank to have the suit property sold by way of **Public Auction** and if Plaintiff were willing to have the property sold, then it would not have looked for ways of salvaging the same but could just have allowed the Bank

to proceed with the said **Public Auction**. The Court therefore finds and hold that as testified by the Plaintiff's witness, the agreement between the Plaintiff and the 1st Defendant was to salvage the suit property from being sold by the Bank. However, the resolution as drafted by 1st Defendant reflected a different scenario.

iii) Was there breach of trust by any of the parties herein?

PW1 testified that the Company believed and trusted that the 1st Defendant would bail the Plaintiff out of the loan arrears with the Bank.

That the 1st Defendant had promised to deposit **Kshs.2,000,000/=** with the Bank to clear part of the arrears and trusting him, the Plaintiff's officials gave him possession of the suit property and also collection of rent from the building erected on the suit property.

It is evident that from exhibits produced in court that after the meeting of **5th June 1995**, the 1st Defendant allegedly wrote to the Chairlady of the Plaintiff's Company and intimated that the 2nd Defendant was willing to buy the suit property at **Kshs.4,000,000/=**. The alleged letter was written on **6th October 1995**, and the Plaintiff alleged that they never received the said letter. Further, that the letter in response dated **12th October 1995**, was never authorized by the Plaintiff's Directors and they were not aware that the Defendants were planning to have the suit property sold.

The Court did consider the demeanor of PW1 while she was testifying in court and even during cross-examination. This Court found no reason to doubt her evidence, that indeed the Plaintiff officials were not fully aware that the 1st Defendant had looked for a buyer for the suit property and the buyer was his Company, the 2nd Defendant. The 1st Defendant went ahead and negotiated with the Bank and finally the suit property was allegedly being sold to 1st Defendant for **Kshs.5,000,000/=**. All this time the 1st Defendant was in possession of the suit property and was also collecting rent therefrom.

It is evident that the Bank went under before the alleged sale had gone through. The Plaintiff testified that the 1st Defendant did not inform them that he was not paying the loan arrears to the Bank and he was also not remitting the collected rent to the Bank nor to the Plaintiff. It is for that reason that the Plaintiff through **L. K. Waweru Advocates** and **Njoroge Baiya & Co. Advocates** wrote two letters dated **3rd June 1998** and the other dated **15th October 1998**, seeking to be handed over the suit property by the 1st Defendant. DW1 on his part testified that he was indeed trying to bail out the Plaintiff but there was no explanation why he took possession of the suit property and rent collection but did not remit the said collected rent as part payment of the loan arrears. The Court finds and holds that the 1st Defendant was in breach of trust that was bestowed upon him by the Plaintiff which was made up of a group of illiterate women who had looked upon him for assistance.

iv) Is the Plaintiff entitled to the prayers sought?

It is evident that the Plaintiff herein though had solicited for the assistance from 1st Defendant, ended up losing the suit property which was sold to **Rune Farm Ltd** through **Public Auction**. It is evident from the arrangement entered by 1st Defendant and the bank that 1st Defendant was to purchase the suit property for **Kshs.5,000,000/=** wherein he was to deposit initial **Kshs.2,000,000/=** to the bank and the balance of **Kshs.3,000,000/=** which was to be paid in **30 months** of **Kshs.100,000/=** per month. However, from the available evidence, instead of the 1st

Defendant depositing the **Kshs.2,000,000/=** in the loan account of the Plaintiff, he made a fixed deposit of **Kshs.1,000,000/=** in favour of his account held at the bank and further **Kshs.700,000/=** that was held in his account of his son **Nganga John Mungai** and **Kshs.451,000/=** was held in the Current Account. Therefore there was no deposit of **Kshs.2,000,000/=** to the Bank as part payment of the purchase price nor for offsetting part of the loan. For that reason, the loan continued to accrue interest. Further though the 1st Defendant continued to collect rent from the suit premises, he did not remit the said collected rent towards clearing of the loan arrears. Though 1st Defendant said he had brought down the building that he took possession from the Plaintiff, there was no evidence to that effect and further how could he bring down a building before he had wholly acquired it. Even if he brought it down, that was done before the Plaintiff's loan had been cleared and therefore he was in breach of trust and agreement.

It is also not in doubt that after the collapse of the transaction, the 1st Defendant did not hand over the suit property to the Plaintiff but through various correspondences from his advocate, the 1st Defendant alleged that he was the owner of the suit property. Further, the 1st Defendant did not pay the purchase price nor clear the loan arrears and for that reason, the suit property was advertised to be sold by way of **Public Auction**. From the exhibits produced in court, it is clear the **Notification of Sale** was served on **Simon Nganga**, the alleged caretaker of the building. The said **Notification of Sale** was allegedly not brought to the attention of the Plaintiff.

Further, it is evident that at the **Public Auction**, the suit property was sold to **Rune Farm Ltd** which was allegedly the highest bidder for **Kshs.2,800,000/=**. Thereafter the said property was transferred to **Alice Wangari Nganga** and **Mary Wanjiru Kingara** who are daughter-in-law and wife of the 1st Defendant. Even if the 1st Defendant alleged that he had no control over who purchased the suit property via Public Auction, it could not be a coincident that the suit property was sold due to loan arrears though 1st Defendant had promised to settle it. It was sold to the relatives of the 1st Defendant at **Kshs.2,800,000/=** in the year **2001**, yet in **1996**, the same had been offered for sale at **Kshs.5,000,000/=**. The Court finds that the 1st Defendant had a hand in all the above and his actions caused the Plaintiff to lose the suit property which its members had fully entrusted to him. For the above reasons, the Court finds that the Plaintiff is entitled to the prayers sought.

The Plaintiff in its claim has sought for special damages equivalent to the value of the suit property. It is indeed clear that in the year **1996**, the 1st Defendant had offered to buy the suit property at **Kshs.5 million** and a **Sale Agreement** was entered to that effect. The 1st Defendant collected rent arrears and did not remit the same to clear the loan. Failure to do so caused the Plaintiff to lose their land and building.

The Court finds that the Plaintiff had sought for **special damages** of **Kshs.4,000,000/=** being the value of the suit property. The Court will grant the same.

Further, the Plaintiff sought for **mesne profit** being the value of rent collected by the 1st Defendant from **June 1995 to July 2001**. The Plaintiff had testified that by **June 1995**, when they handed over the suit property to the 1st Defendant, it was fetching **Kshs.28,000/=** per month which they later increased to **Kshs.57,000/=**. There was no evidence of such increase and the Court will find and hold that the suit property was fetching **Kshs.28,000/=** per month from **June 1995 to July 2001** and that is the amount the Plaintiff is entitled to as mesne profit. Consequently, the Court finds that from **June 1995 to July 2001**, the Plaintiff is entitled to **Kshs.2,016,000/= as mesne profit**.

The Plaintiff has sought for General damages. '**General damages**' is described by the **Black Laws Dictionary** as:-

“General damages are damages that the law presumes follow from the type of wrong complained of; compensatory damages for harm that so frequently result from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. General Damages do not need to be specifically claimed.”

Having considered the nature of this case, the Court finds that the Plaintiff is entitled to **General damages** of **Kshs.1,500,000/=**. However, the Court finds that the **Plaintiff is not entitled** to **punitive and/or exemplary damages**.

v). **Who should bear costs of this suit?**

As provided by **Section 27** of the **Civil Procedure Act**, costs are awarded at the discretion of the court. Ordinarily costs follow the event and are awarded to the successful litigant. The Plaintiff herein is the successful litigant. It is thus **awarded costs of the suit and interest thereon**.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved its case against the Defendants on the required standard of balance of probabilities.

For the above reasons, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally on the following terms:-

- a. **Mesne Profit at Kshs.2,016,000/=**
- b. **Special damages on the value of the property at Kshs.4,000,000/=.**
- c. **General damages of Kshs.1,500,000/=.**
- d. **Costs of the suit and interest at court rate from the date of filing of the suit to payment in full.**

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of July 2019.

L. GACHERU

JUDGE

4/7/2019

In the presence of

Mr. Wanjohi for Plaintiff

Ms. Njuru Holding Brief for Mr. Kihara for 1st & 2nd Defendants

Lucy - Court Assistant

L. GACHERU

4/7/2019

JUDGE