Njenga v Rajmuk Investments Limited & 3 others (Environment & Land Case 1157 of 2016) [2025] KEELC 4023 (KLR) (19 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4023 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1157 OF 2016

LN MBUGUA, J

MAY 19, 2025

BETWEEN

MICHAEL NJENGA .... PLAINTIFF

AND

RAJMUK INVESTMENTS LIMITED .... 1ST DEFENDANT

STANLEY MUKIRA KIDIAVAYI .... 2ND DEFENDANT

KCB BANK .... 3RD DEFENDANT

REGISTRAR OF TITLES NAIROBI .... 4TH DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit vide a plaint dated 25.6. 2013.He avers that the 1st defendant is the registered lessee from the Government of Kenya parcel L.R. 209/118/56 whereon it has erected a 2 bedroom apartment identified as A1 with the right to exclusive use of two parking bays marked as A1 and A2 (the suit property). The 2nd defendant has leased the suit property from the 1st defendant.
2. That the plaintiff entered into a sale agreement dated 30.11.2009 and an addendum thereto dated 2.11.2010 with the 2nd defendant for purchase of the suit property, of which the plaintiff fully paid the purchase price and made improvements thereon to the tune of Ksh. 500,000/=, but the 2nd defendant went ahead to forcefully evict him.
3. The plaintiff therefore prays for judgment against the defendants jointly and severally for;
    a. A declaration that the agreements dated 30.11.2009 and the addendum thereto dated 2.11.2010 between the plaintiff and 2nd defendant for sale and transfer of the 2nd defendant's proprietary rights and interests in Apartment No. A1 and 2 parking bays numbered A1 and A1 situated on LR No.209/118/56 are legally and equitably valid.

b. Specific performance of the agreement of sale and purchase of the 2nd defendant's proprietary rights and interests in Apartment No. A1 and 2 parking bays numbered A1 and A1 situated on LR 209/118/56 between the plaintiff and the 2nd defendant.

c. A declaration that the 2nd defendant, his agents and/or servants and/ or any other person howsoever claiming under them has no right to continue being in occupation of Apartment No. A1 & 2 parking bays numbered A1 and A1 situated on LR 209/118/56 contrary to the plaintiff's rights and interest thereon.

d. A permanent injunction against the 1st,2nd & 3rd defendants either by themselves, their agents, servant in any manner howsoever from transferring, selling, conveying, charging, leasing, or in any way dealing with or trespassing onto or continuing further trespass on apartment No.A1 and 2 parking bays numbered A1 and A1 situated on LR 209/118/56 and/or interfering with the plaintiff's legal ,proprietary, beneficial, contractual and/or equitable rights and interest to take over, possess, occupy, enjoy and own the apartment.

e. The 1st and 2nd defendants, their agents, servants and/or employees to render to the plaintiff vacant possession of Apartment No. A1 and 2 parking bays numbered A1 and A1 situated on LR 209/118/56.

f. General damages against the 2nd defendant for trespass and unlawful interference of the plaintiff's interest and economic duress.

g. The 4th defendant, its agents, servants, employees and or in any manner howsoever be restrained from registering, and/or effecting any further conveyance, transfers, charges, leases, subdivisions, or any dealing in apartment No.A1 and 2 parking bays numbered A1 and A1 situated on LR No.209/118/56 contrary to the plaintiff's interests.

h. The 4th defendant to rectify any transfers effected by the 1st, 2nd & 3rd defendants so to safeguard and reflect the plaintiff's beneficial, equitable and legal proprietorship interests on Apartment No. A1 and 2 parking bays numbered A1 and A2 situated on LR No.209/118/56.

i. Mesne profits against the defendants and rent money and costs charges incurred by the plaintiff as a result of the illegal allocation and for securing alternative housing.

j. In lieu and alternative to the foregoing the defendants to pay and refund to the plaintiff ksh.500, 000/= costs and expenses incurred in improving the apartment and installing 10,000 litres water storage tank,2 litre instant showers, high quality locks and other fixtures and fittings of total and the defendants to also refund to the plaintiff ksh.6,146,000/= directly paid to the defendants and other sums indirectly paid to the defendants.

k. Interest on (g) above and costs of and incidental to the suit and interest at court rates.

l. The 3rd defendant to recover from the 2nd defendant the loan amounts payments which he made to the 2nd defendant's account under the terms of agreements but which the 2nd defendant deceptively withdrew the money for purposes of frustrating the 3rd defendant's recovery.

(m) Any other remedy as the Honourable court may deem fit and applicable in the circumstances.

4. The suit is opposed by the 2nd defendant vide his defence, set off and counterclaim dated 18.10.2018. He denied the allegations leveled against him in the plaint. He admitted to the sale agreement between him and the plaintiff, but contended that it was terminated after the plaintiff defaulted in payments

as it was a term of the agreement that he was only to transfer his rights in the suit premises upon full payment of the purchase price.

5. He also avers that before the sale agreement, the plaintiff was a tenant in the suit premises paying a monthly rent of ksh.50,000/= as well as a service charge fee of ksh.8,000/=. That the plaintiff was in arrears of ksh.2.2 million being rent for 44 months from November 2009 to June 2013 and ksh.352,000/= being the service charge of 44 months making a total arrears of ksh.2,552,000/=.

6. In his counterclaim, the 2nd defendant seeks the following reliefs;

   a. That the plaintiff's suit be dismissed with costs.

   b. Damages for breach of contract.

   c. Interest thereon at court rates from the date of the filing of this defence and counterclaim until payment in full.

   d. Costs of the set-off and counterclaim.

   e. Any other relief the court deems fit to grant.

7. The plaintiff filed a reply to the 2nd defendant's defence and defence to counterclaim dated 11.12.2018. He avers that the inability by the 2nd defendant to furnish the completion documents frustrated the sale and led to breach of the agreement.

8. The claim against the 3rd defendant was withdrawn by a consent recorded on 14.7.2016, while the notice of withdrawal of the case against the 1st and 4th defendants was filed on 25.7.2016. Thus the 2nd defendant is now a sole defendant in this suit.

Case for the plaintiff

9. The plaintiff Michael Njenga testified as PW1. He adopted his witness statement dated 25.6.2013 as his evidence in chief. He also produced documents contained in his list dated 25th June 2013 as P. Exhibit 1-7.

10. In his oral testimony, he told the court that he entered into a sale agreement with the defendant on 30.11.2009 which was amended on 2.11.2010 because the completion date contemplated in the 1st sale agreement was not feasible and the price was changed.

11. It was his testimony that he paid a deposit of ksh.770,000/= and khs.2,040,000/= before the deed of amendment was executed and continued making payments to the seller paying a total of ksh.6,146,000/=.

12. That upon signing the deed of amendment, he approached I & M bank who agreed to grant him a facility to enable him pay the balance of ksh.3 million of which the bank agreed to advance him ksh.4 million as per the letter of offer dated 29.3.2012. By then, the completion date under the deed of amendment was 30.12.2010.

13. He averred that the seller was not able to give him the completion documents because Savings and Loans insisted that that the vendor owed them over Kshs. 7 million.

14. He contends that he was evicted from the suit premises ostensibly on the basis of a court order, but he later learnt that it was fake, as there was no distress for rent.

15. In his witness statement, Pw1 contends that it was a term of the agreement between him and the defendant that the latter was entitled to interest and/or only 10% of deposit in the event of any default on his part.

16. That he improved the suit premises by installing 10,000 litres water storage tank, 2 litres instant showers, high quality locks and other fixtures and fittings at a cost of Kshs. 500,000/=, but the 2nd defendant with a view of frustrating the agreement violently and forcefully evicted him.

17. In cross-examination, PW1 stated that the completion period for the sale of the suit premises was February 2010 and as at that time, he had not paid the purchase price of ksh.7.7 million.

18. He averred that clause 2.2 of their addendum agreement dated 2.11.2010 came about due to his financial difficulties, he was to be paying ksh.500,000/= from August with ksh.87,000/= going towards paying the mortgage and the balance was to go to the vendor's account.

19. He pointed out that on 9.12.2010, he paid ksh. 90,000/= and the cheque bounced and was replaced as ksh. 87,000/= a day later of which ksh.550 was deducted as charges for bouncing of the cheque but he did not pay it.

20. That on 31.1.2011, he paid Kshs. 190,000/= then Kshs. 105,000/= and in March of that year, he did not make a deposit. He then paid ksh.200,000/= on 26.5.2011 and ksh.200,000 on 8.9.2011 but the cheque bounced, then on 27.10.2011, he paid ksh.97,000/= via a cheque which bounced.

21. He then skipped paying in December and paid ksh.400,000/= on 6.1.2012 and another ksh.200,000/= on 3.5.2012 which bounced of which he was charged ksh.550 but did not pay. His cheque of ksh.140,000/= paid on 28.12.2013 also bounced. But he paid a further sh. 150 000 on 12.6.2012, a cash payment of 100 000 on 14.6.2012 and sh.50 000 on 16.6.2012, as well as sh.10000 on 26.1.2013

22. He admitted that he was paying randomly and that as per the addendum agreement, the completion date was 31.12.2010 but he was making payments even by 2013 in breach of the addendum agreement.

23. He stated that ksh.754 ,000/= was never acknowledged and that he paid ksh.6.1 million though he did not have evidence to that effect. The remaining balance was Ksh. 3 million.

24. Referred to the letter dated 23.11.2011 addressed to him by the vendor's advocates stating that he wished to rescind the sale agreement, PW1 stated that he saw the said letter but insisted that he was not given a termination notice.

25. Referred to the letter dated 19.4.2012 addressed to his advocates by the 2nd defendant's advocates, he admitted that he was given a termination notice. He also admitted that correspondences at page 39-44 of the 2nd defendant's bundle addressed to the 2nd defendant indicate that the mortgage account had arrears and interest and penalties were accruing and it was in arrears since he took over.

26. He reiterated that he was away on the day he was evicted and that it is his wife who was presented with an eviction order, but there was no distress for rent adding that they negotiated with auctioneers for them to leave.

27. He stated that he was to get vacant possession upon paying the full purchase price but he did not pay, adding that he was a tenant to own. He could have been paying just ksh.40,000/= if he was a regular tenant adding that as a tenant, he must have overpaid. Further, as a tenant, he ought not to have been distressed for rent.

28. He stated that if the 2nd defendant rescinded the agreement, he ought to have refunded him, adding that he had no receipts to the effect that he spent ksh.500, 000/= to improve the suit premises and that the same is not captured in the agreement.

29. In re-examination, PW1 reiterated his evidence in chief and in cross-examination.

Case for the Defendant

30. The case for the defendant was advanced by Isaac Kidyavai DW1 who was acting for the defendant pursuant to a Power of Attorney dated 8.2.2007. He adopted the defendant's witness statement dated 28.7.2014 (date not clear) as his evidence in chief and produced 10 documents from a list dated 4.2.2022 as D. Exhibit 1-10. In the said statement, the defendant avers that their agreement stipulated that the plaintiff was to pay Kshs 10% of the purchase price, which he paid and the balance was to be paid in monthly installments of Ksh.500 000, which terms the plaintiff breached. He also contended that the agreement did not provide for the development of the property by the plaintiff. The other payments allegedly made by the plaintiff are denied.

31. In his oral testimony, Dw1 averred that the plaintiff was a tenant on the suit premises before he showed interest in the property, he was paying rent of ksh.50,000/= and service charge of ksh,8,000/= and that they availed a notice for him to vacate but he did not, until he was distressed for rent. That the plaintiff was not evicted vide a court order and that he doesn't owe the plaintiff any money as what he paid was taken up as rent, while other costs were taken up by bank charges when he issued bouncing cheques.

32. In cross-examination, DW1 averred that the plaintiff paid a deposit but contested the payment of ksh.2.4 million. He admitted that the plaintiff did improvements on the suit premises but averred that the same was not in the sale agreement between the parties.

33. He stated that the purchase agreement between the plaintiff and the 2nd defendant was terminated when the plaintiff breached the contract of sale, thus he became a tenant but they did not enter into a fresh tenancy agreement.

34. Referred to page 45 of defendant's bundle, Dw1 stated that the letter dated 30.4.2012 is a notice to evict, they didn't have eviction orders and the tenancy agreement was not filed. That since the plaintiff breached the agreement, they went back to the tenancy relationship, but the sale agreement had no eviction clause.

35. That what the plaintiff paid was ksh.3, 380,000/= and none has been refunded and they are not intending to refund because of breach of contract.

36. Dw1 is not aware of the extensive renovations, adding that their set off was Kshs. 2.5 million.

37. He indicated that the plaintiff made various payments as set out at page 16-34 of his bundle, adding that he is not disputing any payments as per page 33-34 of the plaintiff's bundle, the only issue is that some payments are not reflected in the statement of the defendant.

38. Referred to the terms of offer in the offer letter from I&M bank dated 29.3.2012 at page 14-27 of the plaintiff's bundle, he stated that the it did not go through because the bank declined to give the plaintiff a loan due to unavailability of documents which were to be availed by the defendant.

39. Refereed to 2 payments made by Prismick Petrochem limited of ksh. 200,000/= and ksh. 150,000/=, he stated that he was not aware that the plaintiff was a director in the said company.

40. Dw1 stated that in his statement, he didn't see the figures of the amounts paid, he could however see that several payments were made through cheques, and for the cheques that never cleared, they were in

his statement, adding that " For any cheque that bounced, we would get bounced cheque image from the bank but in our case we didn't ask for such details from the bank. We just got letters."

41. In re-examination, Dw1 stated that the power of attorney dated 8.2.207 is legitimate as it is registered at lands office. He also stated that the agreement between the parties stipulated that the apartment being sold was charged to the 3rd defendant so the plaintiff was aware and was obligated to pay any charges and penalties accruing in the bank. He denied that the sum of Kshs. 2,040,000 was paid by the plaintiff.

Submissions

42. The plaintiff filed submissions dated 10.12.2024. He provided a summary of facts of the dispute herein submitting that the 2nd defendant did not prove that there was a lawful eviction or that he had a valid tenancy agreement to demand for payment of rent.

43. Clause 3(1) of the sale agreement dated 20.11.2009 was cited to submit that the defendant could not seek completion without availing completion documents.

44. It was also contended that documents from the lender indicated that the loan amount was in considerable arrears as the defendant was not using the money paid by the plaintiff to settle the loan, adding that there is no clause in the agreement between the parties allowing the defendant to withhold all the monies paid by the plaintiff as he was to withhold only 10% of the purchase price.

45. The plaintiff also argued that since the suit premises has not been sold to a 3rd party, the court could order specific performance to bring the dispute to an end. To buttress his case, the plaintiff relied on the case of Ngaira v Cheng'oli (Civil Appeal 397 of 2017) [2022] KECA 80 (KLR) (4 February 2022) Judgment) as well as the case of Collins *v Ogango (Civil Appeal 427 of 2018)*[2024] KECA 19 (KLR) (25 January 2024) (Judgment).

46. The defendant's submissions are dated 21.1.2025. It was submitted that due to the plaintiff's breach, it became necessary for the defendant to rescind the agreement between the parties , vide letters dated 23.11.2012 and 19.4.2012.

47. He urges the Court to find that the plaintiff is not entitled to specific performance. It was pointed out that the completion date was specifically stated to be on 31.12.2010, but the plaintiff frustrated the contract by issuing dishonoured cheques to the bank which resulted to automatic accruement of interests making the 1st defendant's loan repayment to lag behind and attract unnecessary interests.

48. Reliance was placed on the case of Ukwala Supermarket (Eldoret) Limited Armritral Sojpar Shah Wholesalers Limited [2017] eKLR to submit that the plaintiff was in a periodic tenancy in terms of Section 57 of the *Land Act* since he was in occupation of the suit premises as a tenant prior to the purchase and he was to take possession after paying the full purchase price.

49. It was also submitted that the plaintiff is not deserving of an order of specific performance since he had moved this court with unclean hands, having breached the contract, and was guilty of material non-disclosure and there was an alternative remedy available to him. To this end, the case of Reliable Electric Engineers (k) Ltd v Montrac Kenya Limited [2006] eKLR was cited.

50. It was further submitted that the moment the sale agreement was rescinded, the foundation upon which the plaintiff was allowed to enter onto the suit premises lapsed and the plaintiff effectively became a trespasser by remaining upon the premises long after the permission was terminated.

51. It was pointed out that the alternative remedy available to the plaintiff would be to recover monies paid to the defendant less;

Total rent and service charge from November 2009 to May 2012=(30 months)=1,740,000/=

Mesne profits @ 754,000/=

10% deposit withheld=770,000/=

Grand Total-ksh.3,264,000/=

DETERMINATION

52. The court has considered the pleadings of the parties, the testimonies of the witnesses as well as the rival submissions. It is common ground that the parties contractual obligations and responsibilities were anchored on the sale agreement dated 30.11.2009 (hereinafter, the 1st agreement) as amended through a Deed of amendment dated 2.11.2010 (the 2nd agreement) in which the defendant was selling to the plaintiff a house identified as APARTMENT A1 situated on parcel 209/118/56 at Fedha Kipkabus Apartments in Nairobi (the suit property). There is also no controversy that the suit property was charged to KCB bank as at the time of the sale agreement. Further, it is noted that the plaintiff had at some time occupied the suit property, but not any more. Finally, it is quite apparent that the sale transaction did not go through, with each side blaming the other for breach of the agreements.

53. The questions therefore falling for determination are;

    a. Who between the plaintiff and the defendant breached the sale agreement of 30.11.2009 and the addendum agreement of 2.11.2010?

    b. Whether the said agreements were procedurally rescinded.

    c. What reliefs are available to the rival parties.

54. This court is called upon to interpret the aforementioned two agreements between the parties without re-writing the contract as was held in National Bank of Kenya Ltd v Pipe- Plastic Samkolt (k) Ltd and another, Civil Appeal No. 95 of 1999 (2002) 2 EA 503. In Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others [2018] eKLR, it was stated that;

> " It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally..."

55. This court will first interrogate whether there was any breach on the side of the plaintiff. As per clause 2 in the 2nd agreement, the terms of COMPLETION were set afresh in the following terms;

> " The agreement of sale shall be, and hereby is, amended by deleting the existing Clauses 3 and Special Condition 2 and restating them in their entirety as follows:
>
> The completion date shall be 3rd (or 30th as date is not clear) December 2010 or such other dates as the parties may agree in writing"

56. The new SPECIAL CONDITIONS were set out at clause 2.1 and 2.2 as follows;

> "2. 1 The purchaser shall pay the vendor a further Kenya Shillings Two million and Forty Thousand only (Kshs. 2,040,000) on or before 30th April 2010 (receipt whereof the vendor hereby acknowledges)
>
> 2. 2 The purchaser shall pay the vendor monthly installments of Kenya Shillings Five Hundred Thousand Only (Kshs. 500,000) from 1st August 2010 up to completion date out of which Kenya Shillings Eighty Seven Thousand only (Kshs. 87,000) shall go towards reducing the outstanding Vendor's home loan with Savings and Loan Kenya Limited"

57. The court takes note that the amended agreement was made in November 2010 and was requiring the plaintiff to have paid the amount of Ksh 2 040 000 seven (7) months earlier in April 2010. The only logical explanation is that the said amounts had already been paid by the time the 2nd agreement was made. It is no wonder that the receipt of the said amount was acknowledged as at the time the 2nd agreement was made. The defendant is therefore estopped from reneging on the said acknowledgement.

58. No other monies were acknowledged as at that time. There is however no evidence to indicate that the plaintiff was paying Ksh 500 000 every month as from 1.8.2010(again it is noted that the date predates the 2nd agreement). What is apparent is that the plaintiff was making random payments of which some were made post the date of completion. He even admitted issuing bouncing cheques.

59. Further, there is no evidence to indicate that the plaintiff made a purchaser's professional undertaking to pay to the vendor the final monthly instalment of ksh.500, 000/=. This far it is clear that the plaintiff was in breach of the agreements.

60. What about the defendant? The 2nd agreement required the defendant to avail the requisite documents on or before the completion date, but this was to take place only after the professional undertaking to pay the final payment was made by the plaintiff. Nevertheless, clause 7 in the 1st agreement stated that:

> "The apartment being sold is charged to Savings and Loan Kenya Ltd and the vendor undertakes to secure a discharge over the title in order for the transfer to be effected in favour of the purchaser"

61. There is no evidence to indicate that the property was free for sale as at the time of the anticipated completion date of 30.12.2010 or thereafter. If anything, the bank was demanding payments from the defendant way after in year 2012 going by the demand letters written to him by the bank.

62. At this juncture, I pose the question; Was the plaintiff required to take over the responsibilities set out in the Mortgage account of the defendant where the house was charged? An argument was proffered by the defendant in his letter of 23.11.2011 that the plaintiff is the one who was supposed to make mortgage payments in defendants mortgage account, and failure to make the said payments had occasioned the account to accrue interests and penalties. However, the wording in clause 2.2 in the 2nd agreement was that part of the monies paid by the plaintiff as from 1.8.2010, the same being sh. 500 000 "the sum of sh. 87 000 would go towards reducing the outstanding vendors home loan with Savings and Loan Kenya". There is nothing in those words to indicate that the loan account where the house was charged was to be taken over by the plaintiff. That is why even the demand letters on loan arrears made by the bank for the mortgage account were directed to the defendant.

63. Further in cross examination, Dw1 admitted that "The obligation to pay the loan was upon the 2nd defendant".

64. In short, there was no apartment available for the plaintiff to buy from the defendant as at the time of completion date. To this end, I find that the defendant too was in breach of the agreements. Thus, this is a case where both parties were responsible for the frustration of the contract. See Gatobu M'Ibuutu Karatho v Christopher Muriithi Kubai [2014] eKLR.

65. Was the rescission of the agreements by the defendant proper?. The defendant contends that the plaintiff breached the contract and issued dishonored cheques which resulted to automatic accruement of interests making the loan to attract unnecessary interests, following which the defendant rescinded the sale and distressed the plaintiff for rent. The two letters termed as the rescission notices are the one dated 23.11.2011 and the other one dated 19.4.2012. For the letter of 23.11.2011, the court has already made a finding that the plaintiff did not take over the responsibilities in the mortgage account, thus the rescission of the agreement on that basis was certainly not proper.

66. As for the letter of 19.4.2012, the same indicates that the parties had convened a meeting of 12.4.2012(date not very clear) where they had agreed that plaintiff would clear the loan arrears to the tune of Ksh 427 483 by close of business of that day. Reference was also made to the letter of offer made by a financier I & M Bank to the plaintiff which was to be given to the defendant for onward transmission to their bank. There is no evidence to indicate how the deliberations made in the meeting of 12.4.2012 and the reference to I & M Bank were to impact on the two main agreements. After all the details of the said meetings were not reduced into writing. To this end, I find that the rescission of the agreements based on the deliberations made on 12.4.2012 and on the I & M Bank transactions was not proper.

67. What reliefs are available to the parties?

The plaintiff admitted in evidence that by 30.12.2010, he had not finished paying the purchase price and neither had he given an undertaking that he would complete paying. But again, the letter of 17.4.2012 is a pointer to the fact that the date of 30.12.2010 was not strictly the completion date, thus time was no longer an issue of essence, See- Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014] eKLR .

68. Further, there is no evidence to indicate that the suit property was discharged and made available for transfer. It is noted that the parties were making the 2nd agreement in November 2010, way after the commencement of compliance date on payment of Kshs. 500 000 per month in August 2010. That was certainly a messy arrangement to say the least. In short, the parties are the authors of their own misfortune in making agreements with unclear terms and responsibilities. None of the parties should therefore have leverage over the other in relation to the frustrated contract. Thus the court will not countenance any unfair enrichment which is a situation whereby a party benefits at the expense of another without justification.

69. To this end, are the claims of rent, service charge and mesne profits made by the defendant on one hand, and the claim of vacant possession made by the plaintiff on the other hand justified? I have gone through the two agreements and there is nothing to indicate that there was a tenancy relationship between the two parties. Clause 8 in the 1st agreement is the one which indicates that "The purchaser shall be entitled to vacant possession on paying the full price". The court has already established that plaintiff did not pay the full amount. This court will not interrogate the circumstances under which the plaintiff took over the suit premises.

70. Despite there being no clear terms of a tenancy relationship, the plaintiff did admit in cross-examination that he was a tenant waiting to own the house. He never got to own the said house. He avers that if he was a tenant he could have been paying Kshs. 40,000 per month. He was not clear on when he made entry and when he left the suit premises. On the other hand defendant avers that plaintiff was paying rent of Kshs. 50,000 and service charge of Kshs. 8,000. He computes the period of stay by the plaintiff at 44 months and 30 months.

71. As plaintiff's quest to own the suit house didn't materialize, then his stay in the suit premises without pay would amount to an unfair and unjust enrichment. I compute defendants claim on rent at Kshs. 50,000 per month (inclusive of service charge) for 30 months giving a total of Kshs. 1,500,000.

72. Further it suffices to note that the Plaintiff left the suit premises, thus he is not entitled to that property again as he is neither a purchaser or a tenant. Similarly, having failed to capture the circumstances under which the plaintiff took over the suit premises, the defendant shall not be entitled to any mesne profits.

73. Another claim which I must disallow is the one on the alleged improvements made by the plaintiff to the suit property. The reason being that the two main agreements did not in any way factor in the issue of the improvement of the suit property. What more, the plaintiff has not given the basis upon which he was improving a property which he didn't own.

74. This far, it becomes apparent that the appropriate route is that of a REFUND. Clause 2.8 in the special conditions of the 1st agreement is the one which provided for consequences of termination of the agreement. But again, those clauses cannot be strictly applied as the court has made a finding that both parties were responsible for breach. The defendant offered to refund the monies paid less interest vide his letter of 19.4.2012, but a decade down the line, the refund was not made, and no reasons have been proffered for that failure. What more, Dw1 was rather evasive on what had been paid, and this was also manifested in the submissions where the defendant was only calculating the set off with no indication as to what had been paid. I find that any retention of the monies paid by the plaintiff to the defendant would also amount to an unfair and unjust enrichment.

75. So, what was paid by the plaintiff, and what is due to each of the protagonists?.

76. The plaintiff gave an account of what he had paid as at February 2013 as Ksh. 6 146 000. He had also given an account of the cheques which bounced, 5 of them. Dw1 didn't object to these figures, his issue was that he could not see the payments in the statement of account of the defendant.

77. At this juncture, it is important to extract some of the responses made by Dw1 during cross examination in relation to the alleged payments;

> " In plaintiffs bundle at page 33-34, I am not disputing any payments, only that some are not reflected in the statement of my brother….
>
> In the sale agreement at page 1 dated 30.11.2009 at clause 3 (1) sh 770 000 was paid being 10 per cent deposit. That payment is not disputed. Indeed, there was a deed of amendment dated 2.11.2010 where there is mention of Ksh 2, 040 000, but I didn't find it in the statement.
>
> At page 23 of plaintiff's bundle, it has sh 200 000 and recipient is Stanley Kidyavai from Prismick Petreleum Chem Ltd. I am not aware that plaintiff was a director in that company….

At page 26 is document dated 14.6.2012 for a cash deposit for Kshs. 100,000. I think the amount was acknowledged. I saw something like Kshs. 100,000 deposited by Michael.

78. What resonates from the above responses is that Dw1 appears not to have been conversant with the statement of accounts and how the remittances were made. It is however noted that the undisputed amount of Kshs. 770 000 was made via a cheque no. 000045 to F.N. Orora & co. advocates by Prismic Petroleum Ltd. Thus, it doesn't follow that all payments were made into that particular mortgage account. Further, it is noted that some of the payments made into the account of Stanley Kidyavai i.e the RTGS of 4.5.2012 and 12.6.2012 for Kshs. 200 000 and 150 000 were made by Prismac Petroleum, thus Dw1 had no justification of saying that he didn't know who prismac was.

79. I have keenly perused the tabulations of the figures as set out at page 33-34 of plaintiffs bundle vis a vis the statement of account of the defendant and other documents like the cheques and I find that almost all the figures mentioned by the plaintiff can be traced to the aforementioned statement of the defendant. There are only two discrepancies. The first one relates to the claim of Kshs 2 040 000 allegedly paid on 9.5.2010 via cheque numbers 000205-7. The payments were actually made on 23rd, 24th and 26th April 2010 for Ksh 990 000+ 60 000 +990 000 which adds up to Kshs. 2 040 000. Thus, the discrepancy on the dates doesn't change the figures. The second variance relates to the two cash deposits of Ksh 60 000 each at page 34 of plaintiffs bundle. Those are the only payments which could not be traced in the statement of account.

80. It is therefore a fallacy for Dw1 to state that he could not trace the mentioned payments in the statement of account of the defendant. I am therefore inclined to find that the plaintiff had paid the sum of Ksh 6 146 000 less the untraced sum of Ksh 120 000 which gives a figure of Kshs. 6 026 000.

81. There is no evidence to indicate that the defendant rejected the payments made after 30.12.2010 all the way up to February 2013, nor is there any evidence indicating that defendant took steps to refund this money after February 2013 when plaintiff stopped making further payments. It is not lost to this court that the payments made by the plaintiff were quite substantial, nearing the full payment of the purchase price.

82. I now have to say something about the bounced/dishonored cheques. At page 34 of his bundle, the plaintiff has given particulars of the bounced cheques, 5 of them. However, in cross-examination, 5 more cheques emerged as having bounced whose particulars are as follows;Kshs. 90,000 – 9.12.2010Kshs. 200,000 – 8.9.2011Kshs. 97,000 – 27.10.2011Kshs. 200,000 – 3.5.2012Kshs. 140,000 – 28.12.2013

83. A perusal of the tabulation given by plaintiff at page 33-34 of his bundle reveals that none of these bounced cheques were factored in arriving at the figure of Kshs. 6,146,000. Additionally, the aforementioned cheques are indicated as unpaid in the statement of account availed by the defendant. It follows that the bounced cheques do not affect the actual amounts paid by the plaintiff.

84. Nonetheless, the defendant's account was accruing penalties in respect of the aforementioned bounced cheques. Plaintiff admitted that much of which the penalty for each bounced cheque was Kshs. 550 (as captured in the statement of account of defendant). Though the total sum in penalties for the 10 traced bounced cheques would amount to Kshs. 5,500, I find that the bouncing of cheques had an overall adverse effect on the loan account of the defendant. In that regard, I will penalize the plaintiff to the tune of Ksh 500 000.

85. In the end, the only order I hereby give is a refund of the traceable monies paid by the plaintiff to the defendant less what is due to the defendant tabulated as follows;

Monies paid by the plaintiff to the defendant Ksh. 6 026 000 less Rent and service charge 1,500,000

And penalties for bounced cheques Ksh 500 000

(1 500000+500 000= Ksh 2 000 000)

Net sum is Kshs. 6 026 000- Ksh. 2 000 000= Ksh.4 026 000.

86. I therefore enter Judgment for the plaintiff against the defendant for the sum of Ksh 4, 026 000. The said sum is to be paid within 90 days from the date of delivery of this judgment of which interest on the said amount is to start accruing at court's rates from the 91st day after delivery of this judgment. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE-ELC NANYUKI

In the presence of:-

Edell C/A

M/S Morara for the 2nd defendant