



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 489 OF 2017**

**(FORMERLY HCCC NO. 402 OF 2008)**

**ANNE NGIMA KINGORI.....PLAINTIFF**

**VERSUS**

**TELPOSTA PENSION SCHEME REGISTERED TRUSTEES.....1<sup>ST</sup> DEFENDANT**

**DORCAS KINYANYA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background:**

The 2<sup>nd</sup> defendant was at all material times an employee of Kenya Posts & Telecommunications Corporation (hereinafter referred to as “KPTC”). The 2<sup>nd</sup> defendant was employed by KPTC with effect from 4<sup>th</sup> November, 1982. Following restructuring in the telecommunication sector that led to the split of KPTC into Postal Corporation of Kenya and Telkom Kenya Limited, the 2<sup>nd</sup> defendant became an employee of Telkom Kenya Limited. The 2<sup>nd</sup> defendant worked for Telkom Kenya Limited (hereinafter referred to as “Telkom”) until 31<sup>st</sup> January, 2007 when her services were terminated due to redundancy. While in the employment of Telkom, the 2<sup>nd</sup> defendant was allocated a two-bedroomed house known as Quarter No. 59 on Akal Road, Nairobi as her residence. This property that was later referred to as Nairobi/Block 69/117, Unit 63 House No. 59 shall be referred to hereinafter as “the suit property”. The suit property among others that were owned by the defunct KPTC was subsequently transferred and vested in TelPosta Pension Scheme (hereinafter referred to only as “the 1<sup>st</sup> defendant”) with effect from 1<sup>st</sup> July, 1999.

In 2004, the 1<sup>st</sup> defendant decided to sell the suit property among others to the occupant thereof. By a letter dated 25<sup>th</sup> March, 2004, the 1<sup>st</sup> defendant offered to sell the suit property to the 2<sup>nd</sup> defendant at Kshs. 1,200,000/- on terms and conditions that were contained in the said letter. On 21<sup>st</sup> March, 2005, the 1<sup>st</sup> and 2<sup>nd</sup> defendants entered into a written agreement of sale in respect of the suit property which provided among others that;

1. The suit property was sold to the 2<sup>nd</sup> defendant together with the buildings and other developments thereon at a price of Kshs. 1,200,000/-.
2. The 2<sup>nd</sup> defendant had paid to the 1<sup>st</sup> defendant a sum of Kshs. 120,000/- as a deposit on execution of the agreement receipt of which the 1<sup>st</sup> defendant acknowledged.
3. The 2<sup>nd</sup> defendant was to pay to the 1<sup>st</sup> defendant the balance of the purchase price on the completion date.
4. The completion date was 90 days from the date of the agreement.
5. The property was sold with vacant possession on the date of completion.
6. The sale was subject to Law Society Conditions of Sale (1989 Edition) in so far as the same was not inconsistent with the terms of the agreement.

The 2<sup>nd</sup> defendant failed to pay the balance of the purchase price within the 90 days completion period. On 28<sup>th</sup> July, 2005, the 1<sup>st</sup> defendant

gave the 2<sup>nd</sup> defendant 21 days notice to pay the balance of the purchase price failure to which she risked forfeiting the 10% deposit that she had paid. The 2<sup>nd</sup> defendant did not respond to the said demand letter. The 1<sup>st</sup> and 2<sup>nd</sup> defendants exchanged some correspondence in 2006 that did not result in the completion of the agreement between the parties.

On 26<sup>th</sup> March, 2007, the 2<sup>nd</sup> defendant forwarded to the 1<sup>st</sup> defendant a Bankers Cheque for Kshs. 540,000/- in part payment of the balance of the purchase price which amount was rejected and returned to the 2<sup>nd</sup> defendant. On 13<sup>th</sup> April, 2007, the 1<sup>st</sup> defendant informed the 2<sup>nd</sup> defendant that a cheque for Kshs. 120,000/- that she had given to the 1<sup>st</sup> defendant as payment of the deposit was dishonored and as such the agreement stood nullified and the 1<sup>st</sup> defendant was making arrangement to re-sell the suit property.

On 20<sup>th</sup> April, 2007, the 2<sup>nd</sup> defendant filed a suit against the 1<sup>st</sup> defendant in the Chief Magistrate's Court at Nairobi in CMCC No. 3396 of 2007 seeking among others; an order to restrain the 1<sup>st</sup> defendant from selling the suit property and specific performance. The 2<sup>nd</sup> defendant also sought an order that a sum of Kshs. 200,000/- that had been deducted from her terminal dues as rent due to the 1<sup>st</sup> defendant be treated as payment made towards the purchase price for the suit property. The 2<sup>nd</sup> defendant's suit in the lower court was struck out with costs on 28<sup>th</sup> August, 2008 for want of jurisdiction. The 2<sup>nd</sup> defendant's application for interlocutory injunction had earlier been dismissed by the court on 26<sup>th</sup> July, 2007.

On 3<sup>rd</sup> October, 2007, 2 years after the agreement of sale that the 1<sup>st</sup> defendant entered into with the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant entered into another agreement for sale of the suit property with the plaintiff. Under the new agreement, the 1<sup>st</sup> defendant sold the suit property to the plaintiff at Kshs. 2,512,036/-. The plaintiff paid a deposit of Kshs. 251,236/- on 24<sup>th</sup> August, 2007 and the balance of the purchase price of Kshs. 2,260,832/- on 7<sup>th</sup> January, 2008. The suit property was transferred and registered in the name of the plaintiff on 5<sup>th</sup> August, 2011.

#### The plaintiff's claim.

The plaintiff commenced this suit by way of a plaint dated 5<sup>th</sup> September, 2008. The plaint was amended on 20<sup>th</sup> March, 2012. In the amended plaint, the plaintiff sought the following reliefs;

- i. A permanent injunction restraining the defendants from occupying, collecting rent from, transferring, alienating, or in any way dealing with or interfering with the proprietary rights and interests enjoyed by the plaintiff over all that property known as Title Number Nairobi/Block 69/117 Unit 63 located in South B Estate, Nairobi (the suit property).
- ii. Vacant possession of the suit property.
- iii. Mesne Profits from 4<sup>th</sup> September, 2008 to the date of recovery of possession of the suit property by the plaintiff together with interest at commercial rates until payment in full.
- iv. Costs of the suit and interest.

The plaintiff averred as follows. The plaintiff purchased the suit property, paid the full purchase price and had the property transferred to her. The plaintiff is the registered and lawful proprietor of the suit property. Although the 1<sup>st</sup> defendant had caused the suit property to be registered in the name of the plaintiff, the 1<sup>st</sup> defendant had failed and/or refused to grant the plaintiff vacant possession of the property. The 1<sup>st</sup> defendant had an obligation under the agreement of sale between the parties to deliver vacant possession of the suit property to the plaintiff upon receipt of the full purchase price. The 2<sup>nd</sup> defendant was the 1<sup>st</sup> defendant's tenant on the suit property prior to the sale of the same to the plaintiff. The 2<sup>nd</sup> defendant was notified of the change of ownership of the suit property by the 1<sup>st</sup> defendant and was advised to pay rent to the plaintiff. The 2<sup>nd</sup> defendant refused to pay rent to the plaintiff and had instead sub-let the suit property unlawfully to third parties. The 2<sup>nd</sup> defendant is a trespasser on the suit property since she is not the owner thereof.

The 1<sup>st</sup> defendant filed a defence and a counter-claim against the 2<sup>nd</sup> defendant on 2<sup>nd</sup> May, 2012. In its defence, the 1<sup>st</sup> defendant admitted that it sold and transferred the suit property to the plaintiff. The 1<sup>st</sup> defendant averred that having transferred the suit property to the plaintiff, it had discharged its obligations to the plaintiff under the agreement of sale between the parties. The 1<sup>st</sup> defendant averred that it was not liable to the plaintiff for vacant possession and mesne profits and that the same should be claimed from the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant averred that the 2<sup>nd</sup> defendant's continued occupation of the suit property was unlawful.

In its counter-claim against the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant reiterated the contents of its defence and averred that prior to selling the suit property to the plaintiff, the 2<sup>nd</sup> defendant had defaulted in her tenancy obligations to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant averred that it had made attempts to levy distress against the 2<sup>nd</sup> defendant which did not yield much since the 2<sup>nd</sup> defendant had nothing to attach. The 1<sup>st</sup> defendant averred that the 2<sup>nd</sup> defendant's tenancy agreement with the 1<sup>st</sup> defendant in respect of the suit property lapsed on account of the 2<sup>nd</sup> defendant's breach of the same and upon the sale and transfer of the property to the plaintiff. The 1<sup>st</sup> defendant averred that the plaintiff was entitled to immediate possession of the property upon the property being transferred to the plaintiff.

The 1<sup>st</sup> defendant averred that since the 2<sup>nd</sup> defendant had failed to deliver vacant possession of the suit property to the plaintiff, she was liable to pay to the plaintiff mesne profits until she delivered up possession. The 1<sup>st</sup> defendant sought the following orders by way of counter-claim;

1. The plaintiff's suit against the 1<sup>st</sup> defendant be dismissed and the 1<sup>st</sup> defendant's costs be borne by the 2<sup>nd</sup> defendant.

2. Judgment be entered for the 1<sup>st</sup> defendant against the 2<sup>nd</sup> defendant for;
  - (i) An order directing the 2<sup>nd</sup> defendant to vacate and give vacant possession of the suit property to the plaintiff.
  - (ii) In default, an order be issued for the eviction of the 2<sup>nd</sup> defendant from the suit property
  - (iii) An order for the 2<sup>nd</sup> defendant to pay mesne profits to the plaintiff from 4<sup>th</sup> September, 2008 until possession is delivered.
3. Kshs. 180,000/- being rent arrears due from the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant as at August, 2008.
4. Costs of the counter-claim.

The 2<sup>nd</sup> defendant filed a defence and counter-claim against the 1<sup>st</sup> defendant on 30<sup>th</sup> May, 2012. The 2<sup>nd</sup> defendant denied that the plaintiff purchased the suit property, paid the purchase price and had the property transferred to her name. The 2<sup>nd</sup> defendant denied that she was notified of the change of ownership of the suit property and advised to pay rent to the plaintiff and that she refused to do so. The 2<sup>nd</sup> defendant denied further that her occupation of the suit property was illegal and that she had sublet the property to third parties.

In her counter-claim against the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant reiterated the contents of her defence. The 2<sup>nd</sup> defendant averred that she was still a tenant on the suit property. The 2<sup>nd</sup> defendant averred that on 25<sup>th</sup> October, 2005, the 1<sup>st</sup> defendant offered to sell to her the suit property that she was occupying. The 2<sup>nd</sup> defendant averred that she entered into a sale agreement with the 1<sup>st</sup> defendant and paid 10% deposit in the sum of Kshs. 120,000/-. The 2<sup>nd</sup> defendant averred that in breach of the said agreement of sale between her and the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant sold the suit property once again to the plaintiff.

The 2<sup>nd</sup> defendant averred that the 1<sup>st</sup> defendant never gave her a notice of termination of the agreement of sale that she had entered into with the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that on 26<sup>th</sup> March, 2007, she forwarded a cheque for Kshs. 540,000/- towards the balance of the purchase price which was rejected by the 1<sup>st</sup> defendant and returned. The 2<sup>nd</sup> defendant averred that she was being discriminated against by the 1<sup>st</sup> defendant since the 1<sup>st</sup> defendant had sold some of its houses to the occupants who had made late payments. The 2<sup>nd</sup> defendant averred that having occupied the suit property for over 10 years, she was entitled to purchase the same. The 2<sup>nd</sup> defendant averred that the 1<sup>st</sup> defendant had breached the agreement of sale between them by failing to furnish her with the completion documents to enable her obtain finance for the balance of the purchase price.

The 2<sup>nd</sup> defendant prayed for;

1. The dismissal and/or striking out of the plaintiff's suit.
2. A permanent injunction restraining the 1<sup>st</sup> defendant from interfering with the 2<sup>nd</sup> defendant's peaceful and quiet occupation of the suit property.
3. Judgment to be entered against the 1<sup>st</sup> defendant for;
  - (i) An order for specific performance directing the 1<sup>st</sup> defendant to complete the agreement of sale that it entered into with the 2<sup>nd</sup> defendant.
  - (ii) An order allowing the 2<sup>nd</sup> defendant to complete the payment of the balance of the purchase price and for the extension of the completion period.
  - (iii) Costs of the counter-claim.

At the trial, the parties called one witness each in proof of their respective cases. The parties had filed an agreed bundle of documents. The plaintiff adopted her witness statement dated 30<sup>th</sup> April, 2013 as part of her evidence in chief. In the said statement and in her oral testimony, the plaintiff narrated how she purchased the suit property from the 1<sup>st</sup> defendant. The plaintiff to a large extent reiterated the contents her claim. The plaintiff stated that the 1<sup>st</sup> defendant was to give her vacant possession of the suit property upon payment of the balance of the purchase price. The plaintiff stated that although the suit property had been transferred to her, she had not been given vacant possession of the same despite having made a demand for the same. The plaintiff stated that when possession was not forthcoming, she demanded mesne profits at the rate of Kshs. 30,000/- per month. The plaintiff stated that that was the rent payable for similar premises then. The plaintiff stated that as at the time she was giving evidence, the rent payable for premises similar to the suit property was Kshs. 40,000/- per month.

After the close of the plaintiff's case, Wilfreda Mwambao(DW1) testified on behalf of the 1<sup>st</sup> defendant. She adopted her witness statement dated 28<sup>th</sup> January, 2020 as her evidence in chief and relied on the agreed bundle of documents. DW1 told the court how the 2<sup>nd</sup> defendant came to occupy the suit property. She stated that the 2<sup>nd</sup> defendant was at all material times a tenant on the suit property. She stated that the 2<sup>nd</sup> defendant was subsequently offered the suit property to purchase. She stated that the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant subsequently entered into a written agreement for sale of the suit property in March, 2005. The suit property was sold to the 2<sup>nd</sup> defendant at Kshs.

1,200,000/- of which the 2<sup>nd</sup> defendant was to pay Kshs. 120,000/- as a deposit on the execution of the agreement of sale. DW1 stated that the 2<sup>nd</sup> defendant issued a cheque for Kshs. 120,000/- in settlement of the said deposit which was dishonoured and no replacement cheque was received from the 2<sup>nd</sup> defendant. DW1 stated that the 2<sup>nd</sup> defendant was duly notified of the non-payment of the said cheque. She stated that no further communication was received from the 2<sup>nd</sup> defendant until sometimes in 2007 when they had a dispute over rent payment that ended up in the Chief Magistrates Court where the 2<sup>nd</sup> defendant sought injunction to restrain the sale of the suit property. DW1 stated that the Chief Magistrate Court dismissed the 2<sup>nd</sup> defendant's application for injunction. She stated that the 1<sup>st</sup> defendant thereafter offered the suit property for sale to the plaintiff.

DW1 stated that although the suit property was sold and transferred to the plaintiff, the 2<sup>nd</sup> defendant refused to vacate the same. She stated that that was the reason why the 1<sup>st</sup> defendant had not given vacant possession of the suit property to the plaintiff. DW2 stated that the 1<sup>st</sup> defendant had no existing contract with the 2<sup>nd</sup> defendant in respect of the suit property since she did not even pay the 10% deposit of the purchase price for the property. DW1 stated that the 1<sup>st</sup> defendant was claiming Kshs. 180,000/- as rent from the 2<sup>nd</sup> defendant from March, 2007 to August, 2008 at the rate of Kshs. 10,000/- per month. She stated that the 2<sup>nd</sup> defendant's rent prior to March, 2007 was paid by her employer.

The 2<sup>nd</sup> defendant was the last to give evidence. The 2<sup>nd</sup> defendant adopted her witness statement as part of her evidence in chief. The 2<sup>nd</sup> defendant relied on her documents in the agreed bundle of documents and the documents that were attached to her list of documents dated 21<sup>st</sup> November, 2018. The 2<sup>nd</sup> defendant admitted that she was in occupation of the suit property and that she had entered into an agreement with the 1<sup>st</sup> defendant to purchase the property at Kshs. 1,200,000/-. The 2<sup>nd</sup> defendant stated that she paid the 10% deposit in the sum of Kshs. 120,000/- but was unable to raise the balance of the purchase price. The 2<sup>nd</sup> defendant admitted that the 1<sup>st</sup> defendant's advocates wrote to her on 28<sup>th</sup> July, 2005 demanding the payment of the balance of the purchase price in the sum of Kshs. 1,080,000/-. She stated that she was unable to raise the said balance of the purchase price within the 21 days that was given in the said demand letter. She stated that her advocates wrote to the 1<sup>st</sup> defendant on 5<sup>th</sup> October, 2006 requesting for the completion documents to enable her secure finance for the balance of the purchase price. The 2<sup>nd</sup> defendant stated that when she received her terminal dues upon retrenchment, a sum of Kshs. 200,000/- was deducted as rent due to the 1<sup>st</sup> defendant. She stated that when she was in employment, rent was deducted directly from her salary by the employer and remitted to the 1<sup>st</sup> defendant. She stated that after receiving her terminal dues she bought a bankers cheque for Kshs. 540,000/- and forwarded the same to the 1<sup>st</sup> defendant on account of the purchase price of the suit property. She stated that the 1<sup>st</sup> defendant rejected the payment. The 2<sup>nd</sup> defendant admitted that she received a letter dated 13<sup>th</sup> April, 2007 informing her that her cheque for Kshs. 120,000/- for the deposit had been dishonoured. She stated that the said letter was written 2 years after the payment was made. She stated that the dishonoured cheque was never returned to her. The 2<sup>nd</sup> defendant stated that she was not notified that the suit property had been sold to the plaintiff. She stated that she learnt of the sale when auctioneers raided the suit property and carried her goods away. The 2<sup>nd</sup> defendant urged the court to grant the reliefs sought in her counter-claim against the 1<sup>st</sup> defendant.

After the close of evidence, the court directed the parties to make closing submissions in writing. The plaintiff filed her submissions on 28<sup>th</sup> May, 2021, the 1<sup>st</sup> defendant filed its submissions on 28<sup>th</sup> September, 2020 while the 2<sup>nd</sup> defendant filed her submissions on 9<sup>th</sup> July, 2021. I have considered the pleadings, the evidence tendered by the parties and the submissions by the advocates for the parties. The parties did not agree on the issues for determination by the court. In their submissions, each party framed its own issues that it submitted on. In my view the issues arising for determination in this suit are the following;

1. Whether the plaintiff is entitled to the reliefs sought against the defendants.
2. Whether the 1<sup>st</sup> defendant is entitled to the reliefs sought against the 2<sup>nd</sup> defendant.
3. Whether the 2<sup>nd</sup> defendant is entitled to the reliefs sought against the 1<sup>st</sup> defendant.
4. Who is liable for the costs of the suit and the two counter-claims?

Whether the plaintiff is entitled to the reliefs sought against the defendants.

I am satisfied from the evidence on record that; the plaintiff purchased the suit property from the 1<sup>st</sup> defendant on 3<sup>rd</sup> October, 2007 at a consideration of Kshs. 2,512,036/-, the plaintiff paid the purchase price in full, the suit property was transferred and registered in the name of the plaintiff on 5<sup>th</sup> August, 2011 and she was issued with a title deed on the same date. There is no counter-claim against the plaintiff. There is no allegation by any of the parties that the plaintiff acquired the suit property fraudulently, illegally, unprocedurally or through a corrupt scheme. Due to the foregoing, the plaintiff is the lawful owner of the suit property. As the owner of the suit property, the plaintiff is entitled to enjoy possession thereof. Clause 7 of the agreement of sale dated 3<sup>rd</sup> October, 2007 between the plaintiff and the 1<sup>st</sup> defendant provided that the 1<sup>st</sup> defendant was to give the plaintiff vacant possession of the suit property upon receipt of the full purchase price. From the evidence on record, the 1<sup>st</sup> defendant received the balance of the purchase from the plaintiff on 7<sup>th</sup> January, 2008. The plaintiff was therefore entitled to vacant possession of the suit property from that date.

It is not disputed that the 1<sup>st</sup> defendant did not give the plaintiff vacant possession in accordance with that clause of the agreement of sale. It follows therefore that the 1<sup>st</sup> defendant breached the said agreement of sale. The 1<sup>st</sup> defendant has contended that it was unable to give the plaintiff possession because the 2<sup>nd</sup> defendant who was occupying the property as a tenant refused to yield possession. This in my view does not excuse the 1<sup>st</sup> defendant's breach. The 2<sup>nd</sup> defendant on the other hand has contended that she is in possession of the suit property as of right having entered into an agreement of sale dated 25<sup>th</sup> March, 2005 with the 1<sup>st</sup> defendant in respect of the suit property which is awaiting completion. As I have stated earlier, the suit property is registered in the name of the plaintiff. It is therefore not possible for the 1<sup>st</sup> defendant

to complete the alleged agreement with the 2<sup>nd</sup> defendant by transferring the suit property to the 2<sup>nd</sup> defendant unless the plaintiff's title is cancelled. As I have also mentioned, neither the legality of the agreement of sale between the plaintiff and the 1<sup>st</sup> defendant nor that of the title held by the plaintiff has been challenged in these proceedings. The court has therefore not been asked to cancel the plaintiff's title so that the suit property may be registered in the name of the 2<sup>nd</sup> defendant. In the circumstances, I am unable to see any justification for the 2<sup>nd</sup> defendant's continued occupation of the suit property which is neither registered in her name nor in the name of the 1<sup>st</sup> defendant from which she intended to purchase the property.

I am in agreement with the plaintiff that the 2<sup>nd</sup> defendant is occupying the suit property illegally and as such she is a trespasser. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph, 18-01. In Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. I have already made a finding that the plaintiff is the lawful owner of the suit property her title not having been challenged. As the owner of the suit property, the plaintiff is entitled to possession thereof. Since the 2<sup>nd</sup> defendant has no lawful interest in the suit property, she has no right to remain thereon. Since both the defendants have no lawful interest in the suit property, they have no basis for interfering with the plaintiff's enjoyment of her rights over the property.

Due to the foregoing, I am satisfied that the plaintiff has proved her case against the defendants. The plaintiff is therefore entitled to vacant possession of the suit property and an injunction to restrain the defendants from interfering with the enjoyment of her rights over the property. The plaintiff has also claimed mesne profits from 4<sup>th</sup> September, 2008 until possession is delivered. Mesne profits can only be claimed from a person who is occupying land unlawfully. Since the 1<sup>st</sup> defendant is not in occupation of the suit property, it is not liable to the plaintiff for mesne profits. The 1<sup>st</sup> defendant could only have been liable to the plaintiff for damages suffered as a result of its breach of the agreement of sale. No such damages have been sought and as such none can be awarded. Since the 2<sup>nd</sup> defendant is occupying the suit property unlawfully, she is liable to the plaintiff for mesne profits. Her liability would however commence from the date when the plaintiff was registered as the owner of the suit property and not from 4<sup>th</sup> September, 2008 when the plaintiff was contractually entitled to be given vacant possession by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant testified that she was paying rent of Kshs. 8,000/- for the suit property in 2007. The 2<sup>nd</sup> defendant's rent statement that was produced by the 1<sup>st</sup> defendant in evidence however showed that the 2<sup>nd</sup> defendant was paying a monthly rent of Kshs. 10,000/-. The 2<sup>nd</sup> defendant did not place any evidence before the court showing that her monthly rent was Kshs. 8,000/-. In her evidence, the plaintiff stated that she had demanded mesne profits at the rate of Kshs. 30,000/- per month and that as at the time she was giving evidence the rent payable for similar properties was Kshs. 40,000/- per month. In her advocates letter dated 18<sup>th</sup> June, 2008 to the 1<sup>st</sup> defendant's advocates, the plaintiff had demanded mesne profits at the rate of Kshs. 30,000/- per month. Taking all factors into account, I will award the plaintiff mesne profits as against the 2<sup>nd</sup> defendant at the rate of Kshs. 30,000/- per month from 5<sup>th</sup> August, 2011 until possession is delivered. I will also award her an order for possession of the suit property.

#### Whether the 1<sup>st</sup> defendant is entitled to the reliefs sought against the 2<sup>nd</sup> defendant.

Most of the reliefs sought by the 1<sup>st</sup> defendant were sought on behalf of the plaintiff and I have dealt with the same earlier when considering the reliefs sought by the plaintiff. The only relief sought by the 1<sup>st</sup> defendant for itself is rent arrears in the sum of Kshs. 180,000/-. According to the evidence tendered by DW1, the rent arrears are from March, 2007 up to August, 2008 at the rate of Kshs. 10,000/- per month. It was not disputed that the 2<sup>nd</sup> defendant was a tenant on the suit property and was to continue paying rent to the 1<sup>st</sup> defendant until she acquired the suit property. The 2<sup>nd</sup> defendant did not dispute the fact that from March, 2007 when her services were terminated by Telkom, she did not pay rent although she was in occupation of the suit property. It is my finding that the 1<sup>st</sup> defendant has established its claim for rent arrears.

#### Whether the 2<sup>nd</sup> defendant is entitled to the reliefs sought against the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> defendant's counter-claim was directed against the 1<sup>st</sup> defendant. The substantive relief sought by the 2<sup>nd</sup> defendant was specific performance of the agreement for sale dated 25<sup>th</sup> March, 2005. The 2<sup>nd</sup> defendant also sought extension of the completion period under the said agreement to enable her pay the balance of the purchase price.

In Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Madhubuti CA No.165 of 1996 it was held that:

**“...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”**

Specific performance is a discretionary remedy. Even where a claimant has satisfied all the conditions for granting of the relief, the court can still decline to grant the same for good reason. In Amina Abdulkadir Hawa v Rabinder Nath Anand & Another [2012] eKLR, the court cited Chitty on Contracts, 28<sup>th</sup> Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

**“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles.....specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will**

**confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party.....severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”**

The 2<sup>nd</sup> defendant admitted that she was unable to raise the balance of the purchase price even after she was served with 21 days completion notice by the 1<sup>st</sup> defendant. That means that it was the 2<sup>nd</sup> defendant who was in breach of the agreement of sale between her and the 1<sup>st</sup> defendant. Furthermore, even before this court, the 2<sup>nd</sup> defendant did not demonstrate that she was ready, able and willing to complete the agreement if the order of specific performance was given. In the circumstances, the 2<sup>nd</sup> defendant is not entitled to an order for specific performance. I wish to add that even if I had found that the 2<sup>nd</sup> defendant was not in breach of the agreement between her and the 1<sup>st</sup> defendant, I would still not have ordered specific performance. This is because the 1<sup>st</sup> defendant is no longer the owner of the suit property. It would not be able therefore to transfer the property to the 2<sup>nd</sup> defendant. With regard, to the 2<sup>nd</sup> defendant’s prayer for extension of time to pay the balance of the purchase price, the same is spent since I have made a finding the 2<sup>nd</sup> defendant is not entitled to an order for specific performance. In her evidence, the 2<sup>nd</sup> defendant had urged the court to order the 1<sup>st</sup> defendant to refund to her a sum of Kshs. 200,000/- that was deducted from her terminal benefits and paid to the 1<sup>st</sup> defendant as rent by Telkom since the payment was made in error. This sum of Kshs. 200,000/- was not claimed by the 2<sup>nd</sup> defendant in her counter-claim against the 1<sup>st</sup> defendant. In any event, the 2<sup>nd</sup> defendant did not convince me that the payment was made in error. The statement of rent account that was produced in evidence by the 1<sup>st</sup> defendant showed that the 2<sup>nd</sup> defendant rent account was in arrears to the tune of Kshs. 200,000/- as at February, 2007.

Who is liable for the costs of the suit and the counter-claims?

Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court and as a general rule, costs follow the event. In this case, the plaintiff and the 1<sup>st</sup> defendant have succeeded in their claims against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant shall bear the costs of the suit and the counter-claims.

Conclusion:

In conclusion, I hereby make the following orders:

1. Judgment is entered for the plaintiff against the defendants as follows;
  - (i) The 2<sup>nd</sup> defendant, her agents, servants, employees or anyone else claiming under the 2<sup>nd</sup> defendant shall vacate and hand over possession of all that property known as Title Number Nairobi/Block 69/117 Unit 63, Nairobi (the suit property) to the plaintiff within 30 days from the date hereof.
  - (ii) In the event that the 2<sup>nd</sup> defendant fails to vacate and hand over possession of the suit property to the plaintiff within the prescribed period, a warrant of eviction shall issue on application by the plaintiff for the 2<sup>nd</sup> defendant’s forceful eviction from the suit property.
  - (iii) A permanent injunction is issued restraining the defendants by themselves or through their agents, servants, employees or anyone else claiming under them from in any way whatsoever dealing with or interfering with the enjoyment of the plaintiff’s rights over the suit property.
  - (iv) The 2<sup>nd</sup> defendant shall pay to the plaintiff mesne profits at the rate of Kshs. 30,000/- per month from 5<sup>th</sup> August, 2011 until vacant possession is delivered to the plaintiff together with interest at court rate from the date hereof until payment in full.
2. Judgment is entered for the 1<sup>st</sup> defendant against the 2<sup>nd</sup> defendant in the sum of Kshs. 180,000/- together with interest at court rate from the date of filing of the 1<sup>st</sup> defendant’s counter-claim until payment in full.
3. The 2<sup>nd</sup> defendant’s counter-claim against the 1<sup>st</sup> defendant is dismissed.
4. The 2<sup>nd</sup> defendant shall pay the plaintiff’s and the 1<sup>st</sup> defendant’s costs of the suit and the counter-claims.

**DELIVERED AND DATED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021**

**S. OKONG’O**

**JUDGE**

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERRING PLATFORM IN THE PRESENCE OF:**

**MR. KIMATHI H/B FOR MR. AGWARA FOR THE PLAINTIFF**

**MS. NYABENGE H/B FOR MS. MATHENGE FOR THE 1ST DEFENDANT**

**MR. ABDINOOR H/B FOR MS. NDUTA FOR THE 2ND DEFENDANT**

**MS. C. NYOKABI-COURT ASSISTANT**