



**Gachoka v Intime Limited & another (Civil Suit 211 of 2006)  
[2024] KEHC 16333 (KLR) (Commercial & Admiralty) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16333 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
CIVIL SUIT 211 OF 2006  
MW MUIGAI, J  
DECEMBER 17, 2024**

**BETWEEN**

**JAYNE WANGUI GACHOKA ..... PLAINTIFF**

**AND**

**INTIME LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MATHEW NDAU KANYI T/A PANAMA MOVERS ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Notice**

1. This Court commenced hearing of this matter while serving in Commercial & Tax Division on 6/3/2019 upto 15/6/2021 on transfer and thereafter served in Machakos High Court. By letter dated 9/10/2024 from Principal Judge of the High Court, this file was forwarded for Judgment to be delivered as the matter could not start de novo due to Party's ill health. By letter dated 24/10/2024 to parties through Advocates the matter was slated for mention. On the date online judgment was scheduled for 28/11/2024. The Court found the written submissions filed were missing from the Court file. Parties/Counsel availed copies for judgment slated for 10/11/2024 where thereafter High Court Human Rights Summit was scheduled hence judgment on 17/12/2024.

**Pleadings**

**Amended Plaintiff**

2. By an Amended Plaintiff dated 7<sup>th</sup> March, 2007 and filed in Court on 3<sup>rd</sup> April, 2007 the;
  1. At All material times the Plaintiff was in possession and operating a business known as LR No 214/468, Muthaiga Nairobi.



2. The Plaintiff averred that she had entered into an agreement with the 1<sup>st</sup> Defendant dated the 6<sup>th</sup> July, 2005 to purchase the said premises and has had paid a deposit of kshs.5,400,000/- as 10% of the purchase price.
3. The Plaintiff averred further that the 1<sup>st</sup> Defendant failed to disclose at the time of the agreement that the property was encumbered by a mortgage to Industrial Development Bank whose consent would be required before sale of the property.
4. The Plaintiff averred that the 1<sup>st</sup> Defendant's Directors during the time of negotiation of the said sale and up to and after execution of the said Agreement for sale falsely represented to her that the said property was unencumbered pursuant to which misrepresentation the Plaintiff agreed to purchase the property and to expend considerable funds in improvement of the property as hereinafter stated.
5. The Plaintiff averred that the transaction has taken unduly long as the 1<sup>st</sup> Defendant has not yet provided the necessary consent from Industrial Development Bank in whose possession the title to the property is.
6. The Plaintiff further averred that the 1<sup>st</sup> Defendant has not confirmed with the said Bank whether or not they will discharge the mortgage on the property and how much they will accept to do so making it difficult for the Plaintiff to finalize her financial arrangements for purchase of the property.
7. The Plaintiff averred that from the foregoing paragraphs it is clear that the 1<sup>st</sup> Defendant has never been in a position to complete the said transaction.
8. The 1<sup>st</sup> Defendant on 3<sup>rd</sup> February, 2006 or thereabouts purported to rescind the aforesaid sale agreement and to forfeit the Kshs.5,400,000/- deposit paid by the Plaintiff.
9. The Plaintiff averred that the aforesaid rescission and forfeiture was unlawful in view of the fact that it was the 1<sup>st</sup> Defendant who failed to complete the contract and the Plaintiff hereby seeks restitution of the aforesaid deposit.
10. The Plaintiff averred that on or about 3<sup>rd</sup> April, 2006 the 2<sup>nd</sup> Defendant acting out of instructions from the 1<sup>st</sup> Defendant unlawfully proceeded to the suit premises and proclaimed her household goods and motor vehicles purportedly in distress for rent owed pursuant to a tenancy agreement between the 1<sup>st</sup> Defendant and one Fredrick Ngatia t/a Andrews Apartments.
11. That the Plaintiff pursuant to the directions given by this Court paid the sums being claimed by the 1<sup>st</sup> Defendant as rent.
12. The Plaintiff averred that she spent an amount in excess of Ksh 28m in improving the property with 1<sup>st</sup> Defendant's consent since entering into the said Agreement for sale and therefore she has a substantial interest in the Company
13. Notwithstanding the payment in paragraph 17 above, the 1<sup>st</sup> Defendant continued to demand payment of rent from the Plaintiff and the figures cited by the 1<sup>st</sup> Defendant thereto are often conflicting and contradictory as exemplified by paragraph 20 below.
14. That on or around 20<sup>th</sup> November 2006, the 1<sup>st</sup> Defendant instructed the firm of Kanyekiini Auctioneers to levy distress upon the Plaintiff for an alleged rental arrears amounting to Kshs.114,500/- and the said Auctioneers in pursuant thereto proceeded to the Plaintiff's



premises on 18<sup>th</sup> December 2006, broke in and seized her goods claiming a sum of Kshs.1,374,000/-.

15. The Plaintiff averred that the distress and the seizure of her goods on 18<sup>th</sup> December 2006 was unlawful for being levied when no sums of money were owed and for seizing goods for alleged rent arrears that had not been proclaimed for.
  16. The Plaintiff further averred that the aforesaid distress paralyzed her business during the December 2006 festive season thus causing her significant and irreparable loss of business and she hereby claimed damages for the loss.
  17. That after the seizing and carting away the Plaintiffs goods on 18<sup>th</sup> December 2007, the 1<sup>st</sup> Defendant neither advertised nor accounted the proceeds of sale to the plaintiff.
  18. That on the 13<sup>th</sup> February 2007, the 1<sup>st</sup> Defendant through its agents including its advocate Mr. Gichuki King'ara proceeded to the Plaintiffs place of business, locked the same and essentially evicted the Plaintiff from the aforesaid premises.
  19. That as a result of the said eviction, the Plaintiffs generator was locked in the suit premises and the 1<sup>st</sup> Defendant and its agents have failed, refused and/or neglected to release the same to the Plaintiff.
3. The Plaintiff prayed for judgment against the Defendants jointly and severally for:
- a. A declaration that the Plaintiff does not owe any monies in form of rent to the 1<sup>st</sup> Defendant and that the purported distresses on 3<sup>rd</sup> April 2006 and 20<sup>th</sup> November 2006 were illegal and wrongful.
  - b. Damages for unlawful distress.
  - c. Restitution of the sum of Kshs.5,400,000/- being the purchase price of L.R. No.214/468 Muthaiga Nairobi.
  - d. Special damages of Kshs.28,000,000/- being the value of the improvements done on L.R. No.214/468 Muthaiga Nairobi.
  - e. An order for account and restitution of all monies paid by the Plaintiff to the 1<sup>st</sup> Defendant as rent or recovered as rent by the 1<sup>st</sup> Defendant.

### **1<sup>st</sup> Defendant's Defence And Counterclaim**

4. The 1<sup>st</sup> Defendant filed his Statement of Defence together with a Counter claim dated 24<sup>th</sup> April 2007 and stated as follows:-
1. The 1<sup>st</sup> Defendant denied the contents of para. 6 & 7 of the Amended Plaint and averred that whilst there was no legal duty to disclose the existence of an encumbrance (The Plaintiff being duty bound to investigate the title) the 1<sup>st</sup> Defendant made full disclosure of the charge at a meeting held in the presence for the Plaintiff's Advocate Mr. Fred Ngatia at the residence of the 1<sup>st</sup> Defendant 's Director in Lavington Nairobi.
  2. The 1<sup>st</sup> Defendant further denies that it was necessary to seek the authority and/or consent of the Chargee as the Chargee's only interest in the transaction was in the repayment of its loan. The 1<sup>st</sup> Defendant averred that the Sale Agreement provided for a cash purchase whereby



the amount paid by the Plaintiff (proceeds) would have offset the debt owed to Industrial Development Bank with the balance to the 1<sup>st</sup> Defendant.

3. The 1<sup>st</sup> Defendant denied the contents of para.7,7, 9 & 10 of the Amended Plaintiff averring that the Plaintiff is looking for scapegoat following her failure to honour the terms of the Sale Agreement. It was not a term of the contract that the Plaintiff was to obtain finance and there was therefore no issue of involving the Chargee in the sale through the Chargee was fully aware of the transaction.
4. The 1<sup>st</sup> Defendant concedes that it lawfully rescinded the said Sale Agreement referred to in para.11 of the Amended Plaintiff. It is denied, that the rescission and forfeiture of deposit was unlawful and or that the 1<sup>st</sup> Defendant failed to complete the contract in the alleged way or at all. It is reiterated that the Plaintiff failed to complete the Sale Agreement even after one indulgence.
5. The 1<sup>st</sup> Defendant denied the contents of para.19,20, 21, 22, 23, 24, 25 & 26 of the Amended Plaintiff. The 1<sup>st</sup> Defendant averred that further to the Court's finding the rent as at 3<sup>rd</sup> April, 2006 to be due the Plaintiff continued to default in subsequent rental payments thus entitling the 1<sup>st</sup> Defendant to lawfully distress for the same. The 1<sup>st</sup> Defendant however is a stranger to any of the allegations against Kanyekiini Auctioneers and makes no admission thereof.

### **Counterclaim**

5. In his counterclaim the 1<sup>st</sup> Defendant stated as follows;
  1. The 1<sup>st</sup> Defendant reiterated that the Plaintiff was its tenant in its residential house erected on L.R. No.214/468 Muthaiga Nairobi.
  2. The 1<sup>st</sup> Defendant averred that for the past 1 year the Plaintiff prior to her departure consistently failed to pay rent as and when it falls due, she issued cheques which were dishonored upon presentation leading to distress for rent.
  3. Despite some rental payments and the distress, the Plaintiff still owes the 1<sup>st</sup> Defendant the sum of Kshs.1,500,000/- as set out in the Rental Statement hereunder, which the 1<sup>st</sup> defendant hereby counter-claimed for.
  4. The Plaintiff is in breach of the implied covenants as to payment of the rent and on the 31<sup>st</sup> day of October 2006 the 1<sup>st</sup> Defendant gave the Plaintiff notice to vacate its premises.
  5. On or about mid-February,2007 the 1<sup>st</sup> Defendant was informed that the Plaintiff was moving her belongings in order to defeat a pending distress for rent. The 1<sup>st</sup> Defendant informed its Advocates who in turn informed the Auctioneer that the proclaimed goods were being moved in pound breads. It was agreed that all parties converge at the house and the Advocate, Auctioneer and Directors duly met at the house at dusk only to find the Plaintiff's brother with a fully loaded lorry No. KAC 373 T Isuzu. The Auctioneer blocked the lorry and called the police.
  6. Upon the arrival by the police the parties all inspected the house and found that; the Plaintiff had carried away all her belongings; all lifts fitting in house vandalized & removed; electricity disconnected at the pole; no running water; jacuzzi vandalized; steam bath room stripped bare of all its accessories, bathrooms vandalized, kitchen cupboards removed; all the toilets stinking due to lack of water, gymnasium equipment removed; various power conduits, switches and power outlets pulled out and vandalized; kitchen taps, bathroom taps and overhead showers



removed; the driveway had been dug up; all the gardening and flower beds unattended and some glowers dug up and placed into plastic bags ready for removal & electricity fence pulled down and not working.

7. The Plaintiff left the property vandalized, wasted and non-habitable state thus causing the 1<sup>st</sup> Defendant to incur Kshs.6,000,000/- to return it to the habitable state. This sum is made up of the repair costs of the main building, swimming pool, sauna, garden area, fixing lights in the entire premises electricity and garden area, fixing lights in the entire premises electricity and water reconnection and such other sums used to repair the vandalized portion.
  8. The electricity and water had been disconnected at the main supply points outside the premises out of the Plaintiff's perpetual defaults in payment of utility bills and issuance of bouncing cheques. The 1<sup>st</sup> Defendant counterclaim for this amount and in the alternative seeks a set off in the event any sum is found due from it to the Plaintiff by this Court.
6. The 1<sup>st</sup> Defendant counterclaims and seeks judgment to be entered against the Plaintiff for:-
- a. Kshs.1,500,000/- being rent arrears owing.
  - b. Mesne profit at the rate of Kshs.256,000/- per month with effect from December 2006 to May 2007.
  - c. Special damages of Kshs.6,000,000/- being the cost of repairs.
  - d. Interest on (a) (b) and (c) above at Commercial Rates or as the Court will deem fit.
  - e. In the alternative, the 1<sup>st</sup> Defendant seeks a set off against any sums found by Court to be due to the Plaintiff.

### **Amended Reply To Defence And Defence To Counterclaim**

7. The Plaintiff filed her amended Reply to Defense & defense to Counter claim dated 15<sup>th</sup> May 2007.
8. The Plaintiff denied in totality the contents of para.4 of the 1<sup>st</sup> Defendant's defense and puts the 1<sup>st</sup> Defendant in strict proof thereof.
9. The 1<sup>st</sup> Defendant in reiterating the contents of para. 6 & 7 of the amended Plaintiff averred that the 1<sup>st</sup> Defendant knowingly made a false statement in its sale agreement with the Plaintiff to the effect that the suit property was free of ALL encumbrances.
10. The Plaintiff denies the contents of para.5 of the defense and averred that the 1<sup>st</sup> Defendant required the consent of the Chargee before selling the suit property more so because the agreed purchase price was less than the amount secured by the Chargee and that the sale agreement in issue did not refer to the purchase price being used to redeem the debt owed to the Industrial Development Bank.
11. In answer to para.6 of the 1<sup>st</sup> Defendant's defense the Plaintiff denied dishonoring the sale agreement or looking for a scape goat and averred that it is actually the 1<sup>st</sup> Defendant who dishonored the sale agreement. Further the purchase price was a huge amount that necessitated the making of financial arrangement which were thwarted by the 1<sup>st</sup> Defendant's misrepresentation.
12. In answer to para 7 of the 1<sup>st</sup> Defendant's defense the plaintiff denied that she failed to complete the sale agreement.
13. In answer to para.10 & 11 of the 1<sup>st</sup> Defendant's defense the Plaintiff averred that she was in possession of the suit premises as a purchaser and the issue of rent and distress cannot arise.



## **Defence To Counter Claim**

14. The Plaintiff denied that she was at all the material time a tenant of the 1<sup>st</sup> Defendant but rather was in possession of the suit premises as a bona fide purchaser and not as a tenant.
15. The Plaintiff denied owing the sums alleged in para.17 of the 1<sup>st</sup> Defendant's counterclaim on the issue of rental payments and she was not a tenant and hence the issue of implied covenants as to rent does not arise.
16. The Plaintiff denied the content of par 19 of the counterclaim and in particular the issue of police being called averred that it is the 1<sup>st</sup> Defendants agents and auctioneers who carried away the Plaintiffs goods.
17. The Plaintiff denied the contents of para.23 and averred that she was not present during the eviction and that the 1<sup>st</sup> Defendant changed locks, hired guards and denied the plaintiff entry to the premises.
18. The Plaintiff finally averred that the mesne profits prayed for in para.(b) of the prayers in the counter claim is unmaintainable for the Plaintiff was in the first place not in occupation of the suit premises for the larger part of the period claimed as she had been evicted on 13<sup>th</sup> February 2007 and in addition the distress in December, 2006 had paralyzed the Plaintiffs business and as such no profits, mesne or otherwise accrued.

## **2<sup>nd</sup> Defendants Defence**

19. The 2<sup>nd</sup> defendant filed his statement of defense dated 19<sup>th</sup> April, 2013 stating as follows;-
  1. The 2<sup>nd</sup> Defendant admitted having been instructed by the 1<sup>st</sup> Defendant to proclaim goods in the sum of Kshs.2,061,000/- however the 2<sup>nd</sup> Defendants denies that the proclamation was unlawful and the Plaintiff is put to strict proof thereof.
  2. That the Plaintiff filed this suit on the 20<sup>th</sup> April, 2006 together with an application for injunction seeking that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be restrained from attaching the goods set out in the proclamation dated 3<sup>rd</sup> April, 2006. Further the Court granted the injunction on condition that the Plaintiff remits to the 1<sup>st</sup> Defendant all sums due on account of rent payable within fifteen days of the date thereof and every month thereafter until the ruling is delivered failure to which the 1<sup>st</sup> defendant would levy distress.
  3. The 2<sup>nd</sup> Defendant denied that he sold any of the Plaintiffs goods and averred that the 2<sup>nd</sup> Defendant released the goods he had attached to the Plaintiff who duly acknowledged receipt of the goods.

## **Evidence**

20. PW1 Jane Wangui Gachoka testified that she relied on Witness Statement Pg 9- 11 of [Index of the Plaintiff's Trial Bundle] jointly filed on 6/6/2019 by both Plaintiff & Defendant and the Plaintiff's Supplementary List of documents at Pg 32.
21. PW1 stated that they had a meeting in Lavington and she was to sign the Sale Agreement over property that was being sold free from any encumbrances. She was keen to ensure that the encumbrance is known in detail and if the bank (IDB) would allow them proceed with the sale despite the encumbrance. PW1 took issue with 1<sup>st</sup> Defendant that it was an obligation to inform IDB that they executed a Sale Agreement they had received 10% proceeds of sale and she was the one who informed IDB as shown by letter from the bank at Pg 14 of the bundle. PW1 stated she was not a tenant at the



- Apartment & the Defendant had not produced any Tenancy Agreement. The Agreement for Sale was signed on 6/7/2005 while she was in possession of the property and pending completion of terms of Sale Agreement she was already occupying the suit property.
22. PW1 stated that there was cocktail of Auctioneers at the premises as she came to Court severally for reprieve and subsequent Auctioneers were sent to the premises. She went to the house and found her tools of trade were carted away to the Test bed. She was unceremoniously evicted and she could not do anything at the house in peace.
  23. The 1<sup>st</sup> Defendant made a claim against her in the Defense & Counterclaim at Pg 44(of Plaintiff Bundle)She did not have arrears of rent of Ksh 1.5million.
  24. At Paragraph 20 & 21 of the Defense, PW1 stated that during the whole process she made regular reports to Muthaiga Police Station and she denied that it is the Police who evicted her.
  25. PW1 did not vandalize the jacuzzi and there was no gymnasium.PW1 denied the cost of Ksh 6 million and put the Defendant on strict proof thereof.
  26. PW1's claim against the 2<sup>nd</sup> Defendant is that they came to evict her for rent arrears and she had several injunctions but they did not heed/obey them. The Lease was by the other tenant (M/S Andrews Apartments) and 1<sup>st</sup> Defendant and not her. The Lease is at Pg 147 of the bundle. The Lease was between Intime Co Ltd & M/S Andrews Apartments and not her. The arrears of rent were guaranteed by Mr. Fred Ngatia.
  27. DW1 Deepak Mediratta, one of the Directors of Intime Ltd relied on his Witness Statement at Pg 48 of the Amended Index Plaintiff's Trial Bundle (all documents of Plaintiff & Defendant put together) DW1 relied on Defense & Counterclaim filed on 27/4/2007 at Pg 43 of the Bundle. Pg 55-175 is the 1<sup>st</sup> Defendant's evidence and all above documents produced as exhibits in Court- Defense bundle-1.
  28. The Plaintiff was in the premises from 2003and she was business Partner of Fred Ngatia. The renovations were done in 2003 and the Sale Agreement was signed in 2005. The Plaintiff Ms Gachoka had been arranging for funds from various financial institutions and they did not see the money. According to the letter, she was to get financial assistance. They made several correspondences the final payments were not made nor undertaking or payment for the suit property.
  29. When the balance was not paid, his Advocate, Satish Gautama wrote to Ms. Gachoka regarding the sale Agreement and to rescind/terminate the contract. The contract was terminated and it was communicated to her Advocates and copied to her. She was aware that the time was over for payment of the balance of the Purchase price. The whole amount would have been paid to IDB bank and title issued in the name of new owner.
  30. After signing of Sale Agreement, the Plaintiff continued to be a tenant- By letter of 20/7/2006, both Advocates of Defendant had the letter written to the Plaintiff was a tenant. The letter at Pg 18 dated 21/7/2006 by Harith Sheth Advocates, the Ksh 5.4 was treated as rent payable.
  31. At Pg 132, The Court directed that injunction was granted that the Plaintiff was to remit the sums to be made within 15 days and going on thereafter and if party defaults levy distress.
  32. When the Plaintiff failed to pay rent, they wrote several letters to Ms Gachoka and in the end levied distress and in the end levied distress through Auctioneers.
  33. The Plaintiff left premises in 2006.On 31/10/2006 the Defendant gave the Plaintiff notice to vacate and on or about mid- 2007, they learnt the Plaintiff was leaving, The Plaintiff's brother came with a lorry and put Plaintiff's goods .The Auctioneers blocked the lorry and called Police who came to



the scene as Plaintiff moved all her possessions. All light fittings in the house & garden were removed and electricity disconnected and jacuzzi. At Pg 49 of the bundle all these were indicated. They did not recover payment of rent. The premises was left in dilapidated state and DW1 sought grant of Counterclaim and dismissal of the Plaintiff.

34. DW 2 Matthew Ndau Kanyi relied on the Trial Bundle filed on 4/6/2019 Supporting Affidavit to the Application of 2012 and Witness Statement of 30/4/2013 & Supplementary Affidavit of 19/7/2012 and annexures as Exhibit 1 & 2. He did not testify further. In cross examination, he stated he levied distress as per instructions from Advocate Kingara Gichuki. He returned/released when ordered by the Court to do so and the distress for rent was not declared illegal by Court order.

## Written Submissions

### Plaintiff's Submissions Dated 1/12/2021

35. The Plaintiff in her submissions averred that she paid the deposit of kshs.5,400,000.00 but to her horror, she discovered that the subject property was encumbered contrary to her expectation. The defendant then purported to illegally rescind the contract without cause or following procedure. As if to add salt to injury, the Defendant then purported to transform the plaintiff into a tenant, impose rent, levy distress on the same and in the process, the Defendant managed to evict the Plaintiff from the premises during the purported distress.
36. The Plaintiff raised the following 4 issues for determination;
1. Whether the 1st Defendant falsely represented that it had capacity to sell the property and the consequences thereof.
  2. Whether the Plaintiff was a tenant of the 1st Defendant or a purchaser and the consequences thereof.
  3. Whether the distress levied against the Plaintiff was lawful.
  4. Who between the Plaintiff and the Defendants is entitled to the prayers sought?
37. On the issue of whether the 1st Defendant falsely represented that it had capacity to sell the property and the consequences thereof, it is submitted that the Plaintiff and Defendant entered into an Agreement of sale dated 6/07/2005. Clause 6 of the said agreement provided that the said piece and parcel of land known as L.R.No.214/468 is sold free of any encumbrances. The Plaintiff came to know of the encumbrance after she had paid 10% of the purchase price and was sourcing for financing and was informed that the Industrial Development Bank (IDB) had a charge registered in its favour against the land.
38. The Defendant admitted that indeed there was a charge in favour of IDB. There was no consent sought from IDB and that the 10% paid by the Plaintiff was not given to IDB. The Plaintiff provided as an exhibit a letter dated 18<sup>th</sup> July, 2009 where IDB indicated that it was embroiled in litigation with the 1<sup>st</sup> Defendant, that there was an injunction preventing it from realizing the security that no consent had been obtained and that if it was to sell the property, it would sell it in the open market not necessarily to the Plaintiff.
39. On the issue of whether the rescission by the 1st Defendant was proper the 1<sup>st</sup> Defendant first the sale according to Clause 8 of the subject agreement was subject to the LSK conditions of Sale (1989) edition. According to condition 4(7) of the said LSK Conditions of Sale (1989) edition when a party was not able to complete the sale by the completion date, a completion notice was issued requiring the



purchaser to within 212 days complete the transaction. It is only after the 21 days were exhausted that the vendor could then rescind the contract and have the purchaser forfeit the deposit paid.

40. On whether the Plaintiff was a tenant or a purchaser it is submitted that the sale agreement was clearly not a Tenant-purchase kind of arranged. Nowhere in the entire agreement was the Plaintiff considered as a tenant.
41. The Plaintiff was not a privy or privity to that lease between the 1<sup>st</sup> Defendant and Fred Ngatia t/a Andrews apartment. The terms for the said lease could not be imposed upon her. There was no Lease or Tenancy Agreement executed by herself with the 1<sup>st</sup> Defendant.
42. On whether the distress levied against the plaintiff was lawful it is submitted that the 2<sup>nd</sup> Defendant sold the Plaintiff's goods and together with the 1<sup>st</sup> Defendant did not account for the proceeds and valuation from a certified valuer when the Plaintiff requested for the same.
43. The 1<sup>st</sup> Defendant instructed Kenyakini Auctioneers to levy distress for rent for alleged non-existent arrears amount to Kshs.114,500/-. The aforementioned auctioneers proceeded to the Plaintiff's premises on 18/12/2006 and seized and damaged the Plaintiff's goods claiming a sum of Kshs.1,374,000/- and not kshs.114,500/- as earlier provided for in the proclamation on 20/11/2006.
44. The distress levied upon the Plaintiff's goods was unlawful, malicious and aimed at frustrating the Plaintiff to leave the premises and forfeit the 10% deposit paid on the purchase of the suit property. The 1<sup>st</sup> defendant has stooped so low to ensure that the Plaintiff is on her knees as is evident from the acts of giving instructions to levy distress for non-existent arrears.
45. Reliance is made in the case of *Mattarella limited -vs- Michael Bell & Anor* [2018]2ekLR the court awarded the plaintiff in damages in the sum of kshs.2,000,000/- and held as follows:-

“While the Defendants were not specifically levying distress for rent, what they sought to do and actually did was to take possession by use of the law of the jungle. That must be, as has always been, frowned upon by the courts. Not only frowned upon but equally remedied by award of damages so that everybody seeking to live within the territory of Kenya, a country whose citizens have chosen to be led by the rule of law, gets to know, if one be otherwise under some illusion, that arbitrariness and or just impunity is not a virtue but a vice. Vice cannot be countenanced but must be curtailed and discouraged. I am saying all the foregoing because I have come to the conclusion that a violation of a right, due process and the law invite a reprieve or remedy to the violated.”

46. In the instant case on or about 13<sup>th</sup> February, 2007 the 1<sup>st</sup> Defendant through its agents proceeded to the Plaintiff's business premises locked the same and evicted the Plaintiff without allowing her to take her things including a generator. This was illegal and it rendered the Plaintiff without a means of livelihood.
47. See also the case of *Gusii Mwalimu Investment Co. limited -vs- Muahimu Hotel Kisii ltd* [1996] eKLR the Court of Appeal while addressing the right of a landlord to re-entry had this to say;

“To obtain possession by levying illegal distress is per se wrong.....If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the



landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession.”

48. Similarly in the case of *Ripples Limited vs Kamau Mucuha Nairobi HCCC 4522 of 1992* the Court held that;
- “ the landlord should only take one course of action against a defaulting tenant - ie either to distrain for rent OR institute an action for forfeiture of the lease/tenancy and repossession. Here the defendant/respondent took both reliefs to his benefit. It cannot be. The law does not permit it and this Court cannot allow it.”
49. The Plaintiff has clearly been wronged by the unlawful distress for rent shenanigans that caused her collapse of her business, irreparable harm and mental anguish. It is our prayer therefore that the Plaintiff be awarded damages for unlawful and/or illegal distress for rent as prayed.
50. On Who between the Plaintiff and the Defendants is entitled to the prayers sought, the Plaintiff has suffered irreparable loss, mental anguish and he loss of a major business. Since it is the 1<sup>st</sup> Defendant breached the Agreement of sale the Plaintiff is entitled to the reliefs sought.
51. The Plaintiff is entitled to the reliefs sought including a declaration that the Plaintiff does not owe any monies in form of rent to the 1<sup>st</sup> Defendant and that the purported distresses on 3<sup>rd</sup> April, 2006 and 20<sup>th</sup> November, 2006 were illegal and wrongful. Besides the restitution of the deposit the plaintiff is also entitled to restitution off all amounts paid as rent and those that were received by the 1<sup>st</sup> Defendant in pursuance of the distress for rent. The 1<sup>st</sup> Defendant did not account for the proceeds of the distress. That is where prayer (h) of the Amended plaint comes in – that an account be given for the amounts collected as rent.
52. Before the accounts are taken, it is worth to note that the Plaintiff pursuant to a court order paid the sum of Kshs.2,061,000/- which is acknowledged in the letter from the 2<sup>nd</sup> Defendant appearing at page 89 of the Trial Bundle. This amount should be refunded.
53. The Plaintiff left a generator and other movable goods. Those plus the costs of repairs amount to the sum of kshs.28,000,000/- which the Plaintiff also asks for.
54. There is a claim for mesne profits amounting to Kshs.256,000/- per month for the period between December, 2006 and May, 2007 the 1st Defendant witness confirmed that the plaintiff completely vacated the premises on 13/02/2007 therefore the period for February, March, April and May 2007 is completely out of the question therefore the Defendant cannot make a claim on it.
55. It is finally submitted that the costs of repairs the defendant claims being in the nature of Special damages, particulars ought to have been specifically pleaded, particularized and proved.

#### **Defendant’s Submissions Dated 25/02/2022**

56. In their submissions the Defendants raised the following 9 issues for determination;
- a. Where there was disclosure or misrepresentation as to the encumbrance and implication of the encumbrance on the sale agreement and whether the Plaintiff conducted due diligence and enter the contract well aware of the encumbrance.
  - b. Whether the issue of encumbrances was raised before the contract was rescinded.



- c. Who between the parties breached the sale agreement and its implication and whether the sale agreement was lawfully rescinded and deposit forfeited.
  - d. Whether the Plaintiff was a tenant in the suit property and when that tenancy began.
  - e. Whether the Plaintiff defaulted in paying the rent and legality of levying distress for rent.
  - f. Whether the Plaintiff vacated the premises or was evicted.
  - g. Whether there is any claim against the 2<sup>nd</sup> Defendant
  - h. Who between the parties is entitled to the orders sought.
    - i. Who should bear the costs of the suit.
57. On the issue of whether due diligence and charge over the suit property was done it is submitted that the disclosure as to the existing charge in favour of the IDB was made to the Plaintiff and her advocate at a meeting held in the 1<sup>st</sup> Defendant's premises which meeting was not denied by the Plaintiff.
58. The Plaintiff blames the 1<sup>st</sup> Defendant for non-disclosure of the encumbrance over the suit property which claims are immaterial since they were expected to conduct due diligence before entering into the transaction.
59. On whether the agreement and rescission was breached it is submitted that the balance of the purchase price was to be paid within 90 days from the date of execution of the agreement. Vide a letter 7<sup>th</sup> October, 2005, the sought extension of time to pay the balance of the purchase price which was never paid despite indulgence.
60. Reliance is made in the case of *Graham -v- Pitkin* [1992] 2 ALL E.R. 235 the court stated that
- “Unreasonable delay by a purchaser in completing a contract for the sale of land does not entitle the vendor to rescind the contract without first serving a notice to complete, although delay may be an ingredient in deciding whether a party in default does not intend to proceed and has repudiated the contract”.
61. On whether the Plaintiff was a tenant and from when that tenancy arose it is submitted that the Plaintiff was a tenant from inception and had presented herself to the court as such from the time the suit was filed. The Plaintiff claimed she spent Kshs.28 million to renovate the premises but surprisingly denied tenancy as at the said period. The Plaintiff alleges that she entered into possession of the suit property as a purchaser upon executing the sale agreement and has never been a tenant. She was however paying rent long before the sale agreement was entered and her further allegation that the previous tenant vacated the premises is not based on evidence. There is nothing like one tenant moving out and her entering the suit premises or change of business operations. No goods were removed and no new properties were moved in. The plaintiff disclosed that all movable properties in the suit property belonged to her and not Andrews Apartment therefore owns up to being beneficial tenant of the suit property long before the sale agreement was executed.
62. On the issue of whether Rent default and distress for rent, accounts and payers for refund, demand for rent arrears and alleged damages for loss of business it is submitted that the plaintiff was a tenant she was duty bound to pay rent and was exposed to levying of distress for rent if a situation of default arose. Therefore the allegation that the proclamation and attachment of goods in distress for rent were illegal is baseless having established that indeed the Plaintiff was the 1<sup>st</sup> Defendants tenant it is submitted that



the distress for rent levied against the Plaintiff was indeed lawful. Reliance is made in the case of *Peter Nthenge -vs- Daniel Itumo & Anor – HCCC No.1242 of 1974* Nairobi.

63. The 1<sup>st</sup> Defendant instructed 2<sup>nd</sup> Defendant to carry out a distress for rent and the Plaintiff herein obtained an order of the Court directing that the 2<sup>nd</sup> Defendant does hereby return all the attached goods. That in compliance with the court order the 2<sup>nd</sup> defendant returned the good and the Plaintiff acknowledged the same. See the case of *Cyo Owaya -vs- George Hannigton Zephania Aduda t/a Aduda Auctioneers & Anor* [2007].
64. The Plaintiff has failed to demonstrate how as a tenant who defaulted in paying rent has immune from distress for rent and the said distress was carried out within the requirements of the law and with Court's blessings in all instances. The 1<sup>st</sup> Defendant accounted for all the rent received as demonstrated in their trial bundle therefore the prayers for accounts are baseless as well as the prayer for restitution of all the rent recovered.
65. On the issue of rendering vacant possession, goods purportedly left in the suit premises, special damages for alleged improvements and prayer for damages for repairs it is submitted that the Plaintiff removed and carted away all her assets from the suit property which had been proclaimed goods with an aim of defeating the looming attachment and by the time the 1<sup>st</sup> Defendant and the police arrived at the suit premises all her belongings had been loaded in a truck. The Plaintiff is unable to demonstrate how she was evicted from the premises or specify what goods she left behind. The allegations that some goods were taken away for her then it means they were lost in her hands and taken away by the people she hired to cart away the goods from the premises. The Defendant is praying for damages for the vandalized premises as per their counter claim since the Plaintiff had no authority to destroy the premises and seek damages as prayed in the counter claim.
66. On the issue of Mesne profits the Plaintiff was given notice to vacate but illegally remained in occupation. Section 2 of the *Civil Procedure Act* Cap 21 of the Law of Kenya defines mesne profits as follows:

“mesne profits’ in relation to property mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.
67. Reliance is made in the following cases; the Court of Appeal in the case of *Attorney General -vs- Halal Meat Products limited* [2016] eKLR and in the case of *Rajan Shah t/a Rajan S. Shah & Partners -vs- Bipin P. Shah* [2016] eKLR and in the case of *Peter Mwangi Mbuthia & Anor vs- Samow Edin Osman* [2014] eKLR.
68. On the issue of whether there is any cause of action against the 2<sup>nd</sup> Defendant, it is submitted that on 3<sup>rd</sup> April, 2006 the 2<sup>nd</sup> Defendant received instructions to distress for rent from the Plaintiff and which was done. The 2<sup>nd</sup> Defendant released the goods and evidence to that effect has been given. That the 1<sup>st</sup> defendant was not issued with any other instructions to levy a distress for rent. Reliance is made in the cases of *Evans Nyakwana -vs- Cleophas Bwana Ongaro* [2015] eKLR and in the case of *William Kabogo Gitau -vs- George Thuo & 2 others* [2010] 1KLR 526.
69. In the instant case it is the duty of the Plaintiff to prove the facts constituting of any breach on the part of the 2<sup>nd</sup> Defendant herein which task the Plaintiff has not proved.
70. It is finally submitted that the Plaintiff case be dismissed and the Defendant's counter-claim be allowed.



## DETERMINATION

71. This Court read pleadings filed by Parties through Counsel, evidence by witnesses as recorded in the court Record and Witness Statements filed and extensive written submissions on the longstanding dispute. The parties through Counsel separately high lighted the issues for determination from instructions obtained from respective clients.
72. The Court will condense various issues and determine the following issues;
  - a. Was the Plaintiff Tenant or Purchaser or both on suit premises LR No 214/468, Muthaiga/Nairobi?
  - b. Was/were the levy for distress for arrears of rent legal?
  - c. What redress/remedy is available if at all/any from the Amended Plaint and/or Defense/Counterclaim.
  - d. Was the Plaintiff Tenant or Purchaser or both on suit premises LR No 214/468, Muthaiga/Nairobi?
73. The aerial view, is that the Plaintiff PW1 Ms Jane Gachoka resided with her mother and children and conducted business in adjacent quarters on LR No 214/468, Muthaiga/Nairobi from 2003 right upto 2007 when she vacated or was evicted.
74. The Lease Agreement of 1<sup>st</sup> May 2003 was executed between In time Co Ltd & M/s Andrew Apartments for Ksh 950,000/- 5 months' rent in advance and Ksh 190,000/- a month rent and 10% after every year. Clearly, the Plaintiff was not signatory and did not execute the said Lease Agreement. At the time, she ran the business M/s Andrew Apartment with Business Associate who executed the Lease Agreement and at paragraph 6 of the Lease Agreement guaranteed to pay any rent the balance outstanding period of lease.
75. Yet from the Statement of Account now of Villa Muthaiga, the Plaintiff's business from 2005 when she solely took over the premises and conducted business as shown Pg 27-30 of the Index to Plaintiff's Trial bundle, the rent paid and not paid runs from 2003, 2004 upto 2005 when Andrews Apartment withdrew and those arrears were not settled by Andrews Apartment who contracted and executed the Lease Agreement and payment guaranteed by Guarantor in the said Agreement.
76. Instead those arrears of rent were visited on the Plaintiff who was Co Partner/Business Associate in Andrew Apartments Limited, merely because she occupied the premises.
77. The Plaintiff deposed and testified that she was in possession of the suit property but had no Tenancy Agreement with the 1<sup>st</sup> Defendant.
78. The Lease Agreement housed at Pg 95 of Plaintiff's bundle indicates; it was signed/witnessed on 25/4/2003; signed by Mr Ashok Mediratta Lessor & Fredrick Ngatia Lessee and witnessed by Daniel Waithaka.
79. The letters of 19/12/2005 by SC Fredrick Ngatia to the Defendant's Advocate SC Satish Gautama and reply of 15/2/2006 confirm that Andrew Apartment /Lessee and Villa Muthaiga Plaintiff's Company were/are 2 separate legal entities/persons and Villa Muthaiga did not execute the lease but occupied the premises after Andrew Apartment left the premises in May 2005.



80. It would have been prudent for 1<sup>st</sup> Defendant and Andrew apartment to confirm all rent arrears before turning to the Plaintiff for monthly rent going forward while in occupation. The letter date 20/4/ 2005 of Rent review to Andrew Apartment is instructive of rent due and owing by Andrew Apartment
81. PW1 admittedly took over possession of the suit premises after M/S Andrew Apartment left in May, 2005. By dint of being in occupation and use of the premises by implication she was a tenant paying monthly rent to 1<sup>st</sup> Defendant. PW1 acquiesced to the terms of Tenancy/Lease Agreement after M/S Andrews Apartments left or else she would have negotiated new terms and sought written Agreement with/by 1<sup>st</sup> Defendant or vacated the premises.
82. PW1 in her statement is that the property was initially leased to Andrews Apartments and when she took over ran a business called Villa Muthaiga. In PW1's testimony she stated she was an employee of Andrews Apartments in cross examination she did not produce any proof of employment as sought by Defendant's Counsel.
83. The 1<sup>st</sup> Defendant, the Plaintiff was Co-tenant running the business Andrew Apartments eventually, the Plaintiff took over. As she stayed on after Andrew Apartment left, then at least from June 2005 rent was due for payment. The Plaintiff deposed that it was agreed between her & Managing Director Mr Ashok Mediratta that once she executed Agreement for Sale of the suit property and paid 10% she would not pay monthly rent and alluded to the letter dated 8/12/2004 on the sale of Muthaiga House as containing the said Agreement. A reading of the letter confirmed the contrary, whereas discussions were made 'advance rent and deposits would be refunded after reconciling the account'.
84. Land Lord & Tenant Cap 301 defines tenancy landlord & tenant as follows;
- "landlord", in relation to a tenancy, means the person for the time being entitled, as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy;
- tenancy" means a tenancy created by a lease or underlease, by an agreement for a lease or underlease by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such;
- "tenant" in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes a sub-tenant;
85. For all intent and purpose the Plaintiff was a tenant on a month to month basis on the assumed terms of lease that subsisted between Andrew Apartment & Intime Ltd. PW1 was in occupation of the premises w.e.f June 2003 and the Agreement for sale of the property signed on July 2003 initiated a Vendor - Purchaser relationship which was yet to crystalize on completion of the sale.
86. PW1 took over the suit premises May 2005, on 6/7/2005, she executed an Agreement for Sale; Pg 56 of the Plaintiff's bundle; between In Time Limited & Ms Jayne Wangui Gachoka for Purchase of LR 214/468 for Ksh 54,000,000/- and make down payment /deposit 10 % of Ksh 5,400,000/- the amount was paid as evidenced by Promissory notes annexed to Managing Director In Time Ltd Mr Ashok Mediretta (deceased) Pg 23-29 of Plaintiff's bundle. The Agreement for Sale did not include Lease with an option to purchase Clause nor spelt out the rent payment process while the Purchase/ sale was ongoing. Presumably, the transaction ideally would have been completed within 90 days.
87. The Plaintiff confirmed that she approached IDB later KCB among other financial institutions to obtain credit to purchase the suit property. In the process; PW1 reliably learnt that the property was encumbered by a mortgage to Industrial Development Bank (IDB) whose consent would be required



before sale of the property. The Plaintiff averred that the time of negotiation of the said sale and up to and after execution of the said Agreement for sale, the Defendant falsely represented to her that the said property was unencumbered the Plaintiff agreed to purchase the property and to expend considerable funds in improvement of the property as hereinafter stated.

88. The Plaintiff averred that the transaction took unduly long as the 1st Defendant failed to provide the necessary consent from Industrial Development Bank in whose possession the title to the property was. The Plaintiff further averred that the 1st Defendant did not confirm said Bank's consent to discharge the mortgage on the property and how much the bank expected in payment failure to which the Plaintiff could not finalize her financial arrangements for purchase of the property. The Plaintiff averred it is the 1st Defendant who breached the contract of sale and hence forfeiture of Ksh 5,400,000/- was unlawful.
89. The Defendant objected that it was under no obligation to disclose the mortgage as any Purchaser conducts due diligence. Further, if PW1 paid the balance of purchase price the Defendant would have paid IDB and discharged the charge and obtained clean title to the Purchaser.
90. From the foregoing the Plaintiff was tenant in the premises and not a purchaser because even though the process of Sale/Purchase was initiated, the sale was not completed as per the Agreement for sale as performance/ enforcement remained pending. According to the Agreement for Sale the Plaintiff would have completed sale /purchase within 90 days upon performance.
91. The 1<sup>st</sup> Defendant in his testimony whilst admitting receipt of Ksh 5,400,000/- 10% down payment to Managing Director of Intime Limited testified that Ksh 5.4 m would be treated as rent payable vide letter dated 21/7/2006 by Harit Sheth Advocates. Yet it was not treated as such because of the successive levies of distress for rent arrears that followed against the Plaintiff as evidenced by the Court record even after the said date.
92. A reading of the Court record depicts the Plaintiff accosted by terms of lease Agreement that she did not sign but by being Co Business Associate in Andrew Apartment which later vacated the premises and she remained in occupation, she was under immense pressure to comply with Tenant obligations and at the same time fulfil Purchaser Obligations under Agreement of Sale over the same suit property within the same period.
93. At the same time PW1 did not have quiet enjoyment of the premises as there were numerous levy of distress operations carried out in the premises and carted away her tools of trade, her business went burst. Cumulatively, with all the competing legal obligations PW1 could not possibly meet the deadlines and conditions of sale. By design or default PW1 had too many balls in the air to handle and it was opportune for 1<sup>st</sup> Defendant to rescind the contract of purchase, claim breach by PW1 forfeit Ksh 5,400,000/- the was paid to the Bank and not as rent payable by PW1as stated and later, obtained another buyer of the same property in compliance with Law Society of Kenya Conditions of Sale Rules paid 10% of purchase price and later full purchase price. These circumstance wreck of unjust enrichment by 1<sup>st</sup> Defendant.
94. In Madhupaper International Limited & Samuel Kamau Macharia Vs Kenya Commercial Bank Limited Kenya Commercial Finance Company Limited Kenya National Capital Corporation Limited Civil Case No. 1263 Of 1992; The Court observed.....

“Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, will



not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice.....

And, on the authorities approved by Madan and Wambuzi, JJA (as they then were) in the Chase International Investment Corporation case (supra), the basic elements presupposed by the doctrine of unjust enrichment are (1) that the defendant has been enriched by the receipt of a benefit; (2) that he has been so enriched at the expense of the plaintiff; and (3) that it would be unjust to allow the defendant to retain the benefit in the circumstances of the case. These subordinate principles of the general principle of unjust enrichment are interrelated. They clearly show the nature of restitution claims, and how people incur restitution obligations

### **Agreement For Sale Of Suit Property**

95. The Plaintiff and Defendant executed the Agreement for Sale of the suit property LR 214/468-Muthaiga Nairobi. The terms of sale were set out including Clause 16 of the Agreement that prescribed;  

‘if for any cause whatsoever other than non- completion by the Vendor the transaction shall not be completed on the completion date, then the Purchaser will pay interest on the balance of the Purchase price at the rate prescribed in the preceding paragraph computed from the completion until payment of purchase price in full, both days inclusive without prejudice however, to any relief open to the Vendor under this contract or any other law and to rescind this Agreement and also forfeit the deposit aforesaid together with interest accrued thereon in accordance with the provisions contained in the Law Society of Kenya Terms & Conditions aforesaid’.
96. Parties are bound by terms of contract, herein PW1 executed the contract of sale which 1<sup>st</sup> Defendant pursued and enforced whilst at the same enforced terms of Lease Agreement which PW1 was not privy to but for holding over and occupying the premises starting a new business and residing there, she was subjected to an avalanche of levy of distress for rent and demands to timely complete sale of the same property, she was paying rent for. This is unconscionable conduct by 1<sup>st</sup> Defendant who from correspondence on record did not negotiate the contract with PW1 on lease and proposed sale but negotiations were by his late brother Mr. Ashok Mediretta and more so after discharging the Andrew Apartment that executed the Lease Agreement whose terms were enforced capriciously on PW1.
97. The letter dated 7/10/2005 by PW1 to Defendant’s lawyer at Pg 48 of Plaintiff’s bundle PW1 negotiated sale and paid Ashok Mediretta who unfortunately died shortly thereafter. PW1 disclosed intention to approach IDB bank for Loan facility to pay balance of purchase price and found that the suit-property was charged to the same bank.
98. PW1 sought Vendor’s input on whether the IDB was aware and consented to sale and give clean title upon payment. On 18/7/2006 when IDB confirmed Plaintiff’s letter on inquiry of the property that there was a court case with the Borrower and would offer the property to open market to ensure the best price. On 20/7/2006, 2 days later, the Defendant rescinded the sale of the suit property and confirmed negotiating re-sale of the property. The alleged notice of 3/2/2006 by the Defendant if true then recession should have been 21 days later and not 5 months later after the letter from IDB on the charged suit property.



99. The following is what Halsbury’s Laws of England, 3rd Edition volume 8 paragraph 282 on page 165 says on the point;

“Notice making time of the essence. In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for completion and stating that, in the event of non-completion within the time so fixed, he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice is given, and to all the circumstances of the case.”

100. The Law Society of Kenya Conditions of Sale Conditions;

Sub condition 7, provides;

This sub condition applies unless a special condition that time is of the essence in respect of completion date.....

b. If the sale shall not be completed on the completion date, either party, may after that date serve on the other notice to complete transaction in accordance with the sub condition.....

c. Upon service of completion notice it shall be a term of the contract that the contract shall be completed within 21 days of service and in respect of such period, time shall be of the essence of the contract.

101. Clause 16 of Agreement for sale incorporated the Law Society Conditions of Sale and failed to confirm that time was of the essence by stipulating the same in the Contract other than completion date and failed to comply with Condition 7 that notice ought to have served to Plaintiff first before recession of contract. See *Thrift Homes Ltd vs Kays Investment Ltd CIVIL SUIT NO. 1512 OF 1998*; Nelson Kivuvani vs Yuda Komora & Anor Nairobi HCC No. 956 of 1991 & Sisto Wambugu vs Kamau Njuguna 1983 eKLR on valid contracts of sale of land and requisite notice served before recession of contract.

102. From the above chronology of events the Plaintiff delayed completion of the Purchase transaction while awaiting Defendant’s consent from IDB for Plaintiff to proceed with sale and the Defendant did not effect legally the recession of contract by not complying with Law Society Conditions of sale.

103. Hence the Ksh 5,400,000/- would amount to unjust enrichment by Defendant whereas the Defendant failed to serve requisite notice as per contract of sale of suit property. I find restitution of the 10% deposit of contract sale Ksh 5,400,000/- shall be refunded to the Plaintiff with interest and costs of the suit.

**b) Was/were the levy for distress for arrears of rent legal?**

104. The Plaintiff submitted that rent was levied contrary to *Distress for Rent Act*. In April 2006 the 1<sup>st</sup> Defendant instructed 2<sup>nd</sup> Defendant Panama Rovers to proclaim household & business goods and motor vehicles for rent arrears Ksh 2,061,000/- & Ksh 240,000/- Auctioneers Costs. The proclamation was addressed to Andrew Apartments and not her t/a Villa Muthaiga. The proclamation included her tools of trade that are exempt from distress for rent process. Under Certificate of Urgency filed in Court, vide Court orders of 7/7/2006 the said amount claimed was to be deposited in escrow Account of parties respective Advocates. Upon payment of Auctioneers Fees her goods were released.



105. On 9/8/2006 the Defendant pursued levy of distress for rent, notwithstanding the payments made through Galaxy Auctioneers' who proclaimed all goods and motor vehicles once again. On 20/11/2006, Kanyekini Auctioneers levied distress for alleged rental arrears of Ksh 114,500/-. On 18/12/2006, 2<sup>nd</sup> Defendant broke in and seized and damaged her goods claiming Ksh 1,374,000/- and not Ksh 114,500/- earlier proclaimed [Pg170 of Trial Bundle] and the goods were carted away and never advertised or accounted for proceeds of sale to PW1. PW1's business was run down and suffered irreparable loss of business. On 13/2/ 2007, the 1<sup>st</sup> Defendant through its agents and advocate locked the premises and evicted her and her generator was locked in.
106. The Plaintiff relied on the case of *Mattarella Limited vs Michel Bell & Anor* [2018] eKLR & *Gusii Mwalimu Investment Co Ltd Vs Muahimu Hotel Kisii* [1996]eKLR & *Ripples Limited vs Kamau Mucuha Nairobi HCCC4522* of 1992 on the illegality of distress for rent.
107. The Defendant stated that the Plaintiff was under obligation to pay rent, the preceding year PW1 presented cheques which were dishonored. The 1<sup>st</sup> Defendant was forced to exercise remedy for distress for rent and instructed advocates to demand rent arrears vide letters 17/10/2006 & 22/9/2006. On 31/10/2006 PW1 was served with notice to vacate the premises.
108. The Defendant submitted the Plaintiff was a beneficial tenant who was in arrears of rent and distress for rent was carried out in terms of Section 3(1) & 4 (1) of *Distress for Rent Act* and relied on the case of *Cyo Owaya vs George Hannington Zephania Aduda T/A Aduda Auctioneers & Another* 2007 to confirm what constitutes illegal distress of rent. The 1<sup>st</sup> Defendant accounted for all rent received as shown by Pg 68-174 of the Trial Bundle.
109. The Court record and more importantly, the Trial bundle is replete with various Proclamations and PW1 filed various Certificates of Urgency on the levy of distress and obtained reprieve for Court as indicated by the following Court orders;
- a. 31/8/2006 by Justice Azangalala restraining levy of distress by Galaxy Auctioneers
  - b. 17/11/2006 by SPM S Muketi restraining Defendant from evicting Plaintiff from suit premises and not interfering with quiet enjoyment of the said property
  - c. On 20/4/2006, by Justice Ransley granting injunction restraining defendants from interfering with Plaintiff's possession of the goods set out in the purported proclamation of 3/4/2006.
  - d. On 9/8/2006 by Justice Ochieng, the attached goods be released unconditionally and forthwith to the Plaintiff, the Plaintiff will not be required to pay charges claimed by Defendant's lawyers or Auctioneers will await determination in due course.
110. There are 2 Rulings one By Justice Ochieng of 11/10/2006 granting interim orders/directions pending hearing and determination of the suit and by Justice Musinga of 29/11/2012 on striking out 2<sup>nd</sup> Defendant from these proceedings.
111. This Court considered the litany of correspondence on default of rent increase/adjustment of rent/ sale of property/and notice to evict Plaintiff from the premises.
112. As considered above The Court finds the Plaintiff was tenant month to month basis in the absence of a new Tenancy Agreement or Lease with an option to purchase clause in the Agreement for sale. The Terms of the Lease Agreement between Andrew Apartment & Intime Ltd were imposed on PW1 who was not Director of Andrew Apartment but possibly Business Associate. The Defendant and Plaintiff ought to have negotiated a new lease on agreed terms and thus binding. For now, in the absence of such lease, yet PW1 was in occupation, she was a month to month tenant.



113. The Court record depicts the following, Andrew Apartment paid deposit which was not refunded nor utilized to clear rent arrears instead according to Pg 26-30 of Trial Bundle all rent arrears from 2003 instead of from 2005 are lumped on PW1 who was not Andrew Apartment but Villa Muthaiga.
114. Secondly, when PW1 made payments the same was not credited in the Running Account. Thirdly, it is conceded that Ksh 2,061,000/- paid by PW1 into a joint interest Account of both Advocates is not acknowledged as credit for rent paid for the period claimed. Fourthly, Ksh 5,400,000/- was already received as deposit and DW1 stated that it would be treated as rent why was this not implemented and credit given for the said amount instead there were subsequent levy of distress? Fifthly, PW1 paid for renovation Ksh 500,000/- of the premises as shown by letter of 6/6/2005 by Engineers & Builders Ltd of the Muthaiga premises.
115. Sixthly, a notice to vacate was issued and PW1 was to leave the premises yet on the day of departure she was accosted by Defendant's agents and Police had to be called in that she collected all her belongings to avoid distress for rent and alleged she was running away. The parties from the Court record knew each other well and each was represented by Advocate where would she escape to and not be reached? How did she know of intended distress for rent? The Defendant held Ksh 5.4 million and Ksh 2 million in an account already.
116. The distress for rent levied was as prescribed by Section 3 & 4 of *Distress for rent Act* However, the manner of carrying out the levy of distress leaves a lot to be desired going by the above outline of facts. The Defendant had advantage of both worlds; under contract of sale of land where the Plaintiff was to comply on the terms within schedule and pay Ksh 54 million for purchase of the suit property she resided in and was to pay rent month to month in the absence of a valid Lease. PW1 made payments in both transactions albeit in arrears and delayed but from the Court orders it is deducible that manner of application of right to levy distress was wanting.
117. Of importance save for correspondence and in the absence of a valid lease, this Court only finds that PW1 stayed on the premises from May 2005 – February 2007, in the absence of a lease between Plaintiff and Defendant she was month to month tenant. The Running Account at Pg 26 of Trial bundle does not give credit for payments made by Plaintiff, monies paid to deposit in joint Account, proceeds from sale upon auction, rent paid in compliance of Justice Ochieng's order to pay rent every 15<sup>th</sup> of the month until determination of the matter such that it is not clear to this Court what rent was payable.
118. If Kanyekini Auctioneers proclaimed for Ksh 114,500/- on 20/11/2006 2 weeks later the 2<sup>nd</sup> Defendant descends with a claim of Ksh 1,374,000/- where did the figure come from rent is payable monthly not biweekly. Whereas Section 3, 5 & 15 of *Distress for Rent Act* sanctions levy of distress in this case there was no acknowledgement of payments made after series of Levy of distress. See *Il Mattero Ltd vs Michael Bell & Ashburn Grove Ltd* 2018 eKLR; *Gusii Mwalimu Investment Co Ltd vs Mwalimu Hotel Kisii Ltd* 1996 eKLR Court of Appeal & *Maraga J in Charles Mwangi Kamau vs Mohammed Hassan Sheikh Noor Mombasa HCCC 2of 2005* on unlawful eviction.
119. This distress for rent was illegal and irregular as the figures due as rent arrears were not confirmed, the payments made prior were not considered and even after PW1's goods were carted away the a value of goods and amount realized were not furnished to PW1 or her Advocate. The Distress for rent upto now cannot be held to be legal unless until accounts are taken giving credit for what was paid and the funds held in Account and when the Plaintiff was to vacate and as such mesne profit cannot be considered at this stage.



## Special Damages

120. Special damages must be specifically pleaded and specifically proved. The claim by Plaintiff of repairs and renovations amounting to Ksh 28,000,000/- was pleaded but proved. He who alleges must prove as encapsulated by Section 107- 112 of the *Evidence Act*.
121. Similarly the Counterclaim of Ksh 6,000,000/- similarly apart from DW1 outlining the damaged properties in his statement, there was no evidence to prove damage occurred the day of eviction if so the damage was by PW1 alone whereas defendant's Agents Auctioneers Advocates, relatives and Police were present during the commotion. Again, there is no tangible and cogent evidence on damage occasioned, on what properties by who and calculation of costs. Similarly, no proof as required by Section 107 -112 of *Evidence Act*. See Evans Nyakwana vs Cleophas Bwana Ongaro 2015 eKLR.
- c) What redress/remedy is available if at all/any from the Amended Plaintiff and/or Defense/ Counterclaim

## Disposition

- a. A declaration that the Plaintiff was a month to month tenant as she held over occupied and used the suit premises and assumed terms of Lease by Andrew Apartments
- b. The distress for rent of 18/12/2006 unlawful distress as outlined above and award of Ksh 1,000,000/- is awarded with interest and costs.
- c. Restitution of the sum of Kshs.5,400,000/- being deposit for the purchase price of L.R. No.214/468 Muthaiga Nairobi is granted with interest & costs of the suit.
- d. Special damages of Kshs.28,000,000/- being the value of the improvements done on L.R. No.214/468 Muthaiga Nairobi not proved not granted.
1. The Counter claim is granted to the extent of Deputy Registrar Commercial & Tax to take accounts of Rent due and owing w.e.f. May 2005 – February 2007 when PW1 occupied premises and paid monthly rent and set off against the monies PW1 deposited in joint Account of Ksh 2,061,000,000/- the various payments by PW1 after reprieve of injunction from Court, payment of rent every 15<sup>th</sup> of the month pending Ruling of Court. The rent payable shall be with interest and Cost of Counterclaim.
  2. Mesne profit at the rate of Kshs.256,000/- per month with effect from December 2006 to May 2007 is denied, Defendant issued Notice to vacate by November,2006 which was unlawful as it was levy of distress contrary to law. PW1 vacated February 2007 and was bombarded and accosted her exit hindered that she was running away without paying balance of rent accrued. If PW1 was in the premises wrongfully it was December & January 2006 -2007, there was no valid lease between parties and the harassment cannot be rewarded by Mesne profits. These are Special Damages only pleaded not strictly proved. How was the figure arrived at? The prayer is denied.
  3. Special damages of Kshs.6,000,000/- being the cost of repairs is dismissed pleaded and not proved.

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 17/12/2024 IN MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE)**

**M.W.MUIGAI**



**JUDGE**

