



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(MILIMANI COMMERCIAL & TAX DIVISION)**

**CIVIL SUIT NO. 185 OF 2009**

**LUCY WAIRIMU MWANGI.....PLAINTIFF**

**VERSUS**

**MONICA JACKLINE WAMBU.....1<sup>ST</sup> DEFENDANT**

**PAULINE MUKUHI NGANGA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit by filing a plaint dated 17<sup>th</sup> March 2009, and amended on 20<sup>th</sup> June 2011, seeking for judgment against the Defendants jointly and severally for;

- (a) *declaration that the defendants have no right, title or interest in the suit property;*
- (b) *A permanent injunction restraining the defendants by themselves, their agents or otherwise from entering, accessing or otherwise interfering with the plaintiff's quiet possession of the suit property;*
- (c) *An order of eviction directed at the defendants, their tenants, agents or other persons claiming interest under them from the suit property;*
- (d) *Mesne profits from March 2009, until delivery of vacant possession of the suit property;*
- (e) *Damages on account of trespass and unlawful interference with the plaintiff's possession of the suit property;*
- (f) *Damages for mental distress and anguish caused by the defendants' said interference, harassment and unlawful eviction of the plaintiff;*
- (g) *Interest on (d), (e) and (f) above until payment in full;*
- (h) *Costs of this suit.*

2. The Plaintiff's case is that, by a sale agreement dated 13<sup>th</sup> January 2009, the 1<sup>st</sup> Defendant sold to her; the right, title and interest in; Maisonette No. 6 Casablanca Villas erected on, L.R. No. 209/5827 along Dennis Pritt Road in Nairobi (herein "**the suit property**"), for a consideration price of, Kshs. 13,700,000. She paid the entire purchase price to Chege Wainaina & Company Advocates, representing both parties to the sale agreement.

3. Subsequently, the suit property was transferred to her by an assignment registered at Titles Registry on 22<sup>nd</sup> January 2009, vesting the suit property in her. On or about 26<sup>th</sup> January 2009, the 1<sup>st</sup> Defendant transferred to her vacant possession of the suit property. That as the property is situated in a common compound with other houses managed by Hemmingways Holding Limited, (herein "the Managing Company"), the company duly executed a share transfer, transferring to her the share in the suit property. The keys to the property were handed over to her and she commenced and fully completed repair works on the property.

4. However, in the month of February 2009, the 2<sup>nd</sup> Defendant who is the 1<sup>st</sup> Defendant's mother, went to the suit property and harassed the Plaintiff demanding for vacant possession of the suit property on allegation that, the sale had been cancelled. The Plaintiff avers that, the 2<sup>nd</sup> Defendant's actions are breach of her quiet possession of the suit property.

5. That, subsequently, the 1<sup>st</sup> Defendant on the inducement of the 2<sup>nd</sup> Defendant, visited the suit property, with the intention of repudiating the sale transaction and with a view to refund the purchase price and regain vacant possession thereof; on the ground that, her family are opposed to the sale. Further, the 1<sup>st</sup> Defendant declined to recognize the sale agreement and told the Management Company to block the Plaintiff from accessing the suit property.

6. On or about March 2009, the Defendants wrongfully and unlawfully took possession of the suit property. The Plaintiff avers that, as a result of the aforesaid, she has been deprived of the right to quiet possession of the suit property and the benefit of the use of the in the form of mesne profits from March 2009 to date and she has suffered considerable trouble, inconvenience and expense, plus mental anguish, hence the prayers sought for herein.

7. However, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint statement of defence dated 15<sup>th</sup> June 2009, amended on 6<sup>th</sup> July 2011 to include a counterclaim and further amended on 25<sup>th</sup> April 2013. The Defendants in the counterclaim seek for judgment against the Plaintiff as herein below reproduced;

*a) A declaration that, the purported contract and transfer of the suit property was null and void for lacking proper consent and therefore is of no effect and an order do issue directing that the transfer of the suit property known as Maisonette No. 6 Casablanca Villas on L.R No. 209/5927 to the 1<sup>st</sup> Defendant in the counterclaim name be nullified and cancelled and the name of the Plaintiff in the counterclaim be restored or the same be retransferred to the Plaintiff and the Defendants do bear the costs of such retransfer.*

*b) An order of injunction restraining the 1<sup>st</sup> Defendant in the counterclaim from interfering with the Plaintiff in the counterclaim peaceful possession, occupation and enjoyment of the suit property known as Maisonette No. 6 Casablanca Villas on L.R No. 209/5927 or laying any claim to it adverse to that of the Plaintiff.*

*c) An order for the cancellation of the sale and transfer Flat No. A5 Block A, Dennis Court on L. R. No. 1/328 to Posh Holdings Limited and the retransfer of the same to the Plaintiff or in the alternative the said property be valued and the proper market price be paid by the 2<sup>nd</sup> Defendant to the Plaintiff.*

*d) An order for account of all the rents received by the 2<sup>nd</sup> Defendant on behalf of the Plaintiff for the two properties namely Flat No. A5, Block A, Dennis Court on L.R No. 1/328 and Maisonette No. 6 Casablanca Villas on L.R No. 209/5927 and the 2<sup>nd</sup> Defendant do pay to the Plaintiff any sum of money found due to the Plaintiff after taking such accounts.*

*e) An order for accounts of the sale proceeds of Flat No. A5, Block A, Dennis Court on L.R No. 1/328 and the 2<sup>nd</sup> Defendant do pay to the Plaintiff any sum of money found due to the Plaintiff after taking such accounts.*

*f) An order for the refund of the sums of money paid by the Plaintiff to the 2<sup>nd</sup> Defendant or a refund of any money retained by the 2<sup>nd</sup> Defendant as legal fees or commission in respect of purported sale of the two properties of the Plaintiff.*

*g) General damages for loss and inconvenience occasioned to the Plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acts, omission, collusion or fraud and due to the 2<sup>nd</sup> Defendant's breach of trust.*

*h) The costs of this suit and interest on any amount awarded to the Plaintiff.*

*i) Any other just remedy the court may deem fit to grant.*

8. The Defendants' case is that, the 1<sup>st</sup> Defendant did not freely consent to or execute the sale agreement, as at the time of executing the agreement, she did not understand or comprehend what she was doing due to the fact that she was mentally impaired, due illness and other factors which were within the knowledge of the Plaintiff and Mr. Chege Wainaina, the Advocate who was acting for the parties namely.

9. That by reason thereof, the 1<sup>st</sup> Defendant's consent to the sale agreement was procured by means of undue influence, fraud, mistake, misrepresentation and coercion, collusion between the Plaintiff and the Advocate and/or criminal breach of trust on the part of the Advocate. Therefore, no valid agreement or contract was made.

10. The 1<sup>st</sup> Defendant's counter claim is directed at the Plaintiff and the Advocate; Mr Chege Wainaina who are named as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively. The particulars of fraud, misrepresentation and collusion to include inter alia;

*a) Inducing or forcing the 1<sup>st</sup> Defendant to sell the property with an unstable mental state.*

*b) Forging the 1<sup>st</sup> Defendant's signature and/or preparing documents on 1<sup>st</sup> Defendant's behalf without authority.*

*c) Colluding to sale property at an undervalue.*

*d) Conducting a hurried sale, forcing tenant on the suit property to vacate and making unauthorised payments on behalf of the Plaintiff.*

11. The 1<sup>st</sup> Defendant denied handing over the keys to the Plaintiff and averred that, the keys to the suit property were in possession of the

Advocate. She denied the allegedly repairs carried out the Plaintiff and averred that, she has been and is still in occupation of the suit property since 2009.

12. The 1<sup>st</sup> Defendant further denied receipt of the purported full purchase price or any sum in respect thereof and averred that, any money received from the Advocate was either received through inducement, if it constitutes part of the alleged purchase price or was money held in trust for her by the Advocate in respect of; the rental income received from the suit property and the balance of the purchase price of another property of the 1<sup>st</sup> Defendant sold by the Advocate and held in trust for the 1<sup>st</sup> Defendant.

13. However, the 1<sup>st</sup> Defendant is ready and willing to refund any money found to have been received by her in respect of alleged purchase price of the suit premises in accordance with the provisions of the contract. She averred that, the suit property was sold at a low market price. She denied ever, threatening to evict the Plaintiff.

14. Further, the suit property belongs to the 1<sup>st</sup> Defendant's minor daughter aged 11 years namely; Cassadra Corbit but registered the 1<sup>st</sup> Defendant's name and held in trust for her till she attains the age of 18 years. That the property was given to the minor by her father Mr. Garry Vincet Corbit, who currently resides out of the country, separated from the 1<sup>st</sup> Defendant. He gave the suit property to the 1<sup>st</sup> Defendant as part of the maintenance settlement for the minor child. The suit property is therefore not available for sell without the consent of an independent guardian of the minor. That the 2<sup>nd</sup> Defendant has assumed the role of such guardian to protect the minor's best interest.

15. The 2<sup>nd</sup> Defendant averred that, she was compelled to intervene in the subject transaction because she knows that, the 1<sup>st</sup> Defendant is at all times mentally unstable and could be taken advantage of as is the case herein and therefore she acted to safeguard the best interests of the minor and the 1<sup>st</sup> Defendant.

16. The 1<sup>st</sup> Defendant averred that, Mr Chege Wainana was her Advocate between the years 2005 to 2009, and was handling all of her affairs, including the matters giving rise to the cause of action herein. In the year 2005, he handled her separation case against her husband Mr Vincent Corbit. She paid him Kshs. 100,000 but he did not act as per her instructions, hence the claim for the refund of the same from the Advocate.

17. That, she developed confidence in the 2<sup>nd</sup> Defendant in their Client/Advocate relationship and in the process of the 2<sup>nd</sup> Defendant advising her, he convinced her to entrust all her personal affairs with him and she heeded and gave him all her documents which included title documents of her properties and other personal documents for safe custody, hoping that, he would act professionally and safeguard her interest, as she was unwell most of that time.

18. Further, in her vulnerable state, she disclosed to the 2<sup>nd</sup> Defendant all her personal affairs including what properties she owned particularly the two properties registered in her name, namely; Town House No. 6 on L.R No. 209/5827 Casablanca Estate and Flat No. A5 Block A Dennis Court erected on L.R No. 1/328, mortgaged to Investments and Mortgages Bank (I & M Bank), with monthly repayment instalments of; Kshs. 38,000, which was comfortably repaid from the rental income from the same property leased at the monthly rent of Kshs. 60,000.

19. That, she appointed the 2<sup>nd</sup> Defendant as her sole agent for collecting rent form her two properties at a commission but he did not and has to date not properly accounted to her for all rents received by him and still owes her substantial sums of money in respect of unaccounted rent, hence the prayer for an account in respect thereof.

20. Further, in the year 2007, the Advocate without any justifiable cause advised and unduly influenced her to sell the property; Flat No. A5 Block A, Dennis Court on L.R No. 1/328 for Kshs. 8,700,000, purportedly to pay off the outstanding mortgage in respect thereof, which was about Kshs. 2,357,805. That the Advocate decided the purchase price of the property and sourced for the purchaser and although the sale agreement was executed on behalf of the purchaser by a different person, the transfer was made to; Posh Holding Limited, a company she later discovered that, the Advocate has 50% shareholding therein. The Advocate never disclosed that, he was a shareholder in the purchaser or that he had personal interest in the transaction.

21. It is averred that, the property was sold at a price of; Kshs. 8,700,000, which was far below the market price of what the real value of the property was. That the Advocate failed to value the property before selling the same to his company. As a result of his conduct, the 1<sup>st</sup> Defendant suffered loss and damage and claims the same against him.

22. Further, the 2<sup>nd</sup> Defendant paid himself a commission of; Kshs. 200,000, for selling the property in addition to the legal fees for the sale transaction. By reason of the non-disclosure the sale should be cancelled. That, after selling the property, the Advocate retained part of the sale proceeds allegedly to pay her rent in the sum of Kshs 60,00, for an apartment she was residing in, as opposed to the rent of Kshs. 40,000, for a similar apartment in the same, whereas the rent for the apartment she owned was Kshs. 60,000.

23. In addition, the 2<sup>nd</sup> Defendant still holds and has declined to release or account for a sum of; Kshs. 1,380,000 from the sale proceeds of the flat. Further, he unilaterally retained; Kshs. 66,000 from the sale proceeds of the property as legal fees for preparing a lease for the apartment which she rented without any request or instructions to prepare the same.

24. The 1<sup>st</sup> Defendant states that, the matter was reported at Kilimani Police Station and upon the police intervention the Advocate paid only Kshs. 264,000, which he had deliberately double charged as quarterly rent for the rented apartment, she had moved to after the sale of the d property.

25. That, barely a year after the 2<sup>nd</sup> Defendant sold the first property, he again without any justifiable cause coerced, advised and/or unduly

influenced her to sell the suit property; Town House No. 6 on L.R No. 209.5827 Casablanca Estate, on the basis that, it was prime and could fetch more money which she could utilize to purchase two smaller houses and use one for residence and let out the other. The suit property had a tenant paying Kshs. 100,000 per month and the lease was expiring in December 2009.

26. However, although the tenant expressed the interest to renew the lease, the Advocate who was entrusted with the management of the property, unreasonably increased rent, and frustrated the tenant to leave upon the expiry of the lease, thus exerting pressure on the 1<sup>st</sup> Defendant to sell the property. He then prevailed upon her on the allegation that, he could get a purchaser for the same at; Kshs. 17,000,000. Without consultation she heeded the Advocates advice and the Advocates started looking for a potential purchaser that culminated.

27. She reiterated that, she was manipulated, unduly influenced and coerced into signing the sale agreement. She further avers that, although the sale agreement and transfer were prepared and signed on the same date, different dates were inserted. Additionally, the speed with which the property was transferred to the plaintiff, within 10 days of the execution of the sale agreement is suspicious, as was the sale of the property without knowledge of any of the family members. Further, the Advocate was well aware that, the suit property was held in trust for her minor child.

28. That, after 5 days from the date of execution of the agreement, the 1<sup>st</sup> Defendant called the Advocate and informed him about her decision to rescind the sale but the Advocate without consulting the Plaintiff, informed her that, he would not accept the rescission of the sale and will make sure the transaction goes through. Further, the Advocate went to Nairobi Hospital and induced her to sign documents purporting that she had agreed to conclude the sale.

29. That, the Advocate without authority or consent purported to make certain payments to 3<sup>rd</sup> entities, purporting the same to be made on behalf of the 1<sup>st</sup> Defendant, to obtain certain clearances prior to transfer and in so doing paid a disputed bill of; Kshs. 179,388 incurred by the developer which the Management Company had undertaken to settle.

30. Further, the 1<sup>st</sup> Defendant has not received any money from the sale proceeds as the Advocate still owes her Kshs. 1,500,000 from rent income and proceeds from the previous sale. Finally, the 1<sup>st</sup> Defendant denied that, any consideration passed between her and the Plaintiff. That, the Advocate in purporting to complete the sale made certain attempts to unilaterally and/or forcefully deposit certain cheques in her account which cheques were not credited to her account as she had instructed her bank not to accept the payment.

31. However, the Plaintiff filed a defence dated 5<sup>th</sup> February 2014 to the counterclaim by the 1<sup>st</sup> Defendant and denied the allegations of; fraud, misrepresentation and collusion on the ground that, she purchased the suit property at its market price and/or value and paid the entire purchase price in accordance with the sale agreement and the title transferred to her.

32. That, the property is registered in the 1<sup>st</sup> Defendant's name and there is no interest of a minor registered or noted on the title as alleged. She further denied ever meeting the 1<sup>st</sup> Defendant during the transaction and/or having influence over her. That, the sale was valid and she is the duly registered owner of the suit property.

33. Similarly, 2<sup>nd</sup> Defendant to the counterclaim (herein "the Advocate"), filed a defence dated 11<sup>th</sup> June 2013, thereto. He averred that, the 1<sup>st</sup> Defendant was his client with instruction and he has handled several matters for her including the separation cause referred to herein. At all times, he executed the instructions without any complaint from her except for the subject matter before the court.

34. He denied being in possession of the 1<sup>st</sup> Defendant's documents and averred that, she has always been in possession thereof. That, she took the documents to his office, in respect of property; L.R No. 1/328, when she fell in arrears in respect of repayments of the mortgaged property and when the bank demanded for payments, which contradicts the allegation that she was paying for the mortgage comfortably.

35. Further, the 1<sup>st</sup> Defendant gave him instructions to collect rent in respect of her property pursuant to default in payment of the same by her tenants and that, every cent thereof was properly accounted for. The Advocate denied inducing the 1<sup>st</sup> Defendant to sell her property known as Flat No. A5 Block A Dennis Court on L.R No. 1/328, for the sum stated.

36. That, in efforts to redeem the property from Messrs I & M Bank, the 1<sup>st</sup> Defendants frantically tried to dispose of the property to third parties. The Advocate further denied the allegations that, he decided on the purchase price or the 1<sup>st</sup> Defendant's lack of knowledge of the identity of; Posh Holding Limited. He averred that, the purchase price of the property was decided on by the 1<sup>st</sup> Defendant and her family members and the same is supported by her previous efforts to sell the property to other third parties.

37. The Advocate averred that, the alleged payments of; Kshs. 200,000 as commission was negotiated and agreed on between him and the 1<sup>st</sup> Defendant. Further, the Kshs. 66,000 was legal fees properly earned. He denied the allegation of non-disclosure of payments received. That, every payment was made with the knowledge of the 1<sup>st</sup> Defendant.

38. The allegations of inter alia; breach of trust, coercion and misadvice, the increase in rent upon the expiry of the lease agreement were denied. That, the 1<sup>st</sup> Defendant has never had any gainful employment and/or other source of income. That, he was under pressure from the 1<sup>st</sup> Defendant to sell the property and that, she sought for the purchaser's concurrence to allow her use the purchase money well before the sale transaction was concluded.

39. The Advocate further averred that, the 1<sup>st</sup> Defendant was always in sound mind and health when giving him instructions. He was not aware that, the property was registered in trust for her daughter or any other person, but the property had structural defect and had been listed in the Ndungu Report as illegally acquired. In addition, the 1<sup>st</sup> Defendant wanted to remove the same from her husband's control

40. The Advocate stated that, the attempted cancellation of the sale agreement was an afterthought as it was made after the property was validly transferred to the purchaser and concluded and although the alleged meeting was held, the Plaintiff refused to concede to the cancellation of the sale. That, the 1<sup>st</sup> Defendant received all the payments of the sale proceeds, and the balance paid to her bank accounts as instructed; though she subsequently instructed her bankers to reject the same. Similarly, the report made to Kilimani Police Station was maliciously made to intimidate the Plaintiff purchaser to cancel the sale. The report was subsequently found to be untrue.
41. At the close of the pleadings, the case proceeded to full hearing. The Plaintiff's case was supported by her own evidence, where in, she relied on her witness statement dated 2<sup>nd</sup> July 2012. She adopted the said statement as her evidence in chief, in addition to the bundle of documents filed in court on 2<sup>nd</sup> July 2012, (also found in the consolidated list of documents at page 384-474) and additional documents dated 10<sup>th</sup> September 2012, (at page 475 of the consolidated bundle of documents and finally documents filed on 15<sup>th</sup> April 2015, of the even date).
42. She literally reiterated the averments in the plaint, save to add that she had never met the Defendants to her claim prior to the filing of the suit or during the period of the sale of the suit property. At the time of cross examination, she stated that, she paid Kshs. 13,700,000 as the purchase price to the Advocate herein and was given vacant possession and the keys to the property on 26<sup>th</sup> January 2009, by the Advocate. The transfer or assignment was effected on 22<sup>nd</sup> January 2009.
43. She testified that, when she took over the house, it was in good condition save for some cracks thereto, which she instructed an engineer to repair. In re-examination, she stated that, the 1<sup>st</sup> Defendant did not require the consent of the 2<sup>nd</sup> Defendant to sell the suit property.
44. The Advocate, Mr. Chege Wainaina testified on behalf of the Plaintiff and in support of his defence to the 1<sup>st</sup> Defendant's counterclaim. He relied on the witness statement dated 11<sup>th</sup> May 2012 amended on 15<sup>th</sup> February 2016, and a bundle of documents filed therewith, as contained in the combined bundle of documents. He testified that, both the Plaintiff and the 1<sup>st</sup> Defendant were his clients in relation to the suit property herein. He reiterated that, he sold the property on instructions and surrendered the purchase price to the 1<sup>st</sup> Defendant with the last payment made vide a cheque for the sum of Kshs. 12,728,363.80, which the 1<sup>st</sup> Defendant declined to accept.
45. However, she even after rejecting the payments she returned to complete the transaction and asked for a cash payment of; Kshs. 150,000 which request was rejected. She later agreed to bank the cheque less that amount. He referred the court to a letter dated 16<sup>th</sup> February 2009, in which the 1<sup>st</sup> Defendant indicated she had changed her mind and accepted the transaction. That, she further wrote to the Management Company to allow the Plaintiff into the premises and introduced her to Kenya Power & Lighting Company, for change of particulars of the meter holder to the suit premises. However, later the bank returned the money to him following the closure or freezing of the 1<sup>st</sup> Defendant's account.
46. The witness was cross examined by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' learned counsel, whereupon he stated that, the 2<sup>nd</sup> Defendant, is the one who referred the 1<sup>st</sup> Defendant to him, to handle her divorce case. That he also acted as a conveyance lawyer in relation to the suit property.
47. He conceded that, in the year 2007, he acted for the 1<sup>st</sup> Defendant in relation to another property at Dennis Pritt which was sold to Posh Holdings Limited, where he is a director. That, the 1<sup>st</sup> Defendant, wanted him to buy it personally, as the bank was threatening to sell it but she gave him instructions in writing to sell it to the Company. That, by a letter dated 19<sup>th</sup> June 2007, he had instructions to sell the property to Moses Kariouki Njenga; and a sale agreement to that effect dated 8<sup>th</sup> November 2007 was prepared. It was a sale of the property for a sum of Kshs. 8,800,00, but it was sold to Posh Holdings Limited at Kshs. 8,400,000.
48. He acknowledged receiving legal fees in relation to the sale transaction and further admitted that the conveyance in respect to the suit property herein was executed on 15<sup>th</sup> January 2009, but was not dated; but confirmed that, the Plaintiff paid the purchase price on 15<sup>th</sup> January 2009, and the 1<sup>st</sup> Defendant requested for some of the money and was given on the same date. He reiterated that, the 1<sup>st</sup> Defendant wanted to sell the property as she was short of cash.
49. That, he made several payments in the sum of; Kshs. 80,360 to the 1<sup>st</sup> Defendant for insurance, Kshs. 50,000 cash to her on two occasions, and on 27<sup>th</sup> March 2009, Kshs. 264,000 was released to her. The witness denied having any other funds belonging to the 1<sup>st</sup> Defendant. He stated that, he went to see her in hospital as she called him. During the re-examination, Mr. Chege stated that, the documents he prepared on 16<sup>th</sup> February 2009, were necessary to give effect of ownership to the Plaintiff. The Kshs. 150,000 he paid the 1<sup>st</sup> Defendant, was to be utilised as hospital bill to allow her discharge.
50. The Plaintiff also called Peter Wakahura Kayungo, a registered and practising valuer to testify on her behalf. He relied on his witness statement he filed in court and stated that, he practices under the trade name of; Circuit Valuers and Management Consultants. That, he was instructed by the Plaintiff to assess the suit property on L.R No. 209/5827 Casablanca Villas. He carried out the assessment, prepared a report in the year 2012, and updated it in the year 2018.
51. That the rental income for the period March 2009 to August 2012, as guided by the Tenancy Agreement of the year 2006 and for a period of two (2) years is Kshs. 5, 860,000, based on a monthly rent of Kshs. 100,000 for the first year and Kshs. 120,000 for the second year. That, although the report was updated on 18<sup>th</sup> January 2018, however he had not filed the updated report and therefore the court could not rely on it.
52. The Defendants' relied on their own evidence with the 1<sup>st</sup> Defendant relying on her undated statement filed on 1<sup>st</sup> March 2013. She adopted the same, alongside the documents filed at pages 585 of the consolidated bundle of documents. She told the court that, the Advocate but they fell apart as he tried to take advantage of the situation she was of depression following a divorce case. That, as per the documents

produced, she has been under psychiatrist doctors' care.

53. In cross examination by the Plaintiff's lawyer, she stated that, she has never met the Plaintiff in person. She confirmed she moved into the suit property in the month of; March 2009. She also confirmed that, she knows one Jackline Githu, an acquaintance, whom she talked to about the sale of her house; to find a buyer thereof in the year 2008. That, although Jackline told her that she had found a buyer, one Muriuki, she changed her mind as the buyer initially offered Kshs 16,000,000 as the purchase price and later changed his offer to; Kshs. 15,000,000.

54. That, Jackline brought another prospective purchaser one lawyer Antony Nganga who offered a purchase price of; Kshs. 15,500,000, but pulled out as the house was in Ndungu Report. Then, her tenant offered to buy the house at; Kshs. 13,500,000 but her lawyer informed the tenant that, the house could only be sold at Kshs. 14,000,000. Finally, the Plaintiff herein came in and offered Kshs. 13,700,000 and executed the sale.

55. The 1<sup>st</sup> Defendant testified that, she did not accept the offer of Kshs. 13,700,000 and neither did she draft any document to transfer the property. She was merely brought the documents to sign. On further cross-examination, she informed the court that, she could recall signing the sale agreement but could not recall signing the transfer. Further, she could not recall receiving the purchase price. She denied the signature on the letter dated 16<sup>th</sup> February 2009, instructing the lawyer to cancel the sale transaction. However, upon being led through several documents, she conceded to the letter on cancellation of the sale.

56. However, she denied knowledge of Plaintiff's repairs to the suit property nor transfer of utilities to the Plaintiff. Finally, she conceded that, she has complained against the Advocate, to Law Society of Kenya, although the issue is yet to be resolved. On further cross-examination, the 1<sup>st</sup> Defendant stated that, she did not understand the nature of the documents she signed. That, she understood the sale agreement and transfer document to be a lease agreement; and got to know of the same after she left hospital. However, she conceded that, before the Plaintiff came into the picture, she had attempted to sell the house to three other people. She denied changing her mind on the sale after she spoke with her mother, who is the 2<sup>nd</sup> Defendant.

57. She further confirmed that, she did not initially sue the Advocate over the 1<sup>st</sup> property. She also denied knowledge of the fact that, the Plaintiff's first offer for the property was Kshs. 13,000,000, enhanced to Kshs. 13,700,000. She told the court that, her initial sale transaction, were just testing the waters, as she was not sure whether she wanted to stay in Kenya or not. She denied the suggestion that, the sale transaction aborted due to deficiencies in the suit property and the property being listed in the Ndungu Report. She further denied that, she invoked her mental incapacity at her convenience. She admitted that, the mental state was not physical disability. She denied attempting to stop a concluded sale.

58. In re-examination she stated that, on 16<sup>th</sup> February 2009, she was admitted at the Nairobi Hospital and did not have a computer to draft and print the subject documents herein. That, she did not tell Jackline to sell the property but find a buyer. She reiterated that she has sued the Advocate for refund of monies received from Dennis Pritt property.

59. The 2<sup>nd</sup> Defendant testified and relied on her statement dated 5<sup>th</sup> October 2012, which she adopted and relied on together with documents at pages 372 and then 627-716 of the consolidated bundle of documents. During cross-examination, she confirmed that the 1<sup>st</sup> Defendant is her daughter. She also conceded Joseph Muraya is a close friend and an Interested party herein. That, one Raphael Njoroge is a family friend; but denied that they evicted the Plaintiff from the suit property. She also confirmed that, she had not met the Plaintiff before they met at the Management Company's offices after the sale. She confirmed that, the 1<sup>st</sup> Defendant is an adult who did not require her consent to sell the property. She described the 1<sup>st</sup> Defendant as a drug addict and a person who abuses alcohol. That, the divorce cause led her into depression. She denied having evicted the Plaintiff.

60. On further cross-examination by the Advocates' lawyer, she told the court that, the 1<sup>st</sup> Defendant informed her that, she signed the transaction documents at her residence under the belief that, she was signing a lease agreement. However, that was not the first time she was signing a lease agreement. The witness conceded that, the 1<sup>st</sup> Defendant had tried to sell the house three times earlier. She alleged that, the 1<sup>st</sup> Defendant signed all the documents under duress. She further conceded that, the Kshs. 150,000 was paid in the hospital, after the 1<sup>st</sup> Defendant called the Advocate to go to hospital and leave her the money.

61. She further told the court that, she is not competent to comment on the documents herein as she was not party thereto. She was unable to answer questions regarding the letter dated 16<sup>th</sup> February 2009. She maintained that, all she knows is that, the 1<sup>st</sup> Defendant is mentally sick. She denied advising her daughter against the sale. In re-examination, she stated that, the 1<sup>st</sup> Defendant was unwell during the period of 2006 to 2008 and she was concerned with her transactions. She maintained that she did not persuade the 1<sup>st</sup> Defendant to cancel the sale transaction.

62. The parties agreed to have a medical report dated 10<sup>th</sup> April 2015, by Dr. Pius Akivaga Kigamwa produced. The consent was informed by the fact that, at the pre-trial stage, the medical reports were dispensed with. Subsequently Dr. Pius Akivaga Kigamwa testified that, he is a psychiatrist, senior consultant and a lecturer at the University of Nairobi. He runs a private clinic at Aga Khan Hospital. That, the 1<sup>st</sup> Defendant has been under his care since 2007. He first met her then at the Nairobi Hospital. He produced the subject medical report dated 10<sup>th</sup> April 2015.

63. During cross-examination, he told the court that, he has taken care of the 1<sup>st</sup> Defendant from 2007 to date. However, he did not know and could not tell the specific dates or months when she was admitted. He also conceded that he is not aware of the sale transaction herein, and he will have to retrieve the records of 3<sup>rd</sup> March 2007, when the transaction took place to testify on the 1<sup>st</sup> Defendant's medical state as at that time. That, all he can do is describe her mental state during that period of his care.

64. That, the records produced are not based on a specific event. He described the cause of the 1<sup>st</sup> Defendant's depression to be alcohol and told the court that, she has disordered liver function, depression and secondary alcohol dependency. That, whenever she went for medical attention she was intoxicated or struggling from the withdrawal of the alcohol. He told the court that, these factors could impact on her decision making. But, she could recover and be discharged and then the depression reoccurs.

65. That, in the years 2008 to 2009, the situation was serious. However, in answer to questions put to him by the Advocate's lawyer, he stated that, if she could call the Advocate to take money to her in hospital, then she was at the verge of recovery but he could not conclude that, she was capable of giving instructions without examining her.

66. At the close of the hearing of the case, the parties filed their final submissions, which I have considered herein alongside the averments in the pleadings, the evidence adduced and the submissions, I find that, the following issues have arisen for determination;

*a) Was the sale agreement herein in relation to the suit property legally and lawfully executed by all the parties?*

*b) Is the subject sale agreement binding on the 1<sup>st</sup> Defendant as the seller of the suit property?*

*c) Was the suit property sold and/or lawfully transferred to the Plaintiff as the purchaser?*

*d) Who is the legally registered proprietor of the suit property?*

*e) Has either party proved the respective claims and/or reliefs claimed?*

*f) Who should bear the costs of the suit?*

67. I find that, as regards the first issue, there is no dispute that, the sale agreement dated 13<sup>th</sup> January 2009, was duly signed by both the Plaintiff and the 1<sup>st</sup> Defendant of the suit property, Maisonette No. 6 Casablanca Villas on **L.R No. 209/5827**. The signatures of the parties thereto were witnessed by Chege Wainaina the Advocate in the transaction. The signatures are not in dispute.

68. It is also evident that, the purchase price of the suit property was Kshs. 13,700,000. By a cheque No. 0000171, dated 13<sup>th</sup> January 2009, the Plaintiff paid a total of; Kshs. 13,700,000 to the firm of; Chege Wainaina Advocates, as stated at, clause 2 of the sale agreement that; "the purchase price shall be Kenya Shillings Thirteen Million Seven Hundred Thousand" read Kshs. 13,700,000, which amount shall be paid to the lawyers herein to hold as stakeholder pending completion of this agreement" It therefore follows that, the moment the cheque was received by the firm of; Chege Wainaina & Company Advocates, and cleared the funds were being held by that law firm as an agent of and on behalf of the seller.

69. Be that as it were, it suffices to note that, the parties had exchanged correspondence in relation to the sale of the suit property, prior to the execution of the sale agreement. By a letter dated 12<sup>th</sup> January 2009, the seller is alleged to have instructed the firm of; Chege Wainaina & Company Advocates, to sell the suit property at a price of; Kshs. 13,700,000 and at a commission of 3% of the purchase price, being; Kshs. 411,000, inclusive of legal fees payable upon the completion of the transaction. The subject letter was allegedly written on the same date the purchaser offered to purchase the property.

70. It is also noteworthy that, the 1<sup>st</sup> Defendant is alleged to have made several requests for disbursements of certain sums of money even before the property was transferred to the buyer The documents produced shows that, on 13<sup>th</sup> January 2009, the firm of; Chege Wainaina & Co. Advocates sought for authority from the Plaintiff to release a sum of Kshs. 20,000 from the purchase price to the 1<sup>st</sup> Defendant. This was the same day the sale agreement was written and the cheque in the name of the law firm issued in payment of the purchase price.

71. The Defendants argued in their submissions, that, it is suspect how the money could have been paid out, before the cheque had cleared. That is quite true. However, the decision to pay against un-cleared effect can only be answered by the law firm as the cheque was in its name. Thus if for any reason they paid and the cheque was subsequently dishonoured, the law firm would have shouldered the risk.

72. Further, the Plaintiff by a letter of the same date; on 13<sup>th</sup> January 2009, gave authority for payment of the Kshs. 20,000 to be made to the 1<sup>st</sup> Defendant. By a payment voucher No. 001 dated 13<sup>th</sup> January 2009, the seller was paid Kshs. 20,000.

73. The payment voucher reveals the following;

*a) The particulars of payment read; "being part payment in respect of my sale of Maisonette No. 6 on L.R NO. 209/5827 Casablanca Villas to, Lucy Wairimu Mwangi."*

*b) The amount (Kshs. 20,000) Kenya Shillings Twenty Thousand Only.*

*c) The voucher is signed by two parties; the person approving the payment and the recipient, with a name indicating, Monica J. Wambui.*

74. The details on the payment voucher are critical, in view of the fact that, the 1<sup>st</sup> Defendant argues that, all the payments made were monies held by the Law firm; from the rent received from the suit property and not from the sale of the suit property.

75. The second request for further payment is evidenced by a letter dated 15<sup>th</sup> January 2009, seeking for a sum of Kshs. 80,360, payable to Jubilee Insurance Company Limited for insurance for a Motor Vehicle Registration Number KBA 500H. Again by a letter of the same date, the Plaintiff authorised the payment. In fact, the Plaintiff states insists in that letter that, the payments should be signed for when disbursed for record purposes. On the same date, the Law firm wrote to; Jubilee Insurance Company Limited, and forwarded a cheque No. 000602 in the sum of Kshs. 80,360 in settlement of premium payment in respect of the Insurance policy for motor vehicle registration number KBA 500H; in the name of their client Jackline Monica Wambui. The firm required acknowledgement by signature on the copy. It was received and signed for by Peter Mbutia (MTN) on 15<sup>th</sup> January 2009. A copy of the cheque in payment of the premium was produced as evidence and a receipt number 334774; in the name of Monica Jackline Wambui issued by the insurance company was produced as evidence.

76. The third request for payment is evidenced by a letter dated 19<sup>th</sup> January 2009, from the Law firm to the Plaintiff to authorise payment of a further Kshs. 50,000 “out of the purchase price” held as stakeholders “in terms of agreement dated 13<sup>th</sup> January 2009”. On the same date, the Plaintiff authorised payments vide a letter of the same date. She further requests to be informed of the “current position of the transaction.” The money was forwarded to the seller vide a letter of the same date, “enclosing the sum of Kenya Shillings Fifty Thousand” read Kshs. 50,000 being “further advance from the purchase price” in respect of the suit property. The seller was to acknowledge receipt by signing on a copy thereof. The letter produced in relation to the same shows, it was signed by Monica J. Wambui on 19<sup>th</sup> January 2009. The payment is also supported by a payment voucher No. 002 dated 19<sup>th</sup> January 2009. The particulars thereof are similar to those in the payment voucher No. 001 of 13<sup>th</sup> January 2009.

77. A similar request for a further payment of Kshs. 50,000 out of the purchase price was made on 24<sup>th</sup> January 2009. The firm sought for authority from the Plaintiff on the same date, she wrote back on the even date, giving the authority and also inquired to know “so far how much monies had been disbursed to the vendor on the account.” A letter was sent to the vendor enclosing the payment and a payment voucher No. 003, issued in support thereof and signed by the 1<sup>st</sup> Defendant on the same date of 24<sup>th</sup> January 2009.

78. On 26<sup>th</sup> January 2009, a further request in the sum of; Kshs. 70,000 was received by the form the 1<sup>st</sup> Defendant and authority sought from the Plaintiff to pay. The authority was given and a payment voucher in the sum of; Kshs. 70,000 signed for. I note that, the 1<sup>st</sup> Defendant in the letter dated 26<sup>th</sup> January 2009, specifically acknowledged that, the sale transaction was complete and authorises the Advocate to keep the balance of the purchase price. She then signed for the sum of the Kshs. 70,000 on the letter dated 26<sup>th</sup> January 2009 from her lawyer, forwarding the money. She also signed a voucher No. 004, bearing further details as in the previous vouchers.

79. The question that arises at this stage is: whether the 1<sup>st</sup> Defendant was all along aware that all these sums of money was part of the purchase price towards the purchase of the suit property herein. She denies knowledge thereof and argues that, she knew the money was part of the suit proceeds and/or the balance from the sale of the property; Flat No. A5 Block A, Dennis Court on L.R No. 1/328.

80. However, it is clear that all the vouchers the 1<sup>st</sup> Defendant signed were clearly stated that, the proceeds were part of the purchase price paid for the Maisonette No. 6 Casablanca Villas. The 1<sup>st</sup> Defendant did not only sign one voucher, but four of them and therefore, she cannot sustain ignorance of what the payments were for. In my considered opinion, the Plaintiff knew all along that, the payments made towards her personal needs were from the proceeds of the sale.

81. It is also noteworthy that, after all the payments both the Plaintiff and the 1<sup>st</sup> Defendant, signed an assignment dated 20<sup>th</sup> January 2009, a copy thereof produced indicates that, the same was effectively registered at the Land Titles Registry, Nairobi Registry under registration No. I.R 87016/2 on 22<sup>nd</sup> January 2009 at 1240 hours. The legal effect of this registration was basically to transfer the suit property from the 1<sup>st</sup> Defendant to the Plaintiff with effect from the date thereof. The Advocate acting for both parties indeed wrote to the Plaintiff a letter dated 26<sup>th</sup> January 2009, notifying her of the registration of the assignment successfully.

82. In that regard, the Advocate forwarded to the Plaintiff the following documents as stated at page 443 items (i) to (iii) of the consolidated bundle. The same were sent together with the keys to the house. Apparently, there is a letter dated 26<sup>th</sup> January 2009, allegedly written by the 1<sup>st</sup> Defendant authorising the Advocate to release the suit property to the purchaser with vacant possession.

83. It therefore follows that, the Plaintiff became the legal owner of the suit property and was entitled to vacant possession upon the registration of the transfer documents. The Plaintiff testified that, she got vacant possession, moved into the suit property and commenced repairs when she was forcibly evicted by the Defendants. The Defendants deny that she ever occupied the house.

84. However, I find that, there is evidence that, the Advocate handed over the keys to the Plaintiff and when the keys could not open the house the 1<sup>st</sup> Defendant availed a bag of keys the purchaser, to search for the proper keys. The purchaser testified that, she still has the bag. In addition, the utility bills were paid to the Service providers from the proceeds of the sale as follows;

*a) Payment to M/s Hemmingways Holdings Management Limited as 1<sup>st</sup> quarter service charge: Kshs. 51,000*

*b) Payment to Kenya Power & Lighting Company: Kshs. 179,378.20. The 1<sup>st</sup> Defendant has disputed liability for payment of the electricity bill, but the basic point is that, it was paid all the same.*

85. The key question is whether: did the 1<sup>st</sup> Defendant authorise or was aware of these payments. Further, whether the same were made as part of the terms of the sale agreement, to enable the transfer of a clean title to the property to the Plaintiff.

86. I have also noted three letters dated 16<sup>th</sup> February 2009, from the 1<sup>st</sup> Defendant to the Service providers referred to herein; Messrs Hemmingways Holdings Management Limited, Kenya Power & Lighting Company and Nairobi Water and Sewerage Company, introducing

the Plaintiff as the new owner of the suit property and seeking that, she be accorded all the necessary assistance, and/or be allowed to change the particulars of the consumer of the utilities offered. In fact, there is evidence that, there was a transfer of Share/Stock held in Hemmingways Holdings Management Limited, from the 1<sup>st</sup> Defendant to the Plaintiff.

87. However, the entire sale transaction became an issue when on 21<sup>st</sup> February 2009, the firm of; L.N Muchiri wrote to the firm of, Chege Wainaina & Company Advocates, in relation to “disputed sale of the suit property”. From the contents of the letter at page 461 of the consolidated bundle of documents, the firm had been instructed by Pauline Mukuhi Nganga, who is described as “a client and current guardian to her daughter Monica Jackline Wambui Corbit”. The letter goes on to state that, “the said Monica is not in sound mental state to make decisions like those you purport she has made towards the sale of this property”.

88. It further states that, several meeting with the parties’ Advocate to stop the sale had not yielded fruits. That, on 5<sup>th</sup> February 2009, Monica wrote to the Advocate in her own handwriting to stop the sale, but the Advocate had not obliged. The letter accuses the Advocate of ignoring the instructions to stop the sale and proceeding avail a bankers’ cheque dated 4<sup>th</sup> February 2009, in the vendor’s name and exerting undue influence on the 1<sup>st</sup> Defendant to accept the cheque.

89. The letter then states as follows;

*“Our instructions are that, her mother has the ‘locus standi’ to stop the sale as she is well conversant with the daughter’s psychiatric struggles; and takes care of her and her grandchild”*

90. The author of the letter then states that, the sale is null and void in law. I have indeed seen, the letter. It is in the handwriting of the 1<sup>st</sup> Defendant, the vendor. It is dated 9<sup>th</sup> February 2009 and makes reference to the parties’ Advocate’s letter dated 5<sup>th</sup> February 2009. The vendor instructs the parties’ Advocate to note that, she is no longer interested in pursuing the sale of the suit property. She states as follows;

*“As you are well aware, this particular transaction was conducted while I was very unwell and did not have time to consult. I am willing to pay back all the monies that may have been used in relation to the sale and I also return the Bankers Cheque No. 002182 which is in your custody amounting to; Kenya Shillings Twelve Million, Seven Hundred Twenty-Six Thousand, Two Hundred Sixty-Two, Eighty Cents Only (Kshs. 12,726,262.80) only, for your return to the Purchaser Lucy Wairimu Mwangi”.*

91. A critical analysis of these two letters lead to several issues of concern being;

- a) *Did the 2<sup>nd</sup> Defendant; Puline Mukuhi Nganga have the “locus standi” to instruct a lawyer to stop the sale between the Plaintiff and the 1<sup>st</sup> Defendant?*
- b) *Did she have lawful guardianship over the 1<sup>st</sup> Defendant?*
- c) *Does the content of the letter by the 1<sup>st</sup> Defendant indicate that, she knew of the payment of the proceeds of the sale or not?*
- d) *Critically, by the time she wrote the letter, had the sale transaction and/or agreement been concluded or not? Or*
- e) *Was the property in the name of the purchaser or was it in the vendor’s name?*
- f) *Could the sale be lawfully cancelled?*

92. However, before I deal with these issues, I wish to consider the reasons advanced for the request to cancel the sale agreement. From the evidence and/or documents produced, the main reason was that, the 1<sup>st</sup> Defendant was suffering from mental impairment and was incapable of entering into a binding sale agreement, and/or making an informed decision.

93. At this point, it suffices to set down the legal principles and/or the law on the defence of mental incapacity. The Plaintiff referred the court to the write up in Chitty on Contracts Vol. 1, 28<sup>th</sup> Edition, Chapter 8, and the cases of; John Patrick Machura vs. Patrick Kahiaru Muturi (2002) eKLR and Grace Wanjiru Munyinyi & Another vs. Gedion Waweru Githunguri & 5 others (2011) eKLR, also cited by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the main suit and the Advocate to the suit. The analysis of these authorities and the general law on mental impairment or incapacity in relation to contracts reveals the following legal principles;

- a) *For a contract to be valid and legally binding on the parties it must have all the essential elements. First, there must be offer and acceptance or two or more parties agreeing to the terms. Next, both parties must be competent or free of mental illness. All parties must mutually agree to the terms of the contract and finally, there must be consideration.*
- b) *Focusing on capacity and mental illness, the incapacity of a party to a contract may render it voidable. However, the general rule is that everyone has the capacity to enter into a contract.*
- c) *Thus, the person pleading mental incapacity to avoid the contract, must strictly prove the same, and in particular, prove that, owing to the mental incapacity, he or she was not able to understand what he or she was doing; and;*
- d) *The other party with whom they contracted knew of the mental incapacity.*

94. It is also settled law that, the mental incapacity of a person, after executing a contract, will not avail the person of the defence of mental incapacity. Similarly, the test of mental incapacity will depend on inter alia; the degree of the mental disorder, and the circumstances of each case. Thus, in order to make a contract voidable using mental incapacity as a ground, the court looks at the following inter alia;

- a) *Did the person understand the nature and consequences of the contract?*
- b) *Was the weight of the consequences of entering into the contract considered?*
- c) *Did the other party (parties) to the contract know of, or at least have an idea, that the party was mentally ill?*

95. As already stated, the 1<sup>st</sup> Defendant has pleaded at paragraph 3 of the defence that, she did not freely consent to the signing of the sale agreement at the time of executing the same and did not understand or comprehend what she was signing as she was mentally impaired due to illness and other factors within the knowledge of the Plaintiff and her Advocate. She has produced medical documents, and in particular the report by Dr. Pius A. dated 6<sup>th</sup> March 2009.

96. I have carefully analysed that report which was produced by the Doctor, and I note the following;

- a) *The report indicates that, the 1<sup>st</sup> Defendant suffers from a mental disorder referred to as “Delirium” due to general medical condition, that impairs decision making and memory.*
- b) *Due to that illness, she has been hospitalized at the Nairobi Hospital under the Doctor’s care severally and in particular on the following dates;*
  - (i) *14<sup>th</sup> June 2008 to 17<sup>th</sup> June 2008’*
  - (ii) *18<sup>th</sup> July 2008 to 23<sup>rd</sup> July 2008’*
  - (iii) *22<sup>nd</sup> September 2008 to 24<sup>th</sup> September 2008*

97. These dates are critical in relation to the date of; signing of the sale agreement and the registration of assignment of transfer documents, more so in view of the fact that, the Doctor who testified in this matter could not, during cross-examination, confirm or state otherwise, if the 1<sup>st</sup> Defendant and/or vendor was hospitalised during the months of January to February 2009, when the transactions herein took place.

98. The 1<sup>st</sup> Defendant has produced medical reports to show that, she has been in and out of hospital. These documents are found at pages 172 to 190, and indicate the various dates of admission of the 1<sup>st</sup> Defendant to the Nairobi Hospital and Nairobi Place and the treatment given.

99. However, the Plaintiff submitted that, that evidence does not prove that, she was mentally impaired to make a decision at the time of the transaction herein took place to bring her within the confines of the defence invoked. That, the evidence of; Dr. Kigamwa which is based on the medical report dated 10<sup>th</sup> April 2015, does not meet the requirements of the defence, as it does not prove that, the 1<sup>st</sup> Defendant was particularly drunk or mentally sick lacking the requisite mental capacity.

100. The Plaintiff invited the court to note that, the 1<sup>st</sup> Defendant declined to avail a medical report from Dr. Njenga despite the consent recorded following the hearing of the Plaintiff’s notice of motion application dated 2<sup>nd</sup> June 2010, for an order that the inquiry be conducted into her mental health to establish whether she was capable of protecting her own interest. That, as a result of her failure to subject herself to the medical test, she has removed herself from the reach of the Mental Health Act, (Cap 284) Laws of Kenya.

101. To revert back to the main defence raised by the 1<sup>st</sup> Defendant of mental incapacity, I find that to resolve the issue, one will have to consider several issues inter alia: whether, the 1<sup>st</sup> Defendant was aware that, the suit property was being sold. In other words, whether she could appreciate the nature of the contract she was entering into. To address that question, the background facts of this case are important.

102. In that regard, I find that, there is no dispute as already stated herein, that the 1<sup>st</sup> Defendant had attempted to sell the house, to three other people prior to the Plaintiff herein. It is evident that, she had instructed one; Jacqueline Githu to find her a buyer for the house. I note from the statement written by the said Jacqueline at page 365 of the combined bundle of documents produced by the parties, she states that, she was engaged by the 1<sup>st</sup> Defendant in March 2007, with instructions to sell the suit property for a sum of; Kshs. 16,000,000 at 2.5% commission. She introduced a prospective buyer by the name Robin Muriuki but the sale failed due to a crack in the suit property identified by the buyer’s Engineer, consequently, the buyer then pulled out.

103. In the last paragraph of the statement, she writes “the 1<sup>st</sup> Defendant appeared normal, was not under any noticeable pressure, delusion or ailment. She looked like any other seller seeking a good price for her property”. I will not however, consider this personal opinion as it was not tested on cross-examination.

104. Be that as it were, the 1<sup>st</sup> Defendant has not disputed instructing her to find a buyer. The letter instructing Jacqueline is produced herein and evidenced further by a letter dated 7<sup>th</sup> March 2007 from the prospective buyer Mr. R. Muriuki, offering to purchase the suit property subject to contract and inspection by their engineer. The offer was subsequently withdrawn by a letter dated 11<sup>th</sup> May 2007, from

the firm of; Njeri Kariuki Advocate, on the ground of the vendor's refusal to "effect vital repairs to the premises". The second party who offered to purchase the premises at; Kshs. 15,500,000 was Captain Antony Nganga as evidenced by a letter dated 7<sup>th</sup> June 2007. The prospective client's law firm; Kagwe, Kamau & Karanja wrote a letter dated 18<sup>th</sup> June 2007 to Chege Wainaina & Company Advocates acting for the vendor, raising concern over the property appearing in the Ndungu Report. Apparently, the vendor's lawyer did not respond, and the sale aborted.

105. The third offer for the sale of the suit property was made by Ghalib Mohamed, the tenant in the premises at a price of; Kshs. 14,000,000 as evidenced by a letter dated 14<sup>th</sup> December 2007 from M/s Chege Wainaina & Company Advocates. The tenant's lawyer, Theuri Wanjohi & Company Advocates responded to the offer by a letter dated 17<sup>th</sup> December 2007, offering a purchase price of Kshs. 13,000,000, due to the state in which the house was. He sought for time to consider the offer of Kshs. 14,000,000, as the same was stated to be open for 3 days only. There does not seem to have been a response to this letter and the sale aborted. The next sale came in on 12<sup>th</sup> January 2009 which is the subject of this case.

106. From these previous attempts to sell the suit property, several issues are noted;

- a) *The three attempts to sell the property took place between March 2007 and December 2007.*
- b) *The price of the house was varied from the 1<sup>st</sup> offer of Kshs. 16,000,000 to Kshs. 15,000,000 then Kshs. 14,000,000.*
- c) *There were mainly two reasons advanced for the aborted sales, albeit unconfirmed defects in the structure of the house and the property appearing in the Ndungu Report.*
- d) *There is evidence that, in the whole year of 2008, there was no attempt to sell the house.*

107. The question that arises is whether; during the period of; March 2007 to December 2007, the 1<sup>st</sup> Defendant had the mental capacity to instruct an agent to find her a buyer for her house. I note from the evidence in cross-examination, she testified and conceded that she gave instructions for the sale of the house, however, "she was testing the waters as she was not sure whether, she was going to stay in Kenya or outside the country".

108. Whatever the case may be, it is evident that, the 1<sup>st</sup> Defendant had the intention to sell the suit property as far back as March 2007. The evidence of two prospective buyers; Mr. R. Muriuki, Mr. Ghalib Mohamed and the Plaintiff herein, is that the suit property required repairs. I am convinced that the 1<sup>st</sup> Defendant had the intention and knew that she was selling the suit property.

109. However, I agree with the Defendants to the Plaintiff's claim that, the sale was conducted in a rather an unusually fast manner, by virtue of the following factors;

- a) *The total purchase price was paid on the same day when the sale agreement was signed;*
- b) *The part-payment of the purchase price was released to the vendor even before the cheque cleared, and thereafter on several other occasions within a period of two weeks of signing the agreement;*
- c) *The assignment was registered on the 22<sup>nd</sup> January 2009, again quite fast.*

110. One of the factors that I think influenced the otherwise alleged "unusual conduct" of the sale transaction, is the fact that, the firm of; Chege Wainaina & Company Advocates, was acting for both the purchaser and vendor in the sale transaction. The entire transaction was conducted in a "one stop shop". Further, the Law firm had apparently acted for both parties previously, in other matters prior to the transaction herein. Be that as it were, the question that arises is whether the unusual way of the transacting herein vitiates the contract of sale of the suit property. I find that per se, is not adequate to declare the sale of the suit property null and void.

111. To revert back and conclude on the issue of the mental incapacity of the 1<sup>st</sup> Defendant, I find that, indeed the medical documents produced have established that she suffers a mental condition known as "delirium" which is capable of impairing her decision making. According to the medical documents produced by Dr. Pius A. Kigamwa consultant psychiatrist dated 6<sup>th</sup> March 2009, the 1<sup>st</sup> Defendant has been under his care since June 2008. A summary of these medical documents is as indicated here below: -

No.	Facility	From	Until
1.	Nairobi Place	June 2008	Not clear
2.	Nairobi Hospital	14 <sup>th</sup> June 2008	17 <sup>th</sup> June 2008

3. Nairobi Hospital 17<sup>th</sup> June 2008 Not clear
4. Nairobi Hospital 22<sup>nd</sup> September 2008 24<sup>th</sup> September 2008
5. Nairobi Hospital 15<sup>th</sup> February 2009 18<sup>th</sup> February 2009

112. In addition, the medical report by Dr. Okonji consultant, psychiatrist dated 14<sup>th</sup> September 2010, indicates that, since 2008, she was in Nairobi Place Rehabilitation Centre. He states that, “she was oriented in time, place and person. Her mood was depressed (but on medication). She did not have hallucination or delusional experiences”. He formed the opinion that, “she is in remission from her psychiatric illness, and was fit to instruct counsel and follow court proceedings.

113. In the same vein, a report by Dr. F. R. Owiti, consultant, psychiatrist dated 25<sup>th</sup> October 2010, who assessed her states that, although, she was scheduled to be examined by a Doctor, “she was on treatment, at Arrow Medical Centre, 1<sup>st</sup> Floor, Arrow House, Koinange Street, where she would be for two months, and he would not wish her to be disturbed or interrupted during the period”.

114. However, although these documents establish the mental state of the 1<sup>st</sup> Defendant but, the same documents establish or indicate the following;

- a) *The 1<sup>st</sup> Defendant/vendor was not hospitalized throughout the period of 2007 to 2009, when she started the process of the sale of the suit property to the final alleged sale on 13<sup>th</sup> January 2009.*
- b) *The medical documents produced do not give evidence on her mental state in the period of 13<sup>th</sup> January 2009 when the sale agreement was signed or 22<sup>nd</sup> January 2009 when the transfer was signed.*
- c) *The documents already referred to herein, show the discharge bill, when she was admitted at the Nairobi Hospital on 26<sup>th</sup> January 2009 and discharged on 30<sup>th</sup> January 2009.*
- d) *The evidence of Dr. Okonji confirms that, she has periods of remission from her psychiatric illness.*

115. The unanswered issue remains as to what was the mental state of the 1<sup>st</sup> Defendant as at 13<sup>th</sup> January 2009 and 22<sup>nd</sup> January 2009. The burden to adduce evidence to prove the same lies on the 1<sup>st</sup> Defendant. So has she discharged that burden? To answer this question, regard has to be held in addition to the medical documents referred to, on the pleadings and supporting evidence.

116. At the risk of repeating what has already been stated herein, I note that, the 1<sup>st</sup> Defendant narrates in details in the further amended defence and counterclaim dated 25<sup>th</sup> April 2013, how she met the Advocate, Mr. Chege, in the year 2005, when he acted for her in the divorce case and she disclosed to him that, she was unwell. She avers at paragraph 24 that, she was sick and was not in good state of mind to enter into the sale agreement by reason of sickness and mental impairment and therefore her consent to sell the property was not freely obtained.

117. At paragraph 23, she states that, the Advocate manipulated, unduly influenced and coerced her into simultaneously signing the sale agreement and hurriedly transferred the suit property without allowing her time to think about it and forbade her from consulting other people for advice. From these averment, it is clear, the 1<sup>st</sup> Defendant is pleading she was unduly un duly influenced and coerced in entering in the sale transaction.

118. Assuming that indeed the 1<sup>st</sup> Defendant was unwell as alleged, the next question to consider is whether, the Plaintiff had knowledge of her mental incapacity. The evidence adduced herein and undisputed is that, the seller and the purchaser did not meet before the sale agreement was signed on 13<sup>th</sup> January 2009. The Plaintiff testified that she was aware of the medical status of the 1<sup>st</sup> Defendant, on the 26<sup>th</sup> January 2009, when the Advocate wrote to her, to authorise payment of; Kshs. 70,000 to pay 1<sup>st</sup> Defendant’ hospitalization deposit at the Nairobi Hospital. She gave authority the same day. The request for the Kshs. 70,000 did not specify the 1<sup>st</sup> Defendant ailment or what she was suffering from. Therefore, the Plaintiff could not tell that the 1<sup>st</sup> Defendant had mental incapacity.

119. Further evidence reveals that, the first time the Plaintiff met the 1<sup>st</sup> Defendant was on 1<sup>st</sup> February 2009, in a meeting held at the premises of; Mr. Patel at Casablanca, between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and Mr. Patel. However, by this time, the sale agreement had already been signed and a transfer of the property effected. Therefore, any Plaintiff’s knowledge of the 1<sup>st</sup> Defendant’s mental incapacity at that stage would not affect the sale agreement.

120. In response to this evidence, the 1<sup>st</sup> Defendant submitted that;

*“Under the circumstances in which the contract was executed, the Plaintiff must be taken to have been aware of the 1<sup>st</sup> Defendant’s mental condition; it was the Advocate (her agent actually) she dealt with all through yet the Advocate did not have the power of attorney from the 1<sup>st</sup> Defendant, she never cared to see the person selling the property even at the point of signing the contract and the fact that some of the documents were signed in hospital lends credence to our assertion that she was well aware of the 1<sup>st</sup> Defendant’s inability. It also follows that considering that the Plaintiff’s agent, the Advocate knew of the 1<sup>st</sup> Defendant’s mental condition and inability, the Plaintiff is equally bound and the same knowledge imputed on her.”*

121. However, in my considered opinion, unless it can be demonstrated by evidence that, the Advocate informed the Plaintiff of the medical condition of the 1<sup>st</sup> Defendant and in particular the mental incapacity, it would be unjust to infer knowledge on the part of the Plaintiff. It should not be lost to the fact that; the Advocate was acting as an agent of both parties. I am unable to find concrete evidence and hold that the Plaintiff was aware of the 1<sup>st</sup> Defendant’s mental incapacity.

122. Be that as it were, the next issue to consider is whether, the Plaintiff and/or the Advocate, Mr. Chege Wainaina colluded to defraud the 1<sup>st</sup> Defendant of the suit property or whether the Advocate breached the duty of trust and/or misrepresented the nature of the transaction to the 1<sup>st</sup> Defendant. In this regard, the Defendants tabulated the particulars of fraud, misrepresentation and collusion at paragraphs 4 and 27 of the further amended defence and counterclaim.

123. In a nutshell, it is alleged, the 1<sup>st</sup> Defendant was, induced to sell the suit property, execute documents while unwell and hurriedly so, “forging” her signature on some documents, preparing letter heads in her name in the Advocate’s office, and printing correspondence thereon purporting they were from the vendor, colluding to sell the property at a grossly undervalued price, far below, market price; thus exploiting the her and forcefully depositing funds into her account.

124. The court was referred to the definition of undue influence defined in the Black’s Law Dictionary as “persuasion, pressure or influence, short of actual force, but stronger than the mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.”

125. However, the Plaintiff denied all these allegations and averred the sale of the property was consensual and between the parties thereto. That, after signing the sale agreement, the 1<sup>st</sup> Defendant sought for various payments, to deal with her financial challenges and medical bills, therefore, the decision to sell the property was not erratic, but considered deliberate and intended to meet her needs. It is not enough to allege particulars of fraud. It must be specifically pleaded and proved by the party seeking to rely on it.

126. The threshold of proof is quite high than required in ordinary civil cases as held in the case of; *Kinyanjui Kamau vs. George Kamau (2015)eKLR*. Further reliance was placed on the case of; *Vijay Mirjaria vs Nansingh Darbar & Another (2000) eKLR* where it was held that, “fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

127. The court was referred to the definition of inducement under the Black’s Law Dictionary where it is stated to be, “the act or process of enticing or persuading another to take a certain course of action” and submitted that, there is no evidence of inducement herein. That, the 1<sup>st</sup> Defendant’s evidence that she thought she was signing a lease agreement contradicts her own averments at paragraph 23 of the further amended defence and counterclaim that, the Advocate “manipulated, unduly influenced and coerced her into simultaneously signing the sale agreement and transfer hurriedly” and at paragraph 24 where she says that “the transfer and sale agreement” were prepared and signed the same day. Further, it was not the first time, the 1<sup>st</sup> Defendant was interacting with a sale agreement or transfer document and therefore, it is incredible and not possible that, she believed she was signing a lease agreement.

128. I have considered the evidence and arguments adduced by the parties on the issue of fraud, misrepresentation and/or collusion and I find that, the law is settled, “he who alleges proves”. The 1<sup>st</sup> Defendant therefore has the burden to prove the alleged acts. However, the evidence reveals that, whereas the 1<sup>st</sup> Defendant makes serious allegation of forgery of her signature at paragraphs 4(f) and 27(f) and allegation of the Advocate making documents in her name without authority as pleaded under paragraph 4(g) and 27(g), there is no iota and/or thread of evidence to support these allegations. No evidence of a document examiner or handwriting expert or any other expert produced.

129. Be that as it were, the defence of *non est factum* arises where the signatory is saying that “this is not his action”. To be successful, three elements must be proved;

a) *The signatory was unable to read the documents either through blindness or illiteracy. See; Saunders vs. Anglia Building Society (1971) HL, the disability was due to the signatory’s glass being broken.*

b) *The document which was signed was fundamentally different from that which he or she thought he was signing.*

c) *The signatory was not negligent in signing the document. Thus, in the ordinary case, he or she should read the document.*

130. It therefore follows that, in most extreme circumstances, will a signatory be able to dispute liability on the basis of *non-est factum*. There is no evidence herein that, the 1<sup>st</sup> Defendant had any form of physical disability that would have hindered her from understanding the sale agreement or transfer or assignment document.

131. In the same vein, for the defence of undue influence or coercion to succeed, the transaction in question must have been manifestly

disadvantageous to the person raising the defence. (See; *National Westminster Bank PLC vs. Morgan (1985) HL*). The 1<sup>st</sup> Defendant herein has conceded to receiving and utilising part of the purchase price. Therefore, the transaction was beneficial to her.

132. In conclusion, I find that the particulars of fraud, collusion and/or misrepresentation not proved. Similarly, although she alleges there was an under valuation of the property, no evidence was availed to show the value of the property at the time

133. I shall now consider the issues raised in the counterclaim. First and foremost, in my considered opinion, the I filing of the same by the Defendants to the main suit merely convoluted the matter herein. In that regard, I note that;

*a) The Plaintiff in the main suit was not a party to the transaction relating to the property described as Flat No. A5 Block A, Dennis Court.*

*b) Prayer under paragraph 35(c) seeking for cancellation of the sale and transfer of Flat No. A5 Block A, Dennis Court, cannot be effectively canvassed in the absence of the current title holder "Posh Holdings Limited" being a party to this suit.*

*c) Most of the evidence adduced herein is based on the sale of the suit property relating to the property No. 6 Casablanca Villas on L.R No. 209/5827.*

134. Be that as it were, in my considered opinion, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants counterclaim against the Plaintiff in the main suit is well founded. However, there was indeed no suit against them by the Defendants by the Advocate that would call for a counterclaim.

135. A counterclaim is basically a claim to rebut a previous claim; it is a claim made to offset another claim especially made by the Defendant in a legal action. It is a claim by the Defendant opposing the claim of the Plaintiff and seeking for some relief from the Plaintiff for the Defendant. A counterclaim contains assertions that, the defendant could have made by starting a lawsuit if the Plaintiff had not already begun the action.

136. It therefore follows that; the counterclaim must arise out of the transaction or occurrence that is the subject of the opposing party's claim. The counterclaim must relate to a person already a party to the original claim. In brief, a counterclaim is the opposite of a claim. In the instant case, the Advocate has not filed any claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the original claim. Therefore, the said Defendants could not raise a counterclaim against no claim.

137. In that regard, the counterclaim against the Advocate herein is incompetent and stands to be struck out. In my considered opinion, the main grievances by the 1<sup>st</sup> Defendant to the original suit in relation to the sale of the property at Dennis Pritt Road are levelled against the Advocate alone. The filing of an independent suit would have been a better option to canvass all issues relating to the two parties.

138. Indeed, the 1<sup>st</sup> Defendant/vendor did not originate the claims against the Advocate in the first instance; the 1<sup>st</sup> Defendants first defence was filed on 15<sup>th</sup> June 2009; it was amended on 6<sup>th</sup> July 2011 and the Advocate was not included as a party. The Advocate was only added as a party by the amendment in the further amended defence and counterclaim on 25<sup>th</sup> April 2013. It is therefore not clear why the claim was introduced at that time. Having found the counterclaim as relates to the Advocate is incompetent, I shall not delve into its merit.

139. The next issue to consider is the role of the 2<sup>nd</sup> Defendant to the original claim and the submission that, she has been improperly joined in the suit. Further, that, there is no evidence tendered how she induced the 1<sup>st</sup> Defendant to recant the alleged sale of the suit property or how she denied the Plaintiff possession of the suit premises. That, she is neither in possession of the suit property nor privy to the sale transaction.

140. However, the Plaintiff maintained that, she interrupted the sale transaction, blocked payment of the balance of the purchase price by freezing the intended recipient bank account and forcefully evicted the Plaintiff from the property as stated in her statement.

141. I have considered the evidence in relation to the issues and I find that, the 1<sup>st</sup> Defendant states in her witness statement at page 370 of the consolidated bundle as follows;

*"Later, I decided to inform my mother about the transaction and my mother advised me against it. I also informed my estranged husband about it, he was equally against it as the suit property was meant to be our daughter's see that she was still a minor and the same could not therefore be registered in her name."*

142. The 2<sup>nd</sup> Defendant states in her statement at page 373 as follows;

*"We notified both the Advocate and the Plaintiff in writing at the earliest opportunity of the cancellation of the sale before completion but the Plaintiff and the Advocate insisted on proceeding with it and even accelerated the registration of the transfer."*

143. It is therefore clear that, before the Plaintiff filed the claim, the 2<sup>nd</sup> Defendant was heavily involved in the matter and her presence herein became necessary. It suffices to note that, the Plaintiff seeks for orders, inter alia that; a permanent injunction be directed at the Defendants to restrain them from interfering with her quiet possession of the suit property. I therefore don't find the joinder of the 2<sup>nd</sup> Defendant to be improper.

144. The Plaintiff further submitted that, the 1<sup>st</sup> Defendant has never been adjudged to be mentally unstable under the Mental Health Act to

require appointment of a guardian by court and that the 2<sup>nd</sup> Defendant has not exhibited a court order appointing her as her guardian under the provisions of that Act and cannot purport to act as such. Therefore, she is a trespasser and liable to pay the Plaintiff damages for trespass in the sum of Kshs. 5,000,000. In my considered opinion, the 2<sup>nd</sup> Defendant has not proved that she had the legal capacity to get involved in the sake transaction and/r was the 1<sup>st</sup> Defendant's legal representative.

145. The other issue concerns the joinder of Cassadra Alison Corbit (a minor suing through her uncle Joseph Muraya) as an interested party. I note that, upon joinder of the interested party, the case proceeded to trial. The Interested party did not file any witness statement nor participated in the trial. No evidence was thus led to support the Interested party's claim (if any) and neither was her interest noted on the title and so the Plaintiff had no knowledge thereof Neither, has the Interested party sought for any orders against the Plaintiff or vice versa.

146. I shall now consider whether, the claimants herein have proved their respective claims and whether the orders sought can be granted. The Plaintiff has sought for a declaratory order, that, the Defendants have no right or interest in the suit property and should be restrained from interfering with her quiet possession thereof and in that regard, they should be evicted from the suit property.

147. I have considered the evidence analysed herein and I find that, there are no factors established to vitiate the sale agreement entered into by the Plaintiff and the 1<sup>st</sup> Defendant. The contract of sale of the suit property was basically concluded on the date the sale agreement was signed and consideration received in full. The subsequent event of transfer of the property was meant to actualise and/or implement the performance of the contract.

148. By the time the 1<sup>st</sup> Defendant was writing to the lawyer to cancel the sale, the contract had already been concluded. It could not be cancelled and/or rescinded. Even without vacant possession, the title had already passed to the Plaintiff and to date, she remains the registered proprietor thereof. The defence of mental incapacity and/or proof of fraud or misrepresentation having failed, the transaction in relation to the sale is valid. I decline to declare it null and void.

149. In that regard, I allow prayers 12(a), (b) and (c) of the amended plaint dated 20<sup>th</sup> June 2011. The next prayer relates to mesne profits and in that regard, I find that, although the Plaintiff has invited the court to assess the rent based on the valuer's report filed; I find that, the valuer's report at pages 481-483 relates to rent for the period between March 2009 to August 2012, the report explains how that rent was assessed. Therefore, the court is guided accordingly, however, there is nothing to guide the court as to the subsequent rent thereafter. The Plaintiff should have filed an updated report. I am therefore unable to speculate and award anything. I shall therefore be guided by the valuer's report that has not been rebutted and award the sum of Kshs. 5,860,000 as mesne profits.

150. I believe that, wherever the money the Plaintiff paid was deposited, if not utilised and hopefully having been deposited in an interest earning account, will assist offset this amount. I have considered the prayers for "damages" for trespass and unlawful interference and/or mental distress and anguish, and I find there is no cogent evidence in proof thereof. The 2<sup>nd</sup> Defendant may have been interfering with the Plaintiff's quiet possession through correspondence to third parties, but trespass is not proved.; neither has the Plaintiff proved mental distress clinically. The two claims fail.

151. As regards the counterclaim, I find that, having held, the sale agreement and assignment or transfer of the property to the Plaintiff in the original claim was valid, then prayers 35(a) and (b) of the amended defence and counterclaim dated 25<sup>th</sup> April 2013, cannot be allowed and/or granted. Prayer 35(c) of the said defence and counterclaim cannot be granted as it is based on an incompetent claim. In the same vein and reason, prayers 35(d), (e) and (f) cannot be allowed as prayers. Finally, the prayer for general damages under paragraph 35(g) fails in view of the fact that collusion and/or fraud was not established.

152. Finally, I find that, the law is settled, costs follow the suit, and in regard to the same I award the Plaintiff in the original suit costs thereof. I dismiss the defence and the counterclaim as it relates to the Plaintiff; the claim as against the 2<sup>nd</sup> Defendant to the counterclaim is incompetent and struck out accordingly with no orders as to costs. I also award the Plaintiff interest on the sum awarded at court rates from the date of this judgment till payment in full. Those are the orders of the court.

153. However, on general observation, this matter presented a very sad case before the court, and the medical conditions of the 1<sup>st</sup> Defendant/vendor was considered seriously and regretted. The court however, evaluated the matter painfully on the legal principles of law as expected. The 1<sup>st</sup> Defendant is wished a quick recovery from her condition.

154. Finally, I apologise for the delay occasioned by the period taken to deliver the judgment. The court apologises profoundly to the parties. Any inconvenience is highly regretted.

**Dated and delivered on this 18<sup>th</sup> May 2020.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Ochieng for Mr. Ojiambo for the Plaintiff

Mr. Kairaria for the 2<sup>nd</sup> defendant

Mr. Mutembei for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

**Delivered via virtual communication**