



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 132 OF 2006

SALOME NALIKA MWANGALE.....PLAINTIFF

VERSUS

TRUST BANK LIMITED (IN LIQUIDATION).....1ST DEFENDANT

KANCHAN RASIKLAL SHAH (Being the executrix of

the will and Estate of

RAIKLAL DEVRAJ SHAH (Deceased).....2ND DEFENDANT

AMIT RASIKLAL SHAH.....3RD DEFENDANT

MEHUL RASIKLAL SHAH.....4TH DEFENDANT

JUDGEMENT

1. At the heart of the dispute herein is the ownership of that property known and described as LR No.209/7828 Kyuna Estate Nairobi (**hereinafter the suit property**) which was at one time charged to Trust Bank Limited now Trust Bank Limited in Liquidation (**the 1ST Defendant or the Bank**).
2. The claim by Salome Naliaka Mwangale (**the Plaintiff**) is set out in a further Amended Plaint dated 11th October 2010 and filed on 31st October 2010. That pleading was supported by the evidence of 3 witnesses. The Plaintiff's case can be stated to be as follows.
3. The Plaintiff, already residing in the suit property, was desirous of buying it from the Bank. In a Sale Agreement dated 6th October 2013 (Plaintiffs Exhibit 1 pages 14-17), the Plaintiff and the Bank agreed that the Plaintiff would buy the property for the sum of Khs. 8,250,000/-. A highlight of the Agreement was that the completion date would be 28th November 2003. Another highlight is that the purchaser would, on or before the execution of the Agreement, pay a deposit of Kshs.825,000 to be held by the Vendor's Advocate (then Messrs. Machira & Co. Advocates) as stakeholders. It was also agreed that the purchaser would be liable to pay for the water bill to facilitate the procurement of the necessary Rates Clearance Certificate by the Bank.
4. The Plaintiff paid 10% deposit and the same was duly acknowledged by the Bank (see P Exhibit page 18, 19, 20, 21). Further sums of Khs. 550,000 and Kshs. 1,100,000 were paid to the Bank (P Exhibit 28 and 39 respectively). The balance of the purchase price was to be financed by Commercial Bank of Africa (CBA).
5. The evidence of the Plaintiff was that the firm of Bowyer Mahihu & Co. Advocates who represent CBA, issued a Professional undertaking to pay the balance of the purchase price being Kshs. 5,775,000 within 14 days of transfer of the property in favour of the Plaintiff and registration of a charge to the Bank (P. Exhibit page 28). The undertaking called for the release from Machira & Company of the transfer by Chargee, together with the original Certificate of Title, the Clearance Certificate from the Nairobi City Council, Rates Clearance Certificate and consent to transfer and charge the property.

6. After exchange of various correspondence and passage of considerable time, the Plaintiff's Advocate through a letter dated 19th April 2004, returned the draft transfer duly approved without amendment for engrossment by the Bank's Lawyers in readiness for execution (P Exhibit page 42). The Bank wanted to be assured of payment of the balance of the purchase price and so on 4th May 2004, the Lawyer for the Plaintiff advised that CBA would be paying the balance of the purchase price upon successful registration of the charge in their favour (P Exhibit page 45). It would be on the basis of this assurance that the firm of Machira & Company wrote to the Bank seeking authority to release all documents of Title to Messrs. Bowyer Mahihu Advocates (P Exhibit page 46).

7. The Plaintiff sought to rely on various letters (dated 7th May 2004, 3rd June 2004, 7th June 2004, 7th June 2004, 23rd June 2004, 24th June, 2004,) to demonstrate that there was a delay on the part of the Bank in releasing the title document. In a letter of 5th July 2004 (P Exhibit 56), Machira & Co. wrote to the Lawyers for CBA assuring them that it had the documents of title but some issues required to be resolved with the Nairobi City Council and the Commissioner of Lands whenafter the document would be forwarded to them.

8. There is then the letter of 28th July 2004 (P Exhibit page 57) in which the Plaintiff's Advocate sent the PIN number of the Plaintiff and a water bill receipt (current at that time) to the Bank's Lawyer. The Plaintiff will be relying on this letter to show that it had carried out its obligation by the date of that letter.

9. Responding to a letter dated 15th October 2004 (P Exhibit page 50), Machira & CO. Advocates informed the Plaintiff's Advocates that they were waiting for the Consent to be signed by the Land Registrar and arranged a meeting on 5th November 2004 for purposes of reading the Water Meter. Considerable time passed and on 26th January 2005 (P Exhibit 65) Machira & Co. Advocates wrote to the Bank accusing them of delaying the matter.

10. On 8th February 2005 (P Exhibit page 68) the Bank's Advocates wrote to the Plaintiff's Advocate requesting them to pay the outstanding water bill so that they would procure a Clearance Certificate. The evidence of the Plaintiff was that the meter reading showed a ridiculous sum of Khs.155,000/= and she sought a reconciliation of the account. This would take sometime and in various letters (of 6th, April 2005, 23rd May 2005, 13th June 2005) the Bank's Lawyers wrote to the Plaintiff's Lawyers enquiring about the outstanding water bill.

11. The evidence of the Plaintiff was that it was not until March that the account was duly rectified leaving her with a balance of KShs. 16,367.50 (P Exhibit 92) to pay. She duly paid the water bill in May 2005 but says that she misplaced the receipt. She had to constitute the records and requested Nairobi Water for records for proof of payment. Because of the challenges she was allegedly facing, her Lawyer through a letter dated 18th July 2005 (P Exhibit 83) requested the Bank's Lawyers to be patience.

12. This letter was in response to a 14 days' Notice by Machira & Co. Advocates threatening to rescind the Sale agreement if the water bill had not been paid. The position of the Plaintiff is that by this time she had already paid the water bill and was not in default to warrant the rescission.

13. The Plaintiff got wind of the intention by the Bank to resell the property by way of public Auction. Her evidence was that upon getting this information she applied to commence these proceedings on 22nd March 2006, which leave was granted and on the same day filed the suit but could not be heard until the afternoon. Acting out of caution, her Lawyer prepared a Notice of Caveat Emptor (P Exhibit 90) to warn any prospective buyer of the pending suit.

14. Erick Otingo (P.W2) is a licenced Process server and was at the material time a clerk in the firm of Langat & Wadabwa Advocate. His evidence was that he filed civil case NO. 131 of 2006 and the present suit on the morning of 22nd March 2006. The applications in the matters could only be heard in the afternoon as was the Court practice. On the same day he received the Caveat Emptor Notice for service upon Ideal Auctioneers.

15. That, accompanied by his colleague George Chweya, he proceeded to the place of Auction which was near Gurunanak Hospital at Pangani. He served a Notice upon the Auctioneer who refused to acknowledge it claiming that it could not stop the Auction. He then gave copies of the Notice to those who had attended.

16. In cross-examination he maintained that he got to the place of auction before the auction had commenced and remained there throughout the auction proceedings. This was about 30 minutes. It was his evidence that they got to the venue using an office car driven by one Kennedy Ogingo who was the Office Driver.

17. In her pleadings the Plaintiff had alleged that the purported sale of the property by the 1st Defendants to the other 3 Defendant was fraudulent. The particulars of fraud being:-

i. The 1st Defendant purported to sale the property when it knew that the subject sale Agreement between the Plaintiff and the 1st Defendant was still in force.

ii. The 1st Defendant continued to sell the suit property when it was aware that a suit had been filed by the Plaintiff herein to safe guard her interest in the property.

iii. The 2nd Defendant purchased the suit property in the full knowledge of the Plaintiffs interest in the property.

iv. The 2nd Defendant purchased the said property in the full knowledge that the Plaintiff had filed suit to safeguard her interest in the property.

v. The Defendants herein acted as they did to defeat the Plaintiff's interest in the property.

18. In the end the Plaintiff sought the following prayers:-

A. An order for the delivery up of the sale Agreement entered into between the parties.

B. An order for specific performance of the said Agreement.

C. A Permanent Injunction restraining the Defendants here-in by itself, servant, agent or otherwise howsoever from auctioning, selling, alienating, leasing, charging or in any manner interfering with the suit property to wit L.R. No.209/7828.

D. An Injunction restraining the Defendants herein by themselves, servants, agent or otherwise howsoever from interfering with the Plaintiffs quiet possession of the suit property.

E. An order cancelling the purported auction dated the 22nd March 2006 and any subsequent transfer.

F. Any further and other relief that his Honorable Court may deem fit and just to grant.

G. Costs of this suit.

19. So as to advice on the value of the property, the Plaintiff instructed Mr. Herbert Mwangi Kamau (PW3) a Registered and Practicing Valuer to carry out a Valuation of the property. The Valuer prepared a Report on behalf of Amazon Valuers Limited dated 27th June 2011 (P Exhibit 2) in which he returned an open Market value of Khs.75,000,000. In cross-examination the witness stated that the property could have in the year 2011 attracted monthly rent of Ksh.80,000/=.

20. The Bank filed its Statement of Defence on 21st November 2006 and after the amendment of the Plaint, it filed an Amended Defence filed on 25th October 2010. Important to note is that in its latter pleadings the Bank adopted its earlier Defence. Abridged, the response of the Bank is that time was of essence in the contract and that the transaction was to complete on or before 28th November 2003. And that any extension was done *ex gratia* and out of the magnanimity of the Bank. It adds that notwithstanding the extended completion date the Plaintiff was still unable to complete the sale transaction. And that the Bank was therefore constrained to rescind the Sale Agreement.

21. The Bank points out that it had no obligation and could not release the document of Title unless the entire purchase price was paid and that the procurement of a loan by the Plaintiff was not a condition precedent to the Sale transaction. It is averred by the Bank that the Plaintiff was unable to pay the water bills to facilitate the procurement of the necessary Rate Clearance Certificate.

22. In respect to the sum of Khs.2,475,000 paid by the Plaintiff to the Bank, it states that the same was forfeited in terms of the conditions of sale.

23. On the events leading to the public Auction, the Bank took the position that the Plaintiff had nothing to do with the Charge under which the Bank exercised its Statutory Power of Sale and that there would have been no reason to serve her with a Notification of sale.

24. It was pleaded that the sale by public Auction took place on 22nd March 2006 and the Bank denies knowledge of circulation of a Caveat Emptor Notice. That at any rate the Notice would be of no consequence in relation to the 1st Defendant's exercise of Statutory Power of Sale.

25. To support that Defence, the Bank called 2 witnesses. Mr. Yasmin Roshen Kaka (DW1) is the Assistant Liquidation Agent of the 1st Defendant. The witness reiterated the matters pleaded in the Bank's Defence. He informed Court that the property was charged by Enjinian Investments Limited for an initial sum of Khs.5,000,000 and a further sum of Khs.2,000,000. The charge was dated 23rd February 1995. Upon default in repayment of the loan secured under the charge, the Bank issued a Statutory Notice to the Chargor. Attempts to sell the property by way of Public Auction did not bear fruit.

26. Enter the Plaintiff. In its search of buyers the Bank spoke to the Plaintiff who was then resident in the house as a tenant. There were negotiations and discussions which culminated into the Sale Agreement of 16th October 2003.

27. On the breach by the Plaintiff of the terms of the sale Agreement the witness stated that substantial correspondence was exchanged and time given for the Plaintiff to settle the water bill. Soon it became clear that the Plaintiff was not ready, able and willing to conclude the sale transaction. The Bank's Advocate then gave a 14 days' Notice to the Plaintiff's Advocates to sort out the issue of the water bill failing which the Bank would rescind the sale transaction and proceed to sell the property (that notice dated 27th June 2005 is found at P Exhibit page 80). The Plaintiff's advocate sought further indulgence and by a letter dated 15th July 2005 (P Exhibit page 84) the Bank's Advocates acceded by granting another 7 days. Even with that extension, the Plaintiff's Advocates did not finalize on the water bill issue.

28. The other witness would give evidence in respect to what happened on the Auction day. He is Peter Githirwa Waweru (DW2) who is the sole proprietor of Ideal Auctioneers. By a letter dated 20th December 2005 (1st Defendants Exhibit page 73) he received instructions from Messrs. Machira & Co. representing the Bank to arrange a Sale of the suit property by way of Public Auction. He arranged the Auction for 22nd March 2006.

29. On that day, 8 prospective bidders attended. Attached to his witness statement was the list of the attendees. That after confirming from Mr. Machira that there was no impediment to the auction, he went on to call the Auction to order. Various bids were made and bidders made offers to outdo each other. That the highest bidder was of Rasiklal Shah who bid on his behalf and on behalf of his nominees. His bid was for Kshs.14,500,000 which was well above the sum of Kshs. 8,400,000 set as the Reserve Price. He accepted his bid and an agreement described as "Particulars of Property and Memorandum" was executed by the successful bidder (D1 Exhibit page 90-93). Under cross-examination he stated that there was no order stopping the sale and that he did not see any Caveat Emptor Notice at the time of the Auction. Neither was it circulated. For that reason there was not need to advise the bidders to ignore it. Asked why he announced to the bidders that there was no impediment to the Auction, he remarked that this was the practice adopted before one would commence the sale.

30. Rasikal Devras Shah (**deceased**) passed away on 29th March 2012 and KANCHAN RASIKLAL SHAH is the Executor of his Will and in that Capacity substituted the Deceased as the 2nd Defendant in these proceedings.

31. AMIT RASIKLAL SHAH (**the 3rd Defendant**) testified as DW4. He is a son of the Deceased and Mehul Rasiklal Shah (the 4th Defendant) is his brother. The suit property is situated next to the 3rd Defendants Family home in Kyuna. It was through an advertisement put out in early March 2006 that the Deceased became aware of the Sale of the suit property.

32. The witness says that he was aware of the condition of the house and he and his father knew the approximate value of the property as it was a neighbouring property and it was unnecessary to verify about its value.

33. Upon consultation within the Family, it was agreed that the Deceased would bid for the house in the auction scheduled for 22nd March 2006. The target bid was Kshs.12,000,000/= which was the price of properties around Kyuna at that time and so the Deceased carried with him a Bankers cheque for Ksh.3,000,000 being 25% of the bid. Eventually the Deceased made a successful Bid of Kshs.14,500,000/=. 25% of this bid was Kshs.3,625,600/= and the Deceased had to make a further payment of Kshs.625,000 by way of Bankers cheque No.095090 dated 23rd March, 2006 drawn on Habib Bank AG Zurich in the Auctioneers favour. Evidence of the payments are on pages 10 to 16 of the 2nd – 4th Defendants Bundle of Documents.

34. Upon payment of the balance, the property was on 11th August 2006 transferred into the names of the Deceased and the 3rd and 4th Defendants as tenants in common in equal shares.

35. The 2nd – 4th Defendants are aggrieved that the Plaintiff continues to be in possession of the property and has refused to yield it up. As a consequence, they have suffered loss. The assessment of that loss was done by Messrs Camp valuers. Mr. James Githaiga Thirikwa (PW3) of the said firm who was asked to advise on the open market rental value for the period between 11th August 2006, to 31st July 2008. In a Report dated 9th July 2008 (2nd – 4th Defendants Documents pages 45-55, he returned a monthly rent of Kshs.130,000/=.

36. The 2nd, 3rd and 4th Defendants have set up a counterclaim against the Plaintiff for the following prayers:-

- a. An order that the Plaintiff, her agents, servants, employees or tenants do forthwith deliver vacant possession of the suit property to the 2nd Defendant.
- b. In default, they be at liberty to forcefully evict the Plaintiff from the suit property at the Plaintiffs cost and expense.
- c. The Plaintiffs do pay them Mesne profit at the rate of Kshs.120,000/= per month from 11th August 2006 until full payment or eviction of the Plaintiff yielding vacant possession.
- d. Costs of the counterclaim together with interest and costs of eviction, if need be.

Issues for determination and Evaluation of evidence.

37. Albeit not too dissimilar the parties proposed separate issues for determination. In addition they each filed written submissions. Upon a synthesis of the issues taken together with the pleadings, evidence and the arguments in submissions, the Court forms the view that it must determine the following so as to resolve this dispute:-

- i. Was the Bank entitled to rescind the Agreement for Sale dated 16th October 2003.
- ii. If so did the Bank properly or duly rescind the said Agreement?
- iii. Whether the 2nd – 4th Defendants duly acquired the suit property by virtue of the purchase at Public Auction.
- iv. Whether the Plaintiff is entitled to the Prayers sought.
- v. Whether the 2nd to 4th Defendants are entitled to Judgement on the counterclaim.

38. The Agreement for sale of 16th October 2003 is the star Document herein. It is a short Agreement and there is no difficulty reproducing it:-

An Agreement made the 16th day of October 2003 between

1. TRUST BANK LIMITED (IN LIQUIDATION) (“the Vendor”) of P.O Box 46342, NAIROBI. The Bank is selling the property in its capacity as Liquidation Agent of Trust Bank Limited which is in Liquidation.

and

2. SALOME NALIAKA MWANGALE (“the Purchaser”) of P.O Box 19883, NAIROBI

1. The property sold is L.R NO.209/7828 KYUNA ESTATE, NAIROBI and all the developments therein.
2. The interest sold is LEASEHOLD for a term of 99 years from 1.11.1972 (where an underlease is at an annual rent of Kshs. 960/= (Revisable). Involved this should be stated).
3. The purchase price is Shs. 8,250,000/= of which the sum of Shs.825,000/= has been paid to MESSRS MACHIRA & CO. ADVOCATES as Stakeholder.
4. The sale is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the conditions contained in this Agreement.
5. The completion date is the 28th day of November 2003.
6. The Vendor’s advocate is M/S MACHIRA & CO. ADVOCATES, REHANI HOUSE, 7th FLOOR, P.O BOX 45049, NAIROBI.

and the Purchaser’s advocate is P.W WENA & CO. ADVOCATES, 3RD FLOOR, RATTANSI EDUCATIONAL TRUST BUILDING, P.O BOX 67537
7. The sale includes the following things which shall be paid by the purchaser at a price of Shs. NONE.
8. The property is sold IN VACANT POSSESSION
9. The property is sold subject to the terms and conditions contained in the Title but otherwise free of encumbrances.

Special conditions

1. The property being sold herein is a residential premises comprising a residential house and measuring about 0.3484 of a Hectare and which has already been identified and inspected by the Purchaser to her own satisfaction. Therefore, the Vendor shall not be called upon to identify any beacons.
2. The property is sold in the condition and state in which it is, as already viewed by the Purchaser, and the Vendor shall not be liable to carry out any repairs and/or redecoration.
3. The purchase price is Kenya Shillings Eight Million Two Hundred and Fifty Thousand (Kshs.8,250,000)= and the Purchaser shall pay a down payment of Kshs.825,000/=, as deposit on or before the execution of this Agreement, which deposit shall be held by the Vendor’s Advocates as Stake Holder while pending the completion of the sale.
4. The Purchaser’s family is already living in the premises being sold herein and therefore the Purchaser shall be liable to pay for all the water bills to facilitate the procurement of the necessary Rates Clearance Certificate by the Vendor and hence to facilitate the completion of the sale. But the Vendor shall be liable to pay all the arrears of Rates and Land Rent, if any, and to procure the necessary consents.
5. The Purchaser shall be liable to pay for her own Advocates’ legal fees whereas the Vendor shall be liable to pay for its own Advocates’ legal fees. But the Purchaser shall be liable to pay Stamp Duty and Registration Fees in respect to the Transfer in her own favour.
6. Time shall be of essence of contract in this sale transaction.
7. Completion shall take place, in accordance with Law Society Conditions of Sale (1989 Edition), in Vendor’s Advocates’ Offices at least three (3) days before the completion date provided in this Agreement.
8. Both parties shall honour this Agreement.

IN WITNESS whereof this Agreement has been duly executed by or on behalf of parties hereto the day and year first hereinbefore written.

Signed by the Liquidation Agent of Trust Bank Limited

In the presence of J.P Machira Advocate< P.O Box 45049 NAIROBI, KENYA

Signed

Signed by Salome Maliaka Mwangale

In the presence of Peter W. Wena Advocates, P.O Box 45707, NAIROBI

Signed

39. The highlights of the Agreement in view of what ensued after, would have to be the following:-

- a. The sale was subject to the Law Society conditions of Sale (1989 Edition) in so far as they were not inconsistent with the conditions contained in the Agreement.
- b. The completion date was appointed as 28th November 2003.
- c. As the Plaintiff's family was already residing in the premises, the Plaintiff would be liable to pay for all the water bills to facilitate the procurement of the necessary Rates Clearance Certificate by the Bank. Nevertheless the Bank was liable to pay all the arrears of Rates and Rent, if any, so as to procure the necessary consents.
- d. Time was of essence for the transaction.

40. It is common ground that by a cheque dated 7th October 2003, the Plaintiff paid Ksh. 825,000 to the Bank being 10% deposit of the Purchase price. Another Kshs.550,000/= was paid and this is acknowledged by the Bank in its letter of 8th January 2004 (P Exhibit page 22). The Bank became aware, and it accepted, that part of the Purchase price being Ksh.5,775,000/= would be financed by CBA (P Exhibit page 26). There was another sum of Kshs.1,400,000/= paid by the Plaintiff to the Bank. While the receipt acknowledging this payment is dated 5.3.2003, the letter sent in acknowledgement is dated 16.9.2004 (P Exhibit 39).

41. The facility by CBA was to be secured by a first legal charge over the suit property (see letter of offer (P Exhibit pages 23-25). So as to perfect this security, the property needed to be first transferred into the name of the Plaintiff and the undertaking to back this arrangement was duly given to the Bank by the lawyers of CBA (in a letter of 15th March, 2004 (P Exhibit page 28). In this letter the Lawyers called for the Transfer together with the Original Certificate of Title, clearance Certificate from Nairobi City Council, Rates Clearance Certificate and consent from the Bank's Lawyers.

42. Sometime passed and on 5th May 2004 (P Exhibit page 46) the Bank's Lawyers wrote to the Bank seeking authority to release the documents of Title to the Lawyers of CBA on the strength of an undertaking to be given by those Lawyers. Between 27th May 2004 and 23rd June 2004 there are letters of eg. 27th May 2004, 3rd June 2004 and 7th June 2004 (P Exhibit pages 48-51), from the Plaintiffs' Lawyers and CBA Lawyers to the Bank's Lawyers inquiring about the Title Documents. The said Lawyers (Machira & Co.) request for the Title Document and relevant clearance Certificates from their client for onward transmission to the CBA Lawyers (P Exhibit page 52). This is in a letter of 12th June 2004.

43. This does not happen and in a letter of 5th July 2004, (Exhibit page 56), the Bank's Lawyers explains the delay to CBA Lawyers, the delay being;

“...there are some issues that require to be sorted out with the Nairobi City Council and the Commissioner of Lands. We have already written to the Liquidator Agent to that effect and once the matter is solved we shall send the documents to you”.

44. The sorting of those issues was slow in coming and so on 26th January 2005 (Exhibit page 65), the Bank Lawyers wrote to the Bank as follows:-

26th January 2005

The Litigation Agent,

Trust Bank Limited (In liquidation)

Head Office, Trustforte Building

NAIROBI

Dear Sir,

RE: ENJINIA INVESTMENTS LIMITED

L.R.NO.209/7828 KYUNA ESTATE – NAIROBI

SALE FROM TRUST BANK LIMITED TO SALOME N.MWANGALE

We refer to the above matter and to the telephone conversation between Mr. Mukindia and Miss Chelangat of 5th January, 2005. As discussed, we are of the opinion that to enable us conclude this matter expeditiously and without any risk as to the documents being rejected by the Ministry of Lands during registration, we decided to start the process afresh. However, do note the delay in concluding this matter has been occasioned by mostly on your part as a result of which we have been forced once again to obtain the relevant Clearance Certificates afresh.

Further, we return herewith your Banker's Cheque for Kshs.2,500/= meant for the City Council Rates Clearance Certificate. Kindly note, we were unable to utilize the same to obtain the Rates Clearance from the City Council, as the Water Bill had not been paid. On that aspect, we wrote to you on 1st December, 2004, and 16th December, 2004 respectively with no response from you. Further, do note the Rates Clearance Certificate is only valid for only one month from the date of issuance, therefore the need for expediency and payment of the Water Bill promptly.

In conclusion, to enable us complete this transaction as soon as practicable, do let us have the following:-

- a. The current water meter reading Bill and the water Bill respectively.
- b. Banker's cheque for Kshs.40,918.15/= as per the enclosed Rates Demand Notice payable to Nairobi City Council.
- c. Banker's cheque for Kshs.2,500/= for the Rates Clearance Certificate payable to Nairobi City Council.
- d. Banker's Cheque for Kshs.960/= being the outstanding Land Rent as per the enclosed Demand for Land Rent; payable to the Commissioner of Lands.
- e. Bankers Cheque for Kshs. 250/= for Consent payable to the Commissioner of Lands.

Do note, to issue separate cheques for each transaction aforesaid.

We are hopeful that this time we shall conclude this transaction as soon as possible. However all this depends on how promptly you respond to our correspondence and requirements. We look forward to your urgent attention as we are under pressure from the other parties to conclude this matter.

Your faithfully,

Signed

MACHIRA & CO. ADVOCATES

CC. M/s Bowyer Mahihu & co.

CC. P.W Wena & Co. Advocates

45. Emerging from this chronology of events is that as at 26th January 2005, the Bank was not in a position to complete the transaction. This would be months after the completion date of 28th November 2003. A count would put it at 14 months later. Not insubstantial as well is that the Documents that were not ready were necessary for purposes of completing the perfection of security in favour of CBA which would then trigger the release of the balance of the purchase price from CBA to the Bank.

46. Thereafter the tide appears to have changed. On 8th February 2005 (P Exhibit 68) the Banks Lawyers wrote to the Plaintiffs' Lawyers asking that the Plaintiff pays the outstanding Water Bill to enable the Plaintiff procure the clearance certificate. A reminder of the issue comes in on 6th April 2005 (P Exhibit page 73) from the Bank's Lawyers and on 11th April 2005 (P Exhibit page 74) from the Lawyers of CBA. A month passes and the issue of the Water Bill was still outstanding (P Exhibit pages 75 and 76).

47. On 6th June 2005, the Plaintiffs' Lawyers writes to the Lawyers of CBA (P Exhibit page 77) stating as follows:-

“Thank you for your letter dated 30.05.05. We have had problems trying to sort out the Water Bill for the property. We hope to resolve the same within the next seven (7) days whereafter we shall obtain the relevant Consent to charge”.

48. The 7 days passed but with no positive outcome. The Bank is now getting impatient and on 13th June 2005 (P Exhibit page 78) its Lawyers write to the Plaintiffs' Lawyers closing with the following words,

“...kindly and as a matter of urgency, do let us know if your client has cleared the outstanding Water Bill without the need for further reminders”.

49. Again, nothing comes through from the Plaintiff or her Lawyers and so two weeks later (on 27th June 2005 (P Exhibit page 80) the Bank's Lawyers issues the following Notice to the Lawyer for the Plaintiff:-

P.W Wena & Co. Advocates

3rd Floor,Rattansi Educational

Trust Building E21

Koinange Street

NAIROBI

Dear Sir,

RE: ENJINIA INVESTMENTS LIMITED

L.R NO. 209/7828 KYUNA ESTATE – NAIROBI

SALE FROM TRUST BANK LIMITED TO SALOME N.MWANGALE

We refer to the above matter and to the various correspondences over your client's payment of the outstanding water bill since 8th February 2005, all of which your response has not been forthcoming. The completion of this sale transaction has been delayed solely by your client failing to pay the water bill. All the other relevant documents are ready for registration save for the water bill to be paid. In this regard, judging from your silence, it would seem your client is not serious in concluding this matter.

Under these circumstances, we hereby give you 14 days Notice from receipt of this letter, to instruct your client to clear the water bill, failure of which our client will rescind the Sale Agreement and advertise the property for sale by Public Auction.

Yours faithfully

MACHIRA & CO.

ADVOCATES

CC. The Liquidation Agent,

Trust Bank Limited (In Liquidation)

Attn: Miss R. Ngure

As discussed, kindly let us know the outstanding loan Account and do have the property valued by your preferred valuers.

50. On 28th June 2005, (P Exhibit page 81) the Plaintiffs' Lawyers seek some indulgence, but in a letter of 8th July 2005(P Exhibit page 82), the Banker's Lawyers do not relent. The Bank's Lawyers did not give up on the issue and on 11th July 2005 (P Exhibit page 83) writes as follows to the Bank's Lawyers:-

11/7/2005

Machira & Co. Advocates

Rehani House, 7th Floor

Koinange Street

NAIROBI

Dear Sirs,

RE: ENJINIA INVESTMENTS LIMITED

L.R.NO.209/7828 KYUNA ESTATE – NAIROBI

SALE FROM TRUST BANK LIMITED TO SALOME N.MWANGALE

Thank you for your letter dated 8/7/05.

Our letter dated 28/6/05 reached you late as our clerk/messenger was bereaved and away from the office for the whole week.

Our client has made several attempts to sort out the water bill. Indeed we have made two separate payments after reconciliation of the account by Nairobi City Council. The Council now requires a final payment of Kshs.16,367/50 upon which the matter should be finalized. We are in the process of sorting out the same and urge you to hold your horses. You no doubt appreciate the poor manner in which the water department is run.

Yours faithfully,

For: P.W WENA & CO. ADVOCATES

PETER WENA

Bowyer Mahihu & Co.

Advocates

Multichoice Towers, Lower Hill Road

NAIROBI

51. The Bank's Lawyers respond through their letter of 15th July 2005 (P Exhibit page 84). Its contents are of some significance in answering the issues raised by this dispute and is here below reproduced:

15TH July, 2005

P.W Wena & Co. Advocates

3rd Floor, Rattansi Educational

Trust Building E21

Koinange Street

NAIROBI

Dear Sir,

RE: ENJINIA INVESTMENTS LIMITED

L.R.NO.209/7828 KYUNA ESTATE – NAIROBI

SALE FROM TRUST BANK LIMITED TO SALOME N.MWANGALE.

We acknowledge receipt of your letter dated 11th July, 2003, contents of which we have duly noted. You intimated to us that you have made some payments and the balance remaining is Kshs.16,367.50/=. Under these circumstances, we are prepared to wait for a further 7 days from the date hereof. After the expiry thereof, we shall proceed and advertise the property for sale by public auction without any further reference to your Client. We are sure you can readily appreciate the delay these matter has taken. (sic)

Yours faithfully

MACHIRA & CO.

ADVOCATES

cc. Client

52. There is silence for about four months and on 31st October 2005 (P Exhibit Page 85), the Plaintiffs' Lawyer writes to the Banks Lawyer advising that the issue on the Water Bill had been settled. In response to this letter, the Bank's Lawyer simply refers to his letter of 23rd May 2005, 13th June 2005, 27th June 2005, 8th July 2005 and 15th July 2005.

53. On 9th November 2005 (P Exhibit page 87) the Plaintiffs' Lawyers writes stating their client's anxiety to have the transaction completed. On 14th November 2005 (P Exhibit page 88) the Banks' lawyers restate that the transaction was rescinded but offers accommodation to the Plaintiff but on condition that she pays a purchase price of Ksh.12 million which was justified as the market value of the property at the date of that letter.

54. Whilst, through a letter of 15th November 2005(P Exhibit 91), the Plaintiffs' Lawyers states that they would take their Client's instructions on the new offer, no other Letter came forth thereafter.

55. The submissions by the Plaintiffs' Counsel is that the Bank extended the period of completion beyond 28th November 2003 within which time the Plaintiffs duly completed the agreement. The Bank on the other hand takes the position that time was of essence and was to complete on 28th November 2003 but that notwithstanding the Bank extended the completion date on several occasions (for a period of one year and seven months), yet still the Plaintiff was unable to complete the sale transaction.

56. The Sale Agreement of 16th October 2003 appointed the completion date to be 28th November 2003 and it expressly provided in Special Condition 6 that Time was of essence. As obvious as it may be, the clause making Time of essence was binding on both the Purchaser and the Seller. From the sequence of events the Bank itself was not ready to complete by 28th November 2003. On 26th January 2005, (P Exhibit 65), which was 14 months after the completion date, the Bank's Lawyer lamented to its Client that,

“...do note the delay in concluding this matter has been occasioned mostly on your part as a result of which we have been forced once again to obtain the relevant clearance Certificate afresh”

This letter was a concession on the part of the Bank of its inability to meet the deadline.

57. On the part of the Plaintiff, she was happy to indulge the Bank as evidenced by letters from her Lawyer and those of CBA who were financing the payment of the balance of the purchase price. At this time none of the parties were insisting on the completion date. The parties were now operating freely outside the completion date of 28th November 2003.

58. In her submissions the Plaintiff has invited the Court to find that the Dispute herein ought to be resolved within the following context:-

a. By its own conduct the 1st Defendant has extended the period of completion beyond the 28th of November 2003, within which time the Plaintiff duly “completed” the agreement, a fact admitted by the 1st Defendant itself through Counsel, though the 1st Defendant subsequently acted otherwise.

b. The 1st Defendant by its own conduct treated the subject agreement as if time was not of essence by reason of which any rescission by it, upon default by the Plaintiff required the 1st Defendant to 1st make time of essence, before issuing a reasonable Completion Notice.

c. By its own conduct the 1st Defendant led the Plaintiff to believe that she was not in default, only to turn around after she had been widowed, and to calculatedly stage manage a rescission.

59. At this point it is crucially important for the Court to reflect on whether what the Plaintiff now asserts was the case she either pleaded or which presented itself as one left for decision of the Court in the course of the hearing. This is crucial because parties should not be allowed to travel beyond their pleadings. And where they do so, the Court can only base its decision on unpleaded issues which are embraced by the parties and left to the Court for decision (ODD Jobs vs. Mubia [1970] EA 476).

60. In the Plaint, the Plaintiff alleges that as she had duly obtained a facility from CBA, CBA wrote to the Bank requesting for completion documents but the Bank took a long time putting those documents together. It is then pleaded,

“13. The Plaintiff duly forwarded to the 1st Defendant the relevant Water Bill Receipts.

14. Thereafter, on the 27th June 2005, the 1st Defendant purported to give a fourteen day notice within which the current Water Bill ought to be paid in default of which the 1st Defendant indicated it would rescind the Sale Agreement and auction the said property.

15. No Notice of rescission was subsequently served on the Plaintiff”.

61. In her statement of 25th January 2002, which constituted her evidence in chief, the Plaintiff states, in respect to the vexing Water Bill and rescission,

“49. I duly paid the amount in May 2005.

50. Unfortunately, I disputed the receipt.

51. Subsequently, I went to Nairobi Water to look at their records for proof of payment, and they gave me a printout. Page 93 and page 94.

52. Accordingly by June when Nairobi Water was issuing the 14 day notice, the Water Bill had duly been paid.

53. My advocate Mr. Wena wrote a letter to the 1st Defendant a letter requesting them to be patient but, by the time he is writing the said letter we had already cleared the Water Bill page 83.

54. I have not been in any default to warrant the Vendor to rescind the Agreement”.

62. In her oral evidence the Plaintiff maintained that the period for completion was extended beyond 28th January 2004 and made Reference to various correspondence. She testified,

“p. 84 letter from Machira and co. dated 15.7.2005. They were still treating the agreement as subsisting and I was being given further time to comply”.

63. The Banks position was that the completion date was 28th November 2003 time being of essence but there was ex-gratia extension of that period to 28th January 2004 (See paragraphs 2(a) 9(b) (c) and (d) of the Defence. In paragraph 2(e) it pleads,

“Despite the 1st Defendant having extended the completion date as pleaded here above, the Plaintiff was still unable to complete the sale transaction, subsequent to which the 1st Defendant served the Plaintiff with fourteen (14) days’ Notice (the Notice was *ex-gratia* as time was of essence of contract in the said sale transaction) to complete the sale, but once again the Plaintiff was unable to complete and the 1st Defendant was constrained to rescind the Sale Agreement/transaction”.

64. From her pleadings and testimony, the Court has understood the Plaintiff’s case to be that she complied with the terms of the contract within the extended time for completion. This Court does not understand her case to be that time had ceased to be of essence because of waiver by the parties. The Plaintiff did not plead or present such a case even in the face of an express and overt stance by the Bank that time, though extended, was nevertheless still of essence. The law being that mere extension of time may not in itself constitute a waiver, the Plaintiff needed to signal that it would be arguing that the extension of time constituted a waiver or abandonment of the “*time is of essence clause*” in the Contract. If a Party wishes to rely on waiver, then it must be specifically pleaded. In the absence of such foreshadow, this Court does not consider that a plea of waiver and its legal implication on the contract is a matter or matters that fall for its determination and decision. This finding, as will be apparent shortly, marks the turning point of the Plaintiff’s fortunes in this matter.

65. It is common ground that the completion date for the agreement was 28th November 2003. It is also common ground that there was an express extension of the completion date to 28th January 2004.

66. There is then clear evidence that the completion date was extended even beyond 28th January 2004. In a letter of 15th March 2004 (p Exhibit pages 28 and 29) the Lawyers of CBA seek certain completion documents from the Bank Lawyers. In that letter the Lawyers for CBA remark,

“We trust that the issue of the completion date has been amicably settled as between your clients and the purchaser”.

67. Responding to that letter Machira and Company does not react directly but indicates that it is attending to the Documents sought. Later there is indication that the Bank had accepted the undertaking from the Lawyers for CBA (see letter of 12th June 2004 by the Bank’s Lawyer P Exhibit page 52). In doing so the Bank acknowledged that it had accepted the Plaintiffs mode of settling the balance of the purchase price.

68. Other than payment of the purchase price, the other obligation that the Plaintiff was to meet was the payment of the Water Bill. In the peculiar circumstances of the transaction, the Plaintiff was in occupation of the property under sale and this obligation fell on her (See Special Condition 4 of the Agreement). The payment of the Water Bill would enable the Bank’s Lawyers to obtain the Rates Clearance Certificate, one of the Documents required to complete the transfer of the property from the Vendor to the Purchaser.

69. Now, the evidence is that by a letter of 28th July 2004 (P Exhibit page 57), the Plaintiff’s Lawyer sent a Water Bill receipt (current then) to the Banks Lawyers. In effect having given an acceptable undertaking for payment of the balance of the Purchase price and payment of the Water Bill, the Plaintiff as at 28th July 2004 had fulfilled her obligations under the Agreement.

70. On the side of the Bank it was still having difficulties obtaining all the completion documents even as late as 26th January 2005 (see a discussion of this in paragraph 44 of this decision). However, and not without consequence, the Plaintiff was minded to entertain the delay caused by the Bank.

71. This led to an important development. The Plaintiffs’ advocates submits as follows:-

“Your Lordship is urged to take judicial Notice of the fact that previously, upon payment of the Water Bill, conveyancing Lawyers had a small window to process the relevant Clearance Certificate from the Council, which Certificate was valid for a month”.

72. This Court need not take Judicial Notice of this fact because there is evidence from the Bank’s Lawyers that this was in fact the position. In their letter of 26th January 2005 to their Client the Lawyers advise that Rates Clearance Certificate is only valid for one month from the date of issuance and hence the “*need for expediency and payment of the Water Bill promptly*”.

73. Having entertained the delay by the Bank for a period of more than one month after forwarding the Water Bill Receipt (28th July 2004), the Plaintiff found herself in a bind. She needed to again pay for the Water Bill as required in Special Clause 4 of the Agreement. The various letters (after 28th July 2004) by the Plaintiffs’ Lawyers suggest that the Plaintiff understood that this obligation continued even after 28th July 2004 as she had given to the Bank more time to meet its obligation. Indeed in various letters (eg. that of 9th March 2005 P Exhibit page 70, 6th June 2005 P Exhibit page 77, 28th June 2005 P Exhibit 81), the Plaintiff seeks to explain the challenges in and efforts made to resolve the Water Bills issue. But there was no success by the time matters turned for the worse, when the Banks issued the notice of 27th June 2005. (P Exhibit page 80).

74. This is the 14th day Notice to rescind. In it the Banks Lawyer, partly tells the Lawyers for the Plaintiff that,

“...The completion of this Sale transaction has been delayed solely by your Client failing to pay the Water Bill”.

In responding, the Plaintiff’s Lawyer (P. Exhibit page 81) without denying that it was solely to blame for the delay requests for time to resolve the Water Bill issue.

75. Upon making a further request (on 11th July 2005) P Exhibit page 83 for further time, the Lawyers for the Bank, in a letter responds,

15TH July, 2005

P.W Wena & Co. Advocates

3rd Floor, Rattansi Educational

Trust Building E21

Koinange Street

NAIROBI

Dear Sir,

RE: ENJINIA INVESTMENTS LIMITED

L.R.NO.209/7828 KYUNA ESTATE – NAIROBI

SALE FROM TRUST BANK LIMITED TO SALOME N.MWANGALE.

We acknowledge receipt of your letter dated 11th July, 2003, contents of which we have duly noted. You intimated to us that you have made some payments and the balance remaining is Kshs.16,367.50/=. Under these circumstances, we are prepared to wait for a further 7 days from the date hereof. After the expiry thereof, we shall proceed and advertise the property for sale by public auction without any further reference to your Client. We are sure you can readily appreciate the delay these matter has taken.

Yours faithfully

MACHIRA & CO.

ADVOCATES

cc. Client

Cc. Bowyer & Mahiu Co. Advocates

The significance of the letter is that the Bank was prepared to hold rescission for another 7 days.

76. The evidence is that it was not until more than 3 months later, on 31st October 2005 (P. Exhibit page 85) that the Plaintiff’s Lawyer advised that the Water Bill ‘issue’ had been settled. The only conclusion that can be drawn is that the Plaintiffs submission that the Plaintiff had completed the agreement beyond the extended period of completion cannot be correct. The Plaintiff has not demonstrated that it had

within 7 days of 15th July 2005 settled the Water bill.

77. Again the evidence does not bear out the Plaintiffs contention that the Bank had led her to believe that she was not in default only to turn around after she was widowed to stage manage a rescission. On 8th February 2005 (P. Exhibit page 68) the Bank pleads with the Plaintiff's Lawyers to settle the Water Bill and in fact go out of their way to procure the Water Bill to assist the Plaintiff Lawyers expedite the payment. A month later (9th March 2005) the Water Bill had not been settled and this continued until 27th June 2005 when the Banks Lawyers issued the 14 days' Notice. Clearly the Plaintiff was well aware of its outstanding obligation.

78. From the evidence and the case as presented by the parties, time was of essence in the sale transaction and that time was extended from time to time beyond the initial period of 28th November 2003.

79. Time being of essence, there was no requirement for giving a Completion Notice before the Rescission Notice. The requirement of a Completion Notice set out in the Law Society Condition of sale (1989 Edition) was in respect of an Agreement which did not provide that time is of essence in respect to the Completion Date. Not so like here! On the other hand, the Agreement itself did not provide a period for a Rescission Notice. On 27th June 2005, the Bank gave a 14 days Rescission Notice but delayed it for another period of 7 days upon the request of the Plaintiff' Lawyer. Is this period unreasonable as submitted by the Plaintiff?

80. This Court is not prepared to agree with this submission given that the Plaintiff had been reminded of her outstanding obligation about 4 months earlier (letter of Banks Lawyer of 8th February 2005) and when in fact the Plaintiff's Lawyers had held themselves out as being in a position to resolve the Water bill within 7 days of 6th June 2005 (P Exhibit page 77). It cannot therefore be unreasonable for the Bank to call up for the performance within 14 days of 27th June 2005. And the Bank was still more the generous by expanding that time by another 7 days!

81. In the Rescission Notice the Banks' lawyers make it clear that, save for the Water Bill, all the other completion documents were ready. The Plaintiff does not challenge that at the time her lawyer received the Notice or later during the hearing. This Court has to find that at the time of issuing the Notice the Bank was ready and willing to perform its side of the Contract. The Rescission was justified and valid.

82. The Sale Agreement of 16th October 2003 having been properly rescinded, the property was available for sale. And the caveat emptor, even if, actually served upon the Auctioneer who conducted the sale by Public Auction would be of no effect.

83. Before the Courts attention turns to the remedies available to the Parties herein, it will make its quick comments on the assertion by the Plaintiff that the sale to the 2nd, 3rd and 4th Defendants is defeated by the Doctrine of *lis pendens*. It is agreed that in selling the property at the auction, the Bank was exercising its statutory power of sale. The process of realization would have commenced with the giving of the necessary statutory notices. The Chargor or Mortgagor does not complain about the manner in which the power was exercised. Is the Doctrine applicable here?

84. There are various decisions of this Court (see for example Argos Furnishers Limited vs. Ecobank Kenya Limited & Another [2014] eKLR, Ravasam Development Company Limited vs. Equatorial Commercial Bank Ltd [2017] eKLR, Geni Plains Company Limited & 2 others vs. Ecobank Ltd [2017] eKLR, which have held that the Doctrine of *lis pendens* will not defeat the exercise of a Chargee's Power of Sale commenced before suit is filed. In Ravasam Supra, I stated as follows:-

“ 17. This Court is contented with the manner in which Justice J.L Onguto on 21st April 2017 dealt with a similar matter in HRC No.316 of 2016 (**Cieni Plains Company Limited & 2 others Vs. Ecobank Kenya Ltd.**)

18. After observing that the Court of Appeal in Naftali Ruthi Kinyua Vs. Patrick Thuita Gachure & another [2015] eKLR did not advocate for 'a carte blanche' application of the Doctrine to post 2012 matters the good judge reasoned:-

“68. As to the applicability of the doctrine to the instant proceedings which involves the contest as to whether a chargee may exercise his Statutory Power of Sale and dispose of the subject property, I must point out that there is now a clear paradigm when it comes to purchasers of charged property. The statute affords them protection. Section 99 of the Land Act shields the purchaser almost absolutely save where he has participated in fraud. Instead, the purchaser is not to be robbed of any acquisition simply because the sale was irregular or improper or out of dishonest conduct, which is what the doctrine of *lis pendens* seeks to fight. Indeed, section 99 proceeds to state that the party prejudiced by the sale is to be compensated through damages. I do not at this stage see how the doctrine may override a statutory provision. Prima facie consequently, I would hold for now that the doctrine has no place to the current circumstances or to properties sold by a chargee.

69. The totality of the circumstances of this case placed along the set principles for the issuance (or denial) of an injunction is what ought to dictate whether the applicant is entitled to the interlocutory orders sought. It should not be a simple reason that there is a pending suit concerning the subject property.”

19. I entirely agree! In addition the motion herein the main, is for an injunctive order to restrain the 1st Defendant Bank from exercising its statutory remedies as a chargee. Whether or not that order is deserving must be considered against the usual principles of grant of an injunction. One remedy available to the Bank is the right to the sell of the charged property. If the Court thinks the order worth of grant then the Bank will be restrained from, inter alia, selling or disposing of the suit property. To allow the Doctrine of *lis pendens* to govern this dispute will be to give the Plaintiffs the benefit of restraining the Bank from exercising its power of sale as a matter of course without requiring it to persuade the court that there is merit in stopping the Bank for enjoying a right which had been conferred to it by a contract and statute. The doctrine of *lis pendens* could be used by Chargors to get a free ride to Restraining Orders and then placing the Chargee in a position where it was required to seek authority of the Court to enforce its Statutory Right”.

85. The Plaintiff cannot lean on the doctrine to prop up her cause.

86. Upon Rescinding the Contract, the Bank retained Kshs.2,475,000 paid to it by the Plaintiff and justifies this as forfeiture under the terms and conditions of the Sale Agreement. Neither the Sale Agreement nor the Law Society Conditions of Sale (1989 Edition) provided for forfeiture of either the deposit or part payment in the circumstances under which the Rescession happened. Retention of Ksh. 2,475,000/= is not well grounded. This amount will have to be refunded as sought by the Plaintiff.

87. The Sale of the Property to the 2nd – 4th Defendants was lawful. The Plaintiff has retained possession notwithstanding that the 2nd to 4th Defendants became entitled to possession after they purchased the property. The Trio seek an order that the Plaintiff delivers up vacant possession and in addition seeks mesne profits at the rate of Ksh.120,600/= per month from 11th August 2006 until delivery up of possession. 11th August 2006 is the date of transfer of the suit property into the names of the 3rd Defendant.

88. The undisputed evidence is that the balance of the auction price being Kshs.10,875,000/= was paid to the Banks Lawyers on 17th May, 2006 (2nd to 4th Defendants bundle page 23). The property was subsequently transferred to the Deceased and the 3rd and 4th Defendants on 11th August 2006 (2nd to 4th Defendants Bundle pages 28 to 32). It is the finding of this Court that the three would be entitled to possession of the property from the date of payment of the balance of the purchase price (17th May 2006) or in the very least from the date of transfer of the property to themselves (11th August 2006). The Plaintiff would be fully aware that the three had purchased the property by 20th November 2006 when she amended her Plaint to enjoin the Deceased and the 3rd and 4th Defendants.

89. Mesne profits is defined in Section 2 of The Civil Procedure Act to mean:-

“mesne profits”, in relation to property, means 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 does not include profits due to improvements made by the person in wrongful possession”.

From this definition a claim for mesne profits is a claim for damages for trespass to land and one measure of those would be reasonable rent (see also the Court of Appeal decision in Mistry Valji vs. Janendra Raichand & 2 others [2016] eKLR.

90. DW3 was instructed by the 3rd – 4th Defendants to advise on the Market Rental value of the property for the period 11.08.2006 to 31.07.2008. He returned an opinion as follows:-

“Net Annual Rental Income is therefore Kshs. 1,591,911/=

Hence monthly rent is

$1,591,911/= / 12 = 132,659$

Call it Kshs. 130,000/= per month.

From the above computations we wish to adopt a monthly rent of Kshs.130,000/= per month.

Hence the rent for the period is as follows:-

- 11th – 31st August 200688,065/=
- September 2006 – July 2008

23 months at 130,000 per month.....2,990,000/=

Total rent for the period..... 3,078,065/=

Rental Value for the period from 11th August 2006 to 31st July 2008 is in the sum of Kshs.3,078,065/= (Read Kenya Shillings Three Point Zero Seven Eight Zero Six Five Million only)”.

This Report was not challenged. In fact no questions were asked in cross-examination.

91. On the part of the Plaintiffs Valuer, he stated as follows,

“I was never told whether she pays any rent. There must be a relationship between the occupant and owner in my experience legal or otherwise. The rent estimate per month is Kshs.120,000/=. In 2011 it could have been Kshs.80,000/=”.

The testimony was given on 4th February 2016.

92. DW2 had prepared an opinion specifically in respect to the period 11th August 2006 to 31st July 2008. For this period he returned an opinion of Khs.3,078,065/=. In his opinion the Valuer adopted what he referred to as the Standard rent of 1.25% per month of the Capital value of the property. Neither the Plaintiff, her Counsel or Valuer commented or criticized the method applied by DW2. This Court would therefore have no reason to doubt it.

93. The weak point of that Report however is that it was for a specific period ending on 31st July 2008. DW3 testified on 30th November 2016 but made no mention of the possible rents at the time he was testifying. However the evidence of the Plaintiffs' own Valuer (PW3) plugged this gap to the extent that he gave a rent estimate as at 4th February 2016 which he put at Khs.120,000/= per month.

94. In the circumstances the 2nd to 4th Defendants claim of Mesne profits at the rate of Khs.120,000/= per month from 11th August 2006 seems reasonable.

95. As I turn to conclude, the Plaintiff had sought a refund of the part payment and interest thereon at Commercial rates from the date of filing suit until payment in full. But that Commercial rate was neither pleaded nor proved. The Court will not speculate on it.

96. The final Orders of the Court are:-

95.1 Save for Prayer (f) of the Further Amended Plaint, the other Prayers therein are hereby dismissed with costs to the 2nd – 4th Defendants.

95.2 In respect to Prayer (f), there shall be an order of Interest on the sum of Kshs.2,475,000/- at Court rates from the date of filing suit until payment in full.

95.3 As there is only part success of the Plaintiff's Claim against the 1st Defendant, The Plaintiff and 1ST Defendant shall each bear their own costs.

95.4 The 2nd to 4th Defendants Counterclaim succeeds as prayed with costs as against the Plaintiff however the Plaintiff is granted 30 days from the date hereof to deliver vacant possession of LR No.209/7828 failing which eviction shall issue.

Dated, Signed and Delivered in Court at Nairobi this 6th Day of April, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Kamau h/b for Wandabwa for Plaintiff

Mwangi for Machira for 1st Defendant

Mwangi for 1st, 2nd, 3rd and 4th Defendant

Nixon - Court clerk