



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1092 OF 2016

LUCY WANGARI NGUGI.....PLAINTIFF

VERSUS

ELIZABETH ATIENO WANYANGA.....1STDEFENDANT

TELPOSTA PENSION SCHEME TRUSTEES REGISTERED.....2ND DEFENDANT

JUDGMENT

By an agreement of sale dated 27th October, 2008 between the 1st defendant and the 2nd defendant, the 2nd defendant sold to the 1st defendant all that parcel of land known as L.R No. 209/870/36 situated at City Park Estate, Nairobi (hereinafter referred to as the “suit property”) at a consideration of Kshs. 7,100,000/- on terms and conditions that were set out in the said agreement. The said agreement that was drawn by the firm of Kale Maina & Bundotich Advocates which acted for both parties provided as follows in part;

1. The 1st defendant was to pay to the 2nd defendant 10% of the purchase price in the sum of Kshs. 710,000/- as a deposit on the execution of the agreement receipt of which payment was acknowledged by the 2nd defendant.
2. The 1st defendant was to pay to the 2nd defendant the balance of the purchase price in the sum of Kshs. 6,390,000/- on or before the completion date.
3. The completion date was 90 days from the date of the agreement or such earlier date as the parties could agree on in writing.
4. In the event that the agreement was not completed on the completion date due to the 1st defendant’s inability to complete, the 2nd defendant was entitled to rescind the agreement upon giving the 1st defendant 21 days’ notice to complete and upon such rescission, the 1st defendant was to forfeit her deposit to the 2nd defendant as liquidated damages and the 1st defendant’s interest in the property was to cease.
5. The 2nd defendant was to give the 1st defendant vacant possession of the suit property upon receipt of the full purchase price.
6. The 1st defendant who was in possession of the suit property as a tenant of the 2nd defendant was to continue paying monthly rental charges to the 2nd defendant until full payment of the purchase price for the suit property.

On 7th November, 2008, the 1st defendant entered into an agreement of sale with the plaintiff in which the 1st defendant assigned to the plaintiff her interest in the suit property and in the agreement of sale dated 27th October, 2008 between her and the 2nd defendant at a consideration of Kshs. 9,137,760/-. This second agreement that was also drawn by the firm of Kale Maina & Bundotich Advocates which again acted for both the 1st defendant and the plaintiff provided as follows in part;

1. The plaintiff had paid Kshs. 950,000/- to the 2nd defendant on behalf of the 1st defendant to offset the 1st defendant’s rent that was in arrears which payment was deemed as part of the purchase price for the suit property that was agreed upon between the plaintiff and the 1st defendant.
2. The plaintiff was to make a further payment of Kshs. 710,000/- to the 2nd defendant on the execution of the agreement as a deposit being 10% of the purchase price that was payable under the agreement of sale between the 1st defendant and the 2nd defendant.

3. The plaintiff was to pay a further sum of Kshs. 6,390,000/- to the 2nd defendant being the balance of the purchase price for the suit property in accordance with the terms of the agreement of sale between the 1st defendant and the 2nd defendant.
4. The balance of the purchase price under the agreement in the sum of Kshs. 1,087,760/- was to be paid as provided in clauses 3.5, 3.6, 3.7, 3.8, 3.9, 3.10 and 4.1 of the agreement.
5. The completion date was 30th November, 2008.
6. In the event that the plaintiff failed to complete the agreement, the 1st defendant was entitled to rescind the agreement after giving the plaintiff 21 days' notice to complete and the plaintiff was to have no further interest in the suit property.
7. The 1st defendant was to give to the plaintiff vacant possession of the suit property upon receipt of the payments referred to in clauses 3.7 and 3.9 of the agreement.
8. Upon taking possession of the suit property, the plaintiff was to continue paying rent to the 2nd defendant until the balance of the purchase price that was due to the 2nd defendant under its agreement of sale with the 1st defendant was paid in full.

The plaintiff brought this suit against the defendants on 8th September, 2016 seeking the following reliefs;

1. A declaration that the defendants' indefinite delay or failure to transfer the suit property to the plaintiff and their interference with the plaintiff's quiet possession of the suit property was unlawful.
2. A declaration that the plaintiff was the lawful owner of the suit property.
3. An order of specific performance of the agreement of sale dated 7th November, 2008 between the plaintiff and the 1st defendant.
4. A permanent injunction restraining the defendants from selling, alienating, wasting, transferring to a third party, claiming, distressing for rent, evicting the plaintiff from or from in any other manner interfering with the plaintiff's quiet possession, enjoyment and ownership of the suit property.
5. General damages.
6. Special damages in the sum of Kshs. 4,362,330/-.
7. In the alternative, a set-off of the general and special damages claimed against the balance of the purchase price due to the 2nd defendant under the agreement of sale between the defendants.
8. Costs of the suit.

In her plaint dated 8th September, 2016, the plaintiff averred that after she paid to the 1st defendant the payments that were due to her under the agreement of sale dated 7th November, 2008 between her and the 1st defendant, the 1st defendant gave her vacant possession of the suit property and she continued to pay rent to the 2nd defendant on behalf of the 1st defendant pending completion of the agreement of sale dated 27th October, 2008 between the 1st defendant and the 2nd defendant (hereinafter referred to as "the defendants" where the context so permits). The plaintiff averred that this arrangement was acknowledged and accepted by the 2nd defendant. The plaintiff averred that time was of essence in relation to the parties' obligations under the agreement of sale dated 27th October, 2008 between the defendants and the agreement of sale dated 7th November, 2008 between the plaintiff and the 1st defendant.

The plaintiff averred that the completion date for the agreement of sale between the plaintiff and the 1st defendant was 30th November, 2008. The plaintiff averred that the completion of the said agreement of sale between the plaintiff and the 1st defendant was dependent upon the readiness and willingness of the 2nd defendant to provide the 1st defendant with the completion documents; in other words, the same was dependent upon the completion of the agreement of sale dated 27th October, 2008 between the defendants. The plaintiff averred that despite the fact that she had paid to the 1st defendant all the sums that were payable to her under the agreement of sale between her and the 1st defendant and that she was ready to complete the said agreement, the 1st defendant had deliberately failed and/or was not ready to complete the agreement. The plaintiff averred that the 2nd defendant had also failed to complete the agreement of sale between it and the 1st defendant or to deliver the completion documents to the plaintiff.

The plaintiff averred that subsequent to the completion date of 30th November, 2008 that was agreed upon between the plaintiff and the 1st defendant, the defendants had jointly and severally demanded and collected rent for the plaintiff's occupation of the suit property on account of and on behalf of the 1st defendant pending the completion of the agreements between the parties. The plaintiff averred that the defendants had always acknowledged the agreement between the plaintiff and the 1st defendant and the assignment of the of the suit property by the 1st defendant to the plaintiff. The plaintiff averred further that the defendants had indefinitely extended the completion dates under the agreements of sale between the parties by demanding and receiving rent from the plaintiff for her occupation of the suit property pending completion. The plaintiff averred that the defendants had demanded and received rent from the plaintiff at the rate of Kshs. 25,000/- per month from 30th December, 2008 to 31st July, 2015 and at the rate of Kshs. 35,000/- per month from 31st August, 2015. The plaintiff averred

that it had paid to the 2nd defendant Kshs. 3, 364, 330/- on account of rent as at 31st August, 2016.

The plaintiff averred that the said sum of Kshs. 3,364,330/- that was demanded by the defendants and paid by her after the completion date accrued as a result of the defendants' indefinite, unlawful and deliberate delay in completing the two agreements of sale that the parties had entered into. The plaintiff averred that the 2nd defendant had continued to demand rent from her and had on 28th July, 2016 levied distress to recover alleged rent arrears amounting to Kshs. 1,312,330/-.

The plaintiff averred that the 2nd defendant's purported distress for rent and sale of the plaintiff's goods was unlawful and amounted to unjust enrichment by the 2nd defendant since the rent that was due from the date of completion to 31st July, 2016 was Kshs. 2,052,000/-. The plaintiff averred that she had overpaid rent to the 2nd defendant by Kshs. 1,312,330/- as at 31st July, 2016. The plaintiff averred that she was entitled to set-off the said amounts unlawfully demanded and received from her by the defendants against the balance of the purchase price in the sum of Kshs. 6,390,000/- that was due to the 2nd defendant under its agreement of sale with the 1st defendant.

The plaintiff averred that the defendants had refused to transfer the suit property to her and had continued deliberately to delay the completion of the agreement of sale between the plaintiff and the 1st defendant with the intention of selling the suit property to third parties unless restrained by the court.

The 2nd defendant filed a defence and a counter-claim against the plaintiff and the 1st defendant on 5th September, 2017. The 2nd defendant admitted that it entered into an agreement with the 1st defendant for the sale of the suit property on 27th October, 2008. The 2nd defendant denied that it was privy to the agreement of sale dated 7th November, 2008 between the plaintiff and the 1st defendant. The 2nd defendant averred that it did not consent to that agreement and as such it was not bound by the terms thereof. The 2nd defendant averred that the firm of Kale Maina & Bundotich Advocates had no instruction to act for it in that agreement between the plaintiff and the 1st defendant. The 2nd defendant averred that all the payments it had received were from the 1st defendant and not from the plaintiff. The 2nd defendant averred that the plaintiff was not a party to the agreement between it and the 1st defendant and that it neither gave the plaintiff possession of the suit property nor demanded rent from her.

The 2nd defendant averred that the 1st defendant defaulted in paying the balance of the purchase price in the sum of Kshs. 6,390,000/- under the agreement of sale dated 27th October, 2008 between them as a result of which the said agreement was rescinded by the 2nd defendant on the expiry of 21 days' completion notice dated 20th July, 2009 that was served upon the 1st defendant by the firm of Kale Maina & Bundotich advocates. The 2nd defendant averred that upon rescission of the said agreement, the 1st defendant remained in possession of the suit property as a rent paying tenant in accordance with clause 7.3 of the agreement between them. The 2nd defendant averred that the 1st defendant was not given possession of the suit property as the owner thereof since she had not finished paying for the same. The 2nd defendant averred that if at all the 1st defendant gave to the plaintiff vacant possession of the suit property, the 2nd defendant was not aware of the same and did not give its consent and as such the act was unlawful. The 2nd defendant averred that if the plaintiff was in possession of the suit property, she was a trespasser therein.

The 2nd defendant averred that it levied distress on the goods that were in the suit property when the 1st defendant failed to pay rent and as such the said distress for rent was lawful. The 2nd defendant averred that the plaintiff was not in occupation of the suit property and that it was immoral and unjust for her to receive rent from the suit property. The 2nd defendant denied that the plaintiff was entitled to any of the reliefs sought in the plaint. In its counter-claim, the 2nd defendant reiterated the contents of its defence and sought judgment against the plaintiff and the 1st defendant jointly and severally for;

1. Vacant possession of the suit property.
2. Kshs. 1,825,000/- being rent arrears as at 28th July, 2017 together with V.A.T and interest.
3. Rent and in the alternative, mesne profits at the rate of Kshs. 35,000/- plus V.A.T and interest from 29th August, 2018 until vacant possession is delivered.
4. General damages for trespass.
5. Costs of repairs and refurbishment of the suit property.
6. Costs of the suit and interest.

The 1st defendant filed her statement of defence on 20th February, 2018. The 1st defendant averred that all her rights and interest in the suit property were assigned to the plaintiff with the consent of the 2nd defendant and as such the plaintiff had no cause of action against her. The 1st defendant averred that after she gave the plaintiff possession of the suit property, the plaintiff failed to pay monthly rent to the 2nd defendant with the result that the rent accumulated to Kshs. 800,000/- which the 2nd defendant recovered from the 1st defendant's terminal dues from Telkom Kenya Limited. The 1st defendant averred that she was compelled to sue the plaintiff for the recovery of the said amount in the Chief Magistrate's Court which suit was settled by the parties. The 1st defendant denied that the plaintiff continued to pay rent to the 2nd defendant on behalf of or at the request of the 1st defendant. The 1st defendant averred that the plaintiff was paying rent to the 2nd defendant pursuant to the agreement of sale that she had entered into with the 1st defendant.

The 1st defendant denied that the completion of the agreement of sale between her and the plaintiff was dependent on the completion of the agreement of sale that the 1st defendant had entered into with the 2nd defendant. The 1st defendant averred that the plaintiff failed to fulfill her obligations under the agreement of sale that she entered into with the 1st defendant by refusing to pay the monies that were payable thereunder within the stipulated period thereby frustrating the same. The 1st defendant denied that the plaintiff was entitled to the reliefs sought in the plaint. The 1st defendant averred that the agreement of sale between her and the plaintiff provided that the plaintiff was to continue paying rent to the 2nd defendant until the balance of the purchase price was paid in full. The 1st defendant averred that in the circumstances, the plaintiff was not entitled to set off the rent that was paid by her against the balance of the purchase price that was payable to the 2nd defendant. The 1st defendant urged the court to dismiss the plaintiff's suit.

In her defence to the 2nd defendant's counter-claim, the 1st defendant averred that she granted to the plaintiff possession of the suit property with the consent of the 2nd defendant. The 1st defendant averred that she assigned her rights in the suit property to the plaintiff with the consent of the 2nd defendant and as such she was not supposed to pay any rent or mesne profits to the 2nd defendant. The 1st defendant denied that the 2nd defendant was entitled to the reliefs sought in its counter-claim.

The plaintiff filed a reply to defence and defence to the counter-claim by the 2nd defendant on 13th October, 2017. The plaintiff averred that the 2nd defendant was privy to and consented to the agreement of sale between the plaintiff and the 1st defendant. The plaintiff averred further that the firm of Kale Maina & Bundotich Advocates were instructed by the 2nd defendant in the transaction and acted for it. The plaintiff averred that she was at all material times ready and willing to complete the agreement that she entered into with the 1st defendant and that the purported 21 days' completion notice by the 2nd defendant was never served upon the parties. The plaintiff averred that she was in occupation of the suit property as a purchaser and that the goods that were distrained for rent belonged to her and not the 1st defendant. The plaintiff denied that she was a trespasser on the suit property. The plaintiff denied the 2nd defendant's counter-claim and contended that the 2nd defendant was not entitled to any of the reliefs sought therein. The plaintiff averred further that the rent that was payable pursuant to the agreement of sale that she entered into with the 1st defendant was Kshs. 25,000/- per month and not Kshs. 35,000/- as claimed by the 2nd defendant.

The suit was fixed for hearing on 1st July, 2019 by the court in the presence of the advocates for all the parties. When the matter was called out on 1st July, 2019, the advocates for the plaintiff applied for adjournment. The court considered the application and dismissed the same. After the application for adjournment was refused, the plaintiff's advocates told the court that they had no evidence to tender in proof of the plaintiff's case. In the absence of any evidence tendered by the plaintiff in proof of her case, the plaintiff's suit was dismissed with costs to the defendants. The court thereafter heard the 2nd defendant's counter-claim against the plaintiff and the 1st defendant.

The 2nd defendant called its administration and trust secretary, Peter Kipyegon Rotich (DW1) as its witness in proof of its counter-claim. DW1 adopted his witness statement dated 5th September, 2017 as his evidence in chief. In his witness statement, DW1 reiterated the contents of the 2nd defendant's defence and counter-claim. In summary, DW1 stated that the 2nd defendant entered into an agreement of sale with the 1st defendant on 27th October, 2008 under which the 2nd defendant sold the suit property to the 1st defendant at Kshs. 7,100,000/-. DW1 stated that the 1st defendant paid the agreed deposit but failed to pay the balance of the purchase price in the sum of Kshs. 6,390,000/- as a result of which the said agreement was rescinded in accordance with the terms thereof. He stated that the 1st defendant also defaulted in the payment of rent for the suit property that had accumulated to Kshs. 1,825,000/- as at 27th July, 2017 and continued to accrue at the rate of Kshs. 35,000/- per month with effect from 29th July, 2017 until vacant possession was delivered up. He stated that the 2nd defendant was not a party to the agreement that the plaintiff entered into with the 1st defendant and did not consent to the same. He urged the court to grant the reliefs sought in the 2nd defendant's counter-claim. DW1 produced the following as exhibits; a copy of a letter dated 20th July, 2009 by the firm of Kale Maina & Bundotich Advocates addressed to the 1st defendant and copied to among others, the plaintiff giving the 1st defendant 21 days' to complete the agreement of sale dated 27th October, 2008, a copy a rent reconciliation statement in respect of the suit property as at 28th July, 2017, a copy of Notice of Claim against a co-defendant and a copy of a statement of a joint bank account in the names of the plaintiff's and the 2nd defendant's advocates in which the plaintiff was to deposit monthly rent pending the hearing of this suit pursuant to the orders given by the court on 27th June, 2017.

In her defence to the counter-claim against her by the 2nd defendant, the 1st defendant adopted her witness statement dated 6th October, 2017 as her evidence in chief. She also produced as exhibits the documents that were attached to her list of documents of the same date. The 1st defendant told the court that she was at all material times occupying the suit property as a tenant of the 2nd defendant. The 1st defendant stated further that the 2nd defendant offered to sell to her the suit property which offer she accepted and entered into a written agreement of sale with the 2nd defendant. The 1st defendant stated that she could not afford to pay the purchase price of Kshs. 7,100,000/-. She stated that she assigned the agreement that she entered into with the 2nd defendant in respect of the suit property to the plaintiff. The 1st defendant stated that she entered into an agreement with the plaintiff on 7th November, 2008. The 1st defendant stated that the plaintiff paid only a deposit which was 10% of the purchase price. She stated that the 2nd defendant could only furnish her with the completion documents upon receipt of the balance of the purchase price. The 1st defendant stated that it was agreed between her and the plaintiff that the plaintiff was to continue paying rent to the 2nd defendant pending completion of the agreement. She stated that the plaintiff was under obligation to continue paying rent so long as she had not completed the payment of the purchase price for the suit property. The 1st defendant stated that she vacated the suit property on 1st December, 2008 and that the 2nd defendant consented to the assignment to the plaintiff of the agreement of sale that she entered into with the 2nd defendant.

The plaintiff did not tender evidence in defence of the counter-claim. After the close of the 1st defendant's case, the parties were directed to file written submissions. The 2nd defendant filed its submissions on 10th July, 2019 while the 1st defendant filed her submissions on 19th December, 2019. The plaintiff did not file submissions. I have considered the evidence tendered by the parties and the submissions of

counsels. The following in my view are the issues that arise for determination in the 2nd defendant's counter-claim;

1. Whether 2nd defendant was aware of and consented to the assignment to the plaintiff of the agreement of sale dated 27th October, 2008 between the 1st defendant and the 2nd defendant.
2. If the answer to the first issue is in the affirmative, whether the plaintiff breached the agreement dated 7th November, 2008 between her and the 1st defendant and the agreement dated 27th October, 2008 between the 1st defendant and the 2nd defendant.
3. Whether the 2nd defendant is entitled to the reliefs sought in the counter-claim against the plaintiff and the 1st defendant.
4. Who is liable for the costs of the suit?

Whether 2nd defendant was aware of and consented to the assignment to the plaintiff of the agreement of sale dated 27th October, 2008 between the 1st defendant and the 2nd defendant.

The 2nd defendant's case as highlighted above is that the 1st defendant breached the agreement of sale dated 27th October, 2008 by failing to pay the balance of the purchase price within the stipulated period with the result that the said agreement was rescinded after due notice was given in accordance with the terms thereof. The 2nd defendant has contended further that the 1st defendant is liable to it for the rent that was payable under the said agreement pending completion of the same. The 1st defendant on the other hand has contended that she assigned the said agreement of sale and her interest in the suit property to the plaintiff with knowledge and consent of the 2nd defendant and as such the breach complained of by the 2nd defendant was committed by the plaintiff. The 1st defendant has contended further that the rent claimed by the 2nd defendant is not payable by her having assigned her interest in the suit property and handed over possession of the same to the plaintiff.

The following facts are not disputed. The 2nd defendant sold the suit property to the 1st defendant through agreement of sale dated 27th October, 2008. The firm of Kale Maina & Bundotich Advocates acted for both parties in the transaction. On 7th November, 2008; just a few days after the date of the said agreement between the defendants, the 1st defendant entered into another agreement with the plaintiff under which the 1st defendant assigned to the plaintiff her interest in the suit property under the agreement of sale dated 27th October, 2008 between her and the 2nd defendant. Once again, the firm of Kale Maina & Bundotich Advocates acted for the 1st defendant and the plaintiff in the transaction. I am satisfied from the evidence on record that the 2nd defendant was aware of the assignment by the 1st defendant of her interest in the suit property to the plaintiff. The 1st defendant produced as exhibit a copy of a letter dated 3rd June 2009 by the firm Kale Maina & Bundotich Advocates who acted for all the parties in this suit in the sale of the suit property addressed to whom it may concern in which the said firm confirmed that the 2nd defendant had no objection to the transaction between the plaintiff and the 1st Defendant.

I am not persuaded from the evidence on record that the firm Kale Maina & Bundotich Advocates acted without instructions while writing that letter. If that was the case, the 2nd defendant should have joined the said firm of advocates as a party to this suit or called a partner in the firm as a witness to explain the circumstances under which the said letter was written. I am in agreement with the submission by the 1st defendant that the 2nd defendant having represented through the said firm of Kale Maina & Bundotich Advocates that it had approved the assignment of the 1st defendant's interest in the suit property to the plaintiff and both the plaintiff and the 1st defendant having acted on that representation, the 2nd defendant is estopped from going back on its word and claiming that it had no knowledge of the transaction. It is therefore my finding that the 2nd defendant was not only aware of the assignment of the 1st defendant's interest in the suit property under the agreement of sale dated 27th October, 2008 between the 1st and 2nd defendant but also consented to the transaction.

If the answer to the first issue is in the affirmative, whether the plaintiff breached the agreement dated 7th November, 2008 between her and the 1st defendant and the agreement dated 27th October, 2008 between the 1st defendant and the 2nd defendant.

Under the agreement of sale between the plaintiff and the 1st defendant, the plaintiff who had assumed the 1st defendant's obligations under the agreement of sale dated 27th October, 2008 between the 1st defendant and the 2nd defendant was required to pay 10% of the purchase price amounting to Kshs. 710,000/- as a deposit and the balance of the purchase price in the sum of Kshs. 6,390,000/- to the 2nd defendant in accordance with the terms of the said agreement of sale dated 27th October, 2008. The agreement of sale between the defendants provided that the balance of the purchase price of the suit property was payable on or before the completion date which was 90 days from 27th October, 2008. This means that the plaintiff should have paid the balance of the purchase price to the 2nd defendant on or before 27th January, 2009. It was not disputed that the plaintiff did not pay the balance of the purchase price as stipulated in the agreement of sale dated 27th October, 2008 or at all and that the said amount remained unpaid as at the time of filing of this suit.

Clause 7.3 of the agreement of sale dated 27th October, 2008 between the defendants provided that the 1st defendant was to continue paying monthly rental charges to the 2nd defendant until the 1st defendant had paid the full purchase price for the suit property. The agreement of sale dated 7th November, 2008 between the plaintiff and the 1st defendant also provided in clause 7.2 thereof that once possession of the suit property was given to the plaintiff, the plaintiff was to continue paying rent to the 2nd defendant until she completed the payment of the balance of the purchase price to the 2nd defendant. I am satisfied from the evidence before the court that the plaintiff was given vacant possession of the suit property by the 1st defendant and that plaintiff did not pay rent as and when the same fell due for payment in accordance with the terms of the two agreements that I have referred to above. The plaintiff was therefore in breach of the terms of the said agreements as concerns rent payment.

Due to the foregoing, it is the finding of the court that the plaintiff breached the terms of the agreement dated 27th October, 2008 between the defendants the benefit of which was assigned to her by the 1st defendant and the agreement dated 7th November, 2008 between her and the 1st defendant.

Whether the 2nd defendant is entitled to the reliefs sought in the counter-claim against the plaintiff and the 1st defendant.

The 2nd defendant has proved on a balance of probabilities that the agreement of sale dated 27th October, 2008 between it and the 1st defendant that was assigned to the plaintiff was breached by the plaintiff in the manner that I have mentioned above. I am satisfied from the evidence placed before the court by the 2nd defendant that the 2nd defendant served both the 1st defendant and the plaintiff with a 21 days' completion notice under clause 5.1 of the agreement dated 27th October, 2008 and that the plaintiff to whom the agreement had been assigned failed to complete the agreement. The said clause 5.1 of the agreement dated 27th October, 2008 provided that in the event that the 1st defendant failed to complete the agreement after being served with the said notice, the 2nd defendant was entitled to rescind the agreement and the 1st defendant was to have no interest or claim in the suit property. This clause bound the plaintiff to whom the agreement was assigned. The plaintiff having failed to complete the said agreement, the 2nd defendant was entitled to rescind the same and since the plaintiff had no further interest or claim in the suit property following the rescission of the agreement aforesaid, the 2nd defendant was entitled to possession of the property. The 21 days' completion notice was served upon the 1st defendant and the plaintiff on 20th July, 2009. The same was to expire on or about 10th August, 2009. I am of the view that the plaintiff to whom the agreement for sale dated 27th October, 2008 was assigned was supposed to pay rent to the 2nd defendant up to the date of expiry of that completion notice. After the expiry of the completion notice and the rescission of the said agreement dated 27th October, 2008, the plaintiff had no interest left in the property either as a purchaser or a tenant on the basis of which she could continue to pay rent. The plaintiff was therefore liable to pay rent to the 2nd defendant up to 10th August, 2009. The 2nd defendant has claimed rent arrears of Kshs. 1,825,000/ as at 28th July, 2017 plus V.A.T. As I have mentioned above, the 2nd defendant is only entitled to rent up to 10th August, 2009 and the rent payable is Kshs. 25,000/- per month.

From the evidence on record, the 1st defendant handed over possession of the suit property to the plaintiff in December, 2008. The 1st defendant is therefore liable to the 2nd defendant for rent that was due as at 30th November, 2008 while the plaintiff is liable for rent due from December, 2008 up to August, 2009. There is no evidence that V.A.T was payable on rent for residential properties. The 2nd defendant is in the circumstances not entitled to V.A.T on rent due to it from the plaintiff. Since the plaintiff who was in possession of the suit property pursuant to the agreement dated 7th November, 2008 between the plaintiff and the 1st defendant did not vacate the property upon the expiry of the completion notice and rescission of the agreement for sale dated 27th October, 2008, her continued occupation amounted to trespass and as such the 2nd defendant which had a right to obtain possession of the suit property is entitled to mesne profits for the plaintiff's continued possession of the property. I will award the 2nd defendant mesne profits at the rate of Kshs. 25,000/- per month from September, 2009 up to June, 2015 and at the rate of Kshs. 35,000/- per month from July, 2015 until possession is delivered to the 2nd defendant. All the payments made by the plaintiff on account of rent from December, 2008 including the payments deposited in the joint account between the advocates for the plaintiff and the 2nd defendant less bank charges and the rent recovered by the 2nd defendant through distress for rent less charges shall be deducted from the rent recoverable from the plaintiff.

Who is liable for the costs of the suit?

Costs is at the discretion of the court. As a general rule, costs follow the event unless the court orders otherwise for good reason. In this case the 2nd defendant has succeeded in its counter-claim against the plaintiff and the 1st defendant. No reason has been put forward why the 2nd defendant should be denied the costs of the counter-claim. This suit could have been avoided if the plaintiff had performed her obligations under the agreement of sale dated 7th November, 2008 between her and the 1st defendant. I will therefore condemn the plaintiff to pay the costs of the counter-claim to the 2nd defendant.

Conclusion:

In conclusion, I hereby enter judgment for the 2nd defendant against the plaintiff and the 1st defendant as follows;

1. Vacant possession of all that parcel of land known as House No. 4, City Park, Nairobi situated on L.R No. 209/870/36.
2. Vacant possession shall be given within 60 days from the date hereof in default of which the 2nd defendant shall be at liberty to apply for the forceful eviction of the plaintiff and the 1st defendant from the property.
3. The 2nd defendant shall serve a copy of the decree extracted from this judgment upon the occupants of House No. 4, City Park, Nairobi situated on L.R No. 209/870/36 for their information.
4. The 1st defendant shall pay to the 2nd defendant rent arrears at the rate of Kshs. 25,000/- per month for the months of September, 2008 to November, 2008.
5. The plaintiff shall pay to the 2nd defendant rent arrears at the rate of Kshs. 25,000/- per month from December, 2008 up to August, 2009.
6. The plaintiff shall pay to the 2nd defendant mesne profits at the rate of Kshs. 25,000/- from September, 2009 up to June, 2015 and at the rate of Kshs. 35,000/- per month from July, 2015 until the date when vacant possession of the suit property is handed over to

the 2nd defendant.

7. The 2nd defendant shall have the costs of the counter-claim to be paid by the plaintiff.

Delivered and Dated at Nairobi this 2nd Day of July 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

Ms. Mireri for the Plaintiff

Ms. Khasira for the 1st Defendant

Ms. Mbabu for the 2nd Defendant

Ms. C. Nyokabi-Court Assistant