

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCLOS NO. E062 OF 2024

SCENIC COURT LIMITED.....1ST
APPLICANT

SKYVIEW PROPERTIES LIMITED.....2ND
APPLICANT

KENON PLACE LIMITED.....3RD
APPLICANT

VERSUS

HOUSING FINANCE COMPANY LIMITED.....1ST
RESPONDENT

MAMICHA & COMPANY ADVOCATES.....2ND
RESPONDENT

JUDGMENT

1. The applicants filed the originating summons dated 25th September, 2024 expressed to be brought under **Order 37 Rules 4 and 8 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** for the orders that: -

a. That the respondents be compelled to release the applicant's leases, titles and discharges in respect to IR 57756, LR. 209/8879/10 (Scenic Court Limited), IR 52787 LR 209/8879/9 (Skyview Properties Limited) and IR 102800, L.R.1870/V/217 (Kenon Place Limited).

b. That the costs of the application be borne by the Respondents.

2. The originating summons is premised on the grounds *inter alia* that the applicants did charge the suit properties known as IR 57756, LR. 209/8879/10 (Scenic Court Limited), IR 52787 LR. 209/8879/9 (Skyview Properties Limited) and IR 102800, L.R.1870/V/217 (Kenon Place Limited) (hereinafter referred to as the suit properties) with the 1st respondent herein, and that together with the 2nd respondent, they have refused to release the original title documents.
3. The application is supported by the affidavit of Bertha Karungari Wachira, the director of the applicants sworn on even date. The applicants deposed that on diverse dates, the 1st respondent handed over the title documents with respect to the suit properties to the 2nd respondent for registration in respect to the lease documents in favour of various purchasers as follows:-
- a) ***That on 24th April, 1996 the 1st respondent released for registration of Scenic Court Limited I.R 57756, LRR209/8879/10 to the 2nd respondent.***
 - b) ***That on 18th March, 1998 the 1st respondent released for registration of charge of Skyview Properties Limited IR. 52787 LR. 209/8879/9 to the 2nd respondent; and***
 - c) ***That on 13th September, 2006 the 1st respondent released for registration of Kenon Place Limited***

IR. 102800, L.R.1870/V/217 to the 2nd respondent.

4. The applicants deposed that they have now since cleared their loans regarding the said properties, and that despite numerous requests, the respondents have failed, and refused to release the title documents. They deposed that they cannot process the certificates of titles and are at risk of being sued for damages by the purchasers. Further, that if the said subleases and sectional titles are not processed, genuine purchasers are at the risk of losing their apartments.
5. The applicants further deposed that the 2nd respondent and his agents are a party to Criminal case no. 95 of 2014 in which the said transfers were fraudulently and illegally prepared and registered through the office of the 1st respondent. Further, that the said criminal case was an appeal and is still pending in the Court of Appeal vide Civil Appeal No. 338 of 2018.
6. The application was opposed vide the replying affidavit of Hedaya Malesi sworn on 19th February, 2025 on behalf of the 1st respondent. The 1st respondent deposed that it is not in possession of any title document in respect of the suit properties, and that according to their records, it was agreed between the parties that the apartment units developed on the suit properties were to be

sold through private treaty sale and the proceeds thereof remitted to the 1st respondent to pay off the negotiated settlement amounts.

7. The 1st respondent deposed that the 1st respondent retained the 2nd respondent to handle the private treaty sale of apartment units, and to that extent, it released to the 2nd respondent the title documents as confirmed in ground 2 of the application. Further, that it is the practice, the suit properties were developed by way of long-term leases in favour of each individual purchaser, and subsequent to that partial discharges and sub-leases were duly registered, and any reversionary interest in respect of each title was to be transferred to the management company. Further, that with respect to the 3rd applicant's title, there are active proceedings going on Milimani ELC No. 214 of 2011.
8. The 1st respondent deposed that save for the 3rd applicant's title which it continues to hold pending the conclusion of the suit referred above, the other two titles were in the course of ordinary transactions developed and released to the purchasers by the 2nd respondent.
9. The application was further opposed by the replying affidavit of Martin Mamicha Mugi, sworn on 7th March, 2025 on behalf of the

2nd respondent. The learned counsel confirmed that it received the title documents from the 1st respondent, and being an agent of a disclosed principal, it is untenable to sue the principal together with its agent and the same amounts to gross abuse of the court process. The learned counsel reiterated the averments of the 1st respondent and further deposed that it released the original title documents in respect of the suit properties to the purchasers for purposes of registration of the reversionary interest in favour of the management companies save for the title registered in the name of the 3rd applicant.

10. The originating summons was canvassed through written submissions. The applicants filed their written submissions dated 17th July, 2025. The respondents filed their written submissions dated 30th June, 2025.
11. I have considered the pleadings, the annexures and the written submissions filed by both parties. The issue for determination is *whether the applicants are entitled to a release of their respective title documents.*
12. Before I delve into the merits or otherwise of this suit, there are three fundamental issues that I must address. First, the applicants in their written submissions sought to raise issues that were not

pleaded in the supporting affidavit, and neither did they find it necessary to respond through a supplementary affidavit. Particularly, issues no. a, b and d. For example, the claim that no valuation was done prior to the private treaty sales was not raised, and cannot now form a basis for argument in their submissions. Equally, fraud is a serious allegation, and to prove the same, a party is required to avail cogent evidence to support such a claim. More importantly, are the allegations contained in issue no. d. which completely failed to address the principal-agent relationship in this instance. Instead, they sought to introduce issues not contained in their affidavit.

- 13.** Secondly, the 2nd respondent argued that the relationship between itself and the 1st respondent is that of an advocate-client owing to the engagement of the assignment that it was tasked to handle. This, the 2nd respondent argued that the applicants acknowledged in ground 2 of their application which stated that the 1st respondent handed over the title documents to the 2nd respondent for registration. I have perused the documents relied on by the parties. The letters dated 6th September, 2005, and three letters dated 7th February, 2006 written by the 1st respondent to the 2nd respondent is a testament to the relationship existing between the respondents as pertaining to this suit.

14. To that extent, I am persuaded to rely on the decision of the Court of Appeal in **Victor Mabachi & another v Nurtun Bates Limited [2013] KECA 204 (KLR)** where it was held as follows:-

“(21) It remains now to consider the second issue whether the enjoinder of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is a disclosed principal. In Anthony Francis Wareheim t/a Wareheim & 2 Others vs. Kenya Post Office Savings Bank, Civil Application Nos. Nai 5 & 48 of 2002, at page 10, this Court unanimously held as follows:

“It was also prima facie imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.”

(22) The principle established in the above case still holds good. In the absence of factors vitiating the liability of the principal, we consider that the enjoinder of the appellants in the case is unwarranted.”

- 15.** Having found that the relationship between the respondents was that of an advocate-client, thus a principal and agent, it was not available for the applicants to sue the 2nd respondent as it only acted on the instructions of the 1st respondent. As far as this suit is concerned, no cause of action can survive against the 2nd respondent. It follows therefore that the suit against the 2nd respondent is dismissed.
- 16.** On the third fundamental issue, the 1st respondent deposed that with regard to the 3rd applicant's property, there are active proceedings ongoing vide ELC No. 214 of 2011 Caroline Waithera Kirumba & 3 Others v Susan Nyambura Wachira & 3 Others. I have seen the amended plaint dated 10th September, 2014. The same is pleaded with regard to the property known as L.R. No. 1870/V/ 217 owned by the 3rd applicant. The applicants have not refuted the existence of this suit, or any indication to show that the same has been heard and determined. In that case, this court will not pronounce itself on the 3rd applicant's suit property.
- 17.** Having said the above, this court is only left to deal with the two properties allegedly owned by the 1st and 2nd applicant. It appears that the genesis of this suit is pegged on a private sales treaty. While the parties have referred to this treaty, the same was not availed for the benefit of the court. With regard to the properties

allegedly owned by the 1st and 2nd applicants, it was argued that they cleared the loans with regard to the suit properties, and despite numerous requests, the 1st respondent has refused to release the title documents. I have perused the documents relied on by the respective parties. The letter dated 24th June, 2005 addressed to the 2nd applicant indicates the 1st respondent's consideration to some kind of negotiations on the settlement of debts owed by the 2nd applicant. It follows thereafter, that the 1st respondent instructed the firm of Mamicha & Company Advocates vide the letters dated 7th February, 2006. Part of the letter reads:-

“We release the above documents upon your firm professional undertaking to hold the same to our order, returnable on demand and to utilize the same for the purpose of the transfer in favour of the purchasers and to ensure that we receive the sum of KShs. 20,000,000.00 from the sale proceeds being the full and final settlement of the borrowers indebtedness.”

18. The 1st respondent on the other hand argued that the apartment units developed on the suit properties was in accordance with conveyancing law and practice to the extent that the same was to be done by way of long-term leases in favour of each individual purchaser, and the reversionary interest in each respective title was to be transferred to the management company formed in respect of each property. It was further argued that none of the

individual title documents would be returned to either the 1st respondent nor the 1st and 2nd applicants in view of the reversionary interest that was to vest with the management company.

19. Section 5 (1) and (2) of the Sectional Properties Act, Cap 286 provides as follows:-

“(1) On the registration of a sectional plan the Registrar shall –

(a) close the register of the parcel described in it; and

(b) open a separate register for each unit described in the plan; and

(c) on payment of the prescribed fee, issue, in respect of each unit of the sectional property, a certificate of title if the property is freehold or a certificate of lease if the property is leasehold and shall include its proportionate share in the common property.

(2) Any interests affecting the parcel which are noted on the register closed under subsection (1)(a) shall be endorsed on the registers opened under subsection (1)(b) and on the title deed for sectional property issued under subsection (1)(c).” with emphasis

20. A careful reading of the above provision of law indicates that once a building or property has been developed into several units, the

mother title document is closed and individual titles are opened with respect to the units. How then is it possible for the 1st and 2nd applicants to seek a release of the original title while the law clearly states otherwise.

21. More importantly, it appears that the applicants are indeed aware of these conveyancing practice and procedures. In the case of **Skyview Properties Limited & another v Njoroge & 4 others** [2025] KEELC 568 (KLR), it was stated as follows:-

“79. The Plaintiffs having divided the suit premises into units and issued long term sub-leases intended to confer ownership of the apartments to the purchasers and are therefore obligated not only to transfer the reversionary interests in the suit premises to the Management Company but further to register the sectional plans and surrender the original titles to the Registrar for purposes of closure of the register of the two parcels and opening of a separate register for each unit (read apartment). They cannot have their cake and eat it at the same time.”

22. The court went to grant the following orders: -

“90. From the foregoing, the court finds in favour of the Defendants against the Plaintiffs. Consequently, the court declares that the three basement units constitute common areas to be managed and administered by the 5th

Defendant, Scenic Court Management Company limited. The court further orders the Plaintiffs to execute all necessary documents and transfer the revisionary interests over the two properties, L.R No. 209/8879/9 and 209/8879/10 to the 5th Defendant within 30 days of this judgment failing which the Deputy Registrar of this court is authorized to sign and execute the necessary deed of transfer to give effect to this order.

91. The Plaintiffs are further ordered to surrender the original title documents of the two properties L.R No. 209/8879/9 and 209/8879/10 to the 5th Defendant in the next 30 days. In default whereof, the Registrar shall act accordingly in accordance with the provisions of Section 13 of the Sectional Properties Act, 2020.”

23. The above judgment deals with the properties similar to the properties in this suit. I felt it was necessary to adopt the reasoning of the court in this case to support the 1st respondent’s argument of the conveyancing process when handling properties where the owner is desirous to develop several units. It follows therefore that it is not possible for the 1st respondent to release the original title as the same underwent the process contemplated in **Section 5 (1) and (2) of the Sectional Properties Act.**

24. From the above, I find no merit in the originating summons dated 25th September, 2024 and it is hereby dismissed. The claim/ suit against the 2nd respondent is dismissed. Costs of this suit is awarded to the 1st and 2nd respondents. Orders accordingly.

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 19TH DAY OF JANUARY, 2026.**

**HON. MBOGO C.G.
JUDGE
19/01/2026.**

In the presence of:

Ms. Vena Aron - Court assistant

Mr. Kamau for the Applicant

Mr. Mutua for both Respondents