REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO 256 OF 2019

ANNE MUMBI WAIGURU ……………………………………… PLAINTIFF

VERSUS

KIHINGO VILLAGE

(WARIDI GARDENS) LIMITED …………………………… DEFENDANT

AND

CHRIS KABIRO ………………………………… 1ST INTERESTED PARTY

JAMES NDUNG'U GETHENJI……………..2ND INTERESTED PARTY

AS CONSOLIDATED WITH MILILMANI HIGH COURT COMMERCIAL CASE NO 355 OF 2012

CHRIS KABIRO T/A KABIRO

NDAIGA & COMPANY ADVOCATES ……………………… PLAINTIFF

VERSUS

KIHINGO VILLAGE (WARIDI GARDENS)LTD … 1ST DEFENDANT

WAGEMA LIMITED …………………………………… 2ND DEFENDANT

MUGANDA WASILWA T/A

ORIGINAL

KEYSIAN AUCTIONEERS .... 3RD DEFENDANT

JUDGMENT

Background

1. This judgment is with respect to two consolidated matters, ELC Case No. 256 of 2019 and HC Commercial Case No. 355 of 2012.

ELC Case No. 256 of 2019

2. In ELC case number 256 of 2019, vide a Plaint dated 2nd August, 2019, the Plaintiff seeks the following reliefs as against the Defendant:

   i. ***An order for specific performance of the clause 3.1.1 of the Agreement for Lease dated the 25th September, 2015 over House Number 1D on Land Reference Number 27754 and the Defendant to be directed to complete the sale transaction within a period of thirty (30) days from the date of determination by this Honourable Court.***

   ii. ***In the event that the Defendant fails to comply with the direction of the court pursuant to prayer (i) hereinabove, an order vesting House Number ID on L.R 27754 against the Plaintiff's financiers undertaking to pay the secured balance of Kenya Shillings Forty Million (Kshs***

ORIGINAL

40,000,000/=) in compliance with clause 3.1.2 of the Agreement for Lease dated the 25th September, 2015.

iii. ***All necessary and consequential accounts, directions and inquiries.***

iv. ***An injunction to restrain the Defendant by itself, its agents, its servants, its employees or otherwise howsoever from transferring or dealing with House Number 1D on Land Reference Number 27754 in any way howsoever as would prejudice the interests of the Plaintiff.***

v. ***Any other relief that this Honourable Court may deem just and expedient to grant in the circumstances of this suit.***

vi. ***Costs of the suit.***

3. The Plaintiff's case is that at all material times, the Defendant was the duly registered grantee from the Government of the Republic of Kenya of all that parcel of land known as Land Reference Number 27754, vide a transfer registered on the 28th February, 2008 as I.R. No. 108885/2. The land is situated in Nairobi and measures approximately 14.74 hectares.

4. It was averred by the Plaintiff that the Defendant constructed on the suit property a gated residential community known as Kihingo Village, consisting of fifty-five (55) dwelling houses

ORIGINAL

together with the usual conveniences connected therewith. Among the said dwelling houses is House D1, (*hereinafter referred to as the suit premises*), and that the Defendant sold the dwelling houses to interested third parties by granting them long-term sub-leases for a period of ninety-nine (99) years less the last seven (7) days.

5. According to the Plaintiff, in the month of March 2015, she commenced negotiations with the Defendant for the purchase of the suit premises. Pursuant thereto, an oral agreement was reached to the effect that the Defendant would sell the suit premises to the Plaintiff at a purchase price of Kshs 80,000,000 and that it was further agreed that the Plaintiff would pay a deposit of Kshs 8,000,000.

6. The sale transaction was to be subject to the Plaintiff obtaining financing for the balance of the purchase price, with the suit premises as security and which balance was to be paid upon delivery to the Plaintiff's financier of the duly registered transfer of lease in favour of the Plaintiff and a charge in favour of the Plaintiff's financier over the suit premises.

7. According to the Plaintiff, in the month of April 2015, and pursuant to the aforesaid oral agreement, she was granted possession of the suit premises which possession she retains to date. The Plaintiff averred that on diverse dates in the months of May, August, and November 2015, she, pursuant

ORIGINAL

to the aforesaid oral agreement paid to the Defendant a total sum of Kshs. 20,687,170.

8. It is the Plaintiff's case that by an agreement for lease dated 25th September, 2015, and executed between the Plaintiff and the Defendant, the parties reduced into writing and formalised the terms and conditions of the aforesaid oral agreement. Pursuant to Clause 3.1.1 of the Agreement, the Plaintiff was required to pay a deposit of Kshs 8,000,000 being 10% of the purchase price, upon execution of the agreement.

9. Under Clause 3.1.2, the balance of the purchase price was to be paid to the Vendor's Advocates within fourteen (14) days of delivery to the Plaintiff's financier of the duly registered transfer of lease in favour of the Plaintiff and the charge in favour of the Plaintiff's financier over the suit premises.

10. It was averred that Clause 3.1.3 required the Plaintiff to pay service charge, transfer fees for the revisionary interest, a utilities deposit, and apportioned costs for incorporation of the management company. Under Clause 14, the Plaintiff was required to bear the costs of preparation and registration of the sub-lease for the suit premises, and that the total amount payable to the Defendant amounted to Kshs. 80,687,170.

11. As at the 25th September, 2015, it was contended, the Plaintiff had paid Kshs. 20,687,170 leaving an outstanding balance of Kshs. 60,000,000 and that by a Facility Letter

ORIGINAL

dated 22nd January, 2016, KCB Bank Kenya Limited agreed to advance to the Plaintiff a loan of Kenya Shillings Forty Million (Kshs. 40,000,000/=).

12. The Plaintiff averred in the Plaint that the said loan was to be secured by a first legal charge over the suit premises; that by a letter dated 28th January, 2016, the firm of M/s Igeria & Ngugi Advocates, acting on behalf of KCB Bank Kenya Limited, notified the Defendant's Advocates of the aforesaid financing arrangement and that they further requested the format of a professional undertaking acceptable to them in order to facilitate the release of the completion documents to her financier's advocates.

13. According to the Plaintiff, on 3rd February, 2016, she and her financier, KCB Bank Kenya Limited, executed the legal charge intended to be registered over the suit premises pursuant to Clause 3.1.2; that as at 5th February 2018, the outstanding unsecured balance of the purchase price amounted to Kshs. 20,000,000 and that by a letter dated 6th February 2018, the Defendant, through its Advocates, M/S Mohamed Muigai, informed her that it was ready and able to complete the sale of the suit premises in her favour. She averred that the Defendant further indicated that all that was required was for her to settle the unsecured balance of the purchase price.

14. The Plaintiff asserts that on 14th May, 2018, she paid to the Defendant the unsecured balance of Kshs. 20,000,000 and

ORIGINAL

that this payment left an outstanding balance of Kshs. 40,000,000 being the secured balance payable upon registration of the transfer of lease and the charge pursuant to clause 3.1.2 of the Agreement.

15. It is the Plaintiff's case that vide a letter of 19th December, 2018, the Defendant expressly and unequivocally acknowledged receipt of the sum of Kshs. 40,687,170 thereby leaving a balance of Kshs 40,000,000 that was to be paid by her financier upon finalization of the transaction pursuant to clause 3.1.2 of the Agreement.

16. She averred that by a further letter dated 19th December 2018, the Defendant expressly and unequivocally notified KCB that she had fully paid the unsecured balance amounting to Kshs. 40,000,000 and all that remained was the anticipated completion by way of mortgage and that notwithstanding repeated demands by it and its financier, the Defendant has to date wrongfully and in breach of the agreement neglected, refused and/or failed to deliver the completion documents.

17. The Plaintiff asserted that by reason of the Defendant's inordinate delay in complying with clause 3.1.2 of the agreement, she risks losing the preferential interest rates she negotiated for financing the secured balance of the purchase price thereby exposing her to irreparable financial loss.

ORIGINAL

18. Further and in the alternative, and without prejudice to the foregoing, she contended that by reason of the Defendant's failure and/or refusal to complete the transaction, she will incur additional duty on the transfer of the suit premises and that she has at all material times been, and remains, ready and willing to perform her obligations under the Agreement.

19. It is the Plaintiff's case that the Defendant remains the registered proprietor of the suit premises and continues to hold all the completion documents and that there exists a threat that this state of affairs will continue indefinitely unless the remedies sought herein are granted.

20. Vide an Amended Defence and Counterclaim dated 24th January, 2022, the Defendant denied the allegations set out in the Plaint. It was stated that the Defendant is a limited liability company incorporated under the Companies Act and has at material times, been the lawful proprietor of the suit premises.

21. According to the Defendant, in April 2015, the Plaintiff unlawfully took possession of the suit premises and has remained in occupation to date and that she relies on the Agreement dated 25th September, 2015 to justify her occupation of the suit premises which agreement is and remains *void ab initio*, as its execution and performance would have amounted to contempt of court in light of the subsisting injunctive orders issued on the 5th December, 2013.

ORIGINAL

22. In any event, the Defendant asserted, any agreement entered into by the Plaintiff was not with the Defendant, there having been no company meeting or company resolution to this effect but with Ndung'u Gethenji, who was acting *ultra vires* and that as such, the Defendant cannot be held to be in breach of an invalid agreement.

23. In the alternative, it was argued, the Plaintiff breached the terms of the Agreement by failing to make payments as stipulated, having paid only Kshs. 8,000,000 out of the agreed sum and that the Plaintiff has no legitimate claim to the suit premises and is, in fact, an unlawful and illegal tenant.

24. Consequently, it was averred, she should deliver vacant possession of the suit premises to the Defendant and that the Defendant further claims Kshs. 57,600,000 being rent due for six (6) years of unlawful occupation and Kshs. 311,200,000 being the amount due in respect of the balance of stand premium of Kshs. 72,000,000, which attracts interest at the rate of five percent (5%) per month until payment in full.

25. According to the Defendant, despite repeated demands, the Plaintiff has refused and/or neglected to pay the said sums. The Defendant states that it is willing to sell the suit premises at Kshs. 250,000,000 and to accept payment of Kshs. 311,200,000 as the amount allegedly due and owing

ORIGINAL

from the Plaintiff in respect of the balance of the stand premium.

26. The Defendant seeks vide the Counterclaim the following reliefs:

i. ***A declaration that the sale agreement dated the 25th September, 2015 between the Plaintiff and the Defendant was and remains to be void ab initio.***

ii. ***Vacant possession of the suit premises.***

iii. ***The amount of Kshs 57, 600, 000/= being the rent due and owing to the Plaintiff.***

iv. ***Mesne profits as compensation for the loss of use, benefit and enjoyment of the suit premises from April, 2015 until final determination of the suit.***

v. ***In the alternative, the sum of Kshs 331, 200,000/= being the stand premium and the interest accrued on the suit premises to date.***

vi. ***Interest at the rate of 5% per month until payment in full.***

vii. ***Costs of this suit.***

viii. ***Interest on costs at court rates.***

ix. ***Such other or further relief as this Honourable Court may deem fit to grant.***

ORIGINAL

27. The 1st Interested Party filed his Defence on 14th December, 2021. He denied the assertions as set out in the Plaint stating that the suit property belongs to him, having purchased the same from the Defendant long before the Plaintiff's alleged purchase, and that the transaction was concluded pursuant to an agreement for lease dated 28th November, 2007.

28. The Interested Party further avers that at the time the Plaintiff allegedly entered into an agreement with the Defendant, injunctive orders were subsisting in **Milimani High Court Civil Suit No. 355 of 2012, Chris Kabiro t/a Kabiro Ndaiga & Company Advocates v Kihingo Village (Waridi Gardens) Limited & 2 others**, restraining the Defendant, *inter alia*, from selling the suit property.

29. According to the 1st Interested Party, the Defendant was at all material times aware of those orders, which were issued in the presence of its Advocates following a protracted hearing and that the Plaintiff is presumed to have had notice of the said court orders, the ruling having been reported on the Kenya Law website, where it remains accessible.

30. Consequently, he states, any purported subsequent sale of the suit property to the Plaintiff was *void ab initio*, having been undertaken in blatant contempt of court orders and in violation of the doctrine *of lis pendens*. On that basis, the Plaintiff has no right or interest in the suit property as alleged or at all, and that the Defendant equally lacked any power or authority to sell the suit property to the Plaintiff or

ORIGINAL

to any other person, the property being lawfully owned by him.

HCCC 355 OF 2012

31. Vide the Plaint dated 31st March, 2012, the Plaintiff, who is the 1st Interested Party in ELC 256 of 2019 seeks the following reliefs:

i. ***An order for the taking of accounts as between the Plaintiff on the one hand and the 1st and 2nd Defendants on the other hand.***

ii. ***A declaration that the Plaintiff has met and discharged fully all its obligations under the agreement for sale made on the 28th November, 2007 between the Plaintiff and the 1st and 2nd Defendants and in particular declarations that:***

   a. ***The Plaintiff has fully paid the purchase price in respect of the suit property, namely House Number 1D Kihingo Village (Waridi Gardens) constructed on Land Reference Number 27754, Nairobi.***

   b. ***The Plaintiff is entitled to exclusive ownership and unfettered occupation, possession and enjoyment of House Number 1D Kihingo Village (Waridi Gardens) constructed on Land Reference Number 27754, Nairobi.***

ORIGINAL

iii. A permanent injunction restraining the Defendants whether jointly and/or severally by themselves or through their officers, agents, servants and/or employees of any other person from occupying, using, selling, leasing, transferring, charging, pledging, alienating, tampering with, altering or otherwise howsoever dealing with House Number 1D Kihingo Village (Waridi Gardens) constructed on Land Reference Number 27754, Nairobi.

iv. An order for specific performance compelling the 1st and 2nd Defendants to execute the lease over House Number 1D Kihingo Village (Waridi Gardens) constructed on Land Reference Number 27754 Nairobi, in favor of the Plaintiff.

v. An Order of Specific Performance compelling the Defendants jointly and severally to immediately execute all such documents and to do all such acts as are necessary to ensure that the Lease over House Number 1D Kihingo Village (Waridi Gardens) constructed on Land Reference Number 27754 Nairobi in favor of the Plaintiff is registered forthwith.

vi. In the event the Defendants jointly and/or severally fail to comply with Orders (iii) and (iv) above, the Registrar of the High Court or such

ORIGINAL

other officer as this Honourable Court shall designate be empowered to execute all the necessary documents including but not limited to the Lease over House Number 1D Kihingo Village (Waridi Gardens) constructed on Land Reference Number 27754 Nairobi in favour of the Plaintiff to ensure that said Lease is registered forthwith.

vii. *Damages on the footing of exemplary and/or aggravated damages against the 3rd Respondent and his principal, the 1st Defendant, jointly and severally for illegal distress and eviction of the Plaintiff, his family and employees.*

viii. *The cost of the illegal distress and/or eviction including the cost of carting away goods, storage charges, hiring of personnel involved in the illegal distress and returning the goods to the Plaintiff be borne by the 3rd Defendant and his principal, the 1st Defendant, jointly and severally.*

ix. *The 3rd Defendant and his principal, the 1st Defendant, jointly and severally do compensate the Plaintiff for the full value of any goods lost, destroyed or damaged as a result of the illegal distress and/or eviction.*

x. *All and any such inquiries, orders and directions as may be deemed just and expedient.*

ORIGINAL

xi. ***Costs of this suit together with interest thereon at such rates and for such period as this Honourable Court may deem appropriate.***

xii. ***Any such other or further relief as this Honourable Court may deem appropriate to grant.***

32. For ease of reference, the parties herein shall be referred to as per their designation in ELC No. 256 of 2019. It is the 1st Interested Party's case that Wagema Limited is the parent company of the Defendant; that the shareholding and directorship of both companies are identical and comprise members of the immediate family of the late Augustine Gethenji (deceased) *to wit*, his sons, Ndung'u Gethenji, Fredrick Gethenji, and Robert Gethenji and his widow Hilda Gethenji.

33. In turn, it was averred, the Defendant is the parent company of the following companies being Kihingo Holdings Limited, Kihingo Village (Waridi Gardens) Management Limited, Kihingo Village (Waridi Gardens) Management One Limited and Kihingo Village (Waridi Gardens) Management Two Limited.

34. According to the 1st Interested Party, on or about the year 2007, the Defendant resolved to develop a high-end residential estate comprising of 55 houses to be constructed on part of Land Reference Number 3862, Nairobi, known as

ORIGINAL

the “Kihingo Village (Waridi Gardens) and that for this purpose, Land Reference Number 3862 Nairobi was sub-divided and a parcel known as Land Reference Number 27754 Nairobi, measuring about 37 acres excised for purposes of the Project.

35. The 1st Interested Party averred that Wagema Limited incorporated the 1st Defendant as a special purpose vehicle to carry out the Project; that various professional consultants were engaged; that out of the 55 units, 51 were sold and the remaining four allocated to directors in the following manner; Unit 5L-James Ndungú Gethenji, 15D-Fredrick Gitahi Gethenji, 32D-Hildah Wangari Gethenji and 41D-Robert Marieka Gethenji.

36. The 1st Interested Party explained that a bulk of the funds used to construct the estate was provided by the Commercial Bank of Africa Limited (CBA) which initially held a legal charge over the head parcel; that CBA would however issue partial discharges in respect of each house as soon as the same was completed and the purchase price thereof paid directly to the bank and that CBA has since partially discharged the larger part of the head parcel.

37. In the course of the development of the Project, it was averred, the 1st Defendant became unable to meet its financial obligations to CBA, the contractors, the suppliers and the professional consultants including the 1st Interested Party; that as a consequence, construction ceased on several

ORIGINAL

occasions and that in a bid to save the situation, Wagema Limited and the Defendant jointly resolved to sell L.R 3861/4 Nairobi and apply the proceeds to discharge the aforesaid liabilities.

38. The 1st Interested Party averred that he was duly instructed to issue an undertaking to the contractor, Laxmanbhai Construction Limited, to pay to the said contractor the sum of Kshs 185,000,000 which he did and that the undertaking has however yet to be discharged.

39. It is the 1st Interested Party's case that the Defendant and Wagema Limited would allocate houses to consultants who were willing to take up houses, in lieu of fees and that in this regard, the following houses were allocated in lieu of fees - Laxmanbhai Construction Limited, House Numbers 8L and 31L, the 1st Interested Party, House 1D, and Dimensions Architects-House Numbers 14D and 19D.

40. He argued that pursuant to the Defendant's decision to allocate the suit property to him, they entered into a sale agreement dated 29th November, 2007 and that as per the agreement, he (1st Interested Party) was the purchaser, Wagema Limited the registered owner of the head parcel including the suit property, and the Defendant, the vendor and a party in the process of acquiring ownership of the head parcel including the suit property from the 2nd Defendant.

ORIGINAL

41. It is the 1st Interested Party's case that the sale agreement provided, *inter-alia,* that the purchase price would be Kshs. 42,800,000 and that the transfer instrument would double as the title document being a lease, a draft of which was attached to the sale agreement.

42. Accordingly, he averred, the sale agreement referenced the parties as lessor and lessee and that it was also a term of the agreement that the Defendants would grant to the 1st Interested Party a lease of ninety-nine (99) years less the last seven days, similar to other purchasers within the estate at an annual rent of a peppercorn.

43. The 1st Interested Party stated that whereas the value of the suit property was initially Kshs 42, 800,000, the houses were extensively varied in design and finishes on his request and the express instructions Wagema Limited pushing up the value of the suit property, minus variations related to electrical elements by Kshs 22,896,784 and that the total value of the house including variations is Kshs 71,011,726.35 made up as follows:

Original purchase price	Kshs 42,800,000
Bill of Quantities	Kshs 22, 896, 784.00
Electronic sub-contractors final account	Kshs 5, 314, 942. 35

44. According to the 1st Interested Party, he diligently rendered legal services to the Defendants and the legal fees payable

ORIGINAL

was in excess of Kshs 104,550,843; that in acknowledgment of the said services, Wagema Limited issued him with four credit notes for the sum of Kshs. 37,678,919.24 on various dates in 2009 and 2010 and that the sum of Kshs 66, 871, 92.07 remains outstanding.

45. According to the 1st Interested Party, additional cash payments were made into the 1st Defendant's escrow account totaling Kshs 1,111,454 comprising of:

Kshs 316, 698.00	13th February, 2009
Kshs 161, 356.00	24th February, 2009
Kshs 633, 400.00	9th March, 2009

46. Ultimately, he averred, the Defendant and Wagema Limited have received from him the benefit of Kshs 105,662, 297 consisting of legal fees and monies paid to the escrow account as aforesaid.

47. In a bid to deny him of his fees, and defeat the undertaking to pay the contractor Kshs 185,000,000, it was averred by the 1st Interested Party that the Defendant purportedly rescinded the sale of the suit premises; that this was despite having granted him possession sometime on 10th August, 2011. The said undertaking, he explained, is the subject of a pending suit-**Milimani HCC 219 of 2012-Laxmanbhau Construction Limited vs Kihingo Village(Waridi Gardens) Limited & 2 Others**.

ORIGINAL

48. It is the 1st Interested Party's deposition that the High Court restrained the Defendant among others from, harassing or interfering with his liberty. Further, that the Defendant filed **Milimani Chief Magistrate's Miscellaneous Application No. 341 of 2012, Mugenda Wasilwa t/a Keyisan Investments and Waridi Gardens Limited v Chris Kabiro**, and obtained an order for police assistance to levy distress for alleged rent arrears in respect of the suit property.

49. He stated that the purported distress was manifestly illegal and actuated by bad faith, as he was a purchaser and not a tenant of the suit property, and therefore no distress could lawfully be levied against him. He further stated that no notice was issued prior to the distress.

50. According to him, the distress was executed in a brutal and unlawful manner, involving forcible entry, the breaking of doors, and the removal of nearly all household goods valued at over Kshs. 500,000. He stated that he and his family were forcibly locked out of the house, while his employees were assaulted, driven away from the suit property, and abandoned more than five kilometres away without money or any means of returning.

51. The 1st Interested Party urged that he is willing to pay the value of the suit property. However, the balance ought to be offset against the amounts due to him from the Defendants

ORIGINAL

and that once done, the monies due to him will be Kshs. 34,650,571.

Hearing and Evidence

52. The hearing commenced on 26th March 2025. The Plaintiff testified as PW1. She adopted her witness statement dated 2nd August, 2019, together with her further statement dated 20th January, 2025, as her evidence in chief. She further produced a bundle of documents dated 19th December, 2024 as PEXHB 1, a second bundle dated 20th January 2025 as PEXHB 2, and additional documents dated 25th February, 2025, which were produced as PEXHB 3.

53. She clarified that the purchase price was Kshs. 80,000,000 and not as stated at paragraph 11 of her witness statement. She further explained that paragraph 3(iii) of her further statement refers to a payment of Kshs. 10,000,000 made to Aberdare, and that the correct date of payment was 17th November 2015, and not 17th May 2015 as indicated therein.

54. It was her evidence vide the statements that in March 2015, she commenced negotiations with the Defendant for the purchase of the suit premises; that an oral agreement was reached to the effect that the Defendant would sell the suit premises to her at an agreed purchase price; that she would pay a deposit, and that the transaction would be subject to her obtaining financing for the balance of the purchase price.

ORIGINAL

55. PW1 informed the court that it was agreed that the suit premises would be used as security to obtain such financing, and that the balance of the purchase price would only be paid after delivery to her financier, of a duly registered transfer of lease in her favour and the registration of a charge in favour of the financier over the suit Premises.

56. She noted that in April 2015, pursuant to the said oral agreement, the Defendant granted her possession of the suit premises, and she has remained in possession to date. She explained that she has thus far paid the unsecured sum of the purchase price totalling Kshs 40,687,817 as follows:

Kshs 8,000,000/=	To vendor on the 12th August, 2015
Kshs 2, 687, 817/=	To Shamser Ltd on advise of Vendor on 14th May, 2015
Kshs 10,000,000/=	To Aberdare Safari Hotels Limited on 17th November, 2015
Kshs 20,000,000/=	To Mohamed Muigai Advocates on 14th May, 2018

57. On the 19th December, 2018, she stated, the Defendant expressly and unequivocally confirmed that she had already paid Kshs. 40,687,170, and that only 40,000,000 remained payable by her financier upon completion and that on the

ORIGINAL

same date, the Defendant formally notified her financier that she had fully paid the unsecured balance and that completion by way of mortgage was all that remained.

58. PW1 stated that Aberdare Safari Hotels Limited is owned by members of the family of the shareholders of the Defendant and Wagema Limited; that the issue of the validity of the injunctive orders previously obtained by the 1st Interested Party was conclusively determined by this court vide its ruling dated 9th November 2023, from which no appeal has been preferred, and that there is no impediment to the sale transaction.

59. PW1 explained that notwithstanding repeated demands by herself and her financier, the Defendant has wrongfully and in breach of the agreement failed and refused to comply with clause 3.1.2, and has given no indication as to when it intends to complete the transaction. She noted that the Defendant has merely continued to give oral assurances through its directors, which has not resulted in completion.

60. PW1 urged that that unless restrained by the court, the Defendant intends to continue and repeat the wrongful acts complained of and that the delay in completing the transaction exposes her to the risk of losing preferential interest rates negotiated for financing, based on her position as a public officer thereby occasioning her irreparable financial loss. Alternatively, it was her case that the continued delay will expose the suit premises to changes in

ORIGINAL

market valuation, resulting in additional stamp duty being payable upon transfer, to her detriment.

61. PW1 averred that she has at all times been, and remains ready and willing to perform her obligations under the agreement, and that she is ready to give such security as the court might deem just. She explained that the Defendant remains the registered proprietor of the suit premises, continues to hold the completion documents, and that there is a real risk that the transaction will remain incomplete indefinitely.

62. It was her evidence during cross-examination that the contractual completion period was ninety (90) days, which would have lapsed on 25th December 2015. She stated that the first formal request for the documents to the Defendant was made through the letter dated 28th January 2016, which was after the lapse of the 90-day period and by that time, however, the parties were still in good terms and were not concerned about strict adherence to the completion timeline.

63. She testified that she dealt with Mr. Ndung'u and his mother, whom she regarded as inseparable from the Defendant's directorship, and that they both executed the agreement and received the purchase monies.

64. On being questioned, she conceded that there were no discussions to formally extend or vary the completion date, and no amendment to the agreement was executed. She testified that the payments referenced at items 1, 2, and 3 in

ORIGINAL

the Defendant's letters dated 19th December, 2018 were indeed made, though not through the advocates, but directly to the Defendant's directors on their express instructions. She stated that those payments were acknowledged in writing and made in good faith, notwithstanding clause 4.4 of the Agreement.

65. PW1 described the property as an ordinary residential house and stated that she did not inquire into who had previously occupied it. She clarified that the balance of the purchase price was not paid solely because the Defendant failed to provide the completion documents.

66. She testified that she only became aware of Chris Kabiro's (the 1st Interested Party) claim in 2020, after the expiry of the relevant court order. She explained that her agreement was executed in 2015, whereas the court order obtained by the 1st Interested Party was in 2020. She stated that she had not been aware of the registration of any court order against the property at the material time.

67. PW1 referred to the official search, noting that the last entry indicated a court order in Civil Suit No. 355 of 2012 restraining dealings with House Number D1 until determination of the suit, with the entry reflecting a date in 2020.

68. DW1 was Fredrick Gethinji Gitahi, a director of Waridi Village Gardens Limited and Waridi Village Gardens

ORIGINAL

Management Limited. He adopted his witness statement dated 24th January, 2022 as his evidence in chief and produced the bundle dated 3rd September, 2024 and 3rd March, 2025 as DEXHB 1 and 2. [The valuation report was not produced].

69. It was his evidence vide the statement that the alleged oral agreement relied upon by the Plaintiff is unknown to the Defendant and has never been sanctioned by the company. According to him, there was no company meeting or resolution authorizing such an agreement. The Plaintiff's negotiations, if any, were conducted with Ndung'u Gethenji and not with the Defendant company.

70. According to Mr. Gitahi, DW1, the Defendant's Articles of Association as set out in Sections 16, 17 and 18 governs how transactions of the nature alleged by the Plaintiff are to be conducted and the same is strictly followed and that the Defendant does not make oral agreements.

71. Alternatively, he stated, clause 3 of the lease agreement dated 25th September 2015 provided that a deposit of Kshs. 8,000,000 was payable upon execution, while the balance of Kshs. 72,000,000 was payable within fourteen days of delivery of completion documents, and that the agreement required payment to be made to the Defendant's advocates.

72. DW1 explained that apart from the Kshs 8,000,000, the Defendant is unaware of any payment of the unsecured

ORIGINAL

balance by the Plaintiff and that the Defendant's advocates have never received such payment and neither does the company accounts reflect such monies.

73. He asserted that the Plaintiff improperly conflated Ndung'u Gethenji with the Defendant company, yet the two are distinct legal persons. He stated that Ndung'u Gethenji had no authority to receive funds on behalf of the Defendant or to direct disbursement of funds, and that no company resolution had been passed authorizing him to do so.

74. The Plaintiff, he explained, cannot seek to bind the Defendant to transactions with Ndung'u Gethenji to which it is not a party and that communication between the Plaintiff and Ndung'u Gethenji, including correspondence dated 19th December 2018, was not co-signed by any other director of the Defendant.

75. DW1 stated that the Plaintiff never acquired lawful possession of the suit premises and has at all material times remained an unlawful occupant. He further testified that injunctive orders issued on 5th December 2013 in Civil Case No. 355 of 2012 and Civil Case No. 350 of 2012 restrained any dealings with the suit property, and that those orders were still in force at the time the impugned agreement was executed by the Plaintiff, thereby rendering the agreement null and *void ab initio.*

ORIGINAL

76. In concluding, DW1 urged that the Plaintiff has unlawfully stayed on the suit property for 6 years without paying rent and is as such liable to pay rent arrears amounting to Kshs. 57,600,000 or, in the alternative, Kshs. 311,200,000 being stand premium together with accrued interest.

77. In cross-examination, he testified that of the fifty-five (55) houses in the project, fifty-four (54) were handled by HHM Advocates, while the suit property was handled by Mohamed Muigai & Co. Advocates, who was not the Defendant's advocates and had never been appointed by them. He stated that he was the Operations Director and, together with James Thuo Githinji, was the most actively involved in the project. He added that his mother was in good health at the time she signed the agreement.

78. DW1 testified that, pursuant to the court orders issued in HCCC No. 355 of 2012, the company had commenced an accounting process, although he was not aware whether the process had been concluded. He explained that the dispute with Mr. Kabiro arose from additional costs incurred in modifying the house, which, under the relevant agreements, were to be borne by the purchasers.

79. DW1 further stated that Ndung'u Gethenji remains the Chief Executive Officer of the Defendant company, but he was unable to confirm whether Ndung'u had personally received any payments in relation to the transaction.

ORIGINAL

80. He explained that he was not a sitting director of the company but attended board meetings from time to time. Finally, he stated that the sum of Kshs. 130,000,000 paid to Mr. Kabiro was in full and final settlement of his claim in lieu of the house, although he had never seen the original agreement allegedly entered into between the company and Mr. Kabiro.

81. He further testified that in his supplementary affidavit filed in HCC No. 355 of 2012, he stated at paragraph 3 that he had been engaged in discussions with Mr. Kabiro, during which it emerged that a sum of Kshs. 89,792,595 was unaccounted for, and that he had no evidence to show that the said amount was ever recovered.

82. DW1 added that a separate bank reconciliation revealed that an additional sum of Kshs. 132,797,843 also remained unaccounted for, and that he was uncertain whether this amount was ever accounted for by Mr. Kabiro.

83. He explained that these discrepancies were not taken into account when the consent was entered into with Mr. Kabiru, the 1st Interested Part, as the parties relied only on an internal audit. Further, that no board meeting was held before the consent was entered into. He further testified that he did not have the internal audit report in court.

84. It was DW1's evidence in re-examination that his mother had authority to sign the agreements, but that she never

ORIGINAL

exercised that authority except in respect of the one agreement in issue. He stated that he could see the letter dated 27th November, 2018 in the Defendants' further documents, which was signed by his mother, Robert, and himself, and which appointed the firm of Gichuki King'ara & Co. Advocates.

85. He testified that he did not recognize the Plaintiff's agreement or the payments alleged to have been made thereunder. He further stated that Mohammed Muigai & Co. Advocates had never acted for them and that they had never issued any instructions to that firm to pay any monies to HHM advocates. With regard to clause 8 of the agreement, he observed that it used the word "*may*," meaning that he could have issued a notice or elected not to do so.

86. DW2 was Paul Kagwamba, a registered valuer who has been in practice since 1991. He produced the valuation report dated 7th February, 2025, contained in the Defendants' bundle and which he produced as 1DEXHB 2. According to him, the subject house has an open market value of Kshs 280,000,000. He described Kihingo Village as a unique development and stated that the prevailing monthly rent for comparable houses in the area is approximately USD 8,000.

87. On cross-examination, he stated that although he visited Kihingo Village, he was not granted access to the suit house and therefore relied on comparisons with other similar houses in the neighbourhood. He explained that the valuation

ORIGINAL

was carried out for litigation purposes and that he compared the subject property with the Gitahi residence and their mother's house.

88. He further testified that he applied two valuation standards and did not separate the value of the land from that of the house. The value, as such, represents the combined value of both and that the assessment was based on both internal and external features of the house, notwithstanding that he did not gain physical access to the interior.

89. DW3 was Robert Marieka Gethenji, a Director and shareholder of the Defendant. He adopted his witness statement dated 24th January, 2022 as his evidence in chief.

90. It was his evidence that the alleged oral agreement relied upon by the Plaintiff is unknown to the Defendant and has never been sanctioned by any company meeting or resolution. According to him, the Plaintiff did not negotiate with the Defendant but with one Ndung'u Gethenji. He explained that under the Defendant's Articles of Association, particularly clauses 16, 17 and 18, such transactions must follow formal procedures and cannot be undertaken orally, as the Defendant conducts its affairs strictly in accordance with its constitution.

91. In the alternative, he stated, clause 3 of the lease agreement dated 25th September, 2015 required the Plaintiff to pay Kshs. 8,000,000 upon execution of the agreement and the

ORIGINAL

balance of Kshs. 72,000,000 within fourteen (14) days upon delivery of the completion documents, with all payments to be made to the Defendant's advocates. He stated that the Defendant was not aware of any payment of the unsecured balance and that its advocates had never received the same, which was the reason the completion documents were neither released nor capable of being released to the Plaintiff.

92. DW3 denied any knowledge of a payment of Kshs. 20,687,170 and stated that the only payment known to the Defendant was the deposit of Kshs. 8,000,000 made to the firm of Mohammed Muigai LLP.

93. DW3 added that the Defendant's company accounts did not reflect receipt of any monies in respect of the suit premises. He emphasized that the Plaintiff improperly treated Ndung'u Gethenji and the Defendant as one and the same entity, yet they are distinct legal persons.

94. He stated that Ndung'u Gethenji had no authority to receive funds on behalf of the Defendant or to direct their disbursement, there having been no company meeting or resolution authorizing him to do so. Having transacted with Ndung'u Gethenji, he asserted, the Plaintiff could not seek to bind the Defendant, and that correspondence between the Plaintiff and Ndung'u Gethenji was not co-signed by any other director, citing the letter dated 19th December 2018 as an example.

ORIGINAL

95. DW3 further testified that the Plaintiff never lawfully took possession of the suit premises on account of injunctive orders issued on 5th December 2013 by Hon. Justice Ogolla in **Civil Case No. 355 of 2012, Chris Kabiro t/a Kabiro Ndiga & Co. Advocates v Kihingo Village (Waridi Gardens) Limited, and Civil Case No. 350 of 2012, Kihingo Village (Waridi Gardens) Limited vs Chris Kabiro t/a Kabiro Ndiga & Co. Advocates.** He stated that, as a result of the subsisting orders, the agreement dated 25th September, 2015 was and remained null and *void ab initio*.

96. He stated that the Plaintiff had remained on the premises for six years without paying rent despite repeated demands by the Defendant's advocates, and asserted that she was liable to pay Kshs. 57,600,000 as rent or, in the alternative, Kshs. 311,200,000 as stand premiums together with accrued interest.

97. During cross-examination he conceded that he was not part of the management during the development process. Before the consent entered into with the 1st Interested Party, he stated, they had undertaken reconciliation of the accounts themselves.

98. DW3 confirmed signing the agreement with Mr. Kabiro, the 1st Interested Party, and explained that Fredrick did not sign it as he was away at the time. He stated that they had given Mr. Kabiro possession but he was thrown out by auctioneers

ORIGINAL

after a disagreement arose between them. He explained that to date, Kshs 130,000,000 payment to Mr. Kabiro remains outstanding.

99. Regarding the document itself, he stated that he does not recognize the third signature on the agreement; that he was unaware that Mr. Ndung'u had denied signing the contract or if the DCI had released a formal report concerning allegations of forgery and that if the signatures are proven to be forged, the agreement will be rendered legally invalid.

100. DW3 confirmed his role as a director and bank signatory for Aberdare Safari Hotels Limited. He conceded that Kshs 10,ooo,ooo could have been deposited into the account and he would have missed it and further that his mother and brother signed the agreement with the Plaintiff.

101. He stated that had he been aware of the NCBA audit, they would not have entered into the consent with the 1st Interested Party. He explained that he and Mr. Ndung'u fell out in early 2004 at the project's inception and that although Mr. Ndung'u remains the CEO, he was never mandated to oversee this specific project.

102. Consequently, he stated, the board did not pass formal resolutions for every individual house sale. For instance, the consent agreement with Mr. Kabiro was discussed privately with his mother and Fredrick. While they informed Mr. Ndungu of these dealings, he refused to participate.

ORIGINAL

103. He admitted that the delay in finalizing the transaction with the Plaintiff was caused by the Defendant. He also confirmed that the Plaintiff currently resides on the property and pays the required service charges. Regarding the legal settlement, he believed that under the terms of the consent, Mr. Kabiro should forfeit his claim to the house in exchange for payment of his fees. Finally, he stated that he has no knowledge of Wagema Limited being a party to that consent.

104. During re-examination, he stated that his signature on the agreement involving Mr. Kabiro was not forged. He explained that had his mother known the document to be a sale agreement, she would not have executed it without first consulting the other parties. He further testified that he was uncertain as to whether he or Mr. Ndung'u signed the agreement first.

105. DW4 was Chris Kabiro, an Advocate of the High Court of Kenya practicing in the name and style of Kabiro Ndiga & Company Advocates. He adopted his witness statement dated 3rd July, 2024 as his evidence in chief and produced the bundle of documents dated 18th July, 2024 as IP Exhibit 1. Also adduced was the bundle of documents dated 7th January, 2025 as IP Exhibit 2.

106. It was his evidence that between the years 2005 and 2011, he acted for the Defendant, Wagema Limited, and its related companies, as well as for the Estate of the late Joseph

ORIGINAL

Augustine Gethenji, who was the original main shareholder of Wagema Limited.

107. It was his evidence that sometime in 2007, Wagema Limited resolved to develop a high-end residential estate comprising 55 houses to be constructed on part of Land Reference Number 3862 Nairobi, which estate came to be known as Kihingo Village (Waridi Gardens and that the Defendant was incorporated as a special purpose vehicle for the project.

108. DW4 testified that he was employed as a legal advisor on assorted matters related to the project and to the best of his knowledge, 51 units have been sold with four allocated to the Directors of the Defendant and Wagema Limited. He stated that he knows of his own personal knowledge that CBA initially held a legal charge over the entire parcel and would issue partial discharges in respect of each house as soon as the sale was completed.

109. He explained that in the course of the project, it became apparent that the Defendant was unable to pay off its liabilities. Consequently, the Defendant and Wagema Limited resolved *inter-alia* that Wagema Limited as the parent company would settle the Defendant's liabilities to CBA, contractors, suppliers and professional consultants, and that it would sell L.R 3861/4 Nairobi and use the proceeds thereof to pay the Defendant's liabilities.

ORIGINAL

110. On that basis, he stated, he was instructed to issue an undertaking to the contractor, Laxmanbhai Construction Limited to pay the contractor Kshs 185,000,000 from the proceeds of L.R 3861/4.

111. It was the evidence of DW4 that the Defendants and Wagema Limited would allocate houses in the estate to such consultants who were willing to take up houses in the estate in lieu of fees; that in this regard the following houses were allocated in lieu of fees, Laxambhai Construction Limited-House Numbers 8L and 31L, he was given house no 1D, the suit premise, and Dimensions Architects-House Numbers 14D and 19D.

112. According to DW4, Wagema Limited and the Defendant agreed to sell him the suit property at the purchase price of Kshs. 42,800,000; that Kshs. 29,800,000 was to be set off against legal fees, while the balance of Kshs. 12,400,000 was payable prior to completion and the completion date was 31st October, 2009, with provision for an extension of up to an aggregate maximum of six months, making 30th April, 2010 the latest date by which completion was to occur and that the property was sold with vacant possession upon completion.

113. According to DW4, at his request and with the consent of the Defendant, variations were effected to the suit premises, which enhanced its value by Kshs. 22,896,784, bringing the total valuation of the property to Kshs. 71,011,726. He

testified that he diligently rendered legal services to the Defendant, earning legal fees in excess Kshs. 104,550,843.

114. In acknowledgment of those services, he stated that the Defendant issued four credit notes amounting to Kshs. 37,678,919.24, leaving an outstanding balance of Kshs. 66,871,924.07; that he made cash payments totalling Kshs. 1,111,454 into the Defendant's escrow account and that, cumulatively, the Defendant and Wagema Limited received from him benefits amounting to Kshs. 105,662,297.

115. He expressed his willingness to pay the balance of the value of the suit property, on condition that it be offset against the amounts owed to him by the Defendant and Wagema Limited, which he quantified at Kshs. 34,650,571.

116. He testified that having fully paid the purchase price, he was granted possession of the suit property. However, in breach of the agreement, the Defendant and Wagema Limited failed to execute the lease to enable registration in his favour and further failed to meet their financial obligations to CBA, or to make the necessary arrangements with the bank to facilitate the discharge of the suit property.

117. He further testified that, in a subsequent breach, the Defendant purported to evict him from the suit property on 11th May 2012, prompting him to institute HCC No. 355 of 2012. He stated that on 5th December 2024, the court directed that accounts between himself and the Defendant be

ORIGINAL

taken, pursuant to which a consent order was entered into on 11th July, 2023, indicating that the Defendant owed him Kshs. 130,000,000.

118. On cross-examination, he testified that he would forward all agreements to the Defendants, who would then affix the company seal, execute the documents, and return them to him; that although he did not personally witness the vendors sign the agreements, he believed that they did; that it is only Mr. Mutungi only witnessed his signature on the agreement and that he was in possession of a letter forwarding the agreement.

119. According to DW4, there was no written communication exchanged between the parties after execution of the agreement; that he did not have any documentary evidence showing approvals for the variations carried out on the house and that he was aware of a complaint lodged with the DCI by Mr. Gethenji alleging he had not accounted for that Kshs. 89,000,000.

120. On re-examination, he testified that not all sale agreements were initialled. He stated that he had never seen the Plaintiff's sale agreement and observed that there were no initials on any page of the Plaintiff's document, whereas his own agreement had been initialled on all pages by the Chief Executive Officer. He further testified that he was the first purchaser of the house and that the Plaintiff came onto the scene approximately eight months later, in 2015.

ORIGINAL

121. He stated that the accepted credit notes amounted to approximately Kshs. 43,000,000, while the debit notes he had issued were in the region of Kshs. 60,000,000. He explained that the figure of Kshs. 130,000,000 represented the full amount of fees owed to him, and that the taking of accounts related strictly to legal work done and not to the house, the two issues being distinct.

122. He further testified that there was acknowledgment by Mr. Ndung'u of his awareness of the agreement, as evidenced by a letter dated 15th June, 2011, in which Mr. Ndung'u also acknowledged receipt of the agreement and approval of the valuation.

123. DW5, Jacob Oduor, testified that he is a forensic document examiner currently working with the Ethics and Anti-Corruption Commission (EACC) and that he previously served in the Directorate of Criminal Investigations (DCI) in the same capacity.

124. It was his evidence that he analyzed the signatures appearing on the lease agreements relating to House Number 1D on L.R. No. 27754, which had been submitted to him by Corporal Otieno. He compared the questioned signatures with known specimen signatures, namely: the signatures of James Ndung'u marked B1 and B2; the signatures of Chris Wachira Kabiru marked C1 to C4; the specimen signatures of Frederick Gethenji marked D1 and

ORIGINAL

D2; and the short-form signatures of Frederick Gethenji marked E1 and E2, as well as F1 and F2. He stated that these exhibits were forwarded to him under a memo dated 15th June 2012, which formed part of his report.

125. According to his findings, James Ndung'u did not author the signature appearing on the lease agreement. He concluded that Chris Wachira Kabiru authored the signatures appearing on the lease agreement. He further stated that the specimen signatures attributed to Frederick Gethenji, namely D1, D2, E1, E2, F1 and F2, were not similar to any of the signatures appearing on the lease agreement, which were in red ink.

126. He testified that he prepared a comparison chart of the signatures of James Ndungu, Chris Kabiru and Frederick Gethenji. He added that the document he examined, appearing at page 2 of his report and marked as item 11, was an agreement for lease and not a lease.

127. During cross-examination, DW5 stated that the agreement marked as Exhibit H was dated 28th November 2007, while his report was prepared in 2012. He explained that signatures can vary over time, but that such variations are usually very minor and do not create significant forensic differences because of the personalized traits in handwriting. He noted that the possibility of error is marginal and that his report was not absolute.

ORIGINAL

128. He stated that all the attachments were collected by the investigating officer and that although the annexures were not physically attached to his report, the report itself was complete and contained all its pages. He maintained that it is a requirement to attach exhibits to reports, but clarified that the exhibits in this case had been collected by the investigating officer.

129. He further testified that the lease document he examined bore signatures attributed to four parties, of which he examined three. He stated that Fredrick did not sign the document. He explained that the first signature belonged to James, while the signature attributed to Chris appeared alone on the right-hand side of the document. He stated that he did not know the individual who executed the second signature. He further testified that he observed a third signature, but it was unfamiliar to him and he could not confirm whether he had examined it.

130. He added that the fifth signature on the document belonged to James, while the final marking was an initial alleged to belong to Frederick, which he maintained was not executed by him. He stated that the sixth signature, also alleged to be Fredrick's, was neither examined by him nor familiar to him, and that he did not establish the identity of the person who signed as Fredrick on the lease. He concluded by stating that he forwarded his report to the investigating officer and did not follow up on the subsequent developments.

ORIGINAL

131. DW6 was James Ndungú Gethenji. He adopted his witness statement dated 23rd January, 2025 as his evidence in chief and produced the bundle of documents thereunder as 2IP PEXHB 2. He also adduced the documents in the bundle dated 24th March, 2025.

132. It was his evidence that at all material times, he was a director and the Chief Executive Officer of the Defendant, a family company whose other directors were his late mother, Mrs. Hilda Gethenji, and his brothers, Robert Gethenji and Gitahi Gethenji. He explained that his brothers have taken a position in the defence of the suit that is wholly inconsistent with a company resolution passed on 5th February 2020, and contrary to the company's Memorandum and Articles of Association, which clearly prescribe the manner in which resolutions are to be passed. He stated that a valid board meeting required the presence of at least three directors.

133. He asserted that the 1st Interested Party, Chris Kabiro, forged his signature on the agreement for lease, unlawfully took possession of the suit property without the consent of the Defendant, and has to date failed to fully pay the purchase price. He stated that the forgery was confirmed by a forensic document examination report and that his brother, Gitahi Gethenji, had also recorded a complainant's statement against Chris Kabiro in the same matter.

134. In addition to the alleged forgery, he stated that he had complained to the DCI regarding the theft of Kshs.

ORIGINAL

86,000,000, which he contended the 1st Interested Party had failed to remit to the Defendant as project proceeds.

135. He further testified that the 1st Interested Party never registered any court order against the mother title, having relinquished his claim to the property until very recently, and in any event only after the death of his late mother in September 2020, who had also been a signatory to the agreement for lease with the Plaintiff. He described the revival of the claim as an afterthought, which he believed was instigated by his co-directors, his brothers with whom he had longstanding family disputes.

136. He explained that he personally sold 51 out of the 55 houses developed within the project and that no specific board resolution was ever required for those sales, as the raison d'être of the Defendant company was to design, build, and sell houses within the project. He therefore described the denial of the legitimacy of the Plaintiff's agreement as dishonest.

137. According to DW6, the 1st Interested Party sought to strike out the Plaintiff's suit in order to reclaim the property, despite having renounced his interest therein and having committed fraud against the Defendant. He testified that he wrote to the 1st Interested Party detailing the alleged acts of fraud, but in response received a telephone call in which the 1st Interested Party hurled insults at him.

ORIGINAL

138. He further asserted that the Defendant's position denying his authority to execute the sale agreement with the Plaintiff, and branding the transaction as fraudulent, has exposed him to disrespect. He emphasized that he executed the agreement jointly with his mother, who was a co-director, and whose authority has never been questioned.

139. It was the evidence of DW6 that he acted as a director, project promoter, and chief executive officer of the Defendant with authority to bind the company, just as he had done in respect of the other 51 houses sold within the estate, and as he had done when negotiating project financing and obtaining all requisite statutory approvals for the development.

140. Upon execution of the agreement, he stated, the Plaintiff paid a total sum of Kshs. 40,687,170 in various tranches. This included Kshs. 10,000,000 paid as legal fees to Hamilton Harrison & Mathews Advocates, the Defendant's advocates, directly from the account of Mohammed Muigai Advocates; Kshs. 10,000,000 paid to Aberdare Safari Hotels Limited, a family company, at the request of his late mother, paid directly from the Plaintiff's account; and Kshs. 2,687,170 paid to Shamsher Kenya Limited, a subcontractor and creditor of the Defendant.

141. He further stated that an additional Kshs. 8,000,000 was paid to the Defendant and subsequently applied to settle obligations owed to Kihingo Village (Waridi Gardens)

ORIGINAL

Management Limited. He explained that this payment was effected through the CBA portal via RTGS, a process that required authorization by two directors, namely himself and Gitahi Gethenji.

142. He added that a further Kshs. 10,000,000 was paid to Kembi Gitura & Co. Advocates in settlement of fees due to project consultants and creditors of the Defendant, the payment having been made directly from the account of Mohammed Muigai Advocates. He stated that it was common practice during the life of the project, for purposes of expediency, for purchasers or advocates to pay creditors directly.

143. He denied the assertions by Robert and Gitahi Gethenji that they were unaware of the receipt and application of the proceeds, stating that they had full visibility of the transactions and had actively participated in dealing with the funds. He concluded by affirming that the Plaintiff lawfully purchased the suit property, is the legitimate owner thereof, and is in possession pursuant to that purchase, with the only outstanding step being transfer of the property, which he stated had been maliciously obstructed by his brothers.

144. In cross-examination, he testified that the instructions to the Plaintiff to directly pay money to the company’s creditors on the company’s behalf was the first time such an arrangement had been done and that she moved into the house before signing the sale agreement.

ORIGINAL

145. Upon being referred to the letter dated 9th March 2020, addressed to Mohamed Muigai Advocates, he denied knowledge thereof stating that he was not a signatory to that letter. He noted that Fredrick denied receipt of any money despite the company's own Advocate acknowledging the payment.

146. He acknowledged that the company issued Mr Kabiro with credit notes expressly acknowledging part payment in respect of "your purchase for Unit 1D." He referred to the order of Ogolla J dated 5th December 2012 in HCC No. 355 of 2012. He further stated that the agreement with the Plaintiff was executed in 2015, when HCC No. 355 of 2012 was still pending and remains so to date, and confirmed that an earlier suit, HCC No. 350 of 2012, also relating to House 1D, is still subsisting.

147. In re-examination, he testified that the letters by Mr Kabiro appearing at page 417 set out Mr. Kabiro's own narrative regarding the alleged purchase of the house and the monies purportedly paid. He categorically disputed the assertions made therein and disowned the sale agreement attributed to him, explaining that, given its content and context, he could never have executed such an agreement.

148. He stated that he reported the matter to the DCI, complaining against Mr Kabiro's forgery of his signature. He further testified that, under clause 3.1.2 of the agreement with the Plaintiff, the purchase price was to be paid to the

ORIGINAL

vendor’s Advocate within forty-eight (48) hours of registration. He emphasized that it was the Defendant’s own actions that frustrated and prevented the registration of the title in favour of the Plaintiff.

149. DW7 was Wandia Mark Mungai, a Deputy Land Registrar at the Ministry of Lands. He testified that he was summoned by the court to produce documents relating to L.R. No. 27754 (I.R. 108885). He produced an official search dated 8th July 2025, which was marked as 2IP Exhibit3. According to the search, the last transaction on the title is Entry No. 100, being a court order issued in Civil Suit No. 355 of 2012 restraining any dealings with the property. This order was registered on 26th November 2020 under Presentation No. 2701.

150. He further testified that Entry No. 87 relates to a discharge of charge in favour of Commercial Bank of Africa. He stated that he personally signed entries numbers 15 to 34 in 2011 and had previously registered several leases on the title as well as a partial discharge.

151. Upon reviewing the 1st IP bundle dated 18th July, 2021, he noted that entry no. 87 therein referred to a court order in HCC No. 355 of 2012 registered on 25th February 2014 under presentation no. 2729. However, he explained that, according to the official records, the presentation numbers had only reached 2701 at the time of the last entry, being entry no. 100.

ORIGINAL

152. Consequently, he stated that he could not vouch for the authenticity of the entry appearing in 1st IP Exhibit 1, and concluded that the search produced therein was not authentic when compared with the official registry records.

153. On cross-examination, he conceded that the official search annexed to the affidavit of Mr Kabiru dated 19th February, 2021 corresponds with, and is a true reflection of, the entries appearing in the land registry records. He explained that "presentation numbers" are sequential and restart at number one at the beginning of each month. Accordingly, in November 2020, the court order in question was presented, received, and registered as document number 2701 for that month.

154. He further testified that in the Interested Party's Exhibit 1, at page 52, the entry appears as number 2729. He clarified that there is only one title entry numbered 87, which cannot be a court order, as entry number 87 in the registry records relates to a discharge of charge. He confirmed that entry number 86 relates to a lease and that the entries up to number 86 were made by different registrars and investigating officers.

155. He stated that the dispute arises from entry number 87 onwards. Although the entries from number 87 were made by a different officer, he explained that this variation does

ORIGINAL

not signify anything unusual, as each investigating officer uses a different stamp.

156. He testified that what he produced before the court is a true copy of the records held at the registry. He further confirmed that the court order appearing as entry number 100 was booked and registered on 26th November 2020. He stated that he did not know who carried out the registration or who presented the court order for registration, as his role was limited to producing the official search. He added that he was seeing entry number 87 as appearing on the 1st Interested Party's search for the first time.

Submissions

157. The Plaintiff's counsel filed submissions on 1st September, 2025. Counsel submitted that **Section 3(3)** of the **Law of Contract Act** sets out the formal requirements for disposition of interests in land and provides that no suit shall be brought upon a contract for disposition of an interest in land unless the contract is in writing, signed by all the parties and the signatures duly attested and that in ***Steadman vs Steadman [1976] AC 536***, the Court of Appeal held that equity will enforce a contract where one party has acted to their detriment in reliance on the agreement.

158. According to Counsel, under the Companies Act and the indoor management rule as articulated in ***Royal British Bank vs Turquand (1856) 6 E&B 327,*** third parties are

ORIGINAL

entitled to assume that company directors act within proper authority, and the Defendant is therefore bound by the actions of its directors. In the present circumstances, it was urged, the Plaintiff demonstrated that she had substantially performed her obligations by paying over 50% of the purchase price, taking possession with the Defendant's consent in April 2015, and continuously paying service charges.

159. It was urged that the Defendant, having accepted payments and permitted possession, cannot now deny the validity of the arrangement owing to the doctrines of waiver and estoppel under **Sections 120–121 of the Evidence Act**, and as reaffirmed in ***Dhanjal Investments Ltd vs Shabaha Investments Ltd Civil Appeal No. 80 of 2019; [2022] KECA 366 (KLR)***.

160. Counsel argued that the Defendant waived strict timelines by accepting payments after the alleged completion date and continuing to invoice for service charges. Counsel relied on ***Aida Nunes vs John Mbiyo Njonjo & Charles Kigwe [1962] 1 EA 88,*** submitting that where time is not of the essence, a contract cannot be repudiated on the basis of delay alone. It was therefore argued that any delay was solely attributable to the Defendant's conduct and that the Plaintiff remained compliant.

161. Counsel urged that the Plaintiff is entitled to specific performance because the subject property is unique and not

ORIGINAL

adequately compensable by damages. Counsel cited ***Nabro Properties Ltd vs Sky Structures Ltd & 2 others (2002) 2 KLR 300, Thrift Homes Ltd vs Kays Investments Ltd [2015] eKLR, and David Mwose Mwaluko v Erastus Kiarie Gitau [2021] eKLR***, all affirming that specific performance is discretionary but available where a valid contract exists and damages would be inadequate. It was urged that equity should intervene, applying the maxim that "equity regards as done that which ought to be done."

162. Regarding the Defendants claim for mesne profits, Counsel submitted that the same must fail. It was submitted that the Plaintiff's possession was lawful from the outset and granted pursuant to the sale transaction, meaning there was no wrongful occupation. Counsel cited ***Christine Nyanchama Oanda vs Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR***, ***Brite Print (K) Ltd & George Maina Kingori vs Barclays Bank of Kenya Ltd Civil Case No. 657 of 2006; [2014] KLR KEHC 6578 (KLR),*** and ***Attorney General vs Halal Meat Products Ltd [2016] eKLR,*** stressing that mesne profits require wrongful possession, which was not the case.

163. On the 1st Interested Party's claim, it was urged that the handwriting expert confirmed the alleged agreement was founded on a forged signature, the order in HCCOMM No. 355 of 2012 had expired, and that the Interested Party's pleadings contained no counterclaim. Reliance was placed on

ORIGINAL

IEBC & another vs Stephen Mutinda Mule & 3 others [2014] eKLR, affirming that courts cannot grant unpleaded reliefs.

164. Counsel further invoked the doctrine of bona fide purchaser for value, referencing ***Kibuchi vs Kanja; Kumuru & 7 others ELCA No. 45 of 2018; [2022] KEELC 3266, Sehmi & another vs Tarabana Company Ltd & 5 others*** **Petition E033 of 2023; [2025] KESC 21,** and ***Torino Enterprises Ltd vs Attorney General Petition 5 (E006) of 2022; [2023] KESC 79***, to show that the Plaintiff acted diligently and without notice of any rival claim.

165. In conclusion, Counsel submitted that the Plaintiff had proved her case on a balance of probabilities by showing payment of at least half the purchase price, lawful possession for ten years, continuing performance of contractual obligations, and readiness to complete. It was urged that the Defendant's refusal to release completion documents constituted unjustified breach, while the 1st Interested Party's claim was unsustainable, unpleaded, compromised by a consent and unsupported by evidence.

166. The Defendant's counsel filed written submissions on 8th October 2025. Counsel submitted that conceptually, specific performance presupposes the existence of a valid and enforceable contract, and that capacity to contract is an essential element of validity, since parties must have legal capacity and must consent to the bargain.

ORIGINAL

167. In the circumstances, it was urged, the Defendant lacked capacity to enter into an agreement with the Plaintiff as the property had already been sold to the 1st Interested Party who had a ninety-nine-year lease which had yet to lapse at the time of the sale. As regards the alleged forgery of the 2nd Interested Party's signature on the agreement, it was stated that although Robert Gethenji testified that the signature on the agreement was his, the complaints regarding the alleged forgery were attributed to the 2nd Interested Party and another director, Frederick Gethenji. Nonetheless no formal criminal charges were ever lodged against the 1st Interested Party in relation to the alleged forgery.

168. Counsel argued that, given the subsisting court orders, the purported sale of the suit property to the Plaintiff was void for offending the doctrine of lis pendens. Relying on ***Mawji vs U.S. International University & Another [1976] KLR 185*** and ***Bellamy vs Sabine, [1857] 1 De G & J 566***, it was submitted that *lis pendens* is a substantive rule grounded in public policy and the administration of justice, binding all purchasers, even those without notice such that any purchaser pendente lite takes the property subject to the outcome of the pending litigation.

169. Counsel submitted that the Plaintiff failed to perform her obligations, having relied on alleged oral arrangements with the 2nd Interested Party that were not incorporated into the agreement, and on payments made to other distinct

ORIGINAL

corporate entities, which could not bind the Defendant, as affirmed in ***Imranali Chandbhai Abdulhussein vs Bamburi Portland Cement Company Limited [1994] eKLR.***

170. Counsel submitted that the Plaintiff's case offends the principle against approbation and reprobation, as she seeks specific performance of clause 3.1.2 while failing to comply with clause 3 on payment contrary to mutuality and the clean hands doctrine. Reliance was placed on ***Gosain vs Yashpal Dhir (1992)*** for the proposition that a party who accepts benefits under a contract or order is estopped from denying its validity, and that litigants cannot be permitted to take inconsistent positions to the opponent's detriment.

171. Counsel further cited ***Ken Group of Companies Ltd vs Standard Chartered Bank (U) Ltd & 2 Others, HCCS No. 486 of 2007***, *and* ***Car & General Ltd vs AFS Construction (U) Ltd [2018] UGCA 34***, ***Reliable Electrical Engineers (K) Ltd vs Mantrac Kenya Ltd [2006] eKLR***, and ***Gurdev Singh Birdi & Another vs Abubakar Madhbuti, Civil Appeal No. 165 of 1996***.

172. Further reliance was placed on ***Flood vs Pritchard [1906] 1 Ch 354***, for the proposition that specific performance will not issue where material terms remain unfulfilled. Counsel also cited ***Government of the United States of America vs Joseph Mulriri Githongo, Nairobi Civil Appeal No. 27 of 1999 (Court of Appeal, 14th July 2000)***, and the Court

ORIGINAL

of Appeal decision in ***Mbururi Matiri & Sons vs Nithi Timber Co-operative Society Ltd, Civil Appeal No. 125 of 1987 (UR)***, for the principle that a written contract cannot be amended by implied stipulation unless mutually intended and necessary to give business efficacy, and that written agreements cannot be made dependent on new verbal conditions in a manner that undermines the written terms.

173. Counsel submitted that although the 1st Interested Party had initially entered into a "house-for-fees" arrangement and rendered legal services to the Defendant, that arrangement was superseded by a consent recorded in HCCC No. 355 of 2012, under which the Defendant agreed to pay Kshs. 130,000,000 in monetary settlement. It was argued that the consent extinguished any entitlement to the suit property and that the 1st Interested Party could not claim both payment in money and the property without being unjustly enriched.

174. Reliance was placed on ***D & C Builders Ltd vs Rees [1966] 2 QB 617*** and ***Sita Steel Rolling Mills Ltd vs Jubilee Insurance Co Ltd [2007] eKLR*** for the proposition that a party is estopped by conduct from enforcing strict rights inconsistent with a settled arrangement and cannot approbate and reprobate to the detriment of the other party.

175. Counsel submitted that the 1st Interested Party is not entitled to exemplary or punitive damages, which as explained in

ORIGINAL

Obongo & Another vs Municipal Council of Kisumu [1971] EA 91 are only awardable in limited circumstances, namely oppressive, arbitrary or unconstitutional conduct by government agents, or conduct calculated to procure an improper benefit.

176. It was argued that the eviction complained of arose from a property dispute, was carried out pursuant to a valid court order, and did not meet the threshold for punitive intervention. Counsel cited ***B vs Attorney General [2004] 1 KLR 431*** to submit that courts should not issue orders in vain where actions are taken lawfully under court authority.

177. It was further argued that exemplary damages are not intended to enrich a claimant and must be proportionate, and that any such award would result in double compensation given the binding consent for Kshs. 130,000,000.

178. Counsel relied on ***Bank of Baroda (Kenya) Ltd vs Timwood Products Ltd [2008] eKLR*** for the principle that harsh conduct alone does not justify punitive damages absent malice or profit motive, and on ***Kenya Power & Lighting Co Ltd vs Joseph Khaemba Njoria [2005] eKLR*** for the prohibition against double recovery. It was submitted that any loss arising during a lawful eviction lay against the auctioneer, Muganda Wasilwa t/a Keysian Auctioneers, and not the Defendant.

ORIGINAL

179. On the Defendant's entitlement to relief, Counsel submitted that the agreement relied upon by the Plaintiff was *void ab initio*, or alternatively breached, entitling the Defendant to vacant possession and mesne profits supported by valuation evidence. Reliance was placed on ***Fredrick Korir vs Soin United Women Group (suing through Eunice Towett, Jane Mwolomet & Lucio Chebocho) [2018] eKLR,*** which cited ***Attorney General vs Halal Meat Products Limited [2016] eKLR,*** and on ***Rajan Shah t/a Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR.***

180. Counsel further submitted that the court cannot rewrite contracts and must enforce them as made unless vitiating factors are proved. Counsel relied on the case of ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002] 2 EA 503 (also reported as [2011] eKLR)*** and ***Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd [2017] eKLR.***

181. The 1st Interested Party's advocate filed submissions on 17th September, 2025. Counsel submitted that the crux of the suit concerns the sale of land which according to the Law of Contract Act must be founded on a written contract. In the instant suit, it was urged, the Plaintiff and the 1st Interested Party have exhibited separate agreements for lease over the suit property of which their respective claim of ownership thereof is predicated on.

ORIGINAL

182. It was submitted that the Plaintiff's sale agreement and the alleged forensic report were of no probative value, as the handwriting expert failed to establish his qualifications, did not attach the examined agreement, relied on dissimilar specimen signatures, and did not ascertain who executed the agreement. Reliance was placed on ***Kagina vs Kagina & 2 Others [2021] KECA 242 (KLR),*** and ***Peter Kariuki Njenga vs Gabriel P. Muchira & Another [2017] eKLR,*** for the principle that the weight of expert evidence depends on its credibility and consistency with the totality of the evidence.

183. Counsel submitted that the agreement for lease dated 25th September 2015 in favour of the Plaintiff was void because the suit property was the subject of active litigation in HCCC No. 355 of 2012, and that the Defendant's attempt to transact while aware of the pending suit amounted to a transaction undertaken *pendente lite*.

184. It was argued that the Plaintiff's advocates would have discovered the subsisting injunction had they conducted a basic search on the Kenya Law website, but in any event, the gravamen of the 1st Interested Party's case was not the injunction itself, but the fact that the transaction was concluded during the pendency of the litigation.

185. Counsel also relied on the Plaintiff's own evidence, submitting that the condition of the house and the terms of the agreement, particularly clause 4.3 on renovations and

ORIGINAL

repairs, revealed prior occupation and ought to have prompted further inquiry by the Plaintiff as to the property's history and prior ownership.

186. Counsel submitted that the Plaintiff's own evidence revealed circumstances that ought to have prompted deeper inquiry, as she admitted the house appeared previously occupied, and the agreement itself, particularly clause 4.3 on renovations and repairs, reinforced that the premises had a prior history.

187. It was further argued that clause 5.2 deemed the Plaintiff to have purchased the property with full knowledge of all interests affecting it, and having conducted no meaningful due diligence, she could not qualify as a bona fide purchaser for value. Reliance was placed on ***Dina Management Ltd v County Government of Mombasa & Others [2023] KESC 30 (KLR)*** and ***Suleiman Rahemtulla Omar & Another v Musa Hersi Fahiye & 5 Others [2014] eKLR.***

188. Counsel also submitted that the suit property was excised from L.R. No. 27754 under Grant No. I.R. 108885, a title governed by the repealed Registration of Titles Act, and that the applicable substantive law was the Indian Transfer of Property Act, 1882 (repealed), as preserved by the saving and transitional provisions of the Land Registration Act.

189. Counsel submitted that the impugned agreement was vitiated by fraud, mistake and/or misrepresentation; that the agreement departed from the Defendant's established

ORIGINAL

execution practice, being the only one allegedly signed by Hilda Gethenji and executed at the 2nd Interested Party's residence rather than at the company offices, and was further tainted by the Plaintiff's admission that she took possession several months before execution and before full payment, cumulatively supporting an inference of irregularity and vitiating factors.

190. Counsel submitted that the 1st Interested Party had demonstrated compliance with the agreement through credit notes settling fee notes, receipts for service charges and utilities, and an account statement showing completion of the initial purchase price of Kshs. 42,800,000. It was argued that subsequent variations, though undocumented by a formal deed, were consented to by the Defendant and quantified to reflect the updated value of the property.

191. Counsel further relied on the consent adopted on 27th June 2023 in HCCC No. 355 of 2012, following accounts taken pursuant to court orders, in which the Defendant and Wagema Limited acknowledged owing the 1st Interested Party Kshs. 130,000,000 in fees, emphasizing that the consent did not determine the issue of ownership of the suit property or damages, which remained live issues for trial.

192. On that basis, Counsel argued that once the full value of the house, inclusive of variations, was offset against the acknowledged fees, the 1st Interested Party had more than fully paid for the property and remained owed a substantial

ORIGINAL

balance, rendering the eviction unlawful and in breach of the agreement.

193. Reliance was placed on ***Ngaira v Cheng'oli (Civil Appeal No. 397 of 2017) [2022] KECA 80 (KLR),*** for the principle that where a party stands by while another incurs expense on the faith of an agreement, the former cannot later resile, and that courts enforce bargains as made absent vitiating factors.

194. By contrast, Counsel submitted that the Plaintiff failed to demonstrate compliance with the agreed payment structure, noting the absence of invoices, appropriation schedules, or explanatory evidence from M/S Mohammed Muigai Advocates, and further failed to prove delivery of the professional and bank undertakings required under clause 3.2.

195. It was argued that the 90-day completion period lapsed in December 2015, yet financier engagement and alleged payments occurred years later, amounting to non-performance. Counsel relied on ***Thrift Homes Limited vs Kays Investment Limited [2015] eKLR,*** citing ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another (2002) 2 EA 503***, for the settled principle that courts will not rewrite contracts in the absence of fraud, coercion, or undue influence.

196. Counsel urged the court to dismiss the Plaintiff's suit, find her occupation unlawful, service charge payments irrelevant

ORIGINAL

as they are paid to a separate management company for common services rather than as consideration for title, declare her a trespasser and order for her eviction.

197. Conversely, Counsel asked the court to find the 1st Interested Party's agreement valid and performed, compel specific performance through execution and registration of the lease in his favour, and award damages flowing from the alleged illegal distress and eviction.

198. The 2nd Interested Party filed submissions on 26th September 2026. Counsel submitted that **Section 3(3)** of the **Law of Contract Act** bars suits founded on contracts for disposition of interests in land unless such contracts are in writing, signed by all parties, and duly attested.

199. Counsel also relied on the Court of Appeal decision in ***Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd & another [2014] eKLR***, for the proposition that the essential elements of a contract are offer, acceptance, and consideration, and contended that these elements were present.

200. Counsel stated that the agreement between the Plaintiff and the Defendant was duly adduced into evidence having been admittedly executed by directors of the Defendant; that the payment of the monies due under the purchase price save for the secured sum to be paid after registration of the lease was also acknowledged and that because companies act through

ORIGINAL

directors and officers, acts done by those agents within authority bind the company. Reliance in this regard was placed on **Sections 34** and **35** of the **Companies Act, 2015.**

201. Turning to the alleged illegality founded on Milimani HCCC No. 355 of 2012 and interim orders, Counsel submitted that the issue had already been dealt with by the court in the ruling dated 9th November 2023, where the court held that the alleged orders had lapsed by operation of law by the time the Plaintiff and Defendant entered into the agreement. On that footing, Counsel urged that the contract, being in writing and duly executed, was valid and binding under **Section 3(3)** of the **Law of Contract Act.**

202. On specific performance, Counsel submitted that the remedy is equitable and discretionary and depends on the existence of a valid, enforceable contract, and will not issue where there is an adequate alternative remedy in damages or where enforcement would be unjust.

203. Counsel relied on ***Reliable Electrical Engineers (K) Ltd vs Mantrac Kenya Limited [2006] KEHC 2855 (KLR)*** for the governing principles of specific performance, and further cited **Halsbury's Laws of England (4th Edition), Vol. 44, para. 487**, to the effect that a party seeking specific performance must demonstrate performance of essential terms or readiness and willingness to perform, with default in non-essential terms not necessarily barring relief.

ORIGINAL

204. Counsel also relied on the Court of Appeal decision in ***Gurdev Singh Birdi & another vs Abubakar Madhbuti (Civil Appeal No. 165 of 1996),*** emphasizing that a party seeking specific performance must show readiness and willingness to perform essential obligations, and that the equitable jurisdiction aims at doing complete justice.

205. Also cited was ***Nabro Properties Ltd vs Sky Structures Ltd & 2 others (2002) KLR 299***, for the proposition that a party seeking specific performance must show it can comply and is ready and able. Applying those principles, Counsel contended that the Plaintiff duly satisfied this limb and duly demonstrated that she is ready, willing, and able to complete.

206. On the 1st Interested Party's claim, Counsel stated that the same is untenable as the 2nd Interested Party had pleaded and proved fraud relating to the alleged 2007 agreement, tendering evidence including a forensic document examination report attributed to **C.L. Oduor** and **J. Muugeni**, which econfirmed forgery. Counsel relied on **R*.G. Patel vs Lalji Makanji (1957) E.A. 314*** on the strict proof required for allegations of fraud, and further cited ***Curtis vs Chemical Cleaning & Dyeing Co. Ltd (1951) All ER 631*** as to the binding nature of signed contracts absent fraud or misrepresentation, and ***John Waruinge Kamau vs Phoenix Aviation Ltd [2015] eKLR*** on the grounds upon which

ORIGINAL

contracts or consents may be set aside, including fraud and misrepresentation.

207. Counsel stated that the Deputy Land Registrar doubted the authenticity of the search produced by the 1st Interested Party, and that government records showed the relevant registration occurring in 2022 rather than 2014, with the 1st Interested Party failing to explain the delay between 2012 and 2022. Counsel urged the court to treat those circumstances as pointing to dishonesty and to find that the 1st Interested Party had no legitimate claim.

208. On the Defendant's counterclaim, Counsel submitted that prayers challenging the agreement fell with the earlier finding that the Plaintiff's agreement dated 25th September 2015 was valid and binding. As regards rent and mesne profits, Counsel cited ***Rajan Shah t/a Rajan S. Shah & Partners vs Bipin P. Shah [2016] KEHC 1880 (KLR)*** on the nature of mesne profits as compensation recoverable from a person in wrongful possession.

209. Mesne profits, it was stated, are not available in the circumstances there having been no landlord–tenant relationship. Counsel added that, in any event, mesne profits are special damages and must be specifically pleaded and proved, relying on ***Karanja Mbugua & another vs Marybin Holding Co. Ltd [2014] eKLR*** and the requirement under **Order 21 Rule 13** of the Civil Procedure

ORIGINAL

Rules, and maintained that the Defendant had not met that standard.

210. The Plaintiff filed further submissions on 17th November, 2025. Counsel submitted that as a doctrine, *lis pendens* was historically codified under **Section 52** of the **Indian Transfer of Property Act, 1882 (now repealed),** continues to apply in Kenya through **Section 107** of the **Land Registration Act**, and operates as an equitable doctrine intended to preserve the subject matter of litigation and prevent parties from gaining an unfair advantage pendente lite.

211. It was submitted, however, that the doctrine does not render subsequent transactions void; rather, transfers made during the pendency of a suit are only subservient to the outcome of that suit. Counsel relied on ***In re Estate of Solomon Muchiri Macharia [2016] eKLR,*** where the court stated that pendency of a suit does not prevent dealings in the property, but any alienation cannot affect rights declared under a decree in the pending suit. Reference was also made to ***Abdalla Omar Nabhan vs Executor of the Estate of Saad Bin Abdalla Bin Aboud & 2 others [2013] eKLR***.

212. Counsel further invoked Mulla's exposition that the maxim does not annul a conveyance but renders it subject to the litigating parties' rights, and cited ***Otto Mruttu & Partners Ltd t/a Otto Mruttu & Partners Architects v Moi***

ORIGINAL

University [2023] KEHC 25577 (KLR) for the equitable maxim that equity aids the vigilant and not the indolent.

213. Counsel submitted that the Defendant and the 1st Interested Party wrongly invoked the doctrine of lis pendens on the basis of HCCC No. 355 of 2012, contending that the suit had been dormant for over a decade and that the 1st Interested Party was seeking equitable relief despite inordinate delay.

214. It was argued that the court had already found the injunction issued to have lapsed and had dismissed the 1st Interested Party's application dated 17th November 2022, a determination said to be consistent with equitable principles and **Order 40 Rule 6** of the **Civil Procedure Rules** on the expiry of interlocutory injunctions.

215. Counsel further contended that the delay in prosecuting the earlier suit was unexplained and amounted to abandonment, that *lis pendens* is an equitable doctrine to be used as a shield and not a sword, and that the Defendant, having participated in both transactions, could not rely on it to defeat the Plaintiff's bargain.

216. It was also argued that *lis pendens* could not apply where the earlier agreement was itself impugned, given evidence that the 2nd Interested Party never executed it, a position supported by a document examiner's findings and the existence of a pending criminal investigation

ORIGINAL

217. It was submitted that, under the then applicable **Companies Act (repealed),** the alleged agreement required execution by two directors, and that a single signature would not validate it, thereby undermining any attempt to elevate that disputed instrument into an equitable bar against the Plaintiff.

218. In any event, Counsel asserted, the 1st Interested Party had settled HCCOMM 355 of 2012 through a consent order issued on 11th July 2023 and that the consent order compromised both the 1st Interested Party's claim and the Defendant's counterclaim, with finality and without reservations, with the consequence that there was no longer any pending suit or subsisting rival claim capable of grounding *lis pendens.*

219. Turning to the enforceability of the Plaintiff's agreement, on payment and performance, Counsel maintained that the payments were made pursuant to the Defendant's own instructions conveyed through its CEO and that the ultimate beneficiaries were the Defendant and/or its directors and shareholders, including payments to Aberdare Safari Hotels Limited and to HHM Advocates.

220. It was submitted that the Defendant's witnesses had acknowledged that the 2nd Interested Party was the project CEO who customarily dealt with purchasers directly without requiring individual board resolutions for each sale.

ORIGINAL

221. Counsel submitted that any denial of receipt of payments was defeated by **Section 25(5)** of the **Limitation of Actions Act,** arguing that an acknowledgment of a debt binds the acknowledger and successors in title. Reliance was placed on the Defendant's letter dated 19th December, 2018 as a clear and irrevocable acknowledgment that the payments were made at the Defendant's behest, rendering it untenable for the Defendant to subsequently dispute receipt. It was further argued that complaints about the absence of a written variation were misplaced, as the Plaintiff's case was not founded on pleading a formal variation but on the Defendant's own written acknowledgment and conduct.

222. Counsel further contended that completion delays were attributable to the Defendant, notwithstanding the Plaintiff's readiness and willingness to complete, including through mortgage financing, which was frustrated by the Defendant's refusal to issue the requisite undertaking instructions.

Analysis and Determination

223. Having considered the pleadings, evidence, testimonies and the submissions, the issues that arise for determination are:

i. *Whether the Plaintiff or the 1st Interested Party has established a valid and enforceable proprietary interest in House No. 1D, L.R. No. 27754, Kihingo Village Waridi Gardens?*

ii. *What are the appropriate reliefs to issue?*

Applicable Legal Principles

ORIGINAL

224. The present dispute revolves around the ownership of House Number 1D situated on L.R. Reference Number 27754. The Plaintiff and the 1st Interested Party primarily seek orders of specific performance, urging the court to compel the Defendant to transfer the suit premises to them. The Defendant, on the other hand, contests both claims and disputes that neither the Plaintiff nor the 1st Interested Party is entitled to the property.

225. The Plaintiff's case is that she entered into an oral agreement with the Defendant for the purchase of the suit premises, House No. 1D, which subsequently crystallized into a written agreement for lease dated 25th September 2015. Pursuant to that agreement, she was granted possession of the property.

226. She contends that she paid a total sum of Kshs. 40,687,170, leaving a balance of Kshs. 40,000,000 which was to be settled by her financier upon completion of the transaction.

227. Notwithstanding this, the Plaintiff asserts that the Defendant has failed and refused to honor its obligations by issuing her with the duly registered transfer of lease and charge in favour of her financier. The 2nd Interested Party supports the Plaintiff's case. It is his position that the Plaintiff's agreement is legitimate and that she duly completed her part of the bargain. It is his contention that the Defendant is responsible for frustrating the transaction.

228. Advancing a different claim, the 1st Interested Party states that he is the legitimate proprietor of the suit property. His case is that the suit premises, House No. 1D, was allocated to him by the Defendant and its parent company, Wagema Limited, in lieu of outstanding legal fees arising from extensive legal services he rendered to them in connection with the Kihingo Village (Waridi Gardens) project.

229. He contends that pursuant to this arrangement, the parties executed a sale agreement dated 28th November, 2007 under which he purchased the property at an agreed consideration of Kshs. 42,800,000, largely by way of set-off against accrued legal fees, with the balance payable in cash.

230. He asserts that he fully performed his obligations under the agreement, was given vacant possession of the suit property, and that the Defendant and Wagema Limited thereafter breached the agreement by failing to execute and register the lease in his favour and by evicting him from the premises.

231. The 1st interested Party maintains that the Defendant and Wagema Limited remain indebted to him in substantial sums on account of unpaid legal fees, which he contends exceed the value of the suit property, and that his entitlement to House No. 1D arises from this contractual and financial arrangement.

232. The Defendant on its part asserts that neither the Plaintiff nor the 1st Interested Party have any claim to the property. It contends that the agreement relied upon by the Plaintiff dated 25th September 2015 is *void ab initio*, having been executed in violation of subsisting injunctive orders and without any valid company resolution authorizing the transaction. In any event, the Defendant maintains that the Plaintiff dealt with Ndung'u Gethenji in his personal capacity and not with the Defendant company, rendering the agreement *ultra vires* and unenforceable.

233. Alternatively, it is argued by the Defendant that the Plaintiff cannot be said to have adhered to the terms of the sale agreement relied on her actions being inconsistent with the contractual framework governing the sale of the other housing units, and that the alleged payments were not made to the Defendant but to other entities

234. From the foregoing narrative, it is evident that the dispute before the court turns on rival claims over the suit property, with each party bearing the burden of establishing the legitimacy of its claim. This obligation flows from the settled principle of law that he who alleges must prove, a maxim firmly entrenched in law and practice and enshrined in **Section 107(1)** and **(2)** of the **Evidence Act,** which provides as follows:

> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the***

existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

235. And **Sections 109** and **112** of the same Act which state:

> ***"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> ***"112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

236. It is also notable that allegations of fraud have been expressly pleaded in the matter. In law, such allegations attract a heightened burden of proof, requiring the party asserting fraud to not only plead the particulars with specificity, but also to strictly prove the same to a standard higher than a balance of probabilities, although not as high as beyond reasonable doubt.

237. Speaking to this, the Court of Appeal in ***Demutila Nanyama Pururmu vs Salim Mohamed Salim [2021] eKLR*** relying

on an earlier exposition by ***Vijay Morjaria vs Nansingh Madhusingh Darbar & Another[2000]eKLR*** noted thus:

> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."***

238. As regards the standard of proof, the Court of Appeal in ***Demutila Nanyama Pururmu vs Salim Mohamed Salim (supra)*** looked to its earlier decision in ***Kinyanjui Kamau vs George Kamau [2015] eKLR*** wherein it had held:

> ***"…It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in***

ORIGINAL

ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases…" In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

239. The court will be so guided.

Whether the Plaintiff or the 1st Interested Party has established a valid and enforceable proprietary interest in House No. 1D, L.R. No. 27754

240. The Plaintiff and the 1st Interested Party seek, *inter alia*, orders of specific performance. Specific performance is an equitable and discretionary remedy. As stated in **Chitty on Contracts**, **28th Edition (Sweet & Maxwell, 1999), Chapter 28, paragraphs 027 and 028**:

> ***"Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far***

ORIGINAL

as possible by fixed rules and principles…specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party…severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible."

241. In ***Reliable Electrical Engineers (K) Ltd vs Mantrac Kenya Limited [2006] eKLR*** the court observed as follows:

"Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality,

ORIGINAL

which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant."

242. More recently, the Court of Appeal in ***Macho & another vs Athuman & 2 others (Civil Appeal E013 of 2022) [2025] KECA 2078 (KLR) (5 December 2025) (Judgment)*** stated thus:

"An award of specific performance is in principle an equitable relief which lies within the court's discretion to grant. It is issued where common law remedies, such as pecuniary damages will be inadequate. An order of specific performance mainly enforces the terms of an executed contract and, as in the present case, contracts relating to land or interest therein We respectfully concur with the findings of this Court in Michael Murithi Muthii vs. Cecilia Wanjiru Cooper & 3

ORIGINAL

others (2021) KECA 964 (KLR) where it was held that:_As regards whether an order of specific performance was properly issued in the circumstances of this appeal, it is worth repeating that such an order is an equitable remedy issued at the discretion of the court. It will be issued where the judge is satisfied that it is equitable to grant it. As is the norm, an equitable remedy will not be granted to a party who does not deserve it, for example by reason of unclean hands or failure to himself to do equity. Where a judge has exercised his discretion, this Court will not interfere unless it is demonstrated that he misdirected himself in law, or he considered matters he should not have considered or he failed to considered matters he should have considered or that the decision is plainly wrong. (See United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] E.A 898)."

243. What clearly emerges from the foregoing authorities is that a plea for specific performance is predicated, first and foremost, on the existence of a valid, lawful, and enforceable agreement. Absent such an agreement, the equitable jurisdiction of the court cannot be invoked.

ORIGINAL

244. In the present matter, there are two competing agreements placed before the court, each forming the basis upon which specific performance is sought. In determining the availability of this relief, the court must therefore interrogate the validity and enforceability of each agreement.

245. Considering that the 1st Interested Party's agreement was first in time, the court will begin with the same. It is undisputed that the 1st Interested Party acted as an advocate for the Defendant and related companies with respect to the project, Kihingo Village Waridi Gardens.

246. It is the 1st Interested Party's case that during the course of the engagement, it became clear that the Defendant was unable to fully discharge its obligations towards its consultants, including him, and that it was agreed that the Defendant and its sister company, Wagema Limited, would allocate houses in the estate to such consultants as would be willing to take up houses, in lieu of fees.

247. In this respect, he was allocated the suit property, House 1D and an agreement was entered into between himself and the Defendant on the 28th November, 2007, a copy of which he adduced. He maintains that pursuant thereto, the Defendant agreed to sell him the property at Kshs 42,800,000, and that the purchase price was to be paid as follows, Kshs 29, 960,000 to be offset against the legal fees whereas Kshs 12, 840,000 was to be paid before completion.

248. According to the 1st Interested Party, variations were made to the house which pushed up its value to Kshs 71,011,726.35; that he rendered legal serviced to the tune of Kshs. 105,662,297 and that when this amount is set off against the property's agreed value of Kshs. 71,011,726.35, the Defendant will still be indebted to him in the sum of Kshs. 34,650,571.00.

249. He asserted that he made substantial payments towards the purchase price through a combination of credit notes issued in his favour in the sum of Kshs. 37,678,919.24, which he duly produced in evidence, together with cash payments deposited into the Defendant's escrow account amounting to Kshs. 1,111,454.

250. On that basis, he maintained that he has demonstrated substantial performance on his part and expressed his willingness to pay any balance of the purchase price, while contending that such balance ought to be set off against the amount owed to him by the Defendant.

251. The validity of the impugned agreement is challenged by the 2nd Interested Party, who asserts that he did not sign the agreement and his signature thereon has been forged. In support of this assertion, he relied on the expert evidence of DW5, Jacob Oduor Muugeni, whose forensic document examination report was produced in evidence. It was DW5's testimony that, upon examining the signatures appearing on the subject agreement, he concluded that James Gethenji

Ndung'u was not the author of the signature attributed to him therein

252. On his part, the 1st Interested Party states that the report's probative value has been greatly weakened as the expert did not provide evidence of his qualifications or competence as a handwriting expert. Similarly, he admitted not having attached the agreement he examined to his report, and that the sample signatures provided were not similar to those in the agreement, and that he never inquired who else had executed the agreement.

253. It is indeed trite that an expert opinion is not binding on the court. It must be weighed against the totality of the evidence and may be accepted or rejected, in whole or in part, depending on its soundness and the surrounding circumstances. As Odunga J. (as he then was) expressed in the case of ***Bernard Philip Mutiso vs Tabitha Mutiso [2022] eKLR***:

> ***"In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that: "It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be***

perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

254. In the case of ***Stephen Kinini Wang'ondu vs The Ark Limited [2016] KEHC 3449 (KLR)*** cited with approval by the ***Court of Appeal in Kagina vs Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment),*** the court undertook an in-depth analysis of the probative value of expert evidence aptly observing thus:

> ***"Firstly, expert evidence does not "trump all other evidence".7 It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which***

is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.12 A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[12]

A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd. v. Minories Finance Ltd. and Another[13] Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “[i]f the reasons stand up the opinion does, if not, not.” A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. Where there is a conflict between experts on a fundamental point, it is the court’s task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning...””

....It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate

standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence". An expert report is therefore only as good as the assumptions on which it is based."

255. In the present case, the forensic document examiner's opinion that Mr. James Gethenji Ndung'u did not author the signature attributed to him does not stand in isolation. Rather, it is reinforced by the surrounding factual inconsistencies emerging from the oral and documentary evidence, including that of the 1st Interested Party himself.

256. It is common ground that Mr. Fredrick did not execute the agreement. While DW3 acknowledged his own signature, he was unable to identify or explain the third signature appearing on the document and expressly testified that he did not recognise it.

257. Critically, no consistent or cogent evidence was tendered to demonstrate who, apart from DW3, executed the agreement on behalf of the Defendant, or under what authority such execution was undertaken.

258. Even the 1st Interested Party himself was unable to confirm whether DW6 signed the agreement or to identify the other

ORIGINAL

alleged signatory. He equally conceded that he did not witness any of the Defendant's representatives execute the agreement and that Mr. Mutungi only witnessed his signature.

259. Although the 1st Interested Party stated that it was his practice to forward agreements to the Defendant for execution under seal and then return them to him, he neither produced correspondence evidencing such forwarding, nor explain how the executed agreement ultimately came into his possession.

260. The court notes that the 1st Interested Party placed reliance on a letter dated 15th June 2011, authored by the 2nd Interested Party, in which reference is made to the impugned agreement of 28th November 2007. While the document does indeed make such reference to the agreement, the 2nd Interested Party's testimony was that the purpose of the 2011 correspondence was to dispute the alleged sale. In any event, a document cannot derive legitimacy from a later instrument whose maker expressly disowns the foundational transaction upon which it is premised.

261. Ultimately, applying the settled principle that expert evidence is only as persuasive as the factual substratum upon which it rests, and must be weighed against the totality of the evidence, the court finds that the cumulative inconsistencies surrounding the execution of the impugned agreement remain unresolved.

ORIGINAL

262. When the forensic opinion is assessed against this evidentiary background, it emerges as both inconsistent and unpersuasive. No competing forensic opinion was tendered to rebut the findings of DW5.

263. In the absence of any such rebuttal, and considering the totality of the evidence before the court, the authenticity and proper execution of the agreement were not proved by the Defendant and the 1st Interested Party on a balance of probabilities. The court is accordingly satisfied that the alleged agreement dated 28th November 2007 is tainted by fraud.

264. The foregoing finding has clear legal consequences. It is settled law that fraud vitiates everything, and a contract founded on fraud is void *ab initio*, incapable of creating or conferring any legal rights or obligations. In ***Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR***, the Court of Appeal emphatically held that no interest in land can pass under a transaction tainted by fraud, such a transaction being a nullity in law that cannot be cured, validated, or sanitised by subsequent conduct or equitable considerations.

265. Beyond the question of authenticity and statutory enforceability of the alleged agreement of 28th November 2007, the court must also interrogate whether the 1st Interested Party's pursuit of conveyance of House No. 1D,

ORIGINAL

while simultaneously asserting substantial monies amounts to an inequitable double benefit thus disentitling him to the discretionary relief of specific performance.

266. In this context, the court has considered the consent recorded on 11th July 2023 in HCCC No. 355 of 2012, which is admitted by the 1st Interested Party, and which states *inter alia:*

> ***" That the 1st and 2nd Defendants jointly and severally owe the Plaintiff [the 1st Interested Party herein] the sum of Kshs 130,000,000/= in lieu of his legal fees for professional services rendered in various matters.***
> ***That the parties undertake to continue with negotiations with respect to outstanding issues in this suit in a view to an amicable settlement."***

267. The Defendant's position is that by entering into the said consent, the 1st Interested Party effectively relinquished any claim to the suit property. The 1st Interested Party disputes this and maintains that the consent did not settle the entire suit, leaving ownership of the suit property and damages for determination.

268. Indeed, as earlier found by this court in its ruling of 11th April, 2024, there is no express or implied relinquishment of the 1st Interested Party's claim to House No. 1D. The consent acknowledges a monetary liability in lieu of legal fees and

ORIGINAL

contemplates continued negotiations on other outstanding issues.

269. The consent does not state that the suit property was surrendered, substituted, or compromised in exchange for the sum acknowledged, nor does it expressly extinguish the claim founded on the alleged agreement for lease. However, the absence of an express relinquishment does not, of itself, establish entitlement to an order of specific performance.

270. In that context, the evidence further shows that the arrangement relied upon by the 1st Interested Party arose from the Defendant's failure to settle legal fees. By the 1st Interested Party's own admission, those fees stood at approximately Kshs. 105,662,297, while the consent subsequently acknowledged a monetary liability of Kshs. 130,000,000 in satisfaction of that claim.

271. To permit the 1st Interested Party, having become entitled to that sum by consent, to additionally obtain the suit property would amount to double recovery and unjust enrichment. Such a result would offend settled equitable principles and disentitle the 1st Interested Party to the discretionary remedy of specific performance in respect of House No. 1D.

272. In the end, the court finds the 1st Interested Party's plea for specific performance to be untenable. His recourse, if any, lies in the monies acknowledged or otherwise proven as

ORIGINAL

against the Defendant and/or including, where appropriate, enforcement of the consent dated 11th July 2023.

273. Having so found with respect to the 1st Interested Party's claim, the court now turns to consider the Plaintiff's case. It is the Plaintiff's evidence that she initially entered into an oral agreement with the Defendant in respect of the suit premises, which agreement was subsequently reduced into writing and formalised on 25th September 2015.

274. The Defendant and the 1st Interested Party contend that this agreement is *void ab initio,* on the grounds that it was entered into in breach of subsisting injunctive orders, offended the doctrine of *lis pendens*, and lacked the requisite authority of the Defendant company.

275. The contention that the Plaintiff's agreement was executed in breach of injunctive orders issued on 4th June, 2012 and affirmed on 5th December 2013 has already been determined by this court. In its ruling delivered on 9th November 2023, the court addressed the issue of whether those orders had lapsed by operation of law under **Order 40 Rule 6** of the **Civil Procedure Rules, 2010,** and resolved the issue conclusively noting as follows:

> ***"It is not disputed that as at the time when the Defendant and the Plaintiff executed the Agreement in respect of House No. 1D, the interim Orders had been in place for over a year.***

Even if the court were to compute the time from 5th December, 2013 when the order was affirmed, still as at 25th September, 2015 when the Agreement was executed, the orders would still have been in existence for about 21 months, way above the prescribed period.

Looking at the interim orders that the Applicant is relying on, and the said Order 40 Rule 6 of the Civil Procedure Rules, 2010, the only conclusion that one could come to is that the orders had clearly lapsed by operation of law as at the date the agreement between the Plaintiff and the Defendant was entered into. This court is not aware of any attempt made to have the orders extended by the court. Consequently, the Plaintiff's suit cannot be struck out on the ground that the sale agreement between the Plaintiff and the Defendant was entered into during the existence of a valid court order prohibiting any dealings in the suit property."

276. That question having been settled, the argument founded on breach of injunctive orders is moot. In any event, DW7 testified that the court order in question was only presented for registration and registered in November 2020 as Document No. 2701 of that month, long after the Plaintiff's agreement of 25th September 2015 had been executed.

277. The court next turns to the doctrine of *lis pendens*. *Lis pendens* refers to acts done during the pendency of a suit. In ***Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another (supra)***, the court cited Black's Law Dictionary, 9th Edition, defining *lis pendens* as the jurisdiction, power, or control acquired by a court over property while a legal action is pending.

278. In ***Mawji vs U.S. International University & Another [1976] eKLR,*** the court observed that the doctrine is grounded in public policy and the need for effective administration of justice, and serves to prevent parties from transferring rights in disputed property during litigation so as to prejudice the outcome of the suit.

279. The Court of Appeal in ***Cove Investments Limited vs Rono & 2 others (Civil Appeal (Application) E051 of 2025) [2025] KECA 1089 (KLR) (20 June 2025) (Ruling)*** exhaustively restated the scope, rationale, and continuing applicability of the doctrine of lis pendens in Kenya thus:

> ***"The above doctrine denotes those principles and rules of law which define and limit the operation of the common law maxim pendente lite nihil innovetur, that is, pending the suit nothing should be changed. As was held in Ex parte Thornton [1867] 2 Ch.p.178, as soon as proceedings are commenced to recover or charge specific property, there is lis pendens, that is, a***

pending suit, the consequence of which is that until the litigation is at an end neither litigant can deal with the property to the prejudice of the other.

Madan, JA (as he then was) in Mawji vs. US International University & Ano. [1976] KLR 185, stated thus:

> ***"The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other…"***

Unlike the repealed TPA which expressly provided for the doctrine of lis pendens at Section 52, neither the Land Act nor the Land Registration Act explicitly mentions "lis pendens". However, this common law doctrine of lis pendens is still applicable in Kenya, courtesy of the common law

doctrines and the doctrines of equity preserved by Section 3 (2) (c) of the Judicature Act which provides that the common law and doctrines of equity are applicable in Kenya, provided that the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

38.At this point it is important to point out that Section 106 of the Land Registration Act preserves rights and liabilities arising from the repealed legislation, including those under the TPA, which included the doctrine of lis pendens."

280. The Defendant and the 1st Interested Party assert that the Plaintiff's agreement is void ab initio for having been entered into while Civil Case No. 355 of 2012 and Civil Case No. 350 of 2012 were pending. However, courts have consistently held that transactions undertaken during the pendency of litigation are not void, but are subject to the final determination of the suit.

281. What this means is that the doctrine of *lis pendens* does not nullify contracts; it merely preserves the authority of the

court and prevents parties from defeating pending proceedings through alienation.

282. In this context, although the Plaintiff's agreement was executed while earlier proceedings touching on the suit property were pending, the doctrine of *lis pendens* does not render such agreement void. Its effect is only to subject the transaction to the outcome of the pending litigation.

283. In the circumstances, having found that the 1st Interested Party's agreement was invalid and unenforceable, there exists no competing proprietary interest capable of protection through the doctrine of *lis pendens*. The Plaintiff's agreement therefore falls to be determined on its own contractual validity and is not defeated by the plea of *lis pendens.*

284. The next issue for determination is whether the Defendant validly entered into the agreement with the Plaintiff. The Defendant and the 1st Interested Party contend that the persons with whom the Plaintiff purported to contract with lacked the capacity and authority to bind the Defendant and that their actions were contrary to the Defendant's Memorandum and Articles of Association (MEMOARTS).

285. The Plaintiff, on her part, as supported by the 2nd Interested Party, maintains that she was dealing with the Defendant as a corporate entity acting through its duly appointed directors, and that by operation of the indoor management

rule, a third party dealing with a company is entitled to assume that the company's internal requirements have been complied with.

286. It is trite that a company is a separate legal entity, distinct from its directors and shareholders, and that it acts through its organs and agents. The company's legal personality is independent, with rights and liabilities attaching to it alone. This principle has been consistently affirmed by the courts.

287. In ***Kolaba Enterprises Limited vs Shamshudin Hussein Varvani & another [2014] KEHC 7729 (KLR),*** the court reiterated that a company is "a different person altogether from its subscribers and directors," and that its separate legal existence is a foundational tenet of company law. Accordingly, where a company acts through its authorized agents, it is the company, and not the individual directors, that bears the legal consequences of those acts.

288. Flowing from the principle of separate corporate personality is the doctrine of indoor management, commonly referred to as the rule in ***Turquand's Case***. The rule protects outsiders dealing with a company from being prejudiced by internal irregularities in the company's management, on the premise that such matters lie peculiarly within the company's own knowledge and control.

289. The *Turquand Rule* is now statutorily codified under **Section 34(2)(b)** of the **Companies Act,** which provides that:

> ***"A person dealing with a company is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorize others to do so and is presumed to have acted in good faith unless the contrary is proved."***

290. The Court of Appeal in ***Standard Chartered Bank of Kenya Limited vs Al-Amin & 9 others (Civil Appeal E029 of 2021) [2023] KECA 1059 (KLR) (22 September 2023) (Judgment)*** stated:

> ***".... The Rule in Turquand's Case (supra) applies in this situation. The rule says: "While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called "the indoor management" and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary***

resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained." ***(Emphasis added).Gower's Principles of Modern Company Law has summarized the rule in Turquand's case as follows:-"This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf." (Emphasis added)."***

291. This rule however has exceptions. As explained by the Court of Appeal in ***Standard Chartered Bank of Kenya Limited vs Al-Amin & 9 others (Civil Appeal E029 of 2021) [2023] KECA 1059 (KLR) (22 September 2023) (Judgment):***

"The general preposition put forth in Turquand's case is that a third party dealing with a company is not bound to ensure that all the internal regulations of the company have in fact been complied with (See generally, Gower, The Principles of Modern Company Law, 3rd Edition at pages 151 to 167). The Rule in Turquand's Case however has exceptions. One is that anyone dealing with a company is deemed to have notice of its public documents. Hence, any act which is clearly contrary to these documents will not bind the company, unless subsequently ratified by the company acting through its appropriate organ. The Rule in Turquand's case will also only protect an outsider "unless he has knowledge to the contrary or there are suspicious circumstances putting him on inquiry."

292. Likewise, in ***Arthi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] KECA 816 (KLR),*** the court emphasized that the rule does not apply where the corporate signature is forged, where the outsider knew of internal non-compliance, or where the circumstances were such as to put a reasonable person on inquiry.

293. Turning to the facts of this case, the Plaintiff produced the written agreement dated 27th September, 2015. The

agreement is between the Plaintiff and the Defendant company and bears the signatures of James Ndungu Gethenji and Hilda Gethenji. This is not disputed.

294. It is also common ground, as confirmed by the CR12, that Hilda Gethenji (now deceased) and James Ndungu Gethenji were, at all material times, directors of the Defendant. There is no allegation or evidence to show that the Plaintiff was aware of any internal limitation on their authority, nor that she had notice of any irregularity in the company's internal decision-making.

295. The Defendant contends, through DW1 and DW3, that the transaction was void for want of quorum under Articles 16, 17 and 18 of its MEMOARTS, and that the directors who executed the agreement lacked authority. However, those provisions govern the Defendant's internal management and do not, without more, affect the position of a third party dealing with the company in good faith. In that regard, **Section 34(1)** of the **Companies Act,** provides as follows:

> ***"Power of directors to bind company***
> ***(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is free of any limitation contained in the company's constitution.***
> ***(2)For purposes of subsection (1)—***

(a)a person deals with a company if the person is a party to a transaction or other act to which the company is a party; and(b)a person dealing with a company—

(i)is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorise others to do so;

(ii)is presumed to have acted in good faith unless the contrary is proved; and

(iii)is not to be regarded as having acted in bad faith only because the person knew that a particular act is beyond the powers of the directors under the constitution of the company.

(3)The references in subsection (2) to limitations on the directors' powers under the company's constitution include limitations deriving—

(a)from a resolution of the company or of any class of shareholders of the company; or

(b)from an agreement between the members of the company or of any class of shareholders of the company.

(4)This section does not affect a right of a member of the company to bring proceedings to restrain the doing of an act that is beyond the powers of the directors, but no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of

the company.(5)This section does not affect a liability incurred by the directors, or by any other person, because the directors have exceeded their powers."

296. In the absence of any evidence that the Plaintiff had knowledge of any internal irregularity, lack of quorum, or limitation on the authority of the directors who executed the agreement, and there being no allegation or proof of forgery in respect of the Plaintiff's agreement, the Defendant cannot evade liability by recourse to its internal governance arrangements.

297. Indeed, separately, DW1, DW3 and DW6 each conceded, in one form or another, that strict adherence to the Defendant's internal governance procedures was not always observed in practice. They acknowledged that decisions relating to the sale of houses were at times made informally within the family without formal board resolutions, and that the company operated with a degree of flexibility inconsistent with the rigid application of the MEMOARTS now relied upon.

298. The *Turquand Rule* also comes into play in answer to contests regarding the appointment of Mohamed Muigai Advocates who dealt with the transaction with the Plaintiff on behalf of the Defendant. Having conducted its affairs in that manner, the Defendant cannot selectively invoke its

internal rules to impeach a transaction entered into with a third party who dealt with it in good faith.

299. Applying the doctrine of corporate personality and the rule in ***Turquand's Case***, the court finds that the Defendant is bound by the agreement executed on its behalf with the Plaintiff.

300. Having disposed of all objections touching on the legitimacy, execution, and enforceability of the agreement for lease, the remaining question is whether the Plaintiff discharged her contractual obligations so as to merit the equitable relief of specific performance. Indeed, this forms the basis of the Defendant's alternative plea. It asserts that even if the contract was lawful, the Plaintiff has not met her bargain thereunder

301. The Plaintiff's evidence was that she paid an aggregate sum of Kshs. 40,687,170 towards the purchase price. According to her, the only outstanding amount is the secured balance of Kshs. 40,000,000, which, under the Agreement, was to be remitted by her financier upon completion. She testified that the payments were made between May 2015 and November, 2018, a position corroborated by DW6, who, vide a letter dated 19th December 2018, formally acknowledged receipt of the said sums on behalf of the vendor's side.

302. Notably, the Defendant, through DW1 and DW3 expressly admits receipt of Kshs. 8,000,000. The Plaintiff produced the cheque and corresponding funds remittance documentation

in support thereof. The Plaintiff also adduced cash deposit slips evidencing payment of Kshs. 2,687,817 to Shamsher Limited, bank slips and RTGS confirmations for Kshs. 20,000,000 paid to Mohamed Muigai Advocates.

303. It was conceded in evidence that Aberdare Safari Hotels Limited is a family-related company of the Defendant. PW1 and DW6 produced the CR-12 confirming its directorship, while DW3 admitted on cross-examination that he was both a director and bank signatory of the said company. Upon cross-examination, DW3 conceded that he could very well have missed the deposit of Kshs. 10,000,000 through that entity.

304. A holistic reading of clause 3 of the Agreement demonstrates substantial and, indeed, over-performance by the Plaintiff. Under Clause 3.1, the sum of Kshs. 8,000,000 was payable upon execution of the Agreement. However, the evidence shows that this amount was paid earlier, in August 2015, even before formal execution of the written agreement pursuant to the oral agreement. By then, the Plaintiff had already taken possession of the disputed house with the Defendant's knowledge and consent and proceeded to make payments in excess of the initial deposit threshold, thereby reducing the balance payable.

305. It is also uncontested that the notice clause was never invoked by the Defendant, a factor which, in equity, militates strongly against any later assertion of default.

306. It is evident that the Plaintiff's mode of compliance departed from the strict parameters contemplated under the Agreement. The purchase monies were paid to third-party entities rather than directly to the Defendant, and in a manner not expressly stipulated in the contract.

307. The critical question, however, is whether such deviation amounted to non-compliance so as to vitiate the Agreement or render it void as alleged by the Defendant and 1st Interested Party, or does it, as asserted by the Plaintiff, call for the invocation of the doctrines of waiver and estoppel.

308. In ***Serah Njeri Mwobi vs John Kimani Njoroge, [2013] KECA 501 (KLR),*** the Court of Appeal drew a clear doctrinal distinction, while at the same time demonstrating the interrelationship between *waiver, estoppel, and acquiescence*. The court stated as follows:

> ***"Waiver is the abandonment of a right… either express or implied from conduct… A person who is entitled to rely on a stipulation existing for his benefit alone… may waive it and allow the contract to proceed as though the stipulation did not exist… Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right."***

309. The court further explained that the doctrine of waiver operates to deny a party the right to insist on strict compliance where that party, with full knowledge of the

right, has elected by words or conduct to forego it. Closely allied to this is estoppel, which precludes a party from asserting a position inconsistent with its prior representations or conduct upon which the other party has relied.

310. The court emphasized that where one party, by words or conduct, makes a promise or assurance intended to affect legal relations, and the other party acts upon it, the promisor cannot thereafter resile and revert to the former legal position as though no such assurance had been given.

311. On acquiescence, the court adopted the classical formulation in Halsbury's Laws of England:

> "***Where a person having a right, and seeing another about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as to induce the other to believe that he assents to it, he cannot afterwards be heard to complain.***"

312. A similar approach was reaffirmed by the Court of Appeal in ***Ngaira vs Cheng'oli, Civil Appeal No. 397 of 2017) [2022] KECA 80 (KLR)*** where the court held that even where time was expressly stated to be of the essence, the subsequent conduct of the parties, particularly the absence of protest or repudiation after lapse of contractual timelines was decisive. The court observed:

> ***"It is our position that indeed the agreement stated explicitly that time was of the essence but the conduct of the parties subsequent to the lapse of the timeline set in the agreement should not have been either overlooked or ignored by the trial Judge. Our take on the conduct of the parties' lack of protests of either parties' action towards compliance with their part of the bargain as stipulated in the agreement was sufficient demonstration by implication that the parties desired to carry on with the sale agreement to its logical conclusion despite lapse of time within which to comply."***

313. Guided by the foregoing authorities, the court finds that the Plaintiff's manner of payment did not amount to fundamental non-compliance capable of invalidating the Agreement. The Defendant, acting through DW6, who, as earlier found, possessed ostensible authority directed and sanctioned the impugned mode of payment.

314. The payments were thereafter received, utilised for the Defendant's benefit, and accepted without protest, and the transaction was allowed to proceed on that basis. In the circumstances, the Defendant is deemed to have waived the right to insist on strict contractual compliance and to have acquiesced in the Plaintiff's mode of performance.

315. Equity will not permit a party to benefit from its own inconsistency. The Plaintiff has satisfied the threshold for the grant of specific performance, which remains the most just and efficacious remedy in the circumstances.

What are the appropriate orders to issue?

316. Having resolved the first issue in the Plaintiff's favour, the court finds that the Plaintiff has, as against the 1st Interested Party, proved her entitlement to the remedy of specific performance, and the appropriate reliefs shall issue. Consequently, the Defendant's claims for vacant possession, declarations that the Plaintiff's agreement is void, and all reliefs flowing therefrom are untenable and must fail.

317. Turning to the claims advanced by the 1st Interested Party, the court notes that, in addition to seeking specific performance in respect of the suit property, he also prays for an order for taking of accounts and damages for alleged illegal distress. It is common ground that the prayer for taking of accounts is spent, having been the very basis upon which a consent was entered into between the 1st Interested Party and the Defendant.

318. With regard to the alleged illegal distress, both the 1st Interested Party and the Defendant admit that the distress complained of arose pursuant to orders issued in Miscellaneous Application No. 341 of 2012 on 10th May, 2012. The 1st Interested Party asserts that despite the orders

having been lifted and restraining orders issued, distress continued which was excessive and wrong.

319. Properly understood, therefore, the grievance is not a stand-alone claim for illegal distress and/or eviction, but one grounded in the implementation, scope, or alleged misuse of orders issued by another court.

320. It is settled law that questions relating to the interpretation, enforcement, breach, or contempt of court orders must be ventilated before the court that issued those orders. This court as such has no jurisdiction to entertain this plea. The same equally falls.

321. For those reasons, the court makes the following final orders:

a) **An order of specific performance is hereby issued vesting House Number 1D on Land Reference Number 27754 in the Plaintiff by the Defendant upon and subject to the Plaintiff's financier furnishing an irrevocable professional undertaking to pay to the Defendant the balance of Kshs. 40,000,000 in accordance with Clause 3.1.2 of the Agreement for Lease dated 25th September 2015 within thirty days (30) days of this Judgment.**

b) **In the event the Defendant does not comply with order (a) above within the said thirty (30) days, the Deputy Registrar of this court, upon being**

satisfied of the professional undertaking given by the Plaintiff's financier to pay to the Defendant Kshs 40,000,000, to sign all the relevant conveyance documents on behalf of the Defendant.

c) **A permanent injunction does hereby issue restraining the Defendant and or the 1st Interested Party, by themselves, their agents, their servants, their employees or otherwise howsoever from transferring or dealing with House Number 1D on Land Reference Number 27754 in any way howsoever as would prejudice the interests of the Plaintiff.**

d) **The Defendant's Amended Defence and Counterclaim dated 24th January, 2022 be and is hereby dismissed with costs.**

e) **Save for the consent recorded in HCCC No. 355 of 2012, and costs in that suit, which shall proceed separately to the exclusion of the Plaintiff in ELC No. 256 of 2019, ALL the other prayers relating to House Number 1D on Land Reference Number 27754 in the 1st Interested Party's Plaint dated 31st March, 2012 in HCCC No. 355 of 2012 be and are hereby dismissed with no order as to costs.**

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f) The Defendant shall bear the costs of the suit in ELC 256 of 2019.

Dated, signed and delivered virtually in Nairobi this 19th day of February, 2026.

O. A. Angote
Judge

In the presence of:

Ms Shaw for the Plaintiff

Ms Wachuka for Mr. King'ara for the Defendant

Ms Atieno for Mr. Koceyo for the 1st Interested Party

Ms Gicharu for Mr. Kiragu for the 2nd Interested Party

Court Assistant - Tracy

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