



REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA**

ELC CIV. CASE NO. 388 OF 2010

PAULINE MUTEI MAKUMU.....1ST PLAINTIFF
KILUNGU JUSTUS MULI.....2ND PLAINTIFF

= VERSUS =

URSULA KRESZENNTIA.....1ST DEFENDANT

MONIKA HERKENRATH.....2ND DEFENDANT

PETER JURGEN HERKENRATH.....3RD DEFENDANT

OSCAR JUMA.....4TH DEFENDANT

J U D G E M E N T

1. Pauline Mutee Makumu and Kilungu Justus Muli the plaintiffs herein commenced their suit against the 1st and 2nd defendants vide a plaint dated 3rd November 2010. The plaint was subsequently amended on 11th September and filed on 12/9/2012 to include the 3rd and 4th defendants. The description of the parties is contained at paragraphs 1 – 3B of the amended plaint.

2. The plaintiffs pleaded that by a deed of agreement dated 27th October 2003, the plaintiffs and 1st and 2nd defendants agreed that the plaintiffs would be entitled to sole proprietorship of a guest house business on plot number 2444/1/MN in Shanzu, Mombasa together with the title to that plot upon the plaintiffs paying their share of Kshs.6,500,000 each. It is the plaintiffs' case that they paid the money but the 1st and 2nd defendants by a letter dated 13/10/2010 purported to cancel the agreement of sale and transfer. That subsequently on 30/10/2010 and 1/11/2010 and on 2/11/2010, the 1st and 2nd defendants attempted to evict the 1st plaintiff from the suit premises.

3. The plaintiffs pleaded that as of November 2010, the 1st and 2nd defendants held the title to the suit property in trust for them. That while this suit was still pending, the 1st and 2nd defendant sold and transferred the suit property to the 3rd defendant who was the owner of the adjacent plot. That the 3rd defendant prior to the signing of the sale agreement had notice that the plaintiffs were in actual possession of the suit premises.

4. The plaintiffs aver that they were never served with the pleadings in CMCC No. 1141 of 2012 commenced by the 3rd defendant. That on 28, 29, and 30th July 2012 at around 4am, the 3rd defendant through the 4th defendant hired goons and used police to evict the plaintiffs from the suit premises. It is the plaintiffs' case that the eviction was unlawful and the particulars of the illegalities are stated in **paragraph 11k** of the plaint. The plaintiffs pleaded that as a consequence of the unlawful eviction, they suffered loss as follows:

- (a) Loss of buildings valued at Kshs.50million.
- (b) Loss of business.
- (c) Loss of goodwill.
- (d) Emotional stress and social stigma.

5. The plaintiffs thus prays for judgment against all the defendants for:

- (a) **A declaration that the 1st and 2nd defendants acted in contempt of court when they sold and transferred Plot sub-division**

No. 2444 (Original Number 1938/1) Section 1 Mainland North to the 3rd defendant.

(b) A declaration that the sale and transfer of Plot sub-division Number 2444 (Original No. 1938/1) Section 1 Mainland North was in breach of a fiduciary duty owed to the plaintiffs by the 1st and 2nd defendants.

(c) A declaration that the sale and transfer of Plot sub-division Number 2444 (Original No. 1938/1) Section 1 Mainland North by the 1st and 2nd defendants to the 3rd defendants dated 26/6/2012 is null and void.

(d) An order of cancellation of the transfer dated 26/4/2012 and the entry thereof over Plot sub-division Number 2444 (Original No. 1938/1) Section 1 Mainland North.

(e) An order for specific performance of Deed of Agreement dated 27/10/2003 and a mandatory injunction compelling the 1st and 2nd defendants to within 30 days of the order, perform their obligations under the agreement by executing a transfer of half share of Plot No. 2444/MN/1 and to perform every other act and avail every other document required by the plaintiff, Lands office and/or any other authority for prompt and effective registration of the plaintiff's half share of the aforesaid suit property to the plaintiffs as equal shareholders.

(f) A declaration that the threat and/or intended eviction and/or interference is in breach of the Deed of Agreement, trespass to land and goods, illegal and unlawful.

(g) An injunction restraining the defendants by themselves, their servant's and/or agents from evicting the plaintiff from the suit business premises, removing her goods, locking her out, obstructing her and her customers access to the business premises, or in any other way interfering with her quiet occupation of the business premises known as Petuscha Guest House or selling charging, or otherwise disposing any interest in Plot No. 2444/MN/1.

(h) An order for compensation of the value of the buildings, fixtures and movables destroyed on 28th, 29th and 30th July 2012 and all the consequential business losses by the 1st, 2nd, 3rd and 4th defendants jointly and severally.

(i) Costs of this suit.

6. The 1st and 2nd defendants filed a joint statement of defence and counter-claim dated 27th November, 2010 and filed on 8th December 2010. The 3rd and 4th defendants filed their separate statements of defences on 14th October 2013.

7. The 1st and 2nd defendants admitted paragraph 4 of the plaint in so far as the deed of Agreement dated 27th October 2003 is concerned. That they are aware of the business operated as Petuscha Guest House since October 2003 but not Pestuscha Garden Lodge. It is the 1st and 2nd defendants' contention that the 1st plaintiff did not pay her share of the agreed Kshs 6,500,000 as alleged in paragraph 7 of the plaint.

8. The 1st and 2nd defendants further pleaded that the 1st plaintiff stand to suffer nothing if she is evicted from the suit premises as she only holds a right to operate Petuscha Guest House with no ownership rights on the property. In the counter-claim, the 1st and 2nd defendants pleaded that they are the rightful owners of the suit land.

9. The 1st and 2nd defendants pleaded further that the 1st plaintiff misrepresented to them that she was a cousin of their brother-in-law Charles Ngoi – deceased and that acting on this misrepresentation, the 1st and 2nd defendants appointed the 1st plaintiff as their assignee vide a **“Deed of Agreement”** jointly with the defendants' nephew Kilungu Justus Muli to oversee the re-construction of Petuscha Guest House and subsequently bring it to its normal operation. The said defendants added that the obligation included following up a case they (defendants) instituted for compensation as a result of the fire which had destroyed the property in September 2003.

10. That the deed of agreement was signed when there was no structure on the suit property and the rebuilding of the guest house was to be done from funds sent by the 1st & 2nd defendants to the 1st plaintiff which they did send an amount of Kshs.17,408,643. That the two defendants were to transfer the **“business interest”** in the business of running Petuscha Guest House to the plaintiff upon the completion of the re-construction and payment of Kshs.6.5 million.

11. Pursuant to this agreement, the plaintiffs registered the business name under Petuscha Guest House on 12th January 2004. The defendants pleaded that they only discovered the misrepresentation in October 2010.

12. The 1st and 2nd defendants stated that the 1st plaintiff attempted to defraud them when on 20th April 2010, she registered a new name as Petuscha Garden Lodge as the same was in breach of the intention of assigning the business interest. The particulars of fraud are set out in para 31 of the defence are *interalia* as follows:

(a) *Purporting to change the defendants' guest house from PETUSCHA GUEST HOUSE to PETUSCHA GARDEN LODGE without the defendants' knowledge or consent.*

(b) *Misrepresenting that PETUSCHA GUEST HOUSE has been replaced and renamed PETUSCHA GARDEN LODGE.*

(c) *Misrepresenting to the Registrar General that PETUSCHA GARDEN LODGE stands on plot number MN/A/2444 which is registered in the name of the defendants where only PETUSCHA GUEST HOUSE stands and where PETUSCHA GUEST HOUSE*

business is registered in the name of the plaintiff and Kilungu Muli Justus.

(d) Using substandard materials in the re-construction of PETUSCHA GUEST HOUSE in total disregard of the defendants' wishes and intentions and inflating the quantities of the construction bills.

(e) Failing to give a proper account of all the money sent to her by the defendants in total breach of her trust and agency.

13. The 1st & 2nd defendants stated that they had no intention of selling Petuscha Guest House to the 1st plaintiff except assign a right to run the business. The defendants therefore in their counter-claim prays for judgment to be entered against the plaintiff in the following terms:

(i) A declaration that the defendants are the lawful and rightful owners of the suit premises and is entitled to vacant possession thereof to the exclusion of the plaintiff or any other party and for a permanent injunction restraining the plaintiff by himself, his agent and/or any other persons authorized by the plaintiff from entering and/or remaining in occupation, alienating, disposing, leasing, mortgaging, collecting rent, manging or interfering with the defendants' quite possession, interfering with the defendant's and/or the Agent's tenants' quite enjoyment and occupation therein and or dealing with premises in all that parcel of land known as plot number MN/1/2444 and under the Title Number 15473.

(ii) A declaration that the purposed deed of agreement dated 27th October 2003 is in all the circumstances of this case, null, void and unenforceable against the defendants, respectively for want of consideration and the same having been cancelled.

(iii) For an order directed at the plaintiff to provide and render a true, full and comprehensive account of all the monies sent to her by the defendants for the reconstruction of PETUSCHA GUEST HOUSE and for an order to refund all the monies the plaintiff has failed to account for and misappropriated for her own personal use during the period she had been assigned to act on behalf of the defendants and an order of accounts for the incoming monies collected from the defendants' PETUSCHA GUEST HOUSE from the date notice was given to cease operations until a vacant possession is given and the said income be given to the defendants.

(iv) Costs of and other incidental to the suit.

(v) Interest on (iii) and (iv) above at court rates.

(vi) Any other or further relief as this court may deem fit.

14. The 3rd defendant filed his statement of defence on 14th October 2013. The 3rd defendant denied the plaintiffs' claim and proceeded to plead that at the time of purchasing the suit property, he was unaware of the existence of this suit. That he entered in agreement for sale with the 1st and 2nd defendants on 23/3/2012 and paid the agreed purchase price. Thereafter a transfer was signed and the suit property became registered in his name. That he did due diligence prior to purchase.

15. The 3rd defendant pleaded that he issued a vacation notice to the plaintiffs which was ignored. He therefore instituted MSA CMCC 1141 of 2012 through the 4th defendant and obtained eviction orders to remove the plaintiffs from the suit property. That all the notices in CMCC 1141 of 2012 were duly served on the plaintiffs. The eviction order was subsequently enforced. The 3rd defendant thus denies the claims contained in paragraphs 11 I, 11J, and 11K of the plaint. He further pleaded that the suit is statute barred and an abuse of the court process. He urged the court to dismiss the case with costs to him.

16. The 4th defendant vide his statement of defence filed on 14th October 2013 also denied the plaintiffs claim in toto. In reply to paragraphs 11F and 11G, the 4th defendant pleaded that he only acted as an advocate for the 3rd defendant in filing and prosecuting MSA CMCC 1141 of 2012. That all court processes were served on the plaintiff. The 4th defendant pleaded that he conducted himself professionally in the conduct of the subject proceedings. That the current suit discloses no cause of action as against him and the same is merely intended to annoy and embarrass him. He stated that he is not liable to compensate the plaintiffs and urged the court to dismiss the suit as against him with costs.

17. At the close of pleadings and determination of interlocutory applications, the suit was set down for hearing. The 1st plaintiff gave evidence as **PW1** on 14th March 2014 before the late Mukunya J. She said the 2nd plaintiff is her business partner. That she knew the 1st and 2nd defendants who is a couple through Charles Ngoi – deceased. That the 2nd plaintiff was the son of Charles Ngoi – deceased and she met him at the suit premises.

18. **PW1** continued that the bar and restaurant was run by Charles and his wife Charlotte while Charlotte solely operated the guest house. **PW1** said she had a bureau for communications inside the guest house. **PW1** stated that she knew the 1st and 2nd defendants very well. That Charlotte was a sister to the 1st defendant. That after the death of Charlotte and while Charles was in hospital, the 1st and 2nd defendants came to give out the business to someone who could look after it.

19. **PW1** stated further that while still discussing on the takeover of the business, Charles died. The discussions were that the 1st plaintiff was to solely run the guest house while the 2nd plaintiff was to operate the bar and restaurant. Later this was reduced into writing. That she agreed to run the guest house in good faith in April 2003 because the 1st and 2nd defendants never lived in Kenya. That she run the business until 1st September 2003 when a fire broke out at the premises and burnt down everything.

20. **PW1** said she informed the 1st defendant of the fire. That when he came, the 1st defendant said he wanted to sell the plot. The witness continued that the 1st defendant returned to Europe but came back to Kenya with her husband after two weeks. An agreement was therefore made on 27/10/2003 (produced as exhibit Pex 1). That the agreement did not set time limit for making payment or termination clause. That when **PW1** signed the agreement there was no Petuscha Guest House or bar and restaurant standing on the suitland.

21. **PW1** also produced as Pex 2 a special power of attorney given by the 1st and 2nd defendants to follow up on the compensation claim. Using the special P.O.A., **PW1** filed the case No. HCCC 202 of 2005 where Judgment was delivered and an award of Kshs15,799,124 made to Petuscha Guest House. **PW1** gave a breakdown on how this money was spent i.e.

- Advocates:	Kshs.1,799,124
- Her Commission @20%	Kshs.2,800,000
- 2 nd plaintiff (as admin. of Charles & Charlotte):	Kshs.9,637,290
- 1 st and 2 nd defendants to receive:	Kshs.4,362,710

22. **PW1** continued that she transferred Kshs.12 million by R.T.G.S. to the 1st and 2nd defendants and also paid them cash of Kshs.2 million. It is **PW1's** evidence that the sum of Kshs.6.5 million was paid to the 1st and 2nd defendants from the disbursements meaning she effectively paid for the plot and the same was explained to the 1st and 2nd defendants. That what remained was the transfer of the land in their names.

23. **PW1** also said she rebuilt the hotel and handed over the key to 1st and 2nd defendants in November/December 2004. That she built the lodge and furnished it by October 2005. That the 1st and 2nd defendants came to Kenya in October 2010 but did not give her any reason only saying her contract is terminated and asked her to pack and go. **PW1** said she continued living at the hotel until 28/07/2012 at 4am when she was woken up by her security that there were armed rowdy youths and Kisauni OCS at the gate. Three bulldozers broke the gate and I was ordered to leave. The guests were thrown out. She reported the matter to Bamburi Police Station but she was told they were only obeying court orders. That the youths stayed in the suit premises until 9am. The demolition was undertaken yet they had not been served with any order.

24. **PW1** called her lawyer who later saw the order in CMCC 1141 of 2012 allowing the demolition. Her advocate subsequently obtained order on Monday (30/7/2012) stopping further demolitions. That by this time, all the structures had been demolished. No business is there today. **PW1** then engaged a valuer to do the valuation of the demolished structures. The valuation report was marked as MFI p3.

25. **PW1** stated that she has sued the 3rd defendant because the property was transferred to him while the suit MISC No. 12 was pending. She had not known that the 3rd defendant had purchased the suit premises. That the 3rd defendant together with the 4th defendant got an order to demolish her hotel. The property is valued at approximately Kshs 250,000,000 but the experts think it is Kshs.100 million. That the 4th defendant was present at the suit premises during the demolition exercise. She blames the 4th defendant for sending people to demolish her property and accompanying them. **PW1** said she is devastated and has suffered loss and damage. She urged the court to grant her prayers as per the amended plaint.

26. Mr. Gikandi learned counsel for the 1st and 2nd defendants then took the witness through cross-examination. **PW1** said that she started business in 1987 trading under the name of Boardline Company. That the name of the bureau was Petuscha. That she had two bank accounts at Barclays Bank with one account holding Kshs.10million and the second Kshs 40,000 as at July 2003. That in 2003 the business became hers but she was not given free of charge.

27. **PW1** stated further that on 13/10/2010 she received a letter of termination of the Deed Agreement. She put the value of the plot at Kshs.6.5 million. That she never paid anything in 2003 but between 2003 – 2010 she had paid over 6m. She said she was under no obligation by October 2010 to pay the 1st and 2nd defendants any money because she had already paid the 6.5million. She admitted receiving money from 1st and 2nd defendants to build the villa.

28. **PW1** stated that the claim for compensation over the fire was for the 1st and 2nd defendants only and items listed amounted to Kshs.12,588,850. That there was no agreement in writing for payment of her commission of 20%. That the only thing insured was the building and the excess 2 million was to clean the compound. **PW1** said that of the 12 million paid to the 1st and 2nd defendants, her contribution was Kshs.3,250,000 for the land. That in par 5 of her affidavit of 3rd November 2010, she deposed that the money had been paid through guest debit charges. That she was not given a receipt when she paid the Kshs.6.5 million and she never asked for one.

29. She was also put through 1st and 2nd defendant documents to confirm monies sent to her. She acknowledged receipt of Kshs.210,000 at page 46 and 20,040 Euros on 29/4/2004. She denied receiving 14,000 Euros at page 48. She also received 4,500 Euros at page 52 and on 1/12/2004 received 1,500 Euros. That the Deed of Agreement should be taken as a contract. She agreed she filed this case in the 7th year from the date of the agreement. That she did not register a caveat emptor on the title but denied being the author of her own misfortune. **PW1** confirmed filing an application to set aside the judgement of the learned Ole Tanchu in August 2012 (in CMCC 1141 of 2012).

30. **PW1** was put to further cross-examination by Mr. Kabebe, learned counsel for the 3rd and 4th defendants. **PW1** said she speaks Kikamba, English, Kiswahili and German. 1st and 2nd defendants speak German and Swiss. That Petuscha is a family business. She did not know the name was a combination of Peter Uschi and Charlotte names. That she was given a P.O.A. on 27/10/2003 together with the 2nd plaintiff. That she started operating the business before the death of Charles Ngoi and Charlotte. That all the documents signed between her and 1st

and 2nd defendants in their happy days, the transfer of land is not among them.

31. Mr. Muniyithya learned counsel for the plaintiffs then re-examined his witness. The witness said from 1989 to 2003 when she signed the Deed of Agreement she had no claim against the 1st and 2nd defendants. The complaint started from 27/10/2003 to 13/10/2010 when she received the termination letter. That on receipt of the letter, the 1st & 2nd defendants never offered to discuss anything. That she never had any meeting with the 1st and 2nd defendant during that period. That the 1st and 2nd defendants were represented by Mulwa advocate and he was present in court when the order for maintenance of status quo was made.

32. That until she received the letter, their relationship was friendly. That in paragraph 5 of the affidavit, there was to be built a villa. She was not claiming anything over the villa. In reference to paragraph 4 of the Agreement, the understanding was that after they paid the 6.5 million, the 1st and 2nd defendants were to transfer to them the plot, but for the villa, they would negotiate. That the 20% commission was agreed between the plaintiff and the 1st defendant. That in the defence filed, the 1st and 2nd defendants have not denied being paid their money. PW1 denies owing the 1st and 2nd defendants any money. That after the demolition only the foundation was left. The villa was destroyed. That the P.O.A. did not give her any authority to sell the plot. That Justus (2nd Plaintiff) is the one who prepared the R.T.G.S. and she signed since the account was in their joint names.

33. Kilungu Justus Muli testified as **PW2**. He is a resident of Shanzu in Mombasa and said he has known the 1st and 2nd defendants for a long time. That his mother was a sister to the 1st defendant. PW2 stated that upon the demise of his mother, he became a joint administrator of her estate with his father as shown in 2nd Pex 1. That his late father was solely running Chacha Bar & Restaurant as confirmed by the 1st defendant's affidavit filed in court on 8th December 2010 – 2nd Plaintiff Pex 2.

34. That to enable them obtain licences, he signed an agreement dated 30th November 2002 which he produced as Pex 3. He said that after the fire of 1st September 2003, the 1st and 2nd defendants approached him and PW1 to buy the suit property. That because they did not have ready cash, they agreed on a flexible mode hence the Deed of Agreement dated 27th November 2003. PW2 stated further that when the suit for compensation was filed, there were interests of 3 parties namely; (i) 1st plaintiff (ii) 1st and 2nd defendants (iii) 2nd plaintiff.

35. PW2 stated that they were advised by their advocate to claim under the name of 1st and 2nd defendants who were the registered owners of the suit land. PW2 stated that they also agreed that upon payment, they were to apportion the proceeds of the judgement in line with what each person owned before the fire. That once judgment was given and an award of Kshs.15,799,124 made, the decretal sum was to be shared as follows:

(a) 1 st and 2 nd defendants	Kshs. 4,362,710
(b) 2 nd plaintiff	Kshs. 9,637,290
(c) Costs to the lawyer	Kshs. 1,799,124

36. PW2 stated that the 1st plaintiff single-handedly pursued the filing and prosecution of HCC 102 of 2006 and that there was agreement the 1st plaintiff was to be paid 20% as commission which translated to Kshs 2,800,000. PW2 continued that at this point he agreed with PW1 that they should discharge their obligation under the Deed of Agreement. He confirmed accompanying the 1st plaintiff on 15th February 2010 when she deposited Kshs.12 million in the account of the 1st and 2nd defendants and they endorsed against the deposit slip.

37. PW2 stated that upon payment being made, he honestly believed that the suit property became their joint property. That from the date of signing the Deed of Agreement to the date of demolition on 30/7/2012, he was running his business on the suit property and he never received any form of notice from the 1st and 2nd defendants.

38. That on 28/7/2012 at about 4am he was woken by the 1st plaintiff informing him of the invasion of the suit property by youths clad with crude weapons and demolition tools. He was able to secure a few movables but most of the property was lost. He approximated his loss at Kshs 40,000,000 which loss affected him drastically. It is **PW2's** evidence that the 1st and 2nd defendants had no stake in the property after they received the payment. **PW2** denied ever being served with pleadings in CMCC 1141 of 2012. **PW2** also said he saw the 4th defendant supervising the demolitions. That 28/7/2012 and 29/7/2012 was a Saturday and Sunday respectively. He urged the court to allow their claim as set out in the amended plaint.

39. **PW2** was also taken through the documents filed. He noted that the 1st and 2nd defendants never complained against Kishore Nanji advocate on the way payment was made. At page 36; on 23/3/2012, there was a sale agreement drawn bearing the same date notices by the 1st – 3rd defendants were dated/prepared. That he last saw the 1st and 2nd defendants when they were staying at their villa. That on 26/4/2012 when the transfer was signed, the 1st and 2nd defendants were not in Kenya. That they lost so much that cannot be determined by a valuer e.g. conference 40 million, movables about 5 million.

40. **PW2** stated that he is a member of the family. He had no problem with paragraph 7 of the plaint because when the suit was filed in 2010 he had not paid Kshs 3,250,000. That the amount at page 55 of 1st plaintiff's documents was paid by her. That the money received from HCC 205 of 2005 went to Petuscha Guest House account.

41. In cross-examination **PW2** said there was no time set for parties to perform their obligations in the Deed of Agreement. That they jointly with the 1st plaintiff paid the whole amount of Kshs.6.5 million on 15/2/2010 by way of R.T.G.S. That the suit property was not included in

the succession cause of Charles Muli Ngoi-deceased.

42. He denied his father was a tenant at will. That there was no document showing they were entitled to benefit from the compensation funds. PW2 confirmed not lodging a restriction on the suit title. He denied being served with notice to vacate or pleadings in CMCC 1141 of 2010 from which the eviction orders were issued. That he spent money to build on the land. He denied building using monies received from the 1st and 2nd defendants. That there are documents to show monies sent were for payments of the land.

43. In cross-examination by Mr. Kabebe counsel for the 3rd and 4th defendants, **PW2** said he had the R.T.G.S documents done after the building was burnt. That by 2005, he had rebuilt and the business was running. That the money on the R.T.G.S was for compensation. He was not a party in the compensation case.

44. In re-examination by Mr. Munyithya, **PW2** stated that at the time of the fire, the developments on the land belonged to his father and an interest of the 1st and 2nd defendants. That he has never received any letters from 1st and 2nd defendants asking him to render accounts. Before the letter dated 13/10/2010, his relationship to the 1st and 2nd defendants was friendly. That he had not seen the witness statement of the 1st and 2nd defendants.

45. PAUL WAMBUA gave evidence as **PW3**. He is a registered valuer and outgoing Chairman (at the time of his testimony) of Institute of Surveyors of Kenya (ISK). He was asked to do a valuation of the suit premises by Munyithya & Co. Advocates. After inspection by his assistant, he prepared a report based on the buildings still remaining on the suit property. He presented his report as an exhibit.

46. In cross-examination, PW3 said his assistant may have visited the premises on a weekend. They did not do a search because of the urgency of the matter. That he arrived at the figures based on the architectural drawings and the remains of the buildings on the ground. That his training and that of a Quantity Surveyor is the same. That he did not require receipt to prepare his report.

47. In cross-examination by Kabebe for 3rd and 4th defendants, PW3 said he did not attach any architectural plans. That the developments were being demolished at the time of inspection. That the newspaper cuttings did not influence his report. He could not confirm who drew the sketch at page 14 of the report. In re-examination, PW3 stated that his report was professionally done. This marked the close of the plaintiffs' case.

48. The 3rd defendant gave his evidence as **DW1** on 13th May 2016. He stated that he is a businessman in Mombasa. He adopted his witness statement filed on October 2013 together with the list of documents filed on 30th September 2013, 25th March 2013 and on 31st March 2014 produced as exhibits except for the transfer document (No. 2 in the first list). **DW1** said he purchased the suit property for KShs.25 million through his advocates Mansur Satchu. **DW1** said he did a search and also got a local agent to go see the property. That he was told the people on the property were only running the business.

49. **DW1** continued that after paying, a transfer dated 26/2/2012 was duly executed in his favour. He paid the stamp duty and subsequently the land was registered in his name on 4/5/2012 and he received a title. That a notice was served on the people on the property but they did not move out thus necessitating the filing of CMCC 1141 of 2012. He obtained eviction orders which was given to the court bailiff to serve the people on the property. That once these people came out, they started the demolitions. That he obtained a demolition order from the City Council. That before this transaction, he had no knowledge of the plaintiffs.

50. **DW1** was cross-examined by Mr. Munyithya learned counsel for the plaintiffs. He gave his ID No. as 8452439 bearing the name Jafferali Kassam Abdulla. That he lives in Tudor, Mombasa. He used a local agent called Hashim Nyale. He never used Kamau. For court process, he used the 4th defendant. That he did not see any askari at the gate to the suit premises. He saw a restaurant where they were served sodas when he visited the suit premises. There was a swimming pool with no water and two small houses by the pool. That the agent told him the upper floor of the restaurant were rooms. That pictures in the valuation report resemble what he saw. There was also a perimeter wall with electricity connected to the suit premises. He visited the suit property in the absence of the 1st and 2nd defendants.

51. In clause 3 of their agreement, **DW1** agreed to take the property in the state it was in. That the notice letter is also dated 23/3/2012. He could not tell when the letter reached the plaintiffs but the process server's affidavit states it reached the same day. On 23/3/2012 he paid KShs.5 million and signed the transfer on 26/4/2012 in the presence of the vendors. He is not aware that the vendors flew out of the country on 9/4/2012. That he has never met the people in the passports as they appear very young.

52. **DW1** said he did not independently verify that the information that plaintiffs were employees of the 1st and 2nd defendants. That his advocate served a vacation notice after May 2012. **DW1** confirmed the eviction commenced on Saturday at about 6am in his presence. He was also accompanied by armed police and his workers. He saw 4-5 people leave the gate. That the police gave the occupants one hour to remove their belongings. He was unaware things were carted away by his employees. That he never informed the council he had a court order. He did not value the property before purchase.

53. In re-examination, **DW1** said the signatures in the agreement was witnessed by Mansur Satchu Advocate. That his ID No. was not indicated in the sale agreement. That the demolition licence was addressed to him. That the site was already fenced and there was no one inside. He did not know anyone had a relationship to the property. That the notice of 23/3/2012 said he was in the process of purchasing. He arrived at the suit premises at 6am. His name is Jaffar Ali Kassam Abdalla although the ID reads Abdullah. That he signed the transfer form in the presence of Mr. Mansur Advocate.

54. Mr. Mansur Satchu testified as **DW2**. He confirmed handling the transaction between the 1st and 2nd defendants on one part and the 3rd defendant who was his client on the other part. He was however stood down after objection was raised by the plaintiffs because documents he was referring to was not part of the record. He was unable to return to court on subsequent dates due to ill health associated with old age.

55. Mr. John Oscar Juma advocate and sued as the 4th defendant testified as **DW3**. He adopted his statement filed in court on 14/5/2013. **DW3** said that he was retained by the 3rd defendant in March 2012 for purposes of obtaining possessions of the property he purchased. That he proceeded to file the case CMCC no 1141 of 2012. That after filing, he instructed Mr. Michael Otieno to serve the court documents upon the plaintiffs. That these plaintiffs did not defend that suit and after formal proof, judgment was entered in favour of the 3rd defendant. That he passed the order to his client with a view to obtaining further instructions. He was however not instructed to proceed with the execution order.

56. **DW3** also said that prior to filing of CMCC 1141 of 2012, he issued a demand notice also served by Mr. Otieno. That there was evidence of service in the lower court file. He denied overseeing the execution of the decree. That the application to set aside the judgement in CMCC 1141 of 2012 by the plaintiffs is still pending. That it was irregular to join him to these proceedings since he acted as an agent of a known principal. He urged the court to dismiss the suit as against him.

57. In cross-examination, **DW3** admitted that he was aware of a stay order given in this file which affects the proceedings in CMCC 1141 of 2012. That how the notices were served can only be answered by the process server. That he had visited the suit premises before filing of this suit. He denied meeting Mr. Muniyithya or the plaintiff at the suit premises on the date of the demolition since he was not at the location. That he was not involved in obtaining the demolition order from the Municipal Council.

58. **DW3** also stated that the property was registered under the Registration of Titles Act (repealed) which defined what a court is. That the sale agreement also gave the consideration at Kshs.25 million. **DW3** said his view on jurisdiction of the lower court did not depend on the consideration as the cause of action was about vacant possession. He used the names of the 3rd defendant as they were appearing on the documents drawn by Mr. Satchu. That if he was instructed to carry out eviction, he would have issued a notice. That since 27/7/2012 he had not served the order because he had no instructions. He took the position of his client that the demolition was pursuant to a notice from the Council.

59. In re-examination, **DW3** said he has dealt with cases at the Business Premises Rent Tribunal. That Business Premises Rent Tribunal would render a termination as long as the tenancy is controlled. This marked the close of the defendants' case.

60. The plaintiffs filed their submissions on 8th October 2018. There were no submissions filed on behalf of the 1st and 2nd defendants. The 3rd and 4th defendants filed their submissions on 30th November 2018. A date was set on 3rd December 2018 for highlighting the submissions. There was no appearance for the defendants while the plaintiffs relied on the submissions as filed and sought a judgment date. I gave a judgment date for 9th April 2019. In the intervening period, the file was called for by the Judicial Service Commission in respect of a matter they were handling and the file was returned to me some time in June 2019. This contributed in the delay in writing this judgment since it came when I had received my letter of transfer and was under a lot of pressure to conclude the part-heard cases.

61. I have taken time to analyse the oral and documentary evidence presented together with the submissions rendered. I will make reference to each where applicable in the body of this judgment. For ease of determination, I frame the following questions some picked from the list of issues filed by the plaintiff and others from those raised in the submissions of the 3rd and 4th defendants:

- (a) What rights were conferred upon the plaintiffs by the Deed of Agreement dated 27th October 2003?
- (b) Did the 1st and 2nd defendants have capacity to transfer plot No. 2444/1/MN to the 3rd defendant?
- (c) Was the 3rd defendant a bonafide purchaser for value without notice of the complaints by the plaintiffs?
- (d) Whether the 4th defendant was properly joined to this suit.
- (e) Whether this court can determine the question of jurisdiction of the Magistrate's court in granting eviction orders in CMCC 1141 of 2012.
- (f) Did the plaintiffs suffer damages as a result of the evictions and demolitions for which they should be compensated?
- (g) Who bears the costs of the suit?

62. There is no dispute that the Deed of Agreement was executed between the plaintiffs on one hand and the 1st and 2nd defendants on the other hand. It has also been correctly submitted by both the plaintiffs and the 3rd and 4th defendants that courts do not rewrite contracts between parties. Both have cited the case of **National Bank Ltd Vs Pipeplastic Samkolit (K) Ltd (2002) E.A. 503** that discussed the role of courts in implementing contracts between parties.

63. The role of this court is to determine what was the effect on the parties of the Deed of Agreement premised on its contents? *Clause 1* of the Deed of Agreement transferred to the 2nd party (read 2nd plaintiff) the operation of Chacha Bar and Restaurant absolutely as the sole proprietor including sole rights as to profits and liabilities. In *Clause 2*, the 1st and 2nd defendants transferred to the 3rd party (read 1st plaintiff) the operation and running of Petuscha Guest House absolutely to run it as a sole proprietor including sole rights as to profits and liabilities.

64. In *Clause 3*, the 1st and 2nd defendants remained the proprietors of the two rental shops. Under *clause 4*; the 2nd and 3rd parties (plaintiffs) were to **pay the 1st and 2nd defendants a sum of Kshs 6,500,000 being the consideration for the transfer of their (1st and 2nd defendants) interest in respect to the said plot. That upon payment of the said sum, the title to the suit premises will be registered in**

the joint names of the 2nd and 3rd parties (plaintiffs herein) absolutely including the two rental shops and all the rights as to profits accruing thereof. Under *clause 5*; the villa to be constructed by the 1st party was to remain theirs with an option to later consider selling it to the plaintiffs.

65. A plain reading of the document infers that clauses 1 & 2 of the Deed of Agreement transferred the business interest in Petuscha Guest House and Chacha Bar & Restaurant to the 1st & 2nd plaintiffs absolutely in their individual capacities. From the undisputed evidence of the **PW2** on record, the Bar & Restaurant was operated by his father. Essentially the Deed of Agreement only confirmed his rights as a beneficiary of his late father Charles Ngoi's estate.

66. The 1st plaintiff in her evidence said she was not given the business for free. That she paid a consideration for the same. Whether she paid for it or not, the 1st and 2nd defendants gave her absolute rights to run, make decisions and enjoy profits as well as incur liabilities in respect to Petuscha Guest House. The inference drawn is that the rights of the 1st and 2nd defendants if any over Petuscha Guest House was extinguished when they signed the Deed of Agreement.

67. Under *clause 4*, it clearly states that the 1st and 2nd defendants are selling their interest in the suit plot to the plaintiffs. The expression that upon payment of the sum of Kshs 6,500,000 the plaintiffs would be registered as joint owners of plot No. 2444/1/MN in my understanding refers to a sale. Consequently what remained was for the plaintiffs to prove that indeed they paid the agreed sum of Kshs.6.5 million to the 1st and 2nd defendants.

68. The defendants pleaded that the plaintiffs' suit was statute barred as it was filed on the 7th year. The plaintiffs counter- mandated that time was not made of essence in the said Deed of Agreement. On the face of it, time was not made of essence. Time would become of essence from the date when parties made it to be. If we take it that it was an ordinary contract which was to expire at the end of six years, my opinion would be and I so hold that time would run from the date of default and or when payment was made. In this case, date of default was given by the 1st and 2nd Defendants when they issued the termination letter on 13th October 2010.

69. Otherwise from the circumstances of this case, the limitation of time applicable is one for a claim of land for that is what it is. Under the Limitation of Actions Act, a claim of land is valid if brought within a period of twelve (12) years from when the right accrued. The defendants' plea that the claim was time barred if at all (which I have held otherwise) would be limited to the claim for land. The claim for the developments which were demolished in the year 2012 during the pendency of this suit cannot be said to be statute barred since the cause of action arose after during the pendency of the suit.

70. Did the plaintiffs prove that they paid the Kshs.6.5 million for the land? Both plaintiffs testified and stated that they paid the sum of Kshs.6.5 million together with the proceeds of the compensation funds that was due to the 1st and 2nd defendants. The 2nd plaintiff stated that before the fire that burnt down the premises, there were interest of three people on the suit land. This included the 1st and 2nd defendants, the advocate and himself. He stated further that vide an oral agreement between the 1st and 2nd defendants and himself, they were to pay the 1st plaintiff 20% of the sum awarded as commission for filing and prosecuting the case on their behalf. The plaintiffs proceeded to give evidence that the 1st and 2nd defendants were only entitled to be paid Kshs 4,362,710 before paying the 1st plaintiff her commission of 20%.

71. It is the plaintiffs' further evidence that the amount of Kshs.14 million (Kshs.2,000,000 in cash and Kshs.12 million via R.T.G.S made on 15/2/2010) was inclusive of the payment due to 1st and 2nd defendants compensation from the fire together with money for the land. This evidence led by the plaintiffs was not challenged by the said 1st & 2nd defendants since they did not present any evidence. The only challenge made to the plaintiffs' evidence was through cross-examination when Mr. Gikandi asked in whose name the suit No. 102 of 2006 was filed to be entitled to the awards.

72. In answering counsel, the witnesses stated that the said suit was filed in the 1st and 2nd defendants name on advice from Mr. Kishore Nanji advocate because the land was still registered in the names of the two defendants. The fact of registration of title in the 1st and 2nd defendants name is not in dispute. Similarly the 2nd plaintiff's stake in the property before the fire cannot be denied. The 1st & 2nd defendants did not deny that Chacha Bar and Restaurant was solely operated by the late Charles Ngoi (PW2's father). There is no claim brought by the 1st & 2nd defendants in their counter-claim in regard to the Bar.

73. The only issue would be whether the 1st Plaintiff was entitled to the commission but as it is, the two plaintiffs' word on the oral agreement for payment of the commission is against none. In any event the issue of taking accounts demanded by the 1st & 2nd defendants were only in respect to monies they sent to the 1st plaintiff for rebuilding (see prayer III of the counter claim). The averment that the 1st & 2nd defendants were fully paid the sum of Kshs.6.5 million has thus not been controverted.

74. In light of my finding that the plaintiffs fully paid Kshs.6.5 million as per the terms of the Deed of Agreement, did the 1st & 2nd defendants therefore have capacity to sell and transfer the suit land to the 3rd defendant? The 3rd defendant produced a sale agreement dated 23rd March 2012 contained in his list that was filed in court on 4th October 2013. The transfer document dated 26/4/2012 was not produced due to objection raised by the plaintiffs' counsel. The 3rd defendant also produced a provisional certificate of title No. 15473/1 and certificate of official search dated 20th February 2012.

75. The current suit initially brought against the 1st and 2nd defendants was commenced on 3rd November 2010. Together with the plaint was a chamber summons application seeking interim reliefs of orders of injunction which was given. On receipt of the order, the 1st & 2nd defendants also through an application dated 27th November 2010 and filed on 8th December 2010 sought for orders of injunction against the 1st plaintiff. At prayer (iv) of this application, the 1st & 2nd defendants pleaded thus **"the exparte injunction granted to the plaintiff**

against the defendants be varied and/or set aside.”

76. It is submitted for the plaintiff that an order of maintenance of the status quo was given by Murithi J on 4/11/2010 in the presence of counsel appearing for the 1st & 2nd defendants. That as at July 2012, Murithi J. had not delivered a ruling to the plaintiffs' application. In spite of this; from the pleadings in the 1st & 2nd defendants' application dated 27th November 2010 the said defendants were indeed aware of the existence of an order of injunction granting the plaintiff permission to remain in possession of the suit premises.

77. The plaintiff cited the case of **Naftali Ruthi Kinyua Vs Patrick Thuita Gachure & Ano (2015) eKLR** where the Court of Appeal quoted Madan J in the case of **Mawjivs Vs International university of Ano. (1976) KLR 185** which 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 recognised by common law. It is based on expedience of the court. It is necessary for final adjudication of the matters before court and in the general interest of public policy and good effective administration of justice. It therefore overrides Section 23 of the Registration of Titles Act and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other.”

78. The 3rd defendant submitted that he was not aware of any legal proceedings between the plaintiffs and the 1st & 2nd defendants. This line of defence/submission in my view cannot be used to defeat the purpose and intent of the doctrine of *lis pendens*. If the 1st & 2nd defendants were barred from inception on dealing with the property in a way that would defeat the outcome of the pending suit, any illegality undertaken by them in disobeying that order cannot be cured by 3rd parties pleading innocence. Such 3rd parties claim as the 3rd defendant herein can only lie as against the 1st & 2nd defendants for lack of material non-disclosure. Therefore, based on the doctrine of *lis pendens* and the existence of an order of injunction/status quo I make a conclusion that the 1st & 2nd defendants had no capacity to sell the suit property to the 3rd defendant.

79. Secondly, the 1st plaintiff having challenged the 1st & 2nd defendants action of terminating the Deed of Agreement vide the letter dated 13/10/2010, the 1st & 2nd defendants should not have disposed of the suit property before the resolution of this case. The 3rd defendant has alluded in his submissions at page 6 (paragraph 25 – 28) on the import of the Deed of Agreement dated 27/10/2003. First he was not a party to the said agreement so he has no capacity to infer any meanings to the Agreement. Further by confirming he was aware of the existence of this Deed of Agreement, he cannot hide under the banner of innocent purchaser for value without notice.

80. It is my opinion and I so hold that the 3rd defendant lost the right to plead the doctrine of innocent purchaser without notice for two reasons. He was represented by an advocate in the transaction between him and the 1st & 2nd defendants who then should have explained to him the meaning of this agreement. It thus contradicts his assertion that he was unaware of the existence of any legal proceedings when due diligence would have entailed him asking the 1st & 2nd defendants for a letter terminating this Deed of Agreement and or their relationship with the plaintiffs.

81. It was not the responsibility of the 3rd defendant to determine whether the purchase price agreed between the plaintiffs and the 1st & 2nd defendants was paid or not. Consequently, on this account too, I find the agreement entered into between the 1st & 2nd defendants on one part and the 3rd defendant on the second part was illegal, unlawful and fraudulent intended to defeat this suit and/or the interests of the plaintiffs.

82. Was the 4th defendant properly joined to this proceedings? The 4th defendant's testimony is that he was an agent of a disclosed principal. The plaintiffs have pleaded and said that they saw the 4th defendant at the premises during the demolition which fact the 4th defendant has vehemently denied. Although the 4th defendant acted for a disclosed principal, I am of the view that he was properly joined so that there was no room for the 3rd defendant to plead a defence that he was not involved in the court process (service and execution) which then would leave open ended blames on who should take responsibility for the plaintiffs' loss if at all. The plaintiffs thus took precaution not to have their claim fail for non-joinder of parties as provided under **order 1 rule 7 of the Civil Procedure Rules**.

83. Can this court determine the question of jurisdiction of the magistrates' court in granting eviction orders in CMCC 1141 of 2012? The 3rd and 4th defendants answered no and supported their answer with the decision in the case of **Anne Waiguru Vs Martha Wangari Karua and 2 others (2018) eKLR** where the Supreme Court held thus, **“It is trite procedural principle that a party that seeks to challenge the jurisdiction of a court before which are pending proceedings should ideally do so before that court ... Consequently we decline to make a determination on the question of jurisdiction as doing so would amount to usurpation of the jurisdiction of the High Court. It goes without saying that any party may be aggrieved by the High Court's decision would not be any way deprived of redress as he or she has recourse through the normal appellate process.”**

The 3rd and 4th defendants also cited the decision in **Namajina Alex and 2 others Vs CMC Mombasa and another 92018) eKLR** where the court held that the applicant ought to have raised the issue before the lower court and if dissatisfied apply for review or appeal.

84. The plaintiffs pleaded and submitted that the chief magistrates' court did not have jurisdiction to grant the orders because:

(1) The Registration of Titles Act under which the title was issued defined court as High Court.

(2) The pecuniary value of the property was way above that given in Section 5 of the Magistrates Court Act cap 12.

85. In *paragraph 11K* of the amended plaint, the plaintiffs pleaded that the process of eviction was unlawful and illegal. They proceeded to

give the particulars of illegalities to include the following:

- (a) **The trial magistrate in CMCC No. 1141 of 2012 had no jurisdiction to hear and issue orders in that case.**
- (b) **The orders, judgment and decree issued in CMCC No. 1141 of 2012 are a nullity.**
- (c) **The 4th defendant executed an illegal court order when he knew or ought to have known that he had no authority.**

86. The plaintiffs thus raised the matter of jurisdiction of the magistrates' court as part of the issues that were for this court's determination in while exercising its original jurisdiction and not as an appellate court. I **equate the manner the issue of jurisdiction was raised to be equivalent to a situation where the plaintiffs could have moved the court by way of Judicial review proceedings**. The circumstances in which jurisdiction has been raised are thus different to those prevailing in the **Ann Waiguru case** and **Namajina Alex and 2 others supra**. In this instance, I find that this court has powers to deal with the question of jurisdiction of the magistrate's court in handling the case filed as CMCC 1141 of 2012.

87. So did the magistrate's court have jurisdiction to entertain the matter? The 3rd and 4th defendants submitted that the prayers in the suit before the lower court i.e.

(a) *A declaration that the defendants continued occupation of plot*

No. 2444 is unlawful and constitutes illegal trespass.

(b) *An eviction order be issued compelling the defendants and*

their agents to vacate the suit premises.

(c) *The O.C.P.D. Kisauni and O.C.S. Bamburi to provide the*

security during the eviction exercise.

88. There is no dispute that the suit title was registered under cap 281. The 3rd and 4th defendant cannot and did not deny that the pecuniary value was beyond the jurisdiction of the magistrates' court as given under the Magistrates Court Act. Their defence is that the value was immaterial as the same did not form part of issues for determination. However the said defendants made no comments on the provisions of Section 2 of the Land Registration Act cap 281 which provides that:

“In this Act, except where there is something repugnant in the subject or context, court means the High Court.”

89. There is no exception provided by the 3rd and 4th defendants why the provisions of Section 2 did not apply to their claim. Therefore the magistrate's court lacked jurisdiction to entertain the claim filed before it as same contravened both Section 2 cap 281 and Section 5 of the Magistrates' Court Act. The orders issued in the case CMCC 1142 OF 2012 were thus null and void *ab inito* for want of jurisdiction.

90. The last question is whether the plaintiffs suffered damages as a result of the unlawful eviction. The defendants did not make any submissions in regards the loss pleaded as suffered by the plaintiffs. At paragraph 10 of the 3rd defendant's statement of defence, he denied that the plaintiffs had suffered any loss or damage as alleged and he put the plaintiffs to strict proof. He also pleaded that the plaintiffs have no claim against him.

91. The plaintiffs claim against the 3rd and 4th defendants is both for land and the losses suffered as a consequence of the eviction. The order issued in CMCC 1141 of 2012 was for eviction of the plaintiffs from plot No. 2444. The 3rd and 4th defendants did not make a prayer for demolition of the structures on the suit properties. The 3rd defendant therefore sought for a licence for demolition from the Municipal Council. The licence did not specify that it was given under what provisions of the law. The licence was addressed to the 3rd defendant meaning he was the one licenced to carry out the demolition yet he knew structures did not belong to him.

92. The sale agreement dated 23/3/2012 is silent on the developments on the plot. Clause 2 at page 1 of the agreement stated that what was sold was the leasehold interest. The 4th defendant in his evidence stated that he only obtained the orders but did not serve the plaintiffs since he never received further instructions on the execution of the decree. The 3rd defendant has admitted that he went to carry out the demolitions with his employees/workers. In essence, the 3rd defendant has conceded that he never used a court bailiff to undertake the exercise. The evidence is quite open that the 3rd defendant was solely responsible for the demolitions therefore he is the person liable to damages occasioned in the process of the eviction and the demolitions.

93. Given that the valuation presented by plaintiffs through the evidence of Mr. Paul Wambua (PW3) has not been contradicted/controverted by any other valuation report, I find that the plaintiffs are entitled to compensation for the demolished improvements at Kshs.53 million as stated in that report (as prayed in paragraph (h) of the plaint).

94. In summary, I enter judgment for the plaintiffs as prayed in the amended plaint as against the 1st, 2nd and 3rd defendants jointly and severally. The costs of the suit is also awarded to the plaintiffs.

Dated & signed at Busia this 23rd day of Sept, 2019.

A. OMOLLO

JUDGE

Delivered at Mombasa this 7th Day of October, 2019

C. YANO

JUDGE

In the Presence of:

Counsel for the Plaintiffs:

Counsel for the Defendants: