



Nduta v Nellie Apartments Limited & another (Environment and Land Case Civil Suit E142 of 2020) [2024] KEELC 331 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E142 OF 2020
JA MOGENI, J
JANUARY 25, 2024**

BETWEEN

ADDAH NDATA PLAINTIFF

AND

NELLIE APARTMENTS LIMITED 1ST DEFENDANT

NAIROBI CONNECTION SERVICES AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 16/09/2020 the Plaintiff instituted this suit against the Defendants seeking for the following reliefs;
 - a. A permanent order for injunction restraining the Defendants, their agents, employees, or otherwise howsoever from continuing with the distress of the Plaintiff's on account of alleged arrears of rent or otherwise distraining, carrying away or selling the Plaintiff's properties at apartment unit No. B6, Block B on LR No. 330/317.
 - b. A permanent order for injunction do issue restraining the Defendants, their agents, employees, or otherwise from distraining the Plaintiff's properties on account of some impugned rent or any amount otherwise or howsoever.
 - c. A declaration do issue that the Plaintiff has a beneficial interest in the property known as apartment unit No. B6, Block B on L.R No. 330/317 and that the 1st Defendant holds the said property in trust of the Plaintiff.
 - d. The exclusive management of the suit property No. B6, Block B on L. R. No. 330/317 be handed over to the Plaintiff in accordance with the [Sectional Properties Act](#).



- e. A permanent injunction restraining the Defendants from interfering with the Plaintiff's exclusive possession occupation and use of the suit property No. B6, Block B on LR No. 330/317 pending processing and registration of the transfer of title documents.
 - f. That in default of prompt execution of transfer documents within 21 days of delivery of the judgment herein the Defendants executing the transfer documents of the suit property No. B6, Block B on L.R No. 330/317 this Honorable Court do issue a vesting Order in favour of the Plaintiff.
 - g. In the alternative the Defendants be ordered to refund forthwith the entire purchase price amount paid with interest at the Central Bank Treasury Bill's rate until settlement in full.
 - h. In the event of prayer g) being granted the plaintiff be awarded damages for inconvenience occasioned and suffered due to the unlawful actions of the Defendants.
 - i. Costs and interest
 - j. Any other relief this Honorable court deems fit to grant.
2. In the Plaintiff, the Plaintiff averred that she entered into a sale agreement with the 1st defendant for purchase of the suit property known as apartment unit no. B6 , Block B on L.R No 330/317. The sale price was Ksh. 32,000,000 and the parties made an arrangement to allow the plaintiff pay Ksh. 180,000 per month for 1 year as the late Francis Njuguna was processing succession document for the estate of the late Nelly Wanjiku Njuguna a co-director and shareholder of the 1st defendant (herein after defendant since 2nd defendant was an agent of 1st defendant).
 3. It was averred by the Plaintiff that before the final transfer of the title documents could be executed and registered, Francis Njuguna who was the surviving Director of the defendant died and Nicky Njuguna purporting to act on behalf of Nellie Apartment Limited yet he is neither a director nor a shareholder issued a demand letter dated 23rd May 2019 for rent arrears of Ksh. 540,000/- for months of February 2019 to April 2019.
 4. The plaintiff averred that the defendant illegally and wrongfully instructed Nairobi Connection Services, Auctioneers to levy distress for rent arrears amounting to Ksh. 900,000 thus her proprietary interest is threatened by the unlawful activities of the 2nd defendant and its agents and servants since the distress of the rent by the activities of the 2nd defendant and its agents is unlawful.
 5. The Plaintiff averred that the actions of the Defendants have caused her to continue to suffer loss, unwarranted anxiety and harm.
 6. The Defendants were duly served but only the 1st defendant filed a Defence in 2015 which was later amended to include a Counter-claim. The 2nd defendant did not enter appearance since they were agents of the 1st defendant. In essence therefore there was only one defendant. The statement of defence and the Counterclaim is dated 12/10/2016. In the said defence, the defendant through its director Dennis Charles Njuguna denied the averments in the Plaintiff except the descriptive parts and insisted that it had not sold the suit property to the plaintiff as claimed. The entire Defence is a denial of allegations made in the plaintiff. The Defendant averred that Nellie Apartment Limited entered into a tenancy agreement with the plaintiff for a one-year lease for a fully furnished apartment from 15th February 2018 to 14th February 2019. The rent payable was Ksh. 180,000. He provided the documents for the tenancy agreement.



7. He further averred that it was the agreement that the plaintiff would buy the suit property as a fully furnished apartment at Ksh. 32,000,000 and that is why no deposit was paid towards the tenancy agreement. The property was to be purchased at Ksh. 16,000,000 deposit and then Ksh. 16,000,000 to be paid as balance on completion.
8. The defendant further averred that despite the plaintiff having expressed the desire to purchase the suit property and despite having received a sale agreement from the defendant she never paid the deposit nor did she sign and return the sale agreement to the defendant. Upon the death of Francis Njuguna the father of the defendant on 1/06/2018, despite an inquiry to the plaintiff if she was still keen on purchasing the suit property vide a letter dated 13/06/2018 to her advocates, E.M. Mulinya the plaintiff never responded and the defendant never received a response.
9. That the plaintiff only paid rent upto January 2019 and stopped. Following the order made by the court on 23/09/2021 the plaintiff vacated the house in October 2021. The order had directed her to pay the rent accrued from February 2019 to October 2021 at Ksh. 180,000 per month or Ksh. 26,000,000 to an escrow account.
10. The defendant averred that despite the earlier Notice issued on 15/03/2019 to the plaintiff to vacate the suit premises, she declined to do so. On his part the defendant denies issuing an offer letter nor receiving any down payments towards purchase of the suit property. He denies that his father ever signed any documents as alleged by the plaintiff. Neither did his father receive any down payment from the plaintiff towards purchase of the suit property. Infact the issue of his father's signature which he avers was forged is a subject of an ongoing criminal case.
11. He further avers that the plaintiff filed a Notice of Withdrawal dated 7/12/2021 for the Objection she had instituted in Nairobi High Court Succession Cause No. 1367 of 2018: Estate of Francis Njuguna stating that she had claim against the suit property.
12. The defendant has thus filed a Counter-claim seeking the following:
 - a. A declaration be issued that the Defendant is the rightful indefeasible owner of the Suit Property
 - b. A mandatory injunction be issued compelling the Plaintiff to pay the sum of Ksh. 5,940,000= in rent arrears;
 - c. A mandatory injunction be issued compelling the Plaintiff to pay the sum of Ksh. 420,750 in restoration charges
 - d. A mandatory injunction be issued compelling the Plaintiff to pay the sum of Ksh. 95,000 being the auctioneers' charges
 - e. General damages for trespass and attempted wrongful occupation by the Plaintiff as shall be assessed by the Court;
 - f. Interest on (ii), (iii), (iv), and (v) above from the date of judgment to the date of payment in full.

Plaintiff's Evidence

13. PW1- Adda Nduta Ndambuki testified on 16/11/2022 and adopted her witness statement and her list of documents dated 16/09/2022. In cross-examination she stated that she lived on the suit property as a sub-owner since she had paid some deposit for the house and agreed with the owner of the house where they had agreed that she would occupy the house and pay a certain amount towards ownership.



14. She testified that she signed a tenancy agreement which does not speak to the issue of ownership and that she was paying rent of Ksh. 180,000 per month for the furnished apartment which was towards purchase. She reiterated that she moved into the suit premises as a sub-tenant and the tenancy agreement was for one year.
15. It was her testimony that the letter of offer to purchase dated 7/03/2018 which she produced as document 1 was signed by Mr Francis Njuguna in the presence of his personal assistant Mr Omunga and it was witnessed by Mr Antony Odhiambo and a Mr Samuel Ndinguri who was the plaintiff's boss was also present. She testified that she could not confirm whether the said letter was the subject of the criminal case.
16. She testified that the court directed the signatures on the letter of offer were to be scrutinized by the DCI who were to issue a report within 21 days and the report issued stated that the signatures were made by different authors.
17. It was her testimony that she paid Ksh. 6 million and she agreed to pay a further Ksh.16 million on or before 1/04/2018. She testified that she moved into the suit property pending the payment of the money as they had agreed. She produced the sale agreement at pages 19-26 which she stated was forwarded to Gatheru Gathemia on 23/03/2018 from Kiarie Kariuki Advocates. She stated that the client Mr Francis Njuguna died in the month of May 2018 before completion of the agreement.
18. She stated that she paid Ksh. 6 million between 10th to 14th March 2018 in cash and that part of the cash equivalent to Ksh. 3.5 million was in USD and the rest in Kenya shillings totaling Ksh. 6 million. She testified that the acknowledgment by Mr Njuguna of receipt of the cash has not been produced in court.
19. It was her testimony that Mr Njuguna asked her to make part of the payment as he awaited succession documents from the Attorney General. She also stated that she signed the tenancy agreement before the CR 12 was received from the Attorney General's office. She testified that she paid rent faithfully from the time she entered into the house till January 2019 without defaulting even after Mr Njuguna died she paid rent for nine months.
20. She testified that she vacated the suit premises before the court gave the order dated 23/09/2021 and that before then she had stopped paying rent from February 2019 to October 2021. That when Mr Njuguna passed on she filed an objection in Succession Cause 1367 of 2018 to safeguard the suit property but later her lawyer withdrew the objection stating that she was not interested in the suit property and it was her testimony that she was not interested in the house and neither did she want to deal with any issue to do with the apartment.
21. In re-examination she re-stated that she had paid Ksh 6 million which was received by Mr Njuguna and by the time of his death he blessed her with the house and he said she should never have a case with his three sons. She stated that the issue of the criminal case came about due to report of the DCI and it is ongoing in the Chief Magistrate's Court.
22. She further stated in re-examination that there were negotiations concerning the sale from tenancy to ownership which was agreed upon by Mr. Njuguna purchase not as rent. The tenancy agreement was therefore a formality to tie down the latter purchaser. It was her testimony that she paid the rental money in cash to Mr Njuguna but after he passed on she was required to pay in an account. At this point through an oral application the plaintiff sought to produce the payment slips and the oral application was granted.



23. The plaintiff also filed an application dated 24/11/2022 seeking to have the Counsel for the defendant disqualified from representing the defendant. A ruling was delivered on 21/03/2023 and the hearing continued on 17/07/2023

Defense Case

24. DW1 – Dennis Charles Njuguna an engineer by profession adopted his witness statement dated 14/12/2021 and his list of documents of even date with 22 exhibits. It was his testimony that his prayers are as per the defence.
25. Upon cross-examination, he testified that the defendant is a limited liability company where there are four directors two of whom are deceased and he stated that he had authorization to file the counter-claim though he had not filed it in court. It was his testimony that there was a tenancy agreement between his father and the plaintiff by the time he passed on dated 15/02/2018. That by the time he took over the conduct of this matter from his deceased father she had stayed at the property for one year and a half year.
26. He testified that there was no purchase agreement between the plaintiff and the defendant because the sale agreement that was forwarded to the plaintiff was never signed and there was no money paid as a down payment. Further that although the suit property has never been sold, it was excluded from the succession process.
27. It was his testimony that the offer letter was not written by his father and also that there was no contract for sale executed and there was no down payment of Ksh. 6 million made by the plaintiff. Further that there are no written minutes instructing the defendant to appear for the company in any transaction.
28. Upon being re-examined he testified that by the time his father passed on the plaintiff had been in the suit premises for 5 months and at the time of succession process no transaction nor down payment had been made. That they informed the succession court about the suit property and that is why it was left out of the process.
29. Expert Witness - Daniel Gutu – Forensic Document Examiner testified that had worked for 14 years at the Directorate of Forensic Examiners but at the time of the case he was now in private practice. It was his testimony that on 22/08/2019 documents were forwarded from an advocate from which a court order dated 19/08/2019 had been made and there were four documents which included, the known signature of the late Francis Njuguna, Tenancy Agreement dated 15/02/2018, an Affidavit dated 23/01/2018, a copy of cheque dated 15/09/2017 and CR 12 Form from the Registrar of Companies.
30. It was his testimony that he was requested to compare the signature and ascertain whether the specimen signature of the Late Francis Njuguna could compare with the signature on the Tenancy Agreement and the other documents forwarded to him and his conclusion was that the signature of the Late Francis Njuguna was forged and the signature was therefore different.
He testified that he subjected the signatures to video imaging using a method known as Video Spector Comparator (VSC) and came to the conclusion that the signatures were made by different people. He stated that his opinion is based on; 1. Signature initialization and strokes, 2. Pen movement, 3. Signature construction and their arrangements, 4. Natural variations and pen lifting, 5. Pen pressure and Ink Flow, and 6. Signature spacing and baseline alignment
31. He testified that he prepared a report on 23/08/2019 which he signed and was therefore producing it as an exhibit in court and it is at pages 51 of the plaintiff's bundle



32. Upon cross-examination he testified that it took him one day to prepare the report. He also stated that another Forensic Examiner Mr EK Kenga filed another report showing that the signatures on the documents filed showed that they were signed by the same person. However, it was his testimony that he did not know when the same documents were forwarded to Mr. Kenga. He holds that his report is still correct.
33. He concluded by stating that known signatures should share the same characteristics irrespective of documents forwarded to him. Further that for signature examination like the one forwarded to him it only takes one hour to conclude the assignment. Further that document examination with machines is not a complex process.
34. On re-examination he stated that he was not paid to do a favorable report. He also testified that Mr E Kenga used to work at DCI but he retired. That by the time he prepared the report he had retired. With this the defence closed its case.

Analysis and Determination

35. I have considered evidence adduced, perused documents produced in Court and read through the submission filed by both parties, on 9/10/2023 for the plaintiff and on 21/11/2023 for the defendant. I must thank the Counsels for the plaintiff and the defendant for very well researched submissions with relevant authorities which have been useful in helping the court in arriving at its decision. I note that prayers (a) and (b) in the plaint captured under paragraph 1 above have been overtaken by events. I consider the following as issues for determination: -
 - a. Whether the parties herein entered into an enforceable contract.
 - b. Whether the plaintiff is entitled to prayers sought in the plaint.
 - c. Whether the defendants are entitled to prayers sought in the counterclaim.
 - d. Who should bear costs of this suit?

(a) Whether the parties herein entered into an enforceable contract

36. The Plaintiff's argument is that enforceable contractual obligations exist between the parties herein while on the other hand, the defendant contends that the transaction was not concluded and therefore no legally binding obligations capable of being enforced. The defendant argues that they sent a sale agreement to the plaintiff but it was never signed and was never returned to the defendant to show acceptance. Further, it is the defendant's contention that there was no enforceable agreement of purchase tenancy between the late Francis Njuguna and the plaintiff and that the signature said to be that of the late Francis Njuguna was not his signature. That the report filed by the Forensic Examiner Mr. Daniel Gutu was never challenged and the report stands. Lastly that the sale agreement sent out to the plaintiff, which was to be completed by a signed agreement was not signed.
37. There are three essential requirements of a valid contract being offer, acceptance and consideration. This position was stated in the case of Charles Mwirigi Miriti Vs Thananga Tea Growers Sacco Ltd & Another [2014] eKLR and also in the case of Karmali Tarmohammed & Another Vs I.H Lakhani & Company [1958] EA 567 where the Courts affirmed the proposition that offer and acceptance supported with consideration equate to a contract.
38. The question which follow is whether an agreement which is not reduced into writing is void. Section 3(1) *Law of Contract Act* does not make all contracts void and unenforceable if they are not reduced into writing. Only certain agreements are required to be in writing; an agreement need not be in any



special form or in writing unless statute expressly provides for it. It is trite law that not all agreements need to be in writing. An agreement can be deemed duly formed and binding where consideration is present and acceptance having been offered. But the parties must act in a manner that shows that what their actions were meant to show is that there is a contract even though it is not in writing.

39. A contract is created by parties as stated in the case of Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] Vs Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] Justice Onguto stated

“Where therefore parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain. The court will not seek to re-write the contract for the parties: see *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* [2002] EA 503.”

40. The case of *Brodgen v Metropolitan Railway Company* [1876-77] L.R 2 App Cas 666, is an English case which stands for the general proposition that a contract can be accepted by the conduct of party. The Court held that there was a contract which came into existence after the coal was supplied and received but not earlier.
41. In the instant case, it is not disputed that the plaintiff never signed the sale agreement. Further, it was also adduced in court by the defendants that payments were never done towards the tenancy purchase agreement nor towards any purchase of the suit property in whichever form. The plaintiff's claim for payment of a down payment is not supported by any evidence produced in court. The claim that she made a down payment in cash in the presence of the Personal Assistant of Mr. Francis Njuguna one Mr Omunga and that the Letter of Offer was witnessed by a Mr. Antony Odhiambo in the presence of Mr. Samuel Ndinguri was not corroborated at all. Further the defendant admitted that there was an attempt to have a sale agreement completed by sending to the plaintiff a sale agreement but she never signed it neither did she sent it back to the defendants to indicate her acceptance of the offer made. In summary though there seems to have been an intention to create a contract the ingredients critical in supporting the existence of unwritten contract and not there – this being offer, acceptance and consideration.
42. The signature of Mr. Francis Njuguna on the letter of offer dated 7/03/2018 was said not to belong to him and the plaintiff never called evidence to negate the testimony of the Expert Witness – Forensic Examiner and the report that showed that the specimen signature did not belong to the late Francis Njuguna.
43. The plaintiff presented before the court through her supplementary list of documents receipts and copies of cheques showing payments of between Ksh. 180,000 to Ksh. 360,000 mostly made in August 2018 and September 2018 to Adeni Limited and a cheque to Francis Njuguna. This is a testament to the payment of rent as already stated by both the plaintiff and the defendant. The plaintiff never presented proof of payment of Ksh. 6 million as a down payment to the purchase of the suit property as she claimed.



44. The defendant stated that there was no document from the plaintiff that could attest to there being an agreement for sale between the late Francis Njuguna and the plaintiff. During her cross-examination the plaintiff indicated that she withdrew her Objection in the Succession Cause No. 1367 of 2018 through her lawyer stating that she had no interest in the property. She further stated that she had no interest in the house and neither did she want to deal with the apartment.
45. The question that arises is why the plaintiff went ahead to file this suit only to come to court and state that she had no interest in pursuing any interest in the suit property? Why would she fight so hard to file various documents in court attesting to her having paid rent of Ksh. 180,000 per month yet fail to file the crucial document to support her claim that she paid Ksh. 6,000,000 as a down payment towards the purchase of the said suit property if indeed it was a tenancy purchase arrangement? I tend to think that her actions point to the fact that she did not pay the said money and going through the motions of this case she has realized her folly.
46. In my view the plaintiff's conduct showed that there was no agreement for sale either directly or even through the tenancy purchase approach. From my examination of evidence produced I can only see actions of a tenant who was paying rent and who defaulted in paying rent at some point and chose to move out of the suit premises without paying the rent owing. This court notes that the action of the plaintiff is in very bad faith. Through an earlier order issued by Justice Okongo on 23/09/2021 the plaintiff had been directed to pay rent arrears from February, 2019 to 30th September 2021. This was not done and it shows a developing bad habit which must be discouraged because once one has enjoyed the services of a tenancy the consideration of the same must be paid. The law must be adhered to.

(b) Whether the plaintiff is entitled to prayers sought in the plaint.

47. There is no doubt that the plaintiff failed to produce any documents to support her claim for proprietorship in the suit property. The defendant argued that there was no agreement for sale nor a tenancy purchase agreement and called evidence to rebut the plaintiff's claim. The defendant admitted that there was an attempt to enter into a sale agreement with the plaintiff but this effort was not honored. It would be hard for me to start examining prayers (c) to (h) since the first two prayers were overtaken by events because in the absence of a semblance of a sale agreement and or contract I would be engaging in a moot exercise.

The plaintiff's argument is that she paid the late Francis Njuguna a down payment of Ksh. 6,000,000 in cash and that there was an offer letter made. She did not call any one of the persons she claims to have been present when she negotiated with Mr Njuguna to testify and or corroborate her evidence. Instead she goes off on tangent of claiming that the CID were bribed in order to prepare the report that was produced in court.

48. Again she did not lay any evidence in court to buttress this claim of bribery. Even if this were so this court is not the right forum to deal with these issues and she can use the proper channels to make her report for thorough investigation to be done. I abhor corruption because it is a cancer that eats away at the good we have in our society. I encourage the plaintiff to follow up on this serious allegation with the relevant authorities if she had the evidence to support her claim.
49. In my view therefore whereas I am sympathetic to the plaintiff who seems to suggest that she was denied her proprietorship due to corruption, my sympathy is not a legal conduit to grant the prayers she seeks and therefore I find that the plaintiff is not entitled to prayers sought in her plaint.



c. Whether the defendants are entitled to prayers sought in the counter claim

50. It is not disputed that the plaintiff vacated the suit property not having paid the rent owed and she is under obligation to pay the rent because that is the document that the parties executed – a tenancy agreement of Ksh.180,000 per month. In her own admission the plaintiff states that she stopped paying rent in February 2019 and only vacated the suit premises in October 2019.
51. The defendant presented evidence showing that they have already engaged an auctioneer who proclaimed the plaintiff's suit including the household goods which unfortunately belonged to the defendant since the suit property was let out as furnished apartment. The plaintiff even in the supplementary list did not present any proof of payment of the rent she owed neither did she rebut the evidence of the defendant that an auctioneer proclaimed her goods while she was in tenancy.
52. I note that the defendant has made a claim for restoration cost charges. The document attached shows that the apartment B6 is situated on Skyrock Apartments but the matter concerns apartment B6 of Nellie apartments. I therefore do not see the relevance of the invoice at page 71 to 75 and which is produced at page 21 of the defendant's bundle. I decline to grant the prayer for restoration charges for the simple reason that the property referred to is not the one in question.
53. It follows that the plaintiff actually has no claim against the defendant and she ought to pay up what she owes. The plaintiff's claim is actually hopeless. In my view the defendants are entitled to all monies owed.

Final Orders

- a. Plaintiff's plaint is hereby dismissed.
- b. The defendant's counterclaim is allowed in in the following terms:
- i. A declaration is hereby issued that the Defendant is the rightful indefeasible owner of the Suit property;
 - ii. A mandatory injunction is hereby issued compelling the plaintiff to pay the sum of Ksh.5,940,000 in rent arrears.
 - iii. A mandatory injunction is hereby issued compelling the plaintiff to pay the sum Ksh.95,000 being the auctioneers charges.
 - iv. Interest on (b) (ii) and (iii) above from the date of this judgment till payment in full.
 - v. Costs of the suit and counter claim are awarded to the Defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF JANUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of:-

Ms.Githii for the Defendant

Mr. McRonald for the Plaintiff



Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

