



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. NO. 430 OF 2008**

**FIROZ NURALI HIRJI - 1<sup>ST</sup> PLAINTIFF**

**SHAROK KHER MOHAMED ALI - 2<sup>ND</sup> PLAINTIFF**

**VS**

**MARCELLUS LAZIMA CHEGGE - DEFENDANT**

**JUDGMENT**

1. By their amended plaint dated the 12<sup>th</sup> September 2012 and filed in Court on the 13<sup>th</sup> September 2012, the plaintiffs herein are seeking the following orders against the defendant;

- a) A declaration that the defendant is in breach of the terms of the sale agreement.
- b) Payment by the defendant to the plaintiffs of the sum of Kshs 18,237,650/- being the gross cumulative rental income covering the period from December 2006 to 31<sup>st</sup> July 2012.
- c) Payment of Mesne profits by the defendant to the plaintiffs in the sum of Kshs. 250,000/- per month exclusive of utility bills from the 1<sup>st</sup> August 2012 until the final settlement and determination of the suit.
- d) Further and or in the alternative but completely without prejudice to the above, the cancellation of the sale and transfer of Land Reference Number 7785/266 back to the favour of the 1<sup>st</sup> Plaintiff by and from the defendant.
- e) Payment by the defendant to the plaintiffs of the sum of Kshs 5,869,496/- being outstanding balance of the sale amount inclusive of Kshs 97,441/- being City Council rates.
- f) General damages
- g) Costs of and incidentals to this suit at bank rates.
- h) Interest on ii), iii), v), vi) and vii) at the prevailing commercial rates.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were married but later divorced in the year 1994. Prior to the transaction, the 1<sup>st</sup> Plaintiff was the registered owner of LR NO 7785/266 which he held in trust for himself as well as the 2<sup>nd</sup> Plaintiff.

3. The basis of the Plaintiffs' claim as canvassed in the plaint aforesaid is that the 1<sup>st</sup> Plaintiff, was at all material times the registered owner of the suit premises known as LR No. 7785/266 situated at Runda Estate Nairobi. That the cause of action arose from alleged breach (es) by the defendant of the terms of the sale agreement entered into by the parties on the 18<sup>th</sup> September 2006.

4. In defence the defendant states that on or about 16<sup>th</sup> October 2007 the suit property was duly transferred and registered in his name and that he has not breached the terms and conditions of the agreement entered on 18<sup>th</sup> September 2006. He denied having failed to pay the sum of Ksh. 5, 869,496/- claimed as outstanding balance of the purchase price together with Ksh. 97,441 being City Council rates or any other sums. He *inter alia* denied liability on account of Kshs 18, 237,650/- as stated in the plaint.

### **The Plaintiffs case**

5. The 2<sup>nd</sup> Plaintiff averred that sometime in September 2014 he and her husband sold their property LR. No. 7785/258 to the defendant, which property was registered in the name of the 1<sup>st</sup> Plaintiff but held 50% in trust for her. The Defendant paid the full purchase price and had the property registered in his nominee. Their view of the defendant on conclusion of this earlier transaction was that he was a wealthy and successful person working in a high-ranking position in the United Nations Offices.

6. She further states that sometime in mid-2006 the Defendant approached her to sell another property LR No. 7785/266 again registered in the name of her ex-husband, and held in trust for both. The Defendant made an offer to the property and paid a down payment of Kes. 150,000/= to facilitate the 1<sup>st</sup> Plaintiff who lived in Tanzania to travel to Nairobi for purposes of negotiating the sale. That since they needed the money to fund their obligations they made the decision to dispose the property. On arrival the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs and their children and the Defendant negotiated the sale after inspecting the house together. By the time of signing the sale agreement the defendant at the request of the plaintiffs had advanced a total of Kes. 350,000/= to the plaintiffs for travel accommodation and personal use.

7. That on the 18<sup>th</sup> October 2006 the 1st Plaintiff entered into a Sale Agreement with the Defendant wherein the 1st Plaintiff agreed to sell and the Defendant agreed to purchase the suit property aforesaid at the price of Kshs. 25 Million. The sale agreement was witnessed by the 2<sup>nd</sup> defendant and her daughter Naziz Hirji Firoz. It was a term of the of agreement that the purchase price would be paid as follows;

a) Kshs. 4 million – upon signing of the Sale agreement. The two plaintiffs were to receive Kshs 1.5 million each. The balance of Kshs 1.0 million was paid to the 1st Plaintiff for purposes of renovating the house to restore it to its original state within 2 months. It was the duty of the 1st Plaintiff to account for this vote head and should there be a remainder to be shared between the plaintiffs in equal portions.

b) The balance of Kshs. 21 million was payable within 60 days as follows;

i. 1st Plaintiff – Kshs 9 million paid to his bank account.

ii. 1st Plaintiff – Kshs 1.5 million to be paid on satisfactory completion of the renovations.

iii. 2nd Plaintiff together with her daughter Nazizi Firoz Hirji – Kshs 2 million.

iv. The balance of 7 million was to be held by the Defendant on behalf of 1<sup>st</sup> & 2nd Plaintiffs and Nazizi Hirji as surety against a loan outstanding at Southern Credit Ltd in respect of their other property LR No. 7785/259 (one of their other properties).

8. It was also agreed between the parties that another separate agreement would be executed between the 1st Plaintiff and the Defendant with the purchase price stated at Kshs 15 million. Under this special agreement the purchase price was to be paid in two installments; Kshs 5 Million upon signing of the

agreement and the balance of Kshs 9 million within 30 days. It would appear that there was a mutual understanding that the Defendant was to initiate the nullification of this agreement in form of a letter to the purchaser. This agreement was witnessed by the 2nd Plaintiff and her daughter Nazizi Hirji.

9. The Plaintiffs aver that the Defendant took possession and occupied the premises before completion of the purchase price and has failed to pay the balance as per the agreement and at the time of filing this suit the balance of Kshs. 5,869,496/= is outstanding inclusive of Kshs. 97,441/= being City Council rates.

10. That 1<sup>st</sup> Plaintiff immediately authorized the repairs which repairs were supervised by a Mr. Muthaura, now deceased. That these repairs were completed and the house handed over to the Defendant in December 2006 who held a grand house opening in December 2006. That it is Mr. Muthaura who kept all the receipts and records in respect to the renovations. The Plaintiffs are challenging the defendant's claim that he carried out renovations worth over Kshs. 2 Million and aver that if he did then the Plaintiffs are not liable for them.

11. Pursuant to the sale agreement dated 18<sup>th</sup> September 2006, the 1<sup>st</sup> Plaintiff and the Defendant entered into the second agreement for sale dated 29<sup>th</sup> October 2006 in which the purchase price was stated to be Kshs. 14 million. This agreement as averred by the parties, was for purposes of the Defendant obtaining a loan from his employees' SACCO – United Nations Federal Credit Union (UNFCU). It was to be nullified immediately its purpose was achieved. In the said agreement, it is stated that the purchaser has inspected the property sold and the Vendor shall not be required to repair or improve the same. It is the Plaintiffs case that in their belief the main Agreement that regulated the transaction remained the 1<sup>st</sup> Agreement signed on 18<sup>th</sup> October 2006. The Plaintiffs aver that the payment of Kshs 14 million was expected to be received within 30 days of the signing of the agreement that is to say 29<sup>th</sup> October 2006 which was within the 60 day period when all the payments were payable, save Kshs 7 million which was to be withheld by the defendant and used to pay off a loan in respect to their other property L.R NO 7785/259. The Plaintiffs aver that the Defendant failed to pay the balance of the purchase price even after signing this agreement.

12. The Plaintiff further aver that by the time the Defendant took over possession of the house in December 2006, the total received was Kshs 13,557,750/= out of which Kshs 9 million went to the 1<sup>st</sup> Plaintiff. That the Defendant was paying the balance of the purchase price in piecemeal which displeased them. Failure to keep his promise to pay is attested by the dishonoured Cheque that he issued in favour of the 2<sup>nd</sup> Plaintiffs firm, Neeyat Hostel Services.

13. Later at the request of the Defendant, the 2<sup>nd</sup> Plaintiff agreed (having taken legal advice of her then lawyer, Mr. Khalwale) to remove the caveat she had registered on the property. The loan was, for purposes of funding the balance of the purchase price aforesaid. That to secure her share of payments, she, on the advice of her lawyer, then Mr. Khalware entered into a third agreement with the Defendant dated 26.5.2007. In this agreement, it was acknowledged that the share of the purchase price due to the 2<sup>nd</sup> plaintiff was Kshs 12.5 million less the sum of Kshs 2,978,500/- which she had received from the defendant leaving an amount of Kshs 9,521,500/- payable in two instalments; Kshs 3 million within 21 days of the transfer of title to the defendant and Kshs 6,521,500/= within 12 months of registration of transfer free from deductions. It was a term of the contract that the 2<sup>nd</sup> defendant was to discharge the caveat registered under the title.

14. That the caveat having been removed and relying on the Defendants promise to pay the 1<sup>st</sup> Plaintiff executed the transfer on 15<sup>th</sup> October 2007 effectively transferring the title to the Defendant. That the said transfer was duly registered on the title on 16<sup>th</sup> October 2007 in favour of the defendant. That the Defendant duly charged the property to Cooperative Bank to secure Kshs. 6 million which charge was registered against the title simultaneously with the transfer on 16.10.2007.

15. That by the time the Plaintiffs filed suit on 9.9.2008 the Defendant had paid a total of Kshs. 19,227,945 leaving a balance outstanding of Kshs. 5,869,496 made as follows:-

- a) Kshs. 5,005,373 on account of the 2<sup>nd</sup> Plaintiff.
- b) Kshs. 804,123 on account of 1<sup>st</sup> Plaintiff.
- c) Kshs. 97,441 on account of city council rates for the year 2007.

16. The Plaintiffs further aver that they are entitled *inter alia* to Kshs. 18,237,650 being gross rental income covering the period December 2006 to 31<sup>st</sup> July 2012 together with mesne profits in the sum of Kshs 250,000/- per month from 1<sup>st</sup> August 2012 until the final settlement and determination of the suit. They have annexed valuation reports dated 24<sup>th</sup> July 2012 and 9<sup>th</sup> February 2015 to support the claim.

17. In his oral testimony, the 1<sup>st</sup> Plaintiff refuted the Defendant's claim that repairs were unsatisfactorily done and challenged the defendant as to why he never raised any objection before taking possession of the house in 2006. That the reason why he transferred the property to the Defendant was as advised by the 2<sup>nd</sup> Plaintiff, to enable the Defendant to obtain a loan from his bankers to enable him to settle the balance of the purchase price.

18. The 2<sup>nd</sup> Plaintiff avers that the property was transferred to the Defendant against her wishes. She admits that they filed suit on 9.9.2008 before the expiry of 12 months stated in the third agreement signed on 26<sup>th</sup> May 2007 because the Defendant had become a perennial defaulter and at that point could not continue believing in his false promises to settle the outstanding purchase price due to them.

19. The Plaintiffs called 3 witnesses at the hearing of the case. PW 2 Eliud Karimi Murimi, a registered valuer who testified that he carried out a valuation for purposes of determining the gross cumulative rental income covering the period December 2006 – 31<sup>st</sup> July 2012 which he established to be Kshs. 18,237,650 and the second period between 1<sup>st</sup> August 2012 – 28<sup>th</sup> February 2015 returning a gross figure of Kshs. 12,646,460. He tabled a valuation report dated 24<sup>th</sup> July 2012. PW 3 Nazizi Firoze Nurali Hirji testified that she witnessed the 1<sup>st</sup> Agreement between the 1<sup>st</sup> Plaintiff and the Defendant. PW 4 David Musyoka stated that he was contracted by the 1<sup>st</sup> plaintiff to maintain the pool in the suit property and when the property changed hands he continued with the maintenance of the said property under the instructions of the defendant.

### **The Defendant's case**

20. The Defendant detailed how he met the 2<sup>nd</sup> Plaintiff through a property agent Messrs. Muigai Commercial Agencies. The Defendant admits in his evidence that he and the 1<sup>st</sup> Plaintiff signed two agreements dated 18.9.2006 and 29 .9. 2006 and a third one with the 2<sup>nd</sup> Plaintiff. He avers that he paid the Plaintiffs at diverse dates the said purchase price agreed through cash transactions, wire transfers and via cheque from his personal savings as well as loan obtained from Cooperative society and his bankers.

21. Regarding the repairs to the suit premises, the defendant admits that the Plaintiff was to repair the suit premises at an estimated cost of 1million to make it habitable. However, he failed to do so. That he was forced to undertake the said renovations at a personal cost of Kshs 2,162,172/- which should be met by the plaintiffs.

22. The Defendant further avers that on or about 16<sup>th</sup> October 2007, the Plaintiff duly and voluntarily transferred the suit property to his name. That the Defendant avers that he has paid the entire consideration for the suit premises and that he does not owe the Plaintiffs any monies. That he has always been in occupation of the suit premises as an owner and not as a tenant since 2007.

23. On Cross examination at the trial, the Defendant stated that he does not know how much he owes the Plaintiffs or whether the Plaintiffs owe him any monies. He advanced the reason for this scenario to the fact that the Plaintiffs filed suit before the accounts were reconciled and agreed.

24. Further he refutes that he is to blame for the delay in completing the transaction and blames the delay on the Plaintiffs. He cited examples of delay in removing the caveat subsisting on the title which impeded the completion of the transaction. He asserts that the balance of the purchase price was to be made within the 12 months in the third agreement.

25. On further cross-examination, the Defendant admitted that though he claims to have paid the purchase price in full, he did not have the documentary evidence to demonstrate that he paid the Kshs. 5,896,496/= which is being claimed by the Plaintiffs over the outstanding balance of the purchase price. When referred to the various documents and amounts that he claimed to have paid, the Defendant kept stating that he had no documents, receipts, bank details to support the alleged payments outstanding to the Plaintiffs. He also admitted on Cross-examination that he does not have documentary evidence showing the specifications of the repairs and the amounts expended on the said repairs.

26. He averred that he had earlier received a demand from the 1<sup>st</sup> plaintiff's lawyers demanding Kshs.1,595,000/= and now the Plaintiffs are demanding Kshs 5.8 million and that he is unable to ascertain from the Plaintiffs the exact amount they are owed, if at all. That he is unaware of any illegality or otherwise on the transaction as the transfer was done with the agreement of the Plaintiffs.

27. The Defendant finally stated in evidence that he is ready and willing to settle the outstanding balances to the Plaintiff should it turn out on reconciliation that he owes them.

### **Issues, analysis and determination**

28. The plaintiffs filed a list issues for which the defendant has adopted for the determination of the court. I set down the said issues as follows with the necessary modifications;

Was the 1<sup>st</sup> Plaintiff at all material times to this suit the registered owner of L. R No. 7785/226 situate at Runda Estate in Nairobi (hereinafter referred to as "the suit premises") or not

Whether the plaintiffs and the defendant entered into a sale agreement for the sale and purchase of the suit premises? If yes what were the terms and conditions of the said agreement and whether they have been adhered to?

Whether the defendant paid the full amount of consideration as set out in the agreement for sale or whether there is an outstanding amount of Kshs. 5,869,496/-?

Whether the plaintiffs are entitled to the sum of Kshs 18,237,650/- plus accruals being rent payment due to them?

Whether the plaintiffs are entitled to the prayers sought?

29. Was the 1<sup>st</sup> Plaintiff at all material times to this suit the registered owner of L. R NO. 7785/226 situated at Runda Estate in Nairobi (hereinafter referred to as "the suit premises") or not? It is the plaintiff's submission that at all material times the 1<sup>st</sup> Plaintiff was the registered owner of the suit property before the defendant took possession in December 2006 and later transferred it to himself in 2007 before completing the purchase price due and payable to the plaintiffs then and to date. The defendant submits that notwithstanding the plaintiffs' averments stated above, their averments do not state who of the plaintiffs was or were at the material times the registered owner of the suit property. The defendant places the material time to be the period immediately before the suit was filed, that is to say the period just before the 9<sup>th</sup> September 2008. The defendant further accuses the 1<sup>st</sup> plaintiff of non-disclosure of the fact of the transfer of the suit property to the defendant on the 16<sup>th</sup> October 2007 in their pleadings. The significance of this being that the 1<sup>st</sup> Plaintiffs rights in the property had been terminated.

30. Materiality derives from the time at which the relevant matters in issue occurred. Therefore material time is that time during which the alleged acts would have occurred. It can be understood to mean all

important times, or all relevant times. Material is defined in the Black's Law as "Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form."

31. I have reviewed the 3 agreements executed by the 1<sup>st</sup> plaintiff and the defendant on the one hand and the 2<sup>nd</sup> plaintiff and the defendant on the other hand and in my view at all material times refer to the period between the 18<sup>th</sup> September 2006 (date of 1<sup>st</sup> agreement entered into between the 1<sup>st</sup> Plaintiff and the defendant) and the 9<sup>th</sup> September 2008 (date when suit was filed). It is on record that the defendant took possession of the suit premises in December 2006. Going by the agreement of sale dated the 18 .9.2006, the suit premises were sold in vacant possession with the knowledge and authority of the plaintiffs pursuant to the agreement of sale aforesaid. It is in evidence, which evidence has not been controverted by the plaintiffs that the suit property had been vacant for a period of eight months prior to the negotiations for sale by the parties. At this point part of the purchase price in the sum of Kshs 4 million had been paid and acknowledged by the plaintiffs. It therefore follows that there was consideration that had passed to the plaintiffs at the time that the defendant took possession of the suit premises. I hold that there was no wrongful occupation of the suit property by the defendant as he did occupy it as a purchaser.

32. On the 16.10.2007, the transfer of the suit property was effected in the name of the defendant. The effect of this transfer when read together with the fact of possession extinguished the right of ownership of the 1<sup>st</sup> plaintiff both under title. The registration of title was pursuant to a relationship of a buyer and a seller. It is the plaintiff's evidence that by the above date, they had received a sum of Kshs 17.6 million as part payment, a sum that is substantial given the total amount payable. Thereafter, it is stated that the defendant paid an additional sum of Kshs 1.6 million after the transfer bringing the total paid to Kshs 19.2 million.

33. From the above analysis, it is therefore not true that at the time of filing suit by the plaintiffs on the 9.9.2008, the 1<sup>st</sup> plaintiff was the registered owner of the suit property. His rights had ended on the 16<sup>th</sup> October 2007. The defendant was indeed the registered owner, at least as can be deduced from the copy of the title of the suit property and the evidence of the parties.

Whether the plaintiffs and the defendant entered into a sale agreement for the sale and purchase of the suit premises? If yes what were the terms and conditions of the said agreement and whether they have been adhered to?

34. It is admitted by the parties in their evidence and submissions that there are 3 agreements that were executed variously by the parties. I shall set out the agreements and the salient features briefly. The 1<sup>st</sup> agreement dated the 18<sup>th</sup> September 2006 identifies the parties thereto as the 1<sup>st</sup> Plaintiff as the seller and the defendant as the buyer. The property is sold with vacant possession but with all the developments thereto. It is sold free from all encumbrances and time was made of essence to the agreement. On the purchase price, the defendant was to pay Kshs 4 million as down payment and the balance of Kshs 21 million would be paid as stipulated in the agreement.

35. The 2<sup>nd</sup> agreement followed 10 days later and the parties here are similar to those in the 1<sup>st</sup> agreement of sale. It is admitted by the parties that the sole purpose of this agreement was to enable the defendant to secure a loan from his employer's SACCO. This agreement was pursuant to a clause in the 1<sup>st</sup> agreement that provided that the parties would enter into it for that purpose and that the defendant would provide a letter nullifying this agreement immediately its purposes was achieved.

36. The 3<sup>rd</sup> agreement was entered into between the 2<sup>nd</sup> plaintiff and the defendant. This agreement, unlike the earlier two is headed "agreement" and it can be concluded that it was an agreement for payment of an agreed debt due in the sum of Kshs 12.5 million and not an agreement for sale, much as it refers to the parties as vendor and buyer, which words I shall read to refer to debtor and creditor. It was the 2<sup>nd</sup> plaintiff's case that she only held a beneficial interest in the suit property as the same was

registered in the name of the 1<sup>st</sup> Plaintiff. According to this agreement, the 2<sup>nd</sup> plaintiff was owed Kshs 12.5 million from the proceeds of sale of the suit property (which as stated in evidence was her share of the proceeds) by the defendant less the sum of Kshs 2, 978,500/- leaving a balance of Kshs 9, 521,500/-. The agreement provided that out of the outstanding sum of Kshs 9.5 million, Kshs 3 million would be paid 21 days after the registration of transfer in the name of the defendant and the balance of Kshs 6.5 million would be paid within a period of 12 months of the registration of the transfer free from any deductions. Further in clause C, the 2<sup>nd</sup> plaintiff was obligated to discharge the inhibition order registered on the title.

### **Whether they have been adhered to?**

37. Whether the 1<sup>st</sup> Plaintiff carried out the renovations in the suit premises as agreed?. It is to be noted that though the sale agreement entered into on the 18<sup>th</sup> September 2006 contained a clause on renovations, the same was removed in the 2<sup>nd</sup> agreement between the 1<sup>st</sup> Plaintiff and the defendant within a period of 10 days. The obligation of the 1<sup>st</sup> plaintiff to carry out renovations was terminated by clause 5 in the 2<sup>nd</sup> agreement dated the 29<sup>th</sup> September 2006. Going by the statement of the parties, the 1<sup>st</sup> plaintiff carried out renovations through a contractor that he hired. The bone of contention introduced by the defendant is that the repairs were done but not to his satisfaction. The 1<sup>st</sup> Plaintiff's case is that the repairs were done to the satisfaction of the defendant before handing over the suit premises to him in December 2006 when he took possession. That the defendant never complained about the said repairs. It is the defendant's case that he took over possession in order to supervise the repairs to the standard that he desired and that he indeed wrote a letter to the plaintiff demanding that the repairs be redone.

38. The agreement dated the 18.9.2006 does not state the nature of repairs to be undertaken nor who was to undertake and certify them as satisfactory. The defendant further states that he expended Kshs 2.1 million on the repairs after taking possession of the house because the repairs carried out by the plaintiff were not satisfactory. He does not give the reason why the repairs were unsatisfactory and the nature of the repairs that he undertook at the cost of Kshs 2.1 million. It is instrumental in both cases that no disclosures were made or agreed on what repairs were to be done. Nevertheless, the defendant took possession. In view of the above I conclude that the repairs that were done by the defendant were properly done and constituted a proper account to the defendant of the Kshs 1 million set aside for such repairs. Incidentally the Kshs 1 million was part of the purchase price and so is deducted from the amount payable to the plaintiffs.

39. My reading of the agreement dated the 18<sup>th</sup> September 2006 does not authorize the defendant to carry out the repairs and if he did carry out the repairs as claimed, such action had not been contemplated or authorized in the agreement and his desire to offset his costs of the repairs, if any, would only be valid for the purpose of this suit if he had made a counterclaim against the 1<sup>st</sup> plaintiff in respect to that sum. He did not and therefore he was not entitled to withhold any payments to the plaintiffs on such basis.

40. Whether the 1<sup>st</sup> Plaintiff was in breach in not releasing the documents of title to the defendant for registration? Going by the sale agreement of the 18.9.2006, payment of Kshs 21 million was not subject to be the release of the documents of title or transfer. I have found that the provisions of the 2<sup>nd</sup> agreement except for acknowledgement of Kshs 5 million and the payment of Kshs 9 million were not meant to bind the parties as by their admissions; was only to facilitate acquisition of a loan by the defendant from his employer. Therefore, the defendant's claim that the transaction delayed on the ground of the 1<sup>st</sup> plaintiff's failure to release documents of titles is unsupported and is not valid.

41. Whether the 2<sup>nd</sup> plaintiff breached the agreement dated the 26.5. 2007 by not removing the inhibition? The breach alleged by the defendant against the 2<sup>nd</sup> plaintiff is that she failed to remove the inhibition order which had been placed on the suit property. Clause B when read together with clause C and D of the agreement dated the 26.5.2007 means that the defendant's obligation to pay the 9 million was enforceable only after the inhibition order had been removed, the original titles released to him, rates clearance certificates released to him and a duly signed transfer has been registered. The agreement in

Clause D did not give a time frame within which the 2<sup>nd</sup> plaintiff was required to have the inhibition order removed. In any event the fact that it was removed on the 13<sup>th</sup> September 2007 did complete the obligation of the 2<sup>nd</sup> plaintiff pursuant to the aforesaid agreement. I hold that there was no specified or agreed time frame within which the inhibition order was to be removed. Having said that there is evidence that she nevertheless fulfilled her obligation on the 13<sup>th</sup> September 2007 and on that ground hold that she was not in breach.

42. Whether the defendants were in breach in failing to pay the full purchase price as agreed by the parties? On the 1st sale agreement, the Defendant did not pay the balance of the purchase price in the sum of Kshs 21 million within 60 days or at all. He also did not nullify the 2nd Agreement dated the 29<sup>th</sup> September 2006 as agreed neither did he pay the agreed sum of Kshs 9 million within 30 days as stipulated in the 2<sup>nd</sup> agreement.

43. The 3rd Agreement dated the 26<sup>th</sup> May 2007 provided for payment of Kshs 3 million to the 2<sup>nd</sup> plaintiff within 30 days after registration. The defendant discharged this obligation to the 2<sup>nd</sup> plaintiff before registration, the precondition stipulated which was, the registration of the transfer which took place on the 16<sup>th</sup> October 2007 leaving the balance of Kshs 6.5 million which was payable within a period of 12 months, that is to say on the 15<sup>th</sup> October 2008 to the 2nd Plaintiff. The 2<sup>nd</sup> Plaintiff did acknowledge the receipt of Kshs 1.6 Million after registration of title, thereby leaving a balance due and payable to the 2<sup>nd</sup> Plaintiff in the sum of Kshs. 5,722,055/-. In addition, it is the plaintiffs case that there is a figure of 97,441 being rates for 2007 due from the defendant giving the net total outstanding and due to the Plaintiffs from the defendant standing at Kshs 5,869,496/-.

44. The Defendant did acknowledge in evidence that should there be monies due to the Plaintiffs, he is ready to pay subject to the Accounts being reconciled. I have analyzed the documents submitted by the defendant and the balance not paid tallies with the figure being claimed by the plaintiffs. He admitted in evidence that he did not have evidence with him in Court to proof full and final payment and that he was not sure whether he owed the plaintiffs or the plaintiffs owed him. The amount claimed by the plaintiffs is no insignificant figure to be wished away. This defendant exhibited callousness on his part in handling the matter at hand. At the very least he should have taken the trouble to prepare his own reconciliation and proof to the Court that indeed he had paid the plaintiffs in full. This constitutes blatant breach on the part the Defendant.

45. Whether the defendant paid the full amount of consideration as set out in the agreement for sale or whether there is an outstanding amount of Kshs 5,869,496/-? The defendant admits having paid the total sum of Kshs 19,227,945/- to the plaintiffs but avers that this amount excludes the sum of Kshs 235,000/- which was paid to the 2<sup>nd</sup> plaintiff as per page 89 of the defendant's bundle, the Kshs 1 million being repairs costs and the Kshs 1.5 Million which was payable to the 1<sup>st</sup> plaintiff as a precondition to conclusion of the renovations. He also averred that he expended Kshs 2,162,172/- towards the renovations which were unsatisfactory. Going by his calculations, he urged this Court that he has indeed paid the sum estimated at Kshs 22, 625,117/- which still falls short of the purchase price of Kshs 25 million. This figure is disputed by the 2<sup>nd</sup> plaintiff who is purported to have signed the handwritten paper by stating that the figure was a duplication of amounts earlier accounted for. She denies this figure. It is my holding that the 1<sup>st</sup> Plaintiff carried out the renovations and was discharged from that obligation. The 3<sup>rd</sup> agreement clearly stated the outstanding amounts due less any deductions. It follows that there are no deductions to be made therefrom and I find these deductions being fronted by the defendant to be an afterthought. In the absence of proof by the defendant that he has paid 5, 869,496/-, I hold that he is liable to pay this amount.

46. Whether the plaintiffs are entitled to the sum of Kshs 18,237,650/- plus accruals being rent payment due to them? The plaintiffs have urged the Court to find that they are entitled to this amount. They have relied on the case of **Mistry Valji Vs Janendra Raichand & 2 others (2016) EKLR** in which the Court of Appeal noted that the award of rent payment due depended on the period it is claimed that the appellant was in wrongful occupation. In **Kenya Hotel Properties Ltd Vs Willesden Investments Ltd CA No**

**149 of 2007**, the Court of Appeal held that in a claim for mesne profits the first task is to determine the days the occupation was wrongful and the correct rate for the rent in question.

47. The Plaintiffs aver that the defendant was in wrongful occupation of the property from December 2006 and should therefore pay the sum of Kshs 18, 237,650/- as stipulated in the valuation Report dated the 24<sup>th</sup> July 2012 prepared by Vineyard Valuers Limited. The report returned rent values in the sum of Kshs 150,000/- per month as at December 2006 progressing to Kshs 200,000/- per month from Nov 2007 – 31<sup>st</sup> July 2012 giving the above cumulative figure of Kshs 18,237,650/- plus further accruals.

48. The defendant in opposing the claim states that the suit property was sold in vacant possession, it having been vacant for 8 months before the parties entered into the sale. He relied on the valuation dated the 5<sup>th</sup> October 2006 prepared by Mwaka Musau Consultants. That possession was given to the defendant with full knowledge of the plaintiffs and hence they have never raised an objection. That the transfer of the property to the defendant on 16.10.2007 was done by the 1<sup>st</sup> plaintiff pursuant to agreements and without any coercion and trickery by the defendant. That the transfer of the property to the defendant by the plaintiff was regular and legal. That the relationship between the 1<sup>st</sup> plaintiff and the defendant was that of a purchaser and a seller and not a landlord tenant and therefore no foundation has been laid to entitle the plaintiffs to an award of rent in the sum of Kshs 18,237,650/- or any further accruals.

49. The amount being claimed above is the rent the plaintiffs would have earned if the house was let on rent. The basis for granting rent or Mesne profits is if the occupation is wrongful. Example given is trespass where the trespasser has no colour of right to enter nor have been authorized by the owner to enter into the premises. The Defendant does not fall under this category. It is on record that the defendant took possession and occupation of the suit premises in December 2006 with the knowledge and permission of the plaintiffs. This fact has not been controverted by the plaintiffs. In the absence of any agreement on the terms of the occupation and possession from December 2006, it will be presumed that the defendant's occupation was that of a purchaser pending completion of the transaction, consideration having passed to the plaintiffs in terms of part payment of the purchase price. It is also uncontroverted evidence that the transfer of the suit property was duly signed by the 1<sup>st</sup> plaintiff in the full knowledge and blessing of the 2<sup>nd</sup> plaintiff thereby extinguishing the right of ownership in the suit property as at 16.10.2007. I find no evidence before this Court that the occupation of the suit premises by the defendant was wrongful or amounted to trespass in any way. I also find no evidence that the transfer of the suit property was illegal, fraudulent or a mistake. Thereby fortifying myself with the decision in **Mitry Valji Raichand & 2 others supra**, I hold that the defendant was not in wrongful occupation and therefore the amount of Kshs. 18,237,650/- being rental income must fail.

50. As regards the claim of Mesne profits in the sum of Kshs 250,000/- per month exclusive of utility bills from 1.8.2012 until final determination of the suit, the plaintiffs have urged the Court to award based on the grounds adduced for rental claim. **Black's Law Dictionary** defines Mesne profits as the profits of an estate received by a tenant in wrongful possession between two dates. According to Court of Appeal in **Kenya Hotel Properties Limited v Willesden Investments Ltd (2009) KLR 126**, in a claim for mesne profits, there has to be evidence that the plaintiff is the owner of the property upon which the claim is based. In this regard, the plaintiff has to show either that he is the registered owner of the suit land or he is in lawful occupation. That case also stands for the proposition that mesne profits is another term for damages for trespass. In other words, mesne profits mean one and the same thing as general damages for trespass. **Stroud's Judicial Dictionary 4th Edition Volume 3** describes mesne profits as:-

**“Another term for damages for trespass arising from particular relationship of landlord and tenant.”**

Based on my reasons given above, this claim must fail as it is not supported in law.

51. In respect to the alternative prayer for cancellation of title, the basis of cancellation of a title is if the transfer is by mistake or fraud. No evidence was tendered to the Court by the Plaintiffs to support the cancellation. Going by the evidence of the Plaintiffs, the 1<sup>st</sup> Plaintiff was paid substantial part his share of

the purchase price. He held the title of the property for himself as well as in trust for the 2<sup>nd</sup> plaintiff. The 2<sup>nd</sup> Plaintiff was acknowledged by the defendant culminating into the agreement of 26.5.07. The basis of payment to her was that her share of the purchase price remained largely unpaid, which payment was agreed to be paid upon registration of transfer to the defendant. It cannot be available to the Plaintiffs to assert cancellation of a title for which the 1<sup>st</sup> Plaintiff's liability had been substantially settled by the Defendant prior to registration of the title in the defendant's name and on which the 2<sup>nd</sup> Plaintiff by way of agreement of 26.5.2007 acknowledged that her share of the purchase price will be paid upon registration of transfer. Such causes of action do not constitute a mistake error or fraud in registering the title in his name. In their evidence and submissions the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs state that they were cheated by the Defendant so as to cause them to sign a transfer for the property to be registered in his name. That cannot be true because the 1<sup>st</sup> Plaintiff had been paid substantially his share and the 2<sup>nd</sup> plaintiff undertook to only be paid by the Defendant upon the registration of transfer to the defendant. In any event the 2<sup>nd</sup> defendant had the benefit of legal advice of counsel before signing the 3<sup>rd</sup> agreement. Such actions by the Plaintiffs does not constitute want of knowledge or that they had been misled by the Defendant. This claim must fail and it is accordingly rejected.

52. In respect to costs, the law is clear that costs follow an event and it is at the discretion of the Court. In the instant case, I have held that the Defendant was in breach of 1<sup>st</sup> Agreement, which Agreement was substantially altered by Agreement No 3. In that agreement the 2<sup>nd</sup> plaintiff and the defendant agreed that that Kshs 6, 521,500/- would be paid within 12 months of the date of registration of transfer (which took place on the 16.10.2007) that is to say by 15.10.2008. The suit was filed on the 9.9.2008 within the period for payment as per the 3<sup>rd</sup> agreement. The suit was therefore prematurely filed and on the date of filing there was no breach by the defendant of the agreement of 26.5.07. Notwithstanding this scenario, I have already held that the defendant had been and is still in continuous breach of the agreements when he failed to pay the balance of the purchase price as agreed for over 10 years. I take cognizance of the fact that demand notice of intention was issued by the plaintiffs on the 1<sup>st</sup> February 2007 but that did not move the defendant to pay the balance of the purchase price. He is not absolved of breach and is hereby ordered to pay the costs of this suit.

53. In the overall the plaintiffs by and large delivered on their part of the bargain in the transaction. The repairs were carried out and the suit property handed over to the defendant by the plaintiffs without full payment of the purchase price. The plaintiffs continued accommodating the defendant by agreeing to his demands and shifting repayment schedules. The defendant continued in his default streak whilst giving the plaintiffs false hope that payment is coming. I cannot say that the plaintiffs were naïve in this transaction because in evidence they have stated that they had been transacting on land before even with the defendant. That said, the Court frowns on the conduct of the defendant.

54. Award of interest is purely at the discretion of the court, so as the rate of interest. **Section 26 (1) of the Civil Procedure Act** states that (1) "Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

55. The court is disallowed to interfere with the interest rate payable if parties have an agreed rate of interest. That interest should apply within the contractual period. If the suit is brought after the lapse of the contractual period the court may award interest at a rate it may think fit. This is the decision in **Ajay Indravadan Shah v. Guilders International Bank Ltd.** In the instant case the suit was filed before the expiry of the 12 months.

56. The Plaintiffs have submitted and urged the Court to award them compound interest on any amounts found to be due and payable to them. I have looked up the definition of compound interest in the Black Law Dictionary and it is interest paid on both the principal and the previously accumulated interest. It is calculated on the initial principal and also on the accumulated interest of previous periods of a deposit or

loan. It is different from Simple interest in that simple interest is calculated on the principal, or original, amount of a loan. Compound interest is calculated on the principal amount and also on the accumulated interest of previous periods, and can thus be regarded as interest on interest.

57. I note that the plaintiffs pleaded under prayer h) for interest on various payments however in their submissions, they did not explained the foundation for the same. In this case the agreement of sale did not provide for the interest payable in case of breach of contract. That being the case and guided by the justification for award of interest as stated in **Lata v. Mbiyu [1965] EA 592:-**

“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”

I find that the plaintiffs have been denied the opportunity to invest the money withheld by the defendant for inordinately extended period. This is a case that warrants the granting of interest to compensate the plaintiffs for the time value of money that was withheld from them for a period of close to 9 years now. I do not find any justification of awarding compound interest in this case given the conduct of the parties in the transaction by accommodating the defendant who kept defaulting on the agreement. I award interest at court rates.

58. As regards the claim for general damages, I note that no evidence was adduced on this limb and therefore find and hold that it is not payable.

59. I order judgement in favour of the plaintiffs as follows;

- a) A declaration that the defendant is in breach of the terms of the sale agreement.
- b) Payment by the defendant to the plaintiffs of the sum of Kshs 18,237,650/- being the gross cumulative rental income covering the period from December 2006 to 31st July 2012 is declined.
- c) Payment of Mesne profits by the defendant to the plaintiffs in the sum of Kshs. 250,000/- per month exclusive of utility bills from the 1st August 2012 until the final settlement and determination of the suit is declined.
- d) Further and or in the alternative but completely without prejudice to the above, the cancellation of the sale and transfer of Land Reference Number 7785/266 back to the favour of the 1st Plaintiff by and from the defendant is not justified and therefore rejected.
- e) The defendant to pay the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs the sum of Kshs 5, 869.496/- being outstanding balance of the sale inclusive of Kshs 97,441/- being city council rates with interest thereon at Court rates from the date of filing suit until payment in full.
- f) General damages are declined.
- g) The defendant shall pay the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> SEPTEMBER 2017.**

**J.G. KEMEI**

**JUDGE**