



**Saint Mary's Sacred Heart Christian Brothers & Sisters International v
Akenya Investment Limited (Environment & Land Case 132 of 2014)
[2025] KEELC 1003 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1003 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 132 OF 2014
E ASATI, J
FEBRUARY 27, 2025**

BETWEEN

**SAINT MARY'S SACRED HEART CHRISTIAN BROTHERS & SISTERS
INTERNATIONAL PLAINTIFF**

AND

AKENYA INVESTMENT LIMITED DEFENDANT

JUDGMENT

Introduction

1. Vide the amended plaint dated 29th May, 2020, the Plaintiff herein sought for the following relief against the Defendant;
 - a. That the honourable court be pleased to compel the Defendant to sign the relevant documents and obtain the relevant consents and clearances to effect the transfer of land parcel No. Kisumu Municipality Block 4/147 to the Plaintiff and effect the said transfer within such timelines as the court deems fit and title deed issued to the Plaintiff.
 - b. In the alternative and in default of (a) above, an order be issued compelling the Defendant to surrender the original title instruments of land parcel Kisumu Municipality Block 4/147 to the Deputy Registrar of this court to sign the relevant documents on behalf of the Defendant in favour of the Plaintiff and a title deed issued to the Plaintiff.
 - c. An order for refund of the purchase price of Kshs.45,000,000/- with interest at court rates from the date of executing the sale agreement until payment in full.
 - d. The notice of distress for rent served by Nyaluoyo Auctioneers on 13th May, 2014 is null and void and of no effect.



- e. Perpetual injunction to restrain the Defendant from breaching its commitment to sell Kisumu Municipality Block 4/147 to the Plaintiff the agreed sum of Kshs.45,000,000/= as long as the Plaintiff is able and willing to keep its part of the bargain.
 - f. Costs of the suit.
2. The Plaintiff's case as pleaded in the amended plaint is that it entered the suit land as a tenant upon payment of the sum of Kshs.696,000/- to the Defendant who was the Landlord in respect of land parcel known as Kisumu Municipality Block 4/147 (the suit land herein) between 28th August, 2013 and 11th September, 2013.
 3. That later the Defendant purposed to sell the suit land to the Plaintiff at a cost of Kshs.45,000,000/- which upon negotiation the parties agreed orally that;
 - a. the Plaintiff was to raise Kshs.20,000,000 as deposit to the purchase price within 1 year and
 - b. the balance of Kshs.25,000,000/- was to be paid within the next 5 years.
 4. That the Plaintiff paid Kshs.19,873,000/- in fulfilment of its part of the agreement. That it was understood by the parties that the Plaintiff was to become a purchaser in occupation as long as it made timeous payment of the agreed deposit of Kshs.20,000,000/- and thereafter agreeing to pay the balance of Kshs.25,000,000/-.
 5. That it was also understood that a formal agreement of sale was to be issued upon them reaching the agreed deposit of Kshs.20,000,000/- and that the Plaintiff's occupancy and usage of the premises as a college was not going to be affected by absence of such agreement.
 6. The Plaintiff's complaint is that contrary to and in breach of the said agreement, the Defendant through the firm of Aboge & Company Advocates served the Plaintiff with a letter dated 9th May, 2014 which was purported to be a Notice of termination of tenancy and demand for arrears of rent. That further on 13th May, 2014, the Defendant through M/s Nyaluoyo Auctioneers served the Plaintiff with a proclamation/ notice of distress for rent and threatened to levy distress for rent upon the Plaintiff's property if the said sum was not paid.
 7. That neither the demand for rent nor the purported termination of the tenancy by the Defendant was lawful.
 8. The Plaintiff therefore sought the court's intervention.
 9. In response to the Plaintiff's claim, the Defendant filed Amended Defence and counterclaim dated 19th May 2020. The Defendant denied the Plaintiff's claim and averred that sometimes in the month of August, 2013 it rented its residential premises situated on the suit land to the Plaintiff at an agreed rent of Kshs.232,000 per month whereupon the Plaintiff paid rent for the month of September, 2013 together with one month's deposit of the same amount hence paying a sum of Kshs.464,000 in accordance with a lease agreement prepared by M/s Aboge Advocate and executed between the parties.
 10. That the Plaintiff fell into arrears of unpaid rent and the Defendant ultimately through M/s Aboge & Company Advocates vide letter dated 9th May, 2014 demanded from the Plaintiff for payment of rent for the month of March, April and May 2014 hence a total of Kshs.696,000/- with a Notice to distress for rent in event of default whereupon the Plaintiff filed the suit.
 11. That the Plaintiff as at January, 2017 had accumulated rent arrears of Kshs.8,353,000/- being rent for 36 months and that the amount continues to rise every month at the rate of Kshs.232,000/- per month.



12. By way of counterclaim, the Defendant sought for the following relief against the Plaintiff;
- a. the sum of Kshs.8,353,000 being the outstanding aggregate arrears of unpaid rent as at January, 2017 and such additional amount that would continue to accumulate thereon at the rate of Kshs.232,000/- per month for the period that the Plaintiff continues to be in occupation of the Defendant's said premises known as Kisumu Municipality Block 4/147 until such a time that the Defendant either forcefully evicts them in the exercise of its common law right of re-entry or otherwise executes the order of eviction by court.
 - b. An order of eviction of the Plaintiff from the said premises known as Kisumu Municipality Block 4/147, together with the value of the costs of the said eviction in the sum of Kshs.200,000/= whether under exercise of the Defendant's common law right or re-entry or under the execution of the order of eviction issued by the court.
 - c. An order for recovery of a sum of Kshs.133,101,95 and Kshs.101,789/- respectively as set out in paragraph 16 herein above and such additional sums as may continue to accrue on the electricity and water bills till the Plaintiffs shall vacate the premises.
 - d. The costs of this suit and the counterclaim and interest on prayers (a), (b) and (c) above at court rates of 14% per annum till payment in full.

The Evidence

13. On behalf of the Plaintiff, two witnesses testified. PW1 was Washington Otieno Ofula. He adopted the contents of his witness statement dated 11th March, 2022 as his evidence in chief. He had stated in the said witness statement that sometime in August, 2013, they were introduced to property in Tom Mboya Estate by a family friend by the name of Vitalis Akuma Jodo.
14. That at that time, the organization was operating its activities of Teachers Training College at Geneva Christian Building. That the property was Kisumu Municipality Block 4/147. That they wanted to take the property as tenants. That the negotiation was with Mrs. Rose Osago, the wife of one Mr. James Humphry Obanda Oswago and Mr. Oswago himself, the agreed rent was Kshs.232,000/- payable on 1st of every month with 2 months deposit equivalent to Kshs.464,000/= rent payable before occupancy.
15. That a lease agreement was drafted by Mr. Aboge of Aboge & Company Advocates which the Plaintiff signed and returned to Mr. Aboge for signing by the other party. That Aboge Advocate warned him not to pay any money to the said Rose and James Humphrey Oswago as the property was not in their name.
16. That later, Rose advised him to forget about Aboge Advocate and that she was going to avail a different lease agreement from Nairobi by Wanjohi Waithaka Advocate for them to sign.
17. That he paid Kshs.464,000/- to one George Debe as instructed by Rose which was acknowledged by way of voucher.
18. That the college moved into the premises on September 11, 2013 on which day he gave George Debe a further 232,000/- which was acknowledged by way of voucher.
19. That George Debe later told him that Mr. Oswago was purposing sale of the property. That they talked and agreed on deposit of 20 million which was to be paid in instalments. That he was advised not to deposit large amounts of money into the bank account. That the Kshs.20,000,000/- was to be paid within one year and the balance of 25,000,000/- to be cleared within a period of five years.



20. That they also agreed that the tenancy agreement was to be cancelled and a formal agreement of sale be executed upon completion of payment of the deposit of Kshs.20,000,000. That the agreement was never availed for signature. That they paid a total of Kshs.47,000,000 to the Defendant.
21. PW1 testified further that it was the Defendant who sold them the suit land. He produced the following documents as exhibits; sale agreement dated 22nd November, 2018 a, payment voucher, letter by Aboge & Company Advocates dated 27th January,2014, copies of receipts, letter dated 30th November, 2019, receipts from 11th December, 2018 to 20th January, 2019. Letter dated 27th February, 2013, form CR 12 for Akenya Investment certificate of official search for the suit land and KCSE results for the school.
22. On cross-examination, PW1 stated that the Plaintiff is a registered NGO. That the school closed down and students went to other schools. That there is nothing going on in the premises. That there are only caretakers.
23. That he came to court in his capacity as the treasurer of the plaintiff organization but that he did not have the minutes which authorized him to come to court.
24. He stated further that by 9th May, 2024, they had paid Kshs.19 million. That after that, they paid more money up to 45 million.
25. That they got the money from loans, well-wishers, school fees, farming activities, friends and harambees.
26. That the total amount paid was Kshs.47 million and that he made the last instalment in the year 2018. That the documents attached to the Supporting Affidavit sworn by his late mother Patricia Aluoch were different from the ones he produced as exhibits herein. That Patricia was convicted of forgery in Criminal Case No.315 of 2014.
27. That the parties in the sale agreement produced as exhibit 1 were Patricia Aluoch representing the Plaintiff (Purchaser) and George Debe representing the seller.
28. PW2 was Frank Otieno Omollo, a journalist. He produced a copy of Newspaper cutting as exhibit.
29. On cross-examination, he stated that he wrote what he was informed by Patricia Aluoch as he was not present when the events recorded in the newspaper cutting happened.
30. The evidence of the Defence comprised of the testimony of three witnesses. DW1 was George Debe Odhiambo. He relied on the contents of his witness statement dated 7th November, 2022.
31. DW2 was Jame Okode Obuya. He adopted the contents of his witness statement dated 4th November, 2022 as his evidence in chief. He had stated in the witness statement that he is a Director of the Defendant Company. That he is also known as Edward. That the signature appearing at the foot of the letter dated 30th November, 2018 is a forgery as it is not his signature. That Akenya Investments has a letterhead and could not have written the letter on plain paper. That the letter contains falsehoods and that by the time it was written, Patricia Aluoch was facing active prosecution in Kisumu CMC CR. CASE NO.315 OF 2014 in which he was a witness. That the letter dated 30th November, 2018 did not feature among the documents she produced and that the same was forged later for purposes of this case.
32. That the letter dated 27th January, 2014 was fake. That George Debe had no authority to issue instruction to advocate on behalf of the Defendant. That Mr. Alloys Aboge Advocate testified against Patricia Aluoch during the Criminal Case. That Washington Otieno Ofula never interacted with the Defendant and that his statement was a false statement. That the NGO, Co-ordination Board has



- confirmed that the Plaintiff is a non-compliant and moribund organization and that there is no way that it would have the kind of resources that would have enabled it to pay for the suit property in the manner in which it alleges to have paid for it.
33. He further stated that the Defendant let out the suit property to ST. Mary's Sacred Heart Brothers and Sisters International at a monthly rental of Kshs.232,000. That the property does not belong to James Oswago or Rose Aketch Oswago. That there is no agreement between the Plaintiff and the Defendant for sale of the suit land. That the company did not authorize George Debe to enter into any land agreement in respect of the suit land.
 34. That Aboge Advocate who was the Advocate for the Defendant assisted in drawing the lease agreement. That the court made rulings dated 7th May, 2015 and 28th February, 2018 to the effect that the Plaintiff continues to pay rent as the case goes on. That there was outstanding rent of about 27 million.
 35. On cross-examination, PW2 stated that he was a witness in the Criminal Case. That Akenya Investments has 4 directors. That the directors hold a total of 24 shares. That Rose Oswago had no share in the investment company.
 36. PW3 was Philip Odera Ouma Onyango. He adopted the contents of his witness statement dated 19th August, 2021 as his evidence in chief. He had stated in the witness statement that he was a director of the Defendant Company. That the Plaintiff entered onto the suit premises as a rent paying tenant with effect from the month of September, 2013 at a monthly rental of Kshs.232,000.
 37. That there was never a proposal to sell the property to the Plaintiff at Kshs.45,000,0000 or at all and that no payment was made in that connection. That it was him and his co-director James Okode Obuya who handed over the suit property to the Plaintiff for rental purposes. That the Plaintiff failed to pay rent and the Defendant was entitled to terminate the tenancy, re-enter the suit premises and levy distress for rent.
 38. He testified further that Patricia Aluoch Okech a director of the Plaintiff Company was charged and tried in Kisumu Chief Magistrate's court Criminal Case No.315 of 2014 with the offence of forgery and uttering of false documents namely three vouchers for Kshs.120,000/= Kshs.600,000/- and Kshs.400,000/-, the charge being that she had purported that the vouchers were signed by George Debe when they were not. That she was found guilty of the offence and sentenced to serve 18 months in prison on each count, which sentence she served. That Patricia Aluoch Okech did not appeal against both the conviction and sentence.
 39. That the Plaintiff was using the suit premises to house an education institution which has been deregistered. That the Plaintiff was a tenant of the Defendant who as at January, 2017, owed the Defendant arrears of rent of Kshs.8,352,000 and the same continues to accrue at the rate of Kshs.232,000/- per month until payment in full or until the Plaintiff vacates the property. That in addition, the Plaintiff had run up water and power bills during its stay in the premises as pleaded in paragraph 16 of the amended Defence.
 40. On cross-examination, DW3 stated that he was one of the directors of the Defendant. That in the Criminal Case, 3 vouchers were found to be forged.

Plaintiff's submissions

41. On behalf of the Plaintiff, written submissions dated 26th August, 2024 were filed by the firm of Lugano & Achura Advocates. Counsel submitted that the prayers by the Plaintiff as contained in the amended Plaintiff dated 29th May, 2020 can be summarized as either orders for specific performance by the Defendant and/or refund of the purchase price already paid by the Plaintiff to the Defendant.



42. Counsel submitted that the questions posed in the Defendant's written submissions ought to have been brought about during the hearing of the suit either through their evidence in chief or cross-examination of the Plaintiff's witnesses. That the same amount to Counsel for the Defendant adducing evidence from the Bar and attempts to fill in gaps left by the Defendant's omissions and commissions.
43. For this submission, Counsel relied on the case of *Emfil Limited -vs- Attorney General & 424 Others* [2016]eKLR where the court disregarded submissions on the grounds that they amounted to evidence from the Bar with no Affidavit evidence to lend credence to the submissions.
44. Counsel submitted further that the Defendant having by its conduct vouched for payment of the monies in relation to the property in cash is estopped from reneging from the demand it made to the Plaintiff to avoid making deposits of colossal amount into the bank account. Counsel relied on the provisions of Section 120 of the *Evidence Act* and the case of *Pickard -vs- Sears* 112 ER.179 which was quoted in *Carol Engineering Limited & Another -vs- National Bank of Kenya (2020)eKLR* to submit that the Defendant was estopped from using as a defence to the Plaintiff's claim the payment in cash.
45. Counsel submitted that having made full payment for the suit property created a legal expectation in the Plaintiff that the suit property ought to be transferred to it as absolute proprietor forthwith. Counsel relied on the case of *Republic -vs- Kenya Revenue Authority, Pinto Energy Limited (Ex parte) (Judicial Review Application E023 of 2021)*[2022]KEHC 5 (KLR) 24 January 2022 on definition of legitimate expectation
46. Counsel urged the court to uphold the valid vouchers issued by Mr. George Debe on behalf of the Defendant company. That since this is a fresh suit nothing stopped the Defendant from calling a document's examiner to ascertain to this court the veracity of signatures claimed to be George Debe's in the vouchers.
48. That neither the Defendant not George Debe lodged an application to privately prosecute any of the directors of the Plaintiff institution. That the Defence of forgery is just a ploy by the Defendant to gain unjust enrichment to the detriment of the Plaintiff.
49. Counsel submitted further that even if the Plaintiff had not adduced a sale agreement for the suit property executed between the two parties herein, it would be unjust and unconscionable to allow the actual and beneficial owners of the suit property to retain the money paid to them which helped them defend the Criminal charges and investigations brought against them by the state.
50. Relying on the case of *Eastern Produce (K) Ltd Chemomi Tea Estate -vs- Bonfas Shoya* [2016]eKLR, Counsel submitted that the standard of proof in Civil cases is on a balance of probabilities hence if there are two contending positions, the court is required to go with the averment which is most probable.
51. That the Plaintiff had surmounted the threshold because it produced various documents including payment vouchers, letters by the transaction advocates and the Defendant has through its witnesses confirmed that only 3 vouchers were confirmed to be forgeries and that the value of the said vouchers amount to Kshs.1,120,000/= out of the total of Kshs.47,000,000/- paid in respect to the suit property.

On whether the orders prayed for should be granted;

52. Relying on the case of *Gurdev Singh Birdi and Marinder Singh Ghatora -vs- Abubakar Madhubuti* CA NO.165 of 1996 Counsel submitted that a party seeking specific performance must demonstrate that he has performed or he is willing to perform all the terms of the said agreement. Counsel submitted that the Plaintiff had fulfilled this.



53. That the Defendants are relying on technicalities to escape from their liability towards the Plaintiff. That the Defendants' pleadings should be dismissed under Order 2 Rule 16 of the Civil Procedure Rules for being frivolous and designed to delay the expedited determination of the Plaintiff's case.
54. That the Plaintiff also prayed for a refund of the purchase price which it had paid to Defendant. That refund of the purchase price amounts to rescission of the contract for want of consideration by the Defendant.
55. That the Defendant is entitled to rescind the contract of sale of the suit property because of non-performance.
56. Counsel relied on the case of Prakash S. Shah -vs- NIC Bank Limited (2012)eKLR to submit that the Plaintiff cannot be kept waiting for eternity for the Defendant to execute the transfer documents and have the suit parcel title deed issued in its favour hence the court should order them to refund the amount already paid to them with interest.
57. Counsel prayed that the Plaintiff's claim be allowed with costs.

Defendant's submissions

58. Written submissions dated 20th August, 2024 were filed by the firm of Owiti Otieno & Ragot Advocates. Counsel framed the issues for determination to be;
 - a. whether the Defendant agreed to sell the suit property to the Plaintiff.
 - b. if the answer to (a) is in the affirmative, what were the terms thereof and were the terms complied with?
 - c. is the Plaintiff entitled to the prayers sought in the amended plaint?
 - d. is the Defendant entitled to judgement as prayed for in the counterclaim?
 - e. what orders should the court make as to the costs of this suit?
59. On whether the Defendant agreed to sell the suit property to the Defendant, Counsel submitted that there was no agreement or other understanding by which the Defendant was to sell the property and hence the claim for specific performance cannot succeed because the Plaintiff pleaded that there was no written agreement by which the Defendant agreed to sell the suit property to the Plaintiff. That the agreement they had was an oral one which they described as a "gentleman's agreement" between DW1 and the Plaintiff. Counsel referred to the provisions of Section 3(3) of the Law of Contract Act and Section 34 of the repealed Companies Acts and submitted that there is no agreement as described in these provisions of the law.
60. That there was no resolution by the Defendant, which is a limited company, to sell the land. There is no evidence that George Debe (DW1) was authorized to execute any agreement on behalf of the company.
61. That the document produced as P.exh.1 being an agreement dated 13th November, 2013 which the Plaintiff purports to be the sale agreement for the suit property has nothing to do with the Plaintiff or the Defendant. It is between PW1 and the late Patricia Oketch.
62. Counsel submitted that although PW1 alleged that his signature on the document was forged, that the law does not allow the Plaintiff to do this as parties are bound by their own pleadings and that a party cannot change the facts on which its case are premised at the trial.
63. Counsel relied on the case of Kinyanjui Kamau -vs- George Kamau Njoroge [2015]eKLR.



64. Counsel submitted further that the parties executed a lease agreement and that under Section 97 of the *Evidence Act*, when the terms of a contract, grant or any other disposition or property have been reduced to the form of a document, no evidence shall be given proof of the terms thereof except the document itself. That the lease could not be altered orally as suggested by the Plaintiff.
65. On what the terms of the agreement were and whether they were complied with, Counsel submitted that the Plaintiff's case was that the right to hold the property as a purchaser in occupation was conditional on it paying a deposit of Kshs.20 million within a year from the date of the agreement. That the Plaintiff claims to have paid Kshs.19,873,000/= as of the date when the suit was instituted. That Patricia had disclosed at her trial that Kshs.18,916,000/- is what had been paid. That in the Replying Affidavit filed on 18th June, 2014, the figure was given as 19,600,073.
66. Counsel submitted that the Plaintiff did not even meet the terms of the fraudulent transaction which it invites the court to enforce.
67. Counsel submitted further that the Plaintiff's director was charged and convicted of forgery of exhibit P.exh.2B, 2D and 2F for Kshs.400,000/-, Kshs.600,000/- and Kshs.120,000/- respectively.
68. That exhibits 4(a) to 4(o) produced by the Plaintiff were stated by defence witnesses to be forgeries. That in any event, the said documents were not issued to the Plaintiff who was supposedly the purchaser of the property. Counsel submitted further that the conviction of the Plaintiff's director is a confirmation that the entire suit is based on a criminal enterprise and relying on the case of National Bank of Kenya Ltd -vs- Wilson Ndolo Ayah, Counsel submitted that the court cannot entertain an action founded on breach of the law.
69. On the prayer that for a declaration that the process of distress for rent cannot succeed, Counsel submitted that it was common ground that monthly rent was Kshs.232,000/-. That the Plaintiff remained a tenant and that in the absence of proof of payment of rent as agreed, the process of distress for rent cannot be said to be unlawful. Counsel relied on the provisions of sections 3 and 15 of the *Distress for Rent Act* for the Landlord's authority to levy distress for rent.
70. On the claim for refund of Kshs.45 million, Counsel submitted that the same cannot succeed because firstly it was not brought as an alternative claim to the claim for transfer, and secondly that the evidence presented in support thereof was acts of forgeries and that while PW1 claimed that the total amount paid was Kshs.47 million no explanations was given for claiming for only Kshs.45 million.
71. Counsel submitted that the Defendant is entitled to judgement on the counterclaim. That the Plaintiff pleaded nothing in denial of the counterclaim. That under the provisions of Order 2 Rule 11 the claim is deemed as admitted.
78. That there is abundance of evidence. That two separate rulings of this court dated 7th May, 2015 and 28th February, 2018, the court directed the Plaintiff to pay rent. That not a coin has been paid yet the Plaintiff continues to hold the suit property. That as at December, 2023, the amount outstanding was Kshs.27,811,000/- and that it continues to rise at the rate of Kshs.232,000 per month consumed by it.
79. Counsel prayed that the suit be dismissed and the counterclaim allowed with costs.

Issues for Determination

80. From the pleadings filed, the evidence placed before court and submissions made by both parties, the following are the issues that arise for determination: -



- a. whether or not there exists a land sale agreement between the Plaintiff and the Defendant for the sale of the suit land to the Plaintiff.
- b. whether or not the Plaintiff paid monies to the Defendant for the purchase of the suit land.
- c. whether or not there exists a tenancy agreement between the parties herein
- d. whether or not the Plaintiff is entitled to the relief sought in the plaint.
- e. whether the Defendant is entitled to the relief sought in the counterclaim.
- f. Who pays the costs of the suit and counterclaim?

Analysis and Determination

81. The first issue for determination is whether or not there exists a sale agreement between the Plaintiff and the Defendant for the sale of the suit land to the Plaintiff.
82. The Plaintiff pleaded in paragraph 10 of the amended plaint that on 10th September, 2013, the parties on the proposal of Mr. Debe agreed orally on gentleman's agreement that the Plaintiff was to raise Kshs.20,000,000/- as deposit to the purchase of the property within one year and the balance of Kshs.25,000,000/- only was to be paid within the next five years. The Plaintiff pleaded further in paragraph 11 of the amended plaint that it was understood by both parties that the Plaintiff was to become a purchaser in occupation and was to remain as long as it kept its part of the bargain by timeously paying the agreed deposits of Kshs.20,000,000/- and thereafter agreeing to pay the balance of Kshs.25,000,000/-.
83. The Defendant denied the existence of any such agreement. The Defendant vide the contents of paragraph 6 of its defence and counterclaim denied the Plaintiff's allegations in paragraph 10 and 11 of the amended plaint.
84. It is common ground that no land sale agreement was produced between the Plaintiff and Defendant herein for sale of the suit property.
85. As submitted by Counsel for the Defendant, under Section 3(3) of the Law of Contract Act, no suit shall be brought upon a contract for the disposition of an interest in land unless;
 - a. the contract upon which the suit is founded
 - i. is in writing
 - ii. is signed by all the parties thereto
 - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
86. The Plaintiff produced a document as exhibit P.1 which is it presented as the agreement for the sale of land the suit land to it by the Defendant. Perusal of the said documents reveals that none of the parties to this suit signed it. There was no evidence that the people who signed the document particularly on behalf of the Defendant had authority of the Defendant to sign on behalf of the Defendant. That Defendant is a limited liability company for which the manner of executing its documents were specified under the Companies Act which was in force as at the time of the alleged transaction.



87. It was submitted on behalf of the Plaintiff that the Defendant which was a proxy through which the actual and beneficial owner of the suit property dealt with the Plaintiff is estopped, having by its conduct, vouched for payment of monies in respect of the suit property in cash.
89. Certificate of official search exhibited shows that the suit land parcel number Kisumu Municipality/ Block 4/147 belonged to Akenya Investment Ltd in whose name it was registered on 10th July, 2013.
90. I find that there was no land sale agreement between the parties herein for the sale of the suit land to the Plaintiff.
91. The second issue for determination is whether the Plaintiff paid monies to the Defendant for purchase of the suit land.
92. The Plaintiff pleaded in paragraph 10 of the plaint that it had been furnished with Account number 008205 9691001 at Chase Bank Riverside Branch, Nairobi where to deposit the rent payments.
93. The Plaintiff's witnesses testified that upon request by one James Oswago, the Plaintiff made payment of the purchase price in cash.
94. According to paragraph 12 of the amended plaint, as at the date of filing suit, the Plaintiff had paid a total of Kshs.19,873,000/- by way of deposit in account and direct cash payment. PW1 testified that the total amount was Kshs.47,000,000/-. The purchase price as per paragraph 10 of the plaint paid was Kshs.45,000,000/-. The Plaintiff was not able to explain why if indeed it paid, it had to pay Kshs.2,000,000/- extra.
95. The Plaintiff was also not able to explain why it had to make further payments in the form of purchase price, if indeed it did, after a dispute had already arisen and the suit filed in court. Because the Plaintiff claims that as at the time of filing suit, it had paid Kshs.19,873,000/- but as at the time PW1 was testifying in court, he claimed the Plaintiff had paid a total of Kshs.47 million.
96. The documents produced by Plaintiff as receipts issued in acknowledgement of the alleged payment were disowned by the Defendant's witness. Under the provisions of sections 107 to 109 of the Evidence Act, the burden of proof was with the Plaintiff to prove that the said documents were authentic and not forged.
97. The payment vouchers produced while some of them were the subject of the Criminal Case in which one of the directors of the Plaintiff was convicted of the offence of forgery, others had irregularities in that copies and the original differed. For instance, in cross examination PW1 admitted in respect of a voucher produced as exhibit P.2 (b) that the way the date was written in the original version was different from the way it was written in the copy. PW1 was taken through copies of the same vouchers that had been attached to an Affidavit filed on behalf of the plaintiff, earlier by Patricia Aluoch a director of the plaintiff and mother of PW1. PW1 stated in cross-examination

“The payment vouchers attached to the affidavit show that the payment was authorized by the head teacher clerk. But according to the vouchers I produced, the authorization was to be done by the director.

The vouchers annexed to the Affidavit by my mother don't bear the signature of Akenya Investments Ltd.

I see the voucher dated 20/1/2014 for Kshs 800,000, my exhibit P. 2 (h). The one annexed to Patricia Aluoch has the name Kisumu altered but the one I produced as exhibit P.2(h) has no alteration.



The documents attached to the Affidavit of Patricia Aluoch are different from the ones I have produced in court.....the vouchers I have produced here are the same ones my mother produced in the criminal case.”

98. Clearly it was not proved that the vouchers were authentic documents evidencing acknowledgement of payments made by the Plaintiff to the Defendant.
99. I find no evidence that the Plaintiff paid monies for purchase of the suit land to the Defendant.
100. The next issue is whether there existed a tenancy agreement between the parties in respect of the suit land.
101. It was common ground that the Plaintiff entered the suit premises on the basis of a tenancy agreement between the parties herein. The monthly rent was agreed to be Kshs.232,000/-. That after this, the Defendant provided the Plaintiff with a bank account in which according to the Plaintiff, it was to be making further small payments.
102. There is no evidence that the tenancy agreement was ever terminated. Though it was claimed on behalf of the Plaintiff that the tenancy was converted into a land sale agreement, there is no evidence to this effect.
103. The Plaintiff as at the time of trial herein was still in possession of the property. I find that there exists a tenancy agreement between the Plaintiff as the tenant and the Defendant as Landlord. This court had through rulings herein ordered the Plaintiff to continue paying rent in the pendency of the suit, orders which the plaintiff did not honour.
104. The next issue for determination is whether or not the Plaintiff is entitled to the relief sought in the plaint.
105. The Plaintiff's claim is based on the alleged land sale agreement between itself and the Defendant. Having found that there was no land sale agreement between the parties herein, there is no basis for the court to order for specific performance or for refund of any monies by the Defendant to the Plaintiff.
106. The certificate of official search produced shows that the Defendant is the registered owner of the suit land. I find no basis upon which to issue a perpetual injunction as prayed.
107. The next issue is whether the Defendant is entitled to the relief sought in the counterclaim.
108. The Defendant seeks for recovery of the outstanding arrears of rent, eviction of the Plaintiff from the suit property and recovery of accrued cost of water and electricity consumed by the Plaintiff.
109. Having found that there exists a tenancy agreement between the parties herein, I find that the Defendant is entitled to the relief sought in the counterclaim.
110. The upshot is that the plaintiff has failed to prove its case on a balance of probabilities and the suit is therefore hereby dismissed with no order as to costs.
111. The Defendant has proved its claim in the Counterclaim on a balance of probabilities. Judgement is entered in favour of the Defendant as prayed in the Counter claim as follows: -
 - a. the sum of Kshs.8,353,000 being the outstanding aggregate arrears of unpaid rent as at January, 2017 and such additional amount that would continue to accumulate thereon at the rate of Kshs.232,000/- per month for the period that the Plaintiff continues to be in occupation of the Defendant's said premises known as Kisumu Municipality Block 4/147 until such a time that the plaintiff shall vacate the premises either voluntarily or by eviction as ordered herein.



- b. An order that the Plaintiff vacates and hands over vacant possession of the suit premises within 90 days hereof failing which an order of eviction shall issue for the Plaintiff's eviction from the said premises known as Kisumu Municipality Block 4/147 as by law provided.
- c. An order for recovery of a sum of Kshs.133,101,95 and Khs.101,789/- being outstanding electricity and water bills and such additional sums as may continue to accrue on the electricity and water bills till the Plaintiff shall vacate the premises.
- d. Costs of the counterclaim and interest thereon and on the awards in (a) and (c) above at court rates.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

No appearance for the Plaintiff

Kapinde h/b for Otieno David for the Defendant.

