Marete v Ndegwa & 2 others (Civil Appeal E042 of 2021)
[2024] KECA 545 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 545 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E042 OF 2021

KI LAIBUTA, P NYAMWEYA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

JANE MARETE ..... APPELLANT

AND

JOSEPH WAITIKI NDEGWA ..... 1ST RESPONDENT

JULIET OTINGA ..... 2ND RESPONDENT

REGISTRAR OF TITLES, MOMBASA ..... 3RD RESPONDENT

(Being an appeal from the Judgement and Decree of the Environment and Land Court at Mombasa (A. Omollo, J.) dated 25th October 2018 in ELC Civil Suit No. 201 of 2008)

JUDGMENT

1. The subject of this appeal are two consolidated suits. The first in time was Mombasa HCCC No. 142 of 2007, which was commenced by way of a plaint dated 15th June 2007. That suit was brought by the 1st respondent against the appellant. In that suit, the 1st respondent pleaded that on or about 5th October 2006, the 1st respondent entered into a sale agreement with the appellant in respect of Land Reference No. 5608 (original number 5203/221) Section I Mainland North (the suit property) at the price of Kshs 4,500,000/-; that, thereafter, the appellant took possession of the suit property and deposited Kshs 1,500,000; that the completion date was agreed to be sixty (60) days from the date of the agreement; and that as the balance was not forthcoming, the 1st respondent issued a 21 days Completion Notice in line with subsection 7 clause 4 of the Law Society Conditions of Sale, 1989 Edition (the Law Society Conditions), but that the appellant did not heed the notice.

2. The 1st respondent sought a declaration that the said contract had been rescinded; rent at the rate of Kshs 50,000 per month from October 2006 till payment in full; vacant possession and eviction of the appellant from the suit property; and costs and interest.

3. On 20th June 2007, the appellant filed her defence and counterclaim in which she denied that the 1st respondent was the owner of the suit property, but admitted the existence of the agreement dated 5th October 2006 as well as the agreed purchase price and the amount deposited as pleaded by the 1st respondent. She denied that she took possession of the suit property upon signing the agreement as well as the contended completion date. She also denied non-payment of the balance of the purchase price as well as the fact of the issuance of the completion notice which she averred was, in any case, invalid and was subsequently waived by the 1st respondent. It was her defence that upon purchasing the suit property, she found it, in her own words, "in a very pathetic and sorry state and/or for all purposes a shell", forcing her to carry out major reconstructions and renovations to the tune of Kshs 7,000,000; and that upon the realisation that the suit property had been brought back to a new state, the 1st respondent changed his mind, demanded the property and frustrated the completion of the transaction notwithstanding the appellant's readiness, willingness and ability to complete the transaction.

4. It was on that basis that the appellant sought in her counterclaim an order for specific performance compelling the 1st respondent to deliver the original Certificate of Title Number CR 19427; a valid transfer; consent to transfer the property from the Commissioner of Lands; together with valid rates payment receipts and clearance certificate from the local authority, upon receipt of which the balance of the purchase price would be paid.

5. The second suit, ELC Civil Suit No. 201 of 2008, was commenced by a plaint dated 7th August 2008, which was subsequently amended on 22nd October 2008 and later re- amended in 2010, in the suit, the appellant sought judgment against the respondents jointly and severally for:

    a. A permanent injunction restraining the respondents by themselves, their agents, assigns and/or employees or otherwise howsoever from selling or purporting to sell, charging, mortgaging, subdividing, pledging, entering, cancelling and/or rescinding the sale agreement, disposing or in any other manner interfering with the appellant's quiet possession and enjoyment of the said property known as LR. 5608 (Original Number 5203/22) Section I Mainland North.

    b. A declaration that the caveat lodged on 29th of January, 2007 was irregularly, unlawfully and illegally lifted thus the same stands valid and in force and should be reinstated and/or reregistered and/or restored forthwith and a declaration that the execution by the 1st and 2nd respondents and registration by the 3rd respondent of the transfer dated 22nd August 2007 over the property known as LR. 5608 (Original Number 5203/22 Section 1 Mainland North was fraudulently, unlawfully and illegally done and consequently an order directing the 3rd respondent to cancel the said fraudulent, illegal and unlawful transfer with immediate effect.

    c. A declaration that the 1st respondent was estopped from selling the suit property to any other person and/or purported Transfer dated the 22nd August, 2007 purportedly registered on the 24th July, 2007 over the suit property, to wit, LR No. 5608 (Original Number 5203/22) Section 1 Mainland North was fraudulent, illegal, unlawful and/or wrongful and void ab initio and a further Order that the same be cancelled and/or revoked and/or deregistered forthwith.

d. An order compelling the First respondent to forthwith surrender the original Certificate of Title Number CR. 19427 to the appellant and to execute a Transfer in favour of the appellant whereupon the balance of Kshs 3,000,000.00 shall be made to the respondent in the ALTERNATIVE the respondent do jointly and/or severally pay the appellant the total amount expended in improving, reconstructing and renovating the suit premises in the sum of Kshs 7,150,075.00, amount paid to the First respondent Kshs. 1,500,000.00 and Advocate's costs in the said transaction of Kshs 78,500.00 totalling to Kshs 8,728,575.00 plus damages for breach of contract.

e. Costs of and incidental to this suit.

f. Interest thereon at Court rates.

1. On 1st September 2010, the two suits were consolidated by consent. Unfortunately, the record does not reveal further directions that ought to be given by the court where such a procedure is adopted. Apart from the order for consolidation, the court ought to have given directions as to which of the files is the lead file in which the proceedings are to be taken and assign the parties their respective designations in the consolidated suit. However, nothing turns on this procedural lapse.

2. The appellant's case, as presented by her at the hearing was that, on 5th October 2006, she got into a sale agreement with the 1st respondent over the title to the suit property for a sum of Kshs 4,500,000; that, after she deposited Kshs 1,500,000, she was put into possession; that the sale agreement provided for the completion date of 60 days and payment of the balance in exchange of the completion documents; that, at that time, the house on the plot was incomplete as it had no floor titles, windows or doors; that the 1st respondent handed over to her the original building plans for the said house and she began completion of construction works, for which she spent Kshs 7,000,000; and that, upon completion of the construction works, her relationship with the 1st respondent became sour after the 1st respondent demanded more money.

8. It was the appellant's further case that, on the advice of her advocate, she did not pay the balance of the purchase price since the completion documents had not been surrendered; that she was always ready to pay the balance of the purchase price; that the 1st respondent started posting adverts for sale of the suit property the suit on property's perimeter wall and, by a letter dated 25th January 2007, instructed, the 1st respondent Kenya Power and Lighting Co. Ltd to disconnect electricity from the premises; and that, as a result, she lodged a caveat on 30th January, 2007.

9. The appellant referred to the pleadings in HCCC 142 of 2007 and confirmed that she received a letter dated 31st July 2008 asking her to hand over vacant possession of the suit premises.

   It was then that she learnt that the 1st respondent had sold the suit property to the 2nd respondent by an agreement dated 22nd July 2007, and a transfer dated 27th August 2007 lodged at the lands office on 24th July 2007. The appellant lamented that the 1st respondent sold the property one year after she had renovated it without refunding her deposit.

10. The appellant admitted that the completion date was 5th December 2006; and that when the notice dated 7th December, 2006 was sent to her advocates, the advocates sought extension of time on her behalf, a request that was accepted for a period of 14 days on condition that she paid Kshs 1,000,000 within 2 days. She conceded that as at 20th January 2007 when the transaction was cancelled, she

had neither paid the balance nor deposited the money with her advocates. It was her case that the documents supplied to her (building plans, photos & application for power supply) were not the documents which she was supposed to be supplied with as per the agreement. She denied the allegation that she was trying to sell the suit property and explained that her reason for not paying the rents and the rates was this existing dispute.

11. The appellant insisted that the searches dated 30th March 2007 and 2nd August 2007 confirmed that the 1st respondent was still the registered owner, although those searches did not reveal the existence of the caveat. She disclosed that she did not execute the said caveat since it was registered by her advocate, but that she could not confirm whether the caveat was actually registered and who actually removed it. Based on the evidence presented by the respondents, she confirmed that the suit property was registered in favour of the 2nd respondent on 24th July 2007 and admitted that no document was presented to the 3rd respondent to register the suit title in her name.

12. The appellant noted that the agreement between the 1st & 2nd respondent was dated 22nd July 2007; that the Stamp Duty form was signed by the Registrar on 23rd August 2007; that the payment for transfer to the 2nd respondent was received by the bank on 24th August 2007, while entry No 4 showed that the 2nd respondent was registered as owner on 24th July 2007. To her, this was evidence of fraudulent transfer.

13. The gist of the claim by the appellant against the 3rd respondent was that the 3rd respondent acted fraudulently, illegally, irregularly and/or colluded with the 1st and 2nd respondents in removing the caveat and registering the purported transfer in favour of the 2nd respondent.

14. The suit was defended by the 1st, 2nd and 3rd respondents, who filed their separate defences. The 1st respondent's defence dated 7th October 2008 filed in Court on the same date denied the appellant's claim and pleaded that the appellant had illegally advertised the sale of the suit property while knowing she had no title at all to the said property. The 1st respondent denied the particulars of illegalities and fraud pleaded against him and urged the Court to dismiss the suit with costs.

15. In her defence filed on 20th August 2008, amended on 28th October 2008 and re-amended on 30th August 2012, the 2nd respondent denied the appellant's claim in its entirety and, in her counter-claim, alleged that she acquired plot LR 5608 (Original 5203/22) Section 1 Mainland North (the suit plot) from the 1st respondent for valuable consideration; that, prior to acquiring the suit property, she carried out a search and confirmed that the suit property was not encumbered; that she paid the full consideration of Kshs. 5,000,000, receipt of which the 1st respondent duly acknowledged; and that she was not aware of the sale agreement between the appellant and the 1st respondent and/or the existence of a caveat registered by the appellant, or the existence of unregistered interests of the appellant over the suit property.

16. By way of counterclaim, the 2nd respondent sought:

    a. A declaration that the Agreement dated 5th October 2006 between the appellant and the 1st respondent did not confer title to the appellant.

    b. A declaration that the 2nd respondent was the registered proprietor of the suit property.

    c. A declaration that the 2nd respondent was entitled to mesne profit from the appellant from 1 st September, 2007 till vacant possession.

    d. An order for vacant possession of the suit property.

1. In its defence filed on 3rd April 2009, the 3rd respondent averred that the caveat by the appellant was removed following the expiry of the 45-day notice to the appellant. The said respondent also denied that it acted fraudulently, illegally, irregularly and/or colluded with the 1st and 2nd respondents in registering the transfer in favour of the 2nd respondent.

18. In his testimony, the 1st respondent's admitted the existence of the sale agreement between him and the appellant on 5th October 2006 for sale of the suit plot; that the appellant paid Kshs 1,500,000 leaving a balance of Kshs 3,500,000; that he instructed his advocate to serve the appellant with a 21 days' notice to pay the balance but she never paid; that the appellant sought extension which was conditionally given, but that she failed to comply with the conditions therein, as a result of which he decided to sell the house to the 2nd respondent, completed the transaction with her and handed over the original title documents to the 2nd respondent; that at the time of selling the suit property to the 2nd respondent on 22nd August 2007, HCCC 142 of 2007, in which he sued the appellant seeking payment of rent at Kshs 50,000 per month, was still pending; that he never permitted the appellant to build, as the house was ready for occupation; and that no caveat was registered on the suit title.

19. The 1st respondent further testified that even though the agreement did not provide for taking over possession on execution of the agreement, he nevertheless allowed the appellant to take possession; that the appellant was not in occupation when he sold the house to 2nd respondent; that he took the completion documents to Mr Waweru but did not take a signed transfer; and that it was the appellant who advertised the property for sale.

20. On her part, the 2nd respondent testified that she saw the sale of the house in a newspaper advert and called the number given on the advert, which disclosed the sale price at Kshs 17 Million; that she met the 1st respondent, they negotiated and agreed at a price of Kshs 5,000,000; that, subsequently, an agreement was drawn by their advocates on record and both parties complied with the terms of that agreement; that the documents were presented to the lands office for registration and payment made in respect of the taxes; that, when she viewed the house, it was complete with 5 bedrooms and a servant quarter; that, although the house looked occupied, she did not enquire about the occupant; that the rental for similar houses was Kshs 50,000 per month, but that at the time of her testimony, the monthly rental was Kshs. 120,000; that the date of presentation of her documents for registration was 24th July 2007 and not 2008 as indicated in the transfer form which, in her view, was an error; that the erasures, the discrepancy in the dates for transfer and registration were minor errors; that the stamp duty was presented on 23rd August 2007; and that, after paying for the house, she never returned to the house because her husband was ill.

21. No evidence was adduced on behalf of the 3rd respondent.

22. In his judgement, the learned trial Judge identified the issues for determination as: what the terms of the contract between the appellant and the 1st respondent were; whether or not the contract was terminated; and whether or not the suit property was available for sale by the 1st respondent to the 2nd respondent.

23. In arriving at her decision, the learned Judge relied on National Bank of Kenya Ltd vs Pipeplastic Sam Solit (K) Ltd & Another (2002) 2 EA 503, in which it was held that courts ought not to re-write contracts between parties. In the learned Judge's finding, a contract was executed between the appellant and the 1st respondent on 5th October 2006; that, although time was of the essence of the contract, the full purchase price was not paid at the expiry of the 60 days; that the agreement was subject to the LSK Conditions of Sale (1989) edition with a variation only to interest rate under condition 2(9); that, by a letter dated 7th December 2006, the 1st respondent notified the appellant of his readiness to compete

the transaction and gave 21 days' completion notice pursuant to clause 4(7) of the said Conditions of Sale; that, by a letter dated 8th January 2007, the appellant, through her advocates, requested for a 45 days extension of time "to facilitate completion of the security documentation of the loan" applied for and which was to be used to settle the balance of the purchase price; that the extension was granted conditionally, but that the appellant failed to comply with the conditions; and that the 1st respondent proceeded to repudiate the agreement for sale vide a letter dated 20th January 2007 pursuant to clause 7(a) of the Law Society Conditions of Sale.

24. According to the learned Judge, the appellant did not demonstrate any steps taken against the 1st respondent after the expiry of the 60 days, and upon advice by her advocate that the completion documents had not been surrendered; that, even though, the appellant insisted that she lodged a caveat on the title, the same was not registered; that the decision in Cassman vs Sachania (1982) eKLR, relied upon by the appellant, was of no assistance to her since she did not demand for a signed transfer on the expiry of the 60 days and that, from her advocate's letter of 8th February 2007, she was not ready with the balance; that, the parties having incorporated the Law Society Conditions of Sale, and the 1st respondent having duly served notice as evidenced by the correspondence exchanged and produced, the sale agreement of 5th October 2006 was effectively terminated by the 1st respondent for non-payment of the balance of the purchase price; and that the appellant could not therefore rely on the non-delivery of the completion documents without evidence that she had the money before the expiry of the 60 days, or within the 21 days' notice period served on her vide the letter of 7th December, 2006.

25. The learned Judge wondered what action the appellant took after getting to know that the 1st respondent was intending to sell the property to ensure that the terms of the contract were fulfilled apart from the purported registration of the caveat. In the learned Judge's view, the appellant having failed to perform her obligations under the contract, she lost the benefits accruing thereunder and, therefore, the 1st respondent was at liberty to sell the property to any ready buyer. Based on the evidence, the learned Judge found that, even though the appellant was apprehensive of the 1st respondent selling the suit property, she herself was also intent on selling the same; and that documents warning the appellant of the intention to remove the caveat as well as evidencing the appellant's intention to sell the suit property absolved the 3rd respondent of the allegations of fraud pleaded by the appellant, which allegations were not proved.

26. In the judgement of the learned Judge, the appellant's claims, apart from the one seeking refund of the appellant's Kshs 1,500,000, were unmerited and she therefore ordered the 1st respondent to refund the appellant the said sum with interest at court rates from date of filing of the suit. The learned Judge further held that there was no evidence in support of the appellant's claim for renovations; that the 1st respondent's claim for rent from the appellant had no basis as there was no evidence of landlord/tenant relationship between the appellant and the 1st respondent; that the most the 1st respondent could have asked for was general damages for the period the appellant was in occupation until vacant possession was given; that the 1st respondent having sold his interest over the suit property, such benefit, if at all, could only accrue to the title holder (2nd respondent) in the event the particulars of loss was proved.

27. Regarding the 2nd respondent's counterclaim, the learned Judge found that, once the property was registered in the 2nd respondent's name and having served the appellant with notice to give vacant possession, the 2nd respondent became entitled to use the property from the date of expiry of her notice from 1st September 2007; that failure by the appellant to surrender vacant possession entitled the 2nd respondent to compensation for the period she (the 2nd respondent) was unable to use the premises. In order to compensate the 2nd respondent, the Court assessed the damages payable at Kshs 500,000 per year as being commensurate with the reasonable market rate of rent at approximately Kshs 40,000

per month from date of filing of the suit until the time when vacant possession would be surrendered. The learned Judge directed the appellant to vacate the suit property within 45 days of the date of the judgment, and that the costs of the suit be borne by the appellant with interest at court rates.

28. Dissatisfied with the said decision, the appellant lodged the instant appeal which he urged us to allow on rather convoluted and argumentative 12 grounds of appeal contrary to the edict of rule 88 of the Court of Appeal Rules, 2022 which enjoins appellants to "... concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against". However, we noticed that in the submissions, the said grounds of appeal were condensed into 6 as follows: whether the trial Judge erred in law by deciding that the doctrine of lis pendens was inapplicable as a fetter, restriction or impediment to the purported sale and transfer of suit property as between the 1st and 2nd respondent; whether the trial Judge erred in law and in fact by recognizing the 2nd respondent as the registered owner of the suit property without evidence of such registered ownership being tendered in court; whether the trial judge erred in law and in fact by failing to find and hold that the sale and transfer of the suit property to the 2nd respondent was fraudulent, illegal, unprocedural, and therefore void ab initio; whether the trial Judge erred in law in awarding the 2nd respondent mesne profits without any basis whatsoever; whether the trial Judge erred in law and in fact by finding and holding that the 1st respondent had served upon the appellant a valid notice of rescission of the subject agreement; and whether the trial Judge erred in law and in fact in finding and holding that the appellant had not lodged a caveat on the suit property, and in failing to find and hold that the caveat was illegally, unprocedurally and fraudulently removed.

29. We heard the appeal on the Court's GoTo virtual platform on 28th November 2023 when learned Senior Counsel, Mr. Murgor, appeared with Mr. Bob Otieno for the appellant while learned counsel, Mr. Joseph Munyithya, appeared for the 2nd respondent. We were informed that the appeal against the 1st respondent had abated and that, although served, there was no representation on the part of the 3rd respondent. However, submissions were filed on behalf of the 3rd respondent.

30. Learned Counsel relied on their written submissions, which they briefly highlighted. According to the appellant, this Court extensively pronounced itself on the doctrine of lis pendens in the case of Naftali Ruthi Kinvua vs. Patrick Thuita Gachure & another [2015] eKLR where it was held that the doctrine remains relevant notwithstanding the legislative developments that have taken place since the promulgation of *the Constitution*, 2010. It was submitted that the learned Judge should not have disregarded the adjudicative support of the doctrine of lis pendens in considering the injunctive relief sought, if for no other reason than for the preservation of the suit property until the suit herein was finally heard and determined; that the learned judge fell into error when she failed to consider and apply the doctrine of lis pendens to grant the injunctive relief sought; and that the learned Judge ought to have been guided by the ruling of Azangalala, J (as he then was) on 2nd December 2008 in which the learned Judge, while granting an interlocutory injunction, held the view that by transferring the suit property to the 2nd respondent during the pendency of HCCC No. 142 of 2007, the 1st respondent stole a match from the appellant.

31. The appellant relied on section 26 of the *Land Registration Act* as well as sections 107, 108 and 109 of the *Evidence Act* and submitted that there was no basis for the finding by the learned Judge that the 2nd respondent was the registered owner of the suit property based merely on a transfer as opposed to either a certificate of search or certificate of title. It was further submitted that the learned Judge failed to take into account the fact that the purported transfer was unprocedurally and unlawfully registered on 24th July 2007 before being executed later on 22nd August 2007 contrary to section 44 of the *Land Registration Act*; that the purported transfer, which was unlawfully, illegally and fraudulently

registered on 24th July 2007 before stamp duty was allegedly paid later on 23rd August 2007 was void ab initio, and in contravention of section 46 of the *Land Registration Act*; that the 1st respondent testified and confirmed that the alleged signature on the purported transfer document to the 2nd respondent was not his signature and, therefore, the said transfer could only be fraudulent and illegal; and that the discrepancy in the registration was pointed out by both Azangalala, J. and Mwongo, J. in their earlier decisions of 2nd December 2008 and 24th July 2007 respectively. In support of this position, the appellant relied on the case of Munyu Maina vs Hiram Gathiha Maina [2013] eKLR for the proposition that where a registered proprietor's root title is under challenge, it is not sufficient to simply rely on the instrument of title as proof of ownership, but that one must go beyond the instrument and prove the legality of how the title was acquired.

32. Regarding the award of mesne profits, it was submitted that, having demonstrated that the 2nd respondent did not prove ownership of the suit property and that the purported transfer was illegal, fraudulent and unprocedural, and hence void ab initio, there was no factual basis upon which the 2nd respondent could be awarded mesne profits. It was submitted that in any case, the learned Judge having found that there was no evidence of landlord and tenant relationship between the appellant and the 1st respondent; and as the 1st respondent's attempt to have the property valued was declined by Mwongo, J in his ruling dated 24th May 2022, there was no basis upon which the mesne profits could be assessed and awarded. In support of this position, the appellant cited the case of Peter Mwangi Mbuthia & Another vs. Samow Edin Osman [2014] eKLR where the Court of Appeal held that it is upon a party to place evidence before the court upon which an order of mesne profits may be made.

33. Regarding service of the rescission, it was submitted that since it was demonstrated that the 1st respondent did not avail the completion documents set out in the agreement, the 1st respondent had no basis for issuing the notice of rescission and, hence, the purported notice of rescission issued was contrary to clause 7(b) of the Law Society Conditions of Sale. According to the appellant, there was clear evidence that a caveat was registered against the suit property by him on 30th January 2007, but was unprocedurally removed without giving her notice, and that she never received the 45-day statutory notice that precedes the removal of a caveat. Accordingly, the appellant submitted that the caveat was unlawfully and unprocedurally removed with the sole intention of defeating the appellant's right to the suit property. Therefore, , the trial Judge erred in law and in fact in finding and holding that the appellant had not lodged a caveat on the suit property; and in failing to find and hold that the caveat was illegally, unprocedurally and fraudulently removed.

34. In urging us to allow the appeal, it was submitted that the learned trial Judge misdirected herself and erred in law and in fact by, inter alia, dismissing the appellant's suit and ordering her to give vacant possession of the suit property and pay general damages of Kshs. 500,000 per year from the date of filing suit 25until delivery of vacant possession.

35. It was submitted on behalf of the 2nd respondent that the agreement between the appellant and the 1st respondent had clear clauses on conditions set by each party; and that the appellant failed to comply with the said terms even after being issued with the rescission notice. In her submissions, the 2nd respondent relied on Sisto Wambugu vs. Kamau Njuguna [1983] eKLR in which this Court held that contracts for sale of land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed date.

36. The 2nd respondent also relied on National Bank of Kenya Limited vs. Pipeplastic Samsolit (k) Limited and Another [2001] eKLR for the proposition that a court of law cannot rewrite a contract between the parties and that parties are bound by the terms of the contract unless they can prove that there was coercion, fraud or undue influence used to procure the contract. It was submitted that, the sale

agreement between the appellant and the 1st respondent having been effectively terminated by the 1st respondent for non-payment of the balance of the purchase price, the 1st respondent was at liberty to sell the property to the 2nd respondent. As too the 2nd respondent, the learned Judge considered all the evidence tendered before arriving at the decision that the 2nd respondent was the registered owner of the suit property. This submission was based on section 26 of the *Land Registration Act*, which provides that the certificate of title is prima facie evidence of proprietorship of land. According to the 2nd respondent, the particulars of illegality and fraud levelled against the 2nd respondent were not proved, and that the 2nd respondent was an innocent purchaser for value without notice. The 2nd respondent being the registered owner of the suit property, and having served a notice to vacate on the appellant, she was entitled to the use of the property from the date of expiry of the notice on 1st September 2007. The 2nd respondent submitted that the appellant having failed to surrender vacant possession, she was unable to use the property. Hence, she was entitled to be compensated for the lost profits. In this regard, the 2nd respondent relied on Lucy Wangari Ngugi vs. Elizabeth Atieno Wanyanga & Another [2020] eKLR where it was held that the 2nd defendant which had a right to obtain possession of the suit property was entitled to mesne profits for the plaintiff's continued possession of the property.

37. On the issue as to the validity of the notice rescinding the sale agreement, it was submitted that the trial Judge did not err in finding that the rescission notice dated 20th January 2007 effectively terminated the sale agreement; that the sale agreement between the appellant and the 1st respondent provided for sixty (60) days completion and, therefore, time was considered of the essence; that it was also a term of the agreement that the Law Society Conditions of sale would apply; that, under clause 4(7) of the said Conditions of sale, a party is obligated to serve a completion notice on the defaulting party if the sale is not completed on the completion date; that the 1st respondent wrote to the appellant on 7th December 2006 giving 21 days' notice to complete the transaction; that the appellant responded on 8th January 2007 seeking extension of time for a period of 45 days to facilitate completion of the security documentation of the loan applied for, and which was to be used to settle the balance of the purchase price; that the appellant had clearly made time of the essence in respect of the completion date when it sought extension of the completion date, but failed to comply despite the extension of time; that the 2nd respondent rightly issued the letter dated 20th January 2007 repudiating the agreement; and that, as from 20th January 2007 when the sale agreement was repudiated, the 1st respondent was at liberty to sell the property as there was no court order restraining the 1st respondent from selling the property to a third party.

38. In this regard, reference was made to Housing Company of East Africa Limited vs. Board of Trustees National Social Security Fund & 2 others [2018] eKLR where this Court appreciated that a request for and the grant of extension of completion date makes time of the essence and, once that is done, there is no room for delay.

39. It was therefore submitted that the rescission notice was valid and in accordance with the law.

40. In view of the above, it was submitted that this appeal lacked merit, and that the same should be dismissed with costs to the 2nd respondent.

41. In the 3rd respondent's submissions dated 15th March 2022 by Emmanuel M. Makuto, the Senior Litigation Counsel in the Attorney General's Chambers, it was submitted that there was no single act of fraud proved by the appellant contrary to the requirements in sections 107 and 108 of the *Evidence Act*, which requires that he who alleges must prove; that on record was a letter dated 9th February 2007 sent by registered post to the appellant's admitted address giving the appellant the requisite 45 days

before removal of the caveat; and that the appellant did not prove her case against the 3rd respondent. We were urged to uphold the the trial court's decision.

42. We have considered the submissions made by the parties.

43. In a first appeal, we are enjoined by the law and authorities, to reconsider the evidence, evaluate it and draw our own conclusions of facts and law. See Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123. However, we will only depart from the findings by the trial Court if they were not based on evidence on record, where the trial Court is shown to have acted on wrong principles of law as was held in Jabane vs Olenja [1968] KLR 661, or where its discretion was exercised injudiciously as held in Mbogo & Another vs Shah [1968] EA 93.

44. In our view, the issues whose resolution will determine this appeal are: whether the agreement for sale of the suit property between the appellant and the 1st respondent was lawfully terminated; whether the 1st respondent was entitled to enter into a sale agreement in respect of the suit property with the 2nd respondent; whether in fact there was such a sale transaction and whether the suit property was transferred to the 2nd respondent; whether there was a caveat registered on the suit property by the appellant and whether it was lawfully removed; and whether the 2nd respondent was entitled to mesne profits from the appellant.

45. Regarding the first issue, it is not contested that there was an agreement dated 5th October 2007 entered into between the appellant and the 1st respondent for sale of the suit property at the agreed sum of Kshs 4,500,000 out of which the appellant deposited Kshs 1,500,000. The agreement expressly stated in clause 4 that:

> The sale is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the Conditions contained in this Agreement or specifically hereby excluded.

46. In clause 6, it was stated that:

The completion date shall be the 60th day from the date hereof or earlier by agreement in writing by the parties.

47. According to clause 7, the said completion was to take place at the offices of Omondi Waweru & Company Advocate on the completion date or earlier, whereupon the 1st respondent's advocates were to deliver certain specified documents to the appellant's advocates. However, what is intriguing is that according to clause 8 of the agreement:

> The vendor's and the Purchaser's Advocates are Omondi Waweru & Company Advocates of Post Office Box Number 1606-80100, Mombasa.

48. We say intriguing because from the way the parties presented their case, one would be forgiven for thinking that the appellant and the 1st respondent were represented by different advocates in their transaction. Clause 4(2) of the Law Society Conditions of Sale, 1989 states that:

> (2) Completion shall take place in manner set out hereunder. namely:
>
> a. Upon completion, the purchaser shall pay the purchase money to the vendor's advocate who shall hold the same as stakeholder until registration of the conveyance. If registration of the conveyance shall not be effected within thirty (30) days of completion, the vendor may, without prejudice and in addition

to any other right or remedy, give notice to the purchaser requiring him to effect the registration of the conveyance within such period (not being less than thirty (30) days from the date of the notice) as may be specified in the notice. If the conveyance shall not have been registered on or before the expiry of the notice, the purchaser shall, within seven (7) days after such expiry:

1. pay and release to the vendor unconditionally the whole of the purchase price and all other sums payable under the contract; or

2. treat the contract as rescinded whereupon the purchaser shall return all documents delivered to him by the vendor against repayment of any sums paid by way of deposit or otherwise and the purchaser shall, at his own expense, procure the cancellation of any entry relating to the contract in any register.

1. The foregoing clause read together with clauses 6 and 7 of the Agreement for Sale reveal that completion was to comprise the payment of the balance of the purchase price by the appellant and the delivery of the documents by the 1st respondent. There is no evidence that either party fully complied with the said stipulations. The appellant did not take any action as she was entitled to under clause 4(2)(a) of the Law Society Conditions of Sale. On the other hand, the 1st respondent, on 7th December 2006, issued a Completion Notice to the appellant in which he informed the appellant that:

> " ...having failed to complete the sale dated 5th day of October, 2006, hereby give you 21 (TWENTY ONE) DAYS NOTICE from the service of this Notice pursuant to Subsection 7 clause 4 of the Law Society Conditions of Sale (1989) to complete the transaction time being of essence."

50. Receipt of this letter was acknowledged by the appellant who, through her advocates, responded vide the letter dated 8th January 2007 that:

> " Kindly note that our client has made arrangements to complete the transaction and settle the balance of the purchase price. Our client has obtaining (sic) bridging finance for the purpose. In the premises our instructions are to request for extension of time for a period of 45 days to facilitate the completion of the security documentation for the loan.
>
> In the meantime, we request you not to take any precipitate action in terms of the completion notice."

51. Clearly, and contrary to the position adopted by the appellant as at the date of the said letter, the appellant was not in a financial position to complete the transaction. It is also noteworthy that the appellant did not raise the issue of non- compliance by the 1st respondent in her response.

52. From the proceedings, it appears that there was a letter dated 10th January 2007 in which the appellant's request was conditionally accepted by the time extended for her to complete the transaction within 14 days on condition that she paid Kshs 1,000,000 within 2 days. Regrettably, that letter does not appear on record and, instead, the letter dated 7th January 2007 is exhibited in place of the said letter. It was contended by the appellant that the conditions imposed by the 1st respondent were not met. As a result,

the 1st respondent's advocates issued a letter dated 20th January 2007 repudiating the contract in which he stated that:

> "Further to the completion notice dated 7th December 2006 and your letter dated 8th January 2007 and ours dated 10th January 2007 and noting that your client has been unable to complete the transaction, we now formally notify you, pursuant to Clause 7(a) of the Law Society Conditions of Sale that our client has repudiated the Agreement forthwith.
>
> Consequently, your client will, within the next 2 days vacate, quit and hand over vacant possession to our client."

53. It is clear that the appellant was, due to financial constraints, unable to settle the balance of the purchase price on the agreed terms. Even after being accommodated by the 1st respondent, she was still unable to do so. In the meantime, the 1st respondent took steps to make time of the essence of the contract in terms of the stipulations in the Law Society Conditions of Sale. Having done so, the 1st respondent was entitled to repudiate the contract. Our view is in tandem with the holding of this Court in Njamunyu vs. Nyaga [1983] KLR 282 where the Court held that:

> " The principle to be acted upon in such a case is stated in Halsbury's Laws (4th edn) p 338, para 482, ie: Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties. Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. The return of the money by the defendant was notice to the plaintiff that the defendant had made time of the essence and rescinded the agreement. Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify."

54. It is clear that the 1st respondent made time of the essence and gave the appellant time within which to complete the agreement, but the appellant was unable to do so. In those circumstances, the appellant cannot blame the 1st respondent for repudiating the contract. In this regard, this Court in Housing Company of East Africa Limited vs. Board of Trustees National Social Security Fund & 2 others [2018] eKLR observed that:

> " Time had clearly been made of the essence in respect of the completion date of 30th September 2007, as a result of the appellant's own request for a final extension of 60 days and granted as per the letter of 2nd August 2007."

55. Similarly, in the instant case, the appellant had made time of the essence by seeking for indulgence. In Housing Company of East Africa Limited vs. Board of Trustees National Social Security Fund & 2 others (supra), this Court cited with approval the case of J.T.M. Construction & Equipment Ltd- vs. Circle B. Farms Ltd, Claim Number 2007 Her 05110, where the Supreme Court of Judicature of Jamaica stated that;

> " 70. It is settled that 'when time is of the essence there is no leeway for delay'. Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where

he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission.

71. This principle was firmly established by the House of Lords in Stickney v Keeble (supra), where the House of Lords, having examined what was left to be done by the respondent as vendor, concluded that the time given (being fourteen days) was sufficient. The headnote, which is accepted as being reflective of their Lordship's decision, read:

'Where in a contract for the sale of land, the time for completion is not made the essence of the contract but the vendor has been guilty of' unnecessary delay, the purchaser may serve upon the vendor a notice limiting time at the expiration of which he will treat the contract as at an end. And in determining the reasonableness of the time so limited, the Court will consider not merely what remains to be done at the date of the notice but all the circumstances of the case including the previous delay of the vendor and the attitude of the purchaser in relation thereof.'"

56. The appellant contends that the 1st respondent ought not to have entered into an agreement for sale of the same property while Mombasa HCCC No. 142 of 2007 was pending on the basis of the doctrine of lis pendens. Black's Law Dictionary defines "lis pendens" it as the jurisdiction, power or control acquired by a court over property while a legal action is pending. In K N Aswathnarayana Setty (D) Tr. LRs. & Others vs. State of Karnataka & Others [2013] INSC 1069, the Supreme Court of India stated that the doctrine is based on the legal maxim 'ut lite pendente nihil innovetur' (during a litigation nothing new should be introduced). The doctrine is based on equity, good conscience or justice because it rests upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.

57. In G.T Girish vs Y. Subba Raju, Civil Appeal No. 380 of 2022, the Supreme Court of India held that:

maxim "pendente lite nihil innovetur". This means that pending litigation, nothing new should be introduced. Section 52 of the Transfer of Property Act, 1882 (for short, 'the TP Act'), which incorporates the Doctrine of Lis Pendens, is based on equity and public policy. It pours complete efficacy to the adjudicatory mechanism. This is done by finding that any disposition of property, as described in the Section by a party to the litigation will, in not any way, detract from the finality of the decision rendered by the court."

58. In the repealed (Indian) Transfer of Property Act (ITPA) 1882, this doctrine was embraced under Section 52 in which it was stipulated that:

During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

59. The ITPA was repealed by the *Land Registration Act* Number 3 of 2013 (LRA) whose Section 107(1) provides for the saving and transitional provisions of the Act in the following terms:

Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the

commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

60. A reading of the LRA does not reveal any prohibition of the application of the doctrine of lis pendens. It is for this reason, and in view of section 107 aforesaid, that this Court has held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another [2015] eKLR). That doctrine was dealt with extensively by this Court in Co- operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others [2017] eKLR in which the Court expressed itself as hereunder:

> " 54. On whether the doctrine can be interpreted to mean that the filing of proceedings serves as an automatic stay of the sale; we are of the view that it cannot. As stated under the repealed Section 52 of the ITPA, an automatic prohibition of dealings or transfers of the property is only during the 'active prosecution' of the proceedings. Consequently, while the parties are automatically duty bound to preserve the property during the pendency of active proceedings, the same cannot be said of fresh proceedings that have just been filed and whose prosecution is yet to begin.
>
> 55. This conclusion is informed by the fact that lis pendens as applied in Kenya is heavily borrowed from the Indian system. However, unlike our system, the Indian one was amended to rid itself of the phrase 'active prosecution.' Consequently, in India, lis pendens kicks in from the moment proceedings are instituted, all the way through to the appellate stage. This has been the position adopted by the Supreme Court of India (see Jagan Singh vs. Dhanwanti [2012] 2 SCC 628). Clearly, the plaintiffs under that system enjoy a wide berth in so far as the doctrine is concerned. To ensure that this new found freedom is not abused by unscrupulous plaintiffs-who may file frivolous suits in a bid to frustrate a legitimate owner's right to deal in his land, several safeguards were put in place; from levies of compensatory costs in frivolous proceedings, to expedited proceedings and compensatory damages against vexatious plaintiffs (see Vinod Seth vs. Devinder Bajaj & Another SCC No. Civil Appeal No. 4891 of 2010). In Kenya, however, no such measures have been legislated regarding lis pendens. As such, the practical approach remains that mere institution of suit does not trigger the doctrine. Rather, it is upon the active prosecution of that suit that the doctrine automatically sets in. Consequently, the contention that mere filing of suit operates as an automatic stay of dealings, fails."

61. In this case, the 2nd respondent was not a party to the proceedings in Mombasa HCCC No. 142 of 2007. While that does not necessarily bar the application of the doctrine of lis pendens, we were not addressed as to the point at which, in the course of the proceedings, the doctrine was operational and whether at that time the parties were actively prosecuting the suit. In the premises, there is no basis upon which the 2nd respondent can be faulted and her title impeached for having entered into a transaction for sale of the suit property. In any case, that doctrine would only be of assistance to the appellant only if we found that the agreement between the appellant and the 1st respondent was not lawfully repudiated. The Indian Supreme Court in a recently delivered judgment in the case of

G.T Girish vs. Y. Subba Raju, Civil Appeal No. 380 of 2022, while expounding on the doctrine of lis pendens, stated as follows with respect to section 52 of the Transfer of Property Act:

> " 94. The cardinal and indispensable requirement, which flows both from Section 52 and the principle, it purports to uphold, is that the transfer or dealing of the property, which is the subject matter of the proceeding, is carried out by a party to the proceeding. Section 52 uses the word 'party' twice. It refers to the disability of a party to transfer or otherwise deal with the property, pending adjudication. This embargo is intertwined with the beneficiary of the veto against such transfer, being any other party thereto..."

62. In that case, the court was clear that the doctrine of lis pendens does not annul the transaction. In the court's words at paragraph 93: not, in any way, be subverted or delayed, when the day of final reckoning arrives."

63. In our understanding, the doctrine of lis pendens runs with the suit so that its application depends on the outcome of the suit. Where the person relying on the doctrine succeeds in the suit, the doctrine may come to its aid in setting aside a transaction that might have been entered into between the other party to the suit and a third party without necessarily affecting the other party's liability to the third party. However, where the party who seeks to rely on the doctrine fails in the suit, he can no longer rely on the doctrine. The court in G.T Girish vs. Y. Subba Raju (supra) held at paragraph 94 that:

> " Thus, the sine qua non for the Doctrine of Lis Pendens to apply is that the transfer is made or the property is otherwise disposed of by a person, who is a party to the litigation. The Doctrine of Lis Pendens, only subject, however, the transfer or other disposition of property to the final decision that is rendered. The person/party, who finally succeeds in the litigation, can ask the court to ignore any transfer or other disposition of property by any party to the proceeding. This is subject to the condition that transfer or other disposition is made during the pendency of the lis." [Underlining ours].

64. The appellant urged that the learned Judge erred in not following the decisions of Azangalala, J. and Mwongo, J. of 2nd December 2008 and 24th July 2007 respectively. Those decisions were interlocutory decisions. Such decisions are usually provisional in nature and, more often than not, made to preserve the subject matter of litigation. They are made pending the hearing and determination of the suit. They cannot be taken to bind the court that hears the case with finality. Upon hearing the case, the court considers all the material presented to it and, where it finds that the decision made at the interlocutory stage ought not to be confirmed, it cannot be faulted merely for failing to go in the same direction as the judge who granted the orders at that stage.

65. Having found that the agreement between the appellant and the respondent was lawfully terminated, it follows that the issues regarding the removal of the caveat and the legality of the transaction between the 1st respondent and the 2nd respondent become moot. The transaction between the appellant and the 1st respondent having been terminated, the appellant had no locus to challenge or question the manner in which the 1st respondent entered into a sale transaction with the 2nd respondent. If the law was not followed in that process, it was for the 1st respondent to complain.

66. As regards the removal of the caveat, there was no concrete evidence that the caveat was actually registered. As at the time of the transaction between the 1st and 2nd respondent, there was no caveat in place. In those circumstances, there is no basis for faulting the 3rd respondent.

67. The last issue for our determination is whether the 2nd respondent was properly awarded mesne profits. The circumstances when claims for mesne profits can arise were discussed by this Court in the case of Attorney General vs. Halal Meat Products Limited [2016] eKLR when it stated:

> " ... where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42."

68. The Supreme Court of Nigeria in the cases of Bolori vs Offorke (2010) LPELR – 3886 (CA) and Osawaru vs. Ezeiruka (1978) NSCC (Vol. 11) 390, explained the rationale behind the claim for mesne profits thus:

> " In a claim for mesne profits the landlord by
>
> implication is challenging the continued occupation of the premises by the tenant whom he now regards as a trespasser, and is therefore claiming damages, which he has suffered through being out of possession of the premises. Mesne profits being, therefore, damages for trespass can be claimed from the date when the Defendant ceased to hold the premises as a tenant and became a trespasser."

69. Goddard, LJ. in the case of Bramwell vs. Bramwell (1942) 1

K.B. 370; (1942) 1 ALL ELR. 137 at p.13S, described the expression, "mesne profits" as "only another term for damages for trespass arising from the particular relationship of landlord and tenant"; that the expression "...mesne profits" simply means intermediate profits – that is, profits accruing between two points of time that is between the date when the Defendant ceased to hold the premises as a tenant and the date he gives up possession."

70. In this case, there was no relationship between the appellant and the 2nd respondent. If the appellant declined to vacate the suit property after the 2nd respondent acquired the same, the 2nd respondent could only claim general damages for trespass as opposed to mesne profits. Apart from that, we have scrutinised the record and we cannot find any evidence on basis upon which the learned Judge arrived at the figure of Kshs 40,000 per month. This Court in Peter Mwangi Mbuthia & another vs. Samow Edin Osman [2014] eKLR expressed itself on the need to prove a claim for mesne profits when it held that:

> " That award for Kshs. 150,000.00 was not based on any evidence at all. In his affidavit in support of the application for summary judgment, the respondent deposed that "as an absolute owner of the property, I am entitled at common law to evict the trespasser to my property, mesne profits, and to self help remedy." Apart from the reference in the demand letter before action that was exhibited to the respondent's affidavit in support of the summary judgment application, there was not the slightest indication how that figure was arrived at. Indeed, counsel for the respondent had difficulty defending that amount merely stating that the figure was not challenged. We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established."

71. That award must therefore be set aside.

72. In the premises, we hereby set aside the award of Kshs 500,000 per year awarded to the 2nd respondent. Save for that, this appeal fails and is hereby dismissed. Each party to bear own costs of the appeal.

73. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR