



Ndunda (Suing as the Administrator of the Estate of David Ndunda Nzivo–(Deceased)) v Windsor Homes Limited (Environment & Land Case E010 of 2023) [2024] KEELC 7539 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E010 OF 2023
A NYUKURI, J
NOVEMBER 13, 2024**

BETWEEN

**CATHERINE MUMBUA NDUNDA PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF DAVID NDUNDA
NZIVO–(DECEASED)**

AND

WINDSOR HOMES LIMITED DEFENDANT

JUDGMENT

1. Catherine Mumbua Ndunda, suing as administrator of the Estate of David Ndunda Nzivo (deceased) instituted this suit against Windsor Homes Limited vide a plaint dated 10th February 2023 seeking the following orders;
 - a. An order directing the defendant to unconditionally and forthwith release to the plaintiff or deliver up to the court the original certificate of title for LR. No. 12715/88 (Grant No. 44404) as the court may direct.
 - b. Costs of this suit.
 - c. Any other or further relief that the Honourable Court may deem fit to grant.
2. The plaintiff averred that the late David Ndunda Nzivo (hereinafter referred to as the deceased) was the registered proprietor of property known as LR. No. 12715/88 measuring 2.551 Hectares situated in Syokimau in Machakos County (Suit property). That prior to his death, the deceased had donated special Power of Attorney to Ruth Mbithe Ndunda who is also now deceased (hereinafter referred to as Ruth), to sell the suit property but that the said power was extinguished on operation of the law, upon the death of David Ndunda.



3. She stated that Ruth entered into a joint venture agreement with the defendant on 17th December 2010 whereof the defendant offered to partner with Ruth for construction of 350 luxurious three bedroom apartments on the suit property so that Ruth's contribution was the suit property while the defendant was to secure finances for construction of the apartments through Palm Estate Ventures Limited, which was the joint venture company.
4. She averred that on 31st March 2011, the defendant advanced Ruth Kshs. 500,000/- as advance payment of profits and committed to pay a further sum of Kshs. 1,000,000/- during the construction period. He stated that the joint venture did not materialize as Mavoko Municipal Council declined to approve the project. He stated that defendant has been holding the original certificate of title to the suit property on the basis of the joint venture agreement.
5. The plaintiff's position is that Ruth was not the administrator of the estate of the deceased and hence the joint venture agreement dated 17th December 2010 was null and void ab initio. She averred that on 7th November 2022, the defendant was refunded Kshs. 651,000/- being all the monies it expended in relation to the joint venture agreement with Ruth, but that despite that it had refused to release the original certificate of title to the plaintiff.
6. The defendant opposed the suit and filed its statement by defence and counterclaim dated 4th May 2023. It admitted the fact that the deceased died on 20th March 2010; that the deceased had donated a special power of Attorney to Ruth to sell the suit property; that the defendant and Ruth entered into a joint venture agreement on 17th December 2010; that the contribution of Ruth was the suit property, while the defendant was liable to secure finances for the construction of apartments through Palm Estate Ventures Limited and that the defendant advanced Ruth Kshs. 500,000/- on 31st March 2011 as advance payment of profits and committed to further pay her Kshs. 1,000,000/- during construction period.
7. Further, the defendant admitted that it was holding the original certificate of title for the suit property since 2011 on the strength of the joint venture agreement. The defendant denied the plaintiff's claim and stated that the joint venture was still alive as Ruth had a right to apply for letters of administration and that the plaintiff had not paid all the monies put into the joint venture by the defendant.
8. The defendant counterclaimed for an order of specific performance to compel the plaintiff to pay the defendant an outstanding amount of Kshs. 799,784/-.
9. The plaintiff filed reply to defence and counterclaim dated 17th May 2023 and stated that the counterclaim was unfounded, incompetent and did not disclose any cause of action against the plaintiff and ought to be struck out and or dismissed.
10. The matter proceeded to hearing by viva voce evidence. Both the plaintiff and defendant presented one witness.

Plaintiff's evidence

11. PW1 was Catherine Mumbua Ndunda, the plaintiff. She adopted the contents of her witness statement dated 10th February 2023 as her evidence in chief and produced documents attached on the plaintiff's list of documents dated 10th February 2023, as exhibits. It was the plaintiff's testimony that she is the daughter and the legal representative of the estate of the deceased who was the registered proprietor of the suit property. She further stated that the deceased died on 20th March 2010 and no full grant to his estate has been made. That prior to his death, the deceased donated his special power of Attorney to Ruth, the plaintiff's mother, to sell the suit property and that the deceased died before



- Ruth sold the suit property. That therefore the power of Attorney was extinguished by operation of the law on the death of the deceased.
12. That at the instance of one Mr. Daniel Ojijo, one of the Directors of the defendants, a joint venture agreement dated 17th December 2010 was entered into between Ruth and the defendant, on the agreement that Ruth was to proffer the suit property while the defendant was to secure funding for the construction of 350 luxurious three bedroom apartments on the suit property through the joint venture company called Palm Estate Ventures Limited. That they agreed that Ruth was to be paid advance payment of profits of Kshs. 1,500,000/- and on 31st March 2011, the defendant paid Ruth Kshs. 500,000/- promising to pay the sum of Kshs. 1,000,000/- during the construction period. That Mavoko Municipal Council failed to approve the project and therefore the same did not materialize and is no longer viable in the circumstances.
 13. She further stated that Ruth surrendered the original certificate of title of the suit property to the defendant he has been illegally holding it since 2011. She took the view that as Ruth was not the administrator of the deceased at the time of the agreement of the joint venture, the said agreement is null and void ab initio. She stated that it was 12 years since the joint venture was entered into yet the defendant had never produced the relevant development approvals, no ground breaking or construction had been done, and that the defendant's directors have never been on the property. She maintained that the defendant was illegally holding the certificate of title herein.
 14. It was the plaintiff's testimony that on 15th May 2012, Ruth wrote to the defendant demanding return of the certificate of title, and that this demand was repeated on 24th January 2023 by advocates representing Ruth. That on 7th November 2022, the defendant was refunded a sum of Kshs. 651,000/- through a banker's cheque No. 500054 and that despite demand, the defendant had refused to return the original title. She asked the court to grant the orders sought in the plaint. She stated that the defendant's counterclaim was baseless as the defendant was to pay for preliminary costs for the project. She stated that the counterclaim was baseless being for legal fees for an advocate called Kamau Muthoni, which advocate was not Ruth's advocate as her mother's lawyer was Isika and Mulwa Advocates.
 15. PW1 produced letters of administration ad litem; copy of certificate of title for the suit property; burial permit for Ruth; joint venture agreement dated 17th December 2010; certificate of incorporation for Palm Estate Ventures Limited; Power of Attorney dated 13th January 2010; Memorandum of Understanding dated 31st March 2011; cheque dated 31st March 2011 for Kshs. 500,000; letter dated 15th May 2017 from Ruth to the defendant; letter dated 24th January 2013 from Mutunga & Company Advocates; letter dated 7th November 2022 from King'oo & Associates Advocates and copy of banker's cheque for Kshs. 651,000/-.
 16. On cross-examination, she stated that she was called Catherine Mumbua Ndunda alias Catherine Ndunda Nita and that she did not have a document to show that all the names refer to her. She stated that there was no stamp on the grant of letters of administration to show it came from court. In re-examination, she stated that the names on her identity card are Catherine Mumbua Ndunda, which appear on the grant of administration. She maintained that she obtained the limited grant of administration from court. That marked the close of the plaintiff's case.

Defendant's case

17. DW1 was Daniel Ojijo Agili, the Managing Director of the defendant. He adopted contents of his witness statement dated 4th May 2023 as his evidence in chief and produced the documents attached to the list of documents dated even date. His evidence was that the defendant and Ruth entered into a



valid and binding agreement vide a joint venture agreement dated 17th December 2010. That the two parties agreed as per clause 4 of the agreement that legal fees was to be settled by Ruth.

18. He stated that Ruth was to proffer the suit property while the defendant was to secure financing for the construction of the apartments. He averred that the defendant advanced Ruth Kshs. 651,000/-. That the defendant incurred costs that were supposed to be refunded by Ruth which is the sum of Kshs. 799,784/-. He stated that Ruth breached the terms of the agreement by failing to complete the same. He sought for the orders sought in the counterclaim for specific performance compelling the plaintiff to pay the defendant the outstanding sum of Kshs. 799,784/- and costs. He sought also for the dismissal of the plaintiff's suit. He produced the defendant's tabulation dated 15th January 2020 and an invoice dated 19th April 2011.
19. On cross examination, he stated that at the time of the joint venture agreement, the registered proprietor of the suit property was the deceased, and that Ruth had no grant of letters of administration for the estate of the deceased. That Ruth only had the Power of Attorney. The witness stated that he was not aware that the Power of Attorney was extinguished on the death of the donor. He averred that he was holding title of the suit property because of the moneys owed to him and asserted that part of the money sought had been paid. That the plaintiff paid the defendant a sum of Kshs. 651,000/-. He conceded that the defence did not state the basis of his claim of Kshs. 799,784/-.
20. The witness stated that from part of what he was claiming, Kshs. 650,000/- was sought as legal fees to be paid to an advocate called Kamau Muthoni. He stated that from the agreement, there was no indication as to who drew the agreement. He stated that the agreement does not show that Ruth was to pay legal fees. He stated that he had no letter of instructions showing that Ruth instructed Kamau Muthoni Advocate to act for her. He stated that the person who witnessed the signing of the agreement by Ruth was Isika Advocate.
21. He confirmed that the invoice he produced was addressed to the defendant and stated that it was not necessary to invoice Ruth as the expenses were to be borne by the defendant. He stated that the defendant paid Kshs. 750,800/- to Kamau Muthoni Advocate but that he had no evidence to demonstrate that payment. That the defendant having paid the money, the advocate did not file a bill of costs against Ruth. Regarding the invoice, the witness stated that the sum of Kshs. 20,000/- was for registration of the defendant and that it was not to be borne by the defendant yet he had no documents to support that payment. He also confirmed that the invoice included payments for models, designs and printing whose evidence he had not produced.
22. DW1 further stated that the models, designs and printing were done by Villa Care Ltd which is the defendant's sister company where the witness was also the Managing Director. He confirmed that he had no documents to show for the costs of marketing solutions used. Further, that he had no evidence to show payment for office seal. He stated that although they entered into agreement in 2010, as at the date of his testimony in January 2024, no ground breaking had been done. He alleged that he did not get approvals for the project because the plaintiff stopped them. He confirmed he received letters demanding return of original certificate of title and that the defendant did not respond to the letter. He stated that he withheld the certificate of title because the joint venture agreement provided that if the agreement was unsuccessful, the defendant was to get refund. He confirmed that the joint venture was not alive. He conceded that Ruth refunded the sum of Kshs. 500,000/- paid to her and Kshs. 151,000/- paid on account of land rates.
23. He stated that the basis of the defendant's claim was clause 8 of the joint venture agreement. That the clause refers to the developer's default. In re-examination, he confirmed that there was no ground breaking for the project. That marked the close of the defendant's case.



24. Parties filed written submissions in support of their respective cases. The plaintiff's submissions are dated 15th February 2024 while the defendant's submissions are dated 22nd April 2024.

Plaintiff's submissions

25. Counsel for the plaintiff submitted that as the deceased died on 20th March 2010 and Ruth was not the administrator of his estate, the purported joint venture agreement of 17th December 2010 was null and void ab initio as Ruth had no capacity to enter into such an agreement. Reliance was placed on the case of *Shah v. The Chief Land Registrar, Nairobi Lands Registry & 2 Others* (Environment & Land Petition E011 of 2022 [2022] KEELC 14970 (KLR) (21 November 2022) for the proposition that it is a well established principle that the Power of Attorney is extinguished upon the death of the donor. Counsel submitted that therefore the defendant's withholding of the certificate of title was unlawful.
26. On whether the defendant was entitled to the prayers sought in the counterclaim, it was submitted for the plaintiff that the counterclaim was not accompanied by a verifying affidavit contrary to provisions of Order 4 Rule (1) of the Civil Procedure Rules and hence the same was incompetent. Counsel also submitted that the defendant sought for specific performance for payment of Kshs. 799,784/- but failed to plead particulars leading to its claim aforesaid and that they also failed to prove the same. The court was referred to provisions of Order 2 Rule 10 of the Civil Procedure Rules and the case of *Candy v. Caspair* [1956] 23 EACA 139, and *Nairobi City Council v. Thabiti Enterprises Ltd* [1995–1998] 2EA 231 among others for the proposition that every pleading must contain necessary particulars. Counsel referred to Section 107 of the *Evidence Act* and submitted that the defendant had failed to discharge its burden of proof in proving its counterclaim.
27. Counsel submitted that the defendant admitted holding the plaintiff's certificate of title, receiving Kshs. 651,000/- from the plaintiff and that the defendant counterclaims, the sum of Kshs. 780,000/- in respect of legal fees allegedly owed to Kamau Muthoni Advocate, yet there is no evidence of Ruth instructing the said advocate and there was no clause in the joint venture agreement stating that Ruth was liable to pay legal fees. They further argued that the defendant did not present any evidence to show that they paid the sum claimed in the counterclaim. Counsel also argued that the firm of Kamau Muthoni did not demand for legal fees from Ruth or file any bill of costs against her.
28. Counsel referred to clause C of the agreement and argued that the same required Ruth to proffer the suit property which was her contribution while the defendant was to facilitate technical expertise and pay for all preliminary costs for the project. Counsel contended that the failure of the joint venture to materialize was not because of default on the part of Ruth but due to the defendant's failure to secure the necessary approvals for the project.
29. It was also argued for the plaintiff that special damages should not only be pleaded, they must also be proved. To buttress this position, the court was referred to the case of *Wilson Waithaka Gitau v. Philip Kuria Wainaina* [2006] eKLR. Counsel therefore argued that the defendant's counterclaim must fail and the plaintiff's claim be allowed.
30. Regarding costs, reliance was placed on Section 27 of the *Civil Procedure Act* for the contention that costs follow the event and that the defendant should be condemned to pay costs.

Defendant's submissions

31. On whether the plaintiff was entitled to the prayers sought in the plaint, counsel relied on the cases of *Rose & Frank Co. v. J. R. Crompton & Bros Ltd* [1923] 2 KB and *William Muthee Muthami v. Bank of Baroda* [2014] eKLR and argued that to demonstrate a contract, there must be offer, acceptance and



consideration and a common intention of the parties to enter into legal obligations. Counsel argued that there was a contract between the defendant and the deceased before he passed on. Counsel argued that the plaintiff's entitlement can only be ascertained after the counterclaim has been considered and settled. It was further submitted by the defendant's counsel that the defendant held the plaintiff's title as lien.

32. On the counterclaim, counsel submitted that the defendant had raised a valid counterclaim. Reliance was placed on the case of *Supermarine Handling Services Ltd v. Kenya Revenue Authority* [2010] eKLR for the contention that costs follow the event.

Analysis and determination

33. Having considered the pleadings, evidence and parties' rival submissions, the following issues arise for determination;

- a. Whether the defendant has demonstrated a valid and lawful lien over the plaintiff's certificate of title for the suit property.
- b. Whether the plaintiff is entitled to the orders sought in the plaint.
- c. Whether the defendant is entitled to the orders sought in the counterclaim.

34. The Black's Law Dictionary, 11th Edition defines "lien" as follows;

A legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied. Typically, the creditor does not take possession of the property on which the lien has been obtained.

35. Therefore, a lien is a right held by a creditor over his or her debtor's property for the period that the debt or obligation remains unsettled.

36. In the case of *Booth Extrusions (formerly Booth Manufacturing Africa Limited v. Ndumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates* [2014] eKLR, the court described a lien as follows;

In its simplest application, a lien generally depends on "the fundamental principle that one party to a mutual contract cannot enforce performance of its obligations in his own favour without giving or tendering performance of the obligations incumbent upon himself". See *John D. Hope & Co. v. Glendinning* [1911] AC 419, 431 simply put the legal notion of a lien is the right to resist a demand for performance of an obligation until a counter obligation is performed by the person demanding it.

37. In this case, it is not disputed that the defendant is holding the plaintiff's original certificate of title. What is disputed is whether that withholding is lawful. The defendant pleaded that until the plaintiff undertakes specific performance by paying the sum of Kshs. 799,784/-, then it cannot release the title. Section 109 of the *Evidence Act* places the burden of proof of a fact on the person who alleges existence of such fact. Therefore, it was upon the defendant to prove that the plaintiff owes it Kshs. 799,784/-. The said sum is in regard to special damages. It is trite that special damages must not only be specifically pleaded, they must also be strictly proved.

38. Although the defendant in its defence and counterclaim failed to state the basis for its claim Kshs. 799,784/-, in its evidence, the defendant in an effort to prove that it was owed the above amount, produced an invoice from Kamau Muthoni Advocate for the sum of Kshs. 750,800/- and its own tabulation for the sum of Kshs. 1,450,784/-. The amount sought via the invoice of Kamau Muthoni



is for instruction to prepare the joint venture agreement while the tabulations by the defendant are for land rates and clearances for Kshs. 151,284/-; payment to Ruth in the sum of Kshs. 500,000/-; company registration for the sum of Kshs. 20,000/-; models, designs and printing for the sum of Kshs. 75,000/-; Trade Software Solutions for Kshs. 50,000/-; company seal for Kshs. 4,500/- and joint venture negotiation and preparation and legal fees for Kshs. 650,000/-.

39. The defendant's witness DW1 conceded that he had not produced any receipts to show that the demanded sum was expended. The joint venture did not materialize and therefore parties are expected to revert to their earlier position before the agreement. Although the defendant indicated that Kamau Muthoni Advocate was entitled to Kshs. 750,000/-, there is no basis for that assertion as the joint venture did not state that the said advocate was the advocate for any of the parties save the fact that the defendant's director signed the agreement before the said advocate, while Ruth signed the agreement before Isika Advocate. There is nothing in the joint venture agreement to show that Kamau Muthoni Advocate was instructed to prepare the said agreement and the agreement does not show who drew it. Besides, the defendant did not give any evidence as to why the plaintiff should pay any sum of money to Kamau Muthoni hence it is the finding of this court that there is no basis for the plaintiff to pay the sum of Kshs. 750,800/- or any part thereof to Kamau Muthoni Advocate as there is no evidence that the plaintiff instructed the said firm to act for her. In addition, there is no legal basis for the defendant to seek legal fees from the plaintiff on behalf of the firm of Kamau Muthoni Advocate because there is no evidence that the plaintiff is authorized to make such demand. The defendant's witness conceded that the sum of Kshs. 151,284/- incurred for land rates clearance as well as the sum advanced to Ruth of Kshs. 500,000/- were refunded to the defendant by the plaintiff. For the remaining claims, the defendant did not present any evidence as to why the plaintiff should meet such expenses if at all and there was no evidence to show that indeed the said sums were expended by the defendant. Having considered the defence and counterclaim as well as the evidence, it is my finding that the defendant failed to plead with particularity and specificity the special damages sought and also failed to prove the same, hence his counterclaim has not been proved. In the premises, as the defendant does not have a lawful claim as against the plaintiff, I find and hold that it has no valid lien over the original certificate of title for the suit property and its continued withholding of the same is unlawful.
40. The upshot is that the defendant's counterclaim lacks merit and the same is hereby dismissed with costs to the plaintiff. The plaintiff having shown that the original certificate of title lawfully belongs to the deceased a fact conceded to by the defendant, it is only fair that the same be handed over to his estate. Therefore, I find and hold that the plaintiff has proved her case on the required standard and I enter judgment for the plaintiff against the defendant as follows;
- a. An order is hereby made directing the defendant to forthwith and unconditionally release to the plaintiff the original certificate of title for L.R. No. 12715/88 (Grant No. 44404) within 14 days of this judgment.
 - b. The costs of the suit and the counterclaim shall be borne by the defendant.
41. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM
A. NYUKURI

JUDGE

In the presence of;

Mr. King'oo for plaintiff



Mr. Nyamagwa for defendant

Court assistant – Josephine

