REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO.895 OF 2015

MACHARIA MUKIRI.....1ST PLAINTIFF

HERITAGE PETROLEUM LIMITED.....2ND APPLICANT

VERSUS

SURAJ HOUSING AND PROPERTIES LIMITED .....1ST DEFENDANT

SURAJ PLAZA LIMITED.....2ND DEFENDANT

JUDGMENT

1. The plaintiffs brought this suit by way of plaint dated 18/09/2015 which was later amended vide Amended plaint dated 5/11/2021. It contended that by a sale agreement dated 4/11/2011 between the 2nd defendant and the 1st plaintiff, on behalf of the 2nd Plaintiff units managed by the 1st defendant. The plaintiff seeks judgment for the following:

a) A permanent injunction restraining the defendant, their Agents, Servant, employees and or assignees from selling, purporting to sell, transferring and or interfering with the suit property being units no's 412, 413, 414, 415, 416, 417, 514 and 515 on LR 209/1241 along Ngara area of Nairobi in any manner inconsistent with the plaintiff rights of possessing and enjoying property.

b) A declaration that the plaintiff as the bona fide owners of all no's 412, 413, 414, 415, 416, 417, 514 and 515 on LR 209/1241 along Ngara area of Nairobi and the defendant has no power or right to interfere with the plaintiffs right to peaceful and quiet possession of the same.

c) Damages for breach of contract and contravening court orders issued on 25/9/2015.

d) Damages for loss of rent of Kshs. 60,000from September 2015 to date.

e) Refund of deposit paid of Kshs. 915,000 plus interest from 7/3/2016 to date.

f) General and exemplary damages for trespass, malicious and unconstitutional and deprivation of poverty.

g) Costs of the suit.

2. The Defendant was duly served and filed a Defence in 2015 which was later amended to include a Counter-claim on 02/12/2021. In the said Defence, it denied the averments in the Plaint except the descriptive and insisted that it had not promised to construct an elevator under the lease agreement but this was a requirement of Nairobi City County. It contended that it has sold the three units namely 513, 514 and 515 and therefore the plaintiff's claim has been overtaken by events. Further, it has been unable to complete the process of registration for subleases of the remaining units namely, 413, 414, 415, 416 and 417 because the plaintiffs

have not paid for the disbursements. That it has no claim over the five units. Further that the recession of units 513, 514 and 515 was lawful and the plaintiff's claim for rent was voided. It claims it has suffered loss and damage. In the counter-claim, it prayed for judgement against the plaintiffs for:

1. Interest on Kshs. 1,812,501.05/= being made up as follows:

a) Amount due on account of rent Kshs.1,950,000.

b) Less deposit paid on account of units 513, 514 and 515 Kshs. 915,000.

c) Arrears outstanding on account of service charge Kshs. 777,501.

3. The matter proceeded for hearing where the 1st plaintiff was the only witness for the plaintiffs while the Defendants called one witness.

4. The Defendant was duly served and filed a Defence in 2012 which was later amended to include a Counter-claim on 2/12/2021. In the said Defence, and counterclaim the defendant stated that indeed there was a sale agreement between the plaintiff and the defendant for a consideration of a sum of Kshs. 7,500,000 for the phase one units which were five in total. There was a conditional offer for phase two units consisting of 513, 514 and 515. That the allocation of the phase two units was premised on plaintiff paying the balance of the purchase price before the execution of the sub-leases for the respective units which was stated in the letter dated 15/04/2014. Further they aver that the balance of the purchase price was a condition expressly provided for in the agreement for sale but the plaintiffs, did not honor the conditions. The defendants contend that on 10/09/2014 they wrote to the plaintiff requesting for a return of duly executed agreements for sale which they state that the plaintiffs never executed in respect of all the units including the suit property which are units 513, 514 and 515.

5. The 1st defendant contends that payment of the balance of the purchase price by the 1st plaintiff was not conditional upon the state of completion of the building and therefore the letter from the 2nd plaintiff dated 30/10/2012 was unjustified. That at the time of the sale of units 513, 514 and 515 a draft copy of the standard lease showed that the lease would be between the 2nd defendant as the registered proprietor and respective purchasers the 1st plaintiff included and therefore the plaintiff cannot say having the 2nd defendant execute the lease was causing confusion.

6. The defendants state that they served the plaintiffs with a letter demanding vacant possession of units, 513, 514 and 515 due to default in payment of the balance of the purchase price and failure to sign the agreement for sale. They therefore contend that the sale was revoked and/or rescinded through the letter dated 8/10/2014. As a result, the plaintiff contend that they sold the three units namely 513, 514 and 515 to a third party, one M/s Adler Properties Limited and are therefore the said units are unavailable to the plaintiff.

7. The defendants aver that they have no claim for units 413,414, 415, 416 and 417 the 1st plaintiff has failed to pay the requisite fees and other disbursement to facilitate registration of the leases which is a condition mandatory for one to be allocated a share in the management company. The defendant denied the averments in the Plaint except the descriptive ones and insisted that the agreement in relation to the phase two units namely 513, 514 and 515 was rescinded due to the fault of the plaintiff. The plaintiff failed to execute the sale agreement in relation to the units. That the plaintiff was given a conditional physical handover in respect of all the three units subject to the terms and conditions expressly provided for vide the 1st defendant's letter dated 15/04/2014. One of the conditions read "***That the developer retains the right to repossess the property if you unreasonably delay the registration of your sublease***".

8. The defendant contends that since the sale of the three units was voided failure of the plaintiff to hand over the units made the plaintiffs liable to a monthly debit of Kshs. 25,000 of rent. Therefore, the plaintiff owes the 2nd defendant Kshs. 1,950,000.

9. Further that since the Plaintiff claims it has suffered loss and damage. The defendants have filed for a counter-claim and they pray for judgement against the Plaintiffs for:

a) Arrears outstanding on account of service charge, Kshs. 777,501.05

b) Amount owing on account of rent for units 513,514, and 515 Kshs. 1,950,000 Deduct the deposit paid on account Kshs. 915,000 Total owing Kshs. 1,812,501.05

10. The matter proceeded for hearing where the Plaintiff called one witness while the Defendant also called one witness.

Evidence of the Plaintiff

11. PW1 Mr. Macharia Mukiri, who is a director in the company of the 2nd plaintiff. He had an offer letter to purchase 8 units from Suraj Plaza Ltd namely 413, 414, 415, 416, 417, 513, 514 and 515. It was his testimony that he was offered purchase of units 413, 414, 415, 416, 417, by Suraj Plaza Ltd and units 513, 514 and 515 by Suraj Housing Limited who are the 1st and 2nd defendants respectively. That after they paid Kshs. 8,415,000 and had a balance of Kshs. 5,085,000 but they took possession of the 8 units. Later the defendants sold units 513, 514 and 515 though the plaintiffs were physically in possession. He further contends that the sale was illegal and that at the time of the illegal sale there was a court order issued on 25/09/2015. Further that the plaintiff had paid a deposit of Kshs. 915,000 and that the defendants have admitted this in their counter claim in response to the amended plaint.

12. In cross-examination, PW1 stated that he has no problem with Suraj Plaza the 2nd defendants and he also testified that he cannot remember if he was sent letters for signing of offer for all the 8 properties because he never received a letter from Suraj Plaza. He only saw a letter from Suraj Housing and Properties Ltd who are strangers to the agreement which he got into with the 2nd defendant. He further stated that he never paid any monies towards units 513,514 and 515 since the monies he paid to 2nd defendant were cumulative and that is why he asked for a refund of Kshs. 915,000. He testified that that the possession was conditional pending the payment of the purchase price. In re-examination PW1 clarified that he protested the cancellation of the offer for the three units vide his letters dated 30/10/2014.

13. He reiterated that he took possession of all units, and the defendants never raised an objection. On the defence to the counter-claim, the Plaintiffs denied the contents therein stating that the counter-claim raises no reasonable cause of action, does not seek any meaningful reliefs in tandem with the serious allegations of the selling of units that were already occupied by the plaintiffs and invalidity of the sale agreement, nullity and rescission, and was thus wanting in seriousness. The Plaintiffs contend that they are the *bona fide* purchaser of units 513-515 and that the defendants had no remedy. They averred further that they are not the defendants' tenant or licensee, and yet the defendants continue to oppressively deprive them of the use and enjoyment of the suit property thus causing unmitigated loses. The Plaintiff produced a long list of documents which included the Lease agreement, letters from the Registrar of Lands, Court Order among others.

Evidence of the Defendant

14. DW1, Kantilal Dhanji Halal stated that he is a contractor, and that Suraj Plaza is the owner of the suit land and Suraj Plaza Management is the developer. He adopted his witness statement dated 5/08/2021and a list of bundles of documents from item 1 to 15 including a further witness statement dated 2/12/2021 which he wished the court to adopt in evidence and a further list of documents to be adopted as exhibit 16-20 . He stated that the project was in 2 phases and the first phase offered the units 413-417 and that the plaintiff signed and started paying for these units and actually finished paying. That after finishing paying for the phase one units the 2nd defendant sent him a lease for signing for the 2nd phase which would include units 513-515. That the plaintiff was sent sale agreements which he never signed and returned to the defendants though he paid Kshs. 200,000 and a further Kshs. 700,000. He testified that the defendants gave PW1 possession of the entire building because of their good working relationship. He reiterated that the letter that was written to the plaintiff was for conditional handover and not total ownership before paying the full purchase price. He stated that the plaintiff is claiming mesne profits Kshs. 60,000 yet he is not the owner of units 513-515 further that he has not signed the sale agreement nor communicated whether he will take the units or not. On his part the 1st defendant stated that he is claiming Kshs. 1,950,000 because the plaintiff occupied the units for 32 months. He stated that he never disobeyed any court order because he was not served personally with the Order that the 1st plaintiff was referring to.

15. In cross-examination, DW1 confirmed that there was a deduction on the funds paid by the plaintiff and therefore he is entitled to a refund. He stated that he has had the copies of the sale agreements since 2014 and he filed them when the plaintiff filed an amended plaint and he noted that the plaintiff was seeking mesne profits. He reiterated that the plaintiff took possession, and they never raised an objection because they assumed that the plaintiff would honor the sale agreement and pay the requisite monies within the stipulated time as provided in the sale agreement. Further the 1st defendant averred that they never received any notices from the registrar.

16. The Defendant produced a list of documents including, copies of the sale agreement pertaining to units 412-417, copies of unexecuted Agreements for sale in relation to units 513 to 517, copies of unexecuted subleases in relation to units 412 to 417, copies for Agreement for sale between the 2nd defendant and M/s Adler Properties Limited, a copy of tabulation in respect of the service charge, letters among others.

17. It is not in dispute that the 1st Defendant is a management company which was incorporated on 2nd March, 2001 to manage the development in LR. No. 209/14036. From evidence, it emerged that the Defendant designed similar Letters of Offer, Sale Agreement and Lease for the suit property. Further the 1st defendant stated that he did not include any prayers in the counter claim.

18. During re-examination DW1 testified that he sent a general letter to the 1st plaintiff referring to both phase one and phase two units and informed the 1st plaintiff that the phase two units were already sold to someone else. On the issue about Suraj Plaza Management Company, he testified that the company was included in the sale agreement from day one and that it is part of the sale agreement. He contends that the 2nd defendants are not tenants, and that service charge is to be paid to Suraj Plaza Management Company. He testified that the letters that he sent to the plaintiff were never acknowledged.

Analysis and Determination

19. I have carefully considered the pleadings, the oral evidence and the authorities proffered by the parties. Referring to the authorities both parties have proffered to court, I opine that they are all good authorities in their facts and circumstances. In coming to the determination, I have made in this suit I have considered the principles enunciated in those authorities. It is not in dispute that the Plaintiff and Defendant entered into a sale agreement with respect to the suit property. It is also not in dispute that the Plaintiffs is currently in possession of the suit property, and that the Defendants are the legal owners of the suit property thereof. The issues in dispute revolve around whether the said sale agreement between the Plaintiff and Defendant with respect to the suit property was validly rescinded, who is the rightful and legal owner of the suit property and whether the parties are entitled to the reliefs they seek. Therefore, upon considering the pleadings, the testimonies of the witnesses as well as submissions, the issues for determination are:

(i) Whether the sale agreement between the Plaintiffs and Defendants with respect to the suit property was validly rescinded.

(ii) Whether the parties are entitled to the reliefs they sought and

(iii) Who should bear the costs of the suit"

Whether the sale agreement between the plaintiffs and Defendants with respect to the suit property was validly rescinded

20. I note that the plaintiffs never executed the sale agreement for the units 513-515. This means that there was therefore no contract for sale of the said units so to speak although the actions of both parties pointed to an existing contract. Further the 1st defendant has testified and produced evidence to show that the contract was rescinded. The Court in ***Francis Wahiu Theuri vs Monica Njeri (2012) eKLR*** held;

that failure of the Defendant therein to pay the balance of the purchase price was conduct that indicated her intention not to perform her obligations under the contract.

21. Further, failure to perform an obligation under a contract constitutes a breach which goes to the root of the contract. Counsel referred to the case of ***Sagoo v Sagoo (1983) KLR 365*** where the Court of Appeal held:

"The Law Society Conditions of Sale provides that it is only upon the payment of the purchase price that the vendor could be required to execute a conveyance and deliver to a purchaser.....the appellants never became entitled to ask the respondents to execute the conveyance because they never proffered to the respondents the balance of the purchase money...."

22. This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position. This position of law is provided in **Halsbury's Law of**

England Volume 42, 4th Edition at paragraph 242.

23. I have perused the sale agreements entered into by the Plaintiffs and Defendants dated 4/11/2011 and the undated and unsigned sale agreements for units 513-515 which are all similar. Clause 12(b)(i) of the agreement provided that the completion of the sale and purchase was to take place within fourteen (14) days from the date upon which the Vendor shall serve a notice in writing upon the Purchaser to make of such payments before the expiry of the said notice. The sale agreement between the Plaintiffs and Defendants did provide for rescission and also it incorporated the application of the Law Society Conditions of Sale (1989 Edition), so far as they were not inconsistent with the conditions contained under the sale agreement.

24. The Law Society Conditions of Sale (1989 Edition) provided for rescission under Condition 11 as follows:

"Recission

1. Where a purchaser makes an objection or a requisition under Condition 10 with which the vendor is unable to comply or with which he is unwilling to comply on reasonable grounds of difficulty, delay or unreasonable expense, the vendor may give to the purchaser written notice referring to this Conditions, specifying his grounds and requesting withdrawal of the objection or requisition within a specified period being not less than seven (7) days.

2. If the purchaser to withdraw the objection or requisition with the period specified by the notice, the vendor may by notice in writing to the purchaser rescind the contract.

3. On recission the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.

4. The purchaser has no claim against the vendor for costs, compensation or otherwise.

5. Where the contract becomes void under any law the provisions of sub-conditions (3) and (4) apply."

25. I am guided in this respect by the Court of Appeal decision in ***Njamunyu vs. Nyaga (1993) KLR 282*** wherein the said Court stated the law on completion once time is made of essence to be as follows at page 287:

"The principle to be acted in such a case is stated in 9 Halsbury's Laws (4th Edn) p. 338, para 482, i.e:

'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 will fulfil the intention of the parties"

26. The 1st defendant testified that the plaintiffs did not pay the full purchase price for the suit properties within the prescribed period. The plaintiffs having failed to complete the payment of the purchase price for the suit properties they cannot seek the relief of permanent injunction. Again, as I have held above, there is no evidence that the defendants refused to transfer the suit properties to the plaintiffs. The plaintiffs simply did not pay for the balance of the purchase price. The plaintiffs did not satisfy this court that the agreements that they entered into with the defendants entitled them to the suit property. Having not satisfied the court of the existence of the agreements which they have sought to enforce, this court therefore finds that the sale agreement was validly rescinded by the Defendants for the foregoing reasons and therefore the plaintiffs are not entitled to the relief of a permanent injunction against the defendants in relation to the following units 513- 515. Neither are the plaintiffs entitled to a declaration that they are the bona fide owners of units 513-515.

27. Since the plaintiffs are not the owners of the suit property units 513-515 it follows that they are not entitled either to rent of Kshs. 60,000 per month from September 2015 to date.

28. The plaintiffs had sought for a prayer for a refund of the payments which they made to the defendants together with interest from 7/3/2016 to date. The 1st defendant did not contest this claim save for the interest. I am satisfied that the plaintiffs are entitled to a refund for the payments which they made to the defendants. If the defendants were to keep the said payments, they would have unjustly enriched themselves having not transferred the suit properties to the plaintiffs. I am however in agreement with the

1st defendant that the claim for interest by the plaintiffs has no basis. As I have held above, the defendants were not to blame for the non-completion of the agreements entered into by the parties. In the absence of any fault on the part of the defendants, there would be no basis for condemning them to pay interest to the plaintiffs on the purchase price. No evidence was placed before the court showing that the plaintiffs had demanded a refund of the purchase price from the defendants and that they had failed to release the same.

29. The plaintiffs had also claimed general and exemplary damages. I am in agreement with the 1st defendant that this claim has no basis. The plaintiffs having failed to establish any fault on the part of the defendants, there would be no basis for such an award. In any event, general damages was merely claimed. It was neither pleaded nor proved. As for exemplary damages, the Court in the case of ***Mikidadi vs. Khaigan & Another [2004] eKLR,*** listed the circumstances under which exemplary damages can be awarded as follows:

"Exemplary damages are only to be awarded in limited instances namely. (a) Oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute."

30. The claim will therefore not stand in the circumstances of the suit at hand. Therefore, I am convinced that the 1st plaintiff is not entitled to ownership of the said units without an existing legal contract. Further the 1st plaintiff did not bring evidence to controvert the 1st defendant's testimony that the said units 513- 515 have already been sold to a third party and are therefore not available. The sale of the units was conditional upon the purchaser completing to pay the purchase price.

Whether the parties are entitled to the reliefs they seek

31. The defendants have sought to have a total sum of Kshs. 1,812,501.05 which includes outstanding arrears of service charge, amount owing on account of rent for units 513-515. Further the defendants have prayed for judgment to be entered in favour of their counter claim. The plaintiffs on their part from the amended plaint have sought for damages for breach of contract and contravening of court orders, Loss of rent of Kshs. 60,000 from September 2015 to date and refund of Kshs. 915,000/ plus interest from 7/3/2016. The earlier claim is for permanent injunction against the defendants from selling, purporting to sell, transferring the 8 units in toto. A declaration that the plaintiff is the bona fide owner of the eight units in toto, general and exemplary damages plus costs of the suit.

32. I have extensively addressed the plaintiffs claim and I found that the claim that is justified relates to ownership to the first five units 413-417 which he fully paid for and refund of Kshs. 915,000. The sale agreement for the three units namely 513-515 was rescinded vide a letter dated 8/19/2014. It therefore follows that the court order obtained by the plaintiffs on 25/9/2015 was not enforceable since the sale agreement had already been rescinded. The plaintiffs were well aware of this yet they did not disclose this critical fact to the court. The plaintiffs not being the owners of the three units 513-515 cannot therefore be entitled to damages for loss of rent.

33. As to whether the Defendant is entitled to the orders sought in the counter-claim. The Defendant sought for various prayers as enumerated above. As for the prayer for mesne profits, I will refer to Section 2 of the Civil Procedure Act which defines the same as follows:-***"mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;'***

34. While Order 21 Rule 13 of the Civil Procedure Rules provides that:

"(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree— (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; (c) directing an inquiry as to rent or mesne profits from the institution of such suit until— (i) the delivery of possession to the decree-holder; (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or (iii) the expiration of three years from the date of the decree, whichever event first occurs. (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

35. Based on the evidence placed before me while associating myself with the legal provisions and decisions cited above, I find

that the Defendant has failed to discharge its burden of proof in respect to entitlement to rent or mesne profits as there was no evidence. In the circumstance, I find that the Defendant is not entitled to orders sought in the counterclaim.

As to who should bear the costs of the suit.

36. The rule on costs is that the same normally follow the event. The court however has a discretion to direct otherwise for good reason. Taking into account all the circumstances surrounding this case, I am of the view that each party should bear its own costs of the suit.

Conclusion:

37. In conclusion, I hereby make the following orders:

1. Judgment is entered for the plaintiffs against the defendants in the sum of Kshs.950,000/- being a refund of the purchase price paid in relation to the three units 513-515 by the plaintiffs to the defendants.

2. The Defendants' claim in the counterclaim is hereby dismissed.

3. The plaintiffs' prayers for permanent injunction against the defendants relating to units 513-515 is dismissed.

4. The plaintiffs' prayer for a declaration that they are the bona fide owners of units 513-515 is dismissed.

5. The plaintiff's prayer for exemplary and general damages is dismissed.

6. The plaintiffs' prayer for a permanent injunction against the defendants relating to units 413-417 is upheld subject to completion of the necessary processes for registration

7. The plaintiffs' prayer for a declaration that they are bona fide owners of units 413-417 is upheld subject to completion of the necessary processes for registration.

8. Each party shall bear its own costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF MARCH 2022

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MOGENI J.

JUDGE

IN THE PRESENCE OF

MR. WANYAMA HOLDING BRIEF FOR MR. KANG'ETHE FOR THE PLAINTIFFS

MR. KIMONDO FOR THE DEFENDANTS

MR. VINCENT OWUOR COURT ASSISTANT.