REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 138 OF 2011

LUKE MATHEW WASONGA.....PLAINTIFF

VERSUS

KARTAR SINGH BHACHU.....DEFENDANT

JUDGMENT

[1] This suit was filed by the Plaintiff, **Luke Mathew Wasonga**, on **7 April 2011** against the Defendant, **Kartar Singh Bhachu**, in connection with an agreement that the parties entered into on **31 July 2009**, by which the Plaintiff agreed to purchase from the Defendant all that piece of property known as **Apartment No. 101, Dhanjay Apartments**. That apartment, which is one of the apartments erected on **Land Reference No. 330/797, Nairobi**, was to be purchased by the Plaintiff for a consideration of **Kshs. 10,000,000/=.** It was the Plaintiff's contention that while he complied with all the terms and conditions of the Agreement, including the payment of the 10% deposit of **Kshs. 1,000,000/=,** the Defendant failed to complete the transaction as required. Accordingly, the Plaintiff was constrained to file this suit vide the Plaint dated **6 April 2011**, which was subsequently amended on **9 June 2011**, seeking Judgment in his favour against the Defendant for:

[a] A declaration that the Defendant was in breach of the Agreement for Sale dated **31 July 2009;**

[b] An Order for Rescission of the Agreement for Sale dated **31 July 2009;**

[c] An Order for refund of the sum of **Kshs. 1,000,000/=** with interest at commercial rates from **31 July 2009** until payment in full;

[d] Costs of the suit;

[e] Any other relief that the Court may deem fit to grant.

[2] The Defendant, upon being served with the Plaint and Summons to Enter Appearance, filed a Defence and Counterclaim, denying the allegations made herein by the Plaintiff and asserting that it was an express condition of the Agreement for Sale that the balance of the purchase price and apportioned Land Rates and Land Rent be paid by the Plaintiff by Banker's Cheque on or before the date of completion; and that the Plaintiff failed to comply with this special condition. It was further the contention of the Defendant that the Plaintiff not only failed to complete the documents, including execution of the Instrument of Assignment, within a reasonable time to enable the Defendant to obtain the consent of the Head Lessor and the Management Company; but also failed to pay the balance of the purchase price.

[3] It was further the contention of the Defendant that the Plaintiff had agreed to purchase some furniture from the Defendant at an agreed price of **Kshs. 500,000/=;** and that, while the same was to be paid for by the Plaintiff before the date of completion to facilitate the delivery of both the flat and the furniture to the Plaintiff on the completion date, the Plaintiff did not honour his part of the bargain. It was thus the averment of the Defendant that, as the Plaintiff failed to complete the transaction within the agreed time, it had the option, under Special Condition No. A of the Agreement for Sale, to either extend the completion time or to rescind the Agreement and forfeit the deposit; and that it was out of good will and *bona fides* on the part of the Defendant that he made an offer by the letter dated **30 October 2009** to extend time.

[4] Accordingly, it was the contention of the Defendant that due to the breaches of contract on the part of the Plaintiff, he suffered loss in terms of interest on the **Kshs. 9,000,000/=** which he would have earned had the Plaintiff paid that amount on or before the completion date. He also contended that he had to make alternative arrangements for accommodation by taking a flat from one **E.N.K. Wanjama** for a period of 12 months from **1 January 2010** at an agreed rent of **Kshs. 40,000/=** per month so that vacant possession could be delivered to the Plaintiff. In addition, the Defendant averred that he had to pay fees to the Head Lessor and the Management Company to the tune of **Kshs. 17,980**/= plus VAT thereon; as well as **Daly & Figgis** of **Kshs. 15,000/=** plus VAT thereon. The Defendant therefore counterclaimed for his loss in the total sum of **Kshs. 567,078.70** and sought that the Plaintiff's suit be dismissed with costs and interest thereon; and that Judgment

be entered against the Plaintiff in his favour for the aforesaid sum of **Kshs. 567,078.70**, interest thereon at 14% per annum, costs of the suit and interest thereon and any other relief the Court may deem fit in the circumstances.

[5] The Counterclaim was resisted by the Plaintiff vide his Reply to Defence and Defence to Counterclaim. He denied breaching the terms of the Agreement for Sale and contended that, despite completing the Assignment before the completion date and getting the same approved by the Defendant's Advocate; and despite forwarding the balance of the purchase price to his Advocate prior to the completion date, the Defendant had problems with completion; and that consequently, his Advocates served the Defendant's Advocates with a completion notice which went unheeded. The Plaintiff accordingly joined issue with the Defendant and put him to strict proof in respect of the allegation that he (the Plaintiff) failed to complete the subject transaction.

[6] In reply to Paragraphs 16 and 17 of the Defence, the Plaintiff reiterated his posturing that the role of the Advocates of the Head Lessor and Management Company was limited to advising their client on whether or not to endorse their consent on the Assignment, and not to look into the substance of the Assignment, which stemmed from the Agreement for Sale. The Plaintiff therefore posited that the Advocates for the Defendant allowed other Advocates, who were strangers to the Agreement for Sale to overstep them and usurp their role in respect of the Agreement for Sale, thereby delaying the transaction. Accordingly, the Plaintiff denied the Defendant's allegations in the Counterclaim and asserted that he was at all material times ready to complete the transaction, even after the issuance of the completion notice. He thus denied having put the Defendant to any loss. He prayed for the striking out of the Defence and Counterclaim with costs and for Judgment to be entered in his favour in terms of the Plaint.

[7] The hearing of this case opened on **25 January 2017** whereupon the Plaintiff, **Luke Mathew Wasonga (PW1),** adopted his Witness Statement dated **6 April 2011** and produced the List and Bundle of Documents filed by him in support of his claim. The documents include the Agreement that is the subject of this suit, the Cheque evidencing the payment of the 10% deposit of **Kshs. 1,000,000/=** to the Defendant as well as the draft Assignment and completion notice. It was the evidence of the Plaintiff that he entered into an Agreement for Sale on **31 July 2009** with the Defendant in connection with the Defendant's property known as **Apartment No. 101**, which was one of the apartments erected on **Land Reference No. 330/797, Nairobi** and were popularly known as **Dhanjay Apartments.** The consideration was agreed at **Kshs. 10,000,000/=,** with a completion period of 90 days.

[8] It was the testimony of the Plaintiff that, since time was of the essence, he duly paid the deposit of **Kshs. 1,000,000/=** and subsequently made arrangements to secure the balance of the purchase price; and that his Advocates conveyed his readiness to complete the transaction to the Advocates of the Defendant vide a letter dated **10 September 2009**. He added that when he checked on the status of the transaction on **30 October 2009,** he was informed by his Advocate that the Defendant had failed to comply with the completion requirements. He was later to receive a letter dated **30 October 2009** from the Defendant's Advocates confirming that the Defendant was not able to complete the Agreement because the premises were still occupied as at **3 November 2009** and therefore the delivery up of vacant possession was impossible.

[9] It was further the evidence of **PW1** that in his letter dated **30 October 2009,** the Defendant sought to introduce a separate transaction, being the purchase of furniture, as a condition precedent to completion of the purchase of **Apartment No. 101**; and that as he was not happy with the turn of events, he asked his Advocates to cancel the transaction. Accordingly, his Advocates sent a completion notice to the Defendant's Advocates on **11 November 2009**, upon the expiry of which his Advocates formally rescinded the contract by way of a letter date **8 January 2010,** and asked for refund of the deposit. He added that when the Defendant, through his Advocates declined to refund the deposit, claiming that the same had been forfeited, he instructed his Advocates to pursue the necessary legal means to ensure that he received and obtained a refund of his deposit.

[10] The Defendant, **Kartar Singh Bhachu (DW1),** testified on **9 October 2017** and adopted his Witness Statement dated **31 May 2011**. He conceded that he entered into an agreement with the Plaintiff dated **31 July 2009** for the purchase of the Suit Property for a price of **Kshs. 10,000,000/=;** and that the agreed date of completion was **30 October 2009.** It was the testimony of the Defendant that, since time was of the essence, his Advocates, **M/s Ahamed & Ahamed** promptly forwarded to the Plaintiff's Advocates copies of the requisite documents to enable preparation of a draft Assignment of Lease; but that the Plaintiff's Advocates repeatedly made errors in preparing the draft Assignment, thereby delaying the process.

[11] It was further the evidence of the Defendant that, prior to the signing of the Agreement, the Plaintiff visited the Apartment in the company of his wife and expressed interest in the furniture. That the parties then agreed on **Kshs. 500,000/=** as the price of the furniture; which was to be paid before the completion date to enable delivery of both the Apartment and the furniture therein. It was further the testimony of the Defendant that immediately after signing the contract with the Plaintiff, he started looking for accommodation and secured an apartment in the same property with effect from **1 January 2010** for a period of 12 months at an agreed rent of **Kshs. 40,000/=** per month.

[12] **DW1** was in agreement with the Plaintiff's evidence that the contract was never completed; but contended that this was principally because the Plaintiff's Advocates failed to act on his Advocate's letter dated **23 November 2009** to amend the Indenture of Lease as had been requested by **M/s Daly & Figgis Advocates**, who were acting in the transaction for the Head lessor and Manager of the property. That according to Special Condition A of the Agreement for Sale, the Plaintiff was served with a notice to complete the transaction, which the Plaintiff ignored. It was therefore the contention of the Defendant that, due to breach of the Agreement by the Plaintiff, he lost what he would have earned by way of interest on the balance of the purchase price of **Kshs. 9,000,000/=;** and also suffered damage in that the Apartment remained vacant and unsold while he had to pay rent for 12 months amounting to **Kshs. 480,000/=** in respect of another apartment. He added that he had to pay **Daly & Figgis** and the Head Lessor their fees and charges of **Kshs. 15,000/=** and **Kshs. 17,780/=,** respectively. He relied on the List and Bundle of Documents filed on his behalf by his Advocates on **2 June 2011**. The Bundle of Documents was marked **Defendant's Exhibit No. 1)**. He also produced a Supplementary Bundle of Documents filed herein on **30 April 2014** (marked **Defendant's Exhibit No. 2)** comprising copies of the Head Lease dated **29 November 1993,** the **Law Society Conditions of Sale, 1989 Edition**, and receipts for rent payments made by the Defendant to **Wanjama & Company Advocates.**

[13] From the foregoing therefore, there appears to be no dispute that the parties did enter into an agreement for the sale of the Defendant's **Apartment No. 101**, which is one of the apartments on **LR No. 330/797 Nairobi**, otherwise known as **Dhanjay Apartments**. A copy of the Agreement was listed as **Document No. 2** in the Plaintiff's List and Bundle of Documents marked **Plaintiff's Exhibit No. 1.** It does confirm

that the agreed purchase price was **Kshs. 10,000,000/=,** of which a sum of **Kshs. 1,000,000/=** had been paid by the Plaintiff to the firm of **M/s Ahamed & Ahamed Advocates** (the Advocates for the Defendant) being 10% deposit of the purchase price. The sale was subject to the **Law Society Conditions of Sale, 1989 Edition,** in so far as they were not inconsistent with the conditions contained in the Agreement. It was further agreed that the Completion Date would be within 90 days from the date of signing of the Agreement for Sale, time being of the essence.

[14] There is no disputation therefore that there was a valid and binding contract for the sale of the Suit Property that was executed by the parties hereto on **31 July 2009**. There is further no disputation that, whereas by **Clause 5** of the Agreement for Sale, the parties covenanted to complete their sale transaction within 90 days, this was not to be. The evidence adduced herein, which is uncontested is that, whereas the Plaintiff promptly paid the 10% deposit on the date of execution of the Contract as stipulated, the completion did not take place; which is one reason why the Plaintiff opted to rescind the Agreement. The other reason for rescission, which was conceded to by the Defendant, was that by a letter dated **30 October 2009**, the Defendant's Advocate wrote a **"Without Prejudice"** letter to the Plaintiff's Advocate setting out new terms, which terms were not acceptable to the Plaintiff. Thus, while it was the contention of the Plaintiff that the Defendant is to blame for breach of contract, the Defendant was similarly of the conviction that the Plaintiff is entirely to blame. Accordingly, having given consideration to the evidence adduced herein, the written submissions made by Learned Counsel for the parties and the Agreed List of Issues filed herein on **10 May 2013,** the following issues stand out as the outstanding issues for consideration and, therefore, determination:

> **[a]** Whether there was breach of the Agreement for Sale by way of non-completion, and who, between the Plaintiff and the Defendant, is liable therefor;
>
> **[b]** Whether the Plaintiff is entitled to a refund of the sum of **Kshs. 1,000,000/=** deposited with the Plaintiff's Advocates in partial performance of the Agreement for Sale;
>
> **[c]** Whether the Defendant is entitled to the sums claimed for in his Defence and Counterclaim.

[a] <u>On the breach of the Agreement for Sale and who, between the Plaintiff and the Defendant, is to blame therefor</u>;

[15] Since the Agreement for Sale was subject to the **Law Society's Conditions of Sale,** the parties were in no disputation that it was the duty of the Plaintiff to prepare the draft conveyance for approval by the Defendant. **Condition 24(1)** of the **Law Society Conditions of Sale** states that:

> **"The Conveyance shall be prepared by the Purchaser and delivered to the Vendor for perusal and approval not less than 14 days before the completion date."**

[16] Although it was the contention of the Defendant that no draft Assignment was forwarded to him prior to the letter dated **10 September 2009,** and therefore that the Plaintiff is to blame for the delay of some 41 days leading up to the completion date. There is however on record a letter dated **31 July 2009** by which the Advocates for the Defendant, **M/s Ahamed & Ahamed Advocates**, acknowledged receipt of payment of the deposit and forwarded a copy of the duly executed Agreement for Sale. In response to that letter, the Plaintiff's Advocate wrote to the Defendant's Advocates on **5 August 2009** and stated thus:

> **"...We refer to your letter of 31st July 2009 and return herewith the Agreement for attestation of your client's signature thereon. We also enclose herewith the draft Assignment for your perusal and approval..."**

[17] Thereafter on the **10 September 2009**, the Advocates for the Plaintiff re-forwarded to the Defendant's Advocates, the draft Indenture of Assignment of Lease for approval and indicated that they were ready to complete the transaction. Receipt of this letter was acknowledged by the Defendant and a copy thereof was exhibited as No. 2 (at page 6) in the Defendant's List and Bundle of Documents (marked **Defendant's Exhibit No. 1).** It was accordingly the responsibility of the Defendant to then prepare the Completion Documents in terms of Special Condition C of the Agreement for Sale. That Clause reads:

> **"Completion shall take place at the offices of the Vendor's Advocates on or before the Completion date when the following documents will be made available to the Purchaser's Advocates by the Vendor after receipt of a Bankers Cheque for the full balance of the purchase price and apportioned Land Rates and Land Rent:**
>
> **i. Duly executed Original Assignment of Lease in respect of the Property in favour of the Purchaser.**
>
> **ii. All the necessary consents required for registration of the Assignment.**
>
> **iii. All documents relating to the Property which are with the Vendor.**
>
> **iv. Pin Number of the Vendor.**
>
> **v. Three Coloured photographs of copies of I.D. card of officials signing.**
>
> **The documents listed in this Special condition C [i to v above] are hereinafter referred to as the "Completion Documents". The Vendor shall be deemed to have fulfilled his obligation under this Agreement if on or before the Completion Date, the Vendor's Advocates deliver to the Purchaser's Advocates the Completion Documents."**

[18] There is ample and credible evidence to show that the Defendant did not comply with **Special Condition C** aforestated. By a letter dated **30 October 2009** (which was the Completion Date), the Defendant's Advocates wrote to the Plaintiff's Advocates proposing *inter alia*,

a new Completion Date. For the first time, the Defendant raised the issue of the auxiliary agreement over furniture as one of the two causes of the delay. His Advocates stated thus:

> **"...Your client also wanted to buy the furniture from our client and he still has not finalized the purchase. Our client is as a result of the delay unable to vacate the flat. Please request your client to confirm if he is purchasing the furniture or not so that our client is able to take appropriate action."**

[19] The Plaintiff, while conceding that he and his wife had expressed interest in the Defendant's furniture, denied that a firm agreement was reached on the purchase price of **Kshs. 500,000/=** as alleged by the Plaintiff. He was also categorical that no agreement was made that he would pay for the furniture on or before the completion date. Hence, granted that the Agreement for Sale, at **Clause 9**, was explicit that **"The Sale includes the buildings and improvements but does not include any movables",** I take the view that the agreement for the purchase of the furniture had no correlation with the Agreement for Sale and therefore non-payment therefor by the Completion Date cannot be accepted as a plausible explanation for non-compliance by the Defendant.

[20] The second explanation offered by the Defendant for non-compliance was that the draft Assignment of Lease had been returned to the Advocates for the Plaintiff with amendments for approval but had not been returned in good time. The Plaintiff's letter dated **30 October 2009** by which the Plaintiff's Advocates returned the Indenture of Assignment for execution by the Defendant and the Management Company, was exhibited at page 9 of the Defendant's Bundle of Documents (marked **Defendant's Exhibit No. 1**) in support of this contention. It is however noteworthy that by that time, the Defendant had already taken the position unilaterally that completion could not be had as agreed; and had introduced new aspects to the Agreement for compliance by the Defendant, including:

> **[a]** The requirement that the furniture be paid for before completion;
>
> **[b]** The need for more time for the Management Company to peruse and approve the Completion Documents;
>
> **[c]** That vacant possession be given 30 days after receipt of the balance of the purchase price to enable the relocation of the Defendant as well as resolution of the question of furniture.

[21] It is noteworthy that in his evidence, the Plaintiff denied prior notice that there was a Head Lessor, or that it was a term of the Agreement for Sale that the approval of the Head Lessor be obtained. The fact of the matter, however, is that there was indeed a Head Lessor in respect of the Suit Property, namely **Fedha (Management) Ltd**. This is a matter that, with the exercise of due diligence, the Advocates for the Plaintiff were able to ascertain. In any case, by a letter dated **31 July 2009,** the Defendant's Counsel provided the Plaintiff's Advocates with a copy thereof; and indeed a copy was exhibited by the Plaintiff as Document No. 1 in the Plaintiff's List and Bundle of Documents **(Plaintiff's Exhibit No. 1).** A copy of the initial Indenture dated **29 November 1993** was exhibited by the Defendant at pages 1-44 of his Supplementary List of Documents (marked **Defendant's Exhibit No. 2**) and **Clause 5.9.1** thereof is explicit that:

> **"Subject to indemnifying the Company and the Manager against all costs incurred by the Company and the Manager in that connection the Owner may subject to clauses 5.9.2 and 5.9.5 with the prior consent in writing of the Company and the Manager (such consent not to be unreasonably withheld or delayed except in the event that the Owner shall then or at the time of assignment or charging be in breach of any of his obligations arising under this Lease) assign or charge the Apartment."**

[22] Vide **Clause 5.9.2,** it was a requirement that, prior to any assignment of the subject Apartment, there be a direct covenant between the Assignee and the Company to perform and observe all of the Owner's covenants and all other provisions during the residue of the Lease Term; while **Clause 5.9.5** of the Original Lease stated that:

> **"If the Company and the Manager shall grant consent for such assignment, sub-lease or charge the Owner shall produce to the Company or the Company's Advocates a draft of the proposed assignment or charge (as the case may be) for approval by the Company upon such terms and conditions as the Company shall deem fit and shall pay the costs (including legal costs on an Advocate and own client basis) and expenses of the Company incidental thereto and shall supply a properly completed and registered copy of the document in question to be retained by the Company."**

[23] Consequently, it is manifest that the Plaintiff had due notice that by the Indenture dated **29 November 1993** between **Akiba Bank Limited**, the **Management Company** and **Mukaniwa Deogratias**, the Suit Property had been leased for the unexpired term of 99 years from **1 November 1992**; and that the Lease had been assigned by **Mukaniwa Deogratias** and the Management Company to **Mrs. Hellen Waithira Macharia** and **Tala Investments**; and thereafter to the Defendant, **Kartar Singh Bhachu** and **Balbir Kaur Bhachu**. The Plaintiff was accordingly deemed to know of the stipulations governing alienation as set out in **Clause 5.9** of the initial Indenture.

[24] Further to the foregoing, there is credible evidence that, vide the letter dated **22 September 2009**, the Defendant's Advocates did mention that the Assignment had to be forwarded to the Lessor and Manager for execution; and the Advocates for the Plaintiff, in their letter dated **30 October 2009** to the Defendant's Advocates, had no difficulty intimating that:

> **"We ... enclose herewith the Indenture of Assignment for execution by your client and the Management thereafter return to us for our further action..."**

[25] The Defendant made heavy weather about this show of tardiness on the part of the Defendant and submitted that the Plaintiff was directly responsible for the delay in having the draft Indenture of Assignment forwarded to **M/s Daly & Figgis Advocates** for the Head Lessor and Manager. Accordingly, it was submitted by Counsel for the Defendant that the Completion Notice issued by the Plaintiff on **11 November 2009** was invalid. Two reasons were cited for this submission, namely; that the Plaintiff failed to prepare the Assignment of Lease according to the Special Conditions contained in the Main Lease and **the Law Society Conditions of Sale;** and for not paying the

balance of the purchase price on or before the Completion Date.

[26] Whereas it is true that the Plaintiff's Advocates only reverted with the signed Assignment of Lease on the Completion Date, there is no denying that the Plaintiff was prompt in preparing the initial draft, which was forwarded to the Defendant's Advocates way back on **5 August 2009**. There is therefore no explanation for the delay in getting the Head Lessor and the Management on board. There was also no explanation by the Defendant why he did not comply with the 21 day Completion Notice, which was, in any case not issued until **11 November 2009.** In similar vein, the argument about the Plaintiff's failure to pay the balance of the purchase price lacks traction, granted that **Special Clause D** was specific that:

> **"Simultaneously with the release of the Completion Documents the Purchaser's Advocate shall release the balance of the Purchase price to the Vendor's Advocates."**

[27] Thus, there is no gainsaying that time was the essence to the subject contract. This can be seen in the explicit stipulation in that regard in **Clause 5** of the **Agreement for Sale** and inferred from the Special Conditions in connection with the Completion Date, such as **Special Conditions A, B, C and D** thereof. **The Law Society Conditions of Sale** also recognize this in Condition No. 4 thereof. Hence, in **Gatere Njamunyu vs. Joseck Njue Nyaga [1983] eKLR** the Court of Appeal was of the view that:

> **"The principle to be acted upon in such a case is stated in 9 *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. 9 *Halsbury's Laws*, para 481 (ibid)."**

[28] Accordingly, it was the responsibility of the Defendant to ensure that the Completion Documents were availed in time, which he did not; and whereas the Plaintiff was geared up for completion as indicated in his letters dated **10 September 2009** and **5 October 2009**, the Defendant was not prepared either for completion or to deliver up vacant possession. Instead, he made new proposals including the proposal for renegotiating a new completion date; and for vacant possession to be given 30 days after completion. The Plaintiff, expressed his disapproval of these proposals and demanded for completion within 21 days, vide the letter dated **11 November 2009**, failing which he would rescind the contract. No action was taken by the Defendant to rectify its default. Instead, he purported to also issue a completion notice on **4 January 2010,** by which time, the Plaintiff's notice had long taken effect.

[29] It is now trite that variation of contract must be renegotiated by the concerned parties. Hence, in **Kenya Breweries Ltd vs. Kiambu General Transport Agency Ltd [2000] 2 EA 398** the Court of Appeal held that:

> **"A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be *ad idem* in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration ...If the agreement for the variation is mere *nudum pactum* it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement...A written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract."**

[30] Indeed, **Condition 4(7)** of the **Law Society Conditions of Sale** to which the Agreement for Sale was subject, either party was at liberty to issue and serve a completion notice, being then himself ready, able and willing to complete; and **Condition 4(7)(c)** states that:

> **"Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence to the contract."**

[31] In the circumstances, it is manifest that by failing to prepare and avail the Completion Documents; and by introducing new terms to the Contract on the Completion Date, the Defendant paved the way for rescission of the contract by the Plaintiff. It therefore my resultant finding that in this instance, the Defendant was to blame for non-completion of the sale transaction and therefore, the Plaintiff was entitled to rescind the Agreement for Sale as he did, for without the Completion Documents, the Plaintiff was under no obligation to pay the balance of the purchase price.

[b] Whether the Plaintiff is entitled to a refund of the sum of Kshs. 1,000,000/= deposited with the Plaintiff's Advocates in partial performance of the Agreement for Sale;

[32] Having found that that the Plaintiff was justified in rescinding the Contract after supplying the requisite 21 days notice of termination, it would follow that he is entitled to his deposit. Rescission is defined in **Black's Law Dictionary, Ninth Edition,** thus:

> **"A party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach ..."**

It is for this reason that **Condition No. 4(7)(f)** of the **Law Society Conditions of Sale** recognizes that:

> **"If the vendor does not comply with a completion notice, the purchaser, without prejudice to any other rights or remedies**

available to him, may give notice to the vendor forthwith to pay to the purchaser any sums paid by way of deposit or otherwise under the contract and interest on such sums at the contract rate from four (4) working days after service of the notice until payment..."

I therefore have no hesitation in holding that the Plaintiff herein is indeed entitled to a refund of the **Kshs. 1,000,000/=** paid by him as deposit of the purchase price, and I so find.

[c] Whether the Defendant is entitled to the sums claimed for in his Defence and Counterclaim.

[33] By way of Counterclaim, the Defendant prayed for the total sum of **Kshs. 567,078.70** made up as follows:

- **Kshs. 48,821.90** as Interest on the balance of the Purchase Price at 18% per annum as per Special Condition A(b) of the Agreement for Sale
- **Kshs. 480,000.00** being the cost of renting an alternative Apartment at Kshs. 40,000.00 per month for one year
- **Kshs. 17,780.00** being fees paid to Head Lessor and Management Co. plus VAT of **Kshs. 2,876.80**
- **Kshs.15,000.00** being fees paid to **Daly & Figgis** Advocates acting for the Head Lessor and the Management Co. plus VAT of **Kshs. 2,400.00.**

[34] Learned Counsel for the parties relied on the case of **Hadley vs. Baxendale (154) 9. Exch. 241** for the proposition that damages are awardable for breach of contract with the sole purpose of fairly compensating the Plaintiff for the loss proximate to the breach. In particular, the following excerpt was quoted:

"Where two parties have made a contract which one of them has broken the damages which the other ought to receive ... should be such as may fairly and reasonably be considered either as arising naturally, i.e according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made a contract as the probable result of a breach of it."

[35] Hence, in respect of the claim for interest on the balance of the purchase price, the Defendant's argument was that, had the purchase price been paid on the Completion Date, he would have earned interest on the amount as envisaged by **Special Condition B(b)** of the Agreement for Sale. Hence the Defendant claimed **Kshs.48,821.90** at the contractual rate of 18% per annum. Special Condition B(b) of the parties' Agreement provides that:

"At the sole discretion of the Vendor, the Vendor shall be entitled to allow the purchaser to complete the transaction after the Completion Date subject to the Purchaser paying interest on the full balance of purchase price at the rate of Eighteen (18) per centum per annum from the Completion date until payment in full. All payments which fall short of the total amount due will be accepted on account and in part payment."

[36] In this case, no completion was had and therefore no payment made. It is not possible therefore to ascertain interest for purposes of **Special Condition B(b)** of the Agreement; and although the Defendant claimed **Kshs. 48,821.90,** there is no explanation as to how that amount was arrived at, noting that such interest would only be claimable from the Completion Date to the date of full payment, where the Vendor is amenable to such late payment. More importantly, granted my findings hereinabove that the Defendant was to blame for non-completion, there would be no basis for such a claim.

[37] The Defendant also counterclaimed for **Kshs. 480,000.00** being the cost of renting an alternative Apartment from one **Mr. E.N.K. Wanjama** at **Kshs. 40,000.00** per month for one year. He relied on the Letter of Agreement dated **17 December 2009** (at pages 33-34 of the **Defendant's Exhibit No. 1)** and the receipts of payment at pages 59-61 of the **Defendant's Exhibit No. 2).** It is noteworthy however that the Letter of Agreement is dated **17 December 2009** and that the tenancy was to take effect from **1 January 2010**, by which date the Completion Period had long expired, and the Completion Notice dated **11 November 2009** had lapsed. Thus, from the Plaintiff's standpoint, the Agreement of Sale stood rescinded well before the alleged tenancy took effect, and a demand for refund of the deposit made.

[38] More importantly, it is indubitable that, according to the Defendant's evidence herein, as of the Completion Date on **30 October 2009,** he had not made any alternative arrangements with a view of moving out of the Suit Property. The letter dated **30 October 2009** from the Defendant's Advocates to the Plaintiff's Advocates is explicit that the Defendant was **"...unable to vacate the flat..."** because the outstanding aspect of furniture had not been sorted out. It was further intimated thus:

"...As the sale is not likely to take place today our client's plan to move to other suitable premises has been delayed..."

[39] Hence, by **4 January 2010**, the Defendant was already of the conviction that the Agreement for Sale had encountered strong headwinds, for in a letter of even date to the Plaintiff's Advocates, notice was given on behalf of the Defendant to the Plaintiff's Advocates to the following effect:

"...our client insists on completion of the contract within 21 days from the receipt by you of this letter, and we hereby give you notice that failure on the part of your client to complete the contract within the said period will be treated ...as breach of a material term of the contract on the part of your client."

[40] The Defendant thereafter communicated, vide the letter dated **17 February 2010** that, pursuant to **Clause 5** and **Special Condition A** of the Agreement for Sale, that the Plaintiff's deposit had been forfeited. In the light of the foregoing, there was absolutely no reason for the Defendant to pay rent to **Mr. Wanjama** as late as **18 January 2011** (per the Receipt No. 1503 on page 61 of the **Defendant's Exhibit No. 2)**

given the aforementioned position taken by the Plaintiff. It was thus incumbent upon the Defendant mitigate his losses and bring the tenancy with **Mr. Wanjama** to an early close. There was no indication of such an attempt or any justification whatsoever as to why the Defendant should be reimbursed by the Plaintiff for the rent paid by him. In the premises, I find no justification for awarding the Plaintiff the **Kshs. 480,000/=** or any of the other sums claimed in the Counterclaim. Hence, the Defendant's Counterclaim is accordingly dismissed with attendant costs.

[41] In the result, I would enter Judgment in the Plaintiff's favour and grant him the following Orders:

[a] A Declaration that the Defendant was in breach of the Agreement for Sale dated **31 July 2009**;

[b] An Order for the refund by the Defendant of **Kshs. 1,000,000/=** being the 10% of the deposit paid by the Plaintiff in connection with the Agreement for Sale dated **31 July 2009**;

[c] Interest on the aforesaid sum at the contractual rate of 18% per annum from **31 July 2009** until payment in full.

[d] Costs of the suit

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF APRIL, 2018

OLGA SEWE

JUDGE