REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 335 OF 2007

GAMI PROPERTIES LIMITED.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD

OF TRUSTEES.....1ST DEFENDANT

AUTOMOBILITY LIMITED.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

JUDGEMENT

1. Gami Properties Limited (Gami or the Plaintiff) seeks General Damages for what it alleges is breach of an Agreement of Sale dated 2nd June 2004 (the Agreement) entered between it and National Social Security Fund Board (NSSF or the 1st Defendant).

2. By that Agreement, NSSF being the Proprietor of Land known as Nairobi/Block 98/73 (herein after Suit Property) agreed to sell and Gami agreed to purchase the said Property at a Purchase price of Khs. 150,000,000/=. It was a term of the said Agreement that Gami would pay a sum of Khs. 32,000,000/- to NSSF on or before Execution of the Sale Agreement. It is not in dispute that Gami paid that sum in two installments of Khs.20,000,000/= on 15th April, 2004 and 12,000,000/= on 26th April, 2004. The balance of the Purchase price being Ksh.118,000,000/= was to paid within two years from the date of Execution of the Agreement.

3. That Agreement contained two terms which are central to the disagreement that subsequently arose between Gami and NSSF. Clause 7 of the Agreement reads:-

> "7. The Property is sold subject to the Act and Special Conditions referred to and contained in this grants but free from any charges or similar encumberances. Provided that and it is hereby agreed that the Sale is subject to an existing lease and the Purchase shall take possession after the Tenant vacates".

While clause 11 is to the following effect:-

> "11. The Purchaser has inspected the Property and is buying it in the condition in which it stands at the date of the signing of this Agreement and the Vendor shall not be called upon to do anything to improve the same save that the Vendor shall, if called upon, point out the beacons. This condition is subject to verification of Survey and acreage. Any shortfall on the acreage shall reduce the total Purchase price on pro-rata basis".

4. The case of Gami is that pursuant to the Provisions of clause 11, it caused the Suit Property to be surveyed by a licenced and qualified Land Surveyor who established that the Suit Property measured 13.07 acres and not 15.2 acres. A Survey Report (P Exhibit page 14) dated 27th October 2004 was shown to Court in support of this assertion.

5. Taking the position that by virtue of Clause 11 the Purchase price ought to have been reduced in view of the shortfall. Gami on 13th May 2005, wrote to NSSF informing it of the finding of it's Surveyor (P. Exhibit page 16). A similar Letter was written by Chebet & Chebet Advocate on behalf of Gami. In that letter of 12th August 2005 (P Exhibit page 17) the Advocates invited NSSF to appoint its own Surveyor to verify the findings. The evidence of Mr. Bharat Ramji Manji (PW2 or Manji) is that NSSF did not respond to these letters.

6. A couple of months later on 25th May 2006 (P Exhibit pages 18-19), the firm of S.S Jowhal & Co. Advocates wrote to NSSF informing it that on the basis of the decreased acreage the Purchase price was prorated to the sum of Khs.130,700,000/=. Having paid a deposit of Khs.32,000,000/=, the Lawyer informed NSSF of the willingness and ability of his Client to pay the balance of the Purchase price which it held to be 98,700,000. At the same time the Lawyer called for the necessary completion Documents. A similar letter but dated 14th June 2006 (P Exhibit page 20) was written by the Advocate to the firm of Robson Harris & Company Advocates who were the Advocates for NSSF in the transaction.

7. It is the evidence of Mr. Manji that Gami came to learn that the Suit Property had been subdivided into 2 portions namely Nairobi/Block 98/74 and Nairobi/block 98/75. Further that the two properties had been sold and registered in the names of Aviline Services Limited and Automobility Limited (the 2nd Defendant). Gami was not aggrieved with the conduct of NSSF but also of the Chief Land Registrar (the 3rd Defendant).

8. The evidence of Mr. Manji is that acting out of precaution, Gami had registered a Caution in the Register of the Suit Property on 23rd June 2004. Gami asserts that it did not receive Notice of the removal of the Caution and that it was therefore fraudulently and unlawfully removed to pave the way for the subdivision of the Property. Gami alleges breach of Section 133 of the Registered Land Act (now repealed). In the further Amended Plaint dated 23rd February 2015 Gami sets out what it sees as particulars of breach of Contract by NSSF. These are found in paragraph 10 which reads:-

> Particulars of Breach of contract;-
>
> a) Entering into agreement to sell the suit property to the second and third Defendants while aware of the existence and validity of the Sale Agreement of 2nd June 2004 without issuing any notice to rescind the agreement as provided for by Clause 3 of the Agreement.
>
> b) Causing the Suit Property to be subdivided during the subsistence of the agreement for Sale.
>
> c) Causing the two subdivisions to be transferred into the names of the second and third Defendants.
>
> d) Carrying out the subdivision and transfer of the two parcels while there was registered against the title a valid caution by the Plaintiff claiming Purchaser's interest.
>
> e) Stealthily, surreptitiously and without notice to the Plaintiff dealing with other parties while the contract with the Plaintiff over the same parcel of land was in existence, valid and binding.
>
> f) Failing to comply with the Plaintiff's request for completion documents to facilitate completion of the transaction.
>
> g) Failing to comply with any of the Vendor's covenants, obligations, terms and conditions of the Agreement for Sale.

9. Although the Plaintiff's claim has eventually evolved to be a claim for damages for breach of the Agreement, it had sought the following Prayers in that Amended Plaint:-

> (i) A declaration that the purported subdivisions of Title No. Nairobi/block 94/73 is null and void for illegality and fraud and be set aside.
>
> (ii) A declaration that the purported transfer and registration of the two subdivisions of the suit property, that is to say Title Nos. Nairobi/Block 98/74 and Nairobi Block 98/75 is null and void for illegality and fraud and be set aside.
>
> (iii) An order of specific performance of the contract against the first Defendant to do all things and necessary to give effect to the contract and to forthwith execute transfer of Title No. Nairobi/Block 98/73 in favour of the Plaintiff such transfer to be executed and delivered to the Plaintiff's advocate within1 4 days of the date hereof failing which the Deputy Registrar of this Honourable Court does execute the transfer to be registered in favour of the Plaintiff upon deposit either with the first Defendant's advocates or with this Honourable Court a sum of Khs.98,000,000/=.
>
> (iv) A permanent injunction to restrain the Defendants by themselves or through or by suit Property by inter alia erecting any developments thereon or taking possession or trespassing thereon.
>
> (v) An Order directed against the fourth Defendant to immediately and forthwith register the Plaintiff's caveat or caution against the said two sub-divisions known as Title No. Nairobi/Block 98/74 and Nairobi/Block 98/75.
>
> (vi) A sum of Kshs.58,870,226.81 payable by the first, second,third and fourth Defendants jointly and severally to the Plaintiff.
>
> (viA) Consequential Damages for loss of Business profits in the sum of Khs.472,504,294.00 being the loss of bargain on the property.
>
> (vii) Further and in addition to the order of specific Performance of the contract for sale by the first Defendant, the first Defendant do pay to the Plaintiff general and punitive damages together with interest thereon at commercial rates of interest from the date of payment of the deposit of Khs.32,000,000/= by the Plaintiff to the first Defendant until payment in full.

(viii) IN THE ALTERNATIVE judgement against the 1st Defendant in the sum of Khs.686,500,000.00 being the loss of bargain on the property.

(ix) The costs of this Suit be paid by the Defendants to the Plaintiff.

(x) Such further or other relief as this Honourable Court may deem just.

10. In its Defence, NSSF avers, that the Agreement was entered into by the Parties laboring under a common mistake that the actual acreage of the Land was 6.15 acres as per the Title Document. That the unilateral decision by Gami to pay a sum of Khs.98,700,000 purportedly as the balance of the purchase price was not acceptable to NSSF and the Agreement was therefore vitiated by Mistake of Fact.

11. That the agreement having vitiated NSSF sold the property to Purchasers who had offered a better bargain for the Suit Property. At the time of filing the Original Defence on 22nd August 2007 NSSF stated that the Plaintiff had never demanded for a of refund Kshs.32,000,000/= which nevertheless it was willing to pay.

12. Following that averment, Gami by way of an Application dated 18th February 2007 filed an Application for Judgement to be entered against NSSF for Khs.32,000,000/= either as an admission or on the basis of Summary Judgement. The Court Record shows that on 13th October 2008, the Advocates for the Parties recorded the following Consent before Justice Kimaru:-

"Order:-

By consent Judgement be and is hereby entered for the Plaintiff against the 1st Defendant for Khs.32 million plus the costs of the Application. The costs of this application should be agreed or taxed. The other issues to proceed to trial".

13. The Defence of the Chief Land Registrar is dated 17th October 2007 and filed a day later on 18th October 2007. Other than denying any wrong doing and any particulars of fraud raised by Gami, the Chief Land Registrar argued that the Suit is time barred by Limitation. In addition that no Statutory Notice was issued to the Attorney General as required by the Provisions of Section 13(a) of the Government Proceedings Act (Cap 40).

14. Counsel have addressed this Court on the matters of evidence and Law that have arisen. These are contained in their detailed written submissions which I have read and considered with gratitude. Although Parties did not agree on the set of issues to be determined, their written submissions revealed a convergence as to what needed the resolution of Court. These are the issues that stand out:-

(i) Whether Gami or NSSF was in breach of the Agreement dated 2nd June 2004.

(ii) Whether the removal of the Caution was unlawful.

(iii) Is the Plaintiff entitled to Damages for breach of Contract and if so what is the measure of the Damages?

15. Admitted by both sides to be at the heart of this matter, is the Sale Agreement dated 2nd June 2004. In the context of the controversy herein the following clauses of the Agreement are of significance:-

2. That the said Purchase price of Kenya Shillings One Hundred and Fifty Million only (Kshs.150,000,000/-) shall be paid by the Purchaser to the Vendor as follows:-

a) As to the sum of Kenya Shillings Thirty Two Million only (Kshs.32,000,000/-) shall be paid to the Vendor by the Purchaser on or before execution of the Sale Agreement receipt whereof the Vendor hereby acknowledges). Payment shall be made as follows:-

(i) 15th April 2004 – Khs.20,000,000 Bankers cheque enclosed.

(ii) 26th April 2004 – Khs.12,000,000

b) The balance of the sum of Kenya Shillings One Hundred and Eighteen Million only (118,000,000/-) to be paid to the Vendor's Advocates within two (2) years from the date of execution of this Agreement.

3. The Sale and Purchase is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the conditions contained in or implied by this Agreement.

4. ,,,,

5. ,,,,

6. ,,,

7. The Property is sold subject to the Act and Special Conditions referred to and contained in this grants but free from any changes or similar encumberances. Provided that and it is hereby agreed that the Sale is subject to an existing lease and the Purchase shall take possession after the Tenant vacates.

8. If the Purchaser shall fail to comply with any of the conditions hereof the Vendor may give to the Purchaser at least Twenty-one (21) days notice in writing specifying the default and requiring the Purchaser to remedy the same before the expiration of such notice AND if the Purchaser shall not comply with the said notice the Vendor shall at the Vendor's sole option be entitled:-

a) To sue the Purchaser forthwith for all sums due and unpaid by the Purchaser under the terms hereof and for specific performance; or

b) To rescind this Agreement and resell the said Property either by public auction of by private treaty subject to such stipulations and conditions as the Vendor may in its uncontrolled discretion deem fit and any deficiency in price which may result upon all expenses in connection with or included to such resale or attempted resale shall be good by the Purchaser to the Vendor and shall be recoverable by the Vendor as liquidated damages after giving credit to the Purchaser for moneys paid by the Purchaser to the Vendor or to the Vendor's Advocates PROVIDED ALWAYS that any increase in the price shall belong to the Vendor absolutely.

9. ,,,,,

10. ,,,,

11. The Purchaser has inspected the Property and is buying it in the condition in which it stands at the date of the signing of this Agreement and the Vendor shall not be called upon to do anything to improve the same save that the Vendor shall, if called upon, point out the beacons. This condition is subject to verification of Survey and acreage. Any shortfall on the acreage shall reduce the total Purchase price on pro-rata basis.

12. ,,,,,

13. ,,,,,

14. In the event that the Purchase price is not fully paid within two years hereof parties shall be at liberty to enter into negotiations for extension of the time provided that such extension shall not be for more than one calendar year."

16. The substantial role and obligation of Gami in the Agreement was payment of the Purchase price. In terms of Clause 2 of the Agreement, the purchase price of Khs.150,000,000/= was to be paid as follows:-

(i) Kshs.32,000,000/= on or before the Execution of the Sale Agreement.

(ii) Khs.118,000,000/= within 2 years from the date of Execution of the Agreement.

There is evidence, and no dispute arises from this, that the sum of Khs. 32,000,000/= was duly paid in terms of the Sale Agreement.

17. The Sale Agreement was dated 2nd June 2004 and was said to be executed by the Parties thereto on that date. Consequently, payment of the balance of the purchase price ought to have been made on or before 1st June 2006. On 25th May 2006 (P. Exhibit page 18). Just six days before that deadline the Lawyer for Gami writes the following Letter to NSSF:-

The Secretary 25.5.2006

Board of Trustees

National Social Security Fund

P.O Box 30599

NAIROBI

Dear Sir,

RE: PURCHASE OF PROPERT FORM N.S.S.F BT GAMI PROPERTIES LTD. TITLE NO. NAIROBI/BLOCK 98/73.

We have been instructed by our Client Gami Properties Limited to act on its behalf in the matter of purchase of the said Property from N.S.S.F.

Our client has had the property surveyed by a licenced surveyor who has calculated the area of the Property as 13.07 acres as distinct from 15.2 acres (6.150 hectares).

As per clause 2 (b) of the Agreement for Sale dated 2nd June 2004, our client is ready willing and able to pay the balance of the purchase price of Shs.98,700,000/= made up as follows:-

1. Purchase price prorated as per clause 11 of the Agreement .. .. .. Shs. 130,700,000/=

2. Less paid .. .. .. Shs. 32,000,000/=

Balance Shs. 98,700,000/=

Kindly let us have the necessary completion documents in order to enable the transfer to be effected in favour of our client.

Kindly expedite.

Yours faithfully,

For: S.S JOWHL & CO.

18. The receipt stamp of NSSF shows that the Letter was received on 3rd July 2006. Caroline Rakama a witness for NSSF remarked as follows in her evidence,

"*This was a request for completion Documents received on 5th July 2006. NSSF did not respond to this Letter. This was well after 2 year period had lapsed*".

19. It would seem curious that a Letter of 25th May 2006 would be received on 3rd July 2006, over one month later. Must anything turn on this? Perhaps not because from the tenor of the Defence by NSSF and clarified by the submissions by its Counsel, blame is placed on Gami not for failing to tender the payment of the balance of the Purchase price by 1st June 2006 but for failing to tender the entire Khs.118 million. Hear what Ms. Rakama had stated in her written testimony,

"*14. That contrary to the terms of the purported Sale Agreement, the Plaintiff offered to pay Khs.98,000,000/= instead of Khs. 118,000,000/= as the balance of the purchase price (effectively unilaterally varying the Sale Agreement) which was not accepted by the 1st Defendant and hence there was no contract ad idem, in any event*"

This Court is willing to accept the version of Gami that it made known to NSSF that it was ready and willing to pay Khs.98,700,000/= before the deadline of 1st June 2006.

20. Gami on the other hand has an explanation for seeking to pay Khs. 98,700,000/= and not Kshs.118,000,000/=. And this leads to discussion of a critical aspect of this case. Clause 11 of the Agreement reads:-

"11. The Purchaser has inspected the Property and is buying it in the condition in which it stands at the date of the signing of this Agreement and the Vendor shall not be called upon to do anything to improve the same save that the Vendor shall, if called upon, point out the beacons. This condition is subject to verification of Survey and acreage. Any shortfall on the acreage shall reduce the total Purchase price on pro-rata basis".

21. The evidence of Manji is that in furtherance of the express provisions of that Clause it caused the Suit Property to be surveyed. The outcome was that the Suit Property measured 13.07 acres and not 15.2 acres (see Survey Report dated 27th October 2004 P. Exhibit page 14). On 12th August 2005 (P. Exhibit paragraph 17) the Lawyers of Gama writes to NSSF as follows:-

The Managing Trustee 12th August, 2005

National Social Security Fund

N.S.S.F Headquarters

P.O. Box 3059900100

NAIROBI

Dear Sir,

RE: COMPLETION OF PURCHASE OF LAND REF: NO. BLOCK 98/73.

The above matter refers.

This is to inform you that the firm of Chebet & Chebet Advocates is handling this matter on behalf of Gami Properties (our client).

Our client intends to complete the purchase of the above Property as per your agreement but as per our Surveyor Report, the area was found out to be 13.07 acres but not 15 acres which the Report lies with you.

As agreed, the purchase price was Kshs.150,000,000/= based on 15 acres (condition 1) and any shortfall in acreage was to reduce the price on pro-rata basis (condition 2) according to the signed Agreement.

We therefore on behalf of our Client (Gami Properties) request you to appoint your own Surveyor to survey and forward the Report to us.

Once received, we shall go ahead with settlement and complete the Transfer.

Kindly revert as soon as possible.

Yours faithfully,

CHEBET & CHEBET ADVOCATES

22. The witness for NSSF Caroline Esendi Rakami (RAKAMA), confirms that it received that letter and the receipt stamp is of 12th August 2005. One can pick four important issues that the letter raises:-

(i) That a Survey had shown the area of the Property to be 13.07 acres and not 15 acres.

(ii) Gami asserts that in accordance with the Agreement the Purchase price should be reduced on a pro-rata basis.

(iii) Gami asks NSSF to appoint its own Surveyor to undertake a Survey and to forward a Report.

(iv) Once the Report is received then the transaction can be completed.

23. Rakama's testimony was that NSSF neither appointed its own independent Surveyors nor took steps to verify the contents of that letter. However, Counsel for NSSF sets up an interesting twist to clause 11. He submits:-

"*First, it is not in dispute that the property acreage as determined from the beacons was 6.15 Ha – this acreage was not erroneous and in accordance with the Property beacons, and thus any verification of acreage in accordance with the original survey beacons would have revealed that the Sale Agreement's clause 11 proviso for pro-rate reduction of the Purchase price for shortfall on acreage did not apply- Clause 11 would only apply if a survey of the beacons showed a lesser acreage which was not the case*".

24. Patrick Opiyo Adero (PW1 or Adero) a Land Surveyor undertook the Survey. He found that the Suit Property encroached onto the Mombasa Road Reserve by approximately 0.5644 ha. There is no evidence by NSSF to counter this and he stood firm in his evidence. This Court has no reason to disbelieve him. The submission by Counsel from NSSF is that the Road encroached onto the Suit Property and did not divest NSSF from Legal ownership of the area encroached. It is then submitted that the existence of the encroachment was a mistake common to the Parties and not within the contemplation of the Provisions of Clause 11.

25. The words used in Clause 11 are plain and do not brook any difficulty in their construction. If this Court breaks down the provisions, then it provides as follows:-

(i) The Purchaser has inspected the Property.

(ii) The Purchaser buys it in the condition in which it stands at the date of signing of the Agreement.

(iii) The Vendor shall not be called upon to improve the Property save that it could be called upon to point out the Beacons.

(iv) All the above is subject to verification of Survey and acreage.

(v) Any shortfall in acreage shall reduce the Purchase price on pro-rata basis.

26. Quite explicitly, vide Clause 11 the Parties gave themselves liberty to to carry out a Survey to verify the acreage. It was also expressly agreed that in the event of a shortfall in acreage the Purchase price would be reduced pro-rata. Curiously, the opposite scenario was not provided! It was not agreed that the Purchase price would increase proportionate to an increased acreage. This, perhaps, an indication that a Survey could only possibly reveal a shortfall. There was no doubt therefore that the issue of the exact price Purchase could only be settled upon verification of the acreage. That the Purchase price was not firm is also reflected in the wording of Clause 1,

"1. *That the Purchase price for the said Properties is the sum of Kenya Shillings One Hundred and Fifty million (Kshs.150,000,000/=) only <u>based on 6.156 Hactares</u>*. (my emphasis).

When the words '<u>based on</u>' is read together with Clause 11 then it becomes clear that the Purchase price was subject to verification of acreage with a rider that it would be less but not more than Khs.150,000,000/=.

27. In the choreography, a Survey was undertaken (whose results have not been debunked by NSSF) which shows that the Suit Property had encroached onto the Mombasa Road Reserve by 0.5644 Ha. The finding really was that what belonged to the Road Reserve could not be part of the Suit Property. The argument by Counsel for NSSF that the encroachment did not divest NSSF from legal ownership of the area encroached upon can hardly find support in Law. The finding of the Survey was that the land available for sale was 13.07 acres and not 15 acres. Clause 11 shows that the parties contemplated that there may be a shortfall in acreage upon verification through Survey. That there was indeed such a shortfall could not, and should not, have taken them by surprise. There was no mistake and that Defence is not tenable.

28. In the course of the Hearing NSSF advanced a second aspect of common mistake. That NSSF offered to sell the suit property to Gami when there was an existing lease with Airline Services Ltd which provided a first option to purchase by the Lessee. Yet this was not pleaded by NSSF and this Court need not to consider it at all.

29. As this Court has found that the Agreement for Sale was not vitiated by common mistake, it must now consider whether either of the Parties breached it.

30. It is now common ground that the Suit Property was subdivided into two portions namely Nairobi/block 98/74 and Nairobi/Block 98/75 and these have been sold by NSSF and transferred to some third Parties. Gami asserts that to date the 1st Defendant has not properly rescinded the Sale Agreement as provided by clause 8 of the Sale Agreement or condition 26 of The Law Society Conditions of Sale.

31. NSSF on the other hand takes the position that on account of the encroachment, Gami ought to have sought variation of the contract and if the proposed variation was to be declined, to rescind the Agreement and seek refund of the deposit. The evidence is that Gami did neither. The argument by NSSF is that having failed to do so and having failed to complete before 1st June 2006 then Gami was in breach.

32. There is in my view, a fundamental flaw in the submissions by NSSF because as already held the issue of reduced acreage and possible reduction of the Purchase price was already contemplated within the terms of the Sale Agreement. The reworking of the Purchase price did not require the Sale Agreement to be varied.

33. If nevertheless, and for purposes of argument, it is accepted that Gami failed to tender payment of the Purchase price by the due date of 1st June 2006, was it in breach of the Contract?

34. It bears repeating that the substantial obligation of Gami was to pay the balance of Purchase price by 1st June, 2006. That said reading the provisions of the Sale Agreement time was <u>not</u> of essence. This is made the clearer by clause 14 which provides:-

> "14. In the event that the Purchase price is not fully paid within two years hereof parties shall be at liberty to enter into negotiations for extension of the time provided that such extension shall not be for more than one calendar year."

35. Now, clause 8 of the Sale Agreement made provision on the options open to NSSF in the event that Gami failed to pay the balance of the Purchase price on time. Clause 8 reads:-

> "8. If the Purchaser shall fail to comply with any of the conditions hereof the Vendor may give to the Purchaser at least Twenty-one (21) days notice in writing specifying the default and requiring the Purchaser to remedy the same before the expiration of such notice AND if the Purchaser shall not comply with the said notice the Vendor shall at the Vendor's sole option be entitled:-
>
> a) To sue the Purchaser forthwith for all sums due and unpaid by the Purchaser under the terms hereof and for specific performance; or
>
> b) To rescind this Agreement and resell the said Property either by public auction or by private treaty subject to such stipulations and conditions as the Vendor may in its uncontrolled discretion deem fit and any deficiency in price which may result upon all expenses in connection with or included to such resale or attempted resale shall be good by the Purchaser to the Vendor and shall be recoverable by the Vendor as liquidated damages after giving credit to the Purchaser for moneys paid by the Purchaser to the Vendor or to the Vendor's Advocates <u>PROVIDED ALWAYS</u> that any increase in the price shall belong to the Vendor absolutely".

36. If indeed Gami was in default of is obligation to pay up the balance of the Purchase price on time then NSSF was obliged, under clause 8, to issue a 21 day Completion Notice upon Gami. It is common ground that no such Notice was issued. Time not being of essence and having not being made of essence by service of a 21 day Notice, then the Agreement subsisted beyond 1st June 2006 (see for instance the decision in <u>Kinyanjui & Another vs. Thande & Another</u> [1995-98] 2EA 159). The Sale Agreement was in subsistence even on the date that NSSF subdivided the Suit Property thereof to third Parties. In doing so NSSF breached the Sale Agreement. That is my answer to the first question.

37. So as to secure its interest, Gami alleges that it placed a Caution in the Registry of the Title to Nairobi/Block 98/75 on 23rd June 2004. It is Gami's case that this Caution was unlawfully removed and that is why it was possible for NSSF to subdivide the Land and subsequently dispose of the resultant plots. An assertion is made that the very removal of the Caution was intended to pave way for the subsequent disposals.

38. But on a closer look at that extract of the Registrar (P Exhibit page 2) something interesting is revealed. It reads as follows:-

> "5. 23.6.04 - CAUTION: BY <u>HARISH R. PATEL AND BHARAT R. MANJI ALL OF BOX 44861 NAIROBI</u> – CLAIMING PURCHASERS INTEREST UNDER GAMI PROPERTIES LIMITED.

39. The Caution itself (P Exhibit page 21) does confirm that the persons who lodged the Caution were Harison R. Patel and Bharat R. Manji with a claim as 'Purchasers under Gami Properties Ltd'. Both from the Caution lodged and the entry made in the Register the Cautioners were Harish R. Patel and Bharat R. Manji. Although they purport to do so as Purchasers under Gami Properties Limited, the two are separate and distinct legal persons from Gami which is a Limited Liability Company. As a fact therefore, Gami was not the Cautioner and has no locus to complain about its removal. That must be the answer to the second issue.

40. In reaching this conclusion it has occurred to this Court that this may seem a far too mechanical approach and this has caused some anxiety. However my overall reading of Division 2 of Part Viii of The Repealed Registered Land Act gives me some comfort. Section 132 of The Act provides that so long as a Caution remains registered, no disposition inconsistent with it shall be registered except with the consent of the Cautioner or by Order of the Court. Section 133 on withdrawal and removal involves the Cautioner but if by Order of The Registrar or Court only after the Cautioner has been invited to a hearing. The Cautioner is at the heart of it all. Now Directors of a Company are distinct from the Company. A change of Directors does not affect the legal personality of the Company. In the matter at hand the persons who applied and were accepted as Cautioners were Harish Patel and Bharat Manji. They are the Cautioners. If the Caution was to be cancelled or removed by the Registar or Court then the Notices for cancellation or removal would have to be served on them and not Gami even if they had ceased to be Directors. Not to do so would be to breach the provisions of the Law. It is therefore of some significance that the two individuals and not Gami are the Registered Cautioners.The point to be made is that Gami is not the Cautioner and while the Caution could have afforded it some protection , I very much doubt that it can maintain a cause of action on the basis of it.

41. Is Gami entitled to Damages for breach of Contract and if so what is the measure of the Damages?

42. In answering this question it is imperative that I set out the history of the pleadings herein and how they have evolved from 28th June 2007. This Claim was presented by way of a Plaint of even date. Gami sought the following Prayers:-

(i) A declaration that the purported subdivisions of Title No. Nairobi/block 94/73 is null and void for illegality and fraud and be set aside.

(ii) A declaration that the purported transfer and registration of the two subdivisions of the suit property, that is to say Title Nos. Nairobi/Block 98/74 and Nairobi Block 98/75 is null and void for illegality and fraud and be set aside.

(iii) An order of specific performance of the contract against the first Defendant to do all things and necessary to give effect to the contract and to forthwith execute transfer of Title No. Nairobi/Block 98/73 in favour of the Plaintiff such transfer to be executed and delivered to the Plaintiff's advocate within1 4 days of the date hereof failing which the Deputy Registrar of this Honourable Court does execute the transfer to be registered in favour of the Plaintiff upon deposit either with the first Defendant's advocates or with this Honourable Court a sum of Khs.98,000,000/=.

(iv) A permanent injunction to restrain the Defendants by themselves or through or by suit Property by inter alia erecting any developments thereon or taking possession or trespassing thereon.

(v) An Order directed against the fourth Defendant to immediately and forthwith register the Plaintiff's caveat or caution against the said two sub-divisions known as Title No. Nairobi/Block 98/74 and Nairobi/Block 98/75.

(vi) A sum of Kshs.45,000,000/= payable by the first, second and third and fourth Defendants jointly and severally to the Plaintiff.

(vii) Further and in addition to the order of specific Performance of the contract for sale by the first Defendant, the first Defendant do pay to the Plaintiff general and punitive damages together with interest thereon at commercial rates of interest from the date of payment of the deposit of Khs.32,000,000/= by the Plaintiff to the first Defendant until payment in full.

(viii) The costs of this Suit be paid by the Defendants to the Plaintiff.

In the initial Plaint Gami was seeking for Specific Performance. In addition it sought Special Damages of some Kshs.45,000,000/= comprised of Consultancy and Professional fees, losses and damages incurred by way of loss of Business profits and losses incurred due to delays occasioned by the Defendant in completing the transaction! Further, Gami sought General and Punitive Damages.

43. Whilst denying breach and resisting the Claim for Specific Performance, NSSF stated that it was ready, able and willing to refund the sum of Khs.32,000,000/=. Riding on this offer for refund, Gami filed a motion dated 18th February 2007 seeking Judgement for the said sum either as admitted or on account of Summary Judgement.

44. That motion was compromised, seemingly, by the Consent of 13th October 2008 which reads:-

"Order:-

By consent Judgement be and is hereby entered for the Plaintiff against the 1st Defendant for Khs.32 million plus the costs of the Application. The costs of this application should be agreed or taxed. The other issues to proceed to trial".

What therefore were the issues to proceed to trial as at the date of the Consent? They would be the other Prayers which included the Prayer for Specific Performance, Special Damages of Khs.45,000,000/= and General and Punitive Damages.

45. By Consent of Counsel (who included of Gami and NSSF) entered on 21st September 2012 the Plaintiff was granted Leave to amend the Plaint. Leave to make further Amendments was granted to the Plaintiff on 17th February 2015. At this latter occasion, NSSF did not resist the request for Leave. As a consequence of these amendments two hefty claims were introduced by Gami. The claim for losses of Business profits was increased from Khs.20,000,000/= to Khs.472,504,294/= and a new claim for Damages for breach of Contract and loss of Bargain of Khs.686,500,000/-.

46. Over time it became clear to Gami that the Claim for Specific Performance was not tenable not in the least because it had accepted the refund of Khs.32,000,000/=. Indeed this truth may have dawned on Gami as earlier as when it applied for the payment of the sum of Khs.32,000,000/= through the motion of 18th February 2007. In the affidavit in support thereof by Mr. Manji he deponed:-

> "*That in breach of the Agreement, the first Defendant fraudulently and illegally subdivided the suit property into two portions and transferred them to the second and third Defendants thereby frustrating the Sale to the Plaintiff. As a result of the defaults and breaches of Contract as well as fraudulent and illegal acts on the first Defendant, the Plaintiff became entitled to rescind the Contract and to recover not only damages in breach of Contract but to the refund of Khs.32,000,000/= paid to the first Defendant pursuant to the Agreement*".

47. This Court does agree with Counsel for Gami that having proved Breach of Contract, it would be entitled to Damages in lien of Specific Performance. On this, Gami finds support from an unlikely quarter. In paragraph 16 of the Further Amended Defence NSSF partly pleads,

> "*…further and without prejudice to the foregoing, with the property not only having been already lawfully sold and transferred to 3rd Parties but also with the Plaintiff having accepted a refund of its deposit of Kshs.32,000,000/= on or before 6th October 2008, the Plaintiff's cause of action , if any, lies solely in Damages*".

From the manner in which the pleadings changed, Gami reserved its right to process for Damages.

48. So what is the measure of Damages? As submitted by Counsel for Gami, the Law generally has been that Damages for breach of Contract of Sale of land is the difference between the Contractual price and the Market price on the date of breach. However Counsel Issa for Gami has forcefully argued that this Court should break from this traditional approach and chart a new course and hold that his Client is entitled to Damages assessed at the value of the Suit Property on the date of Judgement. If I were to agree with Counsel, then the Damages payable herein would be in the region of Kshs.686,500,000/= being the loss of bargain on the Property given that the value of the Suit Property was returned at Kshs. 816,500,000/= by Bageine Karanja Mbuu on 21st July 2001 (P Exhibit pages 137-144).

49. This Court has read the decisions in Wroth & Another vs. Tyler [1973]1 ALL ER 897 and Molhotra vs. Choudhury [1997] 1 ALL ER 186, which support the proposition put forward by Gami. The rationale for the approach is explained in Mc Gregor on Damages (19th Edition) as follows:-

> "The galloping inflation of the 1970's brought into sharp focus a new form of what is essentially consequential loss. As has been, for the normal measure the value of the land is taken, following general principle, at the time contractually fixed for completion, but such a measure could be grossly unfair to a buyer if prices had escalated between the contractual date for completion and the date of judgement in his action for damages, as the award he obtains will fall short of giving him the means of acquiring an equivalent property. Ofcourse, he cannot complain of this if he ought to have acquired an equivalent property before the escalation of prices, but he may be able to show good reason why he did not do so. Thus if he brought a claim for specific performance in circumstances where he had a reasonable chance of obtaining such a decree but in the event was refused one and awarded damages instead, it would clearly be pointless for him to have acquired an equivalent property while he was awaiting the outcome of his specific performance suit. Again, prices might already have substantially increased between the making of the contract and the date fixed for its completion, and the buyer might not be in a position to raise funds which even at that date he would require, in addition to those he had earmarked for the transaction, to acquire an equivalent property. Both these points were available to the buyers in Wroth v. Tyler – *the claim for Specific Performance might well have succeeded, as there were possible ways of dealing with the Seller's wife's rights under the Matrimonial Homes Act 1967 which constituted the stumbling block in the case, and the value of the property at the date fixed for completion was already 25 per cent up on the contract price of £6,000, with the buyers, a young couple about to be married and buying their first house, having, to the Seller's knowledge, no further financial resources, - but it was the second point that was emphasized by Megarry J. in coming to the conclusion that a proper application of the general principle of compensation required that the normal measure be departed from and the value of £11,500, which the property had at the time of Judgement, be taken rather that its £7,500 value at the time of breach.* He then proceeded to award damages on such a basis not by a direct departure from the normal measure at common law but by invoking the equitable jurisdiction established by Lord Cairns' Act to grant damages in substitution for specific performance, being further of the view that a valuation as at the time of judgment was not precluded, as being outside the contemplated, a rise of such dramatic proportions as in fact took place was not. Nonetheless there seems no good reason why similar damages should not be available at law in appropriate circumstances, and this has been accepted by higher authority in two cases where once again, before having had to turn to the damages remedy, a reasonable and proper attempt to compel the Defendant specifically to perform had been made, namely in Malhotra vs. Chodhury by the Court of Appeal, where however the valuation was moved back the date of judgement by one year because of the Buyer's delay in pursuing his claim, and in Johnson v Agnew by the House of Lords, where the converse case of a Buyer's failure to complete was involved.
>
> Starting from 1980 cases have dried up both on whether a loss of profits can be claimed and on whether a date later than the date of breach can be taken in the determination of market value. This may simply be because the existing authorities are generally regarded as having sufficiently settled the law to discourage further litigation".

50. If the objective of an Award of Damages for breach of Contract is to put the offended Party in much the same place if breach had not happened then a person who losses particular land on account of breach should be awarded such Damages as would place him/her in a position of acquiring property of equivalent value. In the recent past, and perhaps now, the price of Land in Kenya escalates sharply over a

short time. On the other end, Court cases, on average, take a long time to resolve. The rationale set out in McGregor for pegging the damages on the value of the Land at the date of Judgement may, therefore, ring more true in certain instances in Kenya. However it cannot be a general Rule and its applicability must turn on the nuance of each Case. It may be suitable, for instance, where an aggrieved party presents a case for Damages as an alternative for Specific performance with has good prospects of success in the claim for Specific Perfomance and pursues it diligently but for reasons out of his control is unable to obtain that relief and the Court makes an award of Damages in leiu.If the litigation has drawn on for a long time and property prices increased sharply then there could justification in assessing the Damages on the value of the lost property at the time of Judgment.

51. Gami think they have made a good case for the enhanced Damages on the following arguments:-

(i) That the caution it had placed was unlawfully removed.

(ii) Gami had offered to buy the Property from the third Party as a way of mitigating loss.

(iii) An application for injunction was strongly resisted by NSSF.

52. This matter has received my anxious consideration and I have reached a decision to follow the more restrictive approach. First, I have found that the much harped on caution was not technically lodged by Gami and because Gami was not the Cautioner it should not draw any undue benefit from it. Second, Gami pressed on for Specific Performance until 24th February 2015(when it amended its Pleadings) when it ought to have been pretty obvious that by accepting the refund of Khs.32,000,000/= on 6th October 2008 only a plea of Damages was tenable. Gamis' loss would be the difference between the Contract price and the value of the Suit Property in 2008 (just 2 years after the breach) their deposit having been paid back.

53. Before assessing the Damages, I must also consider whether Gami is deserving of Khs.18,870,226.81/= said to have been incurred in the preparation of the Feasibility studies, Architectural Plans and Professional fees paid to the Advocates.

54. The evidence is that in April 2005 Mr. Alphone Okwelo Nyasilo (PW4) a Quantity Surveyor was instructed by Gami to carry out a Feasibility Study for a proposed Shopping Complex, Recreational facilities or Parking lot to be erected on the Suit Land. He carried out instructions and he prepared the Feasibility Study Report and Bill of Quantities. His fees, which substantially remained unpaid upto the time of hearing, was Khs.18,870,226.81. Manji justified this expense in cross-examination,

> "*We prepared the Feasibility Study after signing the Sale Agreement. When purchasing the Property we had idea of putting up a Mall. After paying deposit the Property was ours*".

55. Evidently the Feasibility Study was prepared about one year (25th May 2006) before Gami indicated its readiness and ability to pay the balance of the Purchase price. Is this therefore a loss that could have been contemplated by NSSF? There is no evidence that Gami communicated its intention to carry out a Feasibility Study and prepare Bills of Quantities to NSSF even before it was ready and willing to pay the balance of the Purchase Price. This Court has not been told that it is conventional for such an expense to be incurred before a Sale of Land is complete. I have to find that the loss associated with the preparation of the Feasibility Study and Bill of Quantities is far too remote. It does not naturally arise from the breach and cannot be said to have been reasonably in the contemplation of the Parties when the Sale Agreement was made (see Hadley & Baxendale [1874-80] ALL ER 75).

56. Although it may be so in regard to the fees for the Quantity Surveyor it may not be the same for Advocates fees. Even prior to the breach, Gami had made it known to NSSF that a firm of Advocates (Chebet & Chebet Advocates) would be representing it in the transaction. Surely it would be within contemplation that a breach of the Contract would lead to wastage of Legal fees incurred in the transaction. Unfortunately for Gami it did not produce evidence of the Legal Fees paid or charged.

57. Let me now return to the task of assessing the Damages. It is my holding that reasonable Damages for breach of Contract would have to be the difference in the Contract price and the value of the Suit Land as at 6th October 2008 when the part payment was refunded. In addition as the money was not available to Gami from the date of breach upto the date of refund, a charge of interest on the part payment is deserved.

58. In respect to the assessment of Damages the Court is handicapped because no evidence was led on the value of the Suit Land as at 6th October 2008. But so as to compensate Gami for the loss of use of the money which NSSF wrongfully kept even when it was clear that it never intended to carry through its side of the bargain, this Court shall make an award of interest antecedent to the Suit. As to the measure of interest, I turn to the Law Society Conditions of Sale, 1989 which was incorporated into the Sale Agreement. Interest therein means,

> "*the annual rate of interest specified in the Special Conditions or, if none is so specified, two (2) percentage of points above the maximum rate of interest which may be charged by specified banks for loans or advances pursuant to Section 39 of the Central Bank of Kenya Act (Cap. 491); provided that, if more than one maximum rate is so specified, the lowest rate shall be applied*".

59. The upshot is that I enter Judgment for Gami against NSSF for Khs.32,000,000/= (already paid), interest thereon at rates provided in the Law Society Conditions of Sale, 1989 Edition from 26th April 2004 upto 6th October 2008. Interest on this amount shall thereafter be at Court rates from the date of this Judgment until payment in full. Gami shall also have costs (on the sum of Khs.32,000,000/-) to be paid by NSSF. The Suit against the 3rd and 4th Defendants are dismissed but with no order as to costs because the 3rd Defendant did not participate in these proceedings and the 4th Defendant may have been culpable for the removal of the Caution save for the fact that the Caution was not in the name of the part of Gami Decision.

Dated, delivered and signed in open Court at Nairobi this 19th day of October 2018.

F. TUIYOTT

JUDGE

Present:-

Issa for Plaintiff.

Chebet h/b Gacha for 1st Defendant

Kamau for 2nd Defendant

Nixon-Court Assistant