REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO. 611 OF 2010

DEVKAN ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

MUTAMAYO TRADERS (KENYA) LIMITED.....DEFENDANT

J U D G M E N T

1. In its Plaint dated 9th December, 2010 the Plaintiff prays for Judgment against the Defendant for:-

   a. ***An order that the Defendant do forward to the Plaintiff the completion Document necessary to effect Transfer and Registration of L.R Ruiru Township/409.***
   b. ***An order that the Defendant do transfer to the Plaintiff L.R. Ruiru Township/409.***
   c. ***An injunction restraining the Defendant, its agents, servants or howsoever from dealing with L.R. Ruiru Township/409 in any way whatsoever.***
   d. ***Damages for breach of contract.***
   e. ***Interest and Costs.***

2. For the Plaintiff, one witness, Rajan Singh, PW1, gave evidence. He testified that he was a Director of the Plaintiff Company which had an agreement with the Defendant for sale of the suit property. He testified that the agreement was dated 19th May, 2010. He produced the agreement as an exhibit.

3. PW1 testified that the sale price was Kshs. 29 Million and that the completion date was to be 19th July, 2010. He also testified that he paid Kshs. 2,900,000 being 10% of the purchase price to the Vendors Lawyer.

4. Pw1 told the Court that he could not pay the balance of the purchase price because the Defendant did not forward to his Advocate the completion documents necessary to effect the transfer and registration of the suitland.

5. PW1 testified that when the parties executed the apposite sale agreement, he was not aware that the Defendant Company had only one director following the demise, earlier on, of the other director.

6. For the Defendant, two witnesses gave evidence.

7. DW1, Adrew Nyoike Kamau gave evidence that his brother Simon Kamere, negotiated the Sale Agreement, which spawned this suit, with Rajan Shah (herein after referred to as “Shah”) the Defendant. He stated that he was brought on board later on.

8. DW1 testified that Shah had told them (he and his brother Simon Kamere) that the transaction would be completed on cash basis. He said that the Defendant completed all conditions stipulated in the Sale Agreement, including obtaining all clearances.

9. DW1 testified that he believed that the purchaser lacked the intention and the capacity to complete the transaction. He testified that one of the pointers that the Defendant was not ready to complete the transaction was that they were not provided with an undertaking from the Plaintiff's Lawyer that the balance of the purchase price would be forthcoming. He explained that, for this reason, they could not send the necessary documents to the Plaintiff's Lawyers.

10. DW1 testified that at the time he executed the Sale Agreement, he was not aware that the Defendant Company had no legal capacity to carry the transaction through on account of its having only one director. He told the Court that he only became alive to this situation when the matter was raised in Court. He testified that the only other director of the Defendant Company was his late father, Joseph Kamau Kamere.

11. DW1 testified that even before the issue of the Defendant's capacity to conduct its business when it had only one director was raised, it had decided to renege on the Sale Agreement because of the Plaintiff's failure to honour the terms of the Sale Agreement, including full payment of the purchase price. He testified that there would have been no need for this suit had the purchase price been paid.

12. In answer to a question, DW1 accepted that the Defendant Company had discharged a charge in favour of the Kenya Commercial Bank in 2005, when his late father, the other director of the Company was already deceased.

13. DW2, Simon Kamere, testified that he was admitted as an Advocate of the High Court of Kenya in 1978 and that he was a brother to DW1, his younger brother. He further testified that he was qualified to articulate legal issues concerning the Defendant Company, which was a family Company.

14. DW2 told the Court that he ran a general legal practice but had expertise in conveyancing. He told the Court that he attested the signatures of the subscribers of Mutamayo Traders (Kenya) Limited, the Defendant Company. He said that the Company had two directors: 1. Joseph Kamere, his now deceased father and, (2) Andrew Kamere, DW1, his younger brother.

15. He testified that he prepared a draft Sale Agreement and 10% of the consideration amounting to 2.0 Million Shillings was paid. He told the Court that when the period stipulated in the Sale Agreement expired, he gave a notice , in accordance with the agreement, for the Plaintiff to comply within 21 days failing which the agreement would be deemed no longer in existence.

16. DW 2 testified that although the firm of Gadhia Mucheru, Advocate, purportedly on behalf of the Bank of Baroda, wrote an undertaking, the Defendant declined to accept it for, among other reasons, that the firm of Advocates issuing the undertaking was not party to the apposite transaction. He further said that by the time the Advocates representing the Plaintiff in this suit purported to give another undertaking, the time for doing so had lapsed on 19/07/2010.

17. DW2 told the Court that when he sent the Sale Agreement to the Defendant's Advocates, he was not aware that it had been improperly executed. He, however, opined that the Plaintiff had a duty to do due diligence.

18. DW 2 told the Court that he had known shah, the director who executed the Sale Agreement on behalf of the Plaintiff . He testified that right from the beginning, Shah had intimidated that he had cash to complete the transaction and that the issue of borrowing money from a bank never featured in the apposite negotiations.

19. DW2 told the Court that the issue of the Defendant Company not having the requisite number of directors never occurred to his mind . He said that had he become aware of this legal impediment, he would have asked DW 1, his brother to regularize this matter.

20. DW 2, told the Court that he took exception to PW1's claim in his Supporting Affidavit, at paragraph 20, that he had several suits filed against him for professional misconduct and that in most of those cases it appeared that he had taken money from clients and had failed to honour professional obligations. He denied that his intention was not to complete the Sale transaction and that he had contrived a calculation towards the Plaintiff forfeiting its 10% deposit.

21. To rebut this claim DW2 told the Court that the Plaintiff Company was ready and willing to refund the 10% deposit the Defendant Company had paid.

22. In its Submissions, the Plaintiff summarises the Issue to be determined by the Court as follows:-

i. ***Who was in breach of the Terms of the Agreement for Sale?.***
ii. ***Whether the Agreement was to be treated as null and void as the defendants did not have the requisite number of directors.***
iii. ***Whether the Plaintiff would be entitled to damages and an order for specific performance for transfer of the property.***

23. In its submission, the defendant framed the issues to be determined by the Court as follows:-
    i. ***Who was in breach of the Terms of Agreement of sale?.***
    ii. ***Whether the Agreement was to be treated as null and void as the Defendant Company did not have the requisite number of directors?.***
    iii. ***Whether the Plaintiff would be entitled to an order to transfer to the Plaintiff (sic) L.R. Ruiru Township/409.***

There is concurrence regarding the issues framed for determination by the parties except that in issue (iii) the Defendant does not mention damages.

24. The Plaintiff Submits that it is the Defendant which breached the Agreement for sale. He says that by issuing a 21 days notice on 21st July, 2010, the Defendant had extended the contract to 11th August 2010 by which time the Plaintiff had to pay the balance of the purchase price or issue a Professional undertaking for the amount. It says that a fresh undertaking was given on 5th August, 2010 within the 21 days notice.

25. The Plaintiff submits that the Defendant refused to release the Completion Documents and that this refusal was in breach of Clause 4 (d) of the apposite Agreement . The Plaintiff asserts that by doing so, the Defendant was in breach of the parties' contract. The Plaintiff expressed doubt that, contrary to DW 1's evidence-in-Chief, the Defendants had obtained all the requisite compliance documents free of encumbrances, and more so that they had obtained a discharge of charge from the Kenya Commercial Bank.

26. The Plaintiff submits that the their Advocate were within the Terms of the Agreement for Sale when they gave a fresh undertaking. It says on 19th July,2010, the firm of Gadhia & Mucheru , Advocate , on behalf of the financiers had given an undertaking. It submits that it is only on 29th July,2010 when the Defendant's Advocate replied to the financiers Advocate telling them that they were not part to the sale and that, for that reason, they could not accept their undertaking.

27. The Plaintiff argues that the Completion Notice issued by the Defendant's Advocate on 21/7/2010 had the effect of extending the completion date by 21 days. For this reason, they submit that the Professional undertaking given by Singh Gitau, Advocate, was valid.

28. The Plaintiff submits that in response to paragraph 7 of the Plaint the Defendant in its defence has replied as follows:-

"***The contents of paragraph 7 of the plant are admitted and the Defendant Company avers that the same would have been effective if the contract between the parties herein was valid in law with all parties having the requisite legal capacity to effect a valid and binding contract."***

Paragraph 7 of the Plaint reads as follows:-

"**That the Plaintiff's Advocate by letter dated 5th August, 2010, Singh Gitau Advocates, gave the Defendant's Advocates the requisite professional undertaking to pay the balance of the purchase price within 14 days".**

The Plaintiff submits that the Defendant is bound by its pleadingsand that the existence of a valid professional undertaking is admitted. For the proposition that a party is bound by itspleadings, the Plaintiff has proffered the case of Joseph *Omwambo Owiti Versus Magadi Soda Co. Ltd & Another (2008)* EKLR ,where Nambuye J, as She then was, quoted with approval the Case of Galaxy Paints Company Ltd Versus Fallon Guards Ltd, C.A 219 of 1998.

29. The Plaintiff submits that the Agreement for Sale that spawned this suit was valid. It says that Article 23 of the Memorandum and Articles of Association of the Defendant Company donated wide powers of delegation and that the Company could be bound by the authority of two directors or at least one director and the Secretary or some other person appointed by the Board.

30. The Plaintiff submits that the Agreement for Sale was executed by a director and the Company Secretary. It further submits that it was not the Plaintiff's role to ascertain that the Defendant had been in full compliance of its internal procedures. It opines that the Classic Turquand's case is relevant and proffers the rule in this case (called "Rule in Turguand's Case"), quoted with approval by the Court of Appeal in East Africa Safari Air Limited Versus Anthony Ambaka Kegonde & Another (2011) e KLR as stating as follows:-

"While persons dealing with a Company are assumed to have read the public documents of the Company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings- what Lord Hatherley called " the indoor management" and may assume that all is being done regularly. This rule which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a Company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has infact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as it had been obtained".

31. The Plaintiff has proffered "Gowers Principles of Modern Company Law "quoted in CA 42 of 2007 (op. Cit) as having summarised the Rule in Turquand's Case as follows:-

*"**This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a Company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt had actual authority. Not only is it convenient , it is also just. The lot of creditors of limited liability Company is not a particularly happy one; it would be unhappier still if the Company could escape liability by denying the authority of the officers to act on its behalf".***

32. The Plaintiff submits that even if the argument that the Defendant had not been properly constituted when it entered into the apposite Agreement for Sale had merit , the remedy would not be nullification of contracts entered into by the Company. It argues that the Defendant is a private Company for which Section 177 of the now defunct Companies Act provided for a Minimum of one director. The Plaintiff argues that the Minimum had been met and continues to say that it had been exceeded as the Company Secretary had also signed. The plaintiff opines that the

Defendant's Articles of Association which were in the form of internal regulations could not supercede a clear statutory provision of the law.

33. The Plaintiff has also submitted that Section 33 of the now defunct Companies Act provides for a situation where a company may not be properly constituted. The Section states:-

*"**If at any time the number of members of a company is reduced, in the case of a private Company, below two, or in the case of any other Company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the Company during the time that it carries on business after the six months and is cognizant of the fact it carries on business with fewer than two members, or seven members as the case may be, shall be severally liable for the payment of the whole debts of the Company contracted during that time, and may be severally sued therefor."***

34. The Plaintiff claims that it has been kept out of the property it wished to occupy in August, 2010. It claims that it has been forced to rent premises from Rafiki Export Processing Zone at rents stipulated in Clause 1 of the Sale Agreement as follows:-

KSHS. 4,528,692/= For June 2010 to May 2011

KSHS. 4,723,808/= For June 2011 to May 2012

KSHS. 18,895,232/= For June 2012 to May 2016

35. The Plaintiff submits that it is entitled to specific performance by virtue of Clause 4(7) (f) of the Law Society Conditions of Sale to which the Sale was subject to. It says that the Plaintiff could have lost a claim for specific performance if it sought and was refunded the deposit it had paid, which is not the case.

36. The Plaintiff concludes that since the Defendant , according to it, is in breach of the Sale Agreement, and the subject matter is still in the hands of the Defendant, It was not only entitled to the prayer for specific performance but also to damages.

37. The Defendant contends that the Plaintiff was in breach of the Terms of the Agreement for sale because although it paid 10% deposit of Kshs. 2,900,000, it did not pay the balance of Kshs. 26,100,00o before the completion date, that is on or before 19th July, 2010.

38. The Defendant also contends that the Plaintiff did not issue a professional undertaking through its Advocates, Singh Gitau Advocate to the Defendant's Advocate.

39. The Defendant then says that the Plaintiff did not prepare the transfer documents in triplicate, which should have been forwarded to the Defendant for execution. It says that since the Plaintiff had on its part failed to honour its part of the bargain, and for that reason the defendant could not do its part, the Plaintiff should be blamed for breaching the Agreement for Sale. The Defendant cited the authority of Thrift Limited Versus Kays Investment Limited -HCCC 1512 of 1998 which stated as follows: -

"In William Kazungu Karisa <u>Versus</u> Cosmas Angore Chanzera [2006] e KLR , The Court held that ", The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them".

40. The Defendant submits that the parties had agreed to a 60-days completion period instead of the ordinary 90 days completion period. The Defendant asserted that time was of the essence in contractual transactions. They proffered the case of *Thrift Homes Limited <u>Versus</u> Kays Investment Limited (HCCC NO. 1512 OF 1998) as having stated:-*

" ……..in Chitty on Contracts 27th Edition Volume 1 General Principles, Sweet &

Maxwell 1994 at page 1029 the author states that " At law , time is always of the essence of the contract.When any time is fixed for the completion of it, the contract must be completed on the day specified , or an action will be taken for breach of it.....stipulations as to time were generally of the essence of the contract, so that a party could treat the contract as repudiated if the other party's performance was not completed on the date stipulated by the contract".

41. The Defendant then proffered the case of *Gitonga Mwaniki, Onesmus Mwaniki Gichuiri* <u>*Versus*</u> *Annunciata Waithera Kibue [ELC NO. 5409 of 2009] as having opined as follows:-*

"The Plaintiff's herein did not not fulfil their obligations on time as per the terms of the Sale Agreement. They are in breach and therefore Plaintiff's themselves having been in breach of a particular undertaking cannot ask the Court to compel the Defendant to complete her part of the contract (Sale Agreement).The Court only assists a party in the enforcement of a contract if the party has performed its part of the bargain."

42. Regarding its claim that no valid undertaking had been transmitted to its Advocates the Defendant proffered the case of *Naphtati Paul Radier* <u>*Versus*</u> *David Njogu Gachanja (carrying on business as D. Njogu & Company Advocates* [Civil case No. 582 of 2003]e KLR as having stated as follows:-

"***what is a professional undertaking.***

" The encyclopaedia of Forms and Precedents" 5th Edition, Volume 39, defines it as follows:-

"An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it made by: a Solicitor in the course of his practice , either personally or by a member of his staff; or a solicitor as " solicitor, but not in the Course of his practice,

Under which the solicitor (or in the case of a member of his staff,his employer) becomes personally bound. An undertaking is therefore a promise made by a solicitor, or on his behalf by a member of his staff, to do, or to refrain from doing, something. In practice undertakings are frequently given by solicitors in order to smooth the path of a transaction or to hasten its progress and are a convenient method by which some otherwise problematical areas of practice can be circumvented".

The Defendant submits that the letter dated 5th August, 2010 from the Plaintiffs' Advocate did not amount to a professional undertaking as it lacked the basic features contained in professional undertakings. It further states that the letter was issued after the 60 days completion period.

43. The Defendant asserts that it did not receive the letter dated 19th July, 2010 from Gadhia & Mucheru Co. Advocates which, according to the Defendant, attempted to provide a professional undertaking. The Defendant submits that even if the purported letter was issued, the same cannot lie as a professional undertaking, for the reason that the firm of Gadhia & Muchero Co. Advocates was a stranger to the Agreement for sale. The Defendant proffers the view that the Plaintiff's behavior caused the apposite agreement to be frustrated.

44. The Defendant says that out of a Common mistake, the Agreement for Sale was null and void. He says that at the time of incorporation, the defendant company had two directors, Andrew Nyoike Kamere and Joseph Kamau Kamere. It says that Article 11 of the Articles of Association provides that at any general meeting, the quarum present must be two members, who must be present in person. It submits that one director, Joseph Kamau Kamere died on 31/10/2008 and that a Grant of Probate of Written Will was issued by the High Court through Succession Cause No. 2342/2009 on 19th February, 2010. The Defendant has told the Court that common mistake has been defined in CIVIL APPEAL NO. 82 OF 2012 (An appeal from the Judgment of the Principal

Magistrate, Siakago in Civil Suit No. 44 OF 2011 dated 14/06/2012)- *NEBERT NJERU MUNYI VERSUS NICHOLAS MURIITHI ZAKARI* as follows:-

" In the General Principles of the Law of Contract by K. Laibuta,Common mistake is described as follows:-

" A Mistake is said to be Common where both parties operate under the same mistake which is fundamental and not merely collateral to the attainment of the main object of the contract".

" A mistake can only vitiate a contract if it is on the part of either or both parties in respect of either the subject matter or some fundamental term that goes to the root of the contract.

" The Black Law Dictionary defines 'material fact ' as a fact that is significant or essential to the issue or matter at hand".

45. The Defendant has proffered as an authority the case of Supra Studio Versus Kenya National Properties Limited [1985] e KLR where the Court quoted the case of Bell Versus Lever Brothers [1932]AC 1 as stating:-

"The common mistake assumption of both parties was as to the existence of a fact which formed an essential and integral element of the subject matter of the agreement and I think it was sufficiently fundamental to avoid the contract".

46. The Defendant has further proffered the case of Lole Versus Butcher [1049] All ER 1107 where Lord Denning LJ considered factors which may render a contract as a nullity and opined as follows:-

" The correct interpretation of the case, to my mind, is that once a contract has been made, that is to say, once the parties whatever their innermost state of mind have to all outward appearances agreed with sufficiently certain in the terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some conditions expressed or implied in it or for fraud or on some equitable ground".

With due respect, I do not see how this authority assists the Defendant's case.

47. The Defendant submits that it had no legal capacity to effect a valid contract through the apposite agreement for Sale because:-

a. ***The Company had failed to appoint another director in compliance with its Articles of Association.***
b. ***The Company lacked the proper Quorum to hold any form of meetings as well as pass any valid resolutions of the Company since there was only one director after the death of the other director on 31st October, 2008.***

48. The Defendant says that it discovered this common mistake after the Defendant filed this suit through the firm of M/S Karanja Njenga & Co Advocates, who are the Advocates on record for the Defendant.

49. The Defendant laconically submits that it was advised by its Advocate that the Company did not fulfill Article 13 of its Articles of Association and, therefore, did not have the quorum to enter into the Sale Agreement as the one director, Andrew Nyoike Kamere could not act singularly in executing the Sale Agreement. It opines, therefore, that the Agreement for Sale is null and void Ab initio.

50. The Defendant proffered another reason as to why the Plaintiff would not be entitled to an order that it transfers L.R. RUIRU TOWN/409 to the Plaintiff. The Defendant argues that the Defendant

was not able and willing to complete the transaction. The Defendant also says that as per Clause 11:3 of the Sale Agreement, vide a letter dated 21st July, 2010, it gave a 21 days completion Notice but the Plaintiff failed to facilitate the completion of the intended transaction. It submits that the Plaintiff has not demonstrated that it will pay or be able to pay the balance of the Purchase Price should the Defendant be ordered to forward the completion documents as well as transfer L.R. Ruiru/Township/409 to the Plaintiff.

51. Regarding the ability and willingness of the Plaintiff to complete the apposite transaction, the Defendant offered the authority of Purple Rose Trading Company Limited Versus Bhanoo Shashikant JAI- Civil Suit No. 700 of 2006) in which the Court stated:-

"***The next issue for determination is whether the Plaintiff was ready, able and willing to complete the transaction on 25th October, 2009....The Court of Appeal in Civil Appeal No. 165 of 1996 between Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti in which Gicheru, JA, (as he then was) expressed himself thus:-***

" they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement.....which ought to have been performed by them and indeed that they had not acted in contravention of essential terms of the said agreement...It was never in dispute that the appellants were in breach of an essential Term of the Agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property...as stipulated in the Agreement. Indeed....a Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action...."

52. The defendant concludes its submission by saying that parties ae bound by their pleadings and, for that reason, the Plaintiff cannot bring up new issues in its Submissions, such as prayers for damages and specific performance which it claims are not pleaded in the Plaint.

53. I have considered the pleadings proffered by the parties', the oral evidence they have tendered before Court, their Submissions and the authorities offered in support of the parties' various assertions.

54. I do opine that the authorities proffered by the parties are good law and relevant to the factual circumstances in which they were delivered. They can be applied to the factual circumstances of this case and will be taken into account in my determination of the apposite issues.

55. I will start by addressing the Submission by the Defendant that the Agreement for Sale which was executed by the parties was void ab initio because the Defendant Company, contrary to the provisions of its Articles of Association , had only one director. The Court notes that this was a family Company. DW2 acted as the Company's Advocate. DW1 is his younger brother. The deceased director , Joseph Kamau Kamere, was their father. From DW 1's and DW 2's oral evidence and from the pleadings , one can evince the fact that, though he was not a director, DW2 had more control over the Defendant Company than DW1. In cross-examination, DW1 tended to state that DW 2 would come as a witness to answer some of the questions.

56. DW2 is an Advocate of the High Court of Kenya. He had incorporated the Defendant Company, which was a family Company. When his father died, he knew that the Company had only one director. All along when the parties entered into the Agreement for Sale, the death of the second director was in the knowledge of DW 1 and DW2. I do not accept the submission by the Defendant that DW1, the one remaining director, and DW 2, his brother that the claimed common mistake was only discovered after the Defendant filed this suit.

57. A common mistake is made common by the lack of knowledge of a material fact by both parties. In this case DW1 and DW2 knew that the company had only one director. The Plaintiff was not aware of this Omission. A one sided mistake can not be described as common. The parties did not

operate under the same mistake . DW1 and DW2 were aware of the fact that the Defendant had only one director contrary to the provisions of its Articles of Association. The Plaintiff was not aware of this fact. Commonality of a mistake requires more than one party!

58. DW2 in his oral evidence told the Court that the Defendant Company was willing to complete the transaction had the Plaintiff not failed to pay the balance of the purchase price. This is made veritably pellucid in his witness statement signed on 15th October, 2014. This clearly suggests that the Defendant was willing to ignore the fact that the Defendant Company had only one director instead of the required two.

59. I find that this is one case where the rule in Turquands' case should be invoked. The Plaintiff's director Rajan Shah was known to DW2 who incorporated the Defendant Company. He knew that DW2 was a brother to DW1. In any case DW2 attested the signatures which executed the Agreement for Sale. PW 1and the Plaintiff did not need to inquire into the regularity of the internal proceedings and procedures of the Defendant Company.

60. This finding is buttressed by the fact that even though the Defendant Company had only one director, the Plaintiff Company was able to pay the balance of the loan amount owed to the Kenya Commercial Bank and to discharge a charge which had been registered over the suit land when the Company had obtained a loan of Khs. 5,000,000/=. This shows that to all intents and purposes the defendant company constructively demonstrated that it had capacity to enter into contractual obligations vis-a-vis third parties. I find that the Defendant Company had capacity to enter into the Agreement for sale which spawned this suit. I declare that the Agreement for Sale dated 19th May, 2010 was valid.

61. Having found that the Agreement for Sale was valid, I now turn to the issue of who breached or did not breach the Terms of the Agreement. There is no dispute that the completion date was 19th July ,2010. On the face of the Agreement, the Plaintiff was supposed to pay the balance of the purchase price on or before 19th July, 2010. A professional undertaking was to be given by the Advocate's acting for the Plaintiff. Then the transfer documents would be prepared to complete the intended transaction.

62. The parties have proffered diametrically opposed assertions regarding who they considered to have breached the apposite Agreement. The Plaintiff says that it paid 10% deposit as per the Agreement. That an undertaking by Bank of Boraoda's Lawyers was given on 19th July, 2010 which undertaking was rejected by the Defendant's Advocate. That a fresh undertaking was issued by the Plaintiff's Advocates on 5th August, 2010. The Plaintiff says that the Defendant refused to respond to the fresh undertaking. The Plaintiff argues that the completion Notice issued by the Defendant's Advocate had the effect of extending the completion by 21 days. It is instructure that during Cross-examination, DW 2 admitted receipt of the letter containing the professional undertaking but said that the Defendant Company did not release the completion documents because it did not trust Singh Gitau, Advocate.

63. The Defendant's main argument regarding the issue of whether or not it breached the Agreement for Sale was that it had no capacity to do so as it only had one Director instead of two as required by its Articles of Association. It, however, says that it had not breached the Agreement because the Plaintiff had not issued a professional undertaking, had not prepared transfer documents in triplicate which would be forwarded to the Defendants for execution and had not paid the balance of the purchase price.

64. I agree with the Plaintiff that the effect of the Notice to Complete the Agreement had the effect of extending the completion period by 21 days. Had the Defendant accepted the undertaking issued by Bank of Baroda's Lawyers, it is feasible that the transaction would have been completed before the extended period of 21 days lapsed.

65. I find that the 2nd professional undertaking given by Singh Gitau Advocates, the Plaintiff's Advocate, was within the period envisaged by the Notice to complete the Agreement. The

Defendant should have released the apposite completion documents.

66. I find that the Plaintiff is not blameless. It should not have waited until the 19th of July, 2010 to have the Bank of Baroda Lawyers give a professional undertaking. 19th July, 2010 was the completion date. From the pleadings there is no suggestion that the Plaintiff had consulted the Defendant before arranging for this undertaking to be given by their bank's Lawyers.

67. The effect of the issuance of professional undertakings belatedly was to deny the Defendant the funds it expected to be in possession of within 60 days as stipulated in the Agreement for Sale. This, in my view, amounted to a constructive breach. It also heightened the Defendants fears that the Plaintiff was not able and willing to complete the sale of the intended land.

68. I find that both parties were not innocent. They both contributed to the frustration of the apposite contract.

69. I note that the Plaintiff is claiming damages to the tune of Kshs. 28,147,732/= for rent he has been paying to Rafiki Export processing Zone from June 2010 to May, 2106 . This claim is not merited. The Plaintiff, as I have already found, is not completely innocent as far as frustration of the Agreement for Sale is concerned. This claim amounts to more than the balance of the purchase price. It would be speculative to find that the Plaintiff was in a position to put up his premises within the period he is claiming damages for.

70. Having found that both parties are equally to blame for the frustration of their Agreement for Sale. I grant the following orders:-

1. ***The Plaintiff is to deposit the sum of Kshs. 26,100,000/=, being the balance of the purchase in an account to be opened with a reputable bank and which account is to be jointly operated by the Plaintiff's and the Defendant's Advocates.***

2. ***Upon the Plaintiff depositing the sum of Kshs. 26,100,000/= as ordered in 1 above , the Defendant to forward to the Plaintiff's Advocates the completion documents necessary to effect Transfer and Registration of L.R Ruiru/Township/409 in the Plaintiff's favour.***

3. ***The Defendant do transfer to the Plaintiff L.R. Ruiru Township/409 and Upon completion of the Transfer the funds deposited as per order 1 above be released to the Defendant forthwith.***

4. ***Parties to bear their own costs.***

It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 16TH DAY OF MAY, 2016 IN THE PRESENCE OF:

Cc: Lilian/Daniel

James Gitau Singh for the Plaintiff

Kiogora h/b Karanja for Defendant

P.M. NJOROGE

JUDGE