



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO 700 OF 2006**

**PURPLE ROSE TRADING COMPANY LIMITED.....PLAINTIFF**

**-VERSUS-**

**BHANO SHASHIKANT JAI.....DEFENDANT**

**JUDGEMENT**

**PLEADINGS**

1. By its plaint dated 18<sup>th</sup> December 2006 filed in this Court on 19<sup>th</sup> December, 2006, the plaintiff herein seeks the following orders:

**(i) An order for permanent injunction restraining the Defendant by herself and/or from selling, advertising for sale, letting, charging or mortgaging, or in any way interfering with the suit property being L R No. 5/87/.**

**(ii) An order for specific performance compelling the Defendant to receive the purchase price of Kshs 34,000,000/= only from the Plaintiff and in exchange thereof to hand over to the plaintiff all documents as are or would be necessary to transfer the suit property LR No. 5/87 into the Plaintiff's name and/or into the names of the Plaintiff's nominee.**

**(iii) General Damages for breach of contract.**

**(iv) Costs of this suit.**

**(v) Interests on (iii) and (iv) above.**

2. The cause of action according to the plaintiff arose from an agreement dated 1<sup>st</sup> February, 2006 by which the Plaintiff contracted to purchase from the Defendant LR No. 5/87 (hereinafter referred to as the suit premises) in the sum of Kshs 34,000,000.00 which agreement was executed by the Plaintiff and sent to the Defendant's advocates with Kshs 3,400,000/= being 10% deposit on 31<sup>st</sup> January, 2006. The completion date according to the said agreement was 90 days from the date of the said execution which would have been by latest 1<sup>st</sup> May 2006. The sale was however subject to the extension of the lease by the Government which was to be obtained before the completion

- date and in default, the deposit would be refunded and the sale terminated.
3. Due to the difficulties in obtaining the said extension the completion dated was variously extended by mutual consent and by a letter dated 20<sup>th</sup> July 2006 the Defendant informed the Plaintiff that the new Grant with the extended ease had been obtained and requested the plaintiff to draft the property Transfer document which the Plaintiff did together with engrossed transfer document.
  4. However the Plaintiff by a letter dated 11<sup>th</sup> Septembers, 2006 purported to return the said deposit of Kshs 3,400,000/= with interest of Kshs 50,357.25 as interest and terminated the sale thereby provoking the Plaintiff to register a caveat on the said property. Despite issuing a 21 days completion notice under condition 4(7)C of the Law Society Conditions of Sale 1989 Edition, the Defendant was adamant and the Defendant's then advocates informed the Plaintiff that they were no longer acting for the Defendant. However by a letter dated 16<sup>th</sup> October, 2006, the Defendant's new advocates **Ms Otieno Omuga & Ouma** demanded a cheque for the full purchase price to be deposited by 4.00 pm on 19<sup>th</sup> October 2006 failing which the transaction would be treated as having lapsed. To this the Plaintiff intimated that it was ready to exchange the demanded for full price with all completion documents or alternatively with original grant and signed transfer documents plus additional undertaking for provision of remaining documents such exchange to be done on 25<sup>th</sup> October 2006 at 12 noon. By the defendant's letter dated 19<sup>th</sup> October 2006 received on 25<sup>th</sup> October, 2006 at 4.20pm, the Defendant informed the Plaintiff that they would release the completion documents on the 5<sup>th</sup> day after 25<sup>th</sup> October 2006 and on 30<sup>th</sup> October, 2006 the Plaintiff's advocates sent to the Defendant's advocates cheques amounting to the full purchase price and called for completion documents but the Defendant's advocates returned the same on 31<sup>st</sup> October 2006 indicating that there was no transaction in existence between the Defendant and the Plaintiff.
  5. According to the Plaintiff, despite its readiness and willingness to complete the transaction the Defendant is precluded or estopped from claiming that the Plaintiff is in breach. To the plaintiff it has expended enormous amounts of money and time in the said transaction and therefore unless specific performance is ordered it will suffer irreparably.
  6. In her amended Statement of Defence and Counterclaim, the Defendant while admitting the existence of the agreement averred that the contract was null and void *ab initio* as it was made in contravention of a condition forbidding the Defendant from selling, transferring, subletting, charging or parting with possession of the suit property without prior written consent of the Commissioner for Lands. The subsequent consent, it was pleaded could not validate the sale agreement.
  7. It was further pleaded that the transaction lapsed on 20<sup>th</sup> June 2006 after which it became null and void pursuant clause 2 of the said agreement and any subsequent actions by the advocates for the parties were done outside the contract and were therefore not binding on the parties. It was pleaded that the extension of the lease was after the completion date as extended to 20<sup>th</sup> June, 2006 hence the sale agreement even if it were valid became null and void after 20<sup>th</sup> June, 2006 due to non-extension of the lease by then hence the sale thereafter could only proceed pursuant to another agreement which however was not made.
  8. It was pleaded that the agreement of 1<sup>st</sup> February, 2006 was made under mutual mistake of law that the defendant had applied for and obtained the consent to sell the property and in any case the said agreement was invalid and void *ab initio* for uncertainty hence the claim for specific performance is untenable.
  9. While admitting that the deposit was returned, it was pleaded that the return was pursuant to the agreement and averred that the caveat was illegally and irregularly registered on the suit property. The Defendant however disputed the allegation by the Plaintiff that the latter was ready and willing to complete the transaction and contended that the Plaintiff failed to raise the purchase price as proposed.
  10. To the defendant the caveat was illegally and registered as it was based on an affidavit sworn by a person without authority to do so.
  11. In the premises the Plaintiff's alleged loss were similarly denied as well as the prayers sought in the plaint. Therefore apart from seeking declaratory orders in its favour and dismissal of the suit, the Defendant sought an order for withdrawal of the said caveat as well as damages and costs.

12. Suffice it to state that the Plaintiff on 27<sup>th</sup> February, 2007 filed a reply to the defence and Defence to the Counterclaim which was amended by an amended Reply to Defence and Defence to Counterclaim filed in 8<sup>th</sup> April, 2010 reiterating the contents of the Plaintiff and challenging the allegations in the Defence and Counterclaim. According to the Plaintiff the Defendant was not forbidden from entering into a sale agreement without obtaining the Commissioner's consent and that the agreement was properly renewed since there was a mutual mistake of law hence the agreement was enforceable. Similarly, the Defendant on 16<sup>th</sup> March, 2007 filed a reply to the Defence to the Counterclaim.

### **Plaintiff's Case**

13. Although the hearing of this case commenced on 27<sup>th</sup> January, 2011 before **Muga Apondi, J** on 10<sup>th</sup> October, 2011 the hearing was directed to start de novo.
14. In support of its case, the plaintiff called **Stanley Kigera Thuo**, its director as the PW1. According to him, he and his wife, **Esther Mweru Kigera** are the shareholders and directors of the Plaintiff. On 1<sup>st</sup> of February, 2006 the Plaintiff entered into an agreement with the Defendant for the purchase of a piece of land along Waiyaki Way in Nairobi being LR No. 5/87 in the sum of Kshs 34 million, 10% thereof being payable on execution of the agreement and the balance on completion which was to be 90 days from the date of the execution of the agreement. According to him, the date of the execution ought to have been 1<sup>st</sup> May, 2006. The terms of the sale agreement were that the sale was subject to an extension of the lease thereof which was just about to expire. It was agreed that the lease be extended before completion. According to him, at completion, the Defendant's lawyer was to give to the Plaintiff's lawyer the relevant documents and the Plaintiff was to get possession after paying the balance of the purchase price of Kshs 30.6 million.
15. Although the said agreement was reduced in writing and was duly executed by the parties' representatives, the Plaintiff waited until 25<sup>th</sup> April, 2006 when the Defendant's lawyer in writing sought for the extension of the completion date by a period of 30 days on the ground that the Plaintiff was unable to process the extension of the lease as anticipated within the said 90 which request was acceded to by the Plaintiff's lawyers. However the Defendant never obtained the documents and on 5<sup>th</sup> June, 2006 asked for a further extension to 20<sup>th</sup> June, 2006 by which time the completion was not done. However, on 20<sup>th</sup> July, 2006, the Defendant informed the plaintiff that the grant had been issued by the Commissioner for Lands and that it was ready to proceed and sought for a draft transfer for approval.
16. On 21<sup>st</sup> July, 2006 the Plaintiff's lawyers sent for the draft transfer for approval and by a letter dated 26<sup>th</sup> July, 2006 the seller's advocates acknowledged receipt of the transfer and after making some minor amendments returned the same to the Plaintiff's lawyers. According to the witness, in the draft transfer the parties were the sellers as the transferor and Purple Rose nominee known as Moonlight Dealers Investment Ltd and that no issue was raised with respect to the said nominee. According to PW1, they expected the seller to sign the transfer and avail the necessary documents so as to enable the Plaintiff pay the balance of the purchase price and complete the transaction. However, that never happened and instead on 11<sup>th</sup> September, 2006 the seller's lawyers wrote to the Plaintiff's lawyers informing the latter that the former was no longer interested in selling the property and returned a cheque equivalent to the deposit of 10% of the purchase price which had been deposited together with its equivalent interest in the sum of Kshs 50,357.25 totalling Kshs 3,450,357.25.
17. This position was not acceptable to the Plaintiff and their lawyers informed the Plaintiff's lawyers as much as the Plaintiff was willing to complete the transaction. The Plaintiff further vide a letter dated 21<sup>st</sup> September 2006 informed the Defendant that they were intending to register a caveat on the property to protect the Plaintiff's interests and the said cheque was returned to the Defendant and the said caveat registered. Thereafter the then advocates for the Defendants, **Bhailal Patel, Mahinda and Maina** (hereinafter referred to as **Bhailal**) returned the said cheque to the plaintiff's advocates, **Karungu & Co. Advocates** and introduced a new firm of advocates as acting for the Defendants, **Otieno Omuga & Ouma Advocates**, (hereinafter referred to as **Otieno Omuga**). The Plaintiff's advocates, however, vide a letter dated 29<sup>th</sup> September, 2006 returned the said

- cheque to **Bhailal** and issued a completion notice giving 21 days within which to avail the agreed documents for completion purposes. Following the failure to comply with the completion notice, **Bhailal** vide a letter dated 6<sup>th</sup> October, 2006 intimated that their client was withdrawing from the transaction and had collected his documents and did not wish to proceed with the transaction. They returned the cheque and informed the Plaintiff's lawyers to deal directly with **Otieno Omuga** or the seller. Vide a letters dated 25<sup>th</sup> September, 2006 and 4<sup>th</sup> October, 2006, **Otieno Omuga**, asked **Bhailal** to return the cheque on the ground that there was no transaction which position was contested by the Plaintiff's advocates vide a letter dated 6<sup>th</sup> October, 2006.
18. Then vide a letter dated 16<sup>th</sup> October, 2006 **Otieno Omuga** informed the Plaintiff's advocates that they were ready to proceed with the transaction on condition that the cheque for the balance be received by them by 4.00 O'clock on 19<sup>th</sup> October, 2006 failing which they would consider the sale null and void which letter was received on 18<sup>th</sup> October, 2006 by the Plaintiff's lawyers at 11.45 am. The plaintiff's lawyers requested for extension of the deadline to 25<sup>th</sup> October, 2006 taking into account the fact that 20<sup>th</sup> and 24<sup>th</sup> October, 2006 were public holidays. However, vide a letter dated 19<sup>th</sup> October 2006, **Otieno Omuga** informed the Plaintiff's advocates that the former had all the completion documents and were willing to forward the same in strict compliance with clause 3(b) of the Sale Agreement on the 5<sup>th</sup> day after 25<sup>th</sup> October, 2006 at 12.00 noon. This letter was received on 25<sup>th</sup> October, 2006 at 4.20pm and on 30<sup>th</sup> October, 2006, the plaintiff's lawyers wrote to **Otieno Omuga** enclosing the deposit cheque which had been returned earlier in the sum of Kshs 3,450,357.25 and a bankers cheque in the sum of Kshs 30,400,000/= in favour of their client as well as banker's cheque in the sum of Kshs 200,000/= also in favour of their client in full payment of the purchase price while expecting **Otieno Omuga** to forward the completion documents within 5 days of receipt thereof.
  19. However on 31<sup>st</sup> October, 2006 **Otieno Omuga** returned all the said cheques citing noncompliance with the terms of the letter dated 16<sup>th</sup> October, 2006 and saying they had nothing to do with the letter dated 19<sup>th</sup> October, 2006. The Plaintiff then took the cheques and instructed their advocates to institute these proceedings since the plaintiff was not at fault in completing the transaction and was still willing to complete the transaction.
  20. The witness confirmed that he had confirmed that a new lease for 50 years commencing from 1<sup>st</sup> April 2006 had been issued.
  21. In cross-examination by **Dr Kamau Kuria**, learned Senior Counsel for the Defendant, the witness said confirmed that the indenture dated 18<sup>th</sup> June 1974 was not one of the documents produced by him and that he had never seen it. Referred to the indenture in the Defendant's list of documents, he confirmed that the agreement stated that the sale was subject to the said indenture. Although the plaintiff was bound by the conditions in the lease, the witness said that he had not seen the said document before. He confirmed that the seller was under an obligation to obtain the consent from the Commissioner and that at the time of the signing of the agreement the consent had not been sought though according to him the consent was given and was dated 11<sup>th</sup> September, 2006. He confirmed that according to the letter addressed to **Bhailal**, the application for consent was made on 8<sup>th</sup> August, 2006 and as at 1<sup>st</sup> August, 2006 there was no consent to transfer the property.
  22. He confirmed that time was of the essence of the contract and the completion period was 90 days from the date of execution and there was to be no extension unless with consent. He reiterated that the sale was subject to an extension being granted and the extension for 30 days was granted on 30<sup>th</sup> June 2006 while the completion dated was meant to be 1<sup>st</sup> May, 2006. There, however, was a further extension for 20 days to 20<sup>th</sup> June, 2006. The witness however disagreed that the agreement for sale lapsed on 20<sup>th</sup> June, 2006 and that the sale would be null and void if the same was not completed within time. In his view there was an implied request after 20<sup>th</sup> June, 2006 and it was extended vide the letter dated 16<sup>th</sup> October, 2006.
  23. In further cross-examination, he confirmed that the vendor agreed to continue with the transaction on certain specified conditions in the said letter but denied that the Plaintiff was unable to comply with the said conditions. He confirmed that the Plaintiff never gave the cheque within the period stipulated in the letter and that there was no other agreement after 20<sup>th</sup> June, 2006. He agreed that

the sale could not take place without the consent of the Commissioner and therefore no sale could be completed before 11<sup>th</sup> September, 2006. He however disagreed with the suggestion that between 11<sup>th</sup> September, 2006 and 6<sup>th</sup> October, 2006 there was disagreement with respect to the terms of the contract.

24. Referred to clause 3(b) of the agreement the witness agreed that the purchase price was required to be tendered 5 days before the completion date but it was tendered by a letter dated 31<sup>st</sup> October, 2006 and that the sale was not completed by 20<sup>th</sup> June 2006. In his view since the seller's lawyers remained quiet after the first extension which was till 20<sup>th</sup> June 2006 up to 20<sup>th</sup> July, 2006, there was an implied extension. He, however, agreed that there was no agreement of sale after the consent.
25. In re-examination by his learned counsel, **Mr Muturi**, PW1 said that his understanding was that the seller would apply for the consent of the Commissioner before completion date and that there was no requirement for consent at the time of the agreement and that it would only be important at the time of the completion. According to him extensions after 20<sup>th</sup> of June 2006 were contained in the letters of 20<sup>th</sup> July 2006 and 16<sup>th</sup> October, 2006. Since the letter dated 19<sup>th</sup> October, 2006 referred to the Sale Agreement dated 1<sup>st</sup> February, 2006, it meant according to him that the agreement was still in force. He stated that after the consent was obtained on 11<sup>th</sup> September, 2006, he was invited by the seller's advocates to complete the transaction which transaction he is still in a position to complete.
26. The next witness for the Plaintiff was **Peter Karungo**, an advocate of the High Court of Kenya, with over 30 years experience mostly in conveyancing. According to him, in 2006, he was instructed by the Plaintiff to act for them in the purchase of the suit property Pursuant thereto a draft agreement dated 1<sup>st</sup> February, 2006 for sale was received from **Bhailal** which was executed and 10% deposit paid to the said lawyers as stakeholders. Clause 5 of the said agreement specified the completion date as 90 days from the date of execution or earlier as agreed by the parties and the said 90 days were to run up to 1<sup>st</sup> May, 2006. However, the parties were unable to complete the transaction due to the requirement for extension of the lease. This necessitated an extension by the vendor's advocates vide a letter dated 25<sup>th</sup> April 2006 just a few days before completion for a period of 30 days. By a further letter of 5<sup>th</sup> June, 2006 the period was further extended to 20<sup>th</sup> June, 2006 by mutual consent as efforts were being made for issuance of the grant. By a letter dated 20<sup>th</sup> July, 2006 PW2 said that they received a letter to the effect that the grant had been issued and requesting the submission of the draft transfer for approval which was duly forwarded vide a letter dated 21<sup>st</sup> July, 2006 which was amended vide a letter dated 26<sup>th</sup> July, 2006. The transfer was then engrossed and forwarded vide a letter dated 28<sup>th</sup> July, 2006 to the vendor's advocates for execution and return. He clarified that the same was drawn in the name of Moonlight Villas Investment Ltd instead of Purple Rose because the former was a nominee of the latter and this was allowed in the agreement for sale. However, no response was received until 11<sup>th</sup> September, 2006 when they were notified that the vendor no longer wished to sell the suit property to the Plaintiff together with the deposit plus interest. The said cheque was however returned as the Plaintiff was still desirous of proceeding with the transaction. Thereafter the **Otieno Omuga** informed PW2's firm that they had taken over the matter and purported that there was no valid Sale Agreement to execute which action made PW2 to issue a 21 days Completion Notice on 29<sup>th</sup> September, 2006. Instead of complying with the Notice the Plaintiff's advocates instead reiterated that there no agreement of sale. On 18<sup>th</sup> October, 2006, at 4.00pm, a letter dated 16<sup>th</sup> October, 2006 was received from **Otieno Omuga** stating that they had persuaded their client to grant a final extension and an opportunity to the Plaintiff to complete the transaction. PW2 wrote back the following day on 19<sup>th</sup> October, 2006 expressing inability to comply with the conditions therein due to the public holidays in between and suggesting that the completion date be by 25<sup>th</sup> October, 2006. This was not accepted, and vide a letter dated 19<sup>th</sup> October, 2006 received on 25<sup>th</sup> October, 2006 at 4.20pm, the vendor's advocates reiterated that payment ought to have been made by 19<sup>th</sup> October, 2006. In light of PW2's indisposition, payment was made on 30<sup>th</sup> October, 2006. However, this payment was returned hence provoking the filing of this suit.

27. According to PW2, the purchaser was not in breach of the contract as the delay was caused by the vendor trying to get the extension of the grant and the contract was kept alive by the various extensions sought and granted totalling three in number. According to him, in practice, parties do enter into agreements before seeking the Commissioner's consent and the sale does not take place until the full purchase price is received which the seller was to receive towards the end of the contract. Under clause 2 of the agreement, in the event that the extension was not obtained, the vendor was to refund the sum paid and the agreement would become null and void and this would have been on 1<sup>st</sup> May, 2006. Since time was of the essence it meant that if on 1<sup>st</sup> May, 2006 the vendor had not obtained the new grant the deposit would become payable to the purchaser and there would be no contract. However, by 1<sup>st</sup> May, 2006 the new grant had not been obtained and the cheque was not returned but an extension was sought on 25<sup>th</sup> April, 2006.
28. In cross-examination by **Dr Kamau Kuria**, PW2 said that the agreement did not specifically refer to conveyancing practice and that a copy of the 1989 Law Society's Conditions of Sale is not part of the plaintiff's bundle of documents. He however, agreed that clause 4 of the Agreement incorporated the said Conditions with a rider that they were not inconsistent with the agreement. Referred to clause 5 of the agreement he said that time was of the essence and agreed that the sale was to be completed within 90 days unless there was an extension in writing. According to him the vendor's first advocates extended the time twice while the second advocates extended the same once. Referred to the letter dated 25<sup>th</sup> April, 2006 he said the extension meant that the completion was to be 31<sup>st</sup> May, 2006 though there was another one dated 6<sup>th</sup> June, 2006 suggesting that completion was extended to 20<sup>th</sup> June 2006 which was confirmed vide the letter dated 7<sup>th</sup> June, 2006. According to him, the last completion date by banker's cheque. He confirmed that his client did not tender the balance by 15<sup>th</sup> June, 2006.
29. Referred to clause 2 he said that it provided that if the lease was not extended the agreement would come to an end after reimbursement of the deposit. He was however, unable to say with certainty that there was no extension of the lease by 15<sup>th</sup> June, 2006. According to him, his office received a copy of the grant dated 30<sup>th</sup> June, 2006, 10 days after completion dated, on 20<sup>th</sup> July, 2006. He admitted that a seller can only sell what he owns and the property being sold was an assignment of a government lease and in all government leases there are conditions imposed on the lessees. In his view before 1<sup>st</sup> February, 2006, the consent of the Commissioner was not required as the vendor had not sold the land. He agreed that it was a condition precedent that the consent of the Commissioner of Lands was to be obtained before the sale could take place and that as at 1<sup>st</sup> February, 2006, the Defendant did not have the consent of the Commissioner of Lands to sell the suit property. However between 8<sup>th</sup> August, 2006 when the application for consent was made and 11<sup>th</sup> September, 2006 when the consent was granted there was no written extension of the completion date. He confirmed that after 20<sup>th</sup> June, 2006 he did not seek extension as they all knew that the grant was being extended.
30. PW2 however, admitted that there is no extension request after 20<sup>th</sup> June, 2006. He confirmed that the extension made by the letter dated 16<sup>th</sup> October, 2006 was conditional and that by the time of sending the cheques on 30<sup>th</sup> October, 2006, there was no agreement on the terms of the extension though he disagreed that there was only one extension since according to him the letter dated 16<sup>th</sup> October, 2006 was also an extension though it was received on 18<sup>th</sup> October, 2006 and they were unable to comply with the terms thereof. He confirmed that the conditions upon which the final extension was granted were not satisfied and there was no other offer thereafter. To him between 20<sup>th</sup> July, 2006 and 16<sup>th</sup> October 2006 the Purchaser and the Vendor acted on the assumption that there was a contract in existence but disagreed that they acted in error.
31. In re-examination, PW2 said that the extensions were given to enable the issuance of the grant to be done. To him, they did not pay the purchase price by 15<sup>th</sup> June, 2006 because there was no title since the new title was yet to be obtained. In his view, under clause 9 of the sale agreement, the documents had to be forwarded to the purchaser and that the consent was to be availed in exchange with the purchase price. Since they were informed not to draw the transfer documents, it meant the sale was still alive and that the import of the letter dated 16<sup>th</sup> October, 2006 was that they had been given several days to complete the transaction which was still alive.

## **Defendant's Case**

32. On behalf of the Defendant, **Edwin Muloko**, a Senior Registrar in the Ministry of Lands testified as DW1. However, the witness was stood down in the course of examination in chief and was thereafter not recalled.
33. The next witness was the Defendant, **Bhanoo Shashikant Jai**, who testified as DW2. In examination in Chief, she averred that he was the registered owner of the suit property. She confirmed that she authorised his daughter **Kalpana Jai** to sign the agreement on her behalf since she had given her a power of attorney. According to her, in 2006 only three years of the lease was remaining. According to the agreement the sale of the property was subject to extension of the lease while the completion date was to be on or before 90 days from the date of execution of the agreement and time was of the essence of the contract. Under the said agreement for sale any agreement thereunder was to be in writing.
34. When the agreement was signed on 1<sup>st</sup> February, 2006, she testified that they had not obtained the consent of the Commissioner of Lands to sell the property. Referred to the letter dated 8<sup>th</sup> August 2006, she said the letter was addressed to **Bhailal** indicating that a consent for transfer was being given. According to her she received the title after 30<sup>th</sup> June, 2006 despite that vide a letter dated 25<sup>th</sup> April 2006, it was indicated that the Commissioner of Lands had approved the extension of the lease for a period of 50 years from 1<sup>st</sup> April, 2006. Since it was not possible to complete the transaction within the agreed 90 days, she averred that they suggested that the completion period be extended by a period of 30 days which was done by mutual consent. She could not remember the existence of any other letter extending the time beyond 20<sup>th</sup> June, 2006. While acknowledging that **Otieno Omuga** was her advocates, she averred that there was no other agreement made between her and the buyer. While referring to the correspondences exchanged between the advocates, the Defendant testified that she did not agree to extend the completion period beyond 20<sup>th</sup> June, 2006 as claimed by the plaintiff.
35. In cross-examination, DW1 stated that she said that she did not have the consent of the Commissioner of Lands at the time of the agreement which was drawn by her advocates and signed by her daughter since she was outside the Country in India. According to her she came to know later that the consent was required. She confirmed that the property was being sold at Kshs 34,000,000.00 and a deposit of 10% was paid to her lawyers with the balance being payable 5 days before 90. According to her the request for extension was due to the fact that the 90 days period was expiring and the new title had not been obtained which request was accepted. Vide the letter dated 5<sup>th</sup> June, 2006 another extension was sought by her advocates up to 20<sup>th</sup> June, 2006. According to her the completion date was supposed to be by 1<sup>st</sup> May, 2006 and if the consent was not obtained by then the deposit was to be returned. However by that date the new title had not been obtained hence the extension of the completion date to 20<sup>th</sup> June, 2006. She admitted that she asked her advocates to seek extension instead of returning the cheque and the contract was open up to 20<sup>th</sup> June, 2006. According to her the cheque was returned though she could not say when this happened. While confirming that letters were written by her advocates, she denied that there were extensions after 20<sup>th</sup> June, 2006. She confirmed that the consent obtained on 19<sup>th</sup> September was to transfer and was to be used if the sale was to be completed. She confirmed that on 19<sup>th</sup> September, 2006, her lawyers asked for the cheque which was availed 11 days later. She was however, informed that the transaction did not work.
36. In re-examination, she stated that the cheque had to be received before extension and that this condition was not complied with. In her view the only condition for extension was the compliance with the agreement which was that receipt of the purchase price was to be 5 days.

## **Plaintiff's Submissions**

37. At the conclusion of the case, the parties filed their written submissions.
38. According to the plaintiff, it was submitted that the parties kept extending the completion date in writing with the last two extensions being done after 29<sup>th</sup> September, 2009. It was submitted that when the Defendant sought extension of time, time ceased to be of the essence. Having not

- obtained the renewed Grant by the completion date, it was submitted the Defendant ought to have returned the deposit in terms of clause 2 of the agreement instead of seeking more time.. It was submitted that by her conduct the Defendant was/is precluded from reneging from the contract.
39. On the issue of the consent, it was submitted that the agreement for sale did not amount to a sale which was to be on completion date when the Plaintiff would have paid the balance of the purchase price in exchange for the Sale Completion documents which would have included the said consent. It was submitted that the satisfaction of the terms of the agreement including the obtaining of the consent was premised upon the new Grant being issued by the Government.
40. According to the Plaintiff, by her conduct the Defendant kept the contract alive up to 19<sup>th</sup> October, 2006 when she wrote her last extension letter. Since the Plaintiff never solicited for extension, the Defendant cannot now turn around and say that the entire deal collapsed on 20<sup>th</sup> June, 2-006v or that the contract for sale lapsed on that date.
41. By sending the cheques for the full balance, it was submitted, it showed that the Plaintiff was at all times, ready, able and willing to pay the balance of the purchase price and received the completion documents. In support of the submissions the Plaintiff relied on **Openda vs. Ahn Civil Appeal No. 42 of 1981**, **Gulamhussein Nurmohamed Cassam & Another vs. Shashikant Ramji Sachania & Another Civil Appeal No. 63 of 1981**, **Mangi vs. Munyiri & Another Civil Appeal No. 143 of 1990**, **Francis Mwangi Mucheru vs. Annah Mburu Kiarie Civil Appeal No. 194 of 1997**, **Koysam Trading & Inv. Co. Ltd vs. Interspan Ltd HCCC No. ELC 242 of 2008**, **William Kazungu Karisa vs. Cosmus Angore Chanjera HCCC No. 85 of 2001**, **Eunice Wairimu Muturi & Another vs. Mavji Ramji Patel HCCC No. 586 of 2005**, **Lamu Self Help Group vs. Hawritta Buchete Isoho HCCC No. 117 of 2012 (ELC)** and **PCEA Pwani Presbytery vs. Juma Jefa Mboe & Another HCCC No. 139 of 2011** and submitted that specific performance is an equitable remedy not granted as a matter of course but based on the particular circumstances of the case in particular the conduct of the parties; whether the party seeking the remedy has come to court with clean hands; whether it has performed its obligations under the agreement sought to be enforced; whether it has always been ready and willing to perform its part of the agreement. It was submitted that the Plaintiff has fulfilled all these requirements.

### **Defendant's Submissions**

42. On behalf of the Defendant, it was submitted that as the lease was expiring on 1<sup>st</sup> January, 2008, the sale could only take if the lease was renewed upon expiration hence the clause in the Sale Agreement for renewal of the lease as a condition precedent. As the parties did not know how long this would take time was made of the essence.
43. Through an exchange of letters the parties consented to extension of the completion dates on two occasions within 30 days on 25<sup>th</sup> April 2006 and to 20<sup>th</sup> June, 2006. It was submitted that the renewal of the lease was outside the completion period and therefore the condition precedent was not satisfied hence there was no valid agreement to be specifically enforced. According to the Defendant the sale was void *ab initio* since it contravened condition 6 of the special conditions which required the consent of the Commissioner for Lands in such transactions. In the alternative, it was submitted that after the completion date expired on 20<sup>th</sup> June 2006 there was no agreement in respect of which the consent could be given.
44. Since the first agreement expired, it was submitted that specific performance could only be granted based on a contract entered into by the parties after 20<sup>th</sup> June, 2006. Based on **Bell vs. Lever Bros Ltd [1932] AC 161**, **[1931] ALL ER 1**, **Sheikh Bros vs. Arnold Julius [1957] EA 90**, **Associated Japanese Bank International vs. Credit Dunord [1998] 3 All ER 902**, **Jamal Ramji vs. Lint Marketing [1962] EA 752**, **Sri Sri Shiba Prasad Singh vs. Maharaja Srish Chandra Nandi [1950] 52 BOMLR 17**, it was submitted that a contract is void if the parties proceed on a false and fundamental assumption and that the parties were clearly acting on mutual mistake of fact that a contract of sale was in existence when there was none. Based on ***Halsbury's Laws of England***, 4<sup>th</sup> Edn. Vol. 9 paras 566, 568 and 569, it was submitted that the law is that the parties have the freedom to vary the contract and that the result is that a new contract with different terms from the original one comes into existence. According to the Defendants the alleged terms of the purportedly varied contract are so uncertain that they cannot be enforced

- hence the Court ought to hold that there was no contract.
45. It was submitted that the alleged contract which the plaintiff relies upon offends the provisions of section 3(3) of the **Law of Contract Act** which requires that the terms of contract for sale of land be in writing and be clear.
46. According to the Defendant, the suit is incompetent as the verifying affidavit was sworn by a person without authority under seal of the plaintiff. It was submitted that the caveat was irregular and illegal due to the fact that the caveator did not have lawful authority to swear the affidavit in support thereof hence the Defendant is entitled to damages in respect thereof. In support the Defendant relied on **Korica (U) Limited & Another vs. Kenya Ports Authority [2008] eKLR, Bugerere Coffee Growers Ltd vs. Sebaduka & Another [1970] EA 147, A S Sheikh Transporters Ltd & Another vs. Barclays Bank of Kenya Limited & 3 Others HCCC No. 335 of 2011, Vista Holdings International Ltd vs. Span Image (K) Ltd [2012] eKLR, Ashton Apparel (EPZ) Limited vs. Royal garment Industries EPZ Ltd [2013] eKLR.**
47. It was submitted based on **Nabro Properties Ltd vs. Sky Structures Ltd & 2 Others [2002] 2 KLR** that an invalid agreement for sale cannot be a basis for an order of specific performance. Further it was submitted that based on the evidence, the Plaintiff was never ready, willing and able to complete the sale. Citing **Edwin Peel, The Law of Contract**, Sweet & Maxwell, 13<sup>th</sup> edn. It was submitted that an offer expressly stated for a fixed time cannot be accepted after that time.

### **Issues for determination**

48. The parties herein on 7<sup>th</sup> December, 2007 filed what according to them were agreed issues. However, this Court is not bound by what the parties agree to be the issues for determination. As was held by **Oder, JSC** in **Gokaldas Tanna Vs. Rosemary Muyinza & DAPCB SCCA No. 12 of 1992 (SCU)**:

**“An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions”.**

49. Accordingly, based on the pleadings, the evidence and submissions I will paraphrase the said issues as follows:
- 1. Whether the suit is incompetent for the failure by the deponent of the verifying affidavit to exhibit a resolution by the Plaintiff authorising him to swear the verifying affidavit.**
  - 2. Whether the Sale Agreement entered into by the parties herein on 1<sup>st</sup> February, 2006 was null and void *ab initio* for the failure to seek the consent of the Commissioner for Lands.**
  - 3. Whether the agreement for sale dated 1<sup>st</sup> February, 2006 expired on 20<sup>th</sup> June, 2006 and if so could the letter dated 20<sup>th</sup> June, 2006 and whether the subsequent correspondences between the parties could revive the transaction in light of the fact that the extension of the lease was granted after 20<sup>th</sup> June, 2006.**
  - 4. Whether the Defendant was right in returning the deposit of the purchase price to the Plaintiff on 11<sup>th</sup> September, 2006.**
  - 5. Whether the caveat lodged by Stanley Kigera Thuo on 13<sup>th</sup> September, 2006 was properly registered.**
  - 6. Whether the Plaintiff was ready, able and willing to complete the transaction on 25<sup>th</sup> October, 2006.**
  - 7. Whether the Plaintiff deserves the orders sought.**

8. **Whether the Defendant has suffered loss and damages as a result of the registration of the caveat.**
9. **Who should bear the costs of the suit.**

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- 3) **Whether the agreement for sale dated 1st February, 2006 expired on 20th June, 2006 and if so could the letter dated 20th June, 2006 and whether the subsequent correspondences between the parties revive the transaction in light of the fact that the extension of the lease was granted after 20th June, 2006.**
- 4) **Whether the Defendant was right in returning the deposit of the purchase price to the Plaintiff on 11th September, 2006.**
- 5) **Whether the caveat lodged by Stanley Kigera Thuo on 13th September, 2006 was properly registered.**
- 6) **Whether the Plaintiff was ready, able and willing to complete the transaction on 25th October, 2006.**
- 7) **Whether the Plaintiff deserves the orders sought.**
- 8) **Whether the Defendant has suffered loss and damages as a result of the registration of the caveat.**
- 9) **Who should bear the costs of the suit.**

### **Determinations**

50. On the issue of the verifying affidavit, Order 4 rule 1(4) of the Civil Procedure Rules provides:

***Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.***

51. Clearly from the foregoing provision, nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of **Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit.
52. It is rite law that a contract which is tainted with illegality is unenforceable at the instance of either party.
53. It is not in dispute that under clause 6 of the Grant the Grantee, herein the Defendant, was not permitted to sell, transfer, sublet, charge or part with possession of the suit property without prior written consent of the Commissioner for Lands. It is also not in dispute that as at the time of entering into the agreement for sale between the Plaintiff and the Defendant, such consent had not been obtained. The Defendant's position is that the Sale Agreement was therefore null and void.
54. It is trite law that a contract which is tainted with illegality is unenforceable at the instance of either party. Where a contract is ex facie illegal, the Court will not enforce it whether the illegality is pleaded or not. This is due to the fact that once illegality is brought to the court, then the court must investigate it whether it was pleaded in the statement of defence or not since the court, as the custodian of law cannot shut its eyes to an allegation of illegality simply on grounds that it was not pleaded. Once illegality is brought to the attention of the Court it overrides all questions of pleadings including admissions made therein. The Court will not condone an illegality and base a decision on it. It has been held that it is unacceptable that a Court should allow itself to be a party to unlawful act by ignoring it and make an order to the benefit of the wrong doer or those claiming through him. See **Napier vs. National Business Agency Ltd (1951) 2 ALL ER 264, Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183, Ethiopian Airlines vs. Motunrola [2005] 2 EA 57, Allan Njuguna T/A Mwireri Mbao Stores vs. Veronica Nyambura Karuga & 2 Others Civil Appeal No. 165 of 1993**
55. It would therefore follow that if the terms of the Grant barred the Defendant from entering into an agreement for sale, the Defendant's action would have constituted an illegality. It is however, clear that what was barred was not the entering into an agreement for sale, but the sale and transfer. To interpret the phrase "to sell" to include "to enter into an agreement for sale" would render conveyancing transactions in this country impossible. That interpretation would lead to unnecessarily numerous applications for consent being made to the consenting authorities some of which would never see the light of the day. This issue has been dealt with in several cases and in **Abram Kitumba vs. Uganda Telecommunication Corp Kampala HCCS No. 395 of 1991**, the High Court of Uganda expressed itself, an expression which I associate myself with, on the following terms:

**"No action can be maintained on contract which is prohibited by Statute and no one can recover in an action formed on that which is a breach of the provisions of a statute. .... There is no doubt that Section 2 of the Land Transfer Act makes any contract to purchase or lease or accept any interest in land unless the consent of the Minister was obtained void and that the consent obtained later does not validate the contract retrospectively as it is void ab initio..... However there appears to be general acceptance that there is nothing contrary to law in entering into a written agreement to lease any land before the consent is obtained if it is expressly provided in the agreement that the execution of the agreement is contingent upon the consent of the Minister being obtained."**

56. Similarly, in **Fazal Visram Muman vs. M R Lalani Kampala HCCC No. 256 of 1963 (HCU) [1963] EA 425**, the Court held:

**"It is common ground that since both plaintiff and defendant are non-Africans the**

subletting of the two flats by the plaintiff to the defendant required the consent of the Governor under section 2 of the Land Transfer Ordinance (Cap 114).....The consent of the Governor obtained subsequently cannot convert an agreement that was prohibited by law and therefore void *ab initio* into an enforceable contract. ....Whereas an agreement could be expressed to be subject to the Governor's consent, in the instant case the agreement was not expressed to be made subject to the consent of the Governor being obtained so that it cannot be said that the agreement was inchoate until the consent was given.. Again it cannot be said that the agreement was a contingent contract, since the letting was expressed to take effect on a specific date and there was nothing in the terms of the documents to show that it was only to become operative if and when the consent of the Governor was obtained. Therefore the agreement was void *ab initio*, and the subsequent consent of the Governor to the subletting could not convert it into an enforceable contract.”

57. Again in Habib Devji vs. P C Tarmohamed and Another [1960] EA 1022, it was held that:

“Since the Land Transfer Ordinance prohibits a contract to purchase or to take on lease land of which an African is the registered proprietor if the other party is a non-African, unless the Governor has given his consent in writing, a contract of this nature which has been entered into without that consent is void *ab initio*, and the subsequent granting of the Governor's consent cannot convert it into an enforceable contract.... However, in the instant case, the consent was one which would not become enforceable unless and until the statutory consent was obtained. Consequently this contract comes within sections 31 and 32 of the Indian Contract Act which states that a “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen and that contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contracts become void..... Entering into a contract expressed to be contingent upon the statutory consent being granted is not within the mischief of the Land Transfer Ordinance and is not prohibited thereby. Such a contract is not void *ab initio*, though it would, of course become void if the statutory consent was refused. Consequently the contract on which the plaintiff relies in the instant case was not illegal.”

58. In Broadways Construction Co. vs. Kasule and Others Civil Appeal No. 39 of 1971 [1972] EA 76, the East African Court of Appeal expressed itself as follows:

“ Section 2 of the Land Transfer Act (Cap 202) provides that “no non-African or any person acting as his agent shall without the consent in writing of the Minister occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation with the consent of the Minister) or make any contract to purchase or take on lease or accept a gift *inter vivos* or a bequest of any such land or of any such interest therein other than a security for money..... The wording of this section is very wide indeed and clearly shows that the intention of the legislature was to prohibit both the occupation or entering into possession by a non-African of mailo land whose registered proprietor is an African, by or through any transaction, whatsoever, to which the Minister has not given his consent, and to make any contract to purchase or to take on lease or accept any interest in the same without the consent of the Minister. In other words, the wording of section 2 is so wide as to render any transaction which does not have the Minister's consent illegal. A breach of section 2 becomes punishable under section 4(1). Thus to try to enforce a transaction or a contract which did not comply with the requirements of section 2 would be trying to enforce an illegal transaction or contract. It is not disputed that the Minister's consent was obtained after a period of over one year from the date of the contract and after the plaintiff had already taken or entered into possession of the said mailo land. Thus under section 4(1) the plaintiff had incurred liability for a criminal act and could have been prosecuted for breach of

section 2.....Whether or not the contract was contingent the plaintiff should not have agreed to take on lease the mailo land, paid rent and other moneys in respect of places to keep its plant and entered into possession of the land without first obtaining the Minister's consent. The plaintiff was all along in breach of section 2 and the Minister's consent subsequently given did not expunge the plaintiff's liability for its criminal acts. The contract and entering into possession of the land before the consent was given were prohibited by law and the contract was therefore void ab initio. And nothing that was done subsequently (that is the granting of the consent by the Minister) had the effect of rendering it an enforceable contract, particularly in view of section 4(1).....The plaintiff, being a party to an illegal contract or transaction and basing his claim on the same illegal contract cannot maintain an action on a contract which is prohibited by statute. No man can recover in an action founded on that which is a breach of the provisions of a statute.....The judge correctly held the view that the whole transaction was so riddled with illegalities that the court should not be made an instrument of enforcing obligations arising out of it, when particularly the plaintiff is implicated in the illegalities.”

59. Lastly, on this point is the Tanzania High Court case of Mushunga vs. Rwekanika [1974] EA 318 where it was held:

“The effect of regulation 3(1) of the Land Regulations 1948 is that courts will not enforce a claim which can only be established by relying upon a transaction declared by law to be inoperative for lack of approval under the Land Regulations.....In the present case, the appellant has not even attempted to obtain the Presidential approval and if courts are not careful regulation 3 may be abused by unscrupulous sellers. Regulation 3 is applicable only in situations where the President's consent has been sought and refused. It should not, and sellers should not be allowed, to use this regulation when they deliberately refuse to seek this consent. All arrangements to sell or in any way deal with rights of occupancy are contingent. The contingency being the consent by the President, it follows that parties to an agreement of sale must take all the necessary steps to obtain such consent and a seller cannot be heard to deny the validity of the agreement freely entered into by him by pleading lack of consent under regulation 3 when he deliberately takes up the position wherein consent cannot be obtained. There is another consideration regarding this objection. A contract of sale was not contemplated by regulation 3. This regulation refers to dispositions which are defined by the same regulation to mean either conveyances or assignments. A contract of sale is neither of these. It is just what it says it is, a contract by one party to sell and by the other to buy. When both parties have completed their respective obligations, the seller is then obliged to convey the property to the buyer. It is only at this stage that the Presidential consent comes in because for the conveyance to become operative it must have the consent of the President. If at that stage the consent of the President is not obtained for any reason, the buyer is entitled to a refund of all that he paid under the contract of sale, but he cannot convey the property. This is to the court's understanding what regulation 3 means and lack of consent is only a defence to an action for specific performance or damages, but cannot be a reason for holding the agreement to sell void. It is for these reasons that the resident magistrate was correct in ordering specific performance of the contract of sale entered into between the parties and that the appellant must take all the necessary steps that are required before the Presidential consent is sought. When the appellant has signed the transfer forms at the revenue office, these together with the certificate of titles will be forwarded to the Commissioner for Lands Dar Es Salaam for approval and subsequently for registration at the Land Registry, and if for any reason the Commissioner refuses to approve the conveyance, so that it cannot be registered, no court of law will be able to compel the appellant to convey the house to the respondent, the respondent will only be entitled to a refund of what she paid under the contract.”

60. It is not in dispute that under clause 6 of the Grant the Grantee, herein the Defendant, was not permitted to sell, transfer, sublet, charge or part with possession of the suit property without prior written consent of the Commissioner for Lands. It is also not in dispute that as at the time of

entering into the agreement for sale between the Plaintiff and the Defendant, such consent had not been obtained. The Defendant's position is that the Sale Agreement was therefore null and void. In this case, the Agreement for Sale between the parties herein clearly stipulated that the sale of the suit property was subject to extension of the lease before completion and also to the restrictions, conditions and stipulations in the Grant. One of the said conditions as already stated hereinabove was that the consent of the Commissioner was to be obtained before the sale or transfer. The Grant however, did not expressly require such a consent to be obtained before a contract of sale was entered into. Accordingly, I find that the agreement for sale was not void *ab initio* by the mere fact that the Consent of the Commissioner was not obtained before the said agreement was entered into.

61. The next issue is whether the sale agreement dated 1<sup>st</sup> February, 2006 expired on 20th June, 2006. It is agreed by the parties herein that the first extension of the completion period was to run up to 20<sup>th</sup> June, 2006. Thereafter there seemed to have been a lull in communication until 20<sup>th</sup> July, 2006 when the Defendant's advocates requested for the draft Transfer to enable them complete the Transfer. The draft transfer was duly sent and the Defendant's Advocates made some alterations thereto and returned the same to the Plaintiff's advocates for engrossment. The question that arises is whether the actions subsequent to 20<sup>th</sup> June, 2006 could be deemed to extend the Completion period.

62. In Karmali Tarmohamed and Another vs. I H Lakhani & Company [1958] EA 567 the East African Court of Appeal expressed itself as follows:

**“If a contract depends on a series of letters or other documents, and it appears from them that the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether there is no binding agreement until the instrument has been drawn up. The whole of the correspondence or documents must be considered, and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communication. Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract were omitted from those letters... When, once, however, there has been a definite acceptance of all the terms of an offer and the acceptance was without qualification, further negotiations between the parties cannot without the consent of both, get rid of the contract which has been made. Of course it may be an open question whether the terms of the contract really were settled and the fact that further negotiations took place as well as the language of those negotiations, may be very important as throwing light upon the state of things at the time when the alleged contract was signed by the party to be charged. The question is really one of fact; and if, in considering that question of fact, one should come to the conclusion that the negotiations which subsequently took place related to new matter, started for the first time after the contract was complete, they would have no weight in preventing full effect being given to the written contract previously existing..... The effect of the subsequent letters may perhaps be thus stated. If the subsequent correspondences leads to the conclusion that at the date of the letters relied on as the memoranda of the contract there was no contract in fact, then the plaintiff must fail: if, on the other hand, the whole evidence shows that at that date there was a consensus between the parties upon the terms expressed in the letters relied upon, then the subsequent correspondences, unless amounting to a new contract or an agreement for rescission can have no effect upon the existence of the contract.”**

63. In this case, the parties expressly agreed that in the event that the vendor was unable to get approval of the extension of the Lease and procure the Title and/or Grant for the extended term on or before the completion, the vendor was obliged to reimburse deposit paid and upon such reimbursement the agreement was to become null and void and neither party was to have any claim against the other. It is clear that even after the Completion period as expressly extended by

the parties, the lease had not been extended and the new Grant had not been procured. It would therefore follow that from the terms of the agreement the vendor was obliged to reimburse the deposit upon which reimbursement the agreement was to become null and void.

64. The question then is, what would be the consequences of the failure to reimburse the deposit? In my view, that failure would amount to a breach of contract entitling the Plaintiff to sue for damages. What would follow therefore is that the Defendant was obliged to refund the deposit. However, this was not done until 20<sup>th</sup> July, 2006 when without expressly extending the completion period the Defendant's advocates sought for a draft transfer. In **Bakshish Singh and Brothers vs. Panafric Hotels Ltd [1986] KLR 538; [1986-1989] EA 34** the Court of Appeal held:

**“To a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. An agreement between two parties to enter into an agreement in which some crucial point of the contract matter is left undetermined is no contract at all. But if there is silence on that point sometimes it is provided for by implying the test of reasonableness, e.g. the reasonable price of goods which the Sale of Goods Act of 1893 supplies or the contractor will complete the work within a reasonable time of being given possession of the site. On the other hand it is perfectly good contract if it is agreed that one party should decide the point. Where there is provision for the parties to agree on the critical point later and they never do, there is no contract. If a provisional agreement intended to be binding is reached until a subsequent agreement in precise and formal language is drawn and executed the provisional one is fully and immediately binding. When the time of completion in a written building contract signed by the employer is blank even if he and the contractor are told verbally of the date, it is not enough to seek an order to introduce this term into such a contract by parol evidence. There must be something very strong in the case before this can be done, especially where it introduces a penalty or forfeiture. A party is entitled to resist an action for breach of contract on any ground that is available even though before action he gave no reason at all”.**

65. In **Triple Eight Construction Company (Kenya) Limited vs. China Petroleum Pipeline Bureau & Another Nairobi High Court (Commercial & Admiralty Division) Civil Suit No. 186 of 2010**, I held that “without identifiable terms of the contract it is clear that the plaintiff would not be entitled even to an award of damages since an award of damages for breach of contract must necessarily flow from the breach of the terms of the contract.” In that case I relied on **Alfred M O Michira vs. M/S Gesima Power Mills Limited Civil Appeal No. 197 of 2001** where the Court Appeal held that where there is no meeting of the minds of the contracting parties the contract is incapable of performance. The Court further held that where the agreement is uncertain on the fundamental term on the payment of the purchase price in that it does not provide for the time within which the balance of the purchase price is payable or secure the payment, it makes the entire agreement void for uncertainty and neither party can be held to be in breach of the agreement or be entitled to any damages from the abortive agreement. A similar position was taken by the same Court in **Nairobi Homes Ltd. vs. Major Bashir Kalyan Civil Appeal No. 50 of 1985**.

66. From the evidence of PW2, between 8<sup>th</sup> August, 2006 when the application for consent was made and 11<sup>th</sup> September, 2006 when the consent was granted there was no written extension of the completion date and that after 20<sup>th</sup> June, 2006 he did not seek extension and that there was no extension request after 20<sup>th</sup> June, 2006. He, however, confirmed that the extension made by the letter dated 16<sup>th</sup> October, 2006 was conditional and that by the time of sending the cheques on 30<sup>th</sup> October, 2006, there was no agreement on the terms of the extension. What comes out clearly from PW2's evidence was that there was no meeting of the minds of the contracting parties to the sale agreement with respect to the alleged last extension. That being the position, the whole contract became unenforceable for uncertainty as was held in **Alfred M O Michira vs. M/S Gesima Power Mills Limited** (supra).

67. In **Kenya Breweries Ltd. vs. Kiambu General Transport Agency Ltd. Civil Appeal No. 9 of**

2000 [2000] 2 EA 398, the Court of Appeal expressed itself as follows:

**“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 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.”**

68. That being the position, the Defendant was not only right in returning the deposit, but was obliged under the terms of the Sale Agreement to do so.
69. With respect to the caveat which was registered against the title of the suit property, it is clear that at the time of the registration of the caveat both parties were under what the Defendant termed mistake of fact that the contract was still in existence. As was stated in **Bell vs. Lever Bros Ltd** (supra) a mistake by both parties as to the existence of some quality of the subject matter of the contract, which makes the subject matter of the contract without the quality essentially different from the subject matter as it was believed to be, renders the contract void *ab initio*.
70. This mistake of fact was partly contributed to by the Defendant. Accordingly, I am not inclined to hold that the Plaintiff had no interest in the suit land which could be protected by the registration of the said caveat. In **Namuco Ltd vs. Tristar International Ltd Kampala High Court Misc. Appl. No. 36 of 1994 [1994] 1 KALR 39**, the Court held itself as follows:

**“It is common ground from the pleadings filed by both parties and from the submissions made by counsel, that the sublease was subject to the obtaining of consent of the lessor and without that consent the applicant could not validly grant a sub-lease to the respondent. The legal consequence is that the agreement between the two parties was a contingent until the consent was obtained. However, the contract remains unenforceable.... Since it was the obligation of the applicant to obtain the necessary consent, it cannot turn round and say that the agreement it made with the respondent is no longer valid since the non-registration of the sub-lease cannot operate as a bar of any claims arising out of the agreement. The agreement is a contract inter-parties and it confers a right to the respondent to sue for specific performance or damages. The respondent lodged a caveat to stop the applicant from dealing with the land while it pursues other remedies. The court is not concerned with whether the contract was frustrated or the claim being time barred. Although it is correct that the law avoids the creation of an estate or interest in land by unregistered instrument, the law does not render such instruments ineffectual as contracts between the parties for that reason, the agreement between the applicant and the respondent is enforceable. The sub-lease was not registered simply because the applicant did not obtain the necessary consent from the landlord and in the circumstances the respondent had cause to lodge a caveat to stop the applicant from dealing with the suit property in order to protect its interests.”**

71. The next issue for determination is whether the Plaintiff was ready, able and willing to complete the transaction on 25<sup>th</sup> October, 2006. The remedy of specific performance was dealt with by the Court of Appeal in Civil Appeal No. 165 of 1996 between **Gurdev Singh Birdi and Marinder Singh Gatora and Abubakar Madhbuti**, in which Gicheru, JA (as he then was) expressed himself thus:

**“When the appellants sought the relief of specific performance of sale of the respondent’s property...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 the 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. There was, however, no express stipulation nor any indication in the agreement that time was of the essence of the agreement. The appellant's failure to deliver up the balance of the purchase price of the suit property by the appointed date...did not bring the agreement to an end...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. 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. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation...Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim...The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the court of equity would refuse to grant specific performance and would leave the parties to their other rights...When the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”.

72. On his part **Tunoi, JA** (as he then was) said:

“However, the appellants’ conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated”.

73. In this case, I have found that there was uncertainty as to the terms of the contract after 20<sup>th</sup> June, 2006. This uncertainty was confirmed by PW2 in his evidence when he said in cross-examination that he was unable to say with certainty that there was no extension of the lease by 15<sup>th</sup> June, 2006. In those circumstances, for the Plaintiff to be entitled to the remedy of specific performance, the Plaintiff ought to have complied with the terms of the Defendant’s letter dated 16<sup>th</sup> October, 2006. The Plaintiff was however unable to comply therewith partly due to reasons beyond its control. That however unfortunate it was does not entitle this Court to intervene since to do so would amount to rewriting a contract for the parties. It is not generally for the Court to impose its idea of what is best for the parties in contractual matters.

74. It is also trite that the remedy for specific performance is an equitable one, and it would not be granted where damages would afford the injured party adequate protection. In **Frank Rwakijanju vs. Prince Patrick Kaboyo Fort Portal HCCA No. 1 of 1992 [1992] IV KALR 132**, it was held

- that the remedy for specific performance being discretionary the Court's discretion is to be exercised judicially according to the well settled rules one of which is that the relief of specific performance shall not be granted where the agreement is uncertain in any material respect.
75. Having made the foregoing findings, it must now be clear that the plaintiff's case is unmerited. Whereas it is the Court's view that the Defendant ought to have refunded the deposit as soon as she realised that the extension of the lease was not forthcoming after the extension of the Completion period, and that the delay in refunding the same would have entitled the Plaintiff to loss, it is clear that the Defendant refunded the deposit together with interest and it was not contended by the Plaintiff that the said interest was insufficient. The general rule is that general damages cannot be claimed for breach of contract hence there is a need for proof of actual damages. See Kenya Reinsurance Corporation vs. V E Muguku T/A M/S V E Muguku Muriu & Company Civil Appeal No. 48 of 1994 [1995-1998] 1 EA 107, Kenya Breweries Ltd. vs. Kiambu General Transport Agency Ltd. Civil Appeal No. 9 of 2000 [2000] 2 EA 398, Joseph Ung'adi Kedera vs. Ebby Kangisha Kawai Civil Appeal No 239 of 1997, Johnson Joshua Kinyanjui & Another vs. Rachel Wahito Thande & Another Civil Appeal No. 284 of 1997 [1995-1998] 2 EA 159 and Provincial Insurance Company of East Africa Ltd. vs. Mordekai Mwangi Nandwa Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289.
76. Similarly, as a result of my finding that the Plaintiff's action of placing the caveat on the suit property was in the circumstances justified, the Defendant's claim for damages must fail. Even if the Defendant had proved that the caveat was unlawfully placed on the title, no attempt was made to adduce evidence relating to loss if any suffered by her as a result thereof. The best that she would have been awarded had she succeeded would have been nominal damages. As was held in Firozali Noormohamed Lalji vs. Elias Kapombe Toka & 3 Others [1981] KLR 325 parties must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the Court, saying "This is what I have lost, I ask you to give me these damages". They have to prove it.

## **ORDER**

77. Having considered the pleadings the evidence and submissions it is my view and I so hold that both the Plaintiff's suit and the Defendant's counterclaim for damages must fail. However, the caveat lodged against the suit property is ordered to be withdrawn. Each party to bear own costs.

**Dated this 24<sup>th</sup> day of February 2014**

**G V ODUNGA**

**JUDGE**

**Delivered the presence of:**

**Mr Muturi for the Plaintiff**

**Dr Kamau Kuria and Ms Zena Rashid for the Defendant**