



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC CIVIL SUIT NO. 1525 OF 2007

KARIUKI KINUTHIA.....PLAINTIFF

VERSUS

JOB K. CHIRCHIR.....1ST DEFENDANT

JAMES MURIUKI.....2ND DEFENDANT

EVEREST LIMITED.....3RD DEFENDANT

TELEPOSTA PENSION SCHEME TUSTEES REGISTERED.....THIRD PARTY

JUDGMENT OF THE COURT

The Plaintiff filed suit against the Defendants by way of a Plaint filed in Nairobi High Court Civil Case No. 111 of 2005 dated 2nd February 2005 and amended on 12th May 2005. This suit was later transferred to the Environment and Land Division of the High Court at Nairobi and given a new case number being ELC Suit No 1525 of 2007. The Plaintiff in the said Amended Plaint is seeking the following substantive prayers.

- a. 2.4 million Kenya shillings being the value of a demolished 2 bed roomed bungalow and outer buildings.
- b. A permanent injunction restraining the 2nd and 3rd Defendants from carrying out new developments at the site where the Plaintiff's bungalow (House No. 159A) once stood pending final determination of the suit.
- c. Damages against the 1st Defendant for breach of contract.
- d. Costs of this suit and interest.

The Plaintiff's claim is that at all material times, he was the registered owner of L.R. No. 209/14490/18 situate as Tebere Crescent, Kileleshwa, Nairobi, and which bordered the 3rd Defendant's property known as L.R. No. 209/14990/19. The Plaintiff alleges that by an agreement of sale between him and the 1st Defendant dated the 27th of May 2004, he purchased the property known as L.R. No. 209/14490/18 together with a two bed roomed bungalow and outbuildings erected on the property more particularly described as Housing No. 159A (hereinafter referred to as "the suit property"). The Plaintiff has stated that at the time of the alleged sale, the 1st Defendant was simultaneously purchasing the suit property

from the 3rd Party and therefore, the agreement of sale between the Plaintiff and the 1st Defendant was based on the strength of the agreement between the 1st Defendant and the 3rd Party dated the 5th March, 2004.

The Plaintiff further claimed that having paid the full purchase price to the 1st Defendant, the transfer was duly registered in his name, but the 1st Defendant was unable to give vacant possession of the buildings to him. This was for reasons that the buildings were demolished by the 2nd Defendant acting as representatives of the 3rd Defendant, who claims ownership of the ground upon which the buildings stood. The Plaintiff alleges that failure by the 1st Defendant to deliver vacant possession constituted breach of contract, upon which the Plaintiff claims for among other reliefs, damages.

The 1st Defendant's defence on the matter dated 24th March 2005 admitted the Plaintiff's claim as pleaded, save for stating that his failure to deliver vacant possession was attributable to the 2nd Defendant who was responsible for frustrating the contract between the Plaintiff and the 1st Defendant. Further, that the 2nd Defendant was therefore fully responsible for the Plaintiff's loss and damage. The 2nd Defendant however filed an application dated 16th February 2005 seeking that the suit filed against him be struck out, which prayer was allowed by orders issued on 18th August 2005 by Osiemo J. (as he then was).

The 3rd Defendant entered appearance on 20th July 2005 and filed a statement of defence dated 3rd August 2005. The 3rd Defendant denied the Plaintiff's averments and stated that having been the registered proprietor of the property known as L. R. No. 209/14990/19, it was the absolute and indefeasible owner thereof, and that if there was any structure in the said property, the same belonged to the 3rd Defendant absolutely.

The Third Party was brought into these proceedings by the 1st Defendant pursuant to leave granted by the court on 29th April 2005. The 1st Defendant claimed as against the Third Party for indemnity and contribution on the ground that it was liable in negligence, having been the vendor of the house situated on L.R. No.209/14990/18. Save for admitting that it sold the suit property to the 1st Defendant, the Third Party denied knowledge of the agreement entered between the Plaintiff and the 1st Defendant, and further denied liability to the 1st Defendant for indemnity for any award made in favour of the Plaintiff.

The suit herein was heard on 5th December 2011, 7th February 2012, 26th April 2012, 8th November 2012 and 21st November 2012. After the hearing parties were directed to file written submissions, and the parties on 12th March 2013 requested that judgment be reserved on the basis of the submissions filed. The following is a summary of the respective parties' evidence and submissions made.

The Plaintiff's Case:

The Plaintiff testified in court and called two additional witnesses to testify on his behalf. The Plaintiff's testimony given in court and from his written statement is that he was introduced to the 1st Defendant who was selling a property known as LR No. 209/14990/18 which measured 0.0786 Hectares on Tebere Crescent by Mr. Ezekiel Kitema (PW2), a house selling agent. According to the Plaintiff, the property constituted a two bed-roomed bungalow with outer buildings, a garage and servants quarters and that the 1st Defendant was residing thereon with his family. The Plaintiff stated that he was shown the allocation by the Third Party of the said property to the 1st Defendant. He referred the Court to the Plaintiff's Exhibit 1 which was a letter of provisional house allocation by the 3rd Party to the 1st Defendant dated 8th July 2003.

The Plaintiff informed the court that after viewing the said property and its beacons, he entered into a sale agreement with the 1st Defendant at a purchase price of Kshs.3.9 million. It is the Plaintiff's testimony that the 1st Defendant was purchasing the property from the 3rd Party, with whom he concurrently entered

into a sale agreement with. The Plaintiff referred the court to his Exhibit 2, which was a letter dated 17th February 2004 to his lawyers from the 1st Defendant with these instructions.

The Plaintiff stated that before he entered into the sale agreement he conducted a search and found that the property was registered in the name of the 3rd Party, and he produced a copy of the said search as his Exhibit 4. The Plaintiff informed the court that he was required to pay the purchase price directly to the 3rd Party on behalf of the 1st Defendant and further, that he paid the ten (10) percent deposit vide a bankers purchase order dated 19th February 2004. He produced a copy of the banker's draft evidencing the said payment of Kshs 342,000/= as his Exhibit 3.

It is the Plaintiff's testimony that he paid the balance of the purchase price of Kshs 3,078,000/= on 27th May 2004 within 90 days as provided by the sale agreement, and that on the same day the title was transferred from Third Party to the 1st Defendant and then to the Plaintiff. He produced a copy of the banker's draft of the payment of the said balance on 27th May 2004 as his Exhibit 7.

The Plaintiff further stated that at the 1st Defendant's request, he agreed to give the 1st Defendant time to resettle his family before taking possession of the suit property. However, that before the 1st Defendant could move out of the suit property, he informed the Plaintiff that he was not able to give vacant possession for reasons that he had received a notice to vacate the premises from the 3rd Defendant. The Plaintiff referred the court to the said notice dated 5th October 2004 which he produced as his Exhibit 13.

The Plaintiff informed the court that immediately after the issue of the notice to vacate, the two-bed roomed bungalow was demolished and only the garage and a part of the servant quarter were spared. It is the Plaintiff's testimony that when he enquired from the 1st Defendant, he was informed that the 3rd Defendant had acquired part of the plot where the house was standing. Further, that the 3rd Defendant showed the Plaintiff new beacons which were different from the beacons shown to him when he viewed the property.

The Plaintiff stated that as a result he got a smaller portion of land than what had been agreed to with the 1st Defendant. The Plaintiff testified that he did not want to lose the whole property, and he decided to keep the remaining land and seek compensation. Further, that the 1st Defendant wrote to the Third Party to explain and resolve the problem in a letter dated 6th September 2004 which the Plaintiff produced as his Exhibit 8.

According to the Plaintiff, the 1st Defendant had breached the terms of the agreement they had entered into since the said agreement had very clear description of the structures and the plot size that was being sold which was not in conformity with what was delivered to the Plaintiff. The Plaintiff informed the court that when he realized that the bungalow was not part of the sale, he sought to recover the replacement costs of the bungalow which had been valued at Kshs 2.4 million before demolition.

Further, the Plaintiff stated that vide a letter 9th September 2004 in his bundle of documents, the surveyors for the Third Party had stated that there was a technical error in sub-division which had not been told to him at the time of purchase, and which resulted to the Plaintiff getting a smaller portion of land than what had been agreed upon. The Plaintiff averred that he was in part possession of the suit property and that the 3rd Defendant developed new town houses in the portion where the demolished bungalow had been located.

On cross examination by Mr. Langat, learned counsel for the 1st Defendant, the Plaintiff averred that his agent and the 1st Defendant had accompanied him to view the suit property and further, that the 1st Defendant was purchasing the said property from the Third Party. The Plaintiff stated that the transfer of the suit property from the Third Party to the 1st Defendant was registered on 23rd June 2004 and transferred to the Plaintiff on the same date.

The Plaintiff was emphatic that at the time of transfer, the 1st Defendant was in possession of the suit property and that there was no change to the title in so far as the description of the property therein was concerned. Further, that at the time of the 1st Defendant's eviction and demolition, the property was registered in the Plaintiff's name.

Upon further cross examination by Mr. Mburugu, learned counsel for the 3rd Defendant, the Plaintiff maintained that he was the owner of LR 209/14900/18, and that he had sued the 3rd Defendant because they are the ones who asked the 1st Defendant to vacate the property he had bought and which had been shown to be his. Further, the Plaintiff informed the court that he had no evidence that the 3rd Defendant was not the owner of the properties described in the notice to vacate. It was the Plaintiff's evidence that prior to the transaction, he conducted a search and confirmed that LR No. 209/14900/18 was owned by the Third Party. The Plaintiff further stated that he did not see the deed plan with respect to the property and could not tell the court whether the deed plan had been registered with the Ministry of Lands.

The Plaintiff confirmed to the court that there was no reference to a bungalow in the sale agreement between him and 1st Defendant dated 27th May 2004 which he produced as Exhibit 15, and further, that the acreage indicated in the deed plan attached to the title to LR No. 209/14900/18 was 0.0787 hectares which was the balance of the land that he was left with. According to the Plaintiff, the errors in subdivision were not corrected and therefore, that he occupied the area stated in the deed plan whereupon he had developed residential houses.

The Plaintiff admitted that the valuation report of the suit property indicated that the bungalow was in LR 209/14990/19 which was owned by the 3rd Defendant. Further, the Plaintiff confirmed to the court that when he went to the site to view the property, he was not accompanied by a surveyor and only established the beacons with the owner and agent.

During further cross-examination by Mr. Bundotich, learned counsel for the Third Party, the Plaintiff stated that he did not enjoin the Third Party since his claim was against the 1st Defendant who had failed to deliver vacant possession as per their sale agreement. He stated that he was not aware if the 1st Defendant had claimed against the Third Party. The Plaintiff agreed that the agreement entered into with the 1st Defendant dated 27th May 2004 produced as his Exhibit 15 did not mention the word bungalow, and instead referred to buildings and outer buildings. According to the Plaintiff, that agreement had to be read together with the earlier agreement between the 1st Defendant and the Third Party.

The Plaintiff further stated that he relied on the sub-division plan which he had been given by the 1st Defendant and which was attached to the valuation report in identifying the beacons of the suit property. He informed the court that he did not know who prepared the said plan and whether it was registered. He further confirmed that the deed plan attached to the title deed of the suit property showed the acreage to be 0.787 hectares. He also confirmed that he did not receive any documents from the Third Party, and that he relied on the documents that were given to the 1st Defendant.

During re-examination, the Plaintiff stated that he relied on the beacons indicated on the sub-division scheme which was attached to the valuation report produced as the Plaintiff Exhibit 16. Further, that he was shown new beacons when the 3rd Defendant was evicting the 1st Defendant. According to the Plaintiff, the purchase price of the premises tallied with the value in the valuation by the Ministry of Public Works undertaken for stamp duty purposes which he produced as his Exhibit 11. The Plaintiff informed the court that the acreage of the suit property in the deed plan of 0.0787 hectares did not tally with the acreage provisional allocation which was 0.0786 hectares, and further, that although he noticed the cancellation in the deed plan, he never pursued the same. The Plaintiff alleged that he paid the money directly to the Third Party who was aware that the property was being bought on a back-to-back sale agreement.

The second witness who gave evidence for the Plaintiff was Ezekiel Mutai Katenya (PW2), who stated that he was a valuer by profession, and that the parties to the suit were all known to him. PW2's

testimony was that his firm of property valuers, Le Buneei Diversity Limited, was given instructions by the Plaintiff and the 1st Defendant to value the improvements on LR 209/14990/18. PW2 stated that they found a fairly old bungalow in good condition, staff quarters and a garage for two cars astride LR 209/14990/18 and LR 209/14990/19.

According to PW2, the development was valued at 2.4 million in January 2005. In the opinion of PW2, the value now would be 14 – 15 million shillings. PW2 informed the court that at the time, it was clear that LR 209/14990/18 was owned by the Third Party but that the owner of LR 209/14990/19 was not known. It was the evidence of PW2 that they found the property they were asked to value to be located on two titles upon checking the survey plans. He produced their valuation report as the Plaintiff's Exhibit 16.

Upon cross examination by Mr. Langat, PW2 informed the court that it was not common for a property to be situated astride two titles, and that this was his first case of the kind. According to PW2, almost the entire bungalow was in LR 209/14990/19 and only the garage was lying on LR 209/14990/18. Further, PW2 stated that the valuation was not for the garage only but for all the structures bought by the Plaintiff. PW2 insisted that it was not their mandate to establish who the owner of LR 209/14990/19 was, which was for the client to follow up on.

During cross examination by Mr. Bundotich, PW2 stated that although the property was inspected towards the end of 2004, the date of inspection was not given in the report. PW2 was emphatic that their instructions were to value the buildings and to give the replacement value excluding the land for purposes of claiming compensation. PW2 maintained they gave the value of the properties found to be astride two titles at 2.4 million shillings.

The Plaintiff's third witness (PW3) was Jacob Oyatto a land surveyor by profession. PW3 referred to a letter dated 9th September 2004 which was produced as the Plaintiff's Exhibit 17, referring to work his firm did in Kileleshwa, Nairobi for the Third Party. PW3 stated that their terms of engagement were to survey and produce deed plans for a first subdivision of about 40 plots. PW3 informed the court that the first subdivision resulted in technical errors and they undertook a second subdivision which involved amendment to parts of the first sub-division which affected plot LR 209/14990/18 in terms of the shape of the said plot. According to PW3, he developed a revised scheme plan which would have accommodated all the buildings in plot LR 209/14990/18, but thereafter received a stoppage letter from the Third Party stating that the owners wanted the *status quo* maintained.

Upon cross examination by Mr. Lang'at, PW3 clarified that by technical errors he meant that the boundaries did not pass where they were supposed to. PW3 further clarified that the stoppage letter asking him not to implement the amended scheme signed by A. N Githu was forwarded by the Third Party and not by the owner of LR 209/14990/18. PW3 admitted that they made a mistake initially which resulted in part of LR 209/14990/18 being put in LR 209/14990/19. PW3 confirmed that he was not in communication with the owner of LR 209/14990/18 and that in his opinion, the said owner would not have wished that part of his plot went to LR 209/14990/19.

In further cross examination by Mr. Mburugu, PW3 informed the court that prior to the sub-division, they engaged a physical planner who prepared a scheme plan which was approved by the Nairobi City Council, the Commissioner of Land and Director of Surveyors. The physical planner was supposed to visit the site in the process. PW3 confirmed that the deed plan of LR 209/14990/18 attached to its title tallied with his approved survey plans in terms of acreage of the said plot, and that he was the one who certified the said deed plan. PW3 reiterated that the survey plan and deed plan prepared and approved in 2002 was later amended but not for plots number LR 209/14990/18 and LR 209/14990/19, and that the *status quo* with regards to the deed plans for these plots is as per the plan approved in 2002.

PW3 was also cross-examined by Mr. Bundotich and made reference to the valuation report dated 7th January 2005, and stated that the main house was in LR 209/14990/18 and the garage was located in LR 209/14990/ 17 and not in LR 209/14990/ 19 as stated in the valuation report. PW3 informed the court that the title to LR 209/14990/18 showed that it was transferred to the 1st Defendant on 23rd June 2004 and to the Plaintiff on the same date. Therefore the Third Party was not the owner of the said plot when he wrote

to it on the proposed amendments to the survey plans and deed plans on 9th September 2004. PW3 also stated that LR 209/14990/19 had earlier been transferred to A. M. Githu on 12th June 2004 and later on to Everest Limited on the same day. According to PW3, by the time the error was noticed the Third Party had already sold the two plots. PW3 absolved the Third Party from blame in respect to the technical errors.

In re-examination, PW3 stated that it was necessary to take regard of the existing buildings to retain them in their location. While stating that his employer was the Third Party and that he was not allowed to receive instructions from a third party, PW3 stated that he did not establish who A. M. Githu was, and could not tell if he wrote the letter of stoppage on behalf of other owners. PW3 maintained that if a technical error meant the non-alignment of a boundary line, and if it fell on a building then it would need correction. Further, if it was not corrected the *status quo* would be maintained, and alignment of a boundary would mean a change of acreage which may lead to a loss of a building.

The Plaintiff's counsel filed submissions dated 30th January 2013 wherein he reiterated the facts as testified to by PW1, and argued that the Plaintiff suffered loss for breach of contract from the Defendants, jointly and severally. It was submitted that the determination of damages for breach of contract was laid out in the case of **Hadley -vs- Baxendale (1854)9 Exch 341** where the court held that an injured party could recover damages reasonably considered to have arisen naturally from a breach of contract or such as reasonably supposed to have been in the contemplation of both parties at the time the contract was made.

While relying on the case of **Robinson -vs- Harman (1948)1 Exch 850**, counsel for the Plaintiff submitted that contractual damages are usually awarded to compensate the injured party's loss of expectation in that which the injured party would have received had the contract been properly performed is what is paid to the Plaintiff. Further, it was argued that common law provides that where a party sustains loss by reason of breach of contract, he is so far as money can do it, to be placed in the same situation, with respect to damages as if the contract had been performed.

The counsel contended that the Plaintiff was demanding for the value of the demolished two-bed-roomed bungalow and other out buildings at Kshs.1.4 million as well as damages against the 1st Defendant for breach of contract. He relied on the case of **Ruxley Electronics and Construction Ltd -vs- Forsyth (1996)IAC 344 (HL)** where it was held that damages are designed to compensate for an established loss and not provide gratuitous benefit to aggrieved party. Counsel for the Plaintiff further urged the court to effect the principle of restitution in integrum and place the Plaintiff in a position that he would have occupied had he been handed over the suit property. The counsel relied on the case of **C & P Haulage – vs- Middleton, (1983) 1 WLR 1461 (CA)** in support of this submission.

The 1st Defendant's Case:

The 1st Defendant Job Chirchir (DW1) testified on his own behalf and stated that he is a businessman dealing in construction, and previously worked with Kenya Posts and Telecommunications Corporation now Telkom Kenya for 15 years. DW1 informed the court that before he left his employment, he was residing in the Telkom staff quarters at Kileleshwa at the junction of Githunguri and Tebere Crescent. DW1 stated that the premises he resided on comprised a maisonette with two bedrooms, stone walled with two servant quarters and a garage.

DW1 relied on his list and bundle of documents dated 24th October 2011 and filed on 1st December 2011, which he produced as the 1st Defendant's Exhibit 1. He made reference to a letter of provisional allocation in the said bundle of documents dated 8th July 2003 of LR No. 209/14990/18 which was described as a bungalow with outbuildings. DW1 informed the court that he accepted the offer and entered into a sale agreement with the Third Party on 5th March 2004 which was produced in evidence in his Exhibit 1.

It was DW1's testimony that he complied with all the requirements of the agreement, and he made

reference to copies of bankers drafts showing payment of the purchase price of Kshs 3,078,000/= and stamp duty of Kshs 276,820/= and both dated 27th May 2004 produced in his Exhibit 1. DW1 maintained that he acquired the property and the transfer was registered in his favour on 23rd June 2004 as shown in the certificate of title for LR No. 209/14990/18 which he also produced in evidence.

DW1 informed the court that at the material time, he was not financially capable of executing the sale, and the Plaintiff who was interested in the property was brought on board. Further, that there was a back-to-back transfer that saw the property transferred from him to the Plaintiff on 23rd June 2004. DW1 averred that it was in the process of handing over to the Plaintiff when he saw fresh beacons on the property which were different from the initial beacons, and which removed the bungalow from LR No. 209/14990/18. DW1 maintained that he was not notified of the changed beacon and his enquiries to the Third Party in a letter dated 6th September 2004 which he produced in evidence were not responded to. That instead he was served with notice to vacate by the 3rd Defendant dated 5th October 2004 which he also produced in evidence.

DW1 insisted that the Deed Plan he had was the one incorporating all the buildings in LR No. 209/14990/18, and that the Third Party had admitted that a mistake was done by the property section and the property manager. It was the evidence of DW1 that the main house was demolished by the 2nd Defendant while he was still living in it, and that the value of part of the garage which was spared could not come close to Kshs.3,420,000/= being the value paid for the property in addition to legal and other costs. DW1 was emphatic that the Third Party was to be blamed for their mistake and further, that he joined it as a party to indemnify him of any judgment.

During cross-examination by Mr. Mburugu, DW1 informed the court that his employer made a personal allocation of the suit property to him which referred to LR 209/14990/18 and whose plot size was 0.0786 hectares. Further, that he was taken around the property and was shown the beacons by Mr. Oyato, the Third Party's surveyor, and the house was within the beacons. DW1 insisted that paragraph 2 of the sale agreement referred to LR No. 209/14990/18 with the buildings and development thereon. DWI informed the court that it is the Plaintiff who paid the money to the Third Party and that his interest in the property ceased on the day the property was transferred to Plaintiff.

In further cross examination by Mr. Bundotich, DW1 stated that he sold the property to the Plaintiff at a higher price and his premium was Kshs 400,000/=. The witness informed the court that the acreage in the certificate of title which was 0.0787 hectares was different from the allocation letter which indicated 0.786 hectares and admitted that the provisional allocation was not a binding contract. He also stated that he was shown the beacons of the house by Mr. Oyatta, and that he also showed the house and beacons to the Plaintiff at the time of the sale. He could not remember if he showed the Plaintiff the title of LR No. 209/14990/18, and was not sure if a search of the property was conducted.

DW1 insisted that he raised the issue of the new beacons and different acreage of LR No. 209/14990/18 with the Third Party through his letter dated 6th September 2004, and stated that he had no reason to raise any issue before the transfer was effected on 23rd June 2003 since the beacons were in the right place and the house was within the beacons. DW1 averred that he did not refund the Plaintiff the premium and stamp duty paid for reasons that the mistake was not of his making.

Upon re-examination, DW1 informed the court that he was unable to fulfill his contractual obligations to the Plaintiff to deliver vacant possession and insisted that the Third Party did not deliver to him the property they had promised. DW1 was emphatic that the different acreages of the property in the provisional allocation and the title were not his making as he was not the author of the document. Further, that the sale agreement between him and the Third Party created a binding contract despite the provisions of the provisional letter of allocation.

The witness told the court that at the time of issuance of the letter of allocation, he was not shown the title to LR No. 209/14990/18, which was given to him after the offer. DW1 also confirmed that the stamp duty was paid to the government and the purchase price was paid to the Third Party, and that he was not

able to refund the said monies to the Plaintiff. DW1 concluded his evidence by stating that the person who showed him the beacons of the house was commissioned by the Third Party, and that he was in court because of his mistakes. Further, that the Third Party should therefore compensate him.

The 1st Defendant's counsel in submission dated 1st March 2013 reiterated the evidence given by DW, and further argued that although the 1st Defendant performed his part of the contract, the entire transaction was frustrated by the Third Party who should be condemned to compensate the Plaintiff accordingly. The counsel contended that it was clear from the provisional house allocation letter dated 8th July 2003 from the Third Party and clause 2 of the sale agreement between the 1st Defendant and Third Party dated 5th March 2004 that the Third Party did sell the entire property with out buildings in L.R. No. 209/14990/18 to the 1st Defendant. However, that in the survey process errors were committed by the surveyor acting on behalf of the Third Party which resulted in the Plaintiff's house being astride two plots.

The 3rd Defendant's Case

The 3rd Defendant's witness was James Muriuki (DW2), its managing Director. DW2 produced a transfer dated 3rd June 2004 as the 3rd Defendant's Exhibit 1, and stated that the 3rd Defendant was the owner of LR No. 209/14990/19 having purchased the land from Mr. Muchai Githu at a price of Kshs.4, 947,600/= . He stated that the 3rd Defendant's property is as described in the title for LR No. 209/14990/19 which he produced as the 3rd Defendant's Exhibit 2. The witness informed the court that at the time of purchase, there was a bungalow on the property as well as a second building, a part of which was also in LR No. 209/14990/18 wherein the 1st Defendant was living.

DW2 averred that the 3rd Defendant through its notice to vacate dated 5th October 2004 which he produced as the 3rd Defendant's Exhibit 3, informed the Plaintiff and the 1st Defendant of their intention to develop their property since the bungalows thereon were dilapidated. Further, that after expiry of the 30 days notice, DW2 encouraged the 1st Defendant to vacate the bungalow he was residing in. He confirmed that demolition of the premises the 1st Defendant was living in was undertaken in early 2005, and that only part of the said building that was demolished was the one located in LR No. 209/14990/19 without interference to the part of the building that was in LR No. 209/14990/18.

It was the testimony of DW2 that LR No. 209/14990/19 has since been redeveloped and there are 10 town houses thereon and further, that the neighbouring LR No. 209/14990/18 was also developed and has apartments built thereon. According to DW2, all the action of the 3rd Defendant were within its legal rights and did not in any way interfere with the 1st Defendant's LR No. 209/14990/18.

During cross-examination by Mr. Mugo, DW2 informed the court that LR No. 209/14990/19 had a bungalow belonging to the 3rd Defendant, and next to it was a two-bed roomed bungalow occupied by the 1st Defendant which was astride both LR No. 209/14990/19 and LR No. 209/14990/18. DW2 stated that after demolishing the part of the bungalow which was on their plot, the portion which remained and the garage were not habitable. It was the evidence of DW2 that although the 1st Defendant was served with a notice to vacate, he never responded in writing.

During further cross-examination by Mr. Langa't, DW2 averred that he had engaged his own surveyor who pointed out the beacons for LR No. 209/14990/19 , and informed him that part of the bungalow on LR No. 209/14990/18 was also on his plot. DW2 maintained that his surveyor was relying on the deed plan prepared by Mr. Oyato, a surveyor who was working for Third Party. According to DW2, an attempt by the Plaintiff, the 1st Defendant and the surveyor to alter the survey plan and ensure that the bungalow was within boundaries of LR No. 209/14990/18 was not successful because the 3rd Defendant had already bought LR No. 209/14990/19. DW2 insisted that he issued a notice to vacate to the 1st Defendant because he was occupying part of the 3rd Defendant's property.

Upon cross examination by Mr. Bundotich, DW2 stated that they demolished the property on their plot pursuant to the notice given to the 1st Defendant, who refused to move. DW2 maintained that he had no contractual relationship with the Third Party with regard to LR No. 209/14990/19, and further, that the Third Party was also not party to the notice to vacate or the demolition by the 3rd Defendant.

The 3rd Defendant's counsel in submissions dated 7th February 2013 stated that both LR No. 209/14990/18 and LR No. 209/14990/19 were registered under the Registration of Titles Act (now repealed). It was submitted on behalf of the 3rd Defendant that being the registered proprietor of L.R. No. 209/14990/19, the 3rd Defendant was the absolute and indefeasible owner of the land together with all the buildings and improvements therein as provided in section 23 of the said Act. Reliance was placed in the case of **Nairobi Permanent Markets Society vs Salimia Enterprises (1995-1998) EA 232** where the court held that under Section 23 of the Act, a Certificate issued by the Registrar to any purchaser of land was to be taken by all Courts as conclusive evidence that the person named therein was the proprietor of the land is the absolute owner thereof.

While making reference to the Valuation Report produced in Court, counsel submitted that the main house of the development was within the boundaries of L.R. No. 209/14990/19 which was owned by the 3rd Defendant. Counsel contended that there was no evidence to show that the 3rd Defendant interfered with any developments on the Plaintiff's property, nor were there allegations of breach of the Plaintiff's proprietary right to his property which would entitle the Plaintiff to reliefs against it.

Counsel for the 3rd Defendant submitted that there must be privity of contract for a person to claim a relief against the party in breach, and stated that the claim before the Court was founded upon an alleged breach of the agreement dated 27th May 2004 entered into between the Plaintiff and the 1st Defendant, and which the 3rd Defendant was not party to. Counsel for the 3rd Defendant also argued that the Plaintiff has since re-developed his property into a block of flats and therefore, that the Plaintiff has not suffered any loss and the suit is only meant to enrich the Plaintiff which the court should not allow. Lastly, it was submitted for the 3rd Defendant that the order for permanent injunction sought in the Plaintiff has been overtaken by events and as such, it is incapable of being granted.

The Third Party's case:

The Third Party called Julius Kinyondi Matagero (DW3) to testify on its behalf. DW3 stated that he was employed by the Third Party as an information technology officer. He produced the Third Party's List and Bundle of Documents dated 3rd March 2009 and filed on 9th March 2009 as the Third Party's Exhibit 1. He informed the court that L.R. No. 209/14990/18 used to be occupied by the 1st Defendant and was offered to him for sale, whereof he paid the purchase price of 3,420,000/= . It was the testimony of DW3 that the Third Party gave a letter of offer to the 1st Defendant who complied and the property was transferred to him. He produced as evidence the said sale agreement dated 5th March 2004 and correspondence on the said sale agreement between the Third Party's and 1st Defendant's Advocates which was in the Third Party's Exhibit 1.

According to DW3, the Third Party was not the owner of the Plaintiff's property by the time of its demolition, and was therefore not party to the demolition. While making reference to the provisional allocation letter dated 8th July 2003 produced in evidence by the 1st Defendant, DW3 stated that the allottees indicated their interest before a letter of offer was issued, and that it was not intended to create a binding contract. According to DW3, it was the sale agreement entered into with the 1st Defendant which created a binding contract, and that the Third Party did not enter into any contract with the Plaintiff or 3rd Defendant with respect to L.R. No. 209/14990/18 and L.R. No. 209/14990/19 respectively.

During cross examination by Mr. Mugo, DW3 confirmed that the 1st Defendant was the occupant of the house on L.R. No. 209/14990/18 which consisted an old 2 bed-roomed bungalow with a servant quarter and a garage at the time of the sale of the said property by the Third Party. According to DW3, the

developments referred to in clause 2 of the sale agreement entered into with the 1st Defendant could have referred to the bungalow and out buildings.

DW3 admitted that Mr. Oyatto who was their surveyor made reference to technical errors in his letter dated 9th September 2004. According to the witness, if the house occupied by the 1st Defendant was astride L.R. No. 209/14990/18 and L.R. No. 209/14990/19 then it belonged to both owners. This witness also informed the court that the mistake visited on the 1st Defendant was occasioned by the surveyors and further, that the purchasers or allottees did not have any mandate to instruct the surveyors, who were to only receive advise from Third Party during the survey.

Upon cross-examination by Mr. Langat, DW3 stated that he joined employment with the Third Party in January 2000 as an Information Technology Officer, and that he was not the one in-charge of the Third Party's properties. Further that there was an officer who was in charge of the Third Party's properties who left employment in 2010. DW3 admitted to not having played any personal or direct role in the sale agreement between the Third Party and the 1st Defendant. Further, the witness admitted that paragraph 3 of his witness statement stated that the property being sold to the 1st Defendant had a bungalow and outbuildings.

While stating that the transfer to the 1st Defendant was done on 23rd June 2004 before the letter from Mr. Oyatto dated 9th September 2004, DW3 insisted that the technical errors were detected after the transfers and stated that the surveyor could have independently acted on the instructions of any other person since the property had since been transferred by the Third Party. The witness could however not confirm whether the surveyor was doing so, and whether the Third Party agreed to correct the technical errors made by the surveyor. DW3 confirmed to the court that the amended survey plan and the sub-division scheme were approved but not implemented.

Upon further cross-examination by Mr. Mburugu, DW3 stated that the provisional allocation to the 1st Defendant did not bear any contractual effect and further, that what was being sold is what is contained in the deed plan attached to the title of L.R. No. 209/14990/18. DW3 informed the court in re-examination that Mr. Oyatto was never an employee of the Third Party, and that the 1st Defendant had not sued the Third Party claiming liability for the mistakes of the surveyor. According to the witness, the property had been transferred by the Third Party to the 1st Defendant by June 2004, and no technical issues were raised before then.

The Third Party's submissions are dated 28th February 2013 and were filed in court on 6th March 2013. The counsel for the Third Party reiterated the facts as stated in the pleadings and testimony of parties therein. He argued that the agreement of sale between the Plaintiff and the 1st Defendant which the Third Party was not privy to did not refer to a two – bed roomed bungalow and outdoor buildings, and further, that the agreement did not have a term obligating the 1st Defendant to give vacant possession.

It was argued for the Third Party that the agreement for sale dated 5th March, 2004 between the 1st Defendant and the Third Party, and the letter of expression of intent referred to in the said agreement did not indicate the particulars of the buildings. The Third Party contended that from the contract documents, it is clear that the 1st Defendant did not represent to the Plaintiff that he was selling a two bed-roomed bungalow and outbuildings. Counsel for the Third Party also submitted that the evidence adduced is consistent that the property demolished by the 3rd Defendant legally fell on its property, who cannot therefore be called upon to answer the Plaintiff's claim for acting within its rights.

While making reference to the valuation report prepared by Leebunei Diversity Limited on 7th January, 2005 after the demolition, counsel argued that the report stated that the main house was not within the boundaries of L.R. No. 209/14990/18 but was on L.R. No. 209/14990/19 and the therefore, that what was demolished was in the 3rd Defendant's premises. Counsel stated that the valuation report does not state what would have been the actual value of the property if the bungalow had not been demolished, and did

also not state the value of the premises left in the Plaintiff's land upon demolition to enable the Court ascertain what the Plaintiff actually lost from the demolition.

It was further submitted for the Third Party that the Plaintiff had neither pleaded particulars of breach of contract by the 1st Defendant nor particulars of fraud or misrepresentation by the 1st Defendant, which particulars cannot be inferred since the Plaintiff is bound by his pleadings. The Third party in addition submitted that that the 1st Defendant's claim against the third party is for indemnity and or contribution on grounds that you were liable in negligence as stated in the Plaint, yet there is no single allegation of negligence against the 1st Defendant set forth in the Plaint and neither are there any particulars of negligence pleaded.

Further, that the third party notice does not plead any particulars of negligence either. Counsel relied on the treatise by **Mulla on the Code of Civil Procedure** Volume 2 at page 250 line 24 to argue that the third party notice shall state the nature and grounds to the claim or nature and extent of any relief or remedy or the nature of the question or issue sought to be determined. The Third Party also relied on the decisions in **Yafesi Walusombi vs Attorney General of Uganda (1959) EA 223** and **Sammy Ngigi Mwaura Vs John Mbugua Kagai And Another, Civil Appeal No. 177 of 2002** that the the third party proceedings did not meet the requirments set by law.

The Issues for Determination:

I have carefully considered the pleadings and arguments made by the parties. From the evidence it was evident that the prayers sought by the Plaintiff for a permanent injunction restraining the 3rd Defendant had been overtaken by events as both the Plaintiff and 3rd Defendant have since constructed on L.R. No. 209/14990/18 and L.R. No. 209/14990/19 respectively. I also found upon perusal of the court record that no interim orders were granted to stop restrain such construction on, or development of the two parcels of land. I therefore found the main issues for determination to be as follows:

1. Was there breach of the terms of the contract between the Plaintiff and the 1st Defendant as regards the property being sold and purchased?
2. Is the 1st Defendant liable to pay damages to the Plaintiff, and if so what is the quantum?
3. Is the 2nd Defendant liable to pay the Plaintiff the value of the demolished buildings, and if so what amount?
4. Is the 1st Defendant entitled to indemnity and/or contribution from the Third Party for any liability incurred, and if so, to what extent?

The Findings and Determination

a. Was there a breach of the agreement between the Plaintiff and 1st Defendant?

The Plaintiff relied on the description in the provisional letter of allocation produced as his Exhibit 1, stating the property being sold by the 1st Defendant as "LR No. 209/14990/18, Plot size; 0.0786, House Type: A bungalow with outbuildings, Location: Tebere Crescent, Kileleshwya, Nairobi". He also relied on the beacons and deed plan of the said property shown to him to him by the 1st Defendant and he argued that the property that was sold to him was of a different acreage and quality from that agreed upon.

The agreement between the Plaintiff and 1st Defendant dated 27th May 2004 was produced in evidence as the Plaintiff's Exhibit 15 and stated as follows in its recital:

"WHEREAS the seller vide an agreement for sale dated 5th March 2004 is purchasing L.R. No. 209/14990/18 (hereinafter called "the property") from Teleposta Pension Scheme for the sum of Kshs 3,420,000/= and WHEREAS the Buyer is paying the said purchase price on behalf of the Seller on the agreement that the Seller will transfer the property to the Buyer, and the Buyer has at

the date of this agreement paid Kshs. 342,000/= towards the said purchase price.”

It is my opinion that a contract can include terms incorporated from another document by reference, as well as the terms of a contract entered into by one of the parties and a third party (See Halsbury's Laws of England, Fourth Edition (Reissue), Volume 9(1) at paragraphs 686 and 688) The terms of the contract entered into by the Plaintiff and Defendant dated 27th May 2004 was with reference to the property known as L.R. No. 209/14990/18, that in turn was being purchased by the 1st Defendant in the sale agreement dated 5th March 2004 entered into with the Third Party. The terms of the agreement dated 5th March 2004 with regard to the said property was in clause 2 which stated as follows:

“The property sold is all that Leasehold Title number L.R. No. 209/4990/18 Nairobi together with the buildings and all developments thereon.”

According to the copy of title for L.R. No. 209/14990/18 produced in evidence by the 1st Defendant, the said property is described as measuring 0.0787 hectares and was first registered in the name of the Third Party on 12th November 2002, and then transferred to the 1st Defendant on 23rd June 2004 and thereafter to the Plaintiff on the same date.

The descriptions of the said property in the provisional letter of allocation and those given to the Plaintiff by the 1st Defendant do not appear on the title, and were representations of fact that were made to the Plaintiff before entering into contract. The contractual effect of representations of fact in contracts for the sale of land is stated in Halsbury's Laws of England, Fourth Edition, Volume 42 at paragraph 57 as follows:

“The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact made by the vendor, the purchaser expected to get. Where, owing to a misdescription, the vendor fails to perform this duty, and the misdescription, although not proceeding from fraud, is material and substantial, affecting the subject matter of the contract to such an extent that it may reasonably be supposed that, but for the misdescription, the purchaser might never have entered into the contract at all, the contract may be avoided altogether, and if there is a clause of compensation, the purchaser is not bound to resort to it. Where a representation is true at the time when it is made, but owing to change of circumstances becomes untrue before or at the time of completion, it is the vendor's duty to disclose the change of circumstances. However, where the discrepancy between the property as offered by the vendor and the property which, by reason of the defect, the vendor is able to hand over is not such as to alter substantially the nature of the property, then the contract is enforced subject to payment of compensation by the vendor.”

The sale agreement between the Plaintiff and 1st Defendant was entered into on 27th May 2004 just over 2 months after that between the 1st Defendant and Third Party dated 5th March 2004. The statements by the 1st Defendant on the description of the property were made at the time of making of the two contracts and were to an extent confirmed in the sale agreement of 5th March 2004, which referred to the buildings and all developments on L.R. No. 209/4990/18. The Plaintiff and 1st Defendant both testified that their understanding and intention was that the buildings referred to included the bungalow that was found to be astride L.R. No. 209/4990/18 and L.R. No. 209/4990/19. Further, that this was confirmed by surveyors who pointed out beacons that put the bungalow within the property that was to be purchased by the Plaintiff.

It is therefore the finding of this court that the intention of the parties was that the bungalow and all the outbuildings that had been shown to the Plaintiff would be part of the property that was subject of the sale agreements entered into, which later turned out not to be the case. There was thus clearly a misrepresentation of the property that was being purchased by the Plaintiff.

This finding however has to be balanced against the clear duty on the part of the Plaintiff as the purchaser in the contract of sale of land, to conduct due diligence and inform himself on all the relevant aspects concerning the property that he was seeking to purchase. The rule of caveat emptor applies to contracts for the sale of land, and this responsibility on the part of the Plaintiff is clearly explained in Halsbury's Laws of England, Fourth Edition, Volume 42 at paragraph 51 as follows:

“Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.

The vendor is not bound to call attention to patent defects, the rule is “caveat emptor”. Therefore a purchaser should make inspection and inquiry as to what he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition, and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars of description of the property in the contract is not a ground of objection if it is readily corrected on inspection.”

The question therefore to be answered by this Court is whether the Plaintiff did undertake such due diligence. Such due diligence would have included undertaking his own independent survey that would have established whether the representations made by the 1st Defendant were correct or not. The Plaintiff testified that he carried out a search and was shown the beacons and a deed plan by the 1st Defendant, that corresponded to the description of the property he was buying. It is the finding of this court that to the extent that the 1st Defendant went out of his way to give detailed and technical representations about the property to be purchased and which was consequently was relied upon by the Plaintiff, he was thereby bound to deliver property corresponding to that description and was in breach of the agreement.

b. Is the 1st Defendant liable to pay the Plaintiff damages?

The effect of misrepresentation is to entitle the wronged party to either repudiate or rescind a contract or to be paid compensation. The measure of compensation or damages payable differs depending on whether the misrepresentation was fraudulent, negligent or innocent. In the present case the 1st Defendant testified that he also relied on representations made to him by the Third Party's in the provisional letter of allocation and those made by the Third Party's surveyors about the beacons and deed plan of the property being bought, and that he did not intend to deceive the Plaintiff. He cannot therefore be found to have been fraudulent or negligent in his representations, and this is clearly a case where there was innocent misrepresentation on his part.

The measure of damages in cases of innocent misrepresentation is stated in McGregor on Damages, Eighteenth Edition at paragraph 41-062 to be as follows:

“It is submitted that the damages should here aim to put the claimant, so far as it can be done by a money award, into the same position as he would have been if a decree of rescission had been granted to him. Not only does this appear to be the appropriate aim for damages which are explicitly a substitute for rescission, but also it leads to a measure of damages which meets the criterion of failing below the tortious measure. It becomes necessary therefore to examine what is, for a claimant, the practical result of setting aside the contract into which he has been induced to enter by misrepresentation. First and foremost, of course, rescission entails the mutual restoration, generally in specie, of benefits conferred in performance of the contract.”

The Plaintiff therefore would therefore have been put back to the financial position he was in before the contract was made, had he chosen to set aside the contract as a result of the misrepresentation. He brought evidence of payments made with regard to the purchase of the suit property of Kshs 3,420,000/=. He

however also testified that upon realisation of the misrepresentation as to the description and size of the property he had bought, he decided to take the remaining part of the property shown in the title of 0.0787 hectares, and thereafter developed apartments thereon. I have perused the deed plan the Plaintiff claimed to have relied upon when purchasing the suit property, which was annexed to the valuation report he produced as his Exhibit 16. I note that the acreage for L.R. No. 209/4990/18 in the said deed plan was stated as 0.1252 hectares. The Plaintiff therefore ended with about half of the size of land that had been described and represented by the 1st Defendant.

The Plaintiff and 1st Defendant also testified that it was the 1st Defendant in occupation of the buildings that were to be sold to the Plaintiff at the time of their demolition by the 3rd Defendant. The Plaintiff further testified that he has since replaced the said buildings and built apartments on L.R. No. 209/14990/18. The present value of the land was estimated by PW2 to be between 14 and 15 million. It would therefore not be reasonable for this court to find that the Plaintiff suffered any loss of value or loss of expectation with regard to the buildings that were to be sold to him. It is the finding of this court that the financial loss suffered by the Plaintiff was mitigated to the extent of the actions he subsequently undertook as described in the foregoing, and a computation of his measure of compensation has to take into account the gains he made therefrom. I accordingly find that a sum of Kshs 1,500,000/=, which is slightly less than half of the purchase price the Plaintiff paid for the property he bought, would be adequate damages for the financial loss he suffered as a result of the 1st Defendant's misrepresentation.

c. Is the 3rd Defendant liable to pay value of the demolished buildings?

As there was no contract entered into between the Plaintiff and the 3rd Defendant, the only action that can be maintained by the Plaintiff with respect to the buildings demolished by the 3rd Defendant is with regard to tortious liability. The 3rd Defendant has however produced evidence of his tilt to L.R. No. 209/14990/19 and he claimed that the buildings he demolished were within the land covered by the said title. These claims were not disproved by the Plaintiff other than to rely on the misrepresentation by the 1st Defendant that the said buildings were in L.R. No. 209/14990/18, and for which he has already been awarded damages.

The evaluation report produced by the Plaintiff as his Exhibit 16 also confirmed that indeed some of the buildings were astride the two properties. I find that having proved that it was owner of L.R. No. 209/14990/19, the 3rd Defendant was within their legal rights and interest to deal with the said property in the manner it saw fit pursuant to section 23 of the Registration of Titles Act (since repealed). In addition, since the Plaintiff admitted in his testimony that the part of the said buildings located in the L.R. No. 209/14990/18 were not demolished by the 3rd Defendant, I also find that there was no infringement of the Plaintiff's proprietary rights in this respect, and that he is not entitled to any damages from the 3rd Defendant.

d. Is the 1st Defendant entitled to indemnity or contribution from the Third Party?

On the last issue of the 1st Defendant is entitled to indemnity or contribution from the Third Party on the grounds that it was liable in negligence as the vendor of L.R. No. 209/14990/18, I will seek to address the aspect of indemnity first. The right to indemnity arises as a result of either an express or implied contract to that effect, or by operation of the law. The right can also arise as an incident of certain legal relationships such as agency or trust relationships. (see Halsbury's Laws of England, 5th Edition, Volume 49 at paragraphs 1255-1261)

In the present case the sale agreement entered into between the 1st Defendant and Third Party had no terms as to indemnity by the Third Party. In addition the statutory right to damages available under section 24 of the Registration of Titles Act (since repealed) is not applicable in this case as the misdiscretion or errors made were not with respect the certificate of title or any entry in the register or

certificate of search. There was also no special relationship shown between the 1st Defendant and Third Party in the sale of L.R. No. 209/14990/18 that would give rise to a fiduciary relationship. I therefore find that the 1st Defendant is not entitled to any indemnity from the Third Party for these reasons.

There is however the possibility of the 1st Defendant recovering contribution from the Third Party, if the Third Party is found to be liable for the misrepresentation about the property sold to the Plaintiff. PW3 called by the Plaintiff testified that he was contracted by the Third Party to undertake a survey of its various properties and prepare deed plans. He produced a letter dated 9th September 2004 which he wrote and in which he admits some errors in this process that affected the property that was bought by the Plaintiff. The error specifically pointed was the nonalignment of the boundaries of L.R. No. 209/14990/18 with the buildings thereon, resulting in part of the buildings being located on a separate parcel of land. Further, that there were attempts to correct these errors and it was too late as the Third Party had already transferred the property.

The 1st Defendant testified that the said PW3 had shown him the beacons of the property he was to buy when it was first allocated to him by the Third Party, and that all the disputed buildings were within the beacons. It is these beacons that he subsequently showed to the Plaintiff. Further, that when they were later changed, he wrote to the Third Party on 6th September 2004 and got no response to his letter. The 1st Defendant also testified that the deed plans annexed to the valuation report produced as the Plaintiff's Exhibit 16 and which he relied upon were prepared by PW3 on behalf of the Third Party. The witness for the Third Party DW3 denied that PW3 was an employee of the Third Party, but could not confirm if he was acting on behalf of, or upon the instructions of the Third Party.

It is my finding that PW3 was acting as an agent of the Third Party, as he could not have been surveying its property without authority. Even if it is the case as alleged by the Third Party that he had no such authority, he had ostensible authority as a result of his actions. This position is also confirmed by the fact that the deed plans attached to the titles for L.R. No. 209/14990/18 and L.R. No. 209/14990/19 that were produced in evidence were prepared by PW3. The two properties were sold by the Third Party to the 1st and 3rd Defendant's respectively.

It therefore follows that the misrepresentation made by PW3 in the course of undertaking his duties of survey of the above-mentioned properties had the same effect as if they were made by the Third Party. It is also the finding of this court that from the evidence adduced the Third Party bears greater responsibility for the misrepresentation made to both the Plaintiff and 1st Defendant as the said initially emanated from PW3 who was their agent. I therefore find the Third Party liable for contribution to the extent of 75% of the damages awarded to the Plaintiff as against the 1st Defendant.

I have considered the Third Party's submissions that the particulars of negligence against it were not pleaded or proved, and that the Third Party Notice did not meet the requirements of the law, as it did not state the nature and extent of the claim sought. It is my view in this regard that adequate evidence has been brought as to the Third Party's culpability, and it is within the court's discretion to arrive at an equitable and just determination as to the extent of their liability. In addition it is too late in the day to bring an objection on the format of a Third Party Notice filed on 11th April 2005.

Arising from the above-stated reasons, this Court enters judgment as follows:

1. The Plaintiff is entitled to be paid damages of a sum of Kshs 1,500,000/= as assessed in the foregoing, with interest at court rates with effect from the date of this judgment until the date of full payment.
2. The 1st Defendant shall pay the Plaintiff a contribution of the said damages of Kshs 375,000/= with interest at court rates with effect from the date of this judgment until the date of full payment.
3. The Third Party to pay to the Plaintiff a contribution of the said damages of Kshs 1,125,000/= with interest at court rates with effect from the date of this judgment until the date of full payment.
4. The Third Party shall pay 75% of the Plaintiff's costs of the suit while the 1st Defendant shall pay

the Plaintiff 25% of his costs of the suit. The Plaintiff shall pay the 3rd Defendant its costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____12th____ day of ____June____, 2013.

P. NYAMWEYA

JUDGE