



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL CASE NO. 142 OF 2005**

**DR. MOSES GAKURU THUO.....1<sup>ST</sup> PLAINTIFF**  
**ARCHITECT KAMAU JAMES NJENDU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA NATIONAL ASSURANCE CO. (2001) LTD.....1<sup>ST</sup> DEFENDANT**  
**KENCENT HOLDINGS LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Dr. Moses Gakuru Thuo and Architect Kamau James Njendu**, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein, filed an action against **Kenya National Assurance Co. (2001) Ltd** and **Kencent Holdings Ltd.**, being the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein, by way of the 2<sup>nd</sup> Further Amended Plaintiff dated 16<sup>th</sup> July 2008. In the aforesaid Plaintiff, the Plaintiffs sought for judgment against the Defendants in the following terms:

- (a) A declaration that there is a valid contract of sale for Plot No. 397 (Original No. 181 & 187)/1MN which was created between the Plaintiffs and the 1<sup>st</sup> Defendant.**
- (b) A declaration that the Plaintiff having a valid contract, paid deposit and demonstrated the will and ability to settle the balance of the consideration, having taken possession of the suit property and time being of essence, the 1<sup>st</sup> Defendant could not rescind the contract of sale; and its failure to complete the contract was unlawful.**
- (c) Kshs. 115,000/= plus interest of 15% per annum.**
- (d) General damages.**
- (e) Costs of the suit.**
- (f) Interest**

The Defendants denied the Plaintiffs' claim by relying on the 1<sup>st</sup> Defendant's defence.

The Plaintiffs' case is supported by the evidence of five witnesses. Before analyzing the evidence, let me give a brief overview of this case. In the Plaintiff, the Plaintiffs pleaded that Kenya National Assurance Co. (2001) Ltd., the 1<sup>st</sup> Defendant herein, was the registered proprietor of the parcel of land known as **Plot No. 397 (original No. 181 & 187) I/M.N.**, hereinafter to be referred to as the '**suit land**'. The aforesaid land measures approximately eighty six (86) acres. It is said that the suit land was offered for sale by the 1<sup>st</sup> Defendant in 2004 through an advertisement published in the local media. The Plaintiffs submitted their offer to purchase the land at Ksh.28 Million on 2<sup>nd</sup> November 2004. The offer is said to have been accepted by the 1<sup>st</sup> Defendant on 13<sup>th</sup> April 2005. A draft agreement was prepared and

forwarded to the Plaintiffs by the firm of Charles Kioko Munyithya & Co. Advocates, the parties' joint advocate. Upon receipt of the draft agreement, the Plaintiffs are said to have executed the agreement by appending their signatures. The Plaintiffs claimed they paid a sum equivalent to 20% of the consideration to the firm of Charles Kioko Munyithya & Co. Advocates. The Plaintiffs aver that upon making the aforesaid payment, they proceeded to organize for the eviction of the squatters who had occupied the suit land. While waiting for the 1<sup>st</sup> Defendant to execute its part of the agreement, the Plaintiffs received information from the 1<sup>st</sup> Defendant of its intention to terminate the contract in favour of the 2<sup>nd</sup> Defendant. The Plaintiffs aver that they were able, willing and ready to complete the transaction at all times. It is the Plaintiffs' submission that due to the 1<sup>st</sup> Defendant's actions, they incurred huge expenses and time in pursuing completion of the contract. The Plaintiffs also aver that the 1<sup>st</sup> Defendant's act of accepting the Plaintiffs' offer vide the letter dated 13<sup>th</sup> April 2005 constituted a contract of sale between the Plaintiffs and the 1<sup>st</sup> Defendant. In its defence the 1<sup>st</sup> Defendant pleaded that the suit land was registered in its name in trust for the closed life fund business of the collapsed Kenya National Assurance co. Ltd., hence any sale of the land was subject to the consent of the Minister for Finance. The 1<sup>st</sup> Defendant denied receipt of the 20% down payment from the Plaintiffs. It also denied having encouraged the Plaintiffs to evict squatters from the suit land nor authorizing them to fence it. According to the 1<sup>st</sup> Defendant, there was no valid sale agreement as envisaged under *Section 3* of the Law of Contract (Amendment) Act. The 1<sup>st</sup> Defendant justified the sale to the 2<sup>nd</sup> Defendant on the basis that it got the best price. The 1<sup>st</sup> Defendant urged this court to dismiss the suit.

Having given the general overview of the case, let me now set out in brief, the evidence presented by each side. I have already stated that the Plaintiffs tendered the evidence of five witnesses in support of their case. The first to testify was Dr. Moses Thuo (P.W.1) the 1<sup>st</sup> Plaintiff. P.W. 1 told this court that in the year 2004, he read an advertisement of the 1<sup>st</sup> Defendant published in the Daily Nation Newspaper inviting bids for the purchase of the suit land. It is then that P.W. 1 approached **Architect Kamau James Njendu** (P.W.5), the 2<sup>nd</sup> Plaintiff to team up with him to make a joint bid to purchase the land. The duo (i.e. P.W.1 and P.W.5) stated that they consulted one Maina Chege (P.W.2) a valuer to give them an opinion on the viability of the land. P.W.1 said that they presented their bid to purchase the land at Ksh.28,000,000/= upon being told by P.W.2 that they would make a profit of Ksh.395,000,000/= if they subdivided and sold the land. P.W.1 produced as an exhibit in evidence the letter dated 13<sup>th</sup> April 2005 in which the 1<sup>st</sup> Defendant requested the Plaintiffs to confirm if they were still interested to purchase the suit land at Ksh.28,000,000/=. The Plaintiffs claimed they accepted the contents of the letter as the 1<sup>st</sup> Defendant's offer. P.W. 1 said they then visited the suit land whereupon they found some squatters, paid a deposit of Ksh.5.6 Million representing 20% of the consideration to the joint advocate. P.W.1 also claimed that they appointed Worthy Contractors to repair the damaged fence and to fence the entire land at a cost of Ksh.115,000/=. Despite doing what was required of the Plaintiffs, P.W.1 said, the 1<sup>st</sup> Defendant rescinded the contract. P.W.1 alleged that they had spent time in meetings planning how to purchase and develop the property thus losing a lot of time to attend to his clinic. P.W.1 further alleged that he was greatly inconvenienced and suffered mental anguish as a result of the 1<sup>st</sup> Defendant's actions. Maina Chege (P.W.2) told this court that he was consulted by the Plaintiffs to advise them on the market price of subdivisions 1/8 and 1/16 of the suit land. He said he gave them an estimate value of 1/8 and 1/16 of an acre of the land retailing at Ksh.600,000/= and Ksh.350,000 respectively. He produced his report as an exhibit in evidence. Fredrick Waweru Njoroge (P.W.4), a businessman in construction industry, told this court that he was instructed by the Plaintiffs to evict the squatters occupying the suit land and to fence the land. P.W.4 said he used Administration Policemen and soldiers to carry out the eviction of squatters from the suit land within two days. He acknowledged having received Ksh.115,000/=. He said he raised an invoice for Ksh.150,000/= which was presented to the 1<sup>st</sup> Defendant but the same remains unsettled to date. Architect James Kamau Njendu (P.W.5) corroborated the evidence of P.W.1, his partner in the transaction in dispute. P.W.5 said that it was their intention to purchase the suit land, subdivide and sell portions leaving a bigger portion for the establishment of a hospital. He claimed that a professional property consultant told them that if they did that they would get a profit of Ksh.235 Million. The 2<sup>nd</sup> Plaintiff went ahead to state that they considered the second option of subdividing the land, develop housing units and then sell. According to P.W.5, the second option meant

they would have put up 96 apartments, 720 maisonettes and still set aside 10 acres to put up a hospital. The witness said that the total cost would have been Ksh.3.1 billion whilst the net income would have been Ksh.752,000,000/=. P.W.5 said they considered those options before bidding to purchase the property. The 2<sup>nd</sup> Plaintiff alleged that the 1<sup>st</sup> Defendant had misrepresented to the Plaintiffs that their bid had been accepted by sending the draft agreement through their joint advocate. It is also alleged that the 1<sup>st</sup> Defendant had misled the Plaintiffs to believe that it had cancelled the 2<sup>nd</sup> Defendant's bid because it did not meet the terms of the bid and that it would coordinate with the Plaintiffs to remove the squatters. The 2<sup>nd</sup> Plaintiff said he believed the 1<sup>st</sup> Defendant since it was a reputable company, hence they acted on their representation by signing the draft sale agreement and paid their portion of fencing in the sum of Ksh.115,000/=. P.W.2 claimed they approached financiers and a consortium. They were devastated when the 1<sup>st</sup> Defendant rescinded the contract. P.W. 1 produced audited statement of accounts showing they made losses as a result of the 1<sup>st</sup> Defendant's actions.

The Defendants' case was supported by the evidence of three witnesses. Sebastian Madimwa (D.W.1), the 1<sup>st</sup> Defendant's property caretaker in Mombasa, told this court that he took valuers to the suit land to identify the beacons on the suit land whom he paid Ksh.125,000/=. D.W.1 further stated that the 1<sup>st</sup> Defendant paid Ksh.50,000/= to hire a bulldozer and labourers to remove squatters and to provide security. He denied the allegation that he met with P.W.1 to negotiate for payment over the fencing of the suit land. D.W.1 said the land was not fully fenced hence squatters crept back into the land and that the Plaintiffs never took possession of the same. D.W.1 confirmed that he was aware that the offer to the Plaintiffs was rescinded. This witness further stated that the squatters were evicted in May 2005 and that the eviction took place in phases. Alexander Thuraira Kamincha (D.W.2), being the Chairman and Chief Executive of the 1<sup>st</sup> Defendant said that the suit land was being sold to pay off policy holders and as a parastatal, they are required to obtain permission for the sale of property. He said he wrote to the Minister of finance and obtained approval after which he invited bids for the purchase of the suit land. D.W. 2 confirmed having received the bids of the Plaintiffs and the 2<sup>nd</sup> Defendant for Ksh.28,000,000 and 43,945,000/= respectively. D.W.2 said the bids were considered and the 1<sup>st</sup> Defendant accepted the 2<sup>nd</sup> Defendant's bid and forwarded the draft agreement. This witness further stated that there was confusion on transmission of correspondences and notice rescinding the offer to the 2<sup>nd</sup> Defendant was not received by them resulting in the Finance Minister instructing the 1<sup>st</sup> Defendant to stop the offer to the Plaintiffs since a better offer was received from the 2<sup>nd</sup> Defendant. D. W. 2 said that since the suit land belonged to the public and as a complaint was received, the same was investigated found to be with merit and in line with public policy, the 1<sup>st</sup> Defendant accepted the 2<sup>nd</sup> Defendant's offer being the highest bidder. D.W. 2 also said that the draft agreement prepared by their joint advocate i.e. Charles Kioko Munyithya & Co. Advocates was not in line with the documents prepared for the institution as it was the board policy that the Attorney General would prepare the document as they do not accept private law firms to act as stakeholders on sales involving funds belonging to the public. D.W.2 also said that the draft agreement was not approved by the 1<sup>st</sup> Defendant's board hence there was no valid agreement. D.W. 2 produced the standard sale agreement the 1<sup>st</sup> Defendant entered with the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant is said to have received a sum of Ksh.8,800,000/= as a down payment from the 2<sup>nd</sup> Defendant and is still awaiting to be paid the remaining balance of Ksh.35,145,000/=. This witness said that the squatters on the suit land were solely removed by the 1<sup>st</sup> Defendant's staff at Mombasa with the assistance of the Provincial Commissioner. D.W.2 produced title documents indicating that the proprietary interest to the suit land has already been transferred to the 2<sup>nd</sup> Defendant. D.W.2 said that their investigations revealed that the letters which were forwarded to the 2<sup>nd</sup> Defendants were never received resulting in the rescinding of the offer to the Plaintiffs. Tabitha Mwaniki (D.W.3) said that as early as 21<sup>st</sup> July 2005, the draft agreement now being relied upon by the Plaintiffs had not been signed by the Plaintiff. She said she was informed by the copy exhibited and annexed to the affidavit of Dr. Moses Kamau sworn in support of the Plaintiff's application dated 21<sup>st</sup> July 2005. D.W. 3 was therefore of the view that both the 1<sup>st</sup> Defendant and the Plaintiffs never signed the draft sale agreement as required under Section 3(3) of the Law of Contract Act. D.W.3 said that in the absence of a valid signed agreement, then the claim of damages is not tenable. She further alleged that the claim for damages was an afterthought in view of the fact that such a prayer was not filed in the first instance. It was stated by D.W.3 that since there was evidence that the 2<sup>nd</sup>

Defendant did not receive the letters rescinding the offer it was given the benefit of doubt hence there was no discrimination against the Plaintiffs. D.W.3 admitted that the 1<sup>st</sup> Defendant has not received the balance of the consideration from the 2<sup>nd</sup> Defendant because the 1<sup>st</sup> Defendant has not delivered vacant possession of the suit land. D.W. 3 claimed that the 1<sup>st</sup> Defendant's board did not approve nor sanction the appointment of Charles Kioko Munyithya & Co. Advocates. She also alleged that the 1<sup>st</sup> Defendant did not receive the Plaintiffs' deposit.

At the close of evidence, learned counsels from both sides were invited to file their submissions which they did. I have considered the evidence of the witnesses from both sides plus the written submissions, plus the authorities cited and relied by learned counsels. It is appropriate at this stage to state that the Plaintiffs have expressly stated that they do not have any claim against the 2<sup>nd</sup> Defendant. The record shows that the 2<sup>nd</sup> Defendant applied by itself to be joined to this suit as a defendant. It did not also bother to defend the suit. Secondly, the Plaintiffs have also indicated that they are abandoning prayers (a) and (b) of the 2<sup>nd</sup> Further amended Plaintiff because they were no longer pursuing the claim for the suit land but they are instead claiming for both special and general damages plus cost and interest. Though the parties listed 19 issues, I think the following issues appear to arise for the determination of this court:

- (i) Whether or not there was a contract of sale between the 1<sup>st</sup> Defendant and the Plaintiffs?
- (ii) If the answer to (i) above is in the affirmative, whether or not the Plaintiffs performed and or whether they were in a position to perform the contract?
- (iii) If there was no contract by dint of Section 3 of the Law of Contract, are the Plaintiffs entitled to damages?
- (iv) If the answer to (iii) above is in the affirmative, what is the quantum of damages?

I will determine the aforesaid issues in their chronological manner. The first issue is whether there was a contract of sale of land between the Plaintiffs and the 1<sup>st</sup> Defendant? What is not in dispute is that the 1<sup>st</sup> Defendant made an advertisement in the Daily Nation Newspaper inviting bids for the purchase of the parcel of land known as Plot No. 397 (original No. 181 and 187) I/M.N. It is also not in dispute that the Plaintiffs submitted a bid to purchase the suit land for Ksh.28,000.000/= . Further, there is no dispute that the 1<sup>st</sup> Defendant acknowledge receipt and accepted the Plaintiffs' bid vide the letter dated 13<sup>th</sup> April 2005. In aforesaid letter the 1<sup>st</sup> Defendant stated in part as follows: "Our lawyer will draft the sale agreement which will form the basis of the sale contract." Both the Plaintiffs and the 1<sup>st</sup> Defendant are in agreement in their evidence that their joint advocate i.e. Charles Kioko Munyithya & co. Advocates prepared and forwarded a draft agreement to the Plaintiffs. There is also no dispute that the 1<sup>st</sup> Defendant did not sign the agreement but instead proceeded to rescind the Plaintiffs' offer on the bid for the suit land. According to the 1<sup>st</sup> Defendant, the draft agreement did not conform with the provisions of Section 3(3) of the law of Contract in that the same was not signed by all the parties. The 1<sup>st</sup> Defendant urged this court to find that no suit shall be brought upon a contract for disposition of an interest in land unless the provisions of *Section 3(3)* of the Law of Contract Act are complied. The Plaintiffs are of the view that it was quite open and clear that their offer was accepted by the 1<sup>st</sup> Defendant vide its letter of 13<sup>th</sup> April 2005, the sending of the draft sale agreement to the Plaintiffs and the payment of the deposit of 20% of the purchase price. In short the Plaintiffs are saying they acted on the 1<sup>st</sup> Defendant's representation. The Plaintiffs are of the view that in tenders, the Contract is complete once the bidders bid is accepted by the tenderor. The transaction in this suit is the disposition of land. The applicable law therefore is *Section 3(3)* of the Law of Contract Act. In the above provisions, it is a mandatory requirement that a contract relating to land must be in writing and signed by all parties thereto, incorporate all the terms which the parties expressly agreed in one document, signatures of each party signing must be attested by the witnesses who are present at the time the contract is executed. I have carefully perused the draft agreement produced by P.W.1. The same is duly signed by the Plaintiffs. It is the contention of the 1<sup>st</sup>

Defendant that by the time of filing the suit, the agreement had not been signed. A copy of the agreement attached to the affidavit of Dr. Moses Thuo sworn on 21<sup>st</sup> July 2005 was referred to. In determining the issue in conflict, this court is enjoined to consider the documents presented during the trial. It is important to note that the 1<sup>st</sup> Defendant did not object to the production of the draft agreement during the trial by Dr. Moses Thuo. They cannot be heard to object at this late stage. In my view, I find the objection to be an afterthought. There is evidence that the Plaintiffs sent a cheque for Ksh.5.6 Million to the firm of Charles Kioko Munyithya & Co. Advocates. The amount represents 20% of the purchase price. The aforesaid firm of advocates acted for both the vendor and the purchaser. In my view the cheque was received by the advocates as agents for the 1<sup>st</sup> Defendant. It is unfortunate that this court did not receive evidence from the aforesaid law firm to shed light on what happened to the aforesaid cheque. It would appear from the evidence tendered that the draft agreement relied on by the Plaintiffs does not comply with the provisions of *Section 3(3)* of the Law of Contract (Cap. 23 laws of Kenya) in that not all the parties executed the same hence no action can flow from it. Having come to the above conclusion, it means that there is no need to determine the second issue.

Let me turn my attention to the third issue which is to the effect if there is no valid contract by dint of *Section 3(3)* of the Law of Contract, whether the Plaintiffs are entitled to claim general and special damages. It is the submission of the 1<sup>st</sup> Defendant that since there is no valid sale agreement, no claim for damages whether general or special is available. It is further submitted that even if the Plaintiffs were entitled to damages they did not discharge the burden of proof of the loss they suffered as a result of the 1<sup>st</sup> Defendant's action of rescinding the offer of sale. The Plaintiffs are of the view that they are entitled to claim damages on the basis of the 1<sup>st</sup> Defendant's misrepresentation by deceit. What comes out clearly from the evidence tendered and the pleadings is that the Plaintiffs are praying damages for misrepresentation. In my estimation, I think the fact that the contract was rendered invalid did not bar the Plaintiffs from seeking for damages for misrepresentation. In the treatise of **Mcgregor on Damages by Harvey Mcgregor 16<sup>th</sup> Edition at pages 1290-91** the issue is discussed in part as follows:

**“(c) Where no contract between the parties results**

***Where the plaintiff's change of position consequent upon the deceit is not the conclusion of contract, the terminology of normal measure and consequential losses ceases to have relevance and no more exact principle can be obtained than that, in Lord Atkin's formulation in Clark =Vs= Urquhart [1930] A.c 28, the measure of damages is to be “based on the actual damages directly flowing from the fraudulent inducement.” Thus expenses incurred may ground recovery. Accordingly in Richardson =VS= Silvester [1873] L.R. Q.B 34, where the defendant falsely advertised in a paper that a farm was to be let by tender, the plaintiff recovered damages in respect of useless expenses he had incurred in going to inspect the farm and in employing others to value it.”***

Having come to the conclusion that the Plaintiffs are entitled to claim damages for the 1<sup>st</sup> Defendant's misrepresentation, it is important to give a brief summary of how the 1<sup>st</sup> Defendant induced the Plaintiffs to act in this saga. The evidence of Architect Kamau James Njendu (P.W.5) and Alexander Kamincha (D.W.2) agree that the 1<sup>st</sup> Defendant wrote the letter dated 13<sup>th</sup> April 2005 with the intention that the same be acted upon by the Plaintiffs. The Plaintiffs have shown that upon receipt of the aforesaid letter, they proceeded to make a deposit of 205 of the purchase price thus executing a term of the draft agreement. The Plaintiff further executed the draft agreement and thereafter visited the suit land. They held several meetings to plan on how to deal with the offer. The Plaintiffs have also shown that in furtherance of the draft agreement, they spent a sum of Ksh.115,000/= in evicting the squatters and on fencing the suit land. The Plaintiffs were also able to show that upon seeing the advertisement, they engaged the services of a qualified valuer (P.W.2) who gave them guidelines on the viability of the suit land. The Plaintiffs are a reputable doctor and Architect based in Mombasa. They were able to show that they lost valuable time and as a consequence their professional businesses suffered a great deal. Some statement of accounts were presented showing the losses suffered by the 2<sup>nd</sup> Plaintiff which he attributed to the 1<sup>st</sup> Defendant's deal. In the treatise of **Chitty On Contracts 28<sup>th</sup> Edition Volume 1 at page 368** it

was stated as follows:

***“But damages for worry and inconvenience as for mental and physical suffering have been awarded in actions based on fraud.”***

To conclude this matter let me determine the issue regarding to the quantum of damages. Let me point out at this juncture that the Defendants did not address the court over the issue touching on quantum of damages. The Plaintiffs have basically pleaded to be paid special damages in the sum of Ksh.115,000/= and general damages. When dealing with assessment of damages for misrepresentation and or fraud the principles to be applied appear to be well settled. In Chitty On Contract 28<sup>th</sup> Edition Vo. 1 at pages 363-364 this issue is ably discussed as follows:

***“Measure of Damages for fraudulent misrepresentation:***

***The proper measure of damages for fraudulent misrepresentation was discussed by the Court of appeal in Doyle =Vs= Olby (Ironmongers) Ltd [1969] 2 QB 158 -. It was held that damages for fraud were not the same as damages for breach of contract in that they were not designed to place the innocent party in the position he would have been in if the representation had been true, but to put him in the position he would have been in if the representation had not been made.....This means that where a person is induced by fraud to buy some property, the proper measure of damages is prima facie the difference between the price paid and the fair value of the property. In Doyle =Vs= Olby (Ironmongers) Ltd. It was held that in cases of fraud the plaintiff was entitled to damages for any such loss which flowed from the defendants fraud, even if the loss could not have been foreseen by the latter. Thus the claimant may recover not only the difference between the price and the value of what he received but also the expenditure wasted in reliance on the contract and compensation for other opportunities passed over in reliance on it.***

***In Smith New Court Securities Ltd =Vs= Scrimgeour Vickers (Asset Management) Ltd [1997] A.C. 254 at p. 63. Lord Brown Wilkinson described Doyle =Vs= Olby (Ironmongers) Ltd as re-stating the law correctly. He stated principles applicable in assessing damages where a party has been induced by a fraudulent misrepresentation to buy property as follows:***

- (1) “The defendant is bound to make reparation for all the damage directly flowing from the transaction.*
- (2) Although such damage need not have been foreseeable, it must have been directly caused by the transaction;*
- (3) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;*
- (4) As a general rule, the benefits received by him include the market value of the property acquired at the date of the transaction; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;*
- (5) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property;*
- (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction;*
- (7) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud.”*

Let me now apply the above principles to this case. The Plaintiffs have beseeched this court to order the 1<sup>st</sup> Defendant to reimburse them Ksh.115,000 being the amount incurred to fence and evict squatters. The

1<sup>st</sup> Defendant has denied the claim In fact it submitted evidence showing that its Mombasa offices in liaison with the coast Provincial Commissioner's office had fenced the suit land and evicted squatters. In my view, that could be true. However, there is a cogent evidence to controvert the Plaintiffs' assertion that they were encouraged to fence the land and evict squatters. I am convinced by the evidence of P.W.1 and P.W.2 that the Plaintiffs incurred a sum of Ksh.115,000/= in doing the aforesaid job. They are entitled to be paid. Having disposed of the claim on special damages, the difficult part is assessing general damages. The Plaintiffs have shown the kind of damage they suffered. They have also shown the profit they anticipated to reap if the transaction succeeded. They were put in a contractual mood between the 13<sup>th</sup> day of April 2005 and 29<sup>th</sup> June 2005. In fact they indicated that they expected a profit in range of Ksh.752,000,000/=. It is alleged that the Plaintiffs businesses suffered losses during that period. The Plaintiffs have asked this court to award them Ksh.30,000,000/= general damages. In assessing damages on this head, the court exercises its discretion. Taking into account all the evidence and the circumstances of this case, I think I will give a conservative global figure of Ksh. 8,000,000/= to represent general damages. I will award the Plaintiffs costs of the suit.

For the avoidance of doubt, judgment is entered in favour of the Plaintiffs and against the 1<sup>st</sup> Defendant in the following terms:

- (i) **Ksh.115,000/= being special damages.**
- (ii) **Ksh.8,000,000/= being general damages.**
- (iii) **Costs of the suit.**

*Dated and delivered at Nyeri this 18<sup>th</sup> day of March 2011.*

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Mr. Wairoma holding brief Miss Omondi for the 1<sup>st</sup> Defendant. No appearance for the 2<sup>nd</sup> Defendant and Mr. Macharia holding brief for Mabeya for the Plaintiff.

**Wairoma**: I apply for a stay of execution for 30 days. I also apply for certified copy of proceedings and judgment.

**COURT**: A stay of execution is given to last for 30 days. Certified copies of proceedings and judgment to be supplied upon payment of the copying charges.

**J. K. SERGON**  
**JUDGE**