



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 357 of 2005

DAVID GEORGE BELL .....1<sup>ST</sup> PLAINTIFF

ESTHER MWIHAKI BELL .....2<sup>ND</sup> PLAINTIFF

VERSUS

ASHUTOSH BHASIN.....DEFENDANT

JUDGEMENT

In a letter dated 14<sup>th</sup> June 2004 **M/S Billy Bhasin and Nutcracker Limited** intimated their intention to purchase the suit property from the Plaintiffs herein. The plaintiffs in a letter dated 17<sup>th</sup> June 2004 accepted the offer to sell their property to the said persons for a sum of Kshs.7.5 million. They also stated that the completion period would be 90 days from the date of the execution of the sale agreement. The offer was accepted through a letter dated 24<sup>th</sup> June 2004 by the purchasers through their advocates. The agreement for sale was drafted and after several exchanges the plaintiffs through their advocate indicated that unless they receive the 10% deposit on or before 19<sup>th</sup> July 2004, they shall withdraw the offer to sell the suit property. In a letter dated 19<sup>th</sup> July 2004 written on behalf of the defendant herein as a purchaser, **M/S Singh Gitau** Advocate forwarded the cheque of Kshs.750,000/= and directed the vendor's advocate to do the following;

1. *That you will hold the sum of Kshs.750,000.00 in an interest bearing account to our order returnable upon demand and you will not release the sums to the vendor or any other person whatsoever until the completion date.*

2. *That subject to Clause 5 1(d), if the transaction shall not progress and or the Transfer is not registered, you shall return to us the sum of Kshs.750,000.00 together with interest thereof within 14 days of written demand being made by us.*

*Please sign and return to us the enclosed duplicate of this letter in acknowledgement of the receipt of the cheque and as to confirmation of the professional undertaking.*

*In the meantime, please note that the Agreement should be amended to read ASHUTOSH Bhasin of P O Box 63460 Nairobi as Purchaser."*

However, it appears that the vendor's decided to cancel that transaction by a letter dated 23<sup>rd</sup> July 2004. A further offer was made on telephone by **Mr. Singh Gitau** advocate to the plaintiffs' advocate which was later accepted and which is a subject of this dispute. It is alleged that the initial offer by the

plaintiffs was for a quick sale and time was of essence. And when it became apparent that the defendant was delaying the transaction, the plaintiffs had to withdraw the offer. It is the case of the Plaintiffs that they withdrew their initial offer for proper reasons and were only persuaded to revert back to the sale by an enhanced offer for Kshs.8,450,000/=.

In an agreement dated 20<sup>th</sup> August 2004, the plaintiffs agreed to sell the suit property to the defendant. This suit arose from the transaction involving the sale of apartment No.RH001 erected on L.R. NO.1870/VI/85 referred to as the suit premises and which is the subject of the sale agreement dated 20<sup>th</sup> August 2004. The plaintiffs alleged claim against the defendant is that the plaintiffs seeks to cancel the sale and transfer of RH001 Connaught apartment on the grounds that the transfer of the property was effected after the plaintiffs advocate had issued a notice terminating the sale agreement. It is the case of the plaintiffs that the transfer was done fraudulently since the transaction had been terminated through a letter dated 18<sup>th</sup> April 2005. According to the sale agreement dated 20<sup>th</sup> August 2004, the completion date was to be 90 days from the date of the agreement or 7 days of successful registration of the transfer. Now it is essential to get the background information to the dispute that resulted in the alleged termination. It is clear the defendant's advocate by a letter dated 16<sup>th</sup> November 2004 gave an undertaking which provided as follows:

***“We refer to your letter of September 7<sup>th</sup> and hereby give you our professional undertaking to pay the balance of the purchase price upon successful registration and transfer of property in favour of our client. We now look forth to receiving the documents detailed in clause 2.4 of the agreement of sale.”***

The said undertaking was accepted by the plaintiffs through a letter dated 23<sup>rd</sup> November 2004 which reads as follows;

***“We thank you for your letter dated 16<sup>th</sup> instant.***

***We forward herewith copies of both the transfer of lease and shares duly executed by our clients for your client's execution. Kindly ensure that the same are returned at the earliest to enable us obtain the management company's endorsement.***

***Our clients are of the opinion that since your client delayed the transaction as we received your undertaking only two days before completion period, the sale agreement should be amended to extend the completion date by a further 30 days in which time your client should pay interest for the period at the rate provided in Clause 1.1 (c) of the sale agreement.***

***Kindly confirm to enable us prepare a supplementary sale agreement.”***

The above letter was followed by a letter dated 15<sup>th</sup> December, 2004 by the plaintiff's advocate and it is essential to reproduce its contents;

***“Our clients are concerned that your client is not keen on performing his obligation as per the sale agreement. This transaction is taking unnecessarily long not to mention that our clients are losing the value of their money.***

***This letter serves you notice that unless your client executes the transfers enclosed in our aforesaid letter within twenty one (21) days from the date of this letter, this transaction shall stand terminated as per clause 5 and your client shall forfeit his deposit. Either way, our clients expects the principal amount to continue attracting interest from 20<sup>th</sup> November 2004.”***

It appears that the defendant's advocate did not take the threat to terminate the agreement seriously as by a letter dated 24<sup>th</sup> December 2004 they forwarded the documents and apologized for the delay in responding to the letter dated 15<sup>th</sup> December 2004. The above letter was followed another letter dated 4<sup>th</sup> January 2005. The plaintiffs advocate forwarded all the documents and demanded to have the balance

of the purchase price and interest within 7 days from that date. They also expressed that their clients were in dire need of the proceeds of the sale as they had already committed themselves in another transaction. They also contended that due to the delay in the transaction subject of this suit, their clients were suffering dearly in terms of punitive interest rates. Through a letter dated 12<sup>th</sup> January 2005 the defendant stated as follows;

***“We have in other transactions involving properties in Connaught Apartments experienced considerable delay in obtaining consents from Maple Management Limited.***

***As our client does not want to be held responsible for any delays that may arise, we have been instructed to return the following documents to you:-***

- 1. Original Share Certificate***
- 2. Transfers of shares (2 copies)***
- 3. Instruments of transfer (2 copies).***
- 4. Original Lease Document.***

***Kindly acknowledge receipt and return the documents once you obtain the endorsement of the consent of Maple Management Limited.”***

The plaintiffs replied by way of a letter dated 25<sup>th</sup> January 2005 which forwarded all the completion documents to the defendant’s advocates and in the same letter they demanded receipt of the balance of the purchase price within 7 days of that letter. There are two important events that culminated in this dispute and which are letters dated 24<sup>th</sup> March 2005 and the one dated 18<sup>th</sup> April 2005. In the letter dated 24<sup>th</sup> March 2005 the plaintiff’s advocate gave a 21 days notice within which the defendant were required to pay the balance of the purchase price failure to which the transaction shall stand terminated and/or rescinded. It appears that the defendant did not comply with the terms of the letter dated 24<sup>th</sup> March 2005 making the plaintiffs to write the second letter dated 18<sup>th</sup> April 2005 which states as follows;

***“As your client has failed to pay the balance of the purchase price and interest accrued therein within the 21 days given, our clients have pursuant to the terms of Clause 5 of the Sale Agreement dated 20<sup>th</sup> August 2004, terminated this transaction.***

***We are therefore instructed to demand that you return all the original completion documents received and held by your firm on 25<sup>th</sup> January 2005 on the strength of your professional undertaking. In case your client had taken any steps to transfer the documents to himself, we expect him to ensure that the same revert to our clients names. Upon return of the same, you shall consequently be discharged from your said professional undertaking.”***

The defendant did not reply to the said letter of termination and it appears that the letter was forwarded to **M/S Iseme Kamau & Maema** Advocates who were acting for **Giro Commercial Bank Limited** the financier, financing the purchase of the suit property. In a letter dated 20<sup>th</sup> April 2005 the said advocates wrote to the plaintiffs’ advocate and the letter reads in part;

***“We have been informed by the purchaser’s advocates that you had issued a termination notice on behalf of vendor which has since expired. We write to confirm that we have received all the completion documents and we have commenced with the stamping of the transfer and the charge. We anticipate that we shall complete the registration process in the next few days whereupon we shall forward a cheque of Kshs.5,915,000/= in accordance with the terms of our undertaking of 8<sup>th</sup> March 2005. Kindly request your client to extend the termination notice for a further 2 weeks upon the date of this letter. We shall on our part endeavour to complete the registration process with the said period after which our client will release the funds for the payment of the purchase price.”***

The plaintiffs' advocates in a letter dated 27<sup>th</sup> April 2005 stated that the transaction was effectively terminated on 15<sup>th</sup> April 2005 and there was nothing to extend unless a new offer was made. However, the defendant's advocates through a letter dated 12<sup>th</sup> May 2005 forwarded a cheque for the balance of the purchase price and requested the plaintiffs' advocates to release them from the professional undertaking earlier given. The above is a clear representation of the facts presented in this dispute that has fallen for my determination.

It is clear that the present dispute arose because the parties could not complete the agreement for sale within the stipulated time. The plaintiffs gave the defendant an extension through a letter dated 23<sup>rd</sup> November 2004 for a period of 30 days, because the defendant's advocates sent the professional undertaking a few days before the expiry of the initial 90 days stated in the agreement dated 20<sup>th</sup> August 2004. The terms of undertaking as expressed in the agreement for sale states that on or before 30 days prior to the completion date and upon receipt of a suitable professional undertaking for the balance of the purchase price, the vendor's advocate shall hand over to the purchaser's advocate all the completion documents. The agreement for sale also provided for the rescission and termination as follows;

**5.1(a) *Either party shall be entitled to terminate this Sale Agreement on the breach or failure of the other party to comply with or perform its obligations in accordance with this Agreement and the Law society conditions applicable to the same.***

**5.1(b) *Termination shall be by notice in writing to the other party in default specifying the breach or failure and allowing the other party a period not less than twenty one (21) days from the date of the notice to rectify the breach or default and where the party in breach or default fails to rectify the same within twenty (21) days of the notice or such longer period specified therein or subsequently extended by notice, then the Agreement shall terminate and stand rescinded on the expiry of that period without any further reference to the party in default.***

**5.1(c) *Upon the termination of this Agreement by the purchaser due to breach on the part of the Vendor, then the Vendor shall refund the entire deposit paid within fourteen (14) days from the date of the termination together with interest at the rate of provided by this agreement calculated as from the date of termination until payment in full both days inclusive.***

**5.1(d) *Upon the termination of this Agreement by the Vendor due to breach on the part of the purchaser and provided that the requisite completion notice shall have been issued to the Purchaser, then the Vendor shall forfeit and retain the entire deposit paid being the sum of Kenya Shillings Eight Hundred and forty Five Thousand (Kshs.845,000/=) absolutely by way of liquidated damages. However, in lieu of termination, the Purchaser may without prejudice to the Vendor's right to terminate the Agreement and upon due notice by the Vendor of its ability to complete on its part pay to the Vendor a penalty interest on late completion at the rate provided by this agreement calculated from the completion date until payment of the purchase price in full both days inclusive.***

**5.1(e) *For the avoidance of doubt, following the termination of this Agreement by the Vendor due to the Purchaser's default, the Vendor shall be at liberty to sell the property to any other person without any further reference to the Purchaser.***

**5.1(f) *The undertaking of the Purchaser's Advocates given under Clause 4(c) hereinbefore shall be deemed to have been discharged upon the termination of this Agreement as well as upon the return by the Purchaser's Advocates of all original documents of title which may have been released thereunder or on the strength thereof.***

It is the contention of the defendant that the termination notices were issued incorrectly and that they were not sent to the defendant as required in the agreement dated 20<sup>th</sup> August 2004. It is also the case of the defendant that the reason for termination of the sale agreement was for the alleged failure to pay the purchase price and interest thereon. However, the defendant had not agreed to pay interest and had not signed any supplementary sale agreement which would have sanctioned payment of interest in case of

breach of the sale agreement. It is also contended by the defendant that the apartment had not been given with vacant possession and a notice to terminate could only be issued by a party not at fault. It is further contended that an undertaking given by the defendant's advocate was subject to the property being registered and transferred.

On the other hand it is the position of the plaintiff that the delay in completing within time was occasioned by the defendant's advocate giving professional undertaking four days before the completion date. It is the evidence of the Plaintiffs that they were kept in the dark while the defendant was negotiating with Giro bank for a loan. It is further alleged that the defendant never revealed the source of the purchase price so that an appropriate clause for financing would have been mandatory in the sale agreement as is the practice in such transactions. It is the evidence of PW2 that they would not have sought the requisite consent without an appropriate undertaking from the defendant's advocate for the balance of the purchase price as per the terms of the sale agreement and hence the plaintiffs are not guilty of any delay in completion of the transaction. PW2 also stated that by the time he issued the termination notice on 24<sup>th</sup> March 2005 he had forwarded all the completion documents to the defendant on 25<sup>th</sup> February 2005. And that the purported registration and transfer of the title on 4<sup>th</sup> May 2005 is null and void. P.W.2 further contended that the plaintiffs were entitled to issue termination notice and he did issue one and served it on the defendant through his advocate.

The meaning and the purpose of the notice is clear by its wording and the sale agreement entirely adopted the Law Society's conditions of sale with only variation being made in terms of interest and possession. PW2 testified that condition 28 of the Law society condition of sale permit a notice to be issued personally or through a party's advocate and the plaintiff chose to serve the defendant through his advocate. It was also contended that throughout the conduct of the sale transaction and as admitted by the defendant in his testimony, all communication to him were done through his advocate and not through him personally as he was resident in England. In fact the best service of any communication to him was through his advocate and in his testimony he never complained that he was not aware of the notice or that the defendant did not communicate to him and that having acquiesced to such service through his advocate he is now stopped from denying receipt of the notice in the manner of service. He cannot therefore claim that he was unaware of termination notice but instead he chose to ignore as he had no financial capacity to complete the transaction without a bank loan from **Giro Commercial Bank**.

It is also the evidence of PW2 that upon expiry of 21 days termination notice he did an official search on 20<sup>th</sup> April 2005 at the Land's registry and confirmed that the transfer of the suit premises had not been registered. In support of that contention he exhibited an official search. He also contended that no evidence was adduced by the defendant that by the time the termination notice was served, the transfer instrument had been submitted for registration.

And it is clear that on the face of the registered transfer instrument, it was endorsed for valuation on 28<sup>th</sup> April 2005 and received at the Lands registry for registration on 4<sup>th</sup> May 2005 and thereafter a transfer and charge effected on the same day. It is on the strength of the purported termination that the plaintiff's advocate declined to receive the balance of the purchase price when it was forwarded to them on 12<sup>th</sup> May 2005. However the issue is whether there was a legitimate basis for the plaintiffs to issue the termination notice and whether it was proper on the part of the defendant to effect a transfer and charge having knowledge or known that the transaction was purportedly terminated by one party.

The central issue in this case is whether there was a proper basis for the termination undertaken by the Plaintiffs. And whether the defendant acted lawfully and properly after they received the termination notice. The starting point is that the completion date envisaged under the sale agreement was 20<sup>th</sup> November 2004 but it was not met because documentations had not been perfected. The defendant alleges the delay was occasioned in the first instance by the vendor's failure to obtain requisite consents from **Maple Management Limited** and secondly the failure to provide or give vacant possession since the property had a sitting tenant in the name of Nutcracker Limited. On the other hand the plaintiffs contend that the failure to complete within the stipulated time was caused by the defendant in making a representation to the plaintiffs that they had funds to purchase the suit property when they were obtaining

substantial part of the purchase price through a loan where the subject property was being used as a security. They allege that the defendant did not disclose to them that they were using suit property as collateral and the advocate for the defendant gave a professional undertaking when he was not in possession of the full purchase price.

No doubt the defendant is a resident in England and in all transactions or dealings relating to the purchase of the suit property were through his advocate **Mr. James Singh Gitau**. It is also clear that all correspondences between the plaintiffs' advocates and the defendant were directed through the defendant representative or advocate **Mr. Singh Gitau**. The first issue is whether time was of essence in the sale agreement and whether a party can complete a transaction at his own pace and time. In my humble view all sale agreements have a stipulation or clause within which a transaction has to be completed. And if the sale agreement does not contain or provide for a time limit the transaction must be completed within a reasonable time and all issues must be put on the table and ironed out in order to avoid issues which could potentially result in disagreements or enlargement of time to the detriment of one side.

In this case the sale agreement provides for period of 90 days from 20<sup>th</sup> August 2004 as the completion date or within 7 days of simultaneous successive registration of the transfer. In clause 2.4 the agreement provides as follows;

***“2.4 On or before 30 days prior to the completion date and upon receipt of a suitable professional undertaking for the balance of the purchase price the vendor’s advocates shall hand to the purchaser’s advocates the following documents:-***

***2.4(a) Duly executed but undated transfer document in favour of the purchaser.***

***2.4(b) Duly executed document for transfer of shares to the purchaser.***

***2.4(c) A duly executed share certificate from Management company of the flats.***

***2.4(d) All other document of titles in respect of the above property which are in vendors possession.***

***2.4(e) All receipts (original) for the payment of rates, water, land rent and electricity bills duly paid.***

In my understanding when a party to a contract promises to do a certain thing at or specified time but fails to do such thing at or before the specified time, the contract or so much of it which has not been performed becomes avoidable. In any case, if the intention of the parties was that time should be of essence then, it is mandatory on each side of the bargain to ensure due and proper compliance with time stipulation in the agreement or to complete the transaction within a reasonable time. It is also my position that when certain events or issues are outside the control of one party it is essential to inform the other party that certain events would be necessary to happen if the transaction is to be completed within the stipulated time or within reasonable time. What I am saying is that it was incumbent upon the defendant to disclose that he intended to borrow part of the purchase price and secondly that he intended to use the plaintiffs' title document as collateral to obtain a loan to finance part or whole of purchase price. One may therefore safely say that the parties to an agreement cannot in a contract have contemplated that one party can chose to deprive one party stipulation of all contractual force. To do so would be to reduce the agreement to a mere declaration of intent.

In my humble opinion a contract cannot be open-ended or one which gives one party a leeway to complete the agreement at his own pleasure and time. The question therefore that stands out is whether time was of essence and whether the defendant was able to complete the transaction within the stipulated time or within reasonable time. That is the question that requires proper answer in order to determine the liability and responsibilities of each side. No formula will solve this type of question and one must look at the nature of the agreement, the character of the breach alleged and its effect on future performance and expectations and make a judicial estimation of final result. In that regard it is important to determine whether the alleged breach is a breach sufficiently serious to take the case outside the intention of the parties in order to give the plaintiffs the right to refuse further performance or to opt out of the contract

because of non performance or partial performance of the contract by the defendant. The law is that, where there has been a fundamental breach and/or deviation from the terms of the agreement, the party guilty of the breach cannot successfully rely entirely or partially on the provisions in the agreement designed for his protection or protection of the parties in the performance of the agreement.

One way of looking at this matter would be to ask whether the party in the alleged breach has by his breach produced a situation fundamentally and radically different from anything which the parties could as reasonable men could have contemplated when the contract was made.

At the time the parties executed the sale agreement dated 20<sup>th</sup> August 2004, time was made of essence and it was expected that each party would perform his part of the bargain. In this case the initial completion date could not be performed because the advocate for the defendant gave his undertaking four days before the expiry of the completion date. The reason for that delay has not been explained by the defendant but from the correspondences it is clear that the advocate was not put in funds: it is also clear that the defendant did not disclose that he did not have sufficient funds to purchase the suit property: And that he did not also disclose that he was to use the plaintiffs' property to get substantial part of the purchase price. Those essential factors were not incorporated into the sale agreement and it was not brought to the attention of the plaintiffs to warn them of any eventuality that would result in unnecessary delay.

PW1 in his evidence which was not controverted informed court that the purpose for selling the suit property was to enable him to purchase another property. He stated that due to the failure of the defendant to complete the transaction within the stipulated time or within reasonable time, he suffered loss and damages for his failure to perform the other contract in time. I therefore make a finding that the initial extension of the completion date was necessary and mutually beneficial to both sides because it was meant to complete the transaction within reasonable period. I must say that as at November 2004, the defendant was not in funds or was not in a position to complete the transaction because the loan application had not been approved and no funds was extended to the defendant by the bank. This is confirmed by the letter of offer from **Giro Commercial Bank Limited** to the defendant which was dated 4<sup>th</sup> November 2004. It is also clear that through a letter dated 12<sup>th</sup> November 2004 from **M/S Kamau, Iseme and Maema** advocates requested the defendant's advocate whether to give the professional undertaking to the purchaser's advocate or directly to the vendor's advocate. It is therefore crystal clear that the initial undertaking given by the firm of **Singh Gitau** advocate was precedent or conditional upon the offer made to the defendant by **Giro Commercial Bank** to finance the balance of the purchase price. That fact was not disclosed to the plaintiffs or to their advocates, therefore, it is important or essential to show that defendant was at no fault for any subsequent delay or non performance of the contract. That onus is on the shoulders of the defendant having failed to disclose that part or substantial part of the purchase price was to be obtained by making the title of the plaintiffs as collateral to secure such funds. I think that was an important consideration which was withheld from the plaintiffs. And it goes to show whether the defendant acted in good faith or not.

Now, let me address my mind to what has brought the dispute between the parties herein. No doubt that by 25<sup>th</sup> January 2005, the plaintiffs sent all completion documents to the defendant and sought payment of the balance of the purchase price within 7 days. It is also clear that the defendant's mother was in physical possession of the premises thereby making the plaintiffs to have fully completed their part of the contract. What remains therefore was the defendant to pay the balance of the purchase price. It is alleged by the plaintiffs that being frustrated by the unreasonable delay in remitting the balance of the purchase price on 24<sup>th</sup> March 2005 they gave a termination notice. That termination notice was given 2 months after the delivery of completion documents. As per the terms of the sale agreement and specifically clause 5 and condition 7 of Law Society's conditions of sale, the plaintiffs were entitled to issue the notice and consequently terminate the contract on the expiry of 21 days given in the notice. It is important to reproduce clause 5;

## 5. Rescission and Termination

### 5.1(a) Either party shall be entitled to terminate this Sale Agreement on the breach or failure of

the other party to comply with or perform its obligations in accordance with this Agreement and the Law Society conditions applicable to the same.

5.1(b) Termination shall be by notice in writing to the other party in default specifying the breach or failure and allowing the other party a period not less than twenty one (21) days from the date of the notice to rectify the breach or default and where the party in breach or default fails to rectify the same within twenty (21) days of the notice or such longer period specified therein or subsequently extended by notice, then the Agreement shall terminate and stand rescinded on the expiry of that period without any further reference to the party in default.

5.1(c) Upon the termination of this Agreement by the Purchaser due to breach on the part of the Vendor, then the Vendor shall refund the entire deposit paid within fourteen (14) days from the date of the termination together with interest at the rate of provided by this agreement calculated as from the date of termination until payment in full both days inclusive.

5.1(d) Upon the termination of this Agreement by the Vendor due to the breach on the part of the Purchaser and provided that the requisite completion notice shall have been issued to the Purchaser, then the Vendor shall forfeit and retain the entire deposit paid being the sum of Kenya Shillings Eight Hundred and forty five Thousand (Kshs.845,000/=) absolutely by way of liquidate damages. However, in lieu of termination, the Purchaser may without prejudice to the Vendor's right to terminate the Agreement and upon due notice by the Vendor of its ability to complete on its part pay to the Vendor a penalty interest on late completion at the rate provided by this agreement calculated from the completion date until payment of the purchase price in full both days inclusive.

5.1(e) For the avoidance of doubt, following the termination of this Agreement by the Vendor due to the Purchaser's default, the Vendor shall be at liberty to sell the property to any other person without any further reference to the Purchaser.

5.1(f) The undertaking of the Purchaser's Advocates given under Clause 4(c) hereinbefore shall be deemed to have been discharged upon the termination of this Agreement as well as upon the return by the Purchaser's Advocates of all original documents of title which may have been release thereunder or on the strength thereof.

In his evidence before court, the defendant stated that he is a resident in England and all dealings relating to the purchase of the suit property were through his advocate. He also stated that **Mr. James Singh Gitau** Advocate acts on behalf of their family and for all family matters. However, he contended that the termination notice was not sent to his address indicated in the agreement and secondly the property was not given in vacant possession. It is essential to note that in his evidence before court, he stated the reason for the purchase of the property was to accommodate his mother exclusively. **Mr. Singh Gitau** advocate learned counsel for the defendant submitted that the termination notices issued by the plaintiffs were incorrect and improper on the following reasons;

(1) *They were not sent to the address of the defendant as specified in the agreement but were sent to the address of **Singh Gitau** Advocate.*

(2) *The purported notice of termination and the terminating letter made reference to **Mr. Shutosh Bhasin** while the defendant's name is **Ashutosh Bhasin**. Let me say immediately that such a submission amounts to splitting hairs since the spelling mistake is something minor or minimal which cannot give or take away any right accrued or acquired by a party. On that basis I think such a submission is an outright intention to get a mileage out of nothing. It is rejected as having no merit or having no basis for a proper analysis since the plaintiff only omitted the letter 'A' from the defendant's name. If **Mr. Gitau** Advocate had any reasons to think that the letter or the termination notice was not addressed to his client he had an obligation to immediately raise the same with the plaintiff's advocate. That was not done and having accepted the letter on behalf of his client, it means that the objection raised had no merit at that time and does not have at this time, when the horse has bolted.*

(3) *The reason for terminating the sale agreement was for the alleged failure to pay the balance of the purchase price together with the interest thereon.*

(4) *That the apartment had not been given with vacant possession as provided for and as clause 9.1 of the agreement.*

(5) *That a notice to terminate could only be issued by a party not at fault.*

(6) *That the undertaking given by the defendant's advocate was subject to the property being registered and transferred.*

The first question raised by the defendant is whether the plaintiffs were entitled to issue a notice of termination. It is the defendant's contention that the notice of termination was improperly issued. The basis is that under clause 5, termination was only applicable in the event of failure of the defendant complying with his obligation in accordance with the agreement. The defendant contends that he could not be at fault because he was not given vacant possession before the balance of the purchase price was paid. The defendant also contends that there was a sitting tenant in the name of **Nutcracker Limited** whose tenancy was never terminated by the plaintiffs. The issue is whether the plaintiffs could give vacant possession to the defendant in view of the fact that the tenants were close family members of the defendant. It is alleged by the defendant that it was crucial to his peace of mind because he did not want his brother who was residing in the apartment prior to its purchase claiming any rights. The defendant in his evidence before court stated;

***"The notice of termination was never sent to my address indicated in the agreement. The property was not given in vacant possession. At the time my brother and my mother were in residence. The property was purchased exclusively to provide accommodation to my mother. My mother had complete possession."***

The question therefore that arises is whether it was possible or feasible to grant vacant possession to the plaintiff as a basis to throw a mud at the plaintiffs. It is clear in my mind that the evidence on record clearly and correctly shows that the defendant and his relatives were in exclusive control and possession of the suit premises therefore, the question of vacant possession is nothing but an afterthought meant to get a defence, which is misconceived. The numerous cases filed by companies or persons connected to the defendant, is a clear manifestation or testimony that the defendant had full and firm control of the suit premises. It was not, in my view, possible for the plaintiffs to give vacant possession in a premises that was exclusively in possession of the defendant. The defendant was categorical that the property was bought for his elderly mother who has continued to stay in that premises up to the time the suit was heard before this court. It is clear the defendant's mother is the sitting tenant and the issue of vacant possession is nothing but a gimmick to defeat or derail the case of the plaintiffs.

It is also the case of the defendant that the termination notice was never sent to his address indicated in the sale agreement. It is true that the termination notice was not sent to the defendant but it was sent to **M/S Singh Gitau** advocates who were acting for the defendant. However, before I address the issue of the termination notice, it is important to first appreciate whether there was a breach of the terms of the agreement in order to understand and appreciate the nature of the consequences that arose from that breach.

No doubt that the sale was not subject to mortgage being obtained by the defendant from a bank. It is the evidence of the defendant that it was his intention to raise the balance of the purchase price through a finance from the bank. That question was never incorporated into the sale agreement so as to say that the plaintiffs were aware or had knowledge that the defendant was in the process of using their title as collateral to secure funds. The defendant says that question was not necessary and that he did not make any misrepresentation to the plaintiffs. He also confirmed that there was no condition or clause in the agreement to enable him use the plaintiffs' title as a collateral to seek money to complete the transaction.

The question that follows is whether the plaintiffs were entitled to a disclosure that their property or their

title would be used to secure funds from a bank. And whether their title could be used as collateral to secure funds without their knowledge and without their consent amount to a misrepresentation or fraud. The law provides and expects a party shall not be cheated of legitimate expectations by way of unfair tactics and designs meant to give a leeway over the rights and interests of the other side. It is my view that once a duty has arisen, the disclosure must be exact, complete, explicit and unambiguous and any communication which falls short is in law insufficient and does not amount to disclosure at all. It is the case for the defendant for misrepresentation to occur there must be one of the following;

- (1) The misrepresentation must be made before the contract was entered into.
- (2) There must be a representor i.e. there must be a person who makes the misrepresentation.
- (3) The misrepresentation must have induced the representee to enter into the contract.
- (4) The representor must have responded to the misrepresentation.

In support, it is the case of the defendant that misrepresentation cannot be sustained as the parties never met, agreement was solely prepared by the vendor's advocate and the vendor entered into a sale agreement because they wanted to sell the property and not because they were induced into contracting with the defendant. On the other hand it is the case of the plaintiffs that the defendant obtained a loan on the security of their property whilst aware that the property truly belonged to the plaintiffs and without their knowledge. In response it is contended by the defendant it is normal for a purchaser to obtain partial financing for a property. And that his advocates had given professional undertaking after the loan had been approved. Places a cordinal duty on each party to make a full and firm disclosure on all issues that are potentially or likely to create a disagreement between the rights and interests of the contracting parties.

***In the case of Cheshire & Fifoot Law of Contract 9<sup>th</sup> Edition by M. P. Furmston Butterworths (1976) at page 577 makes it clear the breach of contract makes it voidable at the instance of the innocent party "If, on the other hand, the innocent party elects to treat the contract as discharged, he must make his decision known to the party in default. Once he had done this, his election is final and cannot be retracted. The effect is to terminate the contract for the future as from the moment when acceptance is communicated to the party in default.***

***In Chitty on Contracts 27<sup>th</sup> Edition Volume 1 General Principles, Sweet & Maxwell 1994 at page 1029 "At law time is always of the essence of the contract when any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will be for breach of it---stipulations as to time were generally of the essence of the contract, so that a party could treat the contract as repudiated if the other party's performance was not completed on the date stipulated by the contract."***

***At page 1030 "The time is of the essence where the parties have expressly stipulated in their contract that time fixed for performance must be exactly complied with, or that time is to be "of the essence."***

***At page 1032 "Once notice has been given both parties are bound by it so that, if the party giving the notice is not ready to perform on the expiry of the notice, the other party may be entitled to terminate"***

***In the textbook "The Law of Contract" by G. H. Treitel 9<sup>th</sup> Edition Sweet & Maxwell 1995 at page 739 "Certain stipulations as to time are said to be "of essence of a contract." Any failure to perform such a stipulation justifies rescission: it makes no difference that the failure is trivial and causes little or no prejudice to the injured party"***

***At page 740 "Time will obviously be of essence if the contract expressly so provides"***

***At page 741 "At common law, stipulations which specified the time of performance were normally regarded as "of essence" of contracts for the sale of land. Thus the purchaser could not enforce the contract if he was not ready to pay on the precise day fixed for payment"***

*At page 742 “if the contract expressly provides that time shall be of the essence it must be performed within the stipulated time. Time is of the essence in sale is of short leaseholds or reversionary interests since the former will depreciate and the latter will appreciate rapidly with the passing of time. Generally time will also be regarded as of the essence where is the subject matter of the contract is of mighty speculative nature.”*

*At page 743 “The contract may specify the period of notice required for this purpose, if it fails to do so the notice must allow a reasonable time for completion. After expiry of the notice, the injured party can either enforce the contract or rescind it....if one party has constantly pressed the other to complete, he can rely on this fact to shorten the amount of time which must be allowed by the notice”.*

In this case the parties entered into an agreement dated 20<sup>th</sup> August 2004 and in that contract the rights, interests, obligations and duties of the parties were clearly defined. The completion time was indicated to be 90 days from 20<sup>th</sup> August 2004. According to the agreement, the purchase price was also indicated and all necessary speculations and if a party desired to incorporate any clause or condition, it was up to him to bring it to the attention of the other side. In particular clause 2.4 required the advocates for the purchaser to give a suitable professional undertaking to pay the balance of the purchase price to the vendor's advocates on or before 30 days prior to the completion date. In a letter dated 16<sup>th</sup> November 2004 the purchaser's advocates gave a professional undertaking to the vendor's advocates to pay the balance of the purchase price upon successful registration and transfer of property in favour of his client.

The question is whether the purchaser's advocate was in a position to give a professional undertaking when no funds were available to him and when the defendant was securing funds using the plaintiffs' property as collateral. And secondly whether it was necessary or essential to put a clause in the sale agreement showing that the defendant would be seeking the balance of the purchase price by way of financing. It is clear and beyond doubt that the defendant's advocate issued a professional undertaking to the plaintiffs' advocate while he had no funds in his possession: To issue/give a professional undertaking when he had no funds available to him amounted to a premeditation act of misrepresentation. In my humble view it was the duty and responsibility of the purchaser's advocate to have disclosed to his colleague acting for the plaintiffs that he had given the professional undertaking in anticipation of funds to be obtained through financing from a third party. In any case the professional undertaking could not in any way alter the express and fundamental terms of the agreement entered into by the parties. In essence by the time the defendant's advocates gave the professional undertaking he was not in a position to guarantee or pay the balance of purchase price if and when he was called upon by the plaintiffs' advocates after satisfactorily performing their part of the contract. He was not in a position because he was not in funds and that his professional undertaking was conditional or precedent upon the bank disbursing the funds after the necessary hurdles had been removed by the defendant. It suffices to say that the defendant could not charge or mortgage the plaintiffs' property without their consent or permission. And by giving a professional undertaking the defendant's advocate acted in a manner to deceive or defraud the plaintiffs of their property.

The question therefore is whether the plaintiffs could be faulted for giving a termination notice and whether it was legitimate on the part of the defendant to transfer the title after the termination had been served on its advocates. The defendant's advocate confirmed having received the termination notice but he does not state the steps he took to answer the charges that were leveled against his client that they were unable to complete the transaction. The termination notice is dated 24<sup>th</sup> March 2005 and it was followed by a further letter dated 18<sup>th</sup> April 2005 in which the plaintiffs advocate deemed the agreement as terminated.

It is the evidence of PW2 that the delay in completing within the stipulated time of 90 days as initially incorporated in the agreement was occasioned by the defendant's advocate giving professional undertaking four days to the completion date. And that the plaintiffs were kept in the dark while the defendant was negotiating with Giro Commercial Bank for a loan to finance the balance of the purchase price. It is clear that the relationship between the defendant and **Giro Commercial Bank** which affected the interests of the plaintiffs were not disclosed to the plaintiffs' advocates. In my humble view if the

funds were to be sourced from a bank it was mandatory that an appropriate clause for financing should have been incorporated into the sale agreement. The person who had knowledge that the balance of the purchase would be secured through financing from a bank were the defendant and his advocate and it was incumbent upon them to disclose that information to the plaintiffs or their advocates. That was not done and in my humble view the fact that the defendant entered into a contract while the full purchase price was not in his possession is a fundamental or monumental breach of the terms of the agreement he signed with the plaintiffs. It is explicit that a misrepresentation was made before the contract dated 20<sup>th</sup> August 2004 because the defendant had knowledge that he had no funds to complete the transaction as and when demanded by the plaintiffs. He therefore induced the plaintiffs into a contract which he could not complete or which he had no capacity or ability to complete or perform. It is therefore clear that the defendant did not have the capacity to pay the entire balance of the purchase price within 90 days as represented at the time of signing the agreement.

It is also clear that the advocates for the defendant did not have the capacity to give a professional undertaking when they had no funds to satisfy the legal duty/responsibility guaranteed on behalf of their client. In short the undertaking was an empty promise incapable of being performed since it was conditional of the bank disbursing funds using the plaintiffs' property as a security. The advocates for the defendant never disclosed that the undertaking was pegged on release of funds by a third party and for that reason it was fraudulent and dishonest on the part of the defendant to require his advocate to give an undertaking when the same could be satisfied or fulfilled.

It is clear in my mind that at the time the notice was served and at the time the contract was executed the defendant and his advocates were not in a position to complete the transaction. The notice expired on 15<sup>th</sup> April 2005 while the termination notice was issued on 24<sup>th</sup> March 2005 and within that period the defendant was still unable to pay the balance of the purchase price yet the plaintiffs had completed its part of the bargain. The uncontroverted evidence on record is that the completion documents were all forwarded to the defendant on 25<sup>th</sup> January 2005. The defendant purportedly registered the transfers on 4<sup>th</sup> May 2005. On the other hand, the defendant stated that he had capacity to pay from his own other resources, nevertheless he was unable to explain why he never made any payments within the 21 days period given. The answer is that he had no capacity and had no ability to perform his obligation as is stipulated in the sale agreement. That was a fundamental breach which can only be put at his door step.

By proceeding to effect the transfer of the suit property in his favour after the notice of termination was served and without responding to the termination is a clear indication that he acted fraudulently and dishonestly. I am therefore satisfied that frustrated by unreasonable delay in remitting the balance of the purchase price the termination notice dated 24<sup>th</sup> March 2005 which was given two months after the delivery of completion documents was legitimate in order to secure the rights of the plaintiffs. The plaintiffs had fully completed their part of the contract and what remained was for the defendant to pay the balance of purchase price on demand. The defendant was unable to pay the balance of purchase price and by proceeding to transfer the property he exceeded his legitimate powers and interest in the resolution of the dispute. I am satisfied the defendant acted in a manner to defraud and disinherit the plaintiffs of their property. The conduct of the defendant in transferring the suit property whilst a proper notice was served was illegal and unlawful. The notice was properly served on the defendant's advocate who confirmed receipt of the same but who nevertheless acted in a manner detrimental to the interests of the plaintiffs. In conclusion, I am satisfied that M/s James Singh Gitau Advocates received the termination notice for and on behalf of their client being the lawful/legal agents of their clients. The defendant is therefore estopped from claiming that the termination notice dated 24<sup>th</sup> March 2005 was not properly addressed or served on him. As was rightly pointed out by the advocates for the plaintiffs once a party appoints an advocate to act for him in a contract it is to be assumed that acts or omissions undertaken at the behest of the part by his advocate, he is bound by the principles of agency law. The law is that an agent is a person employed to do any act for another or to represent another in dealing with a third person. It therefore imports a fiduciary relationship and agent is expected to concentrate his efforts in protecting the interests and rights of the principal. And since **M/S James Singh Gitau** Advocates were employed by the defendant and by virtue of that employment and relationship they have a corresponding liability to act reasonably and legally on behalf of their client. In this case they received the termination

notice after two months when they were supplied with the completion documents, they did not reply to the plaintiffs as to whether they acted or they would act on the termination notice: However, two months later they wrote a reply after stating that the rights of the plaintiffs had been displaced. The initial contract executed on 20<sup>th</sup> August 2004 had a completion date of 20<sup>th</sup> November 2004. It expired without completion and sometimes in December the defendant was given 21 days notice within which to complete the transaction. The consequence of non-payment was clearly indicated to the defendant. Again the plaintiff by a letter dated 25<sup>th</sup> March 2005 gave another termination notice requiring the defendants to pay the full purchase price within 21 days. The plaintiffs by their letter dated 25<sup>th</sup> March 2005 put themselves in the position that if the defendant at any time within the 21 days paid up the balance of the purchase price, they were obliged to accept the same and transfer the property. However, if the defendant failed to pay the balance of the purchase money, the agreement became null and void. In the contention of the plaintiffs, the completion period as per the contract had expired at the time they gave the termination notice. And that they were ready and willing to complete the transaction to the satisfaction of the defendant. Indeed the notice gave a reasonable time for performance and makes time of essence so that the transaction could be completed to the satisfaction of all parties. It is also clear that there was unreasonable delay on the part of the purchaser which resulted in a considerable and substantial suffering to the plaintiffs since they were selling the suit property in order to acquire another property. PW1 in his evidence stated that the delay put them in a considerable inconvenience and suffering since he could not fulfill his obligation in the other transaction. It is therefore safe to conclude that time was of essence and it was within the powers of the plaintiffs to give a termination notice which was legitimate and lawful. The notice clearly spelt out the consequence of non compliance and by the failure of the defendant the contract was effectively terminated on 15<sup>th</sup> April 2005.

In **Hooker v Wyle & Anor (1973) 3 All E.R at page 714** it was held that;

***“In the result it seems to me that there is no answer to the contention put forward today that notice having been given under condition 19 on 25<sup>th</sup> May, 28 days having elapsed it being quite plain that the purchasers made no effort to fulfill their obligations during or at the end of the 28 day period. That seems to be plain and if it is plain there is no contract, then there should not remain in the register an entry which claims in effect that there is a contract”.***

In Clause 5.1(e) of the sale agreement dated 20<sup>th</sup> August 2004 clearly states that upon termination of the agreement due to purchaser’s default the vendor shall be at liberty to sell the property to any other person. It also provides that the purchaser shall forfeit the deposit as a liquidated damages. The agreement also provides that if the purchaser does not comply with the termination notice he shall return all completion documents to the vendor. Consequently upon termination of the contract and by virtue of expiry of the termination notice the defendant had no option but to return the plaintiff’s title documents immediately. The defendant nevertheless transferred the title documents into his name which was unwarranted and illegal. It is clear that an official search conducted on 20<sup>th</sup> April 2005 showed that the property had not been transferred and it was fraudulent on the part of the defendant to have proceeded and transferred the property despite having received or having knowledge of the termination notice. It was deliberate and reckless act or omission to transfer the property when he knew or ought to have known that the transaction had been terminated by the vendor legitimately and within the boundary of the agreement for sale dated 20<sup>th</sup> August 2004.

In my humble view the existence of fraud or dishonesty is of vital significance or importance to the determination in this case because fraud gives rise to a right of rescission that would have otherwise been extinguished if what happened was not intentional and was the conduct of an innocent party. In my understanding equitable fraud would entitle the party injured the right to rescind a transaction tainted with an illegality or impropriety and to be restored to his original position. In conclusion it was unprofessional on the part of the defendant’s advocate to fail to disclose that his client did not have sufficient funds to purchase the suit property and intended to use the plaintiffs’ title as collateral to seek the balance of the purchase price. It was also wrong on the part of the defendant to give an undertaking through his advocate when he had no funds to complete the transaction. Further it was illegal and unlawful to transfer the property when the defendant was served with the termination notice without

raising any objection to the sale. I do not understand why the defendant and his advocate waited until 13<sup>th</sup> May 2005 and after the registration to dispute the validity of the termination when they had the opportunity to do so before effecting the transfer and the registration.

In my humble view the defendant had the opportunity to contest the validity of the termination immediately it was brought to his attention through his advocates who confirmed having received the same. The act or failure to reply to the termination notice and subsequent transfer and registration amounts to unconscious bargain, abuse of confidence and an act of outright fraud. I am therefore in total agreement with the plaintiffs that the defendant wrongfully and falsely and in breach of the warranty and undertaking given used the plaintiffs' title documents in a manner not contemplated in the sale agreement and by the intention of the parties. First and foremost the defendant used the plaintiffs' title documents to shop for a bank to provide a loan facility for the purchase of the suit property. That is not disclosed and it was a material fact which was wrongfully withheld from the plaintiffs. That is the starting point which resulted in an unreasonable delay in completion of the transaction. In sum, I am satisfied that the defendant committed a fundamental breach which destroyed the foundation of the sale agreement. I make a finding that the termination notice was legitimately served on the defendant's agent. It was a proper document and the failure to act on the contents was a fragrant transgression of the rights of the plaintiff.

Justice and equity does not allow or condone the acts and omissions committed by the defendant. The plaintiffs are entitled to restoration of the status quo before their property was deprived through an illegality. I therefore grant an order that there be an immediate rectification of the register so that the plaintiffs can be entitled to the rights enjoyed before their property or title was wrongfully and illegally transferred to the defendant. The transfer and registration was illegal and a nullity *ab initio* hence the plaintiffs shall be entitled and are entitled to be restored before the act of illegality was perpetrated by the defendant.

The only issue remaining is *mesne* profits and damages as claimed by the plaintiffs. It is clear that the tenant in the premises who was the defendant was paying a monthly rent of Kshs.65,000/= and I understand that there was an order that the defendant or his agent deposit the monthly rent in the joint accounts of the advocates appearing for the parties herein: And since I have made a determination that the property legitimately belongs to the plaintiffs, it goes without saying that they are entitled to the monthly rents accruing therefrom. By virtue of the conduct of the defendant and his relatives, the plaintiffs were denied the rights to receive and enjoy the rental income from the suit premises. In the premises, I make an order that the defendant shall pay a mesne profit of Kshs.2,849,425/= being the rent from May 2005 to 30<sup>th</sup> July 2009 less the sum of Kshs.465,575/= which was deposited by the defendant.

Another issue that is of great concern is the issue of tenancy which has brought various litigations between the plaintiffs and other parties related or directly connected to the defendant. In Milimani CM.CC. No.12702 of 2008 a company by the name Nutcrackers Limited where the defendant is a director filed suit against the plaintiffs and obtained orders restraining them from distressing for rent. The tenant was ordered to deposit the rent outstanding in a joint account between the advocates of the parties within 21 days. The tenant did not oblige and they filed Civil Appeal No.195 of 2008. The High Court reiterated the orders given by the lower court and directed the tenant to deposit the rent as earlier ordered. Again a company by the name **Spra Fuels Limited** sued the plaintiffs in HCCC No.1289 of 2006 seeking injunctive orders against the plaintiffs and in a ruling dated 11<sup>th</sup> July 2006 **Lady Justice Ang'awa J** ordered the said company to deposit the rent in a joint account by both advocates. The order was not complied and at the time this suit was being concluded the amount deposited was less than Kshs.500,000/=. It is therefore clear that there is a persistent and consistent mode used and undertaken by the defendant and parties close to him to abuse the court process. The evidence on record is that the tenant to the suit premises is the defendant's mother and his relations. It is clear therefore the filing of various suits was to avoid payment of rent or to defeat the interests of the plaintiffs. In that regard and since I have made a determination that the property legitimately belongs to the plaintiffs and in view of the fact that the tenants in possession are unwilling to pay the monthly rent, then it is in the interest of justice to order for an immediate eviction of any party residing in the suit premises. In my view the immediate eviction would restore some sanity and ensure the rights of both sides is adequately protected. Upon eviction of the sitting tenant the property shall be let to a willing tenant who shall be in a position to

pay the monthly rent regularly and on demand. As a result of my determination I make the following orders:-

- (1) A declaration that the sale agreement between the plaintiffs and the defendant was duly terminated on 15<sup>th</sup> April 2005. Any subsequent transaction conducted after that day is a nullity and void *ab initio*. No party can and should be allowed to derive right from an act of outright illegality.**
- (2) A declaration that purported transfer of the suit property and plaintiffs shares totaling 170 shares in Maple Management Limited to the defendant was and is illegal null and void.**
- (3) An order that entry No.4 in the Grant L.R. No.84990/1 in the land register be and is hereby cancelled. The property shall be restored to the plaintiffs with immediate effect.**
- (4) An order of eviction directed against any tenant or person in possession or residing in the suit premises with immediate effect but not later than 7 days from the date of this judgement.**
- (5) An order that the defendant or his advocate shall deliver to the Registrar of Titles the original title documents in respect of L.R. No.1870/VI/85 for purposes of cancellation and rectification of the register. In the event that the defendant or his advocate fail to surrender the documents in their possession concerning the suit property an order of this court directed at the Registrar of Titles shall ensure that the plaintiffs are granted new title documents and the ones in possession of the defendant or his advocate shall stand cancelled by virtue of this order.**
- (6) I enter judgement for the plaintiffs against the defendant for the sum of Kshs.2,849,425/= plus the cost of this suit.**

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of July 2009.

**M. WARSAME**

**JUDGE**