



REPUBLIC OF KENYA

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

Civil Case 693 of 2000

JODAD INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

PAUL IMISON.....DEFENDANT

JUDGEMENT

The Plaintiff, Jodad Investments Limited entered an Agreement for Sale of a Property known as Land Reference Number 1160/575 (hereinafter referred to as "the suit property") with the Defendant, Mr. Paul Imison whereby the Plaintiff would sell the suit property to the Defendant at the agreed price of Kshs 3,000,000/= (Kenya Shillings Three Million). The Purchase price was payable in agreed installments. The Agreement for Sale was executed by the parties on the 28th July, 1998.

Sometime in early 2000 a dispute arose between the parties which necessitated the filing of this suit by the Plaintiff on 17th April 2000. The Plaintiff obtained *ex parte injunctive orders on the 20th April, 2000 under a certificate of urgency restraining the Defendant from, inter alia, entering the suit property and from carrying on any further building works pending further orders of this Court. Upon the inter partes hearing of the said application, this Court on 14th June 2000 granted the orders sought on terms pending final hearing and determination of this suit. The orders granted were as follows:?*

- 1. "THAT the Defendant by himself or his servants or agents, or employees be and is hereby restrained from entering into or interfering with in any way all that property known as Land Reference Number 1160/575, Forest Road , Nairobi pending the hearing and determination of this suit.**
- 2. THAT the Defendant or his agents or servants or employees be and are hereby restrained from carrying out any further building works on Land Reference Number 1160/575 pending the hearing and determination of this suit.**
- 3. THAT the Plaintiff do file an undertaking as to the damages within ten (10) days.**
- 4. THAT the costs of this application be costs in the cause."**

The Plaintiff filed the undertaking as to damages on the 15th June 2000. The Parties subsequently amended their respective pleadings which they had filed earlier. In its Amended Plaint filed on 26th November 2002, the Plaintiff sought the following orders against the Defendant:-

(a) An injunction to restrain the Defendant or his agents and or servants

from entering or interfering with all that property known as Land Reference Number 1160/575 until the disputes arising under the Agreement for Sale dated 28th July, 1998 are heard and determined by an Arbitrator.

(a)(i) A Declaration that the Defendant is in material breach of or has repudiated the Agreement for Sale dated 28th July 1998.

(a)(ii) An order that the Plaintiff is fully discharged from further or any further performance of the Agreement for Sale dated 28th July, 1998 together with all the duties and obligations set out therein.

(b) The Defendant to produce an account of monies paid under the Agreement for Sale dated 28th July 1998.

(c) Such further or other relief or relief's which this Honourable Court deems fit.

(d) Costs of this action with interest thereon.

The Particulars of the Repudiation alleged and supplied by the Plaintiff were the following that:?

(I) The Defendant unlawfully and wrongfully constructed or commenced

construction upon the property without the written consent of the Plaintiff.

(ii) The Defendant unlawfully constructed or commenced construction upon the property before the Defendant had obtained any consent required by law.

(iii) The Defendant in complete breach of the Agreement for Sale commenced construction of a commercial structure on the suit property.

The Defendant filed an Amended Defence and Amended Counterclaim on 9th

December, 2002 in which he denied the alleged Repudiation and acts thereof. In the Amended Counterclaim the Defendant sought the following reliefs:?

(a) An order for specific performance compelling the Plaintiff, its servants or agents to hand over to the Defendant the Transfer of the suit property duly executed, stamped and registered in the Defendant's name and to further hand over any and all copies of consents and all documents of title relating to the property which are in the Plaintiff's possession. And in default thereof that the Deputy Registrar of this Court do execute the transfer documents in favour of the Defendant.

(b) General Damages for breach of contract with interest at Court rates from the date of judgement until payment in full.

(bi) An inquiry as to damages occasioned by the grant of the injunction to the Plaintiff.

(c) Interest on the amount of purchase price paid to-date at the rate of 30% as per the agreement.

(d) The costs of this suit together with interest at Court rates from the date of filing suit until payment in full.

The Parties through their Counsel filed a list of agreed issues, thirteen in number; for the Court's determination. After the hearing, by consent, counsel filed written submissions. They subsequently made

oral submissions to highlight their respective written submissions.

I agree with counsel for the Plaintiff when he proposed and identified four broad issues arising from the disputes set out in the pleading. I would add two more, making a total of six issues. The questions for the Court's determinance in my view are:?

1. Has the Defendant repudiated the Agreement for Sale by breaching the said Agreement?
2. Is the Plaintiff discharged from the Agreement for Sale due to the Defendant's breach of the Agreement for Sale?
3. Is the Defendant entitled to Specific Performance of the Agreement for Sale?
4. Is the Defendant entitled to any damages and if so how much?
5. In the event the Defendant is successful in this suit, should there be an inquiry as to damages which may have been occasioned by the grant of the Injunction herein to the Plaintiff?
6. Cost of the suit.
7. I will deal with each of the issues questions, one after the other:?

8. 1. HAS THE DEFENDANT REPUDIATED THE AGREEMENT FOR SALE BY BREACHING THE SAID AGREEMENT?

9. The Plaintiff in its Plea pleaded that the Defendant committed breaches of various fundamental terms of the Agreement for Sale which amounted to repudiation of the Agreement. The alleged acts of repudiation are set out in the Particulars of Repudiation which I have referred to hereinbefore. Did the Defendant commit any of them?

10 (i) Unlawful and wrongful construction or commencement of construction upon the property without written consent of the Plaintiff.

11. The Plaintiff, called one witness to testify on its behalf. This sole witness was Mr. Calvin Harold Cottar a director and shareholder of the Plaintiff Company. He testified that the Defendant was his Cousin. He said that at no time did the Defendant request for consent to commence construction of a house on the suit property. He also said that the Plaintiff never gave the Defendant any consent to commence construction of a house or garage. Mr. Cottar said that he came back from Safari in January 2000 and found the Defendant building a garage on the suit property. He said that they organised for a meeting which took place on 31st March, 2000. It was attended by himself, his mother Mrs. Patricia Cottar, a director and shareholder of the Plaintiff Company, a lady by the name of Lucy and the Defendant. According to the witness, they discussed the question of payments and the on-going construction of the suit property. According to him the meeting broke out in animosity.

12. Mr. Calvin Cottar further testified that there was a second meeting on 5th April, 2000 during which they (Plaintiff) stated that they had not seen the drawings. Mr. Cottar said that he saw some two pits on the suit property and which were not appropriate for a residential building. It was alleged that the Plaintiff told the Defendant that they would not accept the construction of a garage on the land. Mr. Cottar claimed that the Defendant responded that he owned the land, would do anything on it and they could do what they (Plaintiff) wanted to stop him. The witness said that as a result they approached their lawyers on the 7th April, 2000 and instructed them to write to the Defendant asking for arbitration and to revoke the licence they had given him to enter the suit property before the Completion of the Sale.

13. The witness, Mr. Cottar testified that despite letters from their lawyers, the Defendant went ahead with the construction works and they filed this suit and obtained the injunction as a result. Mr. Cottar added during re-examination by the Plaintiff's Counsel that at the second meeting on 5th April, 2000

the Defendant declared that he intended to run a commercial garage on the suit property, whether they liked it or not and that the Defendant confirmed this in a letter to the Plaintiff.

14. In his testimony, the Defendant told the Court that Calvin was his Cousin while Mrs. Patricia Cottar, Calvin's mother was his aunt by marriage and also his God-mother. He said that after his parents died, Patricia Cottar became his confidante and told her of his intention to purchase a property. The Defendant denied that he was only given consent by the Plaintiff only to clear vegetation and bushes on the land. He said that Mrs. Patricia Cottar was aware of the developments on the suit property as she lived on the adjacent plot. He said that Calvin lived with his mother and up to 2000 they had no objections to the constructions and developments on the land. The Defendant produced and referred to photographs showing various stages of the construction and developments. The Defendant added that the Plaintiff was fully aware of his intentions and of the constructions in the land. He claimed that Mrs. Patricia Cottar personally instructed him where to build. He said that the construction started in March, 1999. The Defendant confirmed that the two meetings referred to by Mr. Calvin Cottar took place. The lady called Lucy was his wife. He denied that he had said that he was constructing a commercial building. The Defendant insisted that what he was constructing was a residential house.

I have considered the testimonies of both Mr. Calvin Cottar for the Plaintiff and the Defendant; I have also considered the Agreement for Sale and the correspondence between the parties. In its Special Conditions, the Agreement for Sale *inter alia* provided as follows:-

SPECIAL CONDITIONS

- 1. On the Possession Date The Vendor shall allow the Purchaser to obtain possession of the Property but the Purchaser shall, until the Completion Date remain a Licensee of the Vendor until such time as the balance of the Purchaser Price has been paid.**
- 2. The Purchaser Shall be entitled during the period from the Possession Date to the Completion Date to use the Property in a reasonable manner and in the event the Purchaser wish to alter the property or vegetation thereon or to construct any building or construction he shall first seek the consent from the Vendor, such consent not to be unreasonably withheld.**

The "Possession Date" under clause 5 was meant Ten (10) days from the date of the Agreement. This means that the Defendant had possession of the property from the 7th 11/2 months on the suit property? /2 months before the Plaintiffs filed this suit and obtained injunctive orders. What happened over the said period of 17 August 1998, a period of over 17

The Defendant testified that he in fact had taken possession of the suit property before the Agreement for Sale was signed on 28th July 1998. From the schedule of payments, the Defendant had paid a sum of Kshs. 1,007,785 before the date of execution of the Agreement. Under the terms of the Agreement, he was required to deposit a sum of Kshs. 600,000/= with the Vendor's advocates on the date of execution of the Agreement for Sale. Since the possession of the property appears to have been pegged on the payment of the deposit, it seems plausible if the Defendant was given possession before the actual execution of the Agreement for Sale. The Court notes that the shareholders and directors of the Plaintiff and the Defendant are members of one family and related.

The Defendant testified that he started construction of the foundation to the building in March, 1999. It is clear therefore the question as to whether the Defendant commenced construction on the suit property is not in dispute. He pleaded in the Plaint that he commenced construction on or about February 1999 and that the Plaintiff had given consent for the construction. According to him the consent was given to him orally by Mrs. Patricia Cottar and that she even told him where to put up the building on the suit property. The Plaintiff did not call Mrs. Patricia Cottar as a witness. Mr. Calvin Cottar stated that he was away on Safari and that when he came back from Safari in January 2000 he found construction works taking place. Mr. Calvin Cottar said that nothing much had taken place before. However, it became clear to the Court that Mr. Calvin Cottar goes away on Safaris and his business and he is not much at his mother's house.

He did not state that he lived with his mother; this was said by the Defendant.

The Defendant produced photographs showing the construction of foundation to the building. Three of the photographs show dates of 3rd and 4th March 1999. The other three photographs show construction of a building in different stages. They are dated between March and April, 2000. This Court takes judicial notice of recent technology where photographs can digitally be dated at the time pictures are taken. It is clear that this construction works did not all start in January, 2000 or shortly before as suggested by Calvin Cottar. They were on going from March 1999 as stated by the Defendant. Mr. Calvin Cottar did not say when he left before he came back in January, 2000. Could he have been away for long? He did not say.

I have no doubt that Mr. Calvin Cottar did not give any consent to the Defendant to commence construction on the suit property. Did Mrs. Patricia Cottar give the consent orally as alleged by the Defendant? The Plaintiff's were put on notice in the Plaintiff that it was the Defendant's case that he had been given consent to construct. The consent could only be given by the Plaintiff through its directors or other known officers of the Plaintiff. The Plaintiff did not call Mrs. Patricia Cottar to tell the Court whether the consent pleaded in the Defence could have been given by her or not. The Court was denied the benefit of Mrs. Patricia Cottar's testimony.

The Defendant's testimony given on oath regarding the question of consent remained unchallenged and un-rebutted at the end of the trail. He said that Mrs. Patricia Cottar not only knew of the construction and progress but she had given him consent to construct the building. Mrs. Patricia Cottar could have been called. It was not suggested on record that she was incapacitated or unable to testify in any way. The Court had the opportunity of perusing letters written by Mrs. Patricia Cottar and is convinced that she is an articulate person who would have understood the proceedings and participated in it.

Of particular interest in this regard is the hand written letter by Mrs. Patricia Cottar on 10th March of unnamed year addressed to the Defendant. The Defendant in his testimony claimed that he received the letter on 10th March, 2000. It reads as follows:- “

Friday 10/3

Hi Paul -

You may remember we agreed that when Holly is here for Sat/Sunday we would have a quiet week-end (her house is SO near to the building site!)? Shall we give her quiet week-end tomorrow?

**Thanks,
Pat."**

The Defendant said that Holly was the Plaintiffs tenant. The Plaintiff did not deny the existence of this letter or that it was written by Mrs. Patricia Cottar. I have no doubt from the contents that Mrs. Patricia Cottar knew of the on-going construction on the suit property well before the year 2000. It would appear that there was an agreement or understanding between herself and the Defendant. She states so expressly in her letter.

There is no protest or objection against the construction. To the contrary, she agreed with the Defendant that Holly would have her quiet weekends when she was around. To me, this means either there will be no construction works over the weekend and/or no noise from the building site over the weekends when Holly was around.

Such an agreement could only be possible if Mrs. Patricia Cottar had no objection to the construction works taking place on the suit property. Such an agreement could not reasonably be reached if the construction works were taking place without her consent or at the very least, against her wish and if she was bent on the enforcement of Special Condition No.2 which required a written consent for any construction on the suit property.

In the light of the foregoing and the testimony of the Defendant, I find on a balance of probability, that Mrs. Patricia Cottar did give a verbal or oral consent to the Defendant to construct a building on the suit property. If there could have been any doubt about the existence of some consent given to the Defendant by the Plaintiff to construct on the suit property, this is removed by the last paragraph of the demand letter dated 7th April, 2000 from the Plaintiff's advocates to the Defendant advocates which says as follows :-

“As there is now a dispute of the property, our client under Special Condition No. 2 revokes any consent that it might have given until the dispute is resolved ...”

I would say that one cannot possibly revoke a consent which was not given in the first place. For consent to be revoked, it must have been given. It does not behove of the Plaintiff to pretend to refer to "any consent that might have been given." Either consent was given or was not given. The said letter is a serious legal demand and notice and for it to be of any effect, it is required to be clear and certain. The ambiguity and/or uncertainty in the said paragraph demonstrates that either the Plaintiff is not sure of its facts or is deliberately trying to circumvent the Consent that it had given to the Defendant. Furthermore there is no provision in Special Condition 2 which can be invoked to revoke any consent which has been given there under.

It is for all the foregoing reasons that the balance of probability tilts heavily in favour of the Defendant on the issue of consent. It is on the same basis that I find that there is no requirement in the circumstances for the Defendant to produce evidence of his request to construct. If the consent was verbal, in the absence of any other evidence, this Court believes that the request must have been made orally. Mrs. Patricia Cottar was a director of the Plaintiff and I do hold that she had the ostensible authority of the Plaintiff when she gave the Defendant the consent to construct on the suit land. Her action is binding on the Plaintiff and the Plaintiff is *estopped by its conduct from alleging that Mrs. Patricia Cottar was not authorized by Jodad Investments Limited. The principals set down in **ROYAL BRITISH BANK VERSES TURQUAND (1856) ALL E.R. 886 would apply in this case. It is also to be noted that Mrs. Patricia Cottar was the Defendant's aunt and Godmother, and no reason has been shown for the Defendant to doubt her capacity and authority in the Plaintiff Company which is a family company. It is clear that before April 2000, there was some trust between the parties to the extent that the Defendant made payments of over Kshs 1,000,000/= towards the purchase price and was given possession of the suit property before the Agreement for Sale was executed on 28th July, 1998. As stated in the Plaintiffs submissions, the Defendant himself testified that Patricia Cottar was not only truthful but trustworthy. I hold that she did give consent to the construction and the Defendant relied upon it and acted on it.***

The Plaintiff contended that it is trite law that any consent relating to a transaction of for the disposition of an interest in land must be made in writing. The Plaintiff referred to section 3 (3) of the **Law of Contract Act, Chapter 23, Laws of Kenya which makes it compulsory that all transactions relating to disposition of interest in land to be reduced in writing and be signed by the party to be charged. It added that this requirement covers any transaction such as the consent in question here and the absence of such written consent, the Court should find that no such consent had been granted.**

I have carefully considered this argument within the context of this case. The Agreement for Sale herein was a disposition of an interest in land and it was in writing. There is no challenge of its validity and enforceability. That is what the Plaintiff wants this Court to do. However, I do not see how development or construction on the land under disposition can be deemed to be a disposition of land by itself. It is my view that disposition in this case goes to the title to the land and not the activities on the land. In this case, a sale and transfer were contemplated and in progress as the completion period had not been reached. The construction herein was not the primary transaction but purely incidental to the Sale. Every step or stage of the transaction as a whole would not require to be in writing or amount to a disposition. The right to grant the consent under Special Condition No. 2 and the grant thereof did not amount to a disposition in the circumstances of this case.

(ii) Did the Defendant construct or commence construction upon the property before the Defendant had obtained any consent required by law?

Clause No. 8 (c) of the Agreement for Sale states that "**the property is sold subject to any provisional stipulation and conditions contained or implied in the title**". It is this Court's view that this condition is primarily for the protection of the Vendor, the Plaintiff. It is intended to ensure that the Purchaser is aware of any provisional stipulations and Conditions contained or implied in the Title and would be required to comply and adhere to such Stipulations and Conditions. The Purchaser would not have recourse against the Vendor in the event any of the stipulations and conditions contained or implied in the title are difficult or impossible to comply with or restrict in any means the Purchaser's intended user of the land. Such stipulations and conditions would go with the title and their inclusion amounts to a disclaimer by the Vendor and is not intended to make the Vendor the enforcer of such stipulations and conditions, which are expressly contained in the title or those implied in law.

I am of the opinion that once the Plaintiff gave consent to the Defendant to construct any building or structure on the suit property before the completion of the Agreement, then it was incumbent upon the Defendant and it was his duty to obtain all the requisite consent and approvals from the local authority and other bodies. **Section 30 (1) of the Physical Planning Act, Chapter 286, Laws of Kenya provides as follows:?**

"30 (1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under Section 33."

I agree that the import of this provision is very clear. No person is permitted to commence carrying out development on a property unless he has obtained approval in advance. Section 30 (2) makes it a criminal offence for any person to carry out any construction without approval. If the Defendant breached or violated this law then it is expected that the law of the land would be invoked and enforced by the appropriate authorities and law enforcement agencies. As a law abiding-citizen, the Plaintiff would be entitled to report such a violation if it is within its knowledge. However, can such a breach or violation of the law amount to a repudiation of the Agreement for Sale and particularly after the Plaintiff had given the consent to the Defendant to construct on the land? I do not think so.

It should be recalled that what we have here is an Agreement for Sale of land. The purpose for the acquisition was clearly understood to be for residential purposes and the Court was made to understand that the user of the land in the area in which the land is situated is residential and one would require approvals and consents from the local authority for change of user if one intended to put up a commercial building. Once the Plaintiff as vendor had granted the consent to construct under Special Condition No. 2, then such consent and subsequent construction would be consistent with the disposal of the property under the Agreement for Sale. If the parties agreed to the construction before completion then this is perfectly in order, lawful and legal. However the Defendant would be required to comply with not only all the stipulations and conditions contained or implied in the title but all laws of the land pertaining to the construction works and acquisition of the said land. It would be the duty of the Defendant to abide by the law and also comply with all stipulations and conditions set out in the title or implied therein.

In the event of any violation by the Defendant, I do not think that it is the duty of the Plaintiff as Vendor to enforce the law. That's a matter between the violator of the law and the relevant authorities and law enforcement agencies. If the parties intended that such a violation would amount to a repudiation of the Agreement for Sale, then it ought to have been spelt out clearly and expressly in the Special Conditions just like the other fundamental terms unique to this sale transaction. Inclusion of such a Special Condition would have given the Plaintiff the supervisory powers and rights as to how the construction and related activities would take place. In the absence of such intention, it would be improper for this Court to imply such conditions and thereby re-write the contract for the parties. This would be against the law and "*Laissez faire*"

For the foregoing reasons, I do not intend to go into the question as to whether the Defendant constructed or commenced construction upon the property before he had obtained any consent required by law. I leave that issue to the Local Authority and the Defendant. If the Plaintiff as a neighbour of the Defendant and a law-abiding citizen is desirous of ensuring that the law is complied with, then, it has the right, if not

the duty to report the matter to the relevant authorities. In such event, the Plaintiff would have this Court's blessings, and the matter will certainly be dealt with on its merits and in accordance with the law.

For now, it is a non-issue and cannot be an act of repudiation.

(iii) Did the Defendant in complete breach of the Agreement for Sale commence construction of a commercial structure on the suit property?

The Plaintiff alleges that the Defendant was putting up a commercial garage and not a residential house in complete breach of the Agreement for Sale. I have carefully perused the Agreement for Sale and found no express condition regarding the user of the land upon sale. However there is no dispute that the suit property is situated in a residential area and this is contained or implied in the title. The Defendant had no dispute with this but maintained that he was constructing a residential house and not a commercial garage. The Plaintiff alleges that the Defendant on 5th April 2000 had informed the Plaintiff's directors that he was constructing a commercial garage on the suit property. It is clear that if it is true that the Defendant was constructing a commercial garage on a residential property, he would be in breach of Clause 8 (c) of the Agreement

for Sale which binds the Defendant to comply with all stipulations and conditions contained or implied in the title. As a result the views and reasons which I have given above in respect of the consent to construct would apply herein also.

Once the Plaintiff gave the Defendant the consent to construct the residential building on the land then the Defendant was required to obtain the requisite approval for the construction including approval of the building plan. If he did not obtain the said approvals or if he did and he did not strictly adhere to the building plans, then he would be in violation of Clause 8 (c) of the Agreement for Sale. However the Vendor, the Plaintiff would not be strictly liable for such a violation as long as it remained the registered owner of the property before completion. The Plaintiff would have a defence on the basis of the Agreement for Sale *vis-à-vis any legal action taken by the statutory regulatory body, i.e. City Council of Nairobi. The said local authority would perfectly be entitled to prosecute the Defendant and condemn the illegal structure on the land. This would be a matter between the City Council of Nairobi and the Purchaser, the Defendant. It would remain such even after title had passed and the Defendant became the registered owner of the property. In the circumstances of this case, Clause 8 (c) passes obligations onto the Purchaser and is a disclaimer in favour of the Vendor. It does not per se grant or vest enforcement rights to/in the Plaintiff as strictly the contemplated reversionary holder of the interest in the land (until the Sale Agreement is lawfully revoked, nullified or terminated) is the Defendant and not the Plaintiff. This is more so once the consent to construct has been granted for consideration and in contemplation of the completion of the Agreement for Sale.*

As a result, I shall not delve into the question as to whether the Defendant commenced construction of a commercial structure on the suit property. It is a matter best left for the City Council of Nairobi and any other law enforcement agencies. I hold therefore that there was no act of repudiation by the Defendant in this regards.

This brings me to issue No. 2.

2. IS THE PLAINTIFF DISCHARGED FROM THE AGREEMENT FOR SALE FOR THE DEFENDANT'S BREACH OF THE AGREEMENT FOR SALE?

I do hereby hold that since the Plaintiff did not prove the alleged acts of repudiation of the Agreement for Sale dated 28th Agreement for Sale. The Plaintiff has not been able to show and prove that the Defendant is in breach of the Agreement for Sale as alleged. The alleged violations of the stipulations and conditions contained and implied in the Title and the allegations of violations of the law are, *stricto sensu*, outside the mandate of the Plaintiff to enforce. It falls within the purview and jurisdiction of the City Council of Nairobi and is not a matter for the Plaintiff or this Court to intervene directly. This does not stop the

Plaintiff reporting the matters or even lodging complaints with the appropriate authorities to ensure that the law is complied with as such activities would certainly affect the Plaintiff's property which is adjacent to the suit property and the environment generally. July, 1998, it is not discharged from the said

3. IS THE DEFENDANT ENTITLED TO SPECIFIC PERFORMANCE OF THE AGREEMENT FOR SALE?

By the date of the execution of the Agreement for Sale on 28th Defendant had paid a sum of Kshs 1,007,785.00 towards the purchase price. According to the Agreement the deposit payable was Kshs 600,000/=. The Defendant was required to pay the balance in tranches of Kshs 300,000/= per quarter on the 1st quarter commencing on the 1st June 2000. September 1998. The last tranche was payable on the 1st day of each July, 1998 the

During the trial, it was agreed by the parties as a matter of fact that the Defendant had paid a total of Kshs 2,611,220/= by 1.12.1998 instead of Kshs 1,200,000/= as contemplated by the Agreement for Sale. The Defendant was certainly way ahead of the payments of the agreed installment. The Defendant forwarded 3 cheques subsequently to the Plaintiff:

Cheque No. 187 dated 29.2.2000 for UK£ 888

Cheque No. 190 dated 11.4.2000 for UK£ 3,000

Cheque No. 201 dated 10.7.2000 for UK£ 3,888

The Defendant testified that the value of these cheques would have brought the total payments made to Kshs 3,000,020.00

The Defendant testified that these 3 cheques were all returned by the Plaintiff. The first two cheques were returned on 17th May, 2000 through the Plaintiff's advocates. By this time this suit had been filed and injunction orders obtained. The last cheque which was sent about 10th July, 2000 was returned in August 2000. I view the first 2 cheques of greater significance as they were issued or paid before the suit was filed.

A careful study of the Amended Plaintiff will show that the main cause of action is based on alleged repudiation of the Agreement by the Defendant. It is true that the Plaintiff in paragraph 18 of the Plaintiff pleaded alleged failure on the part of the Defendant to make due payments under the Sale Agreement and the declaration sought includes one for "material breach". However, this Court notes that the Plaintiffs only witness Mr. Calvin Cottar in his testimony did not discuss much on the question of payments of the purchase price. He made no statement regarding any delays or failure to pay the purchase price instalments on due dates. His entire testimony was focused on the question of repudiation due to lack of consent to construct and construction of a commercial garage.

I am of the view that the inclusion of the alleged failure to make due payments on the part of the Defendant was incidental to the main cause of action based on repudiation. There was no attempt to follow it up with evidence during the trial whatsoever. Of more importance, I am of the view that the Defendant duly made the payments towards the purchase price and in fact, he was way ahead of the instalment payments by the date the suit was filed. The Defendant had substantially completed payments and the last 2 cheques he forwarded before the suit was filed were returned in May, 2000. It is my view that all things being equal and had it not been for this suit and injunction order, the Defendant would certainly have completed payment of the purchase price in good time.

Considering the aforesaid findings, is the Defendant entitled to an Order for Specific Performance of the Agreement for Sale?

In "Chitty on Contract" 23rd edition Vol. 1 in paragraph 1522, it is stated that:?

"The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract. The scope of the remedy is in one respect wider than that of an action for damages, since specific performance may be ordered before there has been a breach. It will not be ordered if the contract suffers from some defect, such as informality, mistake or illegality, which makes the contract invalid or unenforceable."

As has been seen above, the Defendant did not repudiate the Agreement for Sale and he complied with the payment schedule agreed in respect of the purchase price. Up to this stage it would appear that the contract is on course, valid and enforceable. However the Plaintiff has submitted that the Defendant ought not to be granted Specific Performance on the following grounds:-

1. Conduct of the Defendant
2. The Agreement contains vague and uncertain clauses
3. Mis-description of the property being sold
4. Possession and Transfer
5. Constant Supervision
6. Severe Hardship to the Plaintiff
7. Unclean hands
8. Agreement is incapable of enforcement
9. Revocability of the Agreement
10. Parties had no intention to create legal relationship enforceable by the Court
11. Damages are an adequate remedy

1 & 7 — Conduct of the Defendant and unclean hands

I think that I have dealt with these two issues herein above. The Court has found that the Defendant neither repudiated nor breached the Agreement for Sale dated 28th July 1998. The Defendant was not guilty of the alleged acts of repudiation or breaches of contract. The conduct of the Defendant has not been found to be questionable and therefore, this cannot be a ground to deny him Specific Performance.

Equally I do not see how I can hold that the Defendant was in contempt of Court when the Plaintiff did not pursue this issue when the alleged contempt took place. I am unable to decide on the question of alleged contempt during the trial of the suit. I also did not venture into the issue whether the Defendant obtained approvals of the building plan without consent of the Plaintiff for reasons on record. It follows therefore there is no basis for the Court to find that the Defendant came to this Court with unclean hands.

2. The Agreement contains vague and uncertain clauses
3. Mis-description of the property being sold
4. Possession and Transfer
5. Constant Supervision
6. Severe Hardship to the Plaintiff

7. Agreement is incapable of enforcement

I have looked at the pleadings including the Reply to Defence and Defence to Counterclaim. The aforesaid grounds of defence have not been pleaded neither was any facts in support thereof placed before the Court. The Parties are bound by their pleadings. The agreed issues do not include any of these matters. I think what the Plaintiff has done is to go to the Agreement and attempt to find flaws and defects in them. With respect, for such grounds to be accepted as defence, to the prayer for Specific Performance they should have been pleaded and material laid before of the Court (facts) during the trial. None of these took place. To allow these grounds would amount to an ambush on the Defendant which will certainly lead to a miscarriage of justice.

10. Parties had no intention to create legal relationship enforceable by the Court

I have decided to deal with this ground raised by the Plaintiff separately as it is as unique a ground as it is surprising that it has been raised by the Plaintiff. The Plaintiff asserts that the parties are close family relatives and this fact couples with the wording of the Agreement for Sale leaves no doubt that the parties never intended to resort to Court action. That is clear that the parties intended to honour this Agreement only through arbitration in case of a dispute. How interesting this submission is.

The Plaintiff being entitled to Court filed this suit but did not stop at only asking for injunctive orders pending the matter to go to arbitration. The Plaintiff in its Amended Plaintiff went beyond injunctive orders and sought declarations and accounts. If it wanted to sustain the Arbitration Clause, it ought to only have come to sustain the Arbitration Clause by limiting the relief sought to injunction pending arbitration. Asking for the other orders the Plaintiff gave the Defendant the right to elect whether to fully participate in the proceedings and take out the dispute out of arbitration or apply for stay of proceedings. The Defendant elected the former approach and the Plaintiff joined issue on this. The Plaintiff cannot therefore cry foul at this late stage during submissions that the Court ought not to adjudicate in this arbitral and family affair. I do not believe that the Plaintiff is committed to this argument and has been slotted in as an after-thought.

I do hereby hold that the Agreement for Sale herein is Valid and enforceable. It is the very reason why the Plaintiff came to Court. If looked at carefully the grant of declarations sought would in effect amount to enforcement of the terms and conditions of the Agreement for Sale. It does not behove of the Plaintiff to stand up now and say that there is nothing to enforce at the tail end of the litigation when it has fought tooth and nail to ensure strict compliance of not only express terms but also those implied in the Agreement and even the title.

11. Damages are an adequate remedy

The Plaintiff Submitted that in this case damages are an adequate remedy and specific Performance should not be granted in the circumstances. The Plaintiff added that the only damages that the Defendant is entitled to is the refund of the purchase price which the Plaintiff agrees to pay.

In Paragraph 1524 of page 710 of Chitty on Contract 23rd edition, it is observed as follows;

"The law takes the view that damages cannot adequately compensate a party for breach of a contract for the sale of an interest in a particular piece of land or particular house (however ordinary). It seems that specific performance is available even though the buyer buys for resale. The Vendor, too, can get specific performance and it seems to make no difference that the land is readily saleable to a third party; or that after contract but before completion a compulsory purchase order is made in respect of it".

I am in agreement with this sound principle of law. Land is a unique and special property, there are no two pieces which are the same or similar. It is almost universal that rights in land rank higher than many other proprietary rights and they cannot easily be taken away. I do not accept that damages are adequate remedy in this case. There is a valid and enforceable agreement here and it relates to land. The Defendant

was given possession of it and allowed to construct on it. He has expended substantial sums on it and has acquired vested interests beyond that in the Agreement for Sale. The Defendant has also paid most of the purchase price and was only hindered to complete payment by the filing of this suit and the grant of the injunctive orders.

In all I find that damages are not an adequate remedy. It is not relevant to the grant of this remedy that the Defendant has also sought general damages for breach of contract. Why should the Court consider this first when there is an earlier prayer for Specific Performance?

The Agreement for Sale herein does not suffer from any defect, informality, mistake or illegality which makes it invalid or unenforceable. Any aspects of unenforceability suggested are minor and severable. Under the principles of equity of which Specific

Performance is one, the law regards as done what ought to be done. I therefore hold that the Defendant is entitled to Specific Performance of the Agreement for Sale.

4. IS THE DEFENDANT ENTITLED TO ANY DAMAGES AND IF SO HOW MUCH?

In paragraph (b) of the prayers in the Counterclaim, the Defendant Claims — general damages for breach of contract while in prayer number (bi) the Defendant seeks an inquiry as to damages occasioned by the grant of injunction.

General Damages:-

In the Court of Appeal case of **PROVINCIAL INSURANCE COMPANY EAST AFRICA LIMITED — VERSUS — MORDEKAI MWANGA NANDWA, Civil Appeal No. 179 of 1995, Justice R.S.C. Omolo, A.A. Lakha and G.S Pall, held that;**

"It is equal clear that no general damages may be awarded for a breach of contract. See Dharamshi —V- Karsam. (1974) E.A. 41. It is however surprising to us that the learned trial judge in the face of reported decisions of the Court should have allowed claims for general damages on a breach of contract or made an award for special damages which had never been pleaded."

Again in the case of **HABIB ZURICH FINANCE (K) LIMITED — V- LEE MUTHOGA JOSEPH M. GITHONGO T/A GITHONGO &..... Civil Appeal No. 144 of 1991, the Court of Appeal had this to say about the Dharamshi case:**

"This case has been accepted by this Court as an authority for the proposition that general damages cannot be awarded for a breach of contract and that proposition makes sense because damages arising from a breach of contract are usually quantifiable and are not at large. Where damages can be quantified they cease to general and in the particular circumstances of the case under discussion, the first respondent, in both the original plaint and in the amended plaint quantified his damages at Kshs. 218,700/=."

These decisions are binding on this Court. It follows therefore that where damages arising from breach of contract are quantifiable they must be pleaded as special damages. They are not general damages which are at large. This principle would apply to this case in any event since the Defendant the time of the trial knew of quantum of damages he claims he had suffered. He produced bills of quantities and a construction valuation report. The Defendant claims that the net addition cost arising from the stoppage by 2002 was Kshs. 1,243,116.20. It was suggested that the damages continued to rise up to the trial and continue to accrue. This means that they are at large. Even by the time of the trial the Defendant did not attempt to seek any further amendment of his counterclaim in respect of damages so that the Special damages which were known could be included in the claim. It is trite law that Special damages must always be expressly pleaded. In the HABIB ZURICH FINANCE case, the Court of Appeal said as follows:?

"We wish to touch briefly on the award of Kshs 1,225,000/= as damages for loss of bargain. As we have repeatedly said, the first respondent had quantified his loss as a result of the alleged breach of contract and a specific sum of Kshs 218,700/= was claimed in the plaint. Even when introducing the valuation report in the evidence the first respondent and his legal advisors did not attempt to amend the plaint, which they could have easily done. This Court has repeatedly held that cases must be decided on issues pleaded and even if we had found for the first respondent on the issue of breach of contract, the only damages he would have been entitled to were the Kshs 218,700/= pleaded in the plaint."

This is exactly what happened in this case. The alleged damages incurred by the Defendant were quantifiable before and certainly when the trial commenced. They were no longer general damages but Special damages. The Defendant did not amend his Counterclaim and the quantum was discernible only from the Construction Valuation Report.

As a result since the general damages for breach of contract are not awardable in the context of this case and no Special damages were pleaded, the Defendant is not entitled to any of these heads of damages. The same is disallowed.

6. IN THE EVENT THE DEFENDANT IS SUCCESSFUL IN THIS SUIT SHOULD THERE BE AN INQUIRY AS TO DAMAGES WHICH MAY HAVE BEEN OCCASIONED BY THE GRANT OF THE INJUNCTION HEREIN TO THE PLAINTIFF?

From the findings of this Court hereinabove, I do hold that the Defendant has been substantially successful in this suit. The Court on the 4th June, 2000 granted the injunction orders against the Defendant on condition that the Plaintiff would file an undertaking as to damages within 10 days of the order. The Plaintiff duly complied and filed the written undertaking. The Plaintiff has ever since enjoyed the said orders and the Defendant has been restrained from entering the suit property and the construction and developments were put on hold since 14th June, 2000. The Defendant was bound to obey these orders and in his Amended Defence and Counterclaim included a prayer as to damages occasioned by the grant of the injunction to the Plaintiff. In its discretion, this Court directed that the question of inquiry as to damages which might have been occasioned by the grant of the injunction await the judgement herein. In my view this was the proper thing to do since it would have been premature, pre-emptive and prejudicial for there to be an inquiry in this regards before the issue of "liability" had been decided. This Court has the power and jurisdiction to make the inquiry even after judgment since it was a condition for the grant of the injunction order. It is the reason why the Plaintiff gave its undertaking as is the right time for the inquiry in my view, even without pleading it, since the injunction was granted on the basis of an undertaking as to damages the Court was obliged to inquire into the matter if the orders were discharged.

As a result, I do hold that the Defendant is entitled to this Order of inquiry. In this regard, I think that it would be appropriate that during the inquiry that the question of interest on the amount of purchase price paid be considered as part of the said inquiry.

This could only arise due to the consequences of the Injunction Orders when the Defendant was excluded from the premises yet his funds remained with the Plaintiff.

7. Costs

This is decided hereunder.

CONCLUSION:

The net result is that I do hereby hold that the Plaintiff is not entitled to the Prayer for Injunction in 21(a) and the declarations in 21(a) (i) and (a) (ii). The Plaintiff is not entitled to an order of account of the monies paid under the Agreement for Sale as these are not in dispute and have been determined in this judgment. They were all paid to the Plaintiff and are within its knowledge. I therefore do hereby dismiss the Plaintiffs suit with costs to the Defendant. The Orders of Injunction granted on the 14th June, 2000 are hereby discharged.

I do hereby enter Judgment in favour of the Defendant as against the Plaintiff in terms of Prayer (a) and (bi) of the Amended Defence and Counterclaim (amended on 9th December 2002.) The Inquiry as to damages occasioned by the grant of the Injunction to the Plaintiff may be carried out by any Judge stationed at the Commercial Division of the High Court of Kenya at Nairobi since I have been transferred and now based at the High Court, Eldoret. The Plaintiff shall pay the costs of the Counterclaim together with Interest at Court rates from the date of this Judgment until payment in full.

DELIVERED AND DATED ON THIS 25TH APRIL 2006.

MOHAMMED IBRAHIM

25/4/06

**CORAM: IBRAHIM J.
BRONO CC.
MR. ONGICHO FOR THE PLAINTIFF**

**MR. KILONZO JR. FOR THE DEFENDANT
Judgment read on their behalf.**

Mr. Ongicho:

I have instructions to appeal against this decision. **I ask for maintenance of the Status Quo for a period of 30 days to enable me to make a formal application for stay of execution of the Decree pending an appeal against this decision. This is a complex matter. It is best the Court of Appeal has an opportunity to hear the matter.**

Mr. Kilonzo:

I object to the application. He is applying for reinstatement of the Injunction. The Judgment has been signed. They want to reinstate the Injunction.

This is a piece of land. Parties are available. Formal application necessary. Matter is complex but no relation to the status quo. They have right of appeal. Title is in their name. Land is not going anywhere.

Mr. Ongicho:

The Defendant will not suffer if the temporary order is given. There is animosity between the parties. In the interest of all for the status quo to be maintained. The Court can decide on the time. The formal application shall be filed.

ORDER

I have considered the application herein. It is certain that the Plaintiff has the right of appeal. In my view, there is nothing to be executed against the Plaintiff as a result of the judgment. There is no extractable order/decreed capable of execution. The Court has only discharged the injunction it had granted. This Court is now *functus officio and cannot reinstate the discharged injunction.*

What of maintenance of the Status Quo? The "Status Quo" suggests the position or state that has been or is in existence. Having discharged the injunction after dismissing the Plaintiff's suit, the status quo is that there is no injunction at the moment. By dismissing the suit the status quo has been changed and reverted to the position on the 14th June 2000.

I do not think that I have the jurisdiction to make any orders that will contradict this judgment. If execution of any order has to take place, that would be a different matter.

This Court however has the jurisdiction and discretion to make orders however temporary to enable one exercise and prosecute rights of appeal. In special circumstances the Court which can take heed of a situation whereby the appeal would be rendered nugatory at the outset the Court can make appropriate orders. In this case the subject matter is land and the title is still registered in the name of the Plaintiff. I see no situation which threatens disappearance of the subject matter or affect the appeal. I see no reason to invoke the Courts inherent jurisdiction and discretion.

I disallow the application to maintain the alleged Status Quo.

IBRAHIM J
FURTHER ORDER

I hereby grant leave to both parties to be supplied with uncertified photo-copies of my hand written judgment forthwith.

I hereby order that this file be returned to the Commercial Division of the High Court at Milimani forthwith.

I hereby direct that the Judgment be typed and availed for my signature as soon as practicable.

IBRAHIM J