REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.1930 OF 1997

RAMESH CHANDER DHINGRA ……...……..PLAINTIFF

VERSUS

CHARLES OTISO G. OTUNDO ……..DEFENDANT

JUDGMENT

I REPRESENTATION

The original plaint in this suit, dated 31st July, 1997 was amended first on 22nd September, 1997 and then again on 4th January, 2001, at which stages the plaintiff was being represented by the law firm, Hamilton, Harrison and Mathews, Advocates. The defendant's first defence was filed on 30th October, 1997 after which there was an amended defence of 19th January, 2001 responding to the re-amended plaint. These defences were filed by the law firm, G.J. Mainye & Co. Advocates. Thereafter both parties instructed other advocates, and the plaintiff was represented by M/s T.O. K'Opere & Co. Advocates whereas the defendant was represented by M/s Oguttu-Mboya & Co. Advocates.

II PLEADINGS

(a) For the Plaintiff

The plaintiff pleaded that a written agreement had been made between himself and the defendant, dated 10th May, 1989; and the defendant thereby agreed to grant to the plaintiff a lease of an education institution, Gusii Highlights High School, together with the premises comprised therein. This lease was later varied, by a supplementary agreement dated 22nd February, 1994. Under the variation agreement, provision was made for rent payable until the year 2002; and in addition, the plaintiff was allowed at his own expense to build more classrooms and supporting premises. It was agreed that rent after 2002 would be mutually agreed.

It was stated in the pleadings that, since the commencement of the lease, the plaintiff had at his own expense, constructed 19 buildings at a cost of Kshs.2,000,000/= and valued at 12,800,000/= as at June 1998. These buildings are stated to represent a crucial development in the capacity of Gusii Highlights High School. It is stated that the plaintiff's personal initiative and management has led to the emergence of a prestigious school with a record of excellent performance.

Sometime in October, 1995 the parties were considering sale by the defendant and purchase by the plaintiff of the leased educational institution and its property; and on the basis of the emerging understanding, the plaintiff advanced to the defendant the sum of Kshs. 300,000/=. Then on *24th November, 1995* an agreement was entered into under which the defendant would sell to the plaintiff, for

the sum of Kshs.10,500,000/= the properties situate in Kisii known as L.R. Nos. NYARIBARI CHACHE/B/B/BOBURIA/1448; 2780; 2995; 3328. Under clause 3 of the said agreement, the plaintiff would pay a deposit of Kshs.2,000,000/= to the defendant; the same was paid and duly acknowledged. In further part-performance of that agreement, the plaintiff paid to the defendant, as requested, the sum of Kshs.15,000/=. Under Special Condition 5 of the agreement of 24th November, 1995 the defendant was required to immediately hand over the primary school to the plaintiff, upon signing of the agreement.

It is pleaded that the defendant had very well known that the plaintiff was purchasing the said properties so as to obtain possession of the part of the premises comprised therein, which was necessary for the running of the *primary school* known as Gusii Highlights Academy, as well as the High School being managed by the plaintiff. The plaintiff is in possession of part of the premises.

On the strength of the said agreement, the plaintiff proceeded to advertise Gusii Highlights Academy (which was being run by the defendant) as associated with Gusii Highlights High School, and this led to improved intake in the Gusii Highlights Academy. This improved enrolment may have been a factor in the defendant refusing, about February, 1995, to hand over the primary school. Since February, 1995 the defendant has continued to manage the primary school (Gusii Highlights Academy), and has refused or neglected to transfer it to the plaintiff; and this has deprived the plaintiff of a substantial income estimated at Kshs.12,755,250/= as at December, 2000.

It is pleaded that the defendant's continued possession of the primary school since 24th November, 1995 has deprived the plaintiff of the rents and profits he would have enjoyed from managing the primary school and from possession of the residential houses comprised therein. The plaintiff states that it is necessary that an account and inquiry be ordered to assess the damages the plaintiff has suffered by reason of the failure of the defendant to perform his obligation under the sale agreement.

It is stated that, pursuant to the said agreement dated 24th November, 1995 the defendant requested the plaintiff to release a sum of Kshs.868,435/40 to Kenya Commercial Bank Ltd in redemption of the charged properties the subject of the sale agreement : L.R. Nos. NYARIBARI CHACHE/B/B/BOBURIA/1448; 2780; 2995; 3328. The plaintiff redeemed the charges by tendering the sum of Kshs.871,107/40 to Kenya Commercial Bank Ltd. The charges were transferred to the plaintiff at his request, in accordance with S.73 of the Registered Land Act (Cap. 300). The plaintiff thereafter, by letters dated 5th July, 1996 and 11th September, 1996 pressed the defendant to complete the sale agreement; but the defendant refused to do so.

The plaintiff pleads that he has at all material times been, and is now, ready and willing to complete the said contract. He claims:

(i) *specific performance* of the agreement dated 24th November, 1995 for the sale by the defendant to him of the properties L.R Nos. NYARIBARI CHACHE/B/B/BOBURIA/1448; 2780; 2995; 3328 situate in Kisii;

(ii) an order for *vacant possession* of the primary school and all residential houses built on land comprised in the area thereof;

(iii) an order for all necessary and consequential *accounts*, *directions* and inquiries;

(iv) in the alternative, *damages for breach of contract*;

(v) in the further alternative, *rescission* of the said contract, and repayment to the plaintiff of the total deposit of Kshs.2,886,107/40 paid thereunder, with interest at the rate of 35% per annum with effect from 24th November, 1995 until payment in full;

(vi) further or other relief;

(vii) interest on costs and damages.

(b) **For the Defendant**

The defendant denies that he had allowed the plaintiff to build more classrooms and supporting premises. He asserts that "any such constructions (if any) were done for the good of the business [which] the plaintiff was conducting therein". By his pleadings the defendant clearly wants to avoid acknowledging that as many as *19 buildings* had been constructed on the suit premises by the plaintiff; he states:

> "**if any such construction of 19 buildings was done, same were done at the plaintiff's own expense for the good of the business during the subsistence of the lease……..".**

As the existence of 19 new buildings on the suit premises could not have been unknown to the defendant at the time of drawing the statement of defence, so as to justify vague pleading on this point, I take it that he *admits* that the plaintiff had constructed those buildings.

The defendant denies that sometime in October 1995 the plaintiff advanced him the sum of Kshs.300,000/= on the premise that a sale of the educational institution the subject of this suit, to the plaintiff would take place.

The defendant admits that *there was* between him and the plaintiff an *agreement for the sale* of L.R. NOS. NYARIBARI CHACHE B/B/BOBURIA/1448; 2780; 2995; 3328 at an agreed price of *Kshs.10.5 million* and that he, the defendant, received Kshs.2,000,000/= as *part-payment* towards the purchase price. But he denies receiving Kshs.15,000/= in further part-payment as claimed by the plaintiff.

With regard to the special conditions of the sale contract (Nos. 1-5), the defendant pleaded that the *plaintiff had been in breach* of the same: for f*ailing to pay the purchase price within the completion date*, namely 120 days from the date of the agreement, which time-limit was agreed to be of the essence.

The defendant pleads that the plaintiff's remaining in possession of part of the four properties aforementioned is *by virtue of the lease* which had been made to the plaintiff (dated 10th May, 1989), "and the tenancy agreement **could only terminate on completion of the sale agreement**".

The defendant pleads that since the plaintiff failed to pay the purchase price and to complete the transaction within the stipulated period of 120 days, the plaintiff was only entitled to a *refund of Kshs.2,000,000/=* which he had paid under the stakeholder clause, in the second special condition of the sale agreement.

The defendant proceeds on the premise that the plaintiff was in breach of contract, and that this fact entitled him, the defendant, to withhold possession of the buildings accommodating the primary school (Gusii Highlights Academy) and the residential houses.

On that same premise, the defendant contends that the plaintiff, having failed to pay the purchase price, was not entitled to any rights over the *primary school*; and so, the defendant pleads, he is not liable for damages as alleged by the plaintiff.

The defendant admits that he did request the plaintiff *to release Kshs.868,435/40* to M/s Hamilton Harrison & Mathews, Advocates and that this was *done within the 120 days of validity of the sale agreement.* But he *denies having authorized the redemption of the charged properties* as alleged by the plaintiff. He also denies having consented to the charges being transferred in favour of the plaintiff.

The defendant denies receiving the plaintiff's letters of 5th July, 1996 and 11th September, 1996 urging the defendant to complete the sale agreement. He states for good measure that *even if such letters had been received, he would not accede to the request because the completion period of 120 days had already expired*. The defendant asserts that the plaintiff had not been ready, willing and able to complete his part under the contract during the agreed 120 days, contrary to the plaintiff's claim.

The defendant pleads that the plaintiff is not entitled to the prayer for specific performance and vacant possession of the primary school and all the residential houses therein, as claimed. He pleads too that the plaintiff is not entitled to any accounts, directions or inquiries as prayed. The defendant denies any liability for damages for breach of contract, and in particular denies that he bears liability to make repayment to the plaintiff with interest at 35% rate as from 24th November, 1995.

III STATEMENT OF AGREED ISSUES

The parties' statement of agreed issues dated 20th November, 2002 was filed on 28th November, 2002. These agreed issues are as follows:-

(i) Did the plaintiff and the defendant enter into a lease agreement on 10th May, 1989?

(ii) If so, what were the terms of such lease agreement?

(iii) Did the lease agreement, if any, concern Gusii Highlights High School as well as Gusii Highlights Academy, or did it concern the former only?

(iv) What were the terms of the said lease agreement?

(v) Did the plaintiff and the defendant negotiate and enter into a sale agreement in respect of L.R. Nos. NYARIBARI CHACHE/B/B/BOBURIA/1448; 2995; 2780; 3328?

(vi) If the answer to (v) above is in the positive, what were the terms of such sale agreement?

(vii) Did the sale agreement materialize?

(viii) If the answer to (vii) above is in the negative, then who breached the sale agreement?

(ix) How much money, if any, had been paid to the defendant in respect of the sale agreement?

(x) Were such monies to attract any interest?

(xi) If the answer to the above is in the positive, then at what rate and for what duration?

(xii) Was the sale agreement herein subject to the provisions of the Land Control Act?

(xiii) If so, was the Land Control Board consent obtained within the statutory period?

(xiv) Is the sale agreement herein valid?

(xv) Is the plaintiff entitled to specific performance?

(xvi) If the answer to (xv) above is in the negative, then what orders are available to the plaintiff?

(xvii) Who should bear the costs of this suit?

IV TESTIMONIES

Prior to the trial of the suit and over the years, several applications were filed and heard, but the first occasion of the main hearing was on *9th November, 2004* when the parties appeared before me with their counsel, *Mr. T.O. K'Opere* for the plaintiff and *Mr. Oguttu-Mboya* for the defendant.

(a) The Plaintiff's Case : Evidence

PW1, *Ramesh Chander Dhingra*, was sworn and gave his evidence. He testified that he was an educationist and was in the business of running educational institutions. He was managing such institutions in various places in Kenya – Kisii, Kitale, Kakamega, Nairobi, Machakos, Kiambu. In February, 1989 he started running Gusii Highlights High School in Kisii. He had *leased* it, by an agreement of May, 1989 from the defendant. This was a five-year agreement, subject to variation from time to time, with an option to renew. The last variation took place on 22nd February, 1994 and it was provided that the terms of lease after the year 2002 would be mutually agreed. The agreement of 22nd February, 1994 was to run upto 2002. It was testified that by the end of 1994, the plaintiff had already paid *advance rent covering 1995, 1996, 1997, 1998 and part of 1999.*

It was testified that, in the run-up to 2002 when the current lease would come to an end, there were *certain transactions between the parties running in parallel*. The significance of these several transactions, is that they were the groundswell for the disputes which have brought the parties to Court.

The plaintiff testifies (though this is denied by the defendant) that in *October, 1995* the defendant sought from him an *advance* of Kshs.300,000/=, over and above the advance rent payment already made as indicated hereinabove. What could be the *purpose of such an advance,* considering that the lease between the parties was running; advance rent had already been paid; there was no rent dispute? The purpose, the plaintiff testified, had to do with a *new course of negotiations* – for the defendant to *sell* property to the plaintiff. The plaintiff testified:

> **"I allowed [the defendant's request] because he said he intended to sell the property; so he would make adjustments on purchase price or rent".**

The plaintiff maintains this line of testimony, notwithstanding that the defendant denies it. The plaintiff had been approached in *October, 1995*; and now, with respect to *November, 1995* he avers:

> **"He [the defendant] came to see me again, at my office [in Nairobi]. He said he was under great financial pressure. He wanted to sell the property. He proposed a price of Kshs.10,500,000/=, and urged me to buy".**

The plaintiff testified that he had expressed *agreement*, and further *agreed to pay an advance sum of 10%*. But the defendant said that sum would not meet his financial problems; he needed at *least Kshs.2,000,000/=*. The plaintiff acceded to this request, and on *24th November, 1995* an *agreement* was made under which the plaintiff was to make an *initial payment of Kshs.2 million*. On that same day the plaintiff telephoned his bank, which agreed to give an *overdraft of Kshs.2,000,000/=*. The petty cash voucher payment for that sum is annexed in the plaintiff's bundle of documents. (*This bundle was fully agreed to by counsel, who indeed so graciously shared the same as their common documentary reference*). It shows the figure of Kshs.2,000,000/=, and is thus expressed:

> **"Paid Kshs. 2,000,000/= (two million) by banker's cheque No. 0049921, as per agreement for the sale of the school property (secondary school, primary school house, boarding house etc up to River)".**

A copy of the banker's cheque, dated 25th November, 1995 and made out in the name of the defendant, issued by Trust Bank River Road, Nairobi is annexed on page 13 of the bundle.

There is a petty cash voucher dated 24th November, 1995 showing the figure of *Kshs.15,000/=*, in favour of the defendant (p.12 of the bundle). It bears the following words:

> **"Part payment of the purchase [price for] Gusii Highlights High School property for L.R No. B/B/BOBURIA 3328, 2780, 2995 and 1448".**

The plaintiff testified that the said sum of Kshs.15,000/= was *paid on the same day the sale agreement was made*. These transactions, the plaintiff testified, took place in Nairobi, and the agreement was drawn

by *Mrs. Rawal* who since then has become *Lady Justice Rawal*. The preparation and execution of the agreement had to be completed urgently, as the defendant needed to travel back to Kisii, where the suit properties are situate.

The agreement of 24th November, 1995, PW1 testified, referred to *four properties* in Kisii (p.8 of the bundle). Among the special conditions in the agreement was a provision in respect of *handing over*:

> **"On signing of the agreement the occupation and possession of the primary school, boarding house and the residential house situated on plot Nos. B/B/BOBURIA 1448 and 2995 shall be handed over to the purchaser."**

The plaintiff testified that the defendant did not hand over plots No. B/B/BOBURIA **1448** and **2995** as agreed. The defendant did not hand over the Primary School (Gusii Highlights Academy). Why? The defendant's explanation had been based on the dictates of *convenience* at the time : "**His explanation had to do with the school term; he had been running the primary school**". PW1 allowed the defendant to *proceed with the school upto the end of term*. This was the new understanding between the parties; and the defendant, after the close of term, told the plaintiff that "***he [the plaintiff] could go ahead to advertise that the school was under new management***". The defendant also requested to be allowed to hang around the school for a while come the new term, for the purpose of *officially informing students and parents of the change of ownership* and management that had just taken place. On the strength of these representations, the plaintiff ran prominent advertisements of "**GUSII HIGHLIGHTS ACADEMY PRIMARY SCHOOL**".

PW1 testified that even as he proceeded with change-of-school-management advertisements, the defendant suddenly became *unavailable*. It proved impossible for the plaintiff, in *December, 1995* to carry out renovations on primary school complex. The defendant, who was expected to hand over the school in *January, 1996* at the beginning of the new term, became impossible to reach. The plaintiff, thus, was unable to effect the renovations.

Come the new term, in January 1996 the plaintiff, who had earlier advertised "**change of management**" for the primary school, realized that the advertisement had had a major impact; there was "**a very heavy intake in the Primary School**". Many parents of children in the Secondary school (already managed by the plaintiff) brought along their primary-school-age children for enrolment. The person registering these new increased numbers of primary school children was *the defendant* himself; and he *did not hand over* the school to the plaintiff as had been agreed. To the plaintiff's telephone calls asking him to hand over, the defendant found a new excuse: he was still seeking a date to call the parents, so as to inform them of the change of management; he needed more time; and this excuse was held out throughout the month of January, 1996.

Then on *31st January, 1996* the defendant himself came to see the plaintiff at the plaintiff's Nairobi office. He had a new explanation for not having handed over the primary school during the month of January : he had a problem handing over. What was this problem? He had been *unable to repay a loan advanced to him by Kenya Commercial Bank (KCB);* and consequently title deeds for some of the suit properties which had been taken as security, would not be released to him to enable him to complete the sale transaction. One of the terms spelt out in the sale agreement of 24th November, 1995 (clause 9) thus read:

"The property sold is subject to the SPECIAL CONDITIONS, COVENANTS, STIPULATIONS, RESTRICTIONS AND RESERVATIONS MENTIONED ON THE TITLE DEED SUBJECT TO WHICH IT IS CURRENTLY HELD BY THE VENDOR BUT OTHERWISE FREE FROM ALL ENCUMBRANCES".

The defendant informed the plaintiff that *he owed Kshs.868,435/40 to KCB*. He then made a request : "***Because he was already performing the agreement, the plaintiff should pay off the mortgage money***." He went further to write a formal letter asking the plaintiff to make the payment to his lawyers. This letter appears at p.18 of the bundle, is addressed to *Mr. Ramesh Dhingra* (the plaintiff) and dated 31st

January, 1996. It reads in part as follows:

> "**This letter is to serve to authorize you to pay Kenya Shillings Eight Hundred and Sixty-Eight Thousand Four Hundred Thirty-Five Cents Forty only (Kshs.868,435/40) to Hamilton Harrison & Mathews, Advocates on my [behalf]. The money will be transmitted to their client, Kenya Commercial Bank Ltd, Kisii.**
>
> **"This is to say I will owe Mr. Ramesh Dhingra Kshs. 868,435/40…….. as per sale agreement".**

PW1 testifies that he had acted by asking his bank to advance him some money to pay as agreed with the defendant. And the plaintiff's bank gave a banker's cheque in the name of KCB, account of the defendant; and the banker's cheque for Kshs.871,107/40 was paid through the lawyers as requested.

As soon as the defendant had had his *mortgage obligation cleared by the plaintiff*, at his urging and request – *so as to enable him to complete his own obligations under the sale agreement* – he became, now for the second time, *unavailable* to the plaintiff. His availability at this stage was crucial, if the land sale agreement was to remain valid and to be accomplished. The defendant was required to sign the *Land Control Board forms*, to enable consent for the sale transaction to be given. Those forms had been duly prepared by the plaintiff's lawyer; and all that was required was the defendant's signature. The procedure regarding obtaining of such consent is referred to in the *Law Society Conditions of Sale*, Clause 16, paragraphs (1) and (2). This reads as follows:

> "16. Consents, etc
>
> (1) The property is sold subject to all necessary consents being obtained. The *vendor is responsible for obtaining all consents* and the purchaser shall, *where necessary*, join in making any application.
>
> (2) The *vendor is responsible for obtaining the discharge for any encumbrance* to which the property is not sold subject."

The plaintiff's advocates prepared the "Application for Consent fo Land Control Board" forms, for L.R. NO. NARIBARI CHACHE/B/B/BOBURIA.2995; L.R. NO. NYARIBARI/B/B/BOBURIA/3328; L.R. NO. NYARIBARI CHACHE/B/B/BOBUTIA/2780 and L.R. NO. NYARIBARI/BB/BOBURIA/1448. All these bear the date *19th December, 1995* and had been signed by the *purchaser* (plaintiff) but *not by the owner (defendant*). Although the defendant's signature was required, he was unavailable; and when one day the plaintiff reached him on telephone, he pleaded that "**he was still talking to his family and friends [regarding the land transaction] before he gets back to me**". Generally the defendant could not be reached on telephone, and on several occasions when the plaintiff's representatives were sent to him, he was not there. This made the plaintiff anxious, and when he took up the matter with his lawyers, they advised him to lodge cautions against the titles to the suit properties. When he conducted official searches, these showed that two of the suit properties were still charged to the Commissioner of Income Tax. In the case of L.R No. B/B/BOBURIA/1448 there was a charge to Income Tax dated 30th May, 1985, to secure the sum of Kshs.200,000/=. In the case of L.R No. B/B/ BOBURIA/2780 there was a charge to Income Tax dated 30th May, 1985 for the sum of Kshs.200,000/=.

The plaintiff testified that his discovery that the suit lands, though the subject of an agreement for sale, were unbeknown to him subject to unredeemed charges, caused him anxiety as he had in the past had very cordial business relations with the defendant. The advise the plaintiff received from his lawyers was that "there was no seriousness [on the part of the defendant]".

It is clear that the plaintiff found it necessary to place his subsequent dealings with the defendant on a stricter legal footing. His lawyers on 5th July, 1996 sent by registered post a completion notice. The letter refers to Title Nos.B/B/BOBURIA 1448, 2995, 2780 and 3328, and thus reads:

> **"We act on behalf of Rameshchandra Dhingra and refer to the sale agreement entered into**

between you and our client dated 24th November, 1995.

"Completion date under the agreement was 'One Hundred and Twenty Days From the Date of Execution of the agreement, that is, the 24th day of March, 1996.

"Our client is ready, able and willing to complete but for your failure to let our client have all the documents necessary to attend to stamping and registration of the Transfers for the above properties to our client.

"On our client's behalf we hereby give you notice under the provisions of Condition 4(7) of the 1989 edition of the Law Society Conditions of Sale, to which the agreement is subject, to complete this transaction.

"In default, action will be filed."

PW1 testified that the defendant paid no heed to this completion notice. Instead, the defendant's lawyers wrote to KCB (whose charge over one of the suit properties the plaintiff had cleared, at the express request of the defendant) *denying that the defendant had any knowledge at all, of the plaintiff, nor had he ever sold any land to the plaintiff* (letter from G.J Mainye & Co. Advocates to the Manager, Kenya Commercial Bank Ltd., dated *5th July, 1996*). From this letter, clearly written on the *instructions of the defendant*, the plaintiff was in shock, and formed the impression that the defendant "**was no longer interested in the transfer transaction**". He instructed his lawyers to communicate with M/s G.J. Mainye & Co. Advocates sending to these advocates a copy of the sale agreement which had been made between the parties herein. The letter also explained to the defendant's advocates how the defendant had obtained from the plaintiff a redeeming of the charge to KCB of the defendant's property.

On *24th March, 1997* the plaintiff secured *transfer of the charges* on the suit properties, NYARIBARI CHACHE/B/B/BOBURIA/1448, 2995, 3388 and 2780 to his name, *after redeeming the charges registered against the same*. In this respect, the plaintiff had proceeded under *S.73 of the Registered Land Act (Cap. 300*), as he apprehended that the *defendant would take away the title deed*. During this transfer process the plaintiff found that the *title document for one of the suit properties, NYARIBARI CHACHE/B/B/BOBURIA/3328 had already been taken away by the defendant*; and he made up for this by having the charge transferred to him for a property which had not been included in the sale agreement, namely, NYARIBARI CHACHE/B/B/BOBURIA/3388.

The plaintiff testified that in the period after the making of the sale agreement, he had *built more classrooms* on the suit properties, including a *multi-purpose hall*; *18 classrooms*; *three dormitories*. He had also effected *renovations* to existing buildings. The value of the total improvement came to the figure of Kshs.3,765,000/= (as per registered valuer's report dated 10th June, 1998). But, for the reasons set out earlier, the plaintiff was not able to take over the school. This caused the plaintiff to lose an income expectation amounting to Kshs.12,755,250/= per year.

The plaintiff was seeking : *specific performance; or compensation for 15 years of hard work, for improvements; damages for lost goodwill*; *orders for taking possession of the primary school; damages for developments effected on the suit lands*; *vacant possession; damages for lost income*. In the *alternative*, the plaintiff prayed for *all moneys he had paid to the defendant* being refunded with interest at 35% rate. He urged that the rate at which interest is payable must be the commercial rate; and the *commercial rate* of interest as at 24th November, 1995 was, it was testified, more than 37%. PW1 testified that it was evident from the letter from the defendant's advocate of 5th July, 1996 to the Manager of Kenya Commercial Bank Ltd, that *he, the defendant, was aware that moneys paid by the plaintiff to him had been sourced from Trust Bank*. The witness added that the mention of the interest rate of 35% was not new; for in the agreement for sale between the plaintiff and the defendant of 24th November, 1995 Special Condition No. 2 had expressly provided:

"If the vendor fails to complete the transaction within [the] completion [period] he shall

refund [to] the stakeholder [the] sum of Shs. 2,000,000/= forthwith along with 35 per cent interest …"

The plaintiff further testified that the loan repayment on behalf of the defendant which he, the plaintiff, had made to KCB was from *borrowed moneys which were also attracting interest* to be borne by the plaintiff himself. In support of his claim, the plaintiff produced the originals of several documents including : title deeds for the suit properties; the charges on those properties; and transfers of charges.

On cross-examination (conducted on 24th November, 2004) the plaintiff testified that he held a Bachelor of Science degree as well as a National Diploma in Fine Art; and he was a member of the British Institute of Management. He was registered by the Teachers Service Commission as a teacher, and had been involved in the educational profession since 1975.

PW1 testified that his initial agreement with the defendant had been made in 1989 and was only in respect of *Gusii Highlights High School*. To that agreement, amendments had been made in 1992 and 1994, and the 1994 amendment was open-ended; provided that come 2002, the rent payable by the plaintiff would be mutually agreed. Then on 24th November, 1995 there was a *new* agreement between the parties, this time a *sale agreement*. From the signing date, namely *24th November, 1995* this agreement was to subsist for *120 days* – and that took the *completion date* to *23rd March, 1996*. PW1 produced a letter by his then advocates, dated *11th September, 1996* and addressed to the defendant's then-advocates. This letter reads in part:

"As we advised in our letter of 7th August 1996, it appears that your client has not given you full instructions in this matter.

"We had served a Completion Notice on [the defendant] by registered post on *5th July, 1996* and the Notice has been returned to us as unclaimed…….

"On behalf of our client, Mr. Dhingra, we now serve the Completion Notice to [the defendant] through you. Under the Sale Agreement dated 24th November, 1995 between our client… and your client, the completion date was '120 days from the date of execution' of the Agreement, that is, the *24th of March, 1996*.

"Our client is ready, able and willing to complete this transaction but for your client's failure to forward all the documents to us necessary to attend to stamping and registration of the Transfers for Title Nos. B/B/BOBURIA/1448, 2995, 2780 and 3328 to our client.

"On our client's behalf, we hereby give your client a notice under the provisions of Condition 4(7) of the 1989 Edition of the Law Society Conditions of Sale (to which the Agreement is subject) to complete this transaction within 21 days from the date hereof, failing which, we have instructions to file suit on our client's behalf."

PW1 testified that the *defendant had failed to complete his part* of the sale agreement; the defendant so failed by not, as required, *availing all transaction papers* and all *claim documents* relating to the suit properties, to the plaintiff by the completion date.

PW1 testified that he was currently holding the title deeds for the defendant's four properties, in his words, "because I discharged all his four charges, and he has not paid up". He cited a letter in the agreed bundle of documents, from the Chief Land Registrar to his then-advocates, M/s Hamilton Harrison & Mathews, dated 3rd December, 1992 and with regard to transfer of charge. The letter reads in part :

"…. it is possible to dispense with execution by chargor and the document can be registered without such execution.

> **"There is a provision in form RL3 for the transferee to delete the provision of acknowledgement by the chargor if the same is not required. It therefore follows that execution by chargor is optional and the same can be dispensed with if circumstances so demand."**

PW1 testified that he had received the title documents for the suit properties on *24th March, 1997* after he had *made payment redeeming the charges*, which charges had been transferred to his name, and the said *payments had been made through Trust Bank* acting on his instructions.

PW1 restated that after the defendant had been out of reach throughout December, 1995 and January, 1996 he suddenly appeared at the plaintiff's Nairobi office on 31st January, 1996, and *on that occasion the plaintiff showed him all the Land Control Board Consent forms* which had been duly prepared. There was no clear evidence of conflicts of interest between the parties at this stage; and the defendant on that occasion told the plaintiff that "**he could not transfer the properties … *because he had other loans with the bank***". He requested the plaintiff to pay certain monies on his behalf. He requested verbally and in writing (his letter dated 31st January, 1996 – which is part of the agreed bundle). By that letter the defendant acknowledged:

> **"This is to say I will owe Mr. Ramesh Dhingra [plaintiff] Kshs.868,435/40 …. only as per sale agreement".**

Since the Land Control Board consent forms were now ready, why didn't the defendant sign them on *31st January, 1996*? The plaintiff's answer was : "There was no conflict at this time. So I did not demand that he should sign immediately." But thereafter, and once the plaintiff had paid the sum of Kshs. 868,435/40 as requested by the defendant, the defendant once again became unavailable. (It is to be recalled that completion date had been agreed as *24th March, 1996*). It is clear that this *period of the defendant's unavailability coincided with the last seven weeks of the completion period*; and it was testified by the plaintiff that the *defendant took no action on the agreement during those seven weeks*; he did not avail to the plaintiff the required documents for completion. In the plaintiff's perception, the *reluctant party* at this stage was the defendant; and by such *reluctance and unavailability leading to non-performance of agreed roles*, the defendant was in breach of the sale agreement. The plaintiff testified that he did indeed give to the defendant *notices to complete* his obligations under the sale agreement (by letter of his advocates dated *5th July, 1996*; by letter of his advocates dated *11th September, 1996* – both in the agreed bundle) – but no action on the part of the defendant followed. The plaintiff testified that the duration of 120 days for completion under the agreement had been expressed to be *of the essence*, and that when the completion notices were being issued, the *completion date had already passed* and wherefor the *defendant* had been responsible. The plaintiff testified that under the sale agreement, the consequence of failure by the vendor to complete was specified, and provision was made for *refund*. He testified further that *by the time he lodged cautions, on 14th May, 1996 against the titles to the suit properties, the completion date had already passed*. The plaintiff testified that he had lodged the cautions even though the agreement had not been completed : because the defendant had *taken his money under an existing agreement, and then failed to complete*.

PW1 testified that under the sale agreement he had been entitled *to take over the primary school* (Gusii Highlights Academy) *immediately* from the defendant. The plaintiff had prepared an *income chart* in respect of the management of the primary school, in 2000. He averred that he had not, to-date, been given possession of the primary school, which is a going concern, managed by the defendant. The plaintiff's income chart (which is in the agreed bundle) shows the total fee collection estimate for the year 2000 as Kshs. 12,755,250/=. He said he still runs the Gusii Highlights High School *on lease, and with a purchaser's interest*. The plaintiff had not paid rent from the year 2000, and he acknowledged that he owed some rent, in unspecified amounts.

On the claims in the re-amended plaint, the plaintiff prayed for *specific performance* in respect of the suit properties – L.R Nos. NYARIBARI CHACHE/B/B/BOBURIA/1448; 2780; 2995; 3328; but he stated that No. 3388 which he had redeemed, was not one of the properties he was claiming. He was praying for

accounts in respect of the incomes of Gusii Highlights High School; for *damages*; and for *interest at* the rate of 35% from 24th November, 1995 until payment in full. The plaintiff testified that he has not at any time sought repayment of the stake-holder sum under the agreement, and neither has the defendant wanted to refund the same; but under the sale agreement, he, the plaintiff, would be entitled to a *refund*.

The plaintiff clarified statements in his testimony during the re-examination, which took place on 9th February, 2005. He said he had working experience in management and accounts, and had been running educational institutions in Kenya since 1975. He said such experience had enabled him to work out the income chart projection, on the basis of which he claims for loss of earnings. He testified that under the *contract of lease, dated 10th May, 1989* he had taken possession of two separate plots of land; but under the sale agreement, he had contracted to purchase two *other plots as well as the leased ones*; and that to-date the plaintiff was in possession of the said four plots – for two of them, as lesee-cum-purchaser; for the other two, as purchaser.

The plaintiff testified that under Special Condition No. 2 in the sale agreement dated 24th November, 1995 he was entitled to the stakeholder sum of Kshs.2,000,000/= with 35% interest. The plaintiff said he had also paid to the defendant other monies : Kshs. 15,000/= and Kshs.871,107/40. The plaintiff testified that he had paid to the defendant more than the stakeholder sum.

The plaintiff testified that following the signing of the sale agreement, the high school name, Gusii Highlights High School, was *registered in his name*; and the defendant who sold the land should have completed within 120 days; the duty to perform was placed on *the defendant who should have obtained Land Control Board permission for the transfer*. The plaintiff testified that he had expected the defendant to hand over to him the suit lands, *free of encumbrances* in accordance with the agreement. The plaintiff referred to a document in the agreed bundle, "**The Law Society Conditions of Sale**", clauses 16(1) and (2):

> **(1)** "**The vendor is responsible for obtaining all consents and the purchaser shall, where necessary, join in making any application."**
>
> **(2) "The vendor is responsible for obtaining the discharge of any encumbrance to which the property is not sold subject."**

So the plaintiff had expected that within 120 days, the vendor would bring *titles without encumbrance*; but the vendor failed so to do. After the expiration of the completion date, the plaintiff conducted a search on the suit-property titles – and found that two of the properties were *charged* to Income Tax. The *defendant had not disclosed this fact*. Following the said official search, in April, 1996 the plaintiff *lodged cautions* in May, 1996. He gave instructions to his lawyers in June, 1996 and the lawyers served *completion notice* in July, 1996.

Regarding the letter from the defendant's lawyers then, dated 5th July, 1996 in which it was *claimed that the defendant had himself redeemed charges over two of the suit properties – charges held by KCB Ltd –* the plaintiff averred that the claim was *not true*, since all the records showed that it is the plaintiff who redeemed the charges. It was also not true as claimed by the said former lawyers of the defendant, that the defendant had not sold the suit lands to the plaintiff.

The plaintiff testified that even when the completion date was coming due, the defendant *did not approach him for the balance of the purchase price, and did not offer to release the completion documents.*

PW1 remarked that the defendant, in his defence, only concedes to the plaintiff being entitled to the stakeholder refund of Kshs.2,000,000/=, but makes no mention of the further payments. *At no stage prior to the expiration of the completion date, had the defendant made such an offer regarding refund of the stakeholder sum*; and so the plaintiff doubted that the defendant had dealt with him honestly and in good faith. The plaintiff saw bad faith in the fact that the defendant had not even given him possession of the

primary school, and had taken no action to perform his obligations towards the plaintiff.

(b) **The Defendant's Case : Evidence**

DW1, *Charles Otiso Otundo*, was sworn and began giving evidence on 9th February, 2005. He said he was a school manager and was the *proprietor of a primary school*, Gusii Highlights Academy. He said he lived in Kisii Town, and came to know the plaintiff in 1989 when the two entered into a lease agreement under which the plaintiff took possession and management of a *high school*, Gusii Highlights High School. The lease was dated 10th May, 1989. DW1 said he had leased the school along with its name to the plaintiff, and that subsequently there had been a sale agreement which he had signed, dated 24th November, 1995. He testified that under the sale agreement, he, the defendant, *did have obligations to discharge all the charges* held against the suit property. Why did he not clear these charges in time, so as to complete his part by the completion date, 23rd March, 1996? In the defendnat's words : "**Because they were not released to me**".

The defendant testified that he had checked with Kenya Commercial Bank Ltd which had charges over two of the suit properties – and found that some Kshs.800,000/= was to be paid to redeem the properties. He *requested the plaintiff to make payment of Kshs.868,435/40 towards redemption of the property titles*. In response, and at his request, the plaintiff gave him a banker's cheque from Trust Bank Ltd, dated 8th February, 1996 for the sum of Kshs.871,107/40 which as of that date was the amount outstanding on the said charges (on account of *interest accumulation*). The cheque was payable to the Kenya Commercial Bank, in the name of the defendant. The *defendant took the cheque personally*, in the company of the plaintiff, to the offices of the advocates. He testified that he requested the advocates to pay the cheque to the bank, to enable him to *discharge the charge* and get back the title deed. He did not get the title documents from the bank, and *he knows that they are in the custody of the plaintiff*. He knows that on *17th March, 1997* charges held against his name were *transferred to the name of the plaintiff* in respect of L.R. Nos. NYARIBARI CHACHE/B/B/BOBURIA/1448, 2995, 3388 and 2780. He said these were the properties he had sold to the plaintiff. He said the agreement had not stated that the bank could transfer any charges on the property titles; in his words : "**I was to execute the discharge of charge of all the properties**". He said he was unable to complete his part of the agreement *because he had not received the titles*. The claim here, obviously, is that the plaintiff himself had committed a wrong by having the charges transferred to himself – *and that this now made it impossible for the defendant to complete his part in the sale agreement*. The defendant said:

> **"I could not hand over the titles to [the plaintiff] as I never received the titles. It is not true that I did not perform my obligation to hand over the title documents free of charges".**

The defendant said he *did* know the consent of the Land Control Board was required for the sale transaction to be completed. But he *did not* obtain that consent. He said he had called the plaintiff and told him that it was necessary to discharge the charged properties in order to place the matter before the Land Control Board. The defendant, who was sometimes inaudible in his speech, said as follows:-

> **"I called the plaintiff on telephone in March 1996. He told me he was no longer interested in pursuing the sale agreement. He had the documents in his hands; therefore he was a purchaser".**

The defendant testified that the plaintiff had not availed to him the Land Control Board consent form for signature. He said he had met the plaintiff on 31st January, 1996 and on 8th February, 1996, but on neither occasion did the plaintiff place the consent forms before him for signature. He did not explain his unavailability to the plaintiff during the months of December, 1995 and January, 1996 up to the very end of that month.

The defendant testified that after *8th February, 1996 he next spoke to the plaintiff only after the lapse of the agreement for sale dated 24th November, 1995*. He said further that the plaintiff has not since the completion date, 23rd March, 1 996 demanded the repayment of the stakeholder sum of Kshs.

2,000,000/=; and *he recalled the provision in the agreement that if there was no action within the completion period of 120 days, then the defendant was to refund the stakeholder sum forthwith*, with 35% interest from the date of the agreement. In the defendant's words:

> **"After the expiration of 120 days I did not return the Kshs.2,000,000; [the plaintiff] also did not ask for it. I confirm I did not refund, even though the obligation was on me [to refund] 'forthwith'."**

The defendant averred that the plaintiff had put up no construction on the suit land, and that it was only earlier, following the making of the lease agreement of 10th May, 1999 that he had constructed *four classrooms* on L.R No. B/B/BOBURIA/2995. The defendant said such construction was only for the purpose of facilitating his relocation, as provided for in the agreement, from four other classrooms to be occupied by the plaintiff on L.R. No. B/B/BOBURIA/1448. The defendant *denies* that the plaintiff built a hall, a dormitory and four classrooms on L.R No. B/B/BOBURIA/2995. He *denies* that the plaintiff ever built twelve classrooms on L.R No. B/B/BOBURIA/1448. He also denied that the plaintiff had at any time brought assessors to assess the value of the physical developments which the plaintiff had made on the suit properties.

The defendant *does not want to continue* with the transaction; in his words:

> **"I do not want to continue any more. [The plaintiff] was unwilling to continue; so I too do not want to continue".**

The defendant averred that the plaintiff, once he obtained discharge of the charges, had not wanted to complete the transactions under the sale agreement. In his words: **"[The plaintiff] should have let the documents come to me, then we would continue; he would then pay the balance and then we would complete. He tied my hands and then wanted me to swim**."

The defendant denied the veracity of the averments of the plaintiff in relation to expenditures incurred on the strength of the sale agreement. He said the plaintiff had not put up any promotions of the primary school by means of posters and advertising. He remarked that the plaintiff's income chart showed only total amounts collected, but did not show *expenses*.

The defendant ascribed truthfulness to the letter by his advocates then, G.J. Mainye & Co. Advocates, to the Kenya Commercial Bank which *denied any sale transaction* between the defendant and the plaintiff. The reasoning was that the sale agreement *had already lapsed*, and on this account the denials in the advocates' letter was *true*. He denied ever receiving the plaintiff's completion notice dated 5th July, 1996. The defendant also contested such a notice on the basis that it was issued "**when there was no valid agreement that I could be called upon to complete**".

The defendant averred that although the plaintiff was today still in possession of Gusii Highlights High School, the agreement which was the basis of the lease of the same, had lapsed in 2001, had not been renewed, and no rents were being paid by the tenant.

The defendant testified that he was *unwilling to transfer to the plaintiff the suit premises*. He said the plaintiff was demanding from him the sum of Kshs.2,886,107/40, and, in his words : "I want to repay it all". He said he would not agree to repay with 35% interest from the date of the sale agreement, 24th November, 1995. He believed that the said interest rate of 35% was applicable only over a time-span of 120 days; and that for the remainder of the time, the agreement had lapsed, and consequently no interest was payable. He insisted that it is the *plaintiff, and not himself*, who had been in breach of the sale agreement.

The defendant gave further evidence on 15th March, 2005 upon cross-examination by learned counsel, *Mr. K'Opere*.

The defendant said he was the manager of a primary school, known as Gusii Highlights Academy, the certificate of registration of which was part of the agreed bundle of documents. The certificate is issued under the Registration of Business Names Act (Cap. 499, s.14). The defendant did acknowledge that the said certificate, issued on 2nd February, 2001 was not in his name, but in the name of the *plaintiff*. The defendant had no certificate which showed that the primary school was registered in *his* name. He acknowledged that he, the defendant, had received letters from the Department of the Registrar-General, dated respectively 15th October, 2001 and 5th July, 2002 informing him that the school by the name Gusii Highlights Academy was lawfully registered already in a name other than his; it was registered in the name of the *plaintiff*. But he then stated that he, the defendant, had already registered Gusii Highlights High School in his own name, *with the Ministry of Education*, in May, 1989. He said he had been running the school under the name, and then leased it to the plaintiff by that name on 10th May, 1989. The defendant testified that he had been running the high school and the primary school concurrently. He said the primary school is run under the name Gusii Highlights Academy and pupils take examinations under that name.

The defendant testified that he was required to hand over the primary school to the plaintiff *at the time of signing the agreement*. In the defendant's words:

> **"We agreed that upon signing, he was to come in January, for me to hand over. When we came to January he did not turn up. Being a service, the school could not be shut down. So I continued in 1996. If he turned up in 1995 I would have handed over".**

Whereas the plaintiff had testified that it was the defendant who kept postponing his handing over of the primary school, the defendant said it was the plaintiff who had asked him to go on as normal. In the defendant's words:

> **"……. When I came to collect [the] cheque, he told me to continue running the school until the 2nd term, so that there would later be a smooth handing over at the end of the 2nd term."**

The defendant testified that the primary school had originally been on L.R No. B/B/BOBURIA/3328 before he shifted it to L.R No. B/B/BOBURIA/2995 where he also resides up to this day. Upon signing of the sale agreement, the defendant was required to give vacant possession of L.R No. B/B/BOBURIA/1448 and 2995 which housed the primary school, the boarding house and the residential house. He confirmed that he did not give vacant possession of the residential house. He confirmed too that he, the defendant, is still running the school, partly in L.R No. B/B/BOBURIA/1448 and partly in 2995. He said he was not in breach of the agreement because "**the plaintiff did not come to Kisii to take over**".

The defendant admitted that the plaintiff had paid him a stakeholder sum of Kshs.2,000,000/=, and was to pay the balance upon completion. He said that on the same day that amount was paid, the plaintiff also paid him Kshs.15,000/=. And on 31st January, 1996 the defendant requested the plaintiff to pay off for him a charge debt of Kshs.868,435/40; and one week thereafter the plaintiff paid him by banker's cheque the sum of Kshs.871,107/40. This payment, the defendant testified was "**so that we could perfect the sale agreement; so that we could go to the Land Control Boa**rd". He said although the plaintiff had signed the Land Control Board consent forms on *19th December, 1995* the space for the owner's signature was left blank, "**because he never brought them to me**". The defendant further said: "**He [the plaintiff] had the titles released to him and he kept them together with the forms**." Although the defendant averred that the land titles were released to the plaintiff *after February, 1996*, he was more precise as to when the *charges were transferred to the plaintiff* : *24th March, 1997*. Could the charges have been so transferred unless the plaintiff *redeemed the property titles*? The defendant seems to think they could have been – and hence his claim is that as at the completion date, namely *23rd March, 1996* the plaintiff had already bagged the property titles, and it is precisely this which frustrated his genuine intention to complete his part in the agreement by that completion date; and on this account, the defendant avers, the party in breach of the agreement is not him, but the plaintiff.

The defendant returned to the rather puzzling letter by his former lawyers, G.J. Mainye & Co. Advocates, addressed to Kenya Commercial Bank and dated *5th July, 1996*. To recall the more remarkable elements in the said letter, the following paragraphs may be set out:

> **"Our client [the defendant] is stunned by the contents of your said letter. Our client categorically states that his [above-mentioned] properties [L.R Nos. NYARIBARI CHACHE/B/B/BOBURIA/1448, 2780, 2995, 3328] have never been sold to and bought by [the plaintiff] or any other person or at all and finds no basis whatsoever upon which your lawyers can give you such instructions.**
>
> **"Our client having fully redeemed the debt he owed your Bank for which your Bank held a charge over the said properties, your Bank is under legal obligation to discharge the charge over the said properties and release the title documents to our client without any delay.**
>
> **"Our client is not a party to any transactions involving Trust Bank Ltd [or] [the plaintiff] nor does he have anything to do with such transactions, and finds no basis whatsoever for your imagination that his properties should secure advances to [the plaintiff] by the said Trust Bank Ltd."**

The defendant affirmed that the said letter from his former advocates was "**factually correct**". At this point I recorded, upon observing the demeanor of DW1 as he spoke, as follows: "**Duplicity in the witness apparent at this point**". He went on to say that the said advocates' letter represented his instructions; and the sale agreement had collapsed; and therefore his advocates were saying the truth. He said he had transactions with the plaintiff only up to the completion date, 23rd March, 1996; "**after that, there was no more transaction with [the plaintiff]**."

The defendant testified that *he did have the document of title for one of the suit properties*, L.R No. NYARIBARI CHACHE B/B/BOBURIA/3328. It had also been charged to the bank, but the *defendant cleared the loan in 1996* – on a date he did not remember, and which was not shown on the official search document obtained by the plaintiff on 20th April, 1998. *Since this particular title was already discharged and was indeed in the custody of the defendant, was there any reason for him not to transfer it to the plaintiff*? The defendant's answer : "**I could not transfer 3328 to [the plaintiff] *because March, 24, 1996 had passed; the sale agreement had collapsed*. That is why I took no action to transfer to [the plaintiff]".**

The defendant noted that the *plaintiff had lodged a caution on all the four suit properties, on 14th May, 1996* – and the same were registered on *20th May, 1996*. He said he came to know of these cautions only much later, in *October, 1996*. What was his reaction, at this time in *October, 1996* when, clearly, the completion date, 23rd March, 1996 had passed? In his own words:

> **"I wasn't happy. I don't know why he did it. *It encumbered the process of perfecting the sale agreement.***"

Would this suggest that as of *October, 1996 the defendant was the willing party actively seeking to complete a sale agreement which he declaims to be lapsed since 24th March, 1996*? Inferences stand to be made later; but at this point in the evidence, and with the benefit of observing DW1 as he testified, I made a record as follows:

> **"This does not look like an honest answer; because the defendant has said the agreement had already collapsed."**

The defendant testified that though he had come to know of the cautions registered against the suit properties, *he took no action to challenge them*, and he *did not instruct his lawyers to contest the lodgment of the same*. But much later, on *27th December, 2001* he instructed his current advocates to seek *vacant possession* from the plaintiff, in respect of all the premises he occupied. The letter reads in

part:

> **"… the lease was to be renewed by mutual consent of the stakeholders. However, [the defendant] is no longer interested in the renewal of the lease, and accordingly wishes to exercise his right of vacant possession forthwith.**
>
> **"… also be informed that the lease herein could also determine upon completion of the sale agreement which [agreement] lapsed upon the expiry of 120 days from 24th day of November, 1995."**

The defendant testified that his *attempts to levy distress against and evict the plaintiff were restrained by the court*; and the first such order was made by *Githinji, J* (as he then was) on 22nd September, 1998. Similar injunctive orders were made by *Mulwa, J* on 29th September, 2000.

The defendant attempted to clarify some of his averments during re-examination which took place on 30th May, 2005. He testified that he had, by the agreement of 10th May, 1989 leased to the plaintiff the high school buildings as well as the school name (Gusii Highlights High School) which he had already registered with the Ministry of Education (with certificate No. 3100). He testified that he had given the said certificate to the plaintiff, who would return the same upon expiration of the lease. He said it was improper for the plaintiff to appropriate the said school name, or to register it again (as the plaintiff had done) under the *Registration of Business Names Act (Cap. 499*). He said that under the sale agreement, he, the defendant, *had covenanted to transfer a primary school, Gusii Highlights Academy, to the plaintiff*, and so the plaintiff must have recognized that the school name belonged to the defendant.

V SUBMISSIONS ON FACT AND LAW

Hearing closed on 30th May, 2005 and learned counsel, on that occasion, agreed to file and serve written submissions; and on 14th July, 2005 after the submissions had been filed and served, they formally adopted the same, and directions were given by consent that they would only highlight orally the key elements.

(a) **Who is in Breach? Does Lapse of Completion Period in**

Land-Sale necessarily absolve all Parties?

- SUBMISSIONS FOR THE PLAINTIFF -

(i) ***Evidence***

Learned counsel, *Mr. K'Opere* stated, as is clear from the evidence, that the lease agreement between the parties related to *Gusii Highlights High School*, and to *two plots* of land, namely L.R. Nos. B/B/BOBURIA/2780 and 2995. This *lease, dated 10th May, 1998* was varied on 22nd February, 1994. Notwithstanding contrary testimony by the defendant, the said lease "**allowed the lessee to build *more classrooms* in the field of the Primary School**" (clause 6). Counsel restated what is clear from the evidence, that the defendant was moved by his own financial burdens to *propose sale* of the suit premises to the plaintiff. On *24th November, 1995* an agreement was entered into between the parties, for the sale of plot Nos. B/B/BOBURIA 1448; 2995; 2780; 3328. Purchase price was Kshs. 10.5 million, Kshs.2,000,000/= thereout being paid immediately on execution of the agreement. This was paid on the same day, in addition to Kshs.15,000/=, by the plaintiff. Although the defendant denied that there had been further payment, in the pleadings, he admitted it in his testimony. By clause 5 in the special conditions in the agreement, the defendant was to give possession of the primary school to the plaintiff upon signing – as well as the boarding house and the residential house situated on plots Nos. 1448 and 2995. The defendant admitted that *he did not hand over* the primary school, which he still runs to-date, and that he *continues to occupy the residential house* on plot No. 2995. From these facts, learned counsel submitted, and with clear justification, "**the defendant from the word go never had the slightest**

intention of honouring the sale agreement".

Learned counsel noted that the completion date, which was part of the sale agreement, stood at *23rd March, 1996*; and the sale was subject to the Law Society's Conditions of Sale. By those conditions, "**completion**" of sale was to be by vendor's advocates after obtaining all the necessary conveyance/transfer documents. By clause 16(1) of the said Conditions of Sale, the vendor is to be responsible for obtaining *all consents*, and the purchaser where necessary shall join in making an application. By clause 16(c) of the Conditions of Sale, the *vendor is to obtain discharge of all encumbrances* on the property before completion date. Evidence was given that the plaintiff after signing the Land Control Board applications forms, on 19th December, 1995 *forwarded the same to Kisii for signature by the defendant*. The applications though duly lodged with the Land Control Board offices in Kisii and *allocated identification numbers*, were *never signed by the defendant*. The defendant's evidence was that the said forms were "**not given to him**", and that he needed to have the title documents for the suit properties, but they were not available to him. The defendant said this is the reason he had approached the plaintiff to redeem the charge held against two of the properties by Kenya Commercial Bank. Learned counsel submitted, quite persuasively, with respect, that it must follow that the defendant *did know* that the consent application had already been made before the Kisii Land Control Board.

Learned counsel noted as well that *one of the suit properties was not charged to a bank* – and so the *defendant would have endorsed consent for its transfer if he had wanted to do so*. Counsel submitted that this was evidence that the defendant "**did not have the slightest intention of honouring his obligations under the sale agreement**".

It emerged from the evidence that two of the suit properties, L.R Nos. B/B/BOBURIA/1448 and 2780 had a charge to Income Tax. Although the defendant alleged that he had discharged these, he could produce *no evidence to that effect*.

Counsel submitted that even though it was the defendant's contractual obligation to ensure the delivery of the property titles free from encumbrance, the *plaintiff had gone out of his way to assist in the clearing of the charge liability* to the Kenya Commercial Bank. The defendant had not even used the stakeholder money which he had been paid, in the sum of Kshs.2,000,000/= to clear the charges lodged against the titles to the suit plots. Counsel submitted that this was evidence of bad faith on the part of the defendant.

Counsel submitted that there was, indeed, breach of the sale agreement, and the evidence would show the defendant as the culprit. The plaintiff did pay the stakeholder deposit of *Kshs.2,000,000/=*, in accordance with the agreement, and on the same day gave the defendant an additional sum of *Kshs.15,000/=*. Later the plaintiff paid *Kshs.871,107/40* for the redemption of charges held by the Kenya Commercial Bank Ltd. The defendant for his part, *never handed over the school and residential house* as required under the agreement; and further, he never obtained the discharge of the Income Tax charges on two of the suit properties; and further still, the defendant did not obtain the consent of the Land Control Board despite the fact that the consent process had already been initiated by the plaintiff. Counsel submitted that *under the law, it is the vendor or his advocate who must furnish completion documents to the purchaser or his advocate*, whereupon the purchaser is to pay the balance of the purchase price. These completion documents are:

(i) original title documents free from any encumbrance;

(ii) signed transfer by the vendor;

(iii) consent to transfer, of the Land Control Board;

(iv) signed stamp duty valuation forms;

(v) any necessary local authority rates clearance certificates.

Did the defendant, as vendor, obtain any of these items and notify the purchaser, the plaintiff, that the

same were *ready*, so that the plaintiff may pay the balance of the purchase price in accordance with Clause 4 of the Law Society's Terms and Conditions of Sale? Learned counsel submitted that it was the responsibility of the vendor to obtain and/or prepare all the aforementioned items, by himself or by his advocate, and then *furnish the same to the purchaser or his advocate*, and/or *call upon the purchaser to deposit or pay the balance of the purchase price*, as a condition to the release to the purchaser of the said items. And it was only *after* the completion date that the purchaser would serve the vendor with a *completion notice* (Clause 4(7) of the Law Society's Terms and Conditions of Sale). The plaintiff had served a completion notice on *5th July, 1996* along with subsequent letters dated 6th and 7th August, 1996 and 11th September, 1996.

Counsel submitted, and with justification, in my view, that the evidence *does not show that the defendant had obtained the necessary completion documents* before the expiry of 120 days following the signing of the sale agreement.

Counsel submitted that the defendant's evidence regarding the completion of the agreement had been largely evasive, an assessment corroborated by his advocate's letter of 5th July, 1996 whereby he denied ever having known or transacted a land sale business with, the plaintiff. The defendant had falsely denied the role of *Trust Bank Ltd* and of the plaintiff in *producing the money used to redeem the charge of two suit properties to Kenya Commercial Bank Ltd*.

Learned counsel stated from the evidence that the plaintiff, in order to protect his interest after the completion date passed, had *lodged a caution* over all the four suit properties, and the defendant who has very well known of the registration of the said cautions, has *never seen fit to challenge them*.

It was in *March, 1997* (nearly one year from the completion date) that the plaintiff secured a *transfer to his name of the two charges* which had been held by Kenya Commercial Bank Ltd. This was done validly by virtue of the provision of *section 73 of the Registered Land Act (Cap. 300*); and the defendant has not, to-date, challenged this transfer of charge, as he very well knows that it was the plaintiff who paid of the debt and discharged the charge. Soon after the transfer of the charge as aforesaid, the plaintiff filed suit on *31st July, 1997* as the last resort.

Counsel noted from the record on file that, soon after the plaintiff filed suit, the defendant began interfering with the plaintiff's occupation of the suit premises and his management of the Gusii Highlights High School. It became necessary for the plaintiff to file applications seeking *injunctive relief*, and the same was duly granted both on 22nd September, 1998 and 29th September, 2000. *Mr. Justice Mulwa* on 29th September, 2000 had made orders requiring the defendant to *furnish accounts of the primary school* (Gusii Highlights Academy) from 24th November, 1995 to date – to facilitate assessment of damages and lost income; but these were never furnished, and consequently the plaintiff had to use a different method in making assessments.

Learned counsel submitted that the pleadings, proceedings, documented facts and oral evidence showed that it is the defendant who breached the sale agreement from the very beginning, apart from him demonstrating a lack of intention to honour any of his obligations under the agreement. This situation, counsel submitted, entitled the plaintiff to the prayers sought in the plaint.

Mr. K'Opere submitted that the defendant had entered into the sale agreement of 24th November, 1995 with a pre-conceived mind not to honour the same; the defendant immediately thereafter failed to surrender to the plaintiff the primary school as agreed; the defendant used delaying tactics to resile from his obligation to hand over the primary school – a delay prolonged to the point at which he now claimed *lapse* in the agreement, as a blanket excuse from the obligation to complete his part under the agreement. The defendant, after asking the *plaintiff* to clear his charge-indebtedness with the bank, now declined to secure the consent of the *Land Control Board* to transfer the suit properties as agreed.

Counsel prayed for orders for *specific performance* of the sale agreement, and for damages for breach of contract – damages to include lost income from the primary school as well as the residential house,

calculated as Kshs.12,755,250/= as at December, 2000. Counsel prayed that a similar damages provision be made for a further five years, running from January, 2001 to-date. Counsel stated that the plaintiff's assessment of damages was arrived at through experience in the running of schools, and comprised 30% of the total projected income as profits – 70% of receipts going towards *expenses* and *overheads*.

Learned counsel submitted that the Court had power under the Land Control Act (Cap.302) to enlarge time for obtaining Land Control Board consent to property transfer, for just cause.

In the alternative, counsel prayed for damages for breach of contract; and such damages would include losses in respect of the primary school – Kshs.12,755,250/= multiplied by 2. The Court was urged to order a refund of the sum of Kshs. 2,886,107/40 together with interest at the agreed rate of 35% per annum from the date of receipt until date of repayment in full. Counsel also prayed for further damages for improvements done on the suit properties by the plaintiff, in the amount of Kshs.3,785,000/= as at June 1998 – a value which should be appreciated upwards. Counsel submitted that such a valuation had not been at all challenged by any documents emanating from the defendant. Counsel urged that the cost burden in this suit should fall upon the defendant, and all damages awarded should carry interest.

(ii) **Law**

Mr. K'Opere submitted it was common ground that the sale transaction at the centre of this suit was subject to the *consent* of the Land Control Board, by virtue of s.2 of the Land Control Act (Cap. 302). Such a transaction, under s.6 of the Act, shall be void for all purposes unless the Land Control Board has given its consent. Under s.8 of the Act, an application for consent is to be made in the prescribed form, to the appropriate Land Control Board within six months of making the agreement; but there is a *proviso* : the High Court may, notwithstanding that the period of six months has expired, *extend that period where it considers sufficient cause to exist*.

Counsel submitted that, in the present instance, the plaintiff had lodged applications in the prescribed form, dated 19th December, 1995. The sale agreement was entered into on 24th November, 1995. The applications were given Land Control Registration numbers 450/95, 451/95, 452/95 and 453/95. The plaintiff executed his part while the defendant failed to execute his part. The Court, in these circumstances, counsel urged, has the jurisdiction and power to order specific performance and direct the defendant to sign the applications which are lying at the Kisii Land Control Board, so that necessary consent is given by the Board. In the alternative, the Court can extend time and direct that fresh application be filed in compliance with an order of specific performance.

Learned counsel further defined the plaintiff's rights on the basis of s.73 of the Registered Land Act (Cap. 300). This section authorized a chargee to transfer the charged property title into the name of *any person other than the chargor* who has an interest in the land, lease, or charged property upon tendering to the chargee such sums as would have been payable to the chargee if the chargor had sought to redeem the charge under s.72 of the Act.

Counsel submitted that the plaintiff in this instance, having a purchaser's interest in the land and having paid the defendant Kshs.2,015,000/= on 24th November, 1995; having at the defendant's written request of 31st January, 1996 redeemed the charges by paying to Kenya Commercial Bank Ltd. Kshs.871,107/40 on 8th February, 1996; and having on 20th May, 1996 registered a caution over the suit properties, was right in law in requesting Kenya Commercial Bank Ltd to *transfer the charges to him* under s.73 of the Registered Land Act which request the Bank acted upon on *24th March, 1997*.

Against the legal position as stated in the above paragraph, counsel submitted, the plaintiff was not only a purchaser of land but had also registered a caution against the same, and also had a charge thereon; and on this basis he can have the suit properties *sold*, to enable him to recover all his outlays thereon with interest.

Learned counsel also founded the plaintiff's claims on the *Law of Contract Act* (Cap. 23). He submitted

that the agreement between the parties, dated 24th November, 1995 fully complied with the provisions of the said Act, and by virtue of s.3(3) thereof, the agreement *bound the parties both during the currency of the completion period, and in relation to enforcement thereafter*. It was submitted that a contract can only be enforced, and completion notice served, *after* the date of completion has expired and not before. Only after the period of completion has passed, can the parties begin enforcing their rights under the contract. Counsel submitted that a contract does not cease after the completion date. Hence the defendant's contention at the trial that after 120 days elapsed following the signing of the agreement, the contract had lapsed and could not be enforced, was untenable.

Learned counsel drew the Court's attention to relevant case law which buttressed the plaintiff's claims in *contract* and in *equity*.

In this very case, at an interlocutory stage, *Mr. Justice Githinji* (as he was) had, on 22nd September, 1998 granted an *injunction* restraining the defendant from interfering with the suit premises until the hearing and determination of the suit. The learned Judge had taken into account the fact that the plaintiff had *already paid* large sums of money and *partly performed the contract*, and this raised a high presumption that he *intended to complete* the contract; but the defendant, by contrast, had from the very beginning declined to hand over the primary school to the plaintiff as agreed. He had also not given the plaintiff possession of the boarding house and the residential house.

In *Kenya Commercial Bank Ltd v Charles Otiso G. Otundo*, C.A. No. 199 of 2000 the Court of Appeal had considered the effect of s.73 of the Registered Land Act (Cap. 300). The plaintiff in that case was held to be a *person who had an interest* in the suit properties as contemplated under s.73 of the Registered Land Act, having paid for the discharge of the properties and having also paid the defendant a sum of Kshs. 2,000,000/= as part of the purchase price. Counsel urged that the Court of Appeal decision therein should guide this Court, on the issue of *transfer of charges*. The suit properties herein were the ones in dispute in that decision, and the Court of Appeal held:

> **"It is clear that Dhingra had agreed to buy the charged properties from the respondent. It is also clear that Dhingra paid the sum of Shs.871,107/40 to redeem the charges. It is also clear that Dhingra had paid, in addition to that sum, a sum of Shs.2,000,000/= as part of the purchase price of the said parcels of land. *Quite clearly it is probable that Dhingra could be treated as a person who has an interest in the properties*. The appellant may not have acted unlawfully or irregularly in considering Dhingra as a person interested in the lands".**

Learned counsel submitted that since Court orders had been made on 22nd September, 1998 (*Githinji, J.*) and on 29th September, 2000 (*Mulwa, J*) restraining the defendant from levying distress or demanding rent, and requiring him to provide accounts for the primary school, yet he has not complied with these orders, he is in contempt of Court and, on the authority of the Court of Appeal decision in *Commercial Bank of Africa v. Isaac Kamau Ndirangu*, C.A. No. 157 of 1991, allowing the defendant's submissions would amount to rewarding a contemnor. Support for this argument emerges from the individual Court of Appeal judgments. *Muli, J.A* thus stated:

> **"It is imperative that orders of the Court must be obeyed, as a cardinal basis for endurance of judicial authority …… To do otherwise would erode the dignity and authority of the Courts. The blatant disobedience of the Court's consent order in this case *renders any transactions in breach of the order to be void*….. To allow the appeal would be tantamount to rewarding the guilty parties for this grave contempt of Court."**

Learned counsel urged this Court to reject the defendant's arguments and allow the assessment of damages for loss of income and profits for the primary school as computed by the plaintiff.

On the failure by the defendant to sign the application forms for Land Control Board consent to the land sale transaction between the parties, counsel relied on the Court of Appeal decision in **Richard Kamir G. Kahia v. Edward Kamau Ng'ang'a**, C.A No. 16 of 2001 to propose *two alternative reliefs*. It was here proposed that this Court, if satisfied that there is sufficient and just cause, can *extend the time* for

obtaining consent under s.8 of the Land Control Board (Cap. 302) and order *specific performance* upon issuance of the consent. In the alternative, the transaction may be regarded as having become void, and an order can be made for the *recovery of all moneys and valuable considerations* paid by the plaintiff to the defendant, as provided in s.7 of the Land Control Act. In the *Kahia* case the Court of Appeal had ordered a refund of the purchase price paid, with interest. Interest, in that case, was paid at Court rates, as no specific interest rate had been pleaded. In the instant case the plaintiff paid a total of *Kshs.2,886,107/40* to and on account of the defendant. The sale agreement of 24th November, 1995 provided for interest to be payable at the *rate of 35%*, and the plaintiff did pray for that figure. Justification for that figure arose from the fact that the moneys paid to the defendant arose from *bank loans* bearing a high and progressively rising interest rates.

Learned counsel submitted that as the surrender of the primary school by the defendant to the plaintiff was not tied to Land Control Board consent, and an order had already been made thereon by *Mulwa, J* on 29th September, 2000 (an order that was not at all challenged), the losses calculated by the plaintiff should be allowed as special damages, in the sum of Kshs. 12,755,250/= as at December, 2000 and then appreciated to cover a further five years.

If it is held that *the author of the lack of Land Control Board consent* to the land sale transaction was the defendant, would it be in law tenable for him to *rely on lapse of the completion period* to avoid legal liability? Not so, on the authority of the Court of Appeal decision in *Openda v Ahn* [1984] KLR 208. The Court held (p.209):

> **"The clause in the sale agreement which provided that the agreement was subject to the appellant showing and delivering a clear title was a condition for the protection of the respondent; the clause added nothing to the general law apart from giving the purchaser a right to a clear title. The appellant had chosen not to deliver a clear title and he could nor resile from his contract on that ground".**

Relying on those principles, counsel submitted that the *defendant as vendor could not rely on having failed to obtain clear titles and Land Control Board consent*, to avoid his obligations. It was submitted that although there are differing authorities on land transactions which become void owing to lack of Land Control Board consent, the *circumstances leading to the failure* to obtain or apply for such consent are fundamental, and are always relevant in the consideration of each case. Counsel submitted that it could not be lawful or equitable that the defendant's claim be upheld: that since the completion period lapsed while the Land Control Board's consent had not been given, the sale agreement was not enforceable against *him*.

Learned counsel was of the view that, from the pleadings, the facts of this case, the proceedings both interlocutory and substantive, the documents and the oral testimonies, the demeanour of the parties, the conduct of the parties prior to and following the signing of the sale agreement, as well as during the pendency of the proceedings, it could be said that the plaintiff had proved his case on more than the required balance of probabilities. He prayed for judgment as prayed in the plaint.

- SUBMISSIONS FOR THE DEFENDANT -

(i) ***Evidence***

Learned counsel, *Mr. Oguttu-Mboya* disputed the veracity of the plaintiff's valuation (through the firm of M/s Mwai Githiomi Associates) of the classrooms constructed by the plaintiff on the suit premises. He submitted that the valuation report was of no probative value, as the valuer had not himself come to present it in evidence.

Counsel ascribed blame to the plaintiff, for the failure, following the sale agreement, to *obtain the consent* of the Land Control Board. On that basis he submitted that the sale agreement had become *void* upon the lapse of six months form the date of execution of the sale agreement, as stipulated under s.6 of the Land Control Act (Cap. 302).

Learned counsel made submissions on the plaintiff's admission in his evidence, that the income projection he had made in respect of the primary school (Gusii Highlights Academy) was based on *estimates*. He submitted that the projection not having been made by a certified public accountant, had no credibility. I think, however, that it would not lie in the defendant's mouth to raise this point, considering that there are Court orders on file (*Githinji, J*, 22nd September, 1998) which required him to provide accounts for the primary school – but which orders the defendant had overlooked.

Learned counsel extolled the defendant's evidence in which he maintained that the lease agreement of 24th November, 1995 had lapsed : "**The defendant …. testified that the sale was not so completed within the completion date and hence the plaintiff's only remedy was to recover the stakeholder's Kshs.2,000,000/= …. together with interest at 35%… for 120 days**." He restated the defendant's evidence : "… **the defendant testified that it was the plaintiff who intercepted the original title documents from M/s Kenya Commercial Bank Ltd., to whom the titles had been charged, thus frustrating the completion of the sale agreement**". I think, however, that this evidence from the defendant would not cut ice, as there is a preponderance of evidence that the defendant's conduct had raised apprehensions in the plaintiff, that the defendant had no intention to complete the agreement, and it became necessary for the plaintiff to secure his interests by having the charges transferred to him. And even more poignant, as evidence controverting the defendant's allegations, the transfer of the charges into the name of the plaintiff took place *long after the defendant had failed to sign the consent application forms*, and long after the expiration of the completion period. These instances show that the evidence counsel is relying on, in support of the defendant's case, just won't stand up!

Learned counsel made much of the difference between the parties on the ownership of the name "**Gusii Highlights High School**". I think this issue would deserve much less attention, as the outcome of this case cannot turn on it. Only a few crucial questions are relevant : *Who was in breach of the contract? Does the lapse of the completion period absolve both parties of any liabilities? If not, who carries the blame, and in what measure is he to make recompense*?

Mr. Oguttu-Mboya has interpreted the terms of s.6 of the Land Control Act (Cap. 302) regarding the consent of the Land Control Board as ordaining that once consent is found to be lacking, then *no party carries liability*. In his words:

> **"… it is immaterial who occasioned the failure to obtain such Land Control Board consent. What is material is the fact that no such consent was obtained. Consequently, the sale agreement in respect of the suit properties… became void for all purposes."**

Counsel urges : "**The relevant Land Control Board consent not having been obtained, the prayers pertaining to specific performances that is, the alleged performance of the sale agreement whose completion date was 120 days from the date of execution, is spurious and legally untenable**". Counsel argues that in terms of s.7 of the Land Control Act, the only remedy available in the circumstances, is the recovery of the moneys that had been paid to the defendant. Counsel contends that s.7 of the Act prohibits recovery of any benefits incidental and/or attendant on such a transaction; and that on this account, "**not even interests, at whatever rate, [are] recoverable**".

Counsel argued too that by virtue of s.6 of the Land Control Act, "**it is also apparent that the plaintiff cannot claim and/or be awarded any special and/or general damages for breach of a void transaction. Neither can the plaintiff stake a claim for the value of improvements, if any, made on the suit properties**."

(ii) ***Law***

To support his interpretation of the provisions of the Land Control Act, learned counsel cited the case of *Kariuki v. Kariuki* [1985] KLR 225. Counsel relied on the headnote in that Court of Appeal decision to submit that "**no general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent from the Land Control Board**…"

I would have expected counsel to consider the *Kariuki* case in the light of other decisions of the same standing, such as *Openda v Ahn* (1984) KLR 208, in which the Court of Appeal had held, in effect, that a defendant's choosing in denying the sale agreement fulfillment through some inaction, will not be held to compromise the plaintiff's rights in contract. If I find, for instance, that the defendant in this case deliberately put brakes on the process of giving fulfillment to the sale agreement of 24th November, 1995 would it be right in law, or equitable to take the position that the defendant had no contractual liabilities towards the plaintiff? I would not think so, as the provisions of the Land Control Act (Cap. 302) cannot be applied in an automatic fashion. It is the core business of this Court to interpret all legislation sensibly and so as not to make an ass of the intendment of the Legislature. Besides, the Court is a Court of equity, and it must resolve disputes in a manner that ensures justice is done and seen to be done.

Learned counsel then sought to rely on the Court of Appeal decision in *Richard Kamiri Gachwe Kahia v. Edward Kamau Ng'ang'a*, Civil Appeal No. 16 of 2001. The learned Judges there stated as follows:

> **"… while a party to a controlled transaction that has become void may recover any money or other valuable consideration as a debt, such a party would not be entitled to recover compensation for improvements**."

The Court also considered the question of interests on any moneys thus refunded. Would any interests be payable? Perhaps *yes*, since the Court did not there allow a 25% interest for the reason only that *it had not been pleaded*.

Counsel has relied on the *Kahia* case to support the proposition that the plaintiff's claim for specific performance is not tenable in law. He has also argued that the plaintiff cannot recover any general or special damages. He urges that the plaintiffs 1st – 4th prayers be dismissed, and contends that if this is allowed, then it will have disposed of two-thirds of the plaintiff's claim; and consequently the defendant should be awarded *costs*.

With regard to the alternative prayers (Nos. 5-7) in the re-amended plaint, counsel submitted that since the sale agreement of 24th November, 1995 had been rendered void by virtue of s.6 of the Land Control Act , no contract subsists that can be the subject of rescission; and so the prayer for rescission must fail with costs.

Counsel submitted that the only prayer of the plaintiff that can be entertained is for *recovery of the stake-holder sum of Kshs.2,000,000/=* in terms of Special Condition No. 2 of the sale agreement of 24th November, 1995. He submitted that s.7 of the Land Control Act (cap. 302) prohibits the recovery of any additional benefits, whether the same be compensation for improvements, or interests on the consideration paid. Counsel did not, however, make any reference to the statement of the Court of Appeal in the *Kahia* case, which implies that interests *if pleaded* would be payable.

The defendant relies on a decision of the Court of Appeal for East Africa in *Rioki Estate Co. (1970) Ltd v. Kinuthia Njoroge* [1977] KLR 146, in which a lease made without the consent of the Land Control Board was declared void; and a prayer by the appellant for *mesne* profits was refused because "the effect of making an award of *mesne* profits would be to restore to the appellant that which section 7 of the Land Control Act had taken away from him in the guise of rent…" (p.146).

Counsel submitted that the plaintiff could also recover the sum of Kshs.886,107/40 which he had paid to the defendant. He contended that such additional sums could only attract interest at *Court rates*, since they were not part of the stakeholder sum.

Mr. Oguttu-Mboya submitted that the plaintiff's prayer for extension of time within which to make an application for the consent of the Land Control Board had not been pleaded, and so it could not be granted on the strength of the submissions of counsel.

Learned counsel submitted that the sale agreement of 24th November, 1995 was *self-contained*, and there

was no room for the application of the Law Society's Conditions of Sale. He contended that the terms set out in those conditions were inconsistent with the terms of the said sale agreement.

Counsel submitted that the plaintiff had not proved his case on a balance of probabilities, especially with regard to prayers 1 – 4, 6 and 7 of the re-amended plaint. He submitted that the plaintiff was only entitled to interest at Court rates; because the sale agreement had become void for lack of Land Control Board consent.

VI **FURTHER ANALYSIS, AND DECREE**

(a) **Legal Principles**

This is not a simple, straightforward case: because the matters in issue as they turn on two separate agreements with modifications, on the management of two schooling institutions; on the several properties comprised therein; on the several past transactions involving those properties; on the charges lodged against those properties; on the mode of discharge of these charges; on the conflicting claims over those properties; and on the endeavours by each party to secure his own interests, necessarily entail lots of facts to be established by oral evidence and through many documents. It is not possible to arrive at a fair resolution of the disputes raised, without a reasonably clear appraisal of the evidence. Indeed, prima facie this is a case to be decided primarily on the *evidence*, as any other basis of decision-making cannot claim to have been fair, as between the parties. Thus, while it is true that in formal dispute resolution there are sometimes points of law of radical impact, which resolve the question *in limine* well before the record gets so long, I think this is not a case in such a category, and all the applicable law must be assessed on the basis of the facts, before a just result can be arrived at.

Such is, of course, not the position taken by counsel for the defendant. He urges that I should merely consider the wording of sections 6,7 and 22 of the Land Control Act (Cap. 302), and on that basis dismiss the suit with costs to the defendant. I think, however, that the better approach is to appreciate those statutory provisons in the light of the *facts* of the case, and to so interpret them as to make good sense of Parliament's intent.

Section 6 of that Act relates to "**transactions affecting agricultural land**", in which category the suit properties fall. It thus provides:

> **"(1) Each of the following transactions:-**
>
> **(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**
>
> **(b) the division of any such agricultural land into two or more parcels to be held under separate titles….;**
>
> **(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area;**
>
> **is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**
>
> **(2) ……"**

The next section of the Act (s.7) is concerned with "**recovery of consideration**", and it provides:

> **"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be**

recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."

Now section 22 is concerned with "**acts of furtherance of void transaction**"; and it stipulates:

"Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person –

(a) pays or receives any money; or

(b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transactions or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment."

Clearly, for the *public purpose* of the administration of agricultural lands under the Land Control Act (Cap. 302), the consent of the Land Control Board is required if there is to come into effect a valid *claim to ownership of land, to tenancy of a leasehold or mortgage*. Thus far, the general point made by counsel for the defendant is valid : *the plaintiff would not be a valid holder of title to the suit lands if the consent of the Land Control Board has not been obtained.*

But I will draw a distinction between that *public purpose* of land administration under the Land Control Act, on the one hand, and the *private law* principle of the *sanctity of contract*. A contract is a binding agreement as between the parties, *in personam*. Contract as the nuclear legal principle for personal relations in *private business*, is inherent in modern civilization; and I take it that public laws, such as the Land Control Act (Cap. 302), would not intend to nullify it unless it was harmful to a public cause, and unless Parliament clearly intended to take away the right of private contract. From the provisions of the Land Control Act set out above, it cannot be said that Parliament even as it clearly sought to regulate the *use*, *occupation* and *ownership* symbols over agricultural land, did intend to nullify the inherent contractual rights of the modern human being, rights which operate purely *in personam* and in no way compromise the State's interests and the public domain.

Therefore, in my belief, contractual rights *in personam* have not been qualified by the Land Control Act; and hence, where such rights are damaged as between one person and another, the injured party can redress both *contractual* and *equitable* rights attached to the breach in question. What the Land Control Act would prevent the aggrieved party from doing is to, as of right, *acquire title* to the property which is the subject of the contract; but the wrongdoer, in a proper case, will be required to accord him recompense on the basis of *private law* and of *equity*.

(b) ***Facts***

The crucial facts in this case relate to the following points: (i) Was there a private agreement between the parties, a private law contract based on *consensus ad idem*? (ii) Was there a breach of such contract, and by whom? (iii) Did such breach compromise or nullify any rights regulated by *public law*? (iv) Did such breach foreclose access by the innocent party to any rights under the law?

From all the evidence, it is clear that a contract had been entered into between the parties, on *24th November, 1995* and by that contract, in respect of which the plaintiff immediately began to perform his obligations, the defendant was to transfer to him four plots of land. It was the responsibility of the defendant to ensure completion within 120 days, by *delivering clear title*, by *facilitating the grant of Land Control Board consent*, and by *placing all required documents before the plaintiff* so that the balance of the purchase price would be paid, and the agreement performed. The defendant did not take those steps. He *retained the property titles under encumbrance*; *he did not sign the application forms for the consent* of the Land Control Board; *he did not place before the plaintiff the documents required for*

completion. There is credible evidence contradicting the defendant's protestations that he is the innocent party. His claim that the plaintiff was in breach of the agreement by not paying the balance of the purchase price within 120 days is, in my view, not made in good faith : because the plaintiff could not have made the final payment *without the required documents and consents* being placed before him by the defendant. The defendant's allegations that the plaintiff had not been willing and able to complete the agreement is not supported by the evidence. The defendant has given no credible reason for his not having signed the Land Control board consent forms which had been lying with the Board at Kisii where he resides and, I believe, to his knowledge. The defendant's representation to the plaintiff, well after the signing of the sale contract, that "**he was still talking to his family**" prior to completing his part, would suggest that the defendant had entered into the agreement without the clear commitment to perform his legal obligations thereunder. That the defendant could endorse the content of the curious letter by his former advocate, G.J. Mainye & Co. (dated 5th July, 1996) denying having sold the suit plots to the plaintiff, was evidence of duplicity and reluctance on the part of the defendant. The defendant cannot very well contest the exercise by the plaintiff of his rights to secure his contractual rights, by having charges against the titles to two of the suit properties transferred by Kenya Commercial Bank to the plaintiff's name. Indeed, when that transfer of charge was in issue in another case, *Kenya Commercial Bank Ltd v. Charles Otiso Otundo,* Civil Appeal No. 198 of 2000 the Court of Appeal held that *the plaintiff in the instant case did have a legitimate contractual interest to secure by having the said charges transferred to his name*. It is, for certain, a false claim from the defendant, that it is precisely that transfer of charges into the name of the plaintiff that frustrated the genuine endeavours by him, the defendant, to complete his part of the sale agreement. Such a claim is, besides, made in bad faith, because the said transfer of charges into the name of the plaintiff took place many months after the expiration of the completion period during which the defendant was required to transfer the properties to the plaintiff. All the evidence herein summarized, belies the defendant's further claim, that in March 1996 he had called the plaintiff who told him, the defendant, that he was no longer interested in pursuing the sale agreement. For good measure the defendant declaimed before this Court : "**I do not want to continue any more**". Quite obviously, the defendant held the belief that the contract of 24th November, 1995 was of no consequence and, no matter what rights it conferred upon the plaintiff, and regardless of any commitments the plaintiff would have undertaken relying on the contract, he, the defendant, was entirely free to walk out of it with impunity, partake of all accruing advantages, and shift to the plaintiff all costs and burdens occasioned by the contract.

(c) **Assessment**

The defendant's, no doubt, reckless view of his contractual obligations has been sought to be vindicated solely by reliance on the public land management provisions of the Land Control Act (Cap. 302). The defendant alleges that he has no obligations under the law of contract, because he has succeeded in denying the plaintiff access to the process of land-transaction approvals, by the Kisii Land Control Board. His learned advocate rationalizes such impunity as follows:

> **"…… the plaintiff has also submitted that the defendant by hiding under statute is guilty of fraud and dishonesty. We humbly submit [that] section 6 of the Land Control Act, [upon] which the defendant relies, does not amount to fraud. In fact, where there is express legislation as in the case of section 6 …., equity and morality take a back seat".**

As I have stated earlier, the provisions of the Land Control Act sought to be relied on by the defendant, while being concerned with orderly public management of agricultural land, are not to be interpreted as seeking to nullify the core principles of legality, which in the sphere of private law, rest in well established principles of *contract*. So fundamental are the rights of parties to regulate their private affairs by contract, that these cannot be taken away except by clear provisions of law specifying that to be the intent of the legislature.

I therefore hold that, notwithstanding that the transfer of the suit properties, namely L.R Nos NYARIBARI CHACHE/B/B/BOBURIA/1448, 2780, 2995 and 3328 to the plaintiff cannot take place in the absence of the consent of the Kisii Land Control Board, the defendant still *bears liability in private contract* towards the plaintiff. It is precisely the *conduct of the defendant*, who has definite contractual

obligations to the plaintiff, which has rendered the transfer process void under the public land management law, the Land Control Act (Cap. 302). The defendant committed himself in a valid legal instrument to perform certain obligations toward the plaintiff, in return for considerations and commitments from the plaintiff. The law of contract requires the defendant to make good the loss which he has thus occasioned to the plaintiff. I hold that the defendant must make recompense in the form of *damages*.

Learned counsel for the defendant has set store by both the *Land Control Act* and a *set of judicial decisions* bearing on that statute. I would distinguish all those decisions, firstly because they had not been made in the context of facts such as the very detailed ones of the instant case, which I have fully recorded and attempted to summarise. At the end of the day, the outcome of a judicial decision must be, and be seen to be, fair. The reality and appearance of fairness is inseparable from the specific details and nuances of a particular case. In the present case I have considered much detail, and it shows wrong on the side of the defendant, and right on the side of the plaintiff. The defendant has acted deliberately to deal a death blow to the plaintiff's interests such as would have ensued from a binding contractual undertaking. I hold that even as the statute law governs the property-holding situation which would have followed if the defendant did not renege on his obligations, the sanctity of the original contract must be upheld, and damages paid for breach.

Such are not considerations that featured in the learned decisions cited by counsel : *Kariuki v. Kariuki* [1983] KLR 225; *Richard Kamiri Gachwe Kahia v. Edward Kamau Ng'ang'a,* Civil Appeal No. 16 of 2001; *Rioki Estate Co. Ltd v. Kinuthia Njoroge* [1977] KLR 146.

From the foregoing analysis it follows that this suit is won by the plaintiff and lost by the defendant. The only question left is, what remedy is to be awarded?

It is equally clear that I cannot award remedies on the basis that the transactions contemplated in the sale agreement of 24th November, 1995 did take place or did achieve the intended result; their taking place was frustrated and nullified by the acts of the defendant. The defendant is, firstly, to refund with full interests all the moneys he received from the plaintiff, on the pretension that he would perform the contract as agreed. Secondly, the defendant is to pay general damages for his breaches of the said contract. Although it is well known that damages in contract are normally special damages, because of the preciseness of contractual undertakings and the fact that the damage flowing out of the breach would be ascertainable, the contract herein was to lead to relatively less well-defined processes, such as the management of education in primary and secondary school. The open-textured scope of such activities would rule out the suitability of *special damages*. But it must be noted at the same time that general damages, being *compensatory* in nature, cannot be arbitrarily derived; there must be an objective reference-point for the relevant figures. In the context of this case, it will be entirely proper to derive figures to support an award of general damages from activities of the parties which may well have become void on account of want of consent of the Land Control Board.

On that basis I will decree as follows:

1. The defendant shall refund to the plaintiff the sum of Kenya Shillings 2,886,107/40 with interest at the rate of 35% with effect from 24th November, 1995 until payment in full.

2. The defendant shall pay general damages in the sum of Kenya Shillings Twenty Million (20,000,000/=), bearing interest at Court rates with effect from the date hereof, until payment in full.

3. The defendant shall bear the plaintiff's costs in this suit, which costs shall bear interest at Court rates from the date of filing suit.

DATED and DELIVERED at NAIROBI this 7th day of October, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk: Mwangi

For the plaintiff: Mr. K'Opere, instructed by M/s K'Opere & Co. Advocates

For the defendant: Mr. Oguttu-Mboya, instructed by

M/s. Oguttu-Mboya & Co. Advocates