REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 142 OF 2012

SWING LIMITED…………….………….…..…………................PLAINTIFF

- VERSUS -

HOUSING FINANCE COMPANY OF KENYA LTD………...DEFENDANT

JUDGMENT

1. The plaintiff herein **Swing Limited** was at all material times to this suit a limited liability company registered in Kenya. The Defendant Housing Finance Company of Kenya too is a Limited liability Company duly incorporated in Kenya.

2. From the parties' pleadings, the parcel of land known as Land Reference Number 37/749 (the property) situate on Kiambere road in the Upper Hill area of Nairobi was at all material times owned by Ebony Development Company Limited (Ebony) which had created a charge and a further charge in favour of the defendant Housing Finance Company Limited as security for the loans borrowed from the defendant. Ebony Development Company Limited had at all material times to this suit commenced construction of a four storey commercial-cum residential building on the subject property but ran into financial difficulties which forced it to abandon the construction of the building and was allegedly unable to service the loans advanced to it by Housing Finance Co., the defendant herein.

3. The defendant then as chargee and in exercise of its statutory power of sale agreed to sell by private treaty the said property to the plaintiff herein Swing Limited at a consideration of shs.47million vide a written agreement dated 26th May, 2006.

4. However, before the transaction could be completed, Ebony Development Limited the registered proprietors of the said property brought an action against the defendant and enjoined the plaintiff being **Nairobi HCCC NO.425 of 2006**, injuncting the defendant from completing the sale of the property to the plaintiff.

5. The plaintiff was later refunded the deposit of 10% purchase price paid but brought this suit claiming for loss of profits and special damages.

6. The defendant filed a defense denying the plaintiff's claim in toto and urging the court to dismiss the suit with costs.

The plaintiff's case

7. The plaintiff called one witness, its Managing Director, **Mr. Kamau Mucuha** who testified on oath as (PW1) and adopted his witness statement filed in court on 26th March, 2012 as his evidence in chief and stated that he was a land surveyor by profession and that the plaintiff decided to buy the property LR 37/749 IR 68125 from the defendant, which property comprised an incomplete four storey building as an investment.

8. His evidence was that the defendant did not say that the property was subject to third party interests. Further, that he did not know at that time that the property was charged to Ebony Development Company Limited.

9. PW 1 further testified that since the plaintiff did not have the full purchase price it approached Barclays Bank of Kenya Ltd (BBK) for a loan and the Bank requested the plaintiff to furnish it with a valuation of the property before it could consider the plaintiff's application for such a loan. BBK advanced him a loan of Kshs 36 million. He negotiated the balance sum from **Shelter Afrique.**

10. Mr Kamau testified that as the property was partially developed and required completion, he engaged the services of Messrs Nduati Wamae & Associates, a firm of Valuers and Estate Agents, who carried out the requisite valuation for a fee of Kshs.448,370/=. The plaintiff produced a receipt for this amount as exhibit No.14) (as per the plaintiff's list of documents filed together with the plaint on 26th March, 2012).

11. PW1 stated that a financial consultancy confirmed the profitability of the property which was located in upper hill, Nairobi, a prime area. That he had started marketing the property as he wanted to put up a 168- 2 bedroom flats in one and a half years and sell the units. That he therefore lost the opportunity to own the property and over kshs 400 million. He stated that he would have spent kshs 212 million to complete the building and would get rental income of kshs 35,000 per house per month which would translate into about 5 million monthly rental income. In addition, PW1 stated that he would have sold the units at about kshs 500million and after repaying off the loan and construction costs and therefore he would have earned a net profit of kshs 250 million.

12. Mr. Kamau also produced in evidence an offer by Barclays Bank agreeing to lend to the plaintiff Kshs.37million, as per PEX No.5.

13. PW1 stated that on the plaintiff was refunded the 10 percent deposit paid for the purchase price but that he now wants interest on it because he got the money on loan from Barclays Bank and that he also paid interest on it.The cheque for efund of 10%deposit is dated 19 th April 2007.

14. Mr Kamau testified that the sale agreement was frustrated after Ebony Development Ltd stopped the sale through a court order. He stated that it was not his problem that the property was claimed by Ebony Development Limited since the defendant had confirmed to him that there was no issue with the property. He stated that he had known the defendant for over 15 years as he had obtained a loan from them for purchase of his first house in Nairobi.

15. PW1 maintained that the defendant never indicated in the agreement that there would be any problem with the transaction and that the defendant’s lawyer assured him that the sale would go through. The plaintiff claimed for special damages of Kshs 400 million and general damages plus costs and interests.

16. The plaintiff also produced all his documents filed in court as exhibits 1-22 which included receipt for Kshs.940,000/= (as per PEX 15) for charges paid to structural engineers. ; Kshs.50,000/= (as per PEX 16) for financial advice, and Kshs.25,000/= (as per PEX 17) for the then City Council Surveyor’s approval and Kshs.12,200/= (as per PEX 18) to the defunct City Council of Nairobi for approval of the plans which were prepared for the completion of the construction of the building.

17. In cross examination by Mr Mbaluto counsel for the defendant, PW1 stated that he had known the defendant for a long time as a credible company but that he no longer dealt with them. He also stated that he had been in the real estate sector for over 40 years.

18. On being shown the agreement for sale of the property in issue, PW1 identified clause 1 thereof and stated that it states that the property was at the material time charged to Ebony Development Ltd. He however stated that he had no reason to doubt the defendant who said to him that they had sorted out the matter.

19. He stated that the property was bought on private treaty and that he entered into an agreement voluntarily and on agreed terms. He also stated that the plaintiff was represented by Mr. Miller advocate, during the sale and that he believed in the defendant and his advocate in that even if the property was charged, they would sort it out because Ebony Development Company Ltd had defaulted in repaying the loan.

20. PW1 maintained that the defendant did not state that there were third party interests but that they said they had sorted it out and he believed them.

21. PW1 also stated that he did not get the 37 million from Barclays Bank. He stated that the valuation was prepared for Barclays Bank and the plaintiff because he wanted to get a loan and that as the applicant for the loan facility, it was him and not the bank to pay the valuation fees. PW1 stated that he had grand project plans for the property.

22. He stated that the plaintiff was enjoined to the suit by Ebony Development Co. Ltd as the second defendant, which suit was terminated on conditions.

23. He stated that he did not know what the Law Society of Kenya Conditions for sale were.

24. In reexamination by Mr L.M.Ombete advocate, PW1 stated that clause 1 of the sale agreement only disclosed that the property was charged and not subject to the rights of Ebony Development company limited.

25. He further stated that Miller advocates acted for both the vendor and purchaser but never told the PW1 that the sale would not sail through. That the advocate told him that the property was okay. The witness further stated that he was the one to pay for the valuation before the Bank could advance him money. He also stated that the defendant had no business with his plans for the purchased building. He reiterated that his company (the plaintiff herein) was enjoined to the suit filed by Ebony. He also confirmed that the building was for commercial business purpose. He stated that his expectation was to buy an incomplete building and complete the construction hence the loan application. He also stated that he could not complete construction work without a project plan. The witness also denied that Miller advocate ever explained to him any Law Society of Kenya conditions of sale.

The defendant’s case

26. At the close of the plaintiff’s case, the defendant Housing Finance Company of Kenya Limited called **Steven Aloo Lila** (DW1) who testified on oath and adopted his witness statement dated 21st November 2016 and filed in court on 22nd November 2016 as his evidence in chief. DW1 stated that he was a Relationship Manager at the Defendant Company and that he was familiar with the matters in dispute between the parties hereto.

DW1 confirmed that at all material times; the Defendant Housing Finance Company of Kenya Ltd held a Charge and a Further Charge over

the property known as No. LR 37/747 so as to secure a loan which had been advanced to the registered owner of the property, Ebony Development Company Limited. The witness produced copy of the Charge as an exhibit and explained that over time, Ebony Development Company Limited defaulted and was unable to service the loan despite reminders and a 3 months Statutory Notice dated 30th April 2004 was issued after which the Defendant's right to exercise statutory power of sale crystalized.

28. DW1 testified that it was after upon expiry of the Statutory Notice that the Defendant entered into a sale agreement with the Plaintiff for sale of the charged property via private treaty. He produced as exhibits the notice and certificate of postage.

29. DW1 confirmed that the Defendant indeed had the legal capacity to sell the property by virtue of being a Chargee to whom statutory power of sale had accrued.

30. DW1 testified that the Defendant was not privy to the manner in which the Plaintiff intended to raise the monies for the purchase price and contended that the Defendant was a complete stranger to the professional services, costs and expenses alleged to have been incurred by the Plaintiff in connection with the intended sale.

31. DW1 contended that the sale was frustrated by dint of a Court Order obtained by Ebony Development Company Limited in **HCCC No. 452 of 2006** which prevented the Defendant from selling the property. He produced as an exhibit the said Court Order.

32. DW1 narrated that on 12th March 2007, the Plaintiff, through its lawyers requested for a refund of the 10% deposit paid in the sum of Kshs. 4,700,000, and that the same was duly refunded to the Plaintiff on 20th April 2007 as shown by letter dated 20th April 2007 and cheque for Kshs. 4,700,000 payable to the Defendant produced in evidence as exhibits.

33. The witness was of the view that the defendant having refunded to the plaintiff all the money deposited, it owed nothing to the plaintiff as the agreement for the sale of the property was mutually terminated.

34. The defendant's witness urged the Court to find that the plaintiff's suit against the defendant was without merit and asked the Court to dismiss the plaintiff's suit with costs.

35. In cross examination by Mr L.M. Ombete counsel for the plaintiff, the defendant's witness stated that he knew that the defendant was selling the property which was charged and added that the defendant had the right to sell the property by private treaty or by public auction. He also stated that there was no clause stating that the sale was subject to the interests of the chargor. He conceded that in a mortgage transaction, costs are incurred before transfer of the property and that the property was an incomplete building hence the plaintiff was entitled to seek advice of professionals to establish its strength.

36. The defence witness conceded that the expenses in paragraph 8 of the plaint are charges ordinarily incurred by the purchaser of an incomplete building. He stated that the plaintiff herein Swing Limited was enjoined to the suit as a second defendant because it had agreed to purchase the property and that as it had to defend the suit, it incurred expenses.

37. According to the defence witness, by the defendant refunding the deposit to the plaintiff, the sale was mutually rescinded. He stated that the defendant did not pay any interest on the deposit refunded to the plaintiff.

38. The defence witness conceded that the defendant held out to the plaintiff that the defendant would transfer the property to the plaintiff once the plaintiff paid the purchase price but added that the defendant was unable to complete the sale because of court cases filed by Ebony Development Company Ltd. The defendant's witness maintained that the plaintiff was refunded its deposit on 20th March, 2007 as per its request.

39. In reexamination by Mr Mbaluto counsel for the defendant, DW1 stated that paragraph 5 of the plaint complains of the defendant's capacity to sell the property and that it is Ebony Development Company Ltd who caused the plaintiff herein Swing Limited to be enjoined to the suit. The witness further stated that all parties to the agreement were represented by advocates as shown by paragraph 8 of the said sale agreement produced in evidence as exhibit.

40. In addition, the witness stated that paragraph 7 of the agreement states that the sale was subject to Law Society of Kenya conditions.

41. He also stated that the letter dated 4th January 2007 gives reasons why the sale was not completed which circumstances were beyond the defendant's control.

SUBMISSIONS

42. At the close of the defence case, parties' advocates agreed to file written submissions

The plaintiff's submissions

43. The plaintiff's counsel submitted that the plaintiff was on its part ready, able and willing to complete the transaction and become the owner of the property but its intention to buy the property was therefore thwarted by the defendant's inability to conclude the sale due to the action taken by Ebony Development Limited which prevented it from selling the property.

44. According to the plaintiff, it sought advice from structural engineers and quantity surveyors on the structural strength of the incomplete building and the cost of completing its construction after ascertaining that it was capable of raising sufficient funds for the completion of the

building.

45. That based on this advice, Mr. Kamau on behalf of the plaintiff approached Shelter Afrique who were willing to provide funds for the completion of the construction of the building. He also sought the then City Council Surveyor's approval of the plans which were prepared for the completion of the construction of the building.

46. It was submitted that the sum of Kshs.4.7million which was 10% of the purchase price was paid to the defendant on 22nd May, 2006 and was refunded to the plaintiff on 20th April, 2007. That this money had been paid by the plaintiff to the defendant in anticipation that the plaintiff would in due time become the owner of the property. It was submitted that the deposit was paid for a commercial transaction which failed and that such failure was attributed to the fact that the defendant, though holding itself as having the statutory power of sale as chargee, was found to have no such power hence in the circumstances, the plaintiff's claim for interest of Kshs.761,110.25 on this sum for the duration the money was held by the defendant at the then prevailing Barclays Bank of Kenya Limited overdraft interest rate of 17.5% per annum is right.

47. It was also submitted that under the terms of the agreement for sale if the plaintiff had defaulted to complete the transaction then it would have forfeited that 10% deposited with the defendant and that if that amount had been advanced to the plaintiff as a loan by the defendant, the latter would have charged interest on it at the prevailing rate of interest.

48. The plaintiff's counsel maintained that there is ample evidence to the effect that the plaintiff was added as a second defendant to the action which Ebony Development Limited brought against the defendant on the ground that it had agreed to buy the property and as such, the defendant should have instructed its lawyers to act for the plaintiff in that action since there was no conflict of interest between them. That the defendant having failed to do so, the plaintiff was compelled to engage its own lawyers *Messrs Kimani Githogo & Co., Advocates* who charged Kshs.915,465/= exhibit (No.13) as their legal fees for that service. In total the plaintiff claimed that it incurred a sum of Kshs.3,181,680.25 in preparing to complete the transaction and also complete the construction of the incomplete building then standing on the property.

49. On Liability, it was submitted that the defendant is a mortgage company which by the year 2006 had been around in this country for over 40 years. That the defendant admitted that it had built a business reputation as a highly reliable lender to property owners or buyers. That the defendant and its lawyers assured the plaintiff that the defendant had the statutory right to sell the property and confer title to the plaintiff, as per paragraph 2 of the Agreement for sale which explicitly stated:

> "*It was expressly declared and provided in the Charge and Further Charge inter alia, that the vendor has in its favour a statutory power of sale as provided for by the Transfer of Property Act, 1882, of India as amended by the Indian Transfer of Property (Amendment) Act 1959 (hereinafter referred to as the "ITPA")".*

50. It was thus submitted that it was on the basis of the defendant's business reputation and the assurance by the defendant and their legal advisers that the transaction will be completed which made the plaintiff to pay the deposit of Kshs.4.7million on 22nd May, 2006 even before a formal agreement for sale had been executed.

51. According to the plaintiff, it had proved, on a balance of probabilities, that the defendant held itself out to the plaintiff and made the plaintiff believe that the defendant had the legal capacity to sell to the plaintiff the property and confer on the plaintiff a valid title as pleaded in paragraph 5 of the plaint which forms the plaintiff's issue number one.

52. It was further submitted that the defendant must be taken to have known that by agreeing to sell the property by private treaty and holding itself as it did that its right to sell the property was absolute, that the plaintiff would incur certain expenses to ensure that it would fulfill its part of the bargain and would wish to turn the incomplete building into a complete building so that it could generate income from it.

53. The plaintiff maintained that the question here is not whether the defendant was or was not concerned with how the plaintiff would raise funds with which to complete the transaction or what it wanted to do with the property. That the question as raised by the circumstances of this case is whether or not the expenses incurred by the plaintiff were the consequential costs of the anticipated transaction by a prudent purchaser.

54. It was submitted that if the plaintiff had not been assured that the transaction would be completed it would not have spent the various monies it did incur hence the defendant is liable for the loss of bargain and the special damages incurred by the plaintiff.

55. Further, it was submitted that the written agreement dated 26th May, 2006 created a valid contract whereby the defendant, without any reservation, agreed to sell to the plaintiff who in turn agreed to buy from the defendant the property for the sum of Kshs.47million. That the plaintiff was ready, able and willing to pay the purchase price and take possession of the property as an investment, but was disappointed by the defendant's misguided belief that it had the statutory right to sell the property as chargee, which sale was thwarted by the court. therefore, it was submitted that the defendant is liable to the plaintiff for failing to carry out its side of the bargain.

56. On the defendant's contention that the agreement for the sale of the property was frustrated by a court order, it was submitted that the defendant wanted to plead the well established doctrine of frustration, but never complied with the legal requirement that whoever wishes to rely on the defence of frustration must plead it specifically. According to the plaintiff, the defendant did not specifically plead that the completion of the sale was frustrated

57. Reliance was placed on the case of *Kenya Commercial Finance Company Ltd v Ngeny & another [2002] 1 KLR 106 where Owuor JA[as she then was] as* 122 stated:

“*A party who wishes to rely on a frustrating event cannot as in this case simply mention it in passing as was done in paragraph 11 of the Amended Plaint that I have set above. Particular facts which they seek to rely on resulting in the frustration of the contract must be clearly set out in the pleadings to enable the other side to prepare and defend the same. This not having been done, the learned Judge was clearly wrong.”*

58. In this case it was submitted that the defendant does not specifically plead frustration as a defence. Moreover, that the defendant has all along maintained that it had the statutory right to sell. It was further submitted that the defendant did not challenge the High Court'order restraining it from selling the property and therefore the defence of frustration as discharging the defendant's obligation under the contract is not available to it.

59. It was submitted in addition that even if it can be said that the defendant wanted to or did plead the doctrine of frustration as entitling it to regard its obligation under the agreement for sale as discharged, the law is that a frustrating event must be an event which the party seeking to use it as discharging his obligation under the contract could not have been foreseen. In other words it must be an unforeseeable event. In this case, the plaintiff maintains the fact that a chargor of a property may attempt to and actually stop, by court process, the sale of his property by a chargee is a matter which could have been foreseen by the defendant which specializes in lending money to many property owners or buyers on the security of their properties. In addition that the defendant had an option to try to sell the property by public auction whereby it would not have committed itself to one particular purchaser and assured that purchaser, as it did to the plaintiff, in this case.

60. That the defendant opted to sell the property by private treaty to the plaintiff and having made such choice, it should have inserted a clause in the agreement for sale, which was drawn by it'ss lawyers, protecting it from any probable action by the charger, which it did not. Accordingly, the plaintiff

61. It did not do so. The plaintiff therefore submitted that the court order which restrained the defendant from selling the property to the plaintiff does not amount to a frustrating event. Reliance was placed on the *Ngeny* and *another* [supra] case where the respondents' plea, in trying to resist repaying the loans, was that floods brought about by *El Nino* and *La Nina* weather phenomenon had resulted in crop failure which they had pleaded obliquely frustrated their ability to repay the loans duly advanced to them by the appellant. That the trial court had absolved the respondents from repaying the loans on that ground. The Court of Appeal, by a majority, held that the flooding that was brought about by *El Nino* and *La Nina* was not a frustrating event since the contract for the loans was not granted on the basis that the borrowers would have a bumper harvest.

62. On the basis of the above decision, the plaintiff maintained that it was entitled to both special and general damages against the defendant for being unable to convey the property to the plaintiff.

63. Further reliance was placed on the authors of *McGREGOR ON DAMAGES* 18th Edition at page 869 paragraph 22 which states:

“*Thirdly, the buyer may sue one for costs, a course of action most commonly pursued where the seller has no title to convey.”*

64. In this case, it was submitted that the defendant had no title to convey notwithstanding its belief that it had the statutory right to sell the property as a chargee. That the defendant unreservedly agreed to sell the property to the plaintiff. That the defendant had maintained that it had the right to so sell. It was prevented by the Chargor form selling hence it must be held liable for the loss suffered by the plaintiff. That the agreement to sell the property was not made subject to what a court could or could not do if Ebony challenged the defendant's right to sell the property. According to the plaintiff, Court decisions and their impact on commercial transactions are matters of common occurrence. That it was therefore the duty of the defendant to guard against such occurrence by inserting appropriate clause in the agreement for sale. Having not done so it must be held liable for its failure to sell the property to the plaintiff.

65. On special Damages, it was submitted that the law is that special damages must be specifically pleaded and proved. That the plaintiff pleaded Kshs.3,181,680.25 as special damages which it incurred in its pursuit to buy the property and complete the construction of the then incomplete building which was standing on that property. The plaintiff submits that it produced documentary evidence to prove it, and that the defendant did not dispute the fact that it was necessary for the plaintiff to incur these expenses. That the defendant did not dispute that the plaintiff incurred the expenses.

66. It was submitted that without entering into the agreement, the plaintiff would not have incurred all these expenses. That the application for the loan from the Bank was necessary;The request for valuation of the property by the Bank was expected; The need to complete the construction of the incomplete building was essential hence, all the expenses incurred by the plaintiff were the consequential part and arose out of the agreement for sale executed between the plaintiff and the defendant.

67. It was submitted that the defendant, as a mortgage company, must be taken to be peculiarly aware of all these consequential costs, since it gave the plaintiff the unconditional assurance that the sale would be completed and therefore the defendant must be liable for its inability to sell the property to the plaintiff.

68. On general damages, it was submitted relying on the writings by *McGregor on Damages* 18th Edition at paragraph 22-005) at page 869 which states:

“*The normal measure of damages is the market value of the property at the contractual time for completion less the contract price*.”

69. That in this case the approximate value of the property at the time of completion as evidenced by the defendant's own statutory notice was about Kshs.86million which the plaintiff urged the court to grant.

70. On loss of profits it was submitted relying on the McGregor writings state:

"The possibility of recovering for loss of profits eventually became an actuality…"

71. In support of this statement the authors rely on the English case of **Cottrill v Steyning & Littlehampton Building Society [1966] 1 W.L.R. 753** in which the court awarded loss of profits after the vendor had, in breach of contract, sold the property to a third party. It was therefore submitted that the defendant must be taken to have known that the plaintiff will use the building on the property to generate income, as evidenced in the testimony of Mr. Kamau that he planned to complete the construction of the incomplete building and turn that building into 168 one bedroomed residential flats which would have been rented for Kshs.25,000/= per unit per month.

72. It was submitted that on the basis of the rental income which the plaintiff would have earned for a period of 5 years, the loss suffered by the plaintiff as per the calculation is Kshs.100,000,000/= which the plaintiff urged this court to grant.

73. On the whole, the plaintiff prayed for judgment against the defendant and orders for: Kshs.142,181,680.25 made up as follows:

a) Special damages	Kshs. 3,181,680.25
b) General damages	Kshs. 39,000,000,00
c) Loss of profits	<u>Kshs.100,000,000.00</u>
Total	**<u>Kshs.142,181,680.25</u>**

74. The plaintiff also prayed for costs of the suit

The defendant's submissions

75. The defendant filed very detailed and lengthy written submissions setting out the following issues for determination:

76. **On the first issue of whether the Defendant lacked capacity to sell the suit property** it was submitted that the Defendant's capacity to sell the property arises by virtue of statute, namely, section 69 (1) of the Transfer of Property Act 1882 of India, which was specifically incorporated into the Charge between the Defendant and Ebony Development Company Limited.

> *"9. Provided that if default be made by the Chargor in payment of any monthly instalment or other payment hereby covenanted to be made or if default be made by the Chargor in the observance or performance of any of the covenants or obligations herein expressed or implied… the Chargee may without any previous notice to or concurrence on the part of the Chargor:-*
>
> …
>
> *ii) Exercise all statutory powers conferred on Chargees by the Indian Transfer of Property Act 1882 or any Kenyan act amending the same."*

77. It was further submitted that the Charge specifically incorporated in the said agreement the provisions of section 69 (1) of the Transfer of Property Act 1882 of India which stipulates that:

> *"69.1 A mortgagee, or any person acting on his behalf where the mortgage is an English Mortgage, to which this section applies, <u>shall by virtue of this Act and without the intervention of the court have power when the mortgage money has become due subject to the provisions of this section, to sell or to concur with any other person in selling the mortgage property or any part thereof either subject to prior encumbrances or not, and either together or in lots by public auction or private contract subject to contract for sale, and to buy in at an auction, or rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby</u>: the powers of sale aforesaid is in this Act referred to as the Mortgagee's statutory power of sale…"(emphasis provided)*

78. It was therefore submitted that it is clear from the statutory notice at pages 27 of the Defendant's Bundle of Documents that the Defendant was invoking its aforesaid statutory power of sale, which gives the Defendant the right to sell the property to a third party by public auction or private treaty: and that the defendant made it clear to Ebony Development Company that:

> *"… we shall upon the expiry of this notice exercise our statutory rights under section 69 of the Transfer of Property Act as amended and applied in Kenya."*

79. It was further submitted that the fact that the Charge and Further Charge were registered is not in dispute, but that if in doubt, then the Court may have regard to the Certificate of Title at pages 1 to 3 of the Defendant's Bundle of Documents to infer that the same were in fact registered against the Title.

80. The defendant's counsel submitted that PW1's testimony cannot be believed when he says that he was not aware that the property was charged because, as the purchaser, the Plaintiff was represented in the transaction by Advocates (Miller & Company) and that it is a basic task to conduct a search on a property to ascertain its owner, whereby the search would have revealed that the property was charged to the Defendant.

81. Further, it was submitted that in any event, the sale agreement speaks for itself and is explicit that the property was charged to the Defendant and that indeed the sale was pursuant to the Defendant's statutory power of sale.

82. It was submitted that Clause 4 of the sale agreement at page 30 of the Defendant's Bundle of Documents is clear that the property was being sold pursuant to the Defendant's statutory power of sale and that is states:

> "*4. The Vendor in exercise of the statutory power of sale conferred upon the Vendor by the ITPA has agreed to sell and the Purchaser has agreed to purchase the property at the purchase price herein below mentioned."*

83. Reliance was placed on ***Mrao v First American Bank of Kenya v 2 Other*** **(2003) eKLR,** where the Court of Appeal urged persons entering into agrrements to ensure that they get the best advise and ensure they understand the terms of agreents that they append their signatures to.

84. The defendant submitted that the fact that the Defendant was sued by the Chargor, Ebony Development Company Limited in HCCC No. 452 of 2006 and an Order of injunction issued does not *ipso facto* mean that the Defendant lacked the legal capacity to sell.

85. It was submitted that there is no Judgment, Decree or Order issued by the Court that states that the Defendant lacked legal capacity to sell the property, and no sufficient grounds or evidence had been shown to support that view.

86. In light of the foregoing, it was submitted that the Plaintiff's contention that the Defendant lacked legal capacity to sell the suit property does not hold.

87. **On the second issue of Whether the Defendant made any misrepresentations when selling the property,** It was submitted on behalf of the defendant that though not clearly pleaded in the Plaint, the Plaintiff's case on misrepresentation is found in PW1's Witness Statement states as follows:

> "*The Defendant made it clear to me that their right to sell had arisen and there would be no impediment to their right to sell the property. That was also the view of their lawyers. That is why I agreed to execute the agreement*."

> "*The Defendant had not, as they ought to have done, informed the Plaintiff that their right to sell could be challenged and this misrepresentation led the Plaintiff to believe that their right to sell could not be challenged. On this false representation the Plaintiff incurred the amounts specified above…"*

88. According to the defendant, there was no proof that the Defendant actually made this representation, and that therefore it would be a strange representation to make as it is virtually impossible to guarantee that a sale will have "no impediment." Further, it was submitted that the plaintiff's Plaint is a tellingly scant on the details of the alleged misrepresentation and PW1 did not shed any more light on the matter than his Witness Statement.

89. Further, it was submitted that more importantly, the sale agreement speaks for itself and that no such representation (i.e. that nobody would challenge the sale or that there would be no impediment) is borne out in the agreement. That Clause 9 of the agreement is also clear that the agreement contains the whole agreement and understanding between the parties relating to the transaction and supersede all previous agreement (if any) whether written or oral between the parties in respect of such matters.

90. That no extrinsic evidence outside the confines of the sale agreement may be adduced as this would go against the parol evidence rule and contrary to section 97 of the Evidence Act (Cap. 80) Laws of Kenya. Reliance was placed on the case of **Twiga Chemicals Ltd v Allan Stephen Reynolds (2014) eKLR where** the Court of Appeal stated:

> "*It is familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence"*.

91. The above position is also reiterated in ***Halsbury's Laws of England*** (**4th Ed.) Vol. 9 (1)** where para 622 partly states that:

> "*Where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms*".

92. It was therefore submitted that in the circumstances, the Plaintiff's contention that the Defendant made misrepresentations cannot stand.

93. **On the third issue of whether the sale was frustrated by the Court Order in HCCC 452 of 2006 and mutually rescinded by the parties, reliance was placed on** ***Halsbury's Laws of England*** (**4th Ed.) Vol. 9** at para 450 where it is:

> "*It frequently happens that a contract is silent as to the position of the parties in the event of performance becoming literally impossible or only possible in a very different way from that originally contemplated. In such cases, the law excuses further performance under the doctrine of impossibility or frustration."*

94. Further reliance was placed on **Kenya Airways v Satwant Singh Flora (2013) eKLR**, where the Court of Appeal stated with respect to the aforesaid principle of frustration:

> *"...the doctrine of frustration operates to excuse further performance where (i) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and (ii) before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration."*
>
> *The modern context of frustration was first formulated by Lord Radcliffe in the case of* DAVIS CONTRACTORS LTD V FAREHAM U.D.C*, (1956) A.C 696 which sets out the radical change in the contractual obligation at p. 729:*
>
>> *"...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni." It was not what I promised to do."*

95. It was submitted by the defendant that the Defendant brought the fact of impossibility or frustration in the wake of the Court Orders issued in HCCC No. 452 of 2006 to the Plaintiff's attention in the letter dated 4th January 2007 from Oraro & Company to the Plaintiff's then lawyers Kimani Githongo & Company to the effect that:

> *"Our client has always been ready and willing to complete the sale of the above-noted property* *but has been prevented from doing so by circumstances entirely beyond its control**, the particulars of which are well within your client's knowledge." (emphasis added)hence t*he Plaintiff cannot plead ignorance of the circumstances alluded to in the aforesaid letter as it was a party to HCCC No. 452 of 2006 in which the Court Orders were issued and therefore had full knowledge of the same. In any event, if there was any doubt as to the circumstances, nothing would have been simpler than to request for further explanation thereon.

96. It was submitted that notwithstanding the fact that the Plaintiff was fully aware of the circumstances (being a party to HCCC No. 452 of 2006), it elected to call for a refund of the deposit which had the effect of rescinding the contract as between the parties. Reliance was placed on **Halsbury's Laws of England (4th Ed) Vol. 9** at para 561, where it is stated:

> *"Where a contract is executory on both sides (i.e. where neither party has completely performed his obligation under the contract), the parties may terminate it by mutual consent, and this will be so whether the obligation is indefinite or limited in point of time, or provides that it shall be determinable by notice or otherwise. Such rescission may take the form of an express agreement or may be inferred from conduct as where neither party has insisted on performance of the contract for a long period of time, or where the parties have acted in a manner inconsistent with the continuance of the contract..." (emphasis added).*

97. That therefore by conduct of the parties, the refund of the cheque was in furtherance of the rescission of the sale agreement and that moreso, in forwarding the said cheque, the Defendant's lawyers were clear that the refund was being paid in full and final settlement of Plaintiff's claim.

98. **On the fourth issue of whether the Plaintiff is entitled to the special damages and general damages sought, it was submitted that this** Court should only proceed to consider the issue of damages if liability against the Defendant is established and on the basis of the foregoing paragraphs it is submitted that the Plaintiff has not established a case against the Defendant as to warrant the award of any damages. Be that as it may, even if the Plaintiff has succeeded in establishing a case against the Defendant (which is denied) it is submitted that no award of damages should be granted for the reasons that the Plaintiff's suit is in the nature of a claim for breach of contract and it is settled law that special damages must be specifically pleaded and proved, while general damages may not be awarded for breach of contract as stated by the Court of Appeal in the case of **Capital Fish Kenya Limited v Kenya Power and Lighting Company Limited (2016) eKLR** citing with approval earlier decisions of the Court on the matter that:

> *"...it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See* National Social Security Fund Board of Trustees vs Sifa International Limited *(2016) eKLR,* Macharia & Waiguru vs Muranga Municipal Council & Another *(2014) eKLR and* Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa*, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that*
>
> *"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract …".*

99. Secondly, that the Plaintiff's entire claim for loss of business opportunity or loss of profit was not pleaded in the Plaint, but was only raised for the first time at the trial. That Loss of business opportunity or loss of profit is in the nature of a special damage and the same ought to have been specifically pleaded in the Plaint, failing which the claim fails. Reliance was placed on the case of **Kenya Commercial Bank Limited v Shiekh Osman Mohammed (2013) eKLR,** where the Court of Appeal quoted with approval previous decisions of the Court and held that loss of profit was a special damage and ought to be specifically pleaded and thereafter proved as follows:

> *"In* Sande V KCC (1992) LLR 314 (CAK- Cockar, Omolo and Tunoi) *this Court upheld the decision of the trial court declining to award damages based on loss of profits on the grounds that the same should have been specifically pleaded and proved. That*

decision was followed with approval in <u>CosmoAir V Diani Beach(1998) LLR 757 (CAK).</u>

100. Thirdly that in as far as the Plaintiff's claim for special damages of Kshs. 3,181,680.25 is concerned, it is clear that these relate to costs and expenses for services rendered to the Plaintiff by various professionals and/or entities pursuant to contracts which the Defendant was not party to and had no knowledge of.it was submitted that the doctrine of privity of contract holds that a party cannot be held liable pursuant to or under the terms of contract which it is not party. Reliance was placed on the Court of Appeal in the case of **Agricultural Finance Corporation v Lengetia Limited (1985) KLR 765**, where the Court held:

> "*As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.*"

101. In this case, therefore, it was submitted that the Defendant having not been party to, privy to, or have knowledge of the contracts and/or services in relation to the Plaintiff's claim for special damages, the same cannot be visited upon the said Defendant.

102. On the issue of who should bear the costs of the suit, the defendant submitted that ordinarily, costs should follow the event and that the successful party should be awarded his costs as per section 27 of the **<u>Civil Procedure Act</u> (Cap. 21)** Laws of Kenya. Reliance was placed on **Halsbury's Laws of England (4th Ed.) Vol. 37** (at p. 552) that:

> *Costs follow the event. Although in general the court has discretion as to costs, no party is entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the court. If in the exercise of its discretion the court sees fit to make any order as to cost, then subject to the rules relating to costs, the court must order the costs to follow the event except where it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*

103. Accordingly, the defendant prayed that the plaintiff's suit be dismissed with costs.

DETERMINATION

104. I have carefully considered the plaintiff's case as against the defence by the defendant and the parties' respective submissions and authorities relied on and in my humble view, the main issue for determination in this matter is whether the plaintiff is entitled to the prayers sought for special and general damages for alleged breach of contract and loss of bargain.

105. According to the plaintiff, it was made to believe that the defendant was in a position to sell to the plaintiff the suit property and complete the sale, which turned out to be that the defendant had no capacity to sell the property which had earlier been charged to Ebony Development Company and which later company successfully challenged the sale of the charged property through the court process thereby leaving the plaintiff with no option but to ask for refund of the 10% deposit paid to the defendant.

106. The plaintiff now claims that the defendant misrepresented to the plaintiff that the former had the capacity to sell the property in issue when it had no such capacity. Further, that the defence of frustration was never specifically pleaded as required under the doctrine of frustration hence the defendant cannot be heard to rely on it only by mention.

107. On the plea of the doctrine of frustration, I have perused the defence filed by the defendant and at paragraphs 9 and 10 thereof it is clear that the defendant pleaded frustration of the sale agreement and even particularized that the frustration was by a court order staying the sale thereof. In addition, it was this frustration by a court order that the plaintiff requested for refund of the deposit paid by its letter of 12/3/2007 and it was refunded the money on 20/4/2007 by cheque dated 19th April 2007.Accordingly, the plaintiff's assertion cannot be true.

108. The plaintiff also claimed that the defendant was liable to compensate the plaintiff for the loss of business opportunity because the defendant did not challenge the High Court order restraining the sale. The court however notes that the plaintiff was enjoined to the said suit as of right as a co defendant and therefore the plaintiff had the opportunity to challenge the claim by Ebony Development Ltd. There is nothing on record to show that the defendant easily conceded to the claim by Ebony leading to the withdrawal of the said suit against both the defendant herein and the plaintiff. In addition, this claim for loss of business opportunity only came in the testimony in court and in submissions not in the plaint as filed. A party is bound by their pleadings and unless a pleading is amended at whatever stage of the proceeding with or without leave of court as the case may be, they cannot adduce evidence as the evidence would not amend the pleading. In addition, submissions are not evidence.

109. The plaintiff has heavily relied on the writings by McGregor on Damages. However, the principles relied on are relevant only where it is proved that the seller has no title to the property that it purports to sell. In this case, there was evidence that the defendant had the statutory power of sale of the property hence it had title to con vey but the conveyance was frustrated by a court order in proceedings where the plaintiff was a party.

110. The Court of Appeal [Githinji, Okwengu and S. Ole Kantai] in **Civil Appeal No 226 of 2005 delivered on 21st day of July 2017 [2017]eKLR** after this court had heard this case, dealt with a similar issue arising from the judgment and decree of Emukule J (as he then was) in **Satwant Singh Dhanjal & 2 others t/a Paramount Hauliers v Kenya Revenue Authority** and held as follows:

> ***"[41] We find that the appellants neither established breach nor the profits they would have made from resale of the goods. Nor are the appellants' entitled to damages for loss of bargain, as it is evident that the auction sale was nullified pursuant to a court order and not through breach of either party. In this regard, we draw inspiration from <u>Southern Shield Holdings Limited v Estate Building Society</u> [2013] eKLR, where this Court held that a purchaser is only entitled to refund of the deposit and not damages for loss of bargain, in a land purchase transaction, that has failed due to refusal by the Commissioner of Lands to give***

statutory consent.”

111. The facts in that case were that on 2nd March 2001 the respondent Kenya Revenue Authority through its Customs and Excise Department published a notice in the Kenya Gazette advertising various goods for sale through public auction. Amongst the goods advertised were a 40ft container that had 10 pieces of Ro-Ro machines and a 20ft container that had 28 pieces of Ro-Ro machines.

112. The appellants through their agent Mr. Bipin Rathod attended the auction and successfully bid for the two containers at Kshs.7,120,000/=. The appellants duly paid the requisite 25% deposit amounting to Kshs.1,800,800/=. On 26th April 2001 the appellants paid the balance of Kshs.5,320,000/=.

113. On the 27th April 2001 when the appellants’ agent went to collect the goods from the respondent, ***he learnt that the High Court sitting at Kisumu had issued an order barring the respondent from selling disposing and/or alienating the said containers pending the hearing of a judicial review application lodged by Caneland Limited who sought prohibitory orders against the respondent claiming ownership of the goods. The judicial review proceedings were finally determined in favour of Caneland Limited and the respondent ordered to release the two containers to Caneland Limited***.

114. The aggrieved appellants blamed the respondent for this turn of events and therefore filed the suit claiming inter-alia:-

a) Special damages in the sum of Kshs. 32, 880,000/-,

b) General damages for breach of contract,

c) Punitive and exemplary damages.

115. The respondent filed a defence to the appellants’ claim in which it maintained that they released the goods to Caneland Limited in compliance with the court order.

116. In his judgment the learned Judge [Emukule J as he then was] rejected the appellants’ prayers for special and general damages for breach of contract, and punitive damages, and held that the appellants were only entitled to refund of the amount that they had paid. The learned judge therefore ordered the respondent to pay the appellants the sum of Kshs.7,120,000/= together with interest and costs of the suit.

117. The Court of Appeal observed that the appellants had pleaded special damages of Kshs.32,880,000/= which was later amended to read Kshs.40 million. To support this claim the appellants’ witness had produced an invoice from the consignee of the goods M/s Caneland Ltd, which indicated that one machine was sold by the consignee to Busia Outgrowers Ltd for Kshs.8,200,000/. The implication was that the appellants could have sold the machines at that price.

118. The Court of Appeal concurred with the respondent that evidence of a one off sale was not sufficient to prove the market price for the goods, nor was it sufficient to prove that the appellant had a ready market for the goods. The Court further found that moreover, there was no evidence adduced to show that the appellants were in the business of selling cane harvesting material, and would have indeed sold the machines for the price that Caneland did.

119. The Court of Appeal further stated that it was evident that the respondent’s power to sell the goods was subject to the owner of the goods being given notice and an opportunity to remove the goods within the 21 days. Thus, the publication of an advertisement of an intended auction sale was a clear representation and assurance that the respondent’s right to sell the goods at the public auction had crystalized.

120. In the High Court judgment, Emukule J [as he then was] drawing a parallel from the exercise of a statutory power of sale under the Transfer of Property Act of India stated:

> ***“In those instances, it is said that the statutory power of sale had arisen. By this is meant that the mortgage Bank had fulfilled all the legal and contractual requirements vested in him to be able to sell. So for instance, under the provisions of Section 69B of the Transfer of Property Act 1882 of India (Group 8 Acts) a purchaser at an auction, is not either before or on transfer concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given or the power is otherwise properly or regularly exercised, but any person damnified by an unauthorized, or improper, or irregular exercise of the powers shall have his remedy in damages against the persons exercising the power. There is no plea here that the power to sell the goods had not arisen. The evidence of the Defendant’s Peter Mutua Makuli (DW1) was clear. He was a Senior Revenue Officer when the events giving rise to this case arose. His duty was to record and arrange for advertisement and sale of goods which the owners (importers), or their Clearing Agents failed to enter into the country in terms of section 27 of the Customs and Excise Act (Cap 472, Laws of Kenya). There was no challenge that the goods were not properly advertised and sold by public auction in terms of section 34 of the said Act. There was therefore no question of warranty or representation as in contract that the Defendant had and did have authority to sell the goods in question. This was a case of clear observance of statutory requirements on the part of the Defendant.”[emphasis added].***

121. The Court of Appeal concurred with the learned Judge above and stated that the issue of warranty or representation did not arise because the respondent was exercising a statutory power of sale. The Court further observed that Moreover, the question whether the respondent’s statutory power of sale had crystalized was not one for determination by the learned Judge because there was a presumption that the respondent’s statutory power of sale had arisen. The court thus stated: ***“If, as happened in this case, the exercise of the statutory powers was proved to be irregular then the appellants’ recourse lay in damages.”***

122. As was in this case, the issue of lack of capacity of the Defendant to exercise the statutory power of sale of the property in favour of the plaintiff cannot found the plaintiff's claim as the defendant had issued a statutory notice which the plaintiff was aware of, albeit its Director PW1 pretended in his testimony not to have been aware of the same. Furthermore, the allegations of misrepresentation and lack of legal capacity on the part of the defendant to exercise its statutory power of sale of the suit property were not specifically pleaded and or proved by the plaintiff against the defendant to the required standard, of balance of probability. Moreover, the question whether the respondent's statutory power of sale had crystalized was not one for determination by this court because there was a presumption that the respondent's statutory power of sale had arisen. Iam in agreement with the holding in the Mrao case that: ***"If, as happened in this case, the exercise of the statutory powers was proved to be irregular then the appellants' recourse lay in damages."***

123. As stated earlier, nonetheless, no damages are available as there is no proof that the exercise of statutory power of sale by the defendant was irregular or unlawful.

124. On the claim for loss of opportunity to earn profits, the plaintiff claimed that it purchased a semi developed property and put in motion the process of developing the same by engaging experts to advise it on the cost thereof and viability of the project. This was after paying the deposit of 10% as required under the sale agreement. It expected to earn profits from the completed houses which it anticipated to sell. Therefore, on whether the plaintiff is entitled to loss of profits anticipated had the sale been successful, the Court of Appeal in the above cited case of **Satwant Singh Dhanjal & 2 others t/a Paramount Hauliers v Kenya Revenue Authority** further relied on the writings by **Black's Law Dictionary Ninth Edition** where loss of bargain was defined as *"**benefit of the bargain damages**,"* as:

> ***"Damages that a breaching party to a contract must pay to the aggrieved party, equal to the amounts that the aggrieved party would have received including profits if the contract had been fully performed."***

125. It was at that point that the Court of Appeal held:

> ***"We find that the appellants neither established breach nor the profits they would have made from resale of the goods. Nor are the appellants' entitled to damages for loss of bargain, as it is evident that the auction sale was nullified pursuant to a court order and not through breach of either party. In this regard, we draw inspiration from Southern Shield Holdings Limited v Estate Building Society [2013] eKLR, where this Court held that a purchaser is only entitled to refund of the deposit and not damages for loss of bargain in a land purchase transaction, that has failed due to refusal by the Commissioner of Lands to give statutory consent."***

126. The above holding is clear that in a failed sale of land transaction where the sale is frustrated by a court order, as was in this case, the buyer would only be entitled to a refund of the deposit of purchase price paid and not damages for anticipated profit or damages for breach, since such breach was not occasioned by the seller.

127. In my view, the above cited decisions are in *pari materia* with this case. Accordingly, the plaintiff's claim for loss of profits and or loss of bargain fails.

128. As regards the appellants' claim for special damages, the Court of Appeal in the **Satwant Singh Dhanjal** [supra] case found that the same was rendered moot, as there was no proof of breach of contract upon which it could be anchored. The Court went further to state that:

> ***"But even assuming that breach of contract was established it is trite that special damages must be specifically pleaded and strictly proved. This Court made this clear in Bangue Indosuez vs DJ Lowe and company Ltd [2006] 2KLR 208; where this Court stated as follows:***
>
> ***"Though special damages were specifically pleaded or claimed they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by BOWEN LJ IN RATCLIFFEE V. EVANS (1892), 2 QB 524, 532, 533, Lord Macnaghten in STORMS BRUKS AKTIC BOLAG V. JOHN & PETER HUTCHINSON, [1905] AC 515, 525, 526 Lutta JA in KAMPALA CITY COUNCIL V. NAKAYE, [1972] EA 446, 447 and Chesoni, J in OUMA V. NAIROBI CITY COUNCIL [1976] KLR 294, 304 and in SANDE CHARLES C. V. KENYA CO-OPERATIVE CREAMERIES LTD. Civil Appeal No. 125 of 1996 (unreported). With respect, therefore, we think that the learned Judge was wrong to grant the sums under the heading of special damages."***

129. In the above case which was similar to the case herein albeit the sale in the instant case related to immovable property unlike in the above case, the Court of Appeal was clear that it was evident *that the appellants' claim failed not because damages could not be awarded against the respondent, but because the circumstances did not justify award of damages as sought by the appellants*. The Court stated:

> ***"We find that the sale to the appellants was frustrated by virtue of a court order, which order the appellants chose not to challenge. We cannot therefore fault the learned Judge for finding that there was no breach of contract to justify award of damages, nor do we find any contradiction in the application of section 206(3) of the C&E Act and the award of costs to the appellants***."

130. What the Court in the above case was saying and which is applicable to this case is that the appellant was only entitled to the refund of the money deposit it had paid to the vendor and no more for reasons that where a contract is frustrated by an order of the court of competent jurisdiction and unless that order was successfully challenged, then there can be no breach of contract to justify an award of damages.

131. The Court of Appeal further agreed with the holding by Emukule J [as he then was] that:

> "*…….****The Defendant was stopped from delivering up the goods to the Plaintiffs agents, Bhavin Motors Ltd by a stay order issued by a court of competent jurisdiction. The only known remedy to challenge such an order is either to apply to the court which issued it to review and set it aside the order or to appeal to a higher court to set it aside. The interested party namely the said Bhavin Motors Ltd (which was a party to the proceedings under which the stay order was issued) or their Mr. Bipin Rathod (who was the Kingpin in the auction) did not consider it worthwhile either to apply to set aside or appeal against the order. The order therefore remained valid, binding and enforceable at all times against the Defendant. The Defendant would have acted in contempt of that court order if it acted contrary to the said order and delivered the goods either to the Plaintiffs or their agents. I therefore decline to make any order in the nature of general, punitive or exemplary damages against the Defendant."[emphasis added].***

132. Similarly in this case, the completion of sale of the purchased property was frustrated by the Court Order issued by the **High Court in HCC No. 452 of 2006** in which both the plaintiff herein and the defendant were enjoined as parties. The said orders restrained the defendants from selling the property to the plaintiff and therefore the defendant could not have disobeyed the said order. Moreover, as the plaintiff was a party to that suit, it had the right to refuse to accede to any consent that would have deprived it of its right to be entitled to completion of the sale. Further, the plaintiff had the opportunity to appeal against or challenge that order that frustrated the contract of sale of the suit property.

133. The plaintiff in my view cannot claim that the defendant had no right or capacity to sell the property to the plaintiff as the defendant was by law entitled to exercise statutory power of sale of property where there was default by the chargor, and upon following due process as to notification of the default. The plaintiff did not challenge the withdrawal of the suit. It mutually agreed with the defendant to have the deposit made refunded which was done before the question of capacity of the defendant to sell the property could be determined by the Court. Furthermore, the plaintiff never adduced any evidence to demonstrate that the defendant having held itself to have had statutory power of sale of the property in issue, was later found not to have possessed such statutory power of sale. Accordingly, I find and hold that the claim for interest on the 10% deposit is not justifiable, as the contract was not frustrated by the defendant but by a court order

134. Further, the plaintiff did not prove that the defendant was found to have been responsible for the proceedings that gave rise to the court order that frustrated the completion of sale of the property as the said suit was withdrawn from court and the plaintiff having been a party thereto did not adduce evidence in this matter to show how the defendant was to blame for the frustration of the contract of sale. Neither did it demonstrate that the defendant was liable in the suit that gave rise to the order that frustrated the completion of sale of the property to the plaintiff.

135. It was also clear from the sale agreement dated 26th may 2006 at clauses 1,2,3 and 4 that the subject property was being sold in exercise of the defendant's statutory power of sale and that the said property had been charged by EBONY Development Limited to the defendant. It therefore follows that there was no misrepresentation of facts. Nonetheless, the defendant was bound by the terms of the contract to complete the sale which unfortunately was frustrated by the court order.

136. I reiterate that it was not proved that the subject contract was not frustrated by the defendant. In the case of ***DAY VS. SINGLETON (1899) 2 Ch. 320*** was held that a purchaser is entitled to damages (beyond return of deposit) for loss of bargain if the seller fails to do his best to procure consent to transfer where it is required. In that particular case, the Court specifically found that the seller had successfully endeavoured to induce the refusal of consent so that they could sell the property in question on more advantageous terms.

137. Unlike in the above **Day v Singleton [supra]** case, there was no material placed before this court to show that the defendant induced the breach of the contract or that it frustrated completion of the sale.

138. The case of **Davis Contractors Ltd vs Farehum U.D.C. (1956) AC 696** provides guidance on when a contract can be held to have been frustrated. In that case **Lord Radcliff** stated thus:

> ***"…frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. "****Non haec in foederi veni****" It was not what I promised to do...There… must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for."***

139. For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. **In Maritime National Fish vs Ocean Trawlers [1935] AC 524,** self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of their other trawlers leaving no licence to operate the contracted trawler.

140. In **Davis Contractors Ltd vs Farehum U.D.C. (supra),** it was stated:

> ***"The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self induced ."*** *(Emphasis added).*

141. In **Howard & Company (Africa) Ltd vs Burton [1964] EA 157** the Court of Appeal concurred with **Lord Sumner** in **Bank Line Ltd vs Arthur Capel & Company (26) [1919] AC p. 425** who stated:

> ***"It is now well established that the doctrine of frustration cannot apply where the event alleged to have frustrated the contract***

arises from the "act or self-election of the party" who seeks to invoke it. Reliance cannot be based on a self-induced frustration."

142. The question of whether a contract is rescinded, is a matter of fact as stated in *Black's Law Dictionary, Ninth Edition* which defines defines *rescission* as:

> *"A party's unilateral unmaking of a contract, for a legally sufficient reason such as the other party's material breach or a judgment rescinding the contract……Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their pre-contractual positions."*

143. In this case there was no evidence that the defendant unilaterally rescinded the contract between it and the plaintiff.

144. Therefore, as to what orders should this court make, in its paragraph 8 of the plaint, the plaintiff sought for a total sum of special damages of Ksh 3, 181,680.25. However, examining the exhibits produced, I observe that by a letter dated **15th September, 2006** the Advocate for Ebony Development Co. Limited wrote to the plaintiff notifying it of the new developments in the matter wherein Ebony Development Company had obtained an order of the court injunction the defendant from concluding any contract with third parties and that the plaintiff had in the said proceedings been enjoined as a co-defendant.

145. Accordingly, I hold and find that the plaintiff would only be entitled to a refund of what he had paid as deposit of 10% of the purchase price as agreed, and which deposit it was refunded prior to the filing of this suit. The same is therefore not available.

146. The plaintiff would also be entitled to the expenses incurred towards performance of the contract, in terms of due diligence. However,in this case, there was no evidence to show that the plaintiff signed the agreement for purchase of the property on the basis of the professional advise sought and received. The evidence on record shows that the plaintiff paid the 10% before engaging in the advise of professionals. Further, there is no evidence that the plaintiff bought the property solely on the advise of professionals on how much the plaintiff would spent to complete the building hence the claim that he had to borrow from Barclays Bank Kshs 37 million and the balance from Shelter Afrique does not lie. The claim for loss of business opportunity or loss of profit is unsustainable in view of the analysis above that the sale was frustrated by a court order.

147. Furthermore, in the instant case, the plaintiff and the defendant mutually agreed and it was refunded the 10% deposit paid towards the purchase of the property. The plaintiff claims interest on the said deposit from the date it was paid to the defendant. This court's view is that that interest would only be available if the contract was frustrated by the defendant or if the court found that the defendant was responsible for the breach of the contract. However, as the breach was not foreseeable I decline to award the interest claimed as the plaintiff should have negotiated for payment of interest on the deposit before accepting a refund of the same. Moreover, payment of interest on the 10% deposit refund did not form part of the contract and the refund was made prior to the filing of this suit.

148. Albeit the plaintiff claimed that the defendant should have included in the agreement a clause to cushion the plaintiff from loss accruing from a claim by the registered proprietor of the property, it is the view of this court that the plaintiff was ably represented in the sale process and therefore it never lost any opportunity to negotiate for such terms. There is no evidence that the plaintiff in the whole transaction was an underdog.

148. As was held in the case of **Mrao v First American Bank of Kenya v 2 Other (2003) Eklr [**per Kwach JA):

> ***"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal."***

150. In addition, the plaintiff was well aware that the sale agreement was subject to the provisions of the Indian Transfer of Property Act. Under the said provision, sale by private treaty or public auction in exercise of statutory power of sale is allowed. Sale by private treaty which is allowed by law cannot be said, in the absence of fraud or misrepresentation, to have been designed to frustrate the sale, as both parties had equal bargaining power.section 69(9) of the Indian Transfer of Property Act(ITPA) stipulates:

> ***"69(****9) Provided that if default be made by the Chargor in payment of any monthly instalment or other payment hereby covenanted to be made or if default be made by the Chargor in the observance or performance of any of the covenants or obligations herein expressed or implied… the Chargee may without any previous notice to or concurrence on the part of the Chargor:-*
>
> …
>
> *ii) Exercise all statutory powers conferred on Chargees by the Indian Transfer of Property Act 1882 or any Kenyan act amending the same."*

151. In the instant case, it is clear that the Sale Agreement incorporated the above provision.in addition, the letter dated 1/9/2006 by Miller Advocates copied to the defendant clearly show at page 2 that the defendants advocates had obtained all clearances and consents and were only waiting for a green light from the client to proceed with the transfer of the property.in my view there is nothing on record to show that the defendant ever intended to have the agreement rescinded to the prejudice of the plaintiff.

152. On the claim for the legal fees incurred in defending itself in litigation against the defendant, this court finds that the plaintiff is not entitled to the same as the frustration of the contract was occasioned by the stay order issued by the court and the plaintiff did not pursue the case that stayed the completion of the sale of the property to its logical conclusion. Neither did the plaintiff bring before the court material to

show that it had reservations on the withdrawal of the suit by Ebony Development Company until the plaintiff was compensated in damages for the expenses incurred in defending that suit.

153. On the claim for cost of valuation of the property, the structural Engineers Fees and the Quantity Surveyor's fees, the court further observes that the expenses as claimed relate to what the plaintiff intended to do with the purchased property, had the sale been completed. As the expenses were incurred before the sale was completed, the view of this court is that the plaintiff should have awaited completion of the sale before engaging experts to complete the development of the purchased property. Now that the sale was not completed and the expenses were incurred after payment of the 10% deposit, I find that the defendant is not liable for such expenses. The same applies to the financial consultancy expenses and administration fees. This is so because by the time the plaintiff was paying 10% deposit it must have done due diligence to assure itself that it was engaging in a worthy venture. The question.

154. However, as the verification of the building plans on the purchased property was essential to establish whether the initial developer had obtained the necessary approvals before commencing the construction of the sold property, I find that the plaintiff is entitled to the Kshs 12,200 paid to **the Nairobi City Council on 26th July 2006 for payment of extra copies for verification on Plot No LR No. 37/749 Approved Plan CD 503** of the building plans and before the contract was frustrated by the court order. Payment of this sum did not have to await the completion of the sale as it would inform the plaintiff whether to complete the sale of the unfinished construction or whether the building which was costing such huge sums of money was due for demolition for noncompliance with the relevant laws.

155. This court, nonetheless observes that the plaintiff was so much in a hurry to pay the deposit for the purchase of the property. This in my view was unnecessary as the sale was by private treaty and therefore it was critical that there is proper negotiation of terms prior to conclusion of the agreement and payment of any sums thereof and even paid the 10% before the agreement was executed.

156. The court further observes that the valuation was done after the sale agreement was entered into and not prior to the agreement to establish its actual value. Accordingly, the claim for valuation fees is not available to the plaintiff. The same is dismissed.

157. On the claim for administration fees, the court observes that the plaintiff did plead this figure of Kshs 25,0000 being administration fees. However, the receipt for the said amount as produced in evidence is issued by Survey Consult dated 15th December, 2006 does not mention Administration fees.instead, it was paid on account of " invoice No. 11/6/2006 attached". I have perused the filed documents as produced and iam unable to locate the invoice in question and or for what purpose the invoice was issued. The claim is therefore not available to the plaintiff. It is rejected.

158. On the claim for loss of profits in the sum of Kshs 39,000,000, loss of profits by itself is a quantifiable claim which is a special damage. The law is clear that he who alleges must proof. Special damages, as a general rule, must be specifically pleaded and strictly proved (see **Kampala City Council vs Nakaye [1972] EA 446] and Hahn vs Singh [1985] KLR 717** and proof cannot be by way of submissions since submissions are not evidence. [see **Doughlas Odhiambo Apel & Another v Telkom Kenya Limited CA 115 of 2006]** Nambuye, Ouko and Kiage JJA.

159. Further, in. **Sande V KCC (1992) LLR 314 (CAK**- Cockar, Omolo and Tunoi) the Court of Appeal upheld the decision of the trial court declining to award damages based on loss of profits on the grounds that the same should have been specifically pleaded and proved. That decision was followed with approval in **CosmoAir V Diani Beach(1998) LLR 757 (CAK).**

160. The plaintiff in its plaint dated 26th March 2012 pleaded for special damages and particularized them at paragraph 8(i)-(viii) totaling Kshs 3,181,680.25 and at paragraph 9 thereof it pleaded for both special and general damages against the defendant. In the recital for the final prayer, the plaintiff prayed for the stated special damages and general damages and interest thereon plus costs and interest. However, in its submissions before this court, the plaintiff prayed for the special damages as pleaded in the plaint and also added a sum of kshs 100,000,000 as special damages for loss of profits (which was interchanged with kshs 39,000,000 for general damages), which claim was never pleaded in the plaint even in passing.

161. Even assuming that the claimed damages arise from a presumed breach of contract or frustration , there is a long line of authorities from the Court of Appeal to the effect that normally, general damages cannot be awarded for breach of contract since damages arising from breach of contract are usually quantifiable . the principle as crystallized in **Dharamshi v Karan [1974] EA 41 stipulates**:

> ***"this case has been accepted by this court for the proposition that general damages cannot be awarded for a breach of contract and that proposition makes sense because damages from a breach of contract are quantifiable and are not at large. Where damages can be quantified they cease to be general. See also Kenya Commercial Bank Ltd v Stephen Mukiri Ndegwa &Another [2014] Eklr among others."*** *Also c*ited in CA 20 of 2014 Paul Muiyoro t/a Spotted Zebra v Bulleent Gulbahar Remax Realtors [2016]Eklr**.**

162. In the instant case, the plaintiff simply pleaded that the defendant had no title to pass to the plaintiff not withstanding its belief that it had statutory power of sale of the property, and prayed for general damages without stating general damages for what purpose but in submissions, it pleaded that it was entitled to the approximate value of the property at the time of completion. In my view, this was a new cause of action being introduced in the submissions and even then, that amount as submitted amounts to quantifiable special damages which was neither pleaded nor proved to the required standard of balance of probabilities.Accordingly, the plaintiff's claim for special damages for loss of profits is hereby dismissed.

163. Further, on the claim for general damages, the plaintiff in its plaint aforesaid made a prayer for general damages but never stated what damage it had generally suffered as a result of the failed sale transaction. However, in the submissions, it raised the claim of general damages of kshs 39,000,000(not kshs100,000,000) being the approximate value of the property at the time of completion which was about kshs 86,000,000 and sought for the difference between kshs 47,000,000 and kshs 86,000,000 being kshs 39,00,000 and relied on **McGregor on Damages 18th Edition para 22-005**.

164. The view of this court is that the plaintiff was introducing amendments to pleadings in its submissions, which amounts to amendment of pleadings after closure of pleadings without leave of court and without giving to the adverse party an opportunity to plead to the case. Nonetheless, as I have stated, the case for general damages was not made out on a balance of probabilities as the sale was frustrated by a court order hence the claim for general damages does not lie. The claim is accordingly dismissed.

165. In the end, I allow the plaintiffs claim for special damages in the sum of kshs 12,200 only being verification of building plans fees as pleaded and proved. I dismiss the claim for the rest of the special damages and general damages. I award him interest on the special damages awarded from the date of filing suit until payment in full.

166. On costs I award the plaintiff 1/4 costs as it has only succeeded minimally in its claim against the defendant.

167. Orders accordingly.

168. This case was instituted in court on 26th March, 2012 and was heard by me on 20th January, 2016 while I was still serving in the Civil Division and concluded on 22nd February, 2017 after I had been transferred to the Judicial Review Division. Parties were given 21 days each to file and serve written submissions but they procrastinated and it was not until 3rd May 2017 that it was confirmed that they had complied with the filing of written submissions, with the defendant filing their submissions on 2nd May 2017 that the court gave the date for judgment by which time the court diary was fully taken up with other cases for judgment.

169. The court then proceeded on leave in the month of June from June 2nd to 1st of August 2017. The judgment date was fixed for 31st July 2017 when the court was expected to have returned from leave but owing to unforeseen circumstances, leave was extended until after the recess of 1st August, 2017 upon which there was recess from 1st August to 15th September, 2017. Regrettably the file was filed away during my absence and it was not brought to my attention until after taking stock of all cases pending judgment and hence the delay in delivery of this judgment. Again when the court fixed judgment date for 19th March 2018 it was faced with a difficulty following the demise and funeral arrangements of Hon Justice Joseph Louis Onguto. Thereafter the court was on transfer and regrettably the file was inadvertently filed away. The delay in delivering this judgment is therefore regretted. It was not intentional as this court has delivered very many other judgments during the said period.

Dated, Signed and Delivered in open court at Nairobi this 4th day of October 2018.

R.E. ABURILI

JUDGE