



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 285 OF 2009

PAUL IMSON.....PLAINTIFF

Versus

JODAD INVESTMENTS LIMITED.....DEFENDANT

RULING

1. The Suit before the Court for determination arises from the Judgment of the Court in an earlier suit (***High Court Civil Suit No 693 of 2000***). Between the same Parties relating to a dispute arising from the same transaction namely the sale of a Property Known as LR No 1160/575. That property is adjacent to and was previously part of the Property owned by the Defendant. The Defendant had two Directors, J and Calvin Cottar who are related to the Plaintiff. The Parties agreed to the sale of the property and then there was a dispute as to completion and/or repudiation. That dispute came before Hon Mr Justice Ibrahim who delivered his Judgment on 24th April 2006. In that Judgment he made various findings and ordered an inquiry into the loss suffered by the Plaintiff here. It should be mentioned that the Plaintiff here was the Defendant in the earlier suit.

2. The successful Party in the earlier suit has chosen to commence a new action rather than bringing an application within the existing suit. The consequence of that has been the subject of argument and a Ruling delivered by Hon L. Kimaru J in 2009. I will deal with that below. The inquiry which is in fact an assessment of damages, takes its parameters from the Judgment and Order of the Honourable Judge in the earlier suit.

3. In the earlier suit, the Vendor of the Property was the Plaintiff, it is the Defendant here. The Vendor brought a suit by Plaintiff. Neither Party has made any application for the Court to consider the earlier file, However, the Judgment sets out the background and dispute as follows:

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

1. "THAT the Defendant by himself or his servants or agents, or employees be and is hereby restrained from entering into or interfering with in any way all that property known as Land Reference Number 1160/575, Forest Road , Nairobi pending the hearing and determination of this suit.

2. THAT the Defendant or his agents or servants or employees be and are hereby restrained from carrying out any further building works on Land Reference Number 1160/575 pending the hearing and determination of this suit.

3. THAT the Plaintiff do file an undertaking as to the damages within ten (10) days.

4. THAT the costs of this application be costs in the cause."

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

(a) An injunction to restrain the Defendant or his agents and or servants from entering or interfering with all that property known as Land Reference

Number 1160/575 until the disputes arising under the Agreement for Sale dated 28th July, 1998 are heard and determined by an Arbitrator.

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

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

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

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

(d) Costs of this action with interest thereon.

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

(I) The Defendant unlawfully and wrongfully constructed or commenced construction upon the property without the written consent of the Plaintiff.

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

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

The Defendant filed an Amended Defence and Amended Counterclaim on 9th December, 2002 in which he denied the alleged Repudiation and acts thereof. In the Amended Counterclaim the Defendant sought the following reliefs:"

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

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

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

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

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

5. In addition to the findings and orders set out in the Judgment, there was the specific direction/order for an inquiry into damages. The Learned Judge said:

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

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

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

7. Costs This is decided hereunder.

CONCLUSION:

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

*I do hereby enter Judgment in favour of the Defendant as against the Plaintiff in terms of Prayer (a) and (bi) of the Amended Defence and Counterclaim (amended on 9th December 2002.) The Inquiry as to damages occasioned by the grant of the Injunction to the Plaintiff may be carried out by any Judge stationed at the Commercial Division of the High Court of Kenya at Nairobi since I have been transferred and now based at the High Court, Eldoret. The Plaintiff shall pay the costs of the Counterclaim together with Interest at Court rates from the date of this Judgment until payment in full. **DELIVERED AND DATED ON THIS 25TH APRIL 2006.***

6. This Court interprets that Judgment and Order as requiring it to conduct an inquiry into what loss

and/or damage was suffered as a consequence and thereafter assessment of the the loss and/or damages.

7. The timescales alleged by the Plaintiff are between 14th June 2000 (the date of the injunction) up to 25th April 2006 when the Judgment was delivered. Loss and Damage alleged in the Plaint are that:

(1) The injunctive orders stopped the plaintiff from constructing his residential house which he had started in February 1999 and was anticipated for completion in July 2000. The anticipated remaining cost of building as per the Quantity Surveyor retained by the Plaintiff was KShs.9,274,371.82 however, the “recommended tender” was M/S Safi Terrazzo and General Contractors who quoted KShs. 14,218,325/-

(2) The Plaintiff is to pay additional professional fees to calculate the Quantities and prices for completion of the project at KShs. 1,409,685.33

(3) The additional costs including professional fees occasioned by the injunctive orders is KShs6,353,548.51

(4) The Structural Engineers charge to the Plaintiff is KShs23,200/=

(5) Renewal of the Planning Permission in the construction from the City Council of Nairobi is KShs. 60,000/=.

(6) After injctive orders the Plaintiff was prvented from accessing the property LR No 1160/575 on which two twenty feet shipping containers were, where the plaintiff stored building material and personal effects. Among the personal effects in the container were (1) a video camera costing KShs 35,990 and (2) a 35mm Niko FM film Camera valued at KShs. 6,390

(7) Then the Plaint lists “Other loses” includings:

(i) Timber on the roof to the building that is yet to be constructed costing KShs.21,460/=

(ii) 3 roze wire and 12 strand electric fence. The wooden post have deteriorated due to the period of the injunctive orders costing KShs. 178,466

(iii) Surveying the property and replacement of beacon KShs 92,800/=

(iv) Rate paid by the Plaintiff on the property in 2000 – KShs27,370/=

(v) Rates paid in the year 2007 which had not been paid between 2000 and 2007 at KShs. 92,800/=

(vi) When the Property was purchased it was valued at KShs. 3,000,000/ (Three million shillings) the Plaintiff complains that when it was finally transferred the value had risen to KShs. 7,000,000/= (Seven Million Shillings) and therefore the Plaintiff had to pay additional stamp duty to the sum of KShs. 160,540/=

(vii) Costs of installing a gate – KShs 117,624

(viii) Electricity installation KShs 49,500

(ix) Architects from Nairobi City Council to plan gate and utilities in the compound.

8. The Plaintiff in his counterclaim in the earlier suit claimed interest on the costs of the property at a rate of 30% pa. Although that was part of his Pleaded case, Hon. Justice Ibrahim did not deal with that claim and ordered that the question of interest on the amount of the purchase price to be considered as part of

the said inquiry. The Plaintiff claims that the interest on the sum of Kshs 2,611,220/= from the date of payment to 26th April 2006 amounts to KShs. 4,713,072.25/=. In addition to that the Plaintiff is seeking additional interest at Court rates. However, at paragraph 13 of the Plaintiff's statement the Plaintiff avers that "*there is no suit pending and there have been no previous proceedings pending on this subject matter as in this suit*". On the question of interest that cannot be a correct averment.

9. The Claim is Defended. Sadly one of the Directors of the Defendant has since passed away. The Plaintiff sought dismissal of the Defence. He was unsuccessful in that respect. The Defendant sought dismissal of the suit on the grounds of res judicata. In his Ruling Hon Justice L. Kimaru J set out the issues for determination. He said, "*The issue for determination by this court is whether the plaintiff's suit is res judicata and therefore ought to be struck out with costs. Section 7 of the Civil Procedure Act is clear on the circumstances, under which the court will bar a litigant from filing another suit to litigate on issues... Which have been heard and determined by a court of competent jurisdiction.*" He came to the following decision that; "*The foundation of the plaintiff's cause of action in regard to the damages that he is to be paid is the exercise of discretion by the court in directing the defendant to give an undertaking in damages. It can therefore be said that the cause of action in regard to the said damages arose the moment the court reached a finding that the grant of interlocutory injunction was without legal foundation and in the circumstances the defendant was bound to pay damages to the plaintiff.. Once a decision had been made that the plaintiff was entitled to have an inquiry made as to damages, the plaintiff had no choice but to file a different suit.*". The Defendant intimated an intention to appeal but that seems to have come to naught. Both the question of the inquiry and the question of 30% interest were part of the pleaded case in the earlier suit and their treatment was dealt with in the Judgment. Neither Judge gave any directions on how this suit was to progress. Neither Judge stated whether or not the evidence from the earlier suit would be transported into the later suit or whether that should be ignored altogether. That is the starting point for this inquiry.

10. The inquiry is to be into the damage suffered by the Plaintiff. The burden of proof is on the Plaintiff. The Plaintiff has filed a Plaintiff's statement and numerous documents. The Plaintiff (on 23 August 2013) filed the Witness Statements of Paul Imison, who also gave oral evidence and was cross examined.

11. Evidence of Paul Imison (PW-1) At paragraph 13 of his Statement he says "Since the injunction was issued to the date it was removed, I did not enter the land or continue with the construction. I lost immeasurably. The Witness Statement raises a new head of Claim being "Loss of Rental Income" between 2000 and 2006. That is in addition to the Claim for "loss of user, lack of comfort and suffering occasioned by the injunctive orders". That is akin to a claim arising from a personal injury seeking compensation for loss and suffering.

12. It is clear that the exercise envisaged by Hon M. Ibrahim J. was a split trial. A decision on liability to be followed with a decision on quantum. That is a well-known approach in jurisprudence. That exercise involves the application of the Court's discretion, and therefore militates towards the Court taking into account all the relevant evidence. In this case only the evidence from later suit is before the Court, save that provided by earlier decisions. The Court has before it only limited argument on whether it should apply a contractual basis of assessment or a tortious basis. The Plaintiff's position seems to be that any cost or expense that could be remotely connected with the Property is a justifiable claim.

13. Therefore the Plaintiff Claims:

- (a) Loss of user of a home on the Property in question;
- (b) Lack of comfort and suffering
- (c) Loss of rental income
- (d) The anticipated remaining cost of building as per the Quantity Surveyor retained by the Plaintiff was Kshs.9,274,371.82 however, the "recommended tender" was M/S Safi Terrazzo and General Contractors who quoted KShs. 14,218,325/-

- (e) The Plaintiff is to pay additional professional fees to calculate the Quantities and prices for completion of the project at KShs. 1,409,685.33
- (f) The additional costs including professional fees occasioned by the injunctive orders is Kshs6,353,548.51
- (g) The Structural Engineers charge to the Plaintiff is KShs23,200/=
- (h) Renewal of the Planning Permission in the construction from the City Council of Nairobi is KShs. 60,000/=.
- (i) After injunctive orders the Plaintiff was prevented from accessing the property LR No 1160/575 on which two twenty feet shipping containers were, where the plaintiff stored building material and personal effects. Among the personal effects in the container were (1) a video camera costing Kshs 35,990 and (2) a 35mm Niko FM film Camera valued at Kshs. 6,39
- (j) Timber on the roof to the building that is yet to be constructed costing Kshs.21,460/=
- (k) 3 roze wire and 12 strand electric fence. The wooden post have deteriorated due to the period of the injunctive orders costing KShs. 178,466
- (l) Surveying the property and replacement of beacon KShs 92,800/=
- (m) Rate paid by the Plaintiff on the property in 2000 – KShs27,370/=
- (n) Rates paid in the year 2007 which had not been paid between 2000 and 2007 at KShs. 92,800/=
- (o) When the Property was purchased it was valued at KShs. 3,000,000/ (Three million shillings) the Plaintiff complains that when it was finally transferred the value had risen to KShs. 7,000,000/= (Seven Million Shillings) and therefore the Plaintiff had to pay additional stamp duty to the sum of KShs. 160,540/=
- (p) Costs of installing a gate – KShs 117,624
- (q) Electricity installation KShs 49,500
- (r) Architects from Nairobi City Council to plan gate and utilities in the compound.

14. The Plaintiff also filed bundles of documents and witness statements from Frederick Kinyua of Kinyua Koech Ltd to calculate what the proposed residential building on the Property would have fetched for the period in question. He produced a Report which became “Bundle 6”. In it he states that the *incomplete house is estimated to be about 30% complete* (p9/11). In addition there was the Statement of James Munene Gitonga who is a Quantity Surveyor and partner at Integra Consulting Quantity Surveyors. The Witness statement sets out the tendering process. He does say that the Gross Total Construction Cost for the year 1999/2000 was Kshs8,765,946.90 plus professional fees of Kshs 504,424.94 totalling KShs 9,274,371.82. He does not refer to now exhibit any invoices and/or receipts and/or any other evidence on how that figure was calculated. He then says that the Gross Total Cost for the year 2006 was Kshs.13,690,474.41 in total. For some reason, there was a second tender and it is said that the Gross Total Completion Cost for the year 2009 was KShs.15,627,920.33. Therefore the increase in construction cost from the Year 2000 to year 2009 is Kshs6,353,548.51. This Quantity Surveyor produced both the Tender Valuation Reports for both years and the Construction Valuation Report (Bundle 7). He says that the increase in value is due to the delay of 9 years. Neither the Plaintiff’s Second Witness nor Third Witness were called. Their statements were placed before the Court as being expert reports. The Court was informed that they were “unchallenged” by agreement of the Parties. However, they were unchallenged only as far as their admission into evidence was concerned.

15. In view of the age of the file and the concerns previously expressed of documents missing, on the first day of the trial it was considered prudent to list the documents that were on the Court file these were

For the Plaintiff documents which were filed and served on 23 August 2012:

- (1) Bundle 1 which comprised Bills of Quantity Vol. 1 with 1999/2000 prices
- (2) Bundle 2 – Current Tender Prices Vol II 2006
- (3) Bundle 3 – Construction Valuation Report
- (4) Bundle 4 – Bills of Quantities
- (5) Bundle 5: Tender Evaluation Report
- (6) Bundle : List of Witnesses and Documents filed
- (7) Bundle 6: Valuation from Kinyua Koetch

For the Defendant:

- (1) Bundle 1: Report and Valuation by Bel Air Properties filed on 17December 2013
- (2) Report by Quantity Surveyor J M Nyaga filed 17th December 2013
- (3) Defendant's Bundle 3: - Appendix II
- (4) Defendant's Bundle 3 – Appendix III
- (5) Witness Statement of Calvin Cottar

16. The Court heard oral testimony from the two witnesses starting with the Plaintiff. The Plaintiff summarised his case. He explained that his suit was because the injunction stopped him from building in April 2000 there was the remainder of the construction works which had been suspended. He said that since then the costs of construction have increased and he was looking for that under the hearing of "increased value". That figure was KShs. 6,353,584.51. He said that the figure came from the Quantity Surveyor, Mr J Munene Gitonga. He told the Court that the figures in the bundles were admitted as the total cost of building at the time of the suit subtracting the work already done. In addition he was claiming the quantity surveyors and structural engineer's fees. That was necessary to evaluate whether the Building was still viable. The Planning permission had expired and therefore a new permission was needed and that would cost KShs 60,000/=. He was also claiming the interest rate as ordered by the Judge in the earlier suit. He said the funds, he meant purchase price, had almost all been paid before the earlier suit was filed. He said that the Defendants had both the land and the money and he was claiming interest on the purchase price of 2.6 million Shillings. He said the Judge thought it was "Appropriate that interest be considered". The rate suggested is that set out in the Sale Agreement of 30%. His next head of claim was for "Loss of Rental Income". He said the building was to be completed by the end of 2000 (not July as pleaded). That valuer charged KShs 69,600 for the Report. Other losses were small things eg two lost beacons and the survey. He said the property would have been rented out as a single house, unfurnished. He said he was claiming a figure of KShs 6,353,548.51 in Building costs and the Defendant had put the cost at KShs 6,423,766.08 (Bundle 2, page 2, paragraph 2). Under cross-examination, the Plaintiff said that although he purchased the property in 1998 he did not start building until 1999 and that by April 2000 the structure was 60% complete. He confirmed he was claiming interest on the full purchase price at a rate of 30% notwithstanding that the Judgment of Hon Justice Ibrahim but the contract at paragraph 9 does. However, it was put to him that paragraph 4 provides that only the purchaser would pay interest. His response that it was "very unfair". That is the same contract he sought to enforce in the earlier proceedings. The Witness also accepted that although he was given possession of the property in April

2006 he did not in fact take possession until August 2007 , more than 12 months later. He said that was because he was operating a business in rented accommodation. He still thought interest should apply to that period. As to the expenses claimed, the only one that had actually been paid – incurred in the sense Defence Counsel was examining, was the sum of KShs23,500. The additional cost for renewed planning permission had not been incurred. The costs of the Report from Kinyua Koetch had not been paid until just before the trial notwithstanding that it was dated August 2009, that is more than 5 years earlier. At the time of the trial the building work had not been completed and the Plaintiff was still living elsewhere. He confirmed that it was intended to be a single residential dwelling. He said he was camping on the property as there is no house. The claim for loss of income is challenged by the Defence. The cross-examination then moved onto the personal effects and whether they could be repaired. Moving onto the fence, PW 1 confirmed that he had not installed the fence. He said simply that it needs to be replaced. He confirmed that he was related to the Principals behind the Defendant company and the Property in question was adjoining family land.

17. The Plaintiff was re-examined by his Counsel. He told the Court that prior to the injunction he was renting premises on a Jodad property. He has remained there. Apart from the construction he said that there was a vehicle workshop on the land. That is noteworthy as the suit began with allegations of a public garage being built on the land. He was taken to Special Condition 4 of the Sale Agreement and confirmed that it provided that construction should begin in February 1999. He confirmed that he had paid Kshs 2.6 million of the purchase price and that payment in advance had affected the progress of the building work.

18. The Defendant's witness was Calvin Harold Cottar. He is the surviving director. He confirmed that the sale was to a member of the family. It was initially intended to assist the Plaintiff who was his cousin. Later he said that the property had been sold by his mother at an undervalue as she did not appreciate what she was doing. Aside from that he adopted his witness statement that was signed on 16th December 2013. In relation to the claim for interest he said that was unjust enrichment as it was a claim for something he already had. He agreed, when asked, that interest should stop running from the time he went into the property. In relation to the claim he felt it was inflated because the Plaintiff is seeking improvements. He has had the property for a number of years and that should be factored in. The Witness confirmed that there were containers on the property and a incomplete structure. He could not give details as he said he did not go near it. Also since being reinstated the Plaintiff has done nothing for towards completing the building. He also said that it was always within the contemplation of the Parties that the property would be occupied as a single residential premises.

19. In relation to the quantification of damages Justice Ibrahim said;

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

That statement gives this Court a clear indication that the Learned Judge had in mind a split trial and a the pleadings on which assessment of damages was to be conducted. Nevertheless, the Plaintiff chose to start a new suit. There is argument that supports that approach, namely that his action lies in restitution and he is entitled to make that claim. Notwithstanding the approach the principles that apply to quantification of damages will be the same. The damage claimed must flow from the injunction. Since both the claim for injunction and for specific performance of the Sale Agreement are equitable remedies, by analogy principles of equity must apply to the quantification of the resultant loss. In his Plaintiff, the Plaintiff seeks

damages for loss extending to 2009, whereas the injunction was discharged, and he was re-instated in the Property in April 2006.

20. The Parties have both filed their Closing Arguments by way of Written Submissions and for these the Court is appreciative. The Plaintiff's Submissions are interesting to the extent that notwithstanding the choice of starting a new suit and not asking the Court to consider the previous action, the submissions start with repetition of the Defendant's evidence from the earlier suit. That simply repeats something that has been adjudicated upon. It is now established that there was a Sale Agreement. The purchase price was KShs.3 million, KShs. 2.6 million was to be paid. The Plaintiff was supposed to obtain possession on 7th August 1998. That did happen. The Court record shows that the interlocutory injunction was granted on 14th April 2000 and continued until it was discharged on 26 April 2006. The injunction restrained the Purchaser of the Property from entering into the property or carrying out and further works on it. In the Order the Property was incorrectly described as L.R. No 1160/575 Forest Road, Nairobi. In fact it is Forest Lane. Forest Road is on the other side of the City.

21. In the Plaintiff's Submission at point 7 it is stated that "By restraining the Plaintiff from entering the property, this effectively removed him from possession.." That is accepted. It goes on to say "..and he had to leave the property and find residence elsewhere". In fact that statement is factually incorrect. It is contradicted by the evidence of the Plaintiff himself. He said clearly on oath that he did not live in the property. He was living elsewhere and carried on doing so. It is also the fact that the injunction prevented his access to the Property. The Court has found that he had purchased the Property with that purchase comes the right to occupy said Property. That is the right that was interfered with. It is separate from the right to reside there and to some extent wider. In addition the Plaintiff was prevented from accessing his belongings and personal effects stored in two containers. The Plaintiff's Submissions (filed on 13th November 2015) list the following issues for determination:

- a. Whether the injunction issued in HCCC No. 693 of 2000 in favour of the defendant prevented the Plaintiff from accessing and/or continuing with construction?
- b. Whether the Plaintiff has suffered loss and damage as a result of the additional cost of construction materials and labour attributable to the said injunction?
- c. Whether the Plaintiff lost expected rental income as a consequence of the injunction and whether the Plaintiff is justified to recover mesne profits as a result?
- d. Whether the Plaintiff should recover damages occasioned by the deterioration of his property left unattended as a result of the injunction?
- e. What rate of interest should be applied to damages awarded and for what period?

Interestingly, that list omits the Plaintiff's pleaded Claim for interest on the whole of the Purchase price paid at the rate of 30% per annum.

22. The Defendant's Submissions were filed on 15th December 2015. In those Submissions it is argued that it is settled law that the basis for the assessment of damages on an undertaking to the Court is that the same must flow directly from the injunction and must be such that could have been foreseen when the injunction was granted. The Plaintiff in its reply filed on 3rd February 2016 states that "Since the construction was ongoing since 1999, with the full knowledge and consent of the Defendant, it was obvious that stopping the construction would incur increased costs of materials and labour whenever the construction would resume. That argument seems to confuse to principles. In any event the whole thrust of the Plaintiff's Defence was that he did not require the Defendant's permission and that is what the Court held in ordering specific performance.

23. In fact, it is not such that could have been foreseen but in fact, that which could have been "**foreseeable**". That is the test. The Court has not heard any testimony on the respective parties ability to

foresee events. The test to be applied is the objective test of foreseeability from the circumstances.

24. Dealing with each head of damage claimed in turn:

(a) Loss of user of a home on the Property in question

Inherent in this head of claim is the proposition that the Plaintiff was in fact inhabiting a home at the time of the Injunction. His own evidence is that was not the case. There was no inhabitable structure on the Land. The Plaintiff did not live in the containers, he simply stored some of his belongings there. The Defendant concedes that the Plaintiff is entitled to the cost of occupation and that should be assessed according to the rent he has been paying elsewhere. Further, it is the Plaintiff's own evidence that the intended house was incomplete. He said it was almost complete. The Report from Mr Kinyua states it was only 30% complete. The Court prefers the evidence of the expert in particular in view of the fact that the Plaintiff did not permit a joint survey of the Property in 2006. Therefore as a matter of logic, the Plaintiff could not possibly have been able to live in the property in April 2000 and thereafter only if his budget permitted completion of the building works. The Plaintiff has assessed this at KShs 3,840,000 and the Defendant as KShs3,333,600.

(b) Lack of comfort and suffering

There is no evidence before the Court that the Plaintiff suffered lack of comfort and/or suffering. It is not particularised. He was living elsewhere and continued to do so. In fact he went on to celebrate his marriage there. That does not give the impression of someone who had nowhere to live as is suggested by this head of claim. Therefore he cannot be claiming "discomfort" in that sense. If what is claimed is a head of claim for hurt feelings for being excluded from the Property that would be a justifiable claim which has to be assessed by the Court.

(c) Loss of rental income

In order for the Plaintiff to have "lost" rental income in April 2000 he must have been receiving that income at the time of the injunction. In fact he was not. Therefore no claim can arise for something that was not lost. What the Plaintiff may have lost was the expectation of rental income. That may have been a reasonable expectation that was anticipated and could also have been foreseeable. However, that anticipation must be weighed up in light of the evidence before the Court. The Property in question was in a residential area. The planning regulations and sale agreement envisaged that it would have one dwelling house built upon it. The Plaintiff has already claimed that he lost the opportunity of living in a home on the land. Therefore, where was the rental income to come from? It is clear from the Submissions and authority relied upon by the Plaintiff under this head that it demonstrates a misunderstanding of the phrase "mesne profit". Mesne profit is not rent. It is an occupational charge that is payable instead of rent, for example where there is occupation without a rental or lease agreement. The occupant cannot occupy and cannot be excluded without taking that into account. The Claim for occupation and also rental income is an attempt at double recovery and is dismissed.

(d) The anticipated remaining cost of building as per the Quantity Surveyor retained by the Plaintiff was KShs.9,274,371.82 however, the "recommended tender" was M/S Safi Terrazzo and General Contractors who quoted KShs. 14,218,325/- .

It is common ground between the Parties that the building structure was incomplete. The Plaintiff sought to impress upon the Court that it was nearly complete and would be fit and ready for occupation by July 2000. The Plaintiff has not taken the Court to any completion certificates or architect's certificates showing how much of the work had been completed. Had there been significant completion of even one stage, those certificates and certificates of compliance with building regulations would have been available to the Plaintiff and therefore the Court. They are not. In addition the Plaintiff's own expert notes that the building was only 30% complete. The question then arises, that but for the injunction, when would the building have been completed and

inhabitable. That is not a straight line calculation of time over progress of building. The Plaintiff accepted under cross-examination that he was labouring under financial constraints. He said that he had money to build but he also was restricted by a budget. Therefore can the Court be satisfied that the building works would have been completed in a year or considerably more? Even the Plaintiff's own evidence (valuation report) refers to an "anticipated" completion date, not a "projected" completion date which suggests something more than a date chosen with the benefit of optimism but little else. How 70% of the building works could be completed in 2 months without a massive injection of funds is unclear and therefore implausible.

In addition, the injunction was lifted in 2006. This suit was filed in 2009. At the time of filing the building work had not been done. The Plaintiff gave evidence in 2015. At that stage the building work had still not been done. It is therefore clear that the Plaintiff did not demonstrate any enthusiasm for the building project. A valuation was obtained in 2006 but not acted upon. Why not? The question arises whether the Plaintiff is entitled to sit on his hands for 7 years and then chose the second highest in a list of tenders. What is the legal justification for that? Had the building work been completed the Court would have a firm figure rather than the speculative suggestion of a tender without any assurances that in no circumstances could the building works go under or over the tender price. In the circumstances the tender price is of limited evidential value.

(e) The Plaintiff is to pay additional professional fees to calculate the Quantities and prices for completion of the project at KShs.1,409,685.33

This additional fees would be a direct consequence of the injunction and therefore recoverable on proof of payment and/or liability.

(f) The additional costs including professional fees occasioned by the injunctive orders is Kshs6,353,548.51

This figure was explained by oral evidence as a figure calculated by the quantity surveyor Mr J Munene Gitonga, the Author of the Reports..... At page 1 of the Construction Valuation Report he sets out a table which shows the additional costs between 1999/2000 and 2006 when the injunction was discharged. That figure is KShs. 4,416,102.59. In view of the circumstances of this case, any resumption of building will require remedial works to the existing structure. That is conceded by the Defendant. In the Report from Ngasi Consulting Engineers dated 29th may 2006 it is said that "Although the structure has been standing unprotected for the last six years, it is still sound and the finishing of the building could be undertaken after the following remedial measures are carried out: (they are then listed). What that Report does not tell the Court is that if the structural frame had been completed and the roof T& G boarding had been started, and the structure was sound as left, why the attached photographs do not show a completed structure as commonly understood, that is, that all the walls had been built in readiness to receive the roof.

In oral evidence the Plaintiff explained that the KShs 6 million figure was arrived at by taking the total costs in 2000. Then taking the total cost as at the date of the Plaintiff (that is three years after the injunction was lifted) and then subtracting the work already done. Although the Court did not hear expert evidence on the building process, the Reports having been conceded by the Defendant, it defies logic that the calculation suggested does not include an element of double counting in particular in relation to preparation of the site and preparatory works. If the original works were supervised by an architect, he has not been called upon to assist the Court.

(g) The Structural Engineers charge to the Plaintiff is KShs23,200/=

It is an essential part of the Claim that the existing structure be valued. It is unfortunate that relations between the Parties had soured to the extent that this could not be a joint exercise. However, the Defendant's position is This claim is allowed

(h) Renewal of the Planning Permission in the construction from the City Council of Nairobi is

KShs. 60,000/=.

Under cross examination, the Plaintiff accepted that this fee had not been incurred. In fact there is nothing before the Court to show that the Planning Permission was (a) applied for and (b) obtained. If so when? Was it obtained at the earliest opportunity? Given that the Plaintiff has not demonstrated any eagerness to complete the Works, what is the evidence before the Court that it will ever be done. He lives elsewhere.

(i) After injunctive orders the Plaintiff was prevented from accessing the property LR No 1160/575 on which two twenty feet shipping containers were, where the plaintiff stored building material and personal effects. Among the personal effects in the container were (1) a video camera costing Kshs 35,990 and (2) a 35mm Niko FM film Camera valued at Kshs. 6,390

The Plaintiff would like the Court to believe that although he was living elsewhere he chose to store articles of some value in containers on an insecure building site. That of itself is implausible. Even if that had been the case, the very fact of the injunction did not prevent the Plaintiff from accessing those items for a period of about 9 years. The law provides recourse. Order 40 Rule 6 et seq of the Civil Procedure Rules provides:

6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

[Order 40, rule 7.]

Order for injunction may be discharged, varied, or set aside.

7. Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.

[Order 40, rule 8.] Injunction against corporation binding on its officers.

8. An injunction directed to a corporation is binding not only on the corporation itself but also on all members and officers of the corporation whose personal action it seeks to restrain.

The Plaintiff made no application for (a) the discharge of the interlocutory injunction, nor (b) for delivery up of his belongings. He therefore and to that extent acquiesced in the continuation of the injunction. That amounts to a failure to mitigate. There is no evidence before the Court of when the damage occurred. Was it during the first 12 or even 24 months? In the circumstances, the claim is dismissed.

(j) Timber on the roof to the building that is yet to be constructed costing Kshs.21,460/=

This claim should be included in the claim for building works. If it is then it is double recovery. If it is not, then it has not been certified by the Quantity Surveyor as an integral part of the original construction. It is therefore dismissed.

(k) 3 roze wire and 12 strand electric fence. The wooden post have deteriorated due to the period of the injunctive orders costing KShs. 178,466

There is no evidence before the Court that an electric fence (a) existed at the time of the injunction and (b) has deteriorated during 2000 and 2006 and not between 2006 and 2009. The Parties were not able to conduct a joint survey and assessment at the time. The Defendant's witnesses evidence was that the razer wire had been put in place by the Defendant as adjoining land owner. There is nothing before the Court that the Plaintiff acquired that fence as part of the sale agreement. The claim is dismissed.

Surveying the property and replacement of beacon KShs 92,800/=

There is no independent evidence before the Court that the beacons existed at the time of the injunction and have been removed and deteriorated as a consequence of the injunction. The Claim is dismissed.

Rates paid by the Plaintiff on the property in 2000 – KShs27,370/ and Rates paid in the year 2007 which had not been paid between 2000 and 2007 at KShs. 92,800/=

In the earlier suit, the Plaintiff was asserting ownership of the Land in question. The Court takes judicial notice of the fact that land rates are a tax which is payable by the owner, and in some cases the occupier of land. The Plaintiff's case has always been that as a consequence of his compliance with the Sale Agreement he was the rightful and lawful owner of the Property. Taxes are a certainty of property ownership. He cannot offload the responsibility onto the Defendants. The Claim is dismissed.

30% interest on the Purchase price

The Claim for 30% interest of the purchase price arises from the earlier suit. It was made in the context of a claim for breach of contract. Had the Plaintiff not been successful in his claim for specific performance, he would have been entitled under the principles of restitution to refund of the sale price together with interest at the contractual rate. That is not the scenario here. The contract was not rescinded. There was no restitution, therefore there is no grounds for a claim for interest on the sale price. The Learned Judge in the earlier suit said the claim should be considered. He did not bind the decision making of a later tribunal. The claim is dismissed.

When the Property was purchased it was valued at KShs. 3,000,000/ (Three million shillings) the Plaintiff complains that when it was finally transferred the value had risen to KShs. 7,000,000/= (Seven Million Shillings) and therefore the Plaintiff had to pay additional stamp duty to the sum of KShs. 160,540/=

The Plaintiff is in effect complaining that the Property has appreciated in value. That cannot in any estimation be called a loss. Therefore it would not be covered. However, if the Plaintiff insisted on raising that claim, equitable principles would apply and he would have to account for the betterment that he has experienced to the tune of KShs,4 million. There is no suggestion in his evidence or his pleadings that is something he wishes to do. In the circumstances, this claim is misconceived and therefore dismissed.

Costs of installing a gate – KShs 117,624 and Electricity installation KShs 49,500 and Architects from Nairobi City Council to plan gate and utilities in the compound

These items are claimed independently of the Bills of Quantity and Tenders. That suggests that there were not within the contemplation of the original building works and are an afterthought. If there is a need "to plan" a gate, clearly it was not there in the first place. It did not somehow vanish due to the injunction. The claim is opportunistic and without basis. It is dismissed.

Quantification of Damages

25. The general definition of damages is "Damages in the vast majority of cases are the pecuniary compensation obtainable by success in an action, for a wrong which is either a tort or a breach of contract (Broome v Cassell & Co [1972] AC 1027, 1070) the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling (*Bedfordshire Police Authority v David Constable [2009] Lloyd's Rep IR 39*). The vast number of money claims are claims for compensatory damages arising from tort or breach of contract. However, this action is not one of them. Claims for money that are not based on tort or contract include equitable damages and restitutionary actions in addition the the equitable and/or statutory right to recover independent of any contract or tort. "The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered. The heads or elements of damage recognised as such by the law are divisible into two main groups: pecuniary and non-pecuniary loss. The former comprises all financial and material loss incurred, such as loss of business profits or expenses of medical treatment. The latter comprises all losses which do not represent

an inroad upon a persons financial or material assets such as physical pain or injury to feelings. The former being a money loss, is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter however is not so calculable. Money is not awarded as a replacement for other money, but as a substitute for that which is generally more important than money: it is the best that a court can do” (Magreagor on Damages para 1-021 18th Edn). The appropriate measure of damages was defined in Livingstone v Rawyards Coal Co (1880) 5 App Cas.25 at 39 per Lord Blackburn, thus;

“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is not getting his compensation or reparation”.

26. Taking each head of claim in turn. The Plaintiff claims for loss of his right to occupation. Although that is incorrectly described as his right to reside in the property. In fact there was no structure on the Property on which he could reside and therefore that is not a loss he has suffered

Mitigation/Intervening Act (actus novus ineterveniens) / Contribution/Failure to mitigate

27. The Rule as to avoidable loss is that there is no recovery for loss which the Claimant ought to have avoided. “The extent of the damage resulting from a wrongful act, whether tort or breach of contract, can often be considered lessened by well-advised action on the part of the person wronged. In such circumstances the law requires him to take all reasonable steps to mitigate the loss consequent on the defendant’s wrong, and refuses to allow him damages in respect of any part of the loss which is due to his neglect to take such steps. Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss which could be avoided by reasonable efforts or to continue an activity unreasonable so as to increase the loss. To this end see the speech of Viscount Haldane L.C. in the leading case of British Westinghouse Co v Underground Ry [1921] Ac 673 at 689;

“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.”

28. For the reasons set out above, the Court therefore Orders that the Defendant shall pay the Plaintiff the following sums under the heads of claim set out as follows:

(1) Occupation charge for loss of user KShs. 3,000,000. The sum claimed is discounted by 30% to take into account the fact that the premises were not habitable at the time of the injunction but also that they could reasonably have become habitable during the course of the injunction. The claim for loss of amenity is incorporated in this figure.

(2) The increased costs of completion assessed at KShs. 4,416,102.59

(3) Hurt feelings but as the Plaintiff did not argue this point fully it has to be assessed after further submissions.

(4) The Structural Engineer’s Charge of KShs 23,200/=

(5) Bearing in mind that the Quantity Surveyor’s Reports form part of the evidence, and therefore are a litigation cost but may also be used in completion of the works. The Cost of additional professional fees due to the injunction is assessed at Kshs 2,500,000/= (Two million five hundred thousand shillings.

31. The aforesaid sums to be paid within 28 days of today.

32. In the event that they are not paid, interest to apply on the sums found due by the Court at the rate of

14% per annum on all outstanding balances until payment in full.

33. Each Party to pay its own costs.

Order accordingly

FARAH S. AMIN

JUDGE

Signed and Delivered in Nairobi on the 9th June 2017.

In the Presence of:

Court Assistant: Partick Mwangi

Plaintiff: Miss Misere holding Brief for Mr Nyamberi

Defendant: Mr Orina