



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 133 OF 2007**

JOACHIM VON STACKELBERG .....1ST PLAINTIFF

YOLANDA FIRTH .....2ND PLAINTIFF

VERSUS-

SYLKE OBST .....DEFENDANT

**JUDGMENT**

1. Although the parties filed 18 issues for determination by the Court most of those issues are not issues for consideration because to a large extent the parties are agreed on some facts of this case.
2. Parties are agreed that on 1st September 2005 they entered into an agreement. By that agreement the Plaintiffs agreed to sell to the Defendant four (4) plots in Kwale namely **KWALE/GALU KINONDO/1174, 1175, 1176 and 1177 (the Kwale properties)**. The purchase price was Kshs. 23 million which was payable as per the following Schedule-

	KES	Bal due Verbleibend	Euro	ROE
Sales price	23,000,000	23.000,000		
<b>Verkaufspreis</b>				
Flat Germany	-9,555,000	13.445,000	105.000	91
<b>Wohnung D</b>				
Immediate payment	-637,000	10.945,000	27.473	91
<b>Zahlung sofort</b>				
Payment in 1 month	-1,820,000	8.488.000	20.000	91
<b>Zahlung in 1 monat</b>				
Within 2 months				
<b>Innerhalb monaten</b>	2 -2,730.000	5.758.000	30.000	91
Until 31.12.05	-5.578.000	0	63.275	91

## ***Bis Ende 31.12.05***

All the parties in this case are of German origin and that explain the German language in that Schedule.

3. The Agreement also provided that the interest applicable was 15% per annum and the completion date was 1st February 2006.
4. The Plaintiff's case is for interest of Kshs. 2,627,147.25 on basis that Defendant failed to hand over the flat in Germany which was part of the consideration as at the date of completion, that is on 1st February 2006. Plaintiffs pleaded that Defendant handed over the flat on 1st November 2007 and hence the claim for interest at 15% per annum is for the period 31st December 2005 to 1st November 2007.
5. Defendant filed a Defence and Counter claim where she denied Plaintiffs' claim and pleaded that she was ready and willing to hand over the flat in Germany to Plaintiffs but the Plaintiffs sabotaged Defendant's efforts by refusing to sign Transfer and to take possession; and by failing to give Defendant copy of the agreement for sale and other documents necessary for completion of the sale. Defendant pleaded that in particular the firm of Advocates Omondi Waweru Advocates, who represented Plaintiff had failed to date to provide in respect of the Kwale properties Original Title Deeds; duly executed transfers; valid rates clearance Certificate from Kwale County Council; duly completed Valuation Form for stamp duty purposes; Kwale Land Control Board consent and other necessary consent. Defendant also pleaded that Plaintiffs had vandalized and dismantled the physical structures on the Kwale properties. Defendant prayed for an order of specific performance of the agreement for sale of 1st September 2005 and interest at 15% per annum on the purchase price of Kshs. 23 million from 1st February 2006 until date of registration.
6. In my view and having considered the parties evidence before Court there are only two issues that require this Court's determination. Firstly is, which party is entitled to its claim for interest. Secondly is; whether the Defendant is entitled to an order for specific performance.

### **CLAIM FOR INTEREST**

7. The Plaintiffs' claim for interest is based on their allegation that Defendant failed to transfer the flat in Germany to Plaintiffs as agreed within the period of the agreement. Defendant denies failing to transfer.
8. Defendant in her evidence stated that she was unable to transfer the flat in Germany because 1st Plaintiff changed his mind about the transfer and in so doing instructed, on telephone, the German Attorney who was representing both of them in that transfer not to proceed with the transfer on behalf of the Plaintiff. That the procedure in Germany is that the transacting parties instruct a Government Officer, in this case they instructed one called Romer, to carry out the transfer. Once both Defendant and 1st Plaintiff appointed Romer they executed an agreement for that transfer in Germany. The transaction was not completed as anticipated because 1st Plaintiff withdrew his instructions from Romer. That 1st Plaintiff informed Romer that he did not want the flat in Germany. Defendant stated she had to file a case in Court, in Germany, to enforce the agreement of transfer of the flat. Plaintiff's own exhibit No. 10(d) is evidence of that case filed in Country Court – Dessau. Exh. 10(d) is a translation of the Court document in German language. Of importance is the Defendant's claim in that Court which was as follows-

**“Appeal**

**Against the legal opinion of the notary Dr. Jur. Cord Romer,**

**Because of not disclosing my document for UR-NR.436/05**

**Dear Sir/Madam,**

**I request for short-term decision for the above mentioned appeal**

**Reason:**

**We reached a final purchase agreement on 15.06.05 between Mr. Stackelberg(1<sup>st</sup> Plaintiff herein) and myself concerning the property apartment.**

**With the letter on 14.02.07 Mr. Stackelberg did not want the apartment any more and withdrew the power of attorney from Mr. Dr. Romer for changing the transfer of the property**

**A withdrawal of the sale agreement can only be enacted by the Court, at this point is Dr Romer subjected to a error.**

**I hereby request you to grant the appeal that Mr Romer disclose all the documents for purchase transfer so that I can make the transfer in favour of Mr Stackelberg at the land registry office in Wittenberg.**

**Enclosed:**

**Copy of purchase agreement**

**2 letters from Mr. Stackelberg**

**Letter from Mr. Romer**

**I request for a short-term decision Sylke Obst Tel:0179-78618704.”**

The above is the English translation of the German proceedings in Court.

9. Defendant was successful in her claim before the German Court and she produced as an exhibit a Title of the flat now registered in the name of the 1st Plaintiff. Of interest is that the Title show that the Transfer of the flat was in reference to the agreement dated 15th June 2005. The Title has the following details-

**“Ownership Notice for Joachim Freiherr Von Stackelberg, born 15.12.1956 residing in 21274 Undeloh. This is in accordance to a rights grant agreed on 15.06.2005 (Agreement Reference: 436/2005 Notary Dr. Roemer, Lutheran Wittenburg) and signed on 04/08/2005.”**

- 10.1st Plaintiff in evidence confirmed Romer acted for both him and Defendant and he also confirmed that the agreement of the transfer of the flat in Germany to his name was dated 15.06.2005.

- 11.I do make a finding from the evidence adduced before Court both oral and document that the delay occasioned in the transfer of the flat in Germany was occasioned by 1st Plaintiff's withdrawal of instruction to his Attorney Romer of relevance is what Lord Diplock in the case **CHEALL -Vs- APEX [1983]1ALL ER** had this to say-

**“... a contracting party cannot rely on one event brought about by his own breach of**

**contract as having terminated a contract by frustration, is often expressed in broad language as “A man cannot be permitted to take advantage of his own wrong.”**

Similarly the learned author of the book Cheshire, Fifoot & Furmston's 'Law of Contract 14th Edition at page 593 had this to say-

**“If a party to an entire contract performs part of the work that he has undertaken and is then prevented by the fault of the other party from proceeding further, the law does not allow him to be deprived of the fruits of his labour. He is entitled, of course, to recover damages for breach of contract, but alternatively he can recover reasonable remuneration on a *quantum meruit* for what he has done.”**

I wholly adopt the above statement. 1st Plaintiff's attempt to rely on his withdrawal of instructions from the Attorney to enable him and his Co-Plaintiff claim interest is rejected. I do need to state that delay of transfer of the flat in Germany was not because the flat had encumbrances. There was no evidence adduced to prove the same and the Plaintiffs did not plead accordingly. Plaintiffs' submissions in that regard are therefore rejected.

12. Learned Counsel for the Plaintiffs submitted that Defendant is not entitled to completion of the transfer of the Kwale properties because she has not paid Plaintiffs' interest. Although there was no legal basis for refusing to carry out the transfer, since the full sale price has been paid by the Defendant, now that this Court has found that Plaintiffs have no good claim for interest there is no reason why the transfer of the Kwale properties should not be effected in the name of the Defendant.

13. The Defendant as per Defendant Exh. No. 2 has, as far back as 17th April 2008, sought release of all completion documents from the Learned Counsels representing Plaintiff, that is Omondi Waweru & Co. Advocates. That refusal led the Defendant to sue that firm of Omondi Waweru & Co. Advocates by way of Originating summons in **Mombasa 222 of 2008 (O.S)** for payment by that firm to Defendant Kshs. 240,000/- being stamp duty paid by Defendant to that firm and Kshs. 100,000/- being refund of legal fees paid to the firm by Defendant. Judgment was entered for Defendant on 24th February 2009 in that case in default of appearance.

14. I had the opportunity to observe the Defendant as she gave evidence. It is clear Defendant is frustrated both by Plaintiffs and their Counsels who have refused, since the flat in Germany was transferred to 1st Plaintiff, to transfer the Kwale properties to her. Defendant came across as credible witness who had been '**pushed to the wall**' by failure of completion of the transaction. The firm of Omondi Waweru is very integral part to this dispute, it seems they are even unable to account for the stamp duty paid to them by Defendant.

### **IS THE DEFENDANT ENTITLED TO INTEREST?**

15. 1st Plaintiff confirmed that he got the flat in Germany handed over to him on 1st November 2007. The explanation for not transferring Kwale properties to Defendant has been rejected by the Court. Transfer of the Kwale properties ought to have been undertaken at least three months after 1st November, 2007. Since they were not, Defendant is entitled to interest on Kshs. 23,000,000/- at 15% up to the date the transfer will be effected.

### **IS DEFENDANT ENTITLED TO AN ORDER OF SPECIFIC PERFORMANCE?**

16. The whole purchase price has been paid to the Plaintiffs. The Plaintiffs have not refunded the same. Defendant is entitled, therefore to an order of specific performance. I am fortified in my finding by the statement in the case **GITANGA MWANIKI & ANOTHER -Vs- ANNUCIATA WAITHIRA KIBUE [2013]eKLR** viz-

**“The Court only assists a party in the enforcement of a contract if the party has**

**performed its part of the bargain. This was the finding in the case of AZIZ Vs  
BHATIA BROTHERS LTD (2001)  
1 EA 7, where it was held that:-**

**'A party who has performed his part of the bargain may be assisted by the Court to enforce the contract against the defaulting party.'**

17. It should be noted that Defendant has been in possession of the Kwale properties since 3rd July 2006 and is still in possession. She is however in possession without titles. She has however paid fully for the Kwale properties. With that in mind the Court shall order the Plaintiffs who are parties of the agreement to perform their contractual obligation of providing all necessary documents to effect transfer to the Defendant. In addition and bearing in mind Section 1A of the Civil Procedure Act and Article 159 of the Constitution which respectively require the Courts to facilitate justice and that justice be done to all I shall order in default of such provision of documents the Deputy Registrar of this Court do sign all the transfers and that the Registrar of Lands do effect such transfer.

18. In conclusion I grant the following orders-

- a. **The Plaintiff shall within fourteen (14) days provide all documents necessary to effect transfer into Defendant's name of properties KWALE/GALU KINONDO/1174, 1175, 1176 and 1177.**
- b. **In default of (a) above the Deputy Registrar of this Court is hereby authorized to execute the transfer on behalf of the Plaintiffs.**
- c. **The Land Registrar is hereby ordered to effect transfer of those properties into the name of Defendant notwithstanding that they will not have been executed by-**
  - i. **YOLANDA FIRTH and**
  - ii. **JOACHIM HERMAN FREIHERR VON STACKELBERG and notwithstanding the absence of necessary consents.**
- d. **Plaintiffs shall pay Defendant interest on Kshs. 23,000,000/- from 1st February 2008 up to date of such transfer of Kwale properties.**
- e. **The Defendant is awarded costs of the suit and costs of the Counter-Claim.**

**DATED and DELIVERED at MOMBASA this 6<sup>TH</sup> day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**