IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Muli, Gachuhi & Kwach JJ A)

CIVIL APPEAL NO 155 OF 1992

KUKAL PROPERTIES DEVELOPMENT LTD ..…….......... APPELLANT

VERSUS

TAFAZZAL H. MALOO

SAKINA T. MALOO

ANVERALI M. A. PORBUNDERWALL

LATIFA A. PORBUNDERWALLA………………………... RESPONDENTS

(An appeal from the Judgment of the High Court of Kenya at Nairobi

(Mr Justice JA Mango) dated 30th April, 1992

in HCCC No 4459 of 1987)

JUDGMENTS

Muli JA. I have had the advantage of reading in draft the judgment by Kwach, JA and I agree that the appeal be allowed with costs.

The appellant company advertised through its duly appointed agent the sale of the two maisonettes at a price of Kshs 600,000/= each with a loan arrangement with Housing Finance Company of Kenya of Kshs 500,000/- on each maisonette. The respondents are two families residing in Nairobi. The 1st and 2nd respondent are a man and his wife (the Maloos) and the 3rd and 4th respondents are also a man and his wife (the Porbunderwallas).

By the transactions evidenced in writing and dated the 23rd June, 1987, the appellant wished to sell maisonette No 2 to the Maloos and maisonette No 3 to the Porbunderwallas at a price of Kshs 600,000/- each on the terms and conditions contained in the said documents subject to the respondents obtaining a loan from any financial institution within 40 days before the completion date which was stipulated to be the 15th August, 1987. I have used the words “transactions” and “documents’ purposely because the validity of the intended agreements was at issue. The respondent accepted the offer and paid the 10%

deposit of Kshs 60,000/= for each maisonette. By a letter dated 27th May, 1987, the appellants agent, M/s Nairobi Homes Ltd, offered the loan arrangements with Housing Finance upon payment of the necessary commitment fees. This was accepted by the respondents on 23rd June, 1987. Unfortunately the financial arrangements were not successful in time as stipulated in the documents I have referred to whereupon the appellant rescinded and cancelled the intended agreements on 9th September, 1987. Being aggrieved by the cancellations of the agreements, the respondents jointly brought action for specific performance of the agreements on the ground that the appellant was in breach of the said agreements. After a protracted trial the learned trial judge found for the respondents and ordered specific performance of the agreements by the appellant with costs of suit. Hence this appeal.

There are 11 grounds of appeal. For convenience and clarity I would separate the two transactions and deal with each transaction separately. Although both intended vending agreements are identical in every respect, the intended agreement between the appellant and the Maloos (Ex 10) was executed by the parties while the one between the appellant and the Porbunderwallas (Ex 20) was executed by the latter only. I would like to consider this latter agreement first. As the appellant did not execute the intended agreement, its legal effect and validity became a hot issue to be decided on the on-set. Ground 3 of the appeal addresses itself to this issue. The learned trial judge held:-

"It then becomes clear that the defendant treated the agreement between it and 3rd and 4th plaintiffs to have been executed and valid. Of course the 3rd and 4th plaintiffs believed on reasonable grounds that its execution was in fact accomplished and the fact that defendants never signed it would not in their view affect them. So my finding is that the non-signing by the defendant of the agreement Ex 20 must have been an oversight by the defendant's lawyer. Considering the fact that the plaintiff after signing was made to believe in whatever he did, that the agreement had been executed, an estoppel would act against the defendant if he tried to rely on the non-signing. Fortunately he has not in this case and I hold that the agreement must be deemed to have been executed and my answer to the issue in this respect is also yes."

With the greatest respect the learned trial judge misdirected himself completely. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, what were the legal consequences? Put it another way – was the agreement executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?

It is trite law on this point and is made beyond doubt under section 3 (3) of the Contracts Act (Cap 23 Laws of Kenya) as follows:-

> "S 3(3): No suits shall be brought upon a contract for the disposition of an interest in land unless –
>
> (a) The contract upon which the suit is founded –
>
> (i) is in writing
>
> (ii) is signed by all the parties thereto; and
>
> (iii) incorporates all the terms which the parties have expressly agreed in one document; and

(iv) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

In the instant case the appellant did not execute the intended agreement between itself and the Porbunderwallas. No amount of correspondence prior or subsequent to the date of the intended agreement will change the legal position. Mrs Dias urged us to hold that since this issue was not pleaded in the pleadings coupled with the correspondence exchanged prior to and subsequent to the agreement the appellant must be deemed to have executed the intended agreement or that the appellant must be estopped from relying on the non-execution of the intended agreement as a ground to vitiate the agreement. Indeed the learned trial judge fell into this trap and misdirected himself. I do not agree.

Mrs Dias' contention is faulty in two respects. Firstly, it is trite law on pleadings that a party need not plead the law. Secondly, the doctrine of estoppel does not operate against an Act of Parliament. (See *Patterson v Kanji* (1956) EACA 106.

I have considered the authorities cited by Mrs Dias but I find no authority to support her contention that the unexecuted agreement by the parties may be deemed to have been executed by reference to correspondence prior to or after the date of the intended agreement. To do so would be to introduce extraneous matters which may not have been intended by the parties. The authority in *Hasham v Nanji* [1960] EA 7 did not support Mrs Dias' contention and was clearly distinguishable on the facts of that case. I hold that the intended agreement between the appellants and the Porbunderwallas was inoperative and therefore unenforceable for lack of execution by the appellant the total sum was that there was no valid agreement enforceable in law. Ground 3 of the appeal succeeds.

Ground 1 of the appeal complains that the learned trial judge was wrong in that he did not consider sufficiently or at all the agreed issues. There were 19 agreed issues signed by counsel for the parties. Mr Lakha for the appellant, contended that the learned trial judge misdirected himself by not considering all the agreed issues. He submitted further that by not doing so in his judgment, the said judgment became defective. He gave examples of agreed issues Nos 8 and 9 where the judge merely said "Yes" or "in part" without considering them. There is no mention of issues Nos 10 to 19. Order XX rules 4 and 5 of the Civil Procedure Rules provides:-

> "XX r 4 Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

XX r 5 In suits in which issues have been framed, the Court shall state its findings or decision, with the reasons therefore, upon each separate issue."

Clearly the learned trial judge was in error in failing to consider all the issues separately and by omitting issues Nos 10-19. These omissions rendered the judgment defective. Ground 1 of the appeal succeeds. This would have been sufficient to dispose of this appeal but I shall consider the other grounds of appeal because they raised important points of law. For instance ground 2 raises the issue as to whether or not it is prudent to import into an agreement correspondence exchanged between the parties prior to the agreement. In particular whether the agreement between the appellant and the Maloos was binding on the parties.

Mrs Dias contended that all the evidence including correspondence between the parties prior to or after the agreement are admissible. I think that this contention is sweeping. As I understand it where the contract is in writing and its terms are clear and unambiguous, no extrinsic evidence may be called to add or detract from it. (See *Damodar v Eustagce*, [1967] EA 153 at p 159 Spry JA, as he then was).

Evidence of negotiations is never admissible to vary the terms of the written contract. However, where there is a latent ambiguity, extrinsic evidence may be given of surrounding facts to explain the ambiguity. But certainly no evidence or correspondence on prior negotiations may be admissible. It is assumed that the intentions of the parties to a written contract are embodied in a written contract itself. I have used the phrase "priority negotiations" because subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect the written contract. For instance, subsequent correspondence may vary the terms of the written contract if it is clear from the correspondence that the parties intended to vary the contract.

Mrs Dias urged us to consider prior correspondence to show that there was another contract concerning financial arrangements. The learned trial judge held that prior correspondence was admissible. This was a misdirection. Prior correspondence was purely prior negotiations and therefore inadmissible. In *Aberfoyle v Cheng* [1959] 3 All ER 910 at 918F Lord Jenkins, as he then was said:

"Their Lordships can attach no importance to the vendor's argument based on surrounding circumstances. The parties chose to fix Apr 30, 1956 by the agreement as the date for what they themselves described as

"completion" and must be bound by that choice.

> It should also be placed on record that certain evidence as to an alternation made in Cl 4 of the draft of the agreement when the matter was in negotiation, which Good, J appears to have admitted was, in their Lordship's view, wholly inadmissible for the purpose of construing the agreement itself, and was by common consent excluded from consideration at the hearing before them."

And so it is in the instant case. Ground 2 of the appeal succeeds.

The agreement under consideration has special conditions.

It is the agreement between the appellant and the Maloos in respect of maisonette No 2 (Ex 10). The special conditions are;

> "1. Time is of the essence of the contract.
>
> 2-6 Not relevant.
>
> 7. This agreement is subjet to the purchaser getting a loan from any financial institute. If the offer is not coming 40 days before the date of completion, the agreement will be taken as cancelled and the deposit will be refunded after deduction Shs 1,500/= being the fee for Mr K S Brahmbhatt for work done in this matter up to that date. The deposit will not accure any interest thereon.
>
> 8. Not relevant."
>
> (underlining is mine).
>
> These special conditions remained intact from the date of the execution of the agreement by the parties on 23rd June, 1987. There was no amendment or variation of the terms of the agreement with the result that time remained of essence to this agreement and also subject to the purchaser getting a loan from any financial institute (special conditions Nos 1 and 7 respectively (*supra*)). In absence of valid variation of the terms and conditions of the agreement, the parties must be deemed to have intended to be bound by the terms and conditions of the agreement. In terms of special condition No 1 time was of the essence of the agreement with the result that completion date remained as stipulated to be 15th August, 1987 (Cl 5), and the Maloos were required to produce the offer from any financial institute within 40 days before the date of completion. In default the agreement was to be taken as cancelled and the deposit would be refunded (special condition No 7). Forty days before the completion date was 6th July, 1987.There was no such an offer forthcoming as at that date. The appellant was generous enough to grant an extension of time to 4th August, 1987. As at that date or any other date thereafter, no offer was forthcoming from the Maloos. Mrs Dias admitted from the Bar that there had been no offer made up to this day. In absence of the offer being made within the stipulated contractual period and time being of the essence of the agreement, the Maloos were clearly in breach of the special conditions No 1 and 7 of the said agreement. The learned trial judge was clearly wrong when he held that the appellants were guilty of the breach of the agreement. This was not so on the facts of this case.

On 9th September, 1987, Mr Brahmbhatt for the appellant wrote to the Maloos as follows:-

> "I refer to my letter dated 22nd July, last, addressed to you, according to which this transaction was cancelled. Therefore I enclose herewith my cheque for Kshs 58,500/= being balance of the deposit after deducting my fees (Sh 1,500/=) as mentioned in para 7 of the special conditions of the Agreement for Sale and a copy of the Agreement for Sale for your records."
>
> The learned trial judge considered the issues of the time of the essence of the contract and special condition 7 in somewhat muddled way. He found in effect that time was not of essence because

> the appellant was responsible for financial arrangements with Housing Finance Company of Kenya and that special condition No 7 was rendered ineffective. I do not agree. In so far as the agreement entered into between the appellant and the Maloos was concerned, there was no variation of the conditions therein nor was the agreement entered into through fraud, mistake or misrepresentation of facts. The learned trial judge misdirected himself in admitting prior negotiation correspondence to construe the valid written agreement. There was no evidence to alter the special conditions that time was of the essence of the contract and that the Maloos were duty bound to produce the financial offer from any financial institute during the contractual period. He misapprehended the meaning of special condition No 7 which required the Maloos to produce the financial offer 40 days before the completion date. The absence of the financial offer within the extended contractual period was a breach on the part of the Maloos and the appellant was entitled to cancel or to rescind the agreement as he did. Whatever involvement the Housing Finance Company of Kenya and / or the Nairobi Homes may have been, this did not affect the contract between the appellant and the Maloos. Any such involvement can best be termed extraneous matters and clearly wholly inadmissible.

Special condition No 7 rendered the said agreement conditional agreement in so far as it stipulated that the agreement was subject to the happening of the future events namely the production of the financial offer as well as compliance with the completion date. It is trite law that where the contract is subject to a future event, there is no binding contract until and unless that condition subsequent is fulfilled. In *Aberfoyle Plantations v Cheng* (*supra*) Lord Jenkins, as he then was, held at p 914 D E post –

> "Their Lordships may now turn to the question exhaustively debated before them and the courts below:- within what period of time did the agreement… to be performed? The answer to that question must plainly depend on the true construction of the agreement or in other words on the intention of the parties as expressed in, or to be implied from, the language they have used. But subject to this overriding consideration, their Lordships would adopt as warranted by authority and manifestly reasonable in themselves the following general principles:-

i. Where a conditional contract of sale fixes a date for the completion of the sale, then, the conditions must be fulfilled by that date. (ii) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles."

In an earlier decision in *Spottiswoode v Doreen* [1942] 2 All ER 65 at page 66 CE Lord Greene MR, as he then was, had this to say:-

> "The real fact of the matter is that the language used here is equivalent to the common and more concise phrase "subject to contract," and, if anything is settled, it is that the phrase is one which makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way."

ii. Applying the above principles to the present case, it is quite plain that time was of essence for the completion of the agreement on the 15th August, 1987. It is also quite plain that the agreement was to be subject to the Maloos obtaining financial offer from any financial institute and to provide the appellant with that financial offer within 40 days before the completion date (15th August, 1987). The parties must be deemed to have intended to become contractually bound on the fulfillment of the conditions subsequent. Until and unless fulfillment of these conditions subsequent no contract came into existence. Grounds 1, 7, 8 & 10 succeed.

I would like to consider the remaining grounds of appeal, namely grounds 4, 5, 6 and 11. In my opinion, these grounds are consequential and depended on the main issue, namely whether the intended agreements between the appellant and the respondents were operative and enforceable in law.The

intended agreements were dead *ab initio* for lack of execution by the appellant in the case of Porbunderwallas intended agreement. It follows therefore that it was unenforceable against the appellant. With regard to the executed agreement between the appellant and the Maloos, this was a conditional contract intended by the parties to become binding on the fulfillment of conditions subsequent, namely completion of the contract on the 15th August, 1987 and availability of the financial offer from any financial institute 40 days before the date of the completion. None of these future events ever materialized with the result that the Maloos were in breach of their agreement. Flowing from this breach, the appellants through their lawyer, Mr Brahmbhatt, notified the Maloos and in fact all the respondents of the cancellation and rescission of the intended agreements in terms of special condition No 7. This was on 9th September, 1987. Mr Brahmbhatt also returned the 10% deposit less his professional fees. As at that time, no financial offer from any financial institute was forthcoming. The Maloos and indeed all the respondents accepted the refunds. Mrs Dias, while conceding acceptance of the refunds, contended that the cheques were never presented or cashed. It did not matter as to what happened to the cheques provided that the refunds were accepted on behalf of the respondents.

The learned trial judge held that there was a financial offer made by Housing Finance Co. He arrived at this conclusion after considering the correspondence exchanged prior to the execution of the agreements. There was no evidence of any financial offer as stipulated in special condition No 7. The responsibility lay squarely on the Maloos and indeed the respondents to furnish the appellant with the financial offers. The Maloos and indeed all the respondents were unable to secure the financial offers from any financial institute. The learned trial judge was in error in holding that the respondents were ready and willing at all material time to complete the agreements. This cannot be so. He misdirected himself in all respects after holding that prior negotiations correspondence were admissible. There was no evidence to support that conclusion. Grounds 4,5,6 and 11 must succeed.

The Maloos were in breach of the intended agreement. They accepted the refund of 10% deposit. The purchase price was not tendered during the contractual period or thereafter. The remedy of specific performance was not available to the Maloos. Specific performance is an equitable remedy and must flow from a legal right. The Maloos, having committed breach of their agreement, specific performance could not be legally decreed. The learned trial judge fell into error in decreeing specific performance (see *Sisto Wambugu v Kamau Njuguna* (1988) 1 KAR 219).

The entire judgment was defective and bristles with monumental and fatal misdirection of law and facts. It cannot be allowed to stand.

In the result, I would allow this appeal with costs and would set aside the judgment of the superior court.

Kwach JA. This is an appeal by Kukal Properties Development Ltd (the appellant), against a decree for specific performance of two agreements, given by the superior court in favour of two couples, Tafazzal Hatimali Maloo and his wife Sakina Tafazzal Maloo (the Maloos); and Anverali Mohamedali Porbunderwalla and his wife Latifa Anverali Porbunderwalla (the Porbunderwallas).

By an agreement for sale dated 23rd June, 1987, entered into between the appellant and the Maloos, the appellant agreed to sell to the Maloos a maisonette (identified as No 2 on plot LR No 2/20 Nairobi, at a consideration of Shs 600,000/-. The Maloos paid a deposit of Shs 60,000/- to a nominate advocate as a stakeholder. Completion date was to be 15th August, 1987. The sale was subject to 8 special conditions, the relevant ones for the purposes of this appeal being conditions 1 and 7 by which it was provided that:

> “(1) Time is of the essence of the contract

(7) This agreement is subject to the purchaser getting a loan from any financial institute. If the offer is not coming 40 days before the date of completion, this agreement will be taken as cancelled and the deposit will be refunded after deducting Shs 1,500/- being the fees for Mr K S Brahmbhatt for work done in this matter upto that date. The deposit will not accrue any interest thereon.”

The agreement between the appellant and the Maloos was signed by both parties and witnessed. The

agreement for sale between the appellant and the Porbunderwallas was for the sale of maisonete No 3 on the same plot at the same price and was also subject to the same special conditions except that in this case the agreement was signed by the Porbunderwallas but not by the appellant or anyone else authorized by the appellant to do so.

The way special condition No 7 is couched leaves a lot to be desired but I think, and there is no dispute about this, that the purchasers had to provide eveidence of an offer of a loan within two weeks from the date of signing the agreements, that is to say, on or before 6th July, 1987. Alleging breach of this particular special condition, the appellant rescinded both agreements and refunded the deposits to the respondents. The respondents instituted proceedings against the appellant and Nairobi Homes Ltd whom they alleged had at all material times acted as the agent or servant of the appellant in relation to the transactions giving rise to the suit. The plaint was subsequently amended in January, 1988, and the claim against Nairobi Homes Ltd was discontinued. The reliefs sought in the plaint included specific performance of the agreements and damages for breach of contract in *lieu* of or in addition to specific performance and the balance of the deposits paid.

The appellant filed a defence denying the claim and I would refer to paragraphs 4 & 5 which contained the following averments:

> "(4) The first defendant in answer to paragraphs 6 & 7 of the plaint contends that the plaintiffs undertook to pay the outstanding balance of the purchase price prior to the completion date and the first defendant is a stranger to the alleged arrangements between the plaintiffs and the second defendant.
>
> (5) The first defendant further states that the plaintiffs were unable and/or unwilling to pay the purchase price within the contractual period or at all and the proposed sale was therefore rescinded within the terms and conditions incorporated in the sale agreement (sic)."

The appellant raised a counter – claim for damages for breach of contract. The judge heard evidence and at the conclusion of the trial, gave the respondents a decree for specific performance and dismissed the counter-claim with costs. He did not go into the question of general damages in *lieu* of specific performance and there is no cross-appeal against this.

The judge's decision is challenged on a number of grounds which put in a nutshell are that the judge did not determine all the issues framed; that he erred in ordering specific performance of the agreements in question; that the appellant was entitled to rescind the agreements since the said agreements were conditional.

Nineteen issues were framed for decision by the judge. In his judgment, the judge only dealt with 9 issues leaving 10 undecided. It was the submission of Mrs Dias, for the respondents, that the issues that the judge did not deal with explicitly he had covered by implication. With respect this is not borne out by a perusal of the judgment and in any event this would constitute a violation of the express provisions of order 20 rule 5 of the Civil Procedure Rules which provides that:

> "O 20 r 5. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefore, upon each separate issue"
>
> (emphasis added).

Once issues were framed, the judge was obliged to decide each and every one of them and in failing to do so he committed a serious breach of procedure. This ground of appeal accordingly succeeds.

> The decision is also challenged on the ground that in relation to the claim by the Porbunderwallas, there was no valid and enforceable agreement concluded between them and the appellant. The agreement (Ex 20) is dated 23rd June, 1987. It is signed by the Porbunderwallas but it is not signed by the appellant as the vendor. With regard to this omission, the judge took the view that it

was due to oversight on the part of the appellant's advocate and that since the Porbunderwallas had been made to believe that the agreement had been executed, the appellant was estoppped from relying on non-signature. He held that in the circumstances, the agreement was to be deemed to have been executed. The execution of a legal document is a matter of fact. It is either executed or not executed. This was an agreement for the disposition of an interest in land and had to comply with section 3 (3) of the Law of Contract Act (Cap 23) which, before the amendment of 1990, provided that:

"(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

The agreement in question was not signed by the appellant or anyone authorized by the appellant to sign it. The Porbunderwallas could not rely on the *proviso* because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree for specific performance. And as to the judge's holding that the appellant was estopped from denying the validity of the agreement, this is quite clearly erroneous on the authority of *Patterson v Kanji* (1956) 23 EACA 106, where the Court of Appeal for Eastern Africa held that there can be no estoppel against an Act of Parliament. The result is that the order for specific performance in favour of this couple should never have been made at all because it clearly had no legal basis. This ground of appeal succeeds.

The next ground of challenge is that both agreements were conditional. It was Mr Lakha's submission that the agreements were subject to the respondents obtaining offers of loans from any financial institution and that time being of the essence, if the respondents failed to meet this condition there could be no binding contract on which specific performance could be decreed. He referred to the case of *Spottiswoode v Dorren Appliances Ltd* [1942] 2 All ER 65, where an offer by the defendants to take a lease of premises was accepted on behalf of the plaintiffs subject, *inter alia*, to the terms of a formal lease to be prepared by their solicitors. The defendants were let into possession and a draft of the agreement was sent to them. A fortnight later the plaintiffs wrote to the defendants indicating that they were not willing to proceed with the agreement. They brought an action to recover possession, and the defendants counter-claimed for specific performance of an alleged agreement to grant them a lease. It was held by the Court of Appeal that upon the proper construction of the offer, there was no binding contract until a formal agreement had been executed. Since this had not been done, the defendants were not entitled to specific performance.

Mr Lakha also cited the case of *Aberfoyle Plantations Ltd v Cheng* [1959] 3 All ER 910, which was also a case of a conditional contract. In the judgment of the Judicial Committee of the Privy Council which was read by Lord Jenkins, there is this passage at page 915 –E:

"Before parting with these two authorities, their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that, until the condition is fulfilled, there is no contract of sale to be completed, and, accordingly, that, by fixing a date for completion, the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest."

It was the appellant's case throughout that the agreements were conditional upon the respondents producing evidence of offers for loans from any financial institution by a given date and that the respondents had failed to do so. It was contended on behalf of the respondents, on the other hand, firstly, that through an arrangement made by the appellant through its agent, Nairobi Homes Ltd, the offers were to be obtained from the Housing Finance Company of Kenya Ltd, and secondly, that they had produced evidence of such offers within the contractual period. As regards the first contention, the respondents sought to rely on prior correspondence to modify or amplify special condition No 7. This, they could not do because, to my mind, the law on the point is clear. It is that in the construction of an agreement prior correspondence cannot be called in aid. The judge placed reliance on a letter dated 20th March, 1987, which was written before the execution of the agreements, by which Nairobi Homes Ltd confirmed to the Maloos that there was a loan arrangement of Kshs 500,000/-, with Housing Finance Company of Kenya Ltd provided they qualified for the same. If this was to be a term of the agreement, no doubt it would have been incorporated into the agreement which was subsequently executed on 23rd June, 1987. It was not. Such correspondence is regarded in law as forming part of the negotiation process. This point was dealt with by the Court of Appeal for East Africa in the case of *Damodar Jinabhai & Co Ltd v Eustace Sisal Estates Ltd* [1967] EA 153. Sir Charles Newbold, P said at page 155 – F:

> "Before I deal with these submissions I think I should refer to four matters which were raised by Mr Nazareth, who appeared for the purchaser, though the precise reason for raising some of them was not very clear to me. The first matter was that the Chief Justice should have looked at a previous draft of the contract in order to determine the meaning of clause 7. The Chief Justice refused to do so and I entirely agree with his decision. It is true that in certain circumstances evidence of surrounding circumstances may be admissible in order to interpret a document (see section 29, *proviso* 6 of the Evidence Act) but in no case is evidence of prior negotiations admissible (see *Virbai v Bhatt*) and the evidence of a prior draft which has been rejected, of a contract is *ipso* facto nothing other than evidence of prior negotiations."

And Spry, JA, said this at page 159-B:

> "I would begin by stating what I understand to be the law relating to the interpretation of contracts in Tanganyika. First, where the contract is in writing and its terms are clear and unambiguous, no extrinsic evidence may be called to add to or detract from it, but where necessary extrinsic evidence may be given of surrounding facts, although evidence of the negotiations is never admissible to vary the terms of the written contract."
>
> There can be no doubt therefore that the judge was wrong in relying on the letter of 20th March, 1987, in the interpretation of special condition No 7 of the agreement.

With regard to the alternative contention by the respondents that they had produced evidence of loan offers, there is clearly no evidence to support this. Such evidence as there is, is to the contrary. In cross-examination, Taffazal Hatimali Maloo (PW 2) told the judge, *inter alia*:

> "I am pleading for more time in which to obtain mortgage finance. I was to get loan within 40 days. I was refunded Shs 58,500/-. I accepted the refund and I deposited in my account. We agreed on specific deadline. Yes at date of deadline I had not obtained any finance from any financial institution. I cannot produce even now a commitment from any financial institution."

And Mohamedali Porbunderwalla's evidence was that:

> "Contractual date is set therein in the agreement ie 15.8.87. Had I paid Shs 500,000/- the contract would have been complete as on that date. As at the date my loan was still being processed by HFCK. Consequently, by that date, I could give neither the money nor the offer from a financial institution because I was unable."

From the evidence of both Mr Maloo and Mr Porbunderwalla two vital facts emerge, first, that they were totally unable to come up with loan offers on the contractual date and, secondly, that they accepted a

refund of their deposits following the repudiation of the agreements by the appellant.

> I now turn to the consideration of the question whether on the evidence the remedy of the specific performance was available to the respondents. On the date of completion, the respondents may have been willing to complete but they were certainly not ready and able to do so for they did not have the wherewithal. There is no evidence that either Housing Finance Company of Kenya Ltd or any other financial institution had agreed to lend the respondents the necessary mortgage finance.

At the time of the repudiation of the agreements by the appellant, the respondents had neither paid nor tendered the purchase price. On their own admission, they did not have the money and could not therefore be said to be ready and willing to perform their part of the bargain. As they had failed to pay the full purchase price, they could not in law obtain an order for specific performance of the agreements to sell the two maisonettes to them. This Court has so held in the case of *Sisto Wambugu & Kamau Njuguna* [1988] 1 KAR 217.

There is one further reason why specific performance should not have been decreed. The respondents by accepting the refunds of the deposits paid by them, thereby accepted the breach with the result that they could only sue for damages for the alleged breach. Alternatively, they could refuse to accept the breach, treat the contracts as alive, and sue for specific performance. In that event, the respondents would have been obliged to perform their part of the contracts. In this case, the respondents did not keep the contract alive. In his speech in the House of Lords in the case of *Johnson v Agnew* [1979] 1 All ER 883, Lord Wimberforce set out the law on this point admirably at p 889 C:

> "In this situation it is possible to state at least some uncontroversial propositions of law. First, a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the Court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors). This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly, the vendor may proceed by action for the above remedies (*viz* specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.

In the present case the respondents accepted the appellant's repudiation and both parties were therefore discharged from further performance. In my judgment therefore, the remedy of specific performance was not available to the respondents and consequently not open to the judge and should never have been ordered. If the respondents had any claim against the appellant, it was for damages for breach of contract only.

Mrs Dias who appeared for the respondent both here and in the superior court, urged us to uphold the decision of the judge and cited numerous authorities in support of her submissions. It is difficult not to admire her persistence and sheer tenacity but in the ultimate analysis I am convinced that the only reason she fought this case tooth and nail the whole distance, was because she was an interested party. This could have blurred her vision and contributed to her inability to see the wood for the trees.

For these reasons, I would allow this appeal, set aside the judgment and decree of the High Court and substitute therefor an order dismissing the respondent's suit with costs. I would give the appellant the costs of this appeal.

Gachuhi JA. I have had the advantage of reading judgments by Kwach and Muli, JJ A and I entirely agree with their reasoning and their conclusion. I have nothing useful to add.

In the circumstances, the order of the Court is that the appeal is allowed with costs and the judgment of the High Court is set aside and substituted therewith an order dismissing the plaintiff’s suit with costs.

Dated at Nairobi this 31st Day of March, 1993

M.G. MULI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL