IN THE COURT OF APPEAL

AT NAIROBI

(Coram:nyarangi, Apaloo & Masime JJA)

CIVIL APPEAL NO 27 OF 1985

SAMWEL KANOGO RITHO.....APPELLANT

VERSUS

JOHN MWANGI KARIITHI & ANOTHER.....DEFENDANT

JUDGMENT

October 12, 1988, **Nyarangi, Apaloo & Masime JJA** delivered the following Judgment.

This appeal arises from a decision of the High Court (Trainor, J) (as he then was) in a dispute between the appellant and the respondents wherein the appellant alleged that the respondents were in breach of contract. After a full trial the learned judge found that the appellant and the first respondent were party to a contract and that the first respondent was in breach of the contract. The learned judge however refused to order specific performance of the contract as had been sought by the appellant and also declined to award any damages for such breach of contract as in his view no damages had been proved.

In this appeal the court has been informed that despite the superior court's refusal of specific performance the first respondent has subsequently and voluntarily executed a transfer of the suit premises being Plot No LR 36/ 11/108 to the appellant. So the grounds of appeal relating to specific performance are not being pursued in the appeal. Rather the only issue left is that of the refusal of the superior court to award damages to the appellant.

As regards damages the trial court stated the following:-

"The plaintiff claims damages for breach of contract. It is true that the defendant has breached or, at least attempted to breach contract but what damages has the plaintiff proved? He has endeavoured to show what he has lost by way of rents that he would have collected from flats that would have been completed in 1978 but I have no evidence whatever that even had the flats been completed the commissioner would have permitted a transfer of 108 to the plaintiff nor have I anything to indicate that he would not during development re-enter. Had he done so, or should he do so in future then through no fault of the defendant the plaintiff would have no flats. The Commissioner might re-enter at any time. Another way of looking at it is this: The plaintiff was proceeding with the development of the plot upto some uncertain time in 1978. I assume it was until the receipt of the letter from the defendants' advocates. Why did he not continue to do so? Had he done so the onus would have been on the defendant to restrain him: I cannot see any court granting such an application having regard to the security available to the defendant should he be ultimately successful.

I do not know if the plaintiff will proceed to complete the development or if he will be permitted by the

Commissioner so to do. If he does and the plot is developed the extra cost of building as against what it was in 1978 will be considerable, but there are so many … over which the defendant has no control.

The position with regard to damages is so ephemeral and any decision would have to be anticipatory or could only be ascertained as a result of a retroactive situation that I refuse to award any damages."

The learned judge however granted an injunction to restrain the defendant from interfering with the plaintiff in his development of the suit premises.In this appeal it has been argued that having granted this injunction the learned judge erred in not awarding damages in view of section 3(1)© of the Judicature Act Cap 8 which imports the doctrines of equity to Kenya.In the case of *Leeds Co-operative society Ltd v Slack* 1924 AC 851 the House of Lords held that the court had jurisdiction to award damages in lieu of an injunction. That case was based on the construction of section 2 of the Chancery Procedure Amendment Act (Lord Cairn's Act)."In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant contract or agreement, or against the Commission or continuance of any wrongful act, or for the specific performance of any wrongful act, or for the specific performance of any covenant contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance and such damages may be assessed in such manner as the court shall direct."

Viscount Finlay explained that the power to award damages to the party injured either in addition to or in substitution for an injunction if the damages are given in addition to the injunction they are to compensate for the injury which has been done and the injunction will prevent its continuance or repetition. But if damages are given in substitution for an injunction they must necessarily cover not only injury already sustained but also injury that would be inflicted in future by the commission of the act threatened.

This court recently reviewed the authorities interpreting section 2 of the said Lord Cairn's Act and reinforced the position that a party can claim damages in lieu of specific performance. See *Openda v Aann* 1983 II KCA 119 at p 132 per Kneller, JA. As we have said earlier the grounds of appeal relating to specific performance have not been persued since the respondent has, subsequent to the trial judge's refusal of that remedy, voluntarily executed a transfer of the suit premises in favour of the appellant.

In the present case as a result of the interference by the respondent with the appellant, the latter decided to discontinue the development that he had been carrying out on the suit premises; as the learned trial judge put it the respondent had'"indicated that he intended to interfere with the (appellant's) development of the plot;" it was that intention that the learned judge felt he should restrain the respondent from continuing by issuing the injunction.

It is the appellant's case that the learned trial judge having felt constrained to protect the appellant from the respondent's acts of interference erred in not compensating him for the consequential loss he suffered by the increase in the cost of construction by the time he was able to resume and complete the development. He quantified that loss as follows:

(a) the sum of at least Kshs 275,000 being the increase in the cost of construction

(b) the loss of rent at the rate of Kshs 1375 per flat per month for the five flats say Kshs 6,875.

As regards the second head of the claim he claimed for the period from January, 1, 1979 to February 28, 1982 as the case was heard and the evidence led on March 3, 1982. The total loss under this head would thus be Kshs 260,000 that is for 38 months.

On the basis of the case authorities referred to hereinabove we hold that the appellant was entitled to damages under both heads of his claim. We therefore set aside that part of the judgment of the High Court which dismissed the appellant's claim for damages and substitute therefore an award to the appellant of damages:

(a) in the sum of Kshs 250,000 being the difference in the cost of building between 1978 and 1982;

(b) Kshs 260,250 being loss of rent for the five flats at the rate of Kshs 1,375 per flat per month for the period from January 1, 1979 to February 28, 1982.

The appellant will have costs of this appeal and interest on the decretal amount at court rates. Those are the orders of the court.

Dated and delivered at Nairobi this12th day of October 12, 1988

J.O. NYARANGI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O. MASIME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR