IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU, & M'INOTI, JJ.A)

CIVIL APPEAL NO. 460 OF 2018

BETWEEN

GAMI PROPERTIES LIMITED.....APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT

BOARD OF TRUSTEES

CHIEF LAND REGISTRAR.....2ND RESPONDENT

(***Being an appeal from part of the Judgment of the Commercial and Admiralty Division of the High Court of Kenya at Nairobi (F. Tuiyott, J.) dated 19th October 2018***

in

Nai. H.C.C. Suit No. 335 of 2007)

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JUDGEMENT OF THE COURT

1. The appellant, Gami Properties Limited, has in this appeal challenged part of the judgement delivered on 19th October 2018. In that judgment, the High Court at Nairobi (***F. Tuiyott, J.***) held that the 1st respondent, National Social Security Fund Board of Trustees or NSSF, was in breach of an agreement for sale dated 2nd June 2004 in which it had agreed to sell to the appellant a property known as Nairobi/ Block 98/73; that the damages payable by NSSF to the appellant for the breach of the agreement "*would be the difference between the contract price and the value of the suit property in 2008 (just 2 years after the breach), their deposit having been paid back*"; that the claim for Kshs.18,870,226.81 allegedly incurred by the appellant in the preparation of feasibility studies and architectural plans was too remote and did not naturally arise from the breach; and that the removal, by the Chief Land Registrar, the 2nd respondent, of a Caution that had been registered against the said property was not unlawful.

2. The appellant's case as pleaded in its further amended plaint was that under the agreement for sale dated 2nd June 2004 it agreed to purchase the property known as Nairobi/Block 98/73 (the property) from NSSF for a price of Kshs.150,000,000 on the basis that the property measured 6.150 hectares or 15.2 acres; that a deposit of Kshs.32,000,000 was payable before 26th April 2004 and the balance of Kshs.118,000,000 was to be paid within two years from the date of execution of the agreement.

3. The appellant averred that it duly paid the deposit of Kshs.32,000,000 and that it was at all times ready, willing and able to pay the balance of the purchase price of Kshs.118,000,000; that in accordance with the provisions of the sale agreement the appellant had the property surveyed by a licensed and qualified land surveyor who established that it measured 13.07 acres as opposed to 15.2 acres and, on that basis, the appellant proposed to NSSF a pro rata reduction of the purchase price as envisaged in the agreement for sale to Kshs.130,000,000 with the result that the balance of the purchase price that remained outstanding was Kshs.98,000,000. The appellant pleaded that with a view to protecting its interest it registered a caution against the title on 23rd June 2004.

4. The appellant asserted that in breach of the agreement, and despite existence of the caution it had registered against the title, NSSF subdivided the property and transferred the subdivisions thereof to Aviline Services Limited and Automobility Limited (who were named as the 2nd and 3rd defendants in the lower court).

5. In an alternative plea, the appellant averred that NSSF through its officers and servants fraudulently, wrongfully and corruptly entered into the agreement for sale with Aviline Services Limited and Automobility Limited knowing fully well of the existence of the subsisting sale agreement with the appellant.

6. As against the 2nd respondent, the appellant averred that he unlawfully removed its caution in that he did not serve the appellant with a notice of removal of caution as required under Section 133 of the repealed Registered Land Act.

7. For relief, the appellant prayed for: orders that the subdivision of the property be set aside and that transfers in favour of Aviline Services Limited and Automobility Limited be set aside; special damages of Kshs.18,870,226.81 being consultancy and professional charges and fees and other expenses incurred; and losses and damages incurred by way of loss of business profits in the amount of Kshs.472,504,294.00. In the alternative the appellant prayed for damages for breach of contract and loss of bargain in the amount of Kshs.686,500.000 being the difference between the purchase price and the market value of the property of Kshs.816,500,000 based on a valuation report dated 21st July 2011.

8. In its further amended defence the NSSF admitted having entered into the agreement for sale with the appellant and acknowledged that it had received the deposit of Kshs.32,000,000 but denied that the appellant was ready, able and willing to pay the balance of the purchase price of Kshs.118,000,000; it averred that the parties were under a common mistake of fact that the actual acreage of the property was 15.2 acres as per the title document; and that the unilateral decision by the appellant to reduce the purchase price to Kshs.130,000,000 was not acceptable to it and consequently the agreement for sale was vitiated by mistake of fact.

9. NSSF further denied that the subdivision of the property was done either fraudulently, illegally or in breach of contract; that the offer to pay a lower price by the appellant was not accepted and consequently there was no consensus *ad idem* and therefore there was no contract between the parties; it averred that the loss claimed by the appellant arising from third party contracts was too remote and did not flow directly from the agreement for sale.

10. At the trial, the appellant called three witnesses in support of its case. The first was Patrick Opiyo Andrew (PW1), the land surveyor who surveyed the property and concluded that it measured 13.07 acres as opposed to 15.2 Acres. The second witness was Bhavant Ramji Majani (PW2), a director of the appellant who expounded on the appellant's claim. The third witness was John Karanja Kuria (PW3), a valuer, on whose valuation report the claim for loss of bargain in sum of Kshs.686,500.000 was based.

11. For NSSF, one witness, Caroline Esendi Rakama, was called. In her testimony, she stated that there was a mistake when the property was offered to the appellant in light of an existing first option to purchase in the lease in favour of the tenant, and secondly that there was also a mistake as to the size/acreage of the property. She maintained that the agreement for sale was vitiated by mutual mistake.

12. The 2nd respondent did not, either directly or through the office of the Attorney General, participate in the trial and did not otherwise tender any evidence.

13. After considering the evidence and the submissions tendered before him, the learned trial Judge, as already stated, concluded that NSSF had breached the agreement for sale. For relief, the Judge awarded the appellant Kshs.32,000,000 (already refunded) and interest thereon ante dated to 26th April 2004; rejected the claim for loss of bargain of Kshs.686,500,000 that was pegged on difference between the contract price and the value of the property *"on the date of trial or date of judgment"*; and also rejected the claim for costs allegedly incurred on feasibility and architectural fees as being too remote.

14. With regard to the Caution that had been registered against the title, the learned Judge found as a fact that the appellant was not the cautioner, but rather that the cautioners were Harish R. Patel and Bharat R. Manji claiming as *"purchasers under Gami Properties Ltd"* and therefore the appellant had *"no locus to complain about its removal*."

15. The appellant was not fully satisfied with the judgment and lodged this appeal. Whilst affirming the holding by the Judge that NSSF breached the sale agreement, the appellant complains that the Judge was wrong: in assessing damages for loss of bargain on the property as the difference between the contract price and\ the value of the property on 6th October 2008 (when NSSF refunded the deposit) instead of awarding damages based on the difference between the contract price and the value of the property as at the date of judgment, and as a result wrongly failed to award it Kshs.686,500,000.00. The Judge is also faulted for holding that the costs the appellant incurred in the preparation of feasibility studies and architectural plans was too remote; and in concluding that the caution on the property was not placed by the appellant and as a result dismissing the claim against the 2nd respondent.

16. In its cross-appeal presented on the eve of the hearing of the appeal NSSF faults the learned Judge for concluding that it breached the agreement for sale. According to it, the agreement for sale was rendered unenforceable on account of a mutual mistake. In what appears to be a departure from its plea in its statement of defence, NSSF contends that it sold the property to the appellant on *"as is basis"* and therefore the *"encroachment on the property in the form of an illegal road"* was part of the 15.2 acres that it contracted to sell to the appellant; that there was therefore no shortfall in the size of the property that would warrant the appellant to invoke *'the reduction of acreage clause'* within the sale agreement; and that the appellant's option was to accept the property as offered or to rescind the agreement on grounds of mutual mistake. Accordingly, NSSF prays that the judgement of the High Court should be varied or set aside and be substituted with an order dismissing the appellant's claim against it with costs.

17. At the hearing of the appeal, parties were represented by learned counsel. ***Mr. Issa Mansur*** and ***Miss. Ahomo*** appeared for the appellant. ***Mr. Ibrahim Adan*** appeared for the 1st respondent, while ***Mr. Eredi*** appeared for the Attorney General. Counsel relied on their written submissions which they orally highlighted during the virtual hearing.

18. For the appellant, it was submitted that the Judge erred in failing to award damages on the basis of the value of the property as at the date

of judgment as opposed to the date of breach. It was submitted that the appellant tendered into evidence a valuation report dated 11th July 2011 placing the open market value of the property at Kshs.816,500,000.00 on the basis of which the Judge should have awarded damages.

19. According to counsel, although previously courts used to rely on the value of the property as at the date of breach in determining the loss of bargain, the value to be considered is the value of the property subject matter of the suit on the date of trial or date of judgement in the suit. In support, reference was made to English decisions in ***Wroth & another vs. Tyler [1973] 1 All E R 897***; and ***Malhotra vs. Choudhury [1979] 1 All E R 186***; as well as to paragraphs 25-009 of the 19th edition of **McGregor on Damages**, among others.

20. With regard to the claim for special damages of Kshs.18,870,226.81 said to have been incurred in the preparation of feasibility studies and architectural plans, it was submitted that the evidence of the Quantity Surveyor was not controverted; those costs were only incurred after the appellant entered into the contract of sale with NSSF which was aware that the appellant was purchasing the property for development purposes; and that the learned Judge therefore erred in concluding that the claim was too remote.

21. As regards the removal of the caution, counsel faulted the Judge, finding that the directors of the company who lodged the caution were duly authorised to act on its behalf and that the distinction made by the Judge in concluding that the appellant was not the cautioner was misplaced. In that regard reference was made to the decision of the Supreme Court of Uganda in the case of ***United Assurance Company Ltd vs. Attorney General, SCCA No. 1 of 1998*** which was cited by this Court in the case of ***Arthi Highway Developers Ltd vs. West End Butchery Ltd & 6 others [2015] eKLR***.

22. It was submitted that in light of section 133 of the repealed Registered Land Act the Chief Registrar acted unlawfully and irregularly by removing the caution without notice or without an order of the court. Reference was made to the decision of this Court in ***Exclusive Estate Limited vs. The Registrar of Titles, Nairobi Registry & 5 others, Civil Appeal No. 135 of 2013***. It was urged that the second respondent did not at all participate in the proceedings before the lower court and did not tender any evidence to show that either notice of removal of the caution was served on the appellant or an order of the court had been obtained for its removal. Accordingly, it was submitted, the 2nd respondent should be held liable.

23. In opposition to the appeal and in support of the cross-appeal, Mr. Ibrahim Adan submitted that NSSF did not breach the agreement; that the contract was vitiated by a common mistake on account of an encroachment on the property; that the option that was available to the appellant upon the alleged realization that the property was smaller in size than 15.2 acres was to either seek a variation of the contract and if the variation was not accepted, to rescind the agreement and seek a refund of the deposit paid. Consequently, counsel urged, the contract remained open and subject to lapse through effluxion of time. It was submitted that the appellant should have elected to rescind the contract on account of encroachment by issuing a rescission notice but did not do so and the contract continued in existence. In that regard reference was made to the decision of this Court in ***Kinyanjui & another vs. Thande & another [1995-1998] 2 EA 159***.

24. It was submitted further that the appellant breached the agreement by failing to pay the balance of the purchase price by the completion date and NSSF was therefore at liberty to issue a completion notice in accordance with the Law Society conditions of sale and retain the deposit for breach but that

> *"having seen that there was a mutual mistake, elected not to treat the failure to pay the balance of the purchase price as breach but as common mistake.*

25. As pertains to the removal of the caution, Mr. Adan urged that the issue is moot as the claims for specific performance and injunction were abandoned. Furthermore, NSSF was neither notified of the placement of the caution nor did it instigate its removal and that it is likely the Chief Land Registrar removed it after due notice to the appellant. Further, that the Judge was right in holding that the caution was not lodged by the appellant and it could not therefore maintain a cause of action on that basis.

26. It was submitted further that if this Court is inclined to agree with the trial judge that NSSF breached the agreement, the argument by the appellant that damages for loss of bargain would be based on the valuation of land at the time of judgment would only hold if the appellant had a reasonable chance of pursuing a claim for specific performance. In this case, it was submitted, that was not tenable as the appellant accepted a refund of the deposit of Kshs.32,000,000.00 on 6th October 2008 and as the appellant did not lead any evidence as to the value of the property as at that date, its claim was properly rejected by the learned Judge.

27. Furthermore, it was submitted, special damages must be specifically pleaded and strictly proved. In this case the claim for Kshs.685,500,000.00 which the appellant claims as the value of the property, was not strictly proved and was properly rejected.

The case of ***Kenya Tourist Development Corporation vs. Sundowner lodge Ltd [2018] eKLR*** was cited.

28. In relation to the claim by the appellant, for Kshs.18,870,226.81 allegedly incurred in the preparation of feasibility studies and architectural plans, it was submitted that the learned Judge was right that the same was too remote as the same was not contemplated by the parties to be a consequence of breach of contract at the time of executing the contract. The English case of ***Hadley vs. Baxendale (1854) 9 Exch. 341*** and the decision of this Court in Johnson ***Mugwe Wanganga vs. Joseph Nyaga Karingi [2014] eKLR*** were cited.

29. ***Mr. Eredi*** for the 2nd respondent submitted that the caution was removed lawfully and procedurally; that under section 133 of the repealed Registered Land Act, one of the ways in which a caution could be removed was by an order of the Registrar; that under section 133 (2) of that Act, the Registrar had the discretion, on the application of any person interested, to serve notice on the cautioner warning him that his caution would be removed at the expiration of the time stated in the notice. Accordingly, it was submitted that the Registrar cannot be faulted for having removed the caution without informing the cautioner. In that regard a High Court decision in the case of ***Republic vs. Registrar of Titles Department of Land and another Ex parte National Museums of Kenya and 3 others [2016] eKLR*** was cited. It was submitted that where, as here, a body has statutory discretion it cannot be directed to exercise that discretion in a particular manner.

30. Moreover, counsel argued, the Judge was right in finding that the appellant was not the cautioner bearing in mind that a company is a separate legal entity from its shareholders and its directors as held in ***Salomon vs. Salomon (1897) A.C. 22;*** that as the caution was not registered by the appellant, it would not in any event have received notice.

31. In reply to the cross appeal, Mr. Mansur submitted that there was no mistake as claimed; that the agreement for sale had provision for a survey to be done to establish the acreage; that upon undertaking such survey the appellant communicated with NSSF and proposed a pro rata reduction of the purchase price but NSSF did not respond; that the decision by the learned trial Judge that NSSF breached the agreement is well founded and that the cross-appeal has no merit.

32. We have considered the appeal, the cross appeal, the rival submissions and the authorities cited in keeping with our mandate under Rule 29 of the Court of Appeal Rules and the principles in ***Selle vs. Association of Motorboat Co. Kenya & others [1968] EA 123***. The issues arising for our consideration are, firstly, whether as contended by NSSF in its cross appeal, the agreement was vitiated by common mistake and if so whether the Judge erred in concluding that NSSF breached the agreement. Secondly, whether in assessing damages for loss of bargain, the value of the property is the value on the date of trial or date of judgment or the date of breach of agreement. Third, whether the conclusion by the Judge that the claim for feasibility and architectural fees was too remote is well founded. And finally, whether the conclusion reached by the learned Judge that the appellant had no *locus standi* to complain about the removal of the caution is well founded.

33. We start with the question whether, as claimed by NSSF, the agreement was vitiated by mistake and whether the Judge therefore erred in concluding that NSSF was in breach of the agreement. We observe, at the outset, that there is no consistency in the position taken by NSSF in this regard. In its further amended defence in answer to the appellant's claim that it (NSSF) was in breach of the agreement for sale, NSSF pleaded that "*the parties were under a common mistake of fact that the actual acreage was 6.15 hectares*"; that "*the agreement for sale was vitiated by mistake of fact* "; that the appellant was labouring under the mistaken belief that "*the agreement for sale was still valid and subsisting*"; that as "*the agreement for sale was vitiated by mutual mistake*", NSSF was at liberty to deal with the property including selling to third parties; and that "*after the agreement for sale was vitiated there was no contract*…"

34. In its notice of cross-appeal, which as already noted was presented to the Court on the eve of hearing of the appeal, NSSF now complains that the Judge failed to appreciate that the *"illegal road encroachment"* on the basis of which the appellant claimed that the property was smaller in size could not result in a shortfall in the acreage as NSSF was selling the plot *"as is";* that the appellant could not therefore resort to the *"reduction of acreage clause"* in the agreement. In effect, NSSF is, as it were, blowing hot and cold. On one hand it seems to say there was a mistake as to size of the property whilst on the other hand it says there was no mistake as to size because the road encroachment was part of the property.

35. To compound the situation, the witness for NSSF Caroline Esendi Rakama in her testimony introduced yet another dimension to the alleged *"mistake"* namely that NSSF was mistaken in offering the property for sale to the appellant *"when there was an existing lease which provided"* a first option to the tenant to purchase the property. However, the learned Judge quite rightly declined to address this aspect of alleged mistake as the same had not been pleaded.

36. With respect, it is difficult to follow the oscillating defences put forth by NSSF. As stated, and it bears repeating, the plea in the notice of cross-appeal that property sold measured 15.2 acres as it was being sold *"as is"* including the road encroachment contradicts the averment in the amended defence that *"the parties were under a common mistake of fact that the actual acreage was 6.15 hectares"*. In rejecting the claim by NSSF that the agreement for sale was vitiated by mistake, the learned Judge expressed, correctly in our view, that *"the issue of reduced acreage and possible reduction of the purchase price was already contemplated within the terms of the sale agreement."* Clause 11 of the agreement for sale which provided that the appellant "*has inspected the property and is buying it in the condition in which it stands*" was qualified by a provision in the same clause that, "*this condition is subject to verification of survey and acreage. Any shortfall on the acreage shall reduce the total purchase price on pro-rata basis*."

37. The appellant's witness, Patrick Opiyo Andrew, (PW1) a land surveyor testified that he was engaged by the appellant to survey the property, which he did, and confirmed the area of the property to be 13.07 acres. Evidence was also led that following that survey, the appellant wrote letters to NSSF requesting it to engage its own land surveyor to verify the acreage of the property but NSSF never responded to those letters.

38. Based on the foregoing it cannot be said that the parties to the agreement for sale shared any misapprehension of fact. It was appreciated by both parties, and provision was made in the agreement for verification of the acreage. In the case of ***Kiplangat Arap Biator vs. Esther Tala Cheyegon [2016] eKLR***, this Court noted that in order to justify setting aside a contract on grounds of mistake, it should appear to the court that there has been a mistake common to both the contracting parties, and that the agreement purports to have been expressed in a deed or instrument in a manner contrary to the intention of both. The Court affirmed the English decision in ***Moynes vs. Cooper [1956] 1 All ER. 450***, where it was held that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental, or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake; that a contract is also liable to be set aside in equity if the parties were under common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.

39. Based on the foregoing, we are unable to hold that the agreement was vitiated by mutual mistake.

40. As to whether NSSF breached the agreement for sale, there is no doubt that at the time the parties entered into the sale agreement, NSSF had already, by a lease dated 27th November 2003, leased the property to Aviline Services Limited for a term of six years which was to expire on 31st December 2009. That lease had provision that Aviline Services Limited would "*have the first option to purchase*" the property and only if it failed to enter into a sale agreement with NSSF would the latter consider other offers for the purchase of the property. That notwithstanding, NSSF did enter into the agreement for sale with the appellant on 2nd June 2004 during the currency of that lease. Aviline Services Limited then exercised its option to purchase, and thereafter the property was subdivided and transferred. We are therefore in

agreement with the learned trial Judge when he concluded in the impugned judgment that:

> ***"The sale agreement was in subsistence even on the date that NSSF subdivided the suit property thereof to third parties. In doing so NSSF breached the sale agreement."***

41. We conclude, therefore, that there is no merit in the cross-appeal. It is accordingly dismissed with costs to the appellant.

42. Turning to the appeal, there is firstly, the matter of removal of the caution. According to the appellant, it had on 23rd June 2004 registered a caution against the property to secure its interest which it claimed was unlawfully removed by the 2nd respondent, thereby facilitating the subdivision and transfer of the resultant plots to third parties. In that regard, it was appellant's case that the 2nd respondent was required under Section 133 of the repealed Registered Land Act to issue notice of removal of the caution which it did not; that by failing to follow the law in removing the caution, the 2nd respondent did not only aid and induce Aviline Services Limited to breach the contract but also became an accomplice in the fraud and consequently the 2nd respondent "*is liable for all the losses, damages, expenses and costs*" incurred by the appellant.

43. The learned Judge held that the appellant was not the cautioner and did not therefore have *locus standi* to complain about the removal of the caution. The learned Judge pronounced, correctly in our view, that a limited liability company is a distinct legal entity from its directors and shareholders. (See ***Salomon vs. Salomon***) (supra). However, the caution in question, dated 22nd June 2004, was in these terms:

> ***"We Harish R. Patel and Bharat R. Ramji of P. O. Box 44861 Nairobi claim interest as Purchasers under Gami Properties Limited in the above-mentioned title and forbid the registration of dealings and making of entries in the register relating to the title…without my consent until the caution has been withdrawn by me or removed by order of the Court or the Registrar."***

In the accompanying statutory declaration, the said Harish R. Patel and Bharat R. Ramji declared that they are directors of the appellant and that on 2nd June 2004 they entered into an agreement for sale "*as Gami Properties Limited*" for the purchase of the property and that in view of the ongoing transaction they wished to register a caution against the title pending completion of the sale.

44. By a notice of registration of caution dated 8th July 2004, the Land Registrar, Nairobi gave notice to NSSF of the registration of the caution. In that notice the Land Registrar notified NSSF that Harish R. Patel and Bharat R. Ramji claimed, "*interest as purchasers under Gami Properties Limited*" and that no dealing with the land could be registered until the caution is removed. It is surprising therefore for NSSF to claim, as it did at the trial, that it was unaware of the registration of the caution. Be that as it may, Section 133 of the repealed Registered Land Act provided as follows:

> ***"133. (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.***
>
> ***(2) (a) The Registrar may, on the application of any person interested, serve notice on the cautioner warning him that his caution will be removed at the expiration of the time stated in the notice.***
>
> ***(b) If at the expiration of the time stated the cautioner has not objected, the Registrar may remove the caution.***
>
> ***(c) If the cautioner objects to the removal of the caution, he shall notify the Registrar in writing of his objection within the time specified in the notice, and the Registrar, after giving the parties an opportunity of being heard, shall make such order as he thinks fit, and may in the order make provision for the payment of costs."***

45. Under that provision there were three ways, as counsel for the 2nd respondent submitted, in which a caution could be removed. First by the cautioner withdrawing the caution. Second, through an order of the court, and third by order of the Registrar. No evidence was led on behalf of the 2nd respondent as to the circumstances under which the caution was removed. The 2nd respondent did not participate in the proceedings in the lower court despite having been served with the pleadings. Given the positive averment in the plaint and the assertions in the evidence tendered on behalf of the appellant that the caution was irregularly and unprocedurally removed, it was incumbent upon the 2nd respondent to explain the circumstances under which the caution was removed. The 2nd respondent should have explained whether the removal was pursuant to a court order; whether there was an application for its removal; or whether the 2nd moved *suo motto* to remove the caution.

46. Moreover, the appellant's advocates' letter dated 7th December 2006 addressed to the Chief Land Registrar seeking an explanation of the circumstances under which the caution was removed went unanswered. There is, therefore, no factual basis to support counsel's claim that the Registrar moved *suo motu* in removing the caution. That claim is speculative and made in a vacuum without any supporting evidence.

47. In our view, unless the caution was removed on the basis of an order of the court, the cautioner, whether it was the appellant, or the directors of the appellant who registered the caution, was entitled to receive notice of warning that the caution would be removed. Given the uncontroverted evidence tendered by the appellant, we are satisfied and hold that the caution was irregularly and illegally removed, and the 2nd respondent is liable for its removal. We shall advert to the effect of this later in our judgment.

48. Having upheld, as we have done above, the decision of the trial Judge that NSSF breached the agreement for sale, we turn to consider the question of damages. In this regard, the appellant complains that despite the established principle of assessment of damages for breach of contract being the date of judgment, the learned Judge chose to deviate from that principle and elected to follow a restrictive approach.

49. In its further amended plaint, the appellant averred that the loss of bargain it incurred was the difference between the purchase price and the market value of the property, which based on the valuation report aforementioned was Kshs.816,500,000. It therefore claimed Kshs.686,500,000.00. The learned Judge summed up the appellant's contention in that regard as follows:

> ***"So, what is the measure of damages? As submitted by counsel for Gami, the law generally has been that Damages for breach of Contract of sale of land is the difference between the contractual price and the market price on the date of breach. However, counsel Issa for Gami has forcefully argued that this court should break from this traditional approach and chart a new course and hold that his client is entitled to damages assessed at the value of the suit property on the date of judgment.***

50. After considering the English decisions cited in support of that proposition, namely, ***Wroth & another vs. Tyler*** *(supra)*; ***Malhotra vs. Choudhury*** *(supra)* and to the passages cited from **McGregor on Damages** and the learned Judge expressed that the rationale for pegging the damages on the value of land at the date of judgment may *"ring more true in certain instances in Kenya. However, it cannot be a general rule and its applicability must turn on the nuance of each case."* The Judge went on to state that:

> ***"it may be suitable, for instance, where an aggrieved party presents a case for damages as an alternative for specific performance with … good prospects of success in the claim for specific performance and pursues it diligently but for reasons out of his control is unable to obtain that relief and the court makes an award of damages in lieu. If the litigation has drawn on for a long time and property prices increased sharply then there could be justification in assessing damages on the value of the lost property at the date of judgment."***

51. Applying that principle, the learned Judge concluded that in the circumstances of the present case, the proper course for the court to take was to adopt the traditional and more restrictive approach considering, firstly, that the caution was not lodged by the appellant and, secondly, that it *"pressed on for specific performance until 24th February 20015 (when it amended its pleadings) when it ought to have been pretty obvious that by accepting the refund of Kshs.32,000,000.00 on 6th October 2008 only a plea of damages was tenable."* With that, the Judge concluded that the appellant's loss "*would be the difference between the contract price and the value of the suit property in 2008 (just 2 years after the breach) their deposit having been paid back."*

52. As already indicated, the appellant's grievance is that in reaching that conclusion, the learned Judge "*misdirected himself in assessing the damages on the loss of bargain on the property as the differencebetween the contract price and the value of the suit property on 6th October 2008 when the 1st respondent refunded the deposit to the appellant and not the difference between the contractual price and the value of the suit property as at the date of judgment*."

53. We have considered the arguments in that regard. As stated in the case of ***Gicheru vs. Morton & Another (2005) KLR 333*;**

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damages to which the appellant was entitled to".***

We have to consider, therefore, whether the learned Judge acted upon some wrong principle as urged by the appellant.

54. In their book, **The Law of Real Property,** 8th Edition, Page 694, Sir Robert Megarry and Sir William Wade state as follows:

> ***"a) The General Rule.***
>
> ***An action for damages is the primary remedy under the law of contract, though it is less important in relation to contracts for the sale of land than specific performance. The measure of damages is the loss to the claimant from the non-performance of the contract. A vendor, for example can recover the difference between the price agreed to be paid and the net value of the property left on his hands, giving credit for any deposit paid by the purchaser. A purchaser can claim for the loss of a bargain, i.e the amount by which the net value of the property when conveyed to him at the due date would have exceeded the purchase price. But the court may order such damages to be assessed at some other date where justice so requires; this may be the date of the hearing if the property has risen in value meanwhile. Where the purchaser claims damages for his loss of bargain he cannot in addition recover his costs, e.g. for investigation of title. If he is to be placed in the position in which he would have been had the contract been performed, he would necessarily have incurred those costs."*** [Emphasis added]

55. In ***Halsbury's Laws of England , Volume 12, 4th Edition*** at paragraph 1183 it is stated:

> ***"…Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain...."*** [Emphasis added]

56. In our view, the rationale in English cases on which the appellant relied, namely ***Wroth vs. Tyler*** and ***Malhotra vs. Choudhury*** for considering the value of the property as at the date of judgment is on account of the fact that taking normal measure the value of the land at the time contractually fixed for completion "*could be grossly unfair to a buyer if prices had escalated between the contractual date for completion and the date of judgment…as the award he obtains will fall far short of giving him the means of acquiring an equivalent property*."

57. The **Wroth** case decision represents a departure from *"the general principle of compensation"* that the value of the property is to be taken *"at the time of breach."* In ***Southern Shield Holdings Ltd vs. Estate Building Society [2013] eKLR*** for instance, where it had been urged that a purchaser is entitled to damages beyond return of deposit for loss of bargain, this Court proceeded on the basis that the decision in ***Malhotra vs. Choudhury*** which had been cited in support was decided on its facts. Furthermore, in the **Wroth** the court invoked the equitable jurisdiction established by Lord Cairns *'Act to grant damages in substitution for specific performance."*

58. In the present case, the learned Judge did not, as counsel for the appellant appears to suggest, pronounce that the value of the property the subject of the suit cannot be the value on the date of trial or date of judgment for purposes of determining the loss of bargain. Rather, we understand the learned Judge to have pronounced that each case must be decided on its own facts and circumstances and that in the circumstances of this case, it was not appropriate to take the value of the property beyond when the deposit was refunded.

59. In the view of the Judge, with which we agree, the appellant's claim for specific performance did not have any prospect of success. Whereas the appellant claims that it was only after its application for temporary injunction was declined by the lower court in its ruling on 4th April 2011 that it realized its claim for specific performance was untenable and amended its claim to seek damages in lieu of specific performance, we note that the appellant was alive to the fact that the property had been subdivided and transferred long before that. On 16th August 2006 for instance, the appellant wrote to Aviline Services Limited as follows:

> *"Ref: Purchase of Nairobi block 98/74, 98/75 Along Mombasa Road, Belvue- Nairobi (original Nairobi block 98/73)*
>
> *The above subject matter and your previous discussions between yourselves and the undersigned refers.*
>
> *As above, we wish to express our offer to purchase the two parcels of land i.e. Nairobi Block 98/74 and 98/75 (original Nairobi Block 98/73) for Kshs.175,000,000…*
>
> *The same parcels were offered to us by NSSF…where contractual documents were signed…*
>
> *We strongly feel that the offer hereof tendered is reasonable and if acceptable to yourselves, kindly contact us for further consultation…"*

60. Subsequently on 7th May 2007 the appellant's advocates wrote to Aviline Services Limited complaining that the property had been subdivided and transferred. Based on the foregoing, the learned Judge was justified in expressing that the appellant unrealistically pressed on for specific performance when it was *"pretty obvious"* that only a plea for damages was tenable.

61. We are accordingly unable to fault the learned Judge when he declined the invitation to assess damages on the basis of the valuation report submitted on grounds that the appellant

> ***"pressed on for specific performance until 24th February 2015 (when it amended its pleadings) when it ought to have been pretty obvious that by accepting the refund of Kshs. 32,000,000.00 on 6th October 2008 only a plea of damages was tenable"*** and that the appellant's loss ***"would be the difference between the contract price and the value of the suit property in 2008 (just 2 years after the breach) their deposit having been paid back."***

62. We hold therefore that the learned Judge did not in reaching that conclusion make an error of principle so as to give this Court a basis for interfering with the decision.

63. Finally, there is the claim for Kshs.18,870,226.81 said to have been incurred in preparation of the feasibility studies, and architectural plans which the Judge rejected on grounds that it *"is far too remote"*. In the well-known case of ***Hadley & Another vs. Baxendale & Others [1843-60] ALL ER 461*** on which the learned Judge relied, the court stated that:

> ***"... Now we think the proper rule in such a case as the present is this:.....Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.....Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule"***

64. As the Judge stated, no evidence was tendered to the effect that the appellant communicated its intention to carry out a feasibility study or the nature of development it proposed to put up on the property. We are unable to discern any error of principle in the approach the Judge took in declining to allow this head of claim.

65. What remains to consider is the effect of the irregular and unprocedural removal of the Caution by the 2nd respondent. We hold that the 2nd respondent is jointly and severally liable, alongside NSSF, to satisfy the judgment of the trial court. To that extent only, the appeal succeeds.

66. The final orders are that the Judgment of the trial court is hereby varied to the extent that the 2nd respondent is jointly and severally liable to satisfy the decree of the trial court. The cross appeal fails and is hereby dismissed.

The appellant is awarded half costs of the appeal and costs of the cross appeal.

Dated and delivered at Nairobi this 23rd day of April, 2021.

R. NAMBUYE

…….

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

……..…….

JUDGE OF APPEAL

K. M'INOTI

…….……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR