IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 242 OF 2018

BETWEEN

MOHAMMED JAWAYD IQBAL

(Personal representative of the Estate of the late ***Ghulam Rasool Jammohamed*****).....APPELLANT**

AND

GEORGE BONIFACE MBOGUA

Alias

GEORGE BONIFACE NYANJA …….....RESPONDENT

(Appeal from the judgment and decree of the Environment and Land Court at Milimani ***(Bor J)*** *dated* ***31st May, 2018***

in

ELC NO. 1107 OF 2013)

****

JUDGMENT OF THE COURT

By this appeal, the appellant **Mohammed Jawayd Iqbal** who is the personal representative of the Estate of the deceased **Ghulam Rasool Jammohamed** seeks to overturn the verdict of the Environment and Land Court at Milimani (Bor, J.) dated 31st May, 2018. That judgment and decree allowed the claim by **George Boniface Mbogua** *alias* **George Boniface Nyanja (Nyanja)** that the suit property being **L.R. NO. 1/387** along Ngong Road, Nairobi, be transferred to him by the appellant.

The essence of the claim by Nyanja was captured on the following five paragraphs of the plaint as amended on 14th August, 2014;

> ***"4. In 1985, the plaintiff and the said Ghulam Rasool deceased entered into a sale agreement whereby the plaintiff was to buy the deceased?s parcel of land L.R. No. 1/387 situated along Ngong road, Nairobi.***
>
> ***5A. Pursuant to the said Sale Agreement the plaintiff paid to the deceased and his agents Kshs.2,016,295 and took possession of the suit premises as a purchaser for value.***
>
> ***6A. The defendant was appointed the personal representative of the estate of the late Ghulam Rasool Jammohamed (Deceased), having been issued with limited grant of letters of administration ad litem for purposes of representing the deceased?s estate after the death of the administrator of the estate of Ghulam Rasool, that is, the late Shariff Chaudry.***
>
> ***7. The defendant while aware of the full payment of the purchase price by the plaintiff has failed to transfer the said plot L.R. No. 1/387 to the plaintiff.***
>
> ***8. Despite demand and notice of intention to sue having been given, the defendant persists in his failure, neglect or refusal to effect the necessary transfer of title to the plaintiff."***

And he prayed that the defendant therein, now the appellant, be ordered to transfer the suit property to him and grant him costs of the suit.

The suit was resisted by the appellant by way of a defence and counterclaim as amended on 6th June, 2014. He stated that by a letter dated 6th August, 1985 the deceased?s advocates forwarded to Nyanja?s advocates a sale agreement in respect of the suit property, some of the terms whereof were cited. The said agreement was, however, not signed by Nyanja and was never returned to the deceased or his advocate. The appellant also pleaded to the following effect;

- *He denied full payment of the purchase price at any time and denied further that Nyanja took possession upon payment of the full purchase price.*
- *On or about 16th September, 1985 the completion period was extended to 31st December, 1985 and completion documents sent to Nyanja's advocates two days later.*
- *In November, 1985 Nyanja's advocates drew transfer documents and the deceased's advocate later returned them duly executed and sought the balance of the purchase price.*
- *On 11th December, 1985 the deceased's advocate issued a 21 days completion notice, an undertaking as to the balance not having come forth.*
- *On 8th January, 1986 Nyanja paid Kshs.516,295 towards the balance of the purchase price and prayed for possession pending payment of outstanding amounts.*
- *By an undated letter delivered to Nyanja's advocates on 19th January, 2016 and another dated 31st January, 1986; Nyanja was put on notice that interest would be charged on the balance at 16% per annum and that rent for the occupancy of the property would be charged at Kshs.15,000 per month from 1st January, 1986.*
- *On 21st February, 1986 Nyanja's advocate expressed the hope to soon complete having obtained a loan from Housing Finance Company Limited and stated that the previous tenant had been paying Kshs.8,000 per month in rent.*
- *It was therefore acknowledged that a balance of the purchase price was still outstanding as at 31st January, 1986 and rent was agreed at Kshs.15,000 per month.*

- *The total payments made towards the purchase price amounted to Kshs.1,516,295 leaving a balance of Kshs.483,705 the non-payment thereof amounted to a repudiation and cancellation and recession of the contract by Nyanja which the appellant accepted as terminating the agreement and discharging him.*

In the amended counterclaim, the appellant claimed rent for the period 1986 to 2011 amounting to Kshs.25,020,000 and Kshs.200,000 per month *"till judgment is entered."* He also sought interest at court rates and costs.

Nyanja filed a reply to the amended defence and defence to the counterclaim and; denied liability to pay interest; denied that time was of the essence; reiterated that he paid Kshs.2,016,295 towards purchase of the suit property; stated that he occupied the suit property from 4th January, 1986 as a purchaser for value; admitted his advocates? receipt of the executed conveyance, re-conveyance and clearance certificate but denied they were to be used only on payment of the balance; denied agreeing to be a tenant at Kshs.15,000 per month; asserted taking possession as a purchaser who entered the transaction with the deceased?s successor and took responsibilities as an owner who has never paid rent; denied that the purchase price had not been paid in full and that the agreement was repudiated and the appellant discharged; and reiterated full payment.

In the defence to the counterclaim as amended, Nyanja repeated that he occupied the suit premises as owner and was never a tenant of the deceased or his estate, the transaction between him and them being for purchaser per the agreement. He prayed that the amended counterclaim be dismissed with costs.

The trial proceeded before the learned Judge with Nyanja testifying on his own behalf and calling **Judy Wanjiru Karanja (PW2),** an advocate of the High Court of Kenya who produced the various documents related to the transaction from the file of Nyanja?s then advocate who was her late father. For the appellant, **Mr. Mohammed Akram Khan (DW1),** the advocate who was involved in the transaction testified, as did **Moses Mureithi Njuguna (DW2)** a registered and Practising Valuer and principal partner at Zenith (Management) Valuers Limited who carried out a valuation on the suit property for purposes of historical rent assessment and prepared a report, which was produced in evidence. The learned Judge then delivered the judgment in favour of Nyanja, effectively ordering specific performance of the sale agreement and dismissing the appellant?s counterclaim with costs.

Aggrieved by that decision, the appellant in his memorandum of appeal raised some thirteen grounds of appeal complaining, in summary, that the learned Judge erred and misdirected herself by;

- *Failing to analyse and appreciate the appellant's evidence and finding that he had failed to prove his counterclaim.*
- *Upholding the sale agreement by failing to appreciate that Nyanja was in actual breach of the agreement by failing to pay the balance of the purchase price disentitling him to success.*
- *Finding, without evidence, that Kshs.500,000 had been paid yet the demand made on 11th December, 1985 took into account the Kshs.500,000 from Nationwide Finance Company that was set to mature in 3 months.*
- *Ignoring and failing to appreciate that the letter of 11th December, 1985 restated that time had been of essence.*
- *Finding that the appellant was not entitled to 16% interest on the delayed balance of purchase price.*
- *Failing to appreciate that the sale agreement was rescinded by the letter dated 22nd February, 1986.*
- *Granting prayers that unlawfully deprived the appellant of legitimate interest in property without fault.*

The appellant therefore prayed that the appeal be allowed, the judgment and decree be set aside, and in substitution therefor this Court do

grant the prayers in the counterclaim.

Both parties filed written submissions together with bundles and digests of authorities, as agreed at case management, which were highlighted before us during the plenary hearing of the appeal.

Before the hearing of appeal proper commenced on 25th June, 2019, Nyanja?s learned counsel insisted, as was his right, on the hearing of a motion dated 29th March, 2019 seeking two substantive prayers namely;

> ***"1.That this Honourable Court do order the appellant/respondent to deposit the sum of Kshs.5,000,000 within 30 days being the approximate costs payable in this appeal and the Superior Court under the Advocates Remuneration Order;***
>
> ***2. That this Honourable Court do order that the Civil Appeal No. 242 of 2018 be stayed pending the deposit of such security and failure thereto the appeal be struck out with costs."***

The grounds in support of the motion included the following;

> ***"6. That Ghulam Rasool Jammohamed passed away in 1986 and no assets of his remain undistributed;***
>
> ***7. The subject matter of the suit was Kshs.2 Million and the Counter Claim was Kshs.25 Million with interest at court rates from 1989. Together with the costs of the appeal, under the advocates remuneration Order, the costs in both the Superior Court and this Honourable Court will be approximately Kshs.5,000,000.***
>
> ***8. The appellant/respondent, if unsuccessful in the proceedings, would be in the circumstances unable to pay costs. The applicant stands to suffer great prejudice as he will be left with a paper judgment despite being taken through frivolous proceedings;***
>
> ***9. Mohammed Jawayd Iqbal is a foreigner who is not resident in Kenya, has no fixed abode or known assets and is therefore an administrator of non-exiting estate;***
>
> ***10. The appeal is hopeless in light of admissions and previous ruling on the issue of payment of purchase price;***
>
> ***11. That the amount sought as security is reasonable and shall not impede access to justice. The security of costs will ensure that the respondent/applicant is not left without recompense for any costs or charges payable to him;***
>
> ***12. That the appeal is scheduled for hearing on the 25th June, 2019 and it is in the interest of justice that the application herein is heard and determined before the said date or before the hearing of the appeal."***

The motion was supported by Nyanja?s affidavit sworn on the 29th March, 2019 reiterating the grounds. **Mr. Peter King'ara**, his learned counsel stressed in arguing the application that the appellant lives in the United Kingdom with no known assets in Kenya.

Even though the appellant did not file a replying affidavit, his learned Senior Counsel, **Mr. Ahmednassir Abdullahi** opposed the application terming it, picturesquely, as *"presumptuous and premised on a self-induced fallacy that the appeal has no chances of success."* He went on to urge that the Kshs. 5 Million sought has absolutely no basis in law as security for costs in this Court is prescribed by statute and the appellant did deposit the requisite sum of kshs.6,000 on 18th July, 2018.

He urged us to dismiss the motion.

As the motion was filed when a hearing date had already been assigned for the appeal, and as the appeal itself was ready for hearing on the scheduled date, we rejected off-hand the attempt to stay it to pave way for the hearing of the application for security for costs pending appeal as, it was in fact overtaken by events. We directed that we would pronounce ourselves on security for costs in this judgment.

Security for costs in civil appeals in this Court is provided for in **Rule 107(1)** of the **Court of Appeal Rules, 2010** in simple terms:

> ***"Subject to rule 115 [which deals with exemption or relief from fees and security]; there shall be lodged in court on the institution of a civil appeal as security for the costs of the appeal the sum of two thousand shillings."***

Even though ***sub-rule 3*** does provide that the Court may at any time, if it thinks it fit, direct that further security for costs be given, we have no doubt that such further security must bear a resemblance to, and must not be too far removed from, the initial sum required under ***sub-rule 1***. We think therefore that, bearing the statutory sum of Kshs.2,000 and considering further that quantum of fees provided for under Part 3 of the Second Schedule to the Rules, the sum of Kshs. 5 Million sought by Nyanja is so extraordinarily high that this Court cannot grant it in respect of an ordinary civil appeal as the present one is.

It is not lost to us that the motion also cites **Order 42 Rule 14** of the **Civil Procedure Rules** which, other than being inapplicable to proceedings before this Court, may in all probability have misled the applicant as to the conditions, principles and quantum of security for costs. We find the said motion to be devoid of merit and also overtaken by events now that the appeal has been heard. It is accordingly dismissed with costs being in the appeal.

Addressing us on the appeal, Mr. Abdullahi stated that the decisive issue herein is whether Nyanja paid the full purchase price for the suit

premises and, if not, the consequences of such failure on the sale contract. He asserted that a consideration of the testimony of the three witnesses who testified on the issue leads to the *"inescapable conclusion"* that Nyanja did not pay the purchase price in full and that giving full faith and credit to the evidence of the advocate for the deceased and the appellant, Nyanja did not complete the transaction as he left unpaid Kshs.500,000, which remains unpaid to date.

Counsel faulted the judgment as fraught with *"brevity and superficial analysis of the evidence and the law"* and that the learned Judge failed to analyse the evidence in support of the counterclaim and jumped to a conclusion that had no basis in law. He contended that the ***ratio decidendi*** of the judgment was at paragraph 40 thereof yet the conclusion the Judge arrived at was at variance therewith. He insisted that Nyanja?s failure to pay the purchase price in full was a total repudiation of the contract.

He rejected as unfounded Nyamweya J?s observation at interlocutory stage that the purchase price had been paid in full since such observation was not founded on evidence and was properly not relied on by the learned Judge.

Opposing the appeal, Mr. King?ara was also of the view that the critical issue herein is whether the full purchase price was paid. He contended that the deceased and Nyanja were professional colleagues in architecture who trusted each other. He maintained that the full purchase price was paid and that Mr. Khan, Advocate, admitted as much. Nyanja was put in possession as a purchaser and not as a tenant and there in fact was no lease agreement for the premises. He concluded his submissions by suggesting that the appellant or his successor administrator of the deceased?s estate are impelled by greed, having *"seen an opportunity to make a penny"* and so want to keep both the money and the suit property.

In his reply, Mr. Abdullahi stated that even if Nyanja *"were given the whole day"* he could not provide evidence of payment of the contentious Kshs.483,705 which counsel stated was still outstanding and was prayed for in the counterclaim. He criticized the learned Judge for falling back on the *"they were friends"* narrative to supply the want of evidence of that amount having been paid. He asserted that Nyamweya, J. while dealing with an application for interlocutory injunction had heard no evidence and did not make a finding that full payment had been made.

Both counsel drew our attention to various decided cases in their respective digests that they have cited in their written submissions. We have given due consideration to those authorities, the rival arguments and the entire record, consistent with our duty as a first appellate court to proceed by way of a re-hearing and to subject the evidence to a fresh and exhaustive re-evaluation before arriving at our own inferences of fact, while aware that, unlike the trial court, we have not had the benefit of hearing and observing the witnesses and will make due allowance for it. See **Rule 29(1)(c)** of the Court of Appeal Rules; ***PETER -vs-SUNDAY POST LIMITED [1958] EA 424, SELLE -vs ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] EA 123.***

Both parties agree that the decisive point in this appeal is a determination of whether or not Nyanja did pay the full purchase price. He maintains that he did, while the appellant?s long-held position is that nearly Kshs.500,000, to be precise Kshs.483,705, was never paid by Nyanja.

From our own perusal of the record, it is not in dispute that the deceased on the one hand and Mr. & Mrs. G. B. Nyanja on the other did agree that the latter would buy the suit property from the former at the price of Kshs.2,000,000. It is a peculiar aspect of this case that even though the terms of the transaction were reduced into a sale agreement prepared by the deceased?s advocate, sent to Nyanja?s advocates and clearly acted upon by the parties; the said agreement was never dated nor signed by the parties. We think that omission has certain legal consequences even though neither party addressed us on it. Still the terms of the agreement, relied on and exhibited by both parties, are uncontested and they included the following;

> ***"The purchase price is Kenya Shillings Two Million (Kshs.2,000,000/=) payable as follows:-***
>
> ***(i) Kshs.200,000/= has been paid to the Vendor the receipt of which sum the Vendor hereby acknowledges.***
>
> ***(ii) Kshs. 300,000/= on the signing of the agreement to Mr. M. A. Khan, Advocate for the Vendor who shall hold the said sum as a stakeholder pending completion.***
>
> ***(iii) The balance of K.shs.1,500,000/= is to be paid on completion date hereinafter stated and against the delivery of the duly executed transfer of this property in favour of the Purchasers. Completion Date: On or before the 31st October, 1985."***

It also contained other conditions as follows;

> ***"2. Time shall be deemed to be the essence of contract for all the purposes of this agreement;***
>
> ***...***
>
> ***7. The property sold is let on a lease expiring on the 31st October, 1985 and the purchasers are aware of it;***
>
> ***...***
>
> ***If the payment is delayed beyond the completion date by the purchasers then the rate of interest shall be 16% per annum on the balance amount herein payable;***

10. All the Law Society conditions of sale unless expressly excluded shall apply to this Agreement of Sale."

From the first **clause** of the agreement we have cited, the deceased at signing of the same acknowledged receipt of some Kshs.200,000. Even though completion date was 31st October, 1985, payment had not been made and, by a letter dated 20th November, 1985, M. A. Khan, advocate for the deceased, forwarded in his own words the following documents to Nyanja?s advocates to facilitate completion;

"1. Three copies of the Conveyance duly executed by my client but undated;

2. The Re-conveyance of the existing Mortgage dated 17th October, 1985 registered in Vol N2 Folio 353/17. This Re-conveyance means that the Title is now clear;

3. Valid clearance certificate valid until 22nd November, 1985."

After stating that the rest of the documents were with Nyanja?s advocates, Mr. Khan stated as follows in the letter that was copied to the deceased;

"The above documents are forwarded to yourselves on your strict professional undertaking not to make use of these until you are in a position to pay to me the balance of the purchase price now outstanding and payable in respect of the purchase of this property by your client.

Please acknowledge receipt of the above documents and let me have your undertaking."

Three weeks later, and no payment having been made, M. A. Khan wrote yet another letter dated 11th December, 1985 stating in part as follows;

"I refer to my letter of the 20th November, 1985. I also refer to the subsequent conversations that the writer has had with your Mr. Njoroge. No payment towards the balance of the purchase price neither the undertaking has been received from yourselves so that this sale could be completed.

I would draw your attention to the fact that this transaction was not subject to any loans and it was agreed that in this transaction time would be of essence of the contract. Further the completion was agreed to be on the 31st October, 1985.

I am now instructed to give you this Notice which I hereby do that your client is in breach of the Agreement to complete this sale and I do hereby give your client through this letter 21 days? notice to complete the sale failing which my client will forfeit the monies paid herein and rescind the Agreement to sell."

The letter went on to demand that Nyanja not interfere with the tenants then on the premises, and to also indicate that the arrangements he had made with Nationwide Finance Company to pay to the deceased were quite unsatisfactory and not acceptable to the deceased. The letter ended with *"TAKE NOTICE that time is again being made the essence in this matter."*

Nyanja did not pay the balance to complete the transaction and on 3rd January, 1986, M. A. Khan wrote to Nyanja?s advocates indicating that due to the default the deceased was thereby rescinding the agreement. The deposit paid was being forfeited and the deceased was free to sell the property to any other purchaser. He requested a return of the documents.

That threat to rescind the contract seems to have jolted Nyanja, and the parties entered some arrangement captured in an undated letter from M. A. Khan delivered to Nyanja?s advocates on 29th January, 1986 but the contents whereof were repeated in a letter dated 31st January, 1986 stating, in part;

"I refer to the sale of the above property to your client. It is very much regretted that although your client was given possession of the property on the 4th instant on the clear understanding that he will take steps to have the sale completed nothing has been heard on this subject. You will recollect your Mr. Njoroge offered to pay rent for the occupation and even your client offered to pay rent but my client gave possession since it was assured to him that this matter would be completed without any more delay. In pursuance of his assurance that he will complete the sale a sum of kshs.500,000/= towards the purchase price was also paid by your client through Nationwide Finance Company Limited."

The letter however lamented the silence of Mr. Nyanja and his advocates and of Mr. Khan?s and the deceased?s abortive attempts to reach them to progress the transaction. The letter gave yet another 21 days? notice to complete, in default of which the agreement would be rescinded and vacant possession sought. It repeated that time was being made of the essence.

By a letter dated 21st February, 1986 Nyanja?s advocates indicated that he had been granted a loan of Kshs.600,000 by Housing Finance Company of Kenya towards part payment of the purchase price and that he was promising to deposit the remaining balance of Kshs.200,000 with them shortly.

That letter did not go well with the deceased, and his lawyer, M. A. Khan by a letter dated 22nd February, 1986 pointed out Nyanja?s default of completion and his silence on being sought. He reiterated that the sale was not subject to any loan or conditions and gave further notice that the agreement *"is hereby cancelled and rescinded. The deposits so far paid are hereby forfeited."* It demanded the documents of title and *"vacant possession at the end of 28th February, 1986."* It was followed by a letter dated 3rd March, 1986 by which M. A. Khan gave

notice that if he did not receive the title documents by 4.00pm on 4th March, 1986, he would immediately report Nyanja?s advocate to the Law Society of Kenya. He urged them to release the documents to avoid any unpleasantness.

That was the state of the transaction when the deceased departed this life on 19th March, 1986 and **Mohamed Sharif Chaundry** was appointed the Administrator of the Estate of the deceased.

On Chaudry?s instructions, Mr. Khan wrote to Nyanja?s advocate giving notice that unless there was completion within 30 days he would file suit for specific performance. He demanded Kshs.1,200,000 being Kshs.1,000,000 balance of the purchase price; Kshs.120,000 being rent from January to August, 1986 and Kshs.80,000 being interest for the same period.

In response, Nyanja?s advocates wrote on 5th August, 1986 confirming that he would complete the transaction *"before the 31st August, 1986."* He then stated as follows;

> ***"However, we would like to clarify the points raised in your letter as hereunder:-***
>
> ***The balance of the purchase price is Shs.800,000/=. Our client had paid a sum of Shs.1,200,000/= before the death of the deceased.***
>
> ***In your letter you raise the issue of rent to be paid by our client. The understanding between your client and ours was that upon payment of any money in excess of 10% of the purchase price, he would get possession of the premises but not as a tenant. He would occupy the same and start developing it to his taste. So the question of rent does not arise.***
>
> ***As regards interest for the balance of the purchase price our client does not see the basis for this. Our client paid Shs.1,000,000/= in excess of the required deposit. This has been earning more interest for your client than the balance and it would be very unfair to call upon our client to pay more in this regard.***
>
> ***We confirm that we shall obtain the clearance certificate.***
>
> ***In view of the fact that our client is now ready to complete this transaction, we consider it imperative to limit the issues to the payment of the balance of the purchase price only and finalise the matter. Kindly confirm this so that we may have the said balance paid to you to enable this matter to come to its logical conclusion."***

They were to write again on 28th August, 1986 in apparent response to a query as to how the figure of Kshs.1,200,000 was arrived at by stating that it was paid *"by instalments of 200,000/=, 500,000/= and 500,000/=."*

There was a pull in correspondence between the parties then, on 29th April, 1987, M. Khan advocate wrote to Nyanja?s advocates referring to a meeting with Mr. Njoroge advocate who stated that Nyanja was in a position to complete the sale. Mr. Khan sought confirmation within 10 days failing which he would file suit for specific performance. He also indicated having contacted Nationwide Finance seeking confirmation of the payment of Kshs.500,000 to the deceased.

On 8th July, 1987 Nyanja?s advocate forwarded a cheque for Kshs.300,000 to M. A. Khan and asked them to acknowledge receipt. This he did vide a letter dated 13th July, 1987 which also asked Nyanja?s advocate to *"prepare a statement showing to me the exact amounts that have been paid by your client to mine so that we then sit down and finalize as to when the balance is to be paid."*

On 10th September, 1987 Nyanja?s advocates forwarded a cheque for Kshs.300,000 further payment and promised that *"the statement will be coming soon."*

On 24th November, 1987 Nyanja?s advocate wrote to M. A. Khan stating as follows regarding the payments;

> ***"The Purchaser had paid the Vendor Shs.200,000/= as the first deposit. Later he paid a further Shs.500,000. They also agreed that he would receive shs.500,000 deposited with National Finance which you confirmed was finally paid to him. Our office has passed Shs.600,000/= and we herewith enclose the balance of Shs.200,000/=."***

They then stated that there was nothing now outstanding in respect of the purchase price and sought to know the full name of the Administrator who would sign the transfer.

We have gone to great lengths to trace the interactions between the parties herein with regard to the payment of the purchase price so as to determine the critical question of whether or not the purchase price was paid in full. Having done so, there is no doubt that the following payments were made by Nyanja and are either acknowledged or documented, and therefore undisputed;

> *(a) Kshs.200,000 - Paid on or before 6th August,1985 as acknowledged in the Agreement;*
>
> *(b) Kshs.500,000 - Instructed by Nyanja vide a letter to Nationwide Finance dated 20th November, 1985 payable on maturity and was in fact paid as Kshs.516,295 by cheque dated 8th January, 1986;*
>
> *(c) Kshs.300,000 - Njoroge Musyoka Advocates cheque forwarded to M. A. Khan vide letter dated 8th July, 1987;*

(d) Kshs.300,000 - By Njoroge & Musyoka Advocates cheque forwarded to M. A. Khan Advocates on 10th September, 1987;

(e) Kshs.200,000 - Forwarded by Njoroge & Musyoka Advocates to M. A. Khan on 24th September, 1987.

Those acknowledged and documented payments amount to Kshs.1,500,000 plus the interest of Kshs.16,295 earned on Kshs.500,000 released by National Finance. That sum of interest may well be discounted in the calculations because by various letters exchanged between their advocates, the parties to the transaction referred to the money received from National Finance as Kshs.500,000. With the Kshs.1,500,000 being acknowledged and documented as having been paid on the various dates, what is left for our determination, as was for the court below, is whether Kshs.500,000 was also paid so as to make the purchase price complete.

Now, it is trite law that he who alleges must prove, so that the person who asserts a case or makes a claim bears the burden of proving it, or as it is rendered in Latin; ***Affirmanti non Neganti Incumbit Probatio (the burden of proof is upon him who affirms - not him who denies)***. The learned authors of ***Black?s Law Dictionary, 10th Edn. at P 236*** define burden of proof thus;

> ***"1. A party?s duty to prove a disputed assertion or charge; a proposition regarding which of two contending litigants loses when there is no evidence or when the answer is simply too difficult to find."***

They go on to state that the burden of proof includes both the *„burden of persuasion,'* which is a party?s duty to convince the trier of fact in a way that favours that party, which would in a civil case be on a preponderance of probability; and the *„burden of production,'* which is the duty to introduce enough evidence on an issue to have that issue decided by the fact finder. See also ***HALSBURY?S LAWS OF ENGLAND 4th Edn. Vol 17 paragraphs 13*** and ***14.***

The **Evidence Act** captures the essence of the burden of proof and provides in **section 107** to **109** as follows;

> ***"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***
>
> ***(108) The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***
>
> ***(109) The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the facts shall lie on any particular person."***

Nyanja?s case before the trial court was that he was entitled to an order that the suit premises be transferred to him because he had paid the purchase price in full. He bore the burden to prove such payment to the required standard, which is on a preponderance of probability. If the state of the case was such that there was a balance of claims with Nyanja saying he paid the contentious Kshs.500,000 and the appellant asserting that he did not, it behoved Nyanja, in order to succeed, to have furnished proof that he did in fact make such payment beyond his mere say so, for how would the court conclude that payment was made without such proof?

Nyanja?s witness statement dated 14th August, 2014, was admitted by the trial court and treated as his evidence in-chief. Regarding the Kshs.500,000, which came after the initial Kshs.200,000 preceding the sale agreement, he stated;

> ***"I paid Kshs.500,000/- in November, 1985, thereby leaving a balance of Kshs.1,300,000/- of the purchase price unpaid. The advocates representing the late Ghulam Rasool prepared and forwarded the transfer documents for the suit premises to my advocates."***

When cross-examined, this is what he had to say about the payments made;

> ***"Purchase price was Kshs. 2 Million. I paid Kshs.200,000 cash, then 500,000/= from fixed deposit on 20/11/1985. Completion date was superseded by negotiations. Page 14 plaintiff?s documents - I paid Kshs.300,000/= page 10 - Letter to my lawyers stating I had a balance of Kshs.1 Million. Page 16 - paid Kshs.300,000/=. Page 17 - paid a further Kshs. 200,000/=. Paid Kshs. 500,000 as a second instalment. Page 7 - letter confirms no other payments after the one of 200,000/=."***

And in re-examination he stated as follows;

> ***"My payment of Kshs.500,000 paid is missing. The 1st payment of 200,000/= and the 2nd payment of Kshs.500,000/= I paid to the owner in cash. Page 7 - states that Kshs.1.3 Million was outstanding. That was after I had paid Kshs.200,000/= and 500,000/= in cash to Vendor. That was at 11/12/1985. The rest of the payments for Kshs.1.3 Million were paid and are acknowledged in the defence and counterclaim at paragraph 18."***

The Kshs.500,000 was allegedly paid to the deceased in cash, and as dead men tell no tales, he was not available to confirm or deny the claim. His lawyer M. A. Khan did write the letter dated 11th December, 1985 to Nyanja?s advocates in which he said;

> ***"I would state that the balance now payable to complete this sale is a sum of Kshs.1.3 Million together with interest therein at the***

rate of 16% per annum from the 1st November, 1985."

Whereas Nyanja and his advocates maintained that the said letter amounted to an acknowledgment that some other Kshs.500,000 had been paid to the deceased as at that date, M. A. Khan in re-examination stated that the Kshs.1.3 Million was after taking into account the initial Kshs.200,000 and Kshs.500,000 from Nationwide Finance.

It is rather curious, astonishing even, that the learned Judge gave rather short shrift to the explanation given by M. A. Khan in the half of a paragraph only that attempted an interrogation of this all-important and quite hotly contested issue of the Kshs.500,000. All that the learned Judge stated was;

> ***"40. The court is inclined to agree with the plaintiff that by the time he made the payment of Kshs.516,295.00 from Nationwide Finance Company to Mr. Rasool on 8/1/1986 the plaintiff had already paid Kshs.700,000.00 to Mr. Rasool. This is corroborated by Mr. Khan?s letter of 11/12/1985 which stated that the outstanding balance was Kshs.1.3 Million yet by then the payment from Nationwide Finance Company had not been received. …"***

The rest of the paragraph went on to extol the good relationship between Njanja and the deceased evidenced by the latter?s allowing the former to take possession before payment of the purchase price and non-insistence that the sale agreement be signed.

With great respect, we are not convinced that the learned Judge did justice to this issue. She had before her Nyanja?s claim and the appellants diametrically opposed position. She did not give any reason why she accepted one version and not the other. Moreover, her conclusion not preceded by a careful and thorough analysis and evaluation of all the evidence that was laid before her and, in at least one major respect, that of Mr. Khan?s letter of 11th December, 1985 she clearly misapprehended the evidence. The said letter indicated that the balance was Kshs.1.3 Million but it did not admit or concede and could not be said to corroborate the allegation that some Kshs.500,000 had been paid to the deceased in cash. In fact, in his testimony Mr. Khan was emphatic that the balance stated was taking into account the Kshs.500,000 that was coming from Nationwide Finance Company.

Whereas it is true that as at the date of the letter the Kshs.500,000 from Nationwide Finance Company had not been received, Nyanja had written a letter to that financial institution on 20th November, 1985 in these categorical terms;

> ***"M/s Nationwide Finance Company Limited,***
>
> ***P. O. Box 67124,***
>
> ***NAIROBI.***
>
> ***Our Ref: NAA/NFCL/85/XI/01***
>
> ***Date: 20th November, 1985***
>
> ***Attention: Mr. R. K. Ngondi,***
>
> ***MANAGER, BUSINESS DEVELOPMENT***
>
> ***Dear Sirs,***
>
> ***KSHS. 500,000.00 FIXED DEPOSIT***
>
> ***We refer to the Nyanja/Ngondi telephone conversation of today and would like to advise you that our Mr. Nyanja has entered into a deal with a Mr. Ghulam Rasool of P. O. Box 41999, NAIROBI and the two have mutually agreed that you transfer the above referenced mount to him on maturity together with the interest so accrued for three (3) months and the interest for the other three (3) you pay direct to us.***
>
> ***This letter is irrevocable.***
>
> ***Assuring you our co-operation and support in the days to come we remain.***
>
> ***Yours faithfully,***
>
> ***NYANJA ASSOCIATES ARCHITECTS***
>
> ***GEORGE B. NYANJA***
>
> ***PRINCIPAL***
>
> ***CC. Mr. Ghulam Rasool, P. O. Box 41999,***

NAIROBI

N.O.O. M/s. Njoroge & Musyoka Advocates

GBN/nms"

That letter was copied to the deceased. It is to be noted that it was express in its terms that once the amount matured it would be transferred to the deceased. To further bolster its binding effect, it was expressed to be *„irrevocable.'* Is it a wonder then that the deceased and his lawyers treated this amount as good as paid when Mr. Khan wrote his letter of 11th December, 1985 *(a mere three weeks later)* treating the Kshs.500,000 as already paid hence the balance of Kshs.1.3 Million yet actual payment happened by cheque on 9th January, 1986? We do not think so. It is not lost to us that in the excerpt of his cross- examination we have previously quoted Mr. Nyanja also speaks of paying *"Kshs.500,000 from fixed deposit on 20th November, 1985."* Clearly, the deceased and Mr. Khan took payment of the Kshs.500,000 from Nationwide Finance to have been made on the day he gave instructions, even though they were effected some weeks later on maturity of the fixed deposit.

Had the learned Judge paid due attention to these details, she would not have arrived at the demonstrably erroneous conclusion that the letter from M. A. Khan corroborated Nyanja?s later claim that he had some other payment of Kshs.500,000 to the deceased.

As we have pointed out, the onus to prove payment of Kshs.500,000 in cash to the deceased lay on Nyanja. We are un-persuaded that he discharged it. He made heavy weather of the alleged acknowledgment in M. A. Khan?s letter of 11th December, 1985, which we have found was neither confirmatory nor corroborative of any such payment. Indeed, at no point prior to that letter did, Nyanja or his advocates ever make mention of having made or planning to make a cash payment of Kshs.500,000 to the deceased. What is plain from all the correspondence is that after the initial Kshs.200,000 acknowledged in the sale agreement, Nyanja never made any other payment until the Nationwide Finance fixed deposit matured. Indeed, the 11th December, 1985 letter from M. A. Khan opens with the exact complaint of non-payment thus;

> ***"I refer to my letter of the 20th November, 1986. I also refer to the subsequent conversations that the writer has had with your Mr. Njoroge. No payment towards the balance of the purchase price neither the undertaking has been received from yourselves so that this sale could be completed."*** (Our emphasis)

There was not a single letter from Nyanja or his advocates in or immediately after November, 1985 claiming or alluding to any payment of Kshs.500,000, by any standards a significant sum, in that month as later claimed. We find it incredulous that Nyanja is unable to mention a date or place when he alleges to have made so large a payment in cash and that he failed to even mention such payment or seek its acknowledgment until so much later. We do not think that the friendship or trust between the deceased and him can explain so glaring a gap. Rather, we are persuaded from all the circumstances of the case that Nyanja never made the alleged payment of Kshs.500,000 in cash to the deceased. He simply did not have the wherewithal. Had he done so, his advocates would not have responded on 3rd January, 1986 to M. A. Khan?s letter of 11th December which was complaining about non-payment by stating as follows;

> ***"We refer to your letter of the 11th December, 1987.***
>
> ***We confirm our client is making all effort to release the balance of the purchase price without further delay. We hope the transaction will be completed soon."***

Our holding on the decisive point of whether Nyanja paid the full purchase price is inevitably in the negative. The learned Judge fell into a reversible error in finding, without evidence that the contentious Kshs.500,000 was paid by Nyanja to the deceased and we are therefore entitled, indeed compelled, to set aside the same as we hereby do. (See ***SUMARIA & ANOTHER -vs-ALLIED INDUSTRIES LIMITED [2007] KLR 1***.) This also puts to rest any reliance on the interlocutory ruling of Nyamweya, J. dated 4th February, 2015 for any contention that the purchase price was paid in full. It was not.

Having established that Nyanja never paid the purchase price in full, and before addressing the legal consequence of such default or omission, we turn our attention to the related issue of whether time was of the essence and whether the agreement was rescinded. The agreement itself at **clause 2** was quite explicit on this issue.

> ***"2. Time shall be deemed to be the essence (sic) of the contract for all the purposes of this agreement."***

The agreement also indicated that the completion date was on or before 31st October, 1985 but, from the correspondence between the parties, that completion date was extended but not honoured by Nyanja. The letter from M. A. Khan dated 11th December, 1985 stated as follows:

> ***"I am now instructed to give you this Notice which I hereby do that your client is in breach of the agreement to complete this sale and I do hereby give your client through this letter 21 days? Notice to complete the sale failing which my client will forfeit the monies paid herein and rescind the agreement to sell."***

The letter concluded with a notice that time was "*again being made the essence"* in the matter.

By the letter dated 31st January, 1986, M. A. Khan for the deceased addressed Nyanja?s advocates, *inter alia*, as follows;

> ***"I am further instructed that I should put your client to notice again now to complete this matter within twenty one days from the***

date hereof. Please put your client on Notice that if he now fails to complete the moneys paid by him would be forfeited and the Agreement will be rescinded. If this happens then my client will ask for vacant possession and will be free to sell the property to another purchaser and in doing so if he suffers any loss he will recover such loss from your client as damages.

Kindly note that time is now again being made of the essence. I sincerely hope your client will not let this transaction fall through and make all efforts to complete the sale within the above time."

That notice was not honoured and M. A. Khan issued a notice of cancellation and rescission of the agreement by his letter dated 22nd February, 1986 stating as follows;

"I am now therefore instructed to inform your client through you that the agreement to sell this property is hereby cancelled and rescinded. The deposits so far paid by your client are hereby forfeited.

In view of the above please now forthwith on receipt of this letter return all the documents delivered to yourselves by me for and on behalf of the Vendor in the same condition as they were. Take Notice that you are not to deal with these documents at all.

My client will now feel free to sell this property to any other purchaser in accordance with the Law Society conditions of sale.

The rent of Kshs.30,000/- also remains outstanding and payable. Please let me have this amount along with all the documents of title. At the same time put your client on notice that he is to quit and give vacant possession of the property at the end of the 28th February, 1986. It is taken that your client must have cleared the payment of Kshs.2,109/- which was payable by him to the Security Guards Service Limited."

Now, despite that letter, it is clear that following the demise of the deceased his legal representatives quite remarkably, desperately even, continued engaging with Nyanja?s advocates. By a letter dated 24th April, 1987 M. A. Khan conveyed the offer to drop the demands for rent if the matter could be finalized "*within 2 months of today"* and that if that did not happen, they would claim interest on the unpaid purchase price at the rate of 16% per annum from 1st November, 1985 and file suit for specific performance.

The matter was not completed within 2 months but Nyanja made payments of Kshs.300,000 on 13th July, 1987; Kshs.300,000 on 10th September, 1987; and Kshs.200,000 on 24th November, 1987. These were received but on account of the dispute over the unpaid Kshs.500,000, the appellant refused to sign the transfer and the matter then ended up in court.

It would seem to us from the rather convoluted manner in which the transaction was handled, time was at the beginning and at various times made of the essence by the notices to complete given quite consistently with the authorities including ***SISTO WAMBUGU -vs- KAMAU NJUGUNA [1983] eKLR,*** which was cited by the appellant. That was not the end of the matter, though, for the appellant did thereafter still afford further opportunity to Nyanja to complete after the expiry of the notices to complete. Moreover, the appellant did in fact receive some payments towards the purchase price out of the notified time. Had Nyanja paid the full purchase price, the appellant?s cancellation or rescission of the agreement would have been ineffectual to defeat the agreement given his subsequent conduct which negated the purported rescission and invited an estoppel against him. Nyanja did not pay the full purchase price, however, if indeed may be that by accepting payments after expressly indicating that the agreement had been rescinded, the appellant revived the contract so that the time for payment of the balance of the purchase price was varied. We say so appreciating, as do the learned authors of ***CHITTY ON CONTRACTS Volume 1, General principles Thirty-First Edition at P 1620*** that whether, in such circumstances what we have is a mere variation of terms or recession is not an easy one to answer. At any rate, it may well be that what the appellant did in extending time to Nyanja to perform his pre-existing obligation under the sale agreement with no extra benefit and no consideration flowing to the appellant was no more than a concession or forbearance that amounts to a waiver. See ***LAMMERS -vs- KAMUNGE [1991] KLR 345.***

The legal effect of the appellant?s forbearance and extension of time within which Nyanja was to pay the balance is as captured by ***CHITTY ON CONTRACTS*** at paragraph **22-042 (P. 1625);**

"The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered. However, in cases of postponement of performance, if the period of postponement is specific in the waiver, then, if time was originally of the essence, it will remain so in respect of the new date. If the period of postponement is not specified in the waiver, the party forbearing is entitled, upon reasonable notice, to impose a new time-limit, which may then become of the essence of the contract. Similarly, in other cases of forbearance, he may be entitled, upon reasonable notice, to require the other party to comply with the original mode of performance, unless in the meantime circumstances have so changed as to render it impossible or inequitable so to do. He cannot treat the waiver as entirely without effect. If a seller of goods withholds delivery of the goods at the purchaser?s request (i.e. if the seller waives the obligation of the purchaser to accept the goods within a certain time), he will still be under a duty to deliver within a reasonable time if so requested by the purchaser."

The cases cited by Nyanja?s learned counsel including ***GURDEN SINGH BIRDI AND NARINDER SINGH & ANOTHER - vs- ABUBAKAR MADHUBUTI [1997] eKLR; ELIJAH KIPKORIR BARMALEL & ANOTHER -vs- JOHN KIPLAGAT CHEMWENO & 3 OTHERS [2010] eKLR*** and ***LUCY NJERI NJOROGE -vs-KAIYAHE NJOROGE [2015] eKLR,*** speak to the same principle and are germane. Thus, had Nyanja paid the full purchase price once the appellant received some payment post the purported rescission, the appellant would have been in no position to resist the claim for specific performance.

Whichever way one looks at it, however, as long as Nyanja, despite many opportunities granted to him by the time extensions, failed or refused to pay the balance of the purchase price in the sum of Kshs.500,000, he was in open and sustained breach of his obligations under the

agreement, which amounted to repudiation of the same sufficient and effective to discharge the appellant from the obligation to continue with the agreement and in particular to effect transfer of the suit premises to Nyanja. At any rate, a purchaser who was unable to pay the full purchase price cannot, as a matter of reason, good sense and equity, and on the authority of a long line of cases including ***LAMMERS -vs-KAMUNGE*** (supra) benefit from an order of specific performance.

What we have just stated on repudiation by non-payment of full consideration and non-availability of specific performance to a party in such default is perfectly in line with one of the leading decisions of this Court in this area namely ***WAMBUGU -vs-NJUGUNA [1983] KLR 172*** which held, *inter alia*, at P.174 that;

> ***"9. An order for specific performance cannot be granted to a purchaser who has not performed his part of the bargain or has failed to show that he was at all times ready and willing to do so. The respondent in this instance made no attempt to perform his obligation to pay the balance of the purchase price for seven years, he therefore cannot at this late stage obtain an order for specific and performance transfer of land.***
>
> ***...***
>
> ***11. The Vendor is entitled to repudiate the contract of sale of the suit land, for failure of performance. The purchaser had failed to pay the balance of the purchase price and could not demand performance by the appellant. In this case there was originally a contract of sale of the suit land and the contract was lawfully repudiated by the appellant for non-payment of the balance and no specific performance thereof in favour of the respondent can be ordered."***

The position is settled that one who has not or cannot pay the full purchase price cannot possibly benefit from an order of specific performance. In ***KOKAL PROPERTIES DEVELOPMENT LIMITED -vs- MALOO & 3 OTHERS [1993] KLR 52,*** this Court held that specific performance is an equitable remedy and must flow from a legal right so that a purchaser who has committed breach of agreement by non-payment of the purchase price cannot benefit from a decree of specific performance, and it was an error for the High Court to have so decreed. Kwach, JA. was emphatic on the point as follows (at pp. 68-69);

> ***"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 Limited 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."***

In that decision this Court in what bears an uncanny resemblance to the instant appeal, dealt with yet another issue which, though not pleaded or addressed by the parties in the court below or before us, in both that case and this, rendered the suit for specific performance dead on arrival. It was stated thus in the first two holdings (at p.53);

> ***"1. No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing, signed by all the parties and the signature of each party has been attested by a witness who is present when the contract was signed by such parties.***
>
> ***2. In the instant case the appellant did not execute the intended agreement between itself and the 3rd and 4th respondent. No amount of correspondence prior or subsequent to the date of the intended agreement would change the legal position."***

The judgment of Muli, JA. addressed this issue quite comprehensively as follows (at pp.55-56) and we are in full agreement;

> ***"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 to 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."

The conclusion is inescapable therefore that the learned Judge?s order for specific performance was clearly an error of fact and law and cannot be allowed to stand for the reasons we have more than adumbrated. The same is accordingly set aside.

That brings us to a consideration of whether the counterclaim should have been granted in terms of the claim for rent with effect from the year 1986, it being undisputed that Nyanja took possession of the suit premises on 4th January of that year. Whereas there is on record correspondence wherein rent was demanded of Nyanja on behalf of the deceased and later his Estate, it was always Njanja?s position that he was in occupation as a purchaser, not a tenant, and therefore issues of rent did not arise. Be that as it may, however, it is common ground that the deceased had tenants at a rent who had to vacate when Nyanja appeared on the scene and that for all the time he was in occupation, the appellant was deprived of user and profits should it be called rent or *mesne* profits. At any rate, a court of law, justice and equity would not suffer a party so denied his property to be without a remedy, nor for his opposite number to be unjustly enriched or housed for free.

Following the failure of the agreement between the parties, what should have happened is a return of the purchase price to Nyanja paid in part. The appellant did not return the same and from the record there never was a demand for its return by Nyanja. Whereas the appellant is the innocent party would have been entitled to damages for breach of contract from Nyanja, such damages would have to be set off against the Kshs.1,500,000 that Nyanja paid to the deceased and his estate between 1985 and 1987. He would otherwise be unjustly enriched and the courts cannot countenance that, either.

It is unfortunate that on dismissing the counterclaim, and erroneously so in our view, the learned Judge did not nonetheless calculate the quantum of damages by whatever nomenclature, that the appellant would have been entitled to, had the counterclaim succeeded. (See the Supreme Court decision in ***MOHAMMED ABDIMOHAMUD -vs- AHMED ABDULLAHI MOHAMAD & 3 OTHERS, AHMED ALI MUKTAR* (I.P) [2019] eKLR** and this Court?s judgment in ***NATIONAL ASSEMBLY & ANOTHER -vs- INSTITUTE FOR SOCIAL ACCOUNTABILITY & 6 OTHERS [2017] eKLR***.) Indeed, even though the learned Judge stated at paragraph 29 of the judgment that an issue for determination was, *"Is rent payable to the defendant as counterclaimed,"* and had in fact made reference to the testimony and valuation report by Moses Mureithi Njoroge the valuer called by the appellant, she did not at all evaluate that evidence or make a finding on the issue. She did not revert to it and to the said evidence. This non-direction leaves this issue in a wholly unsatisfactory state and we would not ourselves consider it appropriate to make any finding without the benefit of the determination of the court below. The question was not only pleaded, but evidence had been led on it calling for decision. Cases in the line of ***CAPTAIN HARRY GANDY -vs- CASPAIR AIR CHARTERS LIMITED [1956] EACA 139*** and ***GALAXY PAINTS COMPANY LIMITED -vs- FALCON GUARDS LIMITED [2000] eKLR,*** are therefore inapplicable.

In the result, this appeal succeeds and is allowed and the judgment and decree of the Environment and Land Court is set aside in entirety.

In exercise of our powers under **rule 31** of the **Rules of this Court**, we remit this matter to the Environment and Land Court for an assessment of the rent/mesne profits/damages the appellant is entitled to only, while taking into account the sum of Kshs.1,500,000 paid towards the abortive purchase of the suit premises. Such assessment shall be done expeditiously given the age of this dispute by or under the direction of a Judge of that court other than Bor, J.

The appellant shall have the costs of this appeal.

DATED and delivered at Nairobi this 8th day of November, 2019

ASIKE-MAKHANDIA

……..…

JUDGE OF APPEAL

P. O. KIAGE

……..……

JUDGE OF APPEAL

S. ole KANTAI

……..…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR