IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Potter, Kneller & Hancox JJA)

CIVIL APPEAL NO. 42 OF 1981

BETWEEN

THOMAS OPENDA.....APPELLANT

AND

PETER MARTIN AHN.....RESPONDENT

(Appeal from the High Court at Nairobi, Wilkinson Guillemard J)

JUDGMENT

This an appeal by Thomas Openda, the vendor, from a judgment and decree of the High Court (Mr Justice Wilkinson-Guillemard) in Nairobi of May 14, 1980 by which Peter Martin Ahn, the purchaser, was successful in obtaining orders for the specific performance of an agreement for sale of Openda's property in Lower Kabete Road, execution and delivery of the conveyance for it, vacant possession of the property, all by May 26, 1980, special damages of Kshs 2,800 a month from April 1, 1978, costs and, lastly, interest at court rates on the damages and the costs.

Ahn was and is a professor of Soil Structure in the University of Nairobi and Openda was and is the Managing Director of Longmans (Kenya) Limited. They have, so far, employed a minimum of 9 advocates, but one at a time, in their litigation: Ahn 5 and Openda 4. This is one case in which there is no call to worry about the status of the parties or whether they had adequate, in terms of numbers, at any rate, legal advice.

At the beginning of 1977 Openda owned L.R. 2951, a plot of 5 acres in Lower Kabete Road, and lived in a house and let two maisonettes on it. He charged all this property to the Standard Bank for Kshs 150,000 and he hoped to buy the building on another plot and then move to them with his wife and family. He decided to sell the Lower Kabete one and his estate agents advertised it in the Standard on January 24, 1977 for £ 26,000 (Kshs 520,000).

Ahn read it and went round the same morning, inspected the place with Openda and the latter's wife

and offered £ 24,000 (Kshs 480,000) for it which Openda accepted without further ado. Ahn returned in the afternoon with an agreement for sale which he had drafted which Openda read, and amended here and there. Away went Ahn with it to return the next morning with a fair copy which he and Openda then signed and had witnessed. It is odd that Ahn should have chosen to do without an advocate for this vital part of his relations with Openda, but there it is, he did, it is not clear why Ahn wanted this property for he had another nearby but there is a suggestion that he was going to move with his family into the house and let the maisonettes and the house he had let left after or he would stay put and let the Openda house and maisonettes. Ahn swore Openda did not mention the charge or that he had any land at Langata or that he wanted to build another house anywhere else when he asked him why he was selling this Lower Kabete Property. Mrs Openda had two plots somewhere else but whether these are the ones with maisonettes on them is not clear.

Openda maintained that from the outset he explained to Ahn that he did not want to and would not sell this property at all until he had another plot and had built a house on it in which he and his family could live but when he had then he would give Ahn the first option to buy the Lower Kabete Premises. Ahn said he would have to get a loan to buy the place to do this he had to flourish a concluded contract before the building society and, also, he needed it to prevent Openda from selling the place to someone else. This does not quite fit really, for what was the good of Ahn having such a concluded contract and loan if Openda did not obtain another plot and or build on it for years to come (which is just what happened)"

Nevertheless, Openda continues, Ahn insisted on such a contract but promised not to insist on due observance of the completion date by Openda if he had not completed his new house and moved into it by then. Openda's memory plays him false here for in this contract for sale he agrees to sell the property to Ahn and to give him possession, vacant possession of, it on or before March 31, 1978 which was fifteen months ahead, and that was so that he could complete his house at Langata and move into it and so that Ahn could get his loan (and or sell of his property"). Openda also acknowledged in the agreement receiving Kshs 20,000 of the Kshs 480,000 sale price from Ahn on January 25, 1977 and he agreed that the balance of Kshs 460,000 would be due from Ahn when Openda delivered to him on or before the completion date on duly executed proper conveyance or assignment free from encumbrances.

The agreement was subject to Openda showing and delivering a clear title. This is clause 9. Openda, by the agreement, had to repay the deposit to Ahn if he could not get his loan and decided not to buy the place but he would keep it if Ahn did not complete for any other reason.

The agreement was signed on January 25, 1977 and the timetable of events for the rest of 1977 was this. Ahn's first advocate discovered the charge on the premises when he visited the Land Registry on February 25 and he put a caveat on the title on March 16. Later, Openda asked Ahn to buy and bring out some tiles for his bathroom but the date of this Ahn cannot recall. Ahn tried to contact him in August and September but he had no success. October came and Ahn's advocate asked the Standard Bank for Openda's title deeds which the bank sent him asking him to withhold and pay Kshs 150,000 from the purchase price from Ahn for the discharge of the charge and then prepare for Openda a fresh charge on his new plot and house for a new loan, this time one of Kshs 300,000 from the bank. Three days later, November 19, Openda wrote to Ahn and asked him to test the soil on his plot and see if it was good and, perhaps, more to the point, to pay him a further sum on deposit because he was still trying to buy another plot and pay off the charge on the Lower Kabete one. So it seems as if the tiles were not for the Langata house and the soil testing was to be in the Lower Kabete garden.

The first half of 1978 was, for such matters, one of almost feverish activity. There was discussion about

extending the date for completion and Ahn's advocate asked Openda to put forward his views. Ahn wrote to his bank in England and asked it to send Openda the equivalent of Kshs 28,000 in sterling. This was in response to Openda's earlier call for an increase in the deposit. At the beginning of February Ahn asked Brown of the East African Building Society for a loan of Kshs 432,000 but Brown wanted to see Openda's receipt for the Kshs 28,000 from his bank in England but Openda would not issue one for it because he claimed it had not been credited to his account in Nairobi. Ahn promptly made out a sterling cheque for £1,830 and Openda gave him a receipt for it. Openda then told Ahn for the first time he had no alternative accommodation and could not and would not move. At the beginning of that month Ahn had the balance available and his advocate told Openda this and again suggested they should discuss the completion date to which Openda replied saying he would do so if and when the City Council 'passed' his plans for the building he wanted to erect on his Langata plot. Two days later he wrote and told Ahn's advocate he still wanted to complete the sale of his Lower Kabete property by the end of March but he had nowhere to go and that is the first time he put this in writing which is over twelve months after he signed the agreement. Ahn and Openda met on February 7 and Ahn said he would not consider any alteration in the date for completion and Openda revealed that not only had he no plans at all for any building on the Langata plot but, also, he had no title for it. Ahn then suggested that if Openda would give him a new firm date for completion he would let Openda stay on as a tenant in the house. March 9 came and Openda suggested postponing the date of completion till the end of the year but Ahn rejected this but repeated that Openda might remain in the house for the time being provided Openda let Ahn have the two flats on or before March 31. Openda asked if he could stay in the house and pay no rent but Ahn stipulated he must pay an economic one and there the negotiations collapsed. Ahn's advocate wrote to Openda on March 16 saying Ahn was putting him in funds to pay the balance of the purchase price and reminding him that there was only a fortnight to go before he had to complete. He also said time was of the essence of the contract.

The end was sudden. Openda's advocate wrote on March 21 to Ahn's telling him "the deal was cancelled and annulled for all purposes. Mr Openda will sell his house on his own terms and in his convenience". She also claimed the agreement was clearly and always subject to:

1. Openda completing his new house at Langata by March 1978 and

2. his obtaining a clear title to his Lower Kabete one before completion. The first is not mentioned in the agreement and the second is set out in clause 9, or so his advocate of March 21, 1978 and his last one in this appeal assert. Completion date came but there was no completion.

Ahn's plaint was filed in May 19. Openda was served with a copy of it on May 22 and he entered appearance on May 30. Ahn's second advocate wrote a letter on June 16 to the Deputy Registrar who received it and filed it on June 19 asking him to enter judgement for Ahn because Openda had filed no defence but it just so happened that Openda's advocate filed his defence on the same day. It was fifteen days out of time.

Ahn applied on June 27 by motion on notice for summary judgement and Openda's second advocate by summons in chambers of July 25 asked for the time in which to file his defence to be extended and for leave to amend it and on July 26 Simpson J (as he then was) refused the first and granted the letter. Openda's amended defence was filed on August 4 and Ahn's reply on August 9.

When the trial began on March 27, 1980 Ahn's fourth advocate said there was only one issue which was 'whether or not the parties orally agreed Ahn would not insist on Openda completing until he had built and moved into another house"' Ahn and his first advocate testified and Ahn closed his case. The trial was adjourned to May 8 and then Openda's advocate withdrew so Openda refused to give evidence

because he had only learnt at midday his advocate would no longer represent him and he had had no time to engage another. The hearing was adjourned to may 9 and 14 for him to brief another and on May 14 Openda said he would conduct his own defence and the advocate he had approached needed more time but Mr Justice Wilkinson-Guillemard would not let him have another adjournment and, instead, delivered judgement at once. It took the form of distilling the pleadings and setting out Ahn's and Sheikh's evidence and the submissions of his advocate in full. Sheikh was his previous advocate who prepared the conveyance. The judge did not doubt Ahn told the truth (and presumably he found Sheikh did too) and gave him all the orders for which he asked in his plain save for damages at the rate of Kshs 7,000 a month from April 1, 1978 for loss of rent from the letting of the house on the property. He did not attempt to answer the issue but his acceptance of Ahn's testimony on it and the relief he gave indicate he would have answered it by holding that prior to the signing of the agreement the parties did not in the end orally agree Ahn would not insist on Openda completion until he had built another house and moved into it.

A certified copy of the title to the Lower Kabete property was not produced to the High Court before judgement was delivered which should have been done because there was "a prayer for a judgement the grant of which would result in some alteration to the title of land registered under a written law concerning the registration of title to it". Order XXV rule 5A. This was not made a ground of appeal. The contract was not and should have been pleaded and the property should have been described sufficiently in the plaint for the court must give judgement according to the pleadings if the plaintiff moves for judgement in default of appearance or a defence because the facts set out in it are taken to be admitted by the defendant and no evidence can be admitted as to those facts and leave to amend and serve may be refused. *Smith v Buchan* (1888), 58 LT 710. The trial judge may look at any facts outside the plaint so far as costs are concerned as he may if the defendant is before him at the trial in other cases. *Young v Thomas* [1892] 2 Ch 134, 137, 138 (CA). There was no ground of appeal touching on this.

Ground 18 of the grounds of appeal was that Mr Justice Wilkinson- Guillemard should not have given judgement for the rent Ahn would have received from the tenants of Openda's house and or maisonettes had he been put in possession because there was no evidence to support this which was so, but a second look at the judgement and orders revealed the learned judge did not give any such judgement or order.

There were 21 other grounds and after hearing argument on an objection to some of them, 10 were struck out. I will deal with these out of turn and since this is a first appeal the evidence may be reconsidered, evaluated and independent conclusions drawn. *Selle v Associated Motor Boat Co Ltd* [1968] EA 123, 126 (CA-Z).

The first of the surviving grounds of appeal was that the agreement of sale was subject to Openda showing and delivering a clear title and as he did not do so there was nothing to enforce. This concerns the meaning and effect of clause 9 and the argument in support of it was this. It was an express provision so any implied stipulation is excluded. *Miller v Emler Products Ltd* [1956] 1 Ch 304, 318, 319 (CA). The document on the face of it contains all the terms which the parties agreed upon and it amounted to a conditional contract. Clause 9 is an express condition and there is no contract until it is fulfilled and it must be fulfilled by March 31, 1978. Thus, the Vendor could not enforce a contract of sale against a purchaser of his building lease in the Edgware Road in London because when the purchaser repudiated the contract and when the Vendor brought the action he could not assign to the purchaser the benefit of his agreement with the lessors, a railway company, because he had failed to obtain its licence to do so and it was a condition that he should have done so. *Ellis v Rogers* [1882], 29 Ch D 661. Or, take the position of Harold and Dorothy Riley who used Isabella Troll for damages for breach of an agreement

for sale of their premises when she decided not to proceed and found the agreement was not enforceable because it was subject to a formal contract being executed and it never had been. *Riley v Troll* [1953] 1 All ER 966, 967. Then there was Cheng who successfully sued for the return of his deposit provided for in and paid under a contract for his purchase of some mining leases from the vendor which did not obtain the renewal of them by the time fixed by the contract for completion or the time extended by consent. *Aberfoyle Plantations Limited v Cheng* [1959] 3 All ER 910 (PC).

The answer to all that in clause 9 is a condition for the protection of Ahn and, as it turns out, a necessary one for on May 22, 1980, which is 8 days after Mr Justice Wilkinson-Guillemard gave him his order for specific performance of the agreement, the same judge found in another action Openda's wife was joint owner of the premises. The clause adds nothing to the general law part from any agreement giving the purchaser a right to a clear title: *Ellis v Rogers* (ibid), 670 Cotton LJ: nor do the specific provisions of section 55(2) Transfer of Property Act. Returning to the Ahn Openda agreement it will be remembered that, according to its terms, it was not subject to any other event save Ahn obtaining his loan as in *Ellis v Rogers*, or *Aberfoyle* and it was not subject to a formal contract as in *Riley v Troll*. It would be a remarkable contention and one that would require conclusive authority before it could be accepted, to assert that clause 9 meant Openda could resile if he wished, and with impunity, by choosing not 'to show and deliver a clear title'.

The second ground was a corollary of the first one: Openda could not show a clear title by March 31, 1978 so the contract was stillborn. His wife's joint interest was not pleaded or mentioned in the High Court action so it cannot be considered here. The title was encumbered by the mortgage and it was suggested that the bank could sell the property because it was not bound by the decree. This was, in my view, on the facts and circumstances not so compelling that any court could conclude beyond a reasonable doubt Ahn would be at risk of a successful assertion against him of this encumbrance. This was a fanciful possibility and to be ignored. *MEPC Ltd v Christian-Edwards* [1979] 3 All ER 752, 757e, 758d (HL) Lord Russell of Killowen. Ahn had accepted the unclear title with the charge on it by March 31, 1978 and he agreed to clear it. He can rely on the proviso to section 55(5)(b) Transfer of Property Act which permits this. The bank, on the correspondence, concurred in this. The property had not slipped from Openda's grasp by the completion date but he had changed his mind and claimed he could sell it when and to whom he wished which is different from being unable to give a clear title.

The sixth ground was that Ahn, despite Openda's repudiation of the agreement beforehand, was unable to establish that he was ready and willing at all times and at the date of the plaint May 19, 1978 to carry out his part of it. Now it is correct that the purchaser must pay or tender at the time and place of completing the sale the purchase price to the seller or such person as he directs. Section 55(4)(b) Transfer of Property Act. This is a condition precedent for specific performance of the agreement and it is the form in which an order for specific performance of such an agreement is made. Vaisey J in *Palmer v Lark* [1945] 1 Ch 182.

There are circumstances, however, when it is what Sir John Gray, CJ of Zanzibar, called 'a work of supererogation' for a purchaser to pay the purchase price. *Shantilal Lalji Shan v Gulzar Begum Lool Khan* [1948] 15 EACA 25, 27 (CA-K). The Begum Khan accepted Shah's deposit under an agreement for the sale of her house in Parklands but went into possession herself and then resolutely refused to complete until she had found suitable alternative accommodation. Her defence to Shah's claim for specific performance was that he had not tendered a conveyance but the former Court of Appeal for Eastern Africa held she had expressly or impliedly waived that formality by her conduct. So did Openda. Ahn did not have to tender physically the balance of the purchase price and interest if Openda had clearly refused to accept it. *Tin Containers Ltd v Kencon* [1971] EA 216 (CA-K). The fact is Ahn did not accept the repudiation but kept the agreement open and Openda persisted in the wrongful repudiation.

Walton J dealt with the purchaser's obligations in such circumstances in this way:

"It appears to me that in consequence [the purchaser] was never at any time under any obligation to show that it was 'able' to perform its part of the contract. 'Ability', in this connection, means arranging the finance, which, under modern conditions, could be done either by arranging a mortgage or a sub-sale, and doubtless there are other methods as well. But they all involve some form of preparation on the part of the person raising the finance; and it appears to me *pessimi exempli* if the vendor was in a position to say: "Because you were not on a particular day ready with your finance, you cannot claim damages against me. True it is that it would have been perfectly useless for you to make the preparations because I told you I was not going to complete, but I can now huff you for having failed to carry out this perfectly useless exercise." This is the morality of a game, not of a serious legal contest. *Rightside Properties v Gray* [1974] 2 All ER 1169, 1183 F."

If it is not impertinent to say that I agree with that, then I now do so, and declare it is most apt in this appeal. It is not in any way in conflict with what Vaisey J held in *Palmer v Lark* because he was dealing with the form an order for specific performance should take and not the obligations of a purchaser who has not accepted the seller's wrongful repudiation of an agreement of sale.

The tenth ground was that Wilkinson-Guillemard J's judgement was wrong because 'there was evidence including the sworn admission by Sheikh that Openda's house was being purchased for immediate occupation as a residence by Ahn thus making completion date of the essence which was later made so by a written notice to complete'. There was that evidence, and such a notice was sent, so completion date was not a 'target' date but Openda did not meet it. This justifies the result the learned judge reached.

The eleventh and twelfth amount to this (in their actual words)

"Before action and on or before the completion date (whether of the essence or not) to be able to claim specific performance, Ahn had to show he had tendered the conveyance and the balance of the purchase price whether by means of bridging loan or otherwise in cash, or by a banker's cheque, or other acceptable cheque against execution, although not unconditionally, and no so such payment was tendered with the conveyance, which was to be done contemporaneously and accordingly the respondent was not ready and willing to carry out his part of the contract before the date of completion. It was no use Ahn's Advocates merely saying they had available the necessary funds without producing sufficient moneys which they did not by way of legal tender with the conveyance proffered for execution."

All this means, I think, that Ahn's advocate tendered the conveyance for execution but not the balance of the purchase price. We were treated to some English law on when the date of completion in a contract for the sale of land is of the essence and consequent remedies if a party defaults on it. Generally, if the contract specifies the date it is not a target date whether or not it is declared to be of the essence for the defaulting party cannot add 'or within a reasonable time thereafter'. Failure to complete, then, by any party for any reason, other than some trouble about title or conveyancing which are difficult matters in England, gives the other an action for damages for breach of contract. The one who is ready and willing to complete can give notice within a reasonable time of some many weeks or months which makes that date of the essence of the contract as a whole and for both parties with extra reciprocal obligations and remedies. This provision enabling a notice to make the date of the essence is set out in the English Law Society's Conditions of Sale. See *Mackay v Dick* (1881), 6 App Cas 251, 263 Lord Blackburn; *Finkielkraut v Monohan* [1949] 2 All ER 234; *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 All ER 729, 731 (CA); Megarry J in *Wools v Mackenzie Hill Ltd* [1975] 2 All ER 170, 172; and

Raineri v Miles [1980] 2 All ER 145, 155f (HL).

If that is a correct summary of the authorities cited for those grounds, then, with respect, they were irrelevant. The Law Society's Conditions of Sale do not apply here and because Openda at all times until, and even during, the trial, persisted in a wrongful repudiation he could not huff Ahn for not pinning a banker's draft for the balance of the purchase price to the conveyance when he tendered it. The reasons for that are in my attempt to deal with the sixth ground.

Ground 17 was that interest on the loan to Ahn by the building society cannot be awarded as special damages for the loan was never drawn down or made and or it was too remote. The building society keeps the loan until the conveyance is registered which never happened here but the loan was 'earmarked' for Ahn and he was charged interest on it from that date. Formerly, damages were not awarded for the expenses or raising the purchase money by borrowing: *Hanslip v Padwick* (1850), 5 Exch 615; *Sherry v Oke* (1835), 3 Dowl, 349, 361: because they were incurred prior to the contract and not in affirming it. Now, in England, Ahn could recover compensation for any pre-contract expenditure contemplated by the contract or which could reasonably be in the contemplation of the parties as likely to be wasted if the contract is broken. Brightman J in *Lloyd v Stanbury* [1971] 2 All ER 267. Lord Denning MR approached it this way: if the seller must have contemplation of the reason to impute it to him - that this expenditure by the purchaser would be wasted, whether or not it was incurred before or after the contract, the seller is liable. *Anglia Television Ltd v Reed* [1971] 3 All ER 690, 692f, g (CA).

Here in the Ahn Openda agreement, in clause 6, Ahn was to pay all his own costs in connection with the transaction, except those mentioned before in the agreement, including legal charges, conveyancing fees, according to clause 3, was to apply for a loan of Kshs 240,000 from a building society. Damages are at large if a seller refuses to implement an agreement for any reason other than a defective title and the disappointed purchaser can recover the costs of performing any act he has to do under the contract. Openda must have realised that Ahn's expenditure on this loan would be wasted if the contract were not performed. Openda made this contract, he broke it, his breach made Ahn's expenditure wasted and he cannot say he is not liable.

Ground 21. This was:

"if the order for specific performance was correct the High Court should have ordered the balance of the purchase price to be brought into court with interest at 13% or 8% from March 1978."

Submissions on this for Openda were based on English and Indian decisions and section 55(4) (b) and 5 (d) of the Transfer of Property Act. The first authority was *Ballord v Shutt* (1880), 15 LR Ch 122, 123 in which Denman J held that Ballard had to pay Smith the interest on the balance of the purchase price even though he had made no profit on withholding it and the delay in paying was Smith's fault. Ballard never went into possession of the contract of sale property which was building land but he dealt with it as his own by putting a board on it announcing it was to be let or sold by him and he entered in such contracts. See also *Webb v Macpherson* (1903) 1A 238 PC and *Maung Shire Goh v Maung Inn* (1916) 1A 15, 17 (PC). The rate of interest in England on the balance of the purchase money is usually the same as that on a short term investment account. Annual Practice 1982 Vol 1 page 45.

There can be no quarrel with those decisions, of course, but these points about them must be made. A contract of sale of real property in England makes the purchaser the owner in equity and if the right to interest on the purchase money is not regulated by the terms of the contract then the buyer has the rents and profits from the time he enters into possession or could have done so and the seller has the interest on the money until the transfer is executed. A contract for sale of land in Kenya creates no interest or

charge upon the land (section 54 of the Transfer of Property Act) regulates who gets the rents and profits or interest and from when is regulated by section 55 if it is not in the contract but not before ownership passes. Ahn did not enter into possession or assume possession of the land or deal with it as his own because Openda did not give a good title to it and, once again, Openda cannot profit by his default.

The twenty second one is no longer in issue. This was a complaint that the High Court had no jurisdiction to award damages because they were not claimed in the plaint. The issue in the appeal was, in the end, whether or not this court should uphold Mr Justice Wilkinson-Guillemard's order for specific performance of the agreement" It is for the parties to take whatever step is necessary when the answer to this conundrum is divulged.

The sixteenth ground I have left to the last to be fair to the appellant. He complains that in such a heavy action he suffered a clear injustice because he was not permitted to engage an advocate to replace the one who withdrew. The refusal of an adjournment is what Buckley J in *Rose v Humbles* [1970] 2 All ER 519, 523f Ch D called an extreme course for a judge to take but it is a matter for his discretion (order VI rule 1) and it should not be interfered with by any appellate court unless it has been exercised in such a way that is caused an injustice when the appellate court must make sure it is further heard. Among the matters that should be taken into account are any previous indulgence granted to the applicant, was he solely responsible for the fact that he was not in a position to proceed with his case on the day on which the adjournment was refused, was his evidence important, had he an arguable case on the merits and did illness or some physical difficulty he had prompt his application" It is not sufficient that the appellant has a feeling justice has not been done. Atkin LJ in *Maxwell v Kenn* [1928] 1 KB 645, 657; *Dick v Piller* [1943] KB 497; *Rose v Humbles* (ibid). When he asked for an adjournment Openda was in good health and no physical disability prevented him from entering the witness-box and telling the truth about this agreement. The action was not a heavy one. His evidence was important but his defence was almost unarguable; and indulgence had been shown to him previously.

What happened was that Openda voluntarily left the field before the battle was over. He has the very heavy task of satisfying this court it was futile for him to continue and that had he done so he would not have had a fair, proper or satisfactory hearing from the judge. *Brassington v Brassington* [1962] P, 276, 282. Openda, in my view, did not suffer a denial of justice and he has not satisfied me justice might not have been done. I conclude that the decision of Mr Justice Wilkinson-Guillemard should be upheld and the appeal dismissed with costs. As Hancox JA agrees these are the orders of the court.

Hancox JA. I have had the advantage of reading in draft the judgment prepared by Kneller JA. I agree that the learned Judge was right in ordering specific performance of the contract of sale relating the property at Land Reference 2951/62 Lower Kabete Road, Nairobi.

The vendor cannot be heard to say that the conduct of the Purchaser in this case justified him in repudiating the contract. To my mind the situation is epitomised by this citation (referred to by Kneller JA) from *Rightside Properties v Gray* [1974] 2 All ER 1169, at page 1183 as follows:

"Of course, in the present case the repudiation was not accepted at once: Rightside kept the contract open. Equally, however, there was at all times until, and there was persisted in during, the trial, a wrongful repudiation. It appears to me that in consequence Rightside was never at any time under any obligation to show that it was 'able' to perform its part of the contract. 'Ability', in this connection, means arranging the finance, which, under modern conditions, could be done either by arranging a mortgage or a sub-sale, and doubtless there are other methods as well. But they all involve some form of preparation on the part of the person raising the finance; and it appears to me *pessimi exempli* if the vendor was in a position to say: 'Because you were not on a particular day ready with your finance, you

cannot claim damages against me. True it is that it would have been perfectly useless for you to make the preparations because I told you I was not going to complete, but I can now huff you for having failed to carry out this perfectly useless exercise'. This is the morality of a game, not of a serious legal contest."

Accordingly, in my judgment, the purchaser was entitled to treat the contract as still in existence and to sue for the remedy of specific performance. As Lord Diplock said in the recent case of *Sudbrook v Eggleton*, The Times July 15, 1982, the normal remedy in such a case is an action for specific performance, because damages are frequently an inadequate and unjust remedy for a refusal to convey the property concerned.

The foregoing, however, does not mean that a party cannot claim damages in lieu of specific performance under section 2 of Lord Cairns' Act, the Chancery Amendment Act, 1858, this follows from the recent decision in *Johnson v Agnew* [1980] AC, 367.

I am also in agreement that the judge was, in the circumstances of this case, right in refusing a further adjournment to the vendor after Mr Gautama had left the case. The proposed new advocate did not appear on that occasion, and the judge was perfectly correct in exercising his discretion in the way in which he did.

As regards the question of the interest said to have been incurred by the purchaser, the Agreement for sale, by clause 3, provides that an application for a loan would be made by the purchaser, and, should the loan not be forthcoming, that he could regard the contract as null and void. Thus it was in the contemplation of the parties that the purchaser should obtain a loan from Savings and Loan (Kenya) Ltd., and, since loans ordinarily attract interest, that if he did not obtain the loan, then he would have to pay interest thereon. Can this therefore properly be said to have to pay interest thereon. Can this therefore properly be said to have been reasonably in the contemplation of the parties as flowing from the breach of contract which, I am satisfied, occurred, bearing in mind that the loan was not taken up, and was merely a facility granted to the purchaser, and a matter between him and the building society" I have not found this an easy matter to decide. A similar claim was made and rejected in the case of *Frobisher (Second Investment) Ltd v Kiloran Trust Co Ltd* [1980] 1 WLR, 425 in which the facts were rather different. The landlords, being unsuccessful in their claim for advance service charges due to the operation of the Housing Act, 1972, claimed interest on moneys they would consequently be obliged to borrow so as to carrying out those obligations. In holding that the doctrine of *The Moorcock* [1889] 14 PD, 64 could not be applied Walton J said:

"Moreover, it would be very surprising indeed if one could, and for this reason: it may very well be that the present landlord is an impecunious landlord - I know not - but the landlord might, far from being impecunious, have very large sums of money under his control, in which case he would not need to borrow any other money at all; and if that were the situation and interest was going to be charged, one would have expected to find a clause specifically dealing with it and mentioning the interest on sums expended, or words to that effect, somewhere in the lease, and one does not, unfortunately, find any such words."

After consideration I think that case is distinguishable from this one and that the purchaser was entitled to claim under this head. Accordingly, I agree with the orders proposed by Kneller JA and that this appeal should be dismissed with costs.

Judgments read pursuant to Rule 32 sub-rule (3) of the Court of Appeal Rules.

Dated and Delivered at Nairobi this 22nd day of February 1984.

K.D.POTTER

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JUDGE OF APPEAL

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR