THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

CORAM: OWINY - DOLLO DCJ, EGONDA - NTENDE AND TUHAISE JJA.

CIVIL APPEAL NO 179 OF 2015

(Appeal from the judgment of Nyanzi J; in High Court Civil Appeal No. 411 of 1998)

NIPUN BHATI (Administrator of the Estate of Narattam Bhati)
HEMANTINI BHATIA .....**APPELLANTS**

VERSUS

BOUTIQUE SHAZIM LIMITED..... **RESPONDENT**

JUDGMENT OF OWINY - DOLLO; DCJ

I had the opportunity to read, in draft, the judgment of my learned sister, Tuhaise, JA. I am in agreement with her that this appeal should succeed.

Since Egonda-Ntende, JA also agrees, this appeal therefore succeeds; and the orders proposed by Tuhaise JA in her judgment are hereby issued.

Dated, and signed at Kampala this 3rd day of March 2020.

Alfonse C. Owiny - Dollo
Deputy Chief Justice

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL FOR UGANDA

[*Coram: Owiny-Dollo, DCJ, Egonda-Ntende and Tuhaise, JJA*]

CIVIL APPEAL NO. 179 OF 2015

[Arising from High Court Civil Suit No.411 of 1998]

BETWEEN

Nipun Bhatia (Administrator of the
the Estate of Narattam Bhatia)==========Appellant No.1

Hemantini Bhatia==========Appellant No.2

AND

Boutique Shazim Limited==========Respondent

(*On appeal from a ruling of the High Court (Nyanzi, J.), delivered on 11th February 2015*)

Judgment of Fredrick Egonda-Ntende, JA

1. I have had the opportunity to read in draft the judgment of my sister, Tuhaise, JA. I agree that this appeal must succeed for the reasons she provides.

2. I am in agreement too with the proposed orders.

Dated, signed and delivered at Kampala this 3rd day of November 2020

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Owiny-Dollo DCJ, Egonda-Ntende, & Tuhaise, JJA

Civil Appeal No. 179 of 2015

1. Nipun Bhatia (Administrator of the estate of Narattam Bhatia)
2. Hemantini Bhatia ..... Appellants

Versus

Boutique Shazim Limited.....Respondent

[Appeal from the judgment of Yasin Nyanzi J, in High Court Civil Suit No. 411 of 1998 dated 11th February 2015]

Judgment of Percy Night Tuhaise

The brief background to this appeal is that on 1st July 1995, the 2nd appellant and her husband Narattam Bhatia (who were defendants in HCCS No. 411/1998), were the registered proprietors of property comprised in LRV 247 Folio 1 Plot 12 Buganda Road (referred to as the suit property in this appeal). They entered into a sale agreement with the plaintiff (respondent in this appeal) for the sale of the suit property at an agreed price of United States Dollars (US$) 117,300. The respondent paid US$ 50,000 upon execution of the sale agreement. Clause 2 (b) of the sale agreement stipulated that the balance of US$ 67,300 was to be paid at any time within the next 75 days, and that failure by the respondent to complete payment within the stipulated time would cause the sale agreement to lapse and the property to revert to the vendors, subject only to refunding the US$ 50,000 to the respondent by the vendors.

The respondent (plaintiff) effected payment of the balance 9 days after the contractual deadline. This prompted the defendants to

reject the payment on the basis that the contract had already lapsed. The defendants then opted to refund the US$ 50,000 to the respondent (plaintiff). The respondent rejected the refund and filed a lawsuit HCCS No. 910 of 1995 seeking specific performance of the sale agreement of the suit property. The suit was struck out for non-disclosure of cause of action. The respondent filed a fresh suit, HCCS No. 411/1998 which the High Court dismissed on 25th September 2005, on grounds that it was *res judicata.*

Subsequently, on 1st August 2010, the Supreme Court affirmed the order of the Court of Appeal that the case was not *res judicata,* and that it disclosed a cause of action.

The suit was subsequently placed before another trial Judge for hearing. At the commencement of the trial on 1st March 2012, the 1st defendant's name was replaced by that of his son Nipun Bhatia (the 1st appellant in this appeal) as administrator of his estate.

On 11th February 2015, the learned trial Judge entered judgment in favour of the respondent. He found that the sale agreement had not lapsed for the reason that time was not of the essence; and that the appellants were more at fault for the failure of the respondent to fulfil its contractual obligations. He granted an order for specific performance of the sale agreement in favour of the respondent, effectively ordering a transfer of title of the suit property to him. He also dismissed the appellants' counterclaim, and granted costs of the suit and the counterclaim to the respondent.

The defendants (appellants) were dissatisfied with the decision and orders of the learned trial Judge. They lodged this appeal on the following grounds:-

1. The learned trial Judge erred in law and fact when he found that time was not of the essence in the agreement of sale of

property comprised in LRV 247 Folio 1 Plot 12 Buganda Road.

2. The learned trial Judge erred in fact when he found that the appellants were to blame for the respondent's failure to pay the balance of the purchase price on property comprised in LRV 247 Folio 1 Plot 12 Buganda Road.
3. The learned trial Judge erred in law when he granted to the respondent an order for specific performance without considering the legal conditions precedent to the grant of such an order including the absence of any breach of contract terms by the appellant.
4. The learned trial Judge erred in law in granting an order for specific performance in circumstances likely to cause undue hardship to the appellant.
5. The learned trial Judge erred in fact and law in granting an order for specific performance, in spite of the fact that the appellant had an express contractual right to treat the contract of sale as void.
6. The learned trial Judge erred in law and in fact when he granted to the respondent an order for specific performance in spite of laches on the part of the respondent in addition to coming to equity with unclean hands.
7. The learned trial Judge erred in law and in fact in awarding an order of specific performance to the respondent despite the fact that it had not completed the purchase price and without any consequential orders for the payment of the balance and appropriate interest.
8. The learned trial Judge erred in law and in fact in failing to find the respondent a trespasser and, further, in failing to award the appellant *mesne* profits.

Representation

At the hearing of this appeal Mr. Kavuma Terence, learned Counsel, appeared for the appellants. Mr. Nambale David, learned Counsel, appeared for the respondent. The 1st appellant and Mr. Azim Kassim, the respondent's representative, were in court at the hearing of this appeal.

Submissions for the Appellant

The appellants' counsel argued grounds 1, 2 and 8 separately, and grounds 3 to 7 together, contending that the combined grounds relate to the propriety of the trial court's award of the order of specific performance.

Ground 1

The appellant's counsel made lengthy and detailed submissions on this ground of appeal. The gist of his submissions is that, the question of whether or not time was of the essence was not an issue framed for trial by the parties and the court, and that it should never have been treated by the trial court as a basis for deciding the case. According to Counsel, neither the documentary nor oral evidence presented at the trial court created any such issue. He contended that the agreed issue was different, stating whether the sale agreement between the parties dated the 1st July 1995 is specifically enforceable by the plaintiff, or whether it lapsed in accordance with clause 2(b) of the said agreement.

Counsel submitted that it was a misdirection on the part of the learned trial Judge, and of both counsel, to address the agreed issue as if it included any sub-issue on whether or not time was of the essence of the agreement. He contended that, as a result of the misdirection, a lot of valuable time and energy was devoted to determining a matter that was not a subject of dispute between the parties, which eventually led to a wrong decision.

Counsel faulted the learned trial Judge for failing to properly review and understand the pleadings and the evidence on the terms of the agreement as required under Order 15 rule 1 (5) of the Civil Procedure Rules (CPR). According to Counsel, if the learned trial Judge had done so, he would not have found, as he did, that the sale agreement had not lapsed owing to time not being of the essence. He cited **Interfreight Forwarders Limited V East African Development Bank, SCCA No 33 of 1992; Fang Min V Belex Tours & Travel Limited, SCCA No. 06 of 2013; Julius Rwabinumi V Hope Bahimbisomwe, SCCA No 10 of 2009; Osman V Mulangwa reported in 1995-1998 2 EA 275;** and **Jiwaji V Jiwaji [1968] EA 547** to support his submissions.

Submissions for the Respondent

The respondent's counsel submitted that the exact words that time was not of the essence do not have to be pleaded *verbatim*. According to Counsel, it is sufficient if compliance or non-compliance with the time frames in the sale agreement was a matter in controversy. Counsel referred this Court to paragraph 3 of the written statement of defence (WSD) which states that the sale agreement would lapse automatically if the plaintiff failed to pay the second instalment of US$ 67,300 by the 14th September 1995; and to paragraph 4 of the WSD which states that the plaintiff failed to pay in time and the sale agreement did lapse. He also referred this Court to agreed issue number 1 of the case. He maintained that, based on the said factors, lapse of time and its consequences was therefore a matter in contention.

Counsel referred this Court to his submissions on issue number 1 at the trial, where he contended that, if time was not of the essence, the agreement could not automatically lapse. He submitted that the appellants' counsel also framed a sub-issue on whether time was of the essence in their written submissions, and

that they cannot approbate and reprobate at the same time by distancing themselves from a position they took at the trial. Counsel cited various examples of the parties' conduct regarding the sale agreement which showed that they regarded time not to be of essence to the contract. He concluded that the learned trial Judge rightly addressed the sub-issue whether time was of the essence. He cited the authority of **Oriental Insurance Brokers Limited V Transocean (U) Limited, Supreme Court Civil Appeal No. 55/95** to support his submissions. He prayed this Court to dismiss ground 1 of this appeal.

Submissions in Rejoinder for the Appellants

The appellants' counsel submitted that the respondent's submissions is premised on a tenancy agreement regarding the option to purchase, which could and should never have been the basis of interpreting clause 2 (b) of the sale agreement. Counsel argued that this clause required no further interpretation from matters which were extraneous to the sale agreement, under section 91 of the Evidence Act which prohibits the admission of such material in evidence.

Ground 2

Counsel for the appellants submitted that the case of the respondent for breach of contract is covered under paragraph 3 (n) of the plaint, stating that the plaintiff shall at the trial aver that the defendants are in breach of contract for failure to furnish the plaintiff with the details of mode of payment and refusal to accept payment.

Counsel argued that a party can only breach a contract by violating its terms, not by fulfilling the terms or complying with agreed terms. He referred this Court to **Black's Law Dictionary, 7th edition** at page 182 which defines breach of contract as a

violation of a contractual obligation either by failing to perform one's own promise or by interfering with another party's performance. He maintained that in light of the definition of a breach of contract, the learned trial Judge should have been concerned with establishing whether or not the case for breach of contract had been made out on the adduced evidence.

Counsel also maintained that the trial court should have, in particular, addressed itself to the terms of the contract to establish whether the appellants had an obligation under the contract to avail the respondent details of the mode of payment of the second instalment to enable the respondent to pay the said instalment. He maintained that there was no "promise" in the contract to supply any such details, and that therefore the court could not impose an obligation from a non-existent promise.

Counsel also referred this Court to the evidence of PW1 to the effect that the agreement is silent on mode, where and how the payment could be made. He argued that, in light of the said evidence, the court could not properly find that the appellants were in breach of a non-existent obligation to the respondents without re-writing the contract of the parties and introducing its own court imposed obligations.

Counsel submitted that the respondent's own evidence is that the contract did not bar any form of payment the respondent could have chosen to adopt and that, indeed, bank account details would not be necessary for the respondent to effect payment. The respondent's own witness listed three different forms of payment the respondent could have employed to meet its obligations, namely cheques, bank drafts or cash. In light of the said evidence, Counsel faulted the trial court for finding that the appellants had an obligation to supply bank account details to the respondent,

and that the absence of any such details prevented the respondent from meeting its payment obligations on time.

Counsel further submitted that the trial court overlooked another important consideration, that one cannot be in breach of contractual obligations through the actions of a third party or a stranger to the contract. He maintained that the trial court's anguishing over who was telling the truth about the contents of the phone conversation between Mr. Byenkya (DW1) and the respondent's Managing Director (PW1), and its opting to believe PW1 and disbelieve DW1, was erroneous. According to Counsel, the evidence the trial court should have been looking for was direct evidence of obstructive conduct, including inaction by the appellants.

Counsel submitted that the respondent several times claimed DW1 to be its own lawyer for purposes of the transaction. He wondered how the actions of DW1, supposedly a lawyer for both parties, could be held against the appellants and not the respondent.

Counsel submitted that on this ground alone, this appeal should succeed.

Submissions for the Respondent

The respondent's counsel submitted that the sale agreement did not specify where the balance of the purchase price was to be paid, or even the mode of payment; and that it was impossible for the respondent to pay the balance unless the payment details were provided. He argued, based on the appellant's testimony, that in absence of an express term on the place and mode of payment, it was an implied term that the appellant had to provide such information for consideration by the purchaser.

Counsel also maintained that the respondent was perfectly in order to call DW1, as the vendors' (appellants') lawyer, and request for their bank account details in order to remit the balance to them. He argued that if the appellants did not wish to receive money through a bank account, they could have suggested any other payment mode, like payment by cash or cheque, or through a courier. He contended that the appellants' hostile refusal to provide information on the place and mode of payment amounted to prevention of performance of the contract. He referred to paragraph 766 of **Halsbury's Laws of England, 4th Edition** to support his proposition.

Counsel prayed that this Court upholds the finding of the trial court that the appellants were to blame for the respondent's failure to pay the balance of the purchase price, hence, that ground 2 of this appeal be dismissed.

Submissions in rejoinder for the Appellants

The appellants' counsel submitted that the first payment of US$ 50,000 was made by the respondent even when the sale agreement did not provide where it should be made or how, more so, without the need of the appellant's bank details. According to Counsel, the same manner of payment could have been adopted by the respondent to make the second payment.

Counsel also implored this Court to note that the sale agreement indicated the appellants' address to be P.O. Box 6799 Kampala. He contended that a cheque or bank draft could still have been made at the said postal address and it would have constituted effective payment, but this was not done.

Counsel referred this Court to the evidence of DW2, the 1st appellant, who testified that the respondent knew that he had an office at Bhatia Building Plot 8 Wilson Road, and that the

respondent had his phone landline number. He submitted that this evidence, which is entirely plausible, given that the respondent was a tenant of the appellant from 1994 as indicated in the tenancy agreement, was not challenged by the respondent.

Counsel submitted that in spite of the foregoing knowledge, PW1 testified that during the 74 days, he never wrote to Mr. Bhatia to ask him for a bank account nor did he ring him. Counsel argued that had PW1 contacted Mr. Bhatia, he would have got the bank details; that, in such circumstances, he only had himself to blame for failure to pay on time.

Counsel submitted that the respondent's submission that it was an implied term that the appellant had to provide such information in absence of express terms, is without any authority or even any basis, given that the initial payment was made by the respondent in the same circumstances. He invited this Court to disallow the said submission especially in light of the principle that the courts will not make contracts for the parties.

Grounds 3, 4, 5, 6 & 7

Submissions for the Appellants

Counsel submitted that the parties had clearly set out the terms of their agreement in writing, and, in the event that payment was not made at a particular time, the contract was to lapse. He contended that the only remaining obligation for the appellants was to refund the deposit received; that the promise to pay on time was that of the respondent; that it is the respondent who was in breach when the deadline passed; and that the promise the appellants had made in those circumstances was that they would effect a refund of the deposit, which they did.

Counsel cited section 64 of the Contracts Act which provides that where a party to a contract is in breach, the other party may

obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract. He contended that, firstly, the party against whom the order is made must be in breach. He submitted that the evidence established that the appellants did not breach any provision of the contract, and all they did was to strictly enforce it as revealed by the evidence of PW1. He argued that enforcement of contract terms cannot amount to breach.

Secondly, Counsel argued that court will not grant specific performance to a party itself in breach of contractual obligations. He relied on the authority of **Australian Hardwoods Pty Ltd v Commissioner for Railways [1961] 1 All ER 737 at 742** to support this proposition. According to Counsel, on applying the principle expounded to this case, it is clear that the learned trial Judge erred when he granted an order of specific performance in favour of the plaintiff who was in breach of the contract.

Counsel argued that a court cannot order performance contrary to the terms of the contract, or a court cannot order the performance of that which the parties did not themselves promise or agree. He contended that, such would amount to amendment of the contract or making a new contract for the parties. He maintained that the court order must seek only to enforce a promise made under the contract. He submitted that in this case, the only promise the appellants had made, in the event of default in payment, was that the deposit should be fully refunded; and that was the only promise the court could seek to reinforce.

Counsel also submitted that the respondent did not plead non-refund of the deposit in the plaint; that indeed the fact that a refund was tendered by the appellants was freely admitted by the respondent. He argued that, consequently, there was no promise of the appellants left for the court to enforce by way of specific

performance without re-writing the contract of the parties. He contended that the respondent could only seek an order of specific performance concerning the refund of its deposit, not performance of an agreement for the sale of land which had, by the agreed terms, lapsed.

Thirdly, Counsel submitted that the jurisdiction to grant specific performance cannot be exercised where the parties have expressly indicated in their agreement that time is of the essence. He cited the authorities of **Steedman V Drinkle & Another [1914-15] ALL ER 298; Singh V Parmar [1971] EA 210;** and **Sharif Osman V Haji Haruna Mulangwa, SCCA 38 of 1995**, to support his submissions.

Fourthly, Counsel cited sections 64 (2) (e) and 47 of the Contracts Act and argued that court will not grant specific performance where the party against whom specific performance is sought has a right to terminate the contract, as was the case in this case.

Fifthly, Counsel submitted that a court will not grant an order for specific performance to a party who comes to equity with unclean hands. He submitted that the respondent had no clean hands in this matter, partly because its own evidence revealed that it defaulted on timely performance of its obligations purely because it sought to extract maximum profit out of delaying payments till the latest possible time.

Counsel maintained that, the respondent was motivated to delay payments because of greed; that the respondent's MD (PW1) also lied under oath that, on the penultimate day, he called DW1, the appellant's advocate, with intentions to pay the balance through transfer of funds from Canada. Counsel submitted that this was in 1995, with less than an hour or so to the close of business in

Uganda; that even in current times, with the internet and modern electronic money transfer systems, it would be an impossible feat.

Counsel submitted that the foregoing evidence of PW1 contradicted his later testimony during re-examination that the money was not in Canada, but on the respondent's account in Uganda. He contended that if the money was actually in Uganda on a bank account accessible to PW1's partner, and if, on the last day, there were people in Kampala able to deposit a cheque or cash with the appellants, then the whole claim about requesting bank details from the appellants' lawyer in order to make a remittance from Canada is false.

Counsel submitted further that the respondent never intended to remit the money on the 75th day as claimed, as is apparent from the testimony of PW1 in re-examination at page 16, that;-

> *"He blasted me but I insisted he gives me the details. I told him I was coming back within a week also and that I would get in touch with them to settle the payment."*

According to Counsel, this affirms that the funds were in Uganda; that the respondent had no intention of remitting any funds from Canada; and that therefore, the respondent's hands were not clean.

Counsel referred this Court to the testimony of PW1 and submitted that PW1 gave contradictory reasons as to why he did not make the payments on the second instalment within the agreed time, which points to deliberate deceitfulness on part of PW1.

Counsel further submitted that, if PW1 was able to make the first instalment by cheque, and since his evidence is that payment by cheque was not barred by the agreement, and that, on the last day, he had people who would have deposited a cheque or cash

with DW1 or Bhatia, it could not be tenable that PW1 could have been prevented from paying the second instalment by cheque simply because that mode of payment was not specified.

Sixthly, Counsel submitted that equity will not assist a person who is guilty of laches. He submitted that the respondent's conduct amounted to laches, for instance, the respondent waited until the very last hour of the penultimate day to start making calls regarding payment, yet, by its own evidence, their MD (PW1) had the funds available in its account for the entire period of 75 days. Counsel also submitted that the calls made by PW1 regarding paying the balance were to a third party (DW1) to the contract, despite being conscious of the contractual consequences of default. Further, that PW1 took his family on a vacation to Canada without making any arrangements to pay in time and, apparently without briefing his partner to make the necessary arrangements. Counsel submitted that such conduct does not deserve the sympathy of the court and should not benefit under equity.

Seventhly, Counsel submitted that an order for specific performance will not be issued where the hardship to the party against whom it is made is outweighed by the benefit to the party seeking the said order, as set out under section 64 (2) b) of the Contract Act. Counsel submitted that, applying the said doctrine, it is necessary to consider the effect the order of specific performance granted in favour of the plaintiff will have on the parties.

Counsel submitted that, under the terms of the order of specific performance, the suit property passed to the plaintiff (respondent), and there were no conditions whatsoever attached to the order, not even an order to pay the balance of the purchase price or for damages for the respondent's own breach, or for

payment of interest. According to Counsel, the suit property was, in effect, ordered to be transferred for less than 50% of the agreed purchase price without compensating the appellants.

Counsel argued that this meant that the defaulting respondent was rewarded with a huge discount on the purchase price. He argued that it was unfair that the respondent, who was in breach of the contract, was the party who got relief from court, in addition to being in occupation of the suit property which kept on appreciating since 1995, and enjoying all the rights of an owner, including rental income, despite paying less than half the price of the agreed property, and utilising the outstanding balance of US$ 67,300 due to the appellants for his own benefit.

Counsel submitted that, in contrast, the appellants who observed the terms of the contract to the letter and never defaulted, suffered great hardship in that they were penalized for complying with the contract, while the respondent was rewarded for defaulting; that court never even awarded the appellants appropriate interest to make up for the loss of value visited on them by the respondent's default, neither were they awarded *mesne* profits to make up for the respondent's long occupation of the suit property. Counsel, in conclusion, maintained that the order of specific performance visited extreme hardship on the appellants.

Counsel cited the case of **Lamure V Dixon L.R.6 HL 414** and submitted that the well-established rules governing the grant of the discretionary remedy of specific performance were not followed by the learned trial Judge in the instant case, which led to his making wrong findings and conclusions. He prayed that grounds 3, 4, 5, 6 & 7 of this appeal succeed.

Submissions for the Respondent

Counsel for the respondent submitted that grounds 3, 4, 5, 6 & 7 have no merit. He maintained that the learned trial Judge comprehensively reviewed the authorities relating to specific performance before correctly attributing the respondent's failure to pay the purchase price of the suit property on the appellants.

Counsel cited the case of **Manzoor V Baram [2003] 2 EA 580** which sets out the principles governing specific performance as a remedy in land sales. He submitted that in the instant case, there was a valid contract for sale of land; that the appellants made completion of payment impossible by refusing to avail the respondent modalities of payment; and that the respondent has at all material times been ready and willing to pay the balance of the purchase price. He maintained that the respondent, who has been in possession as a purchaser since 1995, is an equitable owner and there are no competing third party interests.

Counsel also argued that by law, the property passed to the respondent upon execution of the sale agreement; that it cannot revert back to the appellants; and that the appellants' only right is to receive the balance of the purchase price. He cited the case of **Osman V Mulangwa [1995-1998] 2 EA 275** and contended that the appellants' interest is only in the balance of the purchase price but they have no lien on the property.

Counsel prayed this Court to uphold the order of specific performance as an equitable remedy in favour of the respondent who was the purchaser of the suit property. He submitted that the English cases cited by the appellants' counsel are not binding on this Court; that, in any case, they relate to common law principles in England, but that section 14 (3) of the Judicature Act provides that the common law shall be in force only in so far as the circumstances of Uganda and of its peoples permit, and subject to such qualifications as circumstances may render necessary.

Counsel also relied on section 14 (4) of the Judicature Act which provides that the rules of equity and the rules of common law shall be administered concurrently; and if there is a conflict or variance between the rules of equity and the rules of common law with reference to the same subject, the rules of equity shall prevail.

Counsel argued that specific performance is an equitable remedy which cannot be subjected to inferior rules of common law. He contended that, since the court ordered specific performance, the respondent is obliged to pay the balance to the appellant, who is obliged to receive the money; and that the certificate of title and transfer form are already deposited in the High Court pending disposal of this appeal.

Counsel further submitted that there is no evidence on record as to how specific performance will cause undue hardship to the appellants.

Submissions in rejoinder for the Appellants

Counsel submitted that the case of **Osman V Mulangwa** which the respondent's counsel cited and the learned trial Judge relied on to justify the remedy of specific performance, is distinguishable from the instant case. He submitted that the sale agreement in the **Osman** case did not have a clause similar to 2(b) of the sale agreement in the instant case. Secondly, Counsel argued that the decision in the **Osman** case eventually rested on the vendor's waiver of his right to rescind the contract, following the purchaser's failure to pay on time. He argued that in the instant case, the appellants cannot be said to have waived their right to rescind the sale agreement because they immediately communicated to the respondent that the agreement had lapsed.

Counsel concluded that in the premises, the decision in the **Osman** case is not helpful to the respondent's case; that it actually supports the appellants' case, with regard to circumstances when time is of essence in equity, for instance, when the parties expressly stipulate that it shall be so, which is what happened in the instant case.

Ground 8

Submissions for the Appellants

The appellants' counsel referred this Court to the terms of the contract and submitted that the adduced evidence shows that the deadline for paying the balance of the purchase price passed; that the respondent was duly notified of the lapse of the sale agreement; and that a refund of the deposit was tendered to the respondent. He referred to the notices in form of exhibits **D1**, **D2** and **D4** which, he argued, were simply administrative because the contract, as correctly noted by the learned trial Judge, lapsed automatically and it was not necessary for any notice to be given to bring about that consequence.

According to Counsel, it is not in doubt that the respondent knew that its right to occupy the suit premises as a purchaser had lapsed along with the sale agreement. He argued that in order for the respondent to remain lawfully in possession, it should have sought fresh consent from the appellants to occupy the premises, probably as tenants under a new tenancy agreement; that instead of accepting the new *status quo*, the respondent opted to challenge its potential landlord's title by filing a law suit seeking a court injunction to protect itself from eviction from the suit property; that by the time of trial, as brought out in the respondent's own evidence, it had occupied the appellants'

premises completely rent free and against the appellant's will for about 18 years.

Counsel maintained that the respondent was able to maintain possession of the land because it obtained a temporary injunction from the High Court. He argued that, that does not make it any less a trespasser because the injunction was granted on the basis of its claim to be owners which, as established by the appellants' evidence, was no longer the case, in which case they remain liable as trespassers and liable to pay *mesne* profits for their occupation.

Counsel referred this Court to the expert evidence of *mesne* profits from the testimony of DW3, Dr. Sali Nicholas Kasimbazi, contained in a report exhibit **P8** that total rental due for the period between after 1998 was US$ 327,356, and rent for the period prior to 1998 at US$ 37,380. He submitted that the appellants sufficiently proved their claim for *mesne* profits which should have been awarded to the appellants who complied with all their contractual obligations, including refund of the deposit. Counsel prayed that this ground of appeal should succeed.

In conclusion Counsel prayed this Court to set asde the judgment of the High Court, and to enter judgment in favour of the appellants on the counter-claim with costs. In the alternative, Counsel prayed for consequential orders for the payment of the balance of the purchase price and appropriate interest by the respondent; and also that the appellant be awarded costs of this appeal.

Submissions for the Respondent

Counsel for the respondent submitted that after the sale agreement was executed, property in the suit land passed to the respondent, who became an equitable owner in possession in

1995. He maintained that the respondent is not a trespasser; and that the appellant is not entitled to *mesne* profits.

Submissions in rejoinder for the Appellants

The appellants' counsel reiterated their earlier submissions and prayed that the appeal be allowed; that the Judgement of the High Court be set aside; and that the counter claim be allowed. In the alternative, Counsel prayed that consequential orders be made for payment of the balance of the purchase and the contractual interest of 1.5% per month premised on clause 2(b) of the sale agreement; and that costs be awarded to the appellants in this Court and in the High Court.

Resolution of the appeal by Court

This Court, as a first appellate court, is, under rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, enjoined to re-evaluate all the evidence on record and make its own findings of fact on the issues while giving allowance for the fact that it did not seen the witnesses as they testified. In **Fr. Narsensio Begumisa & 3 others V Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002**, the Supreme Court reiterated this principle as follows:-

> *"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."*

I will address the grounds of appeal in the order in which they were argued by counsel.

Ground 1

It is the appellants' contention that the learned trial Judge went beyond the parties' pleadings, submissions and arguments; and that he inserted the sub-issue of whether time was of the essence in the contract. It is argued for the appellant that the question of whether or not time was of the essence to the contract in the instant case was not an issue for trial, and that it should not have formed a basis for deciding the case by the learned trial Judge.

The respondent, on the other hand, contends that, if time was not of the essence, the agreement could not automatically lapse; that the appellants indeed also framed such sub-issue and made submissions on it, in which case they cannot approbate and reprobate at the same time, by distancing themselves from a position they took at the trial.

Order 15 rule 1 (1) of the Civil Procedure Rules (CPR) provides that issues arise when a material proposition of law or fact is affirmed by the one party and denied by the other. Order 15 rule 1 (2) states that material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence. Order 15 rule 1 (5) of the same CPR provides as follows:-

> *"At the hearing of the suit the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the court appears to depend."*

In **Oriental Insurance Brokers Ltd V Transocean (U) Ltd, Supreme Court Civil Appeal No. 55 of 1995**, the Supreme Court interpreted this Order, which was then Order 13, to mean that a

trial court has wide discretion to frame or amend issues from all materials before it, including pleadings, evidence of the parties and submissions from counsel. Secondly, the court may amend issues or frame additional issues at any time, including during judgment. In doing so, the court may impose such terms as it thinks fit.

The Supreme Court also cited with approval the following *dicta* of Duffus, P in **Odd Jobs V Mubia [1970] EA 476** where it was stated that:-

> *"It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from those provisions, the court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates on which a decision is necessary in order to determine the dispute between the parties."*

However, in the latter decisions by the same court, in **Fang Min V Belex Tours and Travel Limited, Supreme Court Civil Appeal No. 06 of 2013**, at page 27, Odoki Ag JSC, as he then was, quotes extensively from Oder's lead judgment in **Interfreight Forwarders Limited V East African Development Bank, SCCA No. 33 of 1992**, at page 8, that:-

> *"A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed*

at trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by amendment."

Justice Odoki then quoted Wambuzi CJ, as follows:-

"In the case before us the cause of action pleaded was negligence, the issues were framed and the trial proceeded on that basis. I think it was misdirection on the part of the learned Principal Judge to base his judgment on a cause of action not pleaded and not being part of the issues upon which the parties brought the suit. I think the first ground of appeal therefore must succeed."

The Supreme Court also cited the case of ***Julius Rwabinumi V Hope Bahimisibwe, Supreme Court Civil Appeal No. 10 of 2009*** where it was stated that:-

"I only wish to add by way of emphasis that the Court should have restricted its decision to matters that were pleaded by the parties in their respective petitions .... This Court has had occasion to pronounce itself that a Court should not base its decisions on unpleaded matter."

Thus, on basis of the above provisions of the law, it is not doubted that court has a duty to frame issues. However, a party will not be allowed to succeed on a matter not set out in its pleadings.

In the instant case, the sale agreement, exhibit **P2**, states in clause 2 (b) that:-

"The balance of US$ 67,300 (united states dollars sixty thousand three hundred) to be payable within 75 days of the date of execution PROVIDED that the said payment shall carry an interest of one and a half per cent on reducing balance month which shall be paid along with the principle on the date of effecting payment. For the AVOIDANCE of DOUBT if the

payment is not affected within 75 days of the date of execution, this sale agreement shall be deemed to have lapsed and the property shall revert to the vendor who will be under no obligation save for effecting a full refund of any payments made at the time under the agreement".

The above clause does not raise any doubt about the intention of the parties in the contract under issue, concerning time when payment was to be made. It is very clear from the wording of the contract that time of payment was of the essence. The contract did not only put in place the specific time of 75 days when the balance of US$ 67,300 was payable to the appellants by the respondent, it also provided what would happen if the said balance was not paid within the stated 75 days, namely that the agreement would lapse, property would revert to the appellants, who would in turn refund the US$ 50,000 deposit to the respondent.

The pleadings on record show that the respondent, who was plaintiff at the trial, was suing on a contract that provided expressly that the contract would lapse automatically upon default of payment at a stipulated time. The respondent did not assert in its pleadings, neither the original, nor the amended plaint, that time was not of the essence under the contract. In their submissions, neither party questioned the interpretation of this clause. The parties were in agreement that there was a sale agreement, which was admitted in evidence as exhibit **P2**.

The record does not show that the respondent ever applied for amendment to introduce facts raising an issue of whether or not time was of the essence. Thus, based on the said findings, it is my considered opinion that it was an error for the trial court to delve so much on whether time was of the essence or not, when the sale

agreement was clear and self-explanatory, and when the parties never raised it in their pleadings.

In any case, the respondent's own evidence, through the testimony of its sole witness PW1 Azim Kassam, who was its Managing Director (MD), is to the effect that time was of the essence. PW1 stated that he was fully aware of the contractual terms, understood them clearly, and was alive to the fact that the stipulation as to time of payment was so important that failure to adhere would result in the lapse of the sale agreement. The record of appeal shows at page 27, lines 7-9, that PW1, regarding the terms of the contract, stated during cross-examination that:-

> *"...I was supposed to pay the balance within 75 days. We had the funds available to pay the balance within 75 days. But we took the advantage of the credit extended to us in order to make profit...."*

In line 20 on the same page he stated:-

> *"I knew the importance of the 75 days deadline-otherwise the agreement would lapse."*

Mr. Ebert Byenkya (DW1), the lawyer who drafted the sale agreement, confirmed this position at pages 39 & 40 of the record of appeal when he stated that:-

> *"The balance of US$ 67,300 was to be payable within 75 days i.e. by 14/09/95. On the 67,300$ it was to carry an interest of 1½% per month on reducing balance. The intention was that the Plaintiff would keep paying during the 75 days whatever money they were able to raise and on the 75th day they should have completed. By 14/09/1995 there should have been zero balance. As a consequence of failure to pay the agreement would lapse-only that the refund of the money paid would be made."*

He was more specific under cross-examination when he stated on page 48 of the record of appeal that:-

> *"Time was absolutely of the essence in the sale agreement. We provided two distinct clauses one providing interest to reflect the loss the parties agreed would be incurred. Second clause was '**for avoidance of doubt**' that was a consequence in case of failure. The intention was to be strict about time."*

The evidence of PW1 and DW1 is further corroborated by DW2, the 1st appellant, who, in his testimony at page 55 of the record, stated:-

> *"As I said, the balance was payable within 75 days from the date of execution of the agreement i.e. by 14/09/1995. The balance of US$ 67,300 was payable in any number of parts within the 75 days i.e. from 1/07/1995 to 14/09/1995. The interest payable was 1½% per month chargeable on reducing balance. No instalment was ever paid. Failure to pay the balance of US$ 67,300 by 14/09/1995 was that the agreement would lapse and property reverts back to the vendor who would refund any payments made."*

This evidence shows that the parties never differed in their evidence regarding the terms of the contract. They all understood the terms of contract in the same way. They appreciated the significance of the deadline stipulated for payment of the balance, as well as the consequences of default in meeting the deadline.

Section 91 of the Evidence Act cap 6, provides that where the terms of a contract have been reduced to the form of a document, no evidence except as mentioned in section 79 shall be given in proof of the terms of the contract except the document itself.

These provisions are also supported by well-established principles of construction for deeds and statutes, that when

ascertaining the intention of parties in a document, a court is required to find that intention only from interpreting the words used in the document itself. In **Odger's Construction of Deeds and Statutes, 5th Edition**, it is stated at page 28 that:-

> *"Rule i. The meaning of a document or of a particular part of it is therefore to be sought for in the document itself. In other words, the intention of the parties must be discovered, if possible, from the expressions they have used."*

It is further stated at page 36 of the same book that, in order to ascertain the meaning of words:-

> *"Rule iii. Words are to be taken in their literal meaning. The plain ordinary meaning of the words used is to be adopted in construing a document."*

In **Osman V Mulangwa [1995-1998] 2 EA 275**, Mulenga JSC held that:-

> *"The maxim **contempora expositio est optima et fortisim** (The best way to construe a document is to read it as it would have been read when made) is applicable here. That is to say the agreement and particularly clause 3 thereof must be construed as it was when executed. **Jiwaji V Jiwaji [1968] EA 547** is authority for the proposition that Courts will not make contracts for parties but Courts will give effect to the clear intentions of the parties ...)*

In the same case, Mulenga JSC, went on to hold as follows on the question of time being of the essence:-

> *"The principle at common law and equity is that, in the absence of a contrary intention, time is essential even though it has not been made expressly by the parties. Performance must be completed upon the precise date specified, otherwise*

an action lies for breach.... However in equity time is essential (1) if the parties expressly stipulate in the contract that it shall be so ..."

In the case from which this appeal arises, the learned trial Judge, in justifying his decision that time was not of the essence to the contract, alludes to the fact that though exhibit **P2** required payment of the US$ 50,000 on execution of the agreement, post-dated cheques which could not be cashed on 1st July 1995 the date of execution of the agreement, were accepted by the appellants as vendors.

It is not disputed that there was default in payment of the first instalment of US$ 50,000. However, unlike the clauses on payment of the balance of US$ 67,300, the sale agreement did not put a repercussion on late or non-payment of the first payment of US$ 50,000. To that extent, the learned trial Judge failed to appreciate that there were no consequences ascribed to failure to make the first payment on the date of execution. This was different from the contractual situation on failure to make the final payment of US$ 67,300 within the 75 days, where the sale agreement strictly stated that, "for the avoidance of doubt" it would be deemed to have lapsed.

Exhibit **D1** indeed shows that the appellants, in line with the contract, demonstrated that time was of the essence when on 15th September 1995, their Counsel Mr. Byenkya (DW1) wrote to the respondent informing it that the contract had lapsed; and when they proceeded to refund the US$ 50,000 to the respondent as required under the contract.

The learned trial Judge also relied on exhibit **P1**, the tenancy agreement between the parties that had lapsed before the respondent could exercise its option to purchase. This is evident

at pages 116 to 118 of the record of appeal. The learned trial Judge concluded that, by so doing, the appellants did not make time of essence.

The tenancy agreement (exhibit **P1**) is not an annexure to the sale agreement (exhibit **P2**). This means that exhibit **P1** is not part of exhibit **P2**. Each is independent of the other. In light of section 91 of the Evidence Act, the learned trial Judge's reference to exhibit **P1** in an attempt to ascertain the meaning of terms in exhibit **P2**, and his considering the conduct of the parties regarding the performance of the lapsed tenancy agreement, was an error in law.

Secondly, the learned trial Judge's references to the Bills of Exchange Act cap 68, was, with respect, misguided, and a direct result of the attempt to construe the terms of the contract from the dates on payment cheques instead of the words stated in the agreement. The learned trial Judge was considering evidence barred by section 91 of the Evidence Act. To that extent, he misdirected himself by placing undue importance on inadmissible and extraneous evidence to determine the issue of whether time was of the essence in exhibit **P2** the sale agreement.

In conclusion, based on the adduced evidence and the relevant authorities, it is my finding that the learned trial Judge erred in fact and law when he found that time was not of the essence to the contract between the parties.

This ground of appeal succeeds.

Ground 2

It is the appellants' contention that the respondent's blaming their inability to pay the balance within time on the appellants' not availing bank details was far-fetched, since the same

respondent paid the first instalment where no bank details were availed.

The respondent, on the other hand, maintained that it was perfectly in order for it to request the bank account details from the appellant in order to remit the balance; and that, the appellants' hostile refusal to provide information regarding the place and mode of payment amounted to prevention of performance.

Regarding the mode of payment under the contract, PW1 testified as follows at page 28 lines 15 and 16:-

> *"The agreement is silent on mode, where and how the payment could be made. There was nothing in the agreement that barred payment by cheque. When paying by cheque you did not need to know the account details. There was nothing that barred payment by draft. I did not need his account details in order to pay by draft. It is true the deposits were made by cheques ..."*

PW1, at page 34 lines 5 to 19 of the record, further stated:-

> *"I did not write a cheque because it was not specified that I make a cheque. The mode of payment was not specified. It is the same reason that I did not send a bank draft and so was the reason why I did not send cash. On the last day I had people who would have deposited a cheque or cash with Byenkya or Bhatia if they had specified the modes. I would have called my brother in law Shiraz Hudani to effect any mode of payment. He is my brother in law. We were partners in business. So he had authority to pay from our accounts - either of us could write a cheque. We have been in business of importation together and also get tenders from Government."*

Thus, according to his own evidence, PW1, by himself or through his partner, a one Mr. Shiraz Hudani, could have made the payment by cheques, bank drafts or cash, since the contract did not specify any mode, nor did it bar the use of anyone of the three options.

If that was the position, did the appellants' then interfere with the respondent's ability to perform the contract? **Black's Law Dictionary 7th Edition**, defines the word "interference" to mean the act of meddling in another's affairs, an obstruction or hindrance.

The adduced evidence shows that the first payment of US$ 50,000 was made by the respondent even when exhibit **P2** did not provide where it should be made or how, more so without the need of the appellant's bank details. As correctly argued by the appellants' counsel, the same manner of payment used in the first payment, or even a completely different mode, could have been adopted by the respondent to make the second payment to the appellants. There would, in that regard, therefore be no basis for the respondent to blame its failure to pay the balance on the appellants.

Secondly, exhibit **P2** indicated the appellants' address to be P.O. Box 6799 Kampala. Prudently, a cheque or bank draft could still have been delivered at the said postal address, and it would have constituted effective payment. This was not done.

In addition, the 1st appellant testified as DW2 that the respondent knew that he had an office at Bhatia Building Plot 8 Wilson Road, and that it had his phone landline number. This evidence was not challenged by the respondent. It is supported by exhibit **P1**, signed by the respondent as tenant, which shows that the

respondent was a tenant of the appellant for two years effective 1st July 1994.

In spite of the knowledge about the appellants' contacts, PW1 testified at page 29 of the record that he never contacted Mr. Bhatia (1st appellant) to ask him for a bank account. PW1 was well placed to contact the 1st appellant to get the bank details but he never bothered to do so. In such circumstances, he only had himself to blame for the respondent's failure to pay on time.

The respondent's submission that it was an implied term that the appellant had to provide such information in absence of express terms, is without any authority or even any basis, given that the initial payment was made by the respondent in the same circumstances. As stated in the cited case of **Osman V Mulangwa**, courts will not make contracts for the parties.

The decision of the learned trial Judge is premised on the alleged refusal of Mr. Ebert Byenkya (DW1) to supply the respondent with the appellants' account details. This was, in my opinion, misconceived, since DW1 was not a party to the sale agreement between the parties, let alone the fact that he was not assigned the role of supplying the appellant's account details in the sale agreement, so that failure to do so could be imputed as breach on part of the appellants.

Even if it were to be argued that DW1 was well placed to give such details to the respondent as the appellants' counsel, this justification offered by the respondent for non-payment of the second instalment would be defeated in the circumstances of this case where the evidence shows that the respondent knew the appellant's address and physical contacts through which he could have made the payment, given that the contract was silent on mode of payment.

Secondly, the respondent through the testimony of PW1 at page 22 of the record referred to DW1 as his lawyer. That being the case, DW1's alleged refusal to provide the appellants' bank account details should never have been imputed as breach on part of the appellants. The respondent's argument that a party preventing the other from performing a contract between them, is guilty of a breach, would, in that light, be misplaced. The evidence on record does not demonstrate any conduct of the part of the appellants that amounts to "meddling, obstructing or hindrance" of the respondent in any way.

If, as the undisputed evidence shows, the respondents ably paid the first instalment without the contract stating specifics of bank details, they cannot in the same breath say that it became a hindrance when they were required to pay the balance of US$ 67,300.

This ground of appeal succeeds.

Grounds 3-7

The appellants faulted the learned trial Judge for awarding specific performance of the contract against the appellants in favour of the respondent, yet the respondent was in breach of it, and the appellants had performed their obligations under it.

The respondent, on the other hand, contends that there was a valid contract for sale of land; that the appellants made completion of payment impossible by not advising on the modalities of payment; that the respondent has always been ready and willing to pay; that the respondent has been in possession since 1995 as a purchaser and equitable owner; and that there are no competing third party interests.

Specific performance is an equitable remedy in the law of contract, where a court issues an order requiring a party found in

breach to perform a specific act to complete performance of the contract. As a matter of discretion, court can refuse to make a decree for specific performance if the applicant is in breach of his or her obligations under the contract. In **Australian Hardwoods Pty Ltd V Commissioner for Railways [1961] 1 All ER 737 at 742** Lord Radcliffe stated as follows:-

> *"...A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations...."*

It is already my finding above that the respondent was in breach of the contract when it failed to pay the balance of the contract price within the stipulated 75 days, upon which the agreement lapsed and the appellants had no option but to refund the US$ 50,000 deposit to the respondent. On that basis alone, it could be concluded that the learned trial Judge erred by granting an order of specific performance in favour of the plaintiff despite the fact that the plaintiff was in breach of the contract between it and the defendant.

Secondly, section 64 (2) (e) of the Contract Act, cap 73, provides that a party is not entitled to specific performance of a contract where the person against whom the claim is made is at the time entitled, although in breach, to terminate the contract. This right is reinforced by section 47 of the same Act which states that, where a party to a contract promises to do a certain thing at or before the specified time but fails to do so, the contract or the part of the contract that has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time was of the essence to the contract.

In the instant case, clause 2 (b) of exhibit **P2** is very clear that, if payment is not effected within 75 days of the date of execution, the sale agreement shall be deemed to have lapsed and the property shall revert to the vendor who will be under no obligation, save for effecting a full refund of any payments made at the time under the agreement. This position is acknowledged by PW1 who, at page 31 of the record, testified for the respondent that despite all the efforts the defendants (appellants in this case) insisted on the contractual rights that the agreement had lapsed.

Thirdly, the decision in **Steedman V Drinkle & Another [1914-15] ALL ER 298** is to the effect that the jurisdiction to grant specific performance cannot be exercised where the parties have expressly indicated in their agreement that time is of the essence. It was held in the same case that courts of equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. That however, they never exercise this discretion where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain.

This principle was expounded by the East African Court of Appeal in **Singh V Parmar [1971] EA 210**, where an agreement for sale of land had a condition that a deposit was payable, but did not specify that time was of the essence in connection with the payment of the deposit. The Judge refused to imply a stipulation making time of the essence. He preferred to apply the general rule as stated in **Halsbury's Laws 3rd Edition pages 164 - 165**, and held that, in absence of an express stipulation or clear implication that time in relation to payment of the deposit was of the essence

of the contract, failure to pay the deposit did not entitle the vendor unilaterally to avoid the contract. The *ratio decidendi* of this case is that time is of the essence if there is an express stipulation in the contract to that effect.

The same principle was also recognized in Uganda by the Supreme Court in **Sharif Osman V Haji Haruna Mulangwa [1995-1998] 2 EA 275**.

There is also the age old principle in equity that a court will not grant an order for specific performance to a party who comes to equity with unclean hands. The appellants contend that the respondent had no clean hands in this matter, partly because the respondent's evidence revealed that it defaulted on timely performance of its obligations for selfish reasons like extracting maximum profit.

PW1 testified that he went to Canada at the end of August 1995; that he paid the first deposit by cheques; that he was planning to remit the remaining money from Canada; and that he called DW1 to get bank details in order to remit money. This statement contradicts his later statement during re-examination at page 34 that the money was not in Canada, but on the respondent's account in Uganda. As correctly argued by the appellants' counsel, if the money was actually in Uganda on a bank account accessible to PW1's partner, and if on the last day there were people in Kampala able to deposit a cheque or cash with the appellants, then the whole claim about requesting bank details from the lawyer in order to make a remittance from Canada is baseless.

The reason PW1 initially gave to the trial court for not paying the second instalment was, as earlier stated, that the mode of payment was not specified in the agreement. It is also his evidence that, on the last day, he had people who would have

deposited a cheque or cash with DW1 or the 1st appellant if they had specified the mode. Yet his other evidence is that he made the first payment by cheque, and that he was going to use another method, bank to bank transfer of funds, to pay the appellant. At another point he testified that he delayed because he was not given the appellants' account details by DW1. This evidence is not consistent and it points to deliberate deceitfulness on the part of PW1 who was the respondent's sole witness.

This would, in my considered opinion, mean that the respondent's hands are not that clean as to entitle it to benefit from equity.

It is also a principle of equity that it will not assist a person who is guilty of laches. In this case, it is baffling that the respondent who, by its own testimony, had the funds available in its account for the entire period of 75 days, waited until the 74th day to start making calls regarding payment, let alone that these calls were to a third party to the contract (DW1), despite being conscious of the contractual consequences of default. This conduct would definitely not deserve the sympathy of the court under equity.

I have also considered the principle that an order for specific performance will not be issued where the hardship to the party against whom it is made is outweighed by the benefit to the party seeking the said order. This principle is enshrined in section 64 (2) b) of the Contract Act. It provides that a party is not entitled to specific performance of a contract where the specific performance will produce hardships which would not have resulted if there was no specific performance.

In this case, by awarding the order of specific performance in favour of the respondent, the learned trial Judge, in effect, ordered the suit property to be transferred to the respondent, who had defaulted in paying the balance, for less than 50% of the agreed

purchase price with no compensation whatsoever to the appellants. This was in addition to the fact that, as the adduced evidence reveals, the respondent has been in occupation of the suit property since 1995, and has enjoyed all the rights of an owner despite paying less than half the price of the agreed property.

The respondent's evidence further shows that, the respondent has, during this period, received rental income from the suit property, which income has not been passed on to the appellants. The respondent has also, by the learned trial Judge's orders, or omissions to order, retained use of the US$ 67,300 which it should have paid to the appellants. This benefitted the respondent considering that, as testified by PW1, the value of the property rose from US$ 117,300 at the time of entering the property, to over US$ 1m-1.5m at the time of trial.

This contrasts sharply with the position of the appellants who, as the adduced evidence shows, did not default on any of the agreed contractual terms, but rather acted strictly in accordance with the written terms of the contract. The learned trial Judge's orders in effect made the appellants lose ownership of the suit property to the respondent. *Mesne* profits were not awarded to the appellants to make up for the respondent's long occupation of the suit property.

In my considered opinion, based on the adduced evidence and the relevant authorities, the order of specific performance visited extreme hardship on the appellants who throughout the duration of the contract, observed their contractual obligations. A court of equity would not endorse such hardship to a party who observed their part of the bargain in the contract.

Grounds 3 to 7 inclusive, of this appeal succeed.

Ground 8

The appellants faulted the learned trial Judge for failing to find the respondent a trespasser and failing to award the appellants *mesne* profits. The respondent, on the other hand, argued that it acquired an equitable interest after the sale agreement was executed, and that, therefore, they could not be trespassers.

The appellants' counter claim was dismissed by the learned trial Judge. It was to the effect that, by refusing to hand over possession of the suit premises to the defendants (appellants in this appeal) after the sale agreement had lapsed, and the tenancy terminated, and the (respondent) became a trespasser. The appellants prayed for an order of ejectment against the respondent, *mesne* profits, general damages for trespass and costs for the counter-claim.

According to exhibit **P2**, upon the passing of the deadline for payment, which was 14th September 1995, (without the balance of US$ 67,300 plus accumulated interest being paid) the agreement would lapse.

The adduced evidence shows that the deadline passed; that the respondent was duly notified of the lapse of the sale agreement; and that a refund of the deposit was tendered to the respondent. This is confirmed in exhibits **D1**, **D2** and **D4** though, to all intents and purposes, the sale agreement lapsed automatically.

It is not in doubt therefore that the respondent knew that its right to occupy the suit premises as purchasers had lapsed along with the sale agreement. The adduced evidence as brought out by PW1, shows that, by the time of trial, the respondents had occupied the appellants' premises rent free and against the appellants' will for about 18 years. This was apparently facilitated through a

temporary injunction in their favour obtained from the High Court on basis that they were owners of the suit property.

This court however finds that, since the sale agreement automatically lapsed on the respondent's failure to pay the balance of the purchase price of the suit property, ownership of the said property reverted to the appellants in accordance with the terms of the contract. When the sale agreement lapsed for non-payment of the last instalment in time, the respondent lost its interest in the suit property and became trespassers on the property. This would therefore render the respondent's continued occupation of the promises a trespass commencing from the time of the lapse of the agreement. In that connection, the respondent remains a trespassers, liable to pay *mesne* profits for its occupation of the suit property.

In that regard, based on the adduced evidence and the authorities cited, I would agree with the appellants' counsel's submissions that the learned trial Judge erred in law and in fact when he failed to find the respondent a trespasser, and to award the appellant *mesne* profits.

In my considered opinion, as deduced from the testimony of DW3, Dr. Sali Nicholas Kasimbazi, which was not rebutted by the respondent, contained in a report, exhibit **P8**, the appellants sufficiently proved their claim for *mesne* profits. These should have been awarded to the appellants who complied with all their contractual obligations, including refund of the deposit. The amount of *mesne* profits is US$ 327,356 total rental due for the period prior to 1998 at US$ 37,380.

This ground of appeal succeeds.

In the result, I would allow this appeal on all the grounds. I would accordingly order as follows:-

i) The Judgement of the High Court is set aside.

ii) *Mesne profits* are granted to the appellant to be paid by the respondent in the sum of US$ 327,356.00 for use and occupation of the premises for the period 1st January 1998 to 30th October 2010, and threafter at a rate of US$ 3,000 per month until vacant possession of the property is delivered to the appellant.

iii) Costs of the suit are awarded to the appellants in this Court and in the High Court.

Dated at Kampala this 3rd **day of** March **2020**

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Percy Night Tuhaise

Justice of Appeal