

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**  
**HIGH COURT CIVIL SUIT NO. 411 OF 1998**  
**BOUTIQUE**  
**SHAZIM LIMITED:..... PLAINTIFF**

**VERSUS**

**1. NORATTAM BHATIA**

**2. HEMANTINNI BHATIA:.....DEFENDANTS**  
**( Through Nipun Bhasia as Administrator of Estate)**

**BEFORE HON. JUSTICE NYANZI YASIN**

**JUDGMENT**

**Back ground facts**

1. I have deemed this case to be one of those cases where the application of facts is very important. It is also explanation worthy for a case of 1998 is being decided in 2015 almost 17 years since it was instituted.
2. The defendant are the registered proprietor of the land situated at and comprised in LRV 247 Folio 1 Plot 12 Buganda Road here in after I will refer to as the “ suit land”.
3. On the 4<sup>th</sup> April 1994 the registered owner of the suit with M/S GALLERIA IN AFRICA LIMITED. The tenancy agreement was for a

- period of 2 years and 364 days. Pursuant to clause s.(a) of that tenancy agreement the tenant was given by the land lord on option to purchase the suit land on terms and conditions agreed on in the same clause.
4. On the 8<sup>th</sup> April 1994 Gallaria in Africa Ltd assigned its rights under the tenancy agreement to the plaintiff on the 1<sup>st</sup> July 1995 the plaintiff exercised its right of option to purchase. With agreement of the defendant an agreement of sale for the suit land was entered into the agreed purchase price was USD 117,300. Of that amount the plaintiff paid USD 50,000 leaving an outstanding balance of USD 67,00 USD 50,000 was paid on 7<sup>th</sup> July and 10<sup>th</sup> July 1995 through cheques that were postdated.
  5. The balance of USD 67,300 was to be paid in accordance with clause 2 (b) of the agreement of sale. Clause 2(b) gave the plaintiff 75 days within which to pay the balance else the suit land would revert to the vendor subject only to refunding the amount prior paid.
  6. On or about the 75<sup>th</sup> day the plaintiffs called Mr. Ebert Byanka the Advocate before whom the agreement of sale was executed the plaintiff called /rag Mr. Byankya from Canada through its Director who appeared as PW1. The purpose and contents of the plaintiff claimed its director called the Advocate from Canada to inquire what the defendant's bank account was so that it could pay the balance.
  7. It is claimed in the pleading see paragraph 3(g) of the plaint that on the 13 Sept 1995 when Mr. Azim Kassem talked to Mr. Mr. Byankya on phone for details of Byankya promised to called back the next day.

8. On the next day it is alleged Mr. Byankya refused to give the bank details . instead on the 15<sup>th</sup> Sept 1995 M/s Byankya Kihika and company Advocates acting on the instructions of the defendants notified the plaintiff that the sale has lapse by reason of expiry of time.
9. That the plaintiff efforts to pay in Uganda later by the 23.09.1995 frustrated by the same firm of Advocates refused to accept the payment. The defendant had then opted to refund the USD 50,000 Paid earlier as take over the property. the plaintiff refused the refund and sued for specific performance of the sale agreement on the 24.Oct 1995.
10. The 24.Oct 1999 suit was brought against the attorney of the defendants but it was struck out for non disclosure of cause of action it was HCCS out on 14.04.1998. Under HCCS No. 411/1998 the plaintiff failed a fresh suit against the defendant.
11. The case has since then had a disturbing procedural History. For the purpose of this judgment I will adopt the narration of the counsel for the plaintiff and not contested by the defence.
12. After filing HCCS No. 411/1998 this court granted a temporary injunction to restrain the defendants from evicting plaintiff from the suit land until the determination of the suit. It means the injunction order has been in place for 17 years now.
13. It appears nothing much was done on this file between 1998 to 2004 a period of 6 years but the defendant filed Misc Application No. 505 of

- 2994 under O.7r11 CPR on the grounds that the main suit was res Judicata and be rejected.
14. On the 27<sup>th</sup> Sept 2005 Justice Opio Aweri( as then was)Struck out HCCS No. 411/1998 on the grounds that it was res Judicata in the view of the earlier decision by justice/ Mukanza (RIP) in HCCS No. cause of action).
  15. On the above ground alone the plaintiff appeal rides civil appeal No. 36 of 20087.
  16. On 8<sup>th</sup> Oct 2009 the court appeal ruled that the suit was not resjudicata.
  17. The defendants filed a notice to affirm the decision of the High court on the grounds that the plaint did not disclosed a cause of action.
  18. On 8<sup>th</sup> October 2009 the court of Appeal ruled that the suit was not resjudicata and that the plaint disclosed a cause of action. The Appeal was allowed with a order that the suit be heard on merit before another judge.
  19. Vide civil Appeal No. 16 of 2009 the defendants appealed to the supreme court against the decision of the court of Appeal above.
  20. On 1<sup>st</sup> August 2010 the Supreme Court decisions the Appeal and affirmed of the order of the court of appeal that the file be place before another judge for hearing. Hence this hearing.

21. This file was heard by Justice Zerurikize to close to its and except one defence witness who was heard by myself justice V. Zehurikiza is now retired this being a court of first instance the above detailed account is necessary for the benefit of litigant and other courts in case need arises.

22. At the trial the plaintiff was represented by learned counsel Nerima Nelson of Nambale & co. advocates while the defence case was conducted by learned counsel Mesembe Kanyerezi of MMAKS Advocates. I am thankful to the two for the relevant guidance they gave to this court.

23. From the record and submission of both counsel the facts stated in paragraph 1 to 5 of this judgment are admitted facts .

24. The following issues were agreed namely.

1). whether the sale agreement between the parties dated 1<sup>st</sup> July 1995 is specifically enforceable by the plaintiff or whether it lapsed in accordance with clause 2 (b) of the sale agreement

2). of the sale enforceable whether the plaintiff is entitled to the remedies prayed for in the plaint.

3). If on the other hand the sale agreement lapsed, whether the defendants are entitled to the remedies in the counterclaim.

25. it should be noted that by way of counterclaim in paragraph 16 & 17 of the written statement of defence the defendants pleaded that the plaintiff refused to handover possession after the lapse of the sale agreement and termination of the namely and therefore prayed for

a). an order of .....

- b). measure profile
- c). general damages for trespass
- d). costs of the counter claim

26. This court will ensure the issues in the order they were presented in the scheduling by the parties.

27. whether the sale agreement between the parties dated 1<sup>st</sup> July 1995 is specifically enforceable by the plaintiff or whether it lapsed in accordance with clause 2(b) of the sales agreement.

28. for reasons of clarity I have found it important to reproduce clause 2(b) of exh p.2 in this judgment as it is directly in issue No wonder that both learned advocates reproduced it in their submission.

29. clause 2(b) reads as follows<sup>2</sup> the consideration herein reserved shall be payable in the following manner;

b) the balance of USD 67300( united states Dollars sixty seven thousand three Hundred ) to be payable in within 75 days of the date of execution provided the said payment shall carry interest of one and a half percent on a reducing balance permonth which shall be paid a long with the principle on the date of effecting the payment. For AVOIDANCE OF DOUBT if the payment is not effected within 78 days of the date of execution the sale shall be deemed to have lapsed and the property shall revert to the vendor who will hinder no obligation save for effecting a fall refund of any payment made at the time of ..... The agreement

#### ISSUE ONE

30. Issue number one is structured in such a way that the two sub issues refers to the same thing. In order to reach a conclusion at the agreement in EXH p.2 is specifically enforceable by the plaintiff it must first have to

be decided whether the sale agreement had not lapse by reason of clause 2(b).

31. So the issued to decide here covering both issues is essence of time. Each side presented sprinted arguments on this point. Learned counsel Nalime for the plaintiff strongly urged that the agreement did not lapse at time was not essence. He gave the following reasons.

32. that the defendants conduct showed that they were not stuck that time be adhered to executing the contractual obligation Mr, Nalime drew example from exh p.1 where the plaintiff predecessor in file had the option to purchase the suit property within 12 months from commencement of the tenancy at USD 120,000 payable in one installment. He refered to clause 5 (c) of exh P.1 that the 12 months for purchasing the property expired on 30· 06.1995 But the parties concluded the sale agreement the following day the 1<sup>st</sup> July1995 that DW1 in cross examination agreed that the relaxed the terms of payment from USD 117,300 payable in two installments . To the learned counsel that was evidence that the defendant never required stuck edheverence to timr schedules the second example the cited was drawn from exh p.2, he argued that clause 2 (a) expressly required that USD 50,000 be paid at the execution of the agreement but 2(.. exh P.2 provided 2) the consideration were in reserved still be payable in the following manner

a). USD 50,000( United states Dollars Fifty Thousand) be paid on execution of this agreement.

33 That contrary to the above provision the agreement was executed on 1/7/1995 and payment was by post dated cheque in uanda shillings ...

1). cheques for shs 24,500,000 dated 7<sup>th</sup> July 1995

cheque for 24,500,000 dated 10,july 1995

He concluded that the above manner of payment was a deviation from the strict terms of the agreement on payment

34. to support the plaintiff 's case and thus reasoning Mr. Mehime cited to this court is case of OSMAN VS- MULANGIWA[1995-1998] E.A 275 which I will request to later.

35. the second reason the plaintiff's advocate advanced was that ex p.2 did not ascertain any mode of payment that Pw1 told court that the sales agreement did not specify where how and the mode of payment of the balance. That Pw1 knew of no instruction on how he could pay the balance. That he did not know of the whereabouts of Mr. Bhatia who was to receive the payment that was so because Mr. Bhatia was travelling between India and other parts of the world

36. counsel found the admissions made by Mr. Bhatia Niphen DW1 in his evidence of cross examination relevant for prove this point . He stated that DW1 concluded that

1). The agreement does not state the place of payment of the price.

11) That he did not write or telephone instructing the plaintiff to pay through Byankya kiluke & co Advocates.

III) He went to India after the agreement but he did not communicate to the plaintiff

IV) That at the material time he was staying at fairway Hotel as a guest but did not communicate to the plaintiff

37. That in the circumstances that was reasonable to ask Mr. Byankya counsel for both parties to advise on the mode of remitting the balance. He



asked PW1 to call the next day 14.09.1995 . He PW1 called but told court he was not assisted.

To prove further that the agreement did not lapse Mr. Nelima attacked Mr. Byankya's letter that res..... the agreement on 15<sup>th</sup> Sept 1995 Mr. Byankya wrote to the plaintiff a letter exhibited is D.1 stating that the agreement had lapsed due to failure to pay the balance with 75 days.

38 Mr. Naline argued in first that Mr. Byankya had acted for both parties in the creation of exhibit p.2 that for that reason was letter to one of his client was in contravention of Rule 4 of the Advocates Professional conduct regulation S1 267-2 for the same reasons he terms thus learned friends letter on illegality that can not be conducted by court . in essence he appeared to say that the notice of termination was involved.

39. the last point argued was that the refund made for USD 50,000 breached clause 2(b) on provisions relating to refund . He gave two reasons.

That exhibit D1 notice of termination merely offered to refund the money but less accrued rental and other obligations arising from the tenancy.

That vide exh D3 D4& D5 the defendant lawyers purported to refund USD 35,000/= instead of USD 50,000/= which he plaintiff rejected

He concluded this clause 2 (b) on refund provided for the full amount and never catered for deductions.

40. Mr. Masimbe Kenyereza learned counsel for the defendants strongly argued that time in the present case was of essence like this court he reproduced clause 2 of exh p.2 at page 4 of his written submission after he had served three(3) sub issues out of issues number one.

41.A The sub issues were in g....

- (i), whether time was of essence in relation to Ehb P.2 execution
- (ii). If so what are consequences of the plaintiff's failure to pay in time.
- (iii). Whether that failure was by reason of fault on the first of the defendant.

41B. learned counsel analysed EXH P.2 Clause2(b) and submitted that the plaintiff was supposed to pay the balance of 67,300.USD with 75 days from the 1/7/1995 that the 75 days were due to expire by the 14 September 1995 that by that time the plaintiff had not paid the balance interest as required under clause2(b)

42. from his point of view under Exh p.2 time was of essence in relation to the payment of the balance of USD67,300,. He cited to this court Halsbury laws of England 4<sup>th</sup> Edition Vol a (1) paragraph 931 the gist of which may be paraphrased as below

931" time not generally of essence at common law stipulation as to time in contracts were as a general rule and particularly in less contracts for sale of land

Consider to be of essence of the contract even if they were not expressed to be so and were continued as condition precedent.....

.....

However in the exercise of its jurisdiction to decree specific performance the court of chancery adopted the rule especially in the contracts for sale of land that stipulated as to time were not to be regarded as of essence of contract unless either they were made so by were made so by express terms or it appears from the nature of contract as the surrounding circumstances that such were the intention of the parties..... unless there was an express

stipulation that..... That time should be of essence of the contract specific performance would be decreed even though the plaintiff failed to complete the contract

.....”

43. he sought to strengthen the above argued by citing the East African decision of SYEDNA& ORS VSJAM L.S ENG MEERING CO. 1973)E.A254 where the holding reflects the spirit of paragraph 931 Halbury laws of England(supra) the subject contract in that case which was supplemented to an earlier agreement this supplemental agreement provided for payment of the balance at a fixed date of which the agreement would be ended and the sum earlier paid forfeited there was not payment in the time stipulated in the supplemental agreement though there was an earlier deposit of shs 100,000 out of shs 250,000/=.

44.A The Court held that time was of essence to the contract that the plaintiff was to pay the balance on 15.march 1971 and he did not. Court also allowed that the deposit of shs 100,000 earlier deposited be forfeited as the contract provided.

44.B. counsel then drew a way close and applicable relationship between that case and the present clause 2(b) of exh p.2(b) he was more interest in the following gist if exh P.2 claus 2(b)

.....

.....

The balance of USD 6700of the purchase price to be payable with 75 days of the date of execution

.....

.....

FOR AVOIDANCE OF DOOBY if payment is not effectd with 75 days of the date of execution, thus agreement shall be deemed to have lapsed and the property shall revest to the vendor.....

.....

.....

.....

45. by quoting all the above counsel intended to show that unlike case where here is no express stipulation on time being of essence and the consequences therefore the present case in vlause 2 (b) provided for both.

46. he argued that the situation in OSMAN-VS- MULANGWA (supra) was distinguishable for the present case and can not help it. That in that case although the dates of payment had been indicated in the agreement there was no express stipulation making time of payment to be of essence such as providing for consequences in relation to the continuation of the contract in the event of failure to pay by the date stipulated.

47. on the consequences of failure to pay in time Mr. Mesebe argued that time within which to pay expired on the 14, sept 1990 that by that time contrary to Claus 2(b) the plaintiff had not paid any interest that it was the plaintiff own admission in evidence. In evidence that it was on the 13<sup>th</sup> day of September 1995 at 15:14 hrs Ugandan time that its director Mr. Azim Kassam(PW1) made his first call to the plaintiff's defendant's lawyer allegedly to obtained the bank account details of the defendant to which payment should be made see page 13 typed proceedings on evidence of PW1)

48. THAT IN EVIDENCE Pw1 admitted that he was able to to pay USD 50,000 deposit without having had the bank account he further admitted that there was nothing in the agreement that bared payment by cheques or bank draft drawn in the names of the both case he would not need the account number that the same would be trial if he paid by cash.

49. counsel also using Mr. Byenkya evidence submitted that when the plaintiff called the advocate on 13.09,2005 the purpose of the call was not to aske for bank account details but for request for an extension of 2 months for payment of the balance. But Byenkya told him he had no instructions on the matter but would consu;lt his client Nipun Bhatia the next dy Byankya advised him that the extension would not be granted and he had to pay the balance by close of business oin accordance with the agreement.

50. he asked court to ignore PW1'S VERSION OF THE CONVERSION THAT Byanya was hostile that court accept Byankya version on the quotatopn of validity of exh D.1 Byakya letter of termination of exh p.2 Mr. mesembe presented he argument below.

“ the fa not exhibits P.7(a) and(b) and p.8 (a) and(b) put forward by the plaintiff in laiming that Mr. Byankya had at one point been its lawyer were clerity explained by Mr. Byankya in his testimony as those fee notes were issued pursuant to clause it of the agreement which made the purchaseliabile for the fee for preparation of the agreement this did not and does not constitute an advocates client relationship and in any event not one in the advocate comes to learn of confidential information which would be prejudicial to the client.

51. He prayed in conclusion that court funds that time was of essence to the performance of the obligation to pay the balance under exh p2 and

that the failure to do so by the plaintiff can not be visited on any conduct by the defendants.

52. The above is how best each party's case could be stated in the judgment however suffice to say that all the submissions were considered by this court. I will answer issues on the way Mr. Nelime for the plaintiff presented issues but Mr. Masule own framed issues but which I allowed for reasons of relevance will be answered. That issue is whether the failure to pay in time if court so funds was by reason of fault of the defendants.

54 Mr. Nelima's argument for the plaintiff was time was not of essence for among other reasons that though the transaction between the parties time frame work and other terms were being relaxed in other words not strictly adhered to that has to be born out by evidence in my view.

55. clause 5 (c) of EXH p.1 provided as follows

“ it is agreed that the tenant shall have the first option to purchase the property exercisable within twelve months of the commencement of the terms created herein at a price of USD 120,000( ONE Hundred and twenty Thousand USD) payable in one complete payment.....”

56. Clause 1 of exh p.1 provided that the 1<sup>st</sup> of July 1994 was the commencement date of the tenancy . naturally the 12 month term would expire on the 30.6.1995.

57. Before the expiry of that period on the 29 April 1995 the plaintiff wrote to the defendant in exh p.10 and stated as below

“ with reference to the above tenancy agreement dated April 7<sup>th</sup> 1994 . I hereby give notice of our intention to purchase the property as per clause 5

(c) the full purchase price will be paid on or before the expiry of the option period as per the formula detailed in clause 5(c) 58. The expiry of the option period that is the end of 12 months clause 5(c) gave occurred on the 30.06.1995 by that time no full payment had been made and option to purchase had been executed.

59. However exhibit p.2 the sale agreement between the plaintiff and the defendant shows that on the following day after expiry of the ..... option to purchase period on agreement of sale was concluded it was made on the 1<sup>st</sup> day of July 1995.

60. in Exh p.2 the terms and effect of 5(c) in exh p.1 were notifiable there was no payment in full of USD 120,000 in payment before 5(c) of xpp.1 expired on 30/ June 1995 .

Under clause 5(c) of exh p.1 the defendant has the full right to reject any transaction relating to the option to purchase after the 30.06.1995 . apparently from the record they did not decline to conclude the transaction in exh p.2 despite the expiry of time. It is also notifiable though it does not relate to time the parties also changed the purchase price from USD 120,000 TO 117,300 . however that difference could be explained by clause 5(c) of exh p.1 itself the clause stated that the payment was to be

“ less cost of renovation not yet off set against the tenancy”

62. when it comes to exh p.2 clause 2 (a) provided as below

2). The consideration herein reserved shall be payable in the following manners

a). USD 50,000(USD Fifty Thousand)

to be paid on execution of this agreement

63. I notice that the clause did not mention how that money would be paid on the execution of exh p.2 whether the payment was to be bank draft cash or cheque or any other means it is not mentioned how this money was paid in a manner other than the provision of clause 2(c) is explained in the oral evidence of pw1 and ex p.4

64. on that point PW1 testified as below (see page 7 of typed proceedings.

“ the USD 50,000 was supposed to be paid on 1.07.1995 the date of execution of the agreement but it was paid in two equal instalments in Uganda shilling at the date of shs 980 to 1 USD. These two instalments were dated 7.07.95 and 10.07 95 this was a special argument for the 50,00 USD were paid by cheque it was a cashcheque.

Mr. Nipun Bhatia accepted the cheques and signed on the receipt at the bottom.....

These two cheques were written on 1.07.1995

Exh p.4 it is a small document the contents of which can be reproduced in this judgment as below

“ I Nipun Bhatia hereby acknowledge receipt of the following payment from Azam kassam

<u>Date</u>	<u>Cheque No.</u>	<u>Payable to</u>	<u>Amount</u>
July,7 95	362619	Cash	24,540,000
July, 10,95	32620	Cash	24,500,000

The above payment is the initial amount of USD 50,000 for the purchase of the property at plot 12 Buganda road computed at an agreed rate of 980/= per USD Dollar by boutique Shazam LTD



REPRESENTED BY Galleria in Africa ltd the cheques are to be deposited on two separate days

Relieved subject to realization

Sgn Mbhatia it appears the only condition Ms Nepun Bhatia pput before accepting the cheques was their relation by endorsing in were subject to realization but the wholly accepted them. In this evidence in cross examination as DW2 he told court the evidence reproduced below

“under the sales agreement the price was USD 117,3000 USD 50,000 was paid on the signing of the agreement the balance of 673000 USD was payable within 75 days of the date of execution of the sale agreement it from 1.07.95 the purchasr paid the deposit and issued a receipt 50,000 was paid in wo part one on 7.07.95 and the other on 10.07.95 we accepted these payment.

Now from the evidence of both PW1 AND PW2 it is clear that while exh execution of USD 50,000 no such money was paid on that day. Instead postdated cheques o the date of 7<sup>th</sup> and 10<sup>th</sup> July 1995 were received by a special arrangement which DW1 accepted subject to only one condition that the cheques one realized.

Since the plaintiff’s case appear to be that there was no strict adherence to time frame works I will consider dw2 evidence on the payment that fell due on 14.09 1995 below is what DW2 said about that payment (pg 27)

“ as I said the balance was payable within 75 days from the date of execution of the agreement ie by 14.09.95 the balance in a number of installments with 75 days that is from 1.07.95 to 14.09.1995.....”

No instalment was ever paid to me failure to pay the balance of USD 67300 by 14.09.95 the effect) was that the agreement would lapse and the property revert back to the vendor who would refund any payment made since no payment was made between the deadline of 14.09.95 the sale agreement lapsed and the property revert to my parent (emplied added) This was the first time in the transaction for the defendant to alk of deadlines and require the stick adherence to time I have noted earlier in his judgment that exhibit p.2 was concluded on the 1/07/95 where the time for exercising the option to purchase lapse.

72. I have also noted with serious concern hat though exh p.2 required payment on execution post dated cheques were accepted instead. None of the cheques was cashable on 1/7/96

The bills of exchange Act cap 68 explained the effect of such payment.

73 s. 12 of the Act deals with antedating and postdating of a bill it states s.12 1) where a bill..... is dated , te date shall unless the contrary is proved deemed o be the true of the drawing a acceptance or endorsement,

74.S. deals wit computation of time of payment relevant, relvant to post dated cheques I will refer to s. 13 (a) it states.13 where the bill is not payable on deemed the date on which it falls due is determined as follows (a) three days called days of grace where the bill itself does not otherwise provide, added to the ime of payment as fixed by the bill and the bill is due and payable on the last day of gace

75. s. 12 and 13 of the bills of exchange Act read together would mean that even the cheques dated 7<sup>th</sup> and 10<sup>th</sup> would not be realized on those dates realization th conditiond under which thy wee received would be as calculated under S. 13 by adding 3 days of race. Assuming

therefore the cheques of 7.09.5 was banked on that day it would be found valid on 10<sup>th</sup> .07 95 as the last day of grace subjected to the provisions of s. 13(c) (I) (ii) of the act

76. The above is so being the defendant would not present the bill any earlier than the 7<sup>th</sup> and 10<sup>th</sup> of the sept 95 as S. 44 of the bills of exchange Act provide for rules governing presentation of bills for payment the section states in S.44(3) as below

(3) where the bill is not payable on demand presentment must be on the day it falls due.

77 The above means that DW2 had to stay with the bills (cheques) issued to him on 1/7/95 until 7<sup>th</sup> and 10<sup>th</sup> July 95 in order to present them. At the time there was no payment upon execution of exhp.2 in the eyes of the act governing bills of exchange and since the cheques were received only subject to realization, the effect of payment would be realized on the last day of grace as S. 13 (a) provides applying the law to the facts of this case I hold the view that the parties changed the strict nature and mode of payment exhp.2 provided for to a relaxed one. That was so both in terms time and currency as far as the payment of USD 50,000 was concerned. As to that effect this... on the payment of USD 67,300 as balance will be ensured after consideration of all the sub issues under the current issue.

78. The next issue to ensure is where there were ascertained mode of payment of the balance of USD 67,300 it is not in dispute that exhp.2 did not itself provide for how the balance would be paid. What was to be considered here is PW'S DW1 and DW2 evidence on record a sub matter 1. In so doing this court & seeks to decide whether there were

genuine attempts by the plaintiff to pay that were failed by the defendants as claims.

79 The evidence of PW1 and DW1 show two extreme positions PW1 testified that:-

“ towards the end of August I travelled to Canada with my family while in Canada on 13.09.95 I called Ebert Byankya of Byenkya & co Advocates who was a lawyer to both parties to give me instructions as to where how and what mode the payment should be made.

He told me to call on 14.09.95 and give me the booking and any other details on the 14.09.95 I called him.....”

80 PW1 I continued evidence on the record shows that he did not get the answer from Mr. Byenkya and accused him of turning hostile. On the same point PW1 stated

“ I called Byankya because he was the lawyer for both parties and in a position to give the required information and details on everything also I did not know that he was traveling back and from India and other places’

81. Mr. Ebert Bankya appeared before this court as a witness he testified as DW1 He gave the evidence below” Bhatia never received the balance of 67,300 USD and any interest at all by 14.09.95 so the agreement lapsed and the property would revert to Bhatia

.....within 75 days they could have made a cash payment or sent a cheque in fact the initial payments were by cheques they would have made bank drafts and sent it to the defendants. If you send a cheque you need not know the details of bank account if you want to send it by money transfer then you need bank details.....

I recall receiving a telephone call from PW1 at around 13.09.96 he indicated to me he was calling from Canada he also indicated that he was unable to meet the deadline to pay the balance.

He asked me if I could intercede with Bhatia first extension of time.....

.....

.....

.....

He wanted about two months I told him I would talk to Bhatia and communicated the following days. I contacted the defendants on phone he said no. I communicated that to the plaintiff when he called me back the following day in the afternoon I asked him to pay on that very day of 14.09.95.....”

82 DW2 also gave some evidence that is relevant in the consideration of this issue relevantly in my view DW2 stated

‘ in 1995 I was staying in India and partly in Uganda and that is true even now I was in Uganda by 14.09.95 and I was available. I had come for the payment I did not have to contact them because it was not my obligation. They knew I had an office at Bhatia Building plot 8 Wilson Road I am in real estate business they had my phone number land line. Mr. Byankya rang me. He did not ask me for my bank account because all they wanted was extension to pay the balance.

If they wanted to pay the money in our account they would have asked for the details when paying the first deposit they would have asked for our account at the earliest according to them they asked for the bank account on the 7<sup>th</sup> day i.e 13.09.96 at 3:00 pm. according to them they

asked Byankya but he does not have my account details and would not be details to have no be expected to have my account details”

83 should the true position be that on the 13<sup>th</sup> 09.95 PW1 asked DW1 for extension of time beyond 14.09.95 it means I was not lies intention to honour the agreements if it is the otherwise he says that he wanted the account number so tat he could pay tha means he was doing what ever possible to Honour his con..... obligation . hen court has to making a finding according to the evidence as presented it is what happened.

84. I must say that the above extreme position of PW1 . DW1 and DW2given in their oral evidence was not enough to guide this court in resolving the issue I decided to trace the proble form the pleading and other places of amended plaint he plaintiff pleaded as follows.

The plaintiff’s action arose out of breach of contract the facys of which are as follows

g) on the 13<sup>th</sup> Sept 1995 Mr. AZZIM Kassem who was at th tie in Canada called on hone Ebert Byenkya inKampala to ascertain for im te bank account number of the defendants in order to remit money to same as the plaintiff did not have the details as Mr. Byankyadid not have the details himelf and asked AZIM Kassem to call back the nexy day when Mr. Azim Kasim called Mr. Ebert Byankya the next day 14.09 5 Mr. Byankya refused to give him the details.....”

85 apart from h addition tha a copy of the telephone bill annexture”F” shall be relied on this paragraph remained the same in according in both the oriional and the amended plaintiff.

86. The defendant in reply in her written statement of defence particularly to paragraph 3(g) led in paragraph 6 of the defence as below

6. paragraph 3(g) is deemed in toto and the defendant shall be put to strict proof thereof at the trial that the times fully aware of its obligation under the agreement to effect payment of the record installment at a specific time and alleged relevance at all in right of the clear terms of the agreement.

87. Additionally paragraph 10 of the WDS is a relevant reply to paragraph 3(g) it states.

10) paragraph 4 of the plaint is deemed in total the defendants were never under any contractual obligation to provide details of its account for any of the installment it was not difficult for anybody reading clause 3(g) of the plaint to notice the agreement of seriousness with which the claim that Pw1 called Mr. Byankya for bank account details was made

89. of paragraph 6 of the WSD were to adequately reply to the allegations in 3 (g) of the plaint it would have averred in addition the version DW1 gave in is evidence it would in my view have deemed to Pws' version and added what the defendants though their advocates knew what to be the true version. That was the best and earliest opportunity for the defendants to plead that Pw1 never asked for bank details but for time called Mr. Byankya to asked Mr. Bhatia to extend the time which Mr. Bhatia categorically refused till evidence time for his matter to be brought to light

70. I am forced to believe that if this claim by DW1 and DW2 was to be true it would have been reflected in their written statement of

defence the WSD was filed on 8<sup>TH</sup> June 198 by the same firm of Advocats where DW1 worked and they were aware of those events.

71. turning to the events that followed the 13<sup>th</sup> and 14<sup>th</sup> Sept 95 telephone talk between PW1 and DW1 one is guided to make a probable conclusion as to what happened I will start with the communication in exh D.1 Exhibit D1 was written on 15<sup>th</sup> Sept 95 that is the day that followed the talk between PW1 AND DW1.

72. If the claims for request for extension of time by PW1 were true I would have expected exh D1 to refer to those events it would have communicated to the plaintiff a regret by Mr. Byankya that the defendant refused to accept his request for extension of time and the contract had lapsed. That is so because that is where PW1 and DW1 ended their business according to DW1.

89 I have made the above inference based on the provision of S.113 of the Evidence Act the section provides as follows S.113

The court may presume the existence of any facts which it thinks likely to have happened regard being had to the common course of natural events human conduct and public and private business in their relation to the facts of the particular case.

90. if Mr. Byankya and Alim Cassim had a day before talked about a request to Mr. Bhatia to extend the time of payment of the balance and it is Mr. Byankya's evidence that he promised the plaintiff to talk to Bhatia about it by nature of the above provision (s113) I would have expected Mr. Byankya to communicate his failure on extension of time exh D1 if it existed.

91. there are two other pieces of evidence that are very important to review on this matter that is exh p.5 dated 6.Oct. 95 from James



Matsiko Advocates on behalf of the plaintiff to Bhatia of the defendant this letter was replied to by M/S Byelyese Khika & co. advocates in exh D4 dated 19 Oct 95 92 in exh p.2 p.5 on behalf of the plaintiff the advocates wrote (see paragraph 4) as bellow.....

.....

Mr. Kassem wile in Canada..... attempted to obtain the particulars of your bank account so that he could remit the balance to you but in vein you can not turn around and blame our client for the delay in payment.

93. since the defence case and evidence is that the plaintiff never asked for bank details one would have expected any reply from them or their advocates to states that such a request has never been made . however in exh D4 particullaly Paragraph 3 the defendants advocates replied as below.

“ there was no requirement the consideration be paid into a bank account so the claim that he was trying to ascertain our clients account number is of no relevance to this matter”

94 in my view the above is a very inadequate reply to the serious allegations in exh p.5 if it is true as it claimed that Pw1 asked for time extension the advocates in exh D4 would have categorically denied that Azim Kassim ever asked for bank details while in Canada that instead he wanted time within which their client refused .

95.The answer given in paragraph 4 of eh D4 simply means that the bank account details were never given because the same was not relevant to the matter as he learned advocates so wrote.

96. Using other parties of evidence other than the oral evidence of PW1 and DW1 have come to the conclusion that it is..... that Pw1 while talking to Mr. Byankya on 13.09.95 asked him for bank details in order to pay them that he Pw1 asked for extension of time. Such conclusion is not supported by either the pleadings or the serious security of the evidence ex D1 p.5 and D4 and the effect of the provision of S.113 of the Evidence Act.

97. Mr. Nalima argued and wanted this court to decide the validity of the lapse notice letter ex D1. The latter is dated 15.09.95 I do not agree this matter should be issued just like Mr. Masembe argued the lapse is of no effect itself.

98. Secondly ex P.2 the agreement of sale under clause 2 (a) or (b) never provided that notice of clause 2(b) made the lapse automatic and never referred to the issuance of notice.....

99. It would have been different if the notice time expired say like on any date earlier than 15.09.95 but having been issued after expiry of time the notice is of no legal consequences.

It does not matter whether it comes from lawyers who act for one side or advocates who can be said to be in conflict of interest.

100. However I may only mention that in cases like

- Bristol & West Building - Vs May May & Marnansa & others [1996] 2 All ER 80

- Commonwealth Bank of Australia - Vs - Smith (1991) 103 ALR 477

Ug VS Patricia Ojangole CNM case No. 01/2014

Nifose MINERALS LTD

-VS- Abmak Associates Advocates Misc Application No. 60/201

It would then have been up to pw1 to decide how to use the information of the details of bank account . In absence of the information left a big possibility that he would have paid before time elapsed . it is more probable to say he would pay them saying he would not..

It would not be difficult to conclude that an advocate who acts in a non-contentious matter owing or creates a ..... Relationship between himself and both her parties he act and would not be allowed to act against the interest of any one of them.

101. In conclusion on issue one I find that the defendant's conduct was such that they never required strict adherence to time schedules by the plaintiff as evidence has shown from accepting to enter into an agreement to sell the land after 30 .1. 95 to accepting payment other than in conformity with clause 2 (a) 102 I also find that from the pleadings and evidence it is not true to say

104. the plaintiff deserves the assistance of the defendant in order to pay for among other reasons

- the exhibit p.2 never provided for how the USD 67,300 would be paid where to who was not clear, in his evidence DW1 made the admission Mr. Nalums identified at page 5 of his written submission

105. It is also important to note that DW1 also admitted at page 20 of typed proceedings that if the plaintiff wanted to make a money bank details I do not share the view that calling on 74<sup>th</sup> day meant anything all that DW1 had to do was to give the information that pw1 wanted ( next) that the plaintiff asked for extension of time to pay the balance but never probable true to say that plaintiff asked for

bank account details which were never given to him and no reason was stated or given to court I therefore hold that the plaintiff's failure to pay was mere at the fault of the defendants ten the plaintiff's conduct see opposite p.7 to P.63.

106 however the above finding does not in itself make the need to answer the sub issued under issue one it is easier combine the two issue that the sub issue and number wo that to say whether he agreement lapsed under clause 2(b) and if not whether the contract is enforceable by the plaintiff he two can be conveniently answered together

107 in resolving that issue Mr. M,alima asked this court to apply principles of equity . he refered this court to S 14(2) (b)(1) during the oral clarification on written submission.

s. 14.(2) (1) OF THE Judicature Act provides

2) subject to the consriution and this Act the jurisdiction of the high court shall be exercised

b) subject to any written law and in so far as the written does not apply in conformity wit

ii) the common law and the... of equity

108 the plaintiff's case was supporte by the decision in OSMAN v MULANGWA 1995-98 2 EA 272 CU as cited by Mr. MALIMA ON THE OTHER HAND THE DEFENCE CASE RELIED ON Hulsbury Law of Englend?(supra) paragraph 93 and the case of SYEDNE & OTHERS VS- JAMIL'S ENGINEERING CO 1973 EA 254 the authorities cited all related to the situations which are morels similar to the present facts it is now incumbent upon this court to decide which situation is applicable here

109 in both cases it is very important to appreciate the facts in OSMAN VS- Mulangwa the appellant to the supreme court was the registered proprietor of a building and land comprised in Kibuga block 12 plot 472 situated in Kampala on 5<sup>th</sup> January 1990 the appellant and the respondent entered into a sale agreement by which the appellant sold to the respondent the land and building at an agreed price of USD 12,000 prior to the execution of the agreement the respondent had paid USD 300 which was stated as the first installments towards the purchase price

110. the agreement stipulated that the respondent was to pay US & 5000 OR BEFORE 8<sup>TH</sup> Jan 1990 and the balance of US& 4000 be paid on or before 15<sup>th</sup> April 1990.

111. The respondent paid USD 5000 in two installments. He paid further US & 2000 on a date of or before 20 April 1990. The balance of USD 2000 was not paid within the stipulated period although evidence at the trial showed that respondent had tried on several occasions to tender the same to the appellant but the appellant declined to accept. The appellant refused to vacate the house and attempted to sell at another purchase before the respondent lodged caveat on... and served the appellant the trial court found in favor of the respondent and ordered specific performance hence the appeal to the supreme court.

112. my lords the justice of the supreme court discussed in detail the decisions in Phillips -vs- Silvester and Lyaght -VS- Edward. They actually considered the facts in later case to be similar to ' according to the principle of equity the right to the property passes to the purchaser and the right to the vendor is turned into a money

right to receive the purchase money..... The vendor become a trustee for the purchaser of particular interest the learned justice reasoned as below

“ it should here be observed that the agreement between the vendor and the purchaser in the case to which I have just referred provided for payment just referred provided for payment of interest if the balance of the purchase money remained outstanding beyond 25/03/1886 the date on which the purchaser should have taken possession . it is clear from the passage I have referred to above that even if there remained unpaid balance the property in the lands passed to the purchaser when a deposit was made

115. they then concluded at page on the effect of contract of that nature by quoting Jessel M.R in LYAGT’S case . the matter of Rolls stated after posing the question what is the effect of the contract

“ it is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchase of the Estate sold and beneficial ownership passes the purchaser the vendor having a right to the purchase money or a lien on the estate for the security of the purchase money and right to retained possession until the purchase money is paid.....

116. Mr. Masembe for the defendant did not agree with the law in the case above is applicable however to him he was distinguishable he went further to cite SYEDNA/& ORS VS JAMILS ENGINEERING CO. the summarized facts of the case are noted in the paragraph following

117” The second and third plaintiff agreed to buy certain land from the defendants by an agreement that provided for a payment of a deposit and a fixed date for the completion

The purchase price could not be paid at the date of completion and a further agreement was entered into which provided for a further payment by the plaintiff for possession to be given to the plaintiff and for payment of the balance of the fixed date with a further provision that if payment were not made the agreement would be ended and the sums paid be forfeited. The plaintiff was unable to pay the balance of the purchase price until the day after the fixed date when the defendant declined to receive it.

The plaintiff sued for specific performance or the return of the money paid contending that time was not of essence that relief be given against for future and that the payment was a part of a contract that should be enforced.

118 The learned trial judge held that the circumstances of the second agreement indicated that time was of essence he explained as below “ the circumstances in which the supplementary agreement was made and its provisions which added so greatly to those of the first agreement indicate that the parties intended exact compliance by the plaintiff of the date of payment of the balance of the purchase price Viz 15 March 1971

119 Mr. Masembe found the above situation and decision very comparable to 2(b) in ex p.2 especially the last part of the clause stating that

For the avoidance of doubt if payment is not effected within 75 days of the date of execution the agreement shall be deemed to have lapsed and the property shall revert to the vendor

.....

120. Mr. Musambe argued that principle of equity do not apply to express provisions like clause 2(b) to express provisions like clause 2(b) of ex p.2 he cited 3 paragraph 93 of Helbury laws of England (SUPRA) which states that time is generally by express terms that in ex p.2 parties made under that clause 2(b) time to be of essence and consequently the decision in Syden case was applicable here.

121. I have taken the trouble it needs to consider the arguments of both sides I must say I am more persuaded to agree with the plaintiff's the defendant's case the following are my reasons for the conclusion

122. with respect it is not true to argue or learned counsel Masembe did that OSMAN –VS- MULANGWES case is distinguishable and not applicable here I notice on the facts that balance of 9000 USD was to be paid at specific period in time it was not so paid. At the trial before the high court at page 278 of the law report it is indicated that issue number 3 was whether time was of essence of the contract.

123. the record shows that the trial court ruled in the favor of the plaintiff and ordered specific performance on appeal there is no finding to the contrary or the issue framed

124. while the decision of Sydena case vs High court decision to Osman –vs- Mulangwa is a supreme court decision That makes decision in Sydena's case persuasive and that on Osman binding on me



125. even if the decision in Sydened were to be of an appellat court( which it is not) by reason of time I would not follow it agent Osmon it was pronounced in 073 whicle Osman is a recent decision of 1996 the judgment was delivered on 31.Oct 1996 the doctrine of precedence alooews the law to flow through judicial decision 75B76c 126 having considered all the evidence relevant to the issue and the law applicable this court has come to following conclusion

- 1) Although clause 2(b) of ex p.2 indicated that time was of essence in the payment obligation by the plaintiff the earlier
- 2) conduct by the defendant a sale fate lapse of time for exercising the option for purchase

127. lastly and independent of the above reasons learned counsel Nalime refered me to s.14 of the judicature act and asked to have it in consideration as matter is being decided

128. in position Mr. MASEMBE argued that principle of equity would not apply to cases where thy are express provisions like in Sydens case (supra). I have not been able to follow the persuasive decision in Sydene's case here because it never considered S. 14 ( 2) (b)(1) and s.`14 (4) that is so for the simple reasons hat the judicial Act cap 13 was enected in 2002 and it refered to te 1995 constitution under S 14(2) Sydaness case was decided in 1973 where the two .... Above were not in existence yet very are more imposing on me.

129. MR. s. 14(4) OF THE Judicature act the gist of which is that common and equity rules are administer concurrently and if the two conflict equity shall prevails would still prevent this court from applying the decision in Sydenes' case which ignored

principle of equity as applied by the trial court in Osman –vs- Mulagwas case when despite the facts which showed that parties agreed that time be of essence of their contract as it related to payment and an issue was framed to that effect it went ahead to find in favour of the plaintiff and granted the order according to the supreme court the decision of Osman was based on principle of Equity alone

- The acceptance of payment postdated contrary to payment upon execution of the agreement it was shown that the defendant was by conduct not at all amendable about strict advance to time by the parties court got so much concerned that ex p.2 itself was out of time.

(2) it is this court finding that the plaintiff through PW1 attempted to pay a day before the agreement lapsed by asking for a bank account of the defendant but the same was not available.

3) looking at the pleadings and evidence I find that the defendant was more to be blame for the plaintiff's failure to pay more so that ex p.2 never provided for how USD 67,000 could be paid

4) that in the above circumstances it can not be said that the agreement for sale of 12 Buganda Road lapse as clause 2(b) provided

130. finally I would make the same finding as the S.C finding in MANZOOR –VS- BRAM [2003]2 EA 580 where Mulango JSC said

After taking in consideration the equities of this case I am satisfied that the discretion ought to be exercised in favour of the appellant.

I would hold that the appellants are entitled to specific performance”

I find the passage applicable here exh .2 was a valid contract for sale of land upon which a deposit was made and accepted the remaining interest the defendant have in it the land sold is the purchase price balance not at least not in equity I accordingly performance in favour of the plaintiff.

131. the plaintiff prayed for several damages of shs 50,000,000 that they were unable to develop the plot due to the dispute I am not persuaded to make that award the plaintiff did not enter in evidence approved building plans to develop the plot but frustrated by the dispute .

132 secondly they have been in occupation file this is dispute stated and thirdly it is then who got an injunction first the defendant to say in possession I find no case was made for an award of general damages

133 the consequences of any findings as to the counterclaim fails and the same is determined .i award costs of the suit and of the counter claim to the plaintiff I so orders

.....

NYANZI YASIN

11/02 2015

NELSON Nelisma

For plaintiff 's director Azim Kassim present

Mr. Anerst Sembyata kagoza holding brief for anautuse lmyerezi for defendant

Defendant present

Bhatia Nipun

Present

AISHA CLERK

Court judgment delivered in chambers in the present of the above

.....

NYANZI YASIN

12/02/2012

Mr. Kagwa sembatya

We seek for temporary stay of order of this court providing to file of formal application

- See Lawrence nusiwe Lyazze –vs- uruse Basigye scc application 18/1990
- court held that a temporary stay can be made informally to judge

when judgment delivered the judge directs a formal application be filed . I need 14 days

Mr. Nelima

I undertake not to execute with the re... time pady the finally of the application

Kagwaa

I have no rejoinder

Court I will follow the law cited to me in order that the order of my court be stayed until after 21 days when the defendants will have filed and termed the plaintiff with a formal order to stay execution cost to be in the claims

.....

NAYANAZI YASIN

11/02/2015