THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0012 OF 2017

FUTURE STARS INVESTMENT (U) LIMITED …….…… PLAINTIFF

VERSUS

NASURU YUSUF …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendant for recovery of shs. 108,000,000/=, general damages for breach of contract, and costs. The plaintiff's claim is that on 5th November 2016, it entered into a ten year tenancy agreement with the defendant in respect of premises comprised in plot 15, Transport Road in Arua Municipality at a monthly rent of shs. 4,500,000/=. Under that agreement, the plaintiff made an advance payment of shs. 108,000,000/=, being two years' rent on the understanding that the building, then under construction, would be ready for occupation on 15th January 2017. In breach of the agreement, the defendant failed to complete the building and have it ready for occupation by the plaintiff on the agreed date. The plaintiff demanded for a refund of the advance payment which demand the defendant failed to honour, hence the suit.

In his written statement of defence, the defendant Mr. Nasur Yusuf admitted having executed the tenancy agreement with the plaintiff, but that the agreement was that the plaintiff was to occupy the building in the state it was in without prior renovation. The defendant having undertaken renovations on its own volition, the plaintiff's agent, Mr. Ismael Ahmed Mohamed demanded that some structural adjustments be made to the building and when the defendant objected to the suggestion for fear of violating the Municipality building regulations, the plaintiff unreasonably rescinded the contract and demanded for a refund of the advance payment. Completion of the renovation was not a condition precedent to the plaintiff's occupancy. Moreover, the rate of construction was slowed down by an unforeseen acute shortage of water. The defendant contended that it is the plaintiff who had instead breached the contract for which reason the suit ought to be dismissed with costs.

Testifying on behalf of the plaintiff, Ismael Ahmed Muhamad, a director of the plaintiff company, stated that when the plaintiff developed interest in staring up business within Arua Municipality, it identified the defendant's commercial building at plot 15, Transport Road, then still under construction, as a suitable location, hence the resultant tenancy agreement (exhibit P. Ex. 1) executed between them on 5th November 2016. The advance rental payment of shs. 108,000,000/= was meant to facilitate the defendant's expeditious completion of the building to enable the plaintiff take possession on 15th January 2017, the date on which the tenancy was to commence. That day came and passed yet the building was still under construction.

Construction of the interior walls was still going on. It is designed as a storied building. Only the ground floor had been constructed. The top slab had been cast. The plaintiff was to occupy only the ground floor after all finishing was done. The defendant assured him it would be ready yet it is still under construction up to now. He had inspected the building before he signed the agreement. The agreement was signed in Counsel Buga'a Chambers in Arua. He inspected twice; before signing the agreement sometime in November 2016 and on 5th February 2017. He found that it was still under construction. They met three times between then and 17th February 2017 but failed to agree on what to do. The plaintiff then asked for a refund and at first the defendant accepted and later he failed to return and they sued him. The plaintiff has business in South Sudan and in Kampala. They export building material to South Sudan. The first time he came to Arua was in 2016. He left South Sudan in October 2016, but could not remember the exact date. He used his passport which he has since replaced with a new one.

Under cross-examination, he stated that although there is no completion clause in the tenancy agreement, it was their common understanding that the building would be ready for occupation on 15th January 2017. He was not aware that there was need to approve the structural plans in respect of buildings within the municipality and he never demanded for alterations of the building nor did he meet with the defendant's engineer to make such proposals. He only met the defendant on 5th February 2017 and asked him what delayed him and he said he was ready to refund the money and that is why we went to the plaintiff's lawyer. The defendant never offered any explanation for the delay. Although the defendant made an undertaking to pay, he never

honoured it. Ismael last visited the premises on 27th March 2017 and construction works were still afoot. The building is still a construction site, still covered with an iron sheets fencing along the road, there are no doors yet, no electricity and water, no painting yet, it is not ready for occupation. P.W.2. Mr. Sadik Abdalla, a photographer, tendered in evidence five colour photographs of the building which he took on 27th March 2017 at around 7.00 am, upon the instructions of the plaintiff. He photographed five different elevations using a canon D 505 digital camera, and printed them out himself from his studio on 22nd March 2017.

In his defence, the defendant testified that it was towards the end of October 2016 when Ismael met him at the site and told him he wanted a shop from the commercial building he was constructing which was at the stage of construction of concrete pillars at the time. The first floor slab had not been laid yet. Although the building was incomplete, Ismael told him he wanted to book space for his business. He told Ismael he was still constructing but Ismael insisted that he wanted to book space for a shop. He selected the front side facing Rhino Camp road. The defendant then called his engineer, Kizito to show him the area Ismael was interested in. They later sat down and negotiated an agreement. It was agreed that he would be paying shs. 4,500,000/= per month and that there would be no increments of more than 15%. Ismael said he was going to pay him for two years and they went to lawyer where the agreement was prepared and signed. Ismael then paid shs. 108,000,000/= and the tenancy was to run from 15th January 2017. The agreement was signed on 5th November 2016. It was agreed verbally that the tenancy would begin to run from the date of occupation. The defendant undertook that but said that if the building was not complete by 15th January 2017, the time would be extended.

After the agreement was signed, they went back to the site for Ismael to see the exact space. Ismael suggested that they should raise the height of the ground floor. The defendant called his engineer Kizito and relayed Ismael's request. The Engineer rejected that because it was inconsistent with the plan. The engineer adjusted the height to 14 feet from 13.5 which was within the allowed margin. The engineer asked Ismael who would pay for the structural adjustment. The defendant and Ismael agreed before the adjustment that they would share the cost quantified at shs. 6,000,000/=. The defendant paid shs. 4,000,000/= while Ismael paid shs. 2,000,000/= to the engineer. The two of them monitored the site for about one month. After

which Ismael he said he was returning to Kampala and later to Juba and that we would be communicating by phone. Ismael returned 15th January 2017. The slab had been laid and he was happy. Plastering of the ground level had been done. The defendant had not installed frames of doors and windows and wiring was complete. Floor tiling had not been done yet.

Ismael called the defendant aside and told him that he must block a passage between the building and the next building. The defendant was opposed to the proposal since it was not part of the approved plan and it would be demolished by the Municipal Authorities. The defendant called his engineer who came and advised them that the Municipal Authorities were monitoring the building and would not permit the blockage. It is then that Ismael demanded for a refund of his money. The defendant had already used the money for construction. Ismael was unreasonable and he drove off leaving the defendant at the site and went to the plaintiff's lawyer's office. After ten minutes the lawyer called the defendant by phone and he went to his office. The defendant met Ismael there but failed to reach a compromise and the lawyer then said he was taking the defendant to court. The following day the lawyer wrote a demand letter. The defendant has no problem with refunding the money only if he can be given a schedule. The building remains unoccupied and incomplete. The building is not ready because when the plaintiff showed loss of interest the defendant slowed down.

D.W.2 Ronald Bakabulindi, the site engineer, testified that Ismael Ahmed Mohamed found him at the site. He wanted to rent part of the building for his business and he referred him to the defendant when he expressed interest in renting part of the building under construction. After the agreement was executed, Ismael used to inspect the rate of construction. He used to ask when the work would end. They had to wait for one month for the slab to settle. In February 2017, they constructed the external walls and plastered the walls. Only the floor finishing and the veranda and painting work is what is left for the building to be ready for occupation.

In their joint memorandum of scheduling, the parties agreed on the following issues for the determination of this court;

1. Whether there was any breach of contract by the defendant.
2. What remedies are available to the parties.

Mr. Matovu Akram, Counsel for the plaintiff, in his final submissions argued that the premises were not ready for occupation since the building had no door, windows or electricity and was covered by iron sheets. It was not habitable for business purposes and the defendant failed to advance ant reasonable answer for the delay. This has caused financial loss to the plaintiff company. P.W.2 Sadiq Abdalla the photographer gave evidence of the actual state of the building. P. Ex. 1 shows there was a date of commencement which was agreed upon i.e. 15th January 2017 this is clause 1. The date of commencement is ideally the date of occupation.

There is no express provision on the date of occupancy and in that case court should be guided by the date of commencement in light of the fact that the contract was signed two months prior and the parties stipulated when it was to commence. To give it a business meaning, occupation should coincide with the date of commencement. If the premises had been ready by 15th January 2017, rent would begin to run from that date. He cited the case of *Sharif Osman v. Haji Haruna Mulangwa, S.C.CA. 38 of 1985* for his proposition that time is of the essence even though it has not been expressly provided for by the parties. This term was a condition premised on the fact that this being a commercial transaction, the plaintiff anticipated that he would commence business on the agreed date. The defendant having failed in that obligation even after several reminders, the plaintiff was left with no option but to rescind it. The defndant's breach went to the root of the contract. It was envisaged that he was getting a contract from Roofings. Time was of the essence and any breach therefore is fundamental entitling the plaintiff to rescission.

The remedies are provided for under section 61 (1) of *The Contract Act* and the case of *Joseph Muluuta v. Katama Silvano, SC. ac No. 11 of 1999*, where court stated that if a party receives consideration and does not receive anything in return, then he is entitled to a refund of the money. It is not in doubt that the defendant received 108 million with a clear intention to rent premises but the plaintiff has not received any benefit from it.

On damages, he submitted that the plaintiff suffered inconvenience and hardship. The plaintiff's director had to travel from Kampala to Arua on several occasions to check on the progress of the building and he was using his own private vehicle. The plaintiff's future business prospects in

Arua were entirely curtailed and all this was caused by the defendant's breach. Regarding the money that was advanced to the defendant he submitted that the plaintiff being a commercial entity, could have used it in other profitable ventures since they are dealers in hardware materials and would profitably get income from the same. He cited *Francis Sembuya v. Olport Services Limited, S.C.CA 6 of 1999*, where court stated that general damages are discretionary and compensatory. He suggested an award of 50,000,000/= as general damages. He concluded with a prayer for costs in accordance with section 27 of *The Civil Procedure Act*. The costs follow the event. Demand notices were written way before the suit was filed. The plaintiff tried to persuade the defendant to pay and the defendant had promised to refund but failed to. The suit was indeed inevitable and the plaintiff is entitled to costs.

In response, counsel for the defendant, Ms. Daisy Patience Bandaru submitted that there was no breach. Whereas there is a date of commencement indicated in the agreement, no specific date of occupation was indicated. The date of commencement is not necessarily the date of occupation. The intention of the parties is gathered from the contract. Whereas it is true that the payment was made on the date of execution on 5th November 2016 the intention was to give the defendant time to complete consteruction. Time was not of essence because the specific purpose was not indicated. Clause 3 (c) of the tenancy agreement states that it was to be used for commercial purpose. In *British and Commonwealth Holdings PLC v. Quadrex Holdings, [1989] 3 ALL ER 492*, the court in deciding on the centrality of time in contracts, held that it normally is not of the essence. It is case specific and is not a general principle.

The defendant was under an obligation to complete the premises within a reasonable time. There is nowhere in the evidence of P.W.1 that he claimed to have kept on checking. The meetings which necessitated his travel to Arua took place after 15th January 2017 when he had already demanded for a refund. The advance payment was meant to reserve the premises and when ready, it would be available for occupation. When the premises were to become available was not of essence. The plaintiff's director introduced alterations but the subsequent ones were declined because they fell outside the range permissible by the Municipal Council. Had the suit not been filed, the building would be complete. The plaintiff by demanding a refund disrupted the completion. At the time the suit was filed there was no anticipatory breach. Even if there was

breach by the defendant, it was not a fundamental one. It is only in as far as the date of commencement of the tenancy is concerned. The agreement covers ten years. The two months' breach did not affect the gist of the contract. The plaintiff is still able to derive benefit from the contract. He would be entitled to damages only for the period when the defendant was in breach. At most, he would be entitled to damages for five months only.

The two years' period for which the rent was paid has not elapsed. The period is still running. The plaintiff cannot recover the money paid as rent. He can only do so if it invoked the provisions of the agreement on termination. There is no evidence that the provision on termination has been invoked. By 15th January 2017 the building was not complete it would be fair to the plaintiff is exonerated from the obligation. The plaintiff is only entitled to a refund upon termination which he has not claimed in accordance with the terms of the contract.

The plaintiff has not justified the claim for general damages at all. The only argument is that the amount has been tied down. Since there is still a binding and subsisting agreement, the plaintiff has not lost this money. The plaintiff cannot claim to have suffered any loss. The travels he made could have been better substantiated as special damages. There is nothing on court record to show that they were pleaded. No evidence was adduced in court to prove that. The evidence of P.W.1 of inconvenience is hard to believe that he ever travelled at all from Kampala to Arua. There is no evidence to support that fact; e.g. a fuel receipt, payment for accommodation, etc. The proposal of fifty million has no basis for that quantum. He sought to recover 180 million and the amount sought is close to fifty percent. In the event that the court finds the plaintiff is entitled to damages, she proposed nominal damages of shs. 1,000,000/=. The loss is not substantial. The suit was premature and should be dismissed with costs to the defendant.

In reply, counsel for the plaintiff submitted that there was a total failure of consideration because the premises were not available of the date of commencement. By July the building was not ready. In the alternative, what is reasonable delay would be one month after due date. The suit was not premature in as far as there was breach. The only option was to file the suit because the defendant had failed to deliver the premises.

Before addressing the issues raised, it is noteworthy that the following facts are undisputed; the parties executed the tenancy agreement tendered in court as exhibit P. Ex. 1. Pursuant to that agreement, the defendant received from the plaintiff a sum of shs. 108,000,000/= as two years' advance payment of rent. Despite that payment, the plaintiff did not occupy the premises, the subject matter of the tenancy agreement.

First issue: Whether there was any breach of contract by the defendant.

A breach occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. It is contended that the defendant breached the agreement, in that the building was not ready for occupation by 15th January 2017, the stipulated date of commencement of the tenancy. The defendant refutes this and contends that whereas they agreed on the date of commencement, there was no express agreement as to the date of occupation since it was envisaged that the duration of the lease would be extended in the event that the building was not ready for occupation by 15th January 2017.

Perusal of the agreement, exhibit P. Ex. 1, reveals that in clause one thereof, the parties agreed that the tenancy was to run "for a term of ten (10) years commencing on the 15th January 2017." It is silent though as to the date when the premises were to be handed over to the plaintiff as tenant. In clause 6, the contract specifically provides as follows;

> This tenancy agreement consisting of 10 pages constitutes the entire agreement of the parties hereto with respect to the renting and occupancy of the subject premises. No representations, promises, terms, conditions, obligations or warranties whatsoever, referring to the subject matter premises and subject matters thereof, other than expressly set forth herein shall be of any binding legal force or effect whatsoever, no modification, change or alteration of this lease shall be of any legal force or effect whatsoever unless it is in writing and signed by the parties hereto.....

Therefore, when either party attempts by oral testimony to introduce into the agreement a stipulation as to the date of physical occupation, in respect of which the contract itself is silent, they not only contravene clause six of the contract but also the common law parol evidence rule to the effect that once the terms of a contract are reduced to writing, any extrinsic evidence meant to contradict, vary, alter, or add to the express terms of the agreement, is generally

inadmissible (see *Halsbury's Laws of England* (4th edn.) vol. 9 (1) para 622; *Chitty on Contracts* 24th Edition Vol I page 338; *Jacob v. Batavia and General Plantations Trust, (1924)1 Ch. 287*; *Muthuuri v. National Industrial Credit Bank Ltd [2003] KLR 145*; and *Robin v. Gervon Berger Association Limited And Others [1986] WLR 526 at 530*). A contract without ambiguity is to be applied, not interpreted.

Although the parol evidence rule does not prevent extrinsic evidence intended to prove that there was no agreement at all, fraud, illegality, want of due execution, want of capacity, to clarify an ambiguity, to prove a condition precedent, etc, the parol evidence of either party on this aspect in the instant case is not covered by any of the exceptions. To admit oral evidence to show that this particular stipulation, that is not expressly provided for in the contract, was part of the contract, would be to introduce the mischief that both clause 6 and the parol evidence rule were designed to avoid. The parol evidence rule prevents the admission of oral evidence to prove that some particular term was verbally agreed upon, but had been omitted from the contract. Consequently, that part of either party's evidence is inadmissible.

Unless supported in that respect by the rest of the contract and the surrounding circumstances, the mere selection of a particular date for the commencement of the tenancy will not, in the absence of any other relevant connecting factor with that date, be sufficient to draw an inference as to the intention of the parties for that to be the date on which physical possession of the demised premises is to be given to the tenant as well. It is thus incumbent upon court to construe the contract in light of that omission and determine whether or not it can be read into the contract based on any of the principles guiding the interpretation of contracts. When interpreting a contract, the court seeks out the parties' common intention, and is not bound by the parties' ostensible, or even preferred, characterization. The court is required to give the contract an interpretation that is consistent with the reasonable expectations of the parties, reflects and promotes the purpose of the contract. The true intention of the parties in the absence of an express provision in the contract, has to be discovered by applying sound ideas of business, convenience and sense to the language of the contract itself.

When the intention of the parties to a tenancy agreement with regard to the date on which vacant physical possession of the demised premises is to be handed over to the tenant is not expressed in words, their intention is to be inferred from the rest of terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper date. Where at the time of signing the agreement the demised premises exists in fact, are vacant and habitable, the inference will be more readily made. However, where at the time of signing the agreement, the demised premises are either non-existent (such as in the instant case where they were still under construction), are inhabitable or still under occupancy by the landlord or a third party, the inference does not necessarily follow. In such a case the date for handing over occupation ought to be specified. Where the parties have not expressly or impliedly selected a specific date, the court imputes an intention by applying the objective test to determine what the parties would have intended, as just and reasonable persons, as regards the actual date had they applied their minds to the question. The court has to determine the proper date for the parties in such circumstances by putting itself in the place of a "reasonable man." It has to determine the intention of the parties by asking itself how a just and reasonable person would have regarded the issue.

Where what is required of court is not simply to construe express terms of a contract but rather insert into the contract a term which the parties have not expressed, it is not enough for the court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give business efficacy to the contract and that if its absence had been pointed out at the time both parties, assuming them to have been reasonable men, they would have agreed without hesitation to its insertion (see *Liverpool City Council v. Irwin, [1977] AC 239*). In order to imply a term into a contract, it is necessary to say not merely that it would be a businesslike arrangement to make but that any other arrangement would be so un-businesslike that sensible people could not be supposed to have entered into it (see *Brown and Davis Ltd v. Galbraith, [1972] 1 WLR 997*). It should be an inference which the business realities of the situation really make necessary to make sense of the dealings between the parties so that they can be implemented in a sensible manner.

It is trite that the court does not make a contract for the parties. The explicit terms of a contract are always the final word with regards to the intention of the parties. The court will not improve the contract which the parties have made for themselves, however desirable the improvement might be. The guiding principle was stated in *F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd [1916] 2 A.C. 397, at p 403-404* as follows;

> A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract ... no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

The court's function is to interpret and apply the contract which the parties have made for themselves (see *Trollope and Colls Limited v. North West Metropolitan Regional Hospital Board, [1973] 1 WLR 601, [1973] 2 All ER 260*). Therefore, for an unexpressed term to be implied into a contract, the court must be satisfied first that the parties must have intended that term to form part of their contract; it is not enough for the court to find that such a term would have been adopted by the parties as reasonable even if it had been suggested to them; it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves. A term will be inferred only if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. If the contract makes business sense without the term, the courts will not imply it. If the answer to the question; is it necessary to give business efficacy to the transaction? is; "it is reasonable, but it is not necessary," it will not be implied into the contract.

For this purpose this court has considered the stage of construction at which the building was when the contract was executed. Exhibits P. Ex.2 and 3, taken two months after 15th January 2017 suggest that what was going on was not mere renovation of an existing building but major construction works of a multi-storeyed building, from foundation level. When the plaintiff transacted to rent space on a building at such a stage of construction, he must be deemed to have

taken the risk based on the hope rather than the certainty of completion or at least substantial completion by the date of commencement of the tenancy. According to Lord Somervell in *Davis Contractors Ltd v. Fareham Urban District Council, [1956] 2 All ER 145*;

> A party contracting in the light of expectations based on data of that or any other kind must make up his mind whether he is prepared to take the risk of those expectations being disappointed. If not, then he will refuse to contract unless protected by some specific provision. There is no such provision here. The appellants took the risk under the contract, and it seems to me impossible to maintain that the contract did not apply in this situation as it remained, the expectations on which the estimate was based not having been realised. (Emphasis added).

In that case, the parties had entered into a building contract whereby the Appellants agreed to build for the Respondents 78 houses. For various reasons, the chief of them being lack of skilled labour, the work took not eight but twenty-two months. The appellants were paid the sum agreed upon in the contract but they contended, however, that owing to the long delay the contract price had ceased to be applicable and that they were entitled to a payment on a *quantum meruit* basis. They argued that the contract had been entered into on the footing that adequate supplies of labour and material would be available to complete the work within eight months, but, contrary to the expectation of both parties, there was not sufficient skilled labour and the work took twenty-two months, and that this delay amounted to frustration of the contract. Before the contract was signed, there had been correspondence from the appellant to the respondent to the effect that, " our tender is subject to adequate supplies of material and labour being available as and when required to carry out the work within the time specified." Unfortunately for the appellant, this stipulation was never incorporated into the final contract. Dismissing the appeal, the court held that it would be contrary to all practice and precedent to hark back to a single term of preceding negotiations after a formal and final agreement omitting that term has been signed.

Similarly in the instant case, if the plaintiff contracted on the expectation that the building would be available for occupation by 15th January 2017, then he ought to have made up his mind whether he was prepared to take the risk of those expectations being disappointed. If not, then he should have refused to contract unless protected by some specific provision to that effect. In this contract, when the defendant undertook to do the anticipated work for a definite sum of shs. 108,000,000/= that was paid in advance as two years' rent, he took the risk of the cost being

greater or less than he expected. On the other hand, if delays occurred through no one's fault, greater in degree than was to be expected, and yet there was no provision for a specific date of physical occupation by the plaintiff, to that extent the plaintiff took the risk of delay.

I have also considered the form and object of the contract, the place of performance and the place of business of the parties, to determine the events in its performance to which the stipulated date of 15th January 2017 has its closest and most real connection with. In that regard I note that the tenancy was to run for a period of ten years as from 15th January 2017. The plaintiff paid rent in advance for two years to facilitate completion of the ground floor. Taken from that perspective, that date was only intended to be the date of commencement of the tenancy, but not necessarily for occupation of the building by the plaintiff as tenant. The final consideration is that though timely completion was no doubt important to both parties, it is not right to treat the possibility of delay as having the same significance for each. The onus was on the plaintiff, being the person on whose behalf the advocate who prepared the agreement acted, to draw up his conditions in detail, specifying the time within which he required completion, and protect himself either by a penalty clause for time exceeded or the right of rescission, or both.

In the circumstances of this case, I have not found such a compulsion or necessity to exist as would require this court to impute into the contract the 15th January 2017 as the date of possession of the demised premises in order to give the ten year tenancy agreement business efficacy. Implied terms can only be justified under the compulsion of some necessity. I have not found any basis for construing that the defendant's failure to grant the plaintiff possession of the building on 15th January 2017, in respect of a tenancy that was to run for the next ten years, would occasion such failure of consideration that the parties cannot, as reasonable businessmen, have intended. It is not clear to me how a month's delay from the date of commencement of the tenancy, in handing over possession of the demised premises to the plaintiff in respect of the ten year tenancy, will deprive the contract of its business efficacy. I do not think it is a destruction of the whole foundation of the contract. I find that the proposed term is reasonable, but it is not necessary. To my mind, this contract still makes business sense without the term. I can find no safe ground on which to base the introduction of the proposed implied term. In my judgment,

there is no sufficient material to be found either in the documentation or in the oral evidence of the witnesses to support such an inference. The term cannot be implied into the contract.

That said, it then has to be determined whether the defendant's failure to have the building available for occupation on 15th January 2017 constituted a breach of the contract. The answer to this question depends on the further question as to whether time was of the essence in the performance of this contract. Where time is of the essence, breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract (see *Halsbury's Laws of England, 4th edn. Vol. 4, Para 1179*). The law is well-settled that in transactions relating to immovable properties, time is not the essence of the Contract unless the parties expressly make it so (see *Behzadi v. Shaftsbury Hotels, [1992] Ch 1, [1991] 2 All ER 477, [1991] 2 WLR 1251* and *N. Srinivasa v. Kuttukaran Machine Tools Ltd. [2009 (5) SCC 182; AIR 2009 SC 2217*).

However, where in the express terms of the contract there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will ordinarily be fundamental. However, even where the parties have expressly provided that time is of the essence, such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the construction work by a particular date was intended to be fundamental (see *Charles Rickards Ltd. v. Oppenheim.[[1950] 1 K.B. 616*). The intention to treat time as the essence in the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a tenancy agreement, stipulations as to time are not the essence of the contract. It may be mentioned here that in the instant case, the language used in the agreement itself is not such as to indicate in unmistakable terms that time was of the essence of the contract. The Court is bound to look to the surrounding circumstances, and to the acts and conduct of the parties, for the purpose of ascertaining whether that which appears upon the face of the contract to be the date of occupation of the premises, had been treated by the parties and intended by them as of the essence to the contract.

It was the evidence of P.W.1 that he visited the building site only twice; once before signing the agreement sometime in November 2016 and then on 5th February 2017. At the latter visit, he

found the building was still under construction. He then met the defendant three times between then and 17th February 2017 but they failed to agree on a way forward hence his demand for a refund. It was as well the evidence of the defendant that after the agreement was signed, P.W.1 proposed adjustment to the height of the building, which was done, and they both contributed to the cost of the increment in height. The fact that the plaintiff's director after signing the agreement demanded and partly financed additional structural adjustments to be undertaken on the building, which would inevitably require more time, and only returned to the site on 5th February 2017, nearly a month after the agreed date of commencement of the tenancy, 15th January 2017, is not conduct of a person who took time to be of the essence in the defendant's performance of the contract.

Where time is not of the essence in the performance of a contract, a breach of contact cannot occur unless the innocent party issues a notice to the other, making time of the essence. In *United Scientific Holdings v. Burnley Borough Council, [1978] AC 904*, it was held that;

> In the absence of time being made of the essence, [performance had or has] to be within a reasonable time. What is reasonable time is a question of fact to be determined in the light of all the circumstances. After the lapse of a reasonable time for performance the promisee could and can give notice fixing a time for performance. This must itself be reasonable, notwithstanding that *ex hypothesi* a reasonable time for performance has already elapsed in the view of the promisee. The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed. The promisor is put on notice of these matters. It is only in this sense that time is made of the essence of a contract in which it was previously non-essential. The promisee is really saying, 'Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract.' The court may still find that the notice stipulating a date for performance was given prematurely, and/or that the date fixed for performance was unreasonably soon in all the circumstances. The fact that the parties have been in negotiation will be a weighty factor in the court's determination.

In circumstances where no date for completion is fixed by the contract the impact of delayed completion is different from circumstances where a completion date is fixed but time is not of the essence. In the former case the law implies a term that the contract will be completed within

a reasonable time from the date of the contract, and notice fixing a new completion date and making time of the essence of the date cannot be given until there has been an unreasonable delay, because it is only then that a breach of the contract will have occurred. But in the latter case there is a breach directly the date fixed for completion has passed.

In the case at hand, there is no evidence that before filing this suit, the plaintiff gave the defendant any formal notice that reasonable time for performance had already elapsed, so as to render time of the essence from that point in time going forward. The plaintiff's director may have given some form of informal notice at one or the other of the three meetings he testified to have had with the defendant between 5th February 2017 and 17th February 2017, shortly followed by a rescission of the contract on or about 10th February 2017, (see annexure "B" to the plaint) by way of a formal letter demanding for a refund. The period between the informal notice, if at all there was any given, and the rescission was therefore less that fourteen days, which in the circumstances of this case is not reasonable in light of the fact that the time which had elapsed by then from the date of commencement of the tenancy was barely a month into a ten year long tenancy. I any event, the plaintiff did not tender evidence of having given such notice.

Without notice making time of the essence having been issued, the yardstick by which the length of delay justifying a rescission is to be measured is when it becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, in which case the aggrieved party is entitled to rescind (see *Universal Cargo Carriers Corporation v. Citat, [1957] 2 QB 402*). In the instant case, a month's delay into a ten year tenancy cannot be described as going to the root of the contract. Consequently, by the time the plaintiff rescinded the contract, here had not been any breach of a condition by the defendant which entitled the plaintiff to accept it as repudiation and to withdraw from the contract. The commencement clause was not so fundamental a matter as to amount to a condition of the contract, the breach of which entitled the plaintiff to rescind the contract. Only a repudiatory breach on the part of the defendant would hve given rise to such an entitlement.

The test as to whether a breach is repudiatory is whether the occurrence of the event deprived the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties, as expressed in the contract, that he should obtain as the

consideration for performing those undertakings (see *Hong Kong Fir Shipping Co v. Kawasaki Kisen Kaisha Ltd, [1962] 2 QB 26, [1962] 1 All ER 474*). The question to be answered is, does the breach of the term go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yes, the innocent party may treat the contract as at an end. If no, his claim sounds in damages only.

A stipulation that time is of the essence in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach. It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach (see *Lombard North Central v. Butterworth, [1987] QB 527; [1987] 1 All ER 267; [1987] 2 WLR 7*). The same result will follow if the contract contains a clause to the effect that any breach of such a clause will entitle the innocent party to terminate (or rescind) the agreement. The injured party is relieved of any obligation that remains unperformed on his part. In addition the injured party may claim for damages on the basis that upon termination of the contract the obligations of both parties remaining unperformed are brought to an end. If what is done or not done in breach of a contractual obligation does not make the performance a totally different performance of the contract from that intended by the parties, then it is not so fundamental as to undermine the whole contract. It will only constitute breach of a warranty which sounds only in damages (see *Hong Kong Fir Shipping Co v. Kawasaki Kisen Kaisha Ltd, [1962] 2 QB 26, [1962] 1 All ER 474*).

In the instant case, since no date for physical occupation was fixed by the contract, the law implied a term into it the contract that physical occupation would be granted within a reasonable time from the date of commencement of the contract, 15th January 2017. Notice fixing a date for handing over physical occupation of the premises and thus making time of the essence had to be given only after there has been an unreasonable delay after 15th January 2017, yet none was given. It is only thereafter that a breach of the contract would have occurred. There is no evidence before court that the defendant was not ready and willing to perform his part of the

contract after 15th January 2017 so as to constitute a repudiation justifying a rescission. That inference does not necessarily follow from mere delay of one month or so following the date of commencement of the tenancy.

Where time is not of the essence, then the contract must be performed within a reasonable time after the date fixed in the agreement. If time is not of the essence in performance of the contract, default occurs only when a party serves a notice making time of the essence and requires the other party, within a reasonable time fixed by the notice, to carry out the terms of the contract, and the party served with the notice fails to comply with the requisition. In the case at hand the suit was filed on 20th February, 2017, barely a month after the date of commencement of the tenancy, 15th January 2017, and without prior notice fixing a date for handing over physical occupation of the premises that would have made such time of the essence. For a ten year contract, the rent in respect of two years of which had been paid in advance, a month's delay, without proof of any additional facts, cannot of itself be described as unreasonable delay constituting a repudiation of the contract justifying rescission and a suit. Consequently the suit was filed prematurely, before breach by the defendant of any of his obligations under the contract, and thus before a cause of action had arisen. The first issue is therefore answered in the negative and this suit would have been dismissed but for one additional factor, the defendant's expression of willingness to refund the two years' advance payment.

In his testimony, the defendant stated that he had no problem with refunding the money only if he can be given a schedule. Under Order 13 r 6 of *The Civil Procedure Rules*, the court is empowered to enter judgment on admission at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise. The purpose of this provision is to enable a party to obtain speedy judgment to the extent of the relief which according to the admission of other party, he is entitled to. It is a settled principle that a judgment on admission is not a matter of right but rather a matter of discretion of a Court. The admission should be unambiguous, clear, unequivocal and positive. Where the alleged admission is not clear and specific, it may not be appropriate to take recourse under the provision. In *Cassam v. Sachania [1982] KLR 191*, it was held that; “the judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they

amount to an admission of liability entitling the Plaintiff to judgment." Furthermore, in *Industrial and Commercial Development Corporation v. Daber Enterprises Ltd, [2000] 1 EA 75* and *Continental Butchery Ltd v. Ndhiwa, [1989] KLR 573*, the Court of Appeal of Kenya stated that the purpose of a judgment on admission is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify such a judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim.

In the instant case, I find the defendant's willingness to refund the two years' part payment as a categorical, unambiguous, clear, unconditional and unequivocal admission for which the plaintiff is entitled to a judgment on admission, limited only to recovery of that sum.

Second issue: <u>What remedies are available to the parties</u>.

Having found that the suit was filed prematurely, the plaintiff is not entitled to any of the reliefs he sought, save for that admitted by the defendant, since he has not established that the contract was breached by the defendant. All the plaintiff's claims for additional relief including damages, are therefore rejected.

Although under section 27 (2) of *The Civil Procedure Act* costs follow the event unless court orders otherwise, a successful litigant who has been guilty of some sort of misconduct relating to the litigation or the circumstances leading up to the litigation, may be denied costs (see *Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873*). Having found that the plaintiff had no basis for rescinding the contract and that he filed the suit pre-maturely, before the defendant had breached the contract, the plaintiff is guilty of conduct that is reprehensible or worthy of reproof or rebuke by way of denial of the costs of this litigation. Consequently each party is to bear their costs of the suit. It is so ordered.

Dated at Arua this 30th day of October, 2017

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Stephen Mubiru
Judge,
30th October, 2017.