THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: KISAAKYE, ARACH-AMOKO, TIBATEMWA-EKIRIKUBINZA, MUGAMBA & CHIBITA JJ.S.C

CIVIL APPEAL NO. 04 OF 2020

BETWEEN

BOUTIQUE SHAZIM LIMITED:::::::::::::::::::::::::::::: APPELLANT

AND

1. NORATTAM BHATIA
(Administrator of the Estate of Narottam Bhatia)
2. HEMANTINNI BHATIA::::::::::::::::::::::::::::::RESPONDENTS

(Appeal from the judgment of the Court of Appeal (Owiny-Dollo, DCJ, Egonda-Ntende and Tuhaise, JJ.A.) at Kampala, in Civil Appeal No. 179/2015, dated 3rd March, 2020).

JUDGMENT OF MUGAMBA JSC.

This second appeal is brought against the decision of the Court of Appeal at Kampala which overturned the High Court's verdict in which the appellant was successful and an order for specific performance had been granted against the respondents.

Facts to the background of this appeal as related by the Court of Appeal are that on 1st July 1995, the 2nd respondent and her husband Narattam Bhatia (who were defendants in HCCS No. 411/1998), were the registered proprietors of property comprised in LRV 247 Folio 1 Plot 12 Buganda Road, herein referred to as the 'suit property'. They entered into a sale agreement with the appellant for the sale of the suit property at an agreed price of United States Dollars (US$) 117,300. The appellant paid US $ 50,000 upon execution of the sale agreement. Clause 2 (b) of the

sale agreement stipulated that the balance of US$ 67,300 was to be paid at any time within the next 75 days, and that failure by the appellant to complete payment within the stipulated time would cause the sale agreement to lapse and the property to revert to the vendors(respondents), subject only to the refund of the US$ 50,000 to the appellants by the vendors(respondents).

The appellant sought to pay the balance amount aforementioned 9 days after the contractual deadline. This prompted the respondents to reject the payment on the basis that the contract had already lapsed.

The respondents on their part opted to refund the US$ 50,000 to the appellant. The appellant rejected the refund and filed a civil suit, HCCS No. 910 of 1995. In the suit the appellant sought for specific performance of the sale agreement of the suit property.

That suit was struck out for non-disclosure of a cause of action. The appellant later filed a fresh suit, HCCS No. 411/1998 which the High Court dismissed on 25th September 2005, on the ground that it was *res judicata*. The Court of Appeal set that judgment aside. Eventually, on 1st August 2010, this Court affirmed the finding of the Court of Appeal that the case was not *res judicata*, and that it disclosed a cause of action.

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

On 11th February 2015, the learned trial Judge entered judgment in favour of the appellant. The trial judge found that the sale

agreement had not lapsed for the reason that time was not of the essence and that the respondents were more at fault for the failure of the appellant to fulfil its contractual obligations. The trial judge granted an order for specific performance of the sale agreement in favour of the appellant, effectively ordering a transfer of title of the suit property to the appellant. He also dismissed the respondents' counterclaim, and granted costs of the suit and of the counterclaim to the appellant.

The respondents were dissatisfied with the decision and orders of the learned trial Judge and appealed to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the judgment of the trial Court. The Court further granted the respondents mesne profits based on the use and occupation of the premises for the period between 1st January 1998 and 30th October 2010. The mesne profits were to be paid to the respondents in the sum of US $327,356 calculated at US $ 3000 per month until vacant possession of the property was delivered to the respondents. The court awarded costs also to the respondents.

The appellant was dissatisfied with judgment of the Court of Appeal which it appealed to this court. The memorandum of appeal contains eleven grounds, framed as follows:

1) **The learned Justices of Appeal erred in law and fact when they held that the essence of time was not pleaded.**
2) **The learned Justices of Appeal erred in law and fact when they overlooked the fact that the essence of time was framed as an issue and submitted upon by counsel for both parties.**

3) **The learned Justices of Appeal erred in law and fact when they applied section 91 of the Evidence Act but disregarded the possible exceptions in section 92 (b), (c) and (d) thereof.**

4) **The learned Justices of Appeal erred in law and fact when they held that the second installment should have been paid using: (a) mode of payment of the first installment; or (b) a P. O. Box; or (c) Plot 8 Wilson Road, which modes were not provided for in the contract or subsequent oral agreement.**

5) **The learned Justices of Appeal erred in fact when they overlooked evidence that the 1st Respondent had no fixed place of abode in Uganda and travelled to India after execution of the sale agreement thus rendering him inaccessible.**

6) **The learned Justices of Appeal erred in law and fact when they failed to apply the law relating to passing of property in a land sale.**

7) **The learned Justices of Appeal erred in law and fact when they held that the Appellant breached the contract.**

8) **The learned Justices of Appeal erred in law and fact when they held that the Appellant was guilty of laches.**

9) **The learned Justices of Appeal erred in law and fact when they held that the Appellant was not entitled to specific performance.**

10) **The learned Justices of Appeal erred in law and fact when they held that the Appellant was a trespasser.**

11) **The learned Justices of Appeal erred in law and fact when they awarded mesne profits which were not pleaded.**

At the hearing of the appeal, Mr. David Nambale from Nambale, Nerima & Co. Advocates represented the appellant while Mr. Terence Kavuma from Kabayiza, Kavuma, Mugerwa & Ali Advocates appeared for the respondents. Both parties filed their written submissions, which they adopted at the hearing.

Submissions for the appellant

On grounds one and two, counsel submitted that it was an error for the Court of Appeal to hold that the trial court resolved whether time was of the essence or not, when the parties never raised the issue in their pleadings. According to counsel the justices of the Court of Appeal ignored the explicit pleadings on whether time was of the essence. Counsel argued that in Paragraph 3 (p) of the amended plaint, the appellant stated that he still had the full option to purchase the property by paying the balance due.

Counsel for appellant contended that in Paragraph 3 of the written statement of defence it was stated that the sale agreement would lapse automatically if the appellant/plaintiff failed to pay the second installment of 67,000 US $ by the 14th September 1995.

Counsel further contended that the 1st respondent/defendant testified that time was of essence in this agreement. He added that the significance of time for payment of the balance was therefore a matter which was pleaded and was in controversy. He

further submitted that even if the essence of time was not pleaded as alleged by the respondent, the same was raised as a sub-issue by the respondents' counsel in his written submissions.

Counsel contended that counsel for the respondents/ defendants at the trial court submitted at length on whether time was of the essence. He added that the respondents cannot approbate and reprobate at the same time by distancing themselves from a position taken at the trial. Counsel further submitted that the appellants also addressed the trial court on time being of the essence in the transaction. According to counsel, the trial judge properly addressed the issue whether time was of the essence and that he correctly exercised his discretion to accept a sub-issue as to whether time was of the essence. He added that this helped the trial court to determine the dispute between the parties as to whether or not the agreement lapsed.

Counsel submitted that the appellant was allowed to exercise the option to purchase the property after the lapse of twelve months which had been stipulated in the tenancy agreement. According to counsel, the appellant had to pay U.S. $ 50,000 on execution of the agreement which was on 1st July, 1995. He noted that that money was not paid strictly on 1st July 1995 and that the appellant accepted delayed payment by postdated cheques in Uganda shillings. Counsel submitted that the Court of Appeal erred in law in failing to evaluate both the initial and the additional evidence. Counsel contended that it was incumbent on the Court to re-evaluate the evidence as a whole.

On grounds three, four, five and seven,

Counsel submitted that the Court of Appeal relied on section 91 of the Evidence Act to the effect that where the terms of a contract have been reduced in the form of a document, no evidence except as mentioned in section 79 should be given in proof of the terms of the contract except the document itself. Counsel contended that section 91 of the Evidence Act is not absolute.

Counsel added that there were exceptions in sections 92 (b) and (c) and 30 (b) where the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms may be proved. Counsel averred that the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under such contract, grant or disposition of property, may be proved.

Counsel submitted that the sale agreement did not specify where the balance of the purchase price was to be paid or even the mode of payment. He averred that the respondent testified that in 1995 he was staying partly in India and partly in Uganda. Counsel argued that the respondent in his testimony in cross examination stated that the agreement does not state the place of payment.

Counsel contended that the respondent did not instruct the appellant to pay the balance amount to the law firm of Byenkya, Kihika & Co. Advocates and did not ring Azim Kassam (PW1) to pay to that firm either. He averred that the respondent, after signing the sale agreement, went back to India and did not communicate with the appellant.

Counsel contended that Mr. Ebert Byenkya (DW2) who drafted the agreement and was counsel for the respondent in the transaction testified that the agreement did not provide for the place of payment and that he was not aware of any oral agreement about the place and mode of payment.

Counsel submitted that the Court of Appeal erred when it held that the appellant should have paid using the mode of payment used to pay the first installment, a Post Office Box or at Plot 8 Wilson Road. He contended that the suggested modes of payment were not provided for in the contract or in any subsequent oral agreement.

According to counsel, clause 2(a) of the sale agreement required the purchaser to pay U.S.$ 50,000 on execution of the agreement which was on 1st July, 1995 and that the balance was to be paid by postdated cheques in Uganda shillings. Counsel mentioned these as a cheque for shs. 24,500,000/= dated 7th July 1995 and a cheque for shs. 24,500,000 dated 10th July 1995.

Counsel contended that it was the respondent's testimony that there was a verbal agreement that the purchaser pays by cheque and in Uganda shillings. Counsel further argued that there was no evidence that the appellant was ever instructed to pay money at Plot 8 Wilson Road. According to counsel there was absence of an express written term on the place and mode of payment. He added that it was a condition precedent that the place and mode of payment had to be agreed on before the balance could be paid.

On grounds six and ten, counsel submitted that the suit property legally passed to the respondent upon execution of the sale agreement and that the appellant was put in possession. He

argued that the property cannot revert back to the respondents whose right was only to receive the balance of the purchase price with interest as stipulated in the contract.

Counsel cited the cases of **Osman vs Mulangwa, (1995-1998) 2 EA 275** and **Molly Turinawe & Others vs Ephraim Turinawe & Another, Supreme Court Civil Appeal No. 10 of 2018**, in support of his submissions.

Counsel contended that it is a principle of law that the property passes to the purchaser at the conclusion of a contract of sale and that the vendor thereafter becomes a trustee of the purchaser. Counsel argued that this is strengthened by the principle that risks also pass to the purchaser.

Counsel reiterated that the respondents' only legal right is to receive the balance of the purchase price. He added that the appellant could not be a trespasser on suit property he had purchased.

On ground eight, counsel faulted the Court of Appeal for holding that equity will not assist a person who is guilty of laches. Counsel contended that the doctrine of laches is based on the maxim that equity aids the vigilant and not those who slumber on their rights. Counsel submitted that the appellant did not delay in filing the case. He added that in paragraph 3 (h) of the plaint the respondents alleged that the contract lapsed on 15th September 1997 yet the appellant filed the suit on 23rd April 1998, which was within the limitation period prescribed by the Limitation Act.

Counsel submitted that the purchase price was to be paid by the 74th day and that its deadline does not amount to laches because

the appellant had a contractual entitlement to pay the balance at any time within the 75 days.

On grounds 9, counsel contended that the trial judge comprehensively reviewed the authorities relating to specific performance. He added that the trial judge found that the appellant/plaintiff's failure to pay the balance was to be blamed more on the respondents/ defendants.

Counsel submitted that the principles governing specific performance as a remedy in land sales were summarized by Mulenga JSC in **Manzoor Vs Baram (2003) 2 EA 580** to the effect that specific performance is an equitable remedy grounded in the equitable maxim of "**equity regards as done that which ought to be done**". Counsel added that in that case it was held that courts have long considered damages to be an inadequate remedy for breach of contract for the sale of land, and that courts more readily decree specific performance to enforce such contract as a matter of course.

Counsel submitted that there was a valid contract for the sale of land where the Respondents made completion of payment impossible by refusing to advise on modalities of payment. He added that the appellant has always been ready and willing to pay the balance of the price in the agreement because the appellant has been in possession since 1995 as a purchaser and equitable owner.

On ground eleven, counsel submitted that the awarded mesne profits of US $327,356 for the period January 1998 to October 2010 at a rate of US $ 3000 per month until possession of the property is delivered to the respondents was not pleaded.

Counsel contended that the respondents merely prayed for mesne profits in their counter-claim but that they did not particularly claim for them as is required by law. He added that the appellant was not in wrongful possession.

Submission for the respondents

On ground one, counsel submitted that in the plaint it was stated that time was not of the essence. He contended that the respondents filed a written statement of defence in which they indicated, in paragraph 3, terms of the agreement, that the sale agreement would lapse automatically.

Counsel submitted that the appellant did not file a rejoinder to assert that time was not of the essence. He contended that the appellant amended its plaint after two years and that even when the appellant amended its plaint, it did not assert that the time agreed for payment of the second instalment was not of essence.

Counsel contended that in paragraph 3 (p) of the amended plaint, even if it was stated that the appellant had an option to purchase the property such did not amount to a pleading that time was not of the essence.

Counsel admitted that the matter of whether or not time was of the essence came up in the submissions but argued that the decisions of this Court are now settled that issues cannot properly arise at the submissions stage because such procedure would allow a party to succeed on a case not set up by them. He cited the cases of **Interfreight Forwarders Ltd vs East African Development Bank, SCCA No 33 of 1992 and Fang Min vs Belex Tours and Travel Ltd, SCCA No 06 of 2013.**

Counsel agreed with the first appellate court when it found that the respondent did not assert in its pleadings, neither in the original nor the amended plaint, that time was not of the essence under the contract.

On ground two, counsel submitted that there was only one substantive issue framed and that the issue did not set any question for the trial court to determine regarding whether or not time was of essence. He contended that the question of whether or not time was of the essence was not overlooked by the 1st appellate court as alleged by the appellant.

According to counsel the Court of Appeal considered the amended plaint, the agreement and the oral evidence of the parties on the issue. He added that the court found that from the wording of the contract, time was of the essence. Counsel contended that the contract did not only put in place the specific time of 75 days when the balance of $ 6 7,300 was to paid by the appellant to the respondents but also provided for what would happen in case the said balance was not paid within the agreed 75 days. He added that the agreement would lapse and the property would revert to the respondents who would in turn refund the $50,000 earlier received.

Counsel submitted that the first appellate court correctly determined that time was of the essence under the contract of sale. He added that the oral evidence of PW1, DW1 and DW2 on the essence of time was considered by the first appellate court and that it culminated into a finding that the parties never differed in their evidence regarding the terms of the contract which they all understood. He submitted that the parties were

aware of the significance of the deadline stipulated for payment of the balance as well as the consequence of default in meeting the deadline.

On ground three, counsel contended that the appellant in his plaint referred to the sale agreement in paragraph 3(d) and that the appellant never pleaded the existence of a separate oral agreement between the parties as envisaged by S. 92 (b), (c) and (d) of the Evidence Act. He argued that Order 6 rule 15 of the Civil Procedure Rules requires facts of such oral agreement to be pleaded in order to enable the opposite party to accept or deny the existence of such agreement.

According to counsel, given the absence of the aforesaid pleading in the plaint, this ground of appeal cannot succeed. He cited the cases of **Interfreight Forwarders Ltd vs East African Development Bank, SCCA No 33 of 1992** and **Fang Min vs Belex Tours and Travel Ltd, SCCA No 06 of 2013.**

Counsel further submitted that the appellant did not submit on exceptions referred to in section 92 (b), (c) and (d) of the Evidence Act. He argued that the first appellate court cannot be faulted on an argument that was not put before it for consideration.

On ground four, counsel submitted that the appellant was required by the sale agreement to make the payments indicated therein at the specified time. He added that the mode of payment was left to the discretion of the appellant.

Counsel contended that when paying by cheque one did not need to know the account details. He added that there was nothing that barred the appellant from making payment by draft. Counsel agreed with the first appellate court's finding that the mode of

payment used in the first payment or even a completely different mode could have been adopted by the appellant to make the subsequent payment to the respondents.

On ground 5, counsel submitted that business transactions are not generally carried out at places of abode and went on to contend that they are carried out at business premises. He argued that PW1 knew the respondent's business address. He added that the sale agreement showed that the 1st respondent's address was P.O. Box 6799 Kampala and that with an address, the 1st respondent did not have to be physically present in order for the appellant to effect payment.

Counsel commended the first appellate court for having considered the existence of the said address and for its conclusion that a cheque or bank draft could still have been delivered at the said postal address which could have constituted effective payment, something that was not done. Counsel argued that the appellant is to blame for failure to pay on time.

On ground six, counsel submitted that section 91 (2) of the Registration of Titles Act specifically provides that property in registered land only passes upon registration of a transfer instrument. He contended that there was no evidence on the record that a transfer instrument for the suit land in favour of the appellant had ever been signed by the respondents or registered pursuant to the sale agreement. Counsel argued that the written laws of Uganda take precedence over common law or principles of equity by virtue of section 14 (2) of the Judicature Act.

Counsel averred that the provisions of sections 2 and 91 (2) of the Registration of Titles Act were not considered by this court in the case of **Molly Turinawe & Others vs Ephraim Turinawe & Another** (supra). He added that the case of Molly Turinawe was distinguishable because it concerned the establishment of rights in a matrimonial property which are by nature realms where equitable rights have been expressly allowed by our written law to override legal rights. He stated that in the instant case legal rights must prevail over equitable interests.

Counsel submitted that the intention of the parties as expressed in clause 2(c) of the agreement was that the suit property would only pass upon payment of the consideration. He contended that the balance of the consideration was never paid within the 75 days provided for and that this default culminated into the lapse of the sale agreement.

Counsel contended that courts do not make contracts for parties but only give effect to the clear intentions of the parties. He referred to **Sharif Osman vs Haji Haruna Mulangwa, SCCA 38 of 1995** and **Osukuru Rubongi Land Development Advocacy Organization Ltd v Uganda Hui Neng Mining Ltd & Anor, HCCS 332 Of 2014.**

On ground seven, counsel submitted that clause 2(b) of the agreement required the appellant to pay the balance of the purchase price in the sum of US $ 67,300 within 75 days running from the 1st of July 1995. He contended that the time lapsed on the 14th September 1995 without the appellant making the requisite payment. He stated further that there was no evidence of US $ 67,300 being tendered to the respondents on or

before the 14th September 1995. Counsel submitted that PW1 's testimony revealed that he had the means to pay by cash, cheque or bank draft on the final day but he did not do so and that this constituted breach of the terms of the contract.

On ground eight, counsel submitted that equity will not assist a person who is guilty of laches, adding that PW1 took his family on a vacation to Canada without making any arrangements to pay in time. According to counsel the appellant doubtless failed to pay in time.

On ground nine, counsel submitted that specific performance will not be ordered against a party not itself in breach of its obligations under the contract. In support of that proposition he cited section 64 (1) of the Contracts Act. He contended that the respondents did not breach any provision of the contract to warrant the remedy of specific performance.

Counsel further averred that specific performance is not available to a party which has committed a fundamental breach of the agreement. He cited section 64 (2) (9) of the Contracts Act to that effect. He contended that clause 2(b) of the agreement required the appellant to pay the balance of the purchase price in the sum of US $ 67,300 within 75 days from the 1st of July 1995 but that the time lapsed on the 14th of September 1995.

Counsel referred the court to the Australian case of **Hardwoods Pty Ltd vs Commissioner for Railways [1961] 1 ALLER 742** which he considered relevant.

Counsel submitted that the jurisdiction to grant specific performance cannot be exercised where the parties have expressly indicated in their agreement that time is of the essence.

Counsel further emphasized that court will not grant specific performance where the party against whom specific performance is sought has a right to terminate the contract.

He referred court to the case of **Steedman v Drinklle & Anor, [1914-15] ALLER 298** and Sections 47 and 64 of the Contracts Act

On ground ten, counsel submitted that failure by the appellant to pay the balance of the contract price on time before 14th September 1995 inevitably culminated into the lapse of the agreement thus rendering the appellant a trespasser.

On ground eleven, counsel submitted that mesne profits were claimed by the respondents particularly in paragraph 17 (b) of the counter claim. Counsel contended that the evidence of the mesne profits was led by DW3 whose report is uncontested. He added that the evidence can be derived from the tenancy agreement executed by the respondents and Galleria in Africa, the appellant's sister company which is part of the record.

Submissions in rejoinder by the appellant

Counsel for the appellant reiterated his submissions that nowhere in the plaint was it pleaded that time was not of the essence and that the appellant could not succeed on an issue that was never pleaded in the plaint. He added that the phrase time was not of essence is not a principle of law that must be pleaded in order to found the action for specific performance. Counsel contended that even if it had not been specifically pleaded, time being of essence arose as an issue out of the pleadings.

Counsel agreed with the trial judge who according to him exhaustively evaluated the evidence relating to the relaxation of time and followed the case of **Osman v Mulangwa (1995-1998) 2 EA 275.** He faulted the justices of the Court of Appeal for erring in holding that the trial judge ought not to have made any findings about time being of essence on the false premise it was not pleaded.

Counsel submitted that compliance with the time frames in the sale agreement, lapse of time and the consequences were issues submitted upon at length by both parties and that they required a decision by the trial court. Counsel further contended that having submitted at length on time being of essence as a defence, the respondents are estopped from raising objections about the issue as framed, a fact that the justices of the Court of Appeal overlooked.

Counsel contended that the facts in **Interfreight Forwarders Ltd vs East African Development Bank** (supra) cited by the respondents are distinguishable. He argued that in the instant case the issue as to whether time was of the essence was duly framed and was a matter in great contention on which both counsel submitted at length. He added that it was ruled upon by both the trial court and the Court of Appeal.

Counsel reiterated his submissions that the appellant's case was for specific performance of the contract on the basis that it still had the option to pay the balance. He added that it was sufficient for the appellant to plead that it still has the right to pay the purchase price and proceed to prove the existence of that right by

leading evidence on relaxation of time frames and attempts to be availed a mode of payment.

Counsel submitted that it was the appellant's undisputed evidence that he called Mr. Byenkya (counsel for the vendor) on 13th and 14th September, 1995 seeking for bank account details in order to remit the balance. He added that the phone log was admitted in evidence and that it corroborated the testimony of PW1 that he called Mr. Byenkya, the respondent's counsel. Counsel further contended that Mr. Byenkya's hostile refusal to provide information on the place and mode of payment amounted to prevention of performance.

Counsel contended that the appellant could not post a cheque for such a large sum of money to Post Office Box 6799, Kampala because of the risk of fraud and pilferage. He added that the respondent had not authorized anybody to receive money on his behalf while he was away in India. He concluded that the money was to be paid to a person and not an address.

Counsel submitted that the Registration of Titles Act was not the only law governing registered land. He contended that other laws include the Judicature Act, Common law and equity, the Land Act, the Mortgage Act, amongst others.

He cited the case of **Katarikawe vs Katwiremu and Another, (1977) HCB 187** where it was held that in a contract of sale for land the purchaser acquires an equitable interest in the land which is enforceable against the vendor.

Counsel contended that at equity, however, property passed to the appellant immediately upon execution of the sale agreement and that it cannot revert back to the respondents whose only

right is to receive the balance of the purchase price. He submitted that the respondents had no lien on the suit property since the appellant was in possession.

Counsel added that at equity the Appellant is entitled to specific performance of the contract which entails payment of the balance of the purchase price. Counsel submitted that the appellant testified that he travelled to Canada because his family lived there and that he was not on vacation as alleged.

Consideration of the appeal:

This is a second appeal. The duty of this court as a second appellate court has for long been stated in various decisions of this Court. In **Milly Masembe vs Sugar Corporation (U) Ltd and Another, Supreme Court of Uganda Civil Appeal No. 1 of 2000**, it was held inter alia "**On second appeal, the Supreme Court was not required to re-evaluate the evidence in the same manner as a first appellate Court would as doing so would create unnecessary uncertainty. It was sufficient to decide whether the first appellate Court on approaching its task has applied the relevant principles properly."** See also **Francis Sembatya Vs Alport Services Ltd, SCCA No.6 of 1999 and Banco Arabe Espanol v Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998,**

Having reminded myself of the duty of this court, I proceed to determine the merits of the appeal and find out whether the first appellate Court met its legal obligation of evaluating the evidence on record and applying the relevant laws and principles to the facts.

I have had opportunity to peruse the submissions of both counsel

as well as the authorities filed in this court and I find that both counsel in their various efforts did a commendable job.

This appeal originates from the sale agreement concerning land comprised in Plot 12, Buganda Road LRV 247 Folio. That agreement was made between the parties to this appeal. Given that what transpired after execution of the said sale agreement has earlier been narrated in this judgement in the background facts above, there is no need for another recount. Fortunately, the agreement in contention is readily available on record for perusal and analysis.

Grounds one and two are interrelated. They address the issue of whether in the sale agreement between the appellant and the respondents, time was of essence. It is worthy of note that the same grounds were raised at the Court of Appeal in the form of ground one.

The trial judge in his opinion when addressing the above issue found that by the conduct of the parties, time was not of essence. He based his finding on the fact that the initial payment of US $ 50,000 which was supposed to be paid on the date of execution of the sale agreement was not done then. He further relied on the respondents' conduct of accepting postdated cheques contrary to the payment plan earlier agreed in the sale agreement.

The Court of Appeal was of a view different from that of the trial judge. After revaluating the evidence, it held that constructing from the sale agreement, the parties (appellant and respondents) were cognizant of their duties and intention. The Court of Appeal further held that the contract did not only stipulate the specific time of 75 days within which the contract was to be executed but

also named the consequences for failure to meet the terms of the contract especially on the part of the appellant. Plainly the appellant was to pay the balance within the time laid down but upon default on his part the contract was to be considered as having lapsed. On the other hand, in such an event the respondents were bound to refund the initial US $ 50,000 payment made by the appellant.

In the judgment of the Court of Appeal, at page 26 thereof, it is observed in paragraph 3 as follows:

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

I concur with the above finding by the Court of Appeal. The parties entered into a sale agreement doubtlessly aware of the terms and conditions stipulated therein. The appellant was the first to breach the terms of the sale agreement as far as paying the initial deposit of 50,000 US$ was concerned by not paying the same on the day of execution of the sale agreement. In my view this breach alone would terminate the entire sale agreement considering that under the agreement the said amount was to be paid on the date of execution of the sale agreement, which was not done.

In any event, the respondent accepted the late payment of the initial deposit in the form of two postdated cheques paid

respectively on 7th and 10th July 1995, several days after the execution of the agreement.

The trial judge postulated on the initial breach by the appellant and termed it as relaxation by the parties of the terms of the contract. According to the trial judge, given the first breach by the appellant, accompanied by failure on the part of the respondent to take action on it, the resulting effect was that the time frames stipulated in the agreement would not be of essence. The Court of Appeal once again differed with the trial judge on this, which in my view was the right perspective. It stated that the sale agreement did not place any repercussion on the late or non –payment of the first payment of US$ 50,000. The Court of Appeal noted that failure to pay the initial deposit on time was different from clause (b) of the sale agreement which related to failure to effect the final payment of the balance amounting to US $ 67300 within the 75 days. The Court of Appeal stated that concerning final payment the sale agreement strictly stated **'FOR THE AVOIDANCE OF DOUBT'.** In other words, the contract would be deemed to have lapsed if payment was not effected within the stipulated time.

The Court of Appeal, in my view, after due re-evaluation of the evidence correctly found that the trial judge had erred in fact and in law when he found that time was not of the essence to the contract between the parties.

The trial judge blamed the respondent for the failure to provide to the appellant the mode of payment for the payment of the US $ 67,300 balance. Regarding this issue, the Court of Appeal stated:

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

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

In addition, the 1st appellant testified as DW2 that the respondent knew that he had an office at Bhatia Building Plot8 Wilson Road and that it had his phone land line..."

I am persuaded by the above finding of the Court of Appeal. The appellant did not take any necessary or prudent steps to effect payment of the balance within the time of 75 days clearly stipulated in the sale agreement.

On the remedy of specific performance, the trial judge granted the same in favour of the appellant. In its lead judgment the Court of Appeal found that the award was granted in error and proceeded to state as follows:

"It is already my finding that the respondent was in breach of the contract when it failed to pay the balance of the contract

price within the stipulated 75 days, upon which the agreement lapsed and the appellants had no option but to refund the US $ 50,000 deposit to the respondent. On that basis alone, it could be concluded that the learned judge erred by granting an order of the specific performance in favour of the plaintiff despite the fact that the plaintiff was in breach of the contract between it and the defendants."

The Court of Appeal went on to expound on section (2)(e) of the Contract Act, the Common Law and Equity principles on the award of specific performance and it stated:

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

I have already found in this judgment that the appellant did breach the sale agreement by failing to make payment of the balance of US $ 67300 to the respondent within the 75 days stipulated in the sale agreement. That provision was not contested by the appellant either in the court below or in this court. It was for breach of that stipulation that the agreement was rendered lapsed. To turn around and award specific performance to a party which is in breach would be a travesty of

justice. The contract lapsed upon breach of the agreed term for payment and cannot be resurrected.

I will turn to ground 10 where the appellant averred that the Court of Appeal erred in law and in fact when they held that the appellant was a trespasser. Considering my earlier finding in this judgment pertaining to grounds one, two, four and especially seven, this ground has no merit. I am buttressed in my view by the finding of the Court of Appeal which aptly stated as follows:

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

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

In my opinion, the Court of Appeal was correct to treat the appellant as a trespasser for the reasons clearly advanced in

their judgment above. Having found the appellant was a trespasser on the suit property, I fully subscribe to the reasoning of the Court of Appeal that the respondents were entitled to mesne profits in the sum of US $ 327,356 for the use and occupation of the suit property for the period extent from 1st January 1998 to 30th October 2010 at the rate of US $3000 per month until vacant possession is delivered to the respondents. In effect, therefore, that rate continues to accumulate thereafter until vacant possession is delivered to the respondents. Consequently, ground eleven also fails.

Having reviewed all the evidence on record, I see no ground to fault the findings and conclusions of the Court of Appeal. All the grounds lack merit and must fail.

Given that this appeal lacks merits, it is dismissed with costs in this court and in courts below.

Dated at Kampala this day .....1st.....of .....March.....2021

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PAUL MUGAMBA
JUSTICE OF THE SUPREME COURT

Delivered 11/3/21 before
Counsel Nambale for the appellant
& Counsel Basemera for the resp

THE REPURLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: Kisaakye, Arach-Amoko,Tibatemwa-Ekirikubinza, Mugamba, Chibita, JJSC.)

CIVIL APPEAL NO. 04 OF 2020

BETWEEN

BOUTIQUE SHAZIM LIMITED::APPELLANT

AND

1.NORATTAM BHATIA
(Administrator of the estate of Narottam Bhatia) }::::**RESPONDENTS**
2.HEMANTINNI BHATIA

{Appeal arising from the judgment and orders of the Court of Appeal at Kampala (Owiny-Dollo, DCJ, Egonda-Ntende and Tuhaise, JJA), in Civil Appeal No. 179 of 2015 dated 3rd March, 2020}.

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft the Judgment of my learned brother, Hon. Justice. Mugamba, JSC, and I agree with his findings and decision that this Appeal lacks merit and should be dismissed with costs.

Dated at Kampala this ..1st.....day of..March.....2021

.....
M.S. ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: KISAAKYE, ARACH-AMOKO, TIBATEMWA-EKIRIKUBINZA, MUGAMBA, CHIBITA, JJSC.)

CIVIL APPEAL NO: 04 OF 2020

BETWEEN

BOUTIQUE SHAZIM LIMITED :: APPELLANT

AND

1. **NORATTAM BHATIA**
   (Administrator Of the Estate of Narottam Bhatia)
2. **HEMANTINNI BHATIA :: RESPONDENTS**

[Appeal from the judgment of the Court of Appeal at Kampala [Owiny-Dollo, DCJ, Egonda-Ntende and Tuhaise, JJA], in Civil Appeal No. 179 of 2015 dated 03rd March, 2020]

JUDGMENT OF CHIBITA, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Hon. Justice Mugamba, JSC and I agree with his reasoning and his conclusions that this appeal should be dismissed.

I also agree with the orders he has proposed.

Dated at Kampala this ....1st....day of ....March....2020

Hon. Justice Mike J. Chibita
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KISAAKYE; ARACH-AMOKO; TIBATEMWA-EKIRIKUBINZA; MUGAMBA; CHIBITA JJ.S.C]

CIVIL APPEAL NO. 04 OF 2020

BOUTIQUE SHAZIM LIMITED :::::::::::::::::::::::::::::: APPELLANT

v

1. NIPUN BHATIA
(Administrator of the Estate of Narottam Bhatia)
2. HEMANTINI BHATIA :::::::::::::::::::::::::::::: RESPONDENTS

(Arising from the decision of the Court of Appeal at Kampala in Civil Appeal No. 179 of 2015, (Owiny-Dollo DCJ, Egonda-Ntende and Tuhaise, JJA), dated the 3rd day of March 2020)

JUDGMENT OF HON. DR. KISAAKYE, JSC

I have had the benefit of reading in Draft the Judgment of my learned brother, Justice Mugamba JSC. I only wish to add the following observations.

In arriving at its decision, the Court of Appeal held as follows:

> ***"The adduced evidence shows that the first payment of US$50,000 was made by the respondent even when exhibit P2 did not provide where it should be made or how, more so without the need of the appellant's bank details. As correctly argued by the appellants' counsel, the same manner of payment used in the first payment, or even a completely different mode, could have been***

adopted by the respondent to make the second payment to the appellants. There would, in that regard, therefore be no basis for the respondent to blame its failure to pay the balance on the appellants.

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

I agree with the learned Justices of Appeal that although the appellant company was not provided with the respondents' bank details, it failed to utilize the other avenues that were available to it to pay the balance that it owed the respondents on the suit property.

With all due respect to the learned Justices of Appeal, I respectfully disagree with the second finding of the Court of Appeal that the appellant could also have paid the balance of the purchase price of the property by either a Cheque or a Bank Draft. Given that contracting parties in Uganda do not ordinarily effect payments of such magnitude or at all, by depositing the Cheque or Bank Draft with the Uganda Postal Office, it would not have been prudent for the appellant to use this option, considering the amount of money involved of 67,300 US Dollars.

My review of the record of appeal confirmed that there was no evidence on record that the learned Justices could have relied on to make this erroneous finding.

I further take judicial notice of the fact that payments through the Postal Office is not one of the known modes used by effecting payments in Uganda.

Furthermore, although the respondents' postal address was in Uganda, the respondents admitted that they were out of the country at the time of the deadline for paying the balance of the purchase price of the property came.

Otherwise, I agree with the remainder of the Judgment of Mugamba JSC that this appeal should be dismissed.

As the rest of the members of the Coram also agree with the Judgment of Mugamba JSC, this appeal is dismissed and the orders of the Court of Appeal are hereby upheld.

The appellant will also pay the respondents' costs in this Court.

Dated this ....1st..... day of ....March.... 2021.

E Kisaakye

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Hon. Dr. Justice Esther Kitimbo Kisaakye.
Justice of the Supreme Court

Delivered 1/3/2021 by our Counsel Nambale for the appellant & Counsel Reg

Basemera for the respondent

Reg

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KISAAKYE; ARACH-AMOKO; TIBATEMWA-EKIRIKUBINZA; MUGAMBA; CHIBITA; JJ.S.C.]

CIVIL APPEAL No. 04 OF 2020

BETWEEN

BOUTIQUE SHAZIM LIMITED :::::::::::::::::::::::::::::::::::: APPELLANT

AND

1. NORATTAM BHATIA
(Administrator of the estate of Narottam Bhatia)
2. HEMANTINNI BHATIA :: RESPONDENTS

[Appeal arising from the judgment of the Court of Appeal at Kampala before (Owiny-Dollo, DCJ, Egonda-Ntende and Tuhaise, JJA) in Civil Appeal No. 179 of 2015 dated 3rd March, 2020.]

JUDGMENT OF TIBATEMWA-EKIRIKUBINZA, JSC.

I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice Mugamba, JSC. I agree with his analysis and conclusion that the appeal should be dismissed.

I also agree with the orders he has proposed.

Dated at Kampala this ..1st.... day of March..... 2020.

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PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.