THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT FORT PORTAL CIRCUIT

CIVIL APPEAL No. 0064 OF 2008

[Appeal from the judgment and decree of His Worship Karemani Jamson Karemera - Magistrate Grade 1, in Fort Portal Civil Suit No. 011 of 2006, delivered on the 7th of November, 2008]

HALIMA N. WAKABI …………………………………………………………………... APPELLANT

VERSUS

ASABA SELEVANO ………………………………………………………………….. RESPONDENT

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

This appeal arises from an action the Plaintiff (now the Respondent) brought before the Kabarole District Land Tribunal, as purchaser of a certain piece of land situated in Fort Portal Municipality; in which he sought a Court declaration that he was the lawful owner of the land known as Plot 1 Rwenzori Road, measuring 40.03 metres by 26.28 metres by 46 metres; an order of the Court directing the Defendant to effect specific performance of the said agreement, and also to refrain from any further act of trespass onto the said land. The Defendant, for her part, denied the Plaintiff's claim and also put up a counter claim, seeking therein adverse remedies against the Plaintiff. The facts of the case are straight forward and simple.

The Defendant had been allocated a certain piece of land by Fort Portal Municipal Council. However, upon opening up the boundary to that land, she discovered that the Plaintiff had encroached onto part of it. The parties then reached an understanding for the Plaintiff to acquire that portion of the land by purchase from the Defendant; and in a documented transaction, the Plaintiff paid a deposit to the Defendant, and undertook to complete payment within one month's time. Some eight years later, however, the vendor (Defendant) accused the purchaser (Plaintiff) of having failed to complete payment of the purchase price; and gave him notice that she (the vendor) had elected to treat this conduct as a repudiation of the agreement of sale; for which reason she had rescinded the agreement. She then took steps to recover physical possession of the land; and the purchaser responded with the Court action.

In her defence, the Defendant denied the Plaintiff's claim, pleading first that there had been no concluded contract; and in the alternative, that the Plaintiff had repudiated the agreement of sale, leading to her exercising the right of rescission. She also put up a counter claim, pleading therein for a Court declaration that she was the owner of Plot 6 Kaija Road Fort Portal Municipality, and an order restraining the Plaintiff from committing any further acts of trespass onto the said land. The main issue in controversy for determination by the trial Court was whether the contested documented transaction amounted to a contract of sale between the parties; then additional or subsequent issue was whether the purchaser had acted in breach of the agreement; and finally the consequential and common issue of the remedies available to the parties.

Apart from the plea of breach of contract, none of the Defendant's pleas found favour with the learned trial Magistrate. He instead made a finding that the parties had duly concluded a contract of sale of the suit land; but that the Plaintiff had acted in breach of a term of that contract by non–completion of payment of the purchase price, and for which he ordered the Plaintiff to carry out specific performance, and awarded general damages to the Defendant. Nonetheless, he gave judgment to the Plaintiff; and consequently dismissed the counterclaim. The Defendant was aggrieved; and without waiting to be availed the typed and certified records of the proceedings and judgment of the Court, but while leaving the door open for the possible inclusion of additional or alternative grounds, she formulated (six) grounds in her memorandum of appeal as follows; that:

1. The learned trial Magistrate Grade 1 did not properly evaluate the evidence on record; and as a result, came to an erroneous decision.
2. The learned trial Magistrate Grade 1 erred in law in holding that the agreement dated December 4, 1996, and contained in exhibit PE2, amounted to a contract of sale of the suit land.
3. The learned trial Magistrate Grade 1 erred in law and in fact in finding and holding that the Respondent entered into and took possession of the land, the subject matter of the suit, upon payment of the initial sum of shs.1,000,000/= deposit.

4. The learned trial Magistrate Grade 1 erred in law in holding that the Respondent was in the circumstances of this case not a trespasser on the suit land; and thereby wrongly dismissed the Appellant's counterclaim
5. The learned trial Magistrate Grade 1 misdirected himself on the law relating to specific performance; and thereby erred in law and in fact in dismissing the Appellant's counterclaim.
6. The decision of the trial Magistrate Grade 1 was generally bad in law, and caused a miscarriage of justice to the Appellant.

In their written submissions, counsels for the Respondent accused counsels for the Appellant of having raised new grounds of appeal in their written submissions, but without first obtaining leave of Court as required by the provisions of O. 43, r. 2 (1) of the Civil Procedure Rules. Counsels for the Respondent however did not point out what these new grounds are; and indeed the counsels for the Appellant responded that they had done no such thing, but had merely argued a number of the earlier formulated grounds together. As pointed out, the Appellant had formulated her grounds of appeal long before being availed the certified typed record of the trial Court. In fact when counsels appeared before the appellate Court and consented to proceed to address Court by way of written submissions, the typed records were, to their knowledge, not ready yet.

In the circumstances then, had counsels for the Appellant indeed raised any new ground of appeal in their written submissions, I would have had little difficulty, if any, in allowing it to be argued; save of course if it were manifest that some miscarriage of justice would be occasioned to the Respondent thereby. It is now settled that a first appellate Court is under duty to subject the evidence on record before it to fresh consideration and evaluation – in effect to conduct a re–trial as it were – and with the mandate to reach its own conclusions therefrom; but in doing so, it has to bear in mind that it did not have the benefit of observing the witnesses first hand, as they did not testify before it; hence, it is not in a position to favourably determine their demeanour. This is the proposition of law contained in a long line of cases in our jurisdiction, including ***Ismail Jaffer Allibhai & 2 Others vs. Nandlal Harjivan Karia & Another, S.C. Civ. Appeal No.53 of 1995***; reported in ***[1996] IV KALR 1***.

It is quite clear that grounds 1, and 3 of the memorandum of appeal can conveniently be lumped and handled together as they, essentially, raise the same point of grievance; namely that of inappropriate evaluation of evidence by the trial Magistrate. Equally, the same principle can be applied to grounds 2 and 4; and as well, 5 and 6, of the said memorandum; which respectively complain against his construction of the documented transaction by the parties hereto, and the consequences that ought to have resulted from the Plaintiff's actions subsequent to the execution of that document. I therefore propose to dispose of grounds 1 and 3 first. The complaint raised by the Appellant in these two grounds are first that the trial Magistrate generally failed to evaluate the evidence presented before him; and specifically so with regard to the date the Respondent took possession of the suit land.

In his concise judgment, the trial Magistrate endeavoured to give a fair evaluation of the evidence on record. He touched on all the relevant matters in contention before Court; and made his findings on them. However, it is the apparent confusion arising from his finding regarding the date the Plaintiff (purchaser) took possession of the suit land that is the subject of the said grievance. At page 2 of his judgment, the trial Magistrate stated as follows:

> *"PW1 Asaba Selevano testified that on 4/12/1996 the defendant sold to him a piece of land and the purchase price was agreed at shs. 2,000,000/=. That he paid shs. 1,000,000/= and they executed an agreement. … That he took possession of the land, and applied for it from Fort Portal Municipal Council."*

From this account in Court, the Plaintiff was asserting that he had taken possession after the agreement of sale. On the other hand, at pages 6 to 7 of the judgment, while dealing specifically with the issue of possession of the suit land, the trial Magistrate had this to say:-

> *"The next issue is whether the plaintiff took possession of the land in issue. The defendant doesn't deny the fact that the plaintiff upon payment of the price he continued to use the land which he had earlier on been using before they agreed on the sale. The defendant stated that the plaintiff had gardens. The letters written by the defendant's lawyers show that the plaintiff had been using the land. I therefore find that the plaintiff took possession of the land in issue.*"

The two accounts above are clearly at variance as to when the Plaintiff took possession of the suit land. The Plaintiff's contention was that he took possession of the suit land after the sale. The Defendant for her part testified that the Plaintiff had commenced the use of the land sometime in 1996; and that this was after she had already been allocated the land by the Municipal Council. She stated further that she discovered the encroachment, prior to the agreement of sale, upon opening up the boundary of the land allocated to her. It was therefore not in dispute that the Plaintiff took possession of the suit land and utilised it.

It is apparent from the record that the trial Magistrate entrapped himself when framing the issue of possession. He allowed this issue to flow from the first two issues, which were namely: whether the documented agreement amounted to a contract of sale, and whether the Plaintiff paid the balance of the contract sum. Consequently then, other than framing the issue of possession as being 'when' the Plaintiff had taken possession of the suit land, the learned trial Magistrate instead framed it as 'whether' he had taken possession. He misdirected himself in this regard. Both from the pleadings and the evidence, it was clearly not the taking of possession that was in contention; but rather the date of taking possession. What should have been in issue was the controversial pleading by either side that the suit land formed part of their respective registered plots, namely Plot 1 Rwenzori Road on the one hand, and Plot 6 Kaija Road on the other.

This was however cured by the evidence adduced at the hearing; and was no longer in contention as it became clear therefrom that the suit land did not form part of either of the registered plots, but was instead an unregistered land lying adjacent to both. It was the trial Magistrate's bounden duty, under O. 15, rr. 1 (5), and 3 of the Civil Procedure Rules, to correctly frame the issues based on the pleadings, albeit with the assistance of the counsels. Since, subsequent to evidence having been adduced, the need evidently arose to amend the issue of possession as had been framed, he ought to have done so; including striking out the earlier wrongly framed issue pertaining thereto, in accordance with the provisions of O. 15, rr. 5(1) and (2) of the C.P.R. Had he correctly framed the issues, he would have easily resolved the contradiction arising from the irreconcilable versions of the adversarial parties as to when the purchaser actually took possession of the suit premises.

It is not surprising therefore, that he was unable to expressly pronounce himself in his judgment on the time when the Plaintiff took possession. The closest he was to doing so, was the reference he made to the Plaintiff's acquisition of equitable interest after the sale; and that the Plaintiff was not a trespasser. This, admittedly, permits a strong ground for the inference that the trial Magistrate meant the Plaintiff had taken possession after the sale. It is however not spelt out in unequivocal language. Despite the Plaintiff's obstinate contention otherwise, there was indeed ample material before him from the pleadings, and the evidence adduced in Court for him to resolve this matter. In paragraph 4 (a) of the statement of claim in the suit, the Plaintiff expressly stated that the land which the Defendant sold to him was *'situate in the compound of the plaintiff'*.

The Plaintiff reiterated this position in paragraph 4 of the affidavit he swore in support of Miscellaneous Application No. 8 of 2002 which arose from the original suit; and was filed by him, seeking the intervention of the Court for an interim order against the Defendant. He stated therein that:

" … on the 4th day of December 1996 the respondent sold to me the suit land known as plot 1 Rwenzori Road A situate in my compound …".

The agreement, whose English translation was exhibit P1, clearly states as follows:

> *"I, Nakivumbi Wakaabu have received one million Uganda shillings (1,000,000/=) as deposit for a piece of my land located at Plot No. 1 Rwenzori road in Asaba Selvano's compound. The plot size is 40.03m x 26.28m x 46m. …."*

Finally, in the Plaintiff's application to Fort Portal Municipal Council for the lease of the suit land in October 2002 (eight years after the alleged purchase from the Defendant) – exhibit PE7 – he clearly stated that the land he was applying for was an unsurveyed piece of land. All these looked at together, point to two things: first that the suit land did not form part of the Plaintiff's own land comprised in Plot 1 Rwenzori Road, although he had enclosed it within that land as pointed out in the agreement; and second, that the Plaintiff had taken possession of the land prior to the agreement of sale.

The weight of evidence, with regard to possession, thus strongly favoured the Defendant's account. For that reason then, had the trial Magistrate correctly framed the issues, and properly directed himself on the evidence, he would have rightly come to the finding that the Plaintiff was already in occupation of the suit land when the documented transaction of sale of the land took place. Owing to the misdirection and his failure to properly evaluate the evidence before him regarding the taking of possession by the Plaintiff; and thereby resulting in his erroneous finding thereon, the contentions raised in grounds 1 and 3 of the appeal are well founded. I therefore allow these two grounds of appeal.

Both grounds 2 and 4, attack the learned trial Magistrate's findings on the true import of the agreement between the parties; and the consequential finding that the Plaintiff was not a trespasser; and thereby leading to his dismissing the counterclaim. Determination of these issues partly hinges on the true construction of the agreement – exhibit P1 whose English translation is exhibit P2 – dated the 4th of December 1996; to which both parties, it is not disputed, appended their hands. Owing to its centrality in the matter in contention before Court, I have to reproduce the English translation here, in extenso:

> *"I, Nakivumbi Wakaabu have received one million Uganda shillings (1,000,000/=) as deposit for a piece of my land located at Plot No. 1 Rwenzori road in Asaba Selvano's compound. The plot size is 40.03m x 26.28m x 46m. The plot has been sold at Two million (2,000,000/=) and there is a balance of shs. 1,000,000/= remaining which shall be payable in the one month's time (i.e. on 4th day of January, 1997) upon which I shall prepare the final agreement."*

The bone of contention between the parties to the agreement boils down to this: whether this agreement of 4th December 1996, was precedent to a contract the parties intended or expected was to come into force upon the occurrence of some event, or to the performance of a contract that had already come into force by the parties appending their hands to the agreement. The agreement clearly stated that the Appellant had sold the suit land to the Respondent for shs. 2m/=; and had received 1m/= from the Respondent as deposit, with the outstanding amount payable by 4th January 1997. The case for the Appellant, just as it was argued at the trial, is that the provision in the agreement deferring the preparation of a final agreement to await completion of the purchase price was evidence that the transaction of 4th December was provisional and preceded the coming into place of a contract, other than merely preceding the performance of a contract already in place.

The Respondent has, both at the trial and before the appellate Court, argued otherwise. It is manifest that the answer to this clash of interpretation lies in the proper construction of the two phrases, namely:

'The plot has been sold at shs. 2m/=', and then *'upon which I shall prepare the final agreement'*.

There are a handful of authorities which are instructive on how to approach this type of problem. In ***Branca v. Cobarro [1947] 2 All ER 101;*** the relevant portion of the document had stated that the vendor *'agrees to sell'* the suit land for a specific sum, payable in two instalments from the date of the agreement; with a deposit paid by the purchaser and the outstanding amount payable within a stipulated period. The document also stated that:

'This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed'.

Greene M.R., in his judgment on the construction of this phrase stated at p.102, that:

> *"… The words 'fully legalised agreement' must, I think, mean, and I do not think it is disputed, what we generally call a formal agreement. It is an agreement which has got to embody 'all the conditions herewith stated'. No other terms or conditions are to appear in that fully legalised agreement. …*
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> *My reading of this document is that both parties were determined to hold themselves and one another bound. They realised the desirability of a formal document as many contracting parties do, but they were determined that there should be no escape for either of them in the interim period between the signing of this document and signature of a formal agreement, and they have used words which are exactly apt to produce that result and do not, in my opinion, suggest that the fully legalised agreement is in any sense to be a condition to be fulfilled before the parties are bound …"*

In the celebrated case of ***John Katarikawe vs. William Katwiremu & Anor., [1977] H.C.B 187**,* the Plaintiff had entered into an agreement with the first Defendant, in writing, to buy land from the Defendant. He had made part payment and taken possession of the land subsequent to the agreement, and effected improvements on it on the basis of the contract. Before he could complete payment, he discovered that the land had been transferred to a third party. The issue before Court was whether the purchaser had thereby acquired title to the land. Ssekandi J. fully elucidated the law in this regard; the relevant part of which I recast here as follows:

(i) *A contract for the sale of land is not perfected until an effective transfer of title has been made but, failure to do so does not affect the contract until the land is transferred to other persons. …*

(ii) *Before transfer of the land, a buyer under contract acquires only an equitable interest. …*

(iii) *The plaintiff's taking possession of the land amounted to part performance of the contract and his equitable interest was binding on the vendor as an overriding interest.*

(iv) *Section 3 of the Contract Act specifically preserved the rights of the parties to a contract both at law and in equity and the High Court is enjoined by the Judicature Act to administer both law and equity. …*

(v) *The … [unregistered] interests are rights in personam; such rights may more often arise from contracts for sale of land before transfer. The purchaser acquires an equitable interest in the nature of a right in personam enforceable only against the vendor."*

In the ***Ismail Jaffer Allibhai*** case above, at p. 13, Oder J.S.C stated that:

"… on completion of a contract of sale of immovable property, property passes to the purchaser, and the vendor holds it as a trustee for the purchaser. The legal title, on the other hand, remains with the vendor until transfer is effected. The equitable title which passes to the purchaser is considered to be superior to the vendor's legal title, which is extinguished on payment of the purchase price by the purchaser."

The learned judge quoted, with approval, a passage from the authoritative work of R.E. Meggary and H.W.R. Wade on ***The Law of Real Property*** (3rd Edn.) at p.582 as follows:

"… on completion of a contract of sale of immovable property, property passes to the purchaser, and the vendor holds it as a trustee for the purchaser. The legal title, on the other hand, remains with the vendor until transfer is effected. The equitable title which passes to the purchaser is considered to be superior to the vendor's legal title, which is extinguished on payment of the purchase price by the purchaser.

(a) The purchaser as owner: If the purchaser is potentially entitled to equitable remedy of specific performance, he obtains an immediate equitable interest in the property contracted to be sold; for he is, or soon will be in a position to call for it specifically. It does not matter that the date for completion has not yet arrived; equity looks upon that as done which ought to be done, and from the date of contract the purchaser becomes owner in the eyes of equity (he cannot of course become owner at law until the land is conveyed to him by deed). This equitable ownership is, as has been seen, a proprietary interest enforceable against third parties…"

Applying the principles of construction, as set out in the decided cases above, to the instant case before me, the true meaning to be attached to the expressions contained in the document in contention is plainly that the parties duly concluded an agreement which was a contract of sale of land. The Respondent acquired an equitable title to the land thereby; notwithstanding that as purchaser he was already in possession. Had he not been in possession, the vendor would have held the property in trust for him; pending the completion of the purchase price and the execution of the instrument of transfer (the final agreement) which the Appellant clearly stated in the agreement she would perform upon such completion.

The provision in the agreement that the final agreement would await the completion of the purchase price was nothing more than a condition precedent to the performance of, rather than the coming into force of the contract. The obligation upon either party to the agreement that remained to be performed were conditions precedent to the passing of legal title out of a contract which was already in place and enforceable. It was a safeguard for the execution of an obligation that would then lead to perfection of the contract of sale. Had the agreement been prepared by a professional legal hand, the wording regarding transfer of title might presumably have come out in more certain language.

With regard to the passing of title, the trial Magistrate had this to say in his judgment:

> *"My finding is that since there was a sale agreement entered and part payment effected the defendant ceased to own that land where the plaintiff acquired equitable interests…"*

The statement that the Defendant ceased to own the land sold, upon the Plaintiff acquiring equitable interest therein, is not a correct statement of the law. In a contract of sale of land, including one such as this, where only part payment has been effected, until legal title has passed onto the purchaser, both the vendor and the purchaser have their own title to the land sold; the one legal, while the other equitable. The two titles exist alongside, and independent of, each other.

The rationale behind the passing of the equitable title to the purchaser is that it serves as an insurance or safeguard against any potential mischief by the vendor. It is for this that the purchaser's equitable title is, in the eye of the law, superior to the vendor's legal title, as a right in personam (as between the two persons). Indeed the learned authors, R.E. Meggary and H.W.R. Wade, point out in their authoritative work cited above that where the vendor remains in possession of the demised property he holds it as mere trustee for the purchaser to who risks over the property also passes. This is really a restatement of the superiority of the equitable title, over the legal title still reposing in the vendor. Otherwise, I find that the grievance in ground 2 of the appeal has no merit. I disallow it.

On the issue of trespass, the Defendant had, in her counterclaim, asserted that the Plaintiff had trespassed onto her land comprised in Plot 6 Kaija Road; and laid claim thereto without her consent. It is important to note that the Defendant's plea was not about the encroachment that took place prior to the agreement of sale; rather, it was the continued possession and claim of title over the land by the Plaintiff, which continued even after her rescission of the contract, that was the subject of her complaint. In his judgment, the trial Magistrate correctly understood the Defendant's averment as such; and held that owing to the acquisition of an equitable title to the land by the Plaintiff, that occupation did not amount to trespass.

The Appellant had, as I have pointed out above, upon discovering the act of encroachment, conveniently curved the suit land out of her entitlement to what later, upon registration, became Plot 6 Kaija Road in preference to the sale of the curved out portion to the Respondent. In doing so she had, no doubt, waived her right to remedial action against the Defendant for the act of encroachment. However, apart from this not being in issue, neither did the waiver nor the contract of sale of 4th December 1996, which afforded the Plaintiff lawful possession of the suit land, validate his hitherto unlawful occupation of the said land. The two circumstances were independent of each other.

This is in keeping with the proposition of law as laid down in ***Sheikh Mohammed Lubowa vs Kitara Enterprises Ltd. C.A. Civ. Appeal No. 4 of 1987;*** where Manyindo V.P., as he then was, was categoric that an agreement of sale of property subsequent to an encroachment thereon cannot validate the act of trespass. The sale creates a new relationship between the parties, which is in no way connected to the act of trespass, albeit the sale having been executed against a backdrop of that encroachment which is terminated by the sale. I therefore find that the trial Magistrate was justified in holding that the Plaintiff was not a trespasser onto the suit land in the circumstances; and for which reason, I disallow ground 4 of the appeal.

Upon finding that the Plaintiff had failed to perform his part of the bargain, and the circumstances under which that breach had taken place, the trial Magistrate was tasked with having to determine what remedies to avail the Defendant. He berated the Plaintiff for his blatant falsehood in claiming that he had paid the sum owing on the contract except for a small amount outstanding; whereas not.

Nevertheless he thought the Defendant could be sent home with an order of specific performance by the Plaintiff, and award of damages in atonement for the loss occasioned by the latter's breach. It is this decision that has given rise to grounds 5 and 6 in the memorandum of appeal.

I have no reason whatever to fault the trial Magistrate on his finding that the Plaintiff had indeed breached the terms of the contract entered into with the Defendant. There is such overwhelming evidence on record in support of this finding that the Respondent could not even challenge it, say, by way of cross appeal. To me, however, the central question in this appeal is whether upon finding so, the trial Magistrate truly rendered justice to the Defendant by the award stated above. Counsel for the Appellant has argued that having dismissed the Defendant's counterclaim, there was no basis upon which the trial Magistrate awarded specific performance for her benefit, as he did. This is quite an interesting line of presentation. However, a narrower examination of the judgment reveals that the counterclaim was only partially dismissed; and this, it is apparent, was with regard to the issue of trespass.

Indeed the trial Magistrate, in deciding on the issues of costs payable, stated that both parties to the suit were partially successful. He stated that where there has been a breach of contract, a party is entitled either to an order of specific performance, or of repudiation of the contract. That is a correct statement of the law. Nonetheless, it is necessary that this Court decides whether the order of specific performance and award of damages were the appropriate or tenable remedies in the circumstance of this case. The overriding consideration leading to the trial Magistrate's decision was first, the revelation that the suit land had been sold to the Sisters of Virika Pharmacy, and second, the Defendant having curved it out from the land which she later acquired a title for, and retained.

He also considered that the Defendant had prayed for an order of rescission in the alternative, in the event that the Court found that no contract existed. He therefore deemed it equitable and just to order specific performance of the contract; holding the view that terminating the contract would be unjust to the Plaintiff. The law on how to approach such a situation, as the instant one, was authoritatively set out in the case of ***Johnson and Anor. vs. Agnew [1979] 1 All ER 883***. In that case the purchaser had defaulted in the completion of the contract. The vendors (Plaintiffs) obtained a decree for specific performance but did not act promptly to enforce it. They therefore failed to save the land from foreclosure and sale by a mortgagee; with the result that they were in no position themselves to convey the properties to the purchaser. They went back to Court for an order of damages in lieu of specific performance.

Lord Wilberforce, in a very powerful opinion to the Court in that case, reviewed the authorities on the matter, and helped to sort out the confusion that had been entrenched by Court decisions over the years regarding the issue of damages following rescission on grounds of repudiation. He stated, and I find it incumbent on me to quote extensively therefrom, beginning at page 889[c], as follows:

> *"… First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from court an order for specific performance with damages for any loss arising from any delay in performance … .*
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> *… Secondly, the vendor may proceed by action for the above remedies (viz specific performance or damages) in the alternative. At the trial, he will however have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.*
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> *At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as 'rescinding' the contract, this so–called rescission is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never coming into existence. … In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged.*
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> *Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about 'rescission ab initio'. In* ***Heyman v Darwins Ltd [1942] 1 All ER 337*** *at 360–361,* ***[1942] AC 356*** *at 399 Lord Porter said:*
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> > *'To say that the contract has been rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller*

expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that, upon acceptance of the renunciation of a contract, the contract is rescinded is incorrect.

In such a case, the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded….'

I can see no reason, and no logical reason has ever been given, why any different result should follow as regards contracts for the sale of land, but a doctrine to this effect has infiltrated into that part of the law with unfortunate results. … Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. This is clear law, best illustrated by the judgment of Greene M.R. in ***Austins of East Ham Ltd v Macey [1941] Ch. 338****, at 341in a passage which … repays quotation in full:*

'The contract is still there. Until it is got rid of, it remains as a blot on the title, and the position of the vendor, where the purchaser has made default, is that he is entitled, not to annul the contract by aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated. He cannot, in the circumstances, treat it as repudiated except by order of the court and the effect of obtaining such an order is that the contract, which until then existed, is brought to an end. The real position, in my judgment, is that … the vendor, in such circumstances is choosing a remedy which is alternative to the remedy of proceeding under the order for specific performance. He … elects to ask the court to put an end to the contract, and that is an alternative to an order for enforcing specific performance.'

… [T]here only remains the question whether, if the vendor … [applies] to the court to put an end to the contract, he is entitled to recover damages for breach of the contract. … why, if the court accedes to this, should there not follow the ordinary consequences, undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract? …

This is however the first time that this House has had to consider the right of an innocent party to a contract for the sale of land to damages on the contract being put an end to by accepted repudiation, and I think that we have the duty to take a fresh look. … I quote first from a judgment of Dixon J in ***McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457****, at 476–477 which with typical clarity sets out the principle, this, be it observed, in a case concerned with a contract for the sale of land:*

> *'When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.*
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> *When a contract … which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.'*

… It is easy to see that a party who has chosen to put an end to a contract by accepting the other party's repudiation cannot afterwards seek specific performance. This is simply because the contract is gone, what is dead is dead. … … Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles. The court would not make an order … terminating the contract (with the recovery of damages) if to do so would be unjust, in the circumstances then existing, to the other party, in this case to the purchaser. …"

In ***Strickney vs. Keeble [1945] AC 386***, at 415, Lord Parker stated thus:

"… in a contract for the sale and purchase of real estate the time fixed by the parties has, at law, always been regarded as essential."

In ***Harold Woodbrick Co. vs. Ferries [1935] 2 K.B. 198;*** where upon breach by the purchaser, the vendor had forfeited the land sold to it, Greer L.J. stated at p. 205 as follows:

> *"If one party indicates by his conduct that he is unable or unwilling, whatever time is given, to perform his contract, that is sufficient to justify an acceptance of the repudiation and to entitle the other party to damages…"*

> In the leading case of ***Mersey Steel and Iron Co. Ltd vs Naylor, Benzon & Co ((1884) 9 Appeal Cas 434 at 443, 444; [1881-85] All E.R. Rep. 365 at 370)***, Lord Blackburn said:

> *"The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to **Pordage vs Cole**),if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say:*

>> *'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct …'*

> [As for the justification] *in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract … there are many cases in which the breach may do so; it depends upon the construction of the contract."*

Hence, in the instant case before me, by nominating just one month for the completion of payment of the purchase price, the vendor made it unmistakably clear that time was of the essence to the contract. Completion of the purchase price within this expressly stated period was the very foundation of the contract, as the final act of the vendor that would pass legal title to the purchaser and perfect the sale depended on it. This Court has in mind the very speculative and erratic nature of land market in this country. Surely, the vendor could never have envisaged such an outrageously inordinate delay of close to ten years from the date of the agreement; and far less still, what became clearly manifest, from the evidence, that the purchaser would sit back and harbour no intention at all of discharging his contractual obligation, and yet expect to acquire legal title to the suit land.

Had it been that the purchaser's default was some acceptable or explicable delay, not flagrantly stretched out for a period far removed from the date on which he had been obliged to perform his part of the bargain, notwithstanding that time was of the essence and thus a fundamental term of the contract, it could possibly have been viewed with the liberal eyes of equity. In such a situation, it could be reasonable to argue that whatever loss the vendor might have suffered was probably not much in real terms; with an order of specific performance and an award of damages commensurate with the loss, taken to suffice to atone for such loss.

Otherwise to decree that notwithstanding his flagrant conduct, clearly going to the very root of the contract, the Plaintiff could nonetheless still, come to equity with soiled hands, pay the contractual sum outstanding; together with some liquidated amount arbitrarily arrived at, as penalty, and thereby afford him the benefit of acquiring legal title to the land sold, would be absolutely unreasonable, inequitable, and utterly unjust to the vendor. From the evidence adduced by the Plaintiff, the suit land is still available as the sale to the Sisters of Virika Pharmacy was conditional; it having been done with a caveat by the Plaintiff himself (as seller), that the land sought to be demised to them was encumbered; hence whatever interest they could have acquired therein was subject to that notice.

Had the suit land been disposed of, and thus not available, then an order of specific performance as an equitable remedy, together with that of an award of rescissory damages, properly assessed and adequate to atone for whatever loss the Appellant might have suffered, would have been justifiable. In ***Gibson vs. Manchester City Council [1979] 1 All ER 972,*** Lord Diplock sounded a warning at p. 976, that: **–**

"*…hard cases offer a strong temptation to let them have their proverbial consequences. It is a temptation that the judicial mind must be vigilant to resist.*"

The circumstance of this case demands such vigilance. True justice here demands that the Appellant's election to accept the repudiation of the contract by the Respondent be upheld; and the contract be considered as dead. The alternative plea by her in the counterclaim that there had been no contract between them does not in any way affect her entitlement to this remedy. I can think of no better instance for the application of the old adage that 'those who come to equity must do so with clean hands' than in the nature of breach of contract in the instant case. In the result, I allow grounds 5 and 6 of the appeal; with the consequence that I hereby allow the appeal, set aside the decree of the lower Court and substitute therefor the following orders:

(i) The Plaintiff's original suit is dismissed with costs.

(ii) The Defendant's counterclaim is allowed with regard to rescission of the contract of sale of the suit land.

(iii) The Defendant is entitled to possession of the suit land.

(iv) The Defendant is awarded U. shs. 3m/= (Three million only) as general damages for breach of contract.

(v) The Appellant is entitled to costs of this appeal, that of the original action, and of the counterclaim as well.

Alfonse Chigamoy Owiny – Dollo

JUDGE

08 – 01 – 2010