THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODOKI, J.S.C, ODER, J.S.C., TSEKOOKO, J.S.C

CIVIL APPEAL NO. 38/95

BETWEEN

SHARIF OSMAN…… APPELLANT

AND

HAJI HARUNA MULANGWA……RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Kampala (Mukanza, J.) dated 10 February, 1995)

in

Civil Suit 701/95

JUDGMENT OF TSEKOOKO J.S.C.

The appellant appeals against the decree of the High Court whereby the appellant as defendant was ordered to perform his part of the contract of sale by surrendering vacant possession of his house and effecting transfer of its title to the respondent. In addition the appellant was ordered to pay Shs. 3,000,000/= as general damages plus costs of the suit.

The facts of the case are simple. The appellant is the registered proprietor of a building and land comprised in Kibuga Block 12 Plot No. 472 situated at Kisenyi, Mengo Hill Road, Kampala. On 5th January, 1990 the appellant and the respondent entered into a sale Agreement (Exh. P.2) by which the appellant sold to the respondent the land and building (hereinafter referred to as the suit premises) at an agreed sale price of US$12000.

Prior to the execution of the Agreement the respondent had paid US$3000 which was treated as first instalment towards the purchase price.

The Agreement stipulated that the respondent was to pay US$5000 on or before 8th January, 1990 and the balance of US$4000 on or before 15th April, 1990.

By clause 3 of the agreement the appellant was to occupy the suit premises until 15th September, 1990 when The shall be required to vacate it and give vacant possession to the purchaser but Should. he desire to continue staying there, then he shall pay rent to the vendor which shall be agreed upon by consent of both parties.

The respondent paid the US$5000 apparently in two instalments. He paid a further $2000 on an uncertain date probably on or before 20th April, 1990. He did not pay the balance of $2000 within the stipulated period.

On 7th August, 1990 the suit premises were damaged by a semi-trailer motor vehicle belonging to a Rwandese national. Consequently the appellant, who was still occupying the suit premises, obtained judgment against the owner of the trailer for Shs, 7,200,000/=. The parties are in disagreement as to how much was actually paid by the trailer owner to the appellant, but it is accepted that the appellant repaired the suit premises using the proceeds of that suit.

The appellant did not vacate nor did he hand over vacant possession of the suit premises on 15th September, 1990 or at any other time.

Up to now the appellant still occupies some rooms and lets out some other rooms on the suit premises. Some time in 1991, the appellant appears to have attempted to resell the suit premises to another person. Consequently the respondent lodged a caveat on the title of the suit premises on 13th December, 1991. On 6th February, 1992 the appellant through his lawyers purported to rescind the sale Agreement.

Because of that, and the continued occupation of the suit premises by the appellant, the respondent instituted a suit in the Court below praying for:-

(a) Specific performance of the contract of sale;

(b) Rent due under the said Agreement plus mesne profits;

(c) Shs. 7,200,000/= as special damages (having been recovered from the trailer owner);

(d) General damages for breach of contract;

(e) Vacant possession of the suit premises;

(f) Interest on the decretal amount at Bank rate (45%) p.a.

(g) Costs of the suit.

By his defence the appellant denied liability and justified the rescission of the Contract and by the counterclaim the appellant asked for the caveat to be removed from the title of the suit premises.

Five issues were framed as appear (as appear on the record):-

(1) Whether the plaintiff was entitled to vacant possession on 15th September, 1990

(2) Whether his right to possession was absolute or dependent on a contingency?

(3) Whether time was of the essence of the Contract?

(4) Whether the defendant was entitled to rescind the contract of sale?

(5) Whether the plaintiff was entitled to Shs. 7.2 million after damage to the suit premises?

(6) What in the circumstances are the remedies available to the parties?

The respondent testified in support of his claim and called a valuer, Abdu Bawonga (PW2) to establish the rentals and the value of the suit premises, The appellant testified in support of his defence.

The trial Judge found most of the issues in favour of the respondent, i.e., issues 1 & 2 in the affirmative and issues 3, 4 and 5 in the negative. He held that the respondent was not entitled to Shs. 7,200,000. The Judge never made any finding on the counter-claim which, we were informed from the bar by Mr. Muwayire-Nakana, Counsel for the appellant here and in the Court below, that it (the counter-claim) was abandoned. This information is misleading because Mr. Muwayire during his submissions in the Court below asked for judgment on the counterclaim and for shs. 24m/= as damages.

The appellant has appealed against these findings. The respondent has cross-appealed against some of the findings of the trial Judge. The appeal contains four grounds. The notice of cross-appeal contains 3 grounds.

The complaint in the first ground of appeal is that the trial judge erred in law and fact in holding that the parties intended that by 15th September, 1990 the respondent would be entitled to vacant possession irrespective of whether he had or had not paid the purchase money fully. This complaint relates to the resolution of the first issue by the trial Judge in favour of the respondent,

Mr. Muwayire-Nakana, Counsel for the appellant, referred to clauses 2 and 3 of the sale Agreement (exh. P2) and contended that if the trial Judge had read the whole agreement he would have concluded in effect that the respondent was not entitled to possession until he had paid the whole of the purchase price.

Learned Counsel further contended that until full payment of the purchase price by the purchaser, the appellant as vendor retained a lien on the property, the subject at sale.

He relied on passages in Lysaght vs. Edwards (1876) 2 Ch. D. 499 at page 506 Philips vs. Silvester (1872) 8 Cha. A. 173 at pages 176 and 177 in support of his arguments.

Mr. Tibaijuka for the respondent adopted the arguments he had raised at the trial of the suit. He relied on clauses 3, 4 and 6 or the agreement. The effect of his submissions is that the provisions of clause 3 entitled the respondent to possession of the suit premises regardless of whether or not the full purchase price had been paid on 15.4.90. Learned Counsel submitted that the Agreement had been drafted by Mr. Muwayire-Nakana, as Counsel for the appellant, who did not insert in the agreement any qualifications to the contents of clause 3, by operation of the doctrine of contemporanea expositio clause 3 must be strictly construed so that any ambiguity that may arise from the construction of the agreement is held against the appellant and in favour of the respondent.

As regards the doctrine of lien, Mr. Tibaijuka contended, that it was not available to the appellant; first because it was not relied on in the trial Court and, secondly, that the existence of clause *3* in the sale Agreement shows a contrary intention to the effect that the appellant

never intended to rely on the doctrine of lien. Counsel relied on the same authorities cited by Mr. Muwayire, i.e. Lysaght's case (supra) and Philip (supra) to support these submissions.

Since the sale agreement was drawn by an Advocate, if the Advocate had adopted the provisions of s.208 and conditions set out in the twenty first Schedule (Table 'A) to Registration of Titles Act (RTA) the respondents case would have been disposed of with least argument.

As the Schedule was not referred to, let me refer to the contents of the sale Agreement.

Omitting some irrelevant words in the opening paragraph, the sale Agreement reads as follows:-

> "AGREEMENT OF SALE
> AN AGREEMENT made this 5th day of January,
> 1990 BETWEEN OSMAN IBRAHIM of P.O. BOX.
>
> 30304, KAMPALA (hereinafter called the vendor) of the one part, AND HAJI HARUNA MULANGWA of P.O. BOX 5592, KAMPALA
> (hereinafter referred to as the purchaser…….) of the other part.
>
> **WHEREAS**
>
> (a) The vendor is the owner of all that piece of land above-mentioned/described and comprised in KIBUGA Block 12 Plot 427
> developed with a residential house (hereinafter called the land).
>
> (b) The vendor has agreed to sell the land and the purchaser has agreed
> to buy the said land on terms hereinafter appearing.

NOW THIS AGREEMENT WITNESSETH as follows:-

1. The vendor agrees to sell and the purchaser agrees to buy free from any encumbrances whatsoever.

2. The price for the said land has been agreed at US $12,000 (United States Dollars) Twelve thousand payable in the manner hereinafter appearing.

   (i) US$3,000 (three thousand dollars) has already been paid to the vendor by the purchaser the receipt of which the vendor acknowledges by signing these presents.

   (ii) US$5,000 (Five thousand dollars on or before 8th January, 1990,

   (iii) The balance of US$4,000 (Four thousand dollars on or before 15th April, 1990.

3. The vendor shall occupy the said land and until September, 1990 when he shall be required to vacate it and give vacant possession to the purchaser, but should he desire to continue staying there then he shall pay rent to the vendor which shall be agreed upon by consent of both parties.

4. The vendor shall hand over the certificate of title in respect of the said land to the purchaser after completion of payment of the purchase price.

5. The vendor guarantees that he has not before the date of this Agreement sold, mortgaged or let by way of security or entered into any Agreement creating lien in said land and that he will allow the purchaser quiet and uninterrupted possession and occupation of the land.

6. The vendor hereby undertakes to execute and deliver all and any necessary documents of transfer relating to the said land after completion of the purchase price.

7. The legal fees preparation of this Agreement shall be met by the purchaser.

IN WITNESS WHEREOF, the parties hereto have sat their hands hereto the day and year first above written.

SIGNED AND DELIVERED ::)
by the said SHARRIF OSMAN IBRAHIM::::::::::::::::::::::::::) _____
"Vendor" ::) SIGNATURE

In the presence of Hirje Dere ::) _____
Witness ::) SIGNATURE

SIGNED AND DELIVERED ::)
by the said HAJI HARUNA MULANGWA :::::::::::::::::::: ::::) _____
SIGNATURE
In the presence of NAMAKAJO MUBASHIR ::::::::::::::::::::::::)
WITNESS : :::::::::: : : : : :::::::::::::::::::::::::::::::: ::::::::::::::::::) _____

SIGNATURE

DRAWN & F ILED BY: -
M/S MUWAYIRE—NAKANA & Co.
ADVOCATES,
PLOT 46 WILLIAM STREET
P.O. BOX 9474
KAMPALA

Clearly the word "vendor appearing for the second time in clause is a mistake. The correct word must be purchaser.

It is true as a general proposition that a sale Agreement, or any Agreement for that matter, must be read as a whole in order to give meaning or effect to the intention of the parties. A study of the above quoted contents of the sale agreement, leaves no doubt at all that Mr. Tibaijuka must be right in his submission that the parties to this agreement intended that the purchasers possession of the suit premises was not contingent upon final payment of the purchase price.

Otherwise clauses 4 and 6 would be unnecessary. Any ambiguity arising because of the existence of clause 3, 4 and 6 would have to be resolved against the appellant since it was his Advocate who drew the agreement. See J.F. Lally Vs. Uganda Commercial reported in Vol. 3/73 of the Digest of Decisions of the E.A. Court of Appeal at page 20 and see Law of contract by Cheshire and Fifoot, 6th Ed. Page 113.

The learned trial Judge dealt with this matter at page 415 of his judgment thus (after quoting clause 3):-

> "The plaintiff as PW1 testified that he was entitled to vacant possession by 15th September, l990 as per clause 3 of the agreement. And the defendant as DW1 maintained that clause 3 was expressed intentions of the parties and this has been apparently seen by the learned Counsel throughout their submissions. In essence the parties could not go outside the expressed terms of the sale agreement ……."

The submissions made before us by both Advocates are virtually a regurgitation of the submissions they made in the trial Court. The trial Judge considered the submissions. During examination-in-chief the respondent (PWI) stated that (P.36 of proceedings):-

> "I was supposed to take possession of the house on 15th September, 1990. I did not take possession of the house. The defendant could not allow me to enter. Since then I have never entered that house up to date."

Later, towards the end of examination-in-chief, he testified that:-

> "Around 15th September, 1990 the date of entering the house I talked to him about the rent issue, we agreed that 8 rooms each should be rented at Shs. 30,000/= and other rooms at Shs, 20,000/= each. And one which is a shop was to be rented at Shs. 50,000/= and those occupied by the defendant, he had to pay more of Shs. 150,000/="

During cross-examination the respondent testified:-

> "For our defendant (sic) we agreed that I was to enter before final payment. What was to come first was to pay first before I would enter the house, but we later verbally agreed that I take possession and pay the balance later. We agreed that if by 15th September, 1990 he has not got out he should remain in the house but instead pay me rent…….After 15th September, 1990 I demanded rents from the defendant, and also I demanded the rent from other tenants……."

Towards the end of cross-examination the respondent further testified that:-

> "On 15th September, 1990 we sat together with Osman, estimated how much money could be realised from the tenants by each tenant including where he was staying and by so doing I protected (sic) his integrity by not showing that Osman was going away and that I was their new Landlord."

During examination-in-chief, this is what the appellant stated about possession (page 45):-

> "We agreed that if he finishes payment on 15th April, 1990 or before he would come and enter the house. I would give him documents I would still be there up to September, 1990. Before September if I am still there would pay rents like any other ordinary tenant."

This evidence contradicts clause 3. Later the appellant testified:-

> "Mr. Mulangwa did not come to take possession of the house on 15th April, 1990 because he had not paid the balance. After September, 1990 Mr. Mulangwa could not demand rents from me because the house did not belong to him."

A little later the appellant testified that:-

> "What was catered for (in agreement) was to pay the final balance by 5th April, and I to leave the house by September, 1990. There was no provision for them to pay house rent to the plaintiff.

> The plaintiff was not entitled to the rent of the house because he had not finished payments of the balance and I had not handed over the title to him."

The conclusion I draw from the portions of evidence reproduced above and the reading of the sale Agreement is that transfer of the title in the suit property was dependent on the completion of payment of the purchase price.

But possession was not necessarily so dependent.

The denials to the contrary by the appellant only shows that the appellant became wiser because of the delay in final payment of the purchase price.

The maxim contempora expositio optima et fortissima in leg (the best way to construe a document is to read it as it would have read when made) is applicable here. That is to say the agreement and particularly clause 3 thereof must be construed as it was when it was executed. Jiwali vs. Jiwali (1968) E.A.547 is authority for the proposition that Courts will not make contracts for parties but Courts will give effect to the clear intentions of the parties, Possession was to pass on 15th September, 1990 regardless of whether the purchase price had been completed or not. To hold otherwise is to place a different meaning to the agreement and to render as unnecessary clauses 4 and 6. In other words the Court would not be giving effect to the intentions of the parties.

I think that clauses 4 and 6 did exclude the doctrine that a vendor of Real Property retains a lien in the property for the unpaid balance of the purchase money. Therefore, the cases of Lysaght (supra) and Phillips (supra) do not help the appellant.

A study of the cases relied on both Mr. Muwayire and Tibaijuka shows that the contentions of Mr. Tibaijuka are correct.

The facts in Phillips vs. Silvester (supra) are these.

The plaintiffs were the trustees under the Will of Rev. S.H.W. Naney, who had, on 4th August, 1865, agreed to sell to the defendant John Silvester, for £8500, certain lands; the purchase to be completed on 25th March when the defendant would be let into possession. If the purchase

was then not competed the defendant was, until completion, to pay interest at the rate of 5 per cent on £8075, the balance of the purchase money.

A dispute arose between the plaintiffs and the defendant whether a certain piece of land in the occupation of a railway company was included in the Agreement for sale; and after several attempts to arrange the dispute the plaintiffs filed a suit for specific performance of the Agreement.

The case was heard in February, 1872 when the decree for specific performance was granted against the defendant; the defendant was ordered to pay the balance of £8075 with interest whereon at the rate of 5% from 25/3/1866. The court further ordered that the purchaser (defendant) must be allowed to set off against the interest payable by him the amount of rent which have been received (if he had been allowed possession from 25/3/1866 and the amount of deterioration since 25/3/1866). The plaintiff appealed against the portion of the decree allowing set off because of rent received and cast to remedy deterioration since 25/3/1866. Lord Selborne, L.C., dismissed the appeal. In the course of his judgment the Lord Chancellor made the following statement to which both Counsel referred us (at page 176):

> "By the effect of the contract, according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money-right to receive the purchase money, he retaining a lien upon the land which he has sold until the purchase money is paid. The vendor became a trustee for the purchaser."

The Lord Chancellor expanded on his statement later in his judgment at page 178 that:-

> "But although it is true that each party is entitled to refuse to alter the possession until the whole contract is completed, it is not true that when the parties differ upon some subordinate question as to the manner of completing the contract whether in the form of the conveyance or in the parcels……..,
>
> it is not true that giving possession to the vendor would be a departure from the ordinary course of proceeding.
>
> Possession may be changed before completion But payment of the purchase-money before completion is not according to the ordinary course of proceeding……"

It should here be observed that the agreement between the vendor and the purchaser in the case to which I have just referred provided for payment of interest if the balance of the purchase money remained outstanding beyond 25/3/1866, the date on which the purchaser should have taken possession. It is clear from the passages I have referred to above that even if there remains unpaid balance, the property in the lands passed to the purchaser when a deposit was made. Further even when the trustees refused to surrender possession for a whole six years, i.e., between the date of sale and dismissal of the appeal in February, 1872, eventually the trustees surrendered possession of the property.

The principle in Phillip's case runs through all the cases cited to us. namely Lysaght vs. Edwards (supra), Jones vs. Gardner (1901) 1 Ch. 191; Engell vs. Fitch (1868-9) L.R, 4 Q.B. 659 Ex. Ch.; Hillington Estates Co. vs. Stonefield Estates Ltd (1952) 1 Ch. 627 and Openda vs. Ahn (1982-88) 1 K.A.L.R. 294.

Let me briefly examine Lyaght vs. Edwards (supra) whose facts bear remarkable similarities to the case before us.

On 23/12/1874, a written Agreement was entered into between S.B. Edwards and the plaintiffs, whereby S.B. Edwards agreed to sell and the plaintiffs agreed to purchase a mansion-house called The Bury and certain messuages, farms, and lands at a partly freehold and partly copyhold price of £ 59,740.

The agreement provided that the vendor should, before the completion of the purchase, procure the copyhold to be enfranchised; that £3000, part of the purchase-money, should be paid at once, and the residue on 11.10.1875; and that. on payment of the balance of the purchase-money the vendor should execute a proper conveyance. Part of the property which formed the subject of the contract consisted of a farm and lands called The Bury Farm.

The deposit of f: £ 3000 was duly paid, n abstract of the title was delivered, and, after requisitions had been made thereon, the title was accepted by the plaintiffs on 1/5/1875.

S.B. Edwards died on 12/6/1875, having made a Will dated 22/7/1873 giving his personal Estate to B whom he appointed executor, and devised all his Real Estate to his cousin Hubbard and his friend Muller upon trust for sale, and having also devised to Hubbard alone all the Real Estate which at his death might be vested in him as trustee. Upon the death of

S.B. Edwards the question arose whether the concurrence of his heirs-at-law or customary heir was necessary in order to give a complete title and conveyance to the plaintiffs. In other words since it was difficult to trace the heir-at-law or customary heir of the testator, the question was: did the trustees Hubbard and Muller, or the trustee Hubbard, take the legal Estate in freehold and copyhold lands which the testator had sold before he died. To decide this question the plaintiffs instituted an action for specific performance against the sole executrix (wife of the deceased) some other person jointly with Hubbard and Muller.

When considering the case Jessell, M.R. begun his judgment with a passage (at page 506) a portion to which we were referred by both Mr. Nuwayire-Nakana and Mr. Tibaijuka.

The learned Master of the Rolls stated after posing the question "What is the effect of the contract?" that:-

> "It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the Estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the Estate for the security of the purchase-money, and a right to retain possession of the Estate until the purchase- money is paid, in the absence of express act as to the time of delivering possession."

Clearly this passage which was relied upon both here and at the trial by Counsel for both parties states the common sense view that where parties expressly state in their contract the time at which delivery of possession is to take effect, the doctrine of lien is inapplicable. That exactly is the position in this appeal.

Therefore the first ground of appeal must fail.

The complaint in ground two of the appeal is that the Judge erred in fact and law in holding that the defendant waived his rights to insist on payment as agreed and that the appellant had not demanded payment for two years. In other words this ground hinges on the issue whether time was the essence of the contract. This ground of appeal arises from the answer given by the trial Judge to the third issue. I have quoted the third issue already in this judgment.

Mr. Muwayire's submissions on this ground mainly dwelt on whether the respondent paid the third instalment of US$2,000 before, on or after 15/4/1990 or 20/4/1990,

In Counsel's view the respondent attempted to pay the balance of $2,000 after he received the notice rescinding the sale in February, 1992. Mr. Tibaijuka, for the respondent, contended, in effect, that the appellant waived the time for completion of payment.

The principle at common law and in equity is that, in the absence of a contrary intention, time is essential, even though it has not been expressly made for by the parties. Performance must be completed upon the precise date specified, otherwise an action lies for breach: Contract by Cheshire And Fifoot, 6th Edition, page 466.

However, in equity time is essential:-

1. If the parties expressly stipulate in the contract that it shall be so;

2. If, in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time, the contract will be regarded as broken: Silckney vs. Keeble (1915) AC. 386.

3. If the nature of the surrounding circumstances or of the subject matter makes it imperative that the agreed date should be precisely observed, See Cheshire (supra) page 467.

I think that the answer to ground 2 is partly provided by paragraph 8 of the written statement of defence.

In paragraph 110 of his plaint the respondent pleaded that:-

> "In spite of repeated reminders and/or demands by the plaintiff, the defendant has failed neglected and/or refused to honour his part of the said agreement of sale nor has he remitted the paid sum. Instead the defendant has made every effort to resell the premises, and the plaintiff has been constrained to lodge a caveat (Annexture) '1'."

The sum referred to her is Shs. 7.2m/=
In his defence (para. 8) the appellant pleaded, in part, that:-

> "With regard to para, 10, the defendant avers that having patiently waited for the plaintiff to fulfill his obligation for over 2 years to no avail and having made repeated demands to the plaintiff to pay the purchase price of the house which were ignored and neglected, he was entitled to rescind the contract
> Thus by his own pleading, the appellant sat on his rights for over two years before he sought to rescind the contract because of the respondents failure to pay the balance of the purchase money within the time stipulated by the contract……"

The evidence of both the appellant and the respondent clearly shows that the two parties discussed the payment of the balance of $2000 and payment of! rent by appellant to the respondent long after 15/4/1990 (the last day for the payment) and 15/9/1990, the day when the respondent should have taken possession of the suit premises.

It is noteworthy that although the Agreement required US$5000 be paid in lump sum before or by 8/1/1990, that money was in fact paid in two instalments of $300 and $4700, This is one instance of the evidence that the parties were in practice casual about the time element.

Further the Agreement in clause 2(iii) required the balance of $4000 to be paid on or before 15/4/1990. If that date was the dateline for completion of payment and thus making time essential, why did the appellant accept only $2000 after 15/4/1990? The respondent was categorical that $2000 was paid after 15/4/1990. The appellant was certainly evasive on whether or not this money was paid after 15/4/1990. For my part I accept the evidence of the respondent on this point that he paid $2000 after 15/4/1990. Instead of rescinding the contract because of the respondents failure to complete payment by 15/4/1990, the appellant accepted part-payment.

There is no satisfactory explanation why the appellant accepted $2000. The appellant's attitude towards time element about completion of payment is confirmed by his admission as late as 23/5/1994 that he was prepared to give the suit premises to the respondent if the latter paid more money for the premises.

In cross-examination the appellant stated (page 50):-

> "I was not happy when the plaintiff sued me to Court instead of coming to me for negotiations. If he had come to me instead of suing me it would have been good."

I think, therefore, that the appellant waived his right to rescind the contract on account of the respondents failure to pay all the $4000 by 15/4/1990. In other words time was not, on the facts, of essence in the contract.

When cross-examined by Mr. Muwayire the respondent stated that:-

> "I tried several times to pay him the balance of $2000 dollars and he refused. Later my Advocate wrote to him to allow him (sic) pay the balance but he refused.
>
> I also went to his Advocate he also refused. In 1991 I tried several times to pay the defendant the balance and he refused and his witness is the defendant's Advocate."

The appellant did not seriously challenge this part of the respondents vital evidence. Mr. Muwayire did not pin down the respondent on dates by for instance, asking the dates when attempts to pay were made.

At the end of cross-examination, the appellant testified that:-

> "I asked Haruna several times to pay the balance but he was telling me to hold on."

This confirms the inference I draw that the, appellant did not treat time as of essence. Instead the appellant secretly attempted to resell the suit premises.
Hence the filing of caveat by the respondent. Further I think that the appellant's evidence was unreliable.

During his evidence-in-chief he testified that (page 45 of proceedings):-

> "When we made the Agreement for the sale of the house I and Mr. Mulangwa were aware of the purchase of the machinery in Italy. <u>When we made the agreement it was</u>

> the plaintiff who suggested that the final amount for the payment of the balance be fixed on 15th April, 1990."

However, during cross-examination he contradicted himself when he claimed that - (page 49)

> "I did not mention about the purchase of the machine in the Agreement with Mulangwa because that was unnecessary. Mulangwa was buying my house. He was not concerned with the machinery."

In these circumstances ground two must fail.

Ground three in the appeal complains that the Judge misconstrued issue No. 4; that the evidence on the record did not support the Judges conclusion on issue No. 4

Mr. Muwayire's submissions on this issue were half hearted. He criticised the trial Judge for holding that the respondent cannot be permitted to rescind the contract and at the same time retain the deposit of US$10,000 made by the respondent. Mr. Muwayire's contention that the issue of refund of the money was not put to the appellant when he testified is incorrect. Further Mr. Muwayire contended that the appellant suffered loss and therefore should not refund the deposit.

I agree with Mr. Tibaijuka that the appellant was asked when he gave evidence whether he could refund the deposit. The loss which Mr. Muwayire raised in justification of withholding the deposit by his client is untenable.

I understood the loss to be the claim by the appellant that he was in process of acquiring a machine to make food for children and that the delayed payment of US$2000 by the respondent led to failure by the appellant to get the machine,

I find no need to go into the details of the failure by the appellant to acquire the food machine because I am satisfied on the evidence as a whole that at the time of making the sale Agreement, acquisition of the machine was not an essential element in the sale of the suit premises. The evidence of the appellant which I quoted above when concluding ground two is against the appellant.

Indeed even when the appellant filed his written statement of defence as late as 21/11/1992, three years after the contract was made, the issue of loss was not mentioned even though a counterclaim was included in the defence. The appellant's alleged loss is I think an afterthought.

If this appeal succeeds there would in my opinion be no valid ground raised to justify the withholding of the deposit money. In any case the fourth issue was whether the appellant was entitled to rescind the contract. There was no issue framed about what should happen to the deposit money.

I have held that the appellant waived the time within which the payment of the last instalment was to be made. There had certainly been negotiations between the parties aimed at settling this matter. Both parties being moslems resorted to their brothers in Islam to solve the dispute. This was nearly two years after the due date of payment of last instalment.

Having reviewed all the evidence I cannot see any fault in the conclusions of the trial Judge that the appellant cannot withhold the deposit after the same appellant had purported to rescind the contract. In my view ground three must fail.

The fourth and actually the last ground of appeal complains that the learned Judge erred in law and fact by finding that the appellant was in breach of the contract and that the Judge erred in giving remedies to the respondent.

The learned trial Judge in his decree ordered:-

(1) Specific performance of the contract so that the appellant was to give the respondent vacant possession of the suit premises;

(2) General damages in the sum of Shs. 3m/= for breach of the contract;

(3) Interest on Shs. 3m/= at Court rates;

(4) Costs of the suit.

I am persuaded by the reasoning in the cases of Lyghat (supra) Philip (supra) and Hillington (supra) that the learned trial Judge was justified in granting the prayer for specific performance.

I am fortified in my view by the persuasive authority of the Kenyan Court of Appeal decision in Openda vs. Ahn (1982-88) I K.A.R. 284 whose facts briefly are:-

Openda vs. Ahn. (1982-88) 1 K.A.R. 294

The appellant (Openda) owned property in Lower Kabete Road Nairobi, He advertised it for sale in January 1977.

The respondent (Ahn) inspected the property and agreed to purchase it for KShs, 480,000/= and paid a deposit of KShs. 20,000/ on 25/1/1977, the date on which the sale agreement was executed. By 21/3/1978, Openda had through his faults not fulfilled his part of the contract. On 19/5/1978 Ahn filed a suit seeking specific performance. This was decreed by the High court of Kenya on 14/5/1980.

On appeal to the Kenya Court of Appeal against the judgment of the High Court of Kenya ordering specific performance and awarding damages to the respondent, Openda, the appellant contended inter alia that the agreement had been subject to his showing and delivering a clear title, that the appellant's (Openda's) wife had subsequently been found (in another suit) to be the joint owner of the property, and that the respondent had failed to actually tender the balance of the purchase price, or to establish that he was ready and willing to complete the transaction.

The Kenya Court of Appeal held, inter alia:-

(iii) that since the appellant had wrongfully repudiated the contract and persisted in such repudiation, he could not object that the respondent had failed to carry out the perfectly useless exercise of actually tendering the balance of the purchase price. The judgments of Kneller and Hancox, J.J.A., was to the effect that the purchaser need not deposit cash to complete the contract.

The appeal was decided on 8/7/1983 and the appellant was ordered to carry through the sale agreement nearly six years after the contract was executed by the parties. In the case before us since the respondent had within the stipulated time paid over 83% of the purchase price, which was substantial performances, in order for the appellant to be entitled to repudiate the contract, the appellant should have informed the respondent about the repudiation immediately after 15/4/1990. Like in the Kenyan case of Openda vs. Ahn (1982-88) 1. K.AR. 94, the appellant kept the contract alive by discussing payment of the balance with the respondent. Even during the hearing of the case the appellant was willing to transfer the house if more money was paid. On the other hand I accept the argument by Mr. Muwayire that the evidence available does not justify the award of Shs, 3rn/ or any amount, as general damages.

In my opinion this award is therefore wrong and should be set aside.

Consequently the Order of interest thereon is wrong. I would have awarded interest on the balance of $2000 at the rate of 12% p.a from 15/4/1990, Costs are normally awarded to a successful litigant. There are no reasons why this should have been the case.

In the result ground four succeeds only in part relating to the award of general damages of Shs. 3m/=. But it fails as respects the other orders.

I would dismiss this appeal save as it relates to the award of Shs. 3m/= general damages. I would vary the judgment of the trial Court by setting aside the order awarding general damages. Otherwise I would award to the respondent the costs of this appeal and of the Court below.

I have considered the submissions of Mr. Tibaijuka and of Mr. Muwayire on the cross-appeal. My view of the matter is the although the main appeal has been dismissed, the appellant was entitled to remain in possession till 15/9/1990. Accordingly the respondent had no basis on which to claim Shs. 7.2m/= which was intended to repair the damaged house. Money was used to repair the house.

Furthermore although I have held that the respondent did not breach the contract, his delay in trying to enforce specific performance disentitles him from claiming for mesne profits. I think that it would be inequitable to order the appellant to pay mesne profits and rent on the facts available. I would therefore dismiss the cross-appeal with costs to the respondent on the cross-appeal.

Consequently I would confirm the decree of the trial Court save that the decree be varied by excluding the award of Shs. 3m/= as general damages.

Delivered at Mengo this 31st day of October, 1996

J.W.N. TSEKOOKO,
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS A
TRUE COPY OF THE ORIGINAL

MASALU MUSENE
REGISTRAR SUPREME COURT.

JUDGMENT OF ODOKI

I have had the advantage of reading in draft the judgment of Tsekooko, J.S,C., and I agree with it. As Oder, J.S,C., also agrees, there will be an Order in the terms proposed by Tsekooko,

Delivered at Mengo this 31st day of October 1996.

B.J. ODOKI,
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

MASALU MUSENE
REGISTRAR SUPREME COURT.

JUDGMENT OF ODER, J.S.C.

I have had the benefit of reading in draft the judgment of Tsekooko, J.S,C., I agree with him that the appeal should be dismissed for the reasons he has given.

I have nothing to add.

Delivered at Mengo this 31st day of October 1996.

O.H.A ODER,
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

MASALU MUSENE
REGISTRAR SUPREME COURT.